Information Security: A Panel Discussion

ARIAS US

QUARTERLY

IN THIS ISSUE

- Commutation Agreements
- Rapid-Fire Case Summaries
- Ensuring E-mail Security

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FEATURES

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

EDITOR'S LETTER

Like all kids growing up I had an active imagination, whiling away countless hours playing such roles as cowboy, superman and explorer of galaxies far, far away. And also a few more, like pilot and race car driver.

As I grew older and began to realize that one day I would become an adult, I abandoned these flights of fancy and, so to speak, came down to earth. Lawyer, adman, executive, writer, college professor, brokers of various sorts, (stock, real estate and even insurance), president and senator were some of the careers with which I flirted. Or perhaps I could marry rich or become a hippie. And I never gave up wanting to become a race car driver until I actually tried it and crashed. Other roles I ruled out: doctor (too much blood), accountant (too many numbers) and first baseman for the fondly remembered Brooklyn Dodgers (too little talent).

Possessed of zero manual dexterity, zero desire to spend an entire career staring into mouths and zero desire to inflict the pain on others the way they had inflicted it on me, the thought of becoming a dentist at no time entered my mind. Never having played dentist as a child, it boggles the mind that I would wind up doing so as an adult.

Upon taking on the role of editor of the *ARIAS Quarterly*, I soon discovered that cajoling members to write articles was like pulling teeth and the pages of the magazine were like cavities needing to be filled. Either way, neither playing dentist nor sitting in the dentist's chair is much fun. The *ARIAS Quarterly* depends on contributions from our membership, so please step up and contribute an article.

With that said, we're especially appreciative of those who were responsible

for the articles we're publishing in this edition.

One of the goals of the *Quarterly* is to offer information of practical value to arbitrators, counsel and parties. The symposium format enables us to present a dialogue showing the insights of several of our colleagues at once. Thus, we present in this issue a symposium moderated by Bob Hermes on a subject on which ARIAS has placed much emphasis: information security in arbitrations. I won't go so far as to say that the three experienced practitioners with whom he sat down to discuss the subject have participated in countless arbitrations but I will say that they've participated in a heck of a lot of them. John Cole, Dan Schmidt and David Thirkill shared how their own awareness of cybersecurity issues has heightened and how they've adopted practices for protecting confidential information. A special thanks to Doug Winter of Winter Reporting for reporting their conversation.

Just as reinsurance treaties are agreements so are commutations. And just as there are disputes arising from reinsurance agreements, it's hardly surprising that there are disputes arising from commutation agreements, as well. Perhaps it is less true in commutations of reinsurance relationships, but commutation disputes generally are resolved in court. Jerry McElroy has written a piece explaining some of the issues presented by disputes arising from commutation agreements and how the

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courts have dealt with them. Jerry provides practical advice on avoiding the pitfalls which lead to disputes. Even for those commutations subject to arbitration, Jerry's article is well worth reading.

It's oft said that for every rule, there's an exception. Of course, that's a rule, as well. Reviewing cases where a party has attempted to challenge an arbitrator's suitability, there is, Steve Kennedy points out, an exception to the rule that such challenges must wait until after the panel has rendered an award. Sometimes. Maybe. Want to know more? Better read what Steve has to say.

To hear many people tell it, a contract isn't valid without a meeting of the minds. Pay them no attention and listen to Ron Gass instead. As Ron tells us in his most recent Case Notes Corner column, federal courts have routinely enforced arbitration clauses notwithstanding a party's contention that the contract was void because there was no meeting of the minds. Ron analyzes one such decision involving reinsurance, *HDI Global SE v. Lexington Insurance Company*, No. 16 Civ. 7241 (CM), 2017 U.S. Dist. LEXIS 18677 (S.D.N.Y. Feb. 7, 2017), where the court held that alleged lack of mutual assent to a facultative certificate was not a basis for voiding the arbitration clause or staying the arbitration.

We close this edition of the *Quarterly* with an article that's especially timely considering a topic that has been much in the news lately: cybersecurity. By now, reports of hacked e-mails have become increasingly familiar. Many of us have been victims ourselves, or interact with institutions or individuals whose e-mail accounts have been compromised. In a debut column from the ARIAS Technology Division, Mark Menapace offers tips on how to make your e-mail more secure.

Once again, we hope that this edition of the *ARIAS Quarterly* has been interesting and useful. Let us know if there are any topics you'd like to see us cover in future editions and by all means help speed my retirement from my dental practice by contributing an article. No excuses. Start writing today.

Interested in submitting an article? ARIAS welcomes articles written by its members addressing issues in the field of insurance and reinsurance arbitration and dispute resolution. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. If you're interested in penning an article or have suggestions for topics for articles you'd like to see, please contact Tom Stillman at tomstillman@aol.com.

IN THIS ISSUE

1

2

3

4

5

6

7

8


Pre-Award Challenges—p. 6

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Commutation Agreements—p. 10

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Case Notes Corner—p. 17

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Information Security—p. 29

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5 Robert N. Hermes is a partner, member of the Management Committee, and co-chair of the reinsurance litigation and arbitration practice group at Butler Rubin Saltarelli & Boyd LLP. He has spoken frequently at ARIAS•U.S. conferences and is a member of the ARIAS Forms and Procedures Committee.

6 Daniel E. Schmidt IV has been involved in reinsurance arbitrations since 1983. He is a founding director of ARIAS•U.S. and has also served the organization as president and chairman. Dan is an ARIAS•U.S. Certified Arbitrator/Umpire and a Listed Arbitrator by ARIAS•U.K. He is on the American Arbitration Association's Panel of Commercial Arbitrators, International Arbitrators, and Roster of Umpires.

7 David A. Thirkill has more than 40 years of experience in all aspects of the insurance and reinsurance industries, including run-off. He is an ARIAS•U.S. Certified Arbitrator/Umpire and Qualified Mediator. David was a founding member of the ReMedi Mediation Society.

Tech Corner—p. 37

8 Michael Menapace practices at Wiggin and Dana in Hartford and New York. His practice focuses on the insurance and reinsurance industries, complex commercial litigation, and data breach/cyber liability issues. He regularly represents clients before state and federal courts and in arbitrations concerning a variety of insurance and reinsurance issues.

NOW AVAILABLE

The ARIAS•U.S. Guidance for Data Security in Arbitrations

Arbitration involves the collection and exchange of an enormous amount of information. This information may include personal, medical, or other information that is subject to state and/or federal privacy regulations. Insurance companies have an obligation to protect such information from disclosure, which extends to their use of third-party service providers. Failure to safeguard such data can result in significant repercussions for all involved.

To help mitigate that risk, ARIAS•U.S. created a task force and working group to provide guidance on how all participants in the arbitration process—arbitrators, outside counsel, and company representatives—can better manage the risks of exchanging private information in arbitration. The current draft of this guidance, called the ARIAS•U.S. "Guidance for Data Security in Arbitrations," covers best practices for—

- identifying and minimizing private information in arbitration;
- incorporating information security procedures from the organizational meeting onward;
- protecting private information at rest;
- protecting private information in motion;
- disposing of private information;
- special privacy concerns in life and health or international arbitrations; and
- what to do if private information is disclosed.

Pre-Award Challenges under Sections 4 and 5 of the Federal Arbitration Act

By Steve Kennedy

We are all familiar with cases where parties have challenged the suitability of individuals to serve on a panel by raising various claims of bias or improper conduct. We also know that courts consistently hold that such challenges must be made after the panel has rendered an award. But are there circumstances under which a party may challenge individuals' suitability to serve on an arbitration panel *before* an award is issued?

The answer is "maybe." If an individual proposed to serve on a panel lacks credentials required by the parties' arbitration agreement, then there is authority supporting a pre-award petition for judicial intervention to block that individual's arbitral service.

There are generally two categories of cases under the Federal Arbitration Act (FAA) involving challenges to arbitrator qualifications. The first category consists of cases under FAA §§ 4 and 5 that recognize the courts' authority to appoint an arbitrator or umpire when a party does not comply with contractual arbitrator selection provisions. The second category consists of cases under FAA § 10 that authorize statutory-based challenges to arbitrator qualifications, but only after an award has been entered.

While some parties have argued that cases in the second category establish a uniform rule that pre-award challenges to arbitrator qualifications are never permitted, there are cases upon which a party may request judicial intervention before an award is issued under FAA §§ 4 and 5. This article discusses cases in which courts have decided whether to permit pre-award challenges based upon qualification requirements in the arbitration agreement and the policy considerations courts found important when deciding those cases.

Qualification Requirements in Arbitration Agreements

As insurance and reinsurance practitioners are aware, industry arbitration agreements typically require arbitrators to be "current or retired executives of insurance or reinsurance companies." Arbitration agreements, of course, sometimes contain additional employment requirements. Life and health reinsurance contracts, for example, may call for arbitrators to be actuaries in addition to current or former officers of re/insurance companies. The more qualification requirements there are, the more difficult it usually is for parties to identify suitable arbitrators—especially if the contract requires that the

If an individual proposed to serve on a panel lacks credentials required by the parties' arbitration agreement, there is authority supporting a pre-award petition for judicial intervention to block that individual's arbitral service.

arbitrators be current officers of insurance or reinsurance companies, as the number of such individuals able and willing to serve is small.

The purpose of contractually mandated qualifications is well known—to have individuals with specialized experience decide parties' disputes. This purpose, however, can be frustrated if one party fails to appoint qualified arbitrators or umpire candidates to serve on the panel. Parties facing this scenario have sought pre-award relief from courts under FAA §§ 4 and 5.

FAA § 4 states, in part, that to the extent a party refuses to arbitrate, district courts shall, upon a petition by the other party, direct the parties to arbitrate in accordance with the terms of the arbitration agreement.[1] Under FAA § 5, "a district court has the duty . . . to step in and appoint an arbitrator" in at least two circumstances: (1) when a "party fails to avail itself of the contractual selection method," or (2) when "there is a lapse in the naming of the arbitrator":[2]

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but . . . if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire…[3]

Pre-Award Challenges Based On Contractually Mandated Qualifications

While there are not many cases involving arbitrator qualification challenges under FAA §§ 4 and 5 (especially in comparison to the number of FAA §10 bias cases), of the cases that do exist, almost all of them concern a request to remove an arbitrator that had already been appointed to serve. In seeking removal, objecting parties have argued that the qualification requirements in the arbitration agreements form a part of the "method of naming or appointing" an arbitrator; therefore, to the extent those requirements have not been met, courts must enforce the agreement according to its terms, which means removal of an unqualified arbitrator. Parties opposing these arguments, however, have contended that challenges to arbitrators' qualifications (no matter what the reason) cannot be heard until after a panel issues a final award.

In one of the earlier arbitrator qualification cases, *Jefferson-Pilot Life Insurance Co. v. LeafRe Reinsurance Co.*[4], the U.S. District Court for the Northern District of Illinois ruled that it had the authority under the FAA to entertain a pre-award challenge as to whether the arbitrators in a reinsurance dispute were "active or retired officers of a life or health insurance company and familiar with the reinsurance business," as required by the arbitration agreement in issue. In support of its ruling, the *Jefferson-Pilot* court stated that the objecting party was merely asking it, under FAA §§ 4 and 5, to enforce the terms of the arbitration agreement as written:

The question here is whether a party who challenges an arbitrator's qualifications—just like a party who challenges bias—must wait until the post-award stage to complain. I do not think this is necessary. Here, Jefferson-Pilot does not ask this court to undertake the difficult task of determining whether an arbitrator is impermissibly biased. Plaintiff merely asks that he be entitled to a benefit explicitly conferred by a provision of an agreement negotiated in an arm's length transaction between two sophisticated parties. The Federal Arbitration Act clearly states that contractual provisions for the appointment of an arbitrator "shall be followed."

In two more recent decisions, courts in *B/E Aerospace, Inc. v. Jet Aviation St. Louis, Inc.*[5] and *Oakland-Macomb Interceptor Drain Drainage Dist. v. RIC-Man Construction, Inc.*[6] have also found permissible pre-award challenges as to whether already-appointed arbitrators possess the employment credentials mandated in arbitration agreements.

Courts have also considered FAA §§4 and 5 qualification challenges in the context of umpire selection, but no court has decided on the merits whether such a challenge is permissible.

In stark contrast to these cases, however, other courts have rejected pre-award attempts to disqualify arbitrators under FAA §§ 4 and 5. Perhaps the most well-known case is *Gulf Guaranty Life Insurance Co. v. Connecticut General Life Insurance Co.,*[7] where the U.S. Court of Appeals for the Fifth Circuit reversed the district court's decision to remove a sitting arbitrator on the basis that he was not an officer of a "life insurance company" as required by the arbitration agreement. In reversing the district court, the Fifth Circuit concluded that while courts have the authority to "appoint" arbitrators under FAA § 5, nothing in the FAA grants courts the power to remove arbitrators or even to make inquiries into arbitrators' capacity to serve, prior to the issuance of an award.[8] Unlike the courts in *Jefferson-Pilot*, *B/E Aerospace* and *Oakland-Macomb*, the Fifth Circuit was unmoved by the argument that authority to hear pre-award qualification challenges under FAA §§ 4 and 5 exists because such challenges represent a request by parties to enforce the method of arbitrator selection as written in the arbitration agreement.[9]

The Fifth Circuit's reasoning in *Gulf Guaranty Life* was recently adopted by the U.S. District Court for the District of Massachusetts in *John Hancock Life Insurance Co. v. Employers Reassurance Corp.,*[10] which agreed that courts may not hear pre-award disputes over the qualifications of arbitrators even when framed as a request to enforce the arbitration agreement under FAA §§4 and 5 according to its terms.

Courts have also considered FAA §§4 and 5 qualification challenges in the context of umpire selection, but no court has decided on the merits whether such a challenge is permissible. In *Odyssey Reinsurance Company v. Certain Underwriters at Lloyds London Syndicate 53*, the U.S. District Court for the Southern District of New York declined to find a lapse in the umpire selection process where the parties had deadlocked on the issue of whether the reinsurer's candidates met the qualification requirements in the arbitration clause.[11] Instead, the district court ruled that since both parties had nominated three candidates, they were obligated to proceed with the strike-and-flip process set out in the arbitration agreement. In making this ruling, the district court noted that it did not have the authority to "entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award."[12]

The Court of Appeals for the Second Circuit reversed the district court, finding that there had been a lapse in the umpire selection process because of the parties' disagreement as to whether certain umpire candidates qualified under the arbitration agreement.[13] The Second Circuit, therefore, remanded and directed the district court to appoint the umpire. As for "the question of whether, and under what circumstances, a district court might be empowered to review [umpire] candidates' qualifications prior to arbitration proceedings," the Second Circuit declined to decide it, leaving the matter to be resolved in a future case.

Recent case law makes clear, however, that when courts find a lapse in the umpire selection process, they will review candidates' backgrounds to see whether they satisfy the qualification requirements in the arbitration agreements. For example, the Southern District of New York, in *National Union Fire Insurance Co. v. Source One Staffing LLC*,[14] after finding a lapse in the umpire selection process, undertook a review of 20 candidates proposed by both parties in total and eliminated those who were not, as required by the arbitration agreement, "executive officers or former executive officers of property or casualty insurance or reinsurance companies or insurance brokerage companies, or risk management officials [in a certain industry]."[15]

Policy Concerns Underlying Courts' Decisions

Courts have expressed various policy concerns in deciding the issue of whether to permit pre-award challenges based on contractually-mandated qualifications. In cases allowing such challenges, courts have expressed the view that enforcement of the parties' arbitrator selection agreement is essential to ensure that parties receive the benefit of their bargain to have individuals with specific industry knowledge decide their disputes.[16] They have also noted that failures to enforce eligibility requirements would be contrary to the objective of the FAA to promote fair and efficient resolutions of parties' disputes. In their view, lack of enforcement would result in a significant waste of time and resources by forcing parties to arbitrate before an unqualified arbitrator and under the risk that the entire proceeding could be vacated and re-started when a court finally evaluates the arbitrator's qualifications.

