ARIAS U.S.

Expanding Our Reach:

Exploring the Role of ARIAS in Non-Reinsurance Disputes

2017 ARIAS·U.S. Fall Conference
November 2-3, 2017

New York Marriott Marquis

Conference Program Materials

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General Information about the 2017 ARIAS•U.S. Fall Conference

Attire: The general dress code for the conference is "business casual." This means that while speakers and panel members may be in business professional attire with a tie or suit jacket, it is not a requirement for attendees. Usually at these conferences, attendees will dress up a bit more for the evening reception.

Badges: Conference badges will be issued to all attendees. Please wear your badge at all times to access all conference functions.

Session Materials: While most session materials are in the conference program, some materials may be published online due to length.

Breakout Session Room Assignments: Room assignments for the Thursday afternoon Breakout Sessions are included in the back of the program. Please refer to the list for your assigned session room. Be sure to attend your assigned session and fill in each seat to ensure that all attendees have a seat and sessions can begin on time.

Continuing Legal Education: Continuing legal education credits will be awarded for the State of New York and Illinois. Credits are pending for Pennsylvania and Minnesota. For other states, please reference the information that was communicated to all participants. Sign-in and sign-out sheets are for attorneys who wish to receive CLE Credit. Certificates of attendance will be based solely upon these sheets. You must sign in and out each day to receive credit for each day. There will be sign in and out sheets on tables outside the General Session, next to registration. The sign in and out sheets for the Thursday Breakout Sessions will be on tables near each room, and signage will be displayed clearly for each session. Make sure you sign in and out of the various sessions with the time you arrive and the time you leave in order to receive full credit. Certificates of attendance will be sent via email to everyone who has signed in and out.

This is required by the New York State CLE Board.

ARIAS•U.S. Certification: Anyone receiving credit for ARIAS•U.S. Certification does not have to sign in and out and will not be provided with a certificate of completion for the training. Participants however must be in the training session and not in the hallways. This is a directive from the ARIAS•U.S Board of Directors.

Obtaining Credit for the Conference: You will not receive full credit for a session if you are standing in the hallways or arrive late or leave early. The training is taking place in the session rooms; you must be inside. This is true both for CLE training and for ARIAS•U.S. Certification credit. To be clear, anyone who is attending for ARIAS•U.S. certification renewal or for initial certification and who is not in the session rooms will be considered as not completing the attendance requirement for certification/ recertification.

Opinions and Comments: Opinions and comments expressed in the enclosed materials and during the conference sessions are not necessarily those of ARIAS•U.S., the firms or companies with which the speakers are associated, or even the speakers themselves. Some arguments are made in the context of fictitious disputes to illustrate methods of handling issues; others are individual opinions about the handling of an issue. Every dispute or matter presents its own circumstances that provide the context for decisions.

Finally, please note that this conference will be conducted in accordance with the ARIAS•U.S. Antitrust Policy, which is enclosed and is also available in the About ARIAS section of the website (www.arias-us.org).

We hope you enjoy the conference!

Thursday, November 2

7:00 a.m. – 8:30 a.m.

REGISTRATION

South Pre-function Registration Booth (5th Floor)

Thank you to our lanyard sponsor, FTI Consulting

7:30 a.m. – 8:30 a.m.

BREAKFAST

North Pre-function Foyer Area (5th Floor)

8:30 a.m. – 8:40 a.m.

GENERAL SESSION:
Welcome from the Conference Co-chairs

Westside Ballroom (5th Floor)

James I. Rubin, ARIAS•U.S. Chairman, Butler Rubin Saltarelli & Boyd LLP
Peter Gentile, ARIAS•U.S. Certified Arbitrator
Alysa B. Wakin, Odyssey Re
Marc L. Abrams, Mintz Levin Cohn Ferris Glovsky and Popeo P.C.

8:40 a.m. – 9:20 a.m.

ARIAS•U.S. ORGANIZATIONAL UPDATE

Westside Ballroom (5th Floor)

9:20 a.m. – 10:10 a.m.

GENERAL SESSION: Opening Keynote

Westside Ballroom (5th Floor)

Neal Katyal, Hogan Lovells LLP

10:10 a.m. – 10:40 a.m.

Morning Refreshment Break

North and South Pre-function Foyer (5th Floor)

10:40 a.m. – 11:30 a.m.

GENERAL SESSION:
Direct Insurance Coverage Disputes – Can ARIAS Develop a More Attractive Arbitration Product?

Westside Ballroom (5th Floor)

Top minds from the policyholder bar discuss problems encountered in the existing arbitration process and how policyholders, insurers and ARIAS might develop better arbitration procedures for policyholder disputes.

Panel: Deirdre Johnson, Crowell & Moring LLP
Peter Rosen, Latham & Watkins LLP
Paul Zevnick, Morgan, Lewis & Bockius LLP
Mitchell Dolin, Covington & Burling LLP

11:30 a.m. – 12:20 p.m.

GENERAL SESSION:
Through the Looking Glass – Insurance Company Perspectives on Policyholder Arbitration

Westside Ballroom (5th Floor)

In this companion to the preceding session, high level in-house counsel will discuss problems with arbitrating direct coverage disputes from the insurer perspective. Join us as we continue to explore whether ARIAS can develop an effective dispute resolution model for direct coverage disputes.

Panel: Brian Snover, Berkshire Hathaway Reinsurance Division
Glenn Frankel, The Hartford Financial Services
Kim Hogrefe, ARIAS•U.S. Certified Arbitrator / Retired Senior Vice President, Chubb and Son Insurance
Amanda Music, HCC/Tokio Marine
Steven Rosenstein, AIG

Thursday, November 2

12:20 p.m. – 12:25 p.m. **ANNOUNCEMENTS FROM THE EXECUTIVE DIRECTOR**
Westside Ballroom (5th Floor)

12:30 p.m. – 2:00 p.m. **LUNCHEON**
The Broadway Lounge (8th Floor)

1:30 p.m. – 2:00 p.m. **NETWORKING LOUNGE – Open Networking**
Lyceum Complex (5th Floor)

2:00 p.m. – 2:50 p.m. **BREAKOUT SESSIONS – Round 1**

Discovery – A Matter of Balance. Keeping a Watchful Eye on the Objective

Salon 1

Discovery disputes are increasingly becoming part of the reinsurance arbitration landscape. How can they be avoided, and how can they be addressed when they arise? Join us as we address the issues in a roundtable discussion with panel members and practitioners

Panel: *Don Frechette, Locke Lord LLP*
Christopher Bello, General Re Life Corporation
Jonathan Rosen, Arbitration, Mediation and Expert Witness Services
Aimee Hoben, The Hartford

The Gatekeeper: A Practical Guide to Resolving Evidentiary Disputes at Hearing

Salon 2

Arbitrators must rule quickly on evidentiary disputes at hearing, often without the aid of briefing and while confronted by party predictions that vacatur will follow from adverse evidentiary rulings. In a hypothetical coverage dispute, gain practical experience resolving evidentiary disputes through live e-poll voting, compare your vote to that of other ARIAS-certified arbitrators and company executives, and then learn how a court might consider your ruling when hearing a petition to vacate.

Panel: *Nina Caroselli, RiverStone Resources, LLC*
John F. Chaplin, Compass Reinsurance Consulting LLC
Catherine Isely, Butler Rubin Saltarelli & Boyd LLP

Workers' Compensation Disputes in the Insurance and Reinsurance Sphere – A Practical Guide

Salon 3

This session will address the key procedural and substantive issues presented in workers' compensation arbitrations – both in an insurance and reinsurance setting. We will discuss the specialized structure of workers' compensation programs, with a particular focus on premium financing arrangements. We also will address: common issues concerning the scope of the panel's authority and arbitrability in workers' compensation arbitrations; arbitrator selection, the current pool of frequently-used arbitrators and issues about which court intervention is often sought; the key insurance claim issues that arise in such arbitrations, including disputes over the calculation of retrospective premiums, claim payment and audits; data security concerns; forced commutation provisions in workers' compensation reinsurance contracts; and other disputed issues in workers' compensation reinsurance arbitrations.

Panel: *Mitch Harris, Day Pitney LLP*
Kathleen Perlman, BerkleyRe
Jodi Ebersole, Travelers
Bryce Friedman, Simpson Thacher & Bartlett LLP

Thursday, November 2

Privilege and its Perils: Insights and Strategies for Addressing Privilege Issues in Arbitrations

Salon 4

The attorney-client privilege keeps secrets—sometimes. During this session, panelists and conference participants will explore the foundations of privilege, its role in our business, and recent developments that put its protections at risk. Test your knowledge against real life problems and fellow conference-goers in a lively participatory presentation.

Panel: Patricia Fox, AIG
Chuck Ehrlich, ARIAS•U.S. Certified Arbitrator
Nick Cramb, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

3:00 p.m. – 3:50 p.m.

BREAKOUT SESSIONS – Round 2

All Sums vs. Pro Rata – An Insider's Guide to a Hotly Disputed Issue

Salon 1

One of the most frequently disputed issues between insurers and policyholders is how to apply losses across multiple policy years. This panel will explore why these issues are so critical to policyholders and insurers. Discussion topics will include current developments of the recent *Viking Pump* and *Olin* decisions emanating from New York's courts and how these issues may find their way into reinsurance disputes.

Panel: Alex Furth, Resolute Management, Inc.
Ana Francisco, Foley & Lardner LLP
Ken Gorenberg, Barnes & Thornburg LLP

The Gatekeeper: A Practical Guide to Resolving Evidentiary Disputes at Hearing

Salon 2

Repeated session – see description and panel presenters on page 5.

Arbitrating and Managing Small Disputes Cost-Effectively: Strategies for Arbitrators, Counsel, and Company Representatives

Salon 3

As we are all aware, companies occasionally have smaller disputes where the total amount at issue is less than $1 million and the dispute cannot be resolved on a principal-to-principal basis. The parties are then faced with the prospect of having to incur hard and soft costs in arbitration that are disproportionate to the total amount at stake. In this session, panelists and attendees will discuss best practices to use to minimize the costs and delays of arbitrating smaller claims. Reference will be made to various organizations' procedures governing small claim disputes (such as ARIAS U.S.'s Streamlined Rules For Small Claim Disputes), with a look at which aspects of those procedures work well and which ones could use improvement.

Panel: Steve Kennedy, Clyde & Co.
Diane Nergaard, ARIAS•U.S. Certified Arbitrator
Jane Parker, W. R. Berkley Corporation

Privilege and its Perils: Insights and Strategies for Addressing Privilege Issues in Arbitrations

Salon 4

Repeated session – see description and panel presenters on page 6.

Thursday, November 2

3:50 p.m. – 4:15 p.m.

AFTERNOON REFRESHMENT BREAK
North and South Pre-function Foyer (5th Floor)

4:15 p.m. – 5:05 p.m.

BREAKOUT SESSIONS – Round 3

All Sums vs. Pro Rata - An Insider's Guide to a Hotly Disputed Issue

Salon 1

Repeated session – see description and panel presenters on page 6.

Discovery — A Matter of Balance. Keeping a Watchful Eye on the Objective

Salon 2

Repeated session – see description and panel presenters on page 5.

Arbitrating and Managing Small Disputes Cost-Effectively: Strategies for Arbitrators, Counsel, and Company Representatives

Salon 3

Repeated session – see description and panel presenters on page 6.

Information Security for Arbitrators

Salon 4

Keeping information secure is vital in any confidential arbitration. This interactive workshop is part of a continuing series of offerings from the Technology Committee. Participants will learn two vital information security skills: (1) encrypting individual documents, including PDFs, and (2) deleting files the right way.

Panel: Randi Ellias, Butler Rubin Saltarelli & Boyd LLP
Ron Gass, The Gass Company, Inc

5:10 p.m. – 6:00 p.m.

ANNUAL MEETING AND ELECTIONS
Salon 2 (5th Floor)

6:00 p.m. – 7:30 p.m.

COCKTAIL RECEPTION
The Broadway Lounge (8th Floor)

Friday, November 3

7:00 a.m. – 8:30 a.m.

BREAKFAST
North Pre-function Foyer Area

7:30 a.m. – 8:30 a.m.

ARIAS•U.S. COMMITTEE MEETINGS
All Committee meetings are located on the 5th Floor

Arbitrators Committee – *Broadhurst & Imperial*
Law Committee – *Belasco*
Member Services & Strategic Planning Committee – *Carnegie & Lyceum*
Technology Committee – *Booth*

Friday, November 3

8:30 a.m. – 9:20 a.m.

GENERAL SESSION:
Captives in Reinsurance Disputes

Westside Ballroom (5th Floor)

Reinsurers and arbitrators should recognize that coverage conventions and arbitration rules may take on a unique cast in disputes between a captive and its reinsurers. This session will provide tools to understand the application of "follow the fortunes" in disputes involving captives, what captives look for in arbitrators, and modifications that captives may seek to arbitration clauses.

Panel: *Peter A. Halprin, Anderson Kill*
Robert M. Horkovich, Anderson Kill
Larry Zelle, L Zelle LLC
Sandra J. Sutton, MCIC Vermont LLC

9:20 a.m. – 10:10 a.m.

GENERAL SESSION:
The ARIAS Ethics Code in Practice

Westside Ballroom (5th Floor)

A distinguished panel of experienced arbitrators and counsel will review how the Code operates in four key aspects of everyday situations: conflicts, disclosures, ex parte and advocacy. The panelists will identify and discuss key Code sections applicable to each situation, explain how arbitrators and counsel think about these obligations from a practical perspective, and provide pointers for both new and experienced practitioners.

Panel: *Mark Gurevitz, MG Re Arbitrator & Mediator Services*
Peter Gentile, ARIAS•U.S. Certified Arbitrator
Jeanne Kohler, Carlton Fields
Steve Schwartz, Chaffetz Lindsey LLP
Mark Megaw, ARIAS•U.S. Certified Arbitrator

10:10 a.m. – 10:30 a.m.

MORNING REFRESHMENT BREAK

North and South Pre-function Foyer (5th Floor)

10:30 a.m. – 11:20 a.m.

GENERAL SESSION:
The State of Play: An Insider's Perspective on Insurance and Reinsurance Arbitrations in 2017 and Beyond

Westside Ballroom (5th Floor)

In this session, five panelists who are "repeat players" in the reinsurance dispute market will answer fundamental questions about the state of reinsurance arbitration in 2017. Conference participants will be encouraged to submit questions anonymously to encourage lively discussion and build on new insights.

Moderator: *Marc L. Abrams, Mintz Levin Cohn Ferris, Glovsky and Popeo*
Panel: *Alysa B. Wakin, Odyssey Re*
Scott Birrell, Travelers
Brad Rosen, Berkshire Hathaway Group
Jeffrey Burman, AIG
Josh Schwartz, Chubb

Friday, November 3

11:20 a.m. – 12:10 p.m.

GENERAL SESSION: The Bermuda Form: Can ARIAS Disrupt the Traditional Model?

Westside Ballroom (5th Floor)

In a Bermuda Form arbitration, clients are typically faced with significant dispute costs, including retention of multiple sets of counsel presenting positions across different jurisdictions as well as application of different bodies of law with frequent battles involving jurisdiction, choice of law, experts, and the actual dispute itself. Would use of an ARIAS arbitration clause, certified arbitrators and procedures create jurisdictional impediments to clients that wish to avoid nexus with the U.S.? Would application of an ARIAS format provide a better product to clients in the Bermuda Form market? If so, what does ARIAS need to do in order to "disrupt" the traditional Bermuda Form model?

Panel: *John L. Jacobus, Steptoe & Johnson, LLP*
Jonathan Goodman, General Electric
Leonard Romeo, Arch Bermuda
Mike Merlo, Aon (Bermuda) Ltd.
Robin Saul, XL Bermuda Ltd/Insurance
Greg Hoffnagle, Mintzm Kevin, Cohn, Ferris, Glovsky and Pepeo, P.C.

12:10 p.m. – 12:15 p.m.

ACKNOWLEDGEMENTS / CLOSING REMARKS

Westside Ballroom (5th Floor)

Deirdre Johnson, ARIAS•U.S. Chairwoman, Crowell & Moring LLP

NY CLE CREDIT: ARIAS•U.S. is accredited by the New York State Continuing Legal Education Board as a provider of CLE training. Nine hours of Continuing Legal Education credits are available to those who attend this conference, which breaks down as follows: 1.0 CLE credits for Ethics and 8.0 CLE credits for Areas of Professional Practice. This program is structured for both newly admitted attorneys and experienced attorneys. Sign-in and sign-out sheets will verify attendance at all sessions and will be the basis upon which certificates of attendance will be prepared and sent, but certification of completed credit hours to CLE Boards is the responsibility of each attorney.

Faculty Biographies

Marc L. Abrams, Mintz Levin Cohn Ferris Glovsky and Popeo P.C.

Marc has nearly 20 years of experience guiding clients through complex insurance and reinsurance dispute resolutions, both in US courts and before US and international arbitration panels. He represents US and international insurers and has been involved in a variety of engagements for both insurers and reinsurers across various lines of insurance business. Marc has presented and tried many of the insurance and reinsurance industry's fundamental dispute issues, including, allocation, aggregation, notice, follow the fortunes, security, payment of interest, set-offs, insolvency, captives, "cut-through" provisions, claims handling practices, claims control, special acceptances, rescission, sunset clauses, and other matters of contractual interpretation. He has been admitted as pro hac vice in various US federal courts. On the reinsurance side, Marc has recently resolved a number of matters in court and in arbitration involving allocation and notice as well as a complex international reinsurance dispute involving a fronting company's "cut-through" rights. Marc's practice also extends to litigating and arbitrating insurance coverage matters, broker, agency, and intermediary disputes, and other commercial disputes involving insurers, and he has recently resolved a number of EPLI and business interruption claims for a large US insurer.

Christopher R. Bello,
General Re Life Corporation

Christopher R. Bello serves as Vice President, Senior Counsel and Secretary of United States Aviation Underwriters, Inc. and General Re Life Corporation. He has practiced law for 30 years and is licensed in the State of Connecticut. Chris joined General Reinsurance Corporation in 1996 as an Assistant General Counsel. He has also served as General Counsel of General Re New England Asset Management and General Re Life Corporation. Prior to joining General Re he practiced law with Bello, Lapine and Cassone for 13 years as a litigator and appellate attorney. In 1988 he joined the United States Army Reserve, Judge Advocate Generals Corps and was called to active duty in 1990 in support of Operation Desert Storm and served in Saudi Arabia until April, 1991. He was Honorably Discharged as a Captain from the Army in 1996. His current practice includes life and property/casualty insurance and reinsurance regulation, litigation and arbitration, life and disability reinsurance claims, treaty wording, contract matters, corporate governance, intellectual property matters and information technology contracts.

Scott P. Birrell, The Travelers Companies, Inc.

As head of the Travelers Reinsurance Legal Group, Scott has oversight of all ceded and assumed reinsurance litigation and arbitration for the Company as well as certain oversight responsibilities relative to commutation, regulatory, wording and transactional issues. Prior to joining Travelers, he was in private practice, specializing in the litigation and trial of general commercial and insurance-related matters. Scott is a current member of the Board of Directors for ARIAS·US and is a past member of the Arbitrator and Umpire Certification Committee and past Co-Chair of the ARIAS Arbitration Task Force. He is certified as an arbitrator with ARIAS·US, and with The Association of Insurance & Reinsurance Run-Off Companies (AIRROC). Scott received his undergraduate degree from the University of Colorado and his Juris Doctorate, cum laude, from the New England School of Law in Boston, Massachusetts, and is a past adjunct faculty member of the University of Connecticut School of Law.

Jeffrey S. Burman,
American International Group, Inc.

Jeff Burman is a Deputy General Counsel and the Chief Reinsurance Legal Officer for AIG. Jeff serves as head of legal for various groups, including Reinsurance; Multinational; Alternative Risk Solutions; Commercial Governance & Transactions; as well as the Canada, Bermuda and Latin America regions. Jeff is also active in the AIG legal department's pro bono program. Prior to joining AIG in 2008, Jeff practiced at two leading New York law firms, where he represented insurers, reinsurers, investment banks and investors in insurance and reinsurance based transactions as well as in reinsurance dispute resolution. Jeff is a member of the bars of New York and New Jersey, receiving his law degree from Rutgers University School of Law, where he served as an editor on the Rutgers Law Journal.

