Umpire Roundtable: Deliberation Logistics

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QUARTERLY

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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.

Happy New Year!

ARIAS starts 2019 with a bang, as a change to Canon I, Comment 5 of the ARIAS•U.S. Code of Conduct takes effect (as highlighted in the most recent *Quarterly* and in a letter that all members received).

We also start this issue with a bang—an article titled "Umpire Roundtable: Deliberation Logistics," which follows very nicely from last quarter's article by Richard Waterman about the deliberation process. Moderated by Catherine Isely, a partner at Butler Rubin Saltarelli & Boyd, LLP, the roundtable consists of a distinguished panel of umpires: Katherine Billingham, from Scottish Re; Ann Field, from Willis Re; Andrew Maneval, from Chesham Consulting; and Richard ("Dick") White, the former deputy liquidator of Integrity, in his swan song to ARIAS.

Catherine expertly leads the panel through a wide-ranging discussion about best practices for panel deliberations and how each panelist approaches the deliberation process. This roundtable provides an insightful discussion and is well worth the read. The article is peppered with references to the Code of Conduct and the Practical Guide. It is also worth noting that the panelists generally agreed with each other about best practices in deliberation, which I think is a good sign of the quality and competence of ARIAS-certified arbitrators.

These roundtable discussions are a great way to impart knowledge to newer or less experienced arbitrators and practitioners. If you would like to moderate and conduct a roundtable discussion on any topic, please let Sara Meier or me know.

The umpire roundtable segues into a practical article on addressing emergencies in arbitration that threaten to derail the proceeding. Written by Susan Mack and Angela Grewal of Adams and Reese LLP, the article, "Resolving Urgent Threats to an Arbitration's Viability and Integrity," discusses issues that arise during the arbitration process that require swift and decisive action to keep the process on track. Subjects explored include the death or resignation of a panel member, bias incidents during the arbitration, behavior by counsel that affects the proceeding, and early motions.

Susan and Angela's article is based on a presentation at the ARIAS 2018 Fall Conference. If you make a presentation at an ARIAS conference, workshop or webinar, you can leverage your expertise and hard work and easily turn the presentation into an article. Having an article follow a presentation reinforces the message of the presentation, enhances your thought leadership, and provides members with another resource.

This issue also features another great article from longtime arbitrator Robert M. Hall of Hall Arbitrations on consolidation of arbitrations. Bob takes us through several scenarios where consolidation arises and digests how the courts have handled consolidation requests in these circumstances. Bob's scholarly articles on practical issues should not be missed.

Allocation of long tail losses is a trying issue. How an insurance company allocates claims to its policies over long periods of exposure, especially for environmental losses, can make a big difference in coverage disputes between carriers and their policyholders. John E. DeLascio, from Hinshaw & Culbertson LLP, has put together a very interesting article on how and why consideration of environmental impairment liability (EIL) insurance is necessary when allocating long-tail environmental losses. As John puts it, proper allocation to EIL puts less strain on legacy occurrence policies and the reinsurance that supports them.

Finally, our quarterly "Tech Tips" column follows the Technology Committee program on data rooms at the Fall Conference. Titled "Efficient Data Security: The Use of Data Rooms in Arbitration," authors Barry Weissman from Carlton Fields Jordan Burt and Michael Menapace from Wiggins and Dana explain the pluses and minuses of using a data room as a means of keeping arbitration information secure.

Please enjoy this first *Quarterly* of 2019; our next issue is a special one. I won't spoil the surprise, but expect to see articles from some familiar faces from the recent past. Please also keep your submissions coming. We are always interested in new articles from our members.

—Larry P. Schiffer

Umpire Roundtable: Deliberation Logistics

Moderated by Catherine Isely

Isely: I've gathered four ARIAS•U.S. certified professionals to talk about the logistics of arbitration deliberation: Katherine Billingham, Ann Field, Andrew Maneval, and Dick White. In total, they've served as umpire in, at last count, 137 arbitrations, and as arbitrators in another 200. We'll learn how these experienced panelists approach the nuts and bolts of deliberating when they're sitting in the middle seat—in short, what happens once the parties rest and the panel takes up its work.

Katherine, do you have a regular approach in conducting deliberations when you sit as umpire, or do those deliberations unfold differently based on your fellow panel members and their style?

Billingham: My default approach is to start out by approaching it issue by issue. Depending on what issues are before the panel will dictate the priority of those issues. Generally speaking, I might tackle the easiest issues first and ask each of the party-appointed arbitrators to express his or her views on a given issue, and try to identify agreements or commonalities of insights and capitalize on them. I might then summarize where the differences are—and hopefully we have more consensus than difference on a point—before I explain my own opinions.

Field: My approach is very similar. By the time you're in a deliberation, there's a culture and you already know how the team works together. You can develop your strategy based upon how your party arbitrators work successfully together or on how you will all work best as a three-person team.

I don't know that I have any set approach. I do consider the dynamics of the team, lay out some principles and make sure that I'm hearing from both sides. I will set the guidelines and what the expectations are, and make sure I apply them. I'll check in with the team to make sure they're comfortable with that approach, and I'll ask if anybody has different thoughts for proceeding or am I missing anything that we should consider.

Once we have an agreement on how we're going to tackle the issues, then we move forward. I treat it really as I would treat most business meetings: being very organized, having an agenda, having the respect and the buy-in of the team. I think that's an important part of being an umpire—keeping it professional, keeping it moving forward in a professional, healthy way. So, the basic guidelines are respecting one another, coming prepared, respecting each other's time, respecting each other's thought processes, keeping your emotions in check. It's about being appropriate and being professional.

Maneval: I like what I've heard so far. There's also a question that exists about when the deliberations should be scheduled and undertaken. There's obviously the question of whether the deliberations best follow immediately on the conclusion of the evidentiary hearing, whether there should be some period for post-hearing briefing, and whether there should be some period of reflection. There are a lot of different views that different arbitrators take to those questions.

Obviously, you have a tension between the risk of forgetting evidence that might be most pertinent the longer you wait, versus the danger of not giving the matter sufficient reflection or consideration if you immediately plunge right into the deliberations. My own preference is to try and get right into deliberations, unless a

case is so complicated or there are extrinsic strands of evidence or argument that ought to be considered, whether a briefing would be requested or not, that might warrant putting deliberations off for a period of time. I think the best idea is that these questions will have been addressed before the hearing even starts, or certainly before it concludes, so that the panel understands how it's approaching the way in which deliberations will be handled.

Isely: Section 5.3 of the ARIAS Practical Guide says, in many instances, it's best for the panel to commence and, if possible, conclude deliberations immediately after the parties have presented the case at the hearing. I hear you saying that in many instances that's your preference, but I think you make a solid argument, too, for a period of reflection, particularly when the case is more complicated. Dick, how do you like to start deliberations, and when do you like to start?

White: I normally like to start with a statement from me. Remember, we're doing this right after counsel has concluded with closing arguments, so I would have the benefit of that, and I would summarize what the dispute is and the various issues in the dispute. Oftentimes, in these closing arguments and even the final days of the hearing, some disputes kind of go away. Even though counsel may not remove them, as a practical matter, they've been essentially resolved. So I'll summarize that to get a sense of my co-panelists' views on the matters still remaining so we can dispense with them easily. That tends to bring in the party arbitrators to clarify my lack of clarity. They get to participate, and we get the discussion going just as a result of that process.

As to Andrew's point, I am a strong advocate for deliberations directly after the hearing, such that when we're planning during the hearing, counsel has to adjust as the week goes on. But if anybody has scheduling problems, I encourage everyone to give a lot of notice early so we don't run out of time for deliberations. Not that they have to be the final deliberations, but at least one pass through everything so we kind of understand where people are. I really abhor running out of the room to trains or planes without having some kind of discussion among the panel.

Field: Personally, I agree with Dick and Andrew, in that I still prefer to have as much of the deliberations at the conclusion of the hearing. I do think it's important while it's fresh. But if you need to postpone part of it or have deliberations at a later date, my preference is still to pick up the phone and have that dialogue. I think there are some arbitrators that prefer to send things in writing. It's my preference to do it orally. The parties have presented quite a bit in writing. Our job is to really be discussing that and vetting that together as a team.

Billingham: I also prefer to follow up by phone. I think it's just more efficient, and also you can get a better feel for where other people are coming from and better appreciate their viewpoints when you can hear it and there's more immediate give-and-take.

Isely: You've discussed how an umpire can encourage fruitful discussions in deliberations and set the stage for those being professional and civil. But sometimes, I imagine, deliberations can become more heated. How do you decide when and how to bring those deliberations to a close?

Maneval: Like everything, the question about deliberations continuing or how they would continue is contextual; it's very different depending on the circumstances. Again, I think to some extent it might relate to the complexity of the case. I've found, in any number of cases, that there was value in the panel members going off thinking about things a little more, and even potentially submitting some written thoughts to give some concrete expression to the points that have come in.

One thing that I think of as a fixed principle is that a panel wants time right after the hearing to get together, even if it's just to schedule what happens next. We've all said, ideally, there's deliberation that starts off right away. But you always want to make sure that the panel has gotten together to address what the process will be.

The question, then, is how does one draw deliberations to a conclusion, how does one end it, and so forth. That is, of course, also pertinent to the particular case and the degree of complexity and the feelings of the party-appointed arbitrators. I never like to cut off the party-appointed arbitrators' input until I think it is either purely repetitive—just covering ground that's been gone over before—or, in rare cases (and, in my case, totally absent), harassing or uncivil. But what panels want to do is give as much opportunity for input from both panel members as possible, because that's what the parties were bargaining for when they went with our system of arbitration.

Field: I agree with Andrew, but also I will recap my understanding of each side's position and give them the confidence that I understand the issues, I understand the arguments, I understand their positions, their views on the issues. This also allows me to make sure that I close that repetitive loop as well, where I feel I do have enough information to make that final decision. My colleagues will have that confidence

from my recap.

White: It may be somewhat controversial, but when you get to this point where it's kind of like loggerheads, I would normally raise the suggestion that, say, the minority, be that me or someone else, seriously consider a dissent here so that it's clear what this dispute is. I find that this tends to focus the majority's judgment, as well as the minority's, because now everybody has to document in writing why they think this is the way to run the railroad, as it were. Sometimes when you have to do that, it kind of clarifies things for the panel, and maybe there isn't an insuperable problem.

Where strong disagreement persists, I prefer the dissenting party to write why. When the hearing ends, the parties want to hear from their arbitrators—"how did I do, did I present our case effectively," and all that—and the panel has this kind of unwritten rule that one can say certain things and can't say others. And that's an almost impossible stance to maintain, because these discussions include voice inflection and often body language and so on. This way, if the dissenting arbitrator writes why they disagree, there is no worry about conversation. You've laid out exactly what the problem was. I do think the process is better off when the parties can see as much as possible, consistent with the ARIAS Code of Conduct, what went on in deliberations.

Field: On your idea of inviting folks to do a dissent, I once had an interesting situation where I felt the dissent was inappropriate and I had to provide a lot of guidance as the umpire. I think you're certainly entitled to do a dissent, but when it's including things that shouldn't necessarily be in a dissent, you can have another unique situation transpire.

Maneval: I was in a case as a party-appointed arbitrator where the other party-appointed arbitrator filed a dissent that disclosed deliberations, and intended to do so. That case ended up going to the U.S. Circuit Court eventually. The award was upheld, but there can be the danger of mischief in dissents.

Having said that, in my view, anytime there's a reasoned award I can't imagine being a dissenter and not writing a reasoned dissent. I know you don't have to as a dissenter; you can just say, "I dissent." But I would want to provide a dissenting, reasoned opinion, which was mentioned before, if it would help the process and the parties' understanding of what happened, and so forth, and provide context for what was important to the panel and why. So I would always expect a dissent that's reasoned when we have a reasoned majority opinion.

I also think it's important for the panel to understand that all matters are non-final until whatever drafts are contemplated have been completed. Recently, I was an umpire in a case that I thought was a very close case; it was an all-or-nothing kind of case. In my mind, it was sort of a 55-45 case, and then I saw the dissent and it made it a lot harder for me. It turned it into a 51-49 case. There were issues for me as an umpire to think about more fully. So, you don't want to miss the opportunity to see things expressed perhaps more clearly and forcefully in a dissent.

Isely: Comments to Canon 6 of the ARIAS Code of Conduct speak to these types of issues, including what can and can't be included. Now we want you to dish. Tell us your pet peeves and tell us particular qualities that you appreciate as deliberations are going on.

Billingham: I will say that I really appreciate when counsel is efficient and gets to the point, with not a lot of extraneous information or evidence that the panel has to consider. Certainly we want to give each party the full opportunity to present all evidence, but efficiency is one of the key things that helps the entire panel in processing the information, prioritizing it, and coming to an efficient and fair decision. The flip side of that is grandstanding; an arbitration process is probably not best suited for that sort of thing. But efficiency is certainly at the top of my list.

Isely: Dick, is there a practice that, during deliberations, you find frustrating or inefficient?

White: It's going to be surprising: My answer is no. Some of the people on this call have heard me say this before, but for the arbitrations I've been in, I've never served with a "brother-in-law." I use that as a term for someone who's hostage, who's in the tank for one party or the other. So the umpires and the party arbitrators with whom I've served, though often very aggressive and so on, that's what I expect. I don't find it offensive at all. In my own experience, I've not come across any behavior that I thought was untoward.

The one thing I value the most—which is not necessarily the fault of the arbitrator if they don't have it, but if they do it's extremely helpful to me, especially if I'm the umpire—is knowledge of the business at the time these contracts were entered into or these claims were settled, to know what's happening on the ground firsthand. That's very helpful. As the others here know, many of these disputes are in the nature of "custom and usage" and so on, and the issue(s) are not always clear. Lawyers will argue—Catherine, apologies to you—lawyers will argue, oh, it's

absolutely clear that's what the contract provides, but we know it's not that clear. So other arbitrators that have a sense of what's happening in the market at that time, I find helpful.

Maneval: The thing maybe I like best is when the party-appointed arbitrators are able, thoughtfully, to tie the factual evidence—whether it be testimonial or documentary—to the issues and the possible outcomes, to really have clarity about the record and the significance of evidence that had been developed in the record to what we're trying to decide.

That's complementary to Dick's point because, necessarily, the idea of bringing a general knowledge of the industry, especially when it's potentially decades old, is outside the record, or it can be. We've debated these kinds of things at ARIAS conferences, but I think everyone generally agrees that it's good to have the benefit that Dick referred to. That's part of the reason for picking arbitration. Yet, lawyers and people who are resolving disputes like to look at the record and say definitively what was proven and what wasn't. So, I think the idea of being able to combine both a careful understanding and appreciation of what's in the record with the business knowledge to know what might not have been said but infused everything that was said, is a quality that party-appointed arbitrators can bring in, and the umpire, too.

In terms of things that I don't like—maybe to some extent because of my experience as a litigating attorney a long, long time ago, like Dick, I don't mind the rough-and-tumble—people are going to feel strongly about these issues. But what I don't like is, if there's sort of an emerging clarity in the majority viewpoint in deliberations, a lot of times the party-appointed arbitrator whose viewpoint is faring less well will start to retreat and set up new efforts to pursue some type of unwarranted compromise. I think that, while the reinsurance arbitration process is way better than it used to be in this respect, compromises are fine where they are appropriate, but they're bad when they're not principle-based. I never like it when the side that's not doing well decides to take aim at achieving some lesser and, ultimately, inappropriate outcome.

Field: I would say that the qualities that I do appreciate in my fellow panel members during deliberations help the process go more smoothly—things like collaboration. Being prepared is a big one for me. I look to everybody on the panel to be prepared and be thoughtful and respectful. If you have those key elements, you can have very successful deliberations. Having industry experience in the room, it's what makes a panel really tick well. Whether it's the unconscious experience or conscious experience, it does help the discussions, and I don't see it as being an issue necessarily having anything that's outside of the record, but we do bring our experience to that room.

I would say it's nice to hear my colleagues generally have had positive experiences in their arbitration panels to date. I'd say, overall, I have as well. I'm sure people are going to be more persuasive than others or more aggressive than others, and you deal with that and you deal with it professionally. My hope is that every umpire is doing that. I would say, for me, the behavior that I find disappointing is when I see a panel member who just pushes every issue and does not really listen or try to build some consensus somewhere. There has to be some point or issue that they can agree on, or you start losing credibility for that particular arbitrator. For me, that's a bit of a pet peeve. It doesn't always bene-

"... [C]ompromises are fine where they are appropriate, but they're bad when they're not principle-based. I never like it when the side that's not doing well decides to take aim at achieving some lesser and, ultimately, inappropriate outcome."
—Andrew Maneval

fit that arbitrator, and they need to think about that and how they are approaching every situation, because you tend to lose credibility.

Billingham: Andrew had said, and I agree, that parties have strong feelings about their case. By "grandstanding," I'm not referring to the impassioned arguments of counsel—I think that's great and can even be useful. What I'm referring to is undignified conduct, or casting aspersions on the other side. I haven't seen that very often, but it has happened.

I would dovetail on my colleagues' comments about having experienced people on the panel and, when it adds value to the case, having experts give testimony. But particularly having an experienced panel that understands the history of the issues, the history of the treaties, and has a broader appreciation for the context in which the issues might have arisen.

