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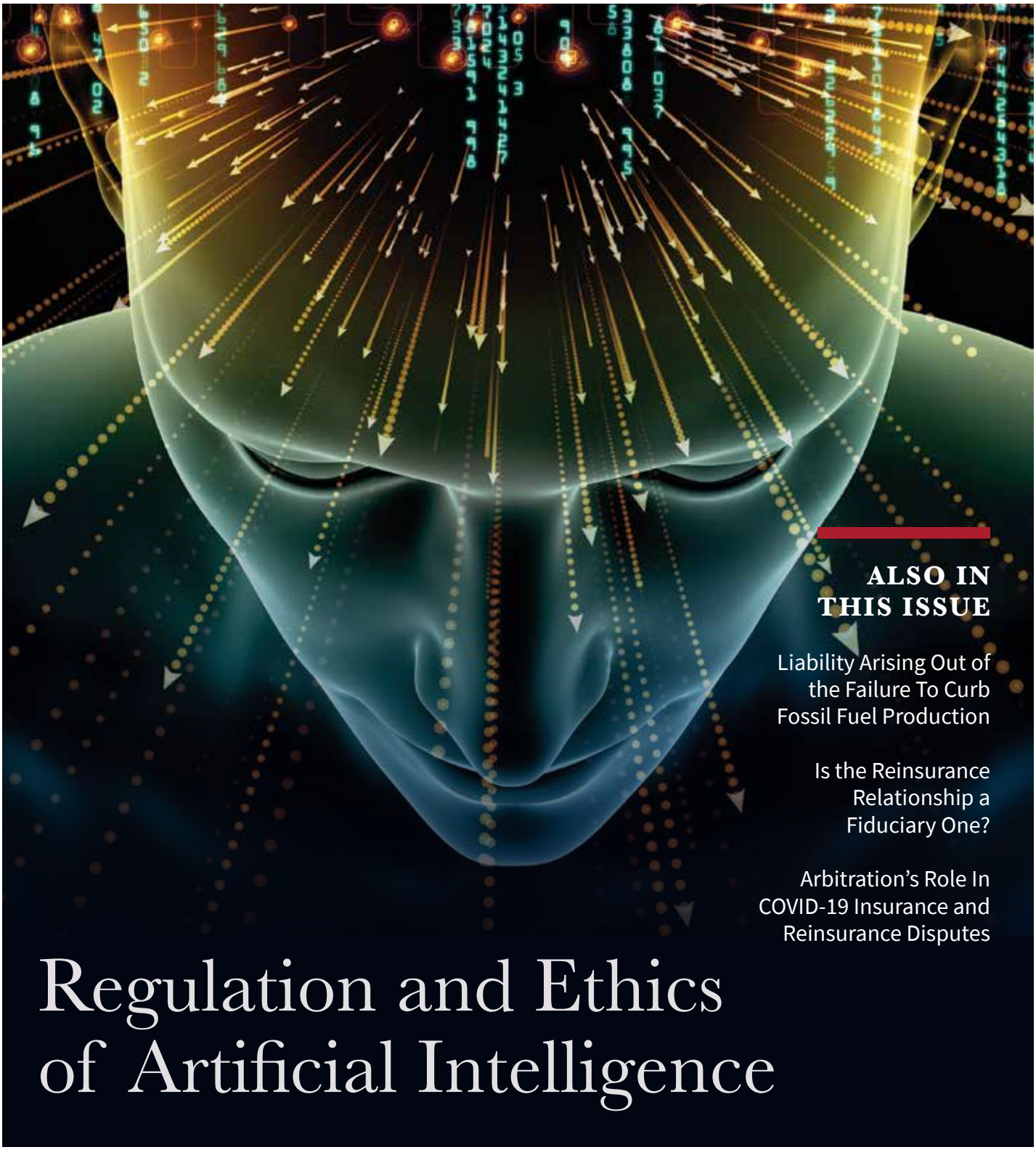

Regulation and Ethics of Artificial Intelligence

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BACK COVER

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

COVER ARTWORK: AGSANDREW/GETTY IMAGES

I hope that by the time you read this, the COVID-19 pandemic will have subsided. As we try to move on with our personal and business lives, it is important to express our condolences to the families of those who have succumbed to the pandemic and our admiration and gratitude to the first responders, healthcare workers, delivery services, government employees, postal workers, grocery workers and others who sacrificed so much to help us through this nightmare. I hope this finds you and yours safe and healthy.

This edition of the *Quarterly* provides something old and something new, maybe something borrowed, but nothing blue. Two articles cover relatively new developments that likely will affect both insurance and reinsurance companies for years to come; two other articles cover important reinsurance and arbitration-related issues that have been around for a while. One last-minute article addresses the COVID-19 pandemic.

Our lead article, "Regulation and Ethics of Artificial Intelligence," by Debra Hall from Hall Arbitrations, provides an in-depth look at artificial intelligence (AI) and explains why insurers and reinsurers need to know all about AI. The article is very comprehensive and well documented, so we broke it up into two parts. Part I, appearing in this issue, provides background into AI and the regulatory challenges facing AI in the insurance and reinsurance business. There is a very interesting discussion on the ethics of using AI and how AI proponents are self-regulating AI. Part II will appear in the 3rd quarter issue and will discuss government regulation of AI.

Next, Suzanne Fetter of Fetter Company gives us an interesting look at the

potential liability from climate change, based on litigation against a large fossil fuel company taking place in Europe. In "Liability Arising Out of Fossil Fuel Production," Suzanne examines the emerging claims issues stemming from the continued use of fossil fuels and their effect on climate change.

On the more traditional side, Bob Hall, also of Hall Arbitrations and a member of the *Quarterly* Editorial Board, gives us "Is the Reinsurance Relationship a Fiduciary One?" Bob explores the traditional notions of the "partnership" between ceding companies and reinsurers and how court decisions on this subject address whether the cedent/reinsurer relationship amounts to a fiduciary one.

Another member of the *Quarterly* Editorial Board, Jonathan Sacher from Bryan Cave Leighton Paisner, offers an update on the *Halliburton v. Chubb* case pending before the U.K. Supreme Court. I hope the case is still pending when you read this, because Jonathan's article, "*Halliburton v. Chubb: Arbitrator Impartiality/ Bias in England*," neatly lays out the arguments before the court. No doubt, once the decision comes down, Jonathan will explain its ramifications for arbitration in the U.K. and elsewhere.

Because there was time between the submission deadline for this issue and its production, I quickly put together a short article on COVID-19. Titled "Arbitration's Role in Resolving COVID-19 Insurance and Reinsurance Disputes," the article outlines some of the issues that likely will arise as COVID-19 insurance and reinsurance disputes arise.

As an arbitrator, did you know how to set up your home office? Have you done it effectively and securely? Never fear, our Technology Committee has authored a two-part article to help you create the best home office possible. Part I of the article covers Internet access, your computer network, and other physical set-up issues; Part II, in the next issue, will cover passwords, document management, billing and other items. Authored by David Winters and Andrew Foreman of Porter Wright Morris & Arthur LLP, and Nasri Barakat of II&RCS, Inc., this article gives arbitrators and prospective arbitrators a roadmap for setting up a secure and efficient home office.

Unfortunately, our Spring Conference was cancelled because of COVID-19. But don't let all your hard work preparing for the Spring Conference go to waste. Please leverage your hard work and submit an article to the *Quarterly* based on the presentation you planned to deliver. You need the exposure, and we need the content.

Larry P. Schiffer
Editor

Regulation and Ethics of Artificial Intelligence: Part I

By Debra J. Hall

"Recent technological change has transformed almost every part of life. Today, technology influences our relationships, decisions, desires and the way we experience reality."[1]

Artificial intelligence (AI) will continue to revolutionize every facet of our lives and have a profound impact on the world economy,[2] including the way we think about risk and liability. In reality, we are only witnessing the beginning days of this transformative technology. The Defense Advanced Research Projects Agency (DARPA) recently announced its focus on the "third wave" of AI theory and application that will transform computers from specialized tools into machines with "human-like communication and reasoning capabilities, with the ability to recognize new situations and environments and adapt to them."[3]

In July 2017, the comptroller general of the United States convened a forum on artificial intelligence, with participants from industry, government, academia, and nonprofit organizations. Forum participants highlighted a number of challenges related to AI, including data bias, issues relating to the collection and sharing of data needed to train AI systems, the adequacy of current laws and regulations, and the need to develop and adopt an appropriate ethical framework to govern the use of AI in research. This article addresses these topics and touches on the regulatory implications for the insurance industry arising from AI development and adoption.[4]

AI and Machine Learning

Many important decisions historically made by people are now made by computers. Algorithms count votes, approve loan and credit card applications, target citizens or neighborhoods for police scrutiny, prepare taxes,

select taxpayers for IRS audits, grant or deny immigration visas, help identify serial rapists (by reducing the turnaround time on untested rape kits), prepare patent claims and even invent new patents, aid radiologists in detecting wrist fractures and other imaging diagnostics, settle insurance claims, and empower the advent of driverless cars.[5]

This article focuses primarily on the subset of AI known as machine learning. Modern machine learning applies and refines a series of algorithms on a large data set by optimizing iteratively as it learns in order to identify patterns and make predictions for new data.[6] Data may be of different types and qualities and may be obtained from different sources (e.g., "structured," as in an explicit database, or "unstructured," such as information obtained from diverse sources on the Internet, massive amounts of pictures, or other data). Computers develop these abilities from "learning algorithms" written by humans who feed massive amounts of training data into an artificial neural network[7] (named for its ability to process information in a way that is loosely based on the brain's nerve cell structure) or through no human intervention at all.[8]

An excellent example of both the power of AI today and the difference between supervised and unsupervised learning is DeepMind Technology's latest evolution of AlphaGo, the first computer program to defeat a world champion at the ancient Chinese game of Go. AlphaGo initially trained on thousands of amateur and professional human games to learn how to play Go. But the new version of the program, called AlphaGo Zero, skips this step and learns simply by playing games against itself, starting from completely random play.

After just 3 days of learning through self-play, AlphaGo Zero defeated its previous version, AlphaGo (which had itself defeated the human world champion 18 times), by 100 games to 0. As noted by DeepMind Technology's CEO, "[o]ver the course of millions of AlphaGo vs. AlphaGo games, the system progressively learned the game of Go from scratch, accumulating thousands of years of human knowledge during a period of just a few days."[9]

The AlphaGo Zero example is what some researchers refer to as "machine teaching" and what commentators suggest will be the biggest exponential leap for AI—machines teaching one another. Imagine a machine that teaches itself in a number of days what humans learned over thousands of years (as with the game of Go), then transfers that knowledge to another machine with the same potential.[10]

Implications for (Re)Insurance Professionals

As insurance and reinsurance professionals, we are at the epicenter of both the legal and regulatory impact of AI. We can expect new insurance products,[11] modifications to existing products,[12] new ways of underwriting products,[13] modified distribution systems,[14] new ways of pricing products,[15] changes in the way we look at risk, including "risk slicing,"[16] new risks,[17] and changes to current revenue streams.[18]

At the same time, we can count on regulators examining the impact on consumers' privacy, insurance risk and pricing, the potential for new non-insurance players in the market, insurance solvency, and much more to drive the regulation of AI use by those in the insurance industry. Whether insurers will be able to play on a level field with others, be stifled in their application of AI, or be scrutinized and tested in unanticipated ways is yet to be seen.