Not surprisingly, courts that have rejected pre-award, contractual-based qualification challenges have taken the opposite view. Those courts expressed concern that permitting such challenges would "spawn endless applications [to the courts] and indefinite delay" as parties who are not satisfied with their opponents' arbitrator choices would file countless petitions to disqualify them.[17] Thus, far from making arbitrations an expeditious alternative to litigation as promoted by the FAA, arbitrations could get bogged down at the outset by mini-trials where courts would have to hear evidence and rule on the meaning of vague, esoteric terms concerning arbitrator eligibility as well as make findings of fact as to whether individuals meet those eligibility requirements.

Conclusion

Certain courts have held that FAA §§ 4 and 5 provide a basis for parties to make pre-award challenges against already-appointed arbitrators who lack specialized experience required by the arbitration agreement. For these courts, such challenges make good sense, as they serve to enforce the parties' agreed-upon arbitrator selection methodology and ensure that only knowledgeable arbitrators decide the parties' dispute.

Other courts, however, have rejected such challenges on the basis that the FAA does not authorize the removal of arbitrators after they have been appointed or allow parties to contest arbitrator qualifications prior to the issuance of an award. For these courts, permitting pre-award challenges could lead to substantial litigation between parties as to whether arbitrators qualify to serve.

With respect to umpire selection, however, no court has ruled one way or the other as to whether FAA §§4 and 5 permit pre-award, contractually-based qualification challenges of umpire candidates prior to the formation of the panel. At some point, courts may be forced to decide that issue, as parties adopt arbitration agreements containing ever-more-detailed and specific qualification requirements such as the eligibility criteria set forth in Section 6.3 of the ARIAS U.S. Neutral Panel Rules for the Resolution of Insurance and Reinsurance Disputes.[18]

Time will tell.

ENDNOTES

1 9 U.S.C. § 4 (2014).

2 *Stop & Shop Supermarket Co. LLC v. United Food & Commercial Workers Union Local 342 AFL-CIO, CLC*, 246 Fed. Appx. 7, 11 (2d Cir. 2007); *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, 689 F.3d 481, 491 (5th Cir. 2012) (FAA § 5 authorizes court intervention to appoint an arbitrator (1) "if the arbitration agreement provides a method for selecting arbitrators but any party to the agreement has failed to follow that method," or (2) "if there is a lapse in the naming of an arbitrator or arbitrators") (internal quotation marks omitted); *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324, 1327 (9th Cir. 1987) (FAA § 5 authorizes a court to "appoint an umpire . . . if the specified [arbitrator selection] method is not utilized by one of the parties, or if there is simply a lapse in time in the naming of the umpire for any other reason").

3 9 U.S.C. § 5 (2014).

4 2000 U.S. Dist. LEXIS 22645 (N.D. Ill. Oct. 26, 2000).

5 2011 U.S. Dist. LEXIS 73621 at *1 (S.D.N.Y. Jul. 1, 2011) (internal citations omitted) (deciding court had power to rule on challenge brought by party under FAA §§ 4 and 5 that arbitrators did not meet contractual requirement that "[a]ll arbitrators selected and appointed...shall be professional business persons knowledgeable of the aircraft industry, including but not limited to industry executives, public accountants and management consultants").

6 304 Mich. App. 46, 56-60 (Mich. Ct. App. 2014) (holding FAA §§ 4 and 5 permit parties to bring pre-award challenges to arbitrator qualifications if those qualifications are expressly part of parties' agreed upon selection process).

7 304 F.3d 476 (5th Cir. 2002).

8 *Id.* at 489-91. In reaching its decision, the Fifth Circuit relied heavily on *Aviall, Inc. v. Ryder System, Inc.*, 110 F.3d 892, 895 (2d Cir. 1997), decided by Court of the Appeals for the Second Circuit. In *Aviall*, the Second Circuit rejected a party's challenge to an arbitrator on bias grounds because it found that the FAA did not authorize removal of arbitrators. *Aviall, Inc.*, 110 F.3d at 895. The Second Circuit also noted its comment made in a prior case that a court "cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award." *Id.* (quoting *Michaels v. Mariform Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980).

9 304 F.3d at 491.

10 2016 U.S. Dist. LEXIS 80592 (D. Mass. Jun. 21, 2016).

11 2014 U.S. Dist. LEXIS 96356 (S.D.N.Y. Jun. 30, 2014).

12 *Id. at* *1 n.1 (quoting *Michaels v. Mariform Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980).

13 *Odyssey Reinsurance Co. v. Certain Underwriters at Lloyds London Syndicate 53*, 615 Fed. Appx. 22, 23 n.1 (2d Cir. 2015).

14 2016 U.S. Dist. LEXIS 141795 (S.D.N.Y. Oct. 13, 2016); *see also Certain Underwriters at Lloyds London Syndicate 53*, 615 Fed. Appx. at 23 n. 2 (noting that district court in appointing umpire may consider individual's qualifications to serve "as incidental to [its] task under Section 5" of curing the lapse).

15 2016 U.S. Dist. LEXIS 141795 at *4.

16 *Oakland-Macomb Interceptor Drain Drainage Dist. v. RIC-Man Construction, Inc.* 304 Mich. App. 46, 56-60 (Mich. Ct. App. 2014); *see also Jefferson-Pilot Life Insurance Co. v. LeafRe Reinsurance Co.*, 2000 U.S. Dist. LEXIS 22645 *4-6 (N.D. Ill. Oct. 26, 2000).

17 *John Hancock Life Insurance Co. v. Employers Reassurance Corp.*, 2016 U.S. Dist. LEXIS 80592 at *16-19 (D. Mass. Jun. 21, 2016) (citing *Gulf Guaranty Life Insurance Co. v. Connecticut General Life Insurance Co.*, 304 F.3d 476, 492 (5th Cir. 2002) (quotations omitted)).

18 Section 6.3 sets forth various criteria that individuals must satisfy in order to serve on a panel under the ARIAS U.S. Neutral Panel Rules, including limitations regarding the number of times one has served as an arbitrator, umpire, expert, consultant and/or counsel in prior matters for parties and their counsel.

Judicial Resolution of Disputes Relating to Commutation of Reinsurance Agreements

Courts have adjudicated many disputes in which one party was careless over the scope of the release in a commutation agreement.

By Wm. Gerald McElroy, Jr.

In the reinsurance context, a commutation agreement is an "agreement between a ceding insurer and the reinsurer that provides for the valuation, payment, and complete discharge of all obligations between the parties under a particular reinsurance contract."[1] This paper discusses case law relating to the resolution of disputes arising from commutation agreements. Based on the cases discussed, some practical suggestions will be made about commutation agreements.

The Importance of Designating Specifically the Reinsurance Contracts Being Commuted and the Parties Subject to the Agreement; Understanding the Scope of the Release

It would appear to be obvious and a matter of common sense that any commutation agreement should designate with specificity the reinsurance contracts being commuted, the parties who are subject to the commutation agreement, and the scope of the release. Nonetheless, there are numerous cases where the courts have adjudicated disputes over the scope of the release in a commutation agreement and the parties who are subject to the release. In some of these cases, one party to the agreement was careless in not understanding contract terms or business relationships relating to the scope of the release.

In *Continental Casualty Co. v. Northwestern National Insurance Co.*,[2] the court affirmed summary judgment in favor of the reinsured, Continental Casualty Company ("CCC") and Continental Insurance Company (CIC") (collectively "Continental"), and ruled that a commutation agreement applied only to three facultative reinsurance contracts between CCC and the reinsurer, Bellefonte Insurance Company ("Bellefonte"), and not to all (approximately 2,200) facultative reinsurance contracts between CIC and Bellefonte. The commutation agreement required

There are numerous cases where the courts have adjudicated disputes over the scope of the release in a commutation agreement and the parties who are subject to the release.

Northwestern National Insurance Company ("NNIC"), Bellefonte's successor-in-interest, to pay $6.1 million to CCC in return for a release from NNIC's obligations under Reinsurance Contracts identified in Schedule A to the Agreement. Schedule A included reinsurance treaties which were listed by number, program, and effective date. Under the title "Through Facultatively Placed," the Agreement included one entry ("0709 Bellefonte Reins"). The dispute focused on the meaning of this term, which the parties agreed was ambiguous.

NNIC's position that this term encompassed all of the facultative reinsurance agreements between CIC and Bellefonte was undermined by negotiations between CNA Financial Corporation ("CNA"), an insurance holding company which owned CIC and CCC, and Bellefonte after the execution of the commutation agreement at issue. During those negotiations, NNIC expressed an interest in "commuting all 2,200 facultative certificates at issue with CNA, which included certificates between Bellefonte and CIC."[3] As the district court noted, NNIC would "not have considered entering into a commutation agreement for facultative certificates that had already been commuted."[4]

There had also been a dispute between NNIC and CIC with respect to whether CIC was bound by the commutation agreement between CCC and Bellefonte. The commutation agreement defined the term "Reinsured" to include CCC and all of its "affiliates." Since CIC and CCC were "sibling corporations related to another corporation, CNA," the district court had previously ruled CIC and CCC were affiliates and CIC was thus bound by the commutation agreement. See *Continental Casualty Co. v. Northwestern Nat'l Insurance Co.*[5]

In *Mid Century Insurance Co. v. American Centennial Insurance Co.*,[6] the court affirmed summary judgment in favor of the reinsurer and held the commutation agreement applied not only to two treaties between Mid Century Insurance Company ("Mid Century") and American Centennial Insurance Company ("ACIC") (its reinsurer) but also to facultative certificates between Truck Insurance Exchange ("Truck"), a subsidiary of Mid Century, and ACIC. The court relied upon the broad release language in the commutation agreement in support of its ruling that the parties intended the commutation to be a "global settlement of all agreements between them."[7] The court rejected Mid Century's argument that ACIC had misrepresented the scope of the commutation agreement and stated that Mid Century was negligent in failing to "determine the precise extent of its reinsurance business with ACIC."[8]

In *National Union Fire Insurance Co. of Pittsburgh v. Walton*,[9] the court rejected a claim by National Union Fire Insurance Company of Pittsburgh ("National Union") that a commutation agreement it entered into with its reinsurer Walton Insurance Limited of Bermuda ("Walton") did not include a reinsurance agreement between the parties involving the Interstate Towers Insurance Program ("Interstate Towers"). The court relied upon the release language in the commutation agreement which specifically identified the Interstate Towers program by Walton contract number. National Union's "unilateral mistake" in failing to know the meaning of the Walton contract number did not constitute a basis for overturning an otherwise unambiguous contract.[10] Just as the court in *Mid Century Insurance Co.* criticized Mid Century, the court chided National Union for its carelessness: "If National Union signed the release mistakenly, it did so as a result of its own carelessness and, therefore, is barred from contesting the release's validity on the grounds of mistake."[11]

In *Old Republic Insurance Co. v. Ace Property and Casualty Insurance Co.*,[12] the court held a commutation agreement between Old Republic Insurance Company ("Old Republic") and Ace Property and Casualty Company's ("Ace's) predecessor-in-interest Central National Insurance Company of Omaha ("Central National") was unambiguous and included all of the reinsurance agreements between Old Republic and Central National, including some agreements in which Central National reinsured Old Republic and other agreements in which Old Republic reinsured Central National. The court rejected the contention by Ace that the term "various reinsurance contracts" in the commutation agreement only terminat-

Since many insurance and reinsurance companies use a holding company structure, it is essential that the commutation agreement designate correctly the parties which are subject to the commutation agreement.

ed the reinsurance agreements in which Central National reinsured Old Republic and not those in which Old Republic reinsured Central National Union. In support of its ruling, the court relied upon language in the second paragraph of the commutation agreement, stating "Old Republic and Central National have heretofore entered into various reinsurance contracts with one another, under which reinsurance agreements there are or may be certain liabilities and obligations outstanding (the [r]einsurance [a]greements')" and in the third paragraph of the commutating agreement, stating the parties "now wish to fully and finally determine and settle all liabilities and obligations of the parties to each other under the [r]einsurance [a]greements."[13] The court also cited provisions in the commutation agreement stating that each party would "hereby release and forever discharge" the other party from "any and all liabilities and obligations" arising under or related to the reinsurance agreements.[14]

Whether Commutation Agreements are Binding on Retrocessionaires

Even where no disputes arise between the parties to a commutation agreement, disputes may arise between the reinsurer and its retrocessionaire(s) regarding the impact of the commutation upon the retrocessoinaire(s)' obligations.

In *Global Reinsurance Corp. of America v. Argonaut Insurance Co.*,[15] the court upheld an arbitration award requiring Argonaut Insurance Company ("Argonaut") to pay its reinsured, Global Reinsurance Corporation of America ("Global"), $1,975,747.55 pursuant to reinsurance agreements. In 2003, Global reached a settlement and commutation agreement with its reinsured, Home Insurance Company ("Home") (hereinafter the "Home Settlement"), settling all outstanding claims and releasing Global from its reinsurance contracts with Home for a lump sum payment. The Home Settlement included existing liabilities as well as contingent liabilities. With the assistance of a consulting firm, Global used actuarial methods to allocate the lump sum settlement among the retrocessionaires, including Argonaut, with whom Global had reinsured its Home exposure. In challenging the arbitration award, Argonaut argued it was not responsible for paying four of the "claims" allocated to it, which represented "contingent liabilities."

In ruling against Argonaut, the court upheld the arbitration panel's rejection of the following two arguments advanced by Argonaut. First, Argonaut argued Global failed to give notice of the claims as required by the treaties between Global and Argonaut. Second, Argonaut argued the commutations were not "claims" within the meaning of the treaties because they did not fit within the coverage defined by the treaties.

With respect to the notice issue, the treaties required Global to advise Argonaut with reasonable promptness of any accident or event in which Argonaut was known to be involved. The notice provision also stated Argonaut had the right to cooperate with Global in the defense and/or settlement of any claim in which Argonaut may be interested. In rejecting Argonaut's late notice argument, the court stated that under New York law, a "reinsurer must show that the failure to give notice was prejudicial or material to the reinsurance contract."[16] While the arbitration award did not offer any explanation with respect to the late notice issue, the court concluded "nothing in the record suggests that the failure to give notice of Global's negotiations with Home regarding the Home Settlement was material to the treaties or prejudicial to Argonaut."[17]

With respect to Argonaut's argument that the commutation agreement did not fall within the coverage it afforded to Global, the court upheld the arbitration panel's conclusion that the claims comprising the Home Settlement were covered by the original reinsurance agreements between Global and Argonaut. According to the court, the question for the arbitration panel was "whether a loss settlement, as used in these [Treaties], includes compromise of liability under all the [Original Reinsurance Contracts] as distinct from the liability of an individual loss settlement under a single [Original Reinsurance

Contract].”[18] As the court states, the arbitration panel found the commutation agreements were covered by the treaties based on the following reasoning:[19]

Noting that “virtually all loss settlements, both in insurance and reinsurance, involve compromise and include a so-called contingent component . . .” and that “the comprehensive nature of the commutation between [Home] and [Global] represents a distinction without a difference to the validity of a loss settlement under the [Treaties][.]” the Panel found the Commutations were covered by the Treaties . . .