Nina L. Caroselli, The RiverStone Resources LLC

Nina Caroselli has over thirty years of experience in the insurance industry and private litigation practice. She began her career in private practice in New York and New Jersey specializing in the litigation of insurance coverage and product liability matters. Subsequently she moved in-house joining the run-off team in 1996 as Senior Attorney focusing on asbestos, pollution and health hazard claims. Ms. Caroselli's career with RiverStone has progressed and varied in responsibility having had executive responsibilities for Claims, Reinsurance and Operations. In 2011 Ms. Caroselli was promoted Chief Operating Officer. Nina graduated from St. John's University School of Law and is a frequent speaker at industry conferences on a wide variety of topics.

John F. Chaplin,
Compass Reinsurance Consulting LLC

John Chaplin is a reinsurance consultant with 40 years' experience in the business. He is a veteran of the casualty reinsurance struggles of the 1970's when he was an executive at Guy Carpenter; the reinsurance transformations of the Workers' Compensation in the 1980's, also at Guy Carpenter; the property reinsurance market upheavals of the 1990's and 2000's while at GC, North American Re and later as a consultant. John has served in every transactional capacity in the business: intermediary, underwriter, buyer, seller, and for the last 15 years, consultant. Currently, John is an ARIAS•U.S. certified arbitrator and continues to provide services in the reinsurance field as an arbitrator, umpire and expert.

Nick Cramb, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Nick Cramb is a member (partner) in Mintz Levin's Insurance, Reinsurance, Investigations, & Risk Management Practice. He represents insurers, reinsurers, and insurance brokers on all matters of coverage, including, for example, the duty to defend, allocation, order of coverage, retention warranties, and bad faith. His expertise includes commercial general liability, directors and officers liability and professional liability insurance, and both facultative and treaty reinsurance. While at Mintz Levin, Nick served as a Special Assistant District Attorney with the Middlesex District Attorney's Office, where tried several cases before juries. Nick was a founding member and recent President of the Massachusetts Reinsurance Bar Association (MReBA) and is a member of ARIAS•U.S.

Faculty Biographies

Mitchell Dolin, Covington & Burling LLP

Mitchell Dolin, who co-chairs Covington & Burling's highly regarded global insurance recovery practice, represents corporate and other policyholders in pursuing coverage for a broad range of underlying liabilities through litigation, arbitration, mediation, and negotiation. His work in the field has included coverage for antitrust, cyber, employment, environmental, intellectual property, mass tort, media, professional liability, and shareholder claims, as well as first-party property, business interruption, cargo, event cancellation, political risk, and representation and warranty losses. Mr. Dolin has been ranked by Chambers USA as one of the nation's top dozen or so policyholder lawyers for each of the past several years, and Chambers has described him as "universally lauded for his deep policyholder experience and knowledge." For several years, he also chaired the firm's arbitration practice group and has served as an advocate and arbitrator in domestic and international arbitrations. Mitchell is a graduate of Tufts and NYU Law School and has spent his entire private practice career at Covington based in its Washington office.

Jodi Ebersole, The Travelers Companies, Inc.

Jodi Ebersole has been with Travelers since 1999 in a variety of legal roles and currently serves as the Vice President, Associate Group General Counsel of Corporate Litigation and Business Insurance. In her Corporate Litigation role, Jodi and the Corporate Litigation team manage all non-claim, non-employment litigation for all of the Travelers enterprise and its individual business units. In her Business Insurance legal role, Jodi is the lead lawyer for the Small Commercial and National Accounts business units, and the lead lawyer for Travelers Workers Compensation product group. Prior to joining Travelers, Jodi was in private practice as a trial lawyer in Baltimore where she was a partner in the law firm of Ferguson, Schetelich and Ballew.

Chuck Ehrlich, ARIAS•U.S. Certified Arbitrator

Chuck Ehrlich was a litigation partner in an AmLaw 100 firm when he joined the executive team organized to extricate Xerox Financial Services, Inc. from the property and casualty insurance business. He was responsible for resolving complex, volatile, high dollar matters as the team completed its assignment for Xerox and ultimately became part of the Fairfax Financial Holdings Limited family. Chuck's corporate positions included: Senior Vice President & General Counsel; Senior Vice President, Claims; and Senior Vice President, Worldwide Special Counsel, as well as directorships of domestic and foreign insurance companies. Chuck was responsible for resolution of billions of dollars in disputes, and administration of legal budgets in the tens of millions annually. His portfolio included mass tort liabilities, pollution, class actions, products liability, and complex commercial coverages. He is familiar with all aspects of the property and casualty industry.Chuck has served as an umpire and a party arbitrator.

Randi Ellias, Butler Rubin Saltarelli & Boyd LLP

Randi Ellias focuses her practice on complex commercial litigation and arbitration, including complex insurance coverage disputes and reinsurance matters. She has handled matters concerning allegations of nondisclosure and misrepresentation, treaty interpretation, ownership of common account reinsurance, direct access to reinsurance proceeds by policyholders, number of occurrences, contractual and statutory obligations regarding security, and compliance with actuarial standards of practice. She was named a leader in insurance law in The Best Lawyers in America (2016 and 2017). Randi is a co-founder of Butler Rubin's Women in Reinsurance organization and she is a member of the Publication Committee of AIRROC Matters. She has spoken at AIRROC meetings and the Women in Insurance Leadership Forum.

Patricia Taylor Fox,
American International Group

Patricia Taylor Fox has over 15 years' experience in the insurance and reinsurance industry. She currently serves as Deputy General Counsel in the Reinsurance Legal Division of AIG, where she is the head of the Dispute Resolution Unit. Patricia has co-authored articles on evidence in arbitrations, attorney-client privilege, the common-interest privilege and developments in reinsurance law, and is a frequent speaker on issues relating to the arbitration of reinsurance disputes.

Ana M. Francisco, Foley & Lardner LLP

Ana M. Francisco is a partner at Foley & Lardner LLP, and the Boston Litigation Department Chair. She is a member of the firm's Insurance & Reinsurance Litigation, Business Litigation & Dispute Resolution, and Privacy, Security & Information management Practices. Ana is a trial lawyer and commercial litigator with deep expertise in insurance disputes. For over twenty years, she has defended clients in coverage disputes and provided strategic advice concerning mass tort and environmental pollution claims across the United States and abroad, particularly those presenting novel issues. Ana also regularly represents insurer and reinsurers in disputes concerning general liability and life insurance disputes. She has been recognized by The Legal 500 for her work in insurance: advice to insurers. Ana has also been selected by her peers for inclusion in The Best Lawyers in America© in the field of commercial litigation. In 2010, Ms. Francisco was named as one of the "Top Women in the Law" by Massachusetts Lawyers Weekly.

Glenn Frankel, The Hartford Financial Services

Glenn is a Vice President of Claims with The Hartford, and currently leads the Strategic Claim Management group, responsible for: (1) direct asbestos and toxic tort (sexual molestation, lead paint, chemical exposures, sports-related head injuries, etc.) claims; (2) Assumed Reinsurance; and (3) International Claims and Puni-Wrap Cover (domestic and international general liability, auto, property, workers' compensation, accidental death and dismemberment, kidnap and ransom, cargo, financial products and punitive damages claims). In addition, Glenn sits on the Boards of Directors for the First State Insurance Group companies. Prior to joining The Hartford, Glenn was a Managing Counsel with Travelers Property & Casualty, and an associate with the law firm of Day, Berry & Howard (now Day Pitney) in Hartford, CT. Glenn is also an ARIAS certified Arbitrator. Glenn earned his J.D. from St. John's University School of Law (cum laude), and B.A. in economics from Wesleyan University.

Donald Frechette, Locke Lord LLP

Don is a partner in the Hartford office of Locke Lord, LLP. As an experienced trial lawyer, he has represented both cedents and reinsurers in foreign and domestic arbitrations. He has also litigated arbitration-related issues in numerous state and federal courts. Don received his B.A. in Economics and

Faculty Biographies

Business Administration from the University of New Hampshire, his J.D. from New York Law School, with honors, and his LL.M. from Boston University, with highest honors.

Bryce L. Friedman,
Simpson Thacher & Bartlett LLP

Bryce L. Friedman, a Partner at Simpson Thacher, represents clients in complex disputes through counseling, litigation and trial. He devotes a significant part of his practice to representing members of the insurance and reinsurance industries in litigated matters, and the financial services and other industries in addressing allegations of fraud and False Claims Act violations. He is recognized by *Chambers* where sources say "he receives high praise for his 'top-notch strategic thinking.'" He is also recognized as a national "Litigation Star" for insurance by Euromoney's *Benchmark Litigation* and was named a "Rising Star" *by Law360*. He is also involved in substantial pro bono work including supervising Simpson Thacher's ongoing legal clinic at the Bushwick Campus Schools in Brooklyn and serves on the Board of VOLS. Bryce received his B.A., *cum laude*, from Dartmouth College and graduated from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar.

Alexandra Furth, Resolute Management, Inc.

Alex Furth is Vice President and Assistant General Counsel at Resolute Management, Inc. Until 2015, Alex was Assistant Vice President and Senior Corporate Counsel in the Legal Department of Liberty Mutual's Complex and Emerging Risks Claims Department, which handled exposures arising out of asbestos, environmental, toxic tort and other mass litigation. Alex continues to manage coverage and reinsurance litigation and arbitrations relating to such complex losses. Prior to joining Liberty Mutual, Alex was a litigator at the law firm of Ropes & Gray, where she represented clients in a variety of commercial disputes, including contract disputes, trademark infringement and government enforcement actions. At Ropes & Gray she specialized in representing insurers in asbestos coverage litigation. She also served as a Special Assistant District Attorney for the Commonwealth of Massachusetts, where she tried numerous criminal cases. Ms. Furth graduated from Williams College, magna cum laude, and received her law degree from the University of Pennsylvania, where she served as an editor of the University of Pennsylvania Law Review.

Ronald S. Gass, The Gass Company, Inc.

Ronald Gass is an attorney and an ARIAS•U.S. Certified Arbitrator and umpire. Most of his 28-year legal career has been devoted exclusively to his reinsurance and insurance practice involving a broad range of complex business issues including coverage disputes arising from various lines of business such as asbestos and environmental liability, workers' comp carve-outs, general liability, medical malpractice liability, medical stop loss insurance, and property and catastrophe insurance. He also has significant experience with reinsurance collections, MGA transactions and disputes, surety reinsurance, aviation and ocean marine reinsurance, reinsurance contract wordings and interpretation, reinsurance intermediary disputes, and commutations. In 2001, Mr. Gass established his own firm to provide arbitrator and umpire dispute resolution services to the reinsurance and insurance industry. Since that time, he has been appointed as an umpire or party-arbitrator in over 90 arbitrations.

Peter Gentile, ARIAS•U.S. Certified Arbitrator

Peter Gentile has served the insurance and re-insurance industries for over forty years; during the last fifteen years as an ARIAS – US Certified Umpire and Arbitrator. He has served on several arbitration panels both as an Umpire and Party Appointed Arbitrator. Peter has also served as a litigation consultant and expert witness in a number of complex disputes involving insurers and re-insurers. Previously, he was CEO. President and CFO of major reinsurers where his responsibilities included all aspects of underwriting, claims, contracts and financial matters. Among his areas of expertise are alternative approaches to transferring both long tail casualty and property risk, mergers and acquisitions, captives and run-off. Mr. Gentile is a Certified Public Accountant and began his career at the accounting firm of KPMG where he was a Partner and leader of the Insurance Practice in New York. He is both Treasurer and a Member of the Board of Directors of ARIAS•U.S.

Jonathan Goodman, General Electric

Jonathan Goodman is Executive Counsel, GE Global Operations, Risk & Property Divestitures in Norwalk, Connecticut and has been with General Electric Company since August 2005. He is responsible for insurance-related legal issues at GE Corporate, including management of insurance coverage claims and disputes, oversight of significant insured litigation, advice on the terms and structure of GE's global insurance and reinsurance programs, and captive management and reinsurance issues. Mr. Goodman's responsibilities cover all lines of coverage, including general liability, property, cyber, professional and other specialty coverages. He also is responsible for managing divestiture of surplus real property held at GE Corporate. Before GE, he practiced law in the New York offices of Dickstein Shapiro Morin & Oshinsky focusing on insurance coverage litigation. Mr. Goodman is an adviser for ALI's Restatement of the Law of Liability Insurance.

Kenneth M. Gorenberg, Barnes & Thornburg LLP

Kenneth M. Gorenberg is a partner in the Chicago office of Barnes & Thornburg LLP. A versatile litigator, he is a member of the firm's Insurance Recovery and Counseling, Commercial Litigation, Construction, Toxic Tort, and Appellate practice groups. Kenneth has handled coverage issues involving an alphabet soup of insurance policies, including CGL, D&O, E&O, EPLI, PLL, and WC/EL, as well as first-party property policies, crime bonds, and surety bonds. He has deep understanding of loss-sensitive insurance programs, having litigated disputes involving workers compensation claim handling as well as deductible and retrospective premium billing. His trial and appellate victories in one such case in the 11th Circuit were featured in Law360's selection of Barnes & Thornburg's Insurance Recovery group as a Practice Group of the Year for 2015. He also works in the trenches of product liability, professional liability, and commercial litigation, including as national coordinating counsel for defendants in asbestos litigation. Gorenberg brings this underlying litigation experience to bear in insurance coverage litigation, negotiation, and counseling for corporate policyholders.

Faculty Biographies

Mark S. Gurevitz, MG Re Arbitrator & Mediator Services

Mark S. Gurevitz is the founder and principal of MG Re Arbitrator and Mediator Services LLC, a consulting firm specializing in dispute resolution services for the insurance and reinsurance industry. An ARIAS•U.S. Certified Arbitrator and Umpire, Mark serves as an arbitrator and umpire on insurance and reinsurance matters involving property-casualty and life business. He is also a FINRA approved arbitrator on their roster for securities-related matters and an AAA international arbitrator on the ICDR roster of arbitrators. He is a Director of Fencourt Reinsurance Company, Ltd. and Heritage Reinsurance Company, Ltd. A frequent lecturer on reinsurance and arbitration topics, Mark is a Director Emeritus, former President and Chairman of ARIAS•U.S., was chair of its Long Range Planning Committee and co-chair of the Forms and Procedures Committee and is on the Editorial Board of the ARIAS Quarterly and the new Ethics Discussion Committee. He is a graduate of The Pennsylvania State University, with high distinction, and received his J.D., cum laude, from Temple University School of Law. He also attended the American Institute for CPCU and Wharton School of Business Insurance Executive Development Program.

Peter A. Halprin, Anderson Kill

Peter A. Halprin is an attorney in Anderson Kill's New York office. His practice concentrates in commercial litigation and insurance recovery, exclusively on behalf of policyholders. He also acts as counsel for U.S. and foreign companies in domestic and international arbitrations (including London and Bermuda Form arbitrations). Peter is a Member of the Chartered Institute of Arbitrators, and received a Postgraduate Distance Learning Diploma in International Commercial Arbitration from the Queen Mary School of Law, University of London. He successfully completed the Hong Kong International Arbitration Centre's (HKIAC) Tribunal Secretary Accreditation Programme, and is on the Tribunal Secretaries Panel for the Australian Centre for International Commercial Arbitration (ACICA). Peter is an Adjunct Professor of Law and Coach of the Benjamin N. Cardozo School of Law Willem C. Vis International Commercial Arbitration Moot Team and is Deputy Co-Chair of the Cyber Insurance Recovery Practice Group, as well as a member of Anderson Kill's Financial Services Industry Group. Since 2013, he has been recognized by Super Lawyers as a New York Metro Rising Star for Insurance Coverage.

Mitch Harris, Day Pitney LLP

Mitch Harris is a trial lawyer, primarily representing financial institutions and insurance companies in litigation, arbitration, investigative and regulatory proceedings. Mitch has served as lead trial counsel in commercial and insurance litigation in federal and state courts and in arbitrations throughout the country. An objective third-party survey, Benchmark Litigation: The Definitive Guide to America's Leading Litigation Firms & Attorneys, has repeatedly recognized Mitch as a "Connecticut Litigation Star."

Aimee L. Hoben, The Hartford

Aimee L. Hoben is Deputy General Counsel, Director of Reinsurance and Claims Law at Hartford Financial Service Group, Inc. Reporting to the General Counsel, she leads a team of lawyers responsible for all legal issues relating to reinsurance as well as for providing regulatory and claim practices support to The Hartford's Claim organization. Aimee counsels The Hartford's Property and Casualty business as well as provides reinsurance counsel to Talcott Resolutions, which manages the company's run-off life and annuity business. She led a multidisciplinary team in the successful Part VII court restructuring of The Hartford's UK run-off businesses completed in October 2015. Prior to joining The Hartford, Aimee was in private practice at Murtha Cullina LLP in Hartford, with a focus on insurance coverage, environmental law and land conservation. She received her B.A. in English Literature from the University of Colorado, and her J.D. from the University of Connecticut School of Law, with high honors.

Gregory S. Hoffnagle, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.

Greg Hoffnagle is Of Counsel in the New York office of Mintz Levin. Greg's practice focuses on complex insurance and reinsurance matters as well as international arbitration and litigation. He has a breadth of experience representing clients with government regulatory and enforcement actions along with internal investigations. Prior to joining Mintz Levin, Greg worked in the New York office of a London-based global law firm, where his practice focused on complex international insurance, reinsurance, and commercial disputes with a particular focus on Bermuda Form arbitrations.

Kim D. Hogrefe, ARIAS•U.S. Certified Arbitrator / Retired Senior Vice President, Chubb and Son Insurance

Kim D. Hogrefe is the Chair of the Board of Trustees of the National Judicial College which provides educational programs and training to Judges in the United States. He was a Senior Vice President and Worldwide Claim Technical Officer of Chubb & Son Insurance with responsibility for direct and reinsurance claims with the highest complexity and financial exposure. He led the handling and strategy in disputed reinsurance claims worldwide for Chubb as both a cedent and reinsurer. He previously served as a trial attorney, supervisor and administrator in the New York County District Attorney's Office. A graduate of Yale University and the University of Pennsylvania Law School, he is an active member of ARIAS•U.S. and the American Bar Association. He was elected as a member of the governing Council and as the Financial Officer of the Tort Trial & Insurance Practice Section of the ABA and currently serves on its Cybersecurity and Data Privacy Committee. He is a frequent speaker on the topics of cyberliability risks, mediation and arbitration resolution strategies and Directors' and Officers' liability claim handling.

Robert M. Horkovich, Anderson Kill

Robert M. Horkovich is "the 'go-to person' in the area of insurance recovery," according to a client cited by Chambers USA, which has recognized Mr. Horkovich as a leading insurance recovery attorney every year since 2005. According to Chambers, Bob "has a strong 'client-first' attitude" and "is recognized in the market for his leading trial and negotiation skills, with an undisputed national presence." Bob has obtained over $5 billion in settlements and judgments from insurance companies for his clients over the past decade. Bob is a trial lawyer with substantial experience in trying complex insurance coverage actions on behalf of corporate policyholders and governmental entities. Bob has been selected by his peers for inclusion in Best Lawyers for insurance law in every year since 2009 and Super Lawyers for Insurance Coverage since 2006. He has been selected as a Fellow of the American Bar Foundation, the premier institute for social science

Faculty Biographies

research regarding law in the USA, an honor limited to one-third of one percent of the lawyers in America.

Catherine Isely, Butler Rubin Saltarelli & Boyd LLP

Catherine Isely is a trial attorney and Butler Rubin Saltarelli & Boyd LLP partner who has litigated and arbitrated complex commercial disputes for more than two decades. For the past ten years, Chambers USA has recognized her as a leading Illinois lawyer in reinsurance dispute resolution. Catherine has extensive experience before courts and arbitration panels litigating the allocation of environmental and toxic tort settlements, as well as disputes related to claims handling, negligent underwriting, bad faith allegations, pool membership rights and obligations, retrospectively-rated business, commutations, retrocessional coverage, title reinsurance, direct access provisions, obligations to follow settlements, obligations to post security, and the interpretation and application of ultimate net loss, aggregate limit, definitive statement of loss, net retained lines, prompt notice, access to records, consent to settle, honorable engagement and arbitration clauses. Catherine is a founding member and co-host of Butler Rubin's annual Women in Reinsurance Program.

