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Setting Up Your Home Office Effectively and Securely

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

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The novel coronavirus pandemic has given us plenty of time to rethink how we work, collaborate, socially gather and interact. We have become better at technology, online collaboration, and the virtual practice of law and arbitration. We have learned to work remotely and to do so safely and securely. We now know that webinars, Zoom cocktail hours, and online forums can save time and money while providing great content.

Will these new routines replace offices, in-person meetings, and conferences? Only time will tell.

Which brings us to this issue of the *Quarterly*, which features the ARIAS Technology Committee Tech Tips article, "Setting Up Your Home Office Effectively and Securely: Part II," by David Winters and Andrew Foreman of Porter Wright Morris & Arthur LLP and arbitrator Nasri Barakat of II&RCS, Inc. This is the second of a two-part series on remote working and comes at a time when many of us continue to work from home.

This article also fits neatly with the new ARIAS•U.S. Virtual Arbitration Hearing Guidelines, drafted at the request of ARIAS Chair Michael Frantz by the Technology Committee (again by David Winters and Nasri Barakat, but this time joined by Ira Belcove of Porter Wright Morris & Arthur LLP). You can find these guidelines on the ARIAS website in the COVID-19 Resource Center.

This issue also features two articles from the first couple of reinsurance, Debra and Robert M. Hall of Hall Arbitrations. Debra's article is part II of "Regulation and Ethics of Artificial Intelligence." Part I, which appeared in the Q2 *Quarterly*, discussed the topic of artificial intelligence (AI) generally; in part II, Debra explores the regulatory efforts that have taken place in the U.S. and abroad. With AI taking center stage during the pandemic, this article could not be timelier.

Bob Hall's article, "Treatment of Expenses in Facultative Certificates: The Road Back from *Bellefonte Re*," takes us through the role experts played in educating the courts on reinsurance custom and practice in the *Bellefonte Re* circumstance. It provides an insider's look into the case law developments in this important area for reinsurance.

Syed Ahmad and Patrick McDermott of Hunton Andrews Kurth LLP offer their take on the objective reasonableness standard in "Assessing *USF&G's* Objective Reasonableness Standard: An Alternative View." Their view is decidedly more pro-cedent than the previous article on the subject (to which they respond), but some feel that neither article truly reflects the reinsurer's viewpoint. Who wants to weigh in next?

This issue also features two articles on discovery in international arbitration. This issue is relevant because insurance and reinsurance arbitrations often require information from non-parties located away from the seat of arbitration. In "U.S. Discovery in Aid of International Private Commercial Arbitration," Max Chester and Charlie Niemann of Foley & Lardner LLP cover the latest developments in discovery in aid of a foreign arbitration under Section 1782 of Title 28 of the U.S. Code. Surely, there will be more case developments on this issue and perhaps a Supreme Court decision down the road.

The second article, by Ann Ryan Robertson, Paul J. Neufeld, and Ernesto R. Palomo of Locke Lord LLP, is the flip side of the 1782 article because it focuses on whether an English court may order discovery of a non-party in aid of a private commercial arbitration seated in New York. Titled "A Door to Discovery in Aiding Foreign-Seated Arbitrations," the article discusses how section 44(2)(A) of the 1996 Arbitration Act may allow for non-party discovery in the arbitration context. Given the limits to non-party discovery in the U.S., this article presents an alternative way to obtain needed discovery.

There is no time like the present to turn your hard work and plans for Spring Conference programs into an article for the *Quarterly*. For those of you who converted your spring conference panels into webinars, please now turn them into articles. For ARIAS committees, please write a summary of your activities for the next *Quarterly*. Information about when and how to submit articles is on the Publications page of the ARIAS website.

Larry P. Schiffer
Editor

Setting Up Your Home Office Effectively and Securely: Part II

By David Winters, Andrew Foreman and Nasri H. Barakat

This is the second in a two-part series of articles aimed at practitioners with home offices. When we wrote the first part, before any state had imposed a stay-at-home order in response to Covid-19, we aimed primarily at arbitrators, though we noted that "many of our suggestions could apply to any sole practitioner or even a member of a law firm who regularly works from home." Almost overnight, that last category went from the exception to the near-universal rule because of the pandemic. Little did we know that our article could have such a broad potential audience!

Yet, as we write this second part, the tide seems to be gradually turning, with people slowly heading back to traditional offices. Still, it seems likely—at least in the near term, if not permanently—that working from home will be much more common than it was at the start of 2020.

In the first part, we covered setting up your office, touching on your Internet and computer network as well as other issues relating to physical setup. In this part, we will cover operations and security, including passwords, document management and editing, billing, conflicts, and communications such as email and videoconferencing.

Passwords

As a first line of defense to protect confidential arbitration and client information, your passwords need to be difficult to crack. To create strong passwords, use upper- and lower-case letters, numbers, and special characters. Shoot for unpredictability, and compose passwords that are as long as you can handle—aim for at least 10 characters (more is better). To check the strength of your passwords, use an online tool such as the one found at http://password-checker.online-domain-tools.com/. Do not use the same password for everything.

Meeting these requirements can seem challenging. The more passwords you have, and the stronger they are, the harder it will be to remember them all. And you'll need to store them in a safe place, NOT on a post-it note stuck to your computer, a piece of paper in your wallet, or an unsecure file on your unlocked smartphone.

Because it is best to have multiple strong passwords, we recommend using a password manager, such as LastPass, 1Password, or Dashlane.[1] With a password manager, you need to remember only one strong password, and you get unique, super-strong passwords that you don't need to remember for every password login you have. The password manager will store all of your passwords in a secure vault that you can access from your browser or phone, which will make logging into websites easier and faster. It will also save you from getting locked out when you forget your password and make too many attempts to login. In short, a password manager will make your life easier and more secure—a win-win.

One more feature to consider is two-factor authentication—for example, receiving a text message from your bank that contains a one-time code required to complete your login. Enable two-factor authentication on any websites that handle sensitive information, including your email.

Document Management and Editing

Plan in advance how you will organize the documents you send and receive. You could use a folder structure on your computer for each arbitration; depending on which devices you use, it might be convenient to use cloud-based storage for your files so they are accessible regardless of whether you have your laptop with you. If you use cloud-based storage, be sure to verify the security protocols it uses, such as encryption of files in motion and at rest. And enable two-factor authentication if it is an option—and if it isn't, consider using another service.

Be sure to have your files regularly backed up. You could use an external hard drive, but a better option may be offsite back-up, in case of theft or property damage. The simplest way to do that is to use a secure cloud-based backup, such as IDrive or Backblaze.[2] Your files can be set to backup in real time or on a schedule, such as every night at a point when you are unlikely to be using your computer.

So far, we have been assuming that a "document" refers to something electronic. But you may prefer to read and/or edit hard copies; maybe you even draft in longhand. We are not going to tell you never to print or use hard copies, but we encourage you to take a long look at the widening gap between hard copies and electronic documents. Increasingly, electronic documents cannot be replaced by paper copies.

With electronic documents, you can search the text, navigate with bookmarks, jump to exhibits, and click links directly to video deposition excerpts. It is also easy to add notes and comments—in Word or a PDF editing program—to help you remember your conclusions and organize your thoughts. As a result, it is important for arbitrators and lawyers to become comfortable with using electronic documents. Everything is moving in the direction of electronic media, and ignoring the progress and enhancements may leave you behind, making your day-to-day tasks more difficult.

Finally, the way you edit documents received from others is also important. Do you work in Microsoft Word? You should, although there are free alternatives that may be acceptable options.[3] Are you comfortable with "tracked" changes? Do you use comment bubbles and know how to add replies? Do you know when and how to clean metadata before distributing a document to others? All of these issues will affect your ability to engage in the editing process effectively, such as editing panel orders or awards—or, if you are on the other side of the table, pleadings, briefs, discovery, and everything else.

Billing

Accounting and billing software such as TimeSolv or FreshBooks can help with the billing process end to end, from time tracking to invoicing to getting paid.[4] If you have an accountant who prepares your taxes, be sure to check the compatibility of your billing software with any accounting software your accountant might use. On the simpler end of things, you might find that an Excel spreadsheet is all you need. But consider all of the other steps involved to be sure that keeping things simple in one area doesn't make things more complicated in another, such as when you are sending out bills.

No matter which system you set up, record your time daily and track your hours in real time. Using a timer built into your billing software can ensure you do not "lose" time. Process your billings on a regular schedule, such as the first day of the next month. Delays between when you perform the work and when you send out the bill can lead to settlement delays and perhaps even nonpayment. Some arbitrators issue only a few invoices over the life of an arbitration, such as an initial billing for the retainer, a second billing after the organizational meeting, a third billing before the evidentiary hearing, and a final billing at the conclusion of the matter. Communication is key—as long as you and the recipient

> "Everything is moving in the direction of electronic media, and ignoring the progress and enhancements may leave you behind, making your day-to-day tasks more difficult."

of your invoices are on the same page, you should be set.

Think about the types and amount of information you need to include on each bill. Most of your clients will require, at a minimum, the date of the task(s) performed, the time devoted to the task(s), and a brief description of what you did. The first two elements are simple enough, although you need to know whether to bill in tenths of an hour, quarters of an hour, or some other unit depending on client or party requirements. But the third element can be a bit tricky. When writing the description of what you did, keep in mind that it could be seen by panel members if your bills are included in a fee petition or even by a reviewing court. As much as possible, then, you should avoid including confidential or privileged information. Determine whether block billing—that is, a single time entry covering multiple tasks—is acceptable to your client, or whether each task should be a separate line item on the bill.

Conflicts and Disclosures

When you have only handled a small number of matters, you might feel you will have no trouble remembering them all when considering whether a new matter presents a conflict of interest or requires a disclosure. But memories are unreliable, and the number of matters will quickly grow to become too big to manage without a system. A missed conflict of interest or disclosure can be a major problem for you as a lawyer or arbitrator.

Some practitioners manage conflicts and disclosures by setting up a file to track both opportunities offered to them in which they received confidential information as well as active and concluded matters in which they were retained. Others purchase commercially available products, including software and online products. An online search for "attorney conflict of interest software" will yield numerous options.

Communications

Using efficient, reliable, and secure methods of communicating with the outside world is critical for arbitrators and lawyers. We have organized communications into three categories: (1) email, (2) videoconferencing, and (3) everything else. We discuss each of those categories below.

Email. One of your primary ways of communicating with the outside world will be email. Your email should be secure, efficient, and reliable.

First, your email should be secure, so that your confidential information stays confidential. The *ARIAS•U.S. Practical Guide for Information Security in Arbitration* contains useful information in this regard, including encrypted email services and multi-step authentication.

Second, your email system should be efficient and well organized so that information relating to different matters, clients, and arbitrations can be properly segregated and easily retrievable. To this end, you may wish to organize your email into folders.[5] Set up a dated master folder for each matter. Within each master folder, segregating emails into subfolders may be helpful.

One more thing: When organizing your emails, remember to include not only the emails you receive, but also the emails you send. Many

people store all of their sent emails in one giant "sent folder." Don't be one of those people. Get into the habit of organizing the emails you send into the same folders you use for the emails you receive.

Another critical element of a well-organized email system is a contact list. If you do not have an electronic contact list, start one soon. As you make new contacts, add them to your contact list. When you add new contacts (and when you send emails), it's best always to use a contact file, such as a vCard or vcf, or to copy and paste the email address rather than type them in manually. While a tiny error in a traditional street address may make no difference, any error in an email address will likely lead to it not being delivered to its intended recipient—and there's a decent chance, depending on the error, of it going to someone else, thereby potentially disclosing confidential information.

Videoconferencing. When we were planning this two-part article in January and February, we intended to recommend that every home office have videoconferencing capability. Then came Covid-19, and videoconferencing capability is now considered essential. We expect that to remain the case.

As we discussed in our first article, you should have a computer with a webcam and an Internet connection to enable you to participate in videoconferencing. In addition, you should have appropriate videoconferencing software. Some services, such as Zoom, Skype, and FreeConference, are free; though useful, they do come with limitations. For example, the free services sometimes have time caps, and they may lack the level of security you need for a confidential arbitration or for data privacy requirements.

Fortunately, there are also services available for a relatively low fee (such as Webex Meet and Zoom Business) that offer more sophisticated features, higher levels of security, and longer conferences with more participants. Though you may not need to purchase your own software, you should become comfortable using the most common platforms. Most of the common programs have apps that can be downloaded to your computer. This facilitates ease of use when a videoconference begins.