The treaties at issue in Global Reinsurance defined “Loss Occurrence” as “any one disaster, casualty, accident, or loss or series of disasters . . . arising out of or caused by one event or occurrence.”[20] The arbitration panel construed the Loss Occurrence language broadly to include all the claims and commutations at issue between the parties. While a narrow construction of the clause “might exclude contingent liabilities, the treaties were interpreted by the panel as ‘honorable undertakings’ not as strict legal documents.”[21]

Once the arbitration panel determined the claims comprising the commutation transaction (including contingent claims) were covered by the original reinsurance contracts issued by Global, the panel applied the “follow the fortunes” doctrine to preclude review of Global’s decision to settle the contingent claims. According to the court, “because the Panel properly applied the ‘follow-the-fortunes’ doctrine to its interpretation of the scope of the treaties, there was no manifest disregard of the law.”[22]

In *Insurance Co. of Pennsylvania v. Associated International Insurance Co.*,[23] the court held a settlement between an insured and its insurer addressing future claims was reimbursable under a reinsurance certificate. Although this case deals with a reinsurer’s obligations to pay a settlement between the cedent and its insured, the reasoning of the court is applicable to the issue of whether a retrocessionaire is obligated to reimburse a reinsurer for a settlement involving future/contingent claims. The reinsurer, Associated International Insurance Company (“Associated”), had argued that a settlement agreement between Insurance Company of Pennsylvania (“ICP”) and its insured that called for the payment of “future, unidentified” asbestos claims was not covered by a reinsurance certificate because “payment is required only for funds actually expended to injured claimants by way of settlement or judgment.”[24] Associated took this position even though it stipulated that the funds paid by ICO pursuant to the settlement agreement would be used for payment by the insured Fibreboard Corporation (“Fibreboard) of “actual claims made against Fibreboard.”[25]

In support of its ruling, the court noted the ICP-Fibreboard settlement agreement required ICP to pay asbestos claims “as and if such claims arise.” Pursuant to the reinsurance contract, Associated’s liability “shall follow that of [ICP] and shall be subject in all respect to the terms and conditions of the [ICP-Fibreboard] policy.”[26] The ICP-Fibreboard policy required ICP to “indemnify [Fibreboard] for all sums which [Fibreboard] shall be obligated to pay by reason of the liability . . .”[27] Since the asbestos claims represented a liability that Fibreboard was obligated to pay, ICP was required to indemnify Fibreboard and Associated was required to indemnify ICP pursuant to the reinsurance contract. To hold otherwise would violate “California’s policy against implying provisions in insurance contracts that would defeat the contractual purpose” and “would frustrate the public policy which encourages settlement.”[28]

Impact of Commutation Agreements on Contingent Commission Calculations

In *Acumen Re Management Corp. v. General Secretary National Insurance Co.*,[29] the court granted summary judgment in favor of the defendant General Security National Insurance Company (“GSNIC”) with respect to substantially all of the breach of contract claims asserted by plaintiff Acumen Re Management Corporation (“Acumen”). In 1994, GSNIC’s predecessor-in-interest, Sorema North American Reinsurance Company (“Sorema”), entered into an Underwriting Agency Agreement (“UAA”), pursuant to which it appointed Acumen as its exclusive non-employee excess workers’ compensation facultative reinsurance underwriter. In that capacity, Acumen assessed the risks of various insurance policies and entered into reinsurance agreements on behalf of Sorema. Under the UAA, Sorema received a base compensation for its services, consisting of underwriting commissions calculated as a percentage of premiums on Acumen’s portfolio of business. Under a Contingent Commission Addendum (“CCA”) executed in 1994 by Acumen and Sorema, Acumen was entitled to receive a “contingency commission” equal to thirty percent of Sorema’s annual net profits, if any, on the reinsurance certificates underwritten by Acumen. On May 1, 2002, Acumen and GSNIC entered into a Termination Agreement which provided that certain provisions of the UAA survived the termination of the UAA (including the requirement that quarterly reports with a current report of incurred loss on all outstanding claims be provided by

GSNIC to Acumen).

Between July 2004 and December 2007, GSNIC executed four commutation agreements on a contract, rather than claim-specific, basis. Certificates of reinsurance underwritten by Acumen represented a "fraction" of the commuted business; however, they represented a "substantial portion" of Acumen's income-deriving business with GSNIC.[30] GSNIC did not consult with Acumen prior to executing the commutation agreements at issue "though the potential impact on Plaintiff was considered by certain personnel."[31]

After each commutation, GSNIC "allocated the losses without differentiating between Plaintiff-produced certificates and the rest of the commuted policies—that is, according to Defendant, losses were attributed based on a proportional application of the settlement payment in proportion to the reserve carried on the contracts at the time of the commutation."[32] In January 2008, GSNIC performed the contingency commission calculations to determine commissions which were potentially owed to Acumen for the underwriting years at issue. GSNIC's calculations "ultimately revealed that there were no net profits in any of the underwriting years" at issue.[33] GSNIC found Acumen's book of business "generated underwriting losses in excess of $56.7 million, with over $47 million representing outside case reserves and IBNR on non-commuted Plaintiff produced business."[34]

While Acumen initially took the position that GSNIC violated the CCA by commuting a substantial portion of its portfolio of business, it subsequently claimed GSNIC violated the CCA by including the commutation payments in the contingent commission calculation. According to Acumen, such inclusion was not permitted by the CCA "because the contract contains no reference to commutations."[35] Acumen also contended such inclusion was not permitted by the CCA since there was "no category in the formula for the contingent commission calculation that allows Defendant to allocate a portion of the losses incurred as a result of the commutation, without verifying what losses were attributable to Plaintiff-produced certificates."[36]

In rejecting Acumen's contentions, the court cited the provisions in the CCA setting forth "in a clear and unambiguous fashion" the formula that GSNIC was required to use to calculate the contingency commission.[37] Pursuant to Section A.2 of the CCA, in computing net profits, a deduction is made for "losses . . . paid by [Defendant] . . . arising from facultative certificates bound or written with effective dates during the Underwriting Year under calculation."[38] According to the court, while the formula did not specifically reference commutation transactions, "the only evidence in the record on commutation indicates that commutations generally result in losses and that, in this instance, the commutation transactions did in fact result in actual losses paid by Defendant."[39] Thus, the court rule was not a violation of the CCA for GSNIC to use losses resulting from the commutation agreements in calculating Acumen's contingency commission.[40]

The court also noted that GSNIC presented evidence that its methodology for calculating Acumen's contingency commission "did differentiate between the profitability of Plaintiffs produced certificates and all other commuted certificates—namely, by allocating the commutation price to each commuted certificate proportionally based on its carried reserves at the time of the commutations."[41]

Applicability of Arbitration Provisions to Resolution of Disputes

The courts in numerous cases have addressed the question of whether disputes between the parties to reinsurance and commutation agreements are subject to arbitration where the reinsurance agreement includes an arbitration provision but the commutation agreement does not include such a provision. In *Repwest Insurance Co. v. Praetorian Insurance Co.*,[42] the court held the arbitration provisions of a Quota Share Agreement and Aggregate Loss Reinsurance Contract entered into by Repwest Insurance Company ("Repwest") were applicable and rejected Repwest's claim that its claims against the defendants were subject to the provisions of a commutation agreement which it sought to invalidate and which did not include an arbitration provision.

In *Continental Casualty Co. v. LaSalle Re Ltd.*,[43] the court held the provisions of a commutation agreement between Continental Casualty Company ("Continental") and LaSalle Re Ltd. ("LaSalle") extinguished their obligations under a retrocession agreement, including the duty to arbitrate. Since the commutation agreement did not include an arbitration provision, the court held Continental could not be compelled to arbitrate a dispute with LaSalle over Continental's purported obligation to pay its share of claims paid by LaSalle to its cedent Hartford Insurance Company of Canada.

Similarly, in *Continental Casualty Co. v. Commercial Risk Re-Insurance Company*,[44] the court held a dispute between plaintiff Continental Casualty Compa-

[A] cedent or reinsurer who favors arbitration of disputes versus litigation would be well advised to include an arbitration clause in the commutation agreement that is consistent with the arbitration clause(s) in the reinsurance agreements being commuted.

ny ("Continental") and the defendants (collectively "SCOR") concerning the scope of a commutation agreement and whether it covered certain reinsurance agreements (the "Unity Fire Contracts") was not subject to the arbitration provisions in the Unity Fire Contracts since the commutation agreement did not include an arbitration provision.

In *Trenwick American Reinsurance Corp. v. CX Reinsurance Co. Ltd.*,[45] the court addressed a dispute involving a reinsurance agreement between Commercial Casualty Insurance Company (CCIC) and Trenwick Reinsurance Corporation ("Trenwick") and a subsequent commutation agreement under which all reinsurance obligations between Trenwick and CCIC were extinguished. When CCIC became insolvent, Trenwick was obligated through a "cut-through" provision to pay claims to CX Reinsurance Co. Ltd ("CX"). After Trenwick refused to pay a claim submitted by CX before the execution of the commutation agreement, CX demanded arbitration pursuant to the reinsurance agreement at issue and moved to compel arbitration. Trenwick sought to enjoin the arbitration on the ground that there was no arbitration provision in the commutation agreement, which commuted and extinguished all reinsurance obligations between Trenwick and CCIC.

The court ruled in CX's favor and held an arbitrator should resolve the dispute between Trenwick and CX concerning whether CX's claims were subject to arbitration. The court distinguished *LaSalle* (relied upon by Trenwick) on the ground that CX was not a party to the commutation agreement at issue and was vested with certain rights under the reinsurance agreement at issue which could only be terminated as provided for in the reinsurance agreement. In support of its ruling, the court relied upon Second Circuit case law, including *ACE Capital Re Overseas Ltd. v. Central United Life Insurance Co.*[46] In *ACE*, the court held a clause in a reinsurance agreement requiring arbitration "as a condition precedent" to resolution of any dispute between the parties "with reference to the interpretation" of the agreement or "their rights with respect to any transaction involved" was a "broad one that encompasses the parties' disputes regarding fraudulent inducement and contract termination." *See also Connecticut General Life Insurance Co. v. Houston Scheduling Services*[47] (stating, [w]here there is a broad arbitration clause, the arbitrator resolves any claim of contract termination.").

Impact of Breach of Commutation Agreement

In *Korea Foreign Insurance Co. v. Omne Re SA*,[48] the U.K. Court of Appeal ruled that a breach of a commutation agreement by a reinsurer gave the reinsured the option of affirming the agreement or wholly discharging it. Pursuant to a commutation agreement, the reinsurer Omne Re SA ("Omne") agreed to pay the reinsured Korea Foreign Insurance Company ("KFIC") $1,350,000 in full and final settlement of all outstanding claims arising from the reinsurance contracts between them. Omne paid the $100,000 due upon execution of the commutation agreement but failed to pay any of the $1.25 million balance due. Article 3 of the commutation agreement, captioned "Special Condition," provided that if Omne defaulted in any of its payment obligations, "this Commutation and Release Agreement shall be wholly null and void, and KFIC shall be entitled to reserve its full rights without prejudice to its rights under the Reinsurance Agreements and the claims recoveries."

The court applied the "general rule of contract law that upon a repudiatory breach by one party, the other party has a right to elect whether or not to affirm that agreement or to treat it as wholly discharged." Thus, upon Omne's failure to meet its payment obligations, KFIC had the "right, either to affirm the compromise agreement and to insist upon performance of its terms or, alternatively, to disregard the compromise agreement and revert to the underlying reinsurance contracts." Since KFIC elected to rely upon the commutation agreement, it was entitled to a recovery based on that agreement.

Practical Suggestions

There are a number of practical suggestions which can be derived from the case law discussed above, including the following:

First, the commutation agreement should identify clearly and specifically the reinsurance contracts being commuted as well as the parties subject to the commutation agreement. Since many insurance and reinsurance companies use a holding company structure, it is essential that the commutation agreement designate correctly the parties which are subject to the commutation agreement. Defining terms such as "affiliates" in the release is important in avoiding disputes over the scope of the release.

Second, to decrease the likelihood of disputes with retrocessionaires, reinsurers entering into commutation agreements should consider providing notice to the retrocessionaires of their intent to commute reinsurance agreements and express their expectation that the retrocessionaires will honor their obligations with respect to such commutations. This does not guarantee there will be no disputes concerning the impact of the commutation agreements upon the retrocessionaires' obligations with respect to such commutations. However, there is no downside to providing such notification, and the potential upside is that disputes may be avoided.

Third, the position of the reinsurer in seeking reimbursement from its retrocessionaire(s) for sums paid pursuant to a commutation agreement is enhanced if the commutation agreement includes an Extended Reporting Clause, requiring the reinsured to provide the same notice(s) of loss(es/occurrence(s) as it would have been obligated to provide to the reinsurer under the reinsurance agreements. The inclusion of a Continued Access to Records Clause in the commutation agreement is also beneficial.

Fourth, reinsurers should be cognizant of the impact of commutation agreements upon commissions which are due based on reinsurance agreements which are being commuted and consider providing notice to the parties affected by the commutation prior to execution of the commutation agreements. As noted above, in *Acumen*, GSNIC personnel considered the impact of the commutation agreements upon Acumen but did not consult with Acumen prior to completing the agreements. Again, there would not appear to be any downside to such consultation even though it may not have eliminated the subsequent dispute between GSNIC and Acumen.

Fifth, given the conflicting case law on the issue of whether disputes between parties to a reinsurance agreement (which includes an arbitration provision) and a subsequent commutation agreement (which does not include such a provision) are subject to arbitration, a cedent or reinsurer who favors arbitration of disputes versus litigation would be well advised to include an arbitration clause in the commutation agreement that is consistent with the arbitration clause(s) in the reinsurance agreements being commuted.

Sixth, to avoid any uncertainty concerning the impact of any breach by the reinsurer of its payment obligations under the commutation agreement, the agreement should make clear that such a breach does not void the terms of the commutation agreement and the reinsured is entitled to a recovery based on these terms.

ENDNOTES

1 http://www.irmi.com/online/insurance-glossary/term/c/commutation -- agreement.aspx. In its "simplest form," a "lump sum payment by the reinsurer is substituted for the unknown future liabilities on ceded risks and it is done for reasons on both sides having to do with the relative advantages of current and long-term money or the convenience of closing certain yearly accounts." A commutation may also be "partial, leaving some long-term obligations in effect, and it may be a contract for a series of fixed future payments rather than a present lump sum." Staring, Graydon S., *Law of Reinsurance*, Section 14.6 (March 2016 Update). In either case, it "terminates the liabilities for indemnities on the one hand and premiums on the other, with respect to the risks specified." *Id.*

2 427 F.3d 1038 (7th Cir. 2005).

3 427 F.3d at 1042.

4 Id.

5 No. 03 C 1455, 2003 WL 21801022 (N.D.Ill. Aug. 4, 2003) at *4.

6 108 F.3d 1385 (9th Cir. 1997) (unpublished).

7 108 F.3d at *3.

8 *Id.* at *4.

9 696 F. Supp. 897 (S.D.N.Y. 1988).

10 696 F. Supp. at 902.

11 *Id.* at 903-904.

12 389 Ill.App.3d 356, 906 N.E.2d 630 (1st District, 2009).

13 906 N.E.2d at 637.

14 906 N.E.2d at 637-38.

15 634 F.Supp.2d 342 (S.D.N.Y. 2009).

16 634 F.Supp.2d at 349.

17 *Id.*

18 *Id.* at 347.

19 *Id.*

20 *Id.* at 350.

21 *Id.*

22 *Id.*

23 922 F.2d 516 (9th Cir. 1991).

24 922 F.2d at 525.

25 *Id.*

26 *Id.* at 526.

27 *Id.*

28 *Id.* at 526.

29 No. 09 CV 01796 (GBD), 2012 WL 3890128 (S.D.N.Y. Sept. 7, 2012).

30 2012 WL 3890128 at*3.

31 *Id.*

32 *Id.*

33 *Id.* at *4.

34 *Id.*

35 *Id.* at *8.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 890 F.Supp.2d 1168 (D. Ariz. 2012).

43 511 F.Supp.2d 943 (N.D.Ill. 2007).

44 No. 07 cv 6912 (HDL), 2009 WL 1034951 (N.D. Ill. April 16, 2009).

45 No. 3:13cv1264 (JBA), 2014 WL 2168504 (D. Conn. May 23, 2014).

46 307 F.3d 24 (2nd Cir. 2002).

47 No. 3:12 cv 01456 (MPS), 2013 WL 4l647252 (D. Conn. Aug. 29, 2013).

48 No. 299057402 (U.K. Ct. App., Civil Div., April 14, 1999). The decision can be accessed at http://vlex.com/vid/ur-judge-david-smith-52581560.