John L. Jacobus, Partner, Steptoe & Johnson, LLP

John Jacobus is a member of Steptoe & Johnson LLP's Insurance and Reinsurance Practice Group. Mr. Jacobus has focused on representing cedents, reinsurers and retrocessionaires in litigation and arbitrations within the United States and in private international dispute resolution centers. He also has a corporate practice, focused on commutation and work-out issues, as well as merger and acquisition activities that are handled through reinsurance assumption agreements and the novation of reinsurance treaties. He is also a specialist with respect to insurance coverage for cyber risks. Mr. Jacobus is an internationally known member of the insurance and reinsurance bar. He is a Chairman Emeritus of the Insurance and Reinsurance Practice Group for LEX MUNDI, the world's largest association of private law firms. John earned an A.B. in History, magna cum laude, Phi Beta Kappa, from Harvard University (1986), and a J.D. from the Harvard Law School (1989).

Deirdre G. Johnson, Crowell & Moring LLP

Deirdre Johnson is a partner in the Washington, D.C. office of Crowell & Moring LLP. She has nearly two decades of experience handling disputes in the U.S., Bermuda, London and European markets in lawsuits and arbitration proceedings arising out of a broad range of claims and virtually all types of insurance and reinsurance agreements. Johnson has handled dozens of reinsurance arbitrations in both domestic and international proceedings, including many Bermuda and London arbitrations arising out of a broad range of claim types. She also represents insurers and reinsurers in insolvency proceedings and leads Crowell & Moring's Professional Liability insurance practice. Johnson is a graduate of the Georgetown University Law Center (cum laude) and the University of Tennessee (B.A., with honors).

Neal Katyal, Hogan Lovells LLP

Neal Katyal, the former Acting Solicitor General of the United States, focuses on appellate and complex litigation. He has extensive experience in matters of patent, securities, criminal, employment, and constitutional law. Neal has orally argued 34 cases before the Supreme Court of the United States, with 32 of them in the last 8 years. In the 2016-17 Term alone, Neal argued 7 cases in 6 separate arguments at the Supreme Court, far more than any other advocate in the nation (the next highest number, 4 arguments, was reached by two attorneys). At the age of 47, he has already argued more Supreme Court cases in U.S. history than has any minority attorney, with the exception of Thurgood Marshall (with whom Neal is currently tied). Neal is well-known for winning the landmark decision *Hamdan v. Rumsfeld*, which challenged the policy of military trials at Guantanamo Bay. The Supreme Court sided with him by a 5-3 vote, finding that President Bush's tribunals violated the constitutional separation of powers, domestic military law, and international law.

Stephen M. Kennedy, Clyde & Co US LLP

Stephen Kennedy represents insurers and reinsurers as lead counsel in trials, arbitrations, mediations and appeals of complex coverage and transactional disputes involving all lines of business, including casualty, energy, environmental, financial guaranty, life and health, political risk, property, and trade credit. He also represents companies in high-dollar bad faith claims and counsels them on contract drafting, risk management and regulatory matters. Mr. Kennedy is a frequent speaker at industry events and has written numerous articles in various publications, including the Journal of Insurance Coverage, Reinsurance Magazine, ARIAS•U.S. Quarterly and the Insurance & Reinsurance International Comparative Legal Guide. He also served on a three-member task force that drafted the ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes as well as the ARIAS•U.S. Streamlined Rules for Small Claim Disputes. He has been consistently recognized by a number of leading legal directories, including the Euromoney's Expert Guide to Insurance and Reinsurance Lawyers, Who's Who Legal Insurance and Reinsurance Lawyers and Legal 500 U.S. He is a graduate of Kenyon College and Villanova University School of Law.

Jeanne M. Kohler, Carlton Fields

Jeanne Kohler is a Shareholder in the New York office of Carlton Fields and a member of its Property & Casualty Insurance and Life Insurance & Annuity practice groups. She also co- chairs the firm's Reinsurance group. Her practice focuses on complex commercial litigation and arbitration, with an emphasis on insurance coverage and reinsurance disputes. Jeanne has litigated and arbitrated cases on behalf of U.S. and international insurers and reinsurers involving a broad range of issues in the property and casualty and life and health sectors, as well as various specialty re/insurance products. She has also represented insurers, brokers, third-party administrators and managing general agents and underwriters in disputes. In addition, Jeanne regularly assists her insurer and reinsurer clients with product development and contract drafting, as well as advises them on regulatory issues and risk management.

Mark Megaw , ARIAS•U.S. Certified Arbitrator

Mark is a former ARIAS Board member, and an original co-chair of the ARIAS Arbitrator's Committee. He currently sits on the ARIAS Ethics Committee. He was previously the head of assumed and ceded reinsurance disputes for the ACE Group of Companies, now known as Chubb. Prior to that role, he served as General Counsel to ACE Tempest Re Group. During the 1990's, he was based in London, in a business role for CIGNA Re. These days, though retired from the practice of law, he serves in neutral roles in reinsurance arbitration disputes. Beyond reinsurance, when not on a tennis court, he and his wife tutor a class of pre-K children and they teach adult-literacy, all in Charlottesville, Virginia.

Faculty Biographies

Michael G. Merlo, Aon (Bermuda) Ltd

Mike joined Aon as Chief Counsel and Senior Vice President of Aon (Bermuda) Ltd. in 2004. He was promoted to Executive Vice President of Aon (Bermuda) Ltd. in 2007, and also continues to serve as its Chief Counsel. In 2011, Mike took on the additional roles of Managing Director of Aon Risk Solution's Casualty Consultation, Advocacy and Claims Resolution Practice, and also Special Counsel to Aon Corporation. As Managing Director of Aon Risk Solution's Casualty Consultation, Advocacy and Claims Resolution Practice, Mike provides counsel and advocacy to Aon's clients on a wide range of issues, including coverage, drafting and interpretation issues across all lines of business, but with a particular emphasis on complex casualty matters. Mike has authored articles and spoken frequently at seminars on various industry topics, legal developments and litigation techniques. Mike has also served as a Board Member of Aon Benfield (Bermuda) Ltd, and as an Executive Board Member of the Association of Bermuda Compliance Officers ("ABCO").

Diane Nergaard, ARIAS•U.S. Certified Arbitrator

Diane Nergaard is an ARIAS•U.S. Certified Arbitrator and Umpire and is engaged as an arbitrator and mediator servicing the insurance and reinsurance industries. She has experience in all aspects of property/casualty insurance and reinsurance and has also spoken extensively on insurance and reinsurance matters at various conferences. Diane has participated in hundreds of arbitrations, including in complex matters such as financial guaranty / securitizations, broker / dealers, global covers, MGA/MGU matters and rescission cases. She also has regulatory expertise and has worked extensively with regulators to set up numerous insurance companies, agencies and MGAs. Nergaard transitioned from being a litigator in private practice to in-house counsel at Crum and Foster where she was involved with the run-off of a $1billion portfolio of reinsurance recoverables.

Kathleen Perlman, BerkleyRe

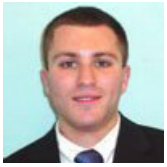
Kate Perlman has over thirty years of experience in reinsurance/retrocessions. Ms. Perlman holds the CPCU and ARe designations and is the Claims Manager at Berkley Re America.

Jane B. Parker, W.R. Berley Corporation

Jane Parker is a senior attorney and member of the corporate claims management team at the W.R. Berkley Corporation. W. R. Berkley Corporation is a holding company which operates through 50 operating units worldwide in the commercial insurance space. Jane has more than 25 years experience handling insurance and reinsurance claim matters.

Leonard Romeo, Arch Insurance (Bermuda)

Leonard Romeo is Vice President, Division Counsel & Claims Director at Arch Insurance (Bermuda). He has been with the company in Bermuda since 2009. Romeo is responsible for managing all litigation and exposure matters for Excess Casualty, D & O, and Professional Liability claims and provides underwriting support on each of those lines of business. Romeo was previously a Complex Claims Director at AIG for five years in the Healthcare and Excess Complex Claims units. Prior to joining AIG, he litigated general/product liability matters as well as medical malpractice cases. Romeo holds a Juris Doctor and a Bachelor's degree (cum laude) from St. John's University.



Brad Rosen, Berkshire Hathaway Group

Brad Rosen is a vice president and counsel with the Berkshire Hathaway Reinsurance Division, where he serves as a legal resource on a variety of matters. Previously, he was an associate at Quinn, Emanuel, Urquhart & Sullivan LLP in New York. Brad also serves as an adjunct lecturer for the Yale College Computer Science Department in New Haven. He received a master's of science and bachelors of science from Yale University in 2004 and his juris doctor from Harvard Law School in 2008.

Jonathan Rosen, Arbitration, Mediation and Expert Witness Services

Jonathan Rosen is an ARIAS•U.S. Certified Arbitrator and Umpire and is primarily engaged as an arbitrator, mediator and expert witness servicing the insurance and reinsurance industries. He is also listed on the CPR's Panel of Distinguished Neutrals. Jonathan was formerly Chief Operating Officer of The Home Insurance Company in Liquidation. Prior to Home's liquidation, Jonathan was Executive Vice President and Reinsurance Counsel of Home and Risk Enterprise Management Limited, responsible for the reinsurance operations of the Home entities as well as certain reinsurance endeavors of the Zurich group. He has depth of experience in all aspects of property/casualty insurance and reinsurance arrangements and has served on NAIC advisory committees and working groups involved in the preparation of model legislation and regulation. Jonathan is currently President of Cityvest Reinsurance Limited, a Bermuda licensed subsidiary of Home, an officer of SOBC Insurance Company Limited, domiciled in Connecticut, and a Director of Compass Insurance Company. He is a past Director and past Chairman of the Association of Insurance and Reinsurance Run-Off Companies ("AIRROC") and a past Director of the Reinsurance Mediation Institute ("REMEDI").

Peter K. Rosen, Latham & Watkins

Peter K. Rosen received his Juris Doctorate from the University of Southern California Gould School of Law. He is a partner in the Los Angeles office of Latham & Watkins and is a member of the litigation department. He is the Global Chair of the Insurance Coverage Litigation practice. He represents insurance policyholders in matters involving commercial general liability policies, directors' and officers' liability insurance policies, transactional liability insurance policies, environmental insurance, fidelity insurance, professional liability policies, property disputes, and surety bonds. Mr. Rosen was the lead lawyer for the retail leaseholder at the World Trade Center in the massive insurance coverage litigation arising out of the 9/11 attacks. His role in the World Trade Center insurance coverage litigation gained him worldwide recognition. Since 2007, Mr. Rosen has taught Insurance Law as well as Corporate Governance at the USC Gould School of Law and will be teaching Insurance Law at Pepperdine Law School in 2018. Mr. Rosen is as a Fellow of the Chartered Institute of Arbitrators (CIArb) and a Fellow of the America College of Coverage and Extracontractual Counsel.

James I. Rubin, Butler Rubin Saltarelli & Boyd LLP

James Rubin is a trial lawyer and head of the reinsurance litigation and arbitration practice at Butler Rubin Saltarelli & Boyd LLP. He is a founding partner of the firm and has extensive experience representing insurance and reinsurance companies and brokers in hundreds of disputes. Mr. Rubin has repeatedly been named

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as a national leader in insurance and reinsurance law in publications including Chambers USA, The Legal 500, The Best Lawyers in America and Super Lawyers. He is a member of the Board of Directors of ARIAS-U.S. and Chair of the ARIAS Ethics and Publications committees and he co-wrote ARIAS' *Guidelines for Arbitrator Conduct.*

Robin Saul, XL Bermuda Ltd/Insurance

Robin Saul is the Claims Manager for Casualty and Healthcare claims at XL Bermuda Ltd ("XLB"). Robin has handled both insurance and reinsurance coverage disputes. Robin's core area of expertise is in handling high value international coverage matters, and has experience in a wide variety of product lines, including: energy; pharmaceutical; life science; product recall; and, professional lines. Robin also has extensive experience in handling Bermuda Form arbitrations. Before joining XLB, Robin held a similar position at Markel Bermuda (formerly Alterra). Prior to that, she was a solicitor with Clyde & Co in London. Robin started her insurance / reinsurance career in the 90s on the excess liability broking team with Johnson & Higgins in Bermuda. Robin has both her ACII (Associate of Chartered Insurers, UK) and ARM (Associate of Risk Management, USA) professional designations. Robin has been called to the Bar in Bermuda and admitted as a Solicitor in England and Wales.

Joshua Schwartz, Chubb

Joshua Schwartz is Managing Counsel, Director of Reinsurance Litigation for Chubb. His responsibilities include management and oversight of reinsurance disputes involving Chubb entities, including Chubb Tempest, Chubb Tempest Life, Brandywine and the ceded reinsurance of Chubb's insurance business. Prior to this role, Josh served as General Counsel and Regional Compliance Officer for ACE Bermuda. His responsibilities included providing legal advice on professional lines, excess liability, property and reinsurance claims; participating in mediations, arbitrations and other litigation; counseling underwriters on policy and reinsurance wordings; assisting with product development; and providing advice on risk management. He participated on the ACE Bermuda Risk, Management Audit, Reserving, Pension and Investment Committees. Josh joined ACE in 2006 as Associate General Counsel (Litigation) in New York. Before ACE, Josh worked as Counsel at O'Melveny & Myers, Associate at Fried Frank and Law Clerk to the Hon. Federico A. Moreno, District Court Judge, Southern District of Florida.

Steven C. Schwartz, Chaffetz Lindsey LLP

Steve Schwartz is a partner at Chaffetz Lindsey LLP. He has devoted most of his practice to reinsurance arbitration and litigation since the early 1990s. During that time, Steve has handled disputes relating to both property/casualty and life and health reinsurance, as well as finite risk reinsurance. Steve is the author of Reinsurance Law: An Analytic Approach, a comprehensive treatise first published in 2009 and updated semi-annually since then. Steve is a graduate of Princeton University and Columbia Law School.

Brian Snover, Berkshire Hathaway Group

Brian Snover is the Senior Vice President and General Counsel of the Reinsurance Division of the Berkshire Hathaway Group in Stamford, CT, and serves as an officer and a director of several companies in the Berkshire Hathaway Group. Snover has been with the Berkshire Hathaway Reinsurance Division since 1993. He received a B.A. from Franklin & Marshall College in 1984 and a J.D. from the Albany Law School of Union University in 1987. Prior to joining Berkshire Hathaway, he was associated with the New York law firms of Simpson Thacher & Bartlett and Werner, Kennedy & French.

Alysa B. Wakin, Odyssey Re

Alysa Wakin is Vice President and Claims Counsel for Odyssey Reinsurance Company where she manages the litigation and arbitration of disputes on behalf of that company and its subsidiaries. Prior to joining Odyssey Re, Alysa was a litigator with the firm of Wiley Rein & Fielding where she represented insurers and reinsurers in complex litigation and arbitration matters and provided advice and counsel on a wide range of insurance and reinsurance topics. Wakin first entered the world of reinsurance arbitrations in 1995 as an associate with the firm of Werner & Kennedy. Ms. Wakin previously served on the ARIAS·U.S. Education Committee and currently serves on the Strategic Planning Committee.

Larry Zelle, L. Zelle LLC

For over 50 years, as a practicing lawyer, Larry Zelle represented major property and casualty insurers (FM Global, IRI, Kemper amongst others) as well as several major reinsurers. His involvement with the captive insurance industry began in the early 1980's when he was retained by the Reiss Organization (ARM, IRM, IRMG) to handle a large subrogation case for one of the captives it managed. In subsequent years Larry became involved in several notable captive losses. Among them were the vapor cloud explosions at Pampas TX and Pasadena TX in the late 1980's, the Cheerios contamination loss in the 1990's, and the 2008 Cargill flood loss. In addition Larry served as Vice President, Claims of a captive in the early 2000's, supervising the runoff and ultimate liquidation of the company. He retired from the practice of law in 2015 and now keeps busy as an arbitrator or mediator in insurance and reinsurance disputes.

Paul Zevnik, Morgan Lewis

Paul Zevnik has nearly 40 years' experience defending mass and toxic tort, environmental and product liability suits; handling insurance recovery disputes; and structuring captives, qualified settlement funds, and other risk transfer vehicles to meet mass and toxic tort, environmental, and product liabilities. His experience extends from the courtroom to the boardroom, embracing trial and appellate practice, arbitration, mediation, advice and counsel, bankruptcy and restructuring, and private and public company transactions and financial reporting.

Thursday, November 2, 2017
11:30 a.m. – 12:20 p.m.

GENERAL SESSION

Through the Looking Glass – Insurance Company Perspectives on Policyholder Arbitration

SESSION MATERIALS:

PRESENTED BY:

Brian Snover, Berkshire Hathaway Reinsurance Division

Glenn Frankel, The Hartford Financial Services

Kim Hogrefe, ARIAS•U.S. Certified Arbitrator / Retired Senior Vice President, Chubb and Son Insurance

Amanda Music, HCC/Tokio Marine

Steven Rosenstein, AIG

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Writing Arbitration Clauses To Get The Arbitration You Want

"Any customer can have a car painted any colour that he wants so long as it is black." —Henry Ford.[1]


Merril Hirsh


Nicholas Schuchert

These days, counsel thinking about agreeing to arbitration clauses have a lot to think about. On the one hand, arbitration can have significant advantages over litigation: if properly designed, arbitration can be faster than litigation; as well as less expensive, more private; more flexible and more closely crafted to the needs of the dispute. On the other hand, everyone seems to have some horror stories: such as the arbitrator who did not get it and issued an obviously incorrect (but now unreviewable) decision; or the arbitration that ended up costing as much (or more) than litigation would have cost because the arbitrator did not limit the discovery and let all the evidence in. To be sure, this does not happen all the time or with every arbitrator. But it happens enough to make people question the process.

So far as the Federal Arbitration Act is concerned, the U.S. Supreme Court has not done these counsel any favors. In one breath, the court emphasizes that the act is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered" to achieve their objectives.[2] But, in the next breath, the court tells the parties that the objective they really need to want to have is finality.

In Hall Street Associates LLC v. Mattel Inc.,[3] the Supreme Court concluded that the Federal Arbitration Act barred courts applying the act from honoring parties' agreements to have courts review an arbitration decision for legal error. The court reasoned that the Federal Arbitration Act provided for only very limited review of arbitration decisions — essentially that a disinterested arbitrator's decision could not be reviewed for being legally wrong, or factually unsupported, but merely for whether the arbitrator either improperly failed to resolve an issue or prevented parties from making arguments. According to the court, the act's provisions on this point "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[4]

"Resolving disputes straightaway" is good so far as it goes: there is no point to having an arbitration if the loser can just relitigate the case somewhere else. But in our experience with participants in arbitration, this finality is a means to an end, not an end in itself.

As our courts have recognized in their own procedures, the goal is to have dispute resolution be "just, speedy and inexpensive."[5] Having a regime of federal law that says that arbitrators generally cannot be reversed for getting the decision wrong, but (absent fraud) only for failing to consider something may be speedy once you get to court, but it does not afford much comfort that arbitration decisions will be just or inexpensive. Indeed, it is difficult to imagine that what people really want, above all else, out of a dispute resolution system is a guarantee that incorrect and expensive determinations will be made final and unappealable.

We are not here to argue that the Supreme Court misread the Federal Arbitration Act. (Nor would it do much good. The justices, after all, are the ones who wear the robes). Our point is that, correct or not, what the Supreme Court read was the Federal Arbitration Act. Participants in arbitration can generally fashion a different system — one that, for example, generally permits reversal for errors of law or factual findings that lack substantial evidence bases, but makes decisions to limit discovery or exclude evidence matters of broader discretion.

The way to fashion a different system is to use a different law. Participants can draft arbitration clauses so that their choice is governed by arbitral procedures or state law that permit them to do so, instead of the Federal Arbitration Act. As the Supreme Court also said in Hall, the Federal Arbitration Act "is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."[6]

Creating an arbitration agreement that is subject to different review requires some care and you need to plan ahead. But generally you can get the arbitration you want.

What Law Do You Want?

As Hall suggests, the Federal Arbitration Act is not the only game in town. Every state has its own law governing arbitration. The law in this area is subject to change (in fact, prior to Hall, lower federal courts differed over whether the Federal Arbitration Act permitted parties to contract for more searching judicial review). Accordingly, it is important to check your state's latest law carefully. However, there are some jurisdictions with laws that afford parties flexibility to provide for judicial review of arbitration decisions.