Although data plays a central role in the insurance industry, it is estimated that most insurers only process 10–15% of the data to which they have access, mostly structured data housed in traditional databases.[19] And as insurers struggle with creating, monitoring and implementing AI within their own business, they will need to be ever-vigilant about the manner in which they underwrite clients who are also utilizing AI in their businesses. Reinsurers will be wise to fully understand how their ceding companies are underwriting and monitoring the AI risk they insure.

Disputes between policyholders and insurers and between insurers and reinsurers will no doubt arise and need to be arbitrated or litigated. Given the proprietary and confidential nature of AI, it may behoove these industry players to utilize the confidentiality afforded by arbitration. By necessity, arbitrators should be aware of the AI landscape and ready to tackle these challenges.

Understanding the Major Challenges of AI

The Problem of Bias. AI systems rely on huge amounts of data, making it essential to understand how the data is influencing the behavior of the AI system. For example, if the system is trained on biased data, it will make unbalanced or unfair decisions, which may favor some groups over others. The irony is that the ability of machine

learning to analyze data at a very granular level has the potential to produce more accurate pricing and risk assessment, but it is challenged by outcomes that might implicitly correlate with the discriminatory characteristics that industry regulators seek to prohibit.[20]

At its core, data bias is how discrimination of various types is translated into technology. This is not to suggest that this is the intended outcome. Bias can inadvertently be introduced in numerous ways, including the following:

- a lack of diverse thought or experiences among those who are training the AI;[21]
- the framing of the algorithmic model (what the data scientists want the AI to achieve);[22]
- the training data can be either unrepresentative of reality or reflect existing prejudices;[23] or
- during the data preparation stage, bias can exist in the selection of attributes chosen for the algorithm to consider,[24] which may include the use of proxies that, in effect, introduce the discriminatory factors into the AI in indirect ways.[25]

Potential bias is not limited to race or gender; it extends to the economic backgrounds of the technologists, their religious preferences, and the full spectrum of their experiences.[26] Experts assert that the key to diversifying data (and thereby minimizing bias) is to diversify the human beings who are accountable for the data in the first instance and charge them with thinking critically about data to ferret out biases, owning the process, and taking responsibility for the consequences.[27]

Others suggest that bias is harder to fix than simply ensuring diversity among people and data on the front end. Fixing data bias involves trying to predict and identify downstream bias impacts before it's too late, altering the standard testing practices that might mask bias in the training/validation process, avoiding the "portability trap" in which a system designed for one purpose or geographic area might not be fairly used in another, and, indeed, defining what is "fair."[28]

Fortunately, some AI researchers are hard at work addressing these problems by creating algorithms to detect and mitigate biases hidden within training data or learned by the model regardless of the integrity of the data, developing processes that hold companies accountable for fair outcomes from their systems, and conducting discussions aimed at discerning the various definitions of "fairness."[29] Accenture recently introduced an "AI Fairness Tool" that uses AI to examine how data influences variables such as age, gender and race in a given model.[30]

A Congressional report, *Rise of the Machines*, warned that as AI is increasingly deployed in industries such as finance, law and medicine, existing biases reinforced by technology can cause harm to populations. Transparency is key to identifying bias—not only for the system itself and the data the algorithm relies upon, but also how and why it makes the decisions it does. Transparency in this context is sometimes referred to as "interpretability" or "explainability."[31]

The Opacity or 'Black Box' Problem

Machine learning techniques have the potential to achieve a high degree of accuracy and avoid errors that might be made by humans. But the complexities of these AI systems and the basis upon which they make decisions often elude humans, including those who created the systems. It is sometimes not possible to track the reason such systems, often referred to as opaque or "black box" AI, make the decisions they make.

Some might question why results need to be explainable—after all, driving a car does not require the knowledge to build one. The need for explainability should be examined because of the impact the technology is expected to have in the real world. If AI is used to find songs or movies to entertain us, interpretability doesn't matter much, but when there are implications affecting our health, safety, or finances, interpretability becomes very relevant.

The concern about transparency is particularly important with respect to what is known as "deep learning."[32] Deep learning has proved very powerful in recent years, and the hope is that it will play an essential role in diagnosing deadly diseases and solving some of the most challenging problems societies face. But this won't happen—and shouldn't happen—unless we can make these systems more understandable to their creators and accountable to their users.[33] Humans will want to know why AI made a given decision, particularly when that decision affects a major life event or even life itself. The OECD notes that "millions or even billions of parameters used by deep learning to solve a

problem do not easily allow its results to be reverse-engineered."[34]

The Financial Stability Board (FSB) has warned that the lack of "interpretability" or "auditability" of AI and machine learning methods could present a macro-level risk if not appropriately supervised.[35] This lack of interpretability could be even more problematic during a systemic shock. Although recognizing the scarcity of skilled resources as a problem, the FSB nonetheless recommends that there needs to be oversight (beyond the staff operating the AI applications) by key functions, including risk management, internal audit, administrative management and regulators.[36]

It is important that progress in AI and machine learning applications be accompanied by further progress in the interpretation of algorithms' outputs and decisions. Increased complexities of models may strain the abilities of developers and users to fully explain and/or, in some instances, understand how they work. Efforts to improve the interpretability of AI and machine learning may be important conditions, not only for risk management, as noted above, but also for greater trust from the general public as well as regulators and supervisors in critical financial services.[37]

Interestingly, AI technology is being developed as a way to interpret the rationale for the decisions made by other AI systems. Mark Riedl, director of the Entertainment Intelligence Lab at the Georgia Institute of Technology in Atlanta, coined the term "AI Rationalization" to describe how we can train a second parallel neural network to semantically describe the actions of the first.[38] Using a 1980s video game called Frogger, Riedl asked human subjects playing the game to describe their tactics aloud in real time, then recorded those comments in the game's code. He trained a second system to translate from code to English, producing an AI that would translate into human terms the decisions it made about the frog's movement.

Similarly, researchers believe that AI will play a critical role in helping us defend against cyber attacks. This is another example of machines helping us address the problems of other machines.

The Challenge of Controlling Adversarial AI

One concern for AI experts and researchers is the malicious use of AI, or "adversarial AI." Imagine AI being manipulated to read benign tumors as malignant to advance an insurance fraud scheme, change or delete stop signs so that autonomous vehicles crash into each other,[39] or generate text or video that could be mistaken for plausible news stories or events (AI-generated "deep fake content").[40]

In fact, deep fake content has gotten so much attention recently that U.S. Sen. Ben Sasse (R-NE) introduced legislation in December 2018 to criminalize the malicious creation and distribution of deep fakes.[41] Although the bill expired at year's end, it is likely to be re-introduced. Legislation addressing deep fakes was also introduced in 2017 in the New York State Assembly and reportedly opposed by several Hollywood companies.[42] One free-market think tank commentator has suggested that deep fakes are nothing new, citing the positive uses of the technology and predicting that society will learn to mitigate any potential resulting harm without the need for regulation or legislation.[43]

To provide more focus and coordination to an effort to fight adversarial AI that has to this point been ad hoc, IBM Research Ireland has released the Adversarial Robustness Toolbox, an open-source software library to support both researchers and developers in defending against adversarial attacks in the hope of making AI systems more secure. IBM defines the adversarial AI threat on its website as follows:

Adversarial attacks pose a real threat to the deployment of AI systems in security-critical applications. Virtually undetectable alterations of images, video, speech, and other data have been crafted to confuse AI systems. Such alterations can be crafted even if the attacker doesn't have exact knowledge of the architecture of the [AI system] or access to its parameters. Even more worrisome, adversarial attacks can be launched in the physical world: instead of manipulating the pixels of a digital image, adversaries could evade face recognition systems by wearing specially designed glasses, or defeat visual recognition systems in autonomous vehicles by sticking patches to traffic signs. [44]

Those contracting with AI vendors and incorporating AI into their own systems should take heed. Designing an AI system ethically is not enough; it must also resist unethical human interventions.[45]

The Ethics of AI

While AI holds the promise of solving some of the most intractable problems of our time, it presents unique and sometimes vexing challenges. Technologists have observed that there is no reason to think we are obliged to choose between scientific advances and ethics. But, as with any project design, you can't solve problems you don't acknowledge.[46]

"AI's impact is already seen in our homes, highways, businesses, and professional lives."

The World Economic Forum has defined AI as the software engine that drives the "Fourth Industrial Revolution,"[47] but has cautioned us to proceed intentionally and ethically, recognizing that decisions regarding responsible AI design are often made by engineers "with little training in the complex considerations at play."[48]

Creating AI without considering the potential ethical and human-centered implications creates liabilities for the evolution of social, economic and governance systems. In view of the magnitude of risk and the central role that AI will have in ordering societal infrastructure, those responsible must be taught from the beginning how to design for healthy outcomes. This includes awareness ranging, for example, from data integrity and cultivating transparency to understanding how technical decisions relate to civil, social and geopolitical outcomes.[49]

AI's impact is already seen in our homes, highways, businesses, and professional lives. Today it is embedded in children's toys and classrooms;[50] the time is coming soon when robots will be caring for our children and the elderly. It is essential that policy decisions be made to protect society, particularly the most vulnerable among us. Of course, the challenge is to accomplish this without stifling innovation.

Renowned Australian philosophers Matthew Beard and Simon Longstaff have raised central questions about how, as a world, we approach the use of AI for good and not for bad, noting that this question is not limited to the obvious military or headline-grabbing topics but must also be pursued in those areas where "the stakes aren't obvious and the harms are hard to foresee."[51]

In their joint paper, Beard and Longstaff propose a universal ethical framework for technology based on principles they say should inform the design, development and deployment of new technologies, regardless of industry sector or AI product. The authors posit that "... if ethics frames and guides our collective decision-making," society can enjoy the benefits of AI without falling victim to its avoidable and manageable shortcomings.[52]

Fortunately, AI developers are also recognizing the need to regulate their own activities. Microsoft has developed six principles for its AI systems: fairness, safety and reliability, privacy, inclusion, transparency, and accountability.[53] Similarly, Google has instituted a "Responsible Development of AI" protocol.[54]

But how far can and should self-regulation go with technology that has the inherent ability to violate our rights of privacy and invite moral dilemmas? Certainly, corporations should not be trusted with the unilateral right to make such decisions for society.

While numerous companies and organizations have been working in good faith to create codes of ethics to govern the development and deployment of AI, one legal scholar and European Commission official/advisor, Paul Nemitz, sees at least some of these efforts as a "move of genius" by the large tech companies to delay the debate and necessary work on AI law and regulation. While embracing the concept of ethics codes when they are intended to guide the behavior of companies above and beyond the rule of law, Nemitz stresses that any effort to replace or avoid the implementation of law through ethics must be rejected. Nemitz observes that the conflicts of interest that inevitably result between corporations and the public cannot be solved by unenforceable codes of

ethics or self-regulation.[55] Additionally, there is no guarantee that ethical frameworks developed by current or future AI companies will be compatible with the expectations of those who use AI or policymakers.

But codes of ethics that are backed by enforcement through certifying regulatory bodies or that, if violated, can be proven in a court of law, are a step above self-regulation and an approach that should be considered. Just as AI through machine learning is a new frontier of "historical" AI, regulatory approaches need to be innovative and nimble, not simply grounded in regulatory history. A technology-savvy approach to regulation will go far in preventing societal harm; conversely, a stodgy mindset of lawmakers may indeed shut a door we've only just cracked open. An assembly of top minds in AI, untethered to corporate gain, should be at the heart of any regulatory body shaping AI legislation or regulation. And legislation/regulation clearly should demand full transparency of algorithmic output.