Alleged Lack of Mutual Assent to Fac Cert Not a Basis for Voiding the Arbitration Clause or Staying the Arbitration

If a contract includes an arbitration clause, it is well settled that a federal court will generally not stay the arbitration but compel it pursuant to the FAA.

By Ronald S. Gass

While it may seem counterintuitive, federal courts have routinely enforced arbitration clauses notwithstanding a party's contention that the contract was void because there was no "meeting of the minds," i.e., there was a lack of mutuality due, for example, to fraud, misrepresentation, or mistake. So if there was no mutual assent, how may a court separately enforce that contract's arbitration clause and compel the parties to arbitrate their dispute?

Cases alleging that a reinsurance contract is void for lack of mutuality are relatively rare, but when the issue does arise, a complainant's initial impulse may be to seek judicial resolution of whether a binding contract exists or not. However, if that contract includes an arbitration clause, it is well settled that a federal court will generally not stay the arbitration but compel it pursuant to §§ 3 and 4 of the Federal Arbitration Act ("FAA"). This was the outcome of recent federal district court litigation in the Southern District of New York involving a facultative certificate that included an arbitration clause.[1]

In late 2000, the cedent, Lexington Insurance Company ("Lexington"), underwrote a $50 million professional

The FAA is an expression of the 'strong federal policy favoring arbitration' as an alternative means of dispute resolution.

liability insurance policy covering the Central Puget Sound Regional Transit Authority (the "Authority"). Com-

Challenges to the existence of the contract as a whole, as opposed to the validity of the arbitration clause itself, are reserved for the arbitrators to decide.

mencing in 2001, the policy insured against claims arising from the Authority's design and construction of a light rail system in Washington State. Lexington subsequently placed facultative reinsurance for the $20 million excess $30 million layer with a German reinsurer, HDI Global SE ("HDI") (the successor to Gerling Konzern Allgemeine Versicherung AG), which in November 2000 agreed to take a 50% share.

The fac cert, which HDI signed and stamped, included an arbitration clause which provided in pertinent part that "[a]ll disputes or differences arising out of the interpretation of this Certificate" shall be submitted to the decision of two party-appointed arbitrators and to an umpire if the party-appointed arbitrators failed to agree. It also identified Lexington's underlying policy as "Form LEX CM PL 7," which in 2001 specifically provided that the professional liability policy applied to "actual or alleged negligent acts, errors or omissions arising out of professional services rendered for others by the [Authority] or any entity for whom the [Authority] is legally liable." The 2001 form with this negligence trigger was forwarded by Lexington's broker to the Authority in January 2002; however, a different and broader coverage form omitting the professional negligence trigger[2] was subsequently sent by that broker to the Authority in March 2002, but not to HDI.

In 2006, the Authority notified Lexington about a potential claim arising under the 2002 policy form that it had received from one of its light rail project subcontractors. In 2011, that subcontractor won a $66 million arbitration award against the Authority. In 2013, the Authority sought indemnification for this loss from Lexington under its professional liability policy. Initially, in early 2014, Lexington disputed the Authority's claim under the misapprehension that the 2002 policy form required the insured to prove professional negligence when, in fact, the negligence trigger had been omitted from that form. After Lexington balked at paying the claim, the Authority filed a coverage action in federal district court in May 2014. It was not until June 2015 that Lexington ultimately conceded on the trigger issue and settled the Authority's coverage litigation for about $27 million.

In August 2015, Lexington notified its broker about the loss settlement with the Authority and requested that a loss notice be circulated to the fac cert reinsurers, including HDI. Before doing so, the broker requested a copy of the relevant policy from Lexington, who forwarded the 2002 policy form and not the 2001 "Form LEX CM PL 7" as was specified in the fac cert. In December 2015, HDI sought additional information regarding the ceded loss settlement to better evaluate the claim. In response, Lexington forwarded a major loss report which confirmed that the 2002 form did not include a negligence trigger and cited the unfavorable judicial environment in Washington as one of the key drivers behind its settlement with the Authority.

Not having received payment on its 2015 billing, Lexington filed an arbitration demand against HDI in August 2016 seeking an award of $5.42 million. In response, HDI filed an action in New York federal district court requesting an order staying the arbitration because (1) the fac cert specifically referenced the 2001 policy form containing the negligence trigger and not the 2002 form omitting it, and (2) there was consequently no mutual assent to reinsure the substituted policy form rendering the parties' contract void. Thus, it is for the court to determine whether a binding and valid contract existed between the parties before permitting the arbitration to proceed. Not surprisingly, Lexington countered with a motion to compel arbitration.

In ruling against HDI, the district court relied on several general principles grounded in various Second Circuit precedents. First, the FAA is an expression of the "strong federal policy favoring arbitration" as an alternative means of dispute resolution. Second, any doubts about the scope of arbitrable issues should be resolved in favor of arbitration. Third, traditional contract defenses such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements. Fourth, litigation may be stayed under the FAA if the court is satisfied that the parties agreed in writing to arbitrate the underlying issues, i.e., the agreement to arbitrate was valid and binding.

As a preliminary matter, the court

If a duly executed reinsurance agreement contains an arbitration clause, the parties should anticipate that any lack of mutuality or similar contract formation challenges will be resolved by the arbitrators and not a federal judge.

found that it was undisputed that HDI signed Lexington's fac cert, which contained a broad arbitration clause applying to *all disputes or differences* arising out of its interpretation. However, HDI argued that the fac cert was "void" for lack of mutual assent because it never agreed to reinsure a professional liability policy without a negligence trigger and, thus, the very "existence" of the fac cert was in dispute—an issue for the court to determine in the first instance. The court observed that HDI "clearly manifested assent to the contract," and the gravamen of its complaint was whether the ceded loss settlement was covered under its terms—a dispute that was "strictly" a matter of contract interpretation subject to arbitration. The "bargained for" arbitrators were charged by the parties to determine whether the reference to Lexington's "Form LEX CM PL 7" did or did not cover the ceded loss. Challenges to the existence of the contract as a whole, as opposed to the validity of the arbitration clause itself, are reserved for the arbitrators to decide.

The district court acknowledged that there were narrow circumstances in which it may separately determine the validity and enforceability of an arbitration clause (e.g., if there was a question about whether a contract was ever made), but HDI's generalized attacks challenging the validity of the fac cert in this case must fail because the aggrieved party so clearly manifested its assent to reinsure Lexington when it duly executed the certificate. In support, the court cited § 2 of the FAA, which provides in pertinent part:

> *A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or* ***an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, [or] transaction . . . shall be valid, irrevocable, and enforceable,*** save upon such grounds as exist at law or in equity for revocation of any contract. [Emphasis added.]

Here the parties' dispute over the ceded loss settlement billing did not "render ambiguous the clear, unequivocal, broad and emphatic arbitration" provision to which they both agreed and which the court must treat as valid. Quoting Second Circuit precedent from 2012, the court concluded that "[t]he required *objective* meeting of the minds [was] demonstrated here by the fully executed contracts." Given the existence of a valid and binding contract "clear on [its] face," it was up to the arbitrators to decide whether the specified 2001 "Form LEX CM PL 7" or the substituted 2002 policy form without the negligence trigger applied to the ceded loss. Consequently, Lexington's motion to stay the litigation and compel arbitration was granted.

This case aptly illustrates the continuing federal court trend toward enforcing arbitration clauses driven by the strong federal policy favoring arbitration. In the presence of a valid and binding arbitration clause, the parties' "bargained for" arbitrators must be entrusted to decide contract formation issues such as lack of mutual assent, fraud, misrepresentation, or mistake. These days, reinsurance contracts rarely go unsigned, but the result in this case may have been different if HDI had not actually signed and stamped the Lexington fac cert. If a duly executed reinsurance agreement contains an arbitration clause, the parties should anticipate that any lack of mutuality or similar contract formation challenges will be resolved by the arbitrators and not a federal judge. Only in those very narrow instances in which, for example, the parties' agreement to arbitrate or the very existence of a written contract is doubtful might a federal court be persuaded to intervene and grant a party's motion to stay the arbitration.

ENDNOTES

1 *HDI Global SE v. Lexington Insurance Company*, No. 16 Civ. 7241 (CM), 2017 U.S. Dist. LEXIS 18677 (S.D.N.Y. Feb. 7, 2017).

2 Lexington's broader 2002 policy form provided: "This policy applies to actual or alleged acts, errors or omissions arising out of Professional Services rendered for others as designated in Item 8.A of the Declarations." In other words, the negligence element of the liability trigger was omitted.

2017 Spring Conference Recap

If you were in Naples, Florida, in May, you had the good fortune of experiencing all that the ARIAS•U.S. 2017 Spring Conference had to offer! If you were not able to attend, enjoy these highlights of events you missed and reflect on some of the things your colleagues had to say about their experience.

The 2017 Spring Conference featured several new and well-received session formats, including roundtable discussions, rapid-fire presentations, and pre-conference workshops.

Pre-Conference Data Protection Workshop

In conjunction with the preparation of the *ARIAS•U.S. Guidance for Data Security in Arbitrations*, a two-session workshop was held the morning before the start of the 2017 Spring Conference to help arbitrators and ARIAS•U.S. members address data security. The workshop covered e-mail security and encryption. The two sessions covered practical ways to secure arbitration e-mail and encrypt data to mitigate against unauthorized access to confidential arbitration information.

In the e-mail workshop, an overview was presented on the security issues that exist when using unsecure e-mail programs such as the free e-mail programs from Yahoo!, AOL, Gmail and Hotmail. The workshop walked through the steps to obtain secure e-mail by upgrading to G-Suite or obtaining a secure e-mail account through products like Proton Mail and Tutanota. In the encryption workshop, attendees learned why encryption is important and how to encrypt a laptop or desktop. There was also a discussion on file encryption.

Each workshop segment included a robust question-and-answer period. Thanks to Michael Menapace of Wiggan and Dana LLP (and a member of the ARIAS•U.S. Technology Committee) and Randi Ellias and Irwin Zeidman of Butler Rubin Saltarelli & Boyd LLP for presenting the two workshop sessions.

Check out a few comments from the workshop:

"First class!"

"Excellent and helpful!"

"Most practical presentations I have attended in 20 years of ARIAS conferences."

"Will utilize all of the suggested tools."

"Already now feel protected on computer encryption. Will work on e-mail."

"Practical knowledge that we can all use. Best workshop ever!"

Conference Kickoff

Larry Schiffer, one of the conference co-chairs, kicked off the three-day conference with a compelling opening presentation that dared attendees to be "disruptive innovators." As the industry sees changes, how can industry professionals adapt to market disruptors in new and innovate ways?

General Sessions

The general sessions proved to be quite stimulating and covered a variety of topics, including the limits of extra-contractual obligations, the business aspect of commutations, the new U.S.-EU Covered Agreement, and dispute resolution involving U.S.-Latin America reinsurance relationships.

Keynote Speaker Mike McRaith

"Interesting topic, and one that likely generates some arbitration opportunities."

– Attendee at "A Fresh Perspective on the Business Aspect of Commutations"

"Terrific session, really interesting debate."

"Excellent session. Very interesting topic, and the format was good!" "I found this to be very interesting and enjoyed the back-and-forth between Ms. Laws and Mr. Huff."

– Attendees at "Is the New U.S.-E.U. Covered Agreement Good for the Industry, and Will the New Administration Make Changes?"

Emerging Risks Roundtable Sessions

The roundtable sessions covered relevant and innovative topics, such as autonomous vehicles, big data, blockchain technology, cybersecurity, drones, environmental resource management, genetically modified organisms, nanotechnology, the opioid crisis, and talcum powder.

"The most informative ARIAS session I've ever attended."

– Blockchain Technology and Reinsurance roundtable session participant

Breakout Session Discussions

The breakout session, "Best Practices and Ethical Issues in Collateral Litigation: Pre-, During, and Post-Arbitration," was a hit with attendees, who had an opportunity to engage in focused discussions in small groups while engaging with other participants.

"Good format that should be used again."

– Breakout session participant

More than **86 percent** of participants said the conference increased their skills and areas of professional practice.

Rapid-Fire Case Presentations

What is the most critical or important reinsurance or insurance case to be decided within the last three years? That's the question 10 presenters attempted to answer in three-minute "rapid-fire" summaries at the 2017 Spring Conference. For more detailed information, read the article that follows this conference recap.

"I tend to like the general sessions, but I really enjoyed the rapid-fire style. It was perfectly concise, and I liked the high-level discussion. It kept me interested."

"I thought the roundtable and rapid-fire presentations were informative, interactive, and a low-key way to network."

– Participants in rapid-fire presentation session

Cocktail Reception and Networking

Recreational Activities

Thank you once again to our activity sponsors: Vocke Law Group, Crowell & Moring, and Allstate Insurance!

"Great location, attendance and content! I plan to attend the next one!"

Women's Networking Event

The Women's Networking Event at the 2017 ARIAS•U.S. Conference was a great success! The event, rich in content and practical tools, focused on several topics, including helpful networking strategies, the importance of personal branding, and the role of mentorship. Here are just a few nuggets from what proved to be an engaging and fruitful session:

Deliver a Dynamic Elevator Pitch

An elevator pitch is a 30-second speech you can present in the time it takes to ride an elevator from the top of a building to the bottom. The pitch should help convey your personal brand and incorporate who you are, what you do, and how you can help the target audience or listener. Here are a few quick tips for developing your elevator pitch:

Make them care. Answer the question, "What can you do for me?" To get to this point, introduce yourself and address a problem right out of the gate. Explain the benefits your company can offer, which is ultimately a real solution. Personalize this person's problem into a question and give them the best solution: your company.

Make it recognizable. If you have worked with people s/he knows, mention them. It shows that you know the market and you have credibility.

Leave them wanting more. Elevator pitches are meant to be short, so don't try to pack in too much. All you're required to do is be able to confidently broadcast that you know exactly what you're doing. Save the rest for later.

Have a call to action. Let them know what you want—a further meeting, a business card, etc.

Be natural. Get comfortable with your pitch. Practice. Make sure it sounds like you, not someone else.

Test yourself. Try it out on friendly colleagues before you try it on potential clients.

Know Your Personal Brand

"Your brand is what other people say about you when you are not in the room." It's a mark indicating identity or ownership. Group participants discussed some of these key questions to create their personal brand:

What differentiates you from others?

How does your uniqueness translate to value?

What are your most significant accomplishments?

What do people come to you for?

Mentor for Career Success

The dictionary defines a mentor as "a wise and trusted counselor and teacher." While mentoring can involve the teaching of practical skills, it usually connotes the passing on of that which cannot be learned in school, but instead is learned through experience. Furthermore, a mentoring relationship is one that is career oriented, covers a wide range of career issues, and assists with professional development and enhancement. Participants were encouraged to think about who they considered mentors as well as how it has been or might be beneficial to them in their careers. The beginning of an ARIAS women's mentoring program was discussed—more information will follow on this new initiative!

Rapid-Fire Case Summary Highlights

What is the most critical or important reinsurance or insurance case to be decided within the last three years? That is the question that 10 presenters attempted to answer in three-minute "rapid-fire" summaries at the 2017 Spring Conference in Naples, Florida. Check out a few of the case summaries highlighted below.

***National Indemnity Co. v. IRB Brasil Reseguros S.A.*, 2017 WL 421944 (2nd Cir. January 31, 2017)**

Alysa B. Wakin, Odyssey Reinsurance Company

Factual Background

In 2009, the parties began panel selection. The process was contentious, with multiple motions and cross-motions filed over consolidation and umpire selection. As a result, Umpire Candidate A completed his questionnaire in 2009, while Umpire Candidate B did not complete his questionnaire until being directed to do so by the court in 2011. Umpire Candidate A was then randomly chosen as the umpire, whereupon he updated his disclosures.

Those updated disclosures included the following:

A new assignment as party arbitrator from counsel to NICO (the "Equitas arbitration"); and

A new assignment as an expert witness from counsel to IRB.

IRB then objected to Umpire Candidate A's service in the *IRB v. NICO* arbitration, arguing that his appointment as a party-appointed arbitrator for Equitas should disqualify him. Umpire Candidate A disagreed, and the case went to final award.

