Arbitrating Direct Insurance Disputes: Three Perspectives

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Q2 · 2018

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FEATURES

Arbitrating Direct Insurance Disputes: Three Perspectives

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During the past several conferences, ARIAS·U.S. has explored the expansion of its traditional reinsurance arbitration platform to various non-reinsurance insurance disputes. Although (as has been pointed out) the original goals of ARIAS include insurance arbitration, the reality is that ARIAS primarily has focused its efforts on reinsurance arbitration.

This edition of the *Quarterly* presents three articles on the prospects of ARIAS consciously expanding into various forms of insurance arbitration. One article, by Everett J. Cygal and Robert Murphy of Schiff Hardin LLP, addresses state law restrictions on arbitration of insurance coverage disputes and explores the legal issues concerning whether direct insurance arbitrations are even allowed in some jurisdictions. Another article provides observations from David W. Ichel and Carlos A. Romero, Jr., two ARIAS-certified arbitrators, on their personal experiences with both policyholder and reinsurance arbitrations. The third article in this series is from Peter Rosen of Latham & Watkins, who offers a policyholder perspective on the expansion of ARIAS into direct insurance arbitrations and gives us something to think about as a path forward. This series should help illuminate the ongoing discussion about how and whether ARIAS should expand its product reach into the various forms of insurance arbitration.

And now for something completely different: This issue of the *Quarterly* has a useful article from the dynamic duo of Debra and Bob Hall that explores the issuance and enforcement of arbitral subpoenas, including the authority of panels to conduct third-party pre-hearing discovery. This article will be helpful to panels when being asked to issue subpoenas to third parties.

Following up from the emerging issues roundtable at the 2017 ARIAS spring conference, Thomas P. Bernier and Brendan H. Fitzpatrick of Goldberg Segalla present a thought-provoking piece on nanotechnology. Their article, "New Evidence that Carbon Nanotubes Have Potential to Cause Mesothelioma," suggests that yet another round of long-tail exposure continuing injury claims may be on the horizon.

The ARIAS Technology Committee's periodic Tech Corner column is back as well. In this edition, committee member David Winters of Butler Rubin Saltarelli & Boyd LLP follows up on the *ARIAS Practical Guide for Information Security in Arbitrations* with tips on keeping confidential information confidential. This article shares some practical experience in addressing information security issues.

Finally, this issue contains an article focusing on our fall meeting location, Brooklyn. As you know, ARIAS is leaving the island of Manhattan for the County of Kings for its fall 2018 conference. Suman Chakraborty of Squire Patton Boggs (US) LLP provides some insights into his Brooklyn.

On a personal note, in the last *Quarterly*, the "Members on the Move" column mentioned John Nonna's move from Squire Patton Boggs to the Office of County Attorney for the County of Westchester, New York. John and I worked together for 33 years starting in 1984, when John joined Werner & Kennedy from Reid & Priest. I was already at Werner & Kennedy as an associate, having joined Dick Kennedy in 1982 from a clerkship at the Appellate Division, Second Department.

During this period of time, reinsurance disputes started becoming more frequent, and John and I were fortunate enough to work on some of the biggest cases together. In 1999, we closed Werner & Kennedy and joined LeBoeuf, Lamb, Greene & MacRae, which then combined to form Dewey & LeBoeuf. After Dewey & LeBoeuf had its "issues," we moved to Patton Boggs, which combined to form Squire Patton Boggs in 2014.

Thirty-three years is a long time to work with someone. While all of us in the industry will miss John, he is now living out one of his dreams, which is to serve in a significant governmental capacity as a public servant. Yes, he was mayor of Pleasantville and a Westchester County legislator, but county attorney is a major accomplishment and an opportunity that he just could not pass up. I couldn't be happier for John. And who knows, don't be surprised if you see a familiar face lurking around an ARIAS reception at a fall conference once in a while (don't tell Sara I said that).

— Larry P. Schiffer

State Law Restrictions on Arbitration of Insurance Coverage Disputes

By Everett J. Cygal and Robert Murphy

The reinsurance community has consistently supported arbitration as a means of resolving disputes. Indeed, a portion of the recent 2017 ARIAS·U.S. Fall Conference was devoted to the issue of arbitration of direct insurance disputes. The consensus of most of those presentations was that, in many contexts involving sophisticated insureds, arbitration of coverage disputes before panels of industry experts can provide benefits to both insurer and insured.

Many of the conference participants urged the insurance industry to expand the use of arbitration clauses in at least some of the policies it issues. This article considers whether arbitration clauses, when included in a policy of insurance, are enforceable. We conclude that, in many states, arbitration clauses are not enforceable.

Statutory Exclusions

A significant number of states, including states that have enacted one of the prevailing versions of the Uniform Arbitration Act (UAA), have restricted binding arbitration clauses in insurance contracts. These restrictions are typically found in one of two places: general laws governing arbitration and state insurance codes.[1]

States with valid insurance contract exclusions in their general arbitration laws include Georgia, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, Nebraska, Oklahoma, South Carolina, and South Dakota.[2] States with arbitration exclusions in their insurance codes include Hawaii, Virginia, and Washington.[3]

A few states have exclusions for particular types of insurance contracts: Illinois (imposing additional requirements to arbitrate health care negligence claims); Iowa (voiding arbitration clauses in adhesion contracts); Mississippi (voiding arbitration clauses in uninsured motorist policies); Rhode Island (voiding arbitration clauses in life insurance policies); West Virginia (voiding clauses in uninsured and underinsured motorist policies); and Wyoming (barring the inclusion of arbitration

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clauses in uninsured motorist coverage, but allowing such terms if contained in a separate written agreement).[4] In Rhode Island, arbitration is allowed only at the option of the insured.[5]

A small number of states also impose explicit opt-out or disclosure requirements on arbitration clauses in insurance contracts: California (imposing disclosure requirements for arbitration clauses in health care service plans); Nevada (imposing arbitration clause opt-out requirements in health care insurance contracts); and Tennessee (requiring insureds to sign or initial arbitration clauses in some specific contexts, including insurance policies relating to residential or farm properties).[6] This is in addition to the general regulatory requirement in many states that an insurer specifically notify insureds at the time of renewal about changes in policy terms.[7]

Arbitration of disputes involving reinsurance and other forms of risk transfer between insurance companies is usually not restricted, presumably on that theory that it constitutes "insurance between consenting adults."

Sometimes these limited or special restrictions apply only to certain kinds of personal lines coverages. For example, Maryland's statute voids arbitration clauses in contracts where the insured is an individual, Oklahoma only allows insurance arbitration clauses when the insurance is "between insurance companies," and Iowa refuses to enforce arbitration clauses in "contracts of adhesion."[8]

Arbitration of disputes involving reinsurance and other forms of risk transfer between insurance companies is usually not restricted, presumably on that theory that it constitutes "insurance between consenting adults."[9] But some state's exemptions are not so circumscribed and at least arguably apply to reinsurance contracts as well: South Carolina, Virginia, and Washington all feature language voiding any arbitration clause in any contract for insurance.[10]

Interplay Between the FAA and McCarran-Ferguson

Under the Federal Arbitration Act (FAA), an arbitration clause in a contract involved in interstate commerce is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[11] and the FAA pre-empts state laws requiring a judicial forum for resolution of claims. This language reflects a "liberal federal policy favoring arbitration" and pre-empts state laws "prohibit[ing] outright the arbitration of a particular type of claim."[12]

The McCarran-Ferguson Act, on the other hand, was enacted to limit congressional pre-emption of state regulation of insurance. Under McCarran-Ferguson, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[13]

Thus, in certain circumstances, McCarran-Ferguson exempts state laws from FAA pre-emption. Briefly, McCarran-Ferguson would reverse pre-empt the FAA only if "(1) the FAA does not specifically relate to insurance; (2) the state law invalidating the arbitration agreement was enacted to regulate the business of insurance; and (3) the FAA would invalidate, impair, or supersede that state law."[14]

In the great majority of circumstances, a narrowly directed state statute invalidating arbitration of coverage disputes will meet the above tests and be sustained. To better understand the limits of McCarran-Ferguson reverse pre-emption, it may be useful to review a handful of cases in which arbitration bans were not sustained by the state courts, notwithstanding a state law prohibiting arbitration of coverage disputes.

The Alabama Supreme Court, in *Central Reserve Life Insurance Co. v. Fox* (Hon. Roy Moore dissenting), invalidated a law that on its face banned arbitration of coverage disputes, but the court never referenced McCarran-Ferguson in its decision.[15] There is a good reason it

didn't: the anti-arbitration statute applied to all contracts, not just contracts of insurance. Thus, the statute was not part of an overall scheme of insurance regulation and did not fall within the scope of McCarran-Ferguson.

In *Courville v. Allied Professionals Insurance Co.*, the court held that, as a general matter, McCarran-Ferguson does pre-empt the FAA. In the unique circumstances before the court, however, the state law prohibiting arbitration was itself pre-empted by an obscure federal statute, the Liability Risk Retention Act of 1986 (LRRA), thus rendering the McCarran-Ferguson reverse pre-emption inapplicable.[16]

Towe Hester & Erwin, Inc. v. Kansas City Fire & Marine Insurance Co. and *Bixler v. Next Fin. Grp., Inc.* involved suits against an insurance agency (Towe Hester) and a broker selling a variable annuity insurance contract (Bixler).[17] As the courts properly pointed out, however, an insurance agency is not involved in the "business of insurance" as the Supreme Court has defined the term in its decisions involving the McCarran-Ferguson Act. McCarran-Ferguson only reaches activity constituting the narrowly defined "business of insurance," which in turn usually involves the regulation of insurer-insured relationships.

Finally, *Little v. Allstate Insurance Co.* involved the not-uncommon situation of the state arbitration act (in this case, Vermont's) excluding arbitration of insurance coverage disputes from the scope of the act.[18] The court reasoned that this exclusion meant that the validity of agreements to arbitrate coverage disputes were thus determined by reference to Vermont common law. While Vermont common law apparently rendered arbitrations unenforce-

able, the court held that the common law was not "enacted" for the purpose of regulating insurance and thus was not subject to the protection of the McCarran-Ferguson Act. In the absence of McCarran-Ferguson protection, Vermont's common law prohibition on arbitration was pre-empted by the FAA.

While *Little* appears to be the only state court case of its kind, many state arbitration acts similarly exclude arbitration of insurance from the scope of the act.[19] These state statutes are commonly thought to prohibit arbitration of coverage disputes, but Little demonstrates there is another way to interpret these statutes.

Conclusion

There are a number of reasons why many insurance coverage lawyers believe that arbitration could be made more generally available for resolution of coverage disputes. After all, coverage arbitration is not generally prohibited under the laws of many of the most important commercial states, like New York, California, Texas, Illinois, Ohio, and New Jersey. The prevalence of Bermuda Form arbitrations is another factor encouraging those who advocate arbitration of coverage disputes. Even so, coverage arbitration is arguably prohibited in about a dozen and a half states (including Georgia, Maryland, Virginia, and Washington), and that fact alone places real constraints on the viability of including arbitration clauses in insurance policies.

While there is little case law interpreting the reach of state arbitration coverage exclusions,[20] it is only prudent to expect litigation regarding the enforceability of an arbitration clause if one is included. A resolution of that issue will depend on many factors, including where a risk or insured is determined to be located. In an age where commercial insureds routinely conduct their businesses in numerous jurisdictions, it is impractical to expect that an underwriter could determine, at the time of policy issuance, whether an arbitration clause is appropriate in a particular case, especially when even a demand for arbitration might give rise in some states to a claim for extra-contractual damages.

NOTES

1. Many states, either in their insurance codes or in their specific version of the Uniform Arbitration Act, have expressly prohibited the arbitration of insurance coverage disputes. States have liberally altered the supposedly "uniform" UAA so that it does not compel arbitration of insurance contracts. See, e.g., NEB. REV. STAT. § 25-2602.01(f)(4) (binding arbitration provision in UAA does not apply to insurance policies in most cases). So, while the UAA provides a common foundation for many states' arbitration laws, it doesn't create actual uniformity.
   Furthermore, there are two different UAAs—the 1955 version (amended in 1956) and the 2000 version—and both are called the Uniform Arbitration Act. In fact, there are some states that have enacted both the 1955 UAA and the 2000 UAA. In Arizona, a court used the 1955 form of the UAA to work around a provision in the revised UAA stating that the 2000 UAA did not apply to arbitration clauses in insurance contracts. *Tessler v. Progressive Preferred Insurance Co.*, 2015 WL 5612123, at *3 n.6 (Ariz. Ct. App. Sept. 24, 2015).
2. GA. CODE ANN. § 9-9-2(c)(3); KAN. STAT. ANN. § 5-401(c)(1) (although there have been attempts to amend this, such as 2017 Kansas House Bill 2186); KY. REV. STAT. ANN. § 417.050(2); LA. STAT. ANN. § 22:868; MD CODE ANN., (CTS. & JUD. PROC.) § 3-206.1; MO. REV. STAT. § 435.350, MONT. CODE ANN. § 27-5-114(2)(c); NEB. REV. STAT. § 25-2602.01(f)(4); OK. STAT. tit. 12, § 1855; S.C. CODE ANN. § 15-48-10(b)(4), S.D. CODIFIED LAWS § 21-25A-3. But see *Little v. Allstate Insurance Co.*, 705 A.2d 538, 539 (Vt. 1997).
3. HAW. REV. STAT. § 431:10-221(a)(2); VA. CODE ANN. § 38.2-312; WASH. REV. CODE 48.18.200(1)(b). See *State Department of Transportation v. James River Insurance Co.*, 292 P.3d 118 (Wash. 2013) (en banc).
4. 710 ILL. COMP. STAT 15/3 et seq; IOWA CODE § 679A.1(2)(a); MISS. CODE ANN. § 83-11-109; R.I. GEN. LAWS § 27-4-13; W. VA. CODE § 33-6-31(g); WYO. ADMIN. CODE INS. Ch. 23, § 7.
5. See R.I. GEN. LAWS § 10-3-2 (allowing arbitration at the option of the insured).
6. CAL. HEALTH & SAFETY CODE § 1363.1; NEV. REV. STAT. § 689B.067; TENN. CODE ANN. § 29-5-302; *Merrimack Mutual Fire Insurance Co. v. Batts*, 59 S.W.3d 142, 151 (Tenn. Ct. App. 2001).
7. See, e.g., ILL. ADMIN. CODE tit. 50, § 753.10; WASH. ADMIN. CODE § 284-44A-050.
8. MD CODE ANN., (CTS. & JUD. PROC.) § 3-206.1; OKLA. STAT. tit. 12 § 1855(D); IOWA CODE § 679A.1(2)(a).
9. GA. CODE ANN. § 9-9-2(c)(3); KY. REV. STAT. ANN. § 417.050(2); NEB. REV. STAT. § 25-2602.01(f)(4).
10. See S.C. CODE ANN. § 15-48-10(b)(4); VA. CODE ANN. § 38.2-312; WASH. REV. CODE 48.18.200(1)(b).
11. 9 U.S.C. § 2.
12. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 341 (2011) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)).
13. 15 U.S.C. §1012(b).
14. *Moore v. Liberty National Life Insurance Co.*, 267 F.3d 1209, 1220 (11th Cir. 2001) (quoting *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999)).
15. *Central Reserve Life Insurance Co. v. Fox*, 869 So. 2d 1124 (Ala. 2003).
16. *Courville v. Allied Professionals Insurance Company*, 174 So. 3d 659, 669-673 (La. App. 2015).
17. *Towe Hester & Erwin, Inc. v. Kansas City Fire & Marine Insurance Co.*, 947 P.2d 594, 598-99 (Ok. Ct. App. 1997); *Bixler v. Next Financial Grp., Inc.*, 858 F. Supp. 2d 1136, 1146-47 (D. Mont. 2012).
18. *Little v. Allstate Insurance Co.*, 705 A.2d 538, 539 (Vt. 1997).
19. See GA. CODE ANN. § 9-9-2(c)(3) (arbitration provisions "shall not apply" to "any contract of insurance"); KAN. STAT. ANN. § 5-401(c) (provisions of arbitration act "shall not apply to ... [c]ontracts of insurance"); NEB REV. STAT. § 25-2602.01(f)(4) ("does not apply to ... any agreement ... relating to an insurance policy other than a contract between insurance companies including a reinsurance contract"); OK. STAT. tit. 12, § 1855 ("shall not apply to ... contracts with reference to insurance except for those contracts between insurance companies"); S.D. CODIFIED LAWS § 21-25A-3 ("does not apply to insurance policies").
20. There are very few cases construing the scope of the various state statutes restricting arbitration of coverage disputes. That is a little surprising, since the statutes are frequently ambiguously drafted and there are numerous circumstances in which the statute might or might not apply. Take, for example, GA. CODE ANN. § 9-9-2(c)(3), which provides in pertinent part: "this part shall not apply [to]: (3) Any contract of insurance, as defined in paragraph (1) of Code Section 33-1-2; provided, however, that nothing in this paragraph shall impair or prohibit the enforcement of or in any way invalidate an arbitration clause or provision in a contract between insurance companies." Read literally, all the Georgia statute provides is that the Georgia Arbitration Code does not apply to arbitration of coverage disputes, not that such arbitration is restricted. That might be a question to be resolved under Georgia common law, as was a similar issue in Vermont, *Little v. Allstate Insurance Co.*, 705 A.2d 538, 539 (Vt. 1997). Even if the Georgia statute and others like it are construed to prohibit coverage arbitration, the question remains: What is the scope of that prohibition? Would it apply to all policies written by an insurer domiciled in Georgia, or just to risks and insureds located in Georgia? Is the scope of the prohibition coterminous with the application of Georgia law to the insurance policy, or is it broader or narrower? Those are good and unresolved questions, but are the proper subject of another article.