The core question then becomes which of the challenges presented by AI can be left to ethics and which need to be addressed by standards-setting organizations or by regulations or laws. Some, including Nemitz, suggest that matters that are fundamental rights of individuals or important to the state must be dealt with through a parliamentary, democratic process. This is not unlike the approach beginning to emerge in the various regulatory arenas. Part II of this article will address the current regulatory environment in the United States and abroad, as well as how these regulatory developments affect AI.

NOTES

*The author recognizes and thanks Tony Lombardo, who provided critical support during the research and writing of this article.

1. Beard, Matthew, and Simon Longstaff. 2019. *Ethical by Design: Principles for Good Technology.* Online report, pg. 8. The Ethics Centre.

2. Hurd, Will, and Robin Kelly. 2018. *Rise of the Machines: Artificial Intelligence and its Growing Impact on U.S. Policy.* Paper, pg. 2. U.S. House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Information Technology. "[AI] has the potential to dramatically reshape the nation's economic growth and welfare." See also *Top Issues: The insurance industry in 2015.* Online report, pg. 22. PwC. "Google estimates that [driverless cars] can reduce traffic accidents by 90%, reduce the number of cars by 90%, and reduce wasted commute time and energy by 90%—resulting in savings of $2 trillion per year to the U.S. economy."

3. Defense Advanced Research Projects Agency. 2018. DARPA Announces $2 Billion Campaign to Develop Next Wave of AI Technologies. News release, Sept. 7.

4. Government Accountability Office. 2018. *Artificial Intelligence: Emerging Opportunities, Challenges, and Implications.* Report to the Committee on Science, Space, and Technology, U.S. House of Representatives.

5. Reidenberg, Joel. 2017. Accountable Algorithms. *University of Pennsylvania Law Review*, 165: 633-705. Reprinted in the Fordham Law Archive of Scholarship and History. See also *Rise of the Machines* at 4; and Firth-Butterfield, Kay, and Yoon Chae, 2018, Artificial Intelligence Collides with Patent Law, Center for the Fourth Industrial Revolution, World Economic Forum. The Creative Machine, developed in 1994 by AI pioneer Stephen Thaler, is known for having created the first known patented AI-generated invention. Computers have also designed a new nose cone for a Japanese bullet train, novel piston geometries for reducing fuel consumption in diesel engines, and new pharmaceutical compounds.

6. Brainard, Lael. 2018. What are we Learning about Artificial Intelligence in Financial Services? Speech at Fintech and the New Financial Landscape Conference, November 13.

7. This type of machine learning is called "supervised learning," wherein the algorithm is fed a set of training data that contains labels on some items in the training set. The algorithm will "learn" a general rule of classification that it will use to predict the labels for the remaining items in the set. For example, after being provided with labels that show various features of dogs, the AI will be able to distinguish a dog from a cat, a turtle and a human.

8. This type of machine learning is referred to as "unsupervised learning" because the data provided to the algorithm does not contain labels. The algorithm is asked to detect patterns in the data by identifying clusters of observations that depend on similar underlying characteristics. For example, an AI looking at dogs might focus on shapes that have tails. When it erroneously labels a cat a dog because the cat also has a tail, the developer might feed images of cats and dogs back through the algorithm to find other distinguishing patterns and thereby "learn" the difference between cats and dogs. This feedback is referred to as "reinforcement learning."

9. Silver, David, and Demis Hassabis. 2017. AlphaGo Zero: Starting from Scratch. DeepMind Technology. Blog post, Oct. 18.

10. Frank, Aaron. 2018. Machines Teaching Each Other Could be the Biggest Exponential Trend in AI. SingularityHub. Blog post, Jan. 21. "There will be a big leap in unsupervised learning in the near future. We will see companies using AI to train I. Instead of data scientists … companies will let AI do the work for them." Yaron Hadad, co-founder and chief scientist, Nutrino.

11. "In this line, new players that have generated deep risk insights are also expected to enter these unpenetrated segments of the market; for example, life insurance for individuals with specific diseases." PwC. 2016. Opportunities Await: How InsurTech is Reshaping Insurance. Global Fintech Survey, pg. 10.

12. "Clients now expect personalized insurance solutions, and 'one-size' does not fit all." PwC, Opportunities Await, pg. 7. Product innovation might include, for example, usage-based, driving mode-based, and trip-based insurance using telematic devices and automated driver assistance systems (ADAS). Opportunities might also include unbundling current auto insurance and re-bundling them with products targeted to urban, casual and self-driving insured profiles. PwC Top Issues, pg. 22.

13. PwC, Opportunities Await, pg. 7. Linking crowdsourcing with insurance is the P2P insurance business concept of the sharing economy. Crowdsource insurance provides access to effective risk capital by bringing together a pool of policyholders.

14. "The rise of affinity groups, car-sharing groups, and vehicle manufacturers who want to package auto insurance with autonomous vehicles can open up new distribution channels for auto insurers." PwC Top Issues, pg. 22.

15. PwC Opportunities Await, pg. 10. "Current trends show an increasing interest in finding new underwriting approaches based on the generation of deep risk insights … Initially incumbents viewed UBI [usage-based insurance] as an opportunity to underwrite risk in a more granular way by using new driving/behavioural variables, but new players see UBI as an opportunity to meet new customer needs (e.g. low mileage or sporadic drivers)." Risk-slicing (see Note 16) introduces new pricing opportunities for insurers such as usage-based or mileage-based premium. Similarly, alternating between hands-on and hands-off driving (see Note 16) may suggest a different approach to pricing based on the mode of driving. PwC Top Issues, pg. 21.

16. PwC Opportunities Await, pg. 10. Car sharing continues to grow. Particularly popular with urban millennials, car-sharing memberships are expected to reach 26 million by 2020. In the next 5-10 years we are likely to see an increase in cars incorporating a self-driving mode. Depending on road conditions and personal preferences, a portion of a single trip could be human hands-on driving and other portions could be hands-off driving. Thus, a single trip could trigger different liabilities—driver liability for the hands-on portion and product liability for the hands-off portion. PwC Top Issues, pg. 21. Both the car memberships and the different modes of driving are examples of "risk slicing." We will soon see more cars with a self-assisted/driving mode allowing a driver to shift between hands-on and hands-off driving. This could result in different risk profiles for a single trip and premiums that are priced differently depending on the mode of driving.

17. Knight, Will. 2019. How malevolent machine learning could derail AI. *MIT Technology Review,* March 25. "Adversarial machine learning" involves feeding information into a machine learning system, causing it to misbehave, devising ways to deceive it or to reveal sensitive information.

18. The implications of autonomous car technologies will significantly impact the auto insurance sector, including lower premiums. PwC Top Issues, pg. 18.

19. Malhotra, Ravi, and Swati Sharma. 2018. Machine Learning in Insurance. Accenture FS Perspectives.

20. Karapiperis, Dimitris. 2019. *Intelligent Machines and the Transformation of Insurance.* Online newsletter. National Association of Insurance Commissioners and the Center for Insurance Policy and Research. January.

21. Hopkins, Curt. 2018. 4 obstacles to ethical AI (and how to address them). Online article. Hewlett Packard Enterprise, July 2. "AIs are created and trained by people. If the pool of developers and trainers are similar in background, their shared bias is likely to be communicated to—and then used by—the AI ... The more diverse the group, the less likely an AI system is to reinforce shared bias."

22. Hao, Karen. 2019. This is how AI bias really happens—and why it's so hard to fix. *MIT Technology Review,* February 4.

23. How AI Bias Really Happens.

24. Id.

25. For example, certain Zip codes may suggest lower income and be a proxy for racial bias.

26. HP 4 Obstacles. "Those issues go beyond gender and race; they also encompass what you studied, the economic group you come from, your religious background, all of your experiences."

27. HP 4 Obstacles.

28. How AI Bias Really Happens.

29. Id.

30. *Rise of the Machines,* pg. 11.

31. Id. at 10-11.

32. Deep learning has been defined by the Financial Stability Board as "a form of machine learning that uses algorithms that work in 'layers' inspired by the structure and function of the brain. Deep learning algorithms, whose structures are called artificial neural networks, can be used for supervised, unsupervised, or reinforcement learning." In Artificial Intelligence and Machine Learning in Financial Services, Nov. 1, 2017.

33. Knight, Will. 2017. The Dark Secret at the Heart of AI. Online article. *MIT Technology Review,* April 11.

34. Marcus, Gary. 2018. Moderating expectations: What deep learning can and cannot do yet. In *Science, Technology and Innovation Outlook 2018.* World Economic Forum.

35. AI and ML in Financial Services at 33-34.

36. Id. at 34.

37. Id.

38. Voosen, Paul. 2017. The AI Detectives. *Science,* 357(6346): 22-27.

39. *Rise of the Machines,* pg. 12.

40. Gallagher, Sean. 2019. Researchers, scared by their own work, hold back "deepfakes for text" AI. Blog post. ARS Technica, Feb. 15. "OpenAI, a non-profit research company investigating 'the path to safe artificial intelligence,' has developed a machine learning system called Generative Pre-trained Transformer-2 (GPT-2), capable of generating text based on brief writing prompts. The result comes so close to mimicking human writing that it could potentially be used for 'deepfake' content … The performance of the system was so disconcerting, now the researchers are only releasing a reduced version of GPT-2 …"

41. Malicious Deep Fake Prohibition Act of 2018, S.3805, 115th Cong. 2018, Senator Ben Sasse (R-NE).

42. New York Assembly Bill A08155 and companion bill S05857, introduced May 31, 2017. The summary of the bills provides: "[e]stablishes the right of privacy and the right of publicity for both living and deceased individuals; provides that an individual's persona is the personal property of the individual and is freely transferable and descendible; provides for the registration with the department of state of such rights of a deceased individual; and that the use of a digital replica for purposes of trade within an expressive work shall be a violation." See also: Quach, Katyanna. 2018. New York State is trying to ban 'deepfakes' and Hollywood isn't happy. Webpage. *The Register,* June 12.

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Liability Arising Out of Fossil Fuel Production

By Suzanne R. Fetter

On April 5, 2019, Shell Oil Company received a summons to appear before the Court of Appeal in The Hague, Netherlands.[1] Multiple environmental and human rights activist groups and associations, in accordance with Article 3:305a of the Dutch Civil Code, had filed a suit against Shell for failure to align its business model with the goals of the Paris Climate Agreement. Although the goals of the Paris Climate Agreement are aspirational, Article 3:305a grants foundations and associations the right to protect social interests by taking legal action.

The complainants alleged that, because of increased risk to the natural eco- and cultural systems, Shell's failure to curtail fossil fuel production had caused real and latent damage that required Shell to take large-scale action to reduce CO2 emissions. Shell's business model has come under scrutiny because it is one of the world's largest producers of oil and gas. The suit alleges that Shell has contributed to the increase in the earth's temperature by its fossil fuel combustion and production and has caused an increase in the concentration of CO2 and other greenhouse gases in the earth's atmosphere, thereby damaging the complainants' rights.