Motion to Vacate

IRB then filed a motion to vacate, arguing that Umpire Candidate A's untimely disclosure of his role as party-appointed arbitrator in the Equitas arbitration and refusal to withdraw constituted evident partiality under the FAA. The court confirmed that in the Second Circuit, "evident partiality within the meaning of the FAA will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."

Timeliness of disclosures. With respect to timeliness, the court held that Umpire Candidate A's Failure to disclose his appointment in the Equitas arbitration between the time of first assignment and the time he was selected as umpire did not constitute evident partiality. *First important rule of this case: Timely disclosure does not mean continuous pre-selection disclosure.*

It is also worth noting that the court went on to say that even if the disclosures had been untimely, the nature of these specific disclosures would not require a reasonable observer to conclude that Umpire Candidate A was biased.

Concurrent service. IRB next argued that Umpire Candidate A's overlapping assignments as party arbitrator in the Equitas matter and umpire in the NICO-IRB matter constituted evident partiality.

Significantly, the court held that even in cases involving affiliated companies, cross-role appointments in unrelated arbitrations do not constitute evidence of partiality. *"In particular, the court sees no principled distinction between an umpire having served as a party arbitrator for an affiliated party in a settled, or completed, or otherwise dormant arbitration and doing so in two arbitrations pending simultaneously."*

IRB further argued that payment to Umpire Candidate A in the Equitas arbitration produced a material or commercial financial relationship with NICO sufficient to constitute evident partiality. *The court found that payment for a person's services as party-appointed or umpire, without more, does not produce a material or commercial financial relationship sufficient to constitute disqualifying partiality.*

***Granite State Insurance Co. v. Clearwater Insurance Co.*, 2016 WL 3386982 (Supreme Court, N.Y. County June 17, 2016)**

Michael P. Thompson, Wiggin and Dana

Factual Background

Granite State Insurance Co. and other AIG companies issued dozens of policies to Kaiser Aluminum between 1970 and 1985, resulting in approximately $574 million in total exposure. Granite State provided excess coverage under policy at issue from 1981-1982 (the "Kaiser Policy"). Granite State entered into Casualty Facultative Reinsurance Certificate (the "Certificate") with Clearwater Insurance Co. (then Skandia). Clearwater reinsured many other AIG policies covering Kaiser as well.

Clearwater entered into retrocessional agreements with Constellation Re and CX Re that covered, among other policies, the Granite State Certificate. Payment was made using a "horizontal bathtub methodology." In other words, payments were allocated to the policies with the lowest limits first. As a result, no dollars were allocated to any higher policies until all lower-layer policies were exhausted. Hundreds of thousands of bodily injury claims were made against Kaiser for losses arising from exposure to asbestos from products produced by Kaiser.

Various insurers disputed coverage, and Kaiser commenced litigation in the California courts in the 2000s. Granite State and the other AIG companies ultimately settled with Kaiser, agreeing to pay up to the AIG companies' product limits in quarterly installments over 10 years. This settlement was approved by the bankruptcy court in 2006. Granite State did not bill Clearwater until 2010, when payments first began to be allocated to the claims under the Kaiser Policy. Prior to 2010, Clearwater had entered into a commutation agreement with Constellation.

Clearwater declined to pay under the Certificate. Clearwater claimed that Granite State unreasonably delayed informing Clearwater of the reasonable likelihood that the Kaiser Policy limits would be reached, causing Clearwater to be substantially prejudiced when Granite State called for payment under the Certificate. Clearwater cited language requiring Granite State to "notify [Clearwater] promptly of any event or development which [Granite State] reasonably believes might result in a claim against [Clearwater] under the [Certificate] . . ." Clearwater claimed Granite State knew many years before it first billed Clearwater that there would be massive losses paid under all of the Kaiser policies, including the one at issue, and that Clearwater should have known that Granite State expected the Certificate would be reached. Clearwater also claimed it was prejudiced because it would not have entered into the commutation with Constellation for the amount it did if it were aware of the pending Kaiser losses and the possibility of a claim under the Certificate.

Granite State maintained that even if it were shown that its notice to Clearwater was late, Clearwater's disclaimer did not originally give late notice as a reason for the denial, only bringing in the defense two years later by pleading late notice as an affirmative defense in the New York action. Granite State also argued that Clearwater must establish prejudice, and the fact that it entered into an allegedly disadvantageous commutation did not meet this requirement.

Granite State filed motion for summary judgment, and Clearwater cross-moved.

California Law Applies

The New York Supreme Court read California law to explicitly recognize that a reinsurer can obtain "constructive notice" of a potential claim. In contrast, New York law requires actual notice of a potential reinsurance claim.

California law applied to any issue of law concerning the Certificate in which New York and California law conflicts, because Clearwater issued the Certificate at its San Francisco office to Guy Carpenter, and presumably

Granite State would make presentation of evidence of loss to Clearwater's office there. So place of performance and contacts with California predominate.

Under California Insurance Code section 54, Granite State did not show misconduct on Clearwater's part in delaying to state its defense of late notice for over two years and has not established that it detrimentally relied on Clearwater's delay. Clearwater was not found to have waived its defense that Granite State failed to give prompt notice to Clearwater of the approaching exhaustion of the Kaiser Policy.

No Constructive Notice of Claim

Under California law, a reinsurer may obtain "constructive notice" of a potential claim by its cedent through events prior to the receipt of formal notice. Here, Granite State claimed that documents sent to Clearwater gave it constructive notice of the claim in 1997, 2000, 2003, and 2005. Upon inspection, the court found that the documents in question were not sufficient to put Clearwater on notice of the likely exhaustion of the Kaiser Policy as a matter of law because—

1. The documents did not relate to Granite State's obligations to Kaiser, "much less to Clearwater's obligations to Granite State";
2. The letters merely recounted the nature of the Kaiser claims and the fact that many policies of insurance had been affected by the Kaiser litigation;
3. There was nothing in the documents that might serve to require Clearwater to begin an inquiry into the status of the Granite State policy, in the absence of any correspondence from Granite State itself;
4. The fact that Granite State's "possible involvement" in the litigations discussed might be found to be "up in the air" as a result of the revelations about other companies' exposure was simply not enough to constitute constructive notice to Clearwater that Granite State would invoke the Certificate; and
5. Providing general knowledge about an underlying policyholder "and hoping the reinsurer 'figures it out' is not what the Certificate's notice provision requires and is not what Clearwater specifically bargained for."

Clearwater provided the court a series of letters from 2006 asking AIG if there were "any additional AIG involvements that we should be put on notice of." Clearwater received no response to these inquiries, showing that it did make reasonable inquiries as to any claim involving the Certificate.

Clearwater Not Prejudiced by Late Notice

California law requires "actual and substantial prejudice" stemming from late notice. "Mere possibility" is not enough. Clearwater claimed that it was prejudiced by the fact that it made a "disadvantageous commutation with Constellation," which it would not have done had it known of its exposure under the Certificate.

Citing *ICSOP v. Associated International Insurance Co.*, 922 F.2d 516 (9th Cir. 1991), the court found that under California law, the only prejudice sufficient to allow an insurer to avoid liability based on late notice is where the insurer shows there is a substantial likelihood that it could have either (i) defeated the underlying claim against its insured, or (ii) settled the case for a smaller sum than it ultimately settled it for. New York law also requires a showing of "material and demonstrable" prejudice where a reinsurer makes a claim of late notice. *Uniguard Sec. Insurance Co. v. North River Insurance Co.*, 79 NYS2d 576 (1992).

The court found that this principle did not include a disadvantageous commutation, which it considered a "collateral matter" not sufficient to prove prejudice and relieve Clearwater of it potential liability. Despite Granite State's demonstrable failure to give timely notice to Clearwater, Clearwater failed to allege the "actual and substantial" prejudice that would allow it to avoid its obligations under the Certificate. [The Court did note, however, that a New York federal court declined to follow the *ICSOP v. Associated* decision on the issue of whether a disadvantageous commutation may be considered prejudice as a result of late notice.]

Without additional evidence, Clearwater's conclusory statements that Granite State's breach of the Certificate was the result of "bad faith, recklessness and/or gross negligence" were not enough to prove actual or substantial prejudice.

Other Findings

Clearwater alleged that Granite State breached the Certificate because it failed to satisfy two conditions precedent to coverage: (i) Granite State did not actually pay amounts in settlement of the Kaiser claim because the payments were made by entities related to Granite State; and (ii) Granite State breached the warranty of retention because it entered into an inter-pooling agreement with other AIG companies and did not retain any portion of the risk itself.

The court found that Clearwater's reading of the Certificate was "overly simplistic" and that Granite State had shown that the required payments to Kaiser were "actually paid" as opposed to pending and that the Certificate did not specify where the payments were to come from.

As for the warranty of retention, the certificate provided that Granite State would retain \$5 million of the \$35 million policy limit. Clearwater established that Granite State did not retain any portion of the risk because it entered into an inter-pooling agreement with the other AIG companies pursuant to which 100 percent of the liability was transferred and assumed by other companies. The court found that the inter-pooling agreements might indicate that Granite State did not retain a portion of the risk for its own account, and a question of fact remained as to whether Granite State breached its warranty of retention. The court found that payment of the retention amount was a condition precedent to Clearwater's payment, and discovery was needed on same.

Clearwater also argued that Granite State failed to demonstrate that the amounts allocated under the policy were "actually covered" by the Kaiser Policy. Finding that the Certificate contained a "following form" clause rather than a "follow the settlements" clause, the court found that Clearwater could challenge Granite State's allocations of insurance proceeds to the underlying claims on a theory that Granite State cannot prove that the losses allocated to the Certificate were "actually covered" by the Certificate, as required under the definition of "loss" in the Certificate.

The court ruled Clearwater may challenge Granite State's allocation of insurance proceeds to the underlying claims to determine whether they were actually covered under the Certificate. Because issues of fact still remained, the court denied both parties' motions for summary judgment.

In the Matter of Viking Pump, Inc., 52 N.E. 3d 1144, 33 N.Y.S. 3d 118 (NY. 2016)

Wesley Sherman, Transatlantic Reinsurance Company

This case arose out of asbestos exposure. The Delaware Supreme Court certified two questions to the New York Court of Appeals—one relating to allocation, the other to exhaustion. The questions are as follows:

1. Under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions?
2. Given the court's answer to Question #1, under New York law and based on the policy language at issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance?

With regard to Question #1 on allocation, the insureds argued for all sums in an effort to collect from some excess insurers before making claims under excess policies for other years in which the injuries occurred. The excess insurers argued for pro rata allocation so that the loss would be limited to amounts incurred by the insured during the policy period.

The court made clear up front that the contract language controls the question of allocation. It then outlined New York's rules for construing insurance policies and its 2002 decisions in *Consolidated Edison Co. of N.Y. v. Allstate Insurance Co.*, 98 NY.2d 208 (2002), in which it supported pro rata allocation. The court then distinguished the language at issue here from that in *Con Ed v. Allstate* because of the inclusion of non-cumulation clauses.

The court held that all sums allocation is appropriate in policies containing non-cumulation clauses, reasoning that because non-cumulation collapses a continuous loss into one policy year, pro rata allocation would make the non-cumulation clause surplusage, which goes against New York contract interpretation rules, which seek to give effect to all provisions.

The court also explained that some of the excess policies also contain continuing coverage clauses, which expressly extend a policy's protections beyond the policy period for continuing injuries, so pro rata allocation would make this clause irrelevant.

With regard to Question #2 on exhaustion, the insureds argued for vertical exhaustion, whereas the insurers argued for horizontal exhaustion if the court applied all sums allocation.

Again siding with the policyholders, the court held that the excess policies are triggered by vertical exhaustion of the underlying available coverage within the same policy period because the excess policies were tied to specific policies in effect during the same policy period. The court further explained that the "other insurance" provision in the excess policies only apply to concurrent policies, not successive policies, so their presence does not warrant horizontal exhaustion. In sum, if your policy has a non-cumulation clause and you are in New York, you are likely looking at all sums allocation and vertical exhaustion, but it will be a contract-specific analysis.

While it is certainly an important decision, it is perhaps not as monumental as some would believe for a number of reasons:

1. The court limited its decision to the policy language before it and did not disturb its decision in *Con Ed v. Allstate*, which upheld the trial court's pro-ration of liability based on time on the risk. As a result, if your policies do not have non-cumulation or non-cumulation and prior insurance provisions, a New York court is still likely to apply pro rata allocation.
2. The decision may provide clarity to policyholders and insurers, potentially easing the cost of future disputes.
3. Insurers that issued the policies selected under an all sums approach may still pursue contribution from other insurers.

Infrassure, Ltd. v. First Mutual Transportation Assurance Co., 842 F.3d 174 (2nd Cir. 2016)

Perry S. Granof, Granof International Group LLC

There has been an increase in captive insurance arrangements by various industry sectors due to globalization, the non-availability of certain types of insurance, rises in insurance premiums, and healthcare uncertainties.

The growth of captives has created new opportunities and potential pitfalls for reinsurers of captive companies, where relationships are not arms-length. Seminal case law concerning reinsurers' relationships with cedents may need to be re-examined in the context of captive relationships—for example, that reinsurers must prove prejudice and tangible economic harm to disclaim coverage based upon late notice [*Unigard Sec. Insurance Co., Inc. v. North River Insurance Co.*, 4 F.3d 1049 (2nd Cir. 1993)]; that reinsurers must prove that the loss of the right to associate would result in prejudice in order to be allowed to associate in the defense of a case, or in pre-settlement negotiations [*Insurance Co. of Ireland Ltd. v. Meade Reinsurance Corp.*, 1994 U.S. Dist. Lexis 15690 (S.D.N.Y. 1994)]; and there is no common interest doctrine to waive attorney-client privilege doctrine between reinsurers and cedents [*North River Ins. v. Philadelphia Reinsurance*, 797 F. Supp. 363 (D.N.J. 1992)].

For example, I was involved in an arbitration where one of the issues under consideration was the duty of the captive to adjust claims in a fair, impartial, and arms-length basis. The insured for which the captive provided coverage may have handled the underlying lawsuit in a fair and proper manner, obtaining a fair result (that is not at issue). However, there was no evidence submitted that the captive engaged in a proper claims evaluation as to the insurability of the final settlement amount. No information was provided to the reinsurer as to whether the amount of stipulated liability represented covered "loss," and no information was provided to the reinsurer as to whether there was an allocation of covered versus uncovered loss.

H v. L & Ors, [2017] EWHC 137 (Comm) (03 February 2017)

Jan W. Woloniecki, ASWLaw

The English Commercial Court has recently restated the principles applicable to challenging party-appointed arbitrators on the grounds of "apparent bias" (the English equivalent to "evident partiality") in the context of a Bermuda Form arbitration with a London seat. The case of *H v. L & Ors* provides authoritative judicial guidance regarding the common practice in the London insurance/reinsurance market of repeated appointments of the same arbitrator by the same party, including appointments of the same arbitrator in multiple disputes arising out of the same market event.

Three Grounds of Challenge

H v L & Ors was an application by "H," the policy holder, against its insurer, "L," in a Bermuda Form arbitration with a London seat, to disqualify the chairman of the tribunal (referred to in the anonymized report as "M"), who had been appointed by the High Court.[1] No allegation of actual bias was made. The grounds for the application were that the conduct of the arbitrator following his appointment gave rise to an appearance of bias for the following three reasons:

(1) M had subsequently accepted an appointment in two Bermuda Form arbitrations involving "R," an affiliated company of H, and two insurers (one of which was L), in which the disputed claim arose out of the same incident and raised similar issues, namely the reasonableness of the settlement;

(2) M's appointment in the R arbitrations had not been disclosed; and

(3) M's response to the challenge to his impartiality.

Applicable Principles

Popplewell J restated the applicable principles as follows:

Section 33 of the [1996] Act requires the tribunal to act fairly and impartially between the parties. The question of whether circumstances exist which give rise to justifiable doubts as to an arbitrator's impartiality is to be determined by applying the common law test for apparent bias: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [17], *A v B* [2011] 2 Lloyd's Rep 591 at [22], *Sierra Fishing Co v Farran* [2015] EWHC 140 at [51].