There are also many software programs that integrate traditional telephone conference calls with video and screen-sharing capabilities. Many companies and law firms use these products (e.g., Microsoft Teams and LoopUp), which may require a local download of a file to allow the video to run.

Having the right videoconferencing equipment is only the beginning. You also need to give serious consideration to the placement of the camera, the lighting, and the background that will be visible to other participants. There are now numerous resources available online that address videoconferencing etiquette; even if you are now a videoconferencing pro, it's worth your time to review some of these resources.[6] And don't forget, as we noted in part one of this article, to ensure your computer and webcam are in a secure and private space so that unauthorized persons cannot access confidential information.

Finally, you should be familiar with the unique challenges that videoconferencing creates in the context of virtual hearings. To address these issues, ARIAS•U.S. recently published guidelines for virtual arbitration hearings that we recommend reviewing.[7]

Everything else. We've covered email and videoconferencing, which we expect will be the communication workhorses for now. But we would be remiss if we did not discuss certain other types of communications.

The telephone remains an excellent tool for communication. You should have to ability to participate in teleconferences and, ideally, host them. The primary issues to consider will be security and whether you have a landline or a cell phone. Be sure you have a secure workspace so that others cannot hear your phone conversations. Whether you have a landline or a cell phone is a personal choice, but a landline might be desirable if your local cell phone reception is poor.

We recommend against using text messages for professional communications. Texts are not necessarily confidential—many people have their phones set to show text messages as visible "notifications" even when locked. And texting is, by its nature, a brief, immediate mode of communication, which makes it difficult to convey nuance. This is problematic for arbitrators and attorneys, who often must be precise in their communications.

Fax machines, once ubiquitous, now seem destined to end up as historical oddities alongside VCRs and BlackBerries. Few people use faxes now, and even fewer will in the future.

Any faxing you may need to do can be done through Internet faxing services. If you already have a fax machine and are attached to using it, make sure that you keep it in a secure physical location so that confidential faxes cannot be seen by persons who are not intended to see them.

Conclusion

As we noted at the end of Part I, our suggestions are meant as a thumbnail sketch of the issues, concerns, and tools available to you in setting up a home office. If we get you thinking about these issues, we will have accomplished our goal. While some of our suggestions should apply across the board—for example, the advice on password security is relevant to everyone, whether you have a home office or not—other issues may be more or less relevant depending on the nature of your practice.

Finally, we're interested in your feedback on this pair of articles. Are there areas we touched on that you'd like to read more about in a future article? Topics we didn't cover that you think are relevant? Please let us know. And if you have any follow-up questions, please feel free to contact any of us by email: dwinters[at]porterwright.com, aforeman[at]porterwright.com, or nasrib[at]gmail.com.

NOTES

1 There are many password managers available. The specific companies we identify here and elsewhere are meant to be examples—good examples, we think—but they are definitely not your only options. We encourage you to read online reviews and consider what features you need before deciding which program is right for you. One source of online reviews that we like is the Wirecutter (https://www.nytimes.com/wirecutter/).

2 See, for example, Alex McOmie, The best cloud storage of 2020 online: free, paid and business, May 22, 2020, Tom's Guide.

3 In 2018, Microsoft Office, which includes Word, had 87.5% of the market share. Schwartz, Samantha Ann. 2020. Microsoft created the office suite status quo. Can Google grow? *CIO Dive,* February 11.

4 Black, Nicole. 2018. Some choices for legal billing software that really pay off. *ABA Journal,* June 22. See also Legal Time and Billing Software, Lawyerist.com.

5 Or, depending on how your email system works (see, for example, Gmail), mark your emails with labels or some other tag or organization system. Though we will continue referring to folders for simplicity here, read "folder" as whatever organization system is available in your email program.

6 See, e.g., Bob Frisch and Cary Greene, What it Takes to Run a Great Virtual Meeting, *Harvard Business Review,* March 5, 2020.

7 See ARIAS•U.S. Virtual Arbitration Hearing Guidelines, May 2020.

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Regulation and Ethics of Artificial Intelligence: Part II

By Debra J. Hall

Part I of this article discussed the topic of artificial intelligence (AI) generally and described how some entities are creating ethical standards aimed at self-regulation, but cautioned that there may be a need for formal government regulation for some areas of AI. Part II explores the regulatory efforts that have taken place in the United States and abroad.

To Regulate or Not, and How?

Governments and policymakers around the world are grappling with questions about how AI affects their existing legal and regulatory frameworks. Some obvious and less-obvious threshold questions are being, or need to be, addressed:

- What interests should regulators seek to protect?
- Do existing regulatory structures cover AI? If not, how should they be adapted, or should new ones be established?
- Recognizing that the cost of regulation is burdensome, how do regulators balance the human benefits to be derived from AI innovation against the potential harm from which we need to be protected?
- How do regulators address these issues in a timely manner, recognizing that protections should be in place before consumers and users experience harm, while at the same time knowing that AI is still developing?
- Knowing that entities are investing now in AI—and, in some cases, these are regulated entities—is it reasonable to impose regulations after the fact that could cause economic harm, or even insolvency?
- Who should regulate AI? Should there be an overarching AI technology regulator, or should the existing sector-specific regulators determine how best to regulate AI within the context of their overall regulatory efforts? In the insurance

industry, does this state-by-state approach further exacerbate the effect of extra-territorial regulation that now burdens the insurance industry? Is a central regulator more appropriate to avoid duplicative and inconsistent regulation? Is this decision dictated by the lack of AI skills and human resources in the regulatory arena?

In addition to the preceding issues, policymakers should carefully consider the question of intentional ambiguity as opposed to specificity in regulating AI. Laws are often enacted with a recognized degree of ambiguity, due to political pressures, stalemate or lack of subject matter knowledge. The expectation is that someone down the road will fill in the details—a regulatory agency may adopt regulations, or a court may interpret and decide what was intended by the legislative body or is required by other laws, treaties or constitutions. Although many commentators have encouraged an "agile" approach, others have suggested that this transfer of responsibility can be counter-productive as applied to AI regulation.[1]

Recognizing that those who build AI systems must, by necessity, deal with certainty and precision, the tendency will be for data scientists to fill in the gaps when faced with ambiguity or broad standards. When this occurs, the accountability we expect through our courts when harm occurs could be difficult to attain, because deep knowledge of AI is not accessible to the average person and courts are ill-equipped to understand it. Some experts suggest that the best approach might be to supplement the more ambiguous or "agile" laws with specific regulation ("Rules give clarity and forewarning while standards offer greater flexibility for interpretation"). In practice, policymakers may consider a broad overarching standard with a narrow set of rules, through regulation, for developers to follow.[2] This is not unlike the federal government's approach to standard setting in the cybersecurity space.

But once policymakers decide on the degree of desired specificity, should the regulatory standards be sector-specific or generally applicable across industries? So far, the sector-specific approach seems to be prevailing.[3] But regardless of the level at which regulation ultimately occurs, it is essential that regulation occur in the context of the application of the AI. The privacy needs that arise from AI systems that recommend songs and movies are very different from the life-or-death concerns presented by an AI system diagnosing a critical medical condition.

That said, some proponents are contemplating not only a national but a world view of AI. The Boston Global Forum[4] advocates for common standards around the world to promote cooperation and "interoperability" among countries.[5] We need to proceed mindfully and cautiously.

AI Use by Governments

While developing their own knowledge and skills in AI and assessing the manner in which to regulate their respective industries and protect consumers, governments and regulators are focused on adopting AI technologies for fraud detection, compliance and other regulatory uses to make their own jobs more efficient and accurate. This is a topic that is beyond the parameters of this article.[6]

The U.S. House of Representatives has observed that federal, state and local government use of AI to make "consequential decisions" about people should ensure that the algorithms that support these systems are accountable and inspectable.[7] Given the power that government has over our daily lives (not to mention our industries), we need to be ever-vigilant of these developing capabilities and uses.

An Overview of Regulatory Efforts

U.S. Executive Order. On February 11, 2019, President Trump signed an executive order titled "Maintaining American Leadership in Artificial Intelligence."[8] The executive order seeks to solidify American leadership in AI by empowering federal agencies to do the following: drive breakthroughs in AI research and development, establish technological standards to support reliable and trustworthy systems that use AI, provide guidance on regulatory approaches, and address issues related to the AI workforce.[9]

Consistent with the objectives set forth in Section 2 of the executive order, Section 6 directs that within six months the Office of Management and Budget (OMB), in coordination with other groups, will issue a memorandum to all agencies that will (1) inform the development of regulatory and non-regulatory approaches by such agencies regarding technologies and industry sectors that are either empowered or enabled by AI, and (2) consider ways to reduce barriers to the use of AI technologies in order to promote innovative application. Both mandates are directed to occur in the

context of upholding civil liberties, privacy, and American values, and the reduction of AI barriers must be balanced with the protection of the U.S. economy and national security. The agencies have six months from the issuance of the memorandum to respond to the OMB.

The executive order also directs the National Institute of Standards and Technology (NIST) to issue a plan "for Federal engagement in the development of technical standards and related tools in support of reliable, robust, and trustworthy systems that use AI technologies." The NIST plan is to be developed in conjunction with private sector, academic and non-government entities as appropriate.

NIST has been a leader in the development of cyber security standards. Their work in AI can be expected to be as challenging, but as robust, as efforts they have led previously.

Federal legislation and regulation. To date, there have been six Congressional hearings on the topic of AI, the most recent culminating in a report, *Rise of the Machines*, by the Subcommittee on Information Technology of the House Committee on Oversight and Government Reform. The subcommittee recommended that federal agencies review privacy laws and regulations to determine the extent to which they apply to AI technologies and, where necessary, update existing regulations to accommodate AI. The subcommittee specifically stressed that any regulatory approach to AI (1) consider whether the risks to public safety or consumers fall within existing regulatory frameworks and, to the extent they don't, (2) consider whether modifications or additions are necessary to better account for AI use.

As part of a multipronged effort, two recent bills have been introduced in Congress. The more interesting one, the Algorithmic Accountability Act (introduced in the Senate with an equivalent bill in the House), would require large tech companies[10] to audit existing machine learning systems to identify their impact on accuracy, fairness, bias, discrimination, privacy and security and take corrective action on a timely basis. It would also require audits prior to implementing new AI systems. The U.S. Federal Trade Commission would be required to promulgate rules within 2 years of enactment of the legislation and would have the power to enforce violations in accordance with existing laws for unfair trade practices and deception. State attorneys general would also have the right to bring civil actions on behalf of the residents of their state, with the right of the FTC to intervene.

In Congressional subcommittee hearings, testifying experts frequently cited concerns about individuals' privacy rights, including the risk of breaches by hackers, misuse of personal data by those who collect it, and secondary use (data collected for one purpose is later re-appropriated for another).[11] A difference of opinion exists as to whether federal privacy regulation is needed for AI or whether regulations should be sector-specific.