Does ARIAS Have a Role to Play in Direct Insurance Arbitrations?

By Peter K. Rosen

Eight months ago, I joined two of my policyholder counsel colleagues, Mitchell Dolin of Covington and Paul Zevnik of Morgan Lewis, on a panel chaired by Deirdre Johnson, now of Squire Patton Boggs, to discuss ARIAS•U.S.'s potential foray into the arbitration of direct insurance coverage disputes. Perhaps to the surprise of many in our audience, we all said we were cautiously optimistic that ARIAS could develop an attractive arbitration product for direct insurance coverage disputes.

Why were we cautiously optimistic? First, as litigators and trial lawyers, we recognize that there is a greater emphasis on arbitration as a binding forum to resolve controversies. Many of our commercial clients see arbitration as an efficient, speedy, and confidential alternative to litigation to resolve controversies. Moreover, as I describe in more detail below, we are seeing more and more commercial insurance policies with arbitration as a method—sometimes a binding method—to resolve disputes about the policies.

Most of the policies we see, however, are form policies sold to our policyholder clients without much input from our clients or their brokers, especially concerning their alternative dispute resolution (ADR) provisions. As policyholder counsel, it behooves us to ensure that, if the only ADR method made available in our clients' policies is binding arbitration, the policies include a rules set that works with insurance coverage disputes. We also must be confident that the organization behind the development and implementation of this rules set is training and certifying arbitrators who are knowledgeable about direct insurance coverage disputes. As we discussed during our panel presentation, we see ARIAS (and its non-administered rules set) as a viable organization to provide this support.

Second, each of the arbitration and mediation organizations (e.g., the American Arbitration Association, JAMS, FedArb, the International Institute for Conflict Prevention & Resolution, and the International Chamber of Commerce) is encouraging its corporate members and their law firms to select it as the arbitration administrator (with its rules set) or as the provider of

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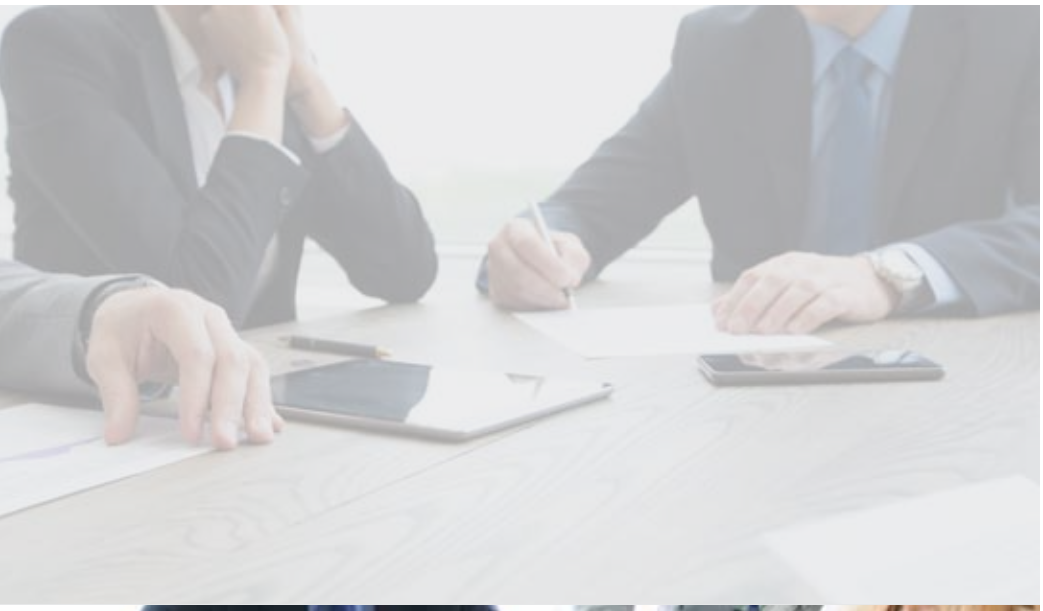

the non-administered rules set in the transactional agreements they sign and their law firms negotiate. For example, CPR, of which each of our firms is a member, has an online arbitration clause tool (available at https://www.cpradr.org/resource-center/model-clauses/clause-drafting/clause-selection-completion-tool) that its member clients and their law firms can use to draft arbitration clauses in their stock purchase agreements, merger agreements, and asset sales agreements. Similarly, JAMS provides that, if a rules set is not provided in an arbitration clause in which JAMS is designated as the arbitration administrator, the parties will default to JAMS' rules set (see https://www.jamsadr.com/rules-comprehensive-arbitration).

These organizations generally encourage the parties to match the rules set (and the administrator, if the arbitration is not self-administered) in all of the agreements governing a transaction or relationship, including the insurance policies that will be affected by the transactions. However, they don't yet provide the same level of training for, or the same degree of consistency among, insurance coverage dispute arbitrators and mediators that ARIAS can provide for direct insurance disputes arising out of these transactions (or, for that matter, any insurer-policyholder disputes). Similarly, while both JAMS and CPR have insurance coverage panels, both are largely self-selecting (with some level of scrutiny by the arbitration organization). Importantly, neither organization sponsors training for, or provides for certification of, mediators and arbitrators specializing in insurance disputes to an extent that is remotely similar to what ARIAS currently offers for reinsurance disputes (in Europe, the Chartered Institute of

Arbitrators offers training; see http://www.ciarb.org/). In the absence of training and certification, matching the rules set and, as appropriate, the administering arbitration organization set out in the underlying transactional documents may not make sense for the insurance policies that would come into play in the event there is an insurance coverage dispute arising under or out of the underlying transactional documents.

Coverage-in-Place Agreements

Third, aside from the policy-specific arbitration clauses discussed above, there are other areas of focus where ARIAS could provide meaningful arbitration products. Many coverage-in-place agreements provide for binding arbitration (during our panel discussion, we provided some examples). Following are three such agreements, one administered by the AAA, one administered by JAMS, and one utilizing CPR's non-administered arbitration rules.

Example #1

The Parties agree that they will attempt to resolve any dispute arising from this Settlement Agreement through good faith negotiations for a period of thirty (30) days after written notification regarding such dispute. Thereafter, if the dispute remains unresolved, the Parties agree to submit the dispute to mediation. The Parties will conduct the mediation in such a manner that it shall be completed within ninety (90) days after good faith negotiations have failed to resolve the dispute. Thereafter, if the dispute remains unresolved, the Parties agree to submit the dispute to binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect as of the Effective Date. Unless the Parties agree otherwise, mediation and/or arbitration shall take place in New York, New York.

Example #2

11.2. In the event the mediation fails to resolve such dispute within ninety (90) days of any Party's written request to mediate pursuant to Section 11.1, said dispute shall be submitted to and resolved by arbitration held through JAMS in New York, New York.

11.3. The dispute resolution procedures set forth in this Section 11 shall govern all disputes relating to, arising out or involving the construction or application of this Agreement, as well as any contention that a Party has failed to live up to is obligations under this Agreement.

Example #3

Binding Arbitration: If a mediated resolution to the dispute is not achieved within ninety (90) days of the selection of a mediator (or such additional time as the relevant Parties may agree in writing), any party may serve a written demand for arbitration of the unresolved dispute.

The unresolved dispute shall be submitted to binding arbitration . . . before a single arbitrator selected by the relevant Parties with substantial background in risk management or insurance coverage law. If the relevant Parties cannot agree on the arbitrator within (30) days of a written demand for arbitration, then a panel of three arbitrators shall be selected by the relevant Parties pursuant to the Center for Public Resources' Rules for Non-Administered Arbitration, subject to the relevant Parties' agreement that all three arbitrators shall have a substantial background in risk management or insurance coverage law. The costs of the arbitration shall be shared equally . . . Each party to the arbitration shall bear its own costs and fees, including attorneys' fees, in association with the arbitration.

Other coverage-in-place agreements provide for a multi-phase dispute resolution process—negotiation, mediation and arbitration—requiring the parties to select arbitrators with, as set out in Example #3 above, "substantial background in risk management or insurance coverage law." ARIAS clearly could provide a set of non-administered rules to govern coverage-in-place agreement arbitrations and supply certified arbitrators with the necessary background and experience.

Captive Insurance and Reinsurance

Captive insurance and reinsurance agreements are another opportunity for an ARIAS arbitration program. During our panel presentation, we highlighted the following provision in a captive insurance agreement:

XIX. GOVERNING LAW AND DISPUTE RESOLUTION

ARIAS clearly could provide a set of non-administered rules to govern coverage-in-place agreement arbitrations and supply certified arbitrators with the necessary background and experience.

Any dispute or claim arising out of or relating to this Agreement, including its formation and validity, shall be referred to arbitration. The arbitration shall be conducted in accordance with the ARIAS U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes.

Arbitration shall be initiated by the delivery, by mail, facsimile, or other reliable means, of a written demand for arbitration by one party to the other . . .

The parties agree to submit to binding arbitration. The arbitration proceedings shall take place before a single arbitrator appointed pursuant to the ARIAS·U.S. Umpire Selection Procedure. Such arbitrator shall be either a present or former executive officer of insurance or reinsurance companies in the United States of America and shall be certified by ARIAS·U.S. The arbitrator shall be disinterested, shall not be under the control of either party, and shall have no financial interest in the outcome of the arbitration.

In another example we provided during our panel presentation, we noted that the policy between the insured company and its captive insurer did not have an arbitration clause, but the reinsurance agreement between the captive and its reinsurers contained the following:

1. Any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, shall be settled by a panel of three arbitrators; [and]

4. The arbitration shall take place in New York City, N.Y., unless the arbitrators select another location. Insofar as the arbitration panel looks to substantive law, it shall consider the laws of New York.

We also pointed out that the provision in the captive reinsurance agreement between the captive insurer and the company's fronting insurer contained the following language:

Arbitration

a. As a condition precedent to any right of action hereunder, any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, shall be submitted for decision to a panel of three arbitrators . . .

d. All arbitrators shall have at least ten (10) years of insurance or reinsurance experience and be disinterested with knowledge about the lines of business at issue.

Specialty Insurance

As we note above, many of the specialty policies our clients purchase contain alternative dispute resolution clauses, all of which could benefit from an ARIAS-sponsored arbitration program. For example, AIG's public entity directors and officers liability insurance policy has contained an ADR clause for many years. Its current form provides as follows:

ADR Options: All disputes or differences which may arise under or in connection with this Coverage Section, whether arising before or after termination of this policy, including any determination of the amount of Loss, shall be submitted to an alternative dispute resolution (ADR) process as provided in this Clause. The Named Entity may elect the type of ADR process discussed below; provided, however, that absent a timely election, the Insurer may elect the type of ADR. In that case, the Named Entity shall have the right to reject the Insurer's choice of the type of ADR process at any time prior to its commencement, after which, the Insured's choice of ADR shall control.

ADR Rules: In considering the construction or interpretation of the provisions of this policy, the mediator or arbitrator(s) must give due consideration to the general principles of the law of the State of Formation of the Named Entity. Each party shall share equally the expenses of the process elected. At the election of the Named Entity, either choice of ADR process shall be commenced in New York, New York; Atlanta, Georgia; Chicago, Illinois; Denver, Colorado; or in the state reflected in the Named Entity Address. The Named Entity shall act on behalf of each and every Insured under this Alternative Dispute Resolution Clause. In all other respects, the Insurer and the Named Entity shall mutually agree to the procedural rules for the mediation or arbitration. In the absence of such an agreement, after reasonable diligence, the arbitrator(s) or mediator shall specify commercially reasonable rules.

Specialty policies sold by other insurers also provide that any arbitration shall be conducted under ARIAS (UK) or ARIAS·U.S. rules.

E7 Jurisdiction and Governing Law / Arbitration

This policy shall be governed by and construed in accordance with the laws of England and Wales. All matters in difference between the parties arising under, out of or in connection with this policy, including formation and validity, and whether arising during or after the period of this policy, shall be referred to an arbitration tribunal. The seat and place of arbitration shall be in London.

The arbitration shall be conducted in accordance with the latest UK ARIAS Rules published at the time that the arbitration is commenced by the claimant (the party requesting arbitration), unless the rules conflict with this clause, in which case this clause will prevail . . .

Some even provide that ARIAS shall appoint the second and third arbitrators in the event the counterparty fails to timely appoint the second arbitrator or the parties cannot agree on the third arbitrator (this is from a product recall policy):

Arbitration

Seat: New York

Appointer: ARIAS (US)

Further, many of the transactional liability policies (representations and warranties and tax liability policies) insurers are placing in the United States contain ADR clauses:

(a) ADR Options. All disputes or differences which may arise under or in connection with

this Policy, whether arising before or after termination of this Policy, including any dispute regarding the determination of the amount of Loss, shall be submitted to an alternative dispute resolution ("ADR") process as provided in this Section 9(a). The Named Insured may elect the type of ADR process discussed below; provided, however, that absent a timely election, the Insurer may elect the type of ADR process. In that case, the Named Insured shall have the right to reject the Insurer's choice of the type of ADR process at any time prior to its commencement, after which, the Named Insured's choice of ADR process shall control. The parties shall only be entitled to pursue judicial proceedings in connection with this Policy (which judicial proceedings shall be in accordance with Section 11(a) hereof) (i) in connection with a dispute, if the parties have first elected and complied with the mediation ADR process provided below with respect to such dispute, or (ii) to enforce any arbitral award.

