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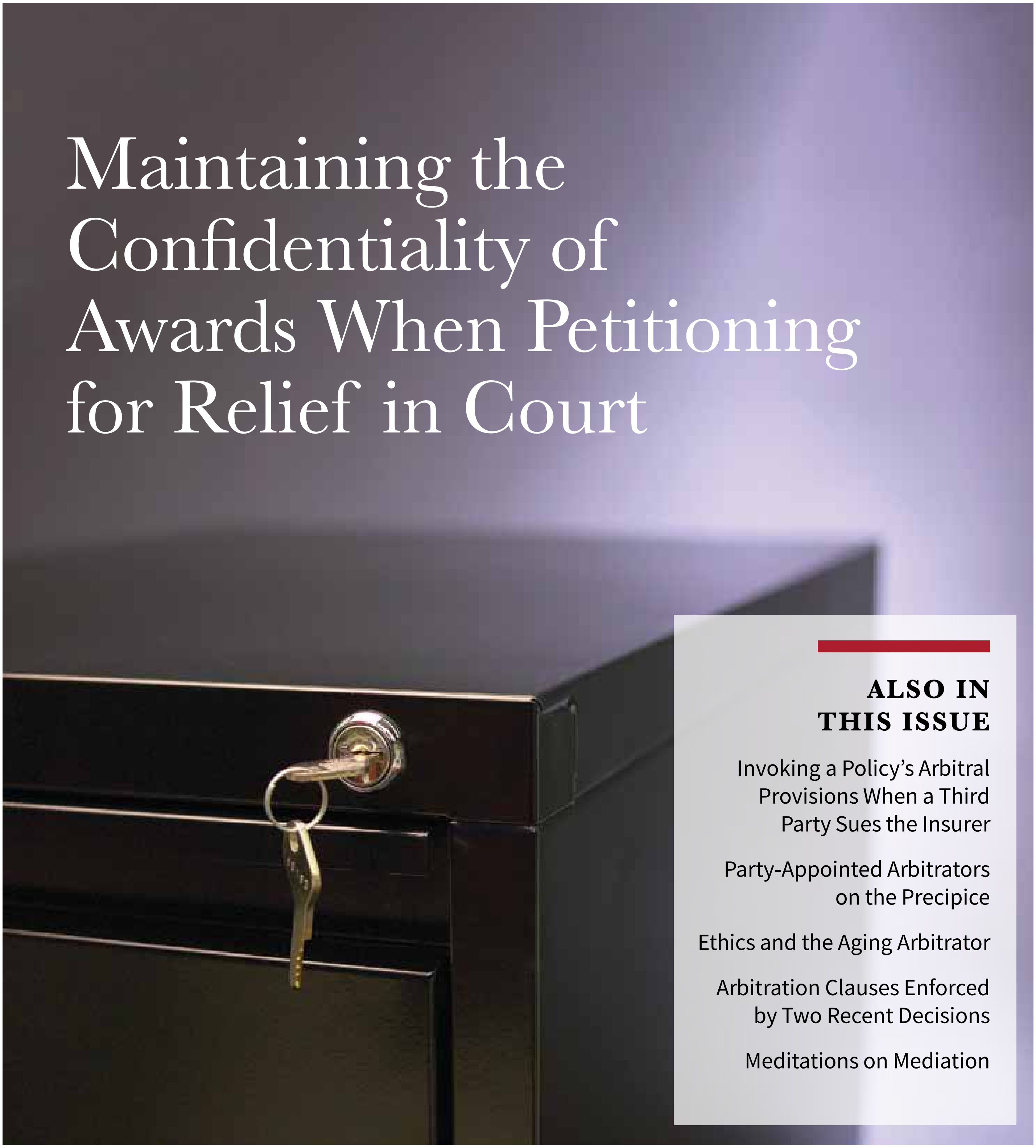

Maintaining the Confidentiality of Awards When Petitioning for Relief in Court

ALSO IN THIS ISSUE

Q3 • 2021

TABLE OF CONTENTS

FEATURES

2 Maintaining the Confidentiality of Awards When Petitioning for Relief in Court
By Amy J. Kallal and Andrea Fort

ALSO IN THIS ISSUE

BACK COVER

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

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By the time you read this, summer will almost be over and we will be getting ready for our first live meeting in a while in November (or so we hope—please get vaccinated!). But before we turn to meetings, we have several interesting and useful articles for you to read.

First up is an excellent article on the confidentiality of arbitration awards written by Amy Kallal and Andrea Fort of Mound Cotton Wollan & Greengrass LLP. Titled "Maintaining the Confidentiality of Awards When Petitioning for Relief in Court," the article discusses recent cases involving efforts to obtain access to arbitration awards filed as part of petitions to confirm or vacate. This is a big issue, because some courts have allowed third-party access to awards just because the parties filed the award in court. This, of course, is not what the parties signed up for when they entered into a private arbitration with a confidentiality agreement.

Staying with the arbitration theme, Ed Lenci of Hinshaw & Culbertson LLP provides us with a deep dive into the complex world of arbitration under the New York and Panama Conventions. His article, "Invoking a Policy's Arbitral Provisions When a Third Party Sues the Insurer," discusses whether an arbitration provision can be invoked when a claimant sues an insured's insurer.

Following Ed's article is a piece I wrote, "Party-Appointed Arbitrators on the Precipice," that sets out my views on party-appointed arbitrators in the non-neutral system still being used in most reinsurance arbitrations. I discuss the limits on

party-appointed advocacy and what predisposition really means. All the issues I examine go away if parties choose the Neutral Rules.

Next is an insightful and thought-provoking article from arbitrator Mark Megaw on an ethics issue that we rarely think about. In "Ethics and The Aging Arbitrator," Mark, who is a member of the ARIAS Ethics Committee, discusses the relationship between age-related issues and arbitrator ethical considerations. This is a must-read for those of us of a certain age.

Following Mark's article is a discussion of some recent cases coming out of the First Circuit Court of Appeals on arbitrability. In "Arbitration Clauses Enforced by Two Recent Decisions," arbitrator Philip Howe digests two recent cases where the court enforced arbitration provisions in contracts and how those decisions can inform arbitrators faced with arbitrability questions.

This issue also brings us an article about mediation in The Arbitrator's Corner. Written by arbitrator John Chaplin, "Meditations on Mediation" discusses some excellent reasons why mediation should be used more frequently for reinsurance disputes.

Now is a great time for you to join these authors and submit your own article to the *Quarterly*. Submissions are welcomed on all topics related to insurance and reinsurance arbitrations and mediations. Don't let your thought leadership languish. We want to hear what you have to say. Send us your articles and you, too, will see your name on these pages.

A final word about the passing of Dick White, who left us in June. Dick was the treasurer of ARIAS for many years and a well-known arbitrator. Some of you may know him from his days at Crum & Forster and Skandia; others may know him from his role as deputy liquidator of Integrity Insurance Company. Dick became deputy liquidator while my firm was outside reinsurance counsel for Integrity. I had the pleasure of working very closely with Dick for several years. Dick was one of the smartest, most creative and nicest persons you could meet. He was selfless and always willing to help those less fortunate than himself. He will be missed.

Larry P. Schiffer
Editor

Maintaining the Confidentiality of Awards When Petitioning for Relief in Court

By Amy J. Kallal and Andrea Fort

In current arbitration practice, a panel's issuance of a final award does not necessarily mean the end of proceedings between the parties. One or both parties may choose to go to court to exercise rights under the Federal Arbitration Act, sometimes in an attempt to vacate the award but, more often, simply to have it confirmed so that it has the force of a court judgment. The rationale for invoking court assistance at the end of a private, confidential arbitration differs from case to case, the most straightforward being to facilitate collection of the award or to have the ability to enforce compliance. Other considerations may also come into play, but they should always be informed by the fact that it is increasingly difficult to ensure that an award will remain confidential once the court's jurisdiction is invoked.

For at least the past decade (if not longer), practitioners representing clients who elect to seek judicial confirmation have been keenly aware that filing a petition in court brings with it the risk that the award may become public knowledge, an outcome that is arguably at odds with the reinsurance industry's tradition of confidential and commercial dispute resolution. More often than not, courts across the country will deny requests to seal an award, unseal awards *sua sponte* and even grant motions to unseal by third-party intervenors (usually another company with exposure to the same claim or reinsurance contract). This last scenario may be of particular concern to a cedent who has "lost" an arbitration with one reinsurer but still seeks to collect from other reinsurers on the same claim.

With the unfavorable award made public, those other reinsurers now can attempt to introduce the decision into the record in their own arbitration with the cedent and argue that it should be given preclusive effect by the arbitrators.

It is a debate unto itself whether this new reality is a positive development—for example, by ensuring the same "fairness" inherent in the judicial process by preventing a party from taking multiple bites at the apple under the same treaties for the same claim—or just another example of how reinsurance arbitration has strayed from its original aim of ensuring efficient, businesslike, and (importantly) confidential dispute resolution. Whatever one's view, parties and their counsel should keep in mind all possible ramifications of simply filing a petition to confirm an award (even if no action is further taken in the proceeding), as recently seen in the Third Circuit.

The *Penn National* Award and Unsealing

Earlier this year, a long-running dispute between Pennsylvania National Mutual Casualty Insurance Company and one of its reinsurers, Everest Reinsurance Company, ended with the unsealing of an award from an arbitration to which Everest had not even been a party. Everest was able to obtain this result even though (1) Penn National had withdrawn its petition to confirm the award mere days after filing and (2) the district court had made no substantive decision based on the award or relied on it in any way.

After the dispute made its way to the Third Circuit for a second time, the court held that the arbitration award was a judicial record to which a common law right of access applied and that Penn National had not demonstrated a specific harm to overcome the presumption of public access [1]. Following remand to the district court, the award was finally unsealed. Although not binding precedent for the Third Circuit (since the decision was not issued by the full court) [2], *Penn National* is nevertheless a significant case on the unsealing of arbitration awards.

