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ARIAS·U.S. Announces Company Project to Improve Arbitration

INSIDE...

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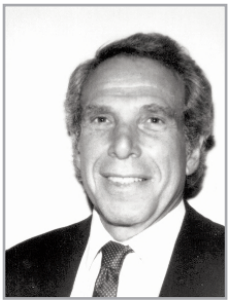
editor's comments



Eugene Wollan

Our lead article in this issue comes from two ARIAS luminaries, Chairman Dan FitzMaurice and President Elaine Caprio Brady. It illustrates and embodies the ever-ongoing exploration by our leadership of ways to enhance and improve what ARIAS can achieve for the industry. In that context, take special note of a brief but important announcement from Eric Kobrick about the new Ethics Discussion Committee.

To emphasize our global character, Christian Bouckaert (an International Editor of this publication) and Romain Dupeyré enlighten us on how the arbitration process works nowadays in France. Dale Crawford shares with us his thoughts, based on his extensive experience, about how arbitration should work. Tom Newman explores some aspects of arbitrability issues, including the rather unusual subject of arbitration with non-signatories. Ron Gass's Case Note focuses on the always hot-button issue of arbitrator disqualification.

Needless to say (but I'll say it anyhow), we are always on the lookout for articles of interest to our membership. They can be scholarly studies or personal viewpoints, or any combination of these. Reinsurance lawyers in particular might bear in mind the ease with which a discrete point in a brief can be transformed into a Quarterly article, with a minimum of time and effort (and no additional research!). We will also happily entertain more letters to the Editor, preferably of a somewhat contentious nature.

Personal note: My eagle-eyed wife noticed, as many of you probably also noticed, a glaring typo in my "Editor's Comments" in the Second Quarter issue: the first line of the penultimate paragraph contained the phrase "letter the editor" instead of "letter to the editor." She pointed this out, not out of malice, but simply because she understands that one of her functions in our partnership is to periodically puncture my pomposity with a needle-thrust of reality, the particular target on this occasion being my obsession with linguistic precision, a sensitive subject because she knew I had proofread the damn thing. [It was also a good way for her to prove that she actually reads my stuff!] Mea culpa for missing the typo, but this provides a convenient segue into my column in this issue, in which I discuss, among other subjects, that selfsame fixation of mine.

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VOLUME 18 NUMBER 2

Editorial Policy

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

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

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

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

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feature

ARIAS•U.S. Announces Company Project to Improve Arbitration

This article will be included in the advance materials sent to registrants for the ARIAS•U.S. 2011 Fall Conference, to prepare them for the discussions that will take place in various sessions.


Daniel L. FitzMaurice


Elaine Caprio Brady

Daniel L. FitzMaurice
Elaine Caprio Brady[1]

ARIAS•U.S. exists to promote "improvement of the insurance and reinsurance arbitration process for the international and domestic markets."[2] As members of this society, we cannot be content with espousing lofty goals and aspirations, however. We need to make actual progress. The degree to which we serve our constituent companies is critically important to our existence. Accordingly, we must evaluate continually and objectively what ARIAS•U.S. can and does accomplish. For some critics, complaints about the state of arbitration in our industry provide evidence that perhaps ARIAS•U.S. is falling short of its goals. Moreover, it is open to question whether ARIAS•U.S. possesses the capacity to effectuate real change. We do not administer or control arbitrations and do not set the requirements for how insurance and reinsurance arbitrations must be conducted. Nor does ARIAS•U.S. determine who will serve as arbitrators, because most arbitration clauses do not require the use of certified arbitrators. Notwithstanding these challenges and limitations, this article will discuss some ways in which ARIAS•U.S. does influence the process and will introduce a task force involving our constituent companies that we hope will foster additional improvement.

The degree to which we serve our constituent companies is critically important to our existence.

Does ARIAS•U.S. Improve Arbitration?

To consider how ARIAS•U.S. might encourage improvements to the arbitration process, it may be helpful to start by identifying what ARIAS•U.S. is and does. ARIAS•U.S. is a non-profit organization with nearly 1,000 members from locations throughout most of the United States and in other parts of the world. Several leading insurers and reinsurers with business in the United States belong to ARIAS•U.S., as do over 250 arbitrators and many lawyers and firms that practice in the area of insurance and reinsurance. ARIAS•U.S. is affiliated with the Association Internationale de Droit des Assurances ("AIDA"), "a non-profit international association, formed in 1960, for the purpose of promoting and developing at an international level, collaboration between its members with a view to increasing the study and knowledge of international and national insurance law and related matters."[3] Our Board of Directors consists of nine members elected from three institutional backgrounds: ceding companies, reinsurers, and law firms. Although not required, several of our current Board members are also certified arbitrators. Much of our focus has been on educating and qualifying arbitrators. Thanks to the contributions of many, we have a code of ethics and a practical guide for arbitral proceedings that includes several procedural forms often used in arbitration. Courts in the United States have mentioned ARIAS•U.S. in over fifteen decisions. The conferences we conduct in the spring and fall each year are well attended. Distinguished individuals have provided keynote addresses at our conferences, including two prominent insurance company CEOs, an Associate Justice of the United States Supreme Court and two former United States Senators.

ARIAS•U.S. developed an All-Neutral Panel selection program, a Newer Arbitrator Program, and a Qualified Mediator Program for our members' use. Our members, however, have rarely used these procedures.

Over the past four years, the Board has adopted significant changes based on recommendations from the Long Range Planning Committee. Among other things, we upgraded the requirements for arbitrator certification, added ongoing educational requirements in the form of seminars and ethics modules, and created a certification process for umpires.[4] We also issued several new guidelines to expand upon the ethical considerations in the Code of Conduct with respect to pre-appointment interviews,

Daniel FitzMaurice is a partner in the Hartford Office of Day Pitney LLP, where he handles arbitrations, trials, and appeals of complex commercial disputes, including reinsurance. He currently serves as Chairman of the Board of Directors of ARIAS•U.S. Elaine Caprio Brady is Vice President and Manager of Ceded Reinsurance for Liberty Mutual Group in Boston, Massachusetts, where she is responsible for reinsurance purchasing, as well as global reinsurer and broker relationships. Ms. Brady currently serves as President of the Board of Directors of ARIAS•U.S.

disclosures, appointments of party-arbitrators, and ex parte communications.[5] We are launching an Ethics Discussion Committee charged with providing additional information and education about ethical issues and concerns. One may ask, however, whether any of these steps have caused arbitrations to become more fair and efficient or improved the quality of arbitral decisions.

The vast majority of reinsurance disputes proceed under agreements that call for tripartite arbitration but do not specify any particular set of rules or procedures to govern. Thus, the participants and the rules they adopt in each arbitration are the key determinants of how the proceedings will run. The ARIAS•U.S. Practical Guide has certainly influenced arbitration practice, including suggested forms for an umpire questionnaire, an agenda for the organizational meeting, and hold harmless and confidentiality agreements. Moreover, our strong focus on educating and training recognizes that the arbitrators are responsible for managing arbitrations. From time to time, various articles in our magazine and programs at our conferences have also addressed ways in which the parties and counsel can improve the process. Nevertheless, our ability to influence a particular arbitration remains indirect, and we have generally refrained from adopting prescriptive rules.[6] Thus, although ARIAS•U.S. has been an indirect force for improvement and some of its work has clearly been beneficial, ARIAS•U.S. has not been able to "fix" a system that it does not govern.

What More Can ARIAS•U.S. and Others Do to Improve Arbitration?

Despite the efforts of ARIAS•U.S. and others, much room remains for improvement in the conduct of insurance and reinsurance arbitrations. Anecdotal evidence suggests that, if anything, the level of dissatisfaction with these arbitrations may have grown in recent years.[7] For example, the rampant jockeying over umpire selection reinforces the view that the choice of umpire determines the outcome.[8] Many harken back to a time when arbitrations were simpler, cheaper, and – not coincidentally – far less legalistic.[9] Deservedly or not, lawyers often receive a lion's share of the blame for the current state of arbitration. To borrow a wry observation from Larry Brandes: lawyers have tried to destroy reinsurance arbitration but have succeeded only with the help of others. The parties control a significant part of the process, and they may ultimately receive that which they are willing to tolerate. Likewise, arbitrators share in some of the criticism, if nothing else, for failing to save the parties and lawyers from themselves. In short, blame abounds, but solutions do not. What more can be done to improve arbitration?

In response to the serious concerns about the arbitration process, the Board of ARIAS•U.S. is inviting a number of company representatives to analyze and discuss the current state of the process, and the role of ARIAS•U.S., with an eye toward transformational changes. To be sure, these are not easy issues, and we do not expect to find quick answers. Nor do we want to create any additional programs to improve arbitration that remain underutilized by our membership. We believe it will be worthwhile for this group to discuss whether ARIAS•U.S. should advance clearly delineated improvements and efficiencies to the current arbitration process.

We write not only to advise our members of this task force but to invite your suggestions and ideas. We enjoy a wealth of experience and collective wisdom among our many members. If you have any thoughts that you think should be considered as part of this project, please e-mail us.

Although we do not approach these discussions with any preconceived set of solutions, some alternative ideas do come to mind, including: increasing the use of all-neutral panels; reclaiming elements of the original process; and employing mediation during arbitration proceedings.

All-Neutral Panels

One idea we think worthy of careful consideration is all-neutral panels. All-neutral panels are, of course, by no means new and have long been the

CONTINUED ON PAGE 4

Board Creates Ethics Discussion Committee

By Eric S. Kobrick

The ARIAS-U.S. Board of Directors is pleased to announce the formation of an Ethics Discussion Committee (the "Committee"). The Committee was created following a recommendation from the Long Range Planning Committee. The Committee is charged with providing information and education about ethical issues and concerns. It will not opine on specific issues arising in pending arbitrations. Instead, the Committee will offer guidance about ethics issues of general interest to the membership.