The test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased (*Porter v Magill* [2002] AC 357 per Lord Hope at [103]). The "fair-minded" observer is gender neutral, is not unduly sensitive or suspicious, reserves judgment on every point until he or she has fully understood both sides of the argument, is not complacent, and is aware that judges and other tribunals have their weaknesses. The "informed" observer is informed on all matters which are relevant to put the matter into its overall social, political, or geographical context. These include the local legal framework, including the law and practice governing the arbitral process and the practices of those involved as parties, lawyers and arbitrators. See *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [1]-[3]; *A v B* at [28] to [29].

The test is an objective one. The fair-minded observer is not to be confused with the person who has brought the complaint, and the test ensures that there is a measure of detachment. The litigant lacks the objectivity which is the hallmark of the fair-minded observer; he is far from dispassionate. Litigation is a stressful and expensive business, and most litigants are likely to oppose anything which they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded (see *Helow* per Lord Hope at [2]; *Harb v HRH Prince Abdul Azsiz Bin Fahd Bin Abdul Aziz* [2016] EWCA Civ 556 per Lord Dyson MR at [69]).

One aspect of the objective test is that it is not dependent on the characteristics of the parties, such as their nationality (see *A v B* per Flaux J at [23-24]). The test is the same whether or not foreign nationals are involved, and the test is not informed by the actual or stereotypical attitudes towards the arbitral process which may be held by a party who is, or is managed by, foreign nationals.

The International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 edition ("The IBA Guidelines") may provide some assistance to the court on what may constitute an unacceptable conflict of interest and what matters may require disclosure. However, they are not legal provisions and do not override the applicable legal principles which have been identified, as they expressly recognise in paragraph 6 of the Introduction. If there is no apparent bias in accordance with the legal test, it is irrelevant whether there has been compliance with the IBA Guidelines (see *Cofely Limited v Anthony Bingham* [2016] EWHC 240 (Comm) at [109]; *A v B* at [73]; *Sierra v Farran* at [58]).

All factors which are said to give rise to the possibility of apparent bias must be considered not merely individually, but cumulatively (see e.g. *Cofely v Bingham* at [115][2]).

ENDNOTES

1 M is a well-known and highly respected international arbitrator. He has extensive experience of insurance and reinsurance law, both English and New York law. He has extensive experience in both domestic and international arbitrations governed by the Act and of arbitral procedural law, practices and procedures. He has sat as a member of an arbitration tribunal in over 30 references concerning the Bermuda Form over many years. He enjoys a reputation as an international arbitrator of the highest quality and integrity." [2017] EWHC 317 (Comm) [9], Popplewell J, who noted [10]: "Prior to expressing his willingness to be appointed, M disclosed that he had previously acted as arbitrator in a number of arbitrations in which L was a party, including appointments on behalf of L, and that he was currently appointed as arbitrator in two pending references in which L was involved. These did not impinge on his ability to act impartially in the subject reference, or form any impediment to his appointment as third arbitrator, and were not regarded by H or the Court as doing so."

2 [2017] EWHC 317 (Comm). [16]

Information Security in Arbitrations

Three experienced arbitrators discuss how the arbitration community should assess and adopt best practices and strategies for identifying and protecting private information.

By John D. Cole, David A. Thirkill and Daniel E. Schmidt, IV
Moderated by Robert N. Hermes and reported by Douglas Winter

Bob Hermes recently sat down with three experienced arbitrators—Dan Schmidt, David Thirkill and John Cole—to hear their experiences in this area, how their awareness of these issues has been heightened, and how they themselves have adopted practices for protecting confidential information.

MR. HERMES: We have all seen news reports about the problems associated with the disclosure of personal information as a result of cyber security breaches at companies and government offices. Insurers have reported that 101.4 million people were affected by data breaches in 2015.

It's interesting to note that it wasn't that many years ago that most of us in the arbitration community had never heard of personal identifying information (PII) or personal health information (PHI). Now we are more attentive to things like encrypted computers and password-protected computers.

However, as discussed at the Fall ARIAS conference, the arbitration community has come to recognize that in the course of an arbitration, panel members may be provided with personal information and medical information of individuals involved in underlying claims. This is especially true for proceedings involving financial insurance products like annuities, credit indemnity, mortgage insurance and managed care disputes. Arbitrators, like the companies and their counsel, must be mindful of best practices and strategies for identifying and protecting private information.

These practices in many ways are steps we all should consider incorporating into the way we protect our own personal information, as well as the confidential information we are entrusted with, as attorneys and arbitrators who assist companies in resolving their insurance and reinsurance disputes.

The first question I have for the group is: Have you been involved in arbitrations in which it was necessary for the panel to receive personally identifiable information? That is, information that can be used to identify, contact or locate a person?

MR. SCHMIDT: Well, I started in this business of actually serving on arbitration panels in 1987. We received that information in the form of underwriting files and claim files and what have you, without much comment and without much concern. As a panel, we did not really need the personal information, it was just provided to us.

I do not even recall that the issue of confidentiality, in the late '80s and even into the early '90s, was much of a consideration, let alone some of the other issues we'll be discussing about protecting this material.

Over time, particularly after ARIAS U.S. became involved in helping us better organize arbitrations and when the confidentiality agreement came out and was used widely, people were aware that they had to keep this information confidential.

MR. HERMES: David, what about you? Have you had arbitrations where it was necessary for the panel to receive personally identifiable information?

MR. THIRKILL: I have not. And perhaps that goes to Dan's point, about the necessity for such information.

As a panel, we are most often focused on the contract between the insurance company and the reinsurance company. But, we often get information regarding the underlying claims. For example, asbestos claims, we may learn the identification of individuals who suffer from some of the more horrendous parts of asbestos injuries, mesothelioma, and so on. I'm sure all three of us have done clergy abuse and similar claims where we received information about individuals who were molested.

So we get the information. Whether it's actually necessary or not is something else altogether. It's necessary in the sense of its cumulative effect. But the individual information is not necessary and could perhaps be eliminated. But then of course, that leads into, particularly in an electronic sense, how and where and who gets to pay for it.

MR. HERMES: John, what about you?

MR. COLE: Just to add one thing to what Dan and David mentioned. I'm asked, from time to time, to do premium audit disputes based upon issues with respect to loss-sensitive, large account programs. And at times in those cases—not always, but at times—the handling of individual underlying claim files becomes an issue.

A policyholder, for example, will challenge the propriety or professionalism of the claim handling. And in those cases, PII and PHI both may be contained within those individual claim files. So that is an area that is somewhat of an exception. It's a relatively small percentage of what I do and I suspect what most of us do. But that certainly is one example where the spectre or the potentiality of the need for confidential information may be present.

MR. SCHMIDT: I would add one more thing. And I'm sure that John and David have gone through this as well.

Often, one or the other party or counsel would redact information that would identify who the claimants are. That's particularly true where hard copy files or copies of hard copy files were presented to the panel.

We also had heightened confidentiality agreements where a limited number of copies would be made and people would receive copies on a need-to-know basis. Those are some other protections that we used.

MR. HERMES: Let's focus now on what's even more sensitive than personally identifiable information, that is, information that can be used to identify, contact or locate a person, and instead focus on the so-called PHI, personal health information, which is information relating to an individual's health that identifies the individual or can be used to identify the individual.

Have you had occasion to have PHI find its way to you in the course of resolving an arbitration?

MR. THIRKILL: Yes. But until recently, I don't think the parties, counsel or panel focused on the information per se, because the PHI was interesting but unnecessary in its complexity and detail and could well have been redacted.

Given the statutory protection of PHI under HIPAA, etc., parties and counsel really need to assess the need for providing such information to the panel.

MR. HERMES: John, what's your experience been with PHI?

MR. COLE: Well, first, I think an over-arching point that I think we all are in complete agreement on is that the sensitivity regarding this information, as Dan and David have alluded to, is simply much higher than it was a decade ago.

The second observation that I would make is that arbitrators don't introduce evidence or provide evidence within the arbitration hearing. It comes from the parties and it comes more directly to us, of course, from counsel. And I suspect that this requires and will increasingly require an emphasis on counsel understanding the record and being able to determine the extent to which, if at all, the PII or PHI may be contained in any documents that they wish to present to us.

MR. HERMES: Dan, anything you would like to add?

MR. SCHIMIDT: I would just add that, in my pretty recent experience, some cases have not handled PHI with any greater care beyond the typical confidentiality agreement and destroy at the end. They were life settlement cases so the panel received detailed medical and personal information regarding underlying insureds. Yet we employed only the standard confidentiality provisions. So, the heightened concern for PHI is quite new in my experience.

MR. COLE: Bob, if I could add real quickly. I was in an organizational meeting recently in New York in a case that, by at least its character, you would have believed that there may have been the potentiality of protected information to come out.

And when asked by the panel, the parties, represented by two very, very sophisticated law firms, did not anticipate there would be any need to protect that information in any kind of particularly careful or comprehensive way.

And again, counsel certainly had a better understanding of the potential document production, but the degree of awareness and sensitivity may not be uniform across the board, as we all increasingly have to grapple with this.

MR. HERMES: Dan, let me shift to you for a minute. What's been your experience with actually engaging in a discussion with the parties, panel members and counsel on the topic of PII or of PHI and what steps need to be taken to keep that information secure and confidential? Have you had discussions like that?

MR. SCHMIDT: Yes. Over the years, the topic typically came up in a discussion of the confidentiality agreement and an effort to ensure agreement as to what it meant and what it applied to.

We did not use the acronym PII or PHI. We talked in terms of enhancing the confidentiality agreement.

I have also spent a lot of time talking at organizational meetings about redaction. Again, it may or may not have fit the definition of PII or PHI, but there was a lot of sensitive information in there, so the parties wanted to ensure that details that might reveal a person's identity would be redacted before disclosure to the panel or third parties.

MR. HERMES: David, what about you?

MR. THIRKILL: I think the one thing perhaps that we should recognize is while PII and PHI information areas are particularly sensitive, in effect, anything that's subject to a confidentiality agreement and could be confidential is possible to be hacked and could possibly be used. We don't know where. So the issue of what do we do is perhaps a little wider.

Thanks to a ruling last year, that while idiosyncratic and certainly unique, nonetheless, opens a possibility for error, panels now routinely add an item to the agenda in relation to when do ex parte communications reopen. And so that normally goes on an agenda now. I suspect that the same thing will happen with respect to protecting PII and PHI.

I also think that it is something that ARIAS could look to make sure that it's on the agenda. It can be raised. And each time that happens, people's awareness becomes heightened and it becomes much more easy to deal with.

MR. HERMES: John and Dan, would you care to comment on David's suggestion that perhaps it ought to become a standard agenda item for discussion at all organizational meetings?

MR. SCHMIDT: I'm happy to comment on that. I completely agree with David on that. And I believe that ARIAS could help a great deal by putting it in their standard agenda.

I would also suggest ARIAS advise arbitrators that newly-formed panels should include it in their organizational letter that attaches the agenda. Umpire questionnaires should also seek confirmation of password protected encrypted computers and any other special confidentiality protections the parties feel are necessary.

MR. COLE: Let me both agree and add that I think over time, uniformity will become even more important.

In the organizational meeting that I made reference to, it was actually very positive that counsel brought up the issue, kind of sua sponte, it was not—as David alluded to—a specific item on the agenda for the meeting. I have not seen that yet. The more uniformity that we wrap around this subject in terms of covering any and all requirements necessary for the proceedings, the better.

MR. HERMES: Now I'd like to put you guys on the spot a little bit more and get a little more personal in my questioning.

And, Dan, let's start with you. Would you mind sharing with us what steps do you personally employ as a matter of routine to keep information that you are provided in the course of an arbitration confidential, especially with respect to your computer practice?

MR. SCHMIDT: Well, looking first at the computer practices, only late last year were all my devices encrypted. I have always had pretty strong passwords.

I confess to not having changed them very frequently over time. But that's something that I'm definitely going to change.

With respect to the screens themselves, they are password-protected and they go off pretty quickly. As a matter of course, they always have. And with respect to hard copy documents, I have offices in New Jersey and Arizona that I use for work. If I'm not there, they are locked.

I also have a safe in Arizona, a fairly large safe that anything that's particularly sensitive can go in there. I have not had any such material. But I could use that if needed.

MR. HERMES: David, what about you?

MR. THIRKILL: Well, I'm slightly more of a dinosaur than Dan in that regard. I do have my computer, my laptop and my cell phone encrypted as best I can.

I remember seeing an ad relatively recently, sometime in the middle of last year, which really spurred me on, which had an "encrypt now or you will regret it later" type heading.

I mean, for example, iPads and iPhones can have fingerprint technology to get in now. You can encrypt your computer quite easily through various, you know, Geek Squads. One day I actually went to the Apple store and went through a short course with them at the "idiot bar" or whatever they call it. So I do my best.

I don't have locked facilities for sensitive information. But, I do live in the woods in New Hampshire, so there's not too many people that break in around there.

I do have a suggestion though. Some while ago, I'm not sure which ARIAS meeting it was at. But I think it was in New York. They had a photographer there. And if you turned up, you could go have your photograph taken. And, I think the arbitrator community would welcome and participate in a similar process at a conference where they could be taught by IT professionals how to protect their computer.

MR. HERMES: John, anything you would like to add? Will you share your security practices?

MR. COLE: First of all, I have the advantage of being a partner in a large law firm. So as a matter of course, everything that I do through our system is encrypted. And I assure you they spend thousands of hours on our IT support team. And often we have to change passwords and take other steps in order to make sure those safeguards are in place.

At home, I do have a locked office and my cell phone is encrypted.

MR. HERMES: Turning to the issue of what needs to be done when an arbitration concludes, I have two questions for the group. First of all, what's been your experience with respect to having a discussion, either at the outset or at the termination of the proceeding, as to what should be done with the confidential information and materials that parties and counsel have provided to you. And absent any discussion on that, what's your practice?

MR. SCHMIDT: I would say that in the vast majority of my cases, there's been no specific discussion concerning that.

At the other end of the spectrum, in the rare instances where the material was focused on because it was so sensitive, we had very specific and explicit discussions with respect to either returning the documents or the destruction of the documents. And that includes electronic information.

My default practice has been to destroy all documents by employing shredding companies.

I have always watched such destruction and received a certificate of some sort verifying what was destroyed.

MR. HERMES: Has anybody ever asked you to return material?

MR. SCHMIDT: Yes. Because it was very sensitive information. And my vague recollection is it had more to do with proprietary information than some insured's or third party's name and identification number related to their business. The parties required us not to make any copies beyond those that we had received and they wanted them returned when we were done.

MR. HERMES: John, what's been your experience with destroying or returning information at the conclusion of a proceeding in which you have been a panel member?

MR. COLE: I have only had one case where it was required. It was particularly sensitive information regarding minors. And I will just leave it at that. So, as a general rule, it's quite an exception.

I return everything in hard copy to my firm that has a very rigorous policy with respect to hard copy documentation and storage.

So again, I have, I suspect, I'm at somewhat of an advantage, from having the luxury of that kind of support.

MR. SCHMIDT: If I could just jump in. I think you have to retain documents at least three to six months because of the time within which a challenge to an award can be raised.

I retain files that I think might be subject to a challenge or have been challenged. And I keep them until the ultimate resolution of the case. And that can be years, sadly. And then I deal with it after that.

MR. HERMES: Let's shift to a different topic.

My and my law firm's awareness and sensitivity to protecting confidential information really became heightened and our focus sharpened when we began to receive requests from our insurance company clients that we certify to them that we practice certain security measures at the firm with respect to how we protect information on our computers and how we protect hard copy information, especially hard copy information that contains PHI.

As a practical matter, if you were involved in a proceeding where the parties involved wanted some type of written certification of practices or procedures that the panel members would follow in the course of an arbitration proceeding, do you have any views as to how that could best be documented or where that should be memorialized?