The award concerned Penn National's cession of lead paint claims under certain excess-of-loss treaties subscribed to by various reinsurers. Two of the reinsurers on the treaties, New England Reinsurance Corporation and Hartford Fire Insurance Company, did not accept Penn National's reinsurance presentation, leading to arbitration and ultimately an award in favor of the two Hartford companies in March 2018 [3]. Although Penn National lost its bid for any reinsurance recoveries, and a panel majority concluded that Penn National's cession methodology was "unreasonable" and violated a policy limits warranty and that the Hartford companies were entitled to attorneys' fees, Penn National filed a petition in the Middle District of Pennsylvania in April 2018 to confirm the award.

Together with its petition to confirm, Penn National also filed an unopposed motion to seal the award, based on the terms of the standard ARIAS·U.S. form confidentiality agreement, which the district court granted. A few days later, Penn National withdrew its petition.

The dispute with Everest began after Penn National subsequently demanded arbitration against Everest on the same claims and treaties that were at issue in the proceeding with the Hartford companies. Penn National and Everest disagreed about the interpretation of a consolidation provision in the treaties, whereby reinsurers were to "constitute and act as one party," and also as to whether their dispute should be decided by the original panel in the Penn National-Hartford arbitration or by a new panel.

Both parties sought relief in district court in November 2018 with competing motions to compel arbitration. Two months later, in January 2019, Everest also moved to intervene in the original confirmation proceeding and to unseal the award issued in the Penn National-Hartford arbitration. The district court allowed Everest to intervene but denied the motion to unseal. Everest appealed the decision, together with a related order granting Penn National's petition to compel arbitration.

In December 2019 [4], the Third Circuit vacated the district court's order denying the motion to unseal, finding that the lower court erred by using the factors set out in *Pansy v. Borough of Stroudsburg*, 23 F. 3d 772 (3d Cir. 1994), which apply to orders preserving confidentiality of documents produced in discovery under the Federal Rules. These factors include: "(1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public" [5].

Instead, the Third Circuit directed that the relevant analysis should follow its 2019 *Avandia* decision [6], which clarified the standard of review when discovery materials are filed as court documents. This standard is "the more rigorous common law right of access," which not only recognizes "fewer reasons to justify the sealing of court records," but also "begins with a presumption in favor of court access" [7]. On remand, the district court granted Everest's motion to unseal and initially also denied Penn National's motion to stay the unsealing pending appeal. Following a motion for reconsideration, a stay was granted while an appeal was taken.

Once again before the Third Circuit, Penn National argued that the award was not a judicial record and thus not subject to a presumptive common law right of access. Everest countered that under clear Third Circuit precedent, a non-discovery document, like the arbitration award at issue, becomes a judicial record upon its filing with a court. Everest further argued that Penn National had failed to make the requisite showing of a clearly defined and serious injury to rebut the presumption of access.

The Third Circuit sided with Everest, citing *Avandia* to explain that the common law right of access "attaches to judicial proceedings and records" [8]. The court further noted that it had rejected the test used in other circuits to determine whether a document is a judicial record, i.e., a test that turns on the use a court has made of a document.

In the Third Circuit, the relevant issue is whether a document "found its way into the clerk's file," and once Penn National filed the award it had become a judicial record, regardless of what use (or not) the district court had made of it [9]. The Third Circuit also rejected Penn National's arguments as to the specific harm it would sustain if the award was unsealed, finding that an affidavit by one of its officers "assert[ing] that other reinsurers might choose to forego paying Penn National and contest their contractual obligation to pay if they learned of the contents in the arbitration award" did not amount to a "clearly defined injury" [10]. This was because the averments in the affidavit did not allow for a determination of "how many relationships could be impacted, the amount of money that could be at stake, the types of actions other parties may pursue, or the likelihood that any such actions would be successful" [11].

Prior Unsealing Cases with Intervenors

The *Penn National* case is not the first, and is unlikely to be the last, decision showing judicial antipathy to sealing what the courts appear to view as simple business records subject to public disclosure once a party has invoked the judicial system. Of particular relevance to the reinsurance industry, the unsealing of an award is a likely result even where the effort is led by a third-party intervenor seeking a tactical advantage in its own dispute with a party. In 2013, for example, two cases resulted in unsealing in the Southern District of New York, a common venue for petitions to confirm.

In the cursory decision *Generali U.S. Branch v. Arrowood Indemnity*, the court unsealed a reinsurance arbitration award, *sua sponte* and without finding it necessary to even decide the intervenor's motion to unseal [12]. Citing the fact that the unreasoned award at issue was, by its terms, "not probative of either party's position," the court rejected arguments that disclosure of the document could cause any harm. A few months later, in *Eagle Star v. Arrowood Indemnity* [13], unsealing was granted despite the objections of both the cedent and reinsurer to the original arbitration.

The *Eagle Star* court first confirmed that the sealed arbitration award had become a judicial document when the petition to confirm was filed. The court further held that the award remained a judicial document, even though the parties later agreed to dismiss the proceeding: "Simply because the parties later filed a stipulation of dismissal does not mean that the parties did not invoke the judicial power upon the initial filing of these documents" [14]. Furthermore, the fact that the court had not decided the original petition to confirm or the cedent's motion to dismiss did not change the strong presumption of public access to the award. The award constituted the "heart of what the Court [had been] asked to act upon" [15].

Finally, the court considered competing factors weighing against the presumption of access, including the privacy interests of the parties objecting to disclosure, and found them insufficient to avoid unsealing. The original confidentiality agreement between the cedent and reinsurer was, according to the court, in itself not enough to establish the need for sealing; neither was the cedent's protest that disclosure of the award would compromise its position in other arbitrations, including an ongoing dispute with the intervenor seeking access to the award. Again, the court made clear that arbitration awards may be unsealed notwithstanding "the risk that [disclosure] will impair [plaintiff's] negotiating position with other reinsurers" [16].

Conclusion

Although apparently not a concern of the courts—whose analysis in unsealing cases focuses on longstanding principles of public access to judicial records—the potential commercial consequences of public disclosure of arbitration awards are clear to industry participants. Given the tradition of confidentiality in reinsurance arbitrations, judicial reluctance to sealing arbitration awards must be taken into account when a party to an arbitration files a petition in court seeking to confirm, vacate or otherwise challenge an award.

Parties should further consider that, at least based on the recent *Penn National* case, defeating a motion to unseal will likely require a strong showing of a "clearly defined injury." According to the Third Circuit's description of relevant factors (such as the amount of money at stake or the likelihood of success of other actions against a party), this could result in the disclosure of further information traditionally protected as proprietary and confidential.

NOTES

1 *Pennsylvania Nat'l Mut. Cas. Ins. Grp. v. New England Reinsurance Corp.*, 840 F. App'x 688 (3d Cir. 2020).

2 The decision is not contained in an official reporter and expressly notes that it is not binding precedent under the Third Circuit's Internal Operating Procedures because it was not heard by the full court. See I.O.P. 5.7 ("Citations. The court by tradition does not cite to its not precedential opinions as authority. These opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.")

3 Mound Cotton's Lloyd Gura, Amy Kallal, and Matthew Lasky represented the Hartford companies.

4 The Third Circuit upheld the district court's order compelling arbitration of the consolidation issue before a new panel. 794 F. App'x 213, 214 (3d Cir. 2019):

By asking us to send the consolidation question to the panel that decided the Hartford Arbitration, Everest invites us to prejudge that question and to disregard the express language of the agreement. But we are bound to enforce the agreement according to its terms and to compel the parties to follow the procedure they agreed to. Because of this, we can only compel arbitration of the consolidation issue before a new panel chosen according to the express terms of the agreement. Consistent with the agreement's terms, the two disputes must be consolidated if and only if: (1) a new panel determines that Everest's dispute is "the same" as the dispute at issue in the Hartford Arbitration, and (2) the panel that decided the Hartford Arbitration is still extant such that it can handle this new dispute.

5 *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (citing Pansy, 23 F.3d at 787-91).

6 *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 924 F.3d 662 (3d Cir. 2019). The *Avandia* decision was filed about two months after the district court's initial order.

7 *Id.* at 670.

8 See 840 F. App'x at 690.

9 *Id.* at 691 (internal citation omitted).

10 *Id.*

11 *Id.*

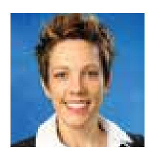
12 *Generali-U.S. Branch v. Arrowood Indem. Co.*, No. 13 CIV. 3401 (WHP), 2013 WL 12311009, at *3 (S.D.N.Y. July 11, 2013).

13 *Eagle Star Ins. Co. v. Arrowood Indem. Co.*, No. 13 CV 3410 HB, 2013 WL 5322573 (S.D.N.Y. Sept. 23, 2013).

14 *Id.*, at *2.

15 *Id.* (citing *Global Reins. Corp.-U.S. Branch v. Argonaut Ins. Co.*, Nos. 07 Civ. 8196, 07 Civ. 8350, 2008 WL 1805459, at *1 (S.D.N.Y. Apr. 21, 2008)).

16 *Id.*, at *3 (citing G*lobal Reins. Corp.-U.S. Branch v. Argonaut Ins. Co.*, Nos. 07 Civ. 8196, 07 Civ. 8350, 2008 WL 1805459, at *1-*2 (S.D.N.Y. Apr. 21, 2008)).



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Invoking a Policy's Arbitral Provisions When a Third Party Sues the Insurer

By Edward K. Lenci

The Supreme Court has extended the validity and expanded the scope of arbitral provisions in consumer and employment contracts. Now, last year's decision in *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC* [1] may pave the way for an insurer to successfully invoke a policy's arbitral provisions when a non-party to the policy sues the insurer (e.g., an injured plaintiff sues for bad faith) if (1) the arbitral provisions fall under either the New York [2] or the Panama Convention [3] and (2) applicable state law permits binding a non-signatory to a contract to its arbitral provisions.