Some AI products and practices are currently subject to federal privacy laws, including HIPAA and the Gramm-Leach-Bliley Act.[12] But Nicholson Price, an assistant professor at the University of Michigan Law School, has pointed out that while HIPAA's Privacy Rule governs and restricts both disclosure and use of certain health information by "covered entities," there are issues with the protection of that information within the AI context—most importantly that large aggregators of big data, including Google and Apple, are not within the definition of "covered entities."[13]

U.S. Food and Drug Administration (FDA). Professor Price has opined that the tools that typically help ensure safety and efficacy in medical technology—scientific understanding and clinical trials—may not work well in the context of AI. Understanding is challenged by the fact that we often don't understand how algorithms make decisions (at least so far); even if we did, the results would likely be too complex. Clinical trials may not be feasible because (1) the algorithms would make highly personalized treatment predictions, (2) the benefits of speed and low cost would be undercut by the long, ponderous, and expensive clinical trial process, and (3) the changing nature of machine learning algorithms would present obvious difficulties.[14]

Professor Price suggests that the FDA focus instead on procedural safeguards—including the quality of the data used, the development techniques, and the validation procedures—coupled with robust oversight following their use. The FDA appears to be headed in this direction with some of its recent announcements:

- In April 2018, the FDA permitted marketing of the first medical device to use artificial intelligence to detect greater than a mild level of the eye disease diabetic

retinopathy in adults who have diabetes.[15]
- In May 2018, the FDA approved an algorithm that aids radiologists in detecting wrist fractures.[16]
- In October 2018, the FDA outlined five steps it was developing that would affect the regulation of AI in the United States.[17]
- In January 2019, the FDA unveiled its first software pre-certification pilot aimed at streamlining the assessment of the safety and effectiveness of software technologies from manufacturers that have demonstrated a level of excellence, without inhibiting patient access to those technologies.[18]

Federal Reserve Board. The Federal Reserve Board has recognized that regulation of AI should be thoughtfully designed to ensure the appropriate mitigation of risks, enhance efficiency and risk detection, and improve accuracy in the financial sector—all without hindering innovation that would benefit consumers and small businesses.[19] In a presentation, FRB Governor Lael Brainard identified several existing regulations, guidance and approaches that will have some applicability to AI regulation, including the following:

- The Federal Reserve's "Guidance on Model Risk Management" (SR Letter 11-7), which highlights the importance of embedding critical analysis throughout the development, implementation and use of models, including AI algorithms;
- Examiners' practice of evaluating the processes that firms use for developing and reviewing models;
- Existing guidance on vendor risk management (SR 13-19/CA 13-21) and guidance on technology service providers, which could be expected to apply to externally sourced AI tools or services; and
- The regulator's longstanding risk-focused supervisory approach, requiring that the level of scrutiny be commensurate with the potential risk posed.[20]

Importantly, the Federal Reserve recognizes that AI presents challenges concerning opacity and explainability as well as the related issue of the "proverbial black box." Noting that it is not uncommon for questions to arise about a bank's lack of understanding of its vendors' models, Governor Brainard focused on the need to avoid discrimination and unfair outcomes, ensuring that AI tools do not "learn" the biases of the society in which they were created.[21] She also recognized that the AI community is working on developing "explainable" AI tools.

The NAIC and state regulation of insurance. With the ability of AI systems to develop without direct human involvement, it will be essential for insurers to develop controls and monitoring protocols that will ensure that machine learning continues to adhere to federal and state regulations concerning data privacy, fairness, discrimination and cybersecurity.

The National Association of Insurance Commissioners (NAIC) is addressing AI regulation primarily through two working streams of its Executive Committee: the Innovation and Technology Task Force and the Big Data Working Group. State regulators are grappling with how to obtain and apply the skills necessary to review AI systems going forward, with some smaller states preferring that this analysis be done through the NAIC and larger states objecting to the NAIC usurping their role as regulators.

Similar to their federal counterparts, the task force and working group are charged with reviewing existing model laws and regulations in light of AI and recommending changes to accommodate emerging technology. These reviews address marketing, rate regulation, underwriting, claims, regulatory reporting requirements, the regulation of data vendors and brokers, and consumer disclosure requirements.[22]

The NAIC's Casualty Actuarial Task Force adopted a white paper in 2018[23] suggesting more than 90 best practices (guidance) to state regulators for assessing predictive models in the private passenger automobile and homeowners' insurance lines for purposes of rate filing. The task force noted that its guidance was largely transferable to other lines of business and other insurance endeavors, such as marketing, underwriting and claims. It cautioned, however, against using the best practices to create a standard for rate filings in all cases.[24] The American Academy of Actuaries, in reviewing the white paper, suggested that regulators consider whether the guidance has the potential to be unmanageable for modelers as well as regulators.[25]

New York regulation. On January 11, 2018, New York Mayor Bill de Blasio signed into law a bill that creates a task force to examine how the city's agencies use algorithms to make decisions that can affect millions of New Yorkers. The bill requires the city to create a task force to recommend ways to establish public accountability for the city's use of

algorithms, including ensuring accuracy and fairness. In New York, algorithms are used to assign children to schools, screen for benefit fraud, assess teacher performance, and design predictive policing behaviors.[26] (It is interesting that prior iterations of the bill would have required companies to disclose proprietary algorithms.)

The concern about bias in the insurance context is best illustrated in Insurance Circular Letter No. 1 (2019), issued by the New York Department of Financial Services[27] following the department's review of external data available to insurers for use with "algorithms and predictive models." Citing New York insurance laws prohibiting the use of criteria such as race, color, creed, national origin, status as a victim of domestic violence, or sexual orientation from being used in underwriting,[28] the department concluded: *... [a]n insurer should not use external data sources, algorithms or predictive models in underwriting or rating unless the insurer has determined that the processes do not collect or utilize prohibited criteria and that the use of the external data sources, algorithms or predictive models are not unfairly discriminatory. The insurer must establish that the external data sources, algorithms or predictive models are based on sound actuarial principles with a valid explanation or rationale for any claimed correlation or causal connection. An insurer must also disclose to consumers the content and source of any external data upon which the insurer has based an adverse underwriting decision.*

The Department of Financial Services does not permit insurers to merely rely on a vendor's claim of non-discrimination or the proprietary nature of their process—the burden remains with the insurer to independently determine the vendor's compliance with anti-discrimination laws.[29] This runs parallel to cyber security law, where the insurer cannot avoid third-party failure but is held accountable for that failure.

> "Some proponents are contemplating not only a national but a world view of AI."

European Union. On April 8, 2019, the European Commission published a set of ethical guidelines, "Trustworthy Artificial Intelligence," and a document, *A Definition of Artificial Intelligence: Main Capabilities and Scientific Disciplines*.[30] The guidelines, based on fundamental rights and ethical principles, list seven key requirements that AI systems should meet and offer guidance for the practical implementation of each requirement. A pilot process is set forth in which stakeholders can participate and provide feedback for improvement, along with a forum to exchange best practices.

The seven key requirements are:

1. Human agency and oversight
2. Technical robustness and safety
3. Privacy and data governance
4. Transparency
5. Diversity, non-discrimination and fairness
6. Societal and environmental well-being
7. Accountability

The European Commission is considering whether to pursue additional legislation for AI beyond the current General Data Protection Regulation (GDPR), which took effect in May 2018 and applies to AI to the extent it processes personal data. Recognizing that AI regulation must be flexible enough to allow innovation, the Commission is reviewing whether the EU and national frameworks are sufficient for addressing the challenges of AI. Among the factors under consideration are how to make regulation usable and practical and whether different rules should be applied to public as opposed to private-sector uses of AI. A report identifying gaps is expected in mid-2020.

Other jurisdictions. On the world stage, the U.S. Congress has recognized the important role of the United States in the development and application of AI-driven technologies while at the same time noting that U.S. leadership is no longer guaranteed. Of particular concern are the prospect of Russia and China overtaking the

United States in AI advancement and the U.S. losing any decisive advantage to other nation states. Congress believes that maintaining U.S. competitiveness in AI is critical to America's economic security.[31]

One of the many organizations working on establishing a code of ethics is the Boston Global Forum, which houses the Artificial Intelligence World Society (AIWS). In December 2018, the Society published the *AIWS Report About AI Ethics*,[32] which tracks the efforts of the G7 countries (Canada, France, Germany, Italy, Japan, the U.K. and the U.S.) as well as other influential AI countries (China, India and Russia). The information in the report is not limited to the issue of ethics—it relates generally to AI regulatory and legislative activities.

Additionally, the OECD has several workstreams for AI and has published a number of articles about the impact of AI on labor markets, education/training gaps and more comprehensive scientific uses of AI.[33]

How Should Courts and Arbitration Panels Address AI?

Although some arbitrators will look at the prospect of deciding cases involving AI as a bridge too far, they might take comfort (or not) in the fact that few in Congress or on the bench understand the foundations of AI any better than they do. As noted above, laws are often ambiguous, and insurance and reinsurance contracts are not always a model of clarity either. Courts and arbitration panels, tasked with the authority and responsibility to determine whether one party's rights have been violated by the other or whether a party has departed from a legal standard, may be hard-pressed to do so in the context of complicated software systems.

This lack of expertise on the part of courts and panels will shift the determination, or at least the interpretation, to technical experts. While courts might choose to appoint special masters with particular skill and knowledge (determination), arbitration panels and those who appoint them might consider appointing experts who can help bridge the gap of understanding between the AI system and the panel as decision makers (interpretation).

The Federal Rules of Evidence set forth the federal standard for the admissibility of new scientific methods in adversarial proceedings: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of opinion or otherwise if ... (a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue ..."

Attorneys presenting cases in arbitration or litigation and decision makers should take into account that full transparency does not equate with accountability. For example, revealing the underlying mechanics of AI could expose trade secrets, hamper law enforcement, or lead to gaming certain decisions. As noted by one expert, concealment does not imply the inability to meaningful analyze the AI system.[34] In a very informative law journal article, Joel Reidenberg sets forth technical tools to provide policy and decision makers with the ability to protect software trade secrets while at the same time ensuring that AI systems are accountable.[35]

Conclusion

AI will affect our daily lives, our families and our work environments with increasing speed and scope. While we are experiencing only the beginning of these impacts, governments, policy makers, insurance professionals, courts and arbitration panels will need to internalize the basics of AI as soon as possible. The learning curve can be daunting and require us to step outside our comfort zones into the scientific world, but it holds much promise and excitement.

NOTES

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

1 Reidenberg, Joel. 2017. Accountable Algorithms. *University of Pennsylvania Law Review,* 165: 700. Reprinted in the Fordham Law Archive of Scholarship and History.

2 Id. at 702.

3 Blaikie, Duncan, and Natalie Donovan. 2018. *Will the UK Regulate AI?* Briefing paper, July 27. London: Slaughter and May. This paper notes that the House of Lords has suggested an existing sector-specific approach to AI regulation. While the U.K. Government appears to agree with this approach, it is establishing a Ministerial Working Group on Future Regulation and three new AI organizations: The Centre for Data Ethics and Innovation (CDEI), The AI Council, and The Government Office of AI.

4 The Boston Global Forum includes the Michael Dukakis Institute for Leadership and Innovation, which sponsors the AI World Society.

5 Boston Global Forum.

6 Financial Stability Board. 2017. *Artificial Intelligence and Machine Learning in Financial*

Services: Market Developments and Financial Stability Implications. Report, pg. 8. AI tools are likely to be useful for central banks and regulators relating to supervision, financial stability and monetary policy; AI could be useful to central banks and prudential regulators for applications ranging from systemic risk identification to detecting fraud and money laundering. The state of Ohio uses robotics in its criminal investigation bureau to help reduce the turnaround time on untested rape kits; it facilitated the testing of 14,000 untested rape kits and identified 300 serial rapists linked to 1,100 crimes. See also: Hurd, Will, and Robin Kelly. 2018. *Rise of the Machines: Artificial Intelligence and its Growing Impact on U.S. Policy.* Paper. U.S. House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Information Technology.

7 *Id.* at 1, 10.

8 Trump, Donald J. 2019. Maintaining American Leadership in Artificial Intelligence. Executive Order 13859. Washington, D.C.: Executive Office of the President.

9 Pierce, Jadzia, and B.J. Altvater. 2019. President Trump Signs Executive Order on Artificial Intelligence. Blog post. Cov Financial Services, February 12.

10 Section 2, Definitions: (5) Covered Entity includes greater than $50 million gross receipts and more than 1 million consumers or consumer devices and other factors.

11 *Rise of the Machines,* pg. 9. These fears were realized when one of the nation's largest credit reporting agencies, Equifax, Inc., was breached in 2017 and hackers obtained personal data on 14.5 million Americans.

12 *Id.* at pg. 10. The U.S. Federal Trade Commission is the primary federal privacy regulatory body and has jurisdiction over other privacy laws and regulations.

13 Price, W. Nicholson II. 2017. Artificial Intelligence in Health Care: Applications and Legal Implications. *The SciTech Lawyer,* 14(1): 10-11. Professor Price teaches intellectual property, health law and innovation in life sciences and has a particular interest in the regulation of emerging technology.

14 *Id.* at 12-13.

15 U.S. Food & Drug Administration. 2018. FDA Permits Marketing of Artificial Intelligence-based Device to Detect Certain Diabetes-Related eye Problems. News release, April 11.

16 U.S. Food & Drug Administration. 2018. FDA Permits Marketing of Artificial Intelligence Algorithm for Aiding Providers in Detecting Wrist Fractures. News release, May 24. "The OsteoDetect software is a computer-aided detection and diagnostic software that uses an artificial intelligence algorithm to analyze two-dimensional X-ray images for signs of distal radius fracture, a common type of wrist fracture… It is an adjunct tool and is not intended to replace a clinician's review of the radiograph or his or her clinical judgment."

17 Slachta, Anicka. 2018. 5 Ways the FDA Promises to Upgrade AI-Related Medical Devices. Online article. Radiology Business, November 6.