Paris Climate Agreement Requires CO_2 Reductions

The Paris Climate Accord requires global CO2 emissions to be reduced by 45% before 2030 and to net zero by 2050 (compared to 2010) to maintain a 50% chance of staying below a global temperature rise of 1.5°C and an 85% chance of staying below 2°C. Shell's climate ambition is to reduce its carbon intensity (or relative CO2 emissions) by 20% by 2035 and by 50% by 2050, simply by making investments in renewable energy (wind, solar, etc.) Shell would therefore achieve its goals without actually reducing its production and sale of fossil fuels.

We have already seen a 0.95°C increase in the earth's temperature over the last 10 years above the twentieth century average of 13.9°C. According to the complainants, there is only a limit of 1°C additional increase in temperature before a "chain reaction of natural processes that will reinforce each other and that will continue to warm the earth in a way that we cannot control, with catastrophic consequences for humankind. The higher the warming above 1°C, the bigger the risks that these tipping points we cannot control will be reached."[2]

Damage Estimates Exceed Prior Catastrophic Projections

In the last four years, damage estimates comprising $1.75 trillion of $2.05 trillion (or approximately 85%) of total U.S. costs have been associated with weather-related events.[3] A 2017 Zillow report predicts that almost 300 U.S. cities will lose at least 50% of their homes by the year 2100 and 36 cities will be completely lost because of natural disasters related to flooding, severe storms and wind, drought, freezing, and wildfires. An April 2019 report by BlackRock, an investment firm, concludes that extreme weather events pose greater risks for the creditworthiness of state and local municipal bond issuers and anticipates that more than half of metropolitan areas face climate-related GDP hits of 1% or more in the next 40–60 years under a "no climate action" scenario.[4]

Climate Change Will Result in Increased Litigation

Increased litigation is anticipated in the United States, where there has been a failure to address foreseeable consequences of climate change. In the January 9, 2020, edition of the *Insurance Journal*, an article by Amy O'Connor reports that more than a dozen Florida insurers are facing ratings downgrades. Several Florida insurers reported significant adverse developments as a result of Hurricanes Michael and Irma and other natural disasters in the 2016–2018 time frame (e.g., Hurricanes Florence, Harvey, and Maria).

Assignment of Benefit (AOB) agreements transfer the insurance claims covered under an insurance policy to a third party, granting authority to the third party to file a claim, make repair decisions, and collect insurance payments without the insured's involvement. Per the Florida Insurance Department's website, restoration companies and contractors that file claims on their own behalf and are paid directly by the insurance company are now commonly using AOBs in homeowners' insurance claims. This practice results in "social inflation," or increased litigation, larger jury awards, and plaintiff-friendly awards, and the associated difficulty of predicting these social trends in terms of underfunded claim reserves. Rising loss adjustment expenses, such as investigation and defense costs, will add to the trend, and business lines will face additional risk, perhaps laying blame in the courthouse as opposed to using more reasonable and less costly dispute resolution procedures. (An increase in loss experience in most cases is due to first-party lawsuits in water damage claims, per Ms. O'Connor's article cited previously.)

Generally, environmental damage to property has been found by courts to constitute physical injury to tangible property and therefore is insurable. The human impact of climate disasters includes business interruption claims, damage to public infrastructure and private property, and loss of life. Quality of life, as we saw in Puerto Rico after the recent earthquakes and previous storm damage, has plummeted in some jurisdictions. The year 2019 saw an above-average cost of $45 billion related to weather and climate events.[5]

> "Lawyers can expect an increase in frequency of coverage disputes, where *Occurrence* may take on a meaning beyond its standard general liability policy definition."

Occurrence Takes on New Meaning

Lawyers can expect an increase in frequency of coverage disputes, where *Occurrence* may take on a meaning beyond its standard general liability policy definition. *Occurrence* is

generally defined as continuous exposure to harmful conditions that results in damages that are neither expected nor intended from the standpoint of the insured. Climate change lawsuits will raise issues such as the definition of *occurrence* in a general liability policy and, in particular, whether the offending act resulting in injury had been neither "expected nor intended" from the standpoint of the insured. In other words, should Shell have known that damage would result from its continued sale and production of fossil fuels? Proof of actual injury or damage is required, and insurers will surely argue that injunctive relief to abate the nuisance, or pollution, is not covered by the CGL policy, where "damages" does not include equitable or injunctive relief.

Expense Factors Likely to Rise

In the United States, it is anticipated that litigation costs will rise because of climate change. Basic principles around causation, where so many emissive factors are contributing to the climate change occurrence, are likely to be argued, even though studies have shown that China bears, by far, most of the blame for failing to control its emission policies around CO_2. Further, is there a "duty of care" to society in general on the part of corporations and other defendants, where production activity is only a small portion of the GDP associated with injurious climate activities? Or, following on the heels of the Illinois Supreme Court's decision in *Addison Insurance Co. v. Fay,* 905 N.E.2d 747 (Ill. 2009), will states find that multiple injuries—such as a town's failure to address basic needs for those affected by weather events caused by continuous negligence—constitute separate "occurrences" under a liability policy? Will "social inflation" lead to higher jury awards aimed at punishing large corporate conglomerates that can only move at the pace of any large entity with hundreds of thousands of employees and few project managers?

> "In the United States, it is anticipated that litigation costs will rise because of climate change."

Similar to asbestos arbitrations, we can expect litigation over the number of occurrences, coverage litigation and anticipated "follow the fortunes" arguments, disputes over arbitrability, and identifiable loss concepts. In cases of third-party recoveries, it will be important to apply the salvage and reimbursements last to first, beginning with the carrier of the last excess, where reinsurance agreements contain such a provision.

Physical injury and loss of life will have the most costly impact. According to paragraph #18 of the Milieudefensie Summons, "the general damage associated with climate change is that of latent damage, which means damage does not fully manifest itself from one moment to the next but worsens gradually. You could compare it to the situation in which employees are constantly exposed to a hazardous substance and gradually but to a worsening extent develop black lungs. The health of their lungs is insidiously affected."

Similarly, climate change activists will attempt to tie the health of citizens to exposures to drought, heat, worsening air quality, and lack of basic resources such as food, water or shelter.

Further, states are now joining litigation, including claims of fraud against major oil producers in Massachusetts and New York. Massachusetts, relying on its consumer protection laws, has implicated Exxon Mobil and other subsidiaries for allegedly misleading investors by failing to divulge potential climate change-related risks. The complaints allege that Exxon had knowledge of the role its fossil fuels played in the global warming trend. New York filed suit against Exxon in October 2018, alleging in a press statement that "Exxon built a façade to deceive investors into believing that the company was managing the risks of climate-change regulation to its business when, in fact, it was intentionally and systematically underestimating or ignoring them, contrary to its public representations."[6]

Shell Should Curtail Fossil Fuel Production

Shell is a global company, with operations in more than 120 countries and slow-moving decision processes. Its core businesses include the exploration and production of oil products and chemicals and gas and power generation, including renewable energy sources. In 2018, Shell had total revenue amounting to US $388.38 billion. Shell recorded its highest revenue in 2011, bringing in a little over US $470 billion; the 2016 fiscal year saw revenue drop to its lowest level in recent years, at US $233.59 billion.

Director and officer liabilities will increase where companies are not making reasonable efforts to reduce their carbon footprint.[7] Sustainable investments alone do not meet the required duty of care. Property losses, such as those in litigation because of the 2019 Camp Fire in Paradise, California, where 25% of the $16 billion in damages were uninsured for fire loss, will be passed on to consumers in the form of higher utility rates, destruction of cultural and historic sites, and failure to maintain a basic standard of living. These wildfires arose because of warmer temperatures causing drier conditions in California and elsewhere.

As part of the Pacific Gas & Electric (PG&E) liquidation resulting from the recent California wildfires, the company has recently settled an estimated $30 billion in wildfire liabilities, with $11 billion to be paid to insurance carriers to reimburse business interruption claims and $13.5 billion to be paid to cover uninsured damages. A $21 billion wildfire fund established by Sempra Energy and Edison International provides some benchmark for the anticipated damage that will result from natural disasters and the cost to avoid D&O liability.

As CAT bonds are called and as California faces disruptions in energy consumption, many states and local communities are ramping up sustainability measures to reduce energy consumption, restrict harmful by-products such as pesticides, improve ground water quality, and train the next generation on the impact of costly human behaviors. While solar investments, wind towers, electric vehicles and other sustainable measures will have positive impacts on the CO_2 emissions that haunt our planet, the costs associated with an increase in fossil fuel production—weather-driven damages and loss of life, company resources, and cultural and historic sites—will far outweigh the benefits to be gained from sustainability and "going green." Insurers and reinsurers should be prepared for possible ratings downgrades, an increase in headcount needed to control claim costs, and an increase in litigation costs associated with climate change.

NOTES

1. See *Milieudefensie v. Royal Dutch Shell plc,* File No. 90046903. Online at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190405_8918_summons.pdf, visited March 4, 2020.

2. See Milieudefensie Summons, Para. #13, p. 11.

3. See U.S. Billion-dollar Weather and Climate Disasters (1980-2019), by Adam Smith, Applied Climatologist at NOAA's National Centers for Environmental Information-Center for Weather and Climate, January 31, 2020.

4. See Aspen Re White Paper, "Climate Change and the (Re)Insurance Implications," June 2019, written in conjunction with Traub Lieberman.

5. See NOAA National Centers for Environmental Information Center for Weather and Climate, publication referenced above in footnote 3.

6. See Aspen Re White Paper, June 2019.

7. The SEC has described the need for companies to report on sustainability plans and disclose material climate risks in a consistent, reliable and comparable manner. See "Modernizing Regulation S-K: Ignoring the Elephant in the Room," public statement by Commissioner Allison Herren Lee, January 30; 2020; see also "Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure," public statement by Chairman Jay Clayton, January 30, 2020.

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Is the Reinsurance Relationship a Fiduciary One?

By Robert M. Hall

Utmost good faith is generally recognized as a fundamental custom and practice of the reinsurance business. But pinning down its exact meaning and legal application has been challenging. For instance, Black's Law Dictionary defines *uberriamae fides* (the Latin version of "utmost good faith") as follows:

"The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of concealment or deception, however slight. A phrase used to express the perfect good faith concealing nothing, with which a contract must be made ..."[1]

Because such descriptions can be both imprecise and over the top, one might gather that the reinsurance relationship is a fiduciary one. The purpose of this article is to explore selected caselaw on this point.