In fact, construction is already underway. Although *Outokumpu* involved a business dispute, the U.S. Court of Appeals for the Eleventh Circuit, in *McCullough v. AIG Ins. H.K. Ltd.* [4], instructed a district court to consider *Outokumpu* in a case where an American woman, injured during a shore excursion from a Caribbean cruise ship, and her husband sued an insurer of one of the excursion's owners for bad faith, and the policy required arbitration in Hong Kong.

Application of the Conventions, and Procedures

As to *Outokumpu's* first requirement, a district court should conduct "a very limited inquiry" [5] and decide that one of the Conventions applies if: the parties' contract has arbitral provisions; those provisions require arbitration in the territory of a signatory to the relevant Convention; and either one party to the contract is not a U.S. citizen [6] or all parties to it are U.S. citizens and their "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states" [7].

The Conventions are treaties, so federal courts have "federal question" jurisdiction over disputes falling under them [8]. Moreover, for purposes of removal to a federal court, the enabling legislation of the Conventions permits removal "at any time before the trial" [9] and "[t]he procedure for removal of causes otherwise provided by law shall apply, ... the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal" [10]. If a court denies a motion to compel arbitration, the movant has the right to an interlocutory appeal to the Circuit Court of Appeals [11], an advantage the other party does not have [12].

> "The Conventions are treaties, so federal courts have 'federal question' jurisdiction over disputes falling under them"

Outokumpu

Article II(2) of the New York Convention requires "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" [13]. In *Outokumpu*, however, the Supreme Court explained that, in cases involving the Federal Arbitration Act, it had "recognize[d] that arbitration agreements may be enforced by nonsignatories [sic] through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel[,]'" [14] and it held simply that the same principle applies in cases falling under the New York Convention because the Convention did not prohibit it [15].

McCullough

The facts in *McCullough* were straightforward [16]. Lynn and William McCullough were passengers on a Royal Caribbean cruise ship. At their shore excursion in St. Lucia, they participated in a zip-line course, during which Lynn McCullough fell and sustained terrible injuries. The McCulloughs sued Royal Caribbean, various insurance companies, and the shore excursion's three owners in federal court in Florida. After the court denied the owners' motion for summary judgment, the owners and the McCulloughs arbitrated their dispute, the arbitrator entered an award in favor of the McCulloughs, and the court entered a final judgment against the excursion's owners, jointly and severally.

AIG Insurance Hong Kong Ltd. ("AIG HK") insured one of the excursion's owners. The policy had liability coverage of up to $5.15 million, but limited AIG HK's liability for "Bodily Injury and Property Damage." Based on the policy's exclusions, AIG HK disputed coverage, though it offered to fund a settlement for $350,000 based on its evaluation of its policyholder's exposure. In their Third Amended Complaint, the McCulloughs alleged, under Florida law [17], that AIG HK had acted in bad faith by failing to settle the McCulloughs' claims within the policy's limits. AIG HK moved to dismiss and compel arbitration based on the policy's dispute resolution provision:

Except as otherwise specifically provided, any dispute regarding any aspect of this policy or any matter relating to cover thereunder which cannot be resolved by agreement within six (6) months, shall first be referred to mediation at the Hong Kong International Arbitration Centre and in accordance with its Mediation Rules. If the mediation is abandoned by the mediator or is otherwise concluded without the dispute or difference being resolved, then such dispute or difference shall be referred *to and determined by arbitration at HKIAC and in accordance with its Domestic Arbitration Rules.*

The McCulloughs argued that they were not subject to that provision because their claim was for common law bad faith and they were not signatories to the policy. With respect to their first argument, the McCulloughs had not sought verification of coverage through litigation, so the district court held that, because there was no determination of coverage but merely a final judgment against the excursion's owners, a bad faith claim was premature. As to their second argument, AIG HK responded that the McCulloughs stood in the shoes of its policyholder, so their bad faith claim was subject to the dispute resolution provision. The court held that the New York Convention binds only a signatory to a contract. The decision the court followed was the Eleventh Circuit's in *Outokumpu Stainless USA, LLC v. Converteam SAS* [18], which the Supreme Court vacated and remanded, so the Eleventh Circuit vacated the court's order and remanded the case:

As noted above, the district court relied entirely on our decision in Outokumpu *in declining to grant AIG's motion to compel arbitration. ... However, after the district court decision in this case and after the briefing on appeal, the Supreme Court in* [Outokumpu]*, reversed our decision. ... Contrary to the Eleventh Circuit decision, the Supreme Court held that nothing in the New York Convention conflicts with the application of relevant equitable doctrines. ... Consistent with that Supreme Court ruling, we also vacate the judgment of the district court and remand for further proceedings not inconsistent with this opinion or the opinion of the Supreme Court in* Outokumpu *[19].*

Drafting an Enforceable Arbitral Provision

Various considerations apply when drafting arbitral provisions or deciding whether to include such provisions at all. Assuming that arbitral provisions will be in the policy, the following are some drafting tips in view of the Fifth Circuit's decision in *McCullough*.

It is worth reiterating that the insurer must choose an arbitral forum in one of the nations that is a signatory to either the New York or Panama Convention. Fortunately, there are many.

While the arbitral provision in *McCullough* is, of course, an excellent place to start, the drafter's work does not end there. As a practical matter, some judges go to great lengths to find a way, despite the Supreme Court's decisions of the last decade, not to enforce arbitral provisions against a party the judge perceives as "the little guy." The scope of the arbitral provision is, therefore, of utmost importance, because a judge inclined not to grant a motion to compel arbitration of a claim akin to the McCulloughs' will have a harder task if the arbitral provision is, within the bounds of applicable law, broad. The provision in *McCullough*, while broad, could be broader—for example, it could state as follows: "any dispute, controversy, claim, or difference, including one in tort or under a statute, regarding any aspect whatsoever of this policy, or arising out of or relating in any way to this policy, shall be resolved by binding arbitration."

"Arbitrability" is whether the dispute in question is subject to the arbitral provision in question. Given the chance that the lawsuit may be assigned to a judge hostile to enforcing the arbitral provision, it is a good practice to take the decision of arbitrability out of judicial hands altogether. However, to put the issue of arbitrability into the hands of the arbitrators—called "competence-competence" in some lands—there must be "clear and unmistakable evidence" that the parties intended that the arbitrators will decide arbitrability [20].

Fortunately, the rules of arbitral institutions around the world typically provide that the arbitrators decide arbitrability. Eleven federal Circuit Courts of Appeal—the Seventh Circuit has not yet addressed the issue—have held that an arbitral provision requiring arbitration before an arbitral institution whose rules provide that the arbitrators decide arbitrability is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability [21]. The arbitral provision in *McCullough* is a good template: any such dispute, controversy, claim, or difference "shall be referred to and determined by arbitration at [name of institution] and in accordance with [the institution's] [r]ules."

In fact, apropos of claims akin to those in *McCullough*, choosing to arbitrate before an arbitral institution, such as the HKIAC, would seem a much better approach than an ad hoc arbitration. A good arbitral institution provides the parties to the arbitration with a set of detailed rules and procedures that are well known to attorneys who practice in the area of international arbitration. This restricts an attorney's ability to create procedural mischief in the hope that the cost of dealing with the mischief will elicit a settlement. Additionally, a good arbitral institution assigns a case manager and has an administrator to help ensure that the arbitration proceeds smoothly and predictably, from soup to nuts.

Furthermore, while it is exceedingly difficult to overturn any international arbitral award, experience has shown that an award by a panel of an arbitration administered by a well-known, reputable arbitral institution stands a better chance of enforcement. Moreover, as readers of the ARIAS·U.S. *Quarterly* know, ad hoc arbitration of reinsurance disputes works (at least much of the time) because there are certain procedural customs and practices that, for the most part, the parties and counsel follow. Such would not likely be the situation in an ad hoc arbitration of a claim akin to that of the McCulloughs.

> “While it is exceedingly difficult to overturn any international arbitral award, experience has shown that an award by a panel of an arbitration administered by a well-known, reputable arbitral institution stands a better chance of enforcement.”

Of course, the drafter must work with or around (as the case may be) the following:

(1) about one-third of states prohibit or restrict the arbitration of insurance disputes or the inclusion of arbitral provisions in insurance policies;

(2) despite the Supremacy Clause [22], in the Second and Eighth Circuits, the Conventions do not preempt those laws or the McCarran-Ferguson Act;

(3) the Fourth and Fifth Circuits have reached a contrary conclusion; and

(4) district court decisions elsewhere go either way [23].

A review of more drafting considerations would be better presented in a webinar or at the next ARIAS·U.S. conference. Suffice to say, the canny drafter knows the applicable legal requirements and carefully tailors the language of the arbitral provisions to achieve the desired result: an enforceable agreement to arbitrate that binds certain third parties in an international context to arbitrate. The canny drafter does not rely on off-the-shelf arbitral provisions that may be decades old. In fact, given the pro-arbitration decisions of the U.S. Supreme Court in the last decade, old arbitral provisions are likely woefully outdated and may not afford the insurer the benefits of recent jurisprudence, including *Outokumpu*.

NOTES

1 *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, __U.S. __, 140, S. Ct. 1637, 207 L. Ed. 2d 1 (2020).

2 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958). The Convention is implemented at 9 U.S.C. §§ 201, et seq., as Chapter 2 of the U.S. Federal Arbitration Act (FAA).

3 The Inter-American Convention on International Commercial Arbitration (Panama City, January 30, 1975). The Panama Convention is implemented at 9 U.S.C. §§ 301, et seq., Chapter 3 of the FAA. The Convention was promulgated at the conclusion of the First Specialized Inter-American Conference on Private International Law

sponsored by the Organization of American States.