New Jersey's arbitration act specifically allows the parties to contract for expanded judicial review.[7] Provided some conditions are met (including that the arbitration not be "conducted under the auspices of the American Arbitration Association"), Iowa's arbitration act provides for vacating an award where "[s]ubstantial evidence on the record as a whole does not support the award."[8] New Hampshire's arbitration act[9] has also been interpreted to allow for expanded judicial review.[10] In 2003, Georgia amended its arbitration statute to allow judicial review for an "arbitrator's manifest disregard of the law."[11]

Other jurisdictions have interpreted their statutes to operate differently from the Federal Arbitration Act. The supreme courts of California,[12] Texas,[13] Alabama[14] and Connecticut[15] have ruled that parties are free to contract for more searching judicial review than what their respective arbitration acts would, by themselves, allow. An older intermediate appellate court case in New York has also suggested that New York would permit parties to contract for broader review, by restricting the arbitrator's authority.[16]

In other states, the law is undecided. This provides limited comfort: people drafting arbitration clauses usually want certainty, not the chance for additional groundbreaking litigation. But an open question may still be better than a closed door. The District of Columbia's arbitration statute allows a court to "vacate an award made in the arbitration proceedings on other reasonable ground."[17] The District of Columbia's highest court has rejected the argument that this language provides for additional grounds for judicial review,[18] but it has not ruled on whether this language might allow the parties to agree to other reasonable grounds for appeal.

More generally, the District of Columbia is one of 18 jurisdictions that have adopted the Revised Uniform Arbitration Act (RUAA) (1990) to replace the Uniform Arbitration Act (1955): the others are Alaska, Arizona, Arkansas, Colorado, Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington and West Virginia.[19] Section 23 of the act specifies the circumstances under which a court "shall" vacate an award, but does not explicitly state whether these circumstances are an exclusive list of those upon which a court "may" vacate an award, if the parties otherwise agree.[20]

The National Conference of Commissioners on Uniform State Laws, which approved the RUAA in 2000, actively debated having an explicit provision allowing parties to "opt-in" to more searching

review of awards. At the time, the commissioners declined to include such a provision because (1) they disagreed among themselves about whether judicial review was consistent with the idea of arbitration; and (2) they were uncertain whether states would permit parties to "contract" for judicial review.[21] They decided instead to leave "the issue of the legal propriety of this means for securing review of awards to the developing case law under the FAA and state arbitration statutes," recognizing that the "parties remain free to agree to contractual provisions for judicial review of challenged awards, on whatever grounds and based on whatever standards they deem appropriate …"[22] Presumably, parties so agreeing would then test the issue by arguing that Section 23 does not prevent enforcement of their agreement.

Today, the argument for permitting such agreements (either by legislation or judicial interpretation) seems stronger than it was in 2000. To begin with, there is now more precedent for legislatures and courts to enforce the parties' choice to have judicial review.

Also, at least at the state level, the pendulum may be in a different place than it was in 2000. In 2000, the main challenge to using arbitration appeared to be the need to eliminate the vestiges of the "bad old days when judges were hostile to arbitration and ingenious about hamstringing it."[23] In 1997, for example, a major survey of representatives at Fortune 1000 companies showed that they overwhelmingly viewed arbitration very favorably as a less-expensive alternative to litigation — so long as arbitration could resolve the dispute.[24]

A 2014 follow-up survey showed that this same group now views arbitration as almost as expensive as litigation, and more risky.[25] Given these concerns, the cure — of presuming that finality is the only goal — starts to look worse than the disease. If arbitration decisions essentially cannot be vacated for being wrong, but can conceivably be reversed based on refusals to consider evidence, the law seems to be incentivizing arbitrators to consider everything any party would want to offer and to be less concerned about getting the decision right. The new challenge is to have arbitrations be sufficiently final to save money, while sufficiently flexible to work for those who use them.

Indeed, the RUAA is sensitive at least to the cost concern. Under the act, parties "can decide to eliminate or limit discovery as best suits their needs," and, if they make no decision, the act affords arbitrators broad discretion to "permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective."[26] This diminishes the incentive to let all the evidence in, as a means of avoiding reversal.

How Do You Get a Different Law?

Now that you have located law that does or may allow you to contract for what you want, the next hurdle is getting the law to apply. This process involves some traps for the unwary.

First, you need to be explicit about what your chosen law will govern. While Hall addressed what the Federal Arbitration Act does and does not do, other Supreme Court cases have addressed when and to what extent the Federal Arbitration Act preempts states from doing something different. When it applies, federal preemption is quite broad. For example, the Supreme Court has now ruled that, where it applies, the Federal Arbitration Act not only preempts states from enforcing a public policy barring consumer agreements that waive class action rights,[27] but also preempts state courts from construing an arbitration agreement not to waive class action rights, where the construction relies on assuming the viability of the public policy.[28]

The Supreme Court has also ruled that parties, who want to avoid the Federal Arbitration Act (and its preemption), need to say so very specifically. In Mastrobuono v. Shearson Lehman Hutton,[29] the court ruled that a provision stating that a contract was governed "by the laws of the State of New York," merely applied "New York's substantive rights and obligations," and did not mean that the parties had chosen to apply a New York law that "allocate[ed] of power between alternative tribunals" by preventing arbitration panels (as opposed to courts) from awarding punitive damages.[30]

One message from Mastrobuono is that if you want to have a state's arbitration act govern appeal rights, you should not just say "this contract shall be governed by the law of X state." Instead, say something like "this agreement will be governed by X's substantive laws and the X Arbitration Act as it may be amended and construed by its courts." Otherwise, at least where your contract involves interstate commerce, a court may well presume you wanted your arbitration to be governed by the Federal Arbitration Act.

Another message from Mastrobuono is that substantive law and procedural law can come from different sources. Particularly in international arbitration, it is very common to have different law govern the substance of the contract and the procedure by which the arbitration award is confirmed. Parties can agree that the substance of their contract is governed by one state's law, but that confirmation or vacatur of the arbitration decision will be governed by the procedures of a different state.

Second, parties may need to have a basis for choosing the law of a state that otherwise has no connection with the contract. Some states, like California, Delaware and New York, have statutes explicitly allowing parties (provided that the contract meets a monetary threshold) to have their law govern contracts regardless of whether the parties have a connection to the state.[31] Other states, like Texas, require that parties seeking to apply its law have some kind of reasonable relationship to the state.[32] Section 187 of Restatement (Second) of Conflict of Laws provides that courts will enforce parties; agreement to have specified law apply to their contract provided (1) it does not contravene a fundamental public policy of the forum state, and (2) the state chosen has a reasonable relationship to the transaction.[33]

None of this is a problem if the state whose arbitration law you choose has a reasonable relationship to the parties or the contract. (If, for example, one of the parties is incorporated or has its principal place of business, negotiated the contract from, or quite likely other more remote, but reasonable, connections with New Jersey, likely any court will honor the parties' choice to use New Jersey's arbitration act). But if there is no connection, the need for a "reasonable relationship" may depend on the law of the forum where the dispute is brought.

For example, Pinela v. Neiman Marcus Group Inc.[34] dealt with a choice of law provision in an employment contract between Neiman Marcus and its employees providing that all disputes would be governed by Texas law. A group of California employees filed a class action in California state court alleging various violations of the California Labor Code. The court found that the arbitration agreement and its choice of law clause was "plainly obnoxious to public policy in California" and amounted to a waiver of the plaintiff's substantive rights. Neiman Marcus cited approvingly to Restatement Section 187.[35] Similarly, Federal courts apply the choice of law rules of the state in which they sit.[36]

In theory you may be able to solve this problem through creative (though, as far as we know, untested) efforts to create a "reasonable relationship" with the state whose arbitration act you want. (E.g., flying to Newark Airport to sign the contract?). But, if you have no apparent connection with the state whose arbitration law you want, a safer solution would be to select not only the arbitration law that governs but also the forum that will decide whether to confirm or to vacate an award.

If You Can't Be With the Law You Love, Love the One You're With

Another (again, we caution, largely untested) possibility that even Hall would appear to leave open is to be creative about delimiting the arbitrator's powers. One of the grounds under which courts "shall" vacate arbitration awards under the federal and both state uniform acts is where "an arbitrator exceeded the arbitrator's powers."[37] In some circumstances, parties have been able to obtain judicial review by circumscribing what the arbitration could do in the first place. For example, a California case vacated an arbitrator's decision to overturn a tenure decision because the arbitration agreement, as relevant to the case, limited the arbitrator's power to instances where the decision was "not based on reasoned judgment," and the arbitrator had exceeded his authority by substituting his judgment for that of the university.[38]

Of course, most parties will not want to limit an arbitrator to deciding whether one party took

action "based on reasoned judgment." But there does not appear to be any reason why parties could not specify other things they do not want their arbitrator to do. Would it be possible for parties to direct an arbitrator to follow specified law and to declare that any failure to follow that law would be presumed not just to be a mistake, but a failure to conform to the terms of the arbitration agreement? Uncertain. But some creativity may be better than no chance.

Another alternative is to have an appeal as part of the arbitration itself. The American Arbitration Association (AAA) and the International Institute for Conflict Prevention and Resolution (CPR), have responded to Hall by adopting rules for appellate arbitration.[39] In principle, it would also be possible to establish a method of appeal in an ad hoc arbitration (one that does not use an administering organization like AAA or CPR) — by agreeing to a two-stage appellate procedure, with one arbitrator (or panel), for example, reviewing the initial decision for legal error or lack of substantial evidence much like a court might review an adjudication by a government agency. That is not a court, but the parties can specify qualifications for the arbitrators (e.g., former appellate judges), or even agree in advance on a list of acceptable candidates.

Delaware's recently enacted Rapid Arbitration Act[40] uses a hybrid approach. This act is a business-to-business arbitration statute that cannot be used in consumer arbitrations.[41] If businesses using its terms do not contract for an appellate arbitration, actions to enforce or to vacate arbitration awards go the Delaware Supreme Court. Under this route, the Hall review standard appears to govern because the act specifies that the Delaware Supreme Court vacates, modifies, or corrects the final award in conformity with the Federal Arbitration Act.[42] However, the act also gives the parties the power to contract for appellate review of a final award by one or more arbitrators who may be appointed by Delaware Court of Chancery. And, in that case, appellate review proceeds as provided in the agreement.[43]

Arbitration as an Exercise in Problem Solving

Today, Fords come in many colors. Perhaps one reason is that, ultimately, people who wanted colorful cars did not have to buy Fords. Good lawyering is an exercise in care and creativity. And for arbitration, it may take some of both to make the system work for you. But you can get the arbitration you want.

—By Merril Hirsh and Nicholas Schuchert, Troutman Sanders LLP

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[1] Henry Ford and Samuel Crowther, My Life and Work at 72 (1922).

[2] Dean Witter Reynolds Inc. v. Byrd, 470 U. S. 213, 220 (1985). See also DIRECTV Inc. v. Imburgia, 136 S. Ct. 463, 473 (2015).

[3] 552 U.S. 576 (2008).

[4] Id. at 588.

[5] Fed. R. Civ. P. 1.

[6] Hall, n.4 above, 552 U.S. at 590.

[7] N.J. Stat. Ann. § 2A:23B-4 (2016).

[8] Iowa Code § 679A.12(1)(f) (2009) (Also specifying that the "court shall not vacate an award

on this ground if a party urging the vacation has not caused the arbitration proceedings to be reported, if the parties have agreed that a vacation shall not be made on this ground, or if the arbitration has been conducted under the auspices of the American arbitration association").

[9] N.H. Rev. Stat. Ann. § 542:8 (Granting courts the power to correct or modify an award for plain mistake.)

[10] See Finn v. Ballentine Partners LLC, 2016 N.H. LEXIS 60, at *10 (N.H. June 14, 2016) ("We have construed this statute to grant a court the authority to vacate an award for plain mistake if it 'determine[s] that an arbitrator misapplied the law to the facts'") (citation omitted).

[11] Ga. Code Ann. § 9-9-13(b)(5) (2015).

[12] Cable Connection Inc. v. DIRECTV Inc., 44 Cal. 4th 1334, 1355 (2008). See also Mave Enterprises Inc. v. Travelers Indemnity Co., 219 Cal. App. 4th 1408, 1432 (2013) (suggesting the defendant could have contracted for judicial review of the arbitration award for errors of law if it included the appropriate language in the parties stipulations). See also Dotson v. Amgen Inc., 181 Cal. App. 4th 975, 987 (2010) (upholding arbitration agreement providing for the same standard review as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.)

[13] See Nafta Traders Inc. v. Quinn, 339 S.W.3d 84, 101 (Tex. 2011) ("We hold that the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the TAA.")

[14] See Raymond James Fin. Servs. v. Honea, 55 So. 3d 1161, 1169 (Ala. 2010) (Alabama law allows a court to conduct a de novo review of an award so long as the agreement provides for such a review.)

[15] Garrity v. McCaskey, 612 A.2d 742, 745 (Conn. 1992) (the arbitration agreement is limited if it "contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review"). See also Maluszewski v. Allstate Ins. Co., 640 A.2d 129, 132 (Conn. App.) ("[i]f the parties engaged in voluntary, but restricted, arbitration, the trial court's standard of review would be broader depending on the specific restriction," and if the restriction is that the arbitrator's award must conform to the law, the court would be bound to enforce the restriction), app. denied, 642 A.2d 1214 (Conn. 1994).

[16] NAB Constr.Corp. v. Metro. Trans. Auth., 579 N.Y.S.2d 375 (1992) (approving application of a contractual provision permitting judicial review of an arbitration award "limited to the question of whether or not the [designated decision maker under an alternative dispute resolution procedure] is arbitrary, capricious or so grossly erroneous to evidence bad faith").

[17] D.C. Code § 16-4423(b) (2016).

[18] A1 Team USA Holdings, LLC v. Bingham McCutchen LLP, 998 A.2d 320, 326 (D.C. 2010) ("We see nothing in the legislative history to support A1's argument that under the revised Arbitration Act, this court 'can now vacate an arbitral award on any 'reasonable' basis'").

[19] Laura A. Kaster, "The Revised Uniform Arbitration Act at 15: The New Jersey Story," Dispute Resolution Magazine (Winter 2016).

[20] Rev. Unif. Arb. Act, available at http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf §23, Comment B.

[21] Id. Comment B5.

[22] Rev. Unif. Arb. Act § 23, Comment B5.

[23] Glass, Molders, Pottery, Plastics & Allied Works Int'l U. v. Excelsior Foundry Co., 56 F.3d 844, 846 (7th Cir. 1995) (citation omitted).

[24] See Ryan Lamare, "The Evolution of ADR Systems at Large US Corporations," Dispute Resolution Magazine (Spring 2014).

[25] Id.

[26] Rev. Unif. Arb. Act §17(c).

[27] AT&T Mobility v. Concepcion, 563 U.S. 333, 352 (2011).

[28] Imburgia, n.3 above, 136 S. Ct at 471.

[29] 514 U.S. 52 (1995).

[30] Id. at 60.

[31] Del. C. Ann. tit. 6 § 2708; Cal. Civ. Code § 1646.5; N.Y. Gen. Oblig. Law § 5-1401.

[32] Tex. Bus. & Com. Code § 271.007; Tex. Bus. & Com. Code § 271.004(b)(1)(E) (defining a transaction bearing a reasonable relation to a particular jurisdiction as one where "a substantial part of the negotiations relating to the transaction occurred in or from that jurisdiction and an agreement relating to the transaction was signed in that jurisdiction by a party to the transaction…")

[33] Restatement (Second) of Conflict of Laws § 187 (1989) (The law of the chosen state will not be enforced where "(1) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice; and (2) application of the law of the chosen state would be contrary to a fundamental public policy of a state which has a materially greater interest than the chosen state in the determination of a particular issue and which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.")

[34] 238 Cal. App. 4th 227 (2015), review denied, 2015 Cal. LEXIS 6186 (Sept. 16, 2015).

[35] Id. at 257 (California had a materially greater interest in "ensuring that its statutory protections for California-based workers are not selectively disabled by out-of-state companies wishing to do business in [California]").

[36] AWH Inv. P'Ship v. Citigroup, 806 F.3d 695, 699 (2d. Cir. 2015); First Intercontinental Bank v. Ahn, 798 F.3d 1149, 1153 (9th Cir. 2015).

[37] Rev. Unif. Arb. Act §23(a)(4). See also Section 10(a)(4) of the Federal Arbitration Act, 9 U.S.C. §10(a)(4); Unif. Arb. Act §12(a)(3).

[38] Cal. Faculty Ass'n v. Superior Ct., 63 Cal. App. 4th 935 (1998). See also Chin v. Advanced Fresh Concepts Franchise Corp., 194 Cal. App. 4th 704, 711-712 (2011) (finding that a provision stating any award shall be based on established law and shall not be made on broad principles of justice and equity is "an accepted way of limiting the arbitrator's broad powers and allowing judicial review on the merits of an arbitration award"); Garrity, n.16, above, 612 A.2d at 745 (noting the parties' ability to restrict the arbitrator's powers).

[39] See American Arbitration Association "Optional Appellate Arbitration Rules" which can easily be included in any arbitration agreement and provide for additional grounds for review, available at http://go.adr.org/AppellateRules; CPR Arbitration and Appeal Procedure and Commentary, available at http://www.cpradr.org/Portals/0/CPRArbitrationAppealProcedure2015.pdf

[40] Del. C. Ann. tit. 10 §§ 5801-5812.

[41] Id. § 5803(a)(3).

[42] Id. § 5809(a).

[43] Id. § 5809(d)(2).

Thursday, November 2, 2017
3:00 p.m. – 3:50 p.m. & 4:15 p.m. – 5:05 p.m.

BREAKOUT SESSION

All Sums vs. ProRata – An Insider 's Guide to a Hotly Disputed Issue

SESSION MATERIALS:

AVAILABLE IN ONLINE MATERIALS ONLY

Olin Corporation v OneBeacon America Insurance Company

PRESENTED BY:

Alex Furth, Resolute Management, Inc.

Ana Francisco, Foley & Lardner LLP

Ken Gorenberg, Barnes & Thornburg LLP

[noting that "(t)hose decisions apparently no longer mean all that they say"]), we plunge ahead into greater confusion, creating a constitutional violation and recoiling from the consequences.

For the foregoing reasons, I dissent and would affirm the Appellate Division order.

Judges RIVERA, STEIN and FAHEY concur; Judge GARCIA dissents and votes to affirm in an opinion in which Judges PIGOTT and ABDUS–SALAAM concur.

Order reversed and a new trial ordered.

27 N.Y.3d 244

In the Matter of VIKING PUMP, INC., et al., Insurance Appeals.

Viking Pump, Inc., et al., Appellants,

TIG Insurance Company et al., Respondents.

Court of Appeals of New York.

May 3, 2016.

Background: Two successors of insured pump manufacturer, who were potentially subject to significant liability in connection with asbestos exposure claims, brought action in a Delaware state court against insurers, seeking to recover under policies issued to insured. The Delaware Court of Chancery, Strine, Chancellor, 2 A.3d 76, ruled that New York law applied to the dispute, that both successors were entitled to coverage under the excess policies, and that the policies unambiguously provided for "all sums" allocation of losses among insurers. Following transfer, the Delaware Superior Court, New Castle County, Silverman, J., 2014 WL 1305003, ruled that under New York law, insured's alleged successors were obligated to horizontally exhaust all triggered primary and umbrella insurance layers before tapping any of insured's excess coverage. On appeal, the Delaware Supreme Court, Holland, J., —— A.3d ——, 2015 WL 3618924, certified questions to the New York Court of Appeals as to how to allocate losses among insurers for injuries potentially triggering coverage across multiple policy periods.

Holdings: The Court of Appeals, Stein, J., held that:

(1) existence of non-cumulation and prior insurance provisions in excess insurance policies mandated use of the all sums allocation method, and

(2) insureds were required to vertically exhaust all triggered primary and umbrella excess layers before tapping into any of the additional excess policies.

Certified questions answered.

1. Insurance ⚿2112

Generally, proration of liability among insurers acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period in claims alleging a gradual and continuing harm.

2. Insurance ⚿1805

In determining a dispute over insurance coverage, courts first look to language of the policy.

3. Insurance ⚿1721, 1809

Insurance contracts, like other agreements, should be enforced as written, and parties to an insurance arrangement may generally contract as they wish and the courts will enforce their agreements without passing on the substance of them.