MR. THIRKILL: The typical arbitration clause is narrow with respect to arbitrator qualifications other than the usual either active or retired director or officer of an insurance company or reinsurance company or underwriter at Lloyd's.

There's nothing in it that says, for example, needs to have an encrypted computer. And I guess we're straying into an area of — it's one thing talking about responsibility, but we're straying into an area that talks about panel selection.

Now, I have never seen perhaps an item on the questionnaire form that, if it was there and it said, relative to umpires, do you have an encrypted computer? Does that mean that if that individual does not, he or she will not be a candidate? Well, very possibly so. Should that be extended on to arbitrators? Well, very possibly so.

But it is an issue that has to be addressed first. Because you can't afterwards, once the panel is formed, then say oh, well, we can't give you information because you are not encrypted. In other words, we have to deal with the issue at a macro level before we can deal with it at a micro level.

MR. COLE: I think human nature tells us that we tend to react as either groups or individuals at either extreme of the spectrum. We either do too little or don't do enough. And probably it's not controversial that that's the stage that we would find most of us in terms of our awareness of these issues. But at times, and then in reacting to them, we do too much or more than is realistically appropriate or proportionate to the problem.

That's why I really tend to favor having ARIAS take a look at this issue, and a broad look at this issue to encompass parties, counsel, as well as arbitrators in terms of what standards might be applicable. I think that generally gives you the best informed view, if you will, from a lot of different constituencies and allows you to make good judgments in making progress and addressing it.

As respects the issue as to at what point this will become something that becomes part of what arbitrators have to consider in terms of being able to certify or make clear, I think that's a completely fair subject for that kind of broad ARIAS discussion.

MR. SCHMIDT: This topic should be front-ended as much as possible—particularly if counsel and parties believe that this can be an issue—to make sure that the selection of their arbitrator and the people who are nominated as umpire are qualified or willing at least to do what's necessary to protect information in a way that the parties and counsel feel that they are legally required to ensure protection.

So that starts, as we talked about earlier, right at the initial discussion with the arbitrators, the candidates and in the questionnaire for the umpire candidate.

With respect to the next steps, how do you certify this or document arbitrators' recognition, I personally do not want to see this added to a hold harmless indemnification agreement.

The hold harmless was intended to place the arbitrator, as the arbitrator should be, in kind of a semi-judicial protective environment that judges receive. And to start adding more and more requirements and conditions and all the rest of it to a hold harmless indemnification is not the way I would want to see it go.

I have no problem with additional and more specific information being put into the Confidentiality Agreement. Personally, my experience has been, just like Bob mentioned. They are separate undertakings. The counsel have asked the panel members to confirm what they did and when they did it. I think that's sufficient, quite frankly.

MR. THIRKILL: I agree with what Dan and John said, particularly Dan's last point there. Because the whole issue comes down to whose responsibility is it?

I think there's a level of reasonable due care that panel members should take and certainly would take. They wouldn't be selected if they did not. But the onus on protecting the information shouldn't be on the judge of that information. It should be on the parties and/or counsel. And I think there are certain things that could be done quite swiftly.

For example, if there was a particularly sensitive area, one of the things that you might be able to do—it sounds expensive, but it really isn't, in the overall scheme of things, it's de minimis as a whole—is send a small computer to each panel member, which was totally set up to receive and deal with encrypted information, irrespective of what I and Dan or John or anybody else might have on their own systems that could be exclusive to that particular arbitration, and could be returned at a particular point in time.

In other words, it should be the users and providers of the information, as far as I'm concerned, not the panel members who take responsibility for the protection of the information. Although I do recognize and absolutely agree that we, as arbitrators, should exercise a reasonable duty of care.

MR. COLE: Bob, if I could just jump on David's point there and very much agree with it.

I know that there's some cynicism at times among the arbitrator community that ARIAS' solution to any problem is, at times at least, to add a further requirement to the arbitrators and rarely, if ever, to counsel or to the parties.

There's no question that the arbitrators have a big role and a big responsibility in this equation, lest that be misunderstood. But I was reviewing in advance of this call and your asking us to become involved in this, the very good materials that were provided at the ARIAS fall conference. And you don't get more than two pages in there before there is a list of requirements on the arbitrators that is proposed.

Arbitrators should have an office shredder; arbitrators should have a dedicated computer that is used only for arbitrator work; arbitrators should do this and do that. And certainly, again that's not inappropriate.

But I'm also interested, and I think a holistic response to this issue requires that there be standards considered by those that provide information.

MR. HERMES: Let's stay with this idea for a minute. As someone whose practice has been in the reinsurance arbitration arena for 35 years, I always view myself, as one of the other roles I play, as well as being an advocate for my clients, as trying to make sure that the arbitration proceeding itself runs as efficiently and fairly and smoothly as possible.

So with that in mind, David, let me go ahead and I will start with you on this one. What would you like to see counsel do to help further the protection of confidential and proprietary information that we have been talking about?

MR. THIRKILL: I think at the organizational meeting or prior to it, counsel should explain to the panel whether or not there is going to be information that will come in that falls under the headings that need to be protected.

If there is, be prepared to explain to the panel what the information is and what the parties want to have done to protect the information. And that duty, like the reverse duty in an arbitrator's ongoing disclosure, should also be an ongoing duty. Because often at the beginning, it may not be apparent that there will be such information. But as it comes down the line, and that if and when occurs, counsel should explain to the panel exactly what they are going to do to protect it.

MR. SCHMIDT: I think the most important thing that counsel can do is discuss a plan among themselves and determine if the panel actually has to receive hard or electronic documents that has PII or PHI information on them.

You know, as a matter of course, we'll get exhibits, documents that have tremendous amounts of information. And there might have been a single sentence in 10,000 words of information that was important.

Do we really need to get that information? If so, I think very serious efforts should be made to redact sufficient amounts of information so it falls out of the PII, PHI category.

If they can't do that, then I think there's going to have to be discussion with the panel as to how to treat that information. It may be that it shouldn't go electronically. That it may go in some other way that it can be received and returned with proper certification or received and destroyed with proper certification.

Again, we're talking about, I think, a very limited number of cases where a reinsurance arbitration panel must receive PII and PHI information. Counsel and the parties could help quite a bit by limiting unneeded information from being sent to panels.

MR. COLE: It's really important that there be sensitivity at the only location that can identify this initially, and that is with the parties and counsel. At times we get much more information than we might legitimately need to decide particularized issues as a panel.

So a two-stage approach may be, as I think Dan was suggesting, first of all, can you identify a priori whether there is any PII, PHI or other legally protected information that you intend to provide to the panel at any stage of the proceeding? Hopefully, you can know that early.

And secondly, what is the character of that information? Certainly not what the details are, but what kind of confidential information as a general rule do you have in mind.

And then a third stage, of course, is if you can identify that for us, can you please explain why you think that it's essential to the resolution of one or more issues in the arbitration.

I think if counsel and the parties can get out ahead of it in that fashion, it provides the best opportunity, if you will, for all of us to consider whether that information exists. And then to take appropriate precautions as arbitrators with respect to that information so long as it is in fact necessary to the resolution of an issue.

MR. THIRKILL: May I jump in and give a very simple example?

We often get in large cases reams of proofs of losses, which come in as fact to show that a reinsurer was billed. We need to know the reinsurer was billed, but we don't need to see every single item that goes into the proof of loss. Much of which, some of those cases that we have identified earlier on, will get down to granular details, such as the individual, where they live and so on and so forth.

It's interesting, but it has absolutely no particular relevance. And so if counsel would get together beforehand and say well, we stipulate to this, that and the other. And here's a list – here's one billing with some items redacted just all the rest are identical and the total of them is X. That's all we really need to know.

MR. HERMES: We have primarily focused on PII and PHI, since it's the protection of that particular information that has moved this topic to the forefront.

But when you step back for a minute and you take into account the fact that the current form confidentiality agreement that is standard procedure at arbitrations currently provides, and let me read it for the record:

All briefs, depositions and hearing transcripts generated in the course of this arbitration, documents created for the arbitration or produced in the proceedings by opposing party or third parties, final award and any interim decisions, correspondence, oral discussions and information exchanged in connection with the proceedings (hereinafter collectively referred to as "Arbitration Information") will be kept confidential.

Is there any reason why arbitration information, as defined in the typical confidentiality agreement should be treated any differently than PHI and PII?

MR. SCHMIDT: I don't think there is. But it's only recently that we're being told that we should be encrypting our computer information. And I think that's the new requirement that companies and counsel are looking for arbitrators to sign on to.

MR. THIRKILL: I agree with that wholeheartedly. I don't think there's any reason why we should have different levels of security. We should take steps to make sure that all information we receive remains confidential.

But how we deal with it is the issue. Increasingly with some particular parties, there seems to be the movement to do away with confidentiality altogether. I often face at organizational meetings one party saying it's not in the contract. There's no reason to have confidentiality. Parties go to court all the time to vacate or confirm.

So, if the confidentiality of the proceedings is being challenged, PII and PHI must be addressed separately to ensure the required legal protections are in place.

MR. COLE: I agree all information should be kept confidential, but if PHI and PII must be disclosed, I think that should be separately noted to the Panel.

Opinions and views expressed by these participants are solely their own and are not attributable to their respective employers, clients, or associated companies.

ARIAS•U.S. News & Notices

Mark Gurevitz Becomes FINRA and AAA Approved Arbitrator

ARIAS Certified Arbitrator and Umpire Mark Gurevitz announces that this year he became a FINRA approved arbitrator on their roster for securities arbitrations and, also, was selected to the American Arbitration Association panel of arbitrators for international arbitrations through the International Centre for Dispute Resolution. Mark can be reached at (203)556-4049 and gurevitzarbitrations@gmail.com.

Freeborn & Peters LLP and Hargraves, McConnell & Costigan P.C. Announce Combination; Development Driven by Client Need, Success of Growing Insurance Practice

Freeborn & Peters LLP is pleased to announce that it is combining with the New York City firm of Hargraves, McConnell & Costigan P.C. The development, which establishes Freeborn's first office in New York, represents a further geographic expansion for the Chicago-headquartered Freeborn, which last year combined with the Richmond, Va.-based Brenner, Evans & Millman P.C.

Freeborn plans to expand the New York office's practice areas to include real estate, where the firm will draw on its existing national footprint to serve investors and developers in the multistate region in and around New York, and corporate law, where Freeborn will leverage its considerable experience with buyers and sellers of varying sizes to service clients with merger and acquisition needs in this region.

ARIAS•U.S. Out & About

On February 7, 2017, Larry Schiffer, a New York litigation partner at Squire Patton Boggs (US) LLP, spoke at the American Bar Association, Tort, Trial & Insurance Law Section's Day at Lloyd's III program in New York. Larry was on a panel titled "Mediating/Arbitrating Disputes Among Insurers and Reinsurers," where he discussed in some detail the ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes and, most importantly, the ARIAS-U.S. Neutral Panel Rules.

On March 28, 2017, Larry Schiffer attended the New York Reinsurance Networking Group meeting in conjunction with the Intermediaries and Reinsurance Underwriters Association ("IRUA") at Mayer Brown's New York offices. The meeting was hosted by Jeremy Wallis and Sylvia Kaminsky and the topic was cybersecurity. Larry provided background and clarification about the draft Guidance, how it is merely Guidance to assist arbitrators when they are asked by appointing parties about their data protection practices.

Ensuring E-mail Security

Some services are available that ensure encryption of messages even while sitting on servers.

By Michael Menapace

This is the inaugural column by the ARIAS•U.S. Technology Committee. It is our hope that this recurring feature can provide practical and helpful information to the reinsurance community.

At the ARIAS•U.S. Spring 2017 Conference, arbitrators were invited to attend a workshop intended to help arbitrators and others in the ARIAS•U.S. community with limited IT support staff understand the potential vulnerabilities of sending and receiving confidential information via e-mail and to adopt some simple and low-cost baseline practices to keep the information secure.

This workshop and these materials are an extension of the draft *Guidance for Data Security in Arbitrations* that is currently being considered by ARIAS•U.S.

Basic Information and Background

The *Guidance for Data Security* uses the term "confidential information" to refer to various types of information that can be exchanged in the course of an arbitration, including the subsets of personally identifiable information ("PII"), protected (or personal) health information ("PHI"), and sensitive or proprietary business information. While various laws and regulations require different levels of confidentiality treatment depending on the subsets describes above, the *Guidance* treats the subsets similarly so that implementing information security measures can be done efficiently.

For some years, insurance and reinsurance companies have been aware of information security risks and safeguards and have invested considerable amounts of time and money to implement robust information security procedures, protocols, and practices. Their efforts are routinely examined and revised. Likewise, law firms have been implementing information security practices and, in most cases, have systems in place to protect confidential information while at rest and in motion. For example, most companies and many firms have e-mail systems that automatically encrypt outgoing messages, while encrypted messages can be automatically unencrypted by the receiving party for seamless and secure communication.

A weak link in the process is when the receiving party uses an e-mail system that cannot, or does not, accept encrypted messages. In this scenario, the e-mail must be sent in an unencrypted format or the sender must make other arrangements (as discussed below) to get the information to the recipient.

Regulators from a host of agencies have been requiring insurers to address this potential weak link as part of the wider trend of considering companies' use and sharing of information with third-party service providers, vendors, and other business partners. For example, the New York Department of Financial Services cyber security regulation requires (among other things) insurance companies to assess the risk that their vendors pose to the security of certain information, require those vendors to implement reasonable safeguards, assume the risk those vendors pose to information security, and attest in writing that they (the insurers) have undertaken these steps. As an example, it has become commonplace for insurers to require law firms to submit their written data security plan and allow the insurers to perform random audits of firms' practices and technology.

Requiring vendors to use a secure e-mail system is a minimum requirement on which companies will insist, even for their smallest vendors and service providers.

Commonly Used Free E-mail Providers

Gmail, Yahoo, and Hotmail e-mail accounts are ubiquitous and free to the user.

Advertising space is sold. To do this, the service providers "read" your e-mails to target advertisements to you. *See* Terms of Service.

In addition, the providers share this information with their sister companies. Gmail = Google, YouTube, etc. Hotmail = Microsoft.

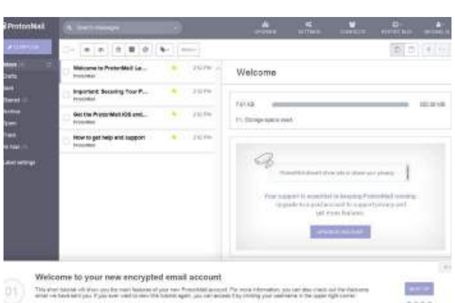
Some of these services advertise that your e-mails are encrypted. But that is generally true only while the e-mails are in transit, not while resting on the providers' servers, and only when you are communicating with other accounts with the same provider.

Once a bad actor gets into the provider's system, it is relatively simple to copy communications from large swaths of users (e.g., as in recent Yahoo revelations).

These are risky systems to use if you want your communications to remain confidential.

Encrypted E-mail Providers

A better alternative to the free e-mail services discussed above are the free and high-security options. Many people find it convenient to maintain two accounts, rather than trying to move everything from an existing account to a new account. Alternatively, many people will use a newly created account for matters moving forward and leave prior files in the existing account.



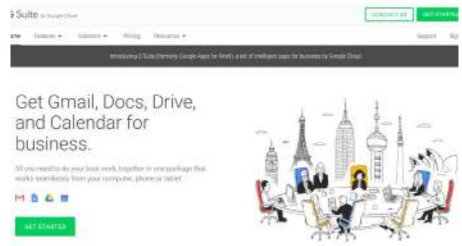
Among the free secure e-mail providers are Proton Mail and Tutanota. These services are free up to certain space limitations. Inexpensive upgrades are available to increase space, allow for multiple users on the same account, or customize your domain name. For example, you could make your name JoeTheArbitrator@BestArbitratorEver.com. ProtonMail (www.ProtonMail.com) provides 500 MB free storage, with a $4 per month upgrade. Tutanota (www.Tutanota.com) provides 1 GB free, with a $1.20 per month upgrade.

