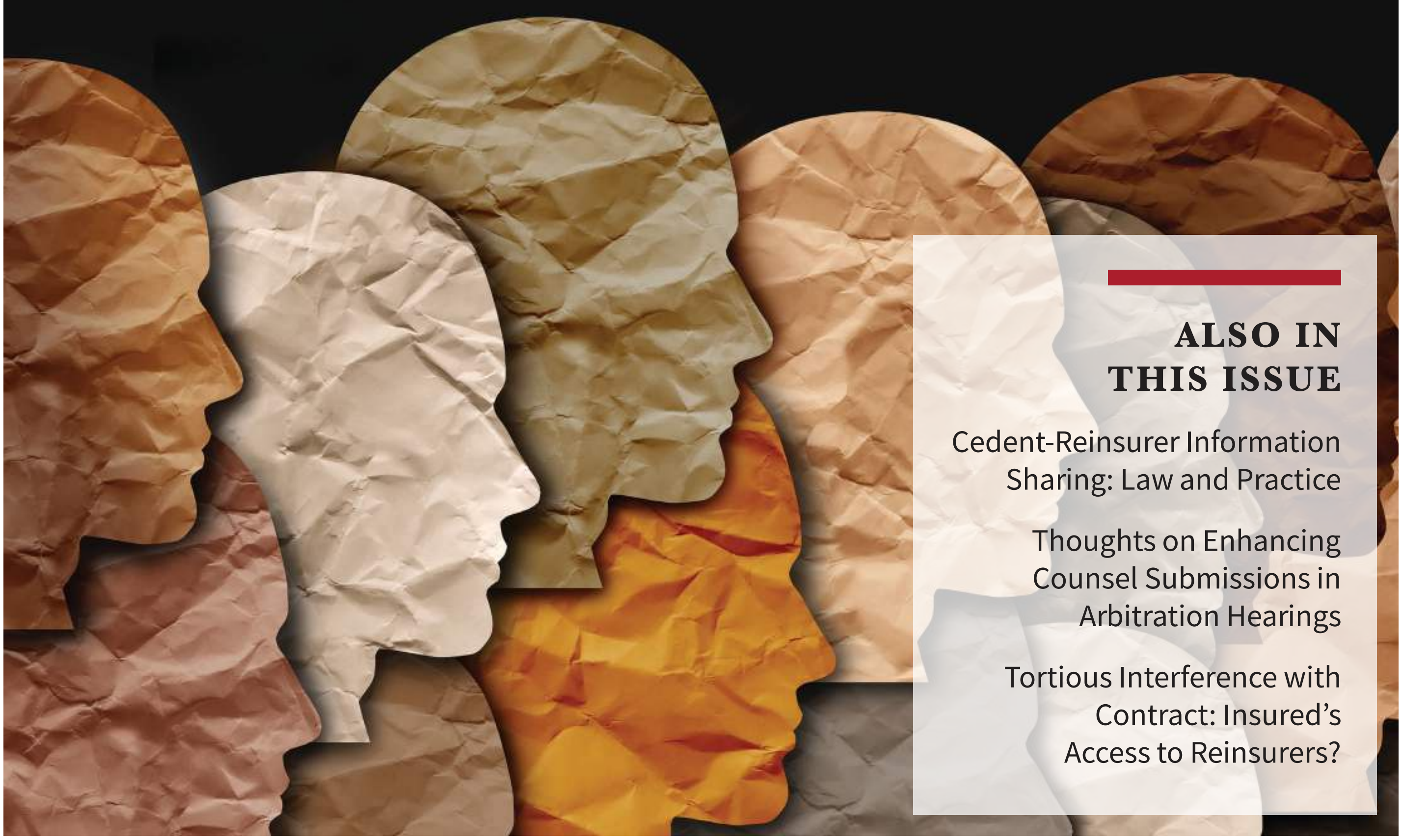
ARIAS U.S.

QUARTERLY

Five Things Your Organization Needs to Know about DEI



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BACK COVER

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

COVER ARTWORK: FRESHIDEA/ADOBE STOCK

By the time you read this, we will have successfully conducted our hybrid (online and live) Fall Conference at the Hilton in New York City. Hopefully, the Spring Conference will be totally live and not online.

Looking at the cover of this edition of the *Quarterly*, you might be wondering what diversity has to do with insurance and reinsurance arbitration. The fact is that diversity—the practice or quality of including or involving people from a range of different social and ethnic backgrounds and of different genders, sexual orientations, etc.—is critical for the continued success of ARIAS and for the insurance and reinsurance industries. To explain this in more detail, Fred E. Karlinsky, Nikki Lewis Simon, and Timothy F. Stanfield from Greenberg Traurig present "Five Things Your Organization Needs to Know About DEI." I believe we can all learn something from this article and from embracing the principles of diversity and inclusion.

Moving on to more traditional subjects, this issue includes an interesting article from Jack Vales and Alfonse Muglia of Dentons US titled "Thoughts on Enhancing Counsel Submissions in Arbitration Hearings." The article is based on the recent Fall Conference presentation on the same subject. Are these ideas radical, or do they make sense to you? If you have strong views either way, write an article responding to them or proposing other suggestions.

We also have another article from Editorial Board member and arbitrator Bob Hall, who provides us with an interesting analysis of tortious interference and reinsurance in "Tortious

Interference with Contract: Insured's Access to Reinsurers?" This is an issue that has come up repeatedly in court cases involving third-party administrators, but also arises in other contexts. This article should have been in our Q3 edition, but somehow it slipped through my hands. Hopefully, we made up for it by publishing it here.

Finally, we have the first in a two-part article from Richard C. Mason of MasonADR titled "Cedent-Reinsurer Information Sharing: Law and Practice." Part I addresses the issue of privilege in the context of information sharing. This is a complicated issue, and Rich clears the air about what is and is not privileged. Some of you may remember that, quite a while back, ARIAS put together a guideline on legal privileges and other evidentiary rules. We appreciate Rich's update on the privilege issue and hope it will be helpful to our arbitrators. You'll have to wait until Q1 of 2022 for Part II.

Speaking of Q1 of 2022, now is a great time for you to follow the example set by the authors in this issue and submit your own article to the *Quarterly*. Submissions are welcomed on all topics related to insurance and reinsurance arbitrations and mediations. ARIAS committee reports and articles are especially appreciated, or you can do what Jack Vales did and take your Fall Conference program and turn it into an article for Q1 and Q2 2022.

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.

Larry P. Schiffer
Editor

Five Things Your Organization Needs to Know about DEI

By Fred E. Karlinsky, Nikki Lewis Simon, and Timothy F. Stanfield

While there is a lot of talk about diversity, equity, and inclusion (DEI) in the business world today, there is not a lot of discussion about what DEI means for organizations in everyday practice. What is true organizational diversity from a commercial perspective?

An organization's talent—its human capital—is the engine that creates, runs, and sustains successful businesses. A workforce that is inclusive of individuals from varied, historically underrepresented backgrounds is the foundation of workplace diversity. Those varying views can create a unique demographic lens through which the internal workings, policies, and procedures are viewed anew. This is true organizational diversity.

When people bring their full, authentic selves into the workplace, it has a positive impact on the work environment, increases competitiveness in the market, elevates the organizational brand, and produces innovation, all of which hopefully translate into increased revenue.

Why Does DEI Matter?

In addition to diversity, equity, and inclusion being the right thing to do, a truly diverse workforce—one that includes individuals of differing races, ethnicities, and genders and who vary by gender identification, physical ability, and social, economic, and educational backgrounds—will better equip a company to serve a consumer/client base that is growing more diverse and globally interconnected by the day. "Cultivating a learning orientation" toward diversity, equity, and inclusion, where people can draw on their personal and professional experiences as members of a particular identity group, enables organizations to increase their overall market advantage.

Organizational diversity is not achieved, however, by merely growing the number of employees with dissimilar characteristics (as listed above) in your workforce. How your organization harnesses that diversity and how willingly it reimagines its power structure based on the insights of a diverse workforce will be the ultimate measures of success [1].

A recent workplace study cites increased employee engagement at companies that embrace diversity and inclusion. The employees of these companies typically have a higher degree of engagement, produce a better work product, and are more likely to stay for a longer term at the company [2].

Similarly, a recent study by McKinsey & Company shows that the business case for diversity is still a compelling one. This report found that, in 2019, companies in the top quartile for gender diversity on executive teams were 25% more likely than less-diverse companies to have achieved an increase in profitability during the fourth quarter. Those companies with more than 30% female representation at the executive level were more likely to outperform companies where this percentage ranged from 10% to 30%, and in turn these companies were more likely to outperform those with fewer female executives or none at all. The same held true for ethnic and cultural diversity, with companies in the top quartile outperforming those in the lowest quartile by 36% in profitability [3]. These statistics bear witness to how rich, sustained diversity and inclusion efforts equal a win in the commercial world.

Implementing a DEI Strategy

When an organization is ready to implement a DEI strategy, it should consider who it is culturally at the time DEI programming begins and who it wants to be in a year, in five years, and in 10 years. This self-reflection requires analyzing the organization's diversity footprint. What is the company's industry? Size? Location? Corporate age? Current demographic make-up?

Once the company takes stock of who it is, it should seek to ensure diversity is at all levels of the corporate structure, starting at the top [4]. When the C-suite backs diversity and inclusion efforts, a message is sent organizationally that DEI is a top priority.

Additional issues to consider in forming the strategy include whether to (1) form a DEI committee, (2) hire a chief diversity, equity, and inclusion officer (CDEIO) if one is not already in place, (3) create employee resource groups/affinity groups, and (4) schedule regular DEI programming aimed at bridging cultural differences. Transparency in these efforts will be paramount to establishing trust and will be a key asset to creating a program that works.

As to the question of hiring a CDEIO, there must be a person—a face associated with, responsible for, and in charge of driving change and increasing DEI—for diversity and inclusion efforts to really take root and remain a core value within an organization. Hiring a C-level executive, or CDEIO, places a passionate advocate at the helm of DEI efforts, someone who will bring employee-led leadership to the forefront of all diversity initiatives within the organization.

> “An organization's talent—its human capital—is the engine that creates, runs, and sustains successful businesses.”

Moreover, a CDEIO can assist with building more efficient teams, creating more inclusive products and programs, and cultivating creative workspaces that promote continued innovation. This C-level leader will also be responsible for crafting or changing the narrative of the work culture to try to ensure all employees' voices are heard and validated, allowing them to focus on what matters: their work. Many companies have come to the realization that by hiring a C-level executive, they are able to move beyond rhetoric to action, boosting productivity and retention rates [5].

Keep in mind that even when a hire is made in the CDEIO role, efforts to create or enhance an inclusive culture should be made enterprise-wide; to succeed, DEI must have buy-in and support at *all levels* of an organization. Communicating regularly with all stakeholders, sharing measurable successes and challenges, and developing a winning DEI initiative requires both commitment at the leadership level and authentic individual responsibility. Here are a few things to keep in mind when putting pen to paper to draft a DEI strategic plan:

- maintain top-level support and involve diversity and inclusion best practices;
- provide training on unconscious (implicit) bias;
- expand diversity and inclusion efforts to include those who provide vendor or contract services; and
- develop specific and targeted metrics to measure and track successes and opportunities [6].