4. Insurance ⚿1817, 1820, 1822

When construing insurance policies, the language of the contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured.

5. Insurance ⚿1810, 1828

Courts must construe an insurance policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect; significantly, surplusage is a result to be avoided.

6. Insurance ⚿1808, 1832(1)

While ambiguities in an insurance policy are to be construed against the insurer, a contract is not ambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion.

7. Insurance ⚿2285(4)

Existence of non-cumulation and prior insurance provisions in excess liability insurance policies mandated use of the all sums allocation method, particularly since several of the excess policies also contained continuing coverage clauses within the non-cumulation and prior insurance provisions.

8. Insurance ⚿2396

In light of language in excess liability insurance policies tying their attachment only to specific underlying policies in effect during the same policy period as the applicable excess policy, and in absence of any policy language suggesting a contrary intent, the excess policies were triggered by vertical exhaustion of the underlying available coverage within the same policy period, and thus insureds were required, under terms of the excess policies, to vertically exhaust all triggered primary and umbrella excess layers before tapping into any of the additional excess policies.

Kirkland & Ellis LLP, Chicago, Illinois (Michael P. Foradas, of the Illinois bar, admitted pro hac vice, Lisa G. Esayian of the Illinois bar, admitted pro hac vice, and William T. Pruitt of the Illinois bar, admitted pro hac vice, of counsel), and Kirkland & Ellis LLP, New York City (Peter A. Bellacosa of counsel), for Viking Pump, Inc., appellant.

Kasowitz Benson Torres & Friedman LLP, New York City (Robin L. Cohen, Elizabeth A. Sherwin and Keith McKenna of counsel), for Warren Pumps LLC, appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York City (Kathleen M. Sullivan of counsel), Simpson Thacher & Bartlett LLP, New York City (Mary Kay Vyskocil, Summer Craig and Alexander Li of counsel), O'Melveny & Myers LLP, Washington, D.C. (Jonathan D. Hacker, of the District of Columbia bar, admitted pro hac vice, of counsel), O'Melveny & Myers LLP, New York City (Tancred Schiavoni, Gary Svirsky, Anton Metlitsky and Brad M. Elias of counsel), Hinkhouse Williams Walsh LLP, Chicago, Illinois (Laura S. McKay, of the Illinois bar, admitted pro hac vice, of counsel), Day Pitney LLP, Hartford, Connecticut (Kathleen D. Monnes, of the Connecticut bar, admitted pro hac vice, John K. Scully, of the Connecticut bar, admitted pro hac vice and John W. Cerreta of counsel), Clausen Miller P.C., Chicago, Illinois (Mark D. Paulson, of the Illinois bar, admitted pro hac vice, Amy R. Paulus, of the Illinois bar, admitted pro hac vice and Don R. Sampen, of the Illinois bar, admitted pro hac vice, of counsel), Zelle Hofmann Voelbel & Mason LLP, Framingham, Mas-

sachusetts (Kristin Suga Heres, of the Massachusetts bar, admitted pro hac vice, of counsel), and Carroll, McNulty & Kull LLC, Basking Ridge, New Jersey (Heather E. Simpson and Christopher R. Carroll of counsel), for respondents.

Vedder Price P.C., New York City (John H. Eickemeyer and Daniel C. Green of counsel), and Wiley Rein LLP, Washington, D.C. (Laura A. Foggan and Nicole Audet Richardson of counsel), for Complex Insurance Claims Litigation and another, amici curiae.

Lowenstein Sandler LLP, New York City (David L. Elkind and Eric Jesse of counsel), for New York State Electric & Gas Corporation, amicus curiae.

Anderson Kill P.C., New York City (Robert M. Horkovich and Edward J. Stein of counsel), and Amy Bach, United Policyholders, San Francisco, California, for United Policyholders and others, amici curiae.

Jenner & Block LLP, Chicago, Illinois (Craig C. Martin, of the Illinois bar, admitted pro hac vice, and Peter J. Brennan of counsel), for Olin Corporation, amicus curiae.

Morgan, Lewis & Bockius LLP, Washington, D.C. (Randall M. Levine, Gerald P. Konkel, Stephanie Schuster and Christopher M. Popecki of counsel) and Morgan, Lewis & Bockius LLP, Los Angeles, California (David S. Cox of counsel), for ITT Corporation, amicus curiae.

[250] OPINION OF THE COURT

STEIN, J.

In this complex insurance dispute, we have accepted two certified questions from the Delaware Supreme Court asking us to determine (1) whether "all sums" or "pro rata" allocation applies where the excess insurance policies at issue either follow form to a non-cumulation provision or contain a non-cumulation and prior insurance provision, and (2) whether, in light of our answer to the allocation question, horizontal or vertical exhaustion is required before certain upper level excess policies attach. We reaffirm that, under New York law, the contract language of the applicable insurance policies controls each of these questions, and we answer the certified questions in accordance with the opinion herein, concluding that all sums allocation and vertical exhaustion apply based on the language in the policies before us.

[251] I.

The facts and procedural history of the underlying litigation are explained in more detail in decisions of the Delaware courts (*see In re Viking Pump, Inc.*, —— A.3d ——, 2015 WL 3618924 [June 10, 2015]; *Viking Pump, Inc. v. Century Indem. Co.*, 2014 WL 1305003, 2014 Del.Super. LEXIS 707 [Feb. 28, 2014, C.A. No. 10C–06–141 FSS CCLD]; *Viking Pump, Inc. v. Century Indem. Co.*, 2013 WL 7098824, 2013 Del.Super. LEXIS 615 [Oct. 31, 2013, C.A. No. 10C–06–141 FSS CCLD]; *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76 [Del.Ch.2009]). As relevant here, Viking Pump, Inc., and Warren Pumps, LLC, acquired pump manufacturing businesses from Houdaille Industries, Inc. in the 1980s. Those acquisitions later subjected Viking and Warren to significant potential liability in connection with asbestos exposure claims. Houdaille had extensive multilayer insurance coverage spanning from 1972 to 1985 that included coverage for such claims. More specifically, Liberty Mutual Insurance Company provided Houdaille with primary insurance (totaling approximately $17.5 million) and umbrella excess coverage (totaling approximately $42 million) through successive annual policies. Beyond that, Houdaille obtained additional

layers of excess insurance through annual policies issued by various excess insurers (totaling over $400 million in coverage), including a number of policies issued by defendants, designated herein as "the Excess Insurers."

Viking and Warren sought coverage under the Liberty Mutual policies, and the Delaware Court of Chancery determined that both companies were entitled to exercise rights as insureds under those policies (*see generally Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, 2007 Del.Ch. LEXIS 43 [Apr. 2, 2007, C.A. No. 1465–VCS]). As the Liberty Mutual coverage neared exhaustion, litigation arose regarding whether Viking and Warren were entitled to coverage under the additional excess policies issued to Houdaille by the Excess Insurers and, if so, how indemnity should be allocated across the triggered policy periods.

Central to the underlying litigation, the Liberty Mutual umbrella policies provide that the insurer

> "will pay on behalf of the insured *all sums* in excess of the retained limit which the insured shall become [252]legally obligated to pay, or with the consent of the [insurer], agrees to pay, as damages, direct or consequential, because of:
>
> "(a) personal injury . . .
>
> "with respect to which this policy applies and caused by an occurrence" (emphasis added).

"Occurrence" is defined, in relevant part, as "injurious exposure to conditions, which results in personal injury" which, in turn, is defined as "personal injury or bodily injury which occurs *during the policy period* " (emphasis added). The policies also state that, "[f]or the purpose of determining the limits of the [insured's] liability: (1) all personal injury . . . arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as the result of one and the same occurrence." The excess policies issued by the Excess Insurers either follow form to (i.e., incorporate) these provisions, or provide for substantively identical coverage.

The majority of the excess policies at issue also follow form to a "non-cumulation" of liability or "anti-stacking" provision in the Liberty Mutual umbrella policies, which provides that

> "[i]f the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within any annual period of this policy, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by [Liberty Mutual] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof."

Those excess policies that do not follow form to the Liberty Mutual non-cumulation provision contain a similar two-part "Prior Insurance and Non[-]Cumulation of Liability" provision, sometimes referred to as "Condition C," as follows:

> "It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess Policy issued to the Insured prior to the inception date hereof[,] the limit of liability hereon . . . shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.
>
> [253]"Subject to the foregoing paragraph and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is con-

tinuing at the time of termination of this Policy the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium."

In the underlying litigation, the parties cross-moved for summary judgment with respect to the availability of coverage and the allocation of liability under the excess policies. The Delaware Court of Chancery granted Viking and Warren summary judgment on those issues, and denied the Excess Insurers' cross motions (2 A.3d at 130). As a threshold matter, the Court of Chancery held that New York law applied to the dispute and that Viking and Warren were each entitled to coverage under the excess policies (*see id.* at 90).[1]

With regard to the allocation issue, the Court of Chancery agreed with Warren and Viking (hereinafter, collectively, the Insureds) that the proper method of allocation was the all sums approach, as compared with the pro rata allocation method propounded by the Excess Insurers (*see id.* at 119–127). The Court of Chancery acknowledged that this Court had previously applied the pro rata method in *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.,* 98 N.Y.2d 208, 222, 746 N.Y.S.2d 622, 774 N.E.2d 687 (2002), where the policy language similarly provided that the insurer would pay "all sums" for an occurrence happening "during the policy period" (*see* 2 A.3d at 120–121). However, the Court of Chancery distinguished the policy language at issue here from that interpreted in *Consolidated Edison* on the ground that the non-cumulation and prior insurance provisions in the policies here evinced a clear and unambiguous intent to use all sums allocation (*see id.* at 119–127). The Court of Chancery rejected the argument of the Excess Insurers that these provisions would not apply if liability was apportioned on a pro rata basis because, according to that court, such an interpretation would—contrary to New York principles of contract interpretation—render the non-cumulation and prior insurance provisions surplusage (*see id.* at 124–126). The Court of Chancery also observed that, even if the policy language was ambiguous, [254] "the only substantial extrinsic evidence offered by the parties weighs in favor of the use of the all sums method" because, the court asserted, Liberty Mutual had, in the past, routinely allocated its liability under its own policies—to which the excess policies followed form—in accordance with the all sums method (*id.* at 119, 127–129). The Court of Chancery further noted that, to the extent the policies are ambiguous, any ambiguity must be resolved in favor of the Insureds (*see id.* at 129–130).

The matter was transferred to the Delaware Superior Court (*Viking Pump, Inc. v. Century Indem. Co.,* 2010 WL 2989690, 2010 Del.Ch. LEXIS 301 [June 11, 2010, C.A. No. 1465–VCS]), where a trial was ultimately held (2013 WL 7098824, *6–7, 2013 Del.Super. LEXIS 615, *21–22). A verdict was returned largely in the Insureds' favor, and the parties made post-judgment motions. As relevant here, the Superior Court rejected the Excess Insurers' renewed arguments that pro rata allocation applied. The Superior Court also determined that, as a matter of New York law, the Insureds were obligated to horizontally exhaust (i.e., deplete) every triggered primary and umbrella layer of insurance before accessing the excess policies. While the Superior Court agreed with the Insureds that policy language supported vertical exhaustion, in the court's view, New York law required that horizontal

1. Neither of those holdings is before us.

exhaustion be utilized with respect to primary and umbrella policies.[2]

On appeal, the Delaware Supreme Court concluded that resolution of the allocation and exhaustion disputes between the Excess Insurers and the Insureds "depends on significant and unsettled questions of New York law that have not been answered, in the first instance, by the New York Court of Appeals" (—— A.3d ——, ——, 2015 WL 3618924, *2). Therefore, the Delaware Supreme Court certified, and we accepted, the following questions:

"1. Under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions?

"2. Given the Court's answer to Question # 1, under New York law and based on the policy language at [255] issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance?" (—— A.3d at ——, 2015 WL 3618924, *3; *see Matter of Viking Pump, Inc.*, 25 N.Y.3d 1188, 16 N.Y.S.3d 46, 37 N.E.3d 104 [2015].)

II. Allocation

A.

Courts across the country have grappled with so-called "long-tail" claims—such as those seeking to recover for personal injuries due to toxic exposure and property damage resulting from gradual or continuing environmental contaminations—in the insurance context. These types of claims present unique complications because they often involve exposure to an injury-inducing harm over the course of multiple policy periods, spawning litigation over which policies are triggered in the first instance, how liability should be allocated among triggered policies and the respective insurers, and at what point insureds may turn to excess insurance for coverage. Given the particular certified questions presented here, we are not asked to review the Delaware courts' rulings regarding which policies were triggered and upon what events such triggering occurred, and we do not pass on those issues here.[3] Rather, we consider only the allocation and exhaustion issues, and we first address the question of allocation.

The Insureds argue that the losses should be allocated through a "joint and several" or "all sums" method. This theory of allocation "permits the insured to 'collect its total liability ... under any policy in effect during' the periods that the damage occurred," up to the policy limits (*Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139, 154, 969 N.Y.S.2d 808, 991 N.E.2d 666 [2013], quoting *Consolidated Edison*, 98 N.Y.2d 208, 222, 746 N.Y.S.2d 622, 774 N.E.2d 687 [2002]; *see United States Fid. & Guar. Co. v. American Re–Ins. Co.*, 20 N.Y.3d 407, 426, 962 N.Y.S.2d 566, 985 N.E.2d 876 [2013]). The burden is then on the insur-

2. The Superior Court subsequently limited that ruling to the primary/umbrella layers, holding that horizontal exhaustion did not apply among additional layers of excess coverage (*see Viking Pump, Inc. v. Century Indem. Co.*, 2014 WL 1305003, 2014 Del.Super. LEXIS 707 [Feb. 28, 2014, C.A. No. 10C–06–141 FSS CCLD]). The propriety of that holding is not before us.

3. After the Delaware Court of Chancery held that the policies were triggered upon an injury-in-fact that occurred upon asbestos exposure (2 A.3d 76, 110–111 [Del.Ch.2009]), the trigger issue was litigated at trial, and the Superior Court declined to alter the jury's verdict on this point (*see* 2013 WL 7098824, *17–18, 2013 Del.Super. LEXIS 615, *55–58 [Super.Ct., Oct. 31, 2013, C.A. No. 10C–06–141 FSS CCLD]).

er against whom the insured |256recovers to seek contribution from the insurers that issued the other triggered policies (*see Consolidated Edison*, 98 N.Y.2d at 222, 746 N.Y.S.2d 622, 774 N.E.2d 687).

[1] The Excess Insurers, by contrast, advocate for pro rata allocation. Under this method, an insurer's liability is limited to sums incurred by the insured during the policy period; in other words, each insurance policy is allocated a "pro rata" share of the total loss representing the portion of the loss that occurred during the policy period (*see Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 154, 969 N.Y.S.2d 808, 991 N.E.2d 666; *Consolidated Edison*, 98 N.Y.2d at 223, 746 N.Y.S.2d 622, 774 N.E.2d 687).[4] Generally, "[p]roration of liability among the insurers acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period" in claims alleging a gradual and continuing harm (*Consolidated Edison*, 98 N.Y.2d at 224, 746 N.Y.S.2d 622, 774 N.E.2d 687).

Courts of different states and federal jurisdictions are divided on the issue of allocation in relation to long-tail claims. Some jurisdictions have expressed a preference for the all sums method, usually relying on language in policies obligating an insurer to pay "all sums" for which an insured becomes liable (*see e.g. State of California v. Continental Ins. Co.*, 55 Cal.4th 186, 199, 145 Cal.Rptr.3d 1, 281 P.3d 1000, 1007 [2012], *as mod.* [Sept. 19, 2012]; *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 315 Wis.2d 556, 583, 759 N.W.2d 613, 626 [2009]; *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 515, 769 N.E.2d 835, 840 [2002]; *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 491 [Del.2001]; *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 855 [Tex. 1994]; *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 39, 626 A.2d 502, 507 [1993]; *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1047 [D.C.Cir. 1981]). Others have, instead, utilized the pro rata method, emphasizing language in the insurance policies that may be interpreted as limiting the "all sums" owed to those resulting from an occurrence "during the policy period," or public policy reasons supporting pro rata allocation, or a combination of the two (*see e.g. EnergyNorth Nat. Gas, Inc. v. Certain Underwriters at Lloyd's*, 156 N.H. 333, 344, 934 A.2d 517, 526 [2007]; *Public Serv. Co. of Colorado v. Wallis & Cos.*, 986 P.2d 924, 940 [Colo. 1999]; *Owens–Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 473, |257650 A.2d 974, 992 [1994]; *Insurance Co. of N. Am. v. Forty–Eight Insulations, Inc.*, 633 F.2d 1212, 1225 [6th Cir.1980], *decision clarified on reh.* 657 F.2d 814 [6th Cir.1981], *cert. denied* 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 [1981]).

We first confronted the question of pro rata versus all sums allocation in *Consolidated Edison*, 98 N.Y.2d at 222, 746 N.Y.S.2d 622, 774 N.E.2d 687. In that case, we applied the pro rata method to claims involving environmental contamination over a number of years and insurance policy periods. Significantly, we did not reach our conclusion in *Consolidated Edison* by adopting a blanket rule, based on policy concerns, that pro rata allocation was always the appropriate method of dividing indemnity among successive insurance policies. Rather, we relied on our general principles of contract interpreta-

4. Courts have devised different methods of fixing losses between policy periods (*see Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 224–225, 746 N.Y.S.2d 622, 774 N.E.2d 687 [2002]). Again, we have no occasion to discuss these methods in this case.

tion, and made clear that the contract language controls the question of allocation.

[2, 3] We emphasized in *Consolidated Edison*, and have reiterated thereafter, that " '[i]n determining a dispute over insurance coverage, [courts] first look to the language of the policy' " (*Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 148, 969 N.Y.S.2d 808, 991 N.E.2d 666, quoting *Consolidated Edison*, 98 N.Y.2d at 221, 746 N.Y.S.2d 622, 774 N.E.2d 687; *see Selective Ins. Co. of Am. v. County of Rensselaer*, 26 N.Y.3d 649, 655, 27 N.Y.S.3d 92, 47 N.E.3d 458 [2016]). We did not adopt a strict rule mandating either pro rata or all sums allocation because insurance contracts, like other agreements, should "be enforced as written," and "parties to an insurance arrangement may generally 'contract as they wish and the courts will enforce their agreements without passing on the substance of them' " (*J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 334, 970 N.Y.S.2d 733, 992 N.E.2d 1076 [2013], quoting *New England Mut. Life Ins. Co. v. Caruso*, 73 N.Y.2d 74, 81, 538 N.Y.S.2d 217, 535 N.E.2d 270 [1989]).

[4–6] When construing insurance policies, the language of the "contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured" (*Dean v. Tower Ins. Co. of N.Y.*, 19 N.Y.3d 704, 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143 [2012], quoting *Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122, 926 N.Y.S.2d 867, 950 N.E.2d 500 [2011]). Furthermore, "we must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 148, 969 N.Y.S.2d 808, 991 N.E.2d 666 [internal quotation marks and citations omitted]). Significantly, "surplusage [is] a result to be avoided" (*Westview Assoc. v. Guaranty Natl. Ins. Co.*, 95 N.Y.2d 334, 339, 717 N.Y.S.2d 75, 740 N.E.2d 220 [2000]). Moreover, while " 'ambiguities in an insurance policy are to be construed against the insurer' " (*Dean*, 19 N.Y.3d at 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143, quoting[258] *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 353, 413 N.Y.S.2d 352, 385 N.E.2d 1280 [1978]; *see Federal Ins. Co. v. International Bus. Machs. Corp.*, 18 N.Y.3d 642, 650, 942 N.Y.S.2d 432, 965 N.E.2d 934 [2012]), a contract is not ambiguous "if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Selective Ins. Co. of Am.*, 26 N.Y.3d at 655, 27 N.Y.S.3d 92, 47 N.E.3d 458 [internal quotation marks and citation omitted]).