4 *McCullough v. AIG Ins. H.K. Ltd.*, 828 Fed. Appx. 704; 2020 U.S. App. LEXIS 33907, 2020 WL 6301357 (11th Cir. Oct. 28, 2020).

5 E.g., *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002).

6 E.g., *id.*

7 9 U.S.C. § 202; 9 U.S.C. § 302 (the Panama Convention incorporates, inter alia, 9 U.S.C. § 202 "as if specifically set forth herein, except that for the purposes of this chapter [9 USCS §§ 301 et seq.] 'the Convention' shall mean the [Panama Convention]."

8 28 U.S.C. § 1331 states that, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

9 9 U.S.C. § 205; 9 U.S.C. § 302 (the Panama Convention incorporates, inter alia, 9 U.S.C. § 205 "as if specifically set forth herein").

10 9 U.S.C. § 205.

11 9 U.S.C. § 16(a)(1)(c) ("an [interlocutory] appeal may be taken from … an order … denying an application under section 206 of this title to compel arbitration"). Interlocutory appeals in cases involving the Panama Convention are a bit convoluted because 9 U.S.C. § 16(a)(1) deals only with motions to compel under the New York Convention but not the Panama Convention. An interlocutory appeal for denial of a motion to compel arbitration under the Panama Convention can be founded under 9 U.S.C. §307, the residual provision of the enabling legislation. "Because Chapter 3 provides essentially no guidance to the district court with respect to the conduct of enforcement proceedings, a district court must turn to [9 U.S.C.] §4 for vital procedures, and §307 permits this borrowing [so] the application of §16 follows, because §16(a)(1)(B) is linked to §4." *Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado*, 771 F.3d 980, 989-90 (7th Cir. 2014), cert. denied, 576 U.S. 1055 (2015).

12 9 U.S.C. § 16(a).

13 Article 1 of the Panama Convention states that "[t]he agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications."

14 140 S. Ct. at 1643-44, 207 L. Ed. 2d at 10 (citations omitted).

15 140 S. Ct. at 1645, 207 L. Ed. 2d at 12.

16 *McCullough v. Royal Caribbean Cruises, Ltd., et al.*, Case No. 16-cv-20194, 2019 U.S. Dist. LEXIS 79338, 2019 WL 2076192 (S.D. Fl. May 10, 2019).

17 "In Florida, a bad faith action against an insurance company may be brought … by a third party whose claim against the insurance policy was the subject of alleged bad faith. … A bad faith claim may be brought by a third party absent an assignment from the insured. See id." *Id.*, 2019 U.S. Dist. LEXIS 79338 at *6 (citation omitted).

18 *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1325 (11th Cir. 2018), vacated and remanded, *Outokumpu*, __ U.S. __, 140 S. Ct. 1637, 207 L. Ed. 2d 1.

19 *McCullough.*, 828 Fed. App'x. 705-06, 2020 U.S. App. LEXIS 33907 at *2-4.

20 *Henry Schein, Inc. v. Archer & White Sales, Inc.*, __ U.S. __, 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019). The U.S. Court of Appeals for the Seventh Circuit has not yet addressed the issue. *Grabowski v. Platepass, L.L.C.*, 2021 U.S. Dist. LEXIS 92859 at *7, 2021 WL 1962379 (N.D. Ill. May 21, 2021) (following the consensus of the eleven other circuits).

21 *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) (citing cases and so holding), cert. denied sub. nom., *Piersing v. Domino's Pizza Franchising LLC*, __ U.S. __, 41 S. Ct. 1268, 209 L. Ed. 2d 8 (2021).

22 The U.S. Const., Art. VI, cl. 2; treaties are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing [sic] in the Constitution or Laws of any State to the Contrary notwithstanding."

23 E. Cygal, et al., "State Law Restrictions on Arbitration of Insurance Coverage Disputes," ARIAS·U.S. *Quarterly*, 2nd Qtr. 2018; B. Briz, et al., "Which Law Is Supreme? The Interplay Between the New York Convention and The McCarran-Ferguson Act," *Univ. of Miami Law Rev.*, Vo. 74, No. 4, Art. 7 (June 23, 2020). The Ninth Circuit joined the Fourth and Fifth Circuits in August 2021 in *CLMS Mgmt. Servs. Limited P'ship, et al. v. Amwins Brokerage of Georgia LLC, et al.*, 9th Cir. Doc. No. 20-354282021, U.S. App. LEXIS 23996 (9th Cir. August 12, 2021).

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Party-Appointed Arbitrators on the Precipice

By Larry P. Schiffer

Concerns about bias and prejudice from multiple repeat appointments have plagued party-appointed arbitrators for years. This is true of international arbitration, commercial arbitration, and, of course, insurance and reinsurance arbitration.

Recently, there have been several cases in the United States and the United Kingdom addressing implicit bias, repeat players and the need for robust disclosures in commercial and international arbitrations. In the reinsurance world, where most arbitrations still follow the old party-appointed advocate arbitrator formula, these concerns are magnified. That magnification was, in part, the impetus for the relatively recent changes to the ARIAS·U.S. Code of Conduct and the development of the ARIAS·U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (the "Neutral Rules").

So where do we go from here? Should we move away from the party-appointed advocacy system and truly embrace neutral arbitration? You know my vote [1]. Until that day, however, it is important to reexamine the rules of engagement in the party-appointed arbitrator context.

Basic Arbitration Concepts

All commercial arbitrators must be disinterested in the dispute. What this means is that arbitrators must have no economic or business interest in the outcome of the dispute. Arbitrators should decide the dispute based on the facts and arguments presented. Arbitrators should be fair and objective, allow the parties to present their evidence and arguments, and consider all positions before coming to a final decision.

In most commercial and international arbitrations, arbitrators must be neutral and impartial. In other words, even if the arbitration agreement permits each side to select their arbitrator, those party-appointed arbitrators must still act impartially.

Arbitrators should disclose any relationships with or interests in the parties, counsel, other arbitrators, or witnesses that might be perceived by an objective observer as evidence of potential bias. This includes prior appointments or engagements by any of the parties or their affiliates.

> "So where do we go from here? Should we move away from the party-appointed advocacy system and truly embrace neutral arbitration?"

Are Reinsurance Arbitrators Different Than Commercial Arbitrators?

Insurance and reinsurance arbitrators are no different than other commercial arbitrators. The common perception among arbitrators and parties is that party-appointed arbitrators are permitted to be predisposed to the positions of the appointing party in a traditional reinsurance arbitration proceeding. While this is generally true, the predisposition concept has been stretched to its breaking point over the last 25 years.

Some reinsurance arbitrators believe that it is their solemn obligation to advocate for their appointing party's position in deliberations and during the arbitration hearing, including aggressively questioning witnesses from the other side. Others believe that they must rule for their appointing party no matter what the evidence shows. Others have no qualms about being appointed by the same party and/or the same law firm dozens of times. These do not represent a majority view, but enough arbitrators believe in some or all these positions.

Several years ago, I attended a meeting of a local bar association alternative dispute resolution committee where a well-known in-house lawyer for a significant insurance company explained to the gathering of commercial arbitration specialists how reinsurance arbitration works. When the in-house lawyer explained the party-appointed advocacy system in reinsurance arbitrations and mentioned that these arbitrators did not have to be neutral and impartial, there was an audible gasp in the room.

While there may be other industries where there are predisposed or advocate party-appointed arbitrators, I think they are far and few between, making reinsurance a rbitration pretty much unique.

Why Predisposition Does Not Mean Advocacy

While a party-appointed arbitrator does not, under old-style traditional reinsurance arbitration provisions, have to be neutral and impartial, that does not mean that a party-appointed arbitrator should be an advocate for the arbitrator's appointing party. The old-style arbitration provision typically provides as follows:

All arbitrators shall be active or retired officers of insurance or reinsurance companies, or Lloyd's London Underwriters, and disinterested in the outcome of the arbitration.

Note that disinterestedness is the only criterion, not neutrality or impartiality. Contractually, neutrality and impartiality are not requirements, yet everyone agrees that the third arbitrator or umpire must be neutral and impartial. So where does the notion of predisposition come from?

One of the sources is the 1977 American Bar Association/American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes. The ABA/AAA Code was revised effective March 1, 2004. The 1977 ABA/AAA Code suggested that all arbitrators should be neutral, but accepted that some types of arbitrations allow for non-neutral party-appointed arbitrators. In providing guidance for non-neutral party-appointed arbitrators, the 1997 ABA/AAA Code stated as follows:

Nonneutral arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness.

Nonneutral arbitrators are permitted to be predisposed toward deciding in favor of the party who appointed them.

Closer to reinsurance disputes, the original ARIAS·U.S. Guidelines for Arbitrator Conduct provided as follows:

Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract), they should avoid reaching a final judgment until after both parties have had a full and fair opportunity to present their respective cases and the panel has fully deliberated the issues. It is preferable that arbitrators advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration objectively. Party-appointed arbitrators are obligated to act in good faith with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly.

When these provisions are read in context, it becomes clear that while a predisposition toward the appointing party and its position is permissible, good faith, integrity and fairness are paramount. And in the reinsurance context, a full and fair opportunity for the party to present its case must be allowed before an arbitrator makes up his or her mind about what final decision should be reached. In other words, deliberations should be fair and objective, and party-appointed arbitrators should decide the case based on the facts and evidence presented and in a fair manner without being influenced by who appointed them to the arbitration panel.

The ARIAS·U.S. Code of Conduct supports this analysis. For example, Comment 2 to Canon I provides the following:

Arbitrators owe a duty to the parties, to the industry, and to themselves to be honest; to act in good faith; to be fair, diligent, and objective in dealing with the parties and counsel and in rendering their decisions, including procedural and interim decisions; and not to seek to advance their own interests at the expense of the parties. Arbitrators should act without being influenced by outside pressure, fear of criticism or self-interest.