When using these services, your e-mails are encrypted while in transit and while at rest. The providers cannot unencrypt even if they want to do so—something that people operating in some places around the world find advantageous or that journalists prefer so they can correspond with whistleblowers or other sources.

Both providers have mobile apps for your smartphone or tablet device, and they use a familiar-looking interface so the transition to a new e-mail program is relatively simple. For example, here is the inbox for a ProtonMail account. You can see the familiar folders on the left, the list of e-mail messages in the center, and the reading pane on the right.

At the Spring 2017 Conference workshops, people asked how these "free" services make money if they do not sell advertisements. They derive revenue primarily from people who upgrade their accounts. In addition, there is an option for users to donate to help support the service, similar to how people donate to Wikipedia or other public interest crowdfunded platforms.

Upgrading to G Suite



If you use Gmail and do not want to use a secure e-mail provider such as ProtonMail, Google offers the option to upgrade free Gmail accounts to G Suite (formerly Google Apps for Work and Google Apps for Your Domain).

Unlike the free, consumer-facing services, G Suite users do not see advertisements, and information and data in G Suite accounts do not get used for advertising purposes. G Suite administrators can fine-tune security and privacy settings.

Data is encrypted while resting in Google's data centers, but Google has the encryption keys, unlike the high-security options discussed above. This means that if faced with a subpoena or other court order, Google could access your G Suite account.

To upgrade from Gmail, you need to sign up for G Suite, select a domain name, customize your domain name settings, and move your data. The interface looks and works very much like standard Gmail. (Neither Hotmail nor Yahoo have the ability to upgrade to a similar product like G Suite.)

If you have questions on the use of secure e-mail, please reach out to a member of the Technology Committee or, if in the course of an arbitration, one of the parties. It is in everyone's interest that information be kept secure and confidential.

Law Committee Case Summaries

The ARIAS•U.S. Law Committee has added several case summaries to the website this year.

By the ARIAS•U.S. Law Committee

The Law Committee has been very busy—over 75 new Law Committee reports have been added to the ARIAS•U.S. website so far this year!

As a service to members and the industry, the ARIAS•U.S. Law Committee periodically provides short summaries of recent cases and pending legislation in any state that could affect arbitration practices. A list of the updated cases can be found below; full summaries can be found on the ARIAS•U.S. website.

To inquire about the publication of a summary that you believe is worthy of being featured on this site, please contact Sylvia Kaminsky (committee co-chair and board liaison) at syl193@aol.com or Michael Carolan (committee co-chair) at mcarolan@crowell.com.

1. *Accenture LLP v. Spreng*
2. *Affiliated FM Insurance Co. v. Constitution Re*
3. *Ali v. Federal Insurance Co.*
4. *Allendale Mutual Insurance Co. v. Excess Insurance Co.*
5. *American Insurance Co. v. Messinger*
6. *Atlas Assurance Company of America v. American Centennial Insurance Company*
7. *Attia v. Audionamix, Inc.*
8. *Bailey Shipping Ltd. v. American Bureau of Shipping*
9. *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*
10. *Bellefonte Reinsurance Co. v. Aetna Casualty & Sur. Co.*
11. *British Island Co. of Cayman v. Water Street Insurance Co.*
12. *Buechel v. Bain*
13. *CE International Resources Holdings LLC v. S.A. Minerals Ltd. Partnership*
14. *Century Indemnity Co. v. OneBeacon Insurance Co.*
15. *Certain Underwriting Members at Lloyd's of London v. Insurance Company of the Americas*
16. *Christiania General Insurance Corp. v. Great American Insurance Co.*
17. *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*
18. *Citigroup Inc. v. Federal Insurance Co.*
19. *Clemens v. Apple*
20. *Comerica Inc. v. Zurich American Insurance Co.*
21. *Commercial Union Insurance Co. v. Swiss Reinsurance Am. Corp.*
22. *Durham Industries, Inc. v. North River Insurance Co.*
23. *Employers Insurance Co. of Wausau v. OneBeacon Am. Insurance Co.*

24. *Employers Reinsurance Corp. v. Mid-Continental Casualty Co.*
25. *Excess Insurance Co. Ltd. v. Factory Mutual Insurance Co.*
26. *Fireman's Fund Insurance Co. v. General Reinsurance Corp.*
27. *Fireman's Fund Insurance Co. v. Great American Insurance Co. Of New York*
28. *First State Insurance Co. v. National Casualty Co.*
29. *Frankart Distribs., Inc. v. Federal Insurance Co.*
30. *Great American Insurance Co. v. Bally Total Fitness Holding Corp.*
31. *Great Eastern Securities, Inc. v. Goldendale Investments*
32. *Hart Surgical Inc. v. Ultracision, Inc.*
33. *Hawker v. BancInsurance, Inc.*
34. *Hilowitz v. Hilowitz*
35. *Infrassure, Ltd. v. First Mutual Transportation Assurance Company*
36. *In re Am. Express Fin. Advisors Sec. Litig.*
37. *In re Arbitration Between Northwestern National Insurance Company and Generali*
38. *Mexico Compania de Seguros*
39. *In re Arbitration Between The Home Indem. Co. v. Affiliated Food Distributors, Inc.,*
40. *In re Liquidation of Inter-Am. Insurance Co. of Ill.*
41. *In re Y&A Group Sec. Litig.*
42. *International Insurance Co. v. Newmont Mining Corp.*
43. *Kaufman v. Eli Lilly & Co.*
44. *Konkar Maritime Enterprises, S.A. v. Compagnie Belge D'Affretement*
45. *Lexington Insurance Co. v. Sirius America Insurance Co.*
46. *Maximus, Inc. v. Twin City Fire Insurance Co.*
47. *McKinney Restoration Co. v. Illinois Dist. Council No. 1, Intern. Union of Bricklayers and Allied Craftworkers*
48. *Meadows Indemnity Co., Ltd. v. Arkwright Mutual Insurance Co.*
49. *Michaels v. Mariforum Shipping, S.A.*
50. *Munich ReInsurance America, Inc. v. American National Insurance Co.*
51. *Nat'l Union Fire Insurance Co. of Pittsburgh, Pa. v. Belco Petroleum Corp.*
52. *National Football League Management Council v. National Football League Players Association*
53. *North River Insurance Co. v. Columbia Casualty Co.*
54. *On Time Staffing, LLC v. Nat. Union Fire Insurance Co.*
55. *Pacific Employers Insurance Co. v. Global ReInsurance Corp. Of America*
56. *Pacific Reinsurance Management Corporation v. Ohio Reinsurance Corporation*
57. *Pereira v. National Union Fire Insurance Co.*
58. *Philadelphia Electric Co. v. Nuclear Electric Insurance Ltd.*
59. *Plantation Pipe Line Co. v. Highlands Insurance Co.*
60. *Progressive Casualty Insurance Company v. Federal Deposit Insurance Corporation*
61. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London*
62. *Rakower v. Aker*
63. *Recyclers Insurance Group, Ltd. v. Insurance Company of North America*
64. *Regence Group v. TIG Specialty Insurance Company*
65. *Staatsburg Water Co. v. Staatsburg Fire Dist.*
66. *State of N.Y. v. AMRO Realty Corp.*
67. *Stonewall Insurance Co. v. Superior Court*
68. *Swift Industries, Inc. v. Botany Industries, Inc.*
69. *Unigard Security Insurance Co. v. North River Insurance Co.*
70. *Unigard Security Insurance Co. v. North River Insurance Company*
71. *U.S. Fire Insurance Co. v. General Reinsurance Corp.*
72. *Utica Mutual Insurance Co. v. Fireman's Fund Insurance Co.*
73. *Utica Mutual Insurance Co. v. Munich Reinsurance America, Inc.*
74. *Utica Mut. Insurance Co. v. R&Q Reinsurance Co.*
75. *Yasuda Fire & Marine Co. of Europe, Ltd. v. Continental Casualty Co.*
76. *Yasuda Fire & Marine Insurance Co. v. Continental Casualty Co.*
77. *Zeig v. Massachusetts Bonding & Insurance Co.*

Newly Certified Arbitrators

Glenn Cunningham has more than 30 years of leadership and management experience in both the insurance and reinsurance industry.

He began his career with the Travelers Insurance Companies in Hartford, Connecticut, rising to senior vice president and chief underwriting officer of Travelers Life and Annuity Company. He served GE Capital as senior vice president and chief operating officer of two life, health and annuity insurance companies, and was part of the acquisition and integration teams in a number of insurance-related acquisitions, mergers and integrations across multiple insurance product lines. He then joined Transamerica Corporation, assuming leadership responsibility for their reinsurance division international group life and accident business, then serving as executive vice president responsible for their core U.S. life reinsurance business for over 15 years. He continued as a member of the Executive Management Board of Transamerica Reinsurance under Aegon N.V after it acquired Transamerica Corporation, and then after the SCOR S.E acquisition of Transamerica Reinsurance.

He has extensive ties and relationships in both the insurance and reinsurance industry and has been an active participant in a number of industry committees, associations, and trade groups over many years. He is recognized for his expertise in business strategy development, planning and execution, Innovative data driven start-up successes along with the assessment of mergers, acquisitions opportunities and integration planning and execution.

Steve Gilford is an attorney who has focused on insurance and reinsurance for over 30 years. He has been involved in almost every area of insurance, including CGL, property/business interruption, D&O, E&O, cyber, recall, EPL and life and health, as well as facultative and treaty reinsurance. He has represented policyholders, captives, insurers, and ceding and assuming companies in a wide range of litigation and in arbitrations in the U.S., Bermuda, Canada and England.

Gilford co-chairs the insurance practice at Proskauer, where he opened its Chicago office in 2008 after 20 years as a partner at Mayer Brown. He is currently transitioning his practice to focus on mediations and arbitrations. He has written and presented on various insurance, reinsurance and arbitration topics and authors "Insurance Coverage for Data Breaches and Unauthorized Privacy Disclosures," which is updated annually in PLI's *Proskauer on Privacy*. He teaches a short course on insurance at Duke University's School of Law.

David W. Ichel serves as an arbitrator and mediator for complex commercial disputes, including insurance and reinsurance disputes. He was a longtime partner at Simpson Thacher & Bartlett LLP, where he was one of the founders of that firm's insurance practice and litigated complex insurance, reinsurance, insurer insolvency, and commercial and product liability cases for 37 years.

Ichel 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 complex civil litigation at both Duke Law School, where he has taught since 2011, and the University of Miami School of Law. He loves ocean scuba diving (he is a PADI-certified instructor), music, and meeting people.

Newly Certified Umpire

Eric Kobrick has been an ARIAS•U.S. Certified Arbitrator for many years, is a former chairman and president of the ARIAS•U.S. Board of Directors, and has also chaired or served on various ARIAS•U.S. committees. He is currently vice president, deputy general counsel, and general counsel –insurance at AIG, where he oversees all legal units worldwide that support AIG's commercial and consumer insurance businesses (e.g., underwriting, distribution, claims, reinsurance, and operations) as well as the legal unit that supports AIG's Information Technology Department. He also chairs AIG's Pro Bono Program.

Before joining AIG, Kobrick was associated with the law firm of Simpson Thacher & Bartlett LLP. Prior to working at Simpson Thacher, he was a law clerk to the Hon. Miriam Goldman Cedarbaum in the U.S. District Court for the Southern District of New York.

Newly Certified Neutral Arbitrator and Qualified Mediator

Paul Huck retired in 2010 after more than 22 years at MetLife, where he divided his time between serving as trial counsel and working in business units with various assignments, particularly cross-enterprise projects from demutualization to mergers and acquisitions, privacy, and general efficiencies. He represented MetLife on the Legal Committee of the International Claims Association and on the Privacy Committees of the American Council of Life Insurers and the American Health Insurance Plans.

Huck has extensive training in arbitration and mediation—he became a Fellow in the Chartered Institute of Arbitrators and took the ICC Institute's Masterclass for Arbitrators. He has acted as a coach for multiple mediation training sessions, helped train law students in arbitration, and spoken about insurance-related dispute settlement issues at bar association conferences. He has also served as an arbitrator in more than 100 matters and has mediated almost 200 matters across the spectrum of commercial disputes, both within the courts and through domestic and international dispute settlement organizations.

Charles Platto is a domestic and international commercial and insurance arbitrator and mediator and has been a professor of insurance law for the past 25 years. In 2013, he was asked by the AAA to train all of the mediators in New York and New Jersey for the mandatory Superstorm Sandy insurance mediation programs. He subsequently mediated more than 200 Sandy-related insurer-policyholder cases for the AAA, the Eastern District of New York, and privately.

He applied to be an ARIAS neutral and mediator because, unlike many ARIAS arbitrators, he has not been a company officer. He has extensive litigation experience in insurance industry cases (including submitting amicus briefs on behalf of the industry to the U.S. Supreme Court and the New York Court of Appeals) as well as significant domestic and international commercial experience, and for the last several years he has served as a neutral in a variety of insurance, reinsurance, and commercial matters. He believes he can best serve the parties and help resolve matters as a neutral, and he has had significant success in this regard.

Qualified Mediator

Andrew S. Nadolna is an arbitrator and mediator at JAMS in New York City. Previously, he was in claims leadership positions at AIG, most recently as global head of casualty claims, where he was responsible for an organization of 1,800 people that paid roughly $9 billion per year in claims throughout the U.S., Canada, the U.K. and Europe, Australia, Singapore, and Hong Kong. He oversaw hundreds of thousands of claims worldwide involving general liability (including umbrella and excess at all layers), pollution, mass tort, medical malpractice, personal and advertising injury, construction defect, workers' compensation, employers' liability, and commercial auto.

Nadolna has significant experience with nearly every form of insurance claim under almost every form of liability policy, including primary and excess policies (all layers), occurrence, claims made, integrated occurrence, occurrence reported, Bermuda and London forms, fronted deductible, and other complex risk transfer arrangements. Prior to joining AIG, he was an insurance defense and insurance coverage lawyer, first with Querrey & Harrow and then with Bollinger, Ruberry & Garvey.

2017 Calendar of ARIAS•U.S. Programs

Details for all events are on the ARIAS•U.S. website

Upcoming Webinars

September 26 — After the Final Award: When is it Permissible and Appropriate for Panels to Retain Jurisdiction?

October 26 — Primary Insurance Arbitrations

December TBD — What are the "CAT" Bonds and How Do They Differ from Insurance and Reinsurance?

Seminars and Networking Events

September, 12 — Intensive Arbitrator Training Workshop

Full-day program, with lectures and mock arbitrations.
Counts towards ARIAS•U.S. Certification initial educational seminar credit.
(Does not count toward renewal credits.)
New York, NY—Exact location and date coming soon.

November 1 — Fall Educational Seminars

Half-day session (1:00–5:00 p.m.); includes lunch starting at 12:00 p.m.
Counts towards ARIAS•U.S. Certification educational seminar credit.
The New York Marriott Marquis, New York, NY

November 2-3 — Fall 2017 Conference

The New York Marriott Marquis, New York, NY

AN INVITATION

Do you know someone who is interested in learning more about ARIAS•U.S.?
If so, pass on this letter of invitation and membership application.

ARIAS U.S.

The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process.

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

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

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

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

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

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

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

Sincerely,

James I. Rubin
Chairman

Ann L. Field
President

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

MEMBERSHIP APPLICATION

ARIAS U.S.

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

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Membership Type	Dues Amount
ARIAS Company Type (Number of Members)	
(A) Law Firms, Consulting & Actuarial Firms (1 - 5)	$1,850
(B) Law Firms, Consulting & Actuarial Firms (6 - 10)	$2,500
(C) Law Firms, Consulting & Actuarial Firms (11 +)	$5,000
Insurance/Reinsurance Companies (1 - 15)	$1,850
Individual Membership	$450

Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

PAYMENT INFORMATION

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

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

SIGNATURE OF INDIVIDUAL
OR CORPORATE MEMBER APPLICANT

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