18 Rowe, Jeff. 2019. FDA Unveils AI Pre-Certification Program. Online article. HealthCare IT News, January 15. See also: U.S. Food & Drug Administration. 2019. *Developing a Software Precertification Program: A Working Model.* Online paper, January.

19 *Artificial Intelligence and Machine Learning in Financial Services.*

20 *Id.*

21 *Id.*

22 National Association of Insurance Commissioners. 2020. Innovation and Technology (EX) Task Force 2020 Adopted Charges. Webpage.

23 National Association of Insurance Commissioners. 2018. Regulatory Review of Predictive Models. Draft published by the NAIC Casualty Actuarial Task Force, October 25.

24 *Id.* at pg. 4.

25 Gibson, Richard. 2019. CASTF Regulatory Review of Predictive Models White Paper. Letter to Kris DeFrain at NAIC Central Office, January 22. American Academy of Actuaries.

26 Stump, Galen. 2018. New York City's Push for Accountable Algorithms. *Fordham Intellectual Property Media & Entertainment Law Journal,* April 14.

27 New York State Department of Financial Services. 2019. Insurance Circular Letter No. 1: Use of External Consumer Data and Information Services in Underwriting for Life Insurance. January 18.

28 *Id.* noting Insurance Law Article 26 and Laws §§ 4224(a) and (b)(2).

29 *Id.* The department referenced the "disparate impact" standard, seemingly applying it to life insurance, but that topic is beyond the scope of this paper.

30 Both documents were prepared by the commission's High-Level Expert Group on AI. The independent group, consisting of 52 experts from academia, business and civil society, was appointed in June 2018 following the publication of the Communication from the Commission to the European Parliament, the European Council, the Council, The European Economic and Social Committee and the Committee of the Regions on Artificial Intelligence for Europe on April 25, 2018 (sometimes referred to as the "European Approach on AI").

31 *Rise of the Machines* at pg. 4-6.

32 Boston Global Forum.

33 Organisation for Economic Co-operation and Development. 2020. Artificial Intelligence. Webpage.

34 Accountable Algorithms at pg. 705.

35 *Id.*

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Treatment of Expenses in Facultative Certificates: The Road Back from *Bellefonte Re*

By Robert M. Hall

More than 30 years ago, a federal district court in Manhattan handed down a decision that remains controversial—indeed, it continues to generate litigation into 2020 (and perhaps beyond[1]). The decision involves facultative certificates, which, traditionally, are very brief contracts drafted largely by underwriters for underwriters, using specialized industry terminology and built on the customs and practices of the industry.

When isolated from the import of industry terminology and customs and practices, these certificates can be misinterpreted by courts, and the resulting misinterpretation can be institutionalized as legal precedent. The purpose of this article is not to trace the legal arguments of the relevant cases, but to demonstrate how proper use of custom and practice (alongside determined and creative lawyering) appears to have reversed the effect of bad rulings in *Bellefonte Re* and its progeny.

Bellefonte Re Decisions

The seminal case in this matter is *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*, No. 85 Civ. 2706 (JFK), 1989 U.S. Dist. LEXIS 10432 (S.D.N.Y. Nov. 28, 1989). The cedent, Aetna, was attempting to collect expenses in addition to the liability limits of Bellefonte Re's facultative certificate. While it was not evident in this decision, it was revealed in a later decision involving Aetna that (1) the original Aetna policy reinsured by Bellefonte Re included expenses within limits, (2) in a settlement with the insured, Aetna agreed to pay expenses in addition to limits, and (3) some of the reinsurance certificates, including the one at issue in *Bellefonte Re*, were not so endorsed.[2]

Thus, the real issue was whether expenses would be treated similarly (i.e., expenses within limits) in the original policy issued by Aetna and in the facultative certificate, or whether the facultative certificate would pay expenses in accord with Aetna's agreement to pay expenses to an insured—an arrangement that was never agreed to by the reinsurer. Unfortunately, this real issue was not evident from the text of the opinion.

Bellefonte Re's facultative certificate contained clauses agreeing to follow the form of the underlying policy and to follow the fortunes[3] of the cedent, plus a limits provision that did not mention expenses. Without benefit of expert testimony or extrinsic evidence, the court found no ambiguity in the language concerning limits, holding that it capped both indemnity and expenses. The court

found that the follow-the-fortunes provision in the certificate did not override other provisions in the certificate. Thus, it appeared from the text of the opinion that the reinsurer was not obligated to pay expenses in addition to the limits of the certificate on a policy that paid expenses in addition to limits.

The appellate court affirmed, ruling that the district court had read correctly the limits provision in the facultative certificate, and did not comment on the lack of expert testimony on custom and practice. *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.,* 903 F.3d 910 (2d Cir. 1990). The court ruled:

We agree with the district court that "the limitation is to be a cap on all payments by the reinsurer." We hold that the district court correctly read the first two provisions of the reinsurance certificate to cap the reinsurer's liability and that the "follow the fortunes" doctrine does not allow Aetna to recover beyond the express cap stated in the certificates.[4]

Progeny of *Bellefonte Re*

Many in the insurance marketplace regarded the *Bellefonte Re* decisions as aberrations, contrary to longstanding custom and practice. I was the general counsel of a major U.S. domestic reinsurer that would have benefited from these rulings; my company, however, refused to take advantage of *Bellefonte Re*, considering it contrary to our legal and client-relation responsibilities. We anticipated that *Bellefonte Re* would be bypassed or effectively overruled by subsequent decisions.

It became impossible to dismiss *Bellefonte Re* as an aberration after *Unigard Security Insurance Co. v. North River Insurance Co.,* 4 F.3d 1049 (2d Cir. 1993). Apparently, without benefit of any extrinsic evidence or expert testimony on custom and practice, the court followed *Bellefonte Re*, dismissing the impact of any factual differences between the cases on the meaning of the limits in the facultative certificate: "The meaning of such provisions is not an issue of fact to be litigated anew each time a dispute goes to court."[5]

The next case in the timeline is *Aetna Casualty & Surety Co. v. Philadelphia Reinsurance Corp.,* No. 94-2683, 1995 U.S. Dist. LEXIS 4806 (E.D. Pa. Apr. 12, 1995), which contains a brief reference to evidence of customs and practices of the reinsurance industry on paying expenses in addition to limits. Aetna argued factual differences between this case and *Bellefonte Re*, but the court dismissed them on the basis that *Bellefonte Re* was based on an interpretation of the facultative certificate and not the facts of the case:

[T]he reinsurers' entire obligation is quantitatively limited by the dollar amount the reinsurers have agreed to reinsure. Once the reinsurers have paid up to the certificate limits, they have no additional liability to Aetna for defense expenses or settlement contributions. Any other construction of the reinsurance certificates would negate the phrase "the reinsurer does hereby reinsure Aetna ... subject to the ... amount of liability set forth herein."[6] (Emphasis added).

Next came *Excess Insurance Co. v. Mutual Insurance Co.,* 3 N.Y. 3d 577 (2004), in which no extrinsic evidence or expert testimony on custom and practice is cited. The court followed *Bellefonte Re* and *Unigard*, ruling that minor differences in the underlying fact situation did not change the meaning of the limits provision in the facultative certificate.

Excess Insurance was followed by *Pacific Employers Insurance Co. v. Global Reinsurance Corp. of America,* No. 09-6055, 2010 U.S. Dist. LEXIS 40506 (E.D. Pa. Apr. 23, 2010), in which the presence of expert testimony on custom and practice was not evident. The court followed *Bellefonte Re* and *Unigard*, observing that minor variations in contract language did not change the cap on the reinsurer's exposure in the limits clause.

Next up was *Utica Mutual Insurance Co. v. Clearwater Insurance Co.,* No. 6:13-cv-1178 (GLS/TWD), 2014 Dist. LEXIS 162645 (N.D.N.Y. Nov. 20, 2014), in which the cedent offered to provide extrinsic evidence of custom and practice on the issue of expenses in addition to limits. The court observed that extrinsic evidence is allowed only to explain ambiguity. In light of prior decisions on point, the court found no ambiguity in the limits provision and found for the reinsurer.

Cases Considering Custom and Practice

Eventually, some courts began to allow extrinsic evidence on the issue of expenses within or in addition to limits. In *Utica Mutual Insurance Co. v. Munich Reinsurance America, Inc.,* 594 Fed. Appx. 700 (2d Cir. 2014), the cases described previously were distinguished on the basis of different certificate language. The court found the certificate language on limits to be ambiguous and directed the court below, on remand, to consider extrinsic

evidence of custom and practice in the industry.

This ruling on ambiguity was followed in *Utica Mutual Insurance Co. v. R&Q Reinsurance Co.,* No. 6:13-CV-1332 (BKS/ATB), 2015 U.S. Dist. LEXIS 93565 (N.D.N.Y. Jun. 4, 2015), in denying the reinsurer's motion for summary judgment. The court ruled that both parties should be given the opportunity to present extrinsic evidence on custom and practice.

The Second Circuit Court of Appeals significantly undercut the *Bellefonte Re* line of cases in *Global Reinsurance Corp. of America v. Century Indemnity Co.,* 843 F.3d 120 (2d Cir. 2016). The court stated:
[W]e find it difficult to understand the Bellefonte *court's conclusion that the reinsurance certificate in that case unambiguously capped the reinsurer's liability for both loss and expenses. Looking only to the language of the certificate, we think it is not entirely clear what exactly the "Reinsurance Accepted" provision in* Bellefonte *meant. Evidence of industry custom and practice might have shed light on this question, but the* Bellefonte *court did not consider any such evidence in its decision, although it is unclear if any was presented.*[7]

So saying, the court certified to the New York Court of Appeals the issue of whether the New York Court's decision in *Excess Insurance* constitutes a rule or strong presumption that the liability cap in a facultative certificate includes expenses, even when the underlying policy pays expenses in addition to limits. In *Global Reinsurance Corp. of America v. Century Indemnity Co.,* 30 N.Y.3d 508 (2017), the New York Court of Appeals ruled that there is no such rule or strong presumption. Reinsurance contracts are to be interpreted according to the same rules as other contracts.

Following the New York Court of Appeals decision, the Second Circuit ruled that its decisions in *Bellefonte* and *Unigard* on the facultative certificate in those cases were "premised on an erroneous interpretation of New York state law" and remanded the case to the district court with instructions to "construe each reinsurance policy in light of its language and, to the extent helpful, specific context." *Global Reinsurance Corp. v. Century Indemnity Co.,* 890 F.3d 74, 77 (2d Cir. 2018). Clearly, the "context" included expert testimony on custom and practice.

Cases Using Custom and Practice to Support Expenses in Addition to Limits

Century Indemnity Co. v. OneBeacon Insurance Co., 173 A.3d 784 (Pa. Super. Ct. 2017), is the appeal of a trial court ruling that considered expert testimony on both sides of the issue of whether, by custom and practice, facultative certificates pay expenses in addition to limits when the underlying policies do so. (I was an expert on behalf of the cedent.) The trial court found the relevant language to be ambiguous and that the better interpretation favored the cedent. The reinsurer appealed on the basis that the relevant language of the facultative certificate was unambiguous and that the trial court should have followed the *Bellefonte Re* line of cases.

The appellate court agreed with the trial court that the relevant portions of the facultative certificate were ambiguous.[8] The appellate court further ruled that the trial judge's decision to admit expert testimony on custom and practice was not an abuse of discretion.[9] The court found that this case was distinguishable from the *Bellefonte Re* line of cases both on the underlying facts and the wording of the facultative certificate, and otherwise upheld the rulings of the trial judge.

The remand of the *Global v. Century* litigation described above is *Global Reinsurance Corp. of America v. Century Indemnity,* No. 13 Civ. 6577 (LGS), 2020 U.S. Dist. Lexis 36579 (S.D.N.Y. Mar. 2, 2020), in which Century, the cedent, had four expert witnesses (I was one of the four), and Global, the reinsurer, had two. Following the lead of the Second Circuit, the district judge observed that the *Bellefonte Re* line of cases had been severely undercut. The court found that the facultative certificate was not an integrated contract—through follow-the-form language, the certificate incorporated the terms and conditions of the underlying policy, including expenses in addition to limits, unless specifically stated otherwise in the certificate. The court found that payment of expenses in addition to limits by the reinsurer was consistent with the text of the limits clause.

As to the role of Century's experts,[10] the court stated: *This textual interpretation is confirmed by the credible expert testimony regarding the relevant industry custom and practice. The Court credits Century's experts' testimony that concurrency was significant enough to the history of reinsurance and to the reinsurance market that parties to reinsurance agreements considered whether the reinsurance and insurance should be concurrent*

when drafting contracts. The Court also credits Century experts' testimony that concurrency was presumed, unless the [certificate] contained an explicit statement of non-concurrency... The Century experts offer more than enough credible evidence "to raise a fair presumption" that these principles were part of the reinsurance industry's customs and practices in the 1970s. Just as a knowledgeable member of the 1970s reinsurance industry would expect material terms like the types of risks covered and the indemnity limit to be expressly stated in the agreement, a knowledgeable insurer or reinsurer would also expect any non-concurrency as to the expenses also to be expressly stated... Therefore, in this case, based on the reinsurance language and industry customs and practices in the 1970s elucidated through credible testimony, when there are losses, the reinsurer's liability as to expenses is not capped by any dollar amount, although the amount is limited and calculated by a ratio in the certificate.[11]

Thus, *Bellefonte Re* and its progeny were effectively bypassed and isolated, based (in part, at least) on expert testimony on custom and practice.

Comments

Many in the insurance industry believe that *Bellefonte Re* and its progeny were a result of (a) a technical underwriting document (b) based on incompletely stated customs and practices (c) being interpreted by judges who were not offered, or who did not accept, expert testimony on technical underwriting terms and procedures as well as other customs and practices of the industry. Many welcome the apparent demise of this line of cases after decades of disruption of the facultative reinsurance industry.

NOTES

The author acknowledges and thanks two expert witness colleagues, Lydia B. Kam Lyew and Paul C. Thomson III, for their commentary on this article.

1 The district court decision in *Global v. Century,* described in Section V, is under appeal.

2 *Aetna Casualty & Surety Co. v. Philadelphia Reinsurance Corp.,* 1995 U.S. Dist. LEXIS 4806 at *6 (E.D. Pa. Apr. 12, 1995).

3 In these decisions, as is common, "follow-the-fortunes" is used interchangeably with "follow-the–settlements." When used accurately, follow-the-fortunes is an underwriting concept dealing with the nature of the risk insured, while follow-the-settlements deals with the cedent's loss settlements. To avoid confusion, this article will use the terminology of the courts on point.

4 903 F.2d 910 at 913.

5 *Unigard Security Insurance Co. v. North River Insurance Co.,* 4 F.3d 1049, 1071 (2d Cir. 1993).

6 1995 U.S. Dist. LEXIS 4806*6, quoting *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.,* 903 F.2d 910 at 912-3 (2d Cir. 1990) (emphasis in the original).

7 *Global Reinsurance Corp. of America v. Century Indemnity Co.,* 843 F.3d 120, 126 (2d Cir. 2016) (emphasis in the original).

8 *Century Indemnity Co. v. One Beacon Insurance Co.,* 173 A.3d 784, 801 (Pa. Sup. Ct. 2017).

9 *Id.* at 804 – 5.

10 Lydia B. Kam Lyew was Century's reinsurance underwriting expert. She offered testimony on the history of facultative reinsurance, facultative certificates and underwriting, following form clauses, the need for concurrency between certificates and underling policies, facultative premium calculations, and the application of these matters to the Global v. Century dispute.

William Manning was Century's ceding insurer underwriting expert. He offered testimony on client expectations and understanding of the coverage provided by facultative reinsurers, the pricing of such coverage, and the application of these matters to the *Global v. Century* dispute.

Paul C. Thomson III was Century's claims expert. He offered testimony on the handling of facultative reinsurance claims (both before and after Bellefonte Re) and the application of this experience to the *Global v. Century* dispute.

Robert M. Hall was Century's expert on insurance policies and facultative certificate issues. He offered testimony on the integration of such documents, follow the form, concurrency of coverage, distribution of premium among reinsurers, and application to the *Global v. Century* dispute.

11 *Global Reinsurance Corp. of America v. Century Indemnity Co.,* No. 13 Civ. 6577 (LGS), 2020 U.S. Dist. LEXIS 36579 (S.D.N.Y. Mar. 2, 2020) *33 – 34 (internal citations omitted).

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Assessing *USF&G's* 'Objective Reasonableness' Standard: An Alternative View

By Syed Ahmad and Patrick McDermott

It has been said before in these pages that we are "not ones to shy away from strong opinions." After reading "Assessing *USF&G's* 'Objective Reasonableness' Standard" in the 2020 Q1 issue of the *Quarterly*,[1] we are compelled to once again share those opinions in response to the overly pro-reinsurer interpretations of *USF&G* expressed by our friends at Rubin, Fiorella, Friedman & Mercante.

Decisions after *USF&G*

The authors paint a rosy picture for reinsurers looking for boundless discovery and seeking to overcome summary judgment. Yet, *USF&G* actually favors limiting discovery and further supports granting summary judgment.

Discovery. For discovery, *USF&G* and the cases following it have not broadened the scope of discovery or expanded the scope of inquiry, as the authors contend. If anything, *UF&G* narrowed the scope of discovery.[2] The court stated that "objective reasonableness should ordinarily determine the validity of an allocation" and "that the cedent's motive should generally be unimportant." Thus, because the allocation is judged from an objective standard, detailed discovery about the cedent's handling of a claim and its subjective views should generally be unnecessary.

Also, the two decisions cited in "Assessing *USF&G*" do not show that *UF&G* broadened discovery. Instead,

Excalibur simply rejects a cedent's attempt to use *USF&G* to limit discovery.[3] *Lexington* merely makes the unremarkable statement that the reinsurer was entitled to discovery under the follow-the-settlements doctrine.[4] Neither decision stated that discovery previously off limits to the reinsurer was now available because of *USF&G*.

Indeed, at least one arbitration panel has arrived at the opposite conclusion: that *USF&G* results in narrower discovery. In that dispute, between American Home and Wausau, American Home ceded the claim three separate times using three separate rationales.[5] The panel found that the third billing was reasonable. Despite that, Wausau argued that it still needed discovery as to whether American Home acted in good faith. The panel rejected that argument because it had found that American Home's allocation was reasonable, so Wausau had to pay the outstanding billings. That is, the panel prohibited discovery on the cedent's good faith because the governing standard was objective reasonableness.

Dispositive motions. As a corollary to the supposed expansion of discovery, the authors assert that courts will have difficulty ruling that a cedent's allocation is objectively reasonable as a matter of law because reinsurers are more likely to get sufficient discovery to show issues of fact. This should not be the case. In fact, where appropriate, courts and tribunals granted summary judgment to cedents before *USF&G* and should continue to do so after *UF&G*, particularly since they now need only consider objective reasonableness and generally need not consider subjective matters like motive. Inquiries about motive and the like can often raise more factual issues than an objective inquiry. *USF&G* itself supports courts continuing to grant summary judgment to cedents. In that case, the New York Court of Appeals found the cedent's allocation among the various insurance policies reasonable as a matter of law and upheld granting summary judgment to the cedent on that part of the allocation.

The pre-*USF&G* court rulings granting summary judgment include *Gerling v. Travelers*.[6] In that case, the district court had granted summary judgment to the reinsurer, Gerling. On appeal, the Second Circuit found Travelers's allocation reasonable as a matter of law, including based on the case law relevant to the challenged portion of the allocation. Thus, it directed the lower court to grant summary judgment to Travelers. The Second Circuit did so despite Gerling's arguments that Travelers had acted in bad faith because Gerling "failed to demonstrate anything approaching the requisite intent on the part of Travelers." That is, the court found summary judgment appropriate even where it considered the cedent's subjective bad faith to be a part of the analysis. Under *USF&G*, summary judgment would be even more appropriate given that "the cedent's motive should generally be unimportant."

In another case, *North River v. ACE,* the Second Circuit upheld the district court's decision to grant summary judgment to the cedent.[7] The reinsurer, ACE, had relied heavily on North River's pre-settlement analysis and claimed that North River's allocation of the settlement did not match its pre-settlement analysis. The Second Circuit rejected that argument, finding North River's allocation proper as a matter of law. In so doing, the court explained that a cedent "may engage in all manner of analyses to inform its decision as to whether, and at what amount, to settle, but those analyses are irrelevant to the contractual obligation of the reinsurer to indemnify the reinsured for loss under the reinsurance policy." That explanation is consistent with *USF&G's* later pronouncement that a cedent's motive is generally irrelevant.

The recent post-trial decision in *Utica v. Century* acknowledges that summary judgment rulings should be frequent in light of the governing standards.[8] In that case, Century challenged Utica's allocation, and a jury ruled in Utica's favor. Century filed a post-trial motion attacking Utica's allocation. In denying that motion, the court gave a detailed overview of *UF&G*. It then concluded that *USF&G* "recognizes that the follow-the-settlement doctrine sweeps broadly enough to permit the resolution of most reinsurance disputes at summary judgment."

Arbitration panels have also applied *USF&G* standards to issue dispositive awards in favor of cedents. As set forth above, the panel in the *American Home v. Wausau* dispute concluded that American Home's allocation was reasonable, found in favor of American Home, and denied Wausau's request for discovery on American Home's good faith. In a dispute between National Union and Resolute Re, the panel granted National Union's summary judgment motion, finding that its allocation was "objectively reasonable."[9]

Of course, there have been and will be decisions declining to grant summary

judgment, like those highlighted in "Assessing *USF&G*." There are plenty of decisions granting summary judgment, however, including those highlighted above from the Second Circuit, the New York Court of Appeals, and arbitration tribunals. Among those cases is *USF&G* itself, which undermines the idea that *USF&G* should lead to fewer summary judgment rulings.

Meeting the Objective Reasonableness Test

The authors also muse about the parameters of the New York Court of Appeals' "objective reasonableness" test set forth in *USF&G*. Many of their theories miss the mark.

For example, while recognizing the *USF&G* court's test is objective reasonableness, the authors try to work in a subjective component focused on the cedent's good faith. *USF&G* belies that attempt in multiple ways. The test is unequivocally "objective reasonableness" and does not have a subjective reasonableness component. Indeed, the court actually considered whether the cedent's subjective views should be relevant and decided they are not.

Thus, acknowledging the fact that *UF&G* "prohibits or severely restricts" a reinsurer's "ability to examine the cedent's motives for settling and allocating" is not a "pro-cedent view." It is decidedly the law in New York.

Manufactured Evidence and Self-Serving Testimony

The authors raise concerns that cedents can "manufacture evidence" and offer "self-serving testimony" to support allocations. This is a rather dim view of the world. That parties may disagree about what happened and why does not mean that evidence was "manufactured" or that testimony is "self-serving" in some nefarious way. Even if legitimate and accepted, however, this view is not unique to cedents, reinsurance cases, or an objective reasonableness standard. Every dispute (reinsurance or otherwise) can lend itself to characterizations that each side (cedents, reinsurers, or any other entity) "manufactured" evidence and provided self-serving testimony.[10]

For example, is it a coincidence that every time a reinsurer challenges an allocation, it construes the facts in a manner that would reduce its own liability and likely increase some other reinsurer's liability? Would it surprise anyone that a reinsurer's claims handler would testify that he or she never would have allocated in the manner in which the cedent did? To be clear, we are not faulting reinsurers solely because they may take positions that are in their own interest or for offering testimony that supports those positions. Rather, we are merely pointing out that a cynical view of purported problems of "manufacturing evidence" and "self-serving testimony" would apply to all participants, cedents and reinsurers alike.

Regardless, the answer is not to eliminate, change, or recharacterize legal tests and standards. There are other solutions already in place, like rigorous cross-examination. Indeed, the Utica claims attorney who offered purportedly "self-serving" testimony cited in the article was the subject of lengthy cross-examinations at three different trials. Two of those trials ended in a jury verdict in Utica's favor, and one case concluded—at least for now—with the court deciding the dispute based on legal issues not involving any evidence, much less any criticism about the testimony that the authors reference.[11] Moreover, the suggestion that the testimony offered under oath was false has no basis, and the accusation is contrary to other evidence.[12] All of that undermines the example the authors use to show the purported problem created by *USF&G*.

Relatedly, the authors' concerns about cedents retaining "hired guns" to opine in support of the cedents' decisions suffer from the same difficulties. If such problems exist, they would not be unique to reinsurance cases and would exist for cedents and reinsurers alike. Too often, one side's expert is the other party's "hired gun," and vice versa. Indeed, while portraying those opining on cedents' behalf as "hired guns," the authors suggest that reinsurers retain an "expert" to rebut those opinions.

No Separate Standard for Settlement Challenges

The authors suggest that a reinsurer can try to avoid the objective reasonableness standard by claiming it is challenging the cedent's settlement, not the cedent's allocation. Yet, while *USF&G* involved reinsurers challenging the cedent's allocation, nothing in that decision supports that a different standard would apply to challenges to a cedent's settlement. And, after *USF&G*, courts have applied the objective reasonableness standard to reinsurers' challenges to a settlement.[13] In addition, tribunals should reject reinsurers' attempts to obtain a different standard of review by cloaking a challenge to an allocation as a challenge to a settlement.

Consistency Between Allocation and Case Law

We do not quibble with the authors' expectation that "an allocation that is inconsistent with" a decision in the dispute between the cedent and the policyholder "is likely not objectively reasonable" except to clarify that it will always depend on the particular facts. But it is also true that an allocation consistent with court decisions on the relevant issues is likely objectively reasonable. Indeed, that was the basis for the *USF&G* court's ruling finding the cedent's allocation among insurance policies reasonable as a matter of law.

In conclusion, while the *USF&G* decision gives both cedents and reinsurers arguments to support and challenge cedent's decisions, it is not so pro-reinsurer as the authors in "Assessing *USF&G*" hope. Of course, time will tell, as courts will continue to interpret and apply decisions like *USF&G*.

NOTES

1 Eson, Jason, and Crystal Monahan. 2020. Assessing USF&G's 'Objective Reasonableness' Standard. *ARIAS Quarterly,* (1): 4-11.

2 *U.S. Fidelity & Guar. Co. v. American Re-Ins. Co.,* 20 N.Y.3d 407, 420-421 (2013).

3 *Travelers Indemn. Co. v. Excalibur Reins. Corp.,* No. 11-cv-1209, 2013 U.S. Dist. LEXIS 50134 (D. Conn. Apr. 8, 2013).

4 *Lexington Ins. Co. v. Sirius Am. Ins. Co.,* No. 651208/2012, 2014 N.Y. Misc. LEXIS 4138, at *26 (N.Y. Sup. Ct. Sept. 15, 2014) ("Sirius is entitled to discovery regarding National and Lexington's settlement and allocation decisions.").

5 *Am. Home Assur. Co. v. Employers Ins. Co. of Wausau,* No. 13-cv-5169, Dkt. 26-7 (S.D.N.Y.), available from authors upon request.

6 *Travelers Cas. & Sur. Co. v. Gerling Global Reins. Corp. of America,* 419 F.3d 181, 194 (2d Cir. 2005).

7 *North River Ins. Co. v. Ace American Reins. Co.,* 361 F.3d 134, 137 (2d Cir. 2004).

8 *Utica Mut. Ins. Co. v. Century Indemn. Co.,* 419 F. Supp. 3d 449, 464 (N.D.N.Y. 2019).

9 *National Casualty Co. v. Resolute Reins. Co.,* No. 15-cv-9440, Dkt. 9-1 (S.D.N.Y.), available from authors upon request.

10 See *U.S. v. Sklena,* 692 F.3d 725, 733 (7th Cir. 2012) ("The characterization of Sarvey's statements as 'self-serving' is also unhelpful. To say that evidence is 'self-serving' tells us practically nothing: a great deal of perfectly admissible testimony fits this description." (citation omitted)).

11 *Utica Mutual Ins. Co. v. Century Indemn. Co.,* 419 F. Supp. 3d 449, 464 (N.D.N.Y. 2019); *Utica Mutual Ins. Co. v. Munich Reins. America, Inc.,* 381 F.Supp.3d 185 (N.D.N.Y. Mar. 29, 2019), *Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co.,* 287 F.Supp.3d 163 (N.D.N.Y. 2018), reversed on other grounds by 957 F.3d 337 (2d Cir. Apr. 28, 2020).

12 *Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co.,* 287 F.Supp.3d 163, 171 (N.D.N.Y. 2018) ("Utica's position has remained that it was unaware of the FFIC reinsurance at the time it settled with Goulds."); *id.* at 169 ("Utica presented extensive evidence that its settlement decisions were reasonable"); *id.* at 170 ("Plaintiff presented evidence that Goulds' summaries of its own insurance program from the 1966 to 1972 period showed aggregate limits for products liability. Two of the primary policies from that time period showed an aggregate limit. Utica argued that in the absence of evidence that Goulds intended to change its insurance program, this "book end" proof provided evidence to Utica that the intervening policies had the same limits."); *id.* at 170 ("In sum, the results of Utica's investigation, Mr. Robinson's virtual policy project, and the final advice from Utica's outside counsel all confirmed to Utica that the 1966 to 1972 primary polices contained aggregate limits. Dennis Connolly, one of plaintiff's experts, opined that aggregate limits were standard in the 1960s and 70s and confirmed the reasonableness of Utica's position on same. Plaintiff also introduced evidence that Brian Gagan, one of FFIC's prior experts in the underlying litigation, agreed with that position.").

13 *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.,* 6:09-cv-853, Dkt. 439 (N.D.N.Y. 2017) (jury instruction stating that "You are being asked to decide whether Utica Mutual's decision to settle with Goulds on the basis that its 1966 through 1972 primary policies contained aggregate limits was among the objectively reasonable options available."), available from authors upon request.

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U.S. Discovery in Aid of International Private Commercial Arbitration

By Max Chester and Charlie Niemann

One of the hottest topics in international arbitration is whether Section 1782 of Title 28 of the United States Code allows discovery from U.S. parties in aid of international private commercial arbitrations. Given that most reinsurance contracts provide for arbitration as a dispute resolution mechanism, and given the recent decisions from the federal circuit courts, we expect more applications for discovery in aid of international private reinsurance arbitrations.[1]

The Fourth Circuit's March 30, 2020, decision in *Servotronics, Inc. v. The Boeing Co.* added to a growing circuit split over the proper interpretation of a "foreign or international tribunal" under 28 U.S.C. § 1782. Section 1782 allows parties to a proceeding before such a tribunal to apply to district courts for an order compelling discovery for use in foreign proceedings, and the Fourth Circuit recently joined the Sixth Circuit in holding that the statute applies to international private commercial arbitration.

This article places these recent decisions in context. Part I provides background on the requirements and function of 28 U.S.C. § 1782 and discusses the Supreme Court's seminal *Intel* decision. Part II analyzes the pre-*Intel* rationale of circuit court decisions holding that § 1782 does not apply to international private arbitration. Part III discusses the *Servotronics* opinion, while Part IV analyzes whether these recent decisions have the potential to undermine the core advantages of arbitration.

Part I: 28 U.S.C. § 1782 and the Seminal *Intel* Decision

Prior to 2004, applications under § 1782 were rare, but the growth of international commerce and the Supreme Court's *Intel* decision have spurred an increase in the number of successful applications.[2] The statute is titled "Assistance to foreign and international tribunals and to litigants before such tribunals," and four statutory requirements must be satisfied before a district court "may order" a person to

provide testimony, documents, or things "for use" in a foreign proceeding:[3] (1) the "person" (including corporate entities) from whom discovery is sought "resides or is found" in the district where the court sits,[4] (2) the request seeks evidence "for use in a foreign or international tribunal,"[5] (3) the request is made by a foreign or international tribunal or by "any interested person" to the proceeding,[6] and (4) the material sought is not protected by "any legally applicable privilege."[7]

In *Intel*, an antitrust complaint against Intel filed with the Directorate–General for Competition of the Commission of the European Communities gave rise to the underlying proceeding.[8] Advanced Micro Devices ("AMD") filed the antitrust complaint and applied to the U.S. District Court for the Northern District of California for an order seeking potentially relevant documents from Intel. The Ninth Circuit Court of Appeals reversed the district court's denial of AMD's application and the Supreme Court affirmed, holding that the district court had authority under § 1782(a) to entertain AMD's request.[9] The Court found that all four statutory requirements outlined above were satisfied, and its analysis opened the door for arguments that international arbitrations constitute "proceeding[s] in a foreign or international tribunal."

A Senate report corresponding to a 1964 amendment to the statute explained that the replacement of the term "any judicial proceeding" was meant to clarify that U.S. court assistance could be provided in administrative and quasi-judicial proceedings abroad.[10] After quoting this Senate report, the Court cited and parenthetically quoted (in dicta) a law review article by Professor Hans Smit, who played a key role in the statutory amendment. Those favoring an expansive view of the term "tribunal" have latched onto this quotation, which states that "[t]he term 'tribunal'... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[11]

Aside from the Court's seeming endorsement of Professor Smit's interpretation of "tribunal" under the statute, there are three other key takeaways from *Intel*. First, the Court held that there is no categorical bar on district courts ordering production of documents when the foreign tribunal or the "interested person" would not be able to obtain the documents if they were located in the foreign jurisdiction. In other words, there is no blanket "foreign discoverability" requirement. Second, after noting that Congress removed the word "pending" in the 1964 amendments, the Court held that judicial assistance under the statute is not limited to "pending" or "imminent" proceedings.[12]

Third, the Court repeatedly emphasized that district courts are not required to grant § 1782 discovery just because they have statutory authority to do so. The Court outlined four factors for district courts to consider after concluding that a discovery applicant has established the threshold statutory requirements of § 1782(a). These factors are:

1. whether the person from whom discovery is sought is a party to the foreign proceeding, in which case "the need for § 1782(a) aid generally is not as apparent";
2. the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance;
3. whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and
4. whether the request is "unduly intrusive or burdensome" to the extent that it should either be "trimmed" or rejected outright.[13]

These factors have provided much-needed guidance for district courts, but the Court's analysis and quotation of Professor Smit have not completely clarified the proper scope of § 1782.

Part II: Pre-*Intel* Jurisprudence on This Issue

Before the seminal *Intel* decision, two circuit courts analyzed whether § 1782 applies to international private commercial arbitrations, and both courts held that arbitral bodies are not "tribunals" under the statute.[14] The proceeding in *Intel* was quasi-judicial in nature, and the Court never addressed private arbitration in its opinion. Thus, the argument goes that these pre-*Intel* decisions remain good law,[15] and district courts lack discretion to grant discovery for use in international arbitration because applicants cannot satisfy the threshold requirements of § 1782(a).

The *Bear Stearns*[16] and *Biederman*[17] courts both relied on plain text interpretation of the statute and found nothing in its legislative history suggesting that Congress intended the

> "The growth of international commerce and the Supreme Court's Intel decision have spurred an increase in the number of successful applications."

statute to apply to private arbitration. The *Bear Stearns* court found this lack of evidence in the legislative history telling, because "a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention."[18] The *Biederman* court similarly found no contemporaneous evidence that Congress contemplated extending § 1782 to the "then-novel arena of international commercial arbitration," and held that past judicial interpretations of the term "tribunal" lent additional support to this conclusion.[19] The court also noted that references to "arbitral tribunals" in the U.S. Code almost uniformly concern adjuncts of foreign governments or international agencies.[20]

Both courts evaluated the potential extension of § 1782 within the context of federal policy favoring arbitration as a means of dispute resolution and the limited discovery allowed in domestic arbitration under the Federal Arbitration Act. The courts found it unlikely that Congress would authorize broader discovery in aid of foreign arbitration than is provided under § 7 of the FAA, which permits the arbitral panel but not all "interested parties" to issue subpoenas for documents and testimony for use in the arbitral proceeding. Further, § 7 only requires federal courts to enforce arbitrators' summonses within the federal district in which the arbitrator (or the panel) is sitting.[21] The *Bear Stearns* court noted that these differences in discovery could "create an entirely new category of disputes concerning the appointment of arbitrators and the characterization of arbitration disputes as domestic, foreign, or international."[22] Both decisions expressed concern that an extension of § 1782 discovery to international arbitration could undercut its main advantages of efficiency and cost effectiveness, replacing these characteristics with "fighting over burdensome discovery requests far from the place of arbitration."[23]

Part III: Recent Decisions Have Created a Circuit Split

The *Intel* decision opened the door to a more expansive reading of § 1782, and two circuit courts have now held that a foreign arbitral panel is a "foreign or international tribunal" under the statute.[24] The Fourth Circuit followed the Sixth Circuit's[25] lead, issuing its *Servotronics* opinion in March 2020. In that case, Servotronics sought testimony from three Boeing employees residing in South Carolina in connection with a U.K. private commercial arbitration between Servotronics and Rolls-Royce. The latter sought indemnification from Servotronics, claiming that its valve was responsible for fire damage to a Boeing engine. Boeing opposed Servotronics' § 1782 application and raised arguments similar to those that the *Biederman* and *Bear Stearns* courts found persuasive, while Servotronics argued that the Supreme Court's *Intel* decision warranted a broader reading of "tribunal."

The Fourth Circuit reversed the district court's ruling that the arbitral panel was not a "foreign tribunal" for purposes of § 1782 and remanded so the district court could conduct further proceedings on Servotronics' § 1782 application. The court concluded that the statute's plain language and legislative history, as analyzed by the Supreme Court in *Intel*, manifests Congressional intent to expand the scope of U.S. assistance in resolving foreign disputes. The court noted that the 1964 amendments removed the words "in any judicial

proceeding pending in any court in a foreign country" and replaced them with the phrase "in a proceeding in a foreign or international tribunal."[26] It also cited and parenthetically quoted the same law review article authored by Professor Smit that the Supreme Court relied on (in dicta) in *Intel*. In holding that an "international tribunal" includes private arbitration, the Fourth Circuit concluded that Boeing's arguments reflected too narrow an understanding of the term "tribunal" and of arbitration itself.

The court explained that the FAA, which provides less government regulation and oversight than the analogous U.K. Arbitration Act, does involve the government because it requires courts to compel arbitration, oversee proceedings, issue summonses and, ultimately, enforce arbitral awards. The court therefore concluded that the U.K. arbitral tribunal would meet the more restrictive definition of "foreign or international tribunal" advanced by Boeing even if the court applied it. In reaching this conclusion, the court expressed disapproval with a definition of "tribunal" that would only include "entities acting with the authority of the State."[27] Under the Fourth and Sixth Circuits' holdings, district courts in these circuits now have discretion to order discovery from persons residing in the district for use in private international arbitration.

Parties have invoked § 1782 in the context of insurance and reinsurance arbitrations, with varying levels of success.[28] In *CMPC*, Brazilian entity CMPC Celulose Riograndense LTDA suffered damage to one of its boilers and sought insurance coverage from Mapfre, which was denied. In anticipation of private foreign arbitration with Mapfre, CMPC filed *ex parte* a § 1782 application in the U.S. District Court for the District of Rhode Island, seeking communications between Mapfre and its reinsurer, FM Global. The district court granted the application and then denied a motion to quash the subpoena. On the issue of "tribunal," the district court cited the legislative changes discussed in *Intel*, refused to follow *Biedermann* and *Bear Stearns* as pre-*Intel* decisions, and cited several cases from the First Circuit that deemed private arbitral bodies as falling within the term "tribunal" in Section 1782.

In *Norfolk Southern*, the movant sought an order requiring the former counsel of the opposing party to appear for a deposition in Chicago in connection with an ongoing reinsurance arbitration in London.[29] After recapping *Intel*, *Bear Stearns*, and *Biedermann*, the court cited several decisions from other district courts and acknowledged that "the majority of courts" to consider the issue post-*Intel* held that "private arbitral tribunals fall within the ambit of § 1782."[30] The court nevertheless broke with this apparent trend and concluded that the arbitration at issue was outside the scope of § 1782, reasoning that the Supreme Court's reference to "arbitral tribunals" in *Intel* includes state-sponsored arbitral bodies but excludes purely private arbitrations.[31] The court thus did not read *Intel's* dicta and citation to Professor Smit as an endorsement of § 1782's applicability to all arbitral proceedings, but instead concluded that discovery may be appropriate in cases where the "adjudicatory power" of an arbitral tribunal is more evident.[32]

Part IV: Is Discovery Under § 1782 a Runaway Train?

At this point, the reader may be wondering whether these decisions have the potential to undermine international arbitration's "norm" by permitting limitless discovery and generating tedious discovery disputes with U.S. parties. There is, however, good reason to believe that there are sufficient guardrails in place to prevent § 1782 from becoming a runaway train that undermines one of the central tenets of international arbitration.

It is important to remember that district courts' analyses under § 1782 involve a two-step process. First, the statutory requirements of § 1782 must be satisfied, and given the novel circuit split, the threshold issue will often be whether the proceeding at issue is taking place before a "foreign or international tribunal."[33] If the statutory requirements are met, courts then engage in a discretionary analysis guided by the four *Intel* factors, which include consideration of whether the foreign tribunal would be receptive to U.S. federal court judicial interference. This factor is often outcome-determinative, and courts do not look kindly on parties to foreign proceedings who attempt to circumvent a tribunal's authority by requesting court assistance under § 1782.[34] It is, therefore, difficult to imagine a scenario where a district court would grant discovery when the parties to an arbitration have agreed to limited discovery or where the tribunal would be unreceptive to court assistance.

The *Servotronics* and *Intel* courts emphasized that § 1782 discovery is not mandatory and will be limited by district court discretion. The Fourth

Circuit reasoned that district courts function "effectively as surrogates" for foreign tribunals in evaluating whether to grant discovery "for use" in foreign proceedings. In performing this surrogacy function, district courts should keep the purposes of international arbitration in mind, as the *Intel* factors disfavor attempts to avoid foreign restrictions on broad pre-trial discovery. Whether district courts will faithfully apply the *Intel* factors remains an open question, but the discretionary guidelines laid out by the Supreme Court and plain text of § 1782 should prevent it from becoming a runaway train.

The circuit split, the importance of international arbitration, and the U.S. Supreme Court's recent history of ruling on arbitration matters in practically every term will likely land the issue of § 1782 applicability to international private commercial arbitrations in the nation's highest court. For now, foreign parties will advance arguments for discovery from U.S. parties whenever such discovery may be advantageous to the claims in the foreign proceedings. The U.S. parties, in turn, should carefully consider the precedent in the circuit where they are located and craft arguments against discovery consistent with the discretion retained by the district courts.

NOTES

1 To date, only a few courts have considered such applications in the context of underlying international insurance/reinsurance disputes. See *In re CMPC Celulose Riograndense LTDA.,* No. CV 19-MC-00005 WES, 2019 WL 2995950, at *3 (D.R.I. July 9, 2019) (arbitration before Arbitration and Mediation Center of Brazil-Canada Chamber); see also *In re Arbitration between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd.,* 626 F. Supp. 2d 882, 883 (N.D. Ill. 2009)) (London-based reinsurance arbitration). For discussion of these cases, see text accompanying notes 28-32.

2 Robertson, Ann, and Scott Friedman. 2015. Coming to America: The Use of 28 U.S.C. § 1782. *Journal of Arbitration Studies,* 25(3): 59, 63.

3 28 U.S.C. § 1782(a) (2018).

4 *In re Schlich,* 893 F.3d 40, 46 (1st Cir. 2018) (citing and quoting *Intel Corp. v. Advanced Micro Devices,* Inc., 542 U.S. 241 (2004) and 28 U.S.C. § 1782).

5 *Id.* The *Intel* decision clarified the meaning of "tribunal" and "for use" under the statute, but the circuit split discussed later in this article centers on the proper interpretation of the former. See Sections II, III, infra.

6 *Id.*

7 *Id.*

8 *Intel Corp.,* 542 U.S. at 246.

9 *Id.* at 246-47.

10 *Id.* at 257-58 (quoting S. Rep. No. 1580, 88th Cong., 2d Sess., 7 (1964)).

11 *Id.* (quoting Smit, International Litigation 1026–1027, and nn. 71, 73) (emphasis added).

12 *Id.* at 259.

13 *Id.; In re Schlich,* 893 F.3d 40, 46 (1st Cir. 2018) (quoting *Intel* and analyzing the Intel factors).

14 *Nat'l Broad. Co. v. Bear Stearns & Co.,* 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l,* 168 F.3d 880 (5th Cir. 1999).

15 *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa,* 341 F. App'x 31, 33 (5th Cir. 2009) (rejecting argument that Intel overturned circuit precedent); *In re Dubey,* 949 F. Supp. 2d 990, 995 (C.D. Cal. 2013) (concluding that Intel did not overturn precedent holding that private arbitrations do not fall within the scope of § 1782).

16 *Nat'l Broad. Co. v. Bear Stearns & Co.,* 165 F.3d 184 (2d Cir. 1999).

17 *Republic of Kazakhstan v. Biedermann Int'l,* 168 F.3d 880 (5th Cir. 1999).

18 *Bear Stearns,* 165 F.3d at 190 (citing H.R. REP. NO. Rep. No. 88–1580, at 3788–89 (1964)).

19 *Biedermann,* 168 F.3d at 882.

20 *Id.*

21 9 U.S.C. § 7 (2018).

22 *Bear Stearns,* 165 F.3d at 191.

23 *Biedermann,* 168 F.3d at 883.

24 See *Servotronics, Inc. v. The Boeing Co.,* No. 18-2454 (4th Cir. 2020); *In re Application to Obtain Discovery for Use in Foreign Proceedings,* 939 F.3d 710 (6th Cir. 2019).

25 The Sixth Circuit opinion largely mirrors the rationale of the Fourth Circuit in *Servotronics,* with the court reasoning that the ordinary meaning of "tribunal" should apply and that the scope of § 1782 is not limited to state-sponsored arbitration. The court took issue with the Second and Fifth Circuits' reliance on, and interpretation of, the statute's legislative history and rejected policy arguments that a broad interpretation of § 1782 would undermine the central purposes of commercial arbitration or create illogical inconsistency with the FAA.

26 *Servotronics,* No. 18-2454 at 8.

27 Id. at 11.

28 See *In re CMPC Celulose Riograndense LTDA.,* No. CV 19-MC-00005 WES, 2019 WL 2995950, at *3 (D.R.I. July 9, 2019).

29 *In re Arbitration between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd.,* 626 F. Supp. 2d 882, 883 (N.D. Ill. 2009).

30 *Id.* at 884.

31 *Id.* at 885 (citing *Republic of Kazakh-*

stan v. Biedermann Int'l, 168 F.3d 880, 882 (5th Cir. 1999)).

32 *Id.* (distinguishing UNCITRAL arbitrations and the Directorate–General for Competition addressed in Intel from purely private arbitration).

33 Material sought must be relevant to meet the "for use" prong. See *Mees v. Buiter,* 793 F.3d 291, 299 n.10 (2d Cir. 2015).

34 See, e.g., *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa,* 341 F. App'x 31, 32 (5th Cir. 2009) (where Swiss arbitral tribunal was unreceptive to § 1782 discovery efforts and district court noted that "even if it did have the authority under § 1782, 'it would not [grant the application], out of respect for the efficient administration of the Swiss arbitration.'")

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A Door to Discovery in Aiding Foreign-Seated Arbitrations

By Ann Ryan Robertson, C.Arb, Paul J. Neufeld, PhD, FCIArb, and Ernesto R. Palomo

In insurance or reinsurance disputes, it is often the case that key witnesses (e.g., current or former employees, brokers, intermediaries, or underwriting agents) and documents are scattered among different countries. The taking of evidence abroad may be crucial to the fair resolution of the dispute. The vehicle for obtaining evidence in the United States for use in a foreign-seated arbitration is 28 U.S.C. § 1782. There is, however, a deep divide among U.S. courts regarding whether § 1782 is available in aid of private commercial arbitrations.

The issue revolves around whether § 1782's use of the term "foreign tribunal" encompasses private commercial arbitration tribunals, with the Fourth[1] and Sixth[2] Circuits of the U.S. Courts of Appeals taking an expansive view of the definition. In those circuits, discovery from a non-party is available in aid of a private commercial arbitration if the applicant satisfies the mandatory and discretionary factors set forth in *Intel Corporation v. Advance MicroDevices, Inc.*[3]

Recently, the Court of Appeal of England and Wales grappled with the converse question: May an English court order discovery of a non-party in aid of a private commercial arbitration seated in New York? The answer is "yes."

At issue in *A and B v. C, D, and E*[4] was specifically whether Section 44(2)(a) of the Arbitration Act of 1996 ("Act") empowered an English court to order a non-party resident of England to provide a deposition for use in a New York arbitration. The New York-seated arbitration involved a contract dispute between petitioners A and B and respondents C and D. During the arbitration, A and B sought evidence from non-party E, who was a lead negotiator for the contracts at issue in the arbitration.

Non-party E refused to travel to New York to give evidence. The New York tribunal, in the face of that refusal, permitted A and B to seek an order from the English court to take non-party E's deposition. Although the English lower court denied A and B's application based on prior authority, it noted, "I can see considerable force in the arguments advanced in favour of the view that the jurisdiction under s.44 could, in an appropriate case, be exercised against a non-party."

The Court of Appeal undertook a detailed analysis of the interplay among Sections 1, 2, 4, 38, 43, 44, and 82 of the Act. The court reached the conclusion that Section 44(2)(a) of the Act gives a court the power to make an order for the taking of evidence by way of deposition from a non-party witness in aid of a foreign arbitration.

The court noted two main limitations on this power. The first limitation is

the opening words of section 44(1): "unless otherwise agreed by the parties." The second limitation is found in Section 44(4) of the Act:

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

In this instance, there was no agreement of the parties limiting the court's power, and notice to the parties and permission from the tribunal had occurred. Because these thresholds were satisfied, nothing restricted the court's power "to make whatever Order in relation to the taking of evidence from witnesses it could have made in civil proceedings in the High Court or the county court, which clearly includes the power under CPR 34.8 to make an Order for evidence to be taken by deposition." Thus, the English Court of Appeal, like the Fourth and Sixth Circuits, held that evidence may, in some circumstances, be procured from a non-party in aid of a foreign commercial arbitration.

The use of § 1782 in U.S. courts has seen rapid growth. Whether the English courts will experience the same growth based on Section 44(2)(a) remains to be seen. What is known is that there now exists a vehicle on both sides of the Atlantic potentially to obtain discovery for use in foreign commercial arbitrations.

Ironically, parties in arbitral proceedings in the United States may be in better position to obtain pre-hearing discovery from a non-party located in England than from a non-party located within the U.S. Indeed, most courts have held that § 7 of the Federal Arbitration Act—which gives arbitrators the authority to issue subpoenas to third-party witnesses—does not permit pre-hearing discovery in aid of arbitration.[5] The majority rule is that arbitrators can compel non-parties to attend the arbitration hearing, but cannot force a party to participate in pre-hearing discovery.[6]

NOTES

1. *Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209 (4th Cir. 2020).

2. *Abdul Latif Jameel Transportation Co. v. FedEx,* 939 F.3d 710 (6th Cir. 2019).

3. *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004). There are four threshold requirements: (1) the request must be made "by a foreign or international tribunal" or by "any interested person," and an "interested person" need not be a litigant; (2) the request must seek evidence, whether it be the "testimony or statement" of a person or the production of "a document or other thing"; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance. In addition, there are five discretion factors to consider even if the four threshold requirements are met, to wit: (1) Is the person from whom discovery sought a participant in the foreign proceeding?; (2) Considering the nature and character of the foreign proceeding, is judicial assistance appropriate?; (3) Will the foreign government, court or agency be receptive to U.S. federal-court judicial assistance?; (4) Is the discovery request a veiled attempt to avoid foreign evidence-gathering restrictions or other policies?; and (5) Is the request unduly intrusive and burdensome?

4. *A and B v. C, D, and E* [2020] EWCA Civ 409 (19 March 2020).

5. 9 U.S.C. § 7 provides in pertinent part: "The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."

6. *In Managed Care Advisory Group, LLC v. Cigna Healthcare, Inc.,* 939 F.3d 1145 (11th Cir. 2019), the Eleventh Circuit joined the Second, Third, Fourth, and Ninth Circuits in holding that § 7 of the Federal Arbitration Act allows arbitrators to compel a non-party witness to attend an arbitration hearing and bring documents with them, but does not permit subpoenas for pre-hearing depositions or for the production of documents.

Ann Ryan Robertson, C.Arb, is the President-elect of the Chartered Institute of Arbitrators. She serves as counsel and arbitrator in a variety of complex business disputes and is a member of the ICDR, HKIAC, CPR, AIAC, BVI IAC, and KCAB panels of neutrals.

Paul J. Neufeld, PhD, FCIArb is a partner in Locke Lord's Houston and London offices, where his practice focuses on international arbitration and litigation in a wide range of industries, including energy, defense, and construction.

Ernesto R. Palomo has been litigating and arbitrating complex insurance and reinsurance disputes for nearly two decades. His experience includes representation of both insurers and reinsurers in matters concerningbodily injury and property damage claims arising in the context of natural disasters, and reinsurance disputes concerning settlement allocations and the follow-the-fortunes and follow-the-settlements doctrines.

Does a Withdrawn Witness Necessitate a Postponed Hearing?

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.

Eaton Partners, LLC, an investment placement agent, entered into a placement agreement with Azimuth Capital Management IV, Ltd. Eaton filed a demand for arbitration alleging that Azimuth breached the placement agreement by failing to pay Eaton certain fees and accrued interest.

The arbitrator entered an order, with approval of the parties, requiring each party to submit a list of all fact witnesses expected to be called at the hearing. Azimuth disclosed three witnesses, including Jason Montemurro, a partner at Azimuth.

Case: *Eaton Partners, LLC v. Azimuth Capital Mgmt. IV Ltd.,* No. 18 Civ. 11112 (ER) (S.D.N.Y. Oct. 18, 2019)

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

Date decided: October 18, 2019

Issue decided: Whether an arbitrator's failure to postpone a hearing when a witness becomes unavailable provides a basis to vacate the arbitration award

Submitted by: Polly Schiavone, vice president, Swiss Reinsurance America Holding Corp.

Right before the first arbitration hearing, Montemurro became unavailable because of a family death. The arbitrator discussed several alternatives with the parties, including video testimony and adjournment. Azimuth ended up withdrawing Montemurro from the witness list, and the initial hearing went forward. At a later hearing, Azimuth sought to introduce a new rebuttal witness, and the arbitrator denied that request.

The arbitrator eventually issued an award in favor of Eaton, and Eaton filed a petition to confirm the award. Azimuth moved to vacate the award, arguing that the arbitrator was guilty of misconduct for (1) failing to postpone the hearing when Montemurro became unavailable and (2) refusing to accept Azimuth's rebuttal witness. Azimuth also asserted that the arbitrator showed manifest disregard for the law and improperly favored Eaton in her interpretation of the placement agreement. Lastly, Azimuth asked the court to enter judgment in its favor, citing breach of contract and various other legal theories.

In its discussion, the court cites the high burden of proof required to vacate an arbitration award and points out that misconduct can rise to the level of vacatur when and if an arbitrator refuses to accept evidence from a key witness. In addition, the court points out that it has no authority to review an arbitrator's decision on the merits.

A review of the arbitration record revealed that Azimuth never made a valid request for postponement of the hearing and that, when withdrawing Montemurro as a witness, Azimuth's counsel stated, "I don't think that he is going to be needed." Also, Azimuth failed to cite any new allegations that the rebuttal witness was intended to address. Finally, the court found that there was no basis in the record to support Azimuth's allegations regarding interpretation of the placement agreement.
Azimuth's motion to vacate the arbitration award was denied, and Eaton was awarded reasonable attorneys' fees.

Polly Schiavone is a Vice President in the Armonk, New York Property Casualty Business Management Unit at Swiss Reinsurance America Holding Corporation ("Swiss Re"). She currently manages asbestos, pollution and health hazard reinsurance claims ceded to Swiss Re by one of its largest clients.

Larry Schiffer Launches Independent Legal and Consulting Practice

On August 1, 2020, Larry Schiffer launched his own independent legal and consulting practice, providing insurance and reinsurance disputes legal services, insurance and reinsurance consulting services, expert witness services, and mediation and arbitration services. He can now be reached at lpschiffer@yahoo.com or 516-650-1827. He also launched a new blog, Schiffer on Re-Insurance, which can be found at https://schifferonreinsuranceblog.wordpress.com/.

Mintz Adds Five to Insurance and Reinsurance Practice in Washington, D.C., and New York

Suman Chakraborty

Ellen MacDonald Farrell

Deirdre G. Johnson

Paul W. Kalish

Elaine Panagakos

Law firm Mintz has added a group of five practitioners to its Insurance and Reinsurance Practice.

Deirdre G. Johnson, Paul W. Kalish, Suman Chakraborty and Ellen MacDonald Farrell joined as members, and Elaine Panagakos joined as special counsel. All five attorneys previously practiced at Squire Patton Boggs and will practice out of the firm's Washington, D.C. office, with the exception of Chakraborty, who is based in New York.

Johnson is a litigator who focuses on representing insurers, reinsurers and captive insurers in coverage disputes and handling domestic and international arbitration proceedings and litigation involving insurance and reinsurance matters. She represents companies in disputes concerning life reinsurance treaties and defends public corporations in class action lawsuits, securities litigation and U.S. Securities and Exchange Commission enforcement actions.

In the reinsurance/insurance litigation side of her practice, Johnson has experience with all types of coverage disputes, including those involving professional liability, life and health, variable annuity, general liability, surety, product liability, first-party property and environmental matters. She has represented numerous clients in disputes arising under policies on the Bermuda form. Her work also encompasses guiding clients through U.S.-based, Bermuda and London arbitration proceedings.

Kalish is a litigator with more than 30 years of experience serving the insurance and financial services industries. He focuses on insurance and reinsurance matters, frequently representing clients in coverage disputes involving tort and environmental claims, class actions related to claims handling practices, international arbitrations and liquidations.

Since 2000, Kalish has also served as counsel for the Coalition for Litigation Justice Inc., a nonprofit established by property and casualty insurers to address abuses and inequities in mass tort litigation. He also advises insurers and captive insurers on new insurance products and policy language.

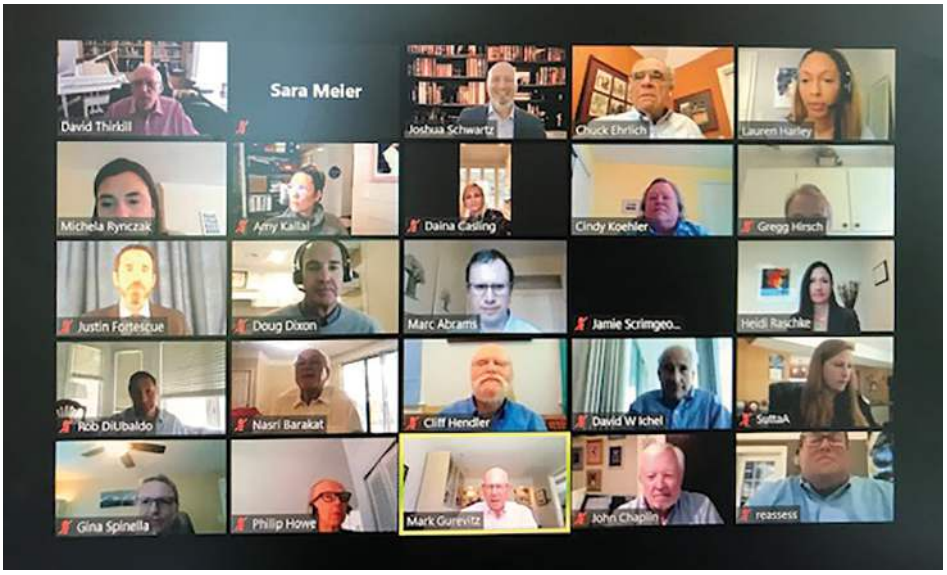
Chakraborty is a litigator with decades of experience advocating for major insurers and reinsurers in high value arbitrations and in state and federal court litigation across the country. His disputes practice confronts a range of issues affecting clients in both the life and property and casualty industries.

ARIAS Goes Virtual… and Succeeds!

When the COVID-19 pandemic intensified shortly ahead of our Spring Seminar, the Education and Member Services Committees quickly responded by revamping the Spring Seminar into a two-part virtual event with a focus on COVID-19 insurance and reinsurance issues, including potential life disputes and application of hours clauses in other cat contexts. To address the critical networking component of the Spring Seminar (and ARIAS•U.S. events in general), the team put together ARIAS's first virtual networking breakout sessions. The Spring Seminar was very successful and included more than 150 attendees—an ARIAS•U.S. Spring Seminar record!

In the wake of the Spring Seminar, and based on positive feedback from the ARIAS•U.S. community, the Member Services and Arbitrator Services Committees co-sponsored a virtual networking event in August that included two 30-minute networking breakout sessions for all attendees. This event included our first "ARI Talk" (akin to a Ted Talk) on the topic of social inflation, presented by Jane Mandigo of Swiss Re and Michael Olsan of White & Williams. More than 100 members registered for this free event.

Be on the lookout for more ARI Talks, virtual networking events, and virtual programming as we adapt to working during the COVID-19 pandemic!



> "Speakers were knowledgeable, very well prepared and delivery of content was clear. The networking session in which I participated, led by Seema Misra, was one of the best networking sessions I have joined in 15 years."

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