The last sentence is especially telling. The little person sitting on the party-appointed arbitrator's shoulder whispering "vote for me or you won't get any more appointments" has no place in reinsurance arbitrations.

Comment 2, Canon II addresses predisposition:

Arbitrators should refrain from offering any assurances, or predictions, as to how they will decide the dispute and should refrain from stating a definitive position on any particular issue. Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract), they should avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions and the panel has fully deliberated on the issues. Arbitrators should advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration objectively. Party-appointed arbitrators are obligated to act in good faith and with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly.

This paragraph should look familiar, as it is derived from the original Guidelines for Arbitrator Conduct, but with some important differences. Under Canon II, Comment 2, the arbitrator "should" advise the appointing party that the arbitrator will ultimately decide the case objectively. In the Guidelines, the phrase "it is preferable" was used. The last sentence makes it abundantly clear that the party's appointment must not influence the arbitrator's decision in any manner.

The development of party-appointed advocate arbitrators, in my view, takes the notion of predisposition too far and ignores the obligations of good faith, fairness and just decision making. Unfortunately, when reinsurance arbitration appointments changed from an honorable undertaking by industry executives into a full-time vocation for some, the explicit and implicit pressures on party-appointed arbitrators caused subtle and less-than-subtle changes in the behavior of some party-appointed arbitrators. As more party-appointed arbitrators felt it necessary to advocate for their appointing party, other parties expected their arbitrators to do the same to level the playing field. This spiral led to the perception of bias and unfairness in the traditional reinsurance arbitration system.

Arbitrator Disclosures

The issue of arbitrator disclosures made the headlines recently in the United Kingdom when the U.K. Supreme Court issued a decision critical of the lack of disclosure of a subsequent appointment by an eminent insurance and reinsurance arbitrator. *Halliburton Co. v. Chubb Bermuda Insurance Ltd.*, No. [2020] UKSC 48 (Nov. 27, 2020). All the arbitrator ethical codes and rules require arbitrators to disclose all relationships and contacts with the parties, lawyers, affiliates, witness(es), other arbitrators, and others relevant to the dispute that might be perceived as evidence of possible bias.

The ARIAS·U.S. Code of Conduct, in Canon IV, requires broad disclosure of any interest or relationship likely to affect the arbitrator's judgment. Importantly, the Code directs that "[a]ny doubt should be resolved in favor of disclosure."

The reason for broad disclosure is to avoid the appearance or impression of bias. Disclosure is required up front and during the arbitration proceeding. The continuing duty to disclose involves subsequent appointments in other matters that might give the impression of favoritism or bias.

> "The complexities of modern reinsurance relationships have put a strain on disclosures"

The complexities of modern reinsurance relationships have put a strain on disclosures because it is not often clear who is the real party in interest in a dispute. With the proliferation of legacy books of business both on the property/casualty and life sides of the industry, disputes are often brought in the name of one party, but the real party in interest could be a different party. Moreover, the disputes may be managed by yet a third party. This is the reason why Canon I, Comment 5 was amended. Canon IV, Comment 2 (b) also addresses this issue as follows:

... the purpose of this rule is to require disclosure of the relationships between the candidate and the parties as well as the candidate and either parties' counsel or third party administrator or manager; such relationships that must be disclosed include appointments as an arbitrator where the party's counsel and/or the party's third party administrator or manager acted as counsel or third party administrator or manager for a party making the appointment.

Disclosures also require cooperation from the lawyers and the parties. Arbitrators cannot make disclosures if the responsible and relevant parties are not revealed to them by the lawyers and the parties. This is why the "Purpose" section of the Code of Conduct contains the following statement:

Though these Canons set forth considerations and behavioral standards only for arbitrators, the parties and their counsel are expected to conform their own behavior to the Canons and avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.

As revelations come to light, the continuing duty to disclose is triggered and disclosure is required.

Because of the case law on disclosures and the criticisms from the courts aimed at well-known arbitrators for failing to disclose, it is incumbent on all arbitrators to make robust disclosures early and often—and clearly on a continuing basis. Err on the side of disclosure, as the Code of Conduct admonishes. If the arbitrator in the U.K. Supreme Court case had disclosed his subsequent appointment, no one would have batted an eye and there never would have been a dispute.

Can We Avoid the Problem?

Problems of potential bias will never go away, but there are several ways to address the situation. First, as stated above, regardless of the form of arbitration, robust, complete, and continuing disclosures by arbitrators must occur. In the reinsurance community, many of the lawyers and arbitrators (and parties for that matter) know each other through ARIAS or otherwise. Disclosures of a relationship generally will not result in an appointment challenge unless it is significant evidence of a lack of impartiality. But failure to disclose an unknown relationship that may lead to an impression of bias will affect how lawyers will react to that arbitrator in the future.

Second, arbitrators should think about whether excessive multiple appointments by a party or by a law firm or lawyer is a good long-term strategy. Being viewed as the "house" arbitrator for a particular party is probably not a title any arbitrator wants to receive. Counsel and parties ought to consider this point as well. There will always be repeat players in reinsurance disputes because the number of participants is finite and much smaller as a group than in many other industries. But heavily overweighting appointments toward one party or one lawyer/law firm is problematic.

Finally, moving to an all-neutral panel—like most of the rest of the commercial and international arbitration world—is a way to remove much of the potential for bias. And by an all-neutral panel I mean a panel that has no party-appointed arbitrators and where all three arbitrators are selected in a neutral manner. The ARIAS·U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes goes further than any other procedure in attempting to eliminate bias and repeat players from the arbitrator selection process. While not perfect, the Neutral Rules reduce the probability of bias and eliminate most of the subconscious and overt issues associated with party-appointed arbitrators for reinsurance disputes.

But neutrality alone does not solve the problem, as can be seen from the U.K. Supreme Court case mentioned above. Under English law, all arbitrators, even if party-appointed, must be neutral. Yet the failure to disclose a subsequent appointment led to a court challenge. While the law in the United States does not allow for many, if any, challenges prior to the issuance of the final arbitration award, a failure to disclose a consequential relationship could result in a challenge to the final award and, under the right factual circumstances, to its vacatur.

NOTES

1 Having helped draft the ARIAS Neutral Rules, it would be disingenuous for me to take any other view.

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Ethics and the Aging Arbitrator

By Mark T. Megaw

Welcome. If you are wearing reading glasses as you dive into this article, you are in the right place.

When we finally return to in-person ARIAS conferences, you might notice that every "old friend" of yours has changed since you last saw them in person. As fate would have it, all arbitrators, both neutral and non-neutral, are aging. Aging is the universal pre-condition to gaining wisdom.

One key question, however, is whether your extended life experiences might also suggest that you should be making an additional perusal of the ARIAS•U.S. Code of Conduct. Critically, the Code of Conduct provides guidance both in what it says about aging and where it remains silent. This article seeks to provide you with a summary of how the Code guides the aging arbitrator.

Perhaps every examination of ethics should include a few hypotheticals. For our first, imagine that an umpire candidate has received a diagnosis of a debilitating disease, and in various iterations of this scenario (1) the disease affects the mind, (2) the diagnosis suggests that the candidate will need a long convalescence, (3) the treatment is going to be expensive, at a time when the candidate's personal finances can ill afford (pardon the pun) to refuse potential income, or (4) some combination of the preceding.

Perhaps unsurprisingly, the Code does not directly delve into the nuances of how medical problems might dictate a panel member's (or prospective panel member's) behavior. Instead, its touchstone for this area is found in the unassuming but weighty comments to Canon I, on integrity:

Canon I, Comment 2: Arbitrators owe a duty to the parties, to the industry, and to themselves to be honest.

In this context, it seems important that the Code says that panel members have a duty, in part, to themselves. In common vernacular: be honest with yourself. If you find that it isn't easy to confront the aging issue, you're in good company. Warren Buffet (age 90 at the time) recently touched on this challenge: "People talk about the aging management at Berkshire, and I always assume they're talking about Charlie [Munger, who is 97] when they say that" [1].

Even the "Oracle of Omaha," as Buffet is called, assumes (here, jokingly) that only other people have age-related concerns.

If you know, for example, that your infirmities are likely to make it impractical to serve for many months, you have a decision to make about whether to accept even the possibility of sitting on a time-consuming arbitration panel. One problem is that an arbitrator won't know, in advance, how lengthy or complex a case might turn out to be. Can you take the risk that the case won't end before your health issues come to bear on your own fitness to serve? Of course, this "to thine own self be true" admonition is universally applicable. And when we are honest with ourselves, we must first acknowledge that aging eventually begets health problems, and health problems can beget ethical questions.

Notably, the Code does not directly implicate hypothetical variants (1), (2) and (3) as matters for which an arbitrator must refuse to serve. Those enumerated prohibitions are found within Canon I, Comment 3 (such as 3a, where a candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings). Health and age are not directly discussed in Canon I, Comment 3.

As such, if the umpire candidate decides to serve notwithstanding any recent diagnosis, the candidate has a further self-inquiry to consider: Should the candidate's diagnosis be disclosed to the parties? Note that no part of the Code suggests, for example, that a panel member should have to waive their right to privacy to be able to serve. From that silence in the Code, arbitrators can rest assured that the parties do not need to know why you expect to be indisposed for six months, but you do have an obligation to let them know of your schedule. On this topic, Canon VII speaks to an arbitrator's obligation to be available to the parties when the panel may be needed:

ADVANCING THE ARBITRAL PROCESS: Arbitrators shall exert every reasonable effort to expedite the process and promptly issue procedural communications, interim rulings, and written awards.
Comments: (2) Individuals should only accept arbitration appointments if they are prepared to commit the time necessary to conduct the arbitration process promptly.

Hypothetical variation (3) provides a twist by highlighting the conflict that can arise because arbitrators are usually paid for their time, and income that an aging arbitrator could derive would be particularly welcome in the face of medical care expenses. As with our preceding discussion, the "conflicting interest" created by the needs of a panel member has nothing to do with age—every to-be-compensated panel member faces the dilemma of knowing that their decision to refuse or accept an appointment (not to mention a panel's decision on interim procedural or substantive points) may affect their personal income. The Code speaks to this potential for conflict in a few passages, first in Canon 1:

Canon I, Comment 2: Arbitrators owe a duty ... not to seek to advance their own interests at the expense of the parties. Arbitrators should act without being influenced by ... self-interest.

Thus, the Code (in Canon I) calls for the recently diagnosed prospective panel member to consider—honestly—whether they are letting their financial needs drive their decision about whether to accept an appointment. Stated another way, if a panel

> "If you find that it isn't easy to confront the aging issue, you're in good company."

member knows that their diagnosis should prevent them from serving (for example, if they can tell that their failing memory prevents them from recalling recent events), the Code tells them that they should not let the prospect of earning fees override their honest self-appraisal about their health situation.

Should Medical Problems Prompt Withdrawal?

The Code provides some conceptual guidance to the arbitrator who is weighing whether to withdraw from an ongoing dispute. Canon II, Comment 5 cautions that if the panel member is withdrawing at their own instigation, there are purposefully narrow examples of "good reason," including "serious health issues" of themselves or a family member:

After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw and should not withdraw at his or her own instigation absent good reason, such as serious personal or family health issues.

There are few authorities that have decided what will happen when a panel member withdraws. Most contracts are silent on the replacement process when illness or death creates a void in the panel. Some courts, such as in *WellPoint Inc. v John Hancock Life Ins. Co.*, 576 F. 3rd 643 (7th Cir 2009), point to the Federal Arbitration Act, 9 U.S.C. § 5, and allow a court to appoint a substitute panel member [2]. But getting a court involved in appointing panel members inevitably creates expense.

At the lower end of that "expense" scale, if the panel has already decided the substantive issues between the two sides, a court may allow the two remaining arbitrators to decide the remaining formalities. *Zeiler v. Deitsch*, 500 F. 3d 157 (2d Cir. 2007). At the other end of the expense scale, if the key issues in the case have not been finalized, an arbitrator's absence (in this case, because of their death) can cause the entire arbitration, including panel selection, to "commence anew." *Marine Products v. MT Globe Galaxy*, 977 F.2d 66 (2d Cir. 1992). The implications on scheduling, on contested discovery disputes, and on any change in the umpire seat—after a case has begun—can be significant.

> "Infirmities that are associated with aging have the potential to create ethical concerns for ARIAS arbitrators."

Our next hypothetical is intended to examine how infirmities that might arise from the aging process can get to the edges of an ethical dilemma. Imagine, for example, that an otherwise well-qualified candidate is reluctant to serve because, at their age, (1) they need more "natural breaks" than arbitration hearings normally have, (2) the small font on facultative certificates will be impossible to read without strongly magnified glasses, (3) the faint voices of witnesses will be hard to hear, even with their hearing aids turned on high, or (4) their diabetic [3] or pre-diabetic blood sugar makes it difficult to concentrate prior to mealtimes.

For these questions, the Code has only oblique input and no definitive answers. Canon I, Comment 3(b), for example, requires a panel member to refuse to serve if they cannot perceive all the evidence and arguments that are presented to them:

... a candidate ... must refuse to serve ... (b) where the candidate does not believe that he or she can render a decision based on the evidence and legal arguments presented to all members of the panel.

Similarly, Canon II, Comment 2 calls for panel members to make decisions based on the allowed presentations from both sides. It expressly says that members "should avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions." Here it is implicit that a panel member can only make decisions based upon evidence that they have been physically able to perceive and focus upon. (To be sure, the ability to perceive the presentation of evidence is a low hurdle to cross.)

Note that the infirmities we are discussing might each be hidden from the counsel and parties, yet important to outcomes. Imagine, in fact, that only one team of lawyers knows of two panel members' challenges with premeal concentration, and they adjust their presentation accordingly. That is not an unreasonable hypothetical, as some frequently cited (and oft-debated) studies have suggested that judges have an increased likelihood of granting a motion seeking parole when it is entertained shortly after a meal break [4].

Why, then, does the Code provide no more insight about the conduct of arbitrators who have a "hidden" impact from aging (i.e., those who might benefit from larger font, louder presentations or more frequent breaks)? Because those issues, however real, do not neatly fit as ethical issues. They are, in part, the standard challenges that lawyers face when designing their presentations. It is counsel's job to see that a panel is engaged in a presentation, and if a panel member is straining to perceive a witness or exhibit, counsel should effect a change that will make it clear that any favorable evidence has been absorbed.

Moreover, these arguably minor health issues would be too nuanced for an ethics code. Consider, for example, that one arbitrator might have a hearing deficit but won't acknowledge that issue, even to their spouse. Within their self- and spousal deception, they are falling afoul of the duty to remain honest to themselves.

In contrast, a different arbitrator might face the same challenge, but use hearing aids that fully correct their hearing. The same analysis follows for any (aging or youthful) arbitrator who wears corrective contact lenses. If the lenses don't do the job, the arbitrator should be making a self-evaluation about their fitness for the role, but it is otherwise beyond the reach of the Code to have a prescriptive approach to every problem.

Conclusion

Infirmities that are associated with aging have the potential to create ethical concerns for ARIAS arbitrators. The touchstone of any analysis of these health issues is an honest self-examination about the depth and timing of any incapacity. The Code, in its wisdom, does not create a year-by-year or illness-by-illness threshold for service or disclosure; instead, it calls on panel members and prospective panel members to be honest with themselves about whether they should serve, or continue to serve.

The Code also anticipates that panel members will need to disclose some information (such as a period of anticipated incapacity) to counsel and, through them, to the parties. That said, the Code rightfully remains largely silent on the topic of many age-associated challenges (such as vision, hearing, and diabetes). The Code's silence reflects the fact that health issues are too nuanced for definitive rule making. No code could dictate a precise answer in such an imprecise arena. Instead, the Code calls for ARIAS panels and prospective panel members to honestly examine themselves for their fitness for the role.

NOTES

1 Platt, Eric. 2021. Berkshire succession: Greg Abel confirmed as Warren Buffett's heir apparent. *Financial Times*, May 3.

2 "… in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein 9 U.S.C. § 5.

3 Diabetic arbitrators are in good company. Supreme Court Justice Sotomayor is a Type 1 diabetic. She wears a continuous glucose monitor to help her regulate her diabetes. Her monitor has even gone off (signaling an urgently low blood sugar level) during oral argument. Gresko, Jessica, and Mark Sherman. 2018. Supreme Court Notebook: Diabetes, Decisions and Justice Math. Associated Press, April 5.

4 See, Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, Proceedings of the National Academy of Sciences of the United States of America, Extraneous Factors in Judicial Decisions; (April 26, 2011) 108 (17) 6889-6892; Cf, The Brain from Top to Bottom Blog (February 5, 2020); https://www.blog-thebrain.org/blog/2020/02/05/blood-glucose-levels-influence-judges-decisions-less-than-we-think/.

Mark T. Megaw is a former ARIAS Board member, and an original co-chair of the ARIAS Arbitrator's Committee. He currently sits on the ARIAS Ethics Committee.

Arbitration Clauses Enforced by Two Recent Decisions

By Philip M. Howe

Arbitrators may be called upon to decide whether there is an enforceable contract, including an arbitration clause between the parties. Arbitrators might also have to decide whether a dispute is arbitrable. As these issues arise, it seems best for arbitrators to understand how the courts have recently discussed and dealt with them.

The First Circuit Court of Appeals issued two significant decisions in March 2021, both enforcing arbitration clauses in contracts. The decisions are lengthy and well researched and show the court's considerable respect for the arbitration process. The first is *Emmanuel v. Handy Technologies, Inc.*, 992 F.3d 1 (1st Cr. 2021). The second is *Bossé v. New York Life*, 992 F.3d 20 (1st Cir. 2021).

The following are summaries of those decisions. We have done a "deep dive" into the decisions, as each provides scholarly research by the court, in-depth analyses of the bases for respecting the parties' agreement to arbitrate, and guidance in resolving those issues.

Emmanuel v. Handy Technologies, Inc.

In *Emmanuel*, the operator of an online platform for house cleaners had a "Terms of Use" provision to which Maisha Emmanuel, the plaintiff, had agreed by clicking on a box online when submitting her application. The "Terms of Use" were in a hyperlink to a page with text, which included a "Mandatory Arbitration Clause." This would have been visible if Emmanuel had scrolled through the text on the screen.

The defendant, Handy Technologies, provided Emmanuel with a personal identification number. She later used it on her cell phone to open Handy's app. The screen from the app included the statement, "To continue, please accept the revised Independent Contractor Agreement." The text on the screen went on to state, "You are agreeing to be bound by the terms of this Service Professional Agreement."

Emmanuel did not scroll through the Agreement, which included the following provision: *Mandatory and Exclusive Arbitration. Handy and Service Professional mutually agree to resolve any disputes between them exclusively through final and binding arbitration instead of filing a lawsuit in court.*

Emmanuel later stopped using the app because she was not paid for a "couple of jobs." Emmanuel subsequently filed a complaint in federal court claiming that Handy had misclassified her and others as independent contractors rather than employees and had failed to pay them the minimum wage. Handy moved to dismiss the complaint and compel arbitration based on the agreement.

The district court rejected Emmanuel's claim that the arbitration clause was "unconscionable." It also granted Handy's motion to compel arbitration. Emmanuel appealed to the First Circuit.

While the appeal was pending before the First Circuit, the Massachusetts Supreme Judicial Court decided *Kauders v. Uber Technologies, Inc.*, 159 N.E. 3d 1033, 1049 (Mass. 2021). The First Circuit ruled that *Kauders* compelled it to find that Emmanuel did "form an arbitration agreement with Handy." Under *Kauders*, in order to form an online contract under Massachusetts law, the user of the "online interface" must have been given "reasonable notice of the terms" and must "have made a reasonable manifestation of assent to those terms." The party seeking to enforce the contract bears the burden of showing satisfaction of these requirements.

The court ruled that Emmanuel had "actual notice" of the terms of the agreement. The court went on to rule that, even if Emmanuel did not have actual notice, Handy could still meet the reasonable notice requirement if the "totality of the circumstances" indicates that the user of the online interface was provided with notice of the terms.

The court wrote that the *Kauders* decision described the relevant factors to consider in deciding whether there is a binding agreement: first, the actual appearance or "form of the contract" (that is, whether the document "appears to be [a] contract"); second, reasonable notice. Notice is more likely to be found to be reasonable where the "nature, including the size of the transaction," suggests a contract is being entered into, where the notice conveys the full scope of the terms, and where the online interface adequately communicates the terms of the agreement. It comes down to whether the party has manifested assent to the terms of the online agreement.

The court further wrote that the *Kauders* decision held that these "click wrap" agreements, where the user is required click a box on the screen, are regularly enforced and are the "clearest manifestation of assent." As a result, the court concluded that Emmanuel had "reasonable notice of the mandatory arbitration provision in the Agreement" when she selected "Accept" on the app. She was then bound by it.

The screen had clearly asked Emmanuel, "To continue, please accept the revised Independent Contractor Agreement." The screen also plainly showed a portion of the Agreement. The court further noted that *Kauders* made clear that a party may be bound by the terms of a contract that they chose not to read.

The court distinguished the situation where a person believes that he or she is signing up for a ride sharing service without understanding that he or she is entering a significant contractual relationship. But in this instance, Emmanuel did not simply download an app. She underwent a screening conducted by Handy, completed an online application and a telephone interview, underwent a background check, and attended an in-person training session.

In its decision, the court provides clear guidance to arbitrators on when an agreement between the parties is enforceable, even in the context of a contract formed online. We can anticipate this issue will arise more frequently in the future given the millions who use online apps daily.

Bossé v. New York Life

A week after deciding *Emmanuel*, the First Circuit Court decided *Bossé v. New York Life*. The court in

> "The court concluded that Emmanuel had "reasonable notice" ... when she selected "Accept" on the app."

Bossé ruled that the issue of whether the dispute over an employment agreement is arbitrable belongs to the arbitrator, not to the court, relying on the U.S. Supreme Court's recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

Over a 15-year period, Bossé had been both an independent contractor and an employee of New York Life, which terminated him in 2016. Bossé, an African American, filed an action in federal court alleging racial discrimination. New York Life sought to enforce its Employment Agreement with Bossé, which provided that any dispute, including employment discrimination and any dispute over the arbitrability of a claim, shall be resolved by arbitration.

The court ruled that the clause in the Agreement delegating disputes over arbitrability is clear, unmistakable and unambiguous. Furthermore, there is a presumption in favor of arbitrability.

Bossé entered the Employment Agreement with New York Life in 2004. He was paid a salary to recruit, train and supervise sales agents. The Agreement included an arbitration clause, which provided that the provisions of any dispute, including "employment arbitration" and whether a claim is arbitrable, shall be resolved by an arbitration proceeding administered by the National Association of Securities Dealers in accordance with its arbitration rules.

The Agreement also contained a "survival" clause providing the provisions of the Agreement will survive termination of the Agreement by either party. The following year, Bossé transitioned to another position with New York Life under an Agreement without an arbitration clause.

The court ruled that to compel arbitration, New York Life must demonstrate:

1. A valid agreement to arbitrate;
2. That N.Y. Life is entitled to invoke the arbitration clause;
3. That Bossé is bound by the clause; and
4. The claim asserted comes within the scope of the clause.

The court in *Bossé* went on to rule that the "survival clause" reinforces the parties' intent that issues of arbitrability be decided by an arbitrator even after the Agreement terminated. In addition, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

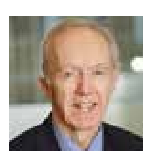
The court in *Bossé* provided the above factors for the arbitrator to consider in determining when a dispute is arbitrable. This is not an exhaustive list, and different facts might present different factors. However, this decision again provides a clear, in-depth discussion and guidance [1].

Conclusion

The First Circuit has, with considerable support from the U.S. Supreme Court, strongly supported arbitration as long as the arbitration clause is set out clearly in an agreement that meets the above criteria. The First Circuit has provided a road map for arbitrators to decide whether there is an enforceable agreement to arbitrate and whether a dispute is arbitrable. While the First Circuit's decisions are binding only in federal courts within the Circuit (Massachusetts, Maine, New Hampshire, Rhode Island and Puerto Rico), they are respected nationwide in both state and federal courts.

NOTES

1 The dissent in *Bossé* stated that, in context, the parties would not have intended the 2004 arbitration agreement to govern claims concerning the parties' subsequent contracts that did not include an arbitration provision.



Philip M. Howe is a civil litigator with lengthy experience in defending complex medical and financial issues.

Meditations on Mediation

By John Chaplin

To the surprise of many, mediation [1] seems to be a hot topic in dispute resolution circles today. August dispute resolution organizations like ARIAS·U.S., for example, have devoted additional space in the form of conference topics, roundtables, and even full-day seminars to the topic and its current relevance.

For some, of course, it has always been thus; no news there. For others, it would seem to be the next great wave, even a bandwagon. Why is that? What has changed? What new insights have now affected—even shifted—sentiment in the field of dispute resolution?

Given the many choices of dispute resolution methods (mediation being but one), it is little wonder that mediation has its devotees as well as critics. It may serve here to examine the principles of mediation that delight its proponents; also, perhaps, to contrast and weigh mediation's beneficial aspects with those of the other current, prevalent alternatives.

The Benefits of Mediation [2]

Mediation proceedings and other methods like arbitration, settlement conferences or direct, face-to-face dispute resolution have typically been characterized by certain common benefits relative to litigation: lower cost, expeditious resolution and lower levels of contention and/or stress [3]. Still, these alternatives are quite distinguishable from one another when viewed on a continuum.

Direct negotiation: It goes without saying that one-on-ones are the most direct approach to resolving disputes. Importantly, they are quite simply completely unaffected by external, non-party beliefs and perspectives.

Mediation, facilitative: Here, a neutral third party (mediator) enters the mix and attempts to help the parties attain a better understanding of the other's point of view and/or evidence. The end result sought is a mutually acceptable resolution, fashioned by the parties of their own volition.

Mediation, evaluative: Much like the facilitative mediation, the mediator is a guide for the parties, helping them to reach their own conclusions. It is distinguished by the mediator's additional role of evaluator, providing objective insights/commentary regarding the merits of each party's position. In effect, the evaluative mediator will, as needed, offer his/her views for those of the parties, as guidance and for their consideration.

Settlement conference: This process introduces a special category of "mediator" who will guide and direct settlement for the parties and has sometimes been considered a close relative of evaluative mediation. In that regard, both processes may derive significant benefit from professional mediators with specific subject matter knowledge such as reinsurance. The difference between settlement conferences and evaluative mediations, of course, is the additional feature of a final, judgmental conclusion about the merits of the dispute from the judge/magistrate hearing the evidence. Having said that, the parties are always at liberty to reject that conclusion or any alternatives offered and to proceed to a hearing or trial.

> "Where mediation succeeds, time, money and perhaps even the relationship between the parties have been saved, and life goes on a little better than before."

Arbitration: This procedure will, in almost every case, reach a final conclusion that is binding on the parties. The arbitration panel consists of individuals who will hear evidence and render a verdict. The panel often consists of arbitrators who favor their party's position; this "preference" is generally offset by a third arbitrator, acting as judge (or umpire), with no position on the matter.

In the broader field of dispute resolution and litigation, courts have used their judgment to urge parties to consider the benefits of mediation as a way to achieve better, quicker, more satisfying resolutions. In the United Kingdom, parties are more regularly urged to consider the benefits of mediation. Moreover, courts in the U.K. can, and do, make orders requiring parties to take steps to avoid court and consider the alternatives. For example, some U.K. courts provide enhanced incentives for parties to mediate (more accurately, disincentives to unreasonably dismiss an effort to mediate [4]).

Focusing on Mediation and Arbitration

Within the above methods of dispute resolution, the major spaces are occupied by arbitration and mediation. In certain fields, arbitration is a part of the contract between the parties from the outset [5]. That said, even in the high-stakes, highly technical field of reinsurance, some reinsurance contracts have included provisions for mediation to be a first step in dispute resolution before arbitration is attempted.

At present, as more practitioners have explored the benefits of mediation in contrast to litigation and arbitration, the following considerations form the bases for evaluating these methods.

Cost factors: In most assessments, arbitration is seen as the more expensive form of alternative resolution, with some averring that arbitration may have become as expensive as litigation. Discovery costs, depositions of expert and fact witnesses, occasional side trips to court to resolve thorny matters, costs of panel members, and so on, are very rarely incurred in mediation.

Time commitments: The commitments of time to conclude arbitrations have lengthened over the years to satisfy the needs of discovery as well as the hearing to accommodate the case presentation and witnesses' testimony. It seems that in every arbitration, someone will declare, "This hearing will be short and sweet!" Would that it was so! Mediations are not always short or sweet, either, but the result can be achieved in just a few days, even a single day.

Results: One truly important feature of arbitration is the finality that can be achieved as the panel considers the evidence and renders a final decision. Mediation does not provide a final resolution if the mediator fails to lead the parties to their own resolution. Three points here: (1) not every arbitration is full and final, as experience has demonstrated how parties can find and pursue several avenues to contest and change the decision; (2) no arbitration decision can be said to satisfy both parties; and (3) a no-decision mediation outcome is infinitely better than a bad arbitration outcome.