Caselaw Supporting a Fiduciary Relationship

An early case in point is *Columbian National Fire Insurance Co. v. Pittsburgh Fire Insurance Co.,* 210 N.W. 258 (Mich. 1926), which raised the issue of whether the cedent held its proper retention under a surplus share treaty. With virtually no analysis of the fiduciary issue, the court concluded that the cedent had a fiduciary duty to the reinsurer:

"The parties were not dealing at arms' length. Under the contract [the cedent] occupied a fiduciary position demanding fairness, and open disclosure of all reinsurance reducing its agreed retention of risks, and if its failure to disclose was intentional it constituted fraud in the eye of the law."[2]

Mutuelle Generale Francaise Vie v. Life Assurance Co. of Pa., 688 F. Supp. 386 (N.D. Ill. 1988) is a curious split decision on fiduciary duty. The issue was whether the cedent (LACOP)

improperly administered and ceded business to the reinsurer (MGF) through an automatic treaty. The court initially dismissed the precedential value of an earlier Illinois trial court decision finding that a cedent has a fiduciary obligation to the reinsurer.[3] The court then broke out LACOP's duties on the business ceded and how that business was administered. Given that the treaty was automatic, the court found LACOP's responsibilities in ceding business were ministerial and, therefore, not fiduciary in nature. The court found, however, that the cedent also had a fiduciary duty to the reinsurer:

"In that regard, the parties' relationship is that of fiduciary and principal. Effectively, LACOP was MGF's agent in providing information on the ceded policies, forwarding the premiums and investigating and paying claims ... Under the treaty, MGF was entitled to place its 'highest faith' in LACOP ... In that sense and to that extent, MGF placed its confidence in LACOP's fair administration of its treaty responsibilities, and LACOP was in a dominant and influential position in carrying out its reporting and administration obligations."[4]

Some support for a fiduciary obligation can be found in *Continental Casualty Co. v. Stronghold Insurance Co.* Ltd., 77 F.3d 16 (2d Cir. 1996), wherein the court stated, "... [a]lthough it has been said that the relationship between a reinsured and its reinsurer is not technically a fiduciary one ... centuries of history have treated both as allies rather than adversaries."[5]

Caselaw That Denies a Fiduciary Relationship

Lack of prompt notice of a claim was the issue in *Christiania General Insurance Corp. of N.Y. v. Great American Insurance Co.,* 979 F.2d 268 (2nd Cir. 1992). The court rejected the reinsurer's argument that lack of prompt notice was a breach of fiduciary duty:

"Christiania's characterization of the relationship between a reinsured and reinsurer as being inevitably fiduciary in nature is one we are unable to adopt. To the contrary, because these contracts are usually negotiated at arm's length by experienced insurance companies ... there is no reason to label the relationship as fiduciary."[6]

United States Fidelity & Guaranty Co. v. American Re-Insurance Co., 985 N.E.2d 876 (N.Y. 2013) is a critical case establishing a standard for the review of allocation of losses by ceding insurers to reinsurers. In doing so, the court stated:

"In our view, objective reasonableness should determine the validity of an allocation. Reasonableness does not imply disregard of a cedent's own interests. Cedents are not the fiduciaries of reinsurers and are not required to put the interests of reinsurers ahead of their own."[7]

Another dispute between cedent and reinsurer concerning allocation was the backdrop for *Stonewall Insurance Co. v. Argonaut Insurance Co.,* 75 F. Supp. 2d 893 (N.D. Ill. 1999). The court rejected a fiduciary duty argument:

"[R]insurance involves two sophisticated business entities familiar with the business of insurance who bargain at arms-length for the terms of their contract ... California allows an insured to recover tort damages for breach of the covenant of good faith in an insurance contract because an insurance policy is characterized by elements of adhesion, unequal bargaining power, public interest and fiduciary responsibility. Because these elements are either entirely lacking or are present to a much lesser degree in a reinsurance policy, a reinsured cannot recover tort damages for a reinsurer's breach of the covenant of good faith."[8]

In *North River Insurance Co. v. Columbia Casualty Co.,* No. 90 Civ. 2518 (MJL), 1995 U.S. Dist. LEXIS 53 (S.D.N.Y. Jan. 5, 1995), the reinsurer sought privileged documents from the cedent and argued that the fiduciary relationship between cedent and reinsurer was an exception to attorney-client privilege. Following precedent in the Second Circuit, the court found that the relationship between a cedent and a reinsurer is not a fiduciary one.[9]

The insurer and reinsurer were suing the insured for fraud in *Certain Underwriters at Lloyd's London v Warrentech Corp.,* No. 4:04-CV-208-A, 2004 U.S. Dist. LEXIS 17086 (N.D. Tex. Aug. 24, 2004). The defendant attempted to assert a counterclaim against the reinsurer. The court rejected this counterclaim, ruling that "It is undisputed that Warrentech did not have any contractual relationship with plaintiffs or a relationship of a kind that would give rise to fiduciary duties."[10]

United States of America v. John Brennan, 183 F.3d 139 (2nd Cir. 1999), was the appeal of a criminal conviction for mail fraud against John Brennan, the CEO of US Aviation, which managed an aviation pool. It was alleged that Brennan had a conflict of interest that influenced his settlement and allocation of losses among the pool, other co-insurers and a security company due to a

plane crash. One of the arguments in the trial court was that Brennan had a fiduciary responsibility to a number of aggrieved parties. Although the conviction was overturned on another basis, the court had pointed comments about this argument *in dicta:*

"[W]e have emphasized that 'a fiduciary relationship involves discretionary authority and dependency' and that 'at the heart of the fiduciary relationship lies reliance, and de facto control and dominance. The relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other ...' We think the elements of domination and control are of particular importance in a case like this one, where all parties to the various contractual relationships were concededly sophisticated companies with experience in the industry, and where the alleged victims had a variety of practical and contractual rights to participate in or challenge defendants' decisions."[11]

Following the *Mutuelle Generale* decision discussed above, several decisions were handed down by other judges in the same court finding that the cedents in those cases did not have fiduciary obligations to the reinsurer, largely for the reasons cited in the caselaw above. See, e.g., *Int'l Surplus Lines Ins. Co. v. Firemans Fund Ins. Co.,* No. No. 88 C 320, 1989 U.S. Dist. LEXIS 10116 (N.D. Ill. Aug. 17, 1989).

Following these cases, Judge Shadur, the author of *Mutuelle Generale*, handed down a series of decisions related to a single dispute in which a reinsurer sought rescission for alleged breach of the duty of utmost good faith by the cedent.[12] Repeatedly characterizing the utmost good faith standard as a fiduciary one, Judge Shadur dismissed the claims for rescission due to lack of fiduciary duty owed from the cedent to the reinsurer.

Conclusion

While caselaw is split, it is evident that by far the greater weight of caselaw does not support fiduciary obligations between the cedent and the reinsurer. Given that the parties to the reinsurance relationship are, or should be, large and sophisticated financial institutions, it is difficult to show the dominance and reliance traditionally inherent in a fiduciary relationship.

Therefore, the question remains as to the proper characterization of the reinsurance relationship. One person's practical answer to this question can be found in Robert M. Hall, Utmost Good Faith in the Reinsurance Relationship, Harris Martin Reinsurance & Arbitration, Vol. 6 No. 10 at 4 (2014), and on the author's website, robertmhalladr.com.

NOTES

1. Henry Black, Black's Law Dictionary, Fourth Edition, West Publishing (1968) at 1690.

2. 258 N.W. at 259.

3. 688 F. Supp. at 397. The Illinois trial court decision in question is *American Re-Insurance Co. v. MGIC Investment Corp.* No. 77 CH 1457, slip op. (Cir. Ct. Cook County, Ch. Div. Oct. 0, 1987).

4. 688 F. Supp. at 396.

5. 77 F.3d at 21-22 (internal citations omitted)

6. 979 F.2d at 280-81.

7. 985 N.E.2d at 882.

8. 75 F. Supp. 2d at 909 (internal citations omitted).

9. 1995 U.S. Dist. LEXIS *16.

10. 2004 U.S. Dist. LEXIS *15.

11. 183 F.3d at 150-51 (internal citations omitted).

12. For a more complete evaluation of these case, and those that preceded them, see Robert M. Hall, Is the Obligation of Utmost Good Faith Dead in Illinois? *Mealey's Reins. Rpt.* No. 3 at 21 (2005), also available at the author's website: robertmhalladr.com.

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Halliburton v. Chubb: Arbitrator Impartiality/Bias in England

By Jonathan Sacher

The London and international insurance markets are awaiting the English Supreme Court's decision in the important arbitration impartiality case of *Halliburton v. Chubb*. In April 2018, the English Court of Appeal gave its judgment in this Deepwater Horizon dispute on the question of whether an arbitrator may accept appointments in multiple arbitrations and the extent to which the arbitrator needs to disclose such appointments to the parties to the other arbitrations.

The English Supreme Court heard arguments in November 2019, and the case is of considerable significance to the international arbitration market. Not only were the parties represented, but the Supreme Court allowed intervention or papers/submissions from the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Chartered Institute of Arbitrators, the Grain and Feed Trade Association (GAFTA), and the London Maritime Arbitration Association. ARIAS UK did not formally intervene in the Supreme Court, but it issued a paper in support of GAFTA's submission to the court, as it felt the court needed to be aware of the arbitration perspective of the London insurance and reinsurance market.

The case involves claims under a Bermuda form insurance policy that were referred to arbitration in London. The party-nominated arbitrators were unable to agree on the chairman of the tribunal, so the English Commercial Court appointed "M," who had been Chubb's preferred candidate. Before his appointment, M disclosed that he had previously acted as arbitrator in a number of arbitrations in which Chubb was a party, including arbitrations in which he had been appointed by Chubb, and was currently appointed in two references in which Chubb was involved.

After his appointment, M accepted appointments as arbitrator by insurers (one of which was Chubb) in two

further arbitrations involving claims in connection with Deepwater Horizon. The appointments were not disclosed to Halliburton. Halliburton applied to the court to remove M as arbitrator. The application was dismissed by the Commercial Court.

Halliburton appealed. At the heart of the appeal was a contention that the judge failed to give proper regard to the unfairness that may arise where an arbitrator accepts appointments in overlapping references with only one common party—the essence of that unfairness being information and knowledge that the common party acquires unknown to the other party. The Court of Appeal accepted such concerns, but drew a distinction between concerns that a party may feel and concerns that would justify an inference of apparent bias:

"Arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind. The mere fact of appointment and decision in overlapping references does not give rise to justifiable doubts as to the arbitrator's impartiality. Objectively this is not affected by the fact that there is a common party. An arbitrator may be trusted to decide a case solely on the evidence or other material before him in the reference in question, and that is equally so where there is a common party."

So, the court held that the mere fact of overlap does not give rise to justifiable doubts of impartiality. There must be something more, and it must be "something of substance."

The Court of Appeal went on to consider when an arbitrator should disclose circumstances that may give rise to justifiable doubts as to his impartiality. The court concluded that, in the context of international commercial arbitration, as a matter of good practice, disclosure should have been made to Halliburton at the time of M's appointment in the two further references. The court, however, did not consider that the non-disclosure would have led a fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased.

The Supreme Court Hearing

The central question before the Supreme Court concerns the circumstances when an arbitrator can accept appointments in multiple references involving overlapping issues with only one common party, without giving rise to justifiable doubts as to impartiality.

Halliburton submitted that to protect the reputation of London arbitration, English law should apply a "gold standard." They argued in favor of a presumption that an arbitrator should never accept appointments in multiple references involving overlapping issues and only one common party without giving disclosure.

Intervenor submissions from the LCIA and ICC (whose arbitration rules require arbitrators to give such "gold standard" disclosure) supported the imposition of more robust disclosure in English law. They referred to an "international pro-disclosure consensus" and reflected concerns within the international arbitration community that the approach of the English courts to arbitrator impartiality is insufficiently strict.

Chubb submitted that the power to remove an arbitrator under section 24(1)(a) of the Arbitration Act applies if there are justifiable doubts as to impartiality. It does not, however, refer to independence. This is deliberate and recognises that in specialist fields, parties may choose to appoint arbitrators with specific expertise—which may have an impact on the links between a party and an arbitrator. It is common in insurance and maritime disputes for arbitrators to sit in multiple arbitrations, and parties may consequently have different expectations of disclosure. This, they argued, runs contrary to the suggestion that there should be a presumption that concurrent appointments in related arbitrations are not allowed without disclosure and that the submission has no support in international jurisprudence.

Papers from GAFTA supported the multiple appointments approach, and the ARIAS (UK) supporting paper set out the position in international reinsurance cases from a UK perspective.

We now await a decision (date unknown) that is likely to have significant implications for English-seated arbitration and will no doubt materially impact the perspectives of the many trade associations where arbitration is the preferred mechanism for dispute resolution.

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Arbitration's Role in Resolving COVID-19 Insurance and Reinsurance Disputes

By Larry P. Schiffer

By the time you read this, the COVID-19 pandemic[1] will have eased or the world as we know it will have changed. Regardless, the massive disruption from the pandemic and the losses caused directly and indirectly by COVID-19 will result in insurance and reinsurance disputes. Many of these disputes, of course, will be arbitrated.

There are several declaratory judgment actions pending in state courts[2] that seek orders directing that commercial property insurance policies, and in particular their provisions for business income and extra expense and civil authority orders, cover policyholder losses of business income and related expenses because of closures decreed by governmental authorities as a result of the spread of COVID-19. The crux of these cases is whether a viral infection like COVID-19 causes direct physical loss of, or damage to, property.

No doubt this very same issue will be at the crux of disputes brought under arbitration provisions in insurance policies. ARIAS arbitrators are uniquely situated to resolve these disputes. Arbitrators understand that the business income and extra expense provision in each insurance policy has to be read in the context of the wording of the entire insurance policy. Arbitrators are trained to examine insurance policy language and interpret that language in a way that meets the expectations of both policyholders and insurers. What arbitrators do

best is focus on the specific contract in dispute and avoid distractions from arguments about what other policies may provide or what legal opinions may have said about different contract wording.

The key advantage to using arbitration to resolve COVID-19 coverage disputes is that ARIAS arbitrators have extensive insurance industry experience and understand how coverages like business income and extra expense with civil authority work and what they are meant to cover. Arbitrators also understand how endorsements and exclusions work and how extensions of coverage expand the scope of a covered loss under the insurance policy.

Where Will the Insurance Arbitrations Come From?

COVID-19 claims will arise under quite a few lines of coverage. Lloyd's chairman, in a recent interview, said Lloyd's underwriters face COVID-19 claims from 14 lines of business, including event cancellation, medical malpractice, employer liability, general liability, workers' compensation, directors and officers, political risk, and mortgage. Other lines include the obvious, like life, health, hospital income, disability and, of course, property insurance with business income and extra expense provisions, contingent business interruption and supply chain insurance.

Not all of these lines of coverage will generate arbitrations, but many will. The wide scope of potential coverage disputes across diverse lines of insurance fits neatly within the skill sets of ARIAS certified arbitrators.

The most likely contentious issue to divide policyholders and insurers is the one discussed above, which concerns whether a virus can result in direct physical loss of, or damage to, property. Outside of these business interruption coverage disputes, a number of the other lines of coverage mentioned above likely will engender coverage disputes.

For example, trigger of coverage and conditions of coverage provisions in event cancellation policies are likely to cause coverage disputes. Policy exclusions found in policies in many lines of business also will trigger coverage disputes, especially where there are exclusions for losses arising from viruses. While viral exclusions usually are clear and unambiguous, the political, economic and social pressures to seek coverage for COVID-19 losses will cause coverage disputes to arise.

There also may be coverage disputes over the application of the pollution exclusion to viral contagion. In the past, the pollution exclusion has been invoked to avoid coverage for any type of airborne contaminant. Whether the pollution exclusion precluded coverage was a big issue in the World Trade Center respiratory coverage cases,[3] but the issue was never resolved by the courts because the matters settled.

While the majority of insurance policies do not contain arbitration provisions, many do. Where coverage disputes over COVID-19 arise under policies with arbitration clauses, attempts to have the coverage issues adjudicated in court will be met with petitions to compel arbitration. In policies where the arbitration provision is broad, the likelihood of a court compelling arbitration over a COVID-19 coverage dispute is high, except in those states with anti-arbitration provisions in the insurance law.

How Will COVID-19 Implicate Reinsurance Arbitrations?

As we know, reinsurance disputes follow closely behind major disasters like the COVID-19 pandemic. These disputes, when they arise, will depend on how ceding companies respond to COVID-19 claims. If ceding companies pay claims arguably outside the coverage grants of the ceded insurance policies or make claims determinations that are allegedly unreasonable and not businesslike, you can be sure reinsurance disputes will occur.

Some of the reinsurance issues likely to arise include the following:

- whether the loss comes within the terms and conditions of the underlying insurance policy;
- whether a cedent's loss payments were made on an *ex gratia* basis;
- whether civil authority orders change the dynamic;
- which lines of business are affected;
- whether reinsurance contracts allow for aggregation of COVID-19 losses as a single occurrence; and
- whether a reinsurer has too much COVID-19 concentration.[4]

Cedents will argue that, under traditional follow-the-fortunes/follow-the-settlements principles, a reinsurer must follow the cedent's claims determination and pay the loss. Reinsurers, on the other hand, will argue that the claims determination has to be made in good faith and businesslike to be followed. Moreover, reinsurers will resist follow-the-settlements principles if the reinsurance

contract is silent on the issue. The traditional principles of follow-the-settlements support the notion that if the cedent pays a claim reasonably and in good faith, and the claim falls within the terms of the underlying contract and the reinsurance contract, the reinsurer must pay, and the reinsured's claims determination will not be second-guessed.

Disputes over cessions of COVID-19 business interruption losses, if they happen, likely will focus on whether the payment was reasonable, made in good faith, and within the terms of the ceded insurance contract and the reinsurance contract. If the underlying contract has the virus and bacteria exclusion, it will be very hard for a cedent to prevail in an arbitration seeking reinsurance coverage for a COVID-19 claim. If the business income and extra expense coverage provision in the ceded insurance contract requires, as it normally does, direct physical loss of or damage to covered property by a covered cause of loss, the dispute will come down to whether a virus can cause direct physical damage. But if these provisions are absent or if the underlying policy covers contagion, the result in a reinsurance arbitration may be different.

Another interesting issue that may have come to the forefront by the time you read this is how reinsurers will respond if legislative intervention[5] directs insurers to pay insureds for business income and extra expense coverage where a virus and bacteria exclusion exists or where there is no direct physical loss of, or damage to, insured property from a covered peril. If reinsurers refuse to pay when cedents have no choice, will arbitrators require the reinsurers to pay even though the loss is outside the terms of the contract? Will it matter if the reinsurer is U.S.-based or outside the United States?

If the proposed legislation does not become law and a ceding company (because of regulatory, political or social pressure) pays COVID-19 claims on a "voluntary" basis, reinsurers may resist the loss cession because the payments were *ex gratia*. Most reinsurance contracts do not allow for the cession of *ex gratia* payments. Arbitrators will have to determine if reinsurers must respond to an *ex gratia* payment under the COVID-19 circumstances.

Finally, another significant issue that may find its way to arbitration is the application and scope of aggregation language in property catastrophe and other excess-of-loss or specialty reinsurance contracts. A ceding company hit with a significant number of modest-value COVID-19 losses may seek to aggregate those losses as one event to obtain reinsurance coverage. This complex issue depends on the reinsurance contract wording, especially the definitions in the alleged aggregation provisions.

Conclusion

Insurance and reinsurance disputes arising from the COVID-19 pandemic are very likely to find their way into arbitration. ARIAS arbitrators are the best suited to address these disputes and resolve them in a way that is fair and objective to all parties.

NOTES

1. See "Coronavirus Disease (COVID-19) Pandemic" on the World Health Organization's website.
2. *Cajun Conti LLC v. Certain Underwriters at Lloyd's London,* No. 2020-02558 (Civ. Dist. Ct, Parish Orleans, La.); *Choctaw Nation of Oklahoma v. Lexington Ins. Co.,* No. CV-20-42 (Dist. Ct, Bryan Cty, Okla.); *Chickasaw Nation Dep't of Commerce v. Lexington, Ins. Co.,* No. CV-20-35, Dist. Ct, Pontotoc Cty, Okla.); *French Laundry Ptnrs, LP v. Hartford Fire Ins. Co.,* No. ___ (Super. Ct of Calif., Cty of Napa) (No case number available).
3. See Schiffer, Larry P. 2012. Terrorism and the Pollution Exclusion. *The Insurance Coverage Law Bulletin* (Law Journal Newsletters), Vol. II, No. 9.
4. See Schiffer, Larry P. 2020. Commentary: Reinsurance and COVID-19. Mealey's Reinsurance, March 27.
5. See, e.g., the New Jersey Legislature website and its "Bills 2020-2021" section.

Larry Schiffer is editor of the *ARIAS Quarterly* and a senior partner at Squire Patton Boggs (US) in New York.

Setting Up Your Home Office Effectively and Securely: Part I

By David Winters, Andrew Foreman and Nasri H. Barakat

This article is aimed at any practitioner with a home office, whether a new arbitrator just getting set up for the first time or a seasoned pro who has had a home office for years. Although we will focus on issues that arbitrators face, many of our suggestions could apply to any sole practitioner or even a member of a law firm who regularly works from home.[1]

As with any office (home or otherwise), there are a number of factors to weigh, some of which may compete with one another: security, convenience, cost, and functionality. We will look at hardware and software, both physical and digital. There is a lot of ground to cover, so although this article is in many ways just a sketch of the various tools and issues, it will be presented in two parts. In this part, we touch on your Internet connection and computer network as well as other issues relating to the physical setup. The second part will cover passwords, document management, billing, and e-mail (among other things).

Before getting into the specifics of each element of a home office computer network, it helps to have a conceptual map of how the pieces relate to each other. See the schematic on page 23 for guidance.

Getting Online

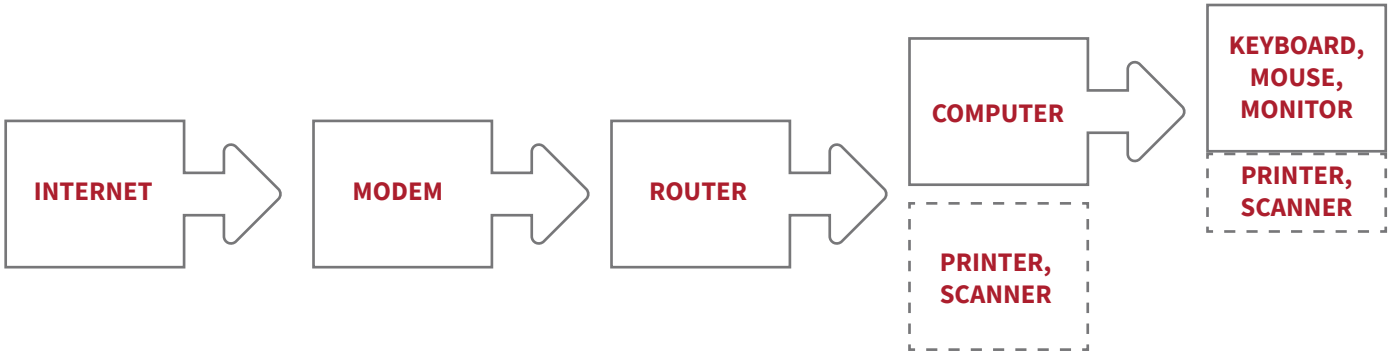
Internet options. You will need high speed Internet service (dial-up will not cut it), but overkill is easy. An Internet service provider (ISP) may try to sell you packages with speeds way beyond what you could possibly need—and if you don't know what you need, you might fall for their bait. When deciding on an ISP, first review your options for connecting, then consider how you will be using the Internet. Remember to include anyone else who will share the connection with you and account for how they will be using it as well.

Generally, your choices for Internet service will be cable and DSL[2] (and, occasionally, fiber optic). In rural areas, your only choice may be satellite. Although cable is usually faster than DSL, either one could potentially meet your needs.[3] If you have cable TV and no landline phone service, cable Internet service will likely make much more sense than DSL. If you have a landline phone and no cable running to your house, DSL may be easier to add. If you have multiple convenient options from which to choose, consider cost, performance, and any reviews you may be able to find online for your specific ISP options.

For your home office, you want to be able to transfer large files, access online databases[4], conduct video calls, and connect to Citrix systems[5], among other things. To varying degrees, these activities place demands on both your download and upload speeds, so pay attention to both.[6] All of these activities, if being performed by one Internet user, can probably be accomplished on a connection with speeds of 5 megabits (Mbps) download and 2 Mbps upload.[7] There are many resources online for determining the speed you need based on how you use the Internet.[8]

How Do You Connect?

Once you have decided on an ISP, you will need certain hardware to connect your computer and devices to the Internet. There are two elements, which are sometimes combined in a single device: a modem and a router. The modem connects to your ISP; the router creates your network by transferring the signal from your modem to all of your devices, often through a Wi-Fi connection.



> “One element we cannot emphasize too strongly is that your laptop should be fully encrypted.”

The modem is specific to the type of Internet service you have (cable, DSL, fiber optic, etc.), while the router is not. Often you will have the choice to buy a modem and router or rent them from your ISP.

We recommend having separate devices and owning your router. This will enable you to change ISPs and even types of Internet service by simply swapping out or reconfiguring the modem—without disturbing your home network. If you rent a combined modem and router or rent both parts separately, changing providers will be more of a hassle, as you will need to reconnect all of your devices to a new network.

You probably won't need to access your modem—just plug it in and your ISP will do the rest. But you will need to access your router to set a password for your Wi-Fi and take other security precautions. Be sure to consider ease of setup as you read the many router reviews available online that can help guide your purchase.[9]

One of the most important steps you can take to secure your network is adding a password to your Wi-Fi connection. It is always wise to check the strength of your passwords using a tool such as http://password-checker.online-domain-tools.com/. If you don't use a password or you useone that is too easy to crack, someone could use your Internet serviceto do bad things or could access your computer, infect it with malware, and/or view your confidential information.[10] Your router acts as a firewall, protecting your network from bad actors online.

If a third party is able to connect to your network, they are inside your firewall. One way to help avoid this risk is to set up guest access through your router, which allows other people to connect to your Internet while keeping them outside your network. If confidential information is stored on your computer, you may want to use a guest network for other family members, not just people visiting your home, to isolate and secure your home office network.

Essential Parts of Your Home Network

Now that you have acquired the infrastructure to set up a network, what basic devices do you need?

Computer. Let's be real—you need a laptop. Once upon a time, laptops were heavy, slow, and expensive, but not anymore. Although you can get by with only a desktop computer, it will be much more of a struggle. You will inevitably find you didn't bring some file with you or need to access something when you are away from home at a hearing (or an ARIAS conference).

You might be able to make do with only a tablet, though you will be limited in your ability to write easily if you don't have a keyboard, and speed and software will be limited as well. In addition, a tablet requires an Internet connection, which may or may not always be readily available. So a laptop is likely to be more useful than a tablet.

As for whether to get a PC or Mac, either is fine. It depends on what you prefer. (We will discuss the software you will want in part two of this article.) As for basic specs, be sure the laptop has a video camera—so you can participate in videoconferences—as well as enough random access memory (RAM) and storage to operate quickly and hold all of the data you accumulate through your work.

One element we cannot emphasize too strongly is that your laptop should be fully encrypted. Why encrypt? Think of the confidentiality agreements that apply in virtually every arbitration. If someone steals your computer or you leave it in a public place, any confidential arbitration information on it couldbe disclosed. In addition, you haveethical obligations, and there are state and federal legal requirements if you deal with certain categories of regulated information, including but not limited to personally identifiable information (PII).[11]

Macs come with built-in encryption software, but make sure you enable it.[12] Encryption is not standard on all ver-

sions of Windows; for example, Windows 10 Home edition does not come with encryption as an option. One alternative is to upgrade to Windows 10 Pro, but there are ways to encrypt your computer for free as well. For example, Veracrypt, a free and open-source program, provides solid encryption, though it can be a bit more complicated to use.[13]

If you strongly object to encrypting everything (we should have a talk), at a minimum you should have the ability to create separately encrypted folders for each arbitration. Veracrypt can do that, too.

Use a good password to decrypt—otherwise, what's the point? Also, have your computer screen set to lock after being idle for a maximum of 15 minutes. Though it can be annoying, if it never locks and you lose your computer, your hard work securing it will have been for nothing.

Printer. Even if you like to go paperless, you need a printer. Sometimes there are things that need to be printed (and it can be nice on occasion to work with a hard copy).

The printer can connect to the network in several ways: hard wired into your computer, hard wired into the router, or connected through Wi-Fi. If it is connected to the router, whether physically or through Wi-Fi, you can print from any computer on the network, which can be convenient if you have more than one.

A basic black-and-white laser printer makes sense if you print in volume and want to keep operating costs down. A color inkjet printer is more flexible, although ink can be pricey. But if you don't print many copies, color might be fine for you.

Scanner. A scanner is like a camera or the first stage of a photocopier, converting physical documents and images into digital ones. You need a scanner, which can connect to your network in the same ways a printer can. One alternative to a physical scanner is a scanner app on your smartphone—options include CamScanner[14] and Genius Scan[15] as well as numerous other choices. Both of these apps have free versions with certain primary basic functions you'll need, as well as paid versions to which you could upgrade.

Other Home Office Devices

There are a whole host of other devices that might be useful to have in your home office. Here are a few to consider.

Shredder. Remember, you will have confidential arbitration information in your possession, and it may be in physical form. Consider whether any document retention policies apply to you or whether the confidentiality agreement requires document destruction at the end of the arbitration.

Separate monitor. Even if your laptop has a screen (which most do), you might find it easier to use a larger separate monitor. You might also consider having two monitors or using a separate monitor and your laptop's screen. It can be helpful to look at one or more documents while editing another, such as exhibits from a hearing while you are drafting an award.

Uninterruptible power supply (UPS). A UPS is essentially a large battery that provides power during an outage. If you have a laptop with a solid battery that you keep charged, you might be fine without one. For example, if you use your laptop plugged in most of the time, the battery will keep it running if the power cuts out. But if you have a desktop or a powered external hard drive, you may need a UPS if you don't want to risk losing work because of a power outage.

Separate keyboard and mouse. These help in reducing strain and the potential for injury. Multi-lingual practitioners may find it useful to purchase an add-on to their keyboard to enable switching languages by "laying on" the language keyboard on top of the English keyboard and changing languages without having to purchase additional keyboards for each language.[16]

Physical Office Layout

Your office should be a separate space that provides privacy and physical security. Although they barely feel like "technology," walls and doors are some of the oldest privacy and security technologies out there. Think of the calls you will have with the rest of the panel discussing confidential information and deliberatingabout the case. Video conferencing, which is being used more often these days for deliberations and remote hearings, requires an even more substantial privacy barrier, as you will very likely use a speakerphone and could have confidential information displayed on your screen by one of the other participants. You also might have documents on your desk that are covered by a confidentiality agreement.

For all of these reasons, walls and a locking door are best. If you can't lock

your home office space, a partial solution is locking file cabinets. That will only work if you always put away all arbitration materials when not in use.

Last but not least, consider the ergonomics of your office space: the level of your monitor, keyboard, and mouse and the height and shape of your chair.[17] Standing desks are among the newer ergonomic office options.[18] They enable you to change your work position, which can counteract health problems that arise from sitting too long. Also, think about getting a separate keyboard and mouse that connect to your laptop wirelessly. They will enable better body physics and engagement with your computer, which can help boost your productivity—or, at least, help prevent physical injury from long work hours.

The advice we are presenting here is intended as a thumbnail sketch of the issues, concerns, and tools involved in setting up a home office. Depending on the nature of your practice, various issues may be more or less relevant. We encourage you to investigate further if you feel you need more information.

> "Your office should be a separate space that provides privacy and physical security."

NOTES

1. If you fall into this last category, you should consult your firm's policies and procedures and its IT department.

2. DSL, or digital subscriber line, is a high-speed Internet connection that uses telephone lines.

3. The same goes for fiber optic, which is usually even faster and more expensive. But consider satellite only if you have no other options, as it is subject to weather conditions and has other limitations (though it's better than a dial-up connection). See http://www.plugthingsin.com/Internet/satellite/ for an overview of satellite Internet service.

4. Document discovery is frequently stored and reviewed in online databases.

5. Citrix allows secure connections to remote servers and resources. A Citrix connection can allow you to view and edit confidential arbitration information without the risk that comes with transferring the information to you or storing it locally.

6. In contrast, for example, online video streaming puts almost all of its demands on your download speed.

7. One way to assess your need is to consider how long you're willing to wait to download a large file—say, a 25 megabyte (MB) file, which is the maximum attachment size Gmail permits. At 5 Mbps (1 MB = 8 Mb), it would take 40 seconds.

8. See https://www.nerdwallet.com/blog/utilities/how-to-decide-what-Internet-speed-you-need/ and https://www.howtogeek.com/409084/how-much-Internet-speed-do-you-really-need to learn more about Internet speeds. It can also be useful to check your current speed at https://speed.measurementlab.net/#/.

9. For example, see https://www.consumerreports.org/products/wireless-routers/ratings-overview/ and https://thewirecutter.com/reviews/best-wi-fi-router/.

10. For an overview of the risks, see https://askleo.com/is_it_safe_to_share_my_Internet_connection_with_my_neighbor/.

11. PII, as that term is used here, includes information such as name, date of birth, Social Security number, and medical information covered by HIPAA, the Health Insurance Portability and Accountability Act.

12. See, e.g., https://gravitypayments.com/highlights/enable-filevault-mac/. Older Macs may not have encryption software, so you'll need to find out what options are available for your specific system (or spring for a new computer).

13. Learn more about VeraCrypt's services at https://www.veracrypt.fr/en/Home.html.

14. See https://www.camscanner.com/ to learn more.

15. See https://thegrizzlylabs.com/genius-scan for more information.

16. If our discussion about modems, routers, and computer networks seems over-

whelming, you can always pay a third party to set everything up for you. There are services in most areas that will do this for a fee.

17. See https://www.cnet.com/how-to/how-to-set-up-an-ergonomic-workstation/ for a guide to setting up an ergonomic workstation.

18. A good overview of the benefits of standing desks is at https://www.cnn.com/2019/09/12/health/standing-desks-tips-myths-facts-wellness/index.html.

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Can the 'Arbitration Card' Be Played Twice?

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

Brickstructures, Inc. and Coaster Dynamix, Inc. collaborated to create a LEGO-compatible roller coaster playset. The two companies signed a joint venture agreement that included an arbitration provision. When the relationship soured, Brickstructures filed a lawsuit in the U.S. District Court for the Northern District of Illinois asserting claims for breach of the joint venture agreement, breach of fiduciary duty, and false advertising.

Coaster Dynamix responded with a motion to dismiss, alleging the agreement between the parties was an unenforceable contract. Coaster Dynamix did not at this time raise the agreement to arbitrate. The trial court dismissed the complaint on jurisdictional grounds.

> "Significantly, the court also noted that a party does not waive a right to arbitrate simply because a motion to compel arbitration is not the first thing it files in a lawsuit."

Brickstructures amended its complaint and Coaster Dynamix again moved to dismiss, reasserting a claim that the joint venture was an unenforceable contract. In this second motion, however, Coaster Dynamix raised the agreement to arbitrate. Coaster Dynamix claimed that arbitration was the exclusive forum for claims between the parties and that, even if there was a valid contract, the lawsuit should be dismissed for improper venue.

In response, Brickstructures wrote to Coaster Dynamix objecting to the argument in favor of arbitration and threatening to seek sanctions. After receiving the letter, Coaster Dynamix formally withdrew its arbitration-based venue argument. The court then denied the remaining argument on the motion to dismiss.

Following the court's decision, Coaster Dynamix changed course and moved to compel arbitration approximately one month later. In this motion, Coaster Dynamix argued that it had asserted its right to arbitrate in the second motion to dismiss, but had received no ruling. Brickstructures accused Coaster Dynamix of "playing games" and argued that Coaster Dynamix had waived any right to arbitrate by withdrawing its earlier motion. Coaster Dynamix defended its position, stating that it withdrew the argument in response to the threat of sanctions.

The trial court denied the motion to compel arbitration, agreeing that Coaster Dynamix had waived its right to arbitrate by withdrawing its motion. The trial court reasoned that

Case: *Brickstructures, Inc. v. Coaster Dynamix, Inc., Case No. 19-2187, 2020 WL 1164270 (7th Cir. March 11, 2020).*

Court: U.S. District Court for the Northern District of Illinois

Date decided: March 11, 2020

Issue decided: Whether a party can rely on an arbitration clause after it withdraws a motion to enforce it.

Submitted by: Martha E. Conlin, partner, Troutman Sanders LLP

by seeking arbitration and then withdrawing the argument, Coaster Dynamix "chose a course inconsistent with submitting the case to an arbitral forum."

On appeal, the Seventh Circuit agreed that Coaster Dynamix had, in fact, waived its right to arbitrate through its actions in the litigation. The opinion noted that "federal law favors arbitration," but found no clear error in the district court's ruling that Coaster Dynamix waived its right to arbitrate. Specifically, the appellate court reasoned that having "put the arbitration card on the table and then taken it back, [Coaster Dynamix] was not permitted to play that card again later."

Significantly, the court also noted that a party does not waive a right to arbitrate simply because a motion to compel arbitration is not the first thing it files in a lawsuit. Rather, Coaster Dynamix surrendered its right to arbitration by seeking arbitration in its motion to dismiss but expressly withdrawing that position. Finally, the court noted that a party may be allowed to rescind a waiver, but such rescission is reserved for "abnormal" circumstances, which this case does not present.

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Remanding for Clarification Due to an Ambiguity

Park Avenue Life Insurance Company (PALIC) reinsured certain life insurance policies issued by Allianz Life Insurance Company of North America. After Allianz entered into an agreement with state regulators to pay death benefits that would be "escheated" to a government entity after a search of the "Death Master File," a dispute arose and the parties proceeded to a confidential arbitration.

Following the arbitration panel's issuance of an award, the parties disagreed with how it applied to claims going forward. Allianz argued the award obligated PALIC to reimburse both beneficiary claims and escheatment claims; PALIC argued the award required reimbursement of only beneficiary claims. Thus, both Allianz and PALIC moved to confirm the award, pressing for its interpretation. Allianz also proposed, in the alternative, that

> "The court further found that because the ambiguity 'goes to the very heart of the dispute,' clarification was the best available remedy."

Case: *Park Avenue Life Insurance Company v. Allianz Life Insurance Company of N. America, No. 19-CV-1089 (JMF), 2019 WL 4688705 (S.D.N.Y. Sept. 25, 2019).*

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

Date decided: September 25, 2019

Issue decided: (1) Whether a court should remand an arbitration award back to the panel for clarification due to an ambiguity; and (2) whether arbitration materials may be filed under seal.

Submitted by: Michael T. Carolan, Partner, Troutman Sanders LLP

the court remand the award to the arbitration panel for clarification.

Ultimately, the court found the award ambiguous and remanded it to the arbitrators for clarification. As the court explained, "... when a district court is asked to confirm an ambiguous award—for instance, one that fails to address a contingency that later arises or is susceptible to more than one interpretation—it should instead remand to the arbitrators for clarification" (internal quotation marks and citation omitted). Thus, while the court cautioned that "remand is only appropriate where a true ambiguity exists," it concluded that remand was "the appropriate course of action" because, after reviewing the award as a whole and the parties' submissions, the court could not say that the interpretation of either Allianz or PALIC was "definitively correct." The court further found that because the ambiguity "goes to the very heart of the dispute," clarification was the best available remedy.

Finally, the court made clear that on remand, "the arbitrators need not limit their clarification to those particular questions" and should "broadly aim" to specify the meaning or effect of the award so that a reviewing court will know what it is being asked to enforce.

Separately, the court also denied the parties' request to maintain under seal virtually every document filed in connection with the confirmation petitions. As the court explained, there is "a presumption of public access" to judicial documents filed with the court, relevant to the performance of the judicial function and useful in the judicial process. Balancing the considerations for and against access, the court found that "there is no basis to keep any of the documents at issue here under seal."

Although the parties cited the confidentiality agreement for the underlying action as a basis to seal the records, the court dismissed that as insufficient, noting that the confidentiality agreement itself provides that arbitration information may be disclosed in connection with motions to confirm. It also held, however, that even without the carve-out, the confidentiality agreement "would not suffice on its own" to overcome the presumption of access to judicial documents under the First Amendment.

Michael T. Carolan is a partner at Troutman Sanders LLP and concentrates his practice on litigating, arbitrating and resolving domestic and international disputes involving reinsurance, complex insurance coverage and brokers' liability.

Newly Certified Arbitrators

Don Allard has more than 35 years of multi-disciplined industry experience as a division president, chief underwriting officer, general counsel, chief claims officer, and chief financial officer with highly rated domestic and global (re)insurers. He has served on boards, co-founded a claims TPA, served as an arbitrator, consultant and expert witness, and led due diligence efforts resulting in mergers or acquisitions of distressed companies and MGAs. He has also acted as a mediator for inter-company disputes for a large domestic carrier, led loss portfolio reviews for a top-tier reinsurer, and managed complex claims, bad-faith actions and coverage issues for several specialty casualty lines. He is a member of the State Bar of Texas and the Ohio State Bar Association.

FREEBORN & PETERS ADDS TWO TO INSURANCE TEAM

Freeborn & Peters announced that it has added two attorneys to bolster its insurance and reinsurance capabilities.

Beth Gould has joined the firm's Richmond, Virginia office as an associate in the Litigation Practice Group and a member of the Insurance/Reinsurance Industry team. She will focus her practice on insurance defense for personal lines, trucking, commercial general liability, and restaurants and retail.

Sarah A. Gottlieb has joined the firm's Tampa, Florida office as an associate in the Litigation Practice Group and a member of the Insurance Brokerage team. She will focus her practice on complex commercial litigation.

Freeborn's Insurance/Reinsurance group serves all areas of the global insurance and reinsurance marketplace and has been recommended by the 2019 Legal 500 United States Guide for Insurance.

In Memoriam: Perry Granof

Perry S. Granof, an ARIAS-U.S. Certified Arbitrator who served for several years as vice president and claims counsel with the Chubb Corporation, passed away on March 9.

At his death, he was managing director at Granof International Group LLC, where he provided insurance consulting and claims resolution services, specializing in international and domestic professional liability exposures. He was the contributing author of a chapter on international alternative dispute resolution for *Resolving Insurance Claim Disputes Before Trial,* published by the American Bar Association in 2018. He was also the principal coordinator, editor, and contributing author for *The Global Directors and Officers Deskbook,* published by the ABA in September 2014. He spoke about professional liability insurance issues at company and industry-sponsored programs.

He was a Fellow of the Chartered Institute of Arbitrators (FCIArb), a public arbitrator for the Financial Institution Regulatory Authority (FINRA), and a member of the American Arbitration Association (AAA) Commercial and Consumer Panels.

In Memoriam: Robert M. Mangino, ARIAS Original Board Member

Robert M. Mangino, 84, passed away peacefully on Easter Sunday. He was a well-loved man who lived a happy, rewarding life.

Bob was one of the original organizers of ARIAS and served as Chairman from 1997 to 1999. Many ARIAS members know Bob's wife, Ann—his true love and best friend —whom he met 68 years ago in high school journalism class. Ann often attended ARIAS and other industry functions with Bob. Bob and Ann have four children: Robert Jr., Julianne, Michael and Jennifer. Three of the four followed Bob into the reinsurance industry. Bob Jr. is a partner at Clyde's specializing in reinsurance/insurance disputes, Julianne was a reinsurance contract wording writer at American Re until she retired, and Jennifer is the general counsel of Arch Reinsurance.

Bob was born in 1936 and grew up in the Tory Corner section of West Orange, New Jersey. After graduating from high school, he attended Cornell University, where he joined Sigma Nu fraternity. He later transferred to Rutgers and earned his law degree from Rutgers Law School (with honors) and was selected to the Law Review. He began his legal career at Mutual Benefit Life in Newark. In 1969 he was hired as general counsel at North American Reinsurance Corporation (later, Swiss Re America), a multinational reinsurance company in New York City, where he had a long, distinguished career.

Bob served on and chaired numerous committees in the industry, including the RAA Law Committee, the Excess Surplus Lines and Reinsurance Committee of the ABA, the Eastern Life Claims Conference, the Legislative Committee of the Life Insurance Council of New York and the American Council of Life Insurance. He testified before Congress on behalf of the industry in 1991. Bob also spoke at countless industry events, including teaching many years at the Strain Seminar.

Retirement in 1999 did not slow Bob down. He became a prominent ARIAS certified umpire and arbitrator of reinsurance disputes, serving on more than 200 panels. Despite a busy work and home life, Bob always found time to give back. He proudly served as a West Orange Councilman from 1970-1974. He coached little league football and baseball and was a president of the W.O. High Booster Club. Bob and Ann travelled extensively. He was an avid runner and, at 46, completed the New York City marathon. He was a doting grandfather to his six grandchildren and had many, many lifelong friends.

Bob loved being a part of the reinsurance community and cherished all of the many co-workers, friends and colleagues he encountered during his 50 years in the industry.

There will be a memorial service in Bob's honor when gatherings are again permitted.

UPCOMING EVENTS

JUNE WEBINAR

June 17th from 12:00 – 1:15 pm ET

An Update on Emerging Risks Webinar: Reviver Statutes/Abuse Claims, Opioids, and E-cigarettes/Vaping

INTENSIVE ARBITRATOR TRAINING WORKSHOP

More information coming soon!

ARBITRATOR & UMPIRE SEMINAR

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