In *Consolidated Edison*, we applied the foregoing principles to the parties' arguments in support of, and in opposition to, pro rata allocation. The arguments presented in that case, and our resulting decision, turned exclusively upon the interpretation of two phrases in the insurance policies that were before us: (1) that an insurer agreed to indemnify the insured for "*all sums*" for which the insured was liable and which were caused by or arose out of an "occurrence"; and (2) that the "policies provide[d] indemnification for liability incurred as a result of an accident or occurrence *during the policy period, not outside that period*" (*Consolidated Edison*, 98 N.Y.2d at 224, 746 N.Y.S.2d 622, 774 N.E.2d 687 [emphasis added]). The Court concluded that "[p]ro rata allocation under th[o]se facts, *while not explicitly mandated by the policies*, [was] consistent with the language of the policies," whereas the mere use of the phrase

"all sums" was insufficient to establish a contrary view (98 N.Y.2d at 224, 746 N.Y.S.2d 622, 774 N.E.2d 687 [emphasis added]). To be sure, we also suggested that, in the absence of language weighing in favor of a different conclusion, pro rata allocation was the preferable method of allocation in long-tail claims in light of the inherent difficulty of tying specific injuries to particular policy periods. Nevertheless, we recognized that "different policy language" might compel all sums allocation (98 N.Y.2d at 223, 746 N.Y.S.2d 622, 774 N.E.2d 687), citing, as a point of comparison, to the Delaware Supreme Court's decision in *Hercules, Inc. v. AIU Ins. Co.,* wherein the Delaware Court adopted the all sums method (784 A.2d 481).

The policy language at issue here, by inclusion of the non-cumulation clauses and the two-part non-cumulation and prior insurance provisions, is substantively distinguishable from the language that we interpreted in *Consolidated Edison,* and the arguments that were made to us in that case were, likewise, different.[5] Indeed, the excess policies before us here present the very type of language that we signaled might compel all [259] sums allocation in *Consolidated Edison.* Inasmuch as the question is now squarely before us, we must determine whether the presence of a non-cumulation clause or a non-cumulation and prior insurance provision mandates all sums allocation.

B.

[7] Generally, non-cumulation clauses prevent stacking, the situation in which "an insured who has suffered a long term or continuous loss which has triggered coverage across more than one policy period . . . wishes to add together the maximum limits of all consecutive policies that have been in place during the period of the loss" (12 Couch on Insurance 3d § 169:5; *see* 1 Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 11.02[e] [16th ed. 2013]). Such clauses originated during the shift from "accident-based" to "occurrence-based" liability policies in the 1960s and 1970s, and were purportedly designed to prevent any attempt by policyholders to recover under a subsequent policy—based on the broader definition of occurrence—for a loss that had already been covered by the prior "accident-based" policy (*see* Jan M. Michaels et al., *The "Non–Cumulation" Clause: Policyholders Cannot Have Their Cake and Eat It Too,* 61 U. Kan. L. Rev. 701, 717 [2013]; Christopher C. French, *The "Non–Cumulation Clause": An "Other Insurance" Clause by Another Name,* 60 U. Kan. L. Rev. 375, 386 [2011]). More recently, courts have been called upon to analyze the impact of these clauses on the allocation question. Significantly, we have enforced non-cumulation clauses in accordance with their plain language (*see Nesmith v. Allstate Ins. Co.,* 24 N.Y.3d 520, 523, 2 N.Y.S.3d 11, 25 N.E.3d 924 [2014]; *Hiraldo v. Allstate Ins. Co.,* 5 N.Y.3d 508, 513, 806 N.Y.S.2d 451, 840 N.E.2d 563 [2005]), despite the limiting impact that such clauses may have on an insured's recovery (and, by extension, that of an injured plaintiff). However, we have never addressed the interplay between non-cumulation/prior insurance provisions and allocation.

Courts in other states that have addressed this issue—both those that have adopted all sums allocation and a few that have followed a pro rata approach—have concluded that non-cumulation clauses cannot be reconciled with pro rata allocation. For example, in *Chicago Bridge & Iron*

5. While such provisions were included in some of the policies at issue in *Consolidated Edison,* there was no reference in our decision to their existence.

Co. v. Certain Underwriters at Lloyd's, London, a Massachusetts appellate court rejected pro rata allocation, in part, on the ground that the non-cumulation/prior insurance provision "would be superfluous had the drafter intended that damages would be allocated among insurers based on their respective time on the risk" (59 Mass.App.Ct. 646, 656, 797 N.E.2d 434, 441 [2003]). Similarly, the Supreme Court of Wisconsin supported its determination that all sums allocation applied by pointing to non-cumulation clauses contemplating indemnity where an injury occurs " 'partly before and partly within the policy period' " (*Plastics Eng'g Co.*, 315 Wis.2d at 583, 759 N.W.2d at 626; *see also Riley v. United Servs. Auto. Assn.*, 161 Md.App. 573, 592, 871 A.2d 599, 611 [2005] [noting that prohibiting stacking would run counter to pro rata allocation], *affd.* 393 Md. 55, 899 A.2d 819 [2006]).

In addition, at least two courts in jurisdictions that have adopted the pro rata allocation method have held that non-cumulation clauses cannot be enforced in conjunction with that method (*see Spaulding Composites Co., Inc. v. Aetna Cas. & Sur. Co.*, 176 N.J. 25, 44–46, 819 A.2d 410, 422–423 [2003]; *Outboard Mar. Corp. v. Liberty Mut. Ins. Co.*, 283 Ill.App.3d 630, 670 N.E.2d 740 [1996], *lv. denied* 169 Ill.2d 570, 675 N.E.2d 634 [1996] [declining to enforce non-cumulation clause with pro rata allocation]). In *Spaulding Composites Co., Inc. v. Aetna Cas. & Sur. Co.*, the New Jersey Supreme Court explained that, "even if the non-cumulation clause was not facially inapplicable, . . . it would thwart the . . . pro-rata allocation modality" (176 N.J. at 44, 819 A.2d at 422). That court reasoned that,

> "[o]nce the court turns to pro rata allocation, it makes sense that the non-cumulation clause, which would allow the insurer to avoid its fair share of responsibility, drops out of the policy. . . . The pro-rata sharing methodology has, at its core, a public policy that favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters. By applying the non-cumulation clause, insurers who were actually 'on the risk' would be insulated from their fair share of liability" (176 N.J. at 44–45, 819 A.2d at 422; *see* 15 Couch on Insurance 3d § 220:30 ["Once a court has determined that a loss is to be shared among sequential insurers on a pro rata basis, 'prior insurance' and 'non(-)cumulation of liability' clauses in the policies become unenforceable"]).

These cases are persuasive authority for the proposition that, in policies containing non-cumulation clauses or non-cumulation and prior insurance provisions, such as the excess policies before us, all sums is the appropriate allocation method. We agree that it would be inconsistent with the language of the non-cumulation clauses to use pro rata allocation here. Such policy provisions plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may "also [be] covered in whole or in part under any other excess [p]olicy issued to the [insured] prior to the inception date" of the instant policy.

By contrast, the very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period—meaning that no two insurance policies, unless containing overlapping or concurrent policy periods, would indemnify the same loss or occurrence. Pro rata allocation is a legal fiction designed to treat continuous and indivisible injuries as distinct in each policy period as a result of the "during the policy period" limitation, de-

spite the fact that the injuries may not actually be capable of being confined to specific time periods. The non-cumulation clause negates that premise by presupposing that two policies may be called upon to indemnify the insured for the same loss or occurrence. Indeed, even commentators who have advocated for pro rata allocation and propounded the complications that can be caused by all sums allocation have recognized that non-cumulation clauses cannot logically be applied in a pro rata allocation (*see* Jan M. Michaels et al., *The Avoidable Evils of "All Sums" Liability for Long–Tail Insurance Coverage Claims,* 64 U. Kan. L. Rev. 467, 489 [2015] ["Provisions such as the non-cumulation clause (do) not even apply and need not be analyzed under pro rata allocation"]). In a pro rata allocation, the non-cumulation clauses would, therefore, be rendered surplus-age—a construction that cannot be countenanced under our principles of contract interpretation (*see Roman Catholic Diocese of Brooklyn,* 21 N.Y.3d at 148, 969 N.Y.S.2d 808, 991 N.E.2d 666; *Consolidated Edison,* 98 N.Y.2d at 221–222, 746 N.Y.S.2d 622, 774 N.E.2d 687; *Westview Assoc.,* 95 N.Y.2d at 339, 717 N.Y.S.2d 75, 740 N.E.2d 220), and a result that would conflict with our previous recognition that such clauses are enforceable (*see Nesmith,* 24 N.Y.3d at 523, 2 N.Y.S.3d 11, 25 N.E.3d 924; *Hiraldo,* 5 N.Y.3d at 513, 806 N.Y.S.2d 451, 840 N.E.2d 563).[6]

[262] Several of the excess policies here also contain continuing coverage clauses within the non-cumulation and prior insurance provisions, reinforcing our conclusion that all sums—not pro rata—allocation was intended in such policies. The continuing coverage clause expressly extends a policy's protections beyond the policy period for continuing injuries. Yet, under a pro rata allocation, no policy covers a loss that began during a particular policy period and continued after termination of that period because that subsequent loss would be apportioned to the next policy period as its pro rata share. Using the pro rata allocation would, therefore, render the continuing coverage clause irrelevant. Thus, presence of that clause in the respective policies further compels an interpretation in favor of all sums allocation (*see Hercules, Inc.,* 784 A.2d at 493–494; *Dow Corning Corp. v. Continental Cas. Co., Inc.,* 1999 WL 33435067, *7–8, 1999 Mich.App. LEXIS 2920, *23–24 [Oct. 12, 1999, No. 200143 et al.], *lv. denied* 463 Mich. 854, 617 N.W.2d 554 [2000]; *Boston Gas Co. v. Century Indem. Co.,* 454 Mass. 337, 362, 910 N.E.2d 290, 309 [2009]; *Liberty Mut. Ins. Co. v. Those Certain Underwriters at Lloyds,* 650 F.Supp. 1553, 1559 [W.D.Pa.1987]).

The Excess Insurers contend that a conclusion that all sums allocation is required would be inconsistent with the Second Circuit's holding in *Olin Corp. v. American Home Assur. Co.,* 704 F.3d 89, 95 (2d Cir.2012) (*Olin III*) and those cases that have followed in its stead (*see Liberty Mut. Ins. Co. v. Fairbanks Co.,* —— F.Supp.3d ——, ——, 2016 WL 1169511, *7 [S.D.N.Y., Mar. 22, 2016, Nos. 13–CV–3755 (JGK) & 15–CV–1141 (JGK)]; *Liberty Mut. Fire Ins. Co. v. J. & S. Supply*

6. Notably, the Insurers originally argued to the Delaware courts that the non-cumulation clauses should not be given effect in a pro rata allocation. Apparently recognizing that this would conflict with our principles of contract interpretation—as the Delaware Court of Chancery concluded—the Insurers now take the position that the non-cumulation clauses can be given effect with pro rata allocation. Indeed, according to the Delaware Superior Court, even the Excess Insurers' own witness, an insurance law professor, conceded that non-cumulation clauses were inconsistent with pro rata allocation (*see* 2013 WL 7098824, *12, 2013 Del.Super. LEXIS 615, *39).

Corp., 2015 U.S. Dist. LEXIS 177124, *24–25 [S.D.N.Y., June 29, 2015, No. 13–CV–4784 (VSB)]). We discern no such impediment to our holding.

In *Olin I,* the Second Circuit held that pro rata allocation applied to distribute the insured's liability to insurance policies triggered by soil and groundwater contamination resulting from Olin Corporation's pesticide manufacturing operations (*see Olin Corp. v. Insurance Co. of N. Am.,* 221 F.3d 307 [2d Cir.2000] [*Olin I*]). There, the Second Circuit relied both on public
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policy reasons supporting pro rata allocation, and on language in the insurance policies limiting the scope of coverage to damages incurred during the policy period (*see id.* at 324–326). In a later appeal in additional related litigation (*see Olin Corp. v. Certain Underwriters at Lloyd's London,* 468 F.3d 120, 127 [2d Cir.2006] [*Olin II*]), the Second Circuit reaffirmed that its conclusion was consistent with our decision in *Consolidated Edison.*

Subsequently, in *Olin III,* the issue on appeal in related litigation against one of Olin's excess insurance carriers was whether the attachment point (i.e., the point at which the insured's liability triggers excess coverage) for two excess policies had been met (704 F.3d at 93–95). Applying strict pro rata allocation to the underlying policies, as provided for in *Olin I,* the attachment point for the two excess insurance policies was not reached (*see id.* at 95). The parties' arguments in *Olin III* centered upon the "Prior Insurance and Non–Cumulation of Liability" provision in the underlying policies to which the excess policies followed form (*id.* at 94), which had not been raised in *Olin I* or *Olin II* (*see id.* at 98). Olin argued that, although pro rata allocation applied under the Second Circuit's earlier holding in *Olin I,* the continuing coverage clause contained in the non-cumulation/prior insurance provision required that the losses allocated to subsequent years be swept back into the policy periods covering the earlier years. The excess insurer, by contrast, argued, as relevant here, that pro rata allocation was inconsistent with the non-cumulation and continuing coverage clauses and, consequently, those provisions could not be enforced in conjunction with pro rata allocation.

The Second Circuit held that the plain language of the continuing coverage clause of the prior insurance provision "require[d] the insurer to indemnify the insured for personal injury or property damage continuing after the termination of the policy" (*id.* at 100). The court, therefore, divided up the damages for each year as if allocating them on a pro rata basis, but then swept the shares attributable to the years outside the policy period back into the earlier policy periods.

At first glance, the Second Circuit's decision in *Olin III* could be viewed as harmonizing the non-cumulation and prior insurance provision containing the continuing coverage clause with pro rata allocation. However, the court's rejection of the insurer's argument that these provisions were inconsistent with pro rata allocation turned on its conclusion that "New
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York state court decisions and those prior decisions of this Court endorsing the pro rata approach foreclose [the Court] from interpreting [the non-cumulation and prior insurance provision] as imposing joint and several liability" (*id.* at 102). As discussed above, our holding in *Consolidated Edison* does not require pro rata allocation in the face of policy language undermining the very premise upon which the imposition of pro rata allocation rests. In light of the Second Circuit's view that it was foreclosed from utilizing all sums allocation—either by *Consolidated Edison* or by its own

earlier holding in *Olin I* imposing pro rata allocation—and the fact that the resulting allocation apportioning numerous years of liability outside the policy period to the relevant policies closely resembles an all sums allocation, the Excess Insurers' contention that *Olin III* supports a pro rata allocation here is unavailing. Nor have those courts that have followed *Olin III* reconciled the language of the non-cumulation clause and prior insurance provision with pro rata allocation (*see Liberty Mut. Ins. Co. v. Fairbanks Co.*, —— F.Supp.3d at ——, 2016 WL 1169511, *7; *Liberty Mut. Fire Ins. Co. v. J. & S. Supply Corp.*, 2015 U.S. Dist. LEXIS 177124, *24–25). Indeed, the Excess Insurers have cited to no authorities satisfactorily reconciling non-cumulation clauses with pro rata allocation.

Accordingly, based on the policy language and the persuasive authority holding that pro rata allocation is inconsistent with non-cumulation and non-cumulation/prior insurance provisions, we hold that all sums allocation is appropriate in policies containing such provisions, like the ones at issue here.

III. Exhaustion

[8] With the allocation issue resolved, we turn to the second question—namely, whether horizontal or vertical exhaustion applies under the relevant policies. That is, we must determine whether the Insureds are required under the terms of the excess policies to "horizontally" exhaust all triggered primary and umbrella excess layers before tapping into any of the additional excess insurance policies, or whether the Insureds need only "vertically" exhaust the primary and umbrella policies, which would allow the Insureds to access each excess policy once the immediately underlying policies' limits are depleted, even if other lower-level policies during different policy periods remain unexhausted. The Excess Insurers argue | 265 that, if we utilize all sums allocation, then horizontal exhaustion should be applied.[7]

All of the excess policies at issue primarily hinge their attachment on the exhaustion of underlying policies that cover the same policy period as the overlying excess policy, and that are specifically identified by either name, policy number, or policy limit. In our view, vertical exhaustion is more consistent than horizontal exhaustion with this language tying attachment of the excess policies specifically to identified policies that span the same policy period. Further, vertical exhaustion is conceptually consistent with an all sums allocation, permitting the Insured to seek coverage through the layers of insurance available for a specific year (*see Westport Ins. Corp. v. Appleton Papers Inc.*, 327 Wis.2d 120, 168–169, 787 N.W.2d 894, 919 [Ct.App. 2010], *review denied* 329 Wis.2d 63, 791 N.W.2d 66 [2010]; *Cadet Mfg. Co. v. American Ins. Co.*, 391 F.Supp.2d 884, 892 [W.D.Wash.2005]; J. Stephen Berry & Jerry B. McNally, *Allocation of Insurance Coverage: Prevailing Theories and Practical Applications*, 42 Tort Trial & Ins. Prac. L.J. 999, 1015–1016 [2007]).

The only argument of the Excess Insurers in support of horizontal exhaustion that merits discussion is their contention that it is compelled by the "other insurance" clauses in the Liberty Mutual umbrella policies and the subject excess policies. The Liberty Mutual umbrella policies pro-

7. While, in some situations, horizontal exhaustion may be beneficial to excess insurers, particularly where the underlying layers of insurance contain a non-cumulation clause, we note that—like with the allocation issue—neither method necessarily militates in favor of insurers or insureds, with much depending on the specifics of the underlying policies and their limits.

vide that the insurer will pay "all sums in excess of the retained limit," which is defined as the relevant limit of liability of underlying policies, "plus all amounts payable under other insurance, if any." An "underlying policy" is "a policy listed as an underlying policy in the declarations," which, as already stated, includes only policies spanning the same policy period as the respective excess policy. Other insurance, in turn, "means any other valid and collectible insurance (except under an underlying policy) which is available to the Insured, or would be available to the Insured in the absence of this policy." The excess policies have similar clauses providing for such policies to be excess to other insurance.

266 The Excess Insurers contend that the "other insurance" available to the Insureds includes coverage provided by *successive* insurance policies. Their argument in this regard is not completely baseless (*see Dow Corning Corp.*, 1999 WL 33435067, *9, 1999 Mich.App. LEXIS 2920, *26–29; *United States Gypsum Co. v. Admiral Ins. Co.*, 268 Ill.App.3d 598, 653, 205 Ill.Dec. 619, 643 N.E.2d 1226, 1261 [1994], *lv. denied* 161 Ill.2d 542, 649 N.E.2d 426 [1995]). However, we stated in *Consolidated Edison* that "other insurance" clauses "apply when two or more policies provide coverage during the *same* period, and they serve to prevent multiple recoveries from such policies," and that such clauses "have nothing to do" with "whether any coverage potentially exist[s] at all among certain high-level policies that were in force during *successive years*" (*Consolidated Edison*, 98 N.Y.2d at 223, 746 N.Y.S.2d 622, 774 N.E.2d 687 [emphases added]). Those cases relied on by the Delaware Superior Court do not hold otherwise because they each involved instances of concurrent insurance policies (*see e.g. American Home Assur. Co. v. International Ins. Co.*, 90 N.Y.2d 433, 437, 661 N.Y.S.2d 584, 684 N.E.2d 14 [1997]; *State Farm Fire & Cas. Co. v. LiMauro*, 65 N.Y.2d 369, 372, 492 N.Y.S.2d 534, 482 N.E.2d 13 [1985]; *Lumbermens Mut. Cas. Co. v. Allstate Ins. Co.*, 51 N.Y.2d 651, 435 N.Y.S.2d 953, 417 N.E.2d 66 [1980]; *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140, 855 N.Y.S.2d 459 [1st Dept.2008]). Moreover, our conclusion in *Consolidated Edison* that other insurance clauses are not implicated in situations involving successive—as opposed to concurrent—insurance policies finds support in other jurisdictions (*see Ohio Cas. Ins. Co. v. Unigard Ins. Co.*, 268 P.3d 180, 184 [Utah 2012]; *Century Indem. Co. v. Liberty Mut. Ins. Co.*, 815 F.Supp.2d 508, 516 [D.R.I.2011]; *Westport Ins. Corp.*, 327 Wis.2d at 168–169, 787 N.W.2d at 919; *Boston Gas Co.*, 454 Mass. at 361, 910 N.E.2d at 308 [the "other insurance" clauses simply reflect a recognition of the many situations in which concurrent, not successive, coverage would exist for the same loss]; *LSG Tech., Inc. v. United States Fire Ins. Co.*, 2010 WL 5646054, *12, 2010 U.S. Dist. LEXIS 140879, *33–35 [E.D.Tex., Sept. 2, 2010, No. 2:07–CV–399–DF]; *Owens–Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 470, 650 A.2d 974, 991 [1994]).