The arbitrator will interpret this Agreement as an honorable engagement and will not be obligated to follow the strict rules of law or evidence. In making the award, the arbitrator shall apply the custom and practice of the property and casualty insurance and reinsurance industry in the United States of American with a view to affecting the general purpose of the Agreement. To the extent that the arbitrator looks to any state or federal law, the arbitration tribunal will apply the laws of State of Delaware.

There certainly are many other insurance companies that sell commercial liability and first-party insurance policies to policyholders that contain binding arbitration provisions, all of which could benefit from ARIAS-certified and -trained arbitrators.

The Path Forward

What, then, are the next steps? As my colleagues and I noted during our presentation, policyholders and their counsel have generally viewed ARIAS with suspicion because it handles only insurance industry disputes. Our concern is that, as largely an industry group, ARIAS is not well suited to handle direct disputes.

This can change (as we discussed during our presentation) with the identification and selection of arbitrators whom both insurers and policyholders will embrace. This will require a revamping of ARIAS' certification process. Among the changes that likely will need to be made are the following:

- modify the "Industry Experience" to include 10 years of specialization in representing policyholders in insurance-related matters;
- add an Option D that permits a member to satisfy the eligibility requirements to be a certified arbitrator by participating as an arbitrator or umpire or as lead trial counsel in a certain number of direct dispute arbitrations; and
- update the ARIAS·U.S. Rules, Code of Conduct, Practical Guide, and Panel Selection Procedures and Forms to account for the addition of direct insurance disputes arbitrators and mediators.

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Comparing Policyholder Arbitrations to Reinsurance Arbitrations

By David W. Ichel and Carlos A. Romero, Jr.

During the last 20 years, arbitration proceedings have been on the rise in disputes, not only between insurers and reinsurers and between reinsurers and retrocessionaires (reinsurance arbitrations) but also between direct policyholders and insurers (policy arbitrations). Although there are differences between the two categories of arbitrations, there are more similarities than differences.

In this article, the authors draw on their personal experiences to review key similarities and differences between both categories of arbitrations. Note: This article will consider only policies and reinsurance agreements that cover U.S.-based risks.

Arbitration Provisions

Policy arbitrations. In the United States, many states still do not permit arbitration provisions to be included in policies issued by admitted insurers, particularly for personal lines policies. Some states take a middle ground and permit arbitration only for limited purposes, such as determining the value of the loss of covered property in a property insurance policy.

Even though there is strong Supreme Court precedent requiring enforcement of arbitration provisions under the Federal Arbitration Act (FAA),[1] practitioners must be sensitive to other laws that could trump the FAA. For example, courts have held that when a state affirmatively prohibits or restricts arbitration provisions in insurance policies, the McCarran-Ferguson Act[2] not only grants a state primary regulatory authority to govern the business of insurance but also will "reverse preempt" the FAA, thus permitting the state prohibition or restriction.[3] On the other hand, courts have enforced arbitration clauses in insurance policies in the absence of any state regulation or statute specifically prohibiting or restricting the arbitration agreement.[4]

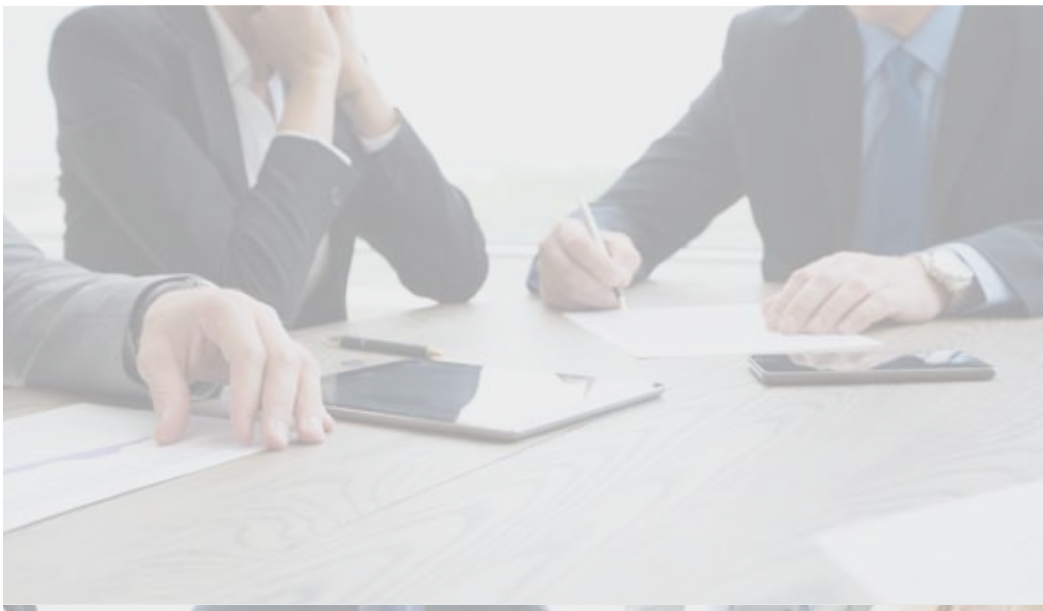
David Ichel serves as an arbitrator and mediator for complex commercial disputes, including insurance and reinsurance disputes. A longtime partner at Simpson Thacher & Bartlett LLP, he is a member of the Panel of Distinguished Neutrals of the Institute for Conflict Prevention and Resolution (CPR) and the Commercial Mediation and Arbitration Panel of Federal Arbitration Inc. (FedArb). He also teaches classes on complex civil litigation at both Duke Law School, where he has taught since 2011, and the University of Miami School of Law.
Carlos Romero is a partner at Post & Romero and has been practicing in a broad array of insurance matters since the early 1980s. He has participated in insurance-related arbitrations as an advocate and arbitrator and enjoys handling complex insurance pool disputes coupled with substantial accounting disputes and discrepancies (along with claims of fraudulent billings and allocations). He has handled insurance disputes concerning many foreign jurisdictions, including Panama, Mexico, Venezuela, Colombia, Bermuda, and Argentina.

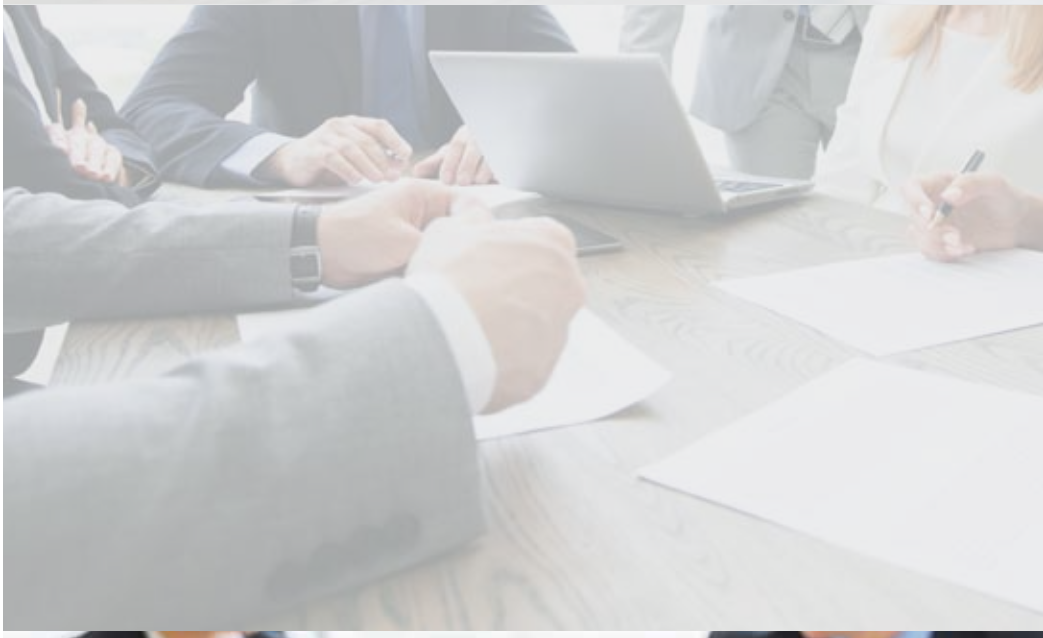
In contrast, it is not uncommon for excess and surplus lines policies issued to commercial entities to contain an arbitration clause. The permissiveness within the commercial risk context reflects a lower regulatory and public policy concern than in the personal lines arena. For example, in the standard Bermuda Form for excess insurance policies and in London market policies, an arbitration clause is common. Arbitration clauses are now found in many types of policies, such as directors and officers, errors and omissions, employment liability, and cyber liability.

Reinsurance arbitrations. Reinsurance arbitration clauses are used generally by most reinsurers. The authors, in their experience, have never seen a reinsurance agreement without an arbitration clause. The range of detail in arbitration provisions can vary, from the sparse (providing few provisions) to the comprehensive (addressing numerous topics).

Older arbitration clauses were quite sparse and at times consisted of a simple notation (like "Arbitration," without anything more) in the cover notes between the insurers. Indeed, arbitration clauses often did not select arbitration rules, were not administered by any organization, called for two party-appointed arbitrators and one umpire, and mandated experience requirements of all sorts (e.g., present or former executive or lawyer in the insurance industry for a requisite number of years). Arbitration clauses in some older agreements sometimes made reference to an arbitration organization (or its rules) that no longer existed or had changed its name.

The more recent arbitration clauses lean toward a more comprehensive provision. They may (or may not) adopt





The trend in more modern arbitration clauses shows a preference for maximizing not only the scope of arbitrable issues, but also the authority of the arbitrator.

arbitration rules, require particular experience of the arbitrators, specify administration by a particular arbitration organization, mandate choice of law, impose time frames to issue a final award, set forth rules for discovery, and define a broad scope of arbitrable issues. Even today, however, there are reinsurers using arbitration clauses that contain no arbitration rules for the panel to follow or provide for administration by an arbitration organization. In such "no rule" arbitrations, arbitrators must fashion their own procedures "on the fly," which often triggers resistance from counsel and presents challenges to obtaining desired party consent.

Arbitration Rules/ Organization/Arbitrator Selection

Policy arbitrations. Arbitration provisions differ significantly from one policy to the next. Bermuda Form policies provide for an "ad hoc" (i.e., non-administered) arbitration and allow policyholders the choice of applying New York, Bermuda, or English substantive law. (Most policyholders tend to choose New York law). Also, although most Bermuda Form policies provide for the procedural rules of the British Arbitration Act of 1996 (along with situs in London), others provide for the Bermuda Arbitration Act (with situs in Bermuda).[5] Various London market and other excess and surplus lines policies frequently provide for the application of New York law under the arbitration rules published by either the American Arbitration Association (AAA), International Institute for Conflict Prevention and Resolution (CPR), Federal Arbitration Inc. (FedArb), or JAMS (formerly known as Judicial Arbitration and Mediation Services).[6] Finally, policy arbitrations can be, at times, non-administered, although usage in the industry leans toward administered proceedings by organizations like the AAA, FedArb, and (recently) CPR.[7]

Certain policies and arbitration rules of more recent vintage now provide additional and optional procedures—if mutually acceptable to the parties—for mediation (it may be conducted by a mediator not on the panel of arbitrators) and for "one" appeal (it may be conducted by a different arbitrator or arbitrators not on the panel that conducted the trial).

Most policy arbitration clauses provide for a panel of three arbitrators, with each side to select an arbitrator and the two selected arbitrators then selecting the panel chair. In case of a deadlock when selecting a chair, Bermuda Form policies provide for selection by lots or by petition to the High Court of Justice of England & Wales.[8] Under AAA, CPR, or FedArb rules, the deadlock can be resolved by the arbitration organization through methods including appointment by the arbitration organization, circulation of a list of additional candidates, a drawing by lots, or other agreed method. Various state arbitration statutes and the Federal Arbitration Act allow deadlocked parties to petition the court for the appointment of arbitrators.[9]

Reinsurance arbitrations. Historically, the reinsurance industry resolved disputes with a gentleman's handshake. Older insurance agreements did contain arbitration clauses, but they were rarely invoked and were sparse in content. Oftentimes, the reinsurers and retrocessionaires, as well as the insurers and reinsurers, signed cover notes with no treaty or facultative agreement. The cover notes contained the general terms of the agreement—they would make

reference to mandatory arbitration and the selected forum, but would omit inclusion of the arbitration clause (the intent being to formalize the agreement at a later date, which sometimes did not happen).

Over the last 20 years, however, two events have contributed to significant changes, ranging from one extreme (how to avoid arbitration entirely) to another (how to exploit drafting more comprehensive arbitration clauses). These two events are as follows: first, discontent has increased over perceived disadvantages, monetary expenditures, and procedural limitations encountered in arbitrations; second, our society has become more litigious, thus spurring (not surprisingly) more detailed arbitration clauses.

Older agreements tended not to define the scope of arbitrable issues. This omission inevitably triggered litigation as to whether specific issues in dispute were even arbitrable. As more recent arbitration clauses began to specifically provide for a broad, all-inclusive scope of authority and arbitrable issues, litigation over the scope of arbitrable issues has been waning. The trend in more modern arbitration clauses shows a preference for maximizing not only the scope of arbitrable issues, but also the authority of the arbitrator (which now includes jurisdiction to resolve not only whether any claim is arbitrable under the arbitration clause, but the jurisdiction of the panel, too).[10] Some arbitrators obtain, at an organization meeting or preliminary hearing, the mutual consent of the parties to reaffirm or expand the scope of arbitrable issues and the authority of the arbitrator to resolve additional issues.

To improve the effectiveness of arbitrations, reinsurers have taken steps to improve arbitration clauses (or to appease the never-ending drafting by corporate attorneys who never litigated). These steps include, among others, the following:

- specifying a time frame for issuing an award;
- specifying the arbitration rules that apply;
- requiring proceedings to be administered by arbitration organizations;
- relying on arbitration organizations to supply a list of qualified arbitrators;
- requiring all arbitrators to be neutral;
- mandating qualified arbitrators from a recognized arbitration organization; and
- expanding the scope of arbitrable issues (like fraud in the inducement, rescission, void or voidable, enforceability, attorney fee award, other agreements between the parties that either do not have arbitration clauses or provide for a different forum, and third parties related to the dispute).

More recently, some reinsurers have started to experiment with requiring mediation prior to an arbitration proceeding. The AAA now has a rule that requires mediation, but either party may opt out.[11] ARIAS also has a voluntary mediation program.