The Committee proposes to accomplish this objective in two principal ways: First, the Committee intends to prepare ethics hypotheticals for the Quarterly in which ethics issues will be raised and discussed. The Committee hopes to solicit suggestions from the membership on topics to be addressed. Second, the Committee intends to lead ethics sessions at the ARIAS•U.S. Fall and Spring Conferences. Towards that end, the Committee is already working with the co-chairs of this fall's conference to incorporate an ethics component into the program.

The Committee Chair is Eric Kobrick. The other Committee members are Mark Gurevitz, Elizabeth Mullins, John Nonna, James Rubin, Daniel Schmidt, and Mary Kay Vyskocil.

Eric S. Kobrick is a Deputy General Counsel and the Chief Reinsurance Legal Officer at American International Group, Inc. He is also a member of the ARIAS•U.S. Board of Directors, served on the ARIAS•U.S. Long Range Planning Committee, and is an ARIAS•U.S. Certified Arbitrator.

Party-arbitrators occupy an uncertain and ill-defined role: many arbitrators subscribe to the view of our Code of Ethics, which encourages party-arbitrators to act independently, fairly, and without advance commitments to their appointing parties, yet courts allow party-appointed arbitrators to behave as partisan advocates with no pretense of objectivity.

CONTINUED FROM PAGE 3

practice in the United Kingdom and in other countries. In 2003, the American Bar Association and the American Arbitration Association adopted a default rule in favor of all-neutral panels.[10] In the insurance and reinsurance context, John Nonna advocated in favor of all-neutral panels in a paper that he presented in the First Quarter 1994 ARIAS•U.S. Quarterly.[11] ARIAS•U.S. put in place a neutral-selection procedure in 2004.[12] Despite these efforts and the many perceived benefits of the all-neutral approach,[13] parties appear to be unwilling or unable to increase the use of this approach in insurance and reinsurance arbitrations.

Should ARIAS•U.S. do more to promote all-neutral panels? Are there conditions under which companies would be willing to commit to using all-neutral panels for all or some categories of their disputes? There may be a range of answers to these questions. Certainly, the party-arbitrator system has recognized benefits,[14] and the relative merit of all-neutral panels is open to debate.[15] At the same time, many perceive that the party-arbitrator system has significant problems. Party-arbitrators occupy an uncertain and ill-defined role: many arbitrators subscribe to the view of our Code of Ethics, which encourages party-arbitrators to act independently, fairly, and without advance commitments to their appointing parties,[16] yet courts allow party-appointed arbitrators to behave as partisan advocates with no pretense of objectivity.[17] In these circumstances, party-arbitrators may want to remain independent and maintain a reputation for integrity but feel torn by concerns of loyalty to the appointing party, the desire for reappointments, and the need to counterbalance advocacy from the other party-arbitrator.[18] In some instances, the absence of clear lines can produce a "'race to the bottom'" in which the party-arbitrators respond and reciprocate with ever-higher levels of advocacy.[19] Moreover, the widespread element of confidentiality in private arbitration compounds the lack of clarity, leading to increased concerns about unpredictability and the inability to expose and correct potential abuses.[20] Against this backdrop, a serious discussion of an all-neutral system, with truly independent and impartial arbitrators, is one idea worthy of consideration.[21] This discussion would address the specific circumstances under which the parties may agree to utilize this type of system.

Recapturing Beneficial Elements from the Original Process

Arbitration was originally the preferred dispute-resolution procedure in the reinsurance industry because it was perceived to be an efficient process with industry professionals as the decision makers.[22] Back then, discovery was extremely limited. The arbitrators were frequently non-lawyers who served as active officers of insurance and reinsurance companies. The process worked well for many years. Are there ways to reinstitute this process for certain types of disputes? Can active business officers in the reinsurance industry whose companies are members of ARIAS•U.S. be encouraged to serve as arbitrators? The task force might develop ways to reduce costly and time-consuming discovery and to recapture a less legalistic process.

Mediation during the Arbitration Process where Appropriate

Another idea would be for the arbitration panels to consider encouraging the parties to explore the use of mediation at critical junctures during the arbitration process.[23] At the organizational meeting, the schedule for the case can include the parties' discussions on whether a mediation session should be held after discovery, before the hearing, etc. The mediation, if held, would not impede the arbitration timetable, but instead would be conducted alongside the arbitration process as an alternative method for the parties to attempt to resolve all or at least some of the items in dispute before the hearing is conducted.

Conclusion

Justice Alito, a keynote speaker at our Spring Conference in 2008, noted in an opinion last year that "parties are 'generally free to structure their arbitration agreements as they see fit.'"[24] For that same reason, parties are able to correct and improve arbitral procedures. Sometimes, however, parties need some help. ARIAS•U.S. exists to provide that assistance. To that end, we are initiating a project among our member companies to focus on whether ARIAS•U.S. can have a further role in the process to improve insurance and reinsurance arbitrations, and if so what improvements should be advanced

to address some of the complaints. Although the three ideas identified above are worthy of discussion, the Board has made no decision to promote these suggestions or to abandon the existing party-arbitration process. Rather, we want to afford an opportunity for the buyers of arbitral services to participate in serious and creative discussions and provide their views on whether and if so how ARIAS•U.S. could assist with fixing some of the vexing problems in arbitrations. These are important issues, and we hope to serve our members by acting as a forum and continuing our work of improving the arbitration process.▼

1 The opinions expressed in this article are not intended nor should be considered as reflecting the opinions of the authors' employers.

2 The quoted text appears at our website under the heading "About ARIAS•U.S." (http://www.arias-us.org/index.cfm?a=2.) This sentence summarizes six objectives of our society set forth in section 1 of the by-laws. (http://www.arias-us.org/index.cfm?a=6.)

3 Information about AIDA is available at http://www.aida.org.uk/about.asp.

4 See http://www.arias-us.org/index.cfm?a=300

5 See http://www.arias-us.org/index.cfm?a=380.

6 *Compare* ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure (available at: http://www.arias-us.org/index.cfm?a=37) with Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (available at: http://www.arbitrationtaskforce.org/images/2009-Procedures_V7.pdf.)

7 *See* Linda Dakin-Grimm & M. Benjamin Valeric, *A Case Against Reinsurance Arbitration*?, National Underwriter, Vol. 106, No. 36 (Sept. 2, 2002) (available at: http://www.milbank.com/NR/rdonlyres/3EA1BAAA-9C47-4AF1-B23B-958170BAF23D/0/050624_020902eprint.pdf); Brian Winn and Earl Davis, *Arbitration of Reinsurance Disputes: Is There A Better Way?*, Dispute Resolution Journal (October 2004); Celeste M. King, *Reinsurance Arbitration: A Flawed Dispute Mechanism*,18th Annual Insurance Coverage Litigation Committee Midyear Program (Feb. 26, 2010) (available at: http://www.wwmlawyers.com/images/uploads/00143647.PDF).

8 See Charles W. Fortune, *Maintaining the Integrity of the Arbitration Process: The Parties' Dilemma*, ARIAS Quarterly, Vol. 17, No. 2 (2010)

9 Rhonda L. Rittenberg and David A. Thirkill, *Results of Our Arbitration Survey*, ARIAS Quarterly, Vol. 12, No. 3 at 17 (2005) (reporting survey results, including that "a large majority, 82 percent, of clients and, 75 percent, of arbitrators felt that the arbitration process itself has become too 'legalistic.'")

10 *See* American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (2003) (http://www.adr.org/sp.asp?id=32124&printable=true).

11 John Nonna and Marc Abrams, *Of Cabbages and Kings*, ARIAS U.S. Quarterly, Vol. 11, No. 4 at 16 (4th Q. 2004).

12 Access to the ARIAS•U.S. process for selecting an all-neutral panel is available at: http://www.arias-us.org/index.cfm?a=91.

13 *See, e.g.*, Nonna, *Of Cabbages and Kings*, *supra*; Anthony M. Lanzone, *Impartial, Independent, Neutral Arbitrators v. Non-Neutral Party Appointed Advocates*, 54 Fed'n Def. & Corp. Couns. Q. 381 (2004) (arguing in favor of all-neutral panels as reflected in international proceedings and changes to the AAA rules and maintaining that: (a) ex parte communications do not enhance fairness and discourage candor among panel members; (b) a party-arbitrator does not need to act as an advocate, because the party already has counsel; (c) neutral arbitrators improve the fairness of the process; and (d) the better way to inform the parties about the panel's reasoning is to require a reasoned award.)

14 *See, e.g.*, David J. McLean and Sean-Patrick Wilson, Article, *Is Three A Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 Pepp. Disp. Resol. L.J. 167 (2008) (noting that, among other things, party-arbitrators increase the parties' comfort with the process and perception that they will be heard, may add substantive expertise to the panel's analysis of the issues, and may improve the channels of communication with the parties). The values of a party-arbitrator in enhancing the parties' belief in and understanding of the process may be additionally enhanced in international arbitrations between parties from disparate cultures. *See* Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 Tex. Int'l L.J. 59, 65-68 (1995).

15 *See* Kathryn P. Broderick, *Pitfalls in Moving to All-Neutral Reinsurance Arbitration Panels*, 54 Fed'n Def. & Corp. Couns. Q. 373 (2004) (identifying as pitfalls to all-neutral panels: (a) loss of access to party-arbitrators' experience; (b) loss of an advocate on the panel; and (c) loss of access to information on the reasons for the panel's decision).

16 ARIAS•U.S. Code of Ethics, Canon II (" Party-appointed arbitrators are obligated to act in good faith with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly."); *see* Nick J. DiGiovanni and Michael A. Knoerzer, *Ethics Issues in Reinsurance Arbitration*, ARIAS•U.S. Quarterly, Vol. 15, No.1 at 2 (1st Qtr. 2008) (providing an extensive analysis of ethical issues in reinsurance arbitration, including the uncertain role of the party-arbitrator); John H. Mathias, Jr. and Adam C. G. Ringguth, *What's Wrong with Arbitration?*, ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, March 3-5, 2011 (available at: http://apps.americanbar.org/litigation/committees/insurance/docs/2011-cle-materials/03-WhatWrongArbitration/03aArbitration.pdf) (identifying uncertainties over the ethical rules that govern the conduct of non-neutral arbitrators and calling for re-examination of the party-appointment system).

17 *See, e.g.*, *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. Ill. 2002) ("in the main party-appointed arbitrators are supposed to be advocates.") (italics in original); *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815 (8th Cir. 2001) (Despite evidence that a party-arbitrator disclosed the substance of panel deliberations and a draft decision, the appellate court reversed vacatur of the award because the losing party "knew from the agreements to arbitrate that the party arbitrators would be partial in the conflict-of-interest sense of that word."); *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753, 759 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994) (a party arbitrator's participation in meetings with witnesses, suggesting lines of testimony, help select consultants, and advise to an expert witness about his testimony was "not only unobjectionable, but commonplace.")

18 See Daphna Kapeliuk, Article, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell L. Rev. 47, 90 (Nov. 2010) (concluding that reputational concerns provide a key incentive toward impartiality by elite investment arbitrators).

19 *See* J. Nonna, *supra* n. 9, at 17.

20 *See, e.g.*, Seth H. Lieberman, Note, *Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is "Nonneutral Neutrals"*, 5 Cardozo J. Conflict Resol. 215, 224 (2004).

21 *See* William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629 (2009) (discussing independence and impartiality in arbitrators).

22 *See* Larry P. Schiffer, ARIAS•U.S. Quarterly, Vol. 17, No. 4 at 10 (4th Q. 2010) (discussing traditional reinsurance arbitrations).

23 *See* John D. Feerick, *The Role of Mediation in Dispute Resolution*, ARIAS U.S. Quarterly, Vol. 16, N. 1(1st Q. 2009); Neal Moglin, Dan Sails, & Jan Schroeder, *Would Greater Use of Mediation Improve U.S. Reinsurance Dispute Resolution? It Seems to be Working Elsewhere*, ARIAS•U.S. Quarterly, Vol. 14, No. 2 (2d Q. 2007).

24 *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758, 1770 (2010) (citations and internal quotations omitted).

To that end, we are initiating a project among our member companies to focus on whether ARIAS•U.S. can have a further role in the process to improve insurance and reinsurance arbitrations, and if so what improvements should be advanced to address some of the complaints.

news and notices

The Board of Directors has established a rebate program for the 2011 Fall Conference. After the conference is concluded, ARIAS•U.S. will send a check for $25 for each night that an attendee stays at the Hilton New York.

ARIAS Offers Rebate for Hilton Stay

The Board of Directors has established a rebate program for the 2011 Fall Conference. After the conference is concluded, **ARIAS•U.S. will send a check for $25 for each night that an attendee stays at the Hilton New York.**

Those who stay at conference hotels have always provided a small subsidy to the event, since meeting rooms are made available often at no cost in return for guaranteed guest room reservations. At the Hilton New York, that is less the case. So few people stay overnight in New York (38%) that ARIAS is required to pay a fee toward the meeting rooms. Recently, as the percentage of attendees staying at the Hilton has decreased, the hotel has increased the amount that it charges. In fairness to members whose room payments are helping to support conference room expenses, this refund is being given to compensate for that support.

In addition to achieving a more equitable distribution of costs, the Board hopes that the refund will encourage a larger number of attendees to stay at the Hilton, supporting a stronger position during future contract negotiations.

Quarterly Will Continue to Be Printed, but ARIAS Members May Opt Out

After a 2011 survey of the ARIAS membership, the Board of Directors voted to continue to print the ARIAS•U.S. Quarterly. While a large share of respondents was willing to read it only in PDF form, 27% said they would not be willing to receive it only in that form. That number was up from 17% in a 2009 survey. ARIAS members had been receiving the journal in both forms since the previous survey. That distribution will be continued.

In reply to the announcement of that decision, several members said that they intended to read it in PDF form only and that it was not necessary to send it in hard copy. The cost saving from printing fewer copies is not significant. However, reducing the press run would conserve some paper and would reduce the postage cost moderately (we already pay the periodical rate, which is well below first class). Therefore, after further consideration, the Board authorized setting up an "opt out" system.

The system is simple. Members wishing to opt out should send an email to Christina at Claudio@cinn.com, indicating that they would like to opt out of receiving a printed Quarterly. Their names will be removed from the mailing list. Please do not send a message if you wish to continue to receive it; your silence will keep you on the list.

Intensive Workshop Moved to September 27; Registration is Open

In June, ARIAS•U.S. announced that the Intensive Workshop would take place on September 21 at Hogan Lovells US LLP, 875 Third Avenue in New York City. However, it turned out that there are virtually no hotel rooms available in Mid-town Manhattan that week, owing to the opening sessions of the UN. As a result, the date of the workshop was changed to **Tuesday, September 27**, when rooms are available and rates are back down to more reasonable levels. Everything else remains the same.

For a refresher on the details of the workshop, please see the September Intensive Workshop page on the ARIAS•U.S. website Calendar. Suggestions for hotel accommodations are included there; plan to stay the night of September 26.

Workshop registration is open on the home page of the website until September 9. **Remember that this workshop is required for anyone who intends to apply under Options B or C of the certification requirements. It does not apply towards renewal of certification**.

Hilton Opens Reservation System for ARIAS Fall Conference

The "Welcome ARIAS" Section of Hilton New York's reservation system is now open on the home page of the ARIAS website. Rooms can be reserved starting at $365 per night. The ARIAS•U.S. Fall Conference rebate lowers the cost to $340.

Members should book rooms for the nights of Wednesday, November 2 and Thursday, November 3. Anyone planning to stay through the weekend should book early. There are a few rooms for Friday and Saturday in the room block, but the rest of the hotel is sold out because of the NY

Marathon on Sunday. The reservation deadline is October 7.

Board Sets Standard for Sponsors in Arbitrator Re-application

The original application for arbitrator certification under the new requirements required an applicant to have three sponsors, unless he/she was currently certified. Since all arbitrators who did not apply under the new requirements by June 30, 2010 lost their certifications, no one is any longer in that category. Several members who lost their certification asked whether they would need new sponsors. The Board decided at its meeting in June that previous sponsors would be considered still valid if an arbitrator's certification gap was less than two years. After that time, the arbitrator who reapplies for certification is required to have three sponsors complete the standard questionnaires.

Board Certifies Shanman and Monteleone as Arbitrators

At its meeting on June 16, 2011, the ARIAS Board of Directors approved James A. Shanman and Joseph P. Monteleone as ARIAS-U.S. Certified Arbitrators. Mr. Shanman had been sponsored by Susan Grondine, Thomas Orr, and Elizabeth Thompson. Mr. Monteleone had been sponsored by John Diaconis, Thomas Paschos, and Dale Frediani. The new arbitrators' biographical profiles are featured in the Recently Certified Arbitrator column of this issue.

Board Certifies Andrew Maneval as ARIAS Umpire

At the same meeting, the Board approved Andrew Maneval as an ARIAS-U.S. Certified Umpire.

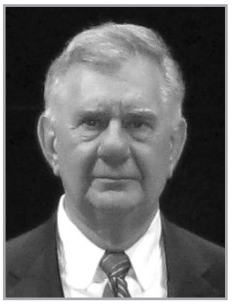
Board Sets Dues Fees for 2012

The Board has established the membership fee structure for 2012. Annual Corporate dues will be $1,175, with each additional representative (beyond five) at $400. Individual dues will be $400. Initiation fees are unchanged at $1,500 and $500. These fees are effective October 1. Members who join on or after that date will be fully paid through 2012.

feature

An Arbitrator's Perspective: Some Thoughts on How Arbitration *Should* Work

Dale C. Crawford



Dale C. Crawford

These pages often include articles regarding perceived shortcomings, problems, and general frustration with the arbitration process. Larry Schiffer wrote recently in his article *Mirror, Mirror On The Wall*, "Perhaps it's time that everyone involved in reinsurance arbitration take a hard look in the mirror before complaining that the system is broken." He points out, quite accurately, that in the final analysis "The authority to manage the actual process of a specific arbitration .... lies with the arbitration panel.1 This article is intended to provoke some thought on how the arbitrators can help to make the process work as intended.

A number of years ago, ARIAS•U.S. developed a Code of Conduct consisting of ten Canons to provide guidance in the conduct of insurance and reinsurance arbitrations, The proposals recommended here are intended as practical ways to apply that Code as the process takes place.

Everyone involved in an arbitration–panel members, counsel, and the parties–has his or her own experiences and perceptions. The parties and counsel have their own agendas, of course, but from the perspective of the arbitrators, and particularly the umpire, effectiveness and impartiality of the panel must be the overriding purpose from the outset. The umpire needs to set the tone, emphasizing that everyone has an equal voice; full expression and discussion of all viewpoints are essential. The umpire should take an active role by questioning positions and presenting opposing views, so that all aspects are fully explored. This is particularly necessary if a panelist displays an orientation toward advocacy for the appointing party, rather than an open examination of the issues. When this happens, the others should press for rationale and present opposing views, in order to compel that arbitrator to justify his or her positions.

There seems to be a developing consensus, if not one that has already developed, that the process can be improved. In addition, there is evident support in trade publications that reveal stalemates over umpire selection, challenges to appointed arbitrators, and other issues, and these are *only* those that make it into the courts. The (likely) even more frequent infighting that takes place within arbitrations is hidden except to the participants. The standards are there: the ARIAS-US Canons clearly set forth the principles of fairness, truthfulness, and propriety.

The umpire should take an active role by questioning positions and presenting opposing views, so that all aspects are fully explored. This is particularly necessary if a panelist displays an orientation toward advocacy for the appointing party, rather than an open examination of the issues.

Suggestions For Arbitrators

- Your appointment (or selection as umpire) is to perform your function with an awareness that the parties believe that you have the requisite experience and background to achieve a resolution in a specific, discrete matter that the parties were unable to settle among themselves. Use your knowledge and experience to achieve a fair resolution based on the evidence presented.
- This is not a job where you were hired as an employee to accomplish organizational goals. Your task is not to perform with the objective of pleasing an employer. You are *appointed by*–not *representing*–a party to the dispute. You are selected only to resolve the issues presented by the parties.
- You cannot enter arbitration with the expectation of securing future appointments and building an income stream. Do not anticipate that arbitration will produce a reliable source of revenue, as it may very likely not happen. Do not become tempted to curry favor with an attorney or party to build a career.
- You will be dealing with attorneys who are highly talented, skilled, and experienced in their practice, and who advocate forcefully on behalf of their clients. It is part of your job to see that they perform within appropriate rules of conduct and decorum. You will be required to make numerous rulings, often with forceful arguments on both sides, and tell one attorney that he or she has lost each time a ruling is made. You may also be required to tell an attorney to cease a certain line of questioning or to stop

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badgering a witness. Be ready and willing to take any needed action.

- Be prepared to say no. One of the more frequent criticisms of arbitration is that one party takes document production or discovery beyond that which is reasonably necessary. Case histories indicate that vacatur of an award for this reason is rare. You must not be overly cautious out of fear. Use your judgment prudently and maintain control of the process.
- Preparation cannot be overstated. You must know the issues and materials in order to make rulings and challenge counsel when appropriate. Your files should be indexed and well organized so as to be available and useful immediately when needed. Decisiveness is imperative, and can be done effectively only with preparation and familiarity with every issue.
- Any panel member who knows how he or she is going to vote prior to examination of the evidence should decline the appointment.

One of the most important steps in conducting a successful arbitration is the organizational meeting. The entire process can be narrowed and effectively channeled by addressing and resolving a number of issues at the meeting. As soon as the meeting date is set, the umpire should solicit agenda items from the arbitrators, and send out a proposed outline to counsel, asking for any comments or additions. Counsel should be instructed to confer and agree on as many items as possible prior to the meeting. The panel should be notified in advance of any items that cannot be agreed upon. Some of the agenda items that can be vital in starting the process and ensuring efficiency include:

1. **Execution of Confidentiality and Hold Harmless Agreements**—ARIAS provides sample documents for both of these (see "Forms" section of website), and experience shows that they are generally accepted. There are times, however, when one side wishes to make changes, particularly to the Confidentiality Agreement. This should be addressed by counsel beforehand; if there is agreement, the documents should be prepared beforehand and signed at the meeting. If the parties cannot agree, the panel must make a decision at the meeting, including arrangements to draft the final document and have all participants sign. Likewise, if any of the panel members (or counsel) are requesting changes in the Hold Harmless Agreement, they should be proposed beforehand and decided at the meeting.
2. **Issues to Be Arbitrated**—It is essential that the record reflect the specific issues that are the subject of the arbitration proceeding. These should be identified by counsel in the initial position statements, clarified if necessary through discussion, and entered into the record. This does not preclude adding specific issues when they develop in the course of events, but it does raise the bar and help to insure legitimacy to any such requests.
3. **Discovery**—This should include discussions and rulings on such items as document production, fact and expert witnesses, audits, and a schedule. Consultation and agreement by counsel beforehand can pave the way to efficiency in this part of the process. In particular, fact witnesses should be identified by name and position to the maximum extent possible in order both to provide disclosure to the opposition and to address any objections regarding any specific individuals.
4. **Requests for Pre-Hearing Security**—These should be briefed in the initial position statement, and the opposition should respond prior to the meeting. These can be orally argued *briefly* at the meeting and a decision made at that time.
5. **Procedures for Disputes**—Experience has shown that in some instances counsel will involve the panel in every minor dispute throughout the discovery process. It should be made clear that this should occur only when significant issues cannot be resolved between counsel after genuine attempts. Exact procedures should be established for filing of motions, including time and page limits, when these attempts fail.
6. ***Ex Parte* Communication and Cutoff Dates**—These are also items that can be discussed by counsel ahead of time; if there is agreement, the panel should affirm the decision unless there is some compelling reason to question it. If counsel do not propose a mutually acceptable date, the panel should consider whether the process will be enhanced by a cutoff sooner rather than later. Bear in mind that the *ARIAS•U.S. Code of Conduct* describes the boundaries of propriety for communication between a party, its counsel, and its appointed arbitrator. There should never be any communication with only the umpire by either party or its counsel, and any communication with the umpire should include both party arbitrators as well as opposing counsel.
7. **Schedule**—This includes setting of the Hearing date, and all the intermediate deadlines. There should be agreement on the dates of briefs, page limits, rebuttals, and whether submission should be simultaneous or sequential. The Hearing date is crucial, and it should be made clear that it can be changed only for a truly compelling reason. The panel should allow reasonable time for the parties to make their cases, while simultaneously maintaining an efficient schedule.
8. **Form of Final Award**—Most reinsurance contracts are silent on whether a reasoned award is required. This is an item that should be agreed upon by the parties, but occasionally there will be disagreement, and the panel will be required to make the decision. The nature and circumstances of the case should be considered. In some instances, a brief explanation rather than an extensive ruling may be appropriate. In any event, the decision should be made at the organizational meeting.

The ultimate objective is to use the organizational meeting to agree on as many items as possible regarding the process and timing, while providing counsel and parties a well-defined "route map" to increase efficiency and encourage adherence to the schedule.

Many members of the arbitration community have expressed valid concerns. Canons, guidelines, and questionnaires can accomplish only what those who serve are willing to assume. Let us hope that those participating in the process will respond in a constructive manner.▼

members on the move

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

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

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

Recent Moves and Announcements

Thomas S. Orr has left Connecticut and headed west. His new contact information is as follows: 36W344 Ferson Creek Road, St. Charles, IL 60174, phone 630-797-5918, cell 203-218-4902, email tsorr@sbcglobal.net.

William D. Hager can be found at Insurance Metrics Corporation, 301 Yamato Road (also known as 301 NE 51st Street), Suite 1240, Boca Raton, FL 33431, phone 561-995-7429, fax 561-431-0596, email bhager@expertinsurancewitness.com.

Michael Murphy is now at DLA Piper LLP (US), 1251 Avenue of the Americas, New York, NY 10020, phone 212-335-4755, fax 917-778-8655, email michael.murphy@dlapiper.com.

Patrick Fee can now be contacted at 2045 Church Street, Wauwatosa, WI 53213, phone 414-774-9995, email pfee@hfinc.us or pfee@wi.rr.com .

Email Changes

Rodney Moore has a new e-mail address, rodmr21@aol.com.

After his AOL address was hacked, **Charles W. Havens III** has changed his address to havens1000@comcast.net. This ARIAS•U.S. Director Emeritus has also retired. Farewell, Charlie!

A New French Arbitration Law: Salient Features for Insurance and Reinsurance Practitioners

Christian Bouckaert
Romain Dupeyré

international

Christian Bouckaert

Romain Dupeyré

The long-awaited new French arbitration law (*décret no 2011-48 portant réforme du droit de l'arbitrage*) was officially published and incorporated into the Code of Civil Procedure (CCP) on January 14, 2011. It contains a number of improvements compared to the former law, which dated from 1981 and which needed to be revised to adapt to the realities of arbitration as they exist today. The new law is the result of wide consultation by the Justice Ministry to receive input from arbitration practitioners and users.

The main objective of the new law is to amend the former law where necessary to meet the purposes and requirements of arbitration users and to codify precedents established under the former law. According to a report by Justice Ministry to the Prime Minister:

> After thirty years of practice, it appeared necessary to reform these provisions, in order, on the one hand, to consolidate part of the body of case law that has developed on [the basis of the former provisions] and, on the other hand, to introduce additions inspired by some foreign legal systems whose usefulness has been proved by practice.

Simplification of Formal Requirements

For domestic arbitration, the new provisions maintain the requirement of a writing, but they take account of practical necessities by providing that an arbitration agreement may arise from an exchange of writings or from a document referred to in the main agreement. This is of particular importance in insurance and reinsurance cases when the arbitration agreement is included in the slip, the cover note, or pre-established wording but does not appear in full in the policy.

One important innovation is that the new provisions explicitly state that an arbitration clause is apt to apply to a group of contracts, provided that the contracts are complementary. Once again, this provision could be of special interest to insurers and reinsurers, since it could permit disputes relating to different policies underwritten as part of a single insurance program to be settled in a single arbitration proceeding involving the insurers on the various layers.

As far as international arbitration is concerned, the new law is even more liberal. It expressly states that international arbitration agreements are "not subject to any requirement as to form." Consequently, an international arbitration clause does not need to be in writing.

Statutory Recognition of the Role of the *Juge d'Appui*, or Support Judge

One of the main changes introduced by the new law is statutory recognition of the *juge d'appui*, whose role is to support the arbitration process and make sure that the authority of the arbitral tribunal is respected. The *juge d'appui* is vested with the power to rule on issues relating to ongoing arbitration proceedings, such as the constitution of the arbitral tribunal, the production of evidence by the parties, the removal of arbitrators in certain cases, and the extension of the deadline for the arbitrators to render their award. The Justice Minister's report to the Prime Minister states:

> This evolution thus affirms the originality of the French arbitration procedure: the state judge is involved in arbitration proceedings to strengthen the authority of the arbitral tribunal, which is devoid of *imperium*, and to enable the parties to conduct the proceedings efficiently, having due regard to the principles of fairness and equality of arms. As in the past,

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It contains a number of improvements compared to the former law, which dated from 1981...

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Romain Dupeyré is an attorney at the Paris and New York bars, an associate at Cabinet BOPS, and a member of the Chartered Institute of Arbitrators (MCIArb).

When more than two parties are involved in a dispute and they are unable to agree on the appointment of the arbitrator(s), the arbitration institution designated by the parties or, failing that, the juge d'appui, remedies the lack of agreement by appointing the arbitrator(s).

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the *juge d'appui* is the chief judge of a *tribunal de grande* instance or a commercial court, who is entitled to intervene only within strictly determined limits.

The section relating to international arbitration provides that, in international arbitration, the *competent juge d'appui* shall, unless otherwise provided by the parties, be the chief judge of the *tribunal de grande instance* of Paris, in particular when the seat of the arbitration is in France or when one of the parties runs a risk of denial of justice. The new law thus concentrates jurisdiction on a particular judge (the chief judge of the *tribunal de grande instance* of Paris) and, by so doing, promotes his or her specialization (B. Leon, "To Specialize or Not: How Should National Courts Handle International Commercial Arbitration Cases?," Kluwer Arbitration Blog, Sept. 2, 2010).

Constitution of the Arbitral Tribunal

The new law also addresses the appointment of arbitrators in cases involving more than two parties, thereby tackling the delicate issue of the constitution of the arbitral tribunal in multiparty cases and enshrining in statutory law the lessons learned from the *Dutco* case (Cass., 1st civ. Div., Jan. 7, 1992, No. 89-18.708, *Siemens & BMKI v. Dutco*). When more than two parties are involved in a dispute and they are unable to agree on the appointment of the arbitrator(s), the arbitration institution designated by the parties or, failing that, the juge d'appui, remedies the lack of agreement by appointing the arbitrator(s).

That rule will not go unnoticed by insurance and reinsurance arbitration professionals, since, in practice, insurance and reinsurance disputes frequently involve more than two parties. The easiest way to resolve problems arising out of multiparty arbitrations is, of course, to include a consolidation provision in the arbitration clause. Clauses including such a provision are, however, rare—a notable example being the ARIAS•U.S. illustrative arbitration clause (comment G). In the absence of a consolidation provision, French law will provide a fall-back solution to ensure that the arbitral tribunal is constituted rapidly and fairly in multiparty cases.

The rule that an arbitral tribunal must have an uneven number of arbitrators continues to apply in domestic arbitration. Supplementary rules to remedy non-compliant arbitration agreements have, however, been established. This is particularly important in insurance and reinsurance disputes where, more often than not, the arbitration agreement provides for a two-member arbitral tribunal with the participation of an umpire only if the two arbitrators are unable to reach a decision. Under the new law, if the arbitration agreement provides for an arbitral tribunal composed of an even number of arbitrators, the nominated arbitrators must appoint an additional arbitrator. If they fail to do so within one month, the additional arbitrator is appointed by the *juge d'appui*.

As a general matter, the newly accredited *juge d'appui* has been given general jurisdiction in matters relating to the constitution of arbitral tribunals: "Any other dispute relating to the constitution of the arbitral tribunal shall, in default of agreement by the parties, be settled by the body responsible for organizing the arbitration or, failing that, by the *juge d'appui*" (CCP Article 1454, as amended).

Affirmation of the Fundamental Principles of Arbitration Law

The principle that **an arbitration agreement is independent from the main contract** is restated in CCP Article 1447, which provides that an arbitration agreement shall not be affected by the possible nullity of the contract in which it is contained.

CCP Article 1448, as amended, enshrines for its part another fundamental principle of arbitration: the negative effect of the doctrine of ***Compétence-Compétence***. The arbitral tribunal has priority to rule on the validity and scope of its jurisdiction.

To put an end to discussion on the subject, the new law establishes a statutory duty of **confidentiality in arbitration**: "Subject to statutory duties and unless otherwise agreed by the parties, arbitration proceedings shall be subject to the principle of confidentiality."

Estoppel Finds its Way into French Arbitration Law

The new law also includes a provision whereby a party that, without a legitimate excuse, failed to raise a procedural objection before the arbitral tribunal is barred from raising the objection in any subsequent action to set aside the award. The Justice

Minister regards this as enshrining the Anglo-Saxon doctrine of **estoppel** in French statutory law:

> Article 1466 enshrines the doctrine of estoppel, already recognized by case law. This concept, borrowed from Anglo-Saxon law, constitutes a procedural defense designed to sanction, in the name of good faith, the inconsistent conduct of a party, the latter being bound by his previous conduct and hence barred from asserting a new claim.

Streamlining of the Arbitration Process

The new law contains a number of provisions designed to ensure that the arbitration process proceeds as quickly as possible.

The new law explicitly allows arbitrators to order interim or protective measures. Orders for such measures may also be obtained from the chief judge of a French court, provided that the matter is urgent and that the arbitration tribunal has not yet been constituted. The second proviso was introduced into the new law to ensure that arbitration cases are dealt with insofar as possible by arbitral tribunals and only exceptionally by the national courts.

The new law requires that arbitration proceedings proceed with due dispatch, and places the responsibility for this both on the parties and on the arbitrators: "**The parties and arbitrators shall act promptly and fairly in the conduct of the proceedings**." (CCP Article 1464)

The new law further provides that the arbitral tribunal must set a date for the arbitrators to render the award, a new rule no doubt designed to ensure the celerity of the proceedings (CCP Article 1476).

The new law also introduces another important change by explicitly providing that arbitrators may order that their **award shall be immediately enforceable** (J. Ortscheidt, *L'octroi et l'arrêt de l'exécution provisoire des sentences arbitrales en France,* Rev. arb. 2004.9; A. Fahrad, *Provisional Enforcement of International Arbitral Awards Made in France*, J. Int'l Arb. 2006(2), p. 115 ff; D. Hascher, "L'exécution provisoire en arbitrage international," *in Etudes de procédure et d'arbitrage en l'honneur de J-F Poudret*, Lausanne, 1999, p. 404).

Further Means of Obtaining Evidence

The new law establishes a new system for **compelling third parties to produce documents or testify in arbitration proceedings**: A party to an arbitration proceeding who intends to rely upon a document held by a third party may, upon the authorization of the arbitral tribunal, subpoena the third party to appear before the chief judge of the *tribunal de grande instance* for the purpose of obtaining delivery of the document or testimony.

According to the new law, the arbitral tribunal may hear "any person" in the course of the arbitration proceeding. This therefore makes clear that representatives of the parties may be heard as **witnesses**, and thus puts an end to the debate on the subject under the former law.

Arbitration Award

CCP Article 1478, as amended, expressly permits the parties to an arbitration to vest the arbitrators with the power to act as *amiables compositeurs*, or decide the case *ex aequo et bono*—a frequent situation in insurance and reinsurance cases.

In domestic arbitration, the new law requires the arbitrators to state the reasons for their award. The requirement does not, however, apply to international arbitration. Consequently, the parties to an international arbitration may decide that the arbitrators need not give the reasons for their award. This topic is frequently debated in insurance arbitration and has come up in recent cases. The one-page award vacated by a New York district court in the *Platinum Re* case would, therefore, probably have found favorable ground for recognition and execution in France (*PMA Capital Ins. Co v. Platinum Underwriters Bermuda*, Ltd, 2010 WL 4409655 (3d Cir. Nov. 8. 2010)).

Possibility for Parties to Waive their Right to Bring an Action to Set Aside an Arbitration Award

A major development in international arbitration is the possibility for the parties to waive their right to bring an action to set aside the arbitral award.

CCP Article 1522, as amended, provides: "The parties may at any time by special agreement renounce the action to set aside." The Justice Minister made these comments on that provision:

> The new Article 1522 gives the parties to the arbitration the possibility to renounce the action to set aside, it being specified that, in such case, they may always lodge an appeal against the order for enforcement, on the basis of the same grounds as those prescribed for the action to set aside. Such a provision, which preserves the parties' right to an effective remedy, is inspired by foreign systems of law. It appears useful when foreign parties have recourse to arbitration in Paris to settle their dispute, without seeking enforcement of the award in France.

Finally and importantly, the filing of an action to set aside an arbitration award does not stay the enforcement of the award, as it did in the past.

All in all, the new law modernizes French arbitration law, makes it user-friendly, and is likely to meet some, if not all, of the high expectations of practitioners and industry representatives. In particular, it makes Paris an attractive seat for international insurance and reinsurance arbitration.▼

feature

Arbitrability and Arbitrating with a Non-Signatory

Thomas R. Newman

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A "question of arbitrability arises only in two circumstances — first, when there is a threshold dispute over 'whether the parties have a valid arbitration agreement at all,' and, second, when the parties are in dispute as to 'whether a concededly binding arbitration clause applies to a certain type of controversy.'"

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A potentially arbitrable reinsurance dispute governed by the Federal Arbitration Act (FAA)[1] may give rise to a number of separate and distinct levels of disagreement among the parties.[2] First, there is the underlying dispute on the merits that led one of the parties to demand arbitration. Second, there may be disagreement about whether the parties had actually agreed to arbitrate the underlying dispute. Third, there may be still further disagreement about who should decide whether the parties had agreed to arbitrate, the court or the arbitrators, i.e., the question of arbitrability. Fourth, a dispute may arise as to whether a non-signatory to the agreement containing the arbitration provision can demand arbitration against, or be compelled to arbitrate with, one of the signatory parties.

Disputes concerning arbitration have often been divided into the categories of substantive or procedural, with substantive referring to whether a particular dispute on the merits is subject to the parties' contractual arbitration provision. "Absent a clear expression to the contrary in the parties' contract, substantive arbitrability determinations are to be made by a court and not an arbitrator."[3]

"'[P]rocedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide,' as are 'allegation[s] of waiver, delay, or a like defense to arbitrability.'"[4] Likewise, "questions of 'contract interpretation' aimed at discerning whether a particular procedural mechanism is authorized by a given arbitration agreement are matters for the arbitrator to decide."[5]

Who Decides Arbitrability?

A "question of arbitrability arises only in two circumstances — first, when there is a threshold dispute over 'whether the parties have a valid arbitration agreement at all,' and, second, when the parties are in dispute as to 'whether a concededly binding arbitration clause applies to a certain type of controversy.'"[6] An attack on the validity of the contract as a whole, as opposed to the arbitration clause in particular, "does not present a question of arbitrability."[7]

The "first task of a court asked to compel arbitration of a dispute 'is to determine whether the parties agreed to arbitrate that dispute'" and "the court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'"[8] Once the court has made this threshold determination, finding the underlying dispute to be subject to arbitration, "any further matters surrounding the dispute are resolved as part of the arbitration procedure to which the parties have committed themselves."[9]

While generally it will be for the courts to decide whether parties have agreed to submit a particular dispute to arbitration,[10] parties are free "to contract around this default rule by assigning the determination of arbitrability to an arbitrator."[11] Whether they have done that is for the court to decide.[12] If "the parties 'clearly and unmistakably' empowered an arbitrator to determine arbitrability, the Court must compel arbitration of the gateway issues as well."[13]

There is "a presumption that the parties did not agree to submit questions regarding the arbitrator's jurisdiction to that same arbitrator."[14] Therefore, if the parties wish to empower arbitrators to determine their own jurisdiction, they must provide clear and unmistakable evidence of their intent to do so.[15] "The issue of arbitrability may only be referred to the arbitrator if there is *clear and unmistakable* evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator."[16]

If the arbitration clause in the contract is

silent or ambiguous, the presumption is not overcome and the question of arbitrability will be for the court to determine.[17] However, when "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."[18] For example, arbitrability was left to the arbitrator where the contract provided for arbitration to be held "in accordance with the Commercial Arbitration Rules of the American Arbitration Association," whose Rule 7 states that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."[19]

Because "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,"[20] the starting point in any dispute over arbitrability (as it is for all other contract disputes) must be the wording of the contract. And, when deciding whether the parties agreed to arbitrate the question of arbitrability, "the courts are to apply ordinary state-law principles that govern the formation of contracts," subject to an important qualification created by the Supreme Court of the United States.

The FAA's "liberal policy of promoting arbitration"[21] has created a general presumption favoring arbitration that requires that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[22] But this presumption is *reversed* when the issue is arbitrability. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so. . . . In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" — for in respect to this latter question the law reverses the presumption."[23]

In the *First Options* case[24], Justice Breyer explained why "this difference in treatment is understandable," stating: "The latter question [whether a particular merits-related dispute is arbitrable] arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, . . . one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter. . . . On the other hand, the former question — the "who (primarily) should decide arbitrability" question — is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. . . . And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[25]

Arbitration with Non-Signatories

The question of whether a party is bound by an agreement containing an arbitration provision is a "threshold question" or "gateway dispute" for the court to decide.[26] "[J]ust because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with any non-signatory."[27] An arbitration clause that does not include third parties "suggests the parties to the contract did not envision that third parties would be in a position to bring suit under the contract."[28]

In *Contect*,[29] Contect Corp. ("Corp.") filed suit to compel Remote Solution ("Remote") to arbitrate an indemnification dispute. Remote argued it could not be compelled to arbitrate because it was a non-signatory to the underlying contract containing the arbitration agreement that Remote had entered into with Contect L.P.("L.P."), an affiliate of Corp. The district court dismissed the suit, holding that whether a valid arbitration agreement existed was an issue

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"[J]ust because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with any non-signatory." An arbitration clause that does not include third parties "suggests the parties to the contract did not envision that third parties would be in a position to bring suit under the contract."

After finding that (i) a sufficient relationship existed between Corp. and Remote to permit Corp. to compel arbitration, and (ii) arbitrability was for the arbitrator to decide, the Second Circuit turned to the question of "whether a non-signatory can compel a signatory to arbitrate under an agreement where the question of arbitrability is itself subject to arbitration."

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to be decided by the arbitrator. The Second Circuit affirmed, stating that in order "to decide whether arbitration of arbitrability is appropriate, a court must first determine whether the parties have a sufficient relationship to each other and to the rights created under the agreement."[30]

The Second Circuit noted that a "useful benchmark for relational sufficiency can be found" in its prior decision in *Choctaw Generation Ltd. P'ship v. American Home Assurance Co.*,[31] where it held that "the signatory to an arbitration agreement 'is estopped from avoiding arbitration with a non-signatory 'when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'"[32] Among the factors to be considered are "the relationship among the parties, the contracts they signed (or did not), and the issues that have arisen."[33]

After finding that (i) a sufficient relationship existed between Corp. and Remote to permit Corp. to compel arbitration, and (ii) arbitrability was for the arbitrator to decide, the Second Circuit turned to the question of "whether a non-signatory can compel a signatory to arbitrate under an agreement where the question of arbitrability is itself subject to arbitration."[34]

This was a novel question in the Second Circuit, so the Court looked to conflicting authorities from other circuits and adopted the reasoning of the First Circuit in *Apollo Computer, Inc. v. Berg*,[35] a "virtually indistinguishable" case where the court had considered whether Apollo, a signatory to an arbitration agreement with another company called Dico, could be compelled to arbitrate by Dico's trustees in bankruptcy, who were non-signatories to the agreement.[36] The First Circuit rejected the argument that Apollo could not be compelled to arbitrate because there was no agreement between it and the defendants, holding:

> The relevant agreement here is the one between Apollo and Dico. The defendants claim that Dico's right to compel arbitration under that agreement has been assigned to them. . . . Whether the right to compel arbitration . . . was validly assigned to the defendants and whether it can be enforced by them against Apollo are issues relating to the continued existence and validity of the agreement.[37]

The Second Circuit found that "the relevant agreement here is the one Remote Solution signed with Contec L.P., in which Remote Solution agreed to submit all disputes to arbitration. Under the reasoning of *Apollo,* whether the arbitration rights under the 1999 Agreement were validly assigned by Contec L.P. to Contec Corporation is an issue that pertains directly to the continued 'existence, scope or validity' of the Agreement. As such, it is within the jurisdiction of the arbitrator pursuant to AAA Rule R-7(a) as incorporated into the 1999 Agreement."[38]

It has also been held that "aside from the issue of relational sufficiency, a non-signatory who exploits a contract containing an arbitration clause is estopped from repudiating that clause."[39] Thus, where it was shown that a non-signatory affiliate exploited a license agreement containing an arbitration clause by marketing products that utilized technology covered by that agreement, the affiliate was "estopped from seeking to avoid an arbitration provision contained in the license agreement since they derived direct benefits from said agreement."[40]

Recently, in *Republic of Iraq v. ABB AG*,[41] the district court held that "estoppel does not result simply because there is a 'relationship of any kind' between the litigating parties and 'their dispute deals with the subject matter of an arbitration contract made by one of them.' . . A sufficient relationship requires something more, for instance that the non-signatory possesses 'some sort of corporate relationship to a signatory party," i.e., as a "subsidiar[y], affiliate[], agent[], [or] other related business entit[y], . . . that the signatory was required to provide services to the non-signatory and to follow the instructions and directives of the non-signatory . . . that the non-signatory's dispute with the signatory is 'bound up' with a dispute already in arbitration between the two signatories to the arbitration agreement, or that the non-signatory was explicitly tasked with performing certain duties in the contract containing the arbitration clause."[42]

In *Microchip Technology Inc. v. U.S. Philips Corp.*,[43] the Federal Circuit affirmed the denial of a motion to compel arbitration and remanded the matter to the district court to determine whether *Microchip* was a

successor party to the agreement containing the arbitration provision. The Federal Circuit also held that the question of whether the arbitration agreement had expired was for the district court to decide, "even if this requires interpretation of the agreement."[44] The Second Circuit declined to follow *Microchip,* stating: "the Federal Circuit did not examine *Apollo*, but instead relied on Supreme Court cases that either did not address whether there was clear and unmistakable evidence of the parties' intent to submit arbitrability to an arbitrator or found that such clear and unmistakable evidence was absent. "In our view, these cases are not determinative when analyzing the factual situation presented by *Microchip, Apollo*, and the instant case, where incorporation of arbitration rules giving jurisdiction to the arbitrator provides clear and unmistakable evidence of the parties' intent to arbitrate issues of arbitrability."[45]

ENDNOTES

1 9 U.S.C. §§ 1-16.
2 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).
3 *Bell Atlantic-Pennsylvania, Inc. v. Communication Workers of America, AFL-CIO, Local 13000*, 164 F.3d 197, 200 (3d Cir. 1999)(" *Bell Atlantic*").
4 *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 179 (3d Cir. 2010)("Puleo"), quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002).
5 *Ibid*.
6 *Puleo*, 605 F.3d at 179, quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).
7 *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."). In Buckeye, plaintiffs alleged that the contract as a whole was illegal on account of its imposition of usurious interest rates. The Supreme Court held the issue was one for the arbitrator, not the court, "because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract." Id. at 446.
8 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).
9 *Bell Atlantic*, 164 F.3d at 200.
10 *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986)("AT&T Technologies").
11 *Anderson v. Pitney Bowes, Inc.*, 2005 U.S. Dist. LEXIS 37662 at *6 (ND Cal. *2005)("Anderson*"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)("*First Options*")("parties may agree to arbitrate arbitrability").
12 *Air Line Pilots Association, Int'l v. Midwest Express Airlines, Inc.*, 279 F.3d 553, 555 (7th Cir. 2002)("*Air Line Pilots Assn.*").
13 *Anderson*, 2005 U.S. Dist. LEXIS 37662 at *7; *Air Line Pilots Assn.*, 279 F.3d at 556 ("when an arbitration clause is so broadly worded that it encompasses disputes over the scope or validity of the contract in which it is embedded, issues of the contract's scope or validity are for the arbitrators").
14 *Ibid*.
15 *AT&T Technologies*, 475 U.S. at 649 (1986)("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator").
16 *Contec Corp. v. Remote Solution Co.,* 398 F.3d 205, 208 (2d Cir. 2005)("*Contec*").
17 *First Options*, 514 U.S. at 944-945 (1995).
18 Contec, 398 F.3d at 208.
19 *Ibid*.
20 AT&T Technologies, 475 U.S. at 649 (1986), quoting Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).
21 *Necchi S.p.A. v. Necchi Sewing Machines Sales Corp.*, 348 F.2d 693, 697 (2d Cir. 1965), quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2 Cir. 1959), *cert. granted* 362 U.S. 909, *cert. dismissed pursuant to stipulation*, 364 U.S. 801 (1960).
22 *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability"); *Contec*, 398 F.3d 205, 208 (2d Cir. 2005).
23 *First Options*, 514 U.S. at 944-945 (1995).
24 514 U.S. 938 (1995).
25 *First Options*, 514 U.S. at 945 (1995)(citations omitted).
26 *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546 (1964); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002)("a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide").
27 *Contec*, 398 F.3d at 209.
28 *Subaru Distribs. Corp. v. Subaru of America, Inc.*, 425 F.3d 119, 125 (2d Cir. 2005).
29 398 F.3d 205 (2d Cir. 2005)
30 *Id*., 398 F.3d at 209.
31 271 F.3d 403, 404 (2d Cir. 2001).
32 *Contec*, 398 F.3d at 209.
33 *Contec*, 398 F.3d at 209; Choctaw, 271 F.3d at 406.
34 *Contec*, 398 F.3d at 209.
35 886 F.2d 469 (1st Cir. 1989)("*Apollo*").
36 The agreement between Apollo and Dico contained a non-assignment clause.
37 *Apollo*, 886 F.2d at 473.
38 *Contec*, 398 F.3d at 210.
39 *Merrill Lynch Int'l Finance, Inc. v. Donaldson*, 27 Misc.3d 391, 396, 895 N.Y.S.2d 698, 703 (Sup. Ct. N.Y. Co., 2010).
40 *Matter of SSL International, PLC, v. Zook*, 44 A.D.3d 429, 430, 843 N.Y.S.2d 264, 265 (1st Dept 2007); *HRH Construction LLC v. Metropolitan Transportation Auth.*,33 A.D.3d 568, 569, 823 N.Y.S.2d 140 (141 (1st Dept 2006).
41 __ F.Supp.2d __, 2010 U.S. Dist. LEXIS 141766 (SDNY 2011).
42Id. at *21-*22 (citations omitted).
43 367 F.3d 1350, 1358 (Fed. Cir. 2004).
44 367 F.3d at 1358-59.
45 *Contec*, 398 F.3d at 210.

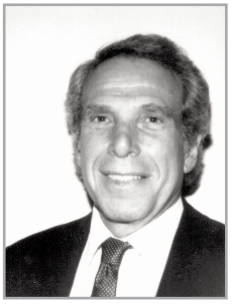
The Second Circuit declined to follow *Microchip,* stating: "the Federal Circuit did not examine *Apollo*, but instead relied on Supreme Court cases that either did not address whether there was clear and unmistakable evidence of the parties' intent to submit arbitrability to an arbitrator or found that such clear and unmistakable evidence was absent.

off the cuff

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

Is Honesty Always The Best Policy?

Eugene Wollan



Have you ever found yourself in a situation in which an honest answer is not necessarily a good idea? I think most of us have.

Consider, for example, these scenarios:

1. **Scene**: An elevator occupied by you and one other person, a total stranger.

   The stranger: "Have a nice day."

   Acceptable answer: "You too."

   Honest answer: "Don't tell me what kind of day to have."

2. **Scene**: A conversation with a friend.

   The friend: "Look at this picture of my new granddaughter. Isn't she gorgeous?"

   Acceptable answer: "Oh, yes!"

   Honest answer: "Actually, to me all newborns look like Winston Churchill."

3. **Scene**: A trendy new "in" restaurant full of beautiful people air-kissing each other and offering art-decorator food prepared by a celebrity chef.

   The friends who selected the venue: "Isn't this a wonderful dining experience?"

   Acceptable answer: "Absolutely."

   Honest answer: "I think this is a lot of pretentious, expensive claptrap."

4. **Scene**: A crowded bus, with a single vacant seat I am approaching.

   The lady in the next seat, who has thrown her purse on the seat I await (snappishly), "Oh, do you want to sit here?"

   Acceptable answer: "Yes, please."

   Honest answer (also snappishly): "Did you pay for one seat or two?"

5. **Scene**: The family car.

   My wife: "Why did you take this street?"

   Acceptable answer: "Because I thought there would be less traffic."

   Honest answer: "Because I'm an idiot."

[This is also guaranteed to be a conversation-ender.]

6. Now for the point of this discussion: I am asked from time to time why I am so obsessed with grammatical correctness and stylistic precision, the question frequently being accompanied by some glib generality like, "What's the difference, really, as long as the meaning comes through?" The easy answer is that I am obviously a pedantic, obsessive-compulsive, perfectionistic curmudgeon. All of these descriptions are probably accurate, but in this instance I think a more extensive and nuanced answer is called for. I have several reasons to explain (or rationalize) my preoccupation with bad writing, especially by lawyers.

Good writing is generally clearer, and conveys its meaning more precisely, than poor writing. Take this example: "I would have liked to have been there when the witness recanted." Is the writer saying that he (or she) would like now to have been there then, or that he would at that time have liked to be there? If you read it literally, he is, for example, speaking on Friday and saying that he would have liked on Thursday to have been there on Wednesday. Is that what he really means? It's entirely unclear, because the writer hasn't paused for a moment to reflect on what he has written.

Good writing is generally clearer, and conveys its meaning more precisely, than poor writing. Take this example: "I would have liked to have been there when the witness recanted." Is the writer saying that he (or she) would like now to have been there then, or that he would at that time have liked to be there?

The rules are there for a reason. One such rule, for example, prescribes that the subject and the predicate should agree in number, but I still see sentences like this: "A review of the depositions reveal many contradictions." Is it any wonder that I snarl at this? It's the review, not the depositions, that did the revealing, and the contrary conclusion suggested by the construction of this sentence is simply nonsense. The subject of the verb is "review," and the last time I checked "review" was singular.

Bad writing is often an indicator of linguistic ignorance. Whoever wrote "The evidence was both verbal and written" was clearly unaware that "verbal" means "in words" and that oral communications use words just as written ones do.

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Mistakes are a common result when writers strain to be elegant or fancy instead of being simple and direct. For example, "Please let us have your document requests promptly, so we may decide which ones we will object to." "May" presumably struck the writer as meaning the same thing as, but sounding more sophisticated than, "can," but the result is simply wrong. The writer here is talking about having the ability to decide ("can"), not about getting permission to decide ("may"). About the last thing a litigator wants to do is solicit his adversary's permission to object to a document request.

Bad writing is often a fine illustration of the adage that a little knowledge is a dangerous thing. Most of us, as we were growing up and learning language, had to be cautioned time and time again not to fall into the sloppy locution "Me and Jimmy went to the park." As a result, many folks grew up thinking that "me" is a dirty word, and we get sentences like "He gave the transcript to Jimmy and I." Even the writer would (presumably) not say, "He gave it to I," so maybe it was the coupling with Jimmy that scared him away from "me."

> [I once saw this same solecism in a diary entry written by General George S. Patton. I think the sentence was something like "He explained the strategy to Ike and I." Patton may have been one helluva combat leader, but obviously he wasn't much of a grammarian.]

Rules can, it is true, sometimes be broken, but if you do it, you should know what the rule is. and you should have a good reason for breaking it. For example, it's generally not a good idea to split an infinitive, but sometimes it works well. Would the Star Trek slogan "To boldly go where no man has gone before" (or something like that) have the same impact if it started out "To go boldly" or "Boldly to go"? I don't think so.

Picasso had to know Rembrandt and Reubens, and learn to paint representational art, before he found his unique, ground-breaking later identity. Schonberg had to be steeped in Beethoven and Brahms, and learn how to write tonal music, before he developed the twelve-tone style. e e cummings had to learn all about Longfellow and Whitman, and write his poetry in a more familiar style, before he dispensed with capital letters. Likewise, a good writer should know the rules before he can judge whether breaking one of them is a worthwhile idea.

Now that I've gotten all of that off my chest, I can return to my original question of why I am "so obsessed with grammatical correctness and stylistic precision," to a point where I seem to take every mistake as a personal affront. Perhaps, for all my explanations, the honest answer is that I really am "a pedantic, obsessive-compulsive, perfectionistic curmudgeon."

I leave that to others to judge.▼

Most of us, as we were growing up and learning language, had to be cautioned time and time again not to fall into the sloppy locution "Me and Jimmy went to the park." As a result, many folks grew up thinking that "me" is a dirty word, and we get sentences like "He gave the transcript to Jimmy and I."

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case notes corner

Federal Court Decides Arbitrator Disqualification Issue Despite Agreement To Refer Selection Disputes To State Court

Ronald S. Gass

Ronald S. Gass

Ronald S. Gass

Occasionally, arbitration clauses include a provision for resolving deadlocks over arbitrator selection (e.g., a party's failure to name its party arbitrator or to select an umpire) by referring those issues to a state trial court for resolution. However, as a recent California federal district court decision demonstrates, the enforceability of such state court referrals will depend heavily on the specific wording of the clause, which will likely be construed narrowly if, for example, an arbitrator selection issue arises, such as party arbitrator disqualification, that was not squarely addressed.

In this noteworthy case, an insurer and its insured entered into a Payment Agreement for Insurance and Risk Management Services. When a dispute arose, the insured demanded arbitration pursuant to the agreement and named its party arbitrator. The insurer subsequently named its party arbitrator but also challenged the qualifications of the insured's arbitrator to serve. The arbitration clause provided that if either party refused or neglected to appoint an arbitrator within 30 days after written notice from the other party requesting it to do so, or if the two arbitrators failed to agree on a third arbitrator within 30 days of their appointment, "either party may make an application to a Justice of the Supreme Court of the State of New York, County of New York and the Court will appoint the additional arbitrator or arbitrators."