Here, the Insureds are not seeking multiple recoveries from different insurers under concurrent policies for the same loss, and the other insurance clause does not apply to successive insurance policies (*see Consolidated Edison*, 98 N.Y.2d at 223, 746 N.Y.S.2d 622, 774 N.E.2d 687). Thus, in light of the language in the excess policies tying their attachment only to specific underlying policies in effect 267 during the same policy period as the applicable excess policy, and the absence of any policy language suggesting a contrary intent, we conclude that the excess policies are triggered by vertical exhaustion of the under-

lying available coverage within the same policy period (*see United States Fid. & Guar. Co. v. American Re–Ins. Co.,* 20 N.Y.3d at 428, 962 N.Y.S.2d 566, 985 N.E.2d 876; 2 Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 13.14).

IV.

Accordingly, following certification of questions by the Supreme Court of Delaware and acceptance of the questions by this Court pursuant to section 500.27 of the Rules of Practice of the Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, the certified questions should be answered in accordance with this opinion.

Chief Judge DiFIORE and Judges PIGOTT, RIVERA, ABDUS–SALAAM and FAHEY concur; Judge GARCIA taking no part.

Following certification of questions by the Supreme Court of Delaware and acceptance of the questions by this Court pursuant to section 500.27 of the Rules of Practice of the Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in accordance with the opinion herein.

27 N.Y.3d 337

The PEOPLE of the State of New York, Respondent,

v.

Quanaparker HOWARD, Appellant.

Court of Appeals of New York.

May 3, 2016.

Background: Following respondent's criminal conviction for unlawful imprisonment of a child, the County Court, Erie County, Kenneth F. Case, J., adjudicated respondent as a level three sex offender in a proceeding under the Sex Offender Registration Act (SORA), and respondent appealed. The Supreme Court, Appellate Division, 125 A.D.3d 1331, 999 N.Y.S.2d 783, affirmed. Leave to appeal was granted.

Holding: The Court of Appeals, DiFiore, C.J., held that hearing court reasonably declined to engage in downward departure from presumptive risk level three.

Affirmed.

Rivera, J., filed dissenting opinion.

1. Mental Health ⚿469(4)

In a proceeding under the Sex Offender Registration Act (SORA), the hearing court has the discretion to depart from a presumptive level, although such a departure should be the exception, not the rule. McKinney's Correction Law § 168–n(3).

2. Mental Health ⚿469(3)

In determining whether to depart from a presumptive risk level under the Sex Offender Registration Act (SORA), the hearing court weighs the aggravating or mitigating factors alleged by the departure-requesting party to assess whether, under the totality of the circumstances, a departure is warranted. McKinney's Correction Law § 168–n(3).

Thursday, November 2, 2017
3:00 p.m. – 3:50 p.m. & 4:15 p.m. – 5:05 p.m.

BREAKOUT SESSION

Arbitrating and Managing Small Disputes Cost- Effectively: Strategies for Arbitrators, Counsel, and Company Representatives

SESSION MATERIALS:

PRESENTED BY:

Steve Kennedy, Clyde & Co.

Diane Nergaard, ARIAS•U.S. Certified Arbitrator

Jane Parker, W. R. Berkley Corporation

ARIAS • U.S. STREAMLINED RULES
FOR SMALL CLAIM DISPUTES

1. INTRODUCTION

1.1 These procedures shall be known as the ARIAS • U.S. Streamlined Rules for the Resolution of U.S. Insurance and Reinsurance Disputes ("Rules") and shall apply only to claims for monetary relief and where the amount in dispute is $1,000,000 or less or in any other cases where the parties agree. For purposes of calculating the amount in dispute, the affirmative claims of both Parties to the arbitration, as of the time of the Organizational Meeting, not including interest, will be considered separately and independently of one another and will not be combined together to arrive at the total amount in dispute. After the Organizational Meeting, the Umpire has the discretion to permit a party to increase its affirmative claim in excess of the $1,000,000 limit up to a total amount of $2 million upon a showing of good cause.

When an agreement, submission or reference provides for or otherwise refers to arbitration under the ARIAS • U.S. Streamlined Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, the Parties agree that the arbitration shall be conducted in accordance with these Rules.

1.2 Any dispute concerning the interpretation of these Rules shall be determined by the Umpire.

1.3 The Umpire shall have all powers and authority not inconsistent with these Rules, the agreement of the Parties, or applicable law.

2. DEFINITIONS

2.1 The definitions in Rule 2 of the ARIAS • U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes in effect at the time the Parties adopt these Rules are incorporated by reference into these Rules.

3. NOTICE AND TIME PERIODS

3.1 Rule 3 (Notice and Time Periods) of the ARIAS • U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes in effect at the time the Parties adopt these Rules is incorporated by reference into these Rules.

4. COMMENCEMENT OF ARBITRATION PROCEEDINGS

4.1 An arbitration shall be initiated by Notice of Arbitration, in writing, that identifies the (1) Petitioner and the name of the contact person to whom all communications are to be addressed (including telephone and e-mail

information); (2) Respondent against whom arbitration is sought; (3) contract(s) at issue; and (4) a short and plain statement of the nature of the claims and/or issues, including the amount in dispute.

4.2 The arbitration is commenced under these Rules on the date the Respondent, or its designated representative, receives the Notice of Arbitration.

5. RESPONSE BY RESPONDENT

5.1 Parties who receive a Notice of Arbitration shall respond to it, in writing, within thirty (30) days, and such Response shall contain (1) the identification of the entities on whose behalf the Response is sent and the name of the contact person to whom all communications are to be addressed (including telephone and e-mail information); (2) a short and plain response to the Petitioner's statement of the nature of its claims and/or issues; and (3) a short and plain statement of any claims and/or issues asserted by Respondent against Petitioner, including the amount in dispute.

6. APPOINTMENT AND COMPOSITION OF THE PANEL

6.1 The arbitration shall be conducted by a single umpire. The Parties may mutually agree on a single umpire. If the Parties are unable to do so within thirty (30) days of the response by the respondent referred to in ¶ 5.1, each Party will select four (4) Umpire candidates from the list of the ARIAS • U.S. Certified Arbitrators. The Parties will jointly send Umpire questionnaire forms (ARIAS • U.S. form, unless otherwise agreed) to the eight (8) selected Umpire candidates for completion and simultaneous return to the Parties within ten (10) days. Within seven (7) days after receipt of completed questionnaires, each Party will strike three (3) names from the other Party's list and simultaneously exchange the name of the remaining candidates. The Parties will select the Umpire from among the remaining two (2) candidates by drawing lots or another method acceptable to both Parties.

6.2 Unilateral contact between a Party or its representative(s) on the one hand, and an individual considered for appointment as an Umpire on the other hand, shall not be permitted.

6.3 If after appointment an Umpire is unable or unwilling to serve, a replacement Umpire shall be chosen by the Parties as soon as practical (but no later than fourteen (14) days) after notification of the Umpire's inability or unwillingness to serve. Where the Parties are unable to reach agreement, the Parties shall appoint a replacement Umpire in accordance with the procedure set forth in ¶ 6.1.

6.4 Unless otherwise awarded by the Umpire pursuant to ¶ 8.2 or ¶ 11.7, each Party shall share equally the cost of the Umpire.

7. CONFIDENTIALITY

7.1 Unless otherwise agreed by the Parties, or ordered by the Umpire upon the motion of a Party and a showing of good cause, all meetings and hearings with the Umpire are private and confidential to the Parties. Only the Umpire, the Parties, the duly authorized representatives of the Parties and others participating in the proceedings may be admitted to meetings and hearings. If the Parties agree that any meeting or hearing is to be non-confidential, they shall inform the Umpire of their agreement as soon as reasonably practical after reaching it.

7.2 Unless otherwise agreed by the Parties, or ordered by the Umpire upon the motion of a Party and a showing of good cause, the Umpire and the Parties shall use their best efforts to maintain the confidential nature of the arbitration proceedings and any Decision, including the hearing and any written explanation of any Decision, except (a) as necessary in connection with a judicial proceeding relating to the arbitration or any Decision; (b) as otherwise required by law, regulation, independent accounting audit or judicial decision; (c) if the arbitration proceedings relate to a direct insurance dispute, then to support the insurer's reinsurance recoveries; (d) if the arbitration proceedings relate to a reinsurance dispute, then to support the reinsurer's retrocessional recoveries; or (e) as otherwise agreed by the Parties. The Parties shall use their best efforts to maintain this confidentiality when pursuing any of the exceptions set forth in this paragraph, including the filing of pleadings under seal when permitted.

8. INTERIM DECISIONS

8.1 The Umpire may issue Decisions for interim relief. Consistent with ¶¶ 9.7 and 10.4, respectively, the Parties are not permitted to make motions on the merits or formal discovery motions.

8.2 The Umpire shall have the power to impose sanctions for failure to comply with an interim Decision by the Umpire or for discovery-related abuse. Such possible sanctions may include but are not limited to: striking a claim or defense; excluding evidence on an issue; drawing an adverse inference against a Party; and imposing costs, including attorneys' fees, associated with such abuse or failure to comply.

9. PRE-HEARING PROCEDURE

9.1 The Umpire shall conduct an Organizational Meeting with the Parties and any authorized representatives of the Parties for the purposes of clarifying the focus of the arbitration hearing, resolving any outstanding issues relating to

the conduct of the hearing and establishing a schedule for the conduct of the proceedings in general.

9.2 The Organizational Meeting shall be held as soon as possible after the selection of the Umpire but in no event shall it be held later than thirty (30) days after the selection of the Umpire. The Umpire shall take into consideration this and other scheduling requirements set forth in these Rules when accepting appointments. The parties will jointly advise umpire candidates either in the umpire questionnaire or some other communication of the scheduling requirements that must be taken into consideration when accepting appointments. Unless the Umpire orders otherwise, the Organizational Meeting shall be conducted by video conference or telephonically.

9.3 Prior to the Organizational Meeting, the Parties shall confer and seek agreement on all issues that are expected to be considered at the Organizational Meeting, with a focus on those items identified in ¶ 9.7.

9.4 Five (5) days prior to the Organizational Meeting, each Party shall submit a position statement to the Umpire. The position statement shall not exceed five double-spaced pages in length using 12 point font of the Times New Roman, Courier or similar business-oriented type face variety. With the exception of the insurance or reinsurance contract(s), exhibits to the position statement shall not be permitted, unless expressly requested by the Umpire or agreed by the Parties. If requested by the Umpire, permissible exhibits may include, as applicable, only: (a) the billing(s) and documents provided specifically in support of the billing(s) or, where the dispute does not concern a billing, such documents that specifically relate and succinctly capture the disputed issue; (b) correspondence between the Parties specifically relating to the matter in dispute; and (c) depending upon the nature of the dispute, the category or categories of documents determined by the Umpire or as mutually agreed by the Parties to be relevant to the specific matter in dispute.

9.5 At the Organizational Meeting, the Umpire shall reveal on the record his or her past, present and any known future business and personal relationships with the Parties, the Parties' counsel, and with potential witnesses if identified in documents provided to the Umpire. Once disclosures have been made by the Umpire, Parties may be asked by the Umpire to accept his or her service as Umpire in the arbitration. The Umpire shall have a continuing obligation to disclose such information to the Parties.

9.6 At the Organizational Meeting, and prior to any request that the Parties accept the Umpire's service in the arbitration, the Umpire shall disclose whether any Party representative, or counsel contacted him or her regarding any work done in return for compensation (*e.g.*, service on a Panel, expert work, consulting work) to the extent not already disclosed in his or her completed ARIAS•U.S.

Neutral Umpire Questionnaire. The Umpire shall have a continuing obligation to disclose whether either Party or their respective counsel or representatives have approached him or her to serve on an arbitration panel in other matters or to work in any other capacity.

9.7 At the Organizational Meeting, the Umpire shall set a schedule for the arbitration. The schedule shall include: (1) a date certain for the hearing on the merits; and (2) a date for the exchange of documents based on the categories outlined in ¶ 10.1 and as determined by the Umpire at the Organizational Meeting. At the Organizational Meeting, the Umpire may address any other matters relating to scheduling, discovery and the administration of the arbitration, including Hold Harmless or indemnification agreements from the Parties flowing to the Umpire and whether the ARIAS • U.S. form agreement should be used as well as confidentiality agreements to ensure the confidentiality provided in Article 7.

Motions on the merits shall not be permitted at the Organizational Meeting or at any other point in time prior to the hearing on the merits

9.8 A formal record or transcript of the Organizational Meeting shall be kept, unless waived by the Parties. The cost of the record or transcript shall be shared equally by the Parties. The Umpire shall place on the record the disclosures required by ¶¶ 9.5 and 9.6.

9.9 The Umpire may allow the Parties to present a brief overview of the matters set forth in ¶ 9.4, whether or not written submissions were requested or received by the Umpire.

10. DISCOVERY

10.1 Automatic document discovery shall be limited to the following categories of documents: (a) the insurance or reinsurance contract(s); (b) the placement and underwriting files; (c) if a reinsurance dispute, the ceded and assumed reinsurance claim files; (d) if a reinsurance dispute, the reinsured policy(ies); (e) the billing(s) and documents provided specifically in support of the billing(s) or, where the dispute does not concern a billing, such documents that specifically relate and succinctly capture the disputed issue; (f) correspondence between the Parties specifically relating to the matter in dispute; and (g) depending upon the nature of the dispute, the category or categories of documents, including, but not limited to, the underwriting and claims files relating to the reinsured policy(ies), determined by the Umpire at the Organizational meeting to be relevant to the specific matter in dispute, or as mutually agreed by the Parties.

10.2 The Umpire shall have additional discretion regarding document discovery on the following categories of documents: (a) documents relating to other

insurance or reinsurance contracts not in dispute; and (b) (i) underwriting or claim handling manuals and/or (ii) documents relating to non-parties, upon a showing of good cause and in recognition that the purpose of these procedures is to streamline discovery, reduce costs, and efficiently resolve disputes.

10.3 Documents required under ¶ 10.1 shall be exchanged by the Parties no later than sixty (60) days after the Organizational Meeting. If any document is withheld from production under ¶ 10.1 pursuant to a claim of attorney-client privilege, work product, or other applicable privilege or protection, the Party asserting such claim shall, contemporaneously with its document production, serve upon the other Party a privilege log meeting the requirements of Fed. R. Civ. P. 26(b)(5). If a Party does not have a particular category of documents, then they shall so state to the other Party and the Umpire. The Parties may mutually agree to expand or restrict the categories of documents to be produced. Any such agreement shall be in writing and communicated to the Umpire. If a Party fails to produce documents in one of the predetermined categories, or to state the non-existence of such documents, the Umpire may make an adverse inference against the non-producing Party.

10.4 No formal document discovery motions shall be permitted. Any dispute regarding document discovery shall be resolved by the Umpire after hearing the positions of both sides during a video conference or conference call, unless the dispute is raised in a Party's position statement or during the Organizational Meeting.

10.5 Depositions shall not be permitted without leave of the umpire, which will be granted for good cause shown. No more than two (2) depositions will be permitted per side and no deposition shall last more than seven (7) hours. Depositions will be completed no later than ninety (90) days after the Organizational Meeting.

10.6 No expert discovery shall be permitted.

11. HEARING ON THE MERITS

11.1 The hearing on the merits shall be set no later than one hundred and eighty (180) days after the Organizational Meeting. The hearing shall be scheduled for one (1) day and shall be held in the location specified in the Arbitration Agreement or as otherwise agreed by the Parties; if the Arbitration Agreement is silent on the location and the Parties cannot otherwise agree, the location shall be selected by the Umpire, after consultation with the Parties. The Parties may agree with the Umpire to conduct the hearing by video conference or telephonically. If the hearing is to be held in person, the Umpire shall permit the Parties or witnesses so choosing, if any, to appear at the hearing by

video conference or telephonically. The hearing shall last for no longer than eight (8) hours, excluding breaks, and no live testimony shall be given at the hearing, unless mutually agreed by the Parties or requested by the Umpire. The remainder of the rules and procedures governing the hearing shall be established by the Umpire, provided said rules and procedures do not contravene these Rules.

11.2 All principal briefs, documents in support, and deposition transcripts shall be provided to the Umpire no later than twenty (20) days prior to the hearing. Principal briefs shall be limited to ten (10) double-spaced pages in length using 12 point font of the Times New Roman, Courier or similar business-oriented type face variety. Documents in support of a Party's position shall be limited to documents exchanged in discovery. The entirety of a deposition video or transcript shall be provided to the Umpire. No later than fifteen (15) business days prior to the hearing, a Party may, but is not required to, submit a reply brief to the Umpire. The reply brief, if any, shall be limited to three (3) double-spaced pages in length.

11.3 No evidence from expert witnesses shall be submitted by the parties to the Umpire.

11.4 After receiving the Parties' submissions, the Umpire shall decide whether an in-person hearing is required and if so, whether live testimony shall be permitted. If the Umpire decides that an in-person hearing is not required, he or she shall inform the Parties at least ten (10) business days prior to the scheduled hearing.

11.5 Within three (3) business days prior to the hearing, the Umpire may, but is not required to, submit questions or topics that any he or she would like the parties to address at the hearing. Notwithstanding a request from the Umpire for certain questions or topics to be addressed at hearing, no additional briefing shall be permitted.

11.6 The decision or award by the Umpire shall not have any res judicata or collateral estoppel effect.

11.7 The Umpire is authorized to award monetary damages, pre- or post award interest, costs of arbitration and attorneys' fees. The Umpire may not award declaratory relief, injunctive relief, rescission or any other equitable relief. The Umpire may not make findings of bad faith or award punitive damages.

.

THE AIRROC DISPUTE RESOLUTION PROCEDURE

September 2014 Edition

THE AIRROC DISPUTE RESOLUTION PROCEDURE

The AIRROC Dispute Resolution Procedure (the "Procedure") was developed in 2008 and 2009 by a subcommittee of AIRROC's Legislative and Amicus Committee. The Procedure is intended especially for less-complicated disputes, or those that would be cost-prohibitive to submit to plenary industry arbitration practices. It is expected that the Procedure will be of interest and serve as a valuable tool to parties able to agree on a more expedited method of resolution. The parties must agree on what specific disputes will be submitted for resolution under these rules.

Below is the September 2014 Edition of the Procedure, which will be amended from time to time.

I. Arbitrator List

A. AIRROC shall maintain and periodically update a list of arbitrators (the "List"), which together with arbitrator resumes will be available on its website. To be considered for inclusion, an applicant must complete an ***Arbitrator Application*** (Form 1) and submit it to AIRROC's Executive Director, along with a current resume. The required qualifications are: (1) certification in good standing by ARIAS*U.S. to serve as an arbitrator; or (2) at least ten years' employment by one or more insurance or reinsurance companies or other entities in an insurance group, including companies in run-off or receivership and risk-bearing syndicates. ARIAS-certified arbitrators will be designated with an asterisk on the List.

B. AIRROC reserves the right at any time to: (1) approve or disapprove a candidate's application for inclusion on the List; (2) remove an arbitrator's name from the List; or (3) amend the criteria for inclusion (including retroactive application to persons who qualified under previous criteria).

C. Notwithstanding the above, AIRROC relies on the information provided by applicants and makes no representations whatsoever regarding the accuracy or completeness thereof.

D. Commencing January 1, 2015, AIRROC will periodically contact all of its approved arbitrators to certify/update contact information. As part of that process, arbitrators will be asked to state how many times in the last calendar year he/she was appointed as an arbitrator pursuant to the Procedures.

II. Initiation of Proceedings

A. To initiate use of the Procedure, the parties must jointly complete an ***Initiation of Proceedings Form*** ("IOPF") (Form 2). The IOPF requires the parties, among other things, to identify the contract or contracts at issue in the arbitration; to stipulate to the claim(s) and any counterclaim(s) to be arbitrated; and to state the principal amount sought in respect of each claim and any counterclaim to the extent possible. The IOPF will thus define the

parameters of the dispute, the subject matter of the arbitration, and the scope of the arbitrator's authority. In agreeing to be bound by the Procedure, the parties stipulate that the arbitration will be strictly limited to the subject matter identified in the IOPF, absent their written agreement to an extension or change.