Today, reinsurance agreements sometimes contain comprehensive arbitration clauses that are longer than one page. These lengthy clauses cover a host of issues so as to be all-inclusive, but often this effort is not as productive as was intended. The drafter, facing a time or budgetary constraint, may neglect to read the designated organi-

Today, reinsurance agreements sometimes contain comprehensive arbitration clauses that are longer than one page so as to be all-inclusive, but often this effort is not as productive as was intended.

zation's rules, may draft rules that are either duplicative or confusing, and may (unwittingly) create expensive procedures. Other times, the rules are too restrictive—requiring arbitrators to issue an award within 60 days of the appointment of a three-member panel, mandating no depositions under any circumstances (which can help settle a case), and denying the use of expert witnesses or forensic accountants (thus complicating resolution). In fairness to the drafter, it is simply not possible to predict the nature and complexity of issues that can arise many years after signing a reinsurance agreement.

In an effort to reduce the cost of a panel of three arbitrators, the AAA recently adopted a new rule granting the parties full flexibility to agree to designate a single arbitrator (typically the chairperson) to be the sole decision maker for (a) part or parts of the proceeding, (b) the entire proceeding (and, if agreed by the parties, even the final hearing and issue of the final award), (c) all issues up to the final hearing (at which point the entire panel participates and issues the final award), (d) the issuance of one or more partial awards, or (e) all issues (including dispositive motions on the merit) up to the final hearing and issue of the final award.[12] This rule is sufficiently flexible to allow the parties to adopt this procedure mid-stream during the proceeding. Doing so basically eliminates the fees of two arbitrators and maximizes the flexibility and speed with which a single arbitrator (who is truly dedicated and responsive) can take action.

Arbitrator Neutrality

Policy arbitrations. The neutrality of arbitrators is a key ingredient in policy arbitrations. All of the Bermuda Form, AAA, CPR, JAMS, and FedArb rules require that all arbitrators (including party-appointed arbitrators) be neutral, impartial, and independent, unless the parties specifically agree otherwise. Ex parte communications with the arbitrators, excepting initial communications to select a party-appointed arbitrator, to discuss the availability or qualifications of a candidate, or to select the panel chair, generally are prohibited.

Reinsurance arbitrations. Traditionally, once a party provides the other with an arbitration notice, each side has a short window of about 30 days to appoint an arbitrator. The two arbitrators then select an umpire. Unless the parties agreed otherwise, the party-appointed arbitrators are not expected to be neutral; the selected umpire will be the sole neutral arbitrator.

Newer arbitration clauses are more comprehensive but still provide for two party-appointed arbitrators, who in turn appoint the umpire. The clauses generally provide no guidance on the extent to which ex parte communications with party-appointed arbitrators are permissible or prohibited. Restrictions and prohibitions can be imposed if (a) the governing arbitration rules contain restrictions and prohibitions, (b) the parties agree to require all arbitrators to be neutral from inception, or (c) the parties agree that the two party-appointed arbitrators must refrain from ex parte communications either before or even after the initial organization meeting or preliminary hearing.

For example, the AAA rules provide (unless agreed otherwise) that the party-appointed arbitrators shall not engage in communications with their appointing party and that the parties must communicate with the entire panel, with a copy to all parties. The ARIAS·U.S. rules allow for ex parte communications up to certain points in the proceeding or as established in or after the initial organization meeting.

Recently, ARIAS adopted neutral panel rules that require three neutral arbitrators and prohibit ex parte communications. Also, more members of ARIAS are suggesting that the practice of permitting ex parte communications with party-appointed arbitrators is creating friction and controversy in arbitrations that detract from the desire for a fair and unbiased award. The concern is that allowing a party-appointed arbitrator to campaign and watch out for the interests of the appointing party not only injects bias but also invites secret conferences between a party-appointed arbitrator (who has a vested financial interest in being selected for future panels) and the attorney representing the appointing party. (This almost suggests that counsel is unable to represent the client competently without discussing the "inside scoop.")

The Initial Organizational Conference, Scheduling, and Pre-Hearing Disputes

Policy arbitrations. In policy arbitrations, the arbitrators will hold an initial organizational conference with counsel for all parties to address the pre-hearing schedule, scope of discovery, pre-hearing briefing, exchange of exhibits intended to be used at the final hearing, witness statements, expert reports, witness list, rebuttal witness statements, expert and rebuttal expert reports, and (often) even the final hearing dates. The arbitrators, after typically maximizing agreement on all subjects with counsel, will issue a procedural order that should outline all agreed-upon subjects as well as matters that remain open for resolution. In

Bermuda Form arbitrations under the British Arbitration Act of 1996, the initial order is called the Directional Order No. 1. Under the AAA rules, it is often called Procedural Order No. 1 or Scheduling Order for Final Hearing.

Unless otherwise agreed by the parties, discovery is limited. In Bermuda Form arbitrations, discovery is generally limited to "standard disclosures" of documents to be relied upon or that adversely affect one's position. These documents can be supplemented by limited specific requests for categories of relevant documents. Depositions are generally not permitted.

Similarly, no depositions are permitted generally under AAA and ICDR Rules, although they are permitted under certain circumstances to preserve evidence. There has been a growing trend over the past 15 years to permit depositions on a limited basis upon insistence by counsel. FedArb and JAMS rules permit at least a limited number of depositions, unless otherwise agreed by the parties. This trend evidences the difficulties that counsel often face in handling litigation without the use of depositions.

Under the International Bar Association's (IBA) Rules on the Taking of Evidence in the International Commercial Arbitration, the parties must disclose all documents "relied upon" and are allowed to request specified additional categories of documents. Discovery disputes are often resolved using a Redfern schedule that requires a party to identify a sought document in one column of the schedule and justify its relevance in the next column, then allows the other party to state its objections in another column. The arbitrators then rule on the requests and objections and note their ruling in the final column of the schedule.[13]

In Bermuda Form arbitrations, prehearing submissions begin with the filing of original pleadings in the form of a Statement of Claim and a Statement of Response (often containing both defenses and counterclaims). Typically, at the preliminary or organizational hearing, the parties are allowed to amend their initial filings. Similar procedures are required under the arbitration rules of the other major organizations, although the names of the pleadings differ.

Disputes can be raised by motion of either party, at or after the initial organizational conference. Experienced arbitration panels will ask the parties to confer and attempt to agree on all prehearing disputes prior to seeking panel resolution of the issue.

Reinsurance arbitrations. The procedures governing reinsurance arbitrations are substantially similar to those governing policy arbitrations. The issues litigated in reinsurance disputes, if concerning a pool of risks, will entail a complex interaction of coverage, annual caps, and the year in which the loss is incurred. The complexity escalates as the number of reinsurers and retrocessionaires participating in the pool, the number of tiered excess loss coverages, the differing annual caps among the policies for different years, the allocations of loss payments among different years and different excess layers, and the years of coverage in question increase.

Manner of Proof

Policy arbitrations. It is the general practice in Bermuda Form and many AAA, CPR, and FedArb arbitrations for witness statements and expert reports to be submitted in advance of the

There is a new crop of reinsurance agreements that specifically disavow the application of the "follow the fortunes" doctrine that has existed for more than a century.

hearing. These statements and reports often are provided in lieu of direct testimony from any witness or expert. Typically, the arbitrators will allow the proffering party to elicit some live, direct testimony to introduce the witness before cross examination. Cross examination and re-direct will then follow. FedArb follows the Federal Rules of Evidence absent the parties agreeing otherwise. Bermuda Form arbitrations are conducted under either the British or Bermuda Arbitration Act, which often depends on whether London or Bermuda is the chosen situs. AAA, CPR, and JAMS arbitrations have some simple rules to follow, but they do not require the application of strict rules of evidence. International commercial arbitrations often are guided by the IBA Rules on the Taking of Evidence.

There are more similarities than differences between policy and reinsurance arbitrations. Nevertheless, differences do exist.

Reinsurance arbitrations. The procedures for reinsurance arbitrations are substantially similar to those applicable in policy arbitrations, where strict evidentiary rules are disregarded.

Rules of Policy Construction

Policy arbitrations. The Bermuda Form generally provides that policies shall be construed in an "even handed fashion" and precludes use of the *contra proferentem* (construction against the drafter) doctrine or "reasonable expectations" doctrine (what a policyholder should reasonably expect). It also prohibits "parol or other extrinsic" evidence for policy construction. AAA, CPR, FedArb, and JAMS do not provide any specific rules for policy construction. FedArb arbitrations simply follow the Federal Rules of Evidence unless the parties agree otherwise.

Reinsurance arbitrations. The "traditional" theme in reinsurance arbitrations leans toward informality and away from strict rules of law. Reinsurance arbitration clauses generally contain language that encourages custom and practice over the application of the law. For example, arbitration clauses containing the following text are quite common (but are being replaced by a new generation of corporate counsel that do not share the same traditional values):

This contract [or arbitration provision] is an honorable engagement, and the panel shall not be obligated to follow the strict rules of law or evidence. In deciding the award, the panel shall [or may] apply the custom and practice of the insurance and reinsurance business.

There is a new crop of reinsurance agreements that specifically disavow the application of the "follow the fortunes" doctrine. This doctrine is being replaced by a complicated host of rules that trigger noncoverage in the event of noncompliance by the reinsured entity. This change will significantly affect the traditional "follow the fortunes" analysis that has existed for more than a century.

Relief and Award

Policy arbitrations. The Bermuda Form allows for coverage of punitive damage awards against a policyholder, and its New York choice of law provision specifically excludes any prohibition on such coverage.[14] The arbitral panel is also empowered to award to the prevailing party recovery of all costs, including reasonable attorney fees, under English (or Bermuda) law applicable to Bermuda Form arbitration procedure, as well as under most arbitration organization rules for other policy arbitrations. Unless specifically agreed by the parties, there is no rule regarding punitive damages coverage in AAA, CPR, FedArb, or JAMS arbitration rules, but arbitrators acting under these rules are permitted to award attorney fees and costs among or between the parties. Parties in policy arbitrations can choose either a reasoned award, full award, or standard award. Reasoned awards tend to be the preferred choice.

Reinsurance arbitrations. Often, the reinsurance treaty or agreement relieves the reinsurer from any bad faith, punitive, or exemplary damages (extra-

contractual liability) that the insurer may have paid the insured in a judgment or settlement. The arbitration clause generally would not cover this issue; instead, the reinsurance agreement typically contains a separate clause that precludes indemnity by the reinsurer to the ceding insurer for such damages. The arbitration clause, however, may contain a provision that strips the arbitrator of authority to grant the insurer or the reinsurer any entitlement to bad faith, punitive, or exemplary damages either as between the reinsurer and the insurer or between the insured and the insurer. Such a provision would seem to ensure consistency between (a) the terms of the reinsurance agreement and (b) the scope of authority of the arbitrator and the scope of arbitrable issues. One might ask whether such limitations could be challenged when the arbitration clause contains language that permits the panel to interpret the agreement as a "gentleman's engagement" and to disregard strict rules of law or evidence (and follow industry custom and practice), where the conduct of a culpable party was egregious.

Confidentiality

Policy arbitrations. Arbitrations under the Bermuda Form will be confidential pursuant to the British Arbitration Act of 1996 and British common law (for London chosen situs) and the Bermuda Arbitration Act (for Bermuda chosen situs). Although the scope may differ as enforced in the United States, confidentiality is the general practice. In contrast, although confidentiality is not strictly mandatory under AAA, CPR, FedArb, and JAMS rules, the arbitrators have authority to order confidentiality for particular materials presented in the proceeding and generally conduct private proceedings that are not open to the public. Typically, the parties agree as to confidentiality in either the arbitration provision or in the initial procedural hearing. Although hearings are private, the parties often engage a court reporter and order transcripts when desired. Confidentiality as to any award often ends as a practical matter if the final award must be filed in court to seek its enforcement.

Reinsurance arbitrations. The rules on confidentiality will differ among the arbitration clauses adopted, and often the parties submit to the panel an agreed order for entry. The hearings are not open to the public, and in this sense all hearings are private. Confidentiality provisions are rarely seen in arbitration clauses in reinsurance agreements.

Conclusion

In summary, there are more similarities than differences between policy and reinsurance arbitrations. Nevertheless, differences do exist. Should ARIAS·U.S. seek to develop a policy arbitration procedure, it should consider state restrictions and limitations where permitted, be fair to the policyholder, promote the neutrality of the panel, and grant the panel maximum authority to resolve all issues that can arise.

NOTES

1. See, e.g., *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (enforcing arbitration provision that prohibited class actions in an antitrust dispute even though the pursuit of an individual claim would not be financially viable or justifiable for an attorney to pursue).
2. 15 U.S.C. §1012(b) (providing that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . .").
3. See, e.g., *Standard Security Life Insurance Co. v. West*, 267 F.3d 821 (8th Cir. 2001) (declining to enforce an arbitration clause in a sports injury policy that was prohibited by Missouri statute governing the business of insurance); *Continental Insurance Co. v. Equity Residential Properties Trust*, 565 S.E. 2d. 603 (Ga. App. 2002). See also Rhode Island General Laws §10-3-2 (1998) (providing that insurer has the option to arbitrate as follows: ". . . and provided further, that in all contracts of primary insurance, wherein the provision for arbitration is not placed immediately before the testimonium clause or the signature of the parties, the arbitration procedure may be enforced at the option of the insured, and in the event the insured exercises the option to arbitrate, then the provisions of this chapter shall apply and be the exclusive remedy available to the insured.")
4. See, e.g., *Monarch Consulting, Inc. v. National Union Fire Insurance Co.*, 26 N.Y. 3d 659, 47 N.E. 3d 463, 27 N.Y.S. 3d 97 (upholding enforcement of arbitration clause in workers compensation policy payment agreement, because the State of California did not prohibit the use of this clause).
5. For references on the Bermuda Form policies and arbitrations, see Richard Jacobs, Lorelie Masters and Paul Stanley, *Liability Insurance in International Arbitration: the Bermuda Form* (Second ed. 2011); Davd Scorey, Richard Geddes and Chris Harris, *The Bermuda Form: Interpretation and Dispute Resolution of Excess Liability Insurance* (Oxford University Press 2011); Leon B. Kellner and Vivek Chopra, "Bermuda Form Arbitration: A Policyholder Perspective" (Perkins Cole LLP, ARIAS·U.S. Fall 2017 Conference presentation); Mina Matin, "The Bermuda Form Arbitration Process: A Glimpse Through the Insurer's Spectacles" (Norton Rose Fulbright LLP, ARIAS·U.S. Fall 2017 Conference).
6. AAA rules can be found at adr.org, CPR rules can be found at cpradr.org, Federal Arbitration rules can be found at FedArb.com, and JAMS rules can be found at jamsadr.com.
7. The standard FedArb arbitration rules provide for the application of the Federal Rules of Civil Procedure, except as modified by agreement of the parties.
8. British Arbitration Act of 1996 §18.
9. Federal Arbitration Act, 9 U.S.C. §5.
10. See, e.g., Rule 7(a), AAA Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large and Complex Commercial Disputes), effective October 1, 2013, stating that the "Arbitrator shall have the power to rule on his or her own jurisdiction, including . . . the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."
11. Rule 9, AAA Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large and Complex Commercial Disputes), effective October 1, 2013, stating that, in disputes involving a claim or counterclaim in excess of $75,000, the parties must mediate during the proceeding, unless either party opts out. Any party has the right to opt out.
12. "Streamlined Three-Arbitrator Panel Option for Large Complex Cases" issued by the AAA, stating that this rule "allows parties to take advantage of this by utilizing a single arbitrator to manage the early stages of the case, decide issues related to the exchange of information and resolve other procedural matters without incurring the costs associated with the entire panel. The AAA has found that a three-arbitrator panel can actually cost five times as much as a single arbitrator. By maximizing the use of a single arbitrator, the parties will be able to capitalize on the cost savings provided by a single arbitrator while still preserving their right to have the case ultimately decided by a panel of three arbitrators."
13. IBA Rules on the Taking of Evidence in International Arbitrations at Art. 3 (Documents).
14. Bermuda Form Policy, Condition O.