The umpire: The single most tortuous element of any arbitration is the process of choosing an umpire. More time and money are expended in the search for an umpire, more disputes within the dispute are waged over the mechanics and process of choosing the neutral, neutrality is rarely accepted in the end by the coin toss loser, and more games are played in the umpire selection than in any other aspect of the entire proceeding. Thankfully, in mediation, there are a plethora of qualified and bona fide neutrals available for the job. Neutrality of the mediator is a given and accepted by the parties.

Final Thoughts

In court after court in the United States, more thought has been given to the value of mediation, and parties have been guided toward that approach. Moreover, parties have generally been satisfied with the results. Where mediation comes up short, the parties' options are preserved, and life goes on as before. Where mediation succeeds, time, money and perhaps even the relationship between the parties have been saved, and life goes on a little better than before.

However, is mediation well suited to the technicalities of reinsurance disputes? It would seem that mediators with a background in the practice of reinsurance would be ideally suited to handle these disputes. Most of the tools of arbitration—for example, discovery, expert and witness testimony, and scholarly legal argument and presentation—are also available to the mediator and the mediation. Given lower costs, shorter time frames and a measure of control over the outcome, perhaps mediation is the wave of the future.

NOTES

1 As a general definition of mediation, I will use this from the National Conflict Resolution Center: "a conflict resolution process in which a neutral mediator assists the Parties through constructive discussion and negotiation of their issues in order to reach a mutually acceptable resolution."

2 Recently, a particularly busy court in Massachusetts took the trouble to write to a large segment of its parties in litigation to affirm that "the benefits of mediation have long been recognized by the court." They proceeded to itemize the benefits as "Control […] Time [expeditious hearing] Confidential […] Finality […] Avoid Court Appearance." Official Massachusetts Trial Court Memorandum 12/21/20: Mediation Referral. Chief Magistrate Kimberly M. Foster, Esq., addressing Parties in Small Claims cases, District Court Department, Somerville Division.

3 At least, most of the time.

4 For example, some courts provide enhanced incentives for parties to mediate. "In cases where the successful party has unreasonably refused to mediate a dispute, however, it is not uncommon for an English court or arbitration panel to reduce or eliminate that party's costs award or, in an extreme case, to order the winning party to pay some of the losing party's costs." Moglin, Neal, Dan Sails, and Jan Schroeder. 2007. "Would Greater Use of Mediation Improve U.S. Reinsurance Dispute Resolution? It Seems to be Working Elsewhere." ARIAS-U.S. *Quarterly*, Vol. 14, No. 2, at 2, 4.

5 As is often the case in, for example, contracts involving investment, technology, insurance, employment, and many others.

John Chaplin has 43 years of broad-based reinsurance industry experience and has served in virtually every capacity related to the reinsurance transaction: intermediary, underwriter, consultant, buyer, seller, expert witness, arbitrator and umpire.

Can a Federal Court Reassess the Evidentiary Record?

Case: *OldCastle Precast, Inc. v. Liberty Mutual Insurance Company, Metra Industries, Inc.,* No 19-868-cv, United States Court of Appeals, Second Circuit

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

Date decided: March 9, 2021

Issue decided: Whether an arbitrator's award is subject to vacatur based upon manifest disregard of the law when the arbitrator allegedly required proof of actual damages rather than proof of damages to a "reasonable certainty." Was the arbitrator guilty of misbehavior where it was claimed that he substituted his own "extra-evidentiary musings," which amounted to a fundamentally unfair proceeding where the evidence was unrebutted?

Submitted by: Sylvia Kaminsky

In *Matter of Daesang Corporation v. The NutraSweet Company*, the First Department of the Appellate Division of the New Y ork Supreme Court held that, under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (FAA), courts could not impose their own conclusion.

In the arbitration, Metra had counterclaimed for damages, with a list of each component of its damages. The arbitrator did not award Metra the full amount of its counterclaim, finding insufficient proof to establish actual damages sustained for certain items. The arbitrator stated that he found the damage calculations proffered by Metra to be unreliable.

Metra claimed that the arbitrator manifestly disregarded the law in requiring proof of actual damages rather than establishing its damages to a "reasonable certainty" and that it was required to accept Metra's claim in full. Additionally, Metra argued that it was unfair for the arbitrator not to award it damages that were not challenged by Oldcastle.

The court held that when a party challenges a district court's review of an arbitral award under the manifest disregard standard, it reviews the application of the standard *de novo*. The court stated as follows:

A litigant seeking to vacate an arbitration award based upon manifest disregard of the law bears a heavy burden, as the grounds exist in exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent ... That impropriety has been interpreted clearly to mean more than error or misunderstanding with respect to the law ... Rather, the award should be enforced, despite a court's disagreement with it on the merits, if there is a colorable justification for the outcome reached.

The court held that it would not overturn the award, as the arbitrator was entitled to weigh the evidence in making his factual findings, which should not be reassessed by the court. Separately, the court found that the arbitrator did not apply the correct pre-judgment interest rate that was specifically provided for in the contract. The court did not entertain plaintiff-appellee's request for attorneys' fees and costs for defending the appeal, leaving the District Court on remand to consider that argument and its merits.

Accordingly, the court affirmed the arbitration in part and vacated it in part.

Sylvia Kaminsky is a certified ARIAS arbitrator and umpire and member of the ARIAS Board of Directors and co-chairs the Arbitrators and Law Committees

NEW EXECUTIVE DIRECTOR NAMED TO REPLACE MEIER

After serving ARIAS•U.S. as Executive Director for over 6 years, Sara Meier has decided to embark on a new career outside of association management, and to step down from her roles at ARIAS•U.S. and MCI. We appreciate Sara's hard work and dedication to the success of ARIAS•U.S. and we wish her luck in her newest endeavors.

We are pleased to welcome Jonathan Gilad as the new Managing Director of ARIAS-U.S. Jonathan has over 12 years of experience in association management and holds a master's degree from the George Washington University in political management. ARIAS•U.S. Chair Steve Schwartz commented, "I know that we'll all miss Sara, but we wish her huge success in her new career, and we look forward to working with Jonathan."

In Memoriam: Larry Zelle

Larry Zelle, founder of Zelle LLP and a longtime member of ARIAS·U.S., died on May 8, 2021, at his home in Minnesota.

Larry represented major property and casualty insurers (including FM Global, IRI, and Kemper) as well as several major reinsurers for 50-plus years as a practicing lawyer. His involvement with the captive insurance industry began in the early 1980s, when he was retained by the Reiss Organization (ARM, IRM, IRMG) to handle a large subrogation case for one of the captives it managed. In subsequent years, Larry became involved in several notable captive losses, including the vapor cloud explosions at Pampas, Texas, and Pasadena, Texas, in the late 1980s, the Cheerios contamination loss in the 1990s, and the 2008 Cargill flood loss.

Larry also served as vice president of claims at a captive in the early 2000s, supervising the runoff and ultimate liquidation of the company. He retired from the practice of law in 2015 and focused on serving as an arbitrator or mediator in insurance and reinsurance disputes.

In Memoriam: George A. Cavell

George Anthony Cavell passed away peacefully surrounded by family on May 16, 2021. He was a senior vice president of Munich Re America's Claim Division and managed their Environmental/Mass Tort, Property, and Bond/Surety Claim Departments, overseeing a professional claim staff that managed pollution, asbestos, toxic products and other latent claims and coverage litigation as well as first-party property and bond/surety losses and litigation.

Prior to joining Munich Re America in 1984, Mr. Cavell was with Royal Insurance Company in New York, where he held various technical and then managerial positions. He served on the ARIAS•U.S. Board of Directors, as a co-chair of the Member Services Committee, and a member of both the Certification and Education Committees.

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Scott MacColl is the founder of MacColl Strategic Advisors (www.MacCollAdvisors.com), a firm focusing on surety and reinsurance industry-related issues, including dispute resolution (mediation, arbitration, and expert witness), as well as advising and outsourcing. He is also co-founder of Innovative Surety Solutions (www.InnovativeSuretySolutions.com), a firm focusing on claim advisory and outsourcing services for surety companies and reinsurers.

Prior to forming MacColl Strategic Advisors, Scott successfully drove profitable growth for surety- and credit-related specialty lines in North America, Latin America, and Europe. He has more than 30 years of experience as a reinsurance broker (Guy Carpenter & JLT Re), reinsurer (American Reinsurance / Munich Re America), and primary surety leader (Aetna, CIGNA, and ACE).

Larry Schiffer recently launched Schiffer Law & Consulting PLLC after 38 years with boutique and global law firms in New York City. He continues to practice commercial, insurance, and reinsurance litigation, arbitration, and mediation, and provides insurance and reinsurance advice and consultation on claims, coverage, contract wording, due diligence, insurance insolvency and other issues. He serves as an expert witness on New York insurance and reinsurance law and as a commercial mediator and arbitrator.

Larry has more than 28 years' experience as a mediator for the United States District Court, Southern District of New York and the New York Supreme Court, New York County, Commercial Division. He also is a neutral hearing officer with National Arbitration and Mediation (NAM). He is active in legal and trade associations, where he has held various leadership positions, including past chair of the ARIAS Technology Committee, a member of the Ethics Committee, and one of the drafters of the Neutral Rules. He serves as an Expert Commentator on reinsurance for IRMI.com and co-authored the chapter on reinsurance in the New York State Bar Association's Insurance Law Practice treatise.

Larry has lectured and has been widely published on reinsurance and other insurance topics. He is the editor of the ARIAS•U.S. *Quarterly* and the Schiffer on Re-Insurance blog, and the owner of the Reinsurance Disputes Group on LinkedIn.

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