DEI in the Insurance Industry

What does commitment to DEI look like in the insurance industry? Following are some efforts taking place:

NAIC. The National Association of Insurance Commissioners (NAIC) has brought forth a DEI framework developed by its employees and leadership that is intended to drive change, promote accountability in the workplace, and offer up a model to the

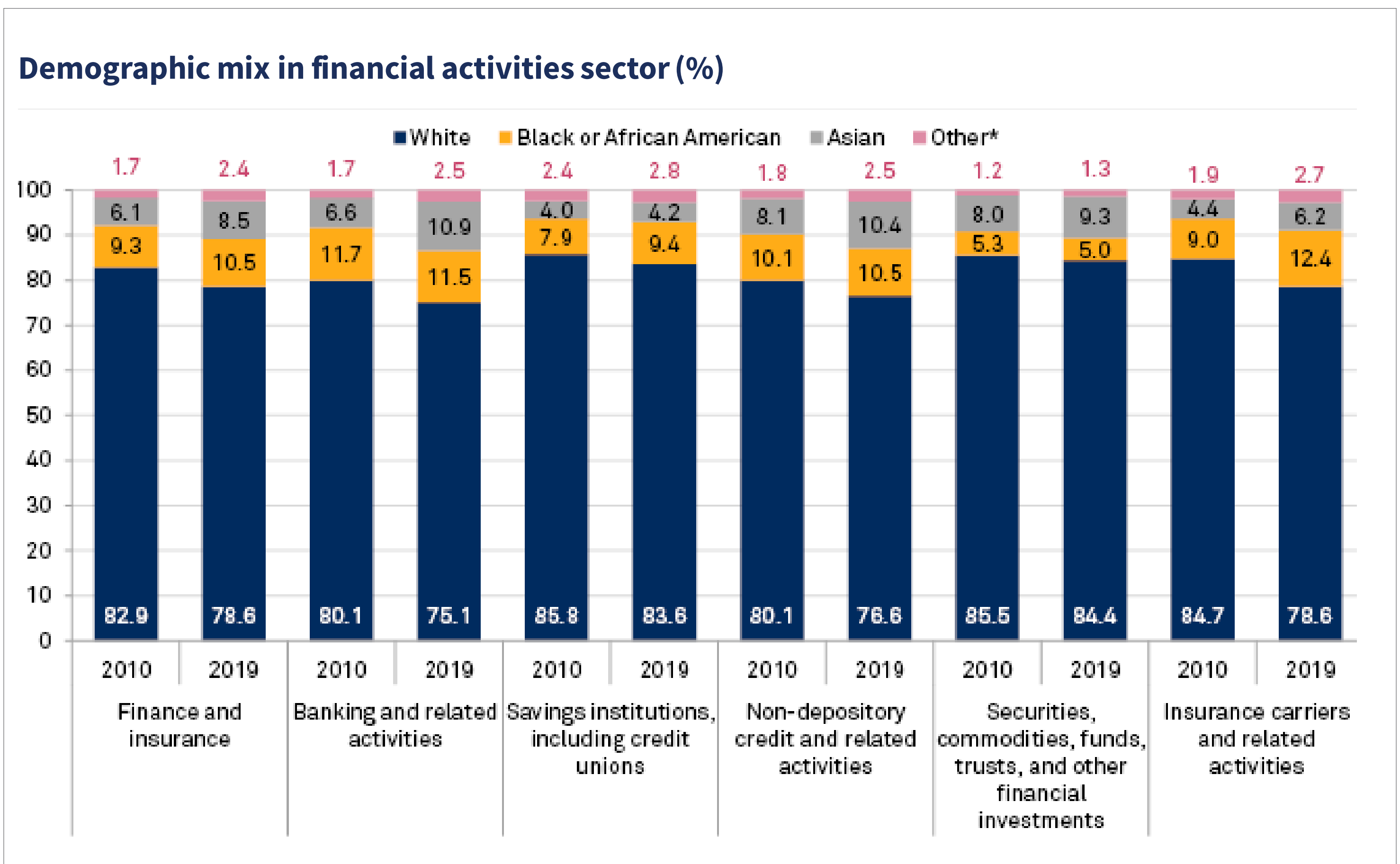

Figure 1: Racial Representation in Insurance [12]

insurance sector that others can follow. The framework focuses on four key components: (1) the workforce, (2) the workplace, (3) NAIC members, and (4) the community at large. This framework shows NAIC's commitment to an employee experience where similarities are celebrated while differences are equally respected and embraced as part of an effort to create a more socially just workplace.

Earlier this year, NAIC reported that it plans to pilot a DEI certification program for staff as part of an effort to offer support for cultural and workplace initiatives. Additionally, NAIC plans to launch employee resource groups (ERGs) to allow for greater connectivity across diverse employee groups, and to host its first annual DEI conference [7].

As a critical piece of the DEI framework, NAIC has formed a Special Committee on Race and Insurance, an initiative that has been tasked with (1) analyzing the level of diversity and inclusion within the insurance industry, (2) engaging with stakeholders on issues related to race, diversity, and inclusion, and (3) identifying and examining current practices or barriers that historically underrepresented groups face in trying to access the insurance sector and insurance products. This committee will report its findings to the NAIC Executive Committee and recommend steps that can be taken by both state insurance regulators and the insurance industry as a whole to increase diversity and inclusion in the industry. The plan is to address practices that potentially create disadvantages for people of color while also ensuring ongoing engagement by NAIC on these issues.

Industry-wide efforts. There has been a recognition that evolutionary change is needed in the U.S. insurance industry by industry insiders, who have noted the dearth of both women and people of color in the insurance workforce and particularly in positions of leadership. In "Moment of Change: How the Insurance Industry Can Bridge the

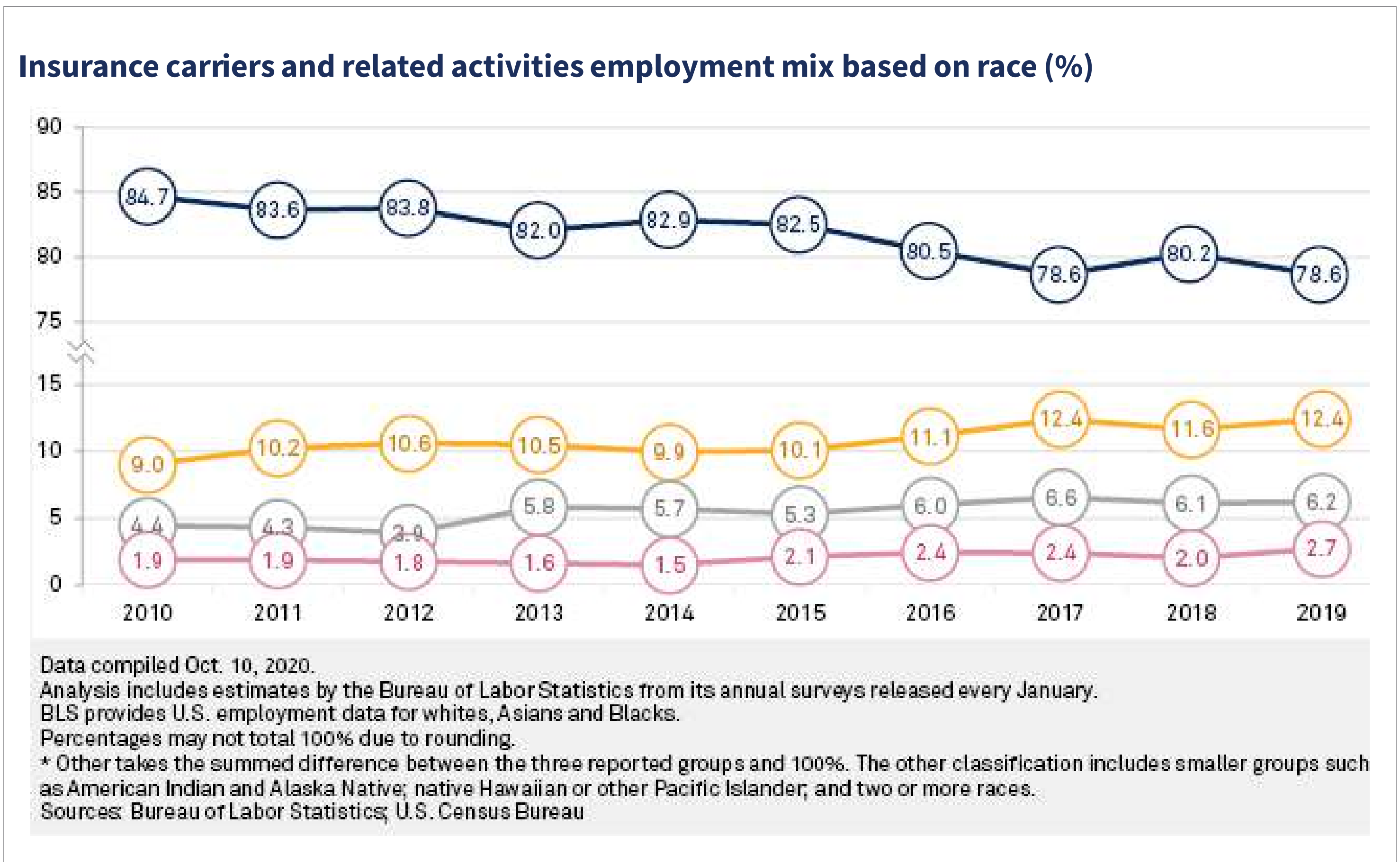

Figure 1: Racial Representation in Insurance [12]

Diversity Gap, Be an Ally" [8], the topic of diversity in the insurance industry is discussed at length. Nina Boone, North America leader for diversity and inclusion at Korn Ferry, makes the direct point in this article that "the insurance industry has done itself a disservice by not bringing in more people of color or elevating those already in its ranks." She was joined in this discussion by Mernice Oliver, founder of the National Association for Advancement of Women in Insurance (NAAWI), and Tyler Whipple, American Family's chief of staff. Ms. Oliver cites times where she "felt both isolated and excluded from advancement opportunities and decision-making scenarios," which have been described as systemic issues that inclusion efforts hope to address.

These and other industry experts challenge companies to examine their stated values and commitment to diversity and inclusion when speaking to issues of branding, attracting diverse talent, and making outreach to communities of color. These are essential pieces (beyond just making financial contributions) in closing the financial literacy gap and moving from rhetoric to action.

Standard & Poor's Global Market Intelligence's recent series on race and gender diversity in the U.S. insurance industry and the approach by regulators sheds light on the (albeit modest) improvements made over the last 10 years. Women make up approximately 21% of executives and officers at insurers that trade on either the New York Stock Exchange or Nasdaq [9]. These numbers are similar to the percentage of nonwhite employees in the insurance workforce, which stood at 21.4% in 2019, an increase from 19.8% in the prior year. The percentage of Black employees in the insurance workforce is cited as 12.4% in 2019, up from 9.0% in 2010 [10].

> "Cultural inclusion, if harnessed to increase productivity, brand presence and revenue, can lead to organizational exceptionalism."

This series also focuses on the impact of social justice issues, pushing insurance regulators to lead calls for change (as noted above with the NAIC's examination of diversity in the industry). The ultimate goals are to create opportunities for early exposure to the insurance industry as a career path and add diversity at the leadership level ("the ultimate proof of a company's inclusion and diversity agenda"). With these salient points in mind, industry leaders are "seeking to bake diversity into their core company strategies."

In a recent thought leadership article on actualizing diversity in the industry, the author of *Making Diversity and Inclusion a Reality in the Insurance Industry* outlines the benefits and challenges to increasing diversity and removing bias in all aspects of the insurance business. The author notes that every industry, regardless of its historic demographic makeup, has an obligation to make tangible changes so that diversity and inclusion practices become part and parcel of the "fabric of industry organizations" [11].

Efforts within the legal profession. As with the insurance industry, embracing DEI in the legal industry creates a more inclusive environment, enhances innovation, leads to better results for clients, and increases profitability. Moreover, within the legal profession, a growing number of law firms are participating in the Mansfield Rule Certification Program as a sign of their active commitment to diversity, equity and inclusion. This robust certification program is administered by The Diversity Lab and is designed to diversify law firm leadership by ensuring that historically underrepresented lawyers (women, racial and ethnic minorities, LGBTQ+ individuals, and those with disabilities) are being considered for significant governance roles, lateral openings, and promotions. Increasingly, law firms and their clients are seeking opportunities to collaborate to drive DEI initiatives in the industry and move the needle.

An example of this active commitment to diversity and inclusion within the legal profession can be found at Greenberg Traurig (GT), an international law firm. GT has grown its DEI initiatives to create a shift in cultural norms that brings into sharp focus a workplace of inclusion and belonging. The firm's efforts include (1) broadening the diversity pipeline, (2) strengthening mentoring and sponsorship programs for women and diverse attorneys, (3) engaging the firm's affinity groups in recruitment, retention and advancement efforts, and (4) enhancing firm-wide DEI training. GT achieved Mansfield Rule 3.0 Certification in 2020 and Certification Plus in 2021.

The bottom line is that it is important for organizations to be intentional in the ways they implement and advance internal and external DEI initiatives to ensure meaningful impact and long-term success. Take a true assessment of who you are as a company from a market, talent, leadership, and growth perspective. Define DEI for your particular organization. Then, create tailored diversity, equity, and inclusion strategies, execute on those initiatives, and measure your successes and failures. Keep what works, and don't be afraid to discard what does not.

Cultural inclusion, if harnessed to increase productivity, brand presence and revenue, can lead to organizational exceptionalism. When the right balance of diversity and inclusion is struck, the momentum to change the game in the DEI space can be actualized.

Note: The firm development team (and, in particular, Rita M. Treadwell, the firm's diversity, equity and inclusion manager) assisted in the preparation of this article.

NOTES

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9 Ross, Hailey, and Jason Woleben. 2020. "Female Insurance Leaders Work Against Odds to Open Doors for Other Women." S&P Global Market Intelligence, November 17.

10 Ross, Hailey, and Jason Woleben. 2020. "Black Representation in Insurance Grows Slowly as Industry Seeks to Diversify." S&P Global Market Intelligence, November 10.

11 Johnson, Michelle. 2021. "Making Diversity and Inclusion a Reality in the Insurance Industry." Palomar, March 4.

12 Ross and Woleben, November 10.

Fred E. Karlinsky is Co-Chair of Greenberg Traurig's Insurance Regulatory and Transactions Practice Group. Fred has nearly 30 years of experience representing the interests of insurers, reinsurers and a wide variety of other insurance-related entities.

Nikki Lewis Simon is a Shareholder and commercial litigator with more than 21 years of experience. She also serves as Greenberg Traurig's Chief Diversity, Equity & Inclusion Officer.

Timothy F. Stanfield is Of Counsel with the Florida Government Law & Policy Practice. He represents a broad array of private and public-sector clients before the Florida Legislature, Cabinet and State agencies.

Cedent-Reinsurer Information Sharing: Law and Practice (Part I)

By Richard C. Mason, Esq.

The law governing cedent-reinsurance information sharing is essential knowledge for the day-to-day conduct of the reinsurance business. It informs and guides cedent-reinsurer claims cooperation, inspection of records, and reporting obligations. While disputes in arbitration are not always determined according to the strict rule of law, the prevalence of lawyer-arbitrators means that legal rules are prone to influence any dispute arising from information sharing between cedent and reinsurer.

This article begins with a discussion of the legal contours of the privilege before turning to common privilege issues that arise from the cedent-reinsurer relationship. Part II of this article, which will be published in the first quarter of 2022, concludes with a discussion of the less-well-understood law governing inspection of books and records under access to records clauses.

Privilege Issues in Reinsurance

Legal privileges are broadly claimed, but often thinly understood. Treatises have been written about legal privileges, but these rarely guide day-to-day business operations. We can best begin our understanding by diagramming the elements of the privilege.

The attorney-client privilege can be diagrammed as follows: It protects (1) communications (2) between the client (3) and inside or outside legal counsel (4) whom the client has retained to represent it (5) where such communications further the rendering of legal advice to the client (6) and the communication is not intended to be disclosed to outside parties (and due care is exercised to prevent such disclosure).

Element (5), "where such communications further the rendering of legal advice to the client," lies at the heart of the doctrine. In its purest sense, the attorney-client privilege protects communications from the client (i.e., the client's own confidences). However, because the attorney's advice to the client invariably reveals the nature of the client's inquiry, communications from counsel have been afforded equivalent protection in most jurisdictions.

A companion privilege, the work product privilege, also is relevant and important to understand. The attorney-work product privilege can be diagrammed as follows: it protects (1) material (2) that was (a) collected or (b) prepared (3) for purposes of litigation or in anticipation of litigation.

Note that the work product privilege is less revered than the attorney-client privilege and may be set aside by a court or arbitration panel if the information is critical to an opponent's claims or defenses and the opponent cannot otherwise obtain the information. Moreover, the work product privilege may provide insurers and reinsurers less than seamless protection, perhaps because insurers handling a disputed claim may be deemed to nearly always be in a state of "anticipation of litigation."

"The law governing cedent-reinsurance information sharing is essential knowledge for the day-to-day conduct of the reinsurance business."

It has been held that documents in a claim file created by or for an insurance company as part of its ordinary course of business are not afforded work product privilege [1]. Another court rejected a claim of privilege by a cedent, observing the following:

The vast majority of the documents are simply the private musings of non-lawyer employees of a non-party, which on their face do not appear to be related to preparation for litigation other than in an incidental manner. In other words, these documents are mere insurance business material [2].

This leads to an arbitration practice tip: A party that is compelled in arbitration to produce what it regards as privileged information very likely has no recourse to the courts concerning such a ruling.

Material that may not be protected by the work product privilege, even if it relates to legal issues or anticipated litigation, includes the following:

- claim files;
- contract drafts (particularly if they resulted in an executed contract);
- financial information;
- audit reports; and
- views of underwriters or claim personnel regarding meaning of contract terms.

Of course, an insurer may always object to discovery on the ground that reinsurance information does not meet the relevance requirements for discoverability. However, as an April 2021 federal court decision observed, "there is no bright-line rule on this topic" [3]. And, at least in federal court, the party seeking to withhold the information bears the burden of demonstrating non-relevance [4].

With these principles in mind, we discuss common privilege issues that are important considerations in the context of cedent-reinsurer information sharing.

Protecting the privilege during cedent-reinsurer cooperation in the defense of insurance claims. The cedent-reinsurer relationship presents distinct challenges for protecting information from disclosure to potential litigants. There are four reasons for this:

1. cedents have a (qualified) duty of affirmative disclosure to reinsurers, which may obligate them to disclose confidential information that they would not otherwise provide to a counterparty;
2. reinsurers usually have inspection rights entitling them to examine records, which may contain privileged information;
3. reinsurers may associate in the defense of a reinsured claim, and thereby become privy to reports from counsel; and
4. reinsurers and cedents may have a common interest in defeating an underlying claim, while having conflicting interests regarding the reinsurance contract.

These factors may produce an environment in which potentially privileged information is frequently circulated—often, though not necessarily, flowing from the cedent to the reinsurer—in circumstances fraught with risks of waiver of otherwise applicable privileges.

Risk of waiver. Waiver of the attorney-client privilege occurs when a party discloses privileged information in such a way that infers the party did not regard the communications as confidential. The New York Appellate Division has ruled that two insurers waived the attorney-client privilege when they transmitted certain documents to their reinsurer [5].

> “Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests.”

The work product privilege is less readily waived and turns upon different considerations. While the attorney-client privilege is designed to protect confidentiality, so that outside disclosure generally is “inconsistent with the privilege,” work product protection “is provided against ‘adversaries,’ so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection” [6]. Consequently, “voluntary disclosure of work product waives the protection only when such disclosure is made to an adversary or is otherwise inconsistent with the purpose of work product doctrine—to protect the adversarial process” [7].

Thus, by way of example, disclosure by a cedent to a reinsurance broker of a legal analysis concerning the cedent’s reinsurance claim could result in a waiver if a court deemed the broker a conduit to an “adversary” (i.e., the reinsurer with whom the cedent is embroiled in a coverage dispute). But if the cedent shared with the reinsurer the cedent’s litigation strategy against its insured, no waiver likely would ensue given that, in relation to such information, the reinsurer is not the cedent’s adversary.

Regarding the attorney-client privilege, a knowing disclosure of privileged information to a separately represented party generally results in waiver of the privilege [8]. A waiver also can occur where the disclosure was not intentional but inadequate care was taken to prevent it, such that one can infer the party was indifferent to the risk of disclosure. Even when the disclosing party intended the information to remain confidential, waiver of the attorney-client privilege may occur if the disclosure is not properly protected (as discussed below). It can be unfair, courts have reasoned, for a company to disclose "privileged" information to some, while withholding it from an opponent in litigation.

Cedents that disclose privileged information to a reinsurer can be, and on occasion have been, deemed to have waived the attorney-client privilege. The most commonly employed (and commonly misunderstood) method to minimize this risk is the "common interest" doctrine.

The Common Interest Doctrine

A "common interest" agreement can be compared to using a turn signal. Regular use is good practice, but one cannot blindly rely upon the signal being observed.

The common interest doctrine may protect disclosure of privileged information to a third party when the recipient's interests are sufficiently aligned that it cannot be said the disclosure reflects any intent to waive the privilege. The common interest doctrine or its equivalent protects both of the following:

- multiple parties represented by the same attorney (dual representation) [9]; and
- separately represented parties who have a common legal goal [10].

The best-protected situation is that in which both parties are represented by the same counsel [11]. Under this "dual representation" arrangement, absent explicit acknowledgement of conflicting interests, exchanges of privileged information will not waive the privilege. All other arrangements carry elevated risks of waiver.

Requirement of a 'common legal enterprise.' Absent shared legal counsel, the common interest doctrine will most likely insulate against waiver of privilege when (1) cedent and reinsurer are engaged in a "common legal enterprise," (2) the information disclosed relates to that common legal enterprise, and (3) there is no actual or incipient dispute involving the reinsurance agreement.

The mere existence of the cedent-reinsurer relationship cannot guarantee recognition of a common interest [12]. "[A]s in the direct insurance context, the interests of the ceding insurer and the reinsurer may be antagonistic in some respects and compatible in others. Thus, a common interest cannot be assumed merely on the basis of the status of the parties" [13].

When there is separate representation, common interest protection has been held to require a common legal goal—not simply that both cedent and reinsurer would prefer the underlying insured claim to be denied or minimized [14]. Thus, the pivotal factor is not merely common interest, but whether the parties have cooperated toward a "common legal goal" [15]. Where, in contrast, the common interest is predominantly commercial, privilege may be waived if information is shared [16]. This is particularly true when the parties had never indicated the communications were confidential [17].

"Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests" [18}. The protection "extends at least to situations where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel" [19].

Nevertheless, some courts have indicated that the common economic interest between reinsurer and cedent may not be irrelevant [20]. And one federal court in Ohio accepted the mere existence of a "common litigation opponent" as sufficient to afford common interest protection [21]. Accordingly, the common interest privilege can credibly be asserted even when a common legal enterprise is lacking, although the more the reinsurer is detached from the underlying legal strategy, the more uncertain the privilege may become.

Actual or incipient dispute can preclude common interest. Even when the cedent and the reinsurer are pursuing a "common legal enterprise," the common interest doctrine may not apply if a reinsurance dispute surfaces. Where the reinsurer and insurer have clearly adverse interests in the underlying matter, "the mere fact that they shared an interest in the eventual outcome of the underlying coverage litigation is not sufficient to create a common interest" [22].

A common interest agreement may, in particular, be called into question when the cedent is inclined to pay a claim and the reinsurer either disputes (a) whether it should be paid on its own merits or (b) whether it falls within the reinsurance agreement [23]. Note, however, that such a conflict will not automatically imply a waiver of the work product privilege if the shared information relates only to the underlying claim. In such an instance, the cedent has not shared work product with the underlying claimant, but only with a reinsurer—who is not the cedent's adversary in respect of the underlying claim.

This suggests a practice tip: Parties hoping to rely upon the common interest doctrine should consider avoiding overt displays of conflict between one another, such as letters memorializing points in dispute. When there is a palpable dispute between cedent and reinsurer, the time when the information was disclosed may be critical to the question of waiver. Information disclosed prior to the reinsurance dispute may remain protected. The mere fact that a dispute ensues does not mean a common interest had not existed previously [24].