Issuance and Enforcement of Arbitral Subpoenas

By Debra J. Hall and Robert M. Hall

This article examines an arbitration panel's authority to pursue third-party pre-hearing discovery. Although the judicial trend is to deny enforcement,[1] some courts have recognized the express authority of panels to convene preliminary hearings for the purpose of taking witness testimony along with the production of documents. This raises a potential minefield of issues for the arbitration panel, including the use of inconsistent language within and among the relevant statutes and conflicting institutional arbitration rules.

Significantly, we highlight the contrast between the authority of an arbitration panel to issue a subpoena with its authority to enforce a witness' compliance. This distinction raises a policy question for an arbitration panel: Does the panel perceive its role with respect to the issuance of subpoenas as merely an administrative one—issuing the form and substance of the summons[2] as requested—or should the panel examine any draft subpoena and its issuance with an eye toward its ultimate enforcement?

Pre-Hearing Discovery of Non-Parties

Any analysis of an arbitration panel's authority to issue subpoenas must start with the Federal Arbitration Act (FAA).[3] Section 7 of the FAA, titled "Witnesses before arbitrators; fees; compelling attendance," provides as follows:

> The arbitrators . . . or a majority of them, may summon in writing, any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case . . . . Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned

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> to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Federal circuits are split on whether this language permits an arbitration panel to issue a documents-only subpoena to a non-party in the course of discovery. The Second,[4] Third,[5] Fourth,[6] and Ninth[7] Circuits have interpreted §7 to require the appearance of a testifying witness before one or more members of the panel, thus not permitting a pre-hearing documents-only subpoena.

These restrictive interpretations of FAA §7 stand in contrast to the more liberal view of the Eighth Circuit[8] that the authority granted by §7 to subpoena relevant documents for production at a hearing includes the "implicit power" to subpoena relevant documents prior to the hearing. The Sixth Circuit, while declining to apply the FAA to the labor matter before it, expressly relied on a similar view of §7.[9]

While the Fourth Circuit adopted the interpretation that §7 precludes discovery subpoenas as a general matter (and in the specific case that was before them), the court noted *in dicta* that pre-hearing document subpoenas might be enforced upon a showing of special need or hardship. The court did not define the parameters of this exception except to observe that the information must, at a minimum, be otherwise unavailable.[10]

A joint committee report of the Association of the Bar for the City of New York is an excellent resource on arbitration subpoena issues, including a list of federal district court cases in other circuits following the restrictive interpretation of §7.[11]

There also has emerged a divergence of views between the Second Circuit and the New York state courts. Some of the state courts have taken a view similar to that of the Fourth Circuit.[12] For a discussion of the implications of this federal/state court split, see the New York Bar Report.[13]

Obtaining Non-Party Compliance

Learning its lesson from a prior attempt, the arbitration panel in *Stolt-Nielsen Transportation Group, Inc. v. Celanese AG*[14] issued subpoenas to Stolt-Nielsen directing its custodian of records to appear and testify at an arbitration proceeding and to bring certain documents with him. The district court enforced these subpoenas, and the custodian appeared before the entire panel bringing documents and providing testimony on evidentiary issues and objecting to certain questions on the grounds of privilege.

Stolt-Nielsen appealed the district court order, arguing that Section 7 does not empower arbitrators to summon non-parties to testify and produce documents in advance of a "merits hearing" and characterizing it as a "thinly disguised effort to obtain pre-hearing discovery." The Second Circuit rejected this argument, upholding the preliminary nature of the hearing and citing three factors: (a) the custodian was not summoned to a deposition designed to elicit information in preparation for a hearing; (b) the custodian gave testimony directly to the arbitration panel, and the panel ruled on certain issues and reserved others for later; and (c) the testimony of the custodian became part of the record to be used by the arbitrators to resolve the dispute. The court commented that the fact that the custodian's testimony was in advance of the final hearing on the merits was irrelevant because there may be preliminary matters to be determined, and hearings are often continued for extended periods. The Second Circuit also made it clear that they were not suggesting that all three factors had to be present in other cases.[15]

The concurring opinion of Judge Chertoff in the Third Circuit's *Hay Group* decision discussed a similar procedure, whereby a single arbitrator may compel a third party to appear with documents and then adjourn the proceedings.[16] The Second Circuit cited both the procedure outlined by Judge Chertoff's concurrence and its decision in *Stolt-Nielsen* as examples of how arbitration panels are not powerless to compel third-party discovery under FAA §7.[17]

Arbitration panels should be aware that institutional arbitration rules have failed to keep abreast of developments in this area. For example, AAA Commercial Rules at R-34 (d) provide that "An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." Although the majority of circuit courts have ruled that arbitrators cannot issue subpoenas for documents alone, this AAA provision may be operative in the Eighth and Sixth Circuits as well as ar-

bitrations conducted under some state statutes. Likewise, insurance/reinsurance arbitration rules permit panels to issue subpoenas for the production of documents in contravention of the rulings in the majority of circuits.[18]

This brings us to questions regarding who can (and how to) issue subpoenas, how many arbitrators must attend a hearing, where the hearing can be held, and other traps to avoid in the enforcement (as opposed to the issuance) of summons.

Issuance of Subpoenas: Process and Procedure

Only arbitrators can issue summons. Section 7 provides that "the arbitrators, or a majority of them" may summon any person to attend before them, as a witness and to bring documents. Unlike certain state statutes—e.g., New York Civil Practice Law and Rules (C.P.L.R.) §7505, which permits an arbitrator or any attorney of record the power to issue subpoenas)—only the arbitrators can issue summons in an arbitration to which the FAA applies.

Opposing party objections to issuance. Typically, the requesting party presents the subpoena to the arbitration panel for its approval and signature.[19] Sometimes the opposing party raises objections—to the issuance of subpoenas generally, the authority or jurisdiction of the panel, or to the scope of the requested summons. The arbitration panel should carefully consider any authority or jurisdiction issues, as the issuance of subpoenas not within the panel's authority or jurisdiction undermines the integrity of the process and of the panel itself.

Issues of scope, however, are generally beyond the ability of the opposing party to raise. Rather, the subpoenaed witness more properly brings these issues before the appropriate federal district court by way of a motion to quash or to modify the subpoena.[20] A party does not have standing to assert any rights of the non-party, absent a personal right or privilege.[21]

Nationwide service of process. FAA §7 provides that a witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." Rule 45 of the Federal Rules of Civil Procedure (FRCP) provides for nationwide service of judicial subpoenas.[22] By extension, an arbitral subpoena can be served anywhere in the United States.

Two questions remain: Can an arbitral summons require the witness to appear at the location where the arbitration is pending, even if it is far from the witness' domicile? And if the witness fails to appear, how and by whom is the subpoena enforced?

Location of third-party witness compliance. While an arbitral subpoena can be served anywhere in the United States, it can command compliance only within 100 miles of the witness, unless other conditions exist as noted below. FRCP Rule 45(c)(1) sets forth the territorial limits for complying with a subpoena, providing in relevant part:

A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense.

Thus, the subpoena should command the witness to appear and testify and bring the requested documents to a place within the geographical limit applicable to the witness, regardless of where the arbitration proceedings are otherwise pending.

Motions to quash. Courts have held that witness objections to relevancy, materiality, privilege, and confidentiality should first be brought before the arbitration panel as the proper entity to determine evidentiary issues in the arbitration.[23] Witness motions to quash based on the limitations imposed by FAA §7 (e.g., the panel exceeded its authority), however, may also be brought before the court with jurisdiction to enforce the subpoena as discussed below.[24]

Insurance/reinsurance industry procedures authorize panels to rule on the objections of either a party or a subpoenaed person without specifying the type of objection.[25]

The New York Bar Report offers a "Model Federal Arbitration Summons" that addresses this and other arbitration subpoena issues with helpful annotations. For example, the text of the Model Summons specifies the type of objections that should be made to the arbitration panel as opposed to the court. The purpose of including this language was to overcome any assumption that all objections are to be addressed to the court and thereby avoid the delay caused by unnecessary judicial intervention in the arbitration process.[26]

The Fourth Circuit has noted that the recipient of an arbitrator-issued subpoena is under no obligation to move to quash the subpoena and that, by failing to do so, the recipient does not waive the right to challenge the sub-

poena on the merits. The FAA imposes no requirement on the subpoenaed party, the only remedy being a motion to compel compliance.[27]

Enforcement of Arbitral Subpoenas

Court enforcement at place of compliance. An arbitration panel's authority to issue a non-party summons does not include the authority to enforce the subpoena. Only a court can compel compliance under the FAA.

FAA §7 provides that ". . . upon petition the United States district *court for the district in which such arbitrators, or a majority of them, are sitting* may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in *the same manner provided by law* for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." (emphasis added)

Additionally, Rule 45 makes it clear that the federal district court at the place of compliance with a judicial subpoena is the court in which enforcement should be sought, as long as the district court has subject matter jurisdiction.[28] In the absence of jurisdiction, enforcement would be proper in the state court at the place of compliance.[29]

In the event that an arbitration panel opts to hold a *Stolt-Nielsen* preliminary hearing with non-party testimony and production of documents, the proper court for enforcement of the subpoena is the district court (or state court) within the 100-mile radius of the witness specified in FRCP Rule 45.

Relocating the panel to another jurisdiction. At least one court has upheld a subpoena requiring a non-party to appear and testify before a panel relocated for that purpose.[30]

Additionally, institutional arbitration rules permit panels to conduct hearings at locations other than where the arbitration is pending. For example, AAA International Dispute Resolution Procedures Article 17, Rule 2, states that a "panel may meet at any place it deems appropriate for any purpose," including conducting hearings. The AAA Commercial Arbitration Rules, at R-11, authorize the arbitrator, in his/her sole discretion, to "conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process." By contrast, insurance/reinsurance industry procedures require that the location of "all proceedings" shall be as agreed by the parties, with the panel able to change the location only in the absence of agreement.[31]

Panels should be aware of any restrictions in the arbitration agreement and the applicable institutional arbitration rules, if any, that might require the consent of all parties to change the location of a hearing. A recalcitrant party could use this provision to preclude court enforcement of a subpoena.[32] Depending on the wording of the arbitration agreement, the panel might be able to relocate for purposes of a preliminary hearing, interpreting the location provision in the parties' agreement as referring only to the merits hearing. Alternatively, the panel may be able to apply an adverse inference against the party refusing to agree to the panel's attempt to relocate for purposes of hearing testimony and obtaining documentary evidence.[33]

Additionally, serious consideration should be given to changing industry insurance/reinsurance arbitration rules so that they no longer impose an impediment to parties and panels attempting to relocate proceedings for the purpose of obtaining non-party documents.

How many arbitrators is enough? FAA §7 provides that the arbitrators "may summon in writing, any person to attend before them *or any of them* as a witness." (emphasis added) Courts have cited the ability of a single arbitrator to hear testimony from a witness;[34] in contrast, when it comes to enforcing a subpoena, §7 provides for enforcement

The taking of testimony by less than the entire panel of arbitrators could also raise questions under the parties' arbitration agreement that may require evidence to be heard by the entire panel.

in the district of compliance upon petition to the district court "in which such arbitrators, or a majority of them, are sitting." Thus, while §7 seems to permit the taking of testimony by a single arbitrator, the same section seems to suggest that enforcement is available only where a majority of them are sitting.

The taking of testimony by less than the entire panel of arbitrators could also raise questions under the parties' arbitration agreement that may require evidence to be heard by the entire panel. Additionally, some arbitration rules require that all arbitrators be present for the taking of evidence. For example, AAA Commercial Arbitration Rules at R-34 (a) provide in relevant part: "All evidence shall be taken in the presence of all the arbitrators and all the parties . . ." Some state statutes may have similar impediments. For example, N.Y. C.P.L.R. §7506 (e) provides: "The hearing shall be conducted by all the arbitrators, but a majority may determine any questions and render an award."

The International Commercial Disputes Committee of the Association of the Bar of the City of New York recommended the following:

> . . . while Section 7 provides that non-party evidence may be taken "before [the arbitrator] or any of them," the Committee believes that all arbitrators should be present when a non-party provides testimony in an international arbitration. This is recommended both to ensure that arbitrators carefully weigh whether the non-party's testimony is "really needed" (to borrow Judge Chertoff's words), and to protect the enforceability of the arbitrators' eventual award from any challenges under the FAA or the New York Convention.[35]

In our view, best practice is to hear testimony before at least a majority of arbitrators and to ensure that the parties agree, on the record, to testimony being taken by less than the entire panel for this purpose. By requiring the presence of a majority, the enforceability provision of FAA §7, which is not subject to waiver by the parties, is clearly met, and the parties are thereby precluded from attacking the ultimate award on this basis.

Testimony by electronic means. Some commentators have suggested, and institutional arbitration rules permit, the taking of testimony by electronic means instead of requiring physical presence. For example, AAA Commercial Rules at R-32 (c) permit video conferencing, Internet communication, telephonic conferencing, and other such means as long as the parties are afforded the opportunity to present evidence and cross-examine witnesses. Similarly, insurance/reinsurance arbitration rules expressly authorize this practice.[36]

The New York Bar report, however, cautions panels that providing for other than physical presence of the arbitrators could give a recalcitrant witness the opportunity to argue that the panel is not "sitting" in the federal district where the witness is located. Noting that the "touchstone of Section 7" is the adjudicative presence (not the physical presence) of the arbitrator, the joint committees believe it is "prudent to avoid controversy on this point."[37]

Conclusion

Following is a summary of the key points we presented:

- The majority of courts hold that FAA §7 requires that non-party documents be produced by a testifying witness.
- The arbitration panel may convene a preliminary hearing for the purpose of taking testimony and receiving documents, as §7 does not limit a panel's authority to a merits hearing.
- Although an arbitration panel has the ability to issue a summons anywhere in the United States, it can command compliance—in accordance with FRCP Rule 45—only within a 100-mile radius of the non-party witness' location.
- Parties have no standing to object to the scope of the subpoena; only the subpoenaed witness has standing, absent a personal right or privilege.
- Motions to quash based on irrelevancy, materiality, privilege, and confidentiality should be brought before the arbitration panel, although challenges to the panel's authority/jurisdiction may be brought before the court ultimately responsible for enforcement of the subpoena.
- The appropriate court in which to seek compliance by a non-cooperative witness is the federal district (or state) court where compliance is sought.
- The panel may temporarily relocate for the purpose of taking testimony and receiving documents, but beware of arbitration agreement wording as well as insurance/reinsurance industry procedures that might impose impediments.
- FAA §7 is internally inconsistent, permitting a single arbitrator to hear testimony but providing for

subpoena enforcement only where a majority of the panel is "sitting." Testimony before less than a full panel may violate the requirements of certain institutional arbitration rules and raise questions of enforceability under the FAA and the New York Convention (in the case of international arbitrations). The best practice is to hear testimony before at least a majority of arbitrators and to ensure that the parties agree, on the record, to testimony being taken by less than the entire panel for this purpose.