This roundtable discussion was reported by Aline Akelis, Winter Reporting, and later edited for clarity and length.

Katherine Billingham has 35 years of reinsurance and insurance experience as an attorney, arbitrator and mediator. She currently serves as vice president and general counsel for Scottish Re, a life reinsurance company. She is an ARIAS-Certified Arbitrator and Mediator and a certified neutral with the American Arbitration Association.

Ann L. Field is a senior vice president and the executive director of client services in North America with Willis Re, Inc. She is an ARIAS-Certified Arbitrator and a licensed attorney with more than 23 years of significant experience in reinsurance and insurance coverage issues, arbitration, and litigation. She has served as an arbitrator or umpire on more than 35 insurance and reinsurance **arbitrations.**

Andrew Maneval is president of Chesham Consulting, LLC, providing arbitration and mediation services. He is an ARIAS-Certified Arbitrator and Umpire, an AIRROC- and FINRA-certified arbitrator, and a New Hampshire court mediator. He previously served as president, COO, and board chair of First State Insurance Company and New England Reinsurance Corp. and was responsible for run-off operations at the Hartford Financial Services Group.

Dick White is the deputy liquidator of Integrity Insurance Company in Paramus, New Jersey, and has an extensive background in the financial and insurance communities. During his professional career, his responsibilities have included finance, accounting, insurance, reinsurance billing and collection, arbitrations, and forensic accounting. He is a certified public accountant and has been an adjunct faculty member at several universities.

Catherine Isely is a partner at Butler Rubin Saltarelli & Boyd LLP, where she litigates complex commercial disputes on behalf of local, national, and global businesses and represents clients in complex mediations and high-stakes commercial arbitrations. Much of her work involves mass torts, product or premises liability actions, workers' compensation claims, or environmental property damage disputes.

Resolving Urgent Threats to an Arbitration's Viability and Integrity

By Susan E. Mack and Angela N. Grewal

This article explores the topic of exigent circumstances in arbitration, which formed the basis for a panel presentation at the ARIAS•U.S. Fall 2018 Conference titled "Emergency First Aid: How to Quickly Resolve Hearing 'Burns'." Ms. Mack moderated the panel, which also consisted of David M. Loper, senior vice president and senior counsel for Protective Life Insurance Company, and Neal Moglin, partner and chair of the Insurance and Regulatory Practice Group at Foley & Lardner LLP. Ms. Mack acknowledges her indebtedness to Mr. Moglin and Mr. Loper for their unselfish dedication of their time as well as their insights and contributions to this article.

The Federal Arbitration Act (FAA), 9 U.S.C. Sections 1-307, appears to stand as a solid bulwark against arbitration irregularities. FAA Section 12 provides that a "motion to vacate … must be served upon the adverse party or his attorney within three months after the award is filed or delivered." But any party, counsel, or, indeed, serving arbitrator confronted by urgent and unusual circumstances will want to act to protect the integrity and viability of arbitration proceedings while the arbitral process is ongoing.

All participants to arbitration proceedings need pragmatic and immediate solutions to treat emergency situations that could well result in injury to the arbitral process. This article outlines instances in which proceedings require emergency first aid and suggests ways to effect a cure.

Viewed from the perspective of counsel to a party involved in an arbitration proceeding, these considerations are particularly timely. The realities of achieving vacatur of an award in federal court appear to be diminishing. Retained counsel acting on behalf of parties to reinsurance arbitrations undoubtedly have committed to memory FAA Section 10(a), which provides grounds for vacating an award in a reinsurance arbitration proceeding. The grounds are, in relevant part, as follows:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

During her keynote address at the ARIAS•U.S. Fall 2018 conference, Judge Shira Scheindlin stated her perspective that, as to arbitrations, vacatur is rarely granted and is even more rarely upheld on appeal. These views concur

with those of the authors and likely of many other current reinsurance arbitration participants. If a party's chances of achieving vacatur of an arbitration award marred by irregularities are indeed slim, its counsel should endeavor to take all appropriate measures to ensure that irregularities are addressed during the process.

Panel Member Issues

Death.[1] Invariably, ARIAS panels consist of two party-appointed arbitrators and an umpire. If an arbitrator or umpire dies and leaves an incomplete panel, the choice is for parties, through counsel, to either replace the umpire or party-appointed arbitrator or, alternatively, re-constitute the entire panel. While the reinsurance contract should be looked to first for the answer to this question, typically the contract does not provide explicit guidance on this point. In the absence of on-point authority from the reinsurance contract, parties and their counsel may look to existing guidance from the federal courts to answer the question of which measure is appropriate.

Addressing this precise question is the seminal Second Circuit case of *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66, 68 (2d Cir. 1992), which holds that the "general rule" is that "where one member of a three-person arbitration panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew with a full panel."

The logic behind the so-called "general rule" is best summarized by stating that the expense and time entailed in starting afresh with a new arbitration panel are outweighed by the disadvantages sustained by the party who must appoint a new arbitrator to an established panel. The reasoning is as follows:

> … it is unfair to require a party to continue an arbitral proceeding after its chosen arbitrator has died, because the party would be disadvantaged by having a substitute join the remaining panel members after they have 'worked together and been exposed to each other's influence,' and after the deceased arbitrator has had some subtle and unknowable effect on them. *Insurance Co. of North America v. Public Service Mutual Insurance Co.*, 609 F.3d 122,129-130 (2d Cir. 2010) (case deals with arbitrator resignation), quoting *Cia de Navegacion Omsil, A.A. v. Hugo Neu Corp.*, 359 F.Supp. 898, 899 (S.D.N.Y. 1973.)

The *Marine Products* "general rule" appears fairly expansive, but it has important qualifications. This rule is applicable only where the arbitration clause of the relevant contract does not anticipate the vacancy, and in order to mandate full panel replacement, the arbitrator's or umpire's death must take place before the panel arrives at an award. The court distinguished the earlier case of *Trade & Transport Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191 (2d Cir. 1991), where the Second Circuit upheld the district court's decision to replace a single arbitrator when one of the arbitrators died after the panel had rendered a partial final award, setting forth liability but not damages. Similarly, in a subsequent case in Connecticut federal court—in circumstances where the arbitrators heard all the evidence and argument, discussed the issues, and reached a final decision, but one arbitrator died prior to issuing the written award—the remaining arbitrators had full authority to make a valid award. *Success Village Apartments, Inc. v. Amalgamated Loc. 376 UAW*, 357 F. Supp. 2d 446, 448 (D. Conn. 2005).

Outside the rendering of a partial final award, are there any "special circumstances" that merit replacement of a single panel member as opposed to the entire panel? Another federal district court within the Second Circuit so indicated, in *Pemex-Refinancion v. Tbilisi Shipping Co.*, No. 04 Civ. 027005 (HB), 2004 U.S. Dist. LEXIS 17478 (S.D.N.Y Aug. 29, 2004). The court followed the "general rule" and authorized replacing the entire panel where a party arbitrator died *after* a 10-year proceeding but *before* the panel deliberated. The court specified, however, that special circumstances would exist if the death had occurred very early in the arbitral proceedings.

Finally, outside the Second Circuit, authority exists for two arbitrators continuing on to render an award upon the death of the third arbitrator where applicable arbitration rules so authorize. In an instance in which the contract's arbitration clause incorporated the "neutral" rules of the American Arbitration Association (AAA), and those "neutral" rules permitted only two arbitrators to rule in the event of the third arbitrator's death, the Tenth Circuit held that the remaining neutral arbitrators could determine whether it was necessary to repeat all or part of the hearing. *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822,832-33 (10th Cir. 2005). Notably, the entire panel had already reached its conclusions regarding liability; only the damages issue remained for the two arbitrators to consider.

Resignation. While the resignation of an arbitrator or umpire creates a panel vacancy, a resignation can also be a special situation fraught with possibilities for gaming the arbitral process. The Second Circuit's opinion in *Insurance Co. of North America vs. Public Service Mutual Insurance Co.* 609 F.3d 122,129-130 (2d Cir. 2010), states a persuasive rationale for treating an arbitrator vacancy due to resignation differently than an arbitrator vacancy due to death. In opting to replace a single arbitrator rather than starting afresh with an entirely new panel, the case indicated that applying a rule to replace the entire panel would "open the door to significant potential for manipulation." Id. at 130. The court hypothesized, among other circumstances, that "a party receiving unfavorable interim rulings would have an incentive to invite the member he designated to resign to forestall an anticipated ultimate defeat."

Appearing to tacitly reason along the same lines as the *Public Service* court, the Eighth Circuit declined to adopt the *Marine Products* "general rule" in the context of a resignation of a member. *National American Insurance Co. v. Transamerica Occidental Life Insurance Co.*, 328 F.3d 462, 466 (8th Cir. 2003). In that case, the reinsurer's party-appointed arbitrator resigned for health reasons. Thereafter, the reinsurer petitioned for an entirely new panel after having previously lost several discovery disputes in the proceeding. The Seventh Circuit's decision in *Wellpoint, Inc. v. John Hancock Life Insurance Co.*, 576 F.3d 643 (7th Cir. 2009) is in accord with this rejection of the *Marine Products* "general rule" when the panel member vacancy is caused by resignation, not death.

Unforeseen disability of a panel member; apparent racial, ethnic, or gender bias by a panel member. Unlike the circumstance of a panel member's death or resignation, which can well be addressed by counsel to the parties, certain irregularities in a proceeding are earliest (and perhaps most completely) viewed and addressed by the remaining members of the particular arbitration panel. Accordingly, this section will focus on how emergency first aid is best administered by a panel member himself or herself.

Let's consider the situation any concerned panel member may encounter where either the other arbitrator or the umpire exhibits obvious hearing difficulties (and either does not possess or refuses to wear hearing aids). In one such real-life situation, the arbitrator with the hearing problem indicated that he was following the proceedings via real-time transcription as a backstop. However, a concerned panel member might question the other arbitrator's ability to judge witness credibility, because voice inflections cannot be readily comprehended.

Let's also consider the instance where a concerned arbitrator is appointed to a panel, and another panel member evinces signs that he or she does not fully understand or grasp the proceedings. This situation poses grave dangers to the integrity of the process, given that the apparently impaired arbitrator or umpire may lack the capacity to both control the proceedings and reach a just result.

Optimally, the other two panel members should agree jointly to bring the impairment to the attention of the affected panel member. In particularly severe situations, such as the apparent

In recent years, counsel have used the tactic of refusing to provide a "hold harmless" agreement to a party arbitrator who has routinely been appointed by just cedents or reinsurers. Under well-established law, the targeted party-appointed arbitrator is well protected, regardless of whether the appointing party, through counsel, seeks an order mandating the provision of an executed "hold harmless" agreement in the particular arbitration proceeding.

senility of the umpire, the other panel members should ask the umpire to step down. There will, however, be instances in which one concerned panel member alone wishes to address another panel member's impairment. Common sense dictates that the panel member should proceed with care if the impaired individual is the umpire, because that individual could be the decision maker in this case. Where, for example, a concerned party-appointed arbitrator would observe, on the record, that the other party-appointed arbitrator is evincing hearing difficulties, he or she may simply go ahead and ask all present to speak up (perhaps in view of the allegedly noisy heating or cooling systems) so the umpire can appreciate the proceedings.

Interestingly, while the ARIAS•U.S. Code of Conduct does not currently speak to the issue of the impaired party-appointed arbitrator or umpire, the AAA maintains arbitrator and mediator fitness requirements that mandate reporting of arbitrator impairment. In relevant part, these requirements impose the obligation to self-report to the AAA "any personal, physical or mental condition that may impair … ability to fully execute their responsibilities during all phases of a case." Similarly, the requirements impose reporting responsibilities on panel members who observe impairment in an umpire or other arbitrator. The authors urge ARIAS to consider a similar rule so that the issue of impairment may be solved head-on rather than touched upon in an oblique and ad hoc manner.

Concerned panel members' practical difficulties in discerning and dealing with impaired arbitrators or umpires pale in comparison to the practicalities of combating possible gender, racial or other bias evidenced by the umpire. Impairment is much more likely to be identified for what it is, but even affected individuals may attribute circumstances evincing bias to be no more than "a panel not getting along." No arbitrator wants truly to believe that an umpire is doing anything other than his or her utmost to administer the proceedings fairly.

But let's consider this apparent gender bias example: the instance of a male umpire, a male arbitrator and a female arbitrator. When the male arbitrator indicates to the umpire that he would like to discuss the merits of a particular objection made by counsel, the umpire willingly takes a break to so consider. But when the "different" arbitrator so indicates that a break is needed to discuss a particular evidentiary ruling, the umpire rules without allowing the "different" arbitrator to be heard.

In such an eventuality, there are practical tips to employ without escalating the situation by using the term *bias*. For example, during a break in the proceedings, the female arbitrator can describe the pattern of behavior she observes and ask for the same treatment as her colleague. But what if that does not suffice? Just as a single aggrieved panel member could currently do in the event of another panel member's impairment, the female arbitrator can resort to the only existing recourse—namely, ARIAS Code Canon 6, Paragraph 3. In relevant part, that paragraph, contained in the Confidentiality Canon, states as follows:

> Notwithstanding the previous sentence [regarding the confidentiality of deliberations], an arbitrator may put such deliberations or communications on the record in the proceedings (whether in a dissent or in a communication to all parties and panel members) to the extent (but only to the extent) reasonably necessary to expose serious wrongdoing of one or more panel member, including actions that are contemplated by Section 10 (a) of the Federal Arbitration Act.

Where the panel's interactions have revealed the presence of impairment or bias on the part of panel members and all attempts at "first aid" to immediately remedy these circumstances have failed, the aggrieved panel member can and should place his or her concerns on the record, especially during the hearing. Admittedly, this is an extreme measure and not a ready cure-all.[2] If an umpire is at all disposed toward the aggrieved arbitrator's positions, this recourse may adversely affect the outcome. But, in extreme circumstances, noting an injustice is justified. Not only are the grounds preserved for vacatur, but this unusual step—taken in the course of the proceedings—may awaken the parties and counsel to agree to consider a solution.

Counsel Issues

Failing to "abstain from all offensive personality." In the authors' experience, most counsel routinely representing parties in reinsurance arbitrations are professional toward each other, the parties and the panel. A few attorneys, however, do not abide by the rule contained within the Florida Bar's oath sworn by newly admitted lawyers: namely, "to refrain from all offensive personality." In the event that raised voices, histrionics and other unprofessional conduct are employed by one or more counsel in a reinsurance arbitration, a unified panel must take

firm, immediate action to stress that the behavior will not be countenanced. A message from the umpire on the record—repeated as necessary—is the most effective means of both stopping the conduct and assuring counsel that such measures are counter-productive.

Refusal to provide all panel member(s) with hold harmless agreements. In recent years, counsel have used the tactic of refusing to provide a "hold harmless" agreement to a party arbitrator who has routinely been appointed by just cedents or reinsurers. Of course, that party arbitrator is the one also named by the party that counsel does not represent. Under well-established law, the targeted party-appointed arbitrator is well protected, regardless of whether the appointing party, through counsel, seeks an order mandating the provision of an executed "hold harmless" agreement in the particular arbitration proceeding.

Austern v. Chicago Board Options Exchange, 898 F.2d 882 (2d Cir. 1990), is instructive, holding that arbitrators acting in their official capacities are immunized from civil liability. No "hold harmless" agreement was involved. The case involved an appellant suing an appellee for fees incurred in a lawsuit successfully contending that appellee had appointed arbitrators without providing the appellant due notice. The court held that both the appellee and all involved arbitrators could not be held liable for fulfilling their authorized functions.

For those arbitrators who prudently continue to insist upon a signed "hold harmless" agreement, substantial case law exists to compel signature. In *Indemnity Insurance Co. v. Mandell*, 30 A.D. 3d 1129 (N.Y. App. Div. 2006), the court granted a motion to compel an executed hold harmless agreement for the arbitrators. The court reasoned that the agreement was consistent with protections the arbitrators are already entitled to under the rule that arbitrators are immune from liability for acts performed in their arbitral capacity. In the context of bankruptcy, the court in *Pacific Employers Insurance Co. v. Moglia*, 365 B. R. 863 (N.D. Ill. 2007) compelled the trustee to sign a "hold harmless" agreement despite his objections. The court held that the panel's hold harmless requirement reasonably and properly served to facilitate the arbitration proceeding.

Process Issues

Pre-organizational meeting motions. In certain cases, counsel may "rush the panel" by presenting a motion before the organizational meeting commences. Should this occur, the nascent panel must consider whether a unilateral motion is presented or whether both parties are seeking relief or clarification prior to the panel being constituted. Further, the panel should determine if the motion relates to a procedural issue (such as the timing or location of the organizational meeting) or if the question is more substantive (confidentiality or pre-answer security?).

Should the panel members confer and at least a majority decide that an "emergency" ruling is desirable, the panel should enlist counsel's cooperation in proceeding. A workable solution to implement would be for (a) the party arbitrators to provide complete up-to-date disclosures in writing, (b) the umpire to update his or her umpire questionnaire responses in writing, and (c) counsel be asked for acceptance of the panel and to provide a hold harmless agreement as a condition of taking up the issue prior to a more formal organizational meeting.

Variance of contested motion protocol. In other instances after the organizational meeting, counsel may argue that emergency circumstances have arisen. A contested motion must be heard as soon as possible, without resorting to lengthier timelines agreed to at the organizational meeting.

If both parties, through counsel, agree that facts present an emergency, it may be difficult for a busy panel to deal with the dispute on an emergency basis. The panel will need to communicate its members' limitations to the parties so the parties can be heard regarding appropriate work-arounds. Possible solutions include adjusting the briefing schedule, adjourning another case-related deadline (if that is what is causing the issue), and, as a last resort, having the parties reach an agreement for only the individual motion to be resolved by less than full panel.

If the parties do not agree that the motion should be heard on an urgent basis, the panel will need to decide if this is an emergency or something else. The likely "something else" includes (a) an attempt by one party to truncate the other side's time for responding, (b) posturing or hyperbole by the movant's counsel, and (c) a timing problem created in whole or in large part by the movant. Even if the movant is blameless and is presenting a true emergency, care must be taken not to jeopardize the other party's rights by unduly truncating the briefing schedule without regard to its counsel's ability to respond.

Conclusion

While definite guidance exists to steer parties and their counsel in the exigent event of arbitrator vacancy due to death or resignation, no clear or completely helpful path currently exists to guide arbitrators in protecting the integrity of the arbitral process if the proceedings are threatened by panelist impairment or bias. In the event of untoward behavior by counsel, the best "first aid" is a united panel, an effective umpire, and a firm grasp on current favorable case law regarding panel member indemnification. Emergencies in the course of motion practice are most quickly and fairly resolved by a panel that looks first to the motivation behind the emergency and, second, to malleable solutions to effect efficient solutions.

NOTES

1. The authors are aware of the irony of using the term *emergency first aid* when it appears adjacent to a discussion of the death of a panel member. Remember, our goal is to apply measures to protect the ongoing viability of the arbitral process, even if we have to mourn the loss of one of our colleagues.
2. The fragility of the solution forms the basis for the recommendation of adopting a rule similar to that of the AAA's requirements in the specific instance of panel member impairment.

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Consolidation of Disputes by Arbitration Panels

By Robert M. Hall

Reinsurance disputes can involve multiple contracts between the same parties, related parties and unrelated parties. In addition, they can involve multiple distinct claims under one or more contracts. The great majority of contracts, including the contracts in the cases cited below, do not contain provisions allowing consolidation of claims and/or parties.

Panelists (particularly non-lawyer panelists) may question whether they or the courts should decide whether to consolidate these disputes and, if so, how to do it. The purpose of this article is to give panelists some confidence as to their authority in a variety of factual circumstances.

First, some background is helpful. The great majority of insurance and reinsurance arbitrations are governed by the Federal Arbitration Act (FAA). The underlying motivation for the FAA was to ensure the agreement of parties to arbitrate. Because the act was designed to overrule the historical refusal of the judiciary to enforce agreements to arbitrate, it follows that a court is not permitted to interfere with private arbitration arrangements in order to impose its own view of speed and economy. This is the case even where the result would be the possibly inefficient maintenance of separate proceedings.[1]

The U.S. Supreme Court has handed down two opinions that are helpful on consolidation issues: *Howsam* v. *Dean Witter Reynolds*, 537 U.S. 79 (2002), and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). A highly simplified description of the holdings in these cases is that the courts decide "arbitrability" (whether there is an agreement to arbitrate and whether the dispute falls within that agreement) and panelists decide "procedural" issues. Just what constitutes a procedural issue was not entirely clear from the decisions, but subsequent case law has helped to elucidate this term with respect to consolidation.

Same issue between same parties on layers of same program. This very common fact situation was at issue in *Employers Insurance Co. of Wausau v. Century Indemnity Co.*, 443 F.3d 573 (7th Cir. 2006). Century ceded two layers of reinsurance to Employers; Employers declined to pay a claim that penetrated both layers. Employers acknowledged its obligation to arbitrate the claim, but opposed Century's effort to arbitrate the dispute in one proceeding. Employers argued that the issue of consolidation was one of arbitrability to be addressed by the court. The court disagreed and found it is one of procedure for the panel:

> We find based on *Howsam* that the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve. It does not involve whether Wausau and Century are bound by an arbitration clause or whether the arbitration clause covers the Aqua-Chem policies. Instead, the consolidation

> question concerns grievance procedures—i.e., whether Century can be required to participate in one arbitration covering both Agreements, or in an arbitration with other reinsurers.[2]

Same issue under multiple contracts between same parties. A union had the same grievance under three different contracts with the same party in *Shaw's Supermarket, Inc. v. United Food & Commercial Workers Union Local 791*, 321 F.3d 251 (1st Cir. 2003). The union asked that the American Arbitration Association (AAA) consolidate the grievances into one proceeding on the same issue, and Shaw's asked the court to prohibit it. The court ruled that the issue of consolidation was for the arbitrator:

> Leaving the decision whether to consolidate the three proceedings in the hands of the arbitrator comports with long-standing precedent resolving ambiguities regarding the scope of arbitration in favor of arbitrability. "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to Arbitrability."[3]

Certain Underwriters at Lloyd's London v. Westchester Fire Insurance Co., 489 F.3d 580 (3rd Cir. 2007), involved two sets of reinsurance treaties between the parties. The cedent, Westchester, demanded a consolidated arbitration for each set of treaties, and Underwriters contested this effort. The court ordered Underwriters to appoint an arbitrator for each demand and for the arbitrators to consider the consolidation issue:

> The Underwriters protest that there is no contractual authority for a threshold proceeding before an arbitrator on consolidation under each program. Yet, Westchester Fire's demands for arbitration under the . . . treaties are based on express contractual language between the parties that calls for tri-partite arbitration. Whether requiring the Underwriters to select an arbitrator for each program is consistent with the contractual language will be appropriately resolved by the arbitrators once the panels are convened.[4]

See also *American Centennial Insurance Co. v. National Casualty* Co., 951 F.2d 107 (6th Cir. 1991).

Multiple contracts and multiple affiliates. *Employers Insurance Co. of Wausau v. Hartford*, 2018 U.S. Dist. LEXIS 205345 (C.D. Cal. 2018), involved 19 reinsurance contracts and multiple Hartford affiliates. Hartford wanted to consolidate all disputes under all contracts and parties into a single proceeding. The court ruled that consolidation in this fact situation was a procedural matter for an arbitration panel and ordered Hartford to proceed with umpire selection on the one treaty in which it was the cedent.

Multiple contracts with managing general agency. In *Certain Underwriters at Lloyds v. Cravens Dargen* & Co., 197 Fed. Appx. 645 (9th Cir. 2006), a managing general agent filed for arbitration and asked the arbitrator to consolidate disputes under a number of contracts. Underwriters opposed this and sought multiple arbitrations. The court declined to prohibit the arbitrator from considering the issue of a consolidated arbitration, as it was a procedural issue.

Multiple disputes under same contract. A series of union grievances under the same collective bargaining agreement were at issue in *Avon Products, Inc. v. International Union, United Auto Workers*, 386 F.2d 651 (8th Cir. 1967). The agreement called for grievances to be referred to an arbitrator, but did not specify whether the grievances should be heard individually or consolidated into one proceeding. The court found that this was a procedural issue for the first arbitrator appointed:

> [T]he first arbitrator must determine whether the grievances are to be resolved in a single or in multiple proceedings. The arbitrator clause is not so clear that it can be said with positive assurance that disputes must be submitted individually, nor is it so clear that it can be said that the union has a right to insist on hearing all grievances in one proceeding.[5]

One or more arbitrators. The issue was whether the AAA rules called for one or three arbitrators in *Dockser* v. *Schwartzbert*, 433 F3d 421 (4th Cir. 2006). The court ruled that this was a procedural issue for the arbitrators: "We conclude that the question of the number of arbitrators is one of arbitration procedure, and that the parties' agreement does nothing to overcome the presumption that such questions are for arbitral, rather than judicial, resolution."[6]

Consolidation with a third party. In *Protective Life Insurance Corp. v. Lincoln National Life Insurance Corp.*, 873 F.2d 281 (11th Cir. 1989), one of the parties to a dispute subject to arbitration objected to consolidations of a dispute with a third party. The district court issued a consolidation order, but the court of appeals overruled, stating, "Parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in."[7] It is not evident from the

decision whether the court believed the panel had the power to consolidate under these facts.

Comments

Arbitrators can feel confident that as long as there is no consolidation provision in the relevant contract, the issue of consolidation of disputes is one for the arbitration panel and not for the court. This is not to say an arbitration panel can make any consolidation it chooses to make.

For instance, if disputes involving multiple treaties are consolidated, which wording takes precedence? If parties are consolidated into an existing dispute, do those parties lose a contractual right to appoint an arbitrator? Are objections to these eventualities a basis to overturn a panel's "procedural" decision on consolidation? Perhaps these issues will be the next chapter in the saga of consolidation litigation.

NOTES

1. *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991).
2. 443 F.3d at 577.
3. 321 F.3d at 254 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 68 n. 8 [1995]).
4. 489 F.3d at 587-8.
5. 386 F.2d at 210.
6. 433 F.3d at 425.
7. 873 F.2d at 282.

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Overlooking Environmental Coverages in an Allocation Battle Could Be Costly

By John E. DeLascio

As the allocation battles continue to rage over long-tail environmental claims, an area that may often be overlooked is the appropriate allocation to the policyholder for failing to have obtained the very insurance that was specifically designed to cover environmental losses: environmental impairment liability (EIL) coverage. As insurers sought to eliminate coverage for pollution claims through the pollution exclusions appearing in general liability policies in the 1970s and 1980s, EIL coverage emerged and was designed to specifically cover environmental risks. Yet, this environmental coverage is sometimes overlooked in the allocation disputes between general liability insurers and their policyholders.

Insurers and practitioners should be alerted that the failure to consider these available EIL coverages may result in saddling the legacy general liability insurers (and their reinsurers) with significantly higher costs and allocation shares. In addition, policyholders may escape paying their full share of the environmental losses. When parties in allocation disputes fail to recognize that this environmental coverage was readily available, there may be a higher allocation and cost to the historic general liability insurers. The argument that pollution losses allocated to the periods of time when the pollution exclusions applied should somehow be borne by the earlier or historic general liability insurers is misguided and wrongheaded for several reasons.

Of course, when general liability insurers sought to use pollution exclusions to eliminate insurance coverage for environmental losses under their general liability policies, the intent was not to increase the liabilities imposed on the previously issued and expired general liability policies. On the contrary, EIL coverage was introduced to provide coverage for environmental risks (under its own terms and conditions). Moreover, to reward policyholders who simply decided to ignore or forego this available environmental coverage and significant risk management mechanism would undermine important public policy goals.

The failure to fully factor in these EIL coverages (and some general confusion in this area) can be attributed to several reasons discussed below, including the evolving nature of the environmental insurance products as well as some fundamental misunderstandings regarding the EIL products and the markets in which they were sold.

Emergence of EIL Insurance

The EIL coverage line first emerged in the 1970s as the general public was awakening to a new environmental awareness and new liabilities created by federal legislation. Since its introduction, EIL insurance has been in "a constant evolution."[1] One state supreme court observed that "… [a]s the environmental movement gained momentum in the 1970s, the insurance industry began to offer separate Environmental Impairment Liability policies to cover pollution risks."[2] Some have explained that EIL coverage was designed to fill a "gap" created by the pollution exclusions included in general liability policies.[3]

EIL coverage was actively marketed in the United States in the late 1970s and early 1980s, partly in response to financial responsibility regulations the U.S. Environmental Protection Agency (EPA) adopted under the Resource Conservation and Recovery Act of 1976 (RCRA).[4] "Several courts and commentators have noted that EIL was designed to fill a coverage gap created by the 'sudden and accident' pollution exclusion in the 1973 CGL policy form."[5] The market for insurance to cover environmental risks further emerged in the mid-1980s when the absolute pollution exclusion was incorporated into standard form general liability policies.[6] For the most part, this environmental coverage developed on a claims-made basis as opposed to an occurrence basis.[7]

The relevant inquiry is not limited to whether an insured was able to continue obtaining coverage for the particular risk in the same policy type; it may take into account whether the insured could purchase coverage of another policy type that would have provided similar coverage. *Olin Corp. v. Insurance Co. of N. Am.*, 221 F.3d 307, 326 (2d Cir. 2000). "If coverage under one type of policy becomes unavailable by exclusion, and the insurance customer can but does not buy the excluded coverage separately or in another policy type, it follows that the customer has opted to self-insure." *Id.* at 326. In *Olin Corp.*, the court specifically noted the availability of "environmental impairment liability" insurance policies after CGL policies were not available without pollution exclusion clauses. *Id.* at 325. *See also, Decker Mfg. Corp. v. Travelers Indem. Co.*, 106 F.Supp.3d 892, 898 (W.D. Mich. 2015).[8]

Although EIL insurance came into existence to provide coverage for pollution losses that were to be excluded under general liability policies, it appears to have been overlooked in many allocation disputes between policyholders and their general liability insurers.[9]

Responsibility for Uninsured Periods

The majority rule for environmental claims is that long-tail losses are allocated on a *pro rata* basis.[10] Courts applying a *pro rata* allocation have recognized that the responsibility for uninsured periods rests squarely on policyholders.[11] Generally speaking, a *pro rata* allocation methodology recognizes the basic fairness of allocating shares or percentages of the environmental loss to the policyholders for periods in which they did not have insurance coverage and/or decided to "go bare."[12] The vast majority of decisions applying a *pro rata* allocation methodology require the policyholder to contribute for "bare" periods, regardless of whether applicable insurance was "available" or unavailable."[13]

To the extent that a few jurisdictions have recognized the so-called "unavailability" exception, the focus in those matters has been markedly askew, and the available EIL coverages should not be overlooked. In New Jersey, for example, an insured facing progressive environmental contamination or property damage is responsible for periods during which insurance was available in the market but the insured chose to retain or self-insure the risk. *See Owens-Illinois, Inc. v. United States Ins. Co.,* 138 N.J. 437 (1997). As the New Jersey Supreme Court explained, "… [w]hen periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable." *Owens-Illinois,* 138 N.J. at 479. Courts in these jurisdictions have made it clear that insureds (not insurers) are held responsible for any risk retained and not transferred by their failure to purchase insurance if it was available in the market. *See, e.g., Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.,* 179 N.J. 87, 101 (2002) ("Policyholders who chose to 'go bare' or underinsure must sustain the burden of those choices").

Policyholders benefit from the fact that general liability insurers may sometimes overlook the fact that considerable environmental coverage products, such as EIL or cost cap policies, were available to policyholders. Instead, the parties to allocation disputes appear to focus upon the availability of other general liability or occurrence-based policies after 1986.

A failure to properly allocate to policyholders under this unavailability myth can be attributed to three main factors. First, policyholders historically have underutilized available environmental coverages such as EIL.[14] Second, general liability insurers may, in some instances, fail to factor in or appreciate these potential environmental coverages in the allocation disputes, which might be explained by a possible lack of familiarity with the claims-made coverage lines (among other reasons). Third, there has been some confusion in this area as the EIL products and market evolved; however, the EIL market rebounded by the 1990s. In fact, there is considerable evidence—from industry experts, public court filings and vintage insurer advertisements—that relatively inexpensive coverage was readily available to companies (and municipalities) or other prospective policyholders in the 1990s and 2000s.

EIL: Underutilized and Unique Coverage

Some have noted that "the history of insurance coverage for site environmental risks reveals a confusing array of different names for the same policy but one constant throughout the close relationship between the policy and environmental law."[15] Generally speaking, the environmental coverages that were available for pollution conditions arising from environmental sites post-1986 included (a) EIL, (b) remediation cost cap insurance ("cost cap"), (c) property transfer liability insurance, and (d) environmental protection program insurance (EPP).

These coverages have several unique features that distinguish them from general liability, such as the claims-made feature. For example, a "cost cap" policy is a "policy designed to protect the insured against the risk that the environmental clean-ups that it undertook would be more expensive than anticipated."[16] As one New York federal court explained, "… [t]he cost cap policy covers the insured for clean-up costs, as defined in the remedial study, that are above the anticipated cost of cleanup." *Frazier Exton Dev., LP. v. Kemper Entv'l, Ltd.,* 2004 U.S. Dist. LEXIS 14602, S.D.N.Y. July 29, 2004) at ⋆6, n. 5 (citations omitted). The court further explained that "… [t]he policy is designed to address the risk and uncertainty associated with beginning an environmental remediation project … attaches above the expected cleanup costs (self-insured retention) … " *Id.* at ⋆6 n. 5 (citations omitted). Typically, substantial analytical data, agency-approved work plans, sophisticated cost estimates and formal contractor quotations are necessary to underwrite cost cap policies. *Id.* (citations omitted). To those in the general liability arena, the unique cost-cap policy features, the underwriting process and the cost cap policy's application to a known contaminated site may seem unusual or counterintuitive.

The EIL Market

When confronted with the issue of whether EIL coverages were available in the context of dispute with a policyholder, industry experts who either underwrote or brokered these coverages during the relevant time period may be helpful in establishing that different types of environmental insurance could have been packaged together to insure all the known and unknown environmental legacy costs that developed over time at the sites. In that regard, there is considerable evidence that insurance policies offering full historical pollution coverage with significant limits of liability and policy terms ranging between 10 and 30 years were available for purchase from top-rated insurance companies by the mid-1990s.

Generally speaking, policyholders could have purchased environmental insurance policies in the 1990s and 2000s to insure their losses for underlying claims, and this available coverage should not be ignored in an allocation dispute. One industry expert, David Dybdahl of the American Risk Management Resources Network, LLC, who has written extensively on the topic, notes that conditions for environmental insurance had significantly improved by the early 1990s, leading to a "hypercompetitive" insurance market by the late 1990s. As a result of this evolving market, insurers aggressively targeted a wide variety of companies (including chemical manufacturers) that had actual or potential environmental liabilities at sites they owned or operated. Based on research into broker archives and public court files, liability limits of $75 million and more were available for purchase by the late 1990s, and amounts in excess of $200 million were available by the early 2000s.

In an allocation dispute between general liability insurers and policyholders, the failure to factor in a potential allocation to these available environmental coverages could be rather costly. For example, initially allocating the first $75 or $100 million in "available" claims-made environmental coverage to a policyholder could certainly impact any allocation analysis. General liability insurers and their counsel should be armed with this knowledge in the allocation battles ahead.

NOTES

1. Dybdahl, David. 2015. "*Environmental Insurance: Just the Facts*." Expert commentary. International Risk Management Institute.
2. *Doerr v. Mobil Oil Corp*. 774 So.2d 119, 126 (La. S. Ct. 2000).
3. See, e.g., *Rhone-Poulenc, Inc. v. Int'l Ins. Co.*, No. 94 C 3303, 1996 U.S. Dist. LEXIS 8000 at *30-*44 (N.D. Ill. June 11, 1996) ("the EIL coverage clearly was intended to provide primary coverage for residual pollution to fill the gaps that developed in CGL coverage"); *Olin Corp. v. Ins. Co. of N. Am.*, 986 F. Supp. 841, 844 (S.D.N.Y. 1997) ("… a substitute form of insurance appeared in the marketplace designed to fill the gap created by the pollution exclusions in the CGL policies").
4. See, e.g., 33-193 Appleman on Insurance Law & Practice Archive § 193.02 (2nd 2011 citing 42 U.S.C. § 6901, et seq.
5. See Mitchell Lathrop, Insurance Coverage for Environmental Claims § 5.02[1] ("Environmental impairment liability (EIL) insurance, also known as pollution liability, is a creature of the post-RCRA era.").
6. Id.
7. Howard, William H. 2005. New Issues in Environmental Risk Insurance. 40 Tort & Ins. L.O. 957.
8. Cooke, Susan M. 2018. 5 Law of Hazardous Waste § 19.07. See also David Dybdahl, User's Guide to Environmental Insurance.
9. Only a few courts have considered the coordination of coverage between commercial general liability contracts written on the occurrence basis and claims made contracts that are not commercial general liability contracts. See Scott M. Seaman and Jason R. Schulze, Allocation of Losses in Complex Insurance Coverage Claims (7th Ed., 2018) at Chapter 6.3. See, e.g., in *Viacom Int'l Inc. v. Admiral Ins. Co.*, No. L-1739-99 2006 WL 1060504 (N.J. Sup. Ct. App. Div. April 21, 2006) (addressing the allocation of indemnity obligations

between an environmental impairment liability "claims-made" insurance contract and CGL "occurrence" contracts and determining that, under Pennsylvania law, the EIL coverage would apply to the loss).

10. Seaman, Scott. M. 2017. "Door Closing on 'Unavailability' Exception: Part 1." Law 360. Jan. 9.
11. See Scott M. Seaman and Jason R. Schulze, Allocation of Losses in Complex Insurance Coverage Claims, Chapter 4 at 129 (7th Ed. Nov. 2018).
12. See Scott M. Seaman and Jason R. Schulze, Allocation of Losses in Complex Insurance Coverage Claims, Chapter 4 at 129-146 (7th Ed. Nov. 2018).
13. Id.
14. Experts note that "[e]nvironmental insurance is vastly underutilized as a risk management tool." Dybdal, David. 2000. "*A User's Guide to Real Environmental Insurance.*" Environmental Claims Journal, 12(4): 23-35.
15. Neuman, Susan. 2015. "Tailored Site Environmental Insurance for Post-Remedial Risks." T*exas Environmental Law Journal*, 45(3): 295-316.
16. Hudson Environmental Serv., *Inc. v. New Jersey Property-Liability Guar. Ass'n*, 372 N.J. Super. 284, 287 (2004).

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Butler Rubin Mergers with Porter Wright, Adding Reinsurance Practice Area

On February 1, Butler Rubin Saltarelli & Boyd LLP merged with Porter Wright Morris & Arthur LLP, adding reinsurance to the latter's 30-plus practice areas.

Established in Chicago in 1980, Butler Rubin focused on insurance and reinsurance as well as on resolving complex disputes in areas such as financial services, health care, and manufacturing. Butler Rubin will now operate under Porter Wright's name, and Butler Rubin's Chicago office will become Porter Wright's eighth location. Butler Rubin partners Ira Belcove and Teresa Snider have been named co-chairs of Porter Wright's Reinsurance Litigation and Arbitration Practice Group, which serves insurance and reinsurance clients.

Porter Wright, based in Columbus, Ohio, added an office in Pittsburgh in 2017 and is now further expanding its footprint by moving into Chicago. Porter Wright is the first full-service law firm headquartered in Columbus to enter the Chicago market.

In Memoriam: Timothy Temple McCaffrey

Timothy McCaffrey, an ARIAS-Certified Arbitrator and the last chief legal officer of General Reinsurance Corporation, passed away February 2 at his home in Connecticut.

Timothy worked for 35 years in the insurance and reinsurance business, retiring as senior vice president and general counsel of General Re. Prior to that, he was chief legal officer for National Reinsurance Company, the Zurich Insurance Company U.S., and the Continental Insurance Companies. He also served as an arbitrator for 25 years on reinsurance dispute arbitrations.

He received a B.A. with honors from Harvard University (1961) and earned a law degree from Columbia University (1965).

Newly Certified Arbitrators

Earl Imhoff was formerly a divisional senior vice president of claims with Great American Insurance Group, where he founded and managed the Legacy and Outsourced Claims Division, which initially handled run-off of the group's asbestos and environmental liabilities and expanded to handle a wide range of liability and specialty claims. He also served during that period as vice president and assistant general counsel of American Premier Underwriters, the successor corporation to the Penn Central Transportation Company, where he administered the historical environmental and occupational liabilities of, and claims against, the railroad. Before going in-house, Earl provided counsel to foreign and domestic insurers and policyholders for more than 23 years while in private law practice in Los Angeles and San Francisco. During his career as a practicing lawyer, he encountered and observed defense and coverage issues, usually from the perspectives of the marine and energy market, long-tail environmental and toxic tort, premises liability, workplace and occupational injury, catastrophic bodily injury, and property damage claims. Since his retirement from Great American, Earl has accepted retentions as a testifying consultant and expert witness from law firms, insurers and reinsurers and has appeared in several dozen cases on both U.S. coasts and throughout the Midwest. He has also served as a party-appointed arbitrator in several insurance and reinsurance disputes.

Christopher Harris is an independent arbitrator and a seasoned CEO and board member with over 25 years of global insurance and reinsurance experience. Mr. Harris serves as a non-executive director and executive adviser for a portfolio of companies.

Chris served as CEO and President and board member of Montpelier Re Holdings Ltd. (NYSE: MRH), a $2 billion Bermuda-based property and casualty reinsurer from 2008 to 2015. Mr. Harris led 200+ employees and managed operations in Bermuda, the Lloyd's market, and the U.S.

Prior to his CEO role, Mr. Harris served as Chief Underwriting Officer, Chief Risk Officer, and Chief Actuary for Montpelier. He also managed the actuarial and risk consulting practice for a large firm and served in an underwriting management role for a large US commercial insurer.

His professional designations include Fellow of the Casualty Actuarial Society, Chartered Financial Analyst (CFA), and Chartered Property and Casualty Underwriter (CPCU).

Karen Schmitt is an actuary by training but spent over 20 years in C-Suite positions in reinsurance and insurance companies in domestic and international markets. Most recently she was the Chief Financial Officer of Bermuda-based Maiden Holdings, Ltd. and previously was President of Maiden's US operations. Throughout her career Karen has had responsibility for Underwriting, Claims, Finance, Marketing, as well as Actuarial. She is a Fellow of both the Casualty Actuarial Society nd the Canadian Institute of Actuaries, a Chartered Enterprise Risk Analyst and a Wharton MBA.

Karen has provided testimony as a Company representative for both arbitration and litigated matters. She has been involved in underwriting and negotiating reinsurance agreements, including commutations and retrocessional transactions, from both company and reinsurer perspectives. Throughout her 38-year career she has had experience with most property and casualty lines, including accident and health.

Tim Bolden is currently Chief Compliance Officer and Deputy General Counsel of American Fidelity Corporation. With thirty-five years' experience in the practice of law, Tim has served in leadership roles in the law, litigation, and compliance functions of several life insurers including Provident Life, Protective Life, CIGNA, Assurant, and AIG American General. He has comprehensive experience as in-house counsel in life company operations in the US and Bermuda. Tim has been responsible for the management and defense of hundreds of cases for insurers involving life, health, disability, annuities, and errors and omissions matters. In addition, he has prior experience as an AAA neutral arbitrator.

The Use of Data Rooms in Arbitration

By Barry Weissman and Michael Menapace

A couple of years ago, the ARIAS • U.S. Board of Directors adopted the *Practical Guide to Data Security in Reinsurance Arbitrations*, which had been drafted by the ARIAS Technology Committee with the input of member companies. Since then, the Technology Committee has presented workshops at ARIAS conferences and written articles about various aspects of the *Practical Guide*, including secure email, encryption, and metadata scrubbing.

At the Fall 2018 Conference, the committee presented a session to introduce one of the tools that is available to protect sensitive data—data rooms, sometimes referred to as deal rooms. This article explains what a data room is and how it works, describes the advantages and limitations of using a data room, and offers practical tips about when to use one.

Data Rooms Defined

It is important to recognize that data rooms are one tool among many. Like all tools, a data room is not appropriate for every job. Not every arbitration will or should use a data room, but in the right situation, they can be very effective.

At its core, a data room is a shared electronic repository. Transactional lawyers use "deal rooms," often in M&A situations. In that context, the parties conducting due diligence on each other upload documents and other information to a deal room. That information can then be made available to anyone authorized to view and review the information.

In the context of an arbitration, the parties can set up a data room and upload their discovery documents, legal briefs, and any other materials they choose to the room. This can eliminate the need to send large amounts of paper via FedEx or electronic records via a hard drive. The data room information lives on a website run by a data room host company.

Benefits and Disadvantages

Among the advantages of using a data room is security—access is limited to only those people the parties agree should have access. Companies concerned about protecting sensitive data can take comfort in knowing that paper copies are not lost, thumb drives are not misplaced, electronic files are not forwarded to people to whom they are not intended, and so on.

Another advantage is ease of access to documents. There is no need to print documents and carry binders of exhibits when everything can be accessed and reviewed in real time with a computer and an Internet connection.

A related advantage is that the parties, lawyers, and arbitrators can access the data room and be assured that everyone is looking at the same document. This can help avoid copying issues, mix-ups due to pages that are no longer in their original order, or different people referring to different versions of the same document.

Once a party loads a document into a data room, the electronic settings can be adjusted so that only certain people can access that document. For example, if the parties decide to put all of their discovery documents in the data room, they might also decide that the arbitrators will have access only to the documents that the parties intend to use as hearing exhibits. A party could also decide to put all of its documents

in the data room for storage and restrict the adverse party from viewing those documents that are privileged. (While this is easily accomplished, the risks of miscoding a privileged document may lead parties to decide to not load any privileged documents into the data room in the first place.)

Another advantage of a data room is the ability to search all documents in the data room on a global basis. This means it is not necessary to look at every page to find key documents.

If the amount of money at issue is small, the cost of the data room may not be an insignificant expense. Likewise, for arbitrations that are not particularly document heavy, the cost of a data room may not make sense. Even in such circumstances, however, the parties may decide that paying for the ease of access and security that come with using a data room is worth the cost.

We acknowledge that new technology can be a barrier to some. While most data room host companies have a user interface that is relatively simple, there is a learning curve the first time a person uses a data room.

Depending on the level of access granted by the producing party, some documents may not be available to download from the data room, which can be a disadvantage for those who still prefer to live in an analog paper universe. In other words, a user may only be able to *view* the document, not save it on his or her computer's hard drive. Likewise, parties can decide to make certain documents unavailable for printing—that is, for viewing only.

Finally, cost can be an advantage, especially in arbitrations that involve a large volume of documents. The cost to print, copy and ship boxes of paper can be avoided by using a data room. As a rough guide, a data room that allows access to 15–20 people costs approximately $14,000 for one year ($7,000 per party). There is no additional cost for storing documents in the database—the only charge is for the number of licenses needed. If we consider that a standard box can hold 5,000 pages of paper and it costs 10 cents per page to copy (i.e., $500) and $75–$100 to ship, a data room can make financial sense if the parties anticipate needing more than 14 boxes of paper per side.

Practical Tips

At the ARIAS Fall 2018 Conference, Sarah Arad of Intralinks joined our presentation and provided a live demonstration of a data room that her company had created specifically for our session. That live demonstration was significantly more effective that our ability to describe in words what the workings of the data room look like. Nonetheless, the look of most data rooms is similar to a typical email account. Files can be set up and individual documents listed where one would typically see the list of emails in the account.

At the start of the arbitration, the parties must establish an agreeable protocol for the room's use to ensure it is used efficiently. Among the topics the parties should discuss are (1) which documents will be put into the data room, (2) who will have access, (3) the level of access the various users will have, and (4) what to do if a privileged document is inadvertently made available to the other party. These issues are not all that different from the discussions that parties should have about basic discovery in any arbitration—they simply are in a different format.

Once a party loads a document into a data room, the electronic settings can be adjusted so that only certain people can access that document. For example, if the parties decide to put all of their discovery documents in the data room, they might also decide that the arbitrators will have access only to the documents that the parties intend to use as hearing exhibits.

Here are our practical tips for using data rooms in arbitration:

1. Talk upfront about protocols.
2. Provide training for all parties using the data room. This should be provided at no extra cost by the data room host company.
3. Provide training for the arbitrators. Again, this should be done at no extra cost by the host company.
4. The host company should have a single point of contact for questions that arbitrators or parties may have about the technical aspects of the data room. (The best host companies have 24/7 telephone support.)
5. The parties should make sure that all documents loaded are searchable and that a single search can be performed across all documents and folders.
6. Clearly name the loaded documents and the files in which they are stored.
7. Most host companies do not use production numbers on documents. The parties should, therefore, stamp each document with an ID number before loading them into the data room.
8. A good host company should provide the option of an audit trail that tracks who logs into the data room and which documents they access. In most instances, this information will not be necessary, but parties should nonetheless use the audit trail feature. We recommend, however, that the parties stipulate that the host company will not make the audit trail available to the parties until after the arbitration is concluded so that no one can track what the other party or the other arbitrators are reviewing during the dispute. The reason for the audit trial is to comply with the data security requirements of certain jurisdictions. Parties should retain the audit trail after the dispute is concluded.

In summary, the use of data rooms has advantage and disadvantages. The parties should consider the needs of the individual dispute and consider whether a data room is the appropriate tool in each instance.

The authors specifically wish to thank Sarah Arad and Intralinks for providing valuable advice in developing the conference session and this article and for participating in the conference sessions.

Barry L. Weissman is a shareholder at Carlton Fields and represents insurance and reinsurance companies in regulatory and transactional matters as well as in all forms of dispute resolution including arbitration, litigation, and mediation. He has served as outside general counsel to several insurance companies and works closely with the senior management of various reinsurance and insurance companies on avoiding and handling dispute resolution, contract drafting, and regulatory issues.

Michael Menapace teaches insurance law at the Quinnipiac University School of Law and advises insurers on policy construction, coverage, compliance, and regulatory issues. He is co-editor of The Handbook on Additional Insureds (ABA 2012) and has litigated numerous disputes concerning insurance and reinsurance coverage and allocation among policies. He also advises companies on privacy and data protection issues and defends companies facing potential data breach liability.

Women's Resource Groups Hold Networking Event

On January 10, the two ARIAS•U.S. New York/New Jersey/Connecticut Women's Resource Groups (WRGs) joined forces for the first networking event of the year, hosted at Tressler LLP. Royce Cohen (Tressler), Kathryn Christ (Swiss Re American Holding Corp.), and Seema Misra (AIG) organized a presentation, titled "Building a Coalition of Allies."

The presentation used an interactive format to discuss building relationships. Guest speaker Nikki MacCallum, a career development coach and stand-up comic, engaged the attendees in a discussion of methodologies and tools that can help effectively leverage connections.

More than 20 attendees mingled and networked, both before and after the presentation. All agreed that the luncheon provided a great launch to the new year.

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