B. The parties are encouraged to discuss at the outset their respective views and expectations on significant issues, including: (1) the substantive issues in dispute; (2) the contemplated need for documents or other discovery (especially important given the consensual nature of discovery under these rules); (3) whether any party expects to submit its case via in-house or outside counsel; and (4) the need, length, and form of any evidence to be presented at a hearing. It is recommended that the parties shall have discussed each of these points ***before*** agreeing to use the Procedure.

C. To initiate the arbitrator selection process administered by AIRROC and described in Section III of the Procedure, the parties must jointly submit to AIRROC's Executive Director: (1) the completed IOPF; and (2) an ***Arbitrator Referral & Disclosure Form*** (Form 3A) with Part I completed. (Part II of the latter form is for prospective arbitrators to complete and shall be left blank by the parties.) Arbitrator selection will then proceed in accordance with Section III.

D. The parties are encouraged to reach agreement on the arbitrator ***without*** AIRROC's involvement. Where the parties can agree on the arbitrator at the outset of the proceeding, they should proceed with arbitration under these rules without informing AIRROC or submitting the documents described in Paragraph C, above. An alternative ***Arbitrator Referral & Disclosure Form*** designed to assist the parties in selecting an arbitrator by consent is attached as Form 3B. No party shall have *ex parte* communications with any prospective arbitrator.

E. The parties shall send the completed IOPF to the arbitrator no later than the time of his or her selection.

III. Arbitrator Selection Administered by AIRROC

A. AIRROC is available to assist in arbitrator selection when requested by the parties. The parties must indicate on the IOPF whether they prefer AIRROC to select prospective arbitrators from the entire List or, alternatively, only from the ARIAS-certified arbitrators designated on the List. After receiving the IOPF and applicable Arbitrator Referral & Disclosure Form submitted by the parties (*see* Section II.C.), AIRROC will select 15 names at random and inform the persons selected, by email, that they are in contention to serve as arbitrator of the parties' dispute. AIRROC will attach the Arbitrator Referral & Disclosure Form to its email and request each prospective arbitrator to complete and return Part II (Availability & Disclosure Statement) by email within one week. (AIRROC shall have no responsibility to verify the accuracy or completeness of the disclosures received.) After identifying the timely submitted responses of prospective arbitrators indicating an availability to serve, AIRROC will notify the parties simultaneously of the candidates

remaining in contention and provide copies of such candidates' completed statements and resumes.

B. Next, not later than one week after the above notification from AIRROC, the parties will simultaneously exchange their respective choices of just over half of the remaining names as acceptable arbitrator candidates. For example, if 11 of the original 15 candidates remain in contention, each party will select six names. This process will result in at least one match among the parties' selections. If there is just one match, then that person shall be the arbitrator. If there is more than one match, then the parties will notify AIRROC's Executive Director, and AIRROC will have the arbitrator chosen by lot from the parties' matched selections.

C. Notwithstanding the commencement of the arbitrator selection process described in this section, the parties are free to reach agreement on the arbitrator at any time before its completion. (Where AIRROC is continuing to play a role in administration, the parties should inform AIRROC of any such agreement as soon as possible.) The parties should then proceed with arbitration as provided below.

D. No party shall have *ex parte* communications with any prospective arbitrator during the selection process described herein.

IV. Procedural Rules

A. ***Organizational Meeting:*** Not later than 21 days after the arbitrator is notified of his or her selection, the parties and the arbitrator will conduct an organizational conference by telephone, unless the parties agree to an adjournment or a meeting in person. At the conference, the arbitrator will make further disclosures to the parties as appropriate. Unless there is a clear, fundamental conflict precluding the arbitrator's engagement, the parties will indicate their acceptance of the arbitrator. The parties will further describe the issues in dispute to the arbitrator, and a schedule for all activities in the proceeding will be established. The schedule will be enforced absent the parties' agreement to change it or the occurrence of exigent and unanticipated circumstances to be determined at the discretion of the arbitrator.

B. ***Discovery:*** There shall be no discovery or any motions or applications for discovery, unless the parties agree otherwise. However, nothing shall preclude the arbitrator, *sua sponte*, from requiring the production of specified documents that the arbitrator considers necessary for the proper resolution of the dispute.

C. ***Preliminary Relief:*** There shall be no motions or applications for preliminary relief, unless the parties agree otherwise.

D. ***Hearing:*** The dispute shall be submitted to the arbitrator on briefs and documentary evidence only (*i.e.*, no live witness testimony), unless the parties agree otherwise. Oral argument or presentations on the briefs and documents submitted may be directed by the arbitrator in his or her discretion, or when requested jointly by the parties. The duration of

any argument or presentations, together with any live witness testimony agreed to by the parties (all of which shall be referred to collectively as the "Hearing"), shall not exceed one day, unless the parties agree otherwise, or the arbitrator considers additional oral presentations or additional live witness testimony necessary for the proper resolution of the dispute.

E. ***Affidavits:*** The arbitrator will have authority to determine whether affidavits will be permitted and, if so, what rules will be followed as to such affidavits regarding their subject matter, scope, timing, rebuttal, and the like.

F. ***Award:*** The arbitrator shall render a written award not later than 30 days after the submission of briefs or the conclusion of the Hearing, if any. Such award will set forth the disposition of the claims(s) and any counterclaim(s) asserted and the relief granted, if any. However, the arbitrator will not issue a "reasoned" award, unless the parties agree otherwise.

G. ***Communications:*** No party shall at any time from the commencement of the arbitrator selection process have *ex parte* communications with the arbitrator concerning any aspect of the proceeding.

V. Fees

A. ***Arbitrator Fees:*** The arbitrator shall charge an hourly rate of $150, which will be apportioned equally among the parties. In addition, each party shall bear an equal share of the arbitrator's reasonable expenses. Upon the arbitrator's initial selection, each party shall pay a $2,000 retainer to the arbitrator. Half of the retainer ($1,000 per party) will be non-refundable to the parties and kept by the arbitrator as minimum compensation regardless of the length of the proceeding. The retainer will be applied to the arbitrator's final statement for services rendered at the conclusion of the proceeding, with any balance returned at that time, subject to the above minimum. All fees of the arbitrator will be paid directly to the arbitrator.

B. ***AIRROC Service Fee:*** Regardless of whether AIRROC administers arbitrator selection, AIRROC will not charge any service fee to member companies for use of the Procedure. If a member company has a dispute with a non-member company(ies) and the parties agree to use AIRROC to administer arbitrator selection, AIRROC will charge the nonmember company(ies) a total service fee of $1,000. If none of the companies in a dispute is a member of AIRROC but the non-members agree to use AIRROC to administer arbitrator selection, AIRROC will charge the non-members a total service fee of $2,000. Any fee due shall be paid in full to AIRROC simultaneously with the submission of documents described in Section II.C. AIRROC shall have no obligation to refund payment under any circumstances (*e.g.*, even if settlement occurs or the parties agree on the arbitrator without AIRROC having rendered service).

VI. Confidentiality

A. Unless the parties agree otherwise in writing, the parties and arbitrator (including all prospective arbitrators) agree to maintain the confidentiality of all papers, communications, statements, submissions, materials, processes, orders, and awards ("Information") in connection with the arbitration. Confidentiality of the Information will remain in effect after conclusion of the arbitration. Disclosure of any Information may be made only to the extent necessary:

(i) to enforce, confirm, vacate, or modify an order or award of the arbitrator;

(ii) in communications with auditors retained by a party or with regulatory authorities or their agents;

(iii) to seek recovery from retrocessionaires regarding the subject matter of the arbitration; or

(iv) to comply with lawful subpoenas or orders of any court or other arbitration panel.

B. The parties will make good faith efforts to limit the extent of any disclosure of the Information and will cooperate with each other in resisting or limiting disclosure to the extent reasonable and appropriate.

VII. Hold Harmless and Indemnification

A. The parties agree that they shall not assert any claim, file any suit, or initiate any action of any kind against the arbitrator or AIRROC concerning any matter arising from an arbitration conducted under the Procedure. Each party further agrees jointly and severally to release, protect, defend, indemnify, and hold harmless the arbitrator, AIRROC, and its officers, principals, directors, employees, agents, representatives, and affiliates from and against any and all claims, liabilities, judgments, losses, damages, demands, causes of action, attorney's fees, expert fees, expenses, and the like, in law or in equity, directly or indirectly arising from an arbitration conducted under the Procedure, including for any alleged non-performance of services. Each party further agrees jointly and severally to reimburse the arbitrator and AIRROC for all reasonable expenses (including attorney's fees) as they are incurred in connection with the investigation of, preparation for, or defense against any pending or threatened claim arising from an arbitration conducted under the Procedure.

B. The arbitrator agrees not to assert any claim, file any suit, or initiate any action of any kind against AIRROC or its officers, principals, directors, employees, agents, representatives, and affiliates concerning any matter arising from the Procedure or an arbitration thereunder, including any derivative claim for a suit or action brought against the arbitrator or any claim by the arbitrator to collect unpaid fees.

C. Paragraphs A and B are non-cancelable and of unlimited duration.

D. Nothing in this section shall abridge any right that a party may have with respect to another party to seek to enforce, confirm, vacate, or modify any order or award that the arbitrator may render, or any right of the arbitrator to collect fees due from a party.

VIII. Absence of Precedential or Preclusive Effect

Unless the parties agree otherwise in writing, it is stipulated by the parties that any arbitration conducted under the Procedure is solely for the purpose of resolving the specific dispute or disputes that the parties have designated as constituting the subject matter of the arbitration; and, to the fullest extent permitted by law, it is further stipulated that any award or ruling will not be subject to collateral estoppel or *res judicata* or have any other precedential or preclusive effect beyond the strict confines of the subject matter.

IX. Confirmation and Enforcement

The parties agree that the award of the arbitrator will be fully binding concerning any matter submitted for arbitration and that the award can be confirmed by any court of competent jurisdiction. Any petition to confirm or vacate the award will be filed under seal to the extent permitted by the court. Notwithstanding the above, no party shall seek to confirm a monetary award that has been paid in full.

Thursday, November 2, 2017
3:00 p.m. – 3:50 p.m. & 4:15 p.m. – 5:05 p.m.

BREAKOUT SESSION

Discovery – A Matter of Balance. Keeping a Watchful Eye on the Objective

SESSION MATERIALS:

AVAILABLE IN ONLINE MATERIALS ONLY

U.S. ex rel. *TGK Enterprises, Inc. v. Clayco, 1nc.*,978 F.Supp.2d 540 (E.D.N.C.1e8o).

PRESENTED BY:

Don Frechette, Locke Lord LLP

Christopher Bello, General Re Life Corporation

Jonathan Rosen, Arbitration, Mediation and Expert Witness Services

Aimee Hoben, The Hartford

I. Referenced Authorities

A. *Miller Brewing Co. v. Fort Worth Dist. Co., Inc.*, 781 F.2d 494 (1986)

B. *Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980).

C. *U.S. ex rel. TGK Enterprises, Inc. v. Clayco, Inc.*, 978 F.Supp.2d 540 (E.D.N.C. 1980).

II. Draft Arbitration Clauses

A. No Discovery

Notwithstanding any other provision of this Agreement, and in recognition of their mutual desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder, the Parties acknowledge and agree that the Arbitrators shall have no authority or jurisdiction to enter any order allowing discovery in connection with any such proceeding. Nothing in the preceding sentence shall be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

B. Dollar Threshold

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, and notwithstanding any other provision of this Agreement, the Parties acknowledge and agree that the Arbitrators shall have no authority or jurisdiction to enter any order allowing discovery in connection with any such proceeding; provided, however, that in any arbitration where the total monetary relief (or, in the case of injunctive relief, the value of the rights or remedies sought to be obtained thereby) sought by the Parties exceeds [INSERT DOLLAR FIGURE], the Arbitrators shall have the authority and all requisite jurisdiction to permit such discovery as they deem appropriate. Nothing in the preceding sentence shall be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

C. Time Limitation

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, the Parties acknowledge and agree that any discovery permitted in connection with any arbitration arising hereunder shall be completed (and not merely initiated) within [INSERT TIME] of [INSERT STARTING EVENT, *i.e.* ARBITRATION INITIATION, CONCLUSION OF ORGANIZATIONAL MEETING, *etc.*]. The Parties further acknowledge and agree that the Arbitrators shall have no authority or jurisdiction to enter any order extending, or in any way enlarging, that discovery period. Nothing in this subparagraph shall, however, be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

D. Limited Depositions

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, the Parties acknowledge and agree that, in connection with any Arbitration, each Party shall be limited to the taking of no more than two (2) depositions, each such deposition having a duration of no more than eight (8) hours. Notwithstanding any other provision of this Agreement, the Arbitrators shall have no authority or jurisdiction to enter any order purporting to enlarge the number of depositions, or the duration thereof. Nothing in this subparagraph shall be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

E. Limited E-Discovery

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, the Parties agree that

[ALTERNATIVE A]

neither Party shall be required, in response to any document production request, to search for documents or records on media or device other than as utilized by that Party within the five years preceding the initiation of any Arbitration.

[ALTERNATIVE B]

neither Party shall be required, in response to any document production request, to search for metadata in connection with any produced document.

[ALTERNATIVE C]

, in connection with any e-discovery permitted by the Arbitrators, each Party shall be permitted to furnish the other Party with no more than [INSERT NUMBER] discrete search terms, and to request that the Party to whom such terms have been furnished produce documents containing such terms.

[ALTERNATIVE D]

production of electronic documents shall generally be limited to those located in sources or media that are used in the ordinary course of business. Except upon a showing of good cause, the Arbitrators shall not order the restoration of backup tapes; erased, damaged, or fragmented data; archived data; or data that has been deleted in the ordinary course of business.[1]

[ADDITIONAL PROVISIONS CAN BE INSERTED TO PROVIDE THE ARBITRATORS WITH FLEXIBILITY TO ADDRESS TECHNOLOGICAL OR COST ISSUES (SEE BELOW), OR TO LIMIT THE ARBITRATORS' AUTHORITY TO VARY THESE PROVISIONS.]

F. COST-SHIFTING

In connection with any discovery that may be permitted by the Arbitrators, the Arbitrators shall have the authority, either by way of interim relief or in connection with any final award, to allocate the costs and expenses associated with such discovery to the Parties in whatever manner the Arbitrators deem appropriate.

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[1] *See Dispute Resolution: Arbitration Contract Clauses*, John H. Wilkinson, GPSOLO Magazine, American Bar Association, March 2010, https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/wilkinson.html (last visited Sept. 19, 2017).

G. EXPERTS

[ALTERNATIVE A]

The Parties, in agreeing to arbitration, desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to arbitration hereunder. Consequently, the Parties each waive the right to proffer expert testimony in connection with any Arbitration. Such testimony shall only be permitted by order of the Arbitrators, which order shall only enter upon a showing of good cause.

[ALTERNATIVE B]

In any Arbitration where a Party elects to offer expert testimony, such Party shall, at least [INSERT TIME] prior to the Hearing, furnish the other Party with an expert report. The report shall contain:

1. a complete statement of all opinions the witness will express and the basis and reasons for them such that the report may fairly serve as a full and complete recitation of any testimony that the witness would be expected to testify to in his/her direct examination;

2. the facts or data considered by the witness in forming them;

3. any exhibits that will be used to summarize or support them;

4. the witness's qualifications, including a list of all publications authored in the previous 10 years;

5. a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

6. a statement of the compensation to be paid for the study and testimony in the arbitration.

[OPTIONAL PARAGRAPH]

The Parties acknowledge and agree that no depositions of experts shall be permitted, and the Arbitrators shall have no authority or jurisdiction to enter any order permitting the same. Given the

foregoing, however, the Arbitrators shall strictly apply the foregoing provisions concerning the expert's report, and the expert shall not be permitted to testify regarding any matter not fully therein disclosed.

H. NO INTERROGATORIES OR REQUESTS TO ADMIT

Notwithstanding any other provision of this Agreement, and in recognition of their mutual desire to assure the expeditious, efficient and inexpensive resolution of any dispute subject to Arbitration hereunder, the Parties acknowledge and agree that the Arbitrators shall have no authority or jurisdiction to enter any order allowing the propounding of interrogatories or requests to admit in connection with any such proceeding. Nothing in the preceding sentence shall be deemed to abrogate, or in any way impair, any Party's inspection or audit rights under this Agreement, and the Arbitrators shall retain full authority and jurisdiction to enter such orders with respect to such rights as they otherwise deem appropriate.

III. Hypotheticals

A. Long Life Insurance Co. has had a ten year non-exclusive relationship with CYA Reinsurance Co. in connection with "executive" life insurance policies written primarily for key employees. Recently, CYA became aware of a noticeable increase in claims on its book and, following an audit, determined that Long Life had been "cutting tables," *i.e.* providing preferred coverage to policy purchasers who did not, in actuality, meet the relevant health requirements for underwriting. CYA declined to pay on the particular policies at issue and Long Life initiated arbitration. In response, CYA sought rescission of the relevant treaties on the basis of fraud and a breach of the duty of utmost good faith. Long Life countered by claiming that "cutting tables," at least to the modest extent present here, was an industry practice designed to meet competition in a competitive rate environment.

CYA has now sought to review all of Long Life's underwriting files for a ten year period, whether such policies were retained, reinsured by CYA, or covered by some other reinsurer. Long Life counters that such files are irrelevant because it has already admitted that it cut tables, so the files will only establish that already agreed-upon fact.

Should the discovery be permitted?

B. Neverpay Insurance Company is property and casualty company that is reinsured by Ever Faithful Reinsurance Corporation pursuant to a 50% quota share covering risks associated with damage at common interest communities. The present treaty is derived from a form that goes back to the mid-1990s and that was heavily

negotiated by Neverpay and Ever Faithful. A dispute has developed over the nature of the risks that Ever Faithful agreed to reinsure, and the treaty is admittedly ambiguous on the issue. Nevertheless, all of the parties who were associated with the original form's negotiation are available to testify as regards their intent in choosing the particular language at issue. In addition, the various drafts that were exchanged during the negotiation process are also all readily available.

Ever Faithful has asked for all of Neverpay's emails and imaged documents (which include drafting notes and the mental impressions of the various draftspersons). Neverpay points out that these documents are all e-discovery that go back 20+ years, and that it has, in the intervening timeframe, switched its form of storage media at least twice. Neverpay has provided an affidavit from a third-party e-discovery expert to establish that the cost of recovery will be approximately $100,000.

Should Neverpay be compelled to provide the requested documentation? If so, who should pay for it? Would your answer be any different if Ever Faithful no longer had access to any of its witnesses?

C. Acme Insurance Co. writes homeowner's policies, with an emphasis on luxury properties. It is reinsured under a 100% quota share with Stable Re, Inc. Recently, a hurricane struck the coast of North Carolina, a location widely serviced by Acme. Acme was deluged (pun intended) by claims, and a substantial amount of litigation ensued over whether the resulting damages were the result of storm surge (where coverage would not exist) or wind-driven rain (where coverage would be present). While a fair amount of publicly available evidence suggested that most of the damage was, in actuality, the result of flooding, a group of plaintiffs nevertheless sought class certification. While that motion was pending, Acme settled with a large majority of the claimants in their individual capacities based, it claims, on advice it received from its counsel, Dewey, Screwem and Howe.

Acme sought reinsurance proceeds from Stable and, as part of its investigation, Stable sought to review all documents evidencing the advice provided by Dewey to Acme. Acme declined to provide access to these documents, citing attorney/client privilege. Stable then denied Acme's claims, citing its "unfettered" right to audit Acme's claims files. Acme initiated arbitration.

Stable filed a document production request as part of the arbitration, seeking the Dewey documents. Acme declined again to provide them and Stable now seeks an order from the Panel instructing Acme to produce the documents based upon Stable's audit rights and its document production requests.

How should the Panel respond? Is your answer any different in the absence of the audit right? Is your answer any different had Acme simply settled without in any way asserting that its decision to do so was based on advice of counsel?

D. Always Right Insurance Company writes D & O coverage that is 100% reinsured by Diligent Re. In response to a series of claims, Diligent contends that Always Right made a series of oral misrepresentations to it regarding the risks and underwriting histories associated with the underlying book. In particular, Diligent claims that a number of Always Right executives conspired with one another to provide this false information to Diligent.

Diligent served a comprehensive set of document production requests on Always Right seeking cell phone records and, more importantly, text messages exchanged between those executives. The executives have filed sