ARIAS U.S.

ARIAS U.S. 25 ANNIVERSARY YEARS

New Perspectives from Past Experience

QUARTERLY

ALSO IN THIS ISSUE

- *Early Thoughts on Late Notice*
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- *Remembering Dick Kennedy*

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EDITORIAL POLICY — ARIAS•U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution. All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include a brief biographical statement and a portrait style photograph in electronic form. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. In the case of authors wishing to submit more lengthy articles, the *Quarterly* may require either a summary or an abridged version, which will be published in our hardcopy edition, with the entire article available online. Alternatively, the *Quarterly* may elect to publish as much of the article as can be contained in 5 printed pages, in which case the entire article will also be available on line. Manuscripts should be submitted as email attachments. Material accepted for publication becomes the property of ARIAS•U.S. No compensation is paid for published articles. Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

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2019 marks the 25th anniversary of the founding of ARIAS•U.S. Sadly, on this 25th anniversary, we lost the visionary behind ARIAS, Chairman Emeritus Dick Kennedy. I am honored to have written an "In Memoriam" column about Dick for this issue.

As part of our 25th anniversary, we asked four veteran reinsurance practitioners who have either retired or moved on from their insurance and reinsurance disputes practice (although one is an arbitrator now) to provide us with some insights and reflections about the practice of arbitration and how it can be improved. We thought a retrospective look with a nod to the future was a useful exercise for the 25th anniversary and would give us an opportunity to receive some wisdom from some old friends one more time.

The first article in this series of "New Perspectives from Past Experience" is from Ed Krugman, formerly of Cahill, Gordon & Reindell LLP, and is titled, "Reflections on Arbitration." Ed, as only Ed can do, provides us with a very thoughtful and well-written piece on the realities of arbitration then and now. The second article, from Larry Greengrass, formerly of Mound, Cotton, Wollan & Greengrass LLP, is titled "The End of Reinsurance Arbitration." Sensing a theme here? Larry lays out a series of legitimate concerns about the arbitration process based on his 40-year career.

The third article comes from Jim Rubin, formerly with Butler Rubin Saltarelli & Boyd LLP and a past chair of ARIAS. Titled "A Simple Way to Improve the Arbitration Process," Jim takes on *ex parte* communications and makes an excellent case why party-appointed arbitrators and *ex parte* communications should not mix. The final article is from John Nonna, formerly with Squire Patton Boggs (US) LLP. John's article, "A Farewell to Reinsurance and Big Law," provides his perspective on the growth of reinsurance arbitration, the closeness of industry practitioners, and the transition to a public service job. A swan song for John.

Notably, three of the authors mention the Neutral Rules as a way forward. From our veterans' pens to our clients' eyes, may it become so.

In addition to these special 25th anniversary articles, there's a thoughtful article about emerging litigation stemming from the opioid crisis and medical device litigation that will be percolating up to the reinsurance level in due course. Written by Heather Simpson and Joshua Wirtshafter of Kennedys CMK, "Recent Trends in Medical Device and Opioid Litigation" expands on the emerging issues panel from the 2018 Fall Conference and furthers the discussion on the coverage and contract issues that are arising and will likely arise as these cases are litigated.

This issue also includes a roundtable symposium titled "How Changing Technology Has Affected Arbitrations." David Winters of Porter Wright Morris & Arthur LLP moderated this "Tech Tips" alternative; he was joined by Jonathan Bank from Locke Lord, arbitrator Caleb Fowler, arbitrator Susan Mack of Adams and Reese LLP, and Jim Rubin. The symposium presents a perspective on how reinsurance arbitrations have changed with the introduction of new technologies. Special thanks to Winter Reporting for supplying a court reporter and a transcript of this symposium.

From across the pond, Jonathan Sacher and Kelly Jones of Bryan Cave Leighton Paisner provide an analysis of a recent English Commercial Court case on where an arbitration should be held when an arbitration clause and service-of-suit clause clash. The interesting point is that the court construed two policies (the lead underwriting policy and the excess policy) with one clause seating the dispute in London and the other having a Washington service-of-suit clause.

We hope to have more special roundtable symposia in the third and fourth quarter issues as part of the 25th anniversary celebration. Plans are in the works for symposia with some of the ARIAS founders on how things have progressed over the past 25 years, with longtime arbitrators envisioning how arbitration can look in the future and some of the younger rising stars in our practice discussing how they became involved and what they see for the future of ARIAS.

As always, I encourage you to submit articles. If you were on a spring conference panel, turn your hard work into an article. If you lead a committee, write something up about what your committee is doing. If you've written a blog post or client alert, turn it into an article for the *Quarterly*. I welcome your submissions.

— Larry P. Schiffer

Reflections on Arbitration

By Edward P. Krugman

When Larry Schiffer asked me and three others to contribute reminiscences to this issue of the *Quarterly*, I suggested that the issue could be subtitled "Old F**ts Hold Forth." I was (and am) honored to have been asked, and I am always happy to mouth off. I am less certain that what I have to say will be new or startling.

A few years ago, I wrote a piece for *Bloomberg* on the history and meaning of the "honorable engagement" clause.[1] The occasion was the then-recent decision in *PMA v. Platinum*,[2] in which the district court (and later the Third Circuit) dumped all over three experienced arbitrators' reasonable, common-sense solution to a problem arising from a badly drafted finite reinsurance contract. Parties who use honorable engagement clauses, I wrote, are looking to the arbitrators to enforce proper business behavior as much as written contractual obligations. (The history is there. Read the article; it's cool stuff.)

I had in mind Jim Rubin's conceit that reinsurance arbitrators should wear judicial robes in recognition of the majesty of their role. Arbitrators are the conscience of the industry.

Really? Well, sure—if my panels were always the three folks who sat on *PMA v. Platinum*. In the real world, however, life is not so simple.

In the real world, arbitration sucks. It is (to me, anyway) no accident that the word looks and sounds like "arbitrary." For as long as I was in and around ARIAS•U.S., the question on the table was not whether reinsurance arbitration worked well—nobody thought it did—but whether, as Churchill said of democracy as a form of government, arbitration "is the worst form of [dispute resolution] except for all those other forms that have been tried from time to time." I have moved on to do other things for the last couple of years, but I have no reason to believe that the question is any less front and center now than it was when I retired.

A Structural Problem

The problems with U.S. reinsurance arbitration are well known. The system of party-appointed arbitrators demands impossibilities from its participants. Even with the best will in the world—and in almost all cases, I fully accept that arbitrators are acting in good faith and with good will—no party-appointed arbitrator can adhere to the standards set forth by Canon II, Comment 2 of the ARIAS Code of Conduct.[3] Nobody can do those mental gymnastics, particularly in this age of endless vetting and the twice-a-year ARIAS job fairs.

Arbitrators who say they can and will adhere rigorously to the Code of Conduct will get appointments in inverse proportion to the extent to which they are believed. That is routine in this age of corporate doublespeak, where everyone says the right thing and nobody believes they mean it, but it does not promote respect for the process.[4] The late Larry Brandes said to me, as I was about to appoint him as my arbitrator, "Ed, it's my job to get you whatever you want in discovery, but on the merits I'm going down the middle." I loved and respected Larry and I miss him greatly, but I did not think he could walk that line, and I don't think anyone else can, either. I repeat: This is not a comment on arbitrators as individuals, it is a comment on the system. The problem is structural.

And because the structural flaw lies in the very fact of party appointment, it cannot be fixed by requiring party-appointed arbitrators to be "neutral." ICDR rules require the entire panel to be "neutral," but walk into an ICDR arbitration during panel questioning of an important witness and you will have no difficulty determining which arbitrator was appointed by which party. Some English lawyers and insurance professionals say they have the problem licked because they have a long tradition of neutrality of party-appointeds, but over the years I have observed U.K. colleagues spending substantial time trying to find the "right" party-appointed arbitrator. They are simply playing a subtler form of the great ARIAS game of "Let's pretend."

So "neutrality" alone is not enough, but using all-neutral panels—appointed centrally, as under the ARIAS Neutral Panel Rules, and *not* by the parties—holds some promise. In the near term, for an individual arbitration, central appointment does solve the structural flaw inherent in tripartite clauses. The longer-term issue of repeat players on the arbitrator side being biased for or against repeat players among the parties remains, but repeat-player bias is ameliorated if the panel members have "taken the pledge" and are certified neutral arbitrators (i.e., they have promised not to accept any party appointments at all).

Unfortunately, of the hundreds of ARIAS-Certified Arbitrators, only 13 have taken the pledge. That is entirely understandable—if you sit as an arbitrator for a living, it is very, very tough to wall yourself off from so many appointments—but it means there is not remotely enough "bench strength" to make true all-neutral panels work. So the system needs to use arbitrators who are neutral-for-today-only, however such neutrality is determined, and that reintroduces the potential for repeat-player bias. Rule 6.3 of the ARIAS★U.S. Neutral Selection Procedures is wholly inadequate to address this problem, and no rule acceptable to the arbitrators' union could be.[5]

At the time I retired, not many people were actually using the ARIAS appointment procedure—those pesky legacy tripartite arbitration clauses kept getting in the way—although Brian Snover had sort of made (and then sort of retracted) a general offer to the world to use this process, and I was aware of at least one ceding company that was writing it into its contracts going forward. Maybe in a few years (decades)? We'll see.

Is Litigating Better?

So, what about the alternative—litigating in court? Is it any better? Sadly, for all of the acknowledged imperfections of the judicial process, in my experience the answer has been yes.

When I started performing reinsurance litigation in 1985, I had a client with the perception that a lot of the industry was not fond of it and was therefore leery of arbitration. This client was generally the ceding company, so I filed a lot of complaints in the state and federal courts. The reinsurers, of course, could have forced the cases into arbitration, but the industry perception at the time was that arbitration favored the cedent (particularly if rescission was an issue, as it frequently was in my cases), so the reinsurers generally accepted our choice of forum, and the cases for the most part stayed in court.[6]

Well, I won a few and lost a few and settled a lot more, but I never had the feeling that I was being gamed or that the deck was stacked, or anything similar. The judges were not experts in the industry, but they were willing to listen to our arguments, and they were willing to learn. They may not have thought my cases were the most exciting part of their docket,[7] but they did their job and moved the cases along to resolution. There were exceptions, of course,[8] but on the whole, the system operated as it should.

For my part, I never had to worry about the completeness of the umpire's questionnaire responses, or how much I could talk to my arbitrator before *ex parte* cut off, or whether my opponent and his/her arbitrator would feel similarly constrained, or whether I had already lost the case at the time of the coin flip. To be sure, I generally knew, liked, and trusted my party-appointed arbitrators (I can't always say the same about the umpires). I felt I could handle the process as well as or better than most, and I can't complain about the results. But I never liked it. It always felt—well, arbitrary.

And, at least these days, the "classic" reasons to prefer arbitration to litigation seem to me not to matter a great deal. I've never had a case, in either litigation or arbitration, where at the end of the day the amount of discovery did not seem more or less appropriate to the needs of the case. Speed? Cost?

They've been about the same. Most lawyers I've talked with over the years feel similarly on these issues.

What arguably does matter is confidentiality. Reinsurance arbitrations are conducted in secret; court cases are not. Yay for protection of confidential business information!

Except, that's not what confidentiality is about in reinsurance arbitration. It's not about protecting claims handling information from the prying eyes of policyholder lawyers; you can do that with protective orders in court just as easily. If you're a ceding company, confidentiality in arbitration is about being able to take inconsistent positions over a spread of cases or even vis-à-vis multiple reinsurers on the same risk. If you're a reinsurer, it's about not having the world know what you will pay and what you will not. And if you're an arbitrator, confidentiality is about protecting the franchise, so that nobody knows your track record. Count me out.

In court, the flip side of confidentiality is *stare decisis*. If a court gets something wrong, the error is likely to persist because later judges, even if not formally bound, will not want to do the work of looking closely at an issue that, in their view, has already been resolved. *Bellefonte* was a real whopper, and it caused decades of distortion in facultative collections.

But the judicial process has had its triumphs, too. In *USF&G v. American Re*,[9] the New York Court of Appeals not only understood but explained with convincing clarity the dynamic underlying reinsurance allocation issues, and it set standards going forward that are just about right—nobody will like them, but everyone will be able to live with them. Because (at least) of confidentiality and the lack of reasoned awards, no panel of arbitrators ever had or could have as important, positive, and cost-reducing an impact on the behavior of ceding companies and reinsurers alike as did the Court of Appeals in *American Re*.

No Industry Knowledge or Agenda

So, finally, what about industry expertise, custom and practice, and all that good stuff? The conscience of the industry? Yes, it can matter, but a lot less often than people think—and *never* on the underwriting side. Maybe in a claims-heavy case, where the issue is just exactly *how* bad was the claims-handling, it would be helpful to have a panel that has a sense as to the line between ordinary screwups and true incompetence.

Except … except that in a classic tripartite arbitration, there are going to be three different personal lines among the panel members, only the umpire's line will matter, and you might not know a lot about where that is until it's too late. And that's *if* it was a mutually chosen umpire (it does happen occasionally). If the choice was made by coin flip, you *will* know where the line is, but one side or the other will be very unhappy.

My observation over the decades was that custom and practice and industry expertise, when it came to arbitrators, was egocentric rather than normative. It was "What would I personally have done?" and not "What was the accepted practice, if any?" As I said, arbitrary. Much better, in my view, for the parties to hire experts, have them report and be cross-examined, and have the ultimate decision be made by someone who has neither an agenda nor industry knowledge but does have experience listening to and weighing competing expert testimony—and who will write down an opinion explaining what s/he decided and why.

Reading this over, it sounds less like "Old F**ts Hold Forth" and more like "Grumpy Old Men." I'm not really that grumpy. I was very fortunate to do something I mostly liked, and was mostly pretty good at, for a very long time—and get paid for it, too! I liked and respected the people for the most part, and some of the issues I dealt with were as intellectually stimulating as anything I've done before or since. All in all, not a bad way to look back on 30 years of reinsurance.

But arbitration sucks.

NOTES

1. Krugman, Edward P. 2010. "Honorable Engagement." *Bloomberg Law Reports—Insurance Law*, 4(8). Bloomberg Finance.
2. *PMA Capital Insurance Co. v. Platinum Underwriters Bermuda, Ltd.*, 659 F.Supp.2d 631 (E.D.Pa. 2009), *aff'd*, 400 F.App'x 654 (3d Cir. 2010).
3. Comment 2 provides in part: Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract). They should avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions and the panel has fully deliberated on the issues. Arbitrators should advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration objectively. Party-appointed arbitrators are obligated to act in good faith and with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly.
4. It is an interesting question whether, feeling as I do (and did at the time), I should have served as long as I did on the ARIAS Ethics Discussion Committee, which did the 2014 revision to the Code of Conduct. My answer was (and is) that because the tripartite model was set in stone (and in thousands of reinsurance contracts), it was worth trying to reduce the level of imperfection rather than simply turning up my nose and walking away. I do not suggest that other answers are not possible.

5. Rule 6.3 reflects months of negotiation seeking to balance the desire of companies and counsel for true neutrality against the economic interest of the arbitrator community in having the fewest possible restrictions on their ability to sit. The arbitrators won in a walk—any rational definition of neutrality would exclude *any* recent partisan engagements on behalf of a party, but Rules 6(c) and 6(d) instead contain logic-chopping numerical criteria that completely miss the point. If I know that a panel member has recently served my opponent as counsel or a consultant *even once*, I am simply not going to believe that the panel member is truly "neutral."
6. There is a saying among bridge players of my generation to the effect that if both sides play the same suit, one side is crazy. We were generally satisfied with our results. Whether the reinsurers should have reasoned, "If Krugman wants to litigate, we want to arbitrate," is a moot point.
7. There was the time I walked into an initial status conference in Foley Square and was met with, "Hello, Mr. Krugman. Not *another* reinsurance case?"
8. One case, in state court, was before a judge who really, really did not like my client, for reasons having nothing to do with me or my particular case. Since the client had lost the motion to recuse in the case that generated the animosity, we were stuck with him. Fortunately, in New York state court, one does not have to decide whether to demand a jury until late in the case, and as the case developed there was not the slightest doubt in our minds that it was going to be tried to a jury of six—whoever they might happen to be—and not to a highly unpleasant bench of one. I felt I could teach six postal workers enough about reinsurance to get a fair shake; I *knew* the merits would have nothing to do with the result if the judge got to be the trier of fact.
9. *United States Fid. & Guar. Co. v. American Re-Insurance Co.*, 20 N.Y.3d 407 (2013).

Edward Krugman retired at the end of 2016 after 30 years as a litigation partner at Cahill Gordon & Reindel LLL. He is currently a volunteer senior attorney at the National Center for Law and Economic Justice (www.nclej.org) performing class action and other impact litigation on behalf of poor people.

The End of Reinsurance Arbitration

By Lawrence S. Greengrass

Don't panic—this essay is neither a prediction nor a current status report. It is, however, intended to highlight certain concerns, based on my 40 years of experience in handling reinsurance arbitrations, about a loss of confidence in our reinsurance arbitration system. These concerns are not just mine; that I know for certain, for over the course of recent years I have heard similar concerns expressed by many people in the business, especially clients and brokers and even counsel.

For the most part, especially among counsel, expressions of a reduction or loss of confidence in our reinsurance arbitration system are said *sotto voce*. In any case, this essay is probably best directed to insurers and reinsurers. They are the entities that actually should control and own the arbitration process, who can stop attorney contentiousness with a single threat not to pay, who can stop excessive discovery with the same threat, and who so rarely sit down to negotiate a fair and level playing field process for the arbitration before it takes off like a train hurtling down the tracks. Too often, the parties themselves cede excessive control to counsel and to the panel.

Scores of articles and presentations have appeared over the decades extolling the virtues of arbitration over litigation. You know the list: arbitration is faster, cheaper, more efficient, confidential, has less contentiousness (OK, you can stop laughing now), and, most importantly, is much more likely to result in a fair and just hearing. This is because the award comes from a panel of industry executives who deliberate based not on archaic legal principles but on their up-to-date knowledge of custom and practice. These are people who put business realities above claimed legal differences and the intent of sophisticated parties above literal contract terms, whether written on a napkin or a fac certificate or full treaty wording.

For many years, in my experience, these points were mostly true, and arbitration worked fairly as intended by its advocates—until perhaps sometime after the beginning of this century. Why did it work so well during the good old days, and why perhaps less so in recent years?

Arbitration worked—and, truthfully, in many cases it still works—because of the extraordinary professionals in this business and the hard work of certain organizations (e.g., ARIAS•U.S., but also the RAA, AAA, AIRROC, and the Reinsurance Taskforce) that, through education, certification, training, and jawboning, have brought a high level of professionalism to the field of reinsurance arbitration. But enough happy talk. The real issue is where it does *not* work and whether there is a significant loss of confidence in the system. I certainly have no scientific study to present or the results of a survey. However, aside from the admissions of unease about how the system is working (which I alluded to at the outset), here are some examples of anecdotal evidence supporting a loss of confidence:

- Years of whining at conferences about the sharp reduction in the number of disputes, the lack of work for most new arbitrators and even many experienced ones, the frequent settlement of cases before hearing, and the increase in commutations and the like.

- Many industry presentations on what's wrong with arbitration, why it's "broken," and how it can be fixed.

- The begrudging and usually off-the-record admissions by many prominent reinsurance counsel who tell me they have lost significant confidence in the system, but really have no choice other than to proceed with the current system as is.

- Internal discussions at several large brokers, insurers and reinsurers about eliminating or at least reducing the scope of arbitration, including increased use of wording that carves out certain issues (such as claims of misrepresentation) from the arbitration clause.

After 40 years, I, for one, have developed a complicated view of the pros and cons of arbitration as it has worked in recent years. I have been involved in arbitrations where the panels did a great job, where there were no ethical problems, and where all the lawyers on both sides thought to themselves, what a nightmare it would have been to be in court for the same dispute.

Yet there were also a number of arbitrations that left me uneasy and led me to a different conclusion: that a smart federal judge is often way too underestimated by industry professionals. Federal judges deal every day with matters much more complex than reinsurance. Federal judges have also written scores of decisions involving reinsurance custom and practice, so they can be fully educated by the parties on that secretive world of ours. Furthermore, when I am before a federal judge, I don't have to worry that she has worked many times before with my adversary, often in private, or that while my case is proceeding, she might be hired by my adversary in multiple other cases. Most federal judges I have been before are not seeking *more* cases—they usually are seeking *fewer* cases.

It is my belief that there has been inarguably a loss of confidence by some (NOT ALL) and that this has been a factor in the reduction of arbitrations and the increase in settlements of disputes. It is also my belief that, primarily, the loss of confidence relates to the application of current ethics rules that, in almost all circumstances, allow arbitrators to accept any assignment so long as they conclude, in their own minds, that they are fully capable of rendering a fair result. Looking back over the last 40 years at arbitrators I have hired, questioned and challenged, not a single one ever told me that she could not arrive at a fair result, including in these cases:

(1) We represented a ceding company, and the issue was aggregation of asbestos claims, allocation, etc. (the usual). The reinsurer selected as its arbitrator an individual who had been the lead underwriter of the treaty in question for another reinsurer on the same exact treaty. The underwriter had written several letters to the intermediary on an earlier claim, quoted the relevant treaty provisions (e.g., definition of "occurrence"), and clearly expressed her interpretation of the treaty and how it applied (she refused to accept any aggregation and argued that it was contrary to her intent). In other words, she was on record on the essentially identical issue in the arbitration, thus clearly prejudging the outcome of this dispute. She was challenged when her involvement was first learned in discovery, but she refused to step down. She should have been a *witness* for the reinsurer, not an arbitrator. A court challenge to the outcome was denied.

(2) We represented a reinsurer against multiple ceding companies in multiple arbitrations over almost a decade. Essentially identical issues were at stake, and all of the cedents used the same party arbitrator. While we prevailed in almost all of the cases, the cedents' arbitrator voted against our side in every single one. And every time he was appointed, he said he could be fair and not influenced by evidence he had seen in earlier matters.

(3) When we commenced the first day of an anticipated several-week hearing on the merits, the umpire "updated" his disclosure to state that in the prior six months, he had been retained as a party-appointed arbitrator by the adversary law firm on six separate arbitrations. When we challenged, the umpire refused to step down because he said he did not feel this would affect or hinder his ability to render a fair award.

I have reviewed the ARIAS•U.S. Code of Conduct, Canon I, as well as the Ethics Committee's responses to Members' Survey Questions dated April 22, 2016. As I read these rules (guidelines), I believe that the following two statements are correct:

(1) An arbitrator may accept as many assignments as she wants from the same party or from the same law firm, so long as she concludes that such multiple assignments will not impair or hinder her ability to arrive at a fair result.

(2) An umpire in a pending arbitration may accept as many party arbitrator assignments as she wants from counsel in the arbitration, so long as she concludes that such assignments will not impair or hinder her ability to arrive at a fair result.

An enormous amount of excellent work has gone into the creation of the Canons, and I have extraordinary admiration for both the process and outcome as well as the people who have participated in their creation. I do think, however, that many believe that, specifically, the circumstances in which arbitrators and umpires must refuse an assignment need to be expanded.

The goal should be to achieve a best practices standard and certainly not tie the outcome to the state of legal decisions. Courts have largely continued to demonstrate a hands-off approach to arbitrator challenges, consistent with their hands-off approach to challenges to awards. The standard we should strive for is to avoid even the appearance of bias or impropriety, rather than allow an arbitrator or umpire to act solely based on his or her own subjective conclusion that the circumstances will not impair or hinder their ability to decide fairly.

It is beyond the scope of this essay to fully provide and support detailed solutions. My own view would include the following—and trust me, I understand the opposition to them. I know these have been studied and debated, but I would continue to do so and try to accomplish as much as possible.

1. Neutral panels coupled with some form of random selection.

2. A Star Chamber, perhaps composed of a rotating group of individuals who only accept umpire assignments, to rule on arbitrator challenges.

3. Transfer of many of the circumstances listed in Canon I, Comment 4, where an arbitrator "may refuse" an appointment, to Canon I, Comment 3, where the arbitrator *must* refuse the appointment. I note that the ARIAS•U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes contain some excellent features (see 6.3) addressing some of these issues; however, I am not aware of many arbitrations completed to award under the Neutral Rules. Hence, many of the rules may need to be moved over, so to speak, to apply to *all* arbitrations.

Looking back at my 40 years in arbitration, for roughly the first three decades it seemed that in most instances, the selection of the panel was relatively straightforward. Objections based on ethical concerns were relatively rare, most parties to the process understood the critical importance of full disclosure, and the system had the full support of the vast majority of participants. In the last decade, there were many arbitrations with extremely ethical and professional arbitrators and counsel that, win or lose, did not negatively impact confidence in the system.

Yet, there was in my view (and in the view of many with whom I have spoken) a feeling that something changed in too many cases. Disclosures sometimes became overrated, because even legitimate objections following a troublesome disclosure were simply rejected by the arbitrator or umpire in question who refused to step aside. Courts and court decisions are a poor substitute for preserving best practices, because courts widely uphold awards under circumstances that I consider highly questionable, and in most instances the parties have to await the time and expense to go through an entire arbitration before a challenge can be made.

As the famous reinsurance professional Hyman Roth once said, "This is the business we've chosen." It is up to all of us to continue addressing these kinds of issues to restore and maintain full confidence in our business of reinsurance arbitrations.

Lawrence S. Greengrass has more than 41 years of experience at Mound Cotton Wollan & Greengrass, where he has litigated insurance and reinsurance disputes in arbitration and in state and federal courts around the country. He has acted as lead counsel in more than 150 arbitrations on subjects involving property/casualty as well as life/accident and health and financial reinsurance.

A Simple Way to Improve the Arbitration Process

By James I. Rubin

What would happen if, following the organizational meeting, a party-appointed arbitrator was prohibited from speaking to the party that appointed him or her, and also prohibited from speaking to the party's counsel? The question is worth asking because companies that participate frequently in reinsurance arbitrations often ask whether anything can be done to improve the arbitration process.

The current ARIAS•U.S. Code of Conduct, at Canon V, Comments 4-6, permits *ex parte* communications during the arbitration "provided that all parties agree to such communications or the Panel approves such communications" (Comment 4). The Code provides that, where such communications are permitted, a party-appointed arbitrator may make suggestions about expert evidence and issues that aren't being clearly presented, comment on which arguments to emphasize or abandon, and provide his or her impressions as to how an issue might be viewed by the panel (Comment 6). Although the Code at Comment 6 states that party-appointed arbitrators "should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing," the Code implicitly permits party-appointed arbitrators to discuss how to respond to arguments advanced by the opposing party, what discovery to pursue or abandon, which witnesses to present, which legal issues are likely to resonate with the panel, and whether to pursue exemplary damages, fees and costs, among other subjects.

What impact do frequent communications with the appointing party or its counsel have on a party-appointed arbitrator? First, with frequent communications, the arbitrator risks becoming part of the appointing party's team. When the arbitrator feels he or she is part of the team, the arbitrator risks wanting the team to succeed.

Second, even if the arbitrator does not consciously or subconsciously feel part of the team, if he or she has given advice or approved arguments that become part of the party's strategy, the arbitrator risks becoming invested in the success of that strategy. Third, where the arbitrator has had frequent communications, given advice, recommended or approved retention of an expert, discussed discovery, and addressed how to respond to the opposing party's arguments, the arbitrator risks seeing the issues differently than if he or she is exposed to the issues at the same time and in the same way that the other panel members are exposed to the issues.

Finally, the arbitrator risks succumbing to "confirmation bias" where, having formed an initial view of the issues, the arbitrator discounts contrary evidence.[1] In other words, with frequent communications, the arbitrator risks losing his or her objectivity—which is, in large part, why parties and counsel want to communicate with the party appointed-arbitrator during the development of the case.

Easier to Be Objective

Some have argued, in an attempt to justify *ex parte* communications, that such communications can advance settlement negotiations or at least minimize the introduction of non-essential issues during the arbitration. Others have argued that prohibiting *ex parte* communications would favor the appointment of experienced arbitrators over inexperienced arbitrators. Still others, being more pragmatic or candid, have simply noted the obvious—that the purpose of appointing an arbitrator is to have an advocate for the appointing party's position and that *ex parte* communications advance that goal.

It is possible that *ex parte* communications could advance settlement negotiations in a particular case. But if there were no *ex parte* communications and the parties wanted to settle, they would still find a way to do so. Moreover, I do not recall a single instance, in a case for which I was responsible, where a party-appointed arbitrator facilitated a settlement; in fact, I never wanted the party-appointed arbitrator to know that settlement negotiations were taking place.

And while it may be the case that party-appointed arbitrators have prevented the introduction of non-essential issues into a proceeding, this rationale supports the retention of more experienced counsel more than the continuation of *ex parte* communications. Indeed, while it is likely that prohibiting *ex parte* communications would affect the selection of more experienced lawyers, the prohibition should not materially impact the selection of the party-appointed arbitrator.

The most important quality in a party-appointed arbitrator is the arbitrator's credibility with the umpire. Credibility is a function of perceived impartiality, expertise, and the arbitrator's understanding of the evidence and arguments submitted before and during the hearing. These qualities are not limited to only the most experienced arbitrators.

What would happen if, following the organizational meeting, a party-appointed arbitrator was prohibited from speaking to the party that appointed him or her, and also prohibited from speaking to the party's counsel? The party-appointed arbitrator would not have given advice about the discovery motion that he or she is going to have to rule on. The party-appointed arbitrator would not have suggested or approved the expert whose credibility is going to be before the panel. The party-appointed arbitrator would not have approved the strategy for addressing the opposing party's arguments that the panel will have to accept or reject. And the party-appointed arbitrator would not be as invested in the appointing party's position as he or she would be if *ex parte* communications had been permitted. In other words, it would be easier for the party-appointed arbitrator to be objective (Canon I, Comment 2) and easier for the party-appointed arbitrator to render a just decision in a fair manner (Canon II, Comment 1).

While at first blush this would seem to be inconsistent with the idea of having a party-appointed arbitrator as an advocate, it actually makes the party-appointed arbitrator more effective—if he or she believes in the position of the appointing party on discovery issues, summary judgment, or at the conclusion of the evidence.

As Charles Ehrlich wrote in an article published in the *Quarterly* in 2015, the party-appointed arbitrator can't be a "mere mouthpiece (or the less polite term often used) because then her influence with me, the umpire, is at risk."[2] Where *ex parte* communications have been prohibited, the risk of appearing as a "mere mouthpiece" is reduced and the effectiveness of the arbitrator with the umpire is increased. The very important corollary is that the opposing party's arbitrator is similarly affected—prohibiting *ex parte* communications means the opposing party's arbitrator will be less invested in the appointing party's position.

Whether *ex parte* communications are prohibited is up to the parties and, if the parties cannot agree, to the panel. Assuming the parties (or at least one party—perhaps the party that is more confident in its position) and panel want less advocacy and more objectivity throughout the arbitration, then prohibiting *ex parte* communications with the party-appointed arbitrators is a simple way to improve the arbitration process without amending the arbitration agreement or the Code of Conduct.

NOTES

1. Ehrlich, Charles G. 2016. "The Ungoverned Brain: A Wild Card in Arbitral Decision Making." *ARIAS•U.S. Quarterly*, (1), 7-8.
2. 2015. "The View from the Middle Seat." *ARIAS•U.S. Quarterly*, (2), 17-18. Notwithstanding Mr. Ehrlich's observation, some parties seem to value an arbitrator who is a certain vote over an arbitrator who is credible and capable of influencing the umpire.

Jim Rubin was a founding partner of Butler Rubin Saltarelli & Boyd (now Porter Wright) and former partner at Winston & Strawn who now practices as James I. Rubin LLC. He was named "Global Insurance and Reinsurance Lawyer of the Year 2010" by The International Who's Who of Business Lawyers and "Insurance Lawyer of the Year" by Who's Who Legal Awards in 2017. He chaired the ARIAS•U.S. Board of Directors in 2017-2018.

A Farewell to Reinsurance and Big Law

By John Nonna

After more than 30 years of practicing commercial litigation with a concentration in insurance and reinsurance litigation and arbitration, I left Big Law for a new career in full-time public service. I began practicing insurance and reinsurance law when my neighbor and friend, Dick Kennedy, offered me a partnership in his firm, which became Werner & Kennedy. Sadly, Dick passed away recently. He leaves a lasting legacy as a co-founder of ARIAS, leading insurance lawyer, bar association leader, and mentor to many successful practitioners.

I joined Dick's firm in 1984 when the reinsurance arbitration boom was in its infancy. Werner & Kennedy had a stellar reputation in the insurance and reinsurance field. We handled significant litigation and arbitration for Travelers, General Re, North American Re, and Employers of Wausau (among other leading insurers and reinsurers). We also represented non-insurance-industry clients that afforded us the opportunity to do commercial litigation. Swatch was a major client for whom I tried cases.

Some clients were reluctant to retain us as counsel for major litigation because of our size. That led us to join a larger firm, and most of the litigators at Werner & Kennedy joined LeBoeuf Lamb Greene & MacRae. The immediate case that led us to a larger firm was the *Unicover* arbitration. *Unicover* was a massive arbitration that took place over a six-week period, involving seven major life insurers and reinsurers. Many of the leading reinsurance lawyers were involved in that case.

Following the sad demise of Dewey & LeBoeuf, Larry Schiffer, Eridania Perez, Suman Chakraborty and I moved to Patton Boggs, which then became Squire Patton Boggs. That was a successful merger. We were delighted when our former LeBoeuf colleague, Deirdre Johnson, joined us.

I enjoyed the years I spent in private practice and valued the relationships I developed with the great colleagues I worked with. I fought hard battles with worthy adversaries, but we always maintained a level of civility and professionalism that I much appreciated. I also had the pleasure of working with many dedicated industry professionals who served as arbitrators.

We saw reinsurance arbitrations develop from relatively informal proceedings to the equivalent of full-blown litigation, complete with depositions and extensive document discovery. This occurred, in my view, because the issues became more complex and fact-intensive.

Arbitration, as traditionally practiced, was not suited to cope with these more complex and fact-intensive cases, which often involve issues of witness credibility. A favorable development was the evolution of arbitral awards from simple one-liners to more reasoned decisions. This change was needed given the complexity of the issues and the parties' need for an explanation of arbitral decisions. One development that has not occurred despite the best efforts of many (including ARIAS) is the use of neutral arbitral panels. In my view, this would enhance trust and confidence in the process significantly.

In November 2017, after the election of a new county executive in Westchester, New York, I was asked to join his senior leadership team and take on the role of county attorney. This position is similar to the role of an attorney general or city corporation counsel. Westchester County is a county of almost one million people and includes three of the largest cities in the state of New York. The county operates a jail, a police department, an airport and an amusement park, among other facilities and departments.

I am the chief counsel for the county executive, board of legislators, and county departments. In my current position, the four law department bureaus—Litigation, Contracts, Appeals Opinions, and Legislation and Family Court—report to me. The Family Court bureau handles child neglect and abuse cases, termination of parental rights, child support and juvenile delinquency cases.

As a litigator, I tend to get involved in all of the cases handled by the Litigation and Appeals bureaus. I have even found time to argue some appeals. I need a court fix now and then. Our cases are venued in both state and federal courts in New York. It is my responsibility to decide whether to recommend settlement on cases.

I have been in this new job for over a year. It is challenging, rewarding and never dull. But I miss the community of lawyers I worked with—my colleagues at Squire Patton Boggs, the clients I have been privileged to serve, my ARIAS friends, and, yes, most of the adversaries in cases with whom I have had vigorous yet civil debate. Good luck and best wishes to you all.

John Nonna served as a partner at Squire Patton Boggs (US) LLP prior to being named county attorney of Westchester County (New York) in January 2018. He is co-editor of the treatise Insurance Law Practice and a co-author of Commercial Litigation in New York State Courts. He is a mediator for the U.S. District Court and New York State Supreme Court Commercial Division mediation programs.

RECENTLY CERTIFIED

James Wrynn has more than 30 years of experience as an insurance executive, attorney, regulator and strategic adviser in the global insurance sector. He has earned wide recognition as a premier authority on domestic and global insurance regulation and related strategic and risk management matters and has served as an expert on a number of insurance and reinsurance cases. He served as the 40th and last superintendent of insurance in the State of New York; had a heavy role in creation of the New York State department of financial services and was its first deputy superintendent, was executive director of the NYS Insurance Fund and has performed in senior roles with the National Association of Insurance Commissioners (NAIC) and the International Association of Insurance Supervisors (IAIS). In addition, he has earned the designations ACI - associate in captive insurance, ARM -associate in risk management and WCP®-workers' compensation professional. Mr. Wrynn is admitted to the New York and New Jersey State Bar and is admitted to practice before the Supreme Court of the United States, the USDC for the Eastern and Southern Districts of New York and the US DC for the District of New Jersey. He has earned a Martindale-Hubbard peer review rating of "AV preeminent".

Early Thoughts on Late Notice

By Sean Thomas Keely

I read with particular interest the article from Syed Ahmad and Patrick McDermott, "The Bad Faith Exception to the Prejudice Requirement Does Not Represent New York Law," in the 4th quarter 2018 issue.[1] As Larry Schiffer noted in his Editor's Letter opening the issue, the authors did not shy away from strong opinions! And we should applaud that, as it can often prompt discussion and new thought.

While I have a different view, the press of business keeps me from preparing anything like a proper article. A full, scholarly treatment would probably be beyond me anyway. So I hope readers of the *Quarterly* might accept instead these early thoughts on late notice under New York law.

As I will try to explain briefly, I do not think New York law has a rule inflexibly requiring reinsurers to prove prejudice resulting from late notice and, thus, there is not a "bad faith exception" to any such requirement. Rather, New York law recognizes that any material breach of a contract (including a reinsurance contract) can relieve a party of its obligations, and bad faith in the context of notice can constitute such a material breach. Accordingly, rather than an errant exception to an ironclad prejudice rule, bad faith can be an independent basis for establishing a late notice defense.

The Seduction of Reinsurance-Specific Rules

As I understand the gist of the argument by the authors, they contend that New York has a "reinsurance-specific rule that reinsurers must show prejudice" in order to prevail on a defense based on late notice.[2] They draw this rule from the 1992 decision by the New York Court of Appeals in *Unigard Sec. Ins. Co. v. North River Ins. Co.* ("*Unigard II*").[3] Furthermore, they contend that the Second Circuit, in poorly reasoned *dicta* in its decisions in *Christiania* and *Unigard III*, inappropriately suggested an exception to that rule where a ceding insurer acts in bad faith with respect to its notice obligations.[4] According to the authors, the "statements in *Christiania* and *Unigard III* regarding a purported bad faith exception to that unequivocal rule [requiring prejudice] do not represent New York law . . ."[5]

As I suspect many in the ARIAS community would agree, reinsurance is a special business. But that leaves some in the business (and some of us lawyers who are privileged to support the business) prone to thinking that there are, or should be, reinsurance-specific rules in the law. The law, however, grows up in a much wider world and generally fashions principles that are, well, generally applicable. Individual facts and circumstances are certainly critical in applying principles to specific cases, but the principles or rules of contract law are usually intended to apply across the broad spectrum of contractual relationships in a sophisticated economy. It is rare that the law will fashion industry-specific rules, even for an industry as special (and, some might consider, specialized) as reinsurance.

The New York Court of Appeals recently reiterated this point, stating bluntly, "Reinsurance contracts are governed by the same principles that govern contracts generally."[6] Accordingly, I think it is prudent at the outset to be skeptical of anything that is cast as a "reinsurance-specific rule." Instead, it is usually helpful to look deeper to the precise question posed (be it reinsurance-specific or otherwise) and the fundamental principles used to answer the question.

The Importance of Understanding the Question

We can easily be led astray by an answer when we fail to understand the question fully. So it is with the so-called prejudice rule. To understand the decision in *Unigard II,* one must consider the question at the heart of the case and the context in which it was decided. A careful reading of *Unigard II* indicates that the Court of Appeals did not create an inflexible rule that a reinsurer can only prevail on a defense involving late notice if the reinsurer proves prejudice.

The decision in *Unigard II* involved an answer to a certified question posed by the Second Circuit to the New York Court of Appeals. The certified question read, "Must a reinsurer prove prejudice before it can successfully invoke the defense of late notice by the reinsured?" The Court of Appeals responded, "We answer the question in the affirmative."[7] Looking only at the question and answer, one can see why some might suggest the court was announcing a "notice-prejudice" rule for reinsurance. But the facts of the case and the court's own explanation of its decision undermine that simple reading.

In the underlying case in federal court, the reinsurer (Unigard) contended that the ceding company (North River) had failed to give it timely notice under a facultative certificate. North River had entered into the Wellington Agreement, but failed to give Unigard notice at the time. North River then had information by April 1, 1987, that the reinsured excess policy would be penetrated, but North River did not give notice to Unigard under the facultative certificate until August 1987 (which was received by Unigard in early September).

The district court determined that North River was not required to provide notice to Unigard at the time it signed the Wellington Agreement.[8] But it decided, under the applicable objective standard, that the notice of the claim itself was untimely because it should have been provided no later than April 1987. The district court nevertheless rejected the late notice defense because Unigard made no showing of prejudice.[9]

On appeal, Unigard pressed its position that it did not have to show prejudice. As the New York Court of Appeals described it, "Unigard contends that it is automatically relieved from its obligations under the reinsurance certificate . . . . Any question of prejudice, it argues, is irrelevant."[10] I think the key to understanding the court's decision is this contention by the reinsurer that it was "automatically" relieved of its obligations. In arguing for this automatic defense, Unigard attempted to invoke cases that had developed such a defense in the context of direct insurance.

Courts in those cases had developed an exception to standard New York contract principles, such that the law would, in the context of direct insurance claims, consider a notice provision to be a condition precedent and would thus presume that a direct insurer is prejudiced whenever the notice condition is breached.[11] The limited question considered in *Unigard II* was whether that exception should be extended to reinsurance. This becomes even more clear when one considers how the New York Court of Appeals itself restated the certified question: "The question posed to us by the Circuit Court may be restated thus: do the same reasons for adopting the 'no prejudice' exception to the general rules of contract for primary insurers apply to reinsurers."[12] The Court of Appeals believed those reasons did not support a similar exception in the reinsurance context.

Accordingly, the decision in *Unigard II* simply ruled that the limited exception to New York contract law implying a presumption of prejudice in the direct insurance context would not be extended. That decision, however, did nothing to establish a rule peculiar to the reinsurance context—and certainly not an "unequivocal rule" requiring prejudice. Instead, the decision in *Unigard II* pointed reinsurers and cedents back to the fundamental principles of contract law when it comes to all claims and defenses, including late notice.

No Unequivocal Prejudice Rule

So, what do those fundamental contract principles require? Helpfully, the New York Court of Appeals in *Unigard II* reiterated them for us in the heart of its opinion explaining how it reached its decision on the certified question. The court explained, "The New York 'no prejudice' rule for primary insurers . . . is a limited exception to two established rules of contract law: (1) that ordinarily one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice; and (2) that a contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition."[13]

Note how the court explained that the rule of New York contract law requires demonstrating *either* a material breach or prejudice. The court did not say that New York law requires demonstrating prejudice. It did not say that it requires demonstrating a material breach and prejudice. Instead, it confirmed that the established rules of contract law require a defense to a contract claim to be supported either by a material breach or by prejudice.

Material breach and prejudice can be seen as two routes to supporting a contract defense. In the direct insurance context, New York law had developed an exception that allowed an insurer to take the prejudice route with the benefit of a presumption of prejudice. The decision in *Unigard II* was limited to rejecting that presumption in the reinsurance context. As the court confirmed at the very end of its opinion, ". . . all we hold here is that the reinsurer must demonstrate how it was prejudicial and may not rely on the presumption of prejudice that applies in the late notice disputes between primary insurers and their insureds."[14]

Accordingly, I think that commentators and litigants misread the opinion when they argue that there is a reinsurance-specific rule that the only way a reinsurer may establish a defense based on late notice is to demonstrate prejudice. To the contrary, New York law seems clear in providing that a reinsurer can establish a late notice defense by demonstrating prejudice (although not by relying on a presumption of prejudice) or—as may a party under any other type of contract—by showing a material breach.

Can't Bad Faith Be Material?

And so we come to *Christiania* and *Unigard III*, much maligned by Messrs. Ahmad and McDermott. Both of those cases were decided in the immediate wake of the Court of Appeals' decision in *Unigard II,* and both cited and discussed *Unigard II*. If the New York Court of Appeals had indeed announced a unique reinsurance-specific rule limiting late notice defenses to prejudice, it would have been passing strange for the Second Circuit so quickly to misunderstand or simply ignore that rule. I submit that the Second Circuit did not misunderstand or ignore New York law in those cases, to the extent it stated that a late notice defense could prevail based on a showing of the reinsured's bad faith without a need to show prejudice. Instead, those cases simply acknowledge the material breach route.

In this regard, it is worth noting how the court in *Unigard III* drew a distinction between simple negligence in failing to meet notice obligations and bad faith (with a minimum threshold of gross negligence or recklessness) with respect to those contractual obligations. That discussion in *Unigard III*, I would suggest, drew on the New York rule that requires a material breach to relieve a party of its obligations under a contract. The court took the view that, in the context of notice, a breach that was simply negligent would not rise to the level of material, so that a reinsurer wanting to rely on that negligent breach would need to establish prejudice. But bad faith is another story.

The identification by the courts in *Christiania* and *Unigard III* of bad faith as an example of a breach that could support a late notice defense is entirely consistent with the basic New York contract rules and the policies behind them. A federal district court in New York said it well several years ago when it predicted that California law would recognize the bad faith basis for a late notice defense just as New York law does. (Full disclosure: I represented the reinsurer in the case.) As the court explained, "[T]he co-existence of a default notice-prejudice rule and a bad faith exception is not unusual. The notice-prejudice rule furthers a public policy that disfavors technical forfeitures, and a bad faith exception, consistent with this policy, acknowledges that when the reinsured has been grossly negligent in providing notice to the reinsurer, its forfeiture of coverage is not the result of a mere technicality."[15]

A full reading of New York law recognizes that bad faith in connection with notice can be a basis for a reinsurer to establish a material breach of contract.

There are many varieties of bad faith with respect to notice that could arise in individual cases. In *Unigard III*, the Second Circuit posited a cedent that willfully disregards its notice obligations by refusing to implement routine practices and controls on notice. Subsequent cases have suggested this and other factual scenarios potentially supporting a bad faith defense.[16] But the baseline question is, can we really say that a party's bad faith can never result in a material breach of its contract? That would be an odd categorical rule, particularly when applied only to reinsurance contracts.

The Bad Faith Basis: Not an Exception

I would close these ruminations by suggesting that referring to a "bad faith exception" to a "prejudice requirement" is a misnomer. I say this fully confessing that I have in the past fallen into referring to "the bad faith exception." Neither *Christiania* nor *Unigard III* referred to an "exception." Instead of an exception, bad faith in connection with notice is better understood as a basis for establishing a material breach of the contract. In that regard, it is not an exception to any rule or requirement, but an independent basis for establishing a defense.

Reinsurance is a sophisticated business, and cedents and reinsurers are sophisticated contracting parties. But their contracts are governed by the same rules as other New York contracts. New York law does not allow either party to rely on technicalities to escape its obligations (such as the obligation to pay). Nor does it allow either party to invoke industry-specific rules to escape the consequences of a material breach of its obligations (such as the obligation to give timely notice).

So I guess at least I agree with Messrs. Ahmad and McDermott that there is no "bad faith exception" under New York law—but that is because there is no reinsurance-specific prejudice rule, and bad faith is not simply an exception. A full reading of New York law recognizes that bad faith in connection with notice can be a basis for a reinsurer to establish a material breach of contract. And, like any other material breach of contract under New York law, late notice resulting from bad faith can relieve a reinsurer from its obligation to pay the late-noticed claim.

Thanks for letting me share these skeletal thoughts, and best wishes for more strong opinions in the next issue of the *Quarterly*.

NOTES

1. 1 Ahmad, Syed S., and Patrick M. McDermott. 2018. "The Bad Faith Exception to the Prejudice Requirement Does Not Represent New York Law." *ARIAS•U.S. Quarterly*, Q4, 13.
2. Id. at 15.
3. *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 594 N.E.2d 571 (N.Y. 1992).
4. *Christiania Gen. Ins. Corp. of N.Y. v. Great American Ins. Co.*, 979 F.2d 268, 281 (2d Cir. 1992) and *Unigard Sec. Ins. Co., Inc. v. North River Ins. Co.*, 4 F.3d 1049, 1069 (2d Cir. 1993).
5. Ahmad and McDermott, 16.
6. *Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 91 N.E.3d 1186, 1193 (N.Y. 2017).
7. *Unigard II*, 594 N.E.2d at 573.
8. *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 762 F. Supp. 566, 587 (S.D.N.Y. 1991). On appeal, the Second Circuit decided that notice of the Wellington Agreement was required. *Unigard III*, 4 F.3d at 1064-66.
9. *Unigard II*, 594 N.E.2d at 572.
10. *Id.*
11. The New York legislature subsequently rejected this exception by statute and required liability insurers to write a prejudice requirement into their policies. *See* N.Y. Ins. L. § 3420(a)(5).
12. *Unigard II*, 594 N.E.2d at 573.
13. *Id*. The Court's disjunctive—material breach or prejudice—was not an isolated slip. It made the same point later in the opinion when stating "[T]here is no sound reason to depart from the general contract law principle that a breach will excuse performance only if it is material or demonstrably prejudicial." *Id*., 594 N.E.2d at 575.
14. *Unigard II*, 594 N.E.2d at 573
15. *Insurance Co. of the State of Pa. v. Argonaut Ins. Co.*, No. 12 Civ. 6494 (DLC), 2013 WL 4005109, at *15 (S.D.N.Y. Aug. 6, 2013).
16. *See, e.g.*, *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, No. 09-CV-853, 2015 WL 521024 (N.D.N.Y. Feb 9. 2015); *Granite State Ins. Co. v. Clearwater Ins. Co.*, No. 09 Civ. 10607 (RKE), 2014 WL 1285507 (S.D.N.Y. Mar. 31, 2014); *ICSOP v. Argonaut*, 2013 WL 4005109; *Certain Underwriters at Lloyd's London v. Home Ins. Co.*, 783 A.2d 238 (N.H. 2001).

Sean Keely is a partner in the New York City office of Freeborn & Peters LLP and a member of the Freeborn Insurance/Reinsurance Industry Team.

English Arbitration Clause Trumps Washington Court Service-of-Suit Clause

By Jonathan Sacher and Kelly Jones

On 21 December 2018, the English Commercial Court ruled in *Catlin Syndicate v. Weyerhaeuser Company*, [2018] EWHC 3609 (Comm), that a coverage dispute relating to claims made under a product liability policy containing both a London arbitration clause and a Washington service-of-suit clause should be heard by a London arbitration panel rather than the courts in the state of Washington. This mirrors the approach generally taken under U.S. law in favoring arbitration on these apparently competing clauses in insurance and reinsurance contracts.

The court commented that the position would be the same under Washington law despite Washington having anti-arbitration legislation.

Background

Catlin ("C") insured Weyerhaeuser ("W"), a timber business, on the fourth layer of an excess-of-loss insurance policy. W issued court proceedings in Washington seeking a declaration that the Washington District Court was the proper venue for litigation relating to cover under the policy. In response, C issued anti-suit injunction proceedings in England seeking to restrain the U.S. proceedings on the basis that the parties had agreed for disputes on cover to be heard in London by an arbitration panel.

The excess-of-loss policy included a service-of-suit clause in standard form:

. . . in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction in the United States . . .

The policy also included provisions to the effect that it will follow the same terms as the lead underlying policy. The lead underlying policy included the following endorsements:

(a) "any dispute, controversy or claim arising out of or relating to" the policy to be determined in London under the Arbitration Act of 1996;

(b) Construction and interpretation of the policy to be governed by the laws of the state of Washington; and

(c) "Solely for the purpose of effectuating arbitration, in the event of the failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the Insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States."

The Decision

English law. The court held that there was no conflict in the drafting. It held (in C's favor) that the service-of-suit clause did not take precedence. The choice of forum was arbitration, and the U.S. court's jurisdiction was restricted to enforcing an arbitration award or to having jurisdiction if the parties agreed to dispense with arbitration. Therefore, the coverage dispute should be heard by way of London arbitration, not by the U.S. courts.

The court considered that C's preferred interpretation made commercial sense, unlike the alternative pleaded by W. It also commented that making a finding that there are conflicting provisions in a contract should not be lightly attributed to commercial parties.

U.S. law. The parties were in disagreement as to whether English or Washington law on jurisdiction would apply, but agreed that the answer would be the same whichever law was held to apply. The court considered whether the decision would be different under Washington law and held that it would not.

Washington law voids non-Washington choice of law and forum clauses in insurances contracts issued for delivery in the state of Washington. However, crucially, W conceded that these provisions did not make an arbitration agreement unenforceable and accepted that even under Washington law, some matters would be arbitrated under the policy. The court, therefore, was left to conclude that the Washington laws on construction of insurance contracts would not lead to any different conclusion to English law. This is in line with settled U.S. law generally, which favors arbitration.

Commentary

While the English court made its decision based on the specific facts in this case, it is in line with English court decisions such as *Ace Capital Ltd. v. CMS Energy Corp.*, [2008] EWHC 1843 (Comm), in seeking to give effect to seemingly conflicting clauses by reducing the applicability of the service-of-suit clause to enforcement of an arbitral award only.

This case is interesting because the court has applied this approach to apparently conflicting provisions found in two separate policies (the excess and the lead underlying policy) as opposed to previous cases that have considered provisions found in the same policy. This case is also interesting as it involves a U.S. state whose policy is anti-arbitration, yet this did not alter the court's decision under either English or U.S. law.

Jonathan Sacher is co-leader of the insurance practice at Bryan Cave Leighton Paisner and is rated one of the top three insurance and reinsurance lawyers in Europe by Who's Who Legal. He is co-chair of the ARIAS•U.S. International Committee and is an Arbitration Panel member of ARIAS U.K.

Kelly Jones is a senior associate at Bryan Cave Leighton Paisner, where she deals with legal issues associated with insurance and reinsurance litigation and international arbitration. She has particular experience with reinsurance and insurance coverage issues, reinsurance claims, and complex debt recovery cases. She is ranked as a Next Generation Lawyer in Legal 500 in the U.K. (2018).

Recent Trends in Medical Device and Opioid Litigation

By Heather E. Simpson and Joshua S. Wirtshafter

In today's litigious society, it is no surprise that pharmaceutical companies and medical device manufacturers often are embroiled in legal disputes. The magnitude of these lawsuits, however—both in terms of the number of claimants and overall potential exposure—has captured the attention of both the media and the insurance/reinsurance industry. The pending litigation arising from opioids, surgical mesh, and joint implants warrants close monitoring by insurers and reinsurers whose policyholders and cedents may be implicated.

Recent Litigation Trends

Arguably the largest piece of litigation facing the pharmaceutical industry right now stems from the opioid epidemic plaguing the United States and beyond. Opioids are potent analgesics that incorporate opium derivatives, such as oxycodone, to help reduce pain. The Center for Disease Control and Prevention has reported that, every day, more than 130 Americans die on average after overdosing on opioids.[1] Despite President Trump's recent approval of legislation dedicating billions of dollars to combat the opioid crisis,[2] some policy experts predict that tens of billions more are needed.[3]

Thousands of lawsuits have been filed against opioid manufacturers (including Purdue Pharma L.P., Teva Pharmaceuticals, Cephalon, and Johnson & Johnson) as well as wholesale distributors (e.g., Cardinal Health Inc. and McKesson Corp.), national retail distributors (e.g., CVS, Walmart, Walgreens, and Kroger), hospitals, doctors, and others. These lawsuits take two basic forms: (1) claims by addicted individuals and/or their families seeking damages for the harms caused by opioid addiction, and (2) claims asserted by municipalities and state attorneys general seeking to recover damages resulting from increased costs incurred to combat the opioid epidemic, including medical resources and care for abused and neglected children of addicted users.

These lawsuits generally allege that the manufacturers misleadingly marketed opioids as safe and appropriate to treat short-term pain for all pain management issues and aggressively advertised them as better than other analgesics because they required fewer doses and resulted in fewer adverse reactions, despite their known addictive propensities. Plaintiffs further assert that manufacturers failed to advise consumers, physicians, and pharmacists of the drugs' "end-of-dose" failures, which allegedly prompted the overuse and over-prescription of even higher doses of opioids to counteract the tapering-off effects and to cure withdrawal symptoms.

More than 1,200 opioid lawsuits have been filed in a multi-district litigation proceeding in the Northern District of Ohio, in which the court recently denied motions to dismiss filed by certain manufacturer, distributor, and retail pharmacy defendants, thus allowing the plaintiff state entities further opportunity to prove their legal theories.[4] Although there have been some successes for the defendants in dismissing cases outside of the multi-district proceeding,[5] manufacturers and distributors are not out of the woods and likely will face opioid litigation for some time to come.

Drug manufacturers are not the only litigation targets; medical device makers have found themselves in the crosshairs of equally problematic mass tort litigation. These product liability claims, such as those involving surgical mesh and joint implants, have triggered litigation not only throughout the United States, but worldwide.

Transvaginal mesh is used to treat pelvic organ prolapse and stress urinary incontinence. Following public health notifications from the U.S. Food and Drug Administration (FDA) regarding complications associated with transvaginal mesh in 2008 and 2011, product liability claims began rolling in against mesh manufacturers. Sources report that more than 100,000 transvaginal mesh lawsuits have been filed in courts throughout the United States, with more than 40,000 of them incorporated into a multi-district litigation in the Southern District of West Virginia.[6]

It is reported that mesh makers have already settled many thousands of claims for upwards of $7 billion, with many thousands of cases still to be tried or settled.[7] In January 2019, a Philadelphia jury hit Ethicon, Inc. with a $41 million verdict for permanent damages to a woman allegedly caused by the company's pelvic mesh implants.[8]

More recently, plaintiffs' firms have pursued litigation arising from surgical mesh used in hernia surgeries. As a result, there are thousands of lawsuits venued in several multi-district litigations against hernia mesh makers, including one pending against Ethicon, Inc. in the Northern District of Georgia.[9]

Joint implants are another target of recent medical device litigation. In late 2018, a subsidiary of Stryker Corporation reached a confidential settlement in principle of hundreds of cases involving allegedly defective hip implants, resulting in the stay of a multi-district litigation pending in the District of Massachusetts and a New Jersey state court action until 31 July 2019.[10] This comes on the heels of a 2014 mass tort settlement involving a different Stryker hip replacement component, in which Stryker was predicted to make payments in excess of $1 billion.[11]

Stryker is not alone in defending its joint implants. DePuy Orthopaedics Inc. (a subsidiary of Johnson & Johnson) has been sued in multi-district litigation in the Northern District of Texas for allegedly defective hip implants. Several thousand cases have been filed against DePuy involving metal-on-metal hip implants, resulting in verdicts as high as $1 billion in a bellwether case involving six California plaintiffs (which was later reduced to $543 million and is pending on appeal).[12] In January 2019, DePuy also entered into a consent judgment in the amount of $120 million to resolve claims brought by attorneys general of 46 states, alleging false claims and deceptive marketing of its hip implants in those states.[13]

Insurance Implications

As these massive pieces of litigation continue to move toward trial or settlement, insurers and reinsurers alike should be mindful of the issues coming down the pike when Big Pharma seeks insurance coverage for these liabilities. There can be little doubt that insurance coverage disputes will become a reality; indeed, opioids, transvaginal mesh, and joint implants already have been the subject of insurance coverage litigation and arbitration, and additional litigation and arbitration can be expected in the coming years. While the particular disputes will depend on the policies and contracts at issue, there are certain key disputes that can be anticipated.

General liability policies typically provide coverage for "bodily injury" caused by an "occurrence" (i.e., an accident). In the context of opioid litigation, disputes have arisen over whether claims by municipalities (and other state entities) satisfy these threshold requirements. Courts have reached differing conclusions as to whether these suits seek damages "on account of" or "because of" bodily injury.

For example, in February 2019, an Ohio state court found that economic damages sought by the plaintiff state entities do not constitute damages "because of or for addiction" but, rather, are economic losses caused by the opioid crisis at large.[14] Therefore, the insurer did not owe a duty to defend its insured, a wholesale prescription opiate distributor.[15] This ruling is consistent with rulings from certain federal district courts that have addressed this issue.[16] The Seventh Circuit, however, has found that a state's claims for economic reimbursement did seek damages "because of" bodily injury to its citizens, thereby triggering the potential for coverage.[17]

Likewise, there have been mixed results in determining whether claims based on drug manufacturers' alleged marketing campaigns to promote the benefits of opioids constitute an occurrence. Compare *The Traveler's Prop. Cas. Co. of America v. Actavis, Inc.*, 16 Cal. App. 5th 1026 (Cal. Ct. App. 2017) (concluding that lawsuit did not allege an "accident" because none of the alleged injuries were unexpected or unforeseen and the alleged conduct was intentional in nature) with *Liberty Mut. Fire Ins. Co. v. J.M. Smith Corp.*, 602 Fed. Appx. 115 (4th Cir. 2015) (finding an "occurrence" where opioid manufacturers were not accused of disseminating drugs with the intent to enable abusers).

In addition to the "occurrence" requirement, liability policies generally preclude coverage for injury that was expected or intended by the policyholder and for losses that were known (or in progress) prior to the policy periods, among other knowledge-based defenses. As each of these defenses is highly fact-sensitive, we can expect future coverage litigation to require comprehensive (and costly) discovery of the defendants' corporate records as well as their communications internally, with the FDA, and with various other entities.

Another significant issue presented by these claims is the insurability of punitive damages. Recent verdicts in the product liability realm have included staggering punitive damage awards. While certain policies may preclude coverage for punitive damages outright, others may allow coverage only to the extent permitted by applicable law or the law of the forum most favorable to the policyholder. Given the size and prevalence of these awards, we can anticipate the insurability of punitive damages to become a hot-button issue, resulting in detailed choice of law analyses, consideration of public policy, and potentially even legislative involvement.

In the event that any covered damages can be established, insurers and reinsurers can expect further disputes about *when* the injuries giving rise to those damages occurred. The policyholder will bear the burden to show bodily injury during each insurers' respective policy period. To the extent these product liability claims allege injury to the plaintiffs that occurred over an extended period of time, a determination will need to be made as to exactly when the injuries occurred. This is another fact-intensive issue that may require the assistance of medical experts to identify and explain the alleged injury process.

Once the implicated insurance policies are identified, the next task will be to determine the appropriate allocation of damages among those policies. Particularly in the context of policyholders as sophisticated as those in the pharmaceutical industry, the allocation of damages can be a complex task involving not only occurrence-based liability coverage but also self-insurance, captive insurance programs, and claims-made coverage. The general approach to allocation largely will be dictated by law; however, the practical application of the law will depend heavily upon the specific coverage profile and policy language at issue. Given the exorbitant verdict and settlement values in this arena, insurers and reinsurers can expect the pursuit of contribution and indemnification claims among insurers and other potentially responsible third parties.

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ARIAS•U.S.
7918 Jones Branch Dr., Suite 300
McLean, VA 22102
Phone: 703-574-4087
Fax: 703-506-3266
info@arias-us.org
www.arias-us.org

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Finally, as these manufacturers and distributors settle claims and seek reimbursement from insurers, an additional universe of coverage issues may arise. Policies commonly contain voluntary payment and consent-to-settlement provisions, which prohibit policyholders from voluntarily assuming any liabilities and/or require them to obtain written consent from the insurer prior to entering into a settlement. In addition, policyholders and cedents will bear the burden to prove that the settlements were reasonable in light of the potential liability exposure at stake. Thus, underlying settlements can give rise to fertile ground for insurance disputes. Insurers of mesh manufacturers already have filed declaratory judgment actions seeking to avoid coverage on the bases of lack of consent, voluntary payment, and unreasonableness of the settlement.[18]

While these are just a few coverage issues that may arise from medical device and pharmaceutical litigation, there are many others that are sure to arise.

Conclusion

Product liability litigation involving pharmaceuticals and medical devices certainly is not a new phenomenon, but it is one that should be closely monitored by insurers and reinsurers. Coverage litigation already is underway with respect to these types of losses, and additional insurance and reinsurance disputes are expected to unfold in the coming years as opioid litigation and new waves of medical device lawsuits reach resolution.

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Heather Simpson is a partner in Kennedys CMK's Basking Ridge, New Jersey, office and handles insurance coverage and commercial litigation matters throughout the United States. She has extensive experience in litigating insurance coverage disputes involving professional liability, general liability, environmental, and products liability matters, including recent claims arising from talc, asbestos, and sports-related head trauma.

Josh Wirtshafter is an associate in Kennedys CMK's Basking Ridge office. His practice primarily focuses on representing insurance carriers in litigated complex insurance coverage matters in the areas of general liability, first-party property, products liability, and contingency, including with respect to insurance claims arising from pharmaceutical products and sports-related head trauma.

Symposium: How Changing Technology Has Affected Arbitrations

Moderated by David Winters

Winters: ARIAS • U.S. is 25 years old, and there have been some remarkable technological changes during that time. For example, since the inception of ARIAS, the Internet "became a thing," as did electronic discovery, and the way that businesses and counsel communicate with one another changed from hard-copy letters to email. And that is just the tip of the iceberg.

The purpose of this symposium is to look back at how changes in technology have affected arbitration over the course of the last 25 years. To address this topic, I asked a panel of some of the most skilled and knowledgeable ARIAS arbitrators and practitioners to share their observations. Thank you all for participating.

I'd like to start the discussion with the topic of electronic discovery—that is, the production of electronically stored information in arbitration. How has electronic discovery changed arbitration?

Rubin: I can say that in the earlier arbitrations in which I was involved, there was no electronic discovery. It was all manual collection of documents and review and production. I think that the first time we really became engaged heavily in electronic discovery was probably in and around 1998 or 1999. We had a series of cases where collection of documents included electronic data, and the electronic data was quite meaningful. It required a different set of skills not only to collect that data, but then process it and analyze it and determine how to use it.

For those of us who had been practicing for quite a long time at that point, it was an interesting transition from manual production, collection and review of documents to now determining who were the people who would have documents, who were likely to have documents that had to be collected electronically, how to process them, and how to analyze them for privilege. It all changed over time beginning in the late 1990s.

Bank: Just to put it into some perspective, there were no pleadings per se to initiate an arbitration. You would send a two- or three-sentence letter making reference to the contract section and demanding arbitration. Likewise, discovery—and this is pre-email—was handled by letter. And you would ask the counter-party to produce X, Y, and Z. It wasn't overly specific. We were not really following any federal rules of procedure when we asked for discovery. Everything was done by letter or telephone.

Fowler: I think the experience of arbitrators is probably different than that of counsel. I suspect that counsel might have had an earlier exposure than that afforded to arbitrators. But the time frame of the late '90s brings back an epiphany that occurred to me and is reflective of Jim's comments about how you had to change your business practices.

The epiphany for me [came when] I was involved in a Bermuda arbitration. With the pleadings, I received 12 banker's boxes of documents—hard copy, of course. The hearing was in Bermuda, and it was in several phases. The panel deliberations were to occur in London. So I had to figure out a way to try to get 12 banker's boxes of information—upon which I had written, on many exhibits, my hand-written notes—down to the hearing in Bermuda; find a way to access them during the hearing so I could make notes on the same exhibits again; and then transport the ones that were the most important to London. Coping with that brought home a sure conclusion, which was: this is not going to work.

I suspect that's when a lot of arbitrators began to realize that as arbitration changes—and it was, as Jonathan pointed out, rapidly changing during that period of time—technology was a way of making it all possible, particularly with respect to an individual arbitrator's ability to cope with the process. In that regard, I remember telling people you've got to think of an arbitrator as being the equivalent of an itinerant judge—no courtroom, no clerk, no office, yet has to be prepared to deal with an ever-increasing mountain of information. Technology, at least in my case, made it all possible.

Rubin: To tell you about the time period and how the transition affected us, I had an arbitration in 1994 and 1995 when one of the arbitrators told us to take all of the exhibits—which existed in hard-copy form only, and there were hundreds—and put them in chronological order in the middle of the hearing. And that required people to stay up all night for a couple of nights trying to figure out how to manage all of the materials, get them copied—which, again, was a very time-consuming process—and get them to the panel.

I had an arbitration in the early 2000s where Caleb was the umpire, and he announced at the organizational meeting that he only wanted to receive information in electronic form. It was the first time that anybody on a panel had said that to us.

So the transition took place in a relatively short period of time, I think from about 1994-95 to 2004-2005. We really had to start dealing at that same period of time with litigation holds for our clients to preserve materials. There had been a decision, I can't remember exactly when, in the early 2000s, establishing the obligation to preserve documents in anticipation of litigation.

Mack: I think Jim is referring to the Zubulake decision by Judge Sheindlin.

Winters: Many believe that the change from hard copy to electronic greatly increased the scope and magnitude of discovery. Is that consistent with your experience, Jonathan?

Bank: Very, very consistent. I would almost say it turned into overkill, because it's almost as if nothing was unavailable electronically, which caused people to reach further than they would have done otherwise. Because it became easier and it became accessible, I personally think it had a dramatic input on the scope, broadening the scope of discovery and increasing the expense of the arbitration proceeding.

Winters: Has discovery become more or less efficient with the addition of electronic discovery in arbitration?

Bank: The word *efficient* is probably subject to a couple of different definitions, depending on maybe which side you're on. It made obtaining the documents less cumbersome; I would say reviewing the magnitude of documents made it more cumbersome.

Mack: I do think I empathize with what Jonathan is saying. But from the perspective of an arbitrator in recent arbitration hearings, I think electronic discovery has greatly assisted in the truth-finding function.

I know that all of [us] are dedicated to the integrity of the arbitration process. In recent arbitrations, I have come across e-mails from individuals, not necessarily directly related to the dispute and not necessarily executives, that have a different spin on the dispute. Whether those would have been picked up by paper discovery before the e-discovery process, I don't know. It seems to really—once the attorneys go through the expense and bother of going through e-discovery—it seems to really focus and crystallize the issues and truly assist in getting to the nub of the controversy.

Fowler: I think also from an individual arbitrator's perspective, finding the truth or at least evidence of the truth has become much easier. Going back to the example I started with, the 12 banker's boxes of documents—many times, as you all know, you read something and say, "I remember a previous communication about that." And we all labored under, I think, the burden of trying to find something in a stack of hard-copy materials that may have been several feet in height. Now, all I've got to do is put the search term into my computer and I can find everything. So, from an arbitrator's perspective, finding evidence and putting things together is much easier than it was in the early days, where you had very little technological help.

Winters: Moving away from discovery, how has email impacted arbitration? And a subset of that: Has it had an effect on civility between and among counsel in arbitrations?

Rubin: What I was going to say was in the '70s, '80s, and even in the '90s, we were required to write letters to opposing counsel if we wanted to communicate with them. I think writing letters required or caused people to be a little bit more thoughtful about what they put down on paper. I think a lot of that thoughtfulness has been lost when people can just begin typing and hit the "send" button on your computer. The fact that thoughtfulness and contemplation and the time that was required for your assistant or secretary to create four carbon copies of something has, I think, contributed to some of the lack of civility.

Fowler: I think another interesting question that perhaps gets to the core of the question is, what about panel communications and panel relationships? Have they improved or deteriorated due to the use of emails? Because, at least in my experience, there's little doubt that panels talk less than they used to.

I would make some of the same observations about the relationships in a panel that I did generally with regard to arbitrations. I think they've become more difficult over time. And I wonder whether that's because they don't talk to each other as much as they used to. I'm just not sure about that.

I know some arbitrators are sensitive to the concept of proportionality, and I think that it should and likely will become a regular theme in arbitrations and in respect to electronic discovery as we move forward.

—Jim Rubin

Winters: I'd like to hear Susan and Jonathan weigh in on the question that Caleb just posed, which is, has email changed the way panels deliberate with each other?

Mack: Yes, I think it has. I think it is more likely that there will be brief in-person or telephonic deliberations, and if the three panel members are not aligned, there will be a back-and-forth of express positions by email confidentially to each other in an attempt to narrow the issues or to arrive at an agreement. I think that's markedly more the case than perhaps even a decade ago.

Bank: I agree with that.

Winters: Moving on to arbitration hearings themselves, I'd like to get the panel's first impressions on whether and to what extent technology has changed arbitration hearings.

Fowler: Dramatically. Going back to the early '90s, I remember you brought stacks of paper to the hearing. Each exhibit was handed out individually, both to counsel and to the panel. So there were delays, because the exhibits would have to be handed around. Or maybe you had a stack of all the exhibits in binders behind you. I remember it was sort of funny—you had 30 people in the room, and you had to wait 5 or 10 minutes because somebody couldn't find the exhibit in their binder. And there was always this exchange, "what binder, what exhibit, what page, where is it," and binders flying all around the room.

You contrast that with what happens today. Lot of hearings that I go to don't even have binders anymore; I have not asked for witness binders for probably a decade. Today, the exhibits go up, often simultaneously on individual displays that are before both counsel and the panel. A lot of times you don't see any hard paper at all. So there's no doubt that the presentation of evidence has changed. As we all know, we're spoiled now by having access to LiveNotes, so we have the transcript in front of us. If you miss a word, you just look down and see it. In my way of thinking, there's been a dramatic change in how hearings have been conducted.

Rubin: It's interesting to listen as a practitioner as opposed to an arbitrator. I've always wondered whether our presentations became more effective as a result of all the electronic information that we have to use. My own view is there have been occasions when I thought the technology helped me make a point. That is, I could very easily assemble electronically several documents and present them in a way that would be very difficult or more difficult to present if I had to use hard copies and everybody was fumbling to find them.

So I've often thought there were times when the electronics enabled me to make a point more effectively than in the past. And not just with documents—there was also a time when I had videotaped a deposition where the witness had made a series of admissions during his deposition, and we were able to play the videotape repeatedly throughout the hearing. I thought in the end that it affected the credibility of the witness in a way that favored our side.

Mack: I would like to address video deposition excerpts with a war story from early in the use of videos. This is going back I guess to the early 2000s, like 2003 or 2004. The party by whom I was appointed as arbitrator videotaped the deposition testimony and put it on in their own case of a senior executive. That person clearly was not taking the matter seriously, looked very taciturn, spoke over the questions, and in general expressed disinterest. This had the effect of actually hurting that party's case.

So, with deposition video clips, I think it's important to use it, as a practitioner, very judiciously. In the case that Jim mentioned, videotaped deposition clips showing admissions by the other party's executives is, I think, very useful.

Winters: What are the panel's thoughts on the biggest risks related to technology going forward in arbitration?

Mack: I think the biggest risk of technology would be the inadvertency of disclosure and how changes in confidentiality rules such as HIPAA and protected personal information has affected arbitrations. I think that, particularly in life reinsurance arbitration, we have to take great care to make sure that protected information is deleted from the produced materials, such as policyholders, Social Security numbers, and other issues. We have to be ever-attentive to that risk.

Fowler: Boy, do I agree with that. We talked about needles in haystacks and searching for the truth. I can only relate—and, fortunately, nobody in this group was involved in it—an arbitration I had which was very contentious. There was a blanket production of documents. One of the emails inadvertently produced was from one of the counsel to his client, saying, "We have to recognize that the information sought is greatly damaging to our case, but we have decided we don't have to produce it"—or words to that effect, even though it was covered by the panel's discovery ruling. Then they tried to call it back, saying that it had been inadvertently produced. Obviously, things went downhill from there. Susan is absolutely right: You really have to be careful what the hell you produce, because some slippery stuff can get through the cracks there.

Rubin: In addition to that, there's one other issue much more significant as we go forward, and that is the idea of proportionality. It got codified into the Federal Rules a few years ago. I know some arbitrators are sensitive to the concept of proportionality, and I think that it should and likely will become a regular theme in arbitrations and in respect to electronic discovery as we move forward. Proportionality should apply in arbitrations just as it applies in federal courts.

Fowler: And technology really enables that argument. Before, I was talking about search terms and hits and so forth. Now we get, as arbitrators, information back from counsel saying, well, the proportionality of this request is out of skew because we've identified 110,000 documents with the term X in it, and for us to review 20 gigabytes of data, etc. In other words, they're much more informed. As a result of that, the panel has a much better appreciation of the magnitude of effort required to achieve the discovery that's desired. Obviously, that brings proportionality and burden directly to the forefront.

Winters: We've reached the end of our time. I'm delighted by all the responses and want to close with a thank you to everyone.

This roundtable discussion was transcribed by Aline Akelis of Winter Reporting, which provides court reporting and complete litigation support services for depositions, arbitrations, meetings, hearings, and conferences. The discussion participants and ARIAS thank Winter Reporting and Ms. Akelis for the generous donation of their services. The transcript has been lightly edited to improved readability.

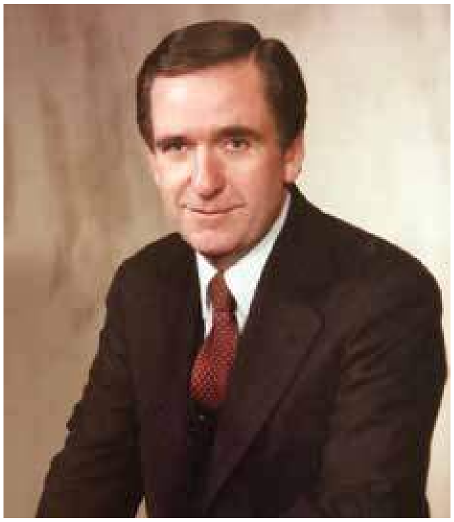
Jonathan Bank of Locke Lord has been involved (as outside counsel) with reinsurance arbitrations since at least 1975. He was previously senior vice president of Tawa Associates Ltd., general counsel of CX Reinsurance, and the insurance practice leader of PwC's U.S. insurance/reinsurance regulatory and restructuring practice. He is an ARIAS•U.S. licensed arbitrator.

Caleb Fowler was employed by INA and its successor, CIGNA, for 28 years, then became a partner in the Washington, D.C. office of Holland & Knight. He left the firm to pursue his interest in insurance and reinsurance arbitration and mediation. He has participated in more than 200 arbitrations, and successfully concluded a large multi-insurer mediation.

Susan Mack is a partner in the Jacksonville, Florida, office of Adams and Reese LLP and is a founding director of ARIAS•U.S. She has served as general counsel and chief contracts officer of both insurers and reinsurers and has been appointed an umpire or arbitrator in 90-plus insurance or reinsurance arbitrations.

Jim Rubin was a founding partner of Butler Rubin Saltarelli & Boyd (now Porter Wright) and former partner at Winston & Strawn who now practices as James I. Rubin LLC. He was named "Global Insurance and Reinsurance Lawyer of the Year 2010" by The International Who's Who of Business Lawyers and "Insurance Lawyer of the Year" by Who's Who Legal Awards in

David Winters is a partner at Porter Wright Morris & Arthur LLP (formerly Butler Rubin Saltarelli & Boyd LLP). He is a member of the ARIAS Technology Committee and writes frequently about information security. In 2016, he received the CIPP/U.S. designation from the International Association of Privacy Professionals (IAPP).



Remembering Dick Kennedy

There are those who knew him longer and better, but for 17 years, I worked with Dick Kennedy as an associate, partner and colleague. Dick was a lawyer's lawyer. Client service and zealous advocacy were his hallmarks, and he took them very seriously. The organized bar and the insurance industry were his passion.

Trained by James B. Donovan (yes, that James Donovan, from *Bridge of Spies*) at Watters & Donovan, Dick joined Victor D. Werner to form Werner, Kennedy, French, Relyea & Molloy. When Victor Werner died suddenly in 1972, Dick became managing partner and ran the various iterations of the firm through its ultimate closing as Werner & Kennedy in 1999. Thereafter, Dick served as general counsel to American Skandia, working with his good friend Jan Carendi. Dick served as chair of the ABA's Tort & Insurance Practice Section (as it was called then) and in the ABA's House of Delegates as the New York state delegate.

When I joined Cabell, Kennedy & French in 1982, I found Dick to be a very imposing and demanding figure. Dick did not tolerate fools or mediocre work. He ran the firm as if it were Cravath, including recruiting summer associates from Harvard, Yale, Columbia, NYU, Virginia and other major law schools. Somehow, I slipped in because of my clerkship at the Appellate Division, Second Department.

Dick was known for his extensive preparation for trials and arguments. When preparing for his Supreme Court argument in *Union Labor Life Insurance Company v. Pireno*, he spent untold hours going over every citation and every factual detail. He ran his oral argument repeatedly. Although he did not win that case, he was very proud of having convinced two justices to dissent, including the chief justice.

Dick was unafraid to take bold stances to protect his clients. During the Medical Malpractice Insurance Association rate hearings, Dick confronted the former chief judge of the New York Court of Appeals, Stanley Fuld—who was serving as hearing officer as a special deputy superintendent—about *ex parte* communications between the judge and the lawyers from the Insurance Department. Dick firmly asked Judge Fuld to recuse himself, which he ultimately did.

A tough litigator, Dick confronted adversaries and insurance superintendents with powerful arguments and even reduced the Insurance Department's actuary to tears by demanding answers to his questions. Despite his tough exterior in the workplace, Dick would annually host a firm outing at his home in Greenwich, where he and Cathy would entertain our young families and us.

As I write this memorial for the *ARIAS•U.S. Quarterly*, I am reminded that neither the *Quarterly* nor ARIAS would exist but for Dick Kennedy. As president of the U.S. Chapter of AIDA, Dick conceived of ARIAS in our office with the help of his good friend Ed Rondepierre and a number of other luminaries. It took two years for ARIAS to launch, and when it did, in 1994, Dick served as its first chair and as editor of the *Quarterly* as well.

Dick's legacy is not only in ARIAS•U.S. and his family (including

ARIAS member Stephen Kennedy), but in the many of us who had the opportunity and privilege to work at the various iterations of Dick's law firm and went on to have successful careers in the insurance and reinsurance industry. Consider just some of the people Dick influenced: Brian Snover, Patricia Fox, John Nonna, Michael Knoerzer, John Finnegan, Nicholas Canelos, Peter Bickford, Fran Semaya, and Alysa Wakin. And there were others.

Unfortunately, we were unable to see Dick during the past several years, even though we tried at the ARIAS Spring Conference in Naples. He was not up to it. Ironically, Dick's tribute to Ed Rondepierre in 2013 mentions both men's battle with Parkinson's disease. Sadly, Parkinson's has taken another giant. We will all miss his leadership, vision and wise counsel.

Rest well, friend and mentor. Your memory lives on in the life and work of ARIAS and its members. —*Larry Schiffer*

Remembering Emory L. White

Emory L. White, Jr, age 85, passed away on August 20, 2018. Emory received his BA in 1955 from the University of Texas and his LLB in 1958 from the UT School of Law and later served in the U.S. Army as a captain. His law practice was devoted to the insurance industry, with a specialty in reinsurance. One of his great pleasures was having been part of Thompson Coe's development, from eight lawyers when he began to a firm with approximately 190 lawyers in six cities today. Emory was a member of the State Bar of Texas, the American Bar Association, the Dallas Bar Association, and the Federation of Regulatory Counsel, and he was certified as an arbitrator by ARIAS•U.S. He also served as a director of Optimum Reinsurance Company (Montreal, Canada, and Dallas), British American Insurance Company, Austin Industries Inc. (Dallas), and SureTec Insurance Company (Houston).

Remembering Don Addison Salyer

Don Addison Salyer of Naples, Florida, passed away on March 2, 2019. Don was born in the heart of Appalachia in a log cabin in East Point, Kentucky. He earned a full, 4-year athletic scholarship to Rollins College in Winter Park, Florida; after graduating, he started a lifelong career in the insurance industry. He progressed from a claims adjuster in Orlando to a vice president of Guy Carpenter and Company. While at Guy Carpenter, he worked extensively with Lloyd's of London on behalf of his clients. Don and his wife, Gwen, moved to Naples in 2001, where he participated in two rewarding volunteer jobs—helping build houses for Habitat for Humanity of Collier County and working at the Collier County Courthouse as a mediator in small claims court.

Freeborn Attorneys Named to 2019 Who's Who Legal: Insurance & Reinsurance

Freeborn & Peters LLP is pleased to announce that six attorneys across the firm's offices have been recognized as among the world's leading insurance and reinsurance lawyers. Freeborn partners Thomas F. Bush, Mark R. Goodman, Daniel Hargraves, Sean Thomas Keely, and Joseph T. McCullough IV are listed in the 2019 edition of Who's Who Legal: Insurance & Reinsurance.

Serving all areas of the global insurance and reinsurance marketplace, including insurance coverage and defense practices, these attorneys work seamlessly across all of Freeborn's offices in Chicago, New York, Richmond, Va., and Tampa, Fla.

Compelling Evidence from Non-Party Witnesses

Since March 2006, the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration- and insurance-related issues. Individual ARIAS•U.S. members are also invited to submit summaries of cases.

Case: *Washington National Insurance Co. v. Obex Group LLC*, 2019 U.S. Dist. LEXIS 9300 (S.D.N.Y. Jan. 18, 2019).

Court: U.S. District Court for the Southern District of New York.

Date decided: 18 January 2019

Issue decided: The principles that govern whether an arbitration panel may compel evidence from a non-party witness under Section 7 of the Federal Arbitration Act.

Submitted by: Michael T. Carolan

In *Washington National Insurance Co. v. Obex Group LLC*, the U.S. District Court for the Southern District of New York enforced two arbitration summonses issued by a reinsurance arbitration panel and ordered two non-parties to appear before the panel and produce documents required by the panel.

The underlying dispute involved Washington National Insurance Company's allegation that it was fraudulently induced into a reinsurance agreement with Beechwood Re. In support of evidence sought by Washington National, the arbitration panel issued non-party subpoenas to Obex Group and Randall Katzenstein, requiring them to appear as witnesses at a hearing and to produce documents. Although Obex Group and Katzenstein produced some documents, Washington National asserted that they failed to produce others. The arbitration panel issued two summonses requiring Obex Group and Katzenstein to appear at a hearing in New York City and to bring additional documents, finding that the documents and information sought "are relevant" to the issues in the arbitration and that the summonses "should be enforced by a court of appropriate jurisdiction." Washington National then filed a petition to enforce the summonses.

Obex Group and Katzenstein moved to dismiss or quash the subpoenas on multiple grounds. For the motion to dismiss, they alleged the court lacked jurisdiction for the following reasons: (1) there was no diversity, because the citizenship of the parties in the underlying arbitration controlled, and those entities were both New York citizens; (2) the amount in controversy was less than $75,000, and the amount at issue in the underlying arbitration was immaterial; and (3) a majority of the arbitration panel was not sitting in the Southern District of New York. For the motion to quash, they alleged that the summonses were impermissible pre-hearing discovery and that only the court, not the arbitration panel, had the power to rule on the merits of their objections.

The court disagreed on all counts. On the diversity issue, the court explained that under the Federal Arbitration Act, "Section 7 actions—unlike those involving Section 4 or Section 10—involve different parties than those in the underlying arbitration." The court also noted that case law from the U.S. Court of Appeals for the Second Circuit "supports looking to the parties to the enforcement action—rather than the parties in the underlying arbitration—to determine whether diversity jurisdiction exists." Since diversity existed between Washington National and Obex Group and Katzenstein, the court had jurisdiction.

On the issue of the amount in controversy, the court held that "[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." Because Washington National sought damages of at least $134 million in the underlying arbitration, the court explained, "[e]ven if documents responsive to the summonses pertain to only a small fraction of that sum, the amount in controversy requirement would still be satisfied."

Finally, on the issue of the situs of the arbitration panel, the court stated as follows: "Here, the summonses ordered respondents to appear at a hearing in New York City. Thus, the arbitrators are sitting in the Southern District of New York, and the court has the authority under Section 7 [of the FAA] to enforce the summonses." The court further explained that "[n]othing in Section 7 requires an arbitration panel to sit in only one location" and that such a rule "would greatly circumscribe an arbitration panel's ability to decide a case, potentially discourage litigants from arbitrating disputes involving nonparty witnesses in multiple locations, and thus contradict 'the strong federal policy in favor of arbitration.'"

On the motion to quash, the court noted that the question of whether a summons seeks impermissible pre-hearing discovery is governed by three factors: (1) whether the witnesses "were ordered to appear for depositions . . . outside the presence of the arbitrators"; (2) whether the arbitrators "heard testimony directly from the witnesses and ruled on evidentiary issues"; and (3) whether the testimony "became part of the arbitration record" such that the arbitration panel used it in determining the dispute.

Concluding that the summonses at issue were "proper" under Section 7 of the FAA, the court explained as follows: "The panel summoned respondents to a hearing before the arbitrators—not to a deposition" and that the panel's order "stated that the panel was 'prepared to receive testimony and documentary evidence . . . and the panel was prepared to rule on evidentiary issues," with a court reporter "ready to record the hearing" so it would be part of the arbitration record used by the panel. While Obex Group and Katzenstein argued that Washington National's willingness to waive the hearing and just receive documents meant that the arbitration panel's hearing order "evidences a subterfuge," the court disagreed, averring that it would not "prejudice petitioner for its sensible willingness to negotiate."

Finally, the court held that even if it had the authority to "independently assess" the materiality of the summonses, courts in the Second Circuit generally declined to exercise that authority and instead deferred to the arbitrators, and that it would do the same. It was enough for the court that the arbitration panel "stated the evidence was relevant and that the summonses should be enforced by a court of appropriate jurisdiction."

Michael T. Carolan is a partner in the Washington, D.C., office of Troutman Sanders LLP.

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ARIAS Members Relax, Refocus at Spring Conference

U.S. P&C Value Creators: Implications and Imperatives

Keynote speaker Bill Pieroni engaged attendees with a study that measures the value created or destroyed among the top 100 U.S. property and casualty insurance companies and explores the strategies and tactics employed by those organizations to deliver consistent value over time. A proprietary cash flow model and capitalization costing approach was used to identify value-creating and value-destroying companies. The analysis leveraged 10 years of financial data along with company reports, research, and interviews.

"Very dynamic speaker with interesting content and insights. I liked the "strategic" focus on the broader industry which ARIAS ultimately serves.

"Great speaker! Very engaging and very interesting perspective on the industry.

"I enjoy data analytics, and this topic was on point.

General Sessions

The Intersection between Catastrophic Loss and the Regulatory Response

Recent record-setting catastrophic events have visited terrible personal losses on consumers and put financial pressure on (re)insurers. Regulators are also under pressure to ensure a robust and competitive insurance market while maintaining protections for the insurance-buying public, especially after headline losses. This session explored the ground between these groups and how disputes might arise in the context of their interaction after an event.

Moderator: Anne Wilson, Vice President, Swiss Re
Panel: Jay Brown, General Counsel Corporate Solutions, Swiss Re; Melissa Burt DeVriese, Chief Administrative Officer and General Counsel, Security First Insurance Company; John M. Huff, President and CEO, Association of Bermuda Insurers & Reinsurers; Steven C. Schwartz, Partner, Chaffetz Lindsey LLP

"I thought that this was one of the best sessions of the conference. This regulatory process that goes on behind the scenes after cats isn't always very transparent to those of us in reinsurance, but it certainly impacts what we do. I therefore found the discussion valuable and interesting.

"Informative and topical, particularly for Florida practitioners.

Unconscious Biases: The Uninvited Arbitration Guests

Did you know that 11 million bits of information are sent to the human brain for processing each second, but only 40-50 bits can be processed at a time? For that reason, the human brain develops a number of shortcuts, making 99.9% of that processing unconscious. These unconscious biases take the form of learned stereotypes, patterns of thinking, and automatic responses that often manifest themselves in micro-inequities. Ann Field, Sarah Gordon, and Stacey Schwartz discussed how these biases can prevent individuals from making the most objective decisions, potentially affecting counsel selection, panel selection, witness perception, counsel perception, and damages assessments.

Panel: Ann L. Field, Senior Vice President, Willis Re; Sarah D. Gordon, Partner, Steptoe & Johnson LLP;Stacey L. Schwartz, Senior Vice President, Swiss Re (US)

"Delightful session, and highly thought provoking.

"As a California practitioner, I welcome the opportunity to get Gender Bias CLE credits in such an enjoyable way.

Ask the Experts: Ethics Session

The "Ask the Experts" session was designed to address and provide guidance on some of the thornier ethical issues we all face in the world of arbitration. The experts addressed numerous hypothetical situations and provided answers within the context of the following considerations: What should someone do in this situation? Does the ARIAS•U.S. Code of Ethics provide guidance? Are there any court decisions? What do other people do in this situation? Attendees were engaged by giving their feedback through live polling.

Moderator: Alysa Wakin, Vice President and Claims Counsel, Odyssey Reinsurance Company
Panel: Deirdre G. Johnson, Partner, Squire Patton Boggs (US) LLP; Beth Levene, Executive Vice President and Chief Claims Officer, Transatlantic Reinsurance Co.; W. Mark Wigmore, ARIAS•U.S. Certified Arbitrator and Umpire, Avalon Consulting, LLC

"Best ethics session ever! Insightful, engaging and very funny.

Breakout Sessions

The Use of Experts in Arbitration

The use of experts in reinsurance arbitrations has long been disfavored. After all, aren't the panel members themselves the experts? In this breakout session, Donald Frechette, Peter Gentile, Cynthia R. Koehler, and Andrew Maneval discussed whether, and in what situations, it may be appropriate to reconsider that view. The panel also shared recent changes in the law affecting expert disclosures and discovery, with particular emphasis on recent amendments to the Federal Rules of Civil Procedure.

Hacking Privileged and Confidential Information

We live in a world where it seems there are no longer any secrets, where the daily news brings stories of individuals and companies attacked by hackers wishing to profit from stolen information. Panelists in this breakout session discussed in depth what happens in a legal case when your clients' privileged and confidential information is stolen and made public by hackers.

Women 'Paint & Pour' to Benefit Charity

What do you get when you combine a blank canvas, mimosas, fun and friendship, and generous support from Willis Re and Chaffetz Lindsey LLP? Women attending the ARIAS Spring 2019 Conference had the opportunity to find out at a "Paint and Pour" networking event on Wednesday, May 8.

The blank canvasses were soon filled with the help of a painting instructor, step-by-step instructions, and inspiration from the gorgeous grounds of The Breakers Hotel. In addition to bringing out their inner artist, attendees enjoyed networking with colleagues and using their time and talent to support a good cause.

The following evening, the paintings were auctioned off during a reception. Proceeds from the silent auction went to Polaris, a leader in the global fight to eradicate modern slavery. Named after the North Star that guided slaves to freedom in the United States, Polaris systematically disrupts human trafficking networks that rob human beings of their lives and freedom. For more information about the Polaris Project, visit www.polarisproject.org or call (202) 790-6300.

Call for Content

Are you a thought leader? Do you want to be one?

The *Quarterly* provides ARIAS members with an easy-to-use platform to demonstrate their thought leadership on a wide variety of insurance, reinsurance and dispute resolution topics.

If you have written a firm client "alert" or blog post, or if you've participated in an ARIAS continuing legal education (CLE) or conference program, just recast that material into an article. Follow the simple instructions on the Publications Page of the ARIAS website. Follow this link (https://bit.ly/2MdRP4I) for the article submission form and instructions.

We look forward to your submissions!

Help ARIAS•U.S. Reach Its Highest Potential!

Many ARIAS•U.S. Committees are looking for new members to help create more engaging content, programs, and events! We're seeking volunteers who:

- Want to help develop education programs for arbitrators, counsel, and company representatives;
- Are interested in creating opportunities and programming that strengthen women's access to networking, career advancement, and mentorship; and
- Have expertise in the field of technology or law and want to be able to share important information with their fellow professionals.

More information about each committee and how to join can be found in the Committee section of the ARIAS•U.S. website (https://www.arias-us.org/about-arias-us/committees/).

Upcoming Events

September Webinar: Price Optimization and Unfair Rate Discrimination – Emerging Regulatory and Litigation Issues in the Era of "Big Data"

Learning Objectives:

- Overview of industry use of predictive pricing models and increasing complex rating approaches
- Regulatory views of unfair discrimination
- Examples of class action lawsuits against insurance companies
- Relevant guidance including actuarial standards of practice

Faculty: Richard Piazza, ACAS MAAA, Chief Actuary, Louisiana Department of Insurance. Additional faculty will be announced at a later date.

September Workshop: Intensive Arbitrator Training

The Intensive Arbitrator Training Workshop is a full-day session focused on the effective engagement of party arbitrators. Presentations by industry veterans and involvement in mock sessions will emphasize the role of the party-appointed arbitrator in the arbitration process. The program is structured so that all arbitrator participants have the opportunity to function in the arbitrator's role in a hands-on mock arbitration. Panel members will be presented with arguments by participating attorneys. They will then deliberate "in private" in front of the other participants, including instructors, who will provide feedback.

This program is designed for newer or aspiring arbitrators; this training is also a great way for veteran arbitrators to refresh their knowledge and skills. It is required for anyone who intends to apply for arbitrator certification under Options B or C of the Arbitration Experience / Knowledge Component.

Course Faculty:

- Sean Keely (Freeborn & Peters LLP; ARIAS•US Education Committee)
- Lisa Keenan (Odyssey Re; ARIAS-US Education Committee)
- William O'Neill (Troutman Sanders; ARIAS-US Education Committee)

Additional faculty will be announced at a later date.

AIDA Reinsurance & Insurance Arbitration Society
7918 Jones Branch Dr., Suite 300 • McLean, VA 22102
Phone: 703-506-3260 • Fax: 703-506-3266
Email: info@arias-us.org

BOARD OF DIRECTORS

CHAIRMAN
Scott Birrell
Travelers
1 Tower Square, 4 MS
Hartford, CT 06183
860-277-5391
sbirrell@travelers.com

PRESIDENT
Michael A. Frantz
Munich Re America
555 College Road East
Princeton, NJ 08543
609-243-4443
mfrantz@munichreamerica.com

VICE PRESIDENT
Cindy Koehler
AIG
99 High Street, Boston, MA 02110
617-330-4324
Cindy.koehler@aig.com

VICE PRESIDENT
Steve Schwartz
Chaffetz Lindsey LLP
1700 Broadway, 33rd Floor
New York, NY 10019
212-257-6940
s.schwartz@chaffetzlindsey.com

TREASURER
Peter A. Gentile
7976 Cranes Pointe Way
West Palm Beach FL. 33412
203-246- 6091
pagentile@optonline.net

Marc Abrams
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
666 Third Avenue
New York, NY 10017
212-692-6775
mlabrams@mintz.com

Deidre Derrig
460 Tower
Barrington, IL 60010
847-778-7955
Deedee.derrig@gmail.com

Deirdre G. Johnson
Squire Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037
202-457- 6301
deirdre.johnson@squirepb.com

Sylvia Kaminsky
405 Park Street
Upper Montclair, NJ 07043
973-202-8897
syl193@aol.com

Beth Levene
Transatlantic Reinsurance Co.
One Liberty Plaza
165 Broadway, 17th Floor
New York, NY 10006
212-365-2090
blevene@transre.com

Alysa Wakin
Odyssey Reinsurance Company
300 First Stamford Place
7th Floor
Stamford, CT 06902
203-977-6074
awakin@odysseyre.com

CHAIRMAN EMERITUS
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Daniel E. Schmidt, IV
*deceased

ADMINISTRATION

Sara Meier
Corporate Secretary / Ex officio
7918 Jones Branch Drive
Suite 300
McLean, VA 22102
703-574-4087
smeier@arias-us.org