Communications during periods of active disputes just prior to litigation likely will fall outside the common interest doctrine. Where, for example, an insurer and insured were disputing coverage and litigation was imminent, a letter relating to coverage sent to the insurer was not protected from waiver [25]. And where an insurer provided its reinsurer with an attorney opinion "well after their interests had ceased to be aligned," a waiver of the attorney-client privilege resulted [26]. Even where the parties were not in suit, a "clear possibility of litigation" was sufficient to abrogate the common interest doctrine and cause a waiver.

Note that in proceedings between formerly aligned parties, all previously shared information may be usable by either party. "[N]either party to a common interest arrangement can reasonably be allowed to deny the other the use of information which he already has by virtue of the former's own disclosure" [27].

> "The common interest doctrine merely guards against waiver of an existing privilege. It cannot create privilege where none otherwise existed."

Scope of information protected by common interest. Even when a common interest exists, it does not apply to every communication between cedent and reinsurer. The common interest privilege is intended to protect only those communications that were designed to further the parties' efforts in that common goal [28]. Given that reinsurance disputes are not part of a common strategy toward an underlying claim, it has been held that the privilege may not apply to communications relating to coverage under the reinsurance contract [29].

In addition, communications that a reinsurer and cedent would ordinarily exchange without regard to any common legal enterprise likely will be deemed to fall outside the privilege. An illustrative case involved a cedent's unsuccessful attempt to shield from its insured the cedent's communication to its reinsurer of a loss:

[T]he information [the cedent] seeks to protect from disclosure involves documents sent by John Ramsey of Front Royal Insurance to its reinsurer, General Reinsurance Corp., to notify it of this loss and correspondence from General Reinsurance to Front Royal regarding the notice of loss. Thus, it appears that Front Royal seeks to use the common interest rule to protect documents which were created in the ordinary course of business under the contractual obligations between insurer and reinsurer [30].

Also noteworthy was the fact that the document in question was not prepared by attorneys. Thus, even had it been disclosed in the context of a common interest agreement, it likely would not have been protected.

To sum up, two kinds of communications have been recognized as falling outside the common interest doctrine even when cedent and reinsurer are engaged in a common legal enterprise vis-à-vis an underlying claim:

- communications relating to the reinsurance, including (particularly) disputes regarding reinsurance protection or concerning pre-contract disclosure by the cedent; and
- communications generated in, or relating to, the ordinary course of business between cedent and reinsurer.

Note that the common interest doctrine merely guards against waiver of an existing privilege. It cannot create privilege where none otherwise existed.

Exception to Privilege Protection for Information 'At Issue'

In litigation or (less often) arbitration, a party may waive an existing privilege by asserting claims or defenses that make the information central to the dispute. For example, a cedent might claim privilege concerning emails that reflect attorney-directed audit response by non-legal personnel. However, if this cedent seeks damages for costs it incurred in complying with a "bad faith audit process," it may be required to disclose these emails even if they were otherwise privileged. "[W]hen the party has asserted a claim or defense that he intends to prove by use of the privileged materials," the "at issue" doctrine may require disclosure [31].

In *United States Fidelity & Guar. Co. v. American Re-Insurance* [32], the reinsurers contended that the cedents had placed the privileged materials at issue (1) by alleging that a settlement was made in good faith and consistent with the law, (2) because of its alleged "bad faith" in defending the underlying action, and (3) through deposition testimony of its witnesses, where the cedent's witness repeatedly revealed advice he had received in preparing a $400 million bill for reinsurance claims. The New York Appellate Division held that a cedent does not place the bona fides of a settlement at issue "merely by alleging in a pleading that the settlement was reasonable and in good faith" [33]. However, the court held that the witness's disclosures during this testimony waived the privilege as to legal advice concerning the $400 million reinsurance claim.

This leads to an arbitration practice tip: The resolution of privilege issues in arbitration often turns on conceptions of "undue burden" and "overreaching." Panels have been less inclined than courts to find privilege waivers.

An "at issue" waiver does not necessarily arise merely because a party concedes it relied upon certain advice. "If admitting that one relied on legal advice in making a legal decision put the communications relating to the advice at issue, such advice would be at issue whenever a legal decision was litigated" [34]. Generally, it is only when preclusion causes undeniable unfairness to the discovering party that the "at issue" doctrine will apply to require disclosure of privileged information.

Can a Common Interest Provide a Basis for Discovery of Otherwise Privileged Information?

One of the oddest wrinkles arising from the common interest doctrine is the occasional assertion by reinsurers that a cedent cannot assert a claim of privilege against the reinsurer on communications relating to matters on which it shares a common interest with the reinsurer. This is an entirely different assertion than the usual invocation of waiver, typically advanced by underlying insureds, who seek to prove a lack of common interest. Here, the reinsurer would be seeking to wield the "common interest" against the cedent.

This seemingly dubious theory was lent some credibility by a New York Appellate Division decision in 2007. While the court did not rule in the reinsurer's favor, it suggested the argument could be effective, stating, "As a general rule, there is no automatic waiver of the attorney-client privilege merely because the parties have a 'common interest' in the outcome of a particular issue" [35]. The First Department concluded that no waiver occurred where the reinsurer and the insurer have clearly adverse interests in the underlying matter: "The mere fact that they shared an interest in the eventual outcome of the underlying coverage litigation is not sufficient to create a common interest so as to defeat [the cedent's] claimed privileges" [36]. Following this decision, cedents that are subject to New York law should carefully consider whether to acknowledge a "common interest" with a reinsurer if they are concerned the reinsurer may ultimately seek to use that interest against the cedent in a subsequent reinsurance dispute.

I close this section with a summary of common misperceptions regarding the common interest doctrine.

Misperception: All states recognize at least some version of the common interest doctrine. *Several states have not definitively recognized the doctrine.*

Misperception: A privilege based on common interest can be created simply by two parties agreeing to it in writing. *A "common interest agreement" merely documents an already existing privilege; it cannot transform non-privileged documents into privileged documents.*

Misperception: The common interest doctrine exists as long as both parties have an interest in minimizing the underlying claim. *Several courts have held that a mere shared interest is insufficient. The parties must be engaged in a "common legal enterprise."*

Misperception: Once a common interest exists, all related communications between those parties are protected from discovery. *The only documents protected with certainty by the common interest doctrine are those which already are privileged and relate to the common defense or evaluation of the underlying claim.*

NOTES

1 *OneBeacon Ins. Co. v. Forman Int'l, Ltd.,* 2006 WL 37771010, *5 (S.D.N.Y. 2006).

2 *Allendale Mutual Inc. Co. v. Bull Data Systems,* 152 F.R.D. 132, 136-37 (N.D. Ill. 1993).

3 *U.S. Tobacco Cooperative, Inc. v. Certain Underwriters at Lloyd's,* No. 5:19-cv-00430, p. 5 (E.D.N.C. April 9, 2021).

4 *Id.*

5 *Mass. Bay Insurance Co. v. Stamm,* 700 N.Y.S.2d 707 (N.Y. App. Div. 2000). The court remanded the case for a determination whether certain documents fell within the scope of the work product privilege and whether such privilege had been waived.

6 *United States v. Mass. Inst. of Tech.,* 129 F.3d 681, 687 (1st Cir 1997).

7 *United States v. Sanmina Corp.,* 968 F.3d 1108, 1120 (9th Cir. 2020).

8 *Allendale Mutual,* 152 F.R.D. at 139.

9 *Strougo v. BEA Assocs.,* 199 F.R.D. 401, 407 (S.D.N.Y. 2001).

10 *North River Ins. Co. v. Columbia Cas. Co.,* 1995 WL 5792 (S.D.N.Y. 1995).

11 *American Re-Insurance Co. v. U.S. Fidelity & Guar. Co.,* 837 N.Y.S.2d 616 (N.Y. App. Div. 2007).

12 *Allendale Mutual,* 152 F.R.D. at 140; *North River Ins. Co. v. Columbia Cas. Co.,* supra.

13 *Id.*

14 *U.S. v. Bergonzi,* 216 F.R.D. 401, 407 (N.D. Ill. 2001).

15 *Id.*

16 *Mass. Bay Ins. Co. v. Stamm,* 700 N.Y.S.2d 707 (N.Y. App. Div. 2000).

17 *Id.*

18 *North River Ins. Co. v. Philadelphia Reins. Corp.,* 797 F. Supp. 363 (D.N.J. 1992).

19 *Id.*; *North River Ins. Co. v. Columbia Cas. Co.,* 1995 WL 5782, at *3.

20 *Great American Surplus Lines Ins. Co. v. Ace Oil Co.,* 120 F.R.D. 533, 537-38 (E.D. Cal. 1988) (privilege not waived where "reinsurer reinsured the greatest proportion of the policy at issue here."); *Minnesota School Boards Employers Ins. Co. of Wausau,* 183 F.R.D. 627, 631-32 (N.D. Ill. 1999) (work product privilege not waived by insurer's disclosure of documents to reinsurer).

21 *Travelers Cas. & Sur. Co. v. Excess Ins. Co., Ltd.,* 197 F.R.D. 601, 607 (S.D. Oh. 2000).

22 *American Re-insurance,* 837 N.Y.S.2d at 621.

23 *North River Ins. Co. v. Columbia Cas. Co.,* 1995 WL 5792, at *4.

24 *Gulf Ins. Co. v. Transatlantic Reins. Co.,* 788 N.Y.S.2d 44 (N.Y. App. Div. 2004) (disclosure of documents by a reinsured to its reinsurer when they have a common interest in the outcome of the underlying litigation does not preclude the assertion of privilege by the reinsured as to "similar documents" when it is later in an adversarial relationship with the reinsurer).

25 *Imperial Corp. of America v. Shields,* 167 F.R.D. 447 (S.D. Cal. 1995).

26 *AIU Ins. Co. v. TIG Ins. Co.,* 2008 WL 5060230, *7 (S.D.N.Y. 2008).

27 *In re Subpoena Duces Tecum,* 408 F. Supp. 381, 394 (S.D.N.Y. 1975).

28 *U.S. v. Bergonzi,* 216 F.R.D. 401, 407 (N.D. Ill. 2001).

29 *North River Ins. Co. v. Philadelphia Re,* 787 F. Supp. at 367 (citing *Waste Mgt. v. Int'l Surplus Lines Ins. Co.,* 579 N.E.2d 322, 336 (Ill. 1991)).

30 *Front Royal Ins. Co. v. Gold Players, Inc.,* 187 F.R.D. 252, 258 (W.D. Va. 1999).

31 *North River Ins. Co. v. Columbia Cas. Co.,* 1995 WL 5892, at *6.

32 837N.Y.S.2d 616, 617 (N.Y. App. 2007).

33 *American Re-Insurance,* 837 N.Y.S.2d at 622.

34 *Metro Life Ins. Co. v. Aetna Cas. & Sur. Co.,* 730 A.2d 51, 53 (Conn. 1999).

35 *American Re-Insurance Co.,* 837 N.Y.S2d at 621 (emphasis supplied).

36 *American Re-Insurance,* 837 N.Y.S.2d at 621.

Richard C. Mason is a mediator, arbitrator, and legal consultant with MasonADR, LLC, with over 30 years of experience.

Checklist for Common Interest Situations

Identify the commonality of interest. Attorneys considering entering into a common interest arrangement must first clearly identify the objectives sought and evaluate the commonality of interests shared between the parties to ensure courts' acceptance of the arrangement.

Limit sharing according to common interests. Limiting shared conversations and documents only to those common areas is extremely important to avoiding waiver of privileged items that may later be used against your client in a subsequent controversy.

Create and enter into a confidentiality agreement. Although not strong enough to protect arrangements when clear adversarial elements are present, a confidentiality agreement provides evidence of intent to maintain confidentiality, a crucial element in many courts' evaluations of whether to allow common interest protection. It also should state the following:
"Information transmitted remains confidential, privileged, attorney-client communications."
Exclusivity clause: Information will not be furnished to any other person, either through copying or disclosing in whole or in part.

Ensure all attorneys are present when confidential information is shared. Since communications protected by the common interest rule require the presence of all attorneys, it is imperative to ensure parties do not make damaging disclosures to one another outside of planned meetings and that all attorneys are present at meetings and undertake a primary role in transmitting written communications [1].

The Common Interest Agreement: Content

A well-conceived common interest agreement may persuade an arbitration panel or a court that the parties were not acting in hindsight to contrive the appearance of a common interest; rather, they had previously considered the issue, intending to protect against further disclosures.

The key elements of a common interest agreement are as follows:

- stipulates to factual and legal issues common to the parties;
- stipulates the parties intend to pursue a joint legal defense or legal inquiry;
- stipulates the parties do not intend to waive the privilege;
- acknowledges that shared information shall be held in confidence; and
- provides that the confidentiality shall survive termination of the agreement.

NOTES

1 Nicole Garsombke. 2006. "A Tragedy of the Common: The Common Interest Rule, Its Common Misuses, and an Uncommon Solution." 40 *Georgia Law Review* 615, 659 (Winter).

Thoughts on Enhancing Counsel Submissions in Arbitration Hearings

By Jack Vales and Alfonse Muglia

Private arbitration continues to remain the preferred vehicle for resolving commercial disputes between parties to reinsurance contracts. While many factors explain the predominance of arbitration as a dispute resolution mechanism, perhaps no factor is more important than confidence by the contracting parties that arbitration will produce fair and just outcomes. It is helpful, therefore, to consider what improvements (if any) can be made to the arbitration process to enhance the ability of arbitrators to render fair and just awards.

This article focuses on a key component of arbitrators' deliberative process: their consideration of written and oral submissions made by counsel during the arbitration proceedings. It discusses the structure of counsel submissions in a typical reinsurance arbitration and outlines potential improvements to the structure to promote the effectiveness of submissions and, in turn, the effectiveness, efficiency, and fairness of the entire arbitration process.

Standard Counsel Submissions in Reinsurance Arbitration Hearings

Most reinsurance arbitration hearings proceed with a similar structure consisting of four dedicated opportunities for counsel's oral and written submissions after discovery concludes: (1) the written pre-hearing brief, (2) the written pre-hearing reply brief, (3) the opening statement, and (4) the closing argument. Each submission serves a distinct purpose for the panel.

Pre-hearing brief. The pre-hearing brief is typically the first opportunity for the parties to lay out the relevant facts, arguments and supporting evidence for the panel in detail. The pre-hearing brief typically includes extended citation to relevant documents and deposition testimony, as well as to legal authorities supporting the parties' position. In many cases, the parties will include voluminous supporting documentation with their pre-hearing briefs, including but not limited to deposition transcripts, exhibits marked during the deposition process, additional documents not marked in depositions but produced in discovery, detailed spreadsheets, and legal authorities. Additionally, parties typically use pre-hearing briefs to refine and detail their positions in the matter and to clarify the specific relief requested in the arbitration hearing.

Ordinarily, the pre-hearing brief varies significantly from counsel submissions that occur earlier in the matter, such as the pre-organizational meeting position statement, or those focused on a discrete issue, such as discovery motions. Whereas those submissions are normally relatively short, the pre-hearing brief allows for an expansive discussion of the factual, legal, and evidentiary matters that sets the stage for the hearing to follow. In most cases, the parties submit pre-hearing briefs about 4–8 weeks before the arbitration hearing and do so simultaneously, so that neither side has an opportunity in their opening submission to respond to the pre-hearing brief of the opposing party. Arbitrators typically provide counsel with significant flexibility as to the structure and content of their pre-hearing briefs, but the pre-hearing briefing should observe any requirements in the parties' arbitration agreement or as the parties may otherwise agree.

Pre-hearing reply brief. The pre-hearing reply brief, when there is one, naturally allows for the parties' first detailed response to their opponent's arguments. Its value to the overall arbitration may be the least significant of all submissions, insofar as the hearing has yet to begin and the parties will still have an additional opportunity to respond to arguments in their opening statement. Still, the reply brief helps the parties fine-turn their arguments in advance of the hearing and rebut key points raised in their opponent's opening brief. Like the pre-hearing brief, the exchange of pre-hearing reply briefs often occurs simultaneously, with the timing of such submissions usually ranging from 2–4 weeks before the final hearing.

Opening statement. Opening statements introduce the panel to the witnesses and other evidence that the parties intend to present at the hearing. Openings typically set forth a hearing roadmap for the panel and provide counsel with an opportunity to frame the issues that will guide counsel's presentation of evidence at the hearing. They may also serve several other important purposes, including highlighting the claims and defenses at issue, responding to issues raised in the pre-hearing briefing, and building trust and confidence in the panel members. Opening statements and closing arguments often are accompanied by a slide presentation, with some panel questions at the conclusion of the statements.

Closing argument. The next and, often, final opportunity for structured attorney advocacy is the closing argument. After three opportunities to introduce the arguments and evidence to the panel prior to the hearing, the closing arguments represent (in many reinsurance arbitrations) the sole opportunity for counsel to comment on the evidence actually introduced in the hearing.

When utilized effectively, closing arguments enable counsel to pull together the most important evidence introduced in the case into a compelling narrative that explains why their client should prevail in the matter. While closing arguments may extend up to two hours or longer in some cases, counsel must make decisions as to how to best use their time, including whether (and to what extent) to highlight strong witnesses or evidence, rehabilitate any damaging witnesses, respond to or explain any damaging evidence, tactfully attack their opponent's witnesses or evidence, or address other matters raised during the hearing. Counsel wants the panel to walk away from the closing argument with a clear understanding of why their client wins and with resources that the panel will remember and rely upon in its deliberation.

The panel also may request a post-hearing briefing, but such instances are not common (in the authors' experience) in reinsurance arbitrations. After two sets of pre-hearing briefings, opening statements, and closing arguments—not to mention the evidentiary portion of the hearing—arbitrators often may conclude that they do not require further briefing. That said, counsel typically include slide presentations with their closing argument, which the panel can review during its deliberations.

Thoughts On Enhancing Counsel Submissions

Typical Structure	Suggestions
Three oral/written submissions prior to evidence; one oral submission after evidence; **no post-hearing briefing.**	Consider **removing pre-hearing reply briefing**, and **adding post-hearing briefing.**
Counsel afforded **great flexibility** in drafting written submissions.	Consider whether requirements like **page limits** and/or **hyperlinks** to exhibits and authorities can improve traditional briefing submissions and slide presentations.
Closing argument occurs **immediately** following close of evidence, with counsel pulling an "all-nighter."	Consider **adding time** between the close of evidence and closing argument, and utilize video conferencing.
Opening and closing argument are largely **planned presentations** with questions at the end.	Consider having the **panel submit questions** prior to the argument for counsel to incorporate into presentations.

Thoughts on Enhancing Counsel Submissions

While most arbitrations follow a similar briefing schedule, counsel and the panel enjoy great flexibility (unless a particular contract might say otherwise) to structure submissions in a way that reflects the needs of the case and promotes the quality of submissions. The ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes say relatively little about the structure of counsel submissions [1]. For example, Rule 10.7(g) provides that the panel and parties shall seek agreement on an arbitration schedule that includes a "pre-hearing briefing schedule, including the number of briefs, whether briefs are to be sequential or simultaneous and any page limitation." Rule 14.2 states that "[t]he Panel may decide whether and to what extent there should be oral or written evidence or submissions," and Rule 14.10 states that "[t]he Panel shall close the hearing following closing arguments and/or post hearing briefs, if any."

The ARIAS•U.S. Sample Scheduling Order Form also reflects this flexibility [2]. Counsel and arbitrators may use this non-binding sample as a baseline for determining the structure of oral and written submissions. While it is not binding, the sample form certainly acts as a "nudge" (to borrow from economists Cass Sunstein and Richard Thaler) that influences the ultimate scheduling of submissions [3]. For example, the sample form includes a line for the parties to fill in the dates for both the pre-hearing brief and the pre-hearing reply briefing. It does not, however, provide a line for any post-hearing submissions, so it may not be a coincidence that the majority of arbitrations include a pre-hearing reply brief but no post-hearing brief.

Options for Enhancing Counsel Submissions

In any event, counsel and arbitrators should—depending on the needs of each case—consider potential deviations to the traditional mode of order for counsel submissions. We now review some potential options to enhance the quality and value of counsel submissions in each case.

What briefing would be most beneficial to the panel? As discussed above, the typical arbitration schedule generally provides three opportunities for oral and written submissions before the presentation of evidence and only one submission after the presentation of evidence, i.e., closing arguments. That schedule, however, may not be optimal in all circumstances. Because the arbitrators will usually focus their deliberations on the evidence introduced during the hearing, it may make sense in certain cases to replace or supplement certain pre-hearing briefings with some form of post-hearing briefing.

The advantages of a post-hearing briefing are clear: it enables counsel to provide the panel members with a thorough review of the relevant facts and evidentiary record in a manner that is far more detailed than a standard closing argument. While a post-hearing briefing may increase the cost of the process, there are ways to ameliorate the impact of any additional costs, including eliminating the pre-hearing reply briefing, setting page limits, and setting a deadline for the post-hearing briefing that is relatively close in time to the conclusion of the hearing. Accordingly, in our view, arbitrators and counsel should thoughtfully consider whether a particular matter would benefit from post-hearing written submissions. Of course, many factors—including the length of the hearing, the complexity of the issues, and the amount at issue—all bear upon this determination.

What are some other considerations with respect to written submissions? Changes to the format of written submissions also may improve the panel's deliberation. For example, considering the fact-specific nature of most disputes that go to a final hearing, hyperlinks to exhibits and transcript citations may assist the panel in identifying and reviewing the most relevant evidence. Establishing page limits may also assist counsel in focusing their arguments and limiting discussion of collateral issues.

Moreover, counsel and arbitrators should not forget about PowerPoint slide presentations as an important form of written submission. Most opening statements and closing arguments incorporate a slide presentation that the arbitrators may review as a written submission in their deliberations above and beyond the transcript of counsel's remarks. Where effectively developed, these presentations may significantly enhance the value of opening statements and closing arguments by introducing visual images, such as tables, document excerpts, charts, and other graphics that direct the panel's attention to the most crucial evidence and arguments. Depending on the needs of the case, counsel may also seek to incorporate detailed references to the evidentiary record into the slide presentation to arm the arbitrators with facts and data in advance of deliberations.

Given that only the imagination of the parties and their counsel limits the format and content of written submissions under the ARIAS•U.S. rules, counsel and arbitrators may wish to consider whether it makes sense to incorporate any requirements or limitations into the content of written submissions as part of the arbitration scheduling process.

When should the closing argument occur? Under the typical schedule, closing arguments occur immediately or within a day of the close of evidence. As counsel's last opportunity to present its case to the panel (in the absence of a post-hearing briefing), the preparation of the closing argument is an intensive process, even where counsel has devotedly worked toward preparing the closing throughout the hearing.

To maximize the value of closing arguments, counsel and the panel should consider whether the process would benefit from building in additional time for reflection between the close of evidence and the closing argument. Especially in this age of COVID-19, closing argument may effectively move to a videoconferencing format a week or two after the close of evidence, even if the hearing itself was conducted in person. Additional time would allow for a more thoughtful opportunity for the parties, counsel and panel to digest the evidence in the case and prepare for closing arguments. It would also promote the physical and mental health of all involved, who otherwise must rush to put forth their best work product under very tight time constraints.

While it certainly would add costs, there is great value in affording the parties time to analyze the case before the closing argument, especially in cases where there is no post-hearing briefing. Other potential changes to the process, such as removing the pre-hearing reply briefing or imposing page limits on written submissions, could mitigate against any increased costs caused by moving the closing argument to a later date.

How can counsel best address the panel's questions in closing submissions? Wise outside counsel listen closely to questions raised by the arbitrators during the hearing and seek to incorporate comments into their closing arguments that respond to, or highlight significant issues raised by, the arbitrators' questions. Still, could the structure and content of closing arguments and any post-hearing briefing be improved further by the submission of a limited number of panel questions to counsel in advance of those submissions? We submit that the answer to this question may very well be "yes," depending on the needs of the case and the available time.

The consideration of panel questions may help focus counsel on the most important issues of concern for the arbitrators and reduce the time spent on matters of limited importance or collateral concern. Accordingly, as counsel and arbitrators plan for the scheduling of hearings, closing arguments, and any post-hearing briefing, it is worthwhile to consider whether the proceeding would benefit from the submission of thoughtful questions by the arbitrators in advance of final arguments.

Conclusion

Effective submissions by counsel indisputably enhance the quality of arbitration proceedings and promote the ability of arbitrators to reach fair and just final awards. One way counsel and the arbitrators can improve the quality of submissions is by making thoughtful, intentional decisions about the schedule, timing and format of the submissions. One size does not fit all.

ARIAS•U.S. could also encourage counsel and the panel to think about ways to improve the effectiveness of oral and written submissions by making modest changes to the Sample Scheduling Order. At present, the ARIAS•U.S. sample form provides the parties with great discretion, but it could go even further to encourage stakeholders to consider the available alternative structures. For example, the sample form could include the yes-or-no question, "Will the parties submit Reply Pre-Hearing Briefs?" rather than leaving it for counsel to think about this question unaided and then to strike through portions of the sample form if they do not want a reply brief. Also, the form could include questions about whether there will be a post-hearing briefing and whether any limitations or requirements should apply to the various forms of counsel submissions. Similarly, the form could also question whether closing arguments should occur by remote video means sometime after the close of evidence, and whether the arbitration participants should build in time for panel questions in advance of closing submissions. These minor changes would encourage all stakeholders to thoughtfully consider how the structure of counsel submissions best promotes the goals of achieving a fair and just final award and enhancing confidence in, and the integrity of, the arbitration process as a dispute resolution vehicle.

This article is based on a presentation at the November 2021 ARIAS•U.S. conference titled "May It Please the Panel: Thoughts on Enhancing Submissions by Counsel in Connection with Arbitration Hearings." The presentation was moderated by Jack Vales. The opinions expressed are the opinions of the authors alone and are not necessarily the opinions of any participant in the conference panel or any other person.

NOTES

1 AIDA Reinsurance & Insurance Arbitration Society. 2014. "ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes. Available online at http://www.arias-us.org/wp-content/uploads/2016/09/ARIASU.S.-Rules.pdf.

2 AIDA Reinsurance & Insurance Arbitration Society. 2016. "ARIAS•US Sample Form 4.1: Scheduling Order. Available online at https://www.arias-us.org/wp-content/uploads/2018/07/ARIAS-U.S.-Sample-Form-4.1-Scheduling-Order-6-2016-2.pdf.

3 Sunstein, Cass R., and Richard H. Thaler. 2009. *Nudge: Improving Decisions About Health, Wealth, and Happiness*. London: Penguin Books.

Jack Vales is a partner in the litigation and dispute resolution group at Dentons U.S. LLP and co-leader of Dentons' U.S. reinsurance practice. Since beginning his legal career as a trial lawyer in the U.S. Army, Jack has accumulated almost 20 years of experience representing insurers and reinsurers in complex proceedings before arbitration panels and courts.

Alfonse Muglia is a managing associate with Dentons U.S. LLP, where his practice focuses on complex insurance and reinsurance disputes.

Tortious Interference with Contract: Insured's Access to Reinsurers?

By Robert M. Hall

It is black letter law that insureds have no right of action against reinsurers absent a cut-through or guaranty endorsement [1] or the reinsurer effectively taking over the duties of the ceding insurer and interacting directly with the insured [2]. This is because the insured lacks privity with the reinsurer; i.e., the insured is not a party to the reinsurance contract. However, tortious interference with contract may provide a pathway to recover from a reinsurer that interferes with the contract between the insured and insurer. The purpose of this article is to explore selected caselaw on point.

Tortious Interference Cases That Survived a Motion to Dismiss

Hartford Steam Boiler Inspection & Insurance Co. v. International Glass Products, LLC, No. 2:08cv1564, 2016 U.S, Dist. LEXIS 135045 (W.D. Pa. Sep. 29, 2016), is a case in which Hartford Casualty Insurance Co. ("Hartford"), the policy-issuing company, ceded 100% of the risk on equipment breakdown to Hartford Steam Boiler ("HSB"), which also handled the investigation and payment of claims on that business. HSB denied a claim, and the insured brought suit against HSB for tortious interference with the insurance policy issued by Hartford. The court noted:

Under Pennsylvania law, a tortious interference with contractual relations claim has four elements: (1) the existence of a contractual or prospective contractual relationship between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation or to prevent a prospective relation from occurring; (3) the absence of a privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct [3].

The court denied HSB summary judgment on the basis that there were genuinely disputed facts concerning the second and third elements above:

[The insured] has produced evidence which, if credited, could support an inference that HSB acted outside the scope of its agency relationship by dictating the outcome of important discretionary decisions and by placing its own interests ahead of [cedent's] fiduciary obligations in the adjustment of [the insured's] loss [4].

The recent case of *Casa Besilu LLC v. Federal Insurance Co.,* No. 20–24766-Civ-Scola, 2021 U.S. Dist. LEXIS 78967 (S.D. Fl. Apr. 23, 2021), is an example of a "reverse flow" reinsurance program (i.e., one in which the insured approaches the reinsurer first and the reinsurer arranges for a primary, policy-issuing company). The insured approached the reinsurers for various coverages, including flood for an estate in the Bahamas. The reinsurers arranged for a local company to issue the policy, and the risk was ceded to the reinsurers. Unfortunately, flood coverage was not added to the policy, and the estate was destroyed by a combination of flood and wind damage. The insured alleged that the reinsurers tortiously interfered with the settlement of the insured's claim against the Bahamian insurer. Because the insured's action was for tortious interference with the insurance policy and not on the reinsurance contracts, the court denied the reinsurers' motion to dismiss.

> "Should a claim be wrongly denied at the direction of the reinsurer or its agent, then the reinsurer may be held liable for tortious interference with the insurance policy in an attempt to reduce claim costs."

An earlier case, cited in *Casa Besilu*, is *Law Offices of David Stern, P.A. v. Scor Reinsurance Corp.*, 354 F. Supp. 2d 1338 (S.D. Fl. 2005). The insurer issued a professional liability policy to a law firm, and the policy was reinsured for claims in excess of $150,00 per occurrence with the reinsurer, which allegedly controlled claim handling through a third-party administrator. A professional liability claim was apparently settled at a mediation, but the ceding insurer declined to pay it and then was placed into rehabilitation. The insured sued the reinsurer for tortious interference, alleging that the reinsurer used the third-party administrator to cause the ceding insurer to breach the policy and not pay the claim. The court declined to dismiss the tortious interference claim, stating as follows:

[T]he jury could . . . determine that [the reinsurer] knew of, and

intentionally and unjustifiably interfered with, the contractual relationship between Plaintiffs and [the cedent] resulting in damage to Plaintiffs as a result of [the cedent's] breach of that relationship [5].

Robertson Stephens, Inc. v. Chubb Corp., 473 F. Supp. 2d 265 (D. R.I. 2007), involved a captive insurer owned by the insured and a reinsurer that was also the claims administrator under a separate contract with the cedent. A liability claim was wrongly denied but belatedly paid after the insured had defended itself. The insured sought indemnification for legal expenses. One of the insured's allegations was that the claims administrator improperly performed its duties because its interest as a reinsurer was to reduce claims costs. The court found that this allegation was sufficient to survive a motion to dismiss.

Tortious Interference Cases That Did Not Survive a Motion to Dismiss

Bonds issued by an insurer that later became insolvent were at issue in *Jurupa Valley Spectrum, LLC v. National Indemnity Co.,* 555 F.3d 87 (2d Cir. 2009). Risk on the bonds was ceded to the reinsurer, which retained a claims administrator to investigate and pay claims. The insured made various allegations as a means of collecting from the reinsurer, including an argument that the claims administrator tortiously interfered with the reinsurance contract. The court found that the insured could not maintain an action for tortious interference with a contract to which the insured was not a party.

McCulloch v. Hartford Life & Accident Insurance Co., 363 F. Supp. 2d 169 (D. Ct. 2005), involved a contested disability claim. Educators Mutual Life Insurance Company ("Educators") issued a disability policy and later effectively sold the business to Hartford Life Insurance Company ("Hartford") by assigning all of its rights and paying outstanding reserves to Hartford. Hartford later determined that the insured was no longer disabled and cut off benefits. The insured claimed that Hartford interfered with the original policy between her and Educators. The court dismissed the tortious interference claim, holding as follows:

Under Connecticut law, a claim for tortious interference with business expectancies requires a showing that a third party adversely affected the contractual relations of two other parties and that such interference was motivated by some improper means or motive, such as maliciousness, fraud or ill-will. However, a direct party to a contract cannot be held liable for contractual interference. Hartford was a direct party to [the insured's] insurance contract because, pursuant to the reinsurance agreement, it was the assignee of her policy [6].

Resolute Management Inc. v. Transatlantic Reinsurance Company, 29 N.E.2d 197 (App. Ct. Mass 2015), involved National Indemnity Company ("NICO"), which assumed books of business from several insurers and appointed Resolute Management, Inc. ("Resolute") to handle claims and collect reinsurance recoverables from Transatlantic Reinsurance Company ("TransRe"). When TransRe declined to pay reinsurance recoverables, Resolute brought an action for tortious interference. The court dismissed this claim on the basis that Resolute was not a party to the contracts with which TransRe allegedly interfered.

Comments

Because none of the above cases went to a verdict, the lessons to be learned are limited. However, the most likely scenario in which a reinsurer could be held liable for tortious interference is a complete fronting transaction or portfolio transfer in which the reinsurer controls claims. Should a claim be wrongly denied at the direction of the reinsurer or its agent, then the reinsurer may be held liable for tortious interference with the insurance policy in an attempt to reduce claim costs.

NOTES

1 Hall, Robert M. 2000. "Cut-Through and Guarantee Clauses." *Mealey's Reinsurance Report,* No. 21.

2 Hall, Robert M. 2008. "Fronting and Direct Actions Against Reinsurers: The Final Chapter?" *Mealey's Reinsurance Report,* No. 1.

3 2016 U.S. Dist. LEXIS 13505, at *108.

4 Id. *108.

5 354 F. Supp. 2d at 1346.

6 363 F. Supp. 2d 169 at 180 (citations omitted).

Robert Hall is a member of the *Quarterly* Editorial Board, an attorney, a former law firm partner, a former insurance and reinsurance executive, and acts as an arbitrator of insurance and reinsurance disputes and as an expert witness. He is a veteran of over 200 arbitration panels and is certified as an arbitrator and umpire by ARIAS•U.S.

Fall Conference Recap – Live from New York!!

By Joshua Schwartz

On November 2–3, 2021, the ARIAS•U.S. community got back together in person and virtually for a hybrid Fall Conference at the New York City Hilton. More than 150 members attended this vibrant conference in person, and 80 attended virtually. With a program that included more than two dozen seasoned arbitrators and many company representatives and outside counsel presenting, the conference packed a great deal of learning into two dynamic days.

The conference began with a welcome from co-chairs Sylvia Kaminsky, Harry Cohen, Joshua Schwartz, and Teresa Snider, who outlined the theme of the coming two days: effective advocacy and what really goes on "behind the curtain" during the arbitration deliberative process. Our keynote speaker, the Hon. Jed S. Rakoff, U.S. District Court Judge, Southern District of New York, spoke on the topic of the long-term effects of the pandemic on trial advocacy, then engaged in an energetic question-and-answer session with the audience. This was followed by the first of a two-part general session, "Gaining Deliberation Insight: Understanding What Really Goes on Behind the Curtain, and Why It Matters," in which Paul Dassenko, Jonathan Rosen and David Thirkill shared insights from their decades of experience arbitrating reinsurance disputes.

The morning concluded with a visual argument presentation from Jack Baughman, founder and partner at JFB Legal, along with his partner-in-graphics from Impact Trial, Jesse Stevenson. Jack shared ideas on how to create more powerful demonstrative exhibits and persuade arbitrators, judges and juries.

For the first time in ARIAS·U.S. conference history, there were no complaints about a hotel-catered lunch (it must have been the 18-month absence from conference room lunches!), and we all welcomed the opportunity to network with longtime and new colleagues.

The afternoon included four breakout sessions and an ARI-Talk. The breakout topics covered the following: (1) Bermuda Form arbitrations, led by Mina Matin, Gavin Kealey QC, David Raim and Robin Saul; (2) life and healthcare hot topics, presented by James Jorden, Susan Mack and Andrew Maneval; (3) a new arbitrator session, with helpful advice and insights from Suzanne Fetter, Ann Field, Peter Gentile, Catherine Isely and Mark Megaw; and (4) a breakout on direct insurance arbitrations featuring David Ichel, Larry Pollack, Elaine Caprio, Steve Gilford and Peter Halprin.

Jane Downey and Mary Dronson presented an ARI-Talk, "The Explosion of Ransomware Cyber Attacks and Its Impact on the Industry." This 30-minute session, analogous to a Ted Talk, focused on a pressing topic in our industry, cyber ransomware, and its potential for reinsurance disputes. The evening concluded with a lively networking reception.

Day #2 brought us back to our core focus—what happens in the room when arbitrating and when arbitrators deliberate. The first general session, which included Jack Vales as moderator along with Lloyd Gura, Cia Moss, Bob Hall and Diane Nergaard, analyzed the best (and worst!) practices employed in oral advocacy in openings and closings and offered alternatives to traditional prehearing briefs. Part II of the "Gaining Deliberation Insight" general session featured John Cole, Mark Gurevitz and Chuck Ehrlich and provided insights into what is and is not effective advocacy at hearings and what happens during deliberations.

> "It was great to have the chance to reconnect in person with so many after what feels like a very long absence."

After the morning refreshment break (and don't worry, the cookies and brownies will be back, by popular demand, for the Spring Conference!), we heard from an experienced group with varied experiences—Susan Claflin, John Dore, Daryn Rush, Eileen Sorabella and Charlie Leasure, with Christy Russell moderating—on the topic of "To Ask or Not to Ask, to Exclude or Admit, Expert or No Expert: Actions That Bolster (or Hinder) the Deliberative Process." As the title suggests, this was a fun group, and the panel served an almost therapeutic purpose for some client representatives and outside counsel by addressing some of the more outlandish arbitrator behavior that has taken place, along with what has been effective in the hearing room.

As in years prior, the ethics session did not disappoint and sparked a robust debate, with the audience analyzing critical issues that arbitrators confront. The all-star cast of presenters included Andrew Maneval, Mark Megaw, Stacey Schwartz, Teresa Snider, Larry Schiffer and Alysa Wakin. The conference concluded with closing remarks from our new ARIAS·U.S. chair, Cyndi Koehler.

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Thank you to our Conference Co-Chairs

Harry Cohen
(Crowell & Moring LLP)

Sylvia Kaminsky
(ARIAS•U.S.)

Joshua Schwartz
(Chubb)

Teresa Snider
(Porter Wright Morris & Arthur LLP)

Joshua Schwartz is Managing Counsel, Director of Reinsurance Litigation for Chubb.

Does a Service-of-Suit Clause Create an Exception to Arbitration?

Montana Association of Counties Property and Casualty Trust ("MACPCT") purchased excess of loss reinsurance from Lloyd's of London ("Underwriters") to cover policies for members of MACPCT's joint risk pool. Following settlement of a claim brought against several of its members, MACPCT demanded reimbursement from Underwriters. After Underwriters refused, MACPCT filed suit against Underwriters alleging breach of contract under the policy's terms and violations of the Montana Unfair Trade Practices Act ("MUPTA").

Underwriters filed a motion to compel arbitration and stay the proceedings, citing the policy's arbitration clause, which stated as follows: "Any dispute arising out of or relating to the interpretation, performance or breach of this Agreement, as well as the formation and/or validity thereof, will be submitted for decision to a panel of three arbitrators."

MACPCT disputed that the claims were subject to arbitration, arguing that the "service-of-suit" clause in the policy created "an exception" to the arbitration clause for the pending breach of contract and MUPTA claims. The service-of-suit clause stated: "It is agreed that in the event of the failure of Underwriters to pay any amount claimed to be due hereunder, the Underwriters ... will submit to the jurisdiction of a Court of competent jurisdiction within the United States."

The court agreed with Underwriters and granted the motion to compel arbitration. As an initial matter, the court held that the language in the service-of-suit clause must be read "in concert—not in conflict—with the arbitration provision." Otherwise, the service-of-suit clause would "swallow the arbitration clause." Thus, the court explained, a "more reasonable interpretation of the policy language ... is that the service-of-suit clause provides a judicial avenue to compel arbitration or enforce an arbitration award."

The court further held that all three of MACPCT's claims fell within the scope of the arbitration clause. MACPCT's claim for unpaid amounts due from the settlement related to the "performance or breach of this Agreement"; likewise, Underwriters' refusal to participate in the settlement agreement did not constitute a claim for "amounts due" and, instead, was a dispute regarding an alleged "breach" of the policy. Lastly, MACPCT's claims under MUPTA related to the "interpretation, performance, and breach of the policy" and were subject to arbitration.

Case: *Mont. Ass'n of Ctys. Prop. & Cas. Trust v. Certain Underwriters at Lloyds,* CV 19-196-M-DLC, 2020 WL 6202673 (D. Mont. Oct. 22, 2020).

Court: U.S. District Court for the District of Montana, Missoula Division

Date decided: October 22, 2020

Issues decided: (1) Whether a service-of-suit clause creates an exception to arbitration; and (2) whether the scope of an arbitration clause includes claims for payment and bad faith claims.

Submitted by: Michael T. Carolan and Chris Verdugo (Associate), Troutman Pepper LLP

Michael Carolan is a partner, and Chris Verdugo is an associate, at Troutman Pepper LLP.

Who Decides Whether an Award Precludes Further Arbitration?

Certain Underwriters at Lloyd's, London ("Underwriters") sought to enjoin an arbitration demand by Century Indemnity Company ("Century"). Underwriters argued that the arbitration demand sought to re-arbitrate claims resolved in a prior confirmed arbitration.

The court denied Underwriters' motion to dismiss the petition to compel arbitration. A motion to reconsider the dismissal was also denied in October 2020, maintaining the ruling that Underwriters must proceed to arbitration to resolve the dispute.

The matter involves the settlement of sexual abuse claims against the Boy Scouts of America ("BSA"). BSA began submitting insurance claims to Century in the 1990s relating to lawsuits alleging that its troop leaders sexually molested minors. Century settled the claims and sought reinsurance from Underwriters, which Underwriters denied. Arbitration regarding these claims resulted in a confidential award, confirmed in late 2018.

Century subsequently demanded arbitration for additional billings. Underwriters argued that the award precluded Century's request for future reimbursements. In response, Century maintained that the previous arbitration did not preclude Underwriters' obligation to arbitrate.

The court agreed with Century and ruled that it could seek reinsurance recovery from Underwriters through an additional arbitration. The court reasoned that "[t]he preclusive effect of an arbitration award is an arbitrable issue that is not for the court to resolve" and must be decided by an arbitrator, in accordance with the agreement between the parties.

Underwriters sought reconsideration of the order on the grounds that the court applied the wrong legal standard to the dispute when ordering the claims to arbitration. Underwriters argued that, per the choice of law provision, the case was governed by New York arbitration law rather than the Federal Arbitration Act. Specifically, Underwriters argued that "New York law requires this court (not an arbitrator) to determine the applicability of the doctrine of res judicata." The court denied the petition for reconsideration without further comment, again ordering the parties to resolve the dispute in arbitration.

Martha Conlin is a partner at Troutman Sanders LLP and represents insurers and reinsurers including the London insurance market.

Case: *Century Indemnity Co. v. Certain Underwriters at Underwriters London,* No. 19-11056 (D. Mass. March 6, 2020)

Court: U.S. District Court for the District of Massachusetts

Date decided: March 6, 2020 (request to reconsider denied October 26, 2020)

Issue decided: Arbitrability

Submitted by: Martha E. Conlin

Using Email to Transmit a Motion to Vacate

Case: *O'Neal Constructors, LLC v. DRT America, LLC.*, 957 F.3d 337 (11th Cir. 2021)

Court: U.S. Court of Appeals for the Eleventh Circuit

Date decided: April 1, 2021

Issue decided: Whether a notice of a motion to vacate may be accomplished by email service under 9 U.S.C. § 12

Submitted by: Michele L. Jacobson, Esq. and TaLona H. Holbert, Esq.

In *O'Neal Constructors, LLC v. DRT America, LLC.*, the U.S. Court of Appeals for the Eleventh Circuit held that notice of a motion to vacate an arbitration award cannot be effectuated by emailing the memorandum of law in support of the motion if opposing counsel did not consent to email service. According to the Federal Arbitration Act ("FAA") and the Federal Rules of Civil Procedure, opposing counsel must expressly consent in writing to email service of a notice of motion to vacate and, once consent is obtained, the moving party must serve the actual motion upon the nonmoving party.

DRT America, LLC ("DRT") failed to obtain O'Neal Constructors, LLC's ("O'Neal") express written consent to accept service by email. DRT emailed the supporting memorandum of law instead of the motion to O'Neal. The Eleventh Circuit ruled that service was not timely, dismissed the appeal, and affirmed the district court's order and judgment confirming the arbitration award and denying the motion to vacate.

The arbitration award at issue arose from a dispute related to a contract between DRT and O'Neal. The contract contained an arbitration provision providing that any arbitration between the parties would be governed by the American Arbitration Association's ("AAA") Construction Industry Arbitration Rules (the "AAA Construction Rules").

As a result of its contract with DRT, O'Neal entered into a subcontract with Excel Contractors, Inc. ("Excel") When a dispute arose between O'Neal and Excel, the companies entered arbitration, and DRT participated as a third-party respondent. On January 7, 2019, the arbitration panel awarded O'Neal attorney's fees, inter alia, from DRT, pursuant to the parties' contract. *O'Neal Constructors,* LLC, 957 F.3d at 1378.

DRT refused to pay O'Neal's attorney's fees, and O'Neal filed suit in Georgia state court on April 4, 2019. The case was removed to the U.S. District Court for the Northern District of Georgia on April 11, 2019, seeking confirmation of the arbitration award. DRT separately filed suit in the Northern District of Georgia on April 5, 2019, seeking to vacate the attorney's fees portion of the arbitration award.

Although DRT emailed O'Neal a "courtesy copy" of the memorandum of law in support of its motion to vacate when the suit was filed, it did not formally serve notice of the motion until April 30, 2019, more than three months after the arbitration award was entered. The cases were consolidated in the Northern District of Georgia, and the district court confirmed the arbitration award and denied the motion to vacate. The court ruled that the award must be confirmed because O'Neal never consented to email service and, thus, DRT's service was untimely. Even if O'Neal had consented to service by email, the district court reasoned that DRT's email service would have been defective because the email did not include a copy of the motion itself. *Id.* at 1378–79.

On appeal, DRT argued that O'Neal consented to service by email because the arbitration provision of their contract provided that the arbitration would be governed by the AAA Construction Rules, which allow for service by email. The "Serving of Notice" provision (AAA Construction Rule 44) of the AAA Construction Rules provides that:

(a) Any papers, notices, or process

necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these[] rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery, electronic fax transmission (fax), or electronic mail (email) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by other methods of communication.

The Eleventh Circuit disagreed with DRT's reading of Rule 44, reasoning that subsection (a) does not allow for service by email or encompass motions to vacate. Although subsection (b) of Rule 44 allows for email service, the Eleventh Circuit pointed out that the provision only applies to "notices required by these rules." The AAA Construction Rules do not specifically provide for notices of a motion to vacate, so the Eleventh Circuit rejected DRT's arguments that the rules permit email service of such notices and that O'Neal consented to email service by agreeing that the rules governed the parties' arbitration. *Id.* at 1380.

Unlike the AAA Construction Rules, Section 12 of the FAA requires notice of a motion to vacate. Under the FAA, notice must be served within three months after the arbitration award is filed or delivered. 9 U.S.C. § 12. The FAA also requires that service be made on opposing counsel according to the law of the court in which the motion to vacate is made if opposing counsel is a resident of that court's district. *Id.* If a moving party fails to follow the FAA's service procedures, it is barred from challenging the arbitration award as invalid (or moving to vacate the award) when the opposing party seeks to confirm it. *Cullen v. Paine, Webber, Jackson, and Curtis, Inc.,* 863 F.2d 851, 854 (11th Cir. 1989); see, e.g., *Corey v. N.Y. Stock Exch.,* 691 F.2d 1205, 1212 (6th Cir. 1982) (citing *Piccolo v. Dain, Kalman, & Quail, Inc.,* 641 F.2d 598, 601 (8th Cir. 1981). *Id.* at 1379.

The Eleventh Circuit explained that DRT should have served O'Neal with the motion to vacate by April 8, 2019, to meet the FAA's three-month time limit because the arbitration award was issued on January 7, 2019. As O'Neal is a resident of the Northern District of Georgia (where the cases are pending), the Eleventh Circuit applied the Federal Rules of Civil Procedure to determine how service should have been made. Rule 5 of the Federal Rules of Civil Procedure allows service by email if the nonmoving party expressly agrees to electronic service in writing. Fed. R. Civ. P.(5)(b)(2)(E); see Fed. R. Civ. P.(5)(b)(2)(E), Advisory Committee Note to 2001 Amendment.

Although O'Neal's counsel responded to DRT's April 5, 2019, suit by stating "[g]uess we need to figure out which court can hear these issues the quickest," the Eleventh Circuit ruled that express consent cannot be implied from conduct, pursuant to Rule 5. See Fed. R. Civ. P.(5)(b)(2)(E), Advisory Committee Note to 2001 Amendment. As neither O'Neal's response to DRT's email nor the parties' contract (as discussed above) constituted express, written consent to email service, the court ruled that the district court properly held that DRT's service was not timely and appropriately (1) confirmed the arbitration award and (2) denied DRT's motion to vacate. Accordingly, the Eleventh Circuit affirmed the district court's order and judgment. *Id.* at 1378–81.

Michele Jacobson Michele L. Jacobson leads Stroock's New York General Litigation Group, co-chairs its Insurance and Reinsurance Group and sits on the firm's Executive Committee.

TaLona Holbert is a member of Stroock's Litigation Group. She focuses her practice on a range of complex disputes, including reinsurance, anti-trust and real estate.

Honorable Engagement Clauses and Supplemental Orders

Case: *Continental Cas. Co. v. Certain Underwriters at Lloyds of London,* No. 20-2892, 2021 U.S. App. LEXIS 25184 (7th Cir. Aug. 23, 2021)

Court: U.S. Court of Appeals for the Seventh Circuit

Date decided: August 23, 2021

Issue decided: Motion to vacate supplemental arbitration orders

Submitted by: J.P. Jaillet

Continental Casualty Company and Continental Insurance Company ("Continental"), the cedents, and Certain Underwriters and Lloyd's of London ("Lloyd's), the reinsurer, were parties to reinsurance treaties that contained arbitration and honorable engagement clauses.

Continental and Lloyd's arbitrated a dispute concerning how reinsurance limits and retentions should be calculated under the treaties with respect to multi-year losses. The arbitration panel issued an award (the "award") finding in Lloyd's favor.

Continental submitted a motion to the panel requesting that it clarify whether the award applied with respect to past billings only or past and future billings. The panel issued supplemental orders (the "supplemental orders") specifying that Lloyd's had fully discharged "their past, present and future obligations" for asbestos losses for three specified accounts. Continental filed a petition in the U.S. District Court for the Northern District of Illinois seeking to confirm the award, but to also vacate the supplemental orders. The District Court confirmed the award and the supplemental orders.

On appeal, the Seventh Circuit affirmed. The court rejected Continental's argument that the supplemental orders exceeded the panel's authority. The court reasoned that the treaties' honorable engagement clauses empowered the arbitrators with wide discretion to fashion appropriate remedies, including rulings with respect to future billings.

The court also rejected the argument that there was no "possible interpretive route" to reach the supplemental orders. The court reasoned as follows:

The arbitrators may have thought that the only way to implement the purpose of the agreement was to preclude all of the asbestos bills for the three named companies. The [treaties] gave them the power to resolve the case on general principles, not just legal entitlements, and that seems to be what they did.

J.P. Jaillet is a member of Choate's Insurance & Reinsurance Group, and he also serves as Choate's hiring partner.

Can an Award Become Subject to Common-Law Right of Access?

Case: *Pennsylvania National Mutual Casualty Insurance Group v. New England Reinsurance Corporation*; Hartford Fire Insurance Company (Everest Reinsurance Company – intervenor in District Court), U.S. Court of Appeals, 3rd Circuit, Nos. 20-1635 and 20-1872

Court: U.S. Court of Appeals for the Third Circuit

Date decided: December 11, 2020

Issue decided: Whether an arbitration award filed with a court as an exhibit to a motion should be unsealed per the common-law right of access

Submitted by: Polly Schiavone

Pennsylvania National Mutual Casualty Insurance Company ("Penn National") arbitrated a matter with two of its reinsurers. The issue in the arbitration was whether Penn National was entitled to proceeds from those reinsurers. The arbitration panel issued a decision/award (hereinafter the "award") in favor of Penn National. Penn National petitioned the District Court to confirm the award, reduce it to judgment, and seal it.

Shortly thereafter, the parties settled and Penn National withdrew its petition to confirm.

Everest Reinsurance Corp. ("Everest"), another of Penn National's reinsurers (but not a party to the subject arbitration), moved to intervene and unseal the award under the common-law right of access. The District Court granted Everest's motion, but stayed its order pending appeal.

For the common-law right of access to apply, a given document must be classified as a "judicial record," and access to the document cannot create an injury that outweighs the presumption of access. Penn National argued that whether an award is a judicial record depends on the use the court has made of it, not simply whether it has found its way into the clerk's file. Penn National cited several cases that analyze the categorization of "judicial records." But this court distinguished each case, rejected Penn National's argument, and found that the award became a judicial record subject to the common-law right of access when Penn National filed it as part of its motion to confirm.

Next, Penn National argued that the District Court erred in holding that it failed to demonstrate specific harm sufficient to overcome the presumption of public access. In support of its argument, Penn National submitted an affidavit from one of its officers stating that other reinsurers might forego paying Penn National if they learned of the award. The court rejected this argument, affirming the lower court's finding that no "clearly defined" injury existed and that Penn National's assertion was simply too speculative.

The Appellate Court affirmed the judgment of the District Court and unsealed the award. This decision is considered "not precedential."

Polly Schiavone is a Vice President in the Armonk, NY Property Casualty Business Management Unit at Swiss Reinsurance America Holding Corporation ("Swiss Re").

Newly Certified Arbitrators

Jane Downey is an internationally known insurance industry expert and consultant, with a background in both insurance brokerage and risk management. Her specialty industries include manufacturing, financial institutions, and technology risks.

Jane founded her company, Clarity Concepts, 25 years ago and has provided a variety of diverse, multinational organizations with her independent insurance and risk management expertise. Clarity Concepts also maintains a significant practice in enterprise risk consulting and expert witness engagements. Jane's expert witness work focuses on broker liability, claims management, risk management and risk control standards, and insurance premium and coverage disputes.

Jane has significant experience in insurance claims and has negotiated large property, marine, general liability, employment practices liability, and bad faith claims. Her work is also focused on claims management and reducing workers' compensation claims and expenses. She participated in the Wellington asbestos coverage negotiations.

Jane has served as adjunct faculty at Temple University in risk management and leadership and at Penn State University in crisis management. She currently teaches advanced CGL, preventing broker E&O claims, E&S market, and introduction to casualty and introduction to property insurance classes for the Institute of Strategic Educational Partners.

Jane holds property and casualty insurance brokerage licenses in Pennsylvania and New Jersey. She is a member of the National Association of Women Business Owners and the Forum of Executive Women.

Peter K. Rosen, Esq., began his full-time ADR career in January 2019 following his prestigious legal career litigating high-profile disputes involving policyholders, insurers, reinsurers, reinsureds and captive insurers. As a neutral, Peter has resolved or arbitrated a wide range of commercial issues and policies, including directors and officers liability, general liability, property, cyber, employment, professional liability, construction, fidelity, environmental, and representations and warranties insurance. He also has mediated and arbitrated disputes involving reinsureds, captive insurers and reinsurers.

Peter is the author of leading texts on D&O liability and business interruption claims. He currently teaches international commercial arbitration law and advocacy at UCLA Law School and taught insurance law at USC's Gould School of Law and the Pepperdine University School of Law for more than a decade. He is a Fellow of the Chartered Institute of Arbitrators, a Fellow in the American College of Coverage Counsel, and an Accredited Mediator through the Centre for Effective Dispute Resolution.

Newly Certified Mediator

Lori Lovgren is an independent mediator, arbitrator, and a seasoned regulatory attorney with over 25 years of property casualty insurance experience. Ms. Lovgren's insurance background includes leadership roles in a rating organization and in a property casualty insurer. She has also practiced law in a group focused on insurance matters.

Ms. Lovgren's mediation practice is largely focused on first party insurance claims. She serves as a mediator for the American Arbitration Association, the Florida Department of Financial Services, and Florida's 15th and 17th judicial circuits. She also serves as an arbitrator for the American Arbitration Association, FINRA, the Florida Attorney General's Office, and ARIAS•U.S.

Her professional insurance designations include Chartered Property and Casualty Underwriter (CPCU), Associate in Insurance Data Analytics (AIDA), and Associate in Reinsurance (ARe).

Newly Certified Umpire

Kevin J. Tierney has been approved as an ARIAS Certified Umpire in addition to his existing Neutral Arbitrator and Mediator certifications. Kevin has over 40 years of experience as a lawyer and senior executive in the life, health and disability insurance and reinsurance industry. He served as Senior Vice President and General Counsel of UNUM Corp. (NYSE: UNM) and a number of its life insurance subsidiaries and as General Counsel of Disability Reinsurance Management Services, Inc., a reinsurance intermediary manager and TPA. He is a former independent trustee of a Merrill Lynch mutual fund which was available to life insurance companies as a funding vehicle for their variable annuity contracts, and he also served as a director of a publicly traded P&C insurance group. He was a member of the core team responsible for the demutualization of Union Mutual Life Insurance Company and its related initial public offering.

In Memoriam: Richard L. White

Dick White, who served as treasurer of ARIAS·U.S. from 1999 to 2006 and arbitrated and umpired many insurance and reinsurance disputes during his career, died June 16 in Cedar Knolls, New Jersey, of complications from multiple myeloma.

Dick worked at Arthur Young & Company, where he obtained the CPA designation and practiced as an audit manager, then at Crum and Forster as senior vice president and controller, and later at Skandia American Corporation as chief financial officer and senior vice president. His next stint was at the forensic accounting firm of Wailoo & White, followed by service as deputy liquidator for the liquidation of Integrity Insurance Co.

Dick was most proud of his five years in the U.S. Marine Corps, where he reached the rank of captain.

After retiring, Dick moved to Delray Beach, Florida. In 2013, he traveled to the French foothills of the Pyrenees and proceeded to walk the Camino de Santiago de Compostela, a 500-mile trek over the Pyrenees in northern Spain. After a brief rest in Santiago, Dick continued west for another 90 miles to Finisterre, thought to be the "end of the world" in the Middle Ages.

ARIAS•U.S.
7918 Jones Branch Drive, Suite 300
McLean, VA 22102
Phone: 703-574-4087
Fax: 703-506-3266
info@arias-us.org
www.arias-us.org

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7918 Jones Branch Drive,
Suite 300, McLean, VA 22102.

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