As noted at the beginning of the article, some panels perceive their role on subpoena issuance as administrative, leaving questions about the conformity of the subpoena with FAA Section 7 and the requirements of FRCP 45 to be decided by a judge. Commentators have suggested that the preferred approach is for arbitration panels to ". . . consider carefully the enforceability of proposed subpoenas as a condition of issuance . . . by making well-conceived decisions based on clearly applicable case law, so that the tribunal rules at the point of issuance of a subpoena as it would rule if it were a judge deciding a motion to compel compliance."[38]

NOTES

1. See *Life Receivables*, infra, Note 4. *Hay Group* signaled what one commentator has called an "emerging rule . . . This growing consensus is evidenced by the wide array of district court decisions—including those within this Circuit—that have adopted *Hay Group*'s holding." *Life Receivables*, 549 F.3d at 215.
2. The Federal Arbitration Act, 9 U.S.C. §§1-16 refers at §7 to the issuance and enforcement of arbitral "summons." This article uses the terms "summons" and "subpoena" interchangeably, as both refer to "an arbitrator's compulsory process to a non-party witness." See New York Bar Report, infra, Note 11, at Annotation A.
3. *Id*.
4. *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008) ("Life Receivables").
5. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) ("Hay Group"). The opinion of the court was issued by then Circuit Judge Samuel Alito (before his appointment to the U.S. Supreme Court).
6. *COMSAT Corp. v. National Science Found.*, 190 F.3d 269 (4th Cir. 1999) ("COMSAT").
7. *CVS Health Corp. v. Vividus, LLC* 2017 U.S. App. LEXIS 26236 (9th Cir.) ("CVS Health").
8. *In Re Security Life Insurance of America*, 228 F.3d 865 (8th Cir. 2000) ("Security Life").
9. *American Federation of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999).
10. *COMSAT*, 190 F.3d at 276. The Third Circuit rejected this exception, *Hay Group*, 360 F.3d at 410.
11. Report of the International Commercial Disputes Committee and the Arbitration Committee of the Association of the Bar of the City of New York, 26 Am. Rev. Int'l Arb. 157 (May 2015) ("New York Bar Report").
12. In *ImClone Systems Inc. v. Waksal*, 22 A.D. 3d 387, 388 (1st Dep't 2005), predating the Second Circuit decision in *Life Receivables*, the Appellate Division First Department of the New York Supreme Court held that in a case governed by the FAA that it would apply §7 to permit discovery depositions of non-parties upon a showing of special need or hardship. The court, in *Connectu Inc. v. Quinn Emanuel Urquhart Oliver & Hodges*, No. 602082/08, slip op. at 10 (Sup. Ct. N.Y. Cnty. March 11, 2010), followed *ImClone* after and notwithstanding the Second Circuit's decision in *Life Receivables*.
13. New York Bar Report at Annotation E.
14. 430 F.3d 567 (2nd Cir. 2005).
15. *Id*. at 578 (". . . although we hasten to add that we do not suggest that all these factors need be present in every case in order to justify the arbitration subpoenas under Section 7.").
16. *Hay Group*, 360 F.3d at 413. To the extent that Judge Chertoff's concurrence could be interpreted as compelling the witness to appear with documents and not taking testimony, it would be contrary to the majority trend that requires the witness to appear for the purpose of taking testimony. See *Life Receivables*, 549 F.3d at 218 (". . . those relying on Section 7 of the FAA must do so according to its plain text, which requires that documents be produced by a testifying witness.")
17. *Life Receivables*, 549 F.3d at 218.
18. Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 1999) ("1999 TF Procedures") at 14.5; Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 2009) ("2009 TF Procedures") at 14.5; ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (2014) ("ARIAS•U.S. Rules") at 14.5.
19. FAA §7 requires that a summons be issued in the name of, and be signed by a majority of, the arbitrators. Does this require the panel to circulate the subpoena for signature by multiple panel members? It is difficult to believe, in today's electronic environment, that one panel member cannot sign on behalf of the panel? Common practice suggests that a single arbitrator may sign the subpoena, listing the arbitrators by name under the signature line and clearly noting that the signature is "on behalf of a majority of" or, if applicable, "on behalf of a unanimous panel."
20. 9 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE, par. 45.50 at 3. (3d ed. 2000).
21. *Id*. at Note 10.
22. FRCP 45(b)(2) was amended effective December 1, 2013, providing for nationwide service. See New York Bar Report at Annotation F (noting that the FRCP 45(b)(2) amendments remove at least one procedural hurdle to arbitral subpoena enforcement raised by cases like *Dynegy Midstream Servs., LP v. Trammochem*, 451 F. 3d 89 (2d Cir. 2006) and *Legion Insurance Co. v. John Hancock Mutual Life Insurance Co.*, 33 Fed. Appx. 26 (3d Cir. April 11, 2002)).
23. See New York Bar Report at Annotation I citing Security Life, 228 F.3d at 871 (Section 7's requirement that information sought by arbitral subpoena be "material as evidence" does not entitle the witness to judicial assessment of materiality, as such a requirement would be "antithetical to the well-recognized policy favoring arbitration and compromise the panel's presumed expertise in the matter at hand").
24. See New York Bar Report at Annotation I citing *Ware v. Peacock, Inc.* 2010 WL 1856021 at 3 (N.D. Ill. May 7, 2010) (granting motion to quash arbitration-issued deposition subpoena based on *Hay Group* and *Life Receivables*); *In re Proshares Trust Sec. Litig.*, 2010 WL 4967988, at *1 (S.D.N.Y. Dec. 1, 2010) (granting motion to quash document discovery subpoena based on *Life Receivables*).
25. 1999 TF Procedures at 14.5; 2009 TF Procedures at 14.5; ARIAS•U.S. Rules at 14.5.
26. New York Bar Report at Annotation I.
27. COMSAT, 190 F.3d at 276.
28. New York Bar Report at Annotation F.
29. Subject matter jurisdiction is beyond the scope of this article. For a discussion of the topic, see New York Bar Report at Annotation H.
30. *In re National Financial Partners Corp.*, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. April 21, 2009).
31. 1999 TF Procedures at 9.1; 2009 TF Procedures at 9.1; ARIAS U.S. Rules at 9.1.
32. Teresa Snider, "The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act", 34 TORT & INS. L.J. 101 (1998).
33. "Adverse Inferences in International Arbitral Practice", ICC International Court of Arbitration Bulletin Vol 22/November 2 – 2011 at 44 ("An arbitral tribunal's power to draw adverse inferences is well established as a matter of international arbitration practice."). Likewise, the International Dispute Resolution Procedures provide that "In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs." International Centre for Dispute Resolution and American Arbitration Association. Article 21.9.
34. *Hay Group*, 360 F.3d at 413.
35. Obtaining Evidence From Non-Parties in International Arbitration in the United States, The International Commercial Disputes Committee of the Association of the Bar of the City of New York at II. C.. Reference to Judge Chertoff is to the concurrence opinion in *Hay Group*.
36. 1999 TF Procedures at 14.6; 2009 TF Procedures at 14.6; ARIAS U.S. Rules at 14.6.
37. New York Bar Report at Annotation F. While not determinative, in the concurring opinion in *Hay Group*, Judge Chertoff noted that obtaining non-party documents through witness testimony requires the arbitrators to decide if they, too, are prepared to suffer some inconvenience in order to mandate what is, in reality, an advance production of documents. Hay Group, 360 F.3d at 413. Obviously Judge Chertoff contemplated the physical presence of the arbitrator(s). See also the Second Circuit's decision in *Stolt-Nielsen*, 430 F.3d at 580 ("Nor should we assume lightly that that arbitrators will subpoena third-party witnesses gratuitously, since the arbitrators themselves must attend any hearing at which such subpoenas are returnable.").
38. *Id*. at Annotation K.

New Evidence that Carbon Nanotubes Have Potential to Cause Mesothelioma

By Thomas P. Bernier and Brendan H. Fitzpatrick

Since the early 1960s, mesothelioma has been identified as the aggressive and incurable cancer strongly and almost exclusively associated with exposure to asbestos. There is, however, a growing body of scientific evidence supporting a causal link between mesothelioma and exposure to long-fiber carbon nanotubes. This article examines that evidence and briefly addresses the potential concerns for the insurance and reinsurance industries.

The needle-like fiber shape of carbon nanotubes (CNTs) has long been compared to the similar appearance of asbestos fibers, raising concerns that widespread use of CNTs may lead to mesothelioma. As recently as November 6, 2017, a study published in the *Journal of Current Biology*[1] reports that long-fiber CNTs replicate asbestos-induced mesothelioma with the disruption of a specific tumor suppression gene. The study, conducted by Tatyana Chernova and others, found that long-fiber CNTs induce malignant mesothelioma in mice commensurate with a corresponding loss of the Cdkn2a tumor suppressor gene identical to that seen in mice exposed to long asbestos fibers. The study discovered that the damage to the gene during the latency period following exposure preceded the development of the mesotheliomas. These findings led the researchers to conclude that long-fiber CNTs pose an asbestos-like hazard.

In separate parallel studies, the researchers directly instilled, via injection, long-fiber carbon nanotubes (LNTs) and long-fiber amosite asbestos (LFA) into the pleural cavity of mice. In both cases, the exposure resulted in the development and marked progression of inflammatory lesions within the pleura of the lung. The cellular profile of the lesions was similar for both LFA and LNTs at one week, twelve weeks and six months after injection and was characterized by increased oxidative DNA damage.

The researchers underscored that oxidative DNA damage is often characteristic of chronic inflammation and facilitates epigenetic modifications,

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thereby promoting carcinogenesis. In one portion of the study, 25 percent of LNT-induced lesions progressed to mesotheliomas. In the 32 mice exposed to LFA, the incidence of mesothelioma was as high as 37 percent and consistent with the levels reported in humans occupationally exposed to asbestos.

To explore the molecular events underlying the progression of LNT- and LFA-induced lesions into mesotheliomas, researchers focused on the status of Cdkn2a. It is readily acknowledged that this suppressor gene is disrupted in asbestos-induced mesotheliomas in humans. Here, the researchers were looking to determine whether the same disruption occurred within their LNT- and LFA- exposed population of mice.

They concluded that the disruption was the same. The common signature of LFA- and LNT-induced pathology demonstrated that there is a molecular mechanism through which long fibers induce pleural disease, including mesothelioma, "and crucially the data place long CNT fibers on the same adverse outcome pathway as asbestos."[2]

Understanding of Risk Lags Research

These findings are significant, as CNTs are a cornerstone of many new engineering breakthroughs occurring at the nanoscale level. Chemical substances that have structures with dimensions at the nanoscale are commonly referred to as nanoscale materials or nanoscale substances. The term *nanoscale* applies to any structure with at least one dimension measuring between 1 and 100 nanometers (a nanometer is one-billionth of a meter). To provide perspective, the thickness of a single sheet of paper is approximately 100,000 nanometers.

At the nanoscale, the physical, chemical, electrical, and biological properties of matter differ in fundamental ways from the properties of the same matter in its macro or bulk form. Below 50 nanometers, Newtonian physics gives way to quantum physics, and the chemical, electrical, physical, magnetic, and optical properties of matter are altered. For example, at the nanoscale, it is reported that carbon becomes stronger than steel, aluminum becomes highly explosive, and silver assumes biological properties and becomes a biocide.

Increasingly, engineers are applying nanoscience to take advantage of these unique properties. The projected applications of nanotechnology are almost limitless and are incorporated into appliances, coatings, electronics, food, beverages, toys, games, clothing, cosmetics, paint, homes, pharmaceuticals, electronics and textiles. The incorporation of nanomaterials is expected to affect scientific advancements in engineering technologies, space exploration, pollution control, and national security.

Since its inception in 2001, through and including amounts it budgeted for 2017, the National Nanotechnology Initiative (NNI) has invested $23 billion in nanotechnology. One research group has estimated that by 2018, investment in nanotechnology will reach $4 trillion worldwide. Through the application of nanotechnology, new benefits for health, the environment, industry, and commerce are being discovered on a daily basis in arenas as varied as pollution control, food, pharmaceuticals, engineering, and construction.

As yet, the study and understanding of the health and environmental risks associated with the use of nanomaterials lag behind research into new applications. Research demonstrates that some nanomaterials may pose significant health and environmental concerns. As scientists conduct further studies into these concerns, regulators, manufacturers, insurers, and attorneys must stay apprised of potential risks.

The 2017 study by Tatyana Chernova and her colleagues is not an aberration or outlier—it is the most recent in a rapidly developing body of research looking specifically at the carcinogenetic potential of CNTs.[3] Indeed, there are numerous case studies suggesting human health concerns potentially caused by nanomaterial exposure.[4] Clearly, this growing body of research merits discussion.

In 2014, the International Agency for Research on Cancer (part of the World Health Organization) convened its Working Group on the Evaluation of Carcinogenic Risks to Humans in Lyon, France, to assess the carcinogenicity of CNTs. In 2017, this group issued *IARC Monograph 111: Some Nanomaterials and Some Fibres*.[5] The monograph concluded that a lack of epidemiological data indicated inadequate evidence to find that CNTs are a carcinogen in humans, but it did classify a particular type of multiwalled carbon nanotube (MWCNT-7) as possibly carcinogenic to humans based on the animal data.[6] Based on its review of available studies, the working group determined that this type of CNT caused peritoneal mesotheliomas under various exposure methods and that the evidence was sufficient to conclude that MWCNT-7 was carcinogenic in experimental animals.[7]

Only a Matter of Time

The impact of the working group's classification of CNTs has significant

implications and warrants further research. The commercial applications of nanotechnologies are far outpacing our understanding of the potential risks of nanomaterials to human health. Recent studies have done little to alleviate those concerns and have raised additional questions.

At the very least, it is generally accepted that some forms of nanomaterials are possible carcinogens, but other health conditions may also be connected to exposures. Of note to insurers and reinsurers is the possibility of nanomaterials as a cause of mesothelioma in humans. Also of concern, but not the subject of this article, is the environmental impact of a release of nanomaterials. Much is unknown about the impact of bioaccumulation of nanomaterials in nature or of the interaction of nanomaterials with other substances in uncontrolled environments.

Although there is no nanomaterial personal injury litigation to date, it may only be a matter of time. Whether exposures to carbon nanotubes will cause mesothelioma in humans and, if so, at what dose and latency period, remain open questions. Nevertheless, if studies establish causation, workers' compensation claims and direct and bystander consumer product user claims could follow, despite improvements in industrial hygiene practices. Likewise, one could foresee various third-party claims, perhaps even from entities in asbestos-related mesothelioma litigation and claims for medical monitoring. Class actions arising from product labeling or false advertisement should be anticipated. Certainly, federal and state regulatory actions must be considered as well.

For now, those insuring manufacturers using nanomaterials in their products, as well as those insuring entities with potential liabilities for asbestos-related diseases, must keep up to date on research. The indicators for a major toxic mass tort are present and building, and the potential causal connection between nanomaterials and mesothelioma may affect the future of asbestos-related personal injury litigation.

NOTES

1. Chernova, Tatyana, Fiona Murphy, Sara Galavotti, Xiao-Ming Sun, Ian Powley, Stefano Grosso, Anja Schinwald, Joacquin Zacarias-Cabeza, Kate Dudek, David Dinsdale, John Le Quesne, Jonathan Bennett, Apostolos Nakas, Peter Greaves, Craig Poland, Ken Donaldson, Martin Bushnell, Anne Willis, and Marion MacFarlane. 2017. "Long-Fiber Carbon Nanotubes Replicate Asbestos-Induced Mesothelioma with Disruption of the Tumor Suppressor Gene Cdkn2a (Ink4a/Arf)." *Current Biology*, 27(21): 3302-3331.
2. *Id*. at 3314.
3. In 2008, a study involving the introduction of multi-walled CNTs (MWCNTs) into the mesothelial lining of the abdominal cavity of mice resulted in asbestos-like pathogenic reactions, including inflammation and the formation of granulomas. (Poland, Craig, Rodger Duffin, Ian Kinloch, Andrew Maynard, William Wallace, Anthony Seaton, Vicki Stone, Simon Brown, William MacNee, and Ken Donaldson. 2008. "Carbon Nanotubes Introduced into the Abdominal Cavity of Mice Show Asbestos-Like Pathogenicity in a Pilot Study." *Nature Nanotechnology*, 3, 423-428.) Of more concern was another 2008 study in which researchers were able to induce mesotheliomas in mice through intraperitoneal exposure to a well-defined dose of CNTs. (Takagi, A., A. Hirose, T. Nishimura, N. Fukumori, A. Ogata, N. Ohashi, S. Kitajima, and J. Kanno. 2008. "Induction of mesothelioma in p53+/- mouse by intraperitoneal application of multi-wall carbon nanotube." *Journal of Toxicological Science*, 33(1): 105–116.) One of the most significant studies was conducted by Nagai et al. in 2011. This study showed that the deleterious effects of "multiwalled carbon nanotubes on human mesothelial cells were associated with piercing of the cell membrane. Thin crystalline MWCNTs showed an ability to pierce mesothelial cell membranes and cause subsequent inflammation and potential for the development of mesothelioma." (Nagai, Hirotaka, Yasumasa Okazaki, Shan Hwu Chew, Nobuaki Misawa, Yoriko Yamashita, Shinya Akatsuka, Toshikazu Ishihara, Kyoko Yamashita, Yutaka Yoshikawa, Hiroyuki Yasui, Li Jiang, Hiroki Ohara, Takashi Takahashi, Gaku Ichihara, Kostas Kostarelos, Yasumitsu Miyata, Hisanori Shinohara. and Shinya Toyokuni. 2011. "Diameter and rigidity of multiwalled carbon nanotubes are critical factors in mesothelial injury and carcinogenesis." *Proceedings of the National Academy of Sciences*, 108(49): E1330-E1338.) This study found, as did Chernova et al.'s 2017 study, that mesotheliomas induced by MWCNTs shared a deletion of tumor suppressor genes similar to mesotheliomas induced by asbestos. The authors concluded that their work suggests that the control of the diameter of MWCNTs could reduce the potential hazard to human health. *Id*. In 2012, an aspiration study in mice assessed pulmonary inflammation, fibrosis, oxidative stress markers, and systemic immune responses to respirable CNTs in comparison with carbon nanofibers (CNFs) and crocidolite asbestos. (Murray, Ashley R., Elena R. Kisin, Alexey V. Tkach, Naveena Yanamala, Robert Mercer, Shih-Houng Young, Bengt Fadeel, Valerian E. Kagan, and Anna A. Shvedova. 2012. "Factoring in agglomeration of carbon nanotubes and nanofibers for better prediction of their toxicity versus asbestos." *Particle and Fibre Toxicology*, 9:10.) Among the conclusions drawn were that CNFs, SWCNTs, and crocidolite asbestos all caused inflammation, pulmonary damage, and fibrosis in the lungs of mice. Interestingly, the study ranked the potency of the SWCNTs highest, followed by CNFs and then asbestos. *Id*. at 13. A 2012 in vitro study of human airway epithelial cells exposed to SWCNTs showed "significant disruption" of cellular mitosis at occupationally relevant doses and disruption of centrosomes. (Sargent, L.M., A.F. Hubbs, S.H. Young, M.L. Kashon, C.Z. Dinu, J.L. Salisbury, S.A. Benkovic, D.T. Lowry, A.R. Murray, E.R. Kisin, K.J. Siegrist, L. Battelli, J. Mastovich, J.L. Sturgeon, K.L. Bunker, A.A. Shvedova, and S.H. Reynolds. "Single-walled carbon nanotube-induced mitotic disruption." *Mutation Research*, 745(1-2): 28–37.) This type of disruption is found to be common in many tumors, including lung cancer, and is an early event in the progression of many other cancers. *Id*.
4. See Theegarten, Dirk, Smail Boukercha, Stathis Phillipou, and Olaf Anhenn. 2010. "Submesothelial Deposition of Carbon Nanoparticles after Toner Exposition: Case Report." *Diagnostic Pathology*, 5:77 (female open office worker who developed weight loss and diarrhea with submesothelial aggregates of carbon nanoparticles from printer toner dust); Kolosnjaj-Tabi, Jelena, Jocelyne Just, Keith Hartman, Yacine Laoudi, Sabah Boudjemaa, Damien Alloyeau, Henri Szwarc, Lon Wilson, and Fathi Moussa. 2015. "Anthropogenic Carbon Nanotubes Found in the Airways of Parisian Children." *EBioMedicine*, 2(11): 1697–1704 (articulate matters consisting mostly of CNTs found in 100 percent of broncho-alveolar lavage-fluids and inside lung cells of asthmatic children in study); Journeay, W. Shane and Rose Goldman. 2014. "Occupational handling of nickel nanoparticles: A case report." *American Journal of Industrial Medicine*, 57(9): 1073–1076 (chemist who developed nickel sensitization when working with nanoparticle nickel powder in a setting without respiratory protection or control measures); see also Song, Y., X. Li, and X. Du. 2009. "Exposure to nanoparticles is related to pleural effusion, pulmonary fibrosis and granuloma." *European Respiratory Journal*, 34(3): 559–567 (seven female workers occupationally exposed to nanoparticles for 5-13 months all developed shortness of breath and pleural effusions; pathological examinations of lung tissue displayed nonspecific pulmonary inflammation, pulmonary fibrosis and foreign-body granulomas of pleura).
5. International Agency for Research on Cancer. 2017. *IARC Monograph 111: Some Nanomaterials and Some Fibres*. IARC Working Group on the Evaluation of Carcinogenic Risks to Humans. Geneva, Switzerland: World Health Organization.
6. *Id*.
7. *Id*.

Keeping Confidential Information Confidential: Tips from the Field

By David Winters

All reinsurance arbitrations involve some kind of confidential information. For example, many disputes involve the production of commercially sensitive information, such as trade secrets or other material that the arbitration participants would prefer not be made public. Some involve the production and exchange of highly regulated and confidential information relating to individuals, including social security numbers and account numbers, often called "personally identifiable information." Additionally, an arbitrator's work notes relating to the arbitration and panel deliberations are considered highly confidential. Finally, if the parties are operating under an ARIAS standard form of confidentiality order or agreement, then almost everything relating to the proceeding will be confidential "arbitration information."

Most confidential information is regulated by law and/or by contract and must be treated with special care by parties, attorneys, and arbitrators alike.[1] The *ARIAS·U.S. Practical Guide for Information Security in Arbitrations*, last revised in June 2017, was created to help participants in insurance and reinsurance arbitrations keep confidential information secure. However, some of the more "technical" directions in the guide might be outside the expertise of the arbitration participants and thus difficult to put into effect.

For example, the guide provides that arbitration participants, including arbitrators, should invest in a computer with full-disk encryption. Full-disk encryption is a process by which data is transformed on the computer's hard drive into a format that is unreadable without access to the encryption key, or password. In addition, the guide also provides that arbitration participants should use and regularly update anti-virus software.

Most parties and their outside counsel have dedicated resources to ensure confidential information is properly encrypted and current anti-virus software is deployed. Law firms and companies often have in-house staff, including IT professionals and legal counsel, who are responsible for determining exactly which information must be kept secure and the steps that must be taken to secure it. In contrast, many arbitrators are solo practitioners who are hired

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The key takeaway for parties, counsel, and arbitrators alike is that arbitrators do not need to be information security experts capable of encrypting their own computers and installing their own anti-virus software.

for their industry expertise and have neither the time nor the resources to master the increasingly complex field of information security.

But assuming the parties and their counsel take steps to assist arbitrators in the shared task of "keeping confidential information confidential," arbitrators need not be technical experts in information security. This article will provide practical tips "from the field" and set forth methods that the author has seen employed to ensure that arbitrators have appropriate encryption and anti-virus safeguards. The article is not intended to be prescriptive; rather, its goal is to provide some real-life examples of steps that arbitration participants have undertaken to keep confidential information secure, in the hopes of helping all arbitration participants meet the challenges posed by information security.[2]

Parties Secure the Panels' Existing Computers

One method of ensuring that arbitrators are using computers with full-disk encryption and properly updated anti-virus software is for the parties to provide the panel with access to an information technology professional (typically a third party retained and compensated by both parties) who can check the panel's computers to ensure that the arbitrators have the necessary security features. If the arbitrators do not, the IT professional can provide the arbitrators with appropriate software and/or software updates. Moreover, if the parties are obligated to destroy some or all confidential information at the termination of the arbitration, the professional can once again reach out to the arbitrators and assist them with proper disposal.

The advantage of hiring an outside professional is that it is relatively easy and inexpensive from the parties' perspective. A disadvantage of the process is that it can be somewhat invasive. Computer software is not without glitches, and any software installed on an arbitrator's computer might cause performance issues. To illustrate, full-disk encryption software installed on computers that did not previously have such software can create performance issues. It is well documented that computers generally work slower when they have full-disk encryption than they do without the software.

Another disadvantage of this approach is that it does not provide the parties with the highest level of assurance that confidential information will be properly disposed of at the conclusion of the proceeding. The IT professional should delete information that should be disposed of pursuant to the arbitration protocol, while taking care to avoid deleting or destroying information on an arbitrator's computer that is not related to the arbitration. The IT professional will inevitably have to rely on the arbitrator to identify which materials should be deleted and which should be retained. In the course of this process, there is a risk that the arbitrator will misfile or forget where confidential information can be found on her own computer—even information security professionals can misfile or misplace information on their own computers.

Parties Provide Dedicated Devices

Another method of helping arbitrators keep confidential information secure is to provide them with dedicated devices, such as laptops. Under this approach, the parties agree to purchase and outfit devices for the arbitrators to use solely for the arbitration. The parties can then

ensure that those devices have required and appropriate security features, including full-disk encryption and anti-virus software. In addition, the parties can instruct the panel members to use only the dedicated devices to send and store confidential information. This will facilitate the disposal of confidential information at the agreed-upon conclusion of the dispute, because the parties can simply retrieve the devices. (The parties should also take steps to wipe the devices' hard drives clean—usually with the assistance of a mutually agreeable third-party vendor—so that information the parties should not see, such as arbitrators' notes, is properly destroyed.)

The advantage of dedicated devices is that they afford the parties a fairly highly level of control and security with respect to storing and disposing of electronically stored confidential information provided to arbitrators. Another advantage is that using them should be fairly simple and non-invasive for arbitrators—the panel members simply have to use the provided devices to handle electronic confidential information relating to the arbitration, and for no other purpose. A disadvantage is that the cost can potentially be higher than certain other methods, such as simply securing arbitrators' existing devices. Another disadvantage is that it could be burdensome if arbitrators end up using multiple devices in multiple arbitrations (in addition to the arbitrators' personal computing devices). An arbitrator could potentially have to transport multiple devices whenever she travels.

Parties Establish Virtual 'Deal Rooms'

Virtual "deal rooms" are another way to ensure that confidential information is appropriately protected. A deal room is a secure website, established and controlled by the parties or a third party, that arbitrators access online. The deal room can be set up so that information can be accessed only by those with appropriate credentials and cannot be copied, downloaded, or otherwise removed from the deal room. This approach effectively eliminates the issue of deleting electronic files stored or maintained by arbitrators at the conclusion of a dispute.

Deal rooms potentially offer the highest level of security of all the methods discussed, at least for information that can only be accessed in the deal room itself. That said, deal rooms have the disadvantage of being relatively inconvenient. First, they can only be accessed when the arbitrators have an online connection. Second, if the parties set up the deal room with the highest levels of security, arbitrators will only be able to review information on their computer when online and may not be able to print and mark up documents.

Finally, the security offered by deal rooms is necessarily limited. Although deal rooms offer excellent security for documents that are accessible only while logged in, they will not ensure the security of electronic documents not contained in the room—for example, an arbitrator's electronic notes relating to a proceeding. Encryption of the arbitrators' computers may still be necessary if they take confidential electronic notes about filings or proceedings on a device.

Parties Provide Passwords

Whether arbitration participants use one of the methods described above or some other method, electronic information should be secured using a secure password. In fact, deal rooms and computers, whether the panel members' own or provided to the panel, are only as secure as the passwords used to secure them. The *ARIAS Security Guide* explains that a strong password is a critical element of any arbitration information security strategy. One method that parties and counsel can use is to generate and provide to the arbitrators secure passwords in person or by phone, such as during the organizational meeting or during a separate teleconference.

As noted at the outset, the approaches and methods set forth in this article are not intended to be prescriptive, but rather descriptive of tools that have been used to make arbitration more secure. The key takeaway for parties, counsel, and arbitrators alike is that arbitrators do not need to be information security experts capable of encrypting their own computers and installing their own anti-virus software. Instead, the parties and counsel can adopt methods and techniques, such as those described in this article, to make arbitrations more secure and help arbitrators play a key part in the process.

NOTES

1. Collectively, I refer to all of the above-mentioned categories of information as "confidential information."
2. There are many challenges relating to information security that are addressed in the *ARIAS Security Guide* but are outside the scope of this article, such as the transfer of confidential information and the treatment of hard-copy confidential information. These topics may be explored further in future articles or at ARIAS conferences.

Honorable Engagement Clauses

Since March 2006, in a section of the ARIAS•U.S. website titled "Law Committee Reports," the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration- and reinsurance-related issues. Individual ARIAS•U.S. members are also invited to submit summaries of cases. Legislation, statutes, or regulations for potential publication by the committee. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions.

PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd., 400 Fed. Apprx. 654 (2010)

Court: U.S. Court of Appeals, Third Circuit

Date Promulgated: November 8, 2010

Issues Decided: Can an arbitration panel operating under an honorable engagement clause "reinvent" the contract before them or order relief not requested?

Submitted by: Elizabeth V. Kniffen and Dennis Anderson

In *PMA Capital Insurance Company v. Platinum Underwriters Bermuda, Limited*, the U.S. Court of Appeals for the Third Circuit affirmed a federal district court's decision to vacate an arbitration award, concluding that, despite an honorable engagement clause in the reinsurance contract, the arbitration panel exceeded its authority when it removed a bargained-for "deficit carry forward" provision from the contract.

PMA Capital Insurance is an insurance company; Platinum Underwriters is a reinsurer. In 2003, they made a contract under which Platinum indemnified PMA for obligations arising from PMA's insurance policies. The contract included a "deficit carry forward" provision that entitled Platinum to reimbursement for losses carried from one year to the next. It also included an honorable engagement clause providing that arbitrators must—

> [I]nterpret this Agreement as an honorable engagement and not as merely a legal obligation. They are relieved of all judicial formalities and may abstain from following the strict rules of law. They will make their award with a view to effecting the general purpose of the Agreement in a reasonable manner rather than in accordance with the literal interpretation of the language.

In 2008, a dispute arose over whether Platinum could carry forward any losses from 1999-2001. Platinum contended it was entitled to carry forward $10.7 million, while PMA argued that Platinum was not entitled to any losses for that period. A panel of arbitrators received evidence, testimony, and argument and issued an award (1) ordering PMA to pay Platinum $6 million, and (2) removing the "deficit carry forward" provision from the contract.

PMA successfully petitioned the Federal District Court for the Eastern District of Pennsylvania for vacatur of the award, and Platinum appealed. The appellate court noted that, although courts are highly differential to arbitration awards, they are not entitled to simply rubber-stamp arbitrators' decisions, and arbitrators may not exceed the scope of the authority granted to them by the parties' contract.

The appellate court agreed "in all respects" with the district court's reasoning, which was as follows:

> The Honorary Engagement Clause allowed the Arbitrators to stray from "judicial formalities" and the 2003 Contract's "literal language" to effectuate in a "reasonable manner" the Contract's "general purposes." No court has

> held that such a clause gives arbitrators authority to re-write the contract they are charged with interpreting.... The 2003 "contract itself" requires the enforcement of the Deficit Carry Forward Provision, not its elimination.

The appellate court concluded that "the honorable engagement clause permitted the arbitrators to stray from judicial formalities [but] did not give them authority to reinvent the contract before them."

Harper Insurance Ltd. v. Century Indemnity Co., 819 F.Supp.2d 270 (2011)

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

Date Promulgated: July 28, 2011

Issue Decided: Can an arbitration panel order a remedy—specifically, a prepayment plan—that was not explicitly stated in the contract?

Submitted by: Elizabeth V. Kniffen and Dennis Anderson

In *Harper Insurance Limited v. Century Indemnity Company*, the U.S. District Court for the Southern District of New York denied a petition by a group of reinsurers to vacate an arbitration award and granted the insurer's cross-petition to confirm the award, based in part on its conclusion that an honorable engagement clause permitted the arbitrators to fashion a prepayment plan that was not included in the contract.

The petitioner reinsurers were parties to a reinsurance contract with Century that obligated the reinsurers to indemnify Century for certain levels of liability arising out of asbestos bodily-injury lawsuits. The contract did not include a reports and remittances clause dictating when claims would be compensated by the reinsurers; instead, the contract directed that the "liability of the Reinsurers shall follow that of [Century] in every case" and "payments of claims . . . in which this reinsurance is involved shall be binding upon the Reinsurers, who shall be bound to pay or allow, as the case may be, their proportion of such payment."

The contract also included a broad arbitration clause providing that arbitrators "shall interpret this Agreement as an honorable engagement and shall make their award with a view to effecting the general purpose of this Agreement in a reasonable manner, rather than in accordance with a literal interpretation of the language."

In the early 2000s, insurers and reinsurers were threatened with bankruptcy when they experienced a flood of asbestos bodily-injury claims. The reinsurers instituted a program requiring Century to meet heightened documentation requirements before receiving indemnification. Those requirements led to a bottleneck in reinsurers' payments for asbestos claims, and Century initiated arbitration to resolve it. A complex arbitration process led to an interim arbitration by which the arbitrators ("the panel") created a prepayment program requiring the reinsurers to pay, within 106 days of delivery of a billing, "the entire amount billed or the undisputed portion plus 75 percent of the disputed portion . . . ."

For over three years, the panel's plan worked smoothly, and the prepayment provision was never triggered. The reinsurers and Century agreed that the panel's jurisdiction should be terminated, and the reinsurers asked that a final order be issued that eliminated the prepayment provision. The panel issued a final order terminating its jurisdiction, but left the prepayment provision in place.

The reinsurers petitioned to vacate the final order, arguing that the panel exceeded its powers by rewriting the agreement to include a prepayment provision for which the parties had not bargained.

The court denied the petition, holding that the panel did not exceed the scope of its authority even though the prepayment plan included obligations not explicitly bargained for by the parties. The court noted that the agreement's honorable engagement clause specifically directed the panel not to interpret the contract literally, but to carry out the contract's "general purpose . . . in a reasonable manner."

The court quoted a 2003 case in which the U.S. Court of Appeals for the Second Circuit observed that "[c]ourts have read [honorable engagement] clauses generously, consistently finding that arbitrators have wide discretion to order remedies they deem appropriate," and stated that courts reviewing decisions made by arbitrators operating under honorable engagement clauses are to determine "whether the award draws its essence from the agreement to arbitrate or has a barely colorable justification."

The court also pointed out that, even though the contract did not include a reports and remittances clause dictating the timing of payments, it clearly sought to ensure a prompt flow of funds to cover claims. "The panel ultimately concluded that this [prepayment] protocol best effectuated the parties' purpose," the court said. "We cannot conclude that [the Panel] did not have, at a minimum, a barely colorable justification for its decision."

First State Insurance Co. v. National Casualty Co., 781 F.3d 7 (2015)

Date Promulgated: March 20, 2015

Court: U.S. Court of Appeals, First Circuit

Issue Decided: In the First Circuit, what is the scope of judicial review of an arbitration award issued under an arbitration agreement that includes an honorable engagement clause?

Submitted by: Elizabeth V. Kniffen and Dennis Anderson

In *First State Insurance Company v. National Casualty Company*, the U.S. Court of Appeals for the First Circuit considered (for the first time) the operation and effect of an honorable engagement provision in an arbitration clause. The court concluded that (1) the already narrow scope of review for arbitration awards generally is even narrower under an honorable engagement clause, and (2) the clause empowers arbitrators to grant relief not explicitly mentioned in the underlying contracts.

First State arose from a dispute rooted in a number of reinsurance and retrocessional agreements between First State Insurance Company and New England Reinsurance Corporation (collectively, "First State") and National Casualty Company ("National"). In August 2011, First State demanded arbitration under eight of the agreements to resolve billing disputes and disagreements about the interpretation of certain contract provisions. The eight arbitrations were consolidated into a single proceeding.

Each of the contracts included an honorable engagement clause directing the arbitrators to consider each agreement "an honorable engagement rather than merely a legal obligation" and explaining that arbitrators were "relieved of all judicial formalities and may abstain from following the strict rules of law."

The arbitration panel decided to consider the contract interpretation issues first and issued a contract interpretation award in 2012, which established a detailed payment protocol. The arbitration panel then turned its attention to the billing dispute and issued a final arbitration award in 2013. First State sought judicial confirmation of both awards. The U.S. District Court for the District of Massachusetts confirmed the arbitration awards, and National appealed.

National argued that the arbitrators exceeded the scope of their authority by setting up a payment protocol not found in the insurance contracts. The First Circuit rejected that argument and provided appellate guidance (for the first time ever in the First Circuit) regarding the scope of judicial review of arbitration awards pursuant to arbitration agreements that include honorable engagement clauses.

At the outset of the opinion, the court stated that the scope of review of an arbitration award is "among the narrowest in the law" and that it is even narrower when the arbitration clause contains an honorable engagement provision. Later in the opinion, the court summarized its guidance for the lower courts of the First Circuit:

> Here, the sole inquiry is whether the arbitrators even arguably construed the underlying agreements . . . . A legal error (even a serious one) in contract interpretation is, in and of itself, not a sufficient reason for a federal court to undo an arbitration award. Only if the arbitrators acted so far outside the bounds of their authority that they can be said to have dispensed their own brand of industrial justice will a court vacate the award. Put another way, as long as an arbitration award draw[s] its essence from the underlying agreement, it will withstand judicial review—and it does not matter how good, bad, or ugly the match between the contract and the terms of the award may be.

The court encouraged lower courts tasked with deciding whether an arbitration panel was arguably interpreting the underlying contract to look to the text of the arbitration award. The award in this case explained that the payment protocol at issue was, in part, "based upon the terms of the subject reinsurance agreements" and that the panel's inquiry pertained to National's obligations "under the subject reinsurance agreements." Based on this intrinsic evidence, the court concluded that it was "readily apparent . . . that the arbitrators understood the nature of their task."

Turning its attention to the honorable engagement clause specifically, the court left no doubt that such clauses are favored in the First Circuit, describing them as a "huge advantage" to the prospects of successful arbitration. "We believe," the court wrote, "that an honorable engagement provision empowers arbitrators to grant forms of relief, such as equitable remedies, not explicitly mentioned in the underlying agreement. This is a huge advantage: the prospects for successful arbitration are measurably enhanced if the arbitrators have flexibility to custom-tailor remedies to fit particular circumstances. An honorable engagement provision ensures that flexibility."

ARIAS Goes to Brooklyn!

The Brooklyn Bridge. Prospect Park. The original Dodgers. Hipsters. Jay-Z.

To this list of Brooklyn icons, we now add (drum roll) ARIAS•U.S. This fall, ARIAS will leave behind the tourist traps and gaudy lights of Midtown Manhattan to make the short trip across the East River to Brooklyn. It is a journey I make every day, having moved to New York's better borough several years ago.

As Brooklyn gets ready to welcome ARIAS for the first time, I thought a brief introduction to my part of the city would be helpful to you all. In this issue, I'll start with the basics. More information will be shared as the conference gets closer.

A caveat before I start: Brooklyn is huge. While Manhattanites usually lump Brooklyn into one amorphous, distant land accessible only by a treacherous journey worthy of a "Lord of the Rings" movie, Brooklyn is in fact a colorful collection of neighborhoods, each with its own distinct flavor and history. We Brooklynites keep one fact handy at all times: if you broke up New York City into its five boroughs, Brooklyn would rank as the third largest city in American by population, behind only Los Angeles and Chicago. There is much to experience in Brooklyn, and much to do.

Where we'll be. Our fall conference will be held at the New York Marriott at the Brooklyn Bridge. Full disclosure: you cannot actually see the Brooklyn Bridge from the hotel. The hotel is located in downtown Brooklyn, not too far from the on-ramp to the Brooklyn Bridge. The hotel is also near Borough Hall, the administrative center of Brooklyn, and near the state and federal courthouses.

Downtown Brooklyn is a rapidly changing part of the borough. While Brooklyn is rarely associated with tall buildings or a striking skyline, that is starting to change. Downtown Brooklyn has seen a spike in luxury high rises, which have transformed the downtown area. They are all visible from the hotel, a few blocks away. These buildings have been attracting renters tired of the high prices and cramped spaces of Manhattan apartments. They have also given rise to bars and restaurants that cater to the new arrivals.

How to get there. The hotel is located near numerous subway lines. Less than a block from the Marriott is the Jay St-Metrotech Station. The A/C (Blue), F (Orange), and R (Yellow) lines all take you right there.; the A/C will take you directly to and from Penn Station if you are coming in by train (the ride is about 20 minutes). For those who want to get into Midtown, the F line travels along the 6th Avenue corridor in Manhattan.

Two more blocks away are the subway lines at Borough Hall Station. Those include the 2/3 line (Red) and the 4/5 line (Green). The 2/3 will take you right to Times Square in less than 20 minutes, while the 4/5 gives you access to the east side of Manhattan. For those who want to travel into Manhattan by car, a taxi or Uber ride will cost about $25 and take about 30 minutes.

If you are traveling by plane, LaGuardia Airport is the closest in terms of time—20 minutes without traffic, 30 with. Getting to and from JFK can take, on average, about 40 minutes.

The surroundings. The hotel is within a few minutes of some of Brooklyn's most upscale and recognizable neighborhoods. None of these neighborhoods will strike you as remotely

Suman Chakraborty assists clients in resolving domestic and international commercial disputes, with an emphasis on reinsurance and complex insurance litigation. He has a nationwide litigation practice in state and federal courts, where he defends insurers, reinsurers, and third-party administrators in coverage and bad faith cases and in a range of tort claims. Having practiced in both London and Tokyo, he brings an awareness of the needs of transnational companies as well as an understanding of his clients' commercial and industry challenges.

"hipster-y." Brooklyn Heights, known as "America's first suburb," is just across Cadman Plaza from the hotel. Few neighborhoods in New York can match the beauty of Brooklyn Heights' elegant brownstones, tree-lined streets, and impressive scenery.

Also within a few minutes are Cobble Hill and Boerum Hill, two family-friendly neighborhoods full of restaurants, bars, and coffee shops. Court Street (which divides the two neighborhoods) and Smith Street (which runs parallel to Court in Boerum Hill) are the main thoroughfares.

DUMBO (an acronym for Down Under the Manhattan Bridge Overpass) is also just a 10-minute walk from the hotel. Once a haven for artists, it is now the most expensive Brooklyn neighborhood in which to live.

Top things to do. In the next issue of the *Quarterly*, I'll share recommendations for restaurants and other things to do in the area. In this issue, I'll tell you the top three places to visit while you are here.

The first is the Brooklyn Heights Promenade. The view of the lower Manhattan skyline, framed on one side by the Brooklyn Bridge and on the other side by the Statue of Liberty, is jaw-dropping. It is a must-visit on your trip.

Just below the Promenade is Brooklyn Bridge Park. Accessible from Atlantic Avenue, DUMBO, and the Squibb Bridge in Brooklyn Heights, this waterfront park has been completely transformed in the last few years. It is a perfect place for those seeking to take a morning walk or run. The views from the park are spectacular—I particularly recommend the view from Jane's Carousel on the far DUMBO end of the park.

Finally, you should walk the Brooklyn Bridge. It can get awfully crowded with both pedestrians and cyclists, so early morning or evening is better than midday. Most people who walk the bridge start on the Brooklyn side and walk into Manhattan. If you don't want to walk back into Brooklyn after that, you can take the 2/3 at Fulton Street or the 4/5 at Brooklyn Bridge/City Hall Station to make the return trip.

I am excited you will all have a chance to experience Brooklyn. And I'm particularly excited that a Fall Conference in Brooklyn means I actually might wake up in time to attend the first morning session.

NEWS & NOTICES

Freeborn Welcomes Four Attorneys to Tampa, Chicago and Richmond Offices; Continues Expansion of Insurance and Reinsurance Industry Team

Freeborn & Peters LLP is pleased to announce the continued expansion of its Insurance and Reinsurance Industry Team with the addition of attorneys Melissa B. Murphy, Steven D. Pearson, Michael J. Braggs and Sarah E. Chibani. Ms. Murphy and Ms. Chibani are based in the firm's Tampa, Fla., office. Mr. Pearson joins Freeborn's Chicago office, and Mr. Braggs is based in the firm's Richmond, Va., office. Freeborn's reinsurance and insurance coverage and defense practices have experienced significant growth over the last 20 months, expanding the group and firm's overall geographic reach. Last year, Freeborn opened its first Florida office, in Tampa, and combined with New York City firm Hargraves, McConnell & Costigan P.C. In 2016, the firm combined with the highly regarded Richmond, Va., law firm Brenner, Evans & Millman P.C.

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

MEMBERSHIP APPLICATION

AIDA Reinsurance & Insurance Arbitration Society
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(C) Law Firms, Consulting & Actuarial Firms (11 +)	$5,000
Insurance/Reinsurance Companies (1 - 15)	$1,850
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OR CORPORATE MEMBER APPLICANT

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