With regard to the arbitrators' qualifications, the clause provided that they "must be executive officers or former executive officers of property or casualty insurance or reinsurance companies or insurance brokerage companies, or risk management officials in an industry similar to [the insured's]," domiciled in the U.S. and "not under the control of either party to this Agreement." The insurer's complaint about the insured's party arbitrator concerned an alleged violation of the "not under the control of either party" provision. He had been a former employee of the insurer's parent company; had issued insurance policies for the insurer while so employed; had recently been appointed as a party arbitrator on behalf of the insurer; and had served as a litigation consultant/expert witness directly for the insurer and its parent company in at least four other cases in recent time. This prior relationship, argued the insurer, gave the insured's arbitrator insider, or "playbook" information about the insurer sufficient to trigger the "not under the control of either party" restriction.

This prior relationship, argued the insurer, gave the insured's arbitrator insider, or "playbook," information about the insurer sufficient to trigger the "not under the control of either party" restriction.

Recognizing that the arbitration clause did not specifically address arbitrator disqualification disputes, the insurer proposed that the parties adopt several supplemental arbitration procedures, including a method for the disqualification of party arbitrators, which were ultimately declined by the insured. When the insurer subsequently refused to proceed to arbitration unless the insured selected a new arbitrator and stated that it intended to petition the Supreme Court of New York to settle its disqualification dispute, the insured filed a motion before the California federal district court to compel arbitration.

Because the arbitration clause provided that the arbitration would be governed by the Federal Arbitration Act ("FAA"), the obvious starting point for the district court's analysis was § 4, which provides in pertinent part: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court...for an order directing that such arbitration proceed in the manner provided for in such agreement." The insurer argued that the insured's party arbitrator should be disqualified and that the arbitration clause

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required this dispute to be adjudicated by the Supreme Court of New York. Because he was allegedly unqualified and the insured refused to appoint someone else, this situation was "akin" to the insured not nominating anyone, and therefore amounted to a failure to comply with the arbitration clause. The insured countered that the provision granting venue to the Supreme Court of New York was limited to two very specific circumstances: (1) when a party refuses or neglects to appoint its arbitrator at all, and (2) when the two arbitrators fail to agree on a third. Consequently, disputes over a party arbitrator's qualifications were for the federal court to decide pursuant to the FAA, not the state court. Furthermore, nothing in the parties' arbitration clause or federal law permitted the disqualification of a party arbitrator prior to the entry of an arbitration award, and in any case, the insured's party arbitrator was qualified to serve.

Agreeing with the insured, the federal district court held that the arbitration clause gave the Supreme Court of New York "limited" jurisdiction, which did not include deciding disputes over arbitrator qualifications, and that a federal forum was the proper place to decide the insured's motion to compel. It also determined that neither the parties' agreement nor well-established precedent allowed one party to disqualify the other's party arbitrator prior to the conclusion of the arbitration and issuance of an award. While acknowledging that the arbitration clause precluded the selection of a party arbitrator under the control of either party, the court interpreted this to mean "currently" under the control of either party. Granting the insured's motion to compel arbitration, the federal court concluded that the parties had complied with the arbitration clause requirements for the selection of arbitrators and that the insured's party arbitrator was qualified to serve because he had no current relationship with the insurer.

This case suggests two important caveats for arbitration clause drafters. First, federal courts are likely to interpret arbitration clause referrals to state courts for the resolution of arbitrator selection disputes very narrowly. Second, if the parties want a state court to resolve arbitrator disqualification disputes during the selection phase of the proceeding, the clause had better expressly address this contingency because, absent extraordinary circumstances sufficient to invoke the court's equitable powers (e.g., overt misconduct), a federal court is unlikely to stray from the well-established rule that arbitrator disqualification disputes must await a motion to vacate after an award is rendered.

Service Partners, LLC v. American Home Assurance Co., Case No. CV-11-01858-CAS(Ex), 2011 U.S. Dist. LEXIS 67207 (C.D. Cal. June 20, 2011).▼

Agreeing with the insured, the federal district court held that the arbitration clause gave the Supreme Court of New York "limited" jurisdiction, which did not include deciding disputes over arbitrator qualifications, and that a federal forum was the proper place to decide the insured's motion to compel.

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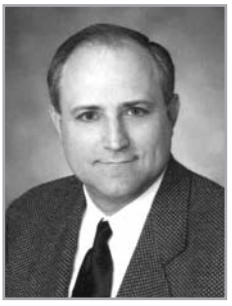

Edward W. Rich

Joseph P. Monteleone

Joseph Monteleone has more than thirty years of experience in the insurance arena, both in the private practice of law and as an insurance company claims executive. He is a frequent author and speaker on topics within his practice areas, having written over one hundred papers, books, book chapters and texts. He has made more than two hundred presentations throughout the U.S. and internationally.

Mr. Monteleone practices primarily in the areas of professional liability, errors and omissions (E&O), directors and officers (D&O), employment practices liability (EPL), and other claims-made insurance products. He represents various insurers and reinsurers in coverage litigation, regulatory matters and arbitrations, and provides coverage advice and monitoring of underlying litigation in the areas of D&O, professional liability, and other specialty lines insurance products. He drafts policy forms and endorsement language, as well as providing legal consulting services, to a wide variety of specialty lines insurers. In addition, Mr. Monteleone provides expert witness testimony on issues of coverage and bad faith allegations and serves as arbitrator or mediator in a variety of disputes involving insurance and reinsurance coverage, particularly in the area of D&O, E&O, professional liability, industry custom and practice, and claims handling standards. Mr. Monteleone has been cited for excellence in Chambers USA America's Leading Lawyers for Business. He has also been selected for inclusion continuously on an annual basis since 2006 in *New York - Metro Super Lawyers®*.▼

Edward W. Rich

Edward Rich is an attorney, arbitrator, and mediator, with more than thirty years of experience dealing with legal, financial, business, and insurance issues. He is a former financial executive, having been corporate treasurer of three Fortune 500 multinational companies and CFO of a $7-billion subsidiary of a Fortune 500 company. He has diverse US and international expertise.

For several years early in his career, Mr. Rich litigated insurance defense cases. He has significant experience in civil litigation, including breast implant and asbestos mass tort litigation, and insurance coverage litigation and arbitration, and has been president of several captive insurance subsidiaries of Fortune 500 companies. He has been a negotiator in difficult financial situations, including pre- and post-bankruptcy, and in settlement of more than $1 billion of insurance coverage disputes. In addition, he has dealt extensively with contracts, corporate finance, mediation, business, and environmental issues.

Mr. Rich currently has a practice based in Michigan. He previously held legal and financial positions with The Dow Chemical Company, including CFO of Dow's subsidiary Union Carbide during years of extensive asbestos litigation; was corporate treasurer of Dow Corning Corp. during years of extensive breast implant litigation; was VP and treasurer of Corning Inc.; and was Financial VP and treasurer of Lyondell Chemical Company.

Mr. Rich is a graduate of the Massachusetts Institute of Technology, with a bachelor's degree in Mechanical Engineering and a Master of Science degree. He graduated from Stanford Law School with a JD. He is also trained as an arbitrator and is on the Roster of Neutrals for the American Arbitration Association, has attended the Mediation Workshop with Professor Frank Sander at Harvard Law School, has attended the Masters Forum for Mediators at Pepperdine University Law School, and has completed the Michigan Supreme Court SCAO General Civil Mediator qualifications.▼

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

James A. Shanman

James Shanman is a partner in the Stamford and New York offices of Edwards Angell Palmer & Dodge LLP, representing national and international clients in major insurance and reinsurance litigation and arbitration matters. He is an accomplished trial lawyer and has tried jury and non-jury cases in federal and state courts, administrative proceedings, and numerous arbitrations throughout the United States. He has also been involved in a number of mediations. His practice includes representation and counseling in matters involving both property and casualty and life and health insurance and reinsurance, personal accident insurance, agents and brokers, surety and credit insurance, and London Market matters, as well as a large variety of other insurance matters.

Among the issues that Mr. Shanman has arbitrated or litigated are contract interpretation, insolvency, late notice, number of occurrences, allocation, MGA/MGU problems, underwriting, coverage, claims handling, corporate owned life insurance, fraud, and many others. He has also represented clients in complex commercial litigation involving a wide range of substantive areas, including contract disputes, securities, creditors' rights, real estate, employment discrimination, publishing, advertising, franchising, fraud, and other business torts.

Mr. Shanman has been involved in insurance and reinsurance matters for more than thirty years. He has a B.S. in economics from the Wharton School of the University of Pennsylvania and a law degree from Yale. After law school he served 4 years in the Air Force, most of it as a JAG officer, including service as a military judge. Mr. Shanman has also acted as an arbitrator in a number of commercial arbitrations, and is a Founding Member of Remedi. He has written numerous articles and spoken frequently on reinsurance topics, and has been an editor of two leading reinsurance texts.

Mr. Shanman is admitted to practice in New York and Connecticut and numerous federal courts.▼

James A. Shanman

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

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

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

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

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

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

Sincerely,

Daniel L. FitzMaurice

Chairman

Elaine Caprio Brady

President

ARIAS U.S. Membership Application

AIDA Reinsurance & Insurance Arbitration Society
PO BOX 9001
MOUNT VERNON, NY 10552

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

914-966-3180, ext. 116

Fax: 914-966-3264

Email: info@arias-us.org

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 10/1/11

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$400	$1,175
FIRST-YEAR DUES AS OF APRIL 1	$267	$783 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$133	$392 (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 4 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 $400 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: ARIAS·U.S. PO Box 9001, Mt. Vernon, NY 10552

Payment by credit card (fax or mail): 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 By-Laws of ARIAS•U.S., and agree to abide and be bound by the By-Laws of ARIAS•U.S. The By-Laws are available at www.arias-us.org in the About ARIAS section.

_____

Signature of Individual or Corporate Member Applicant

ARIAS U.S.
P.O. Box 9001
Mt. Vernon, NY 10552

ARIAS U.S. Board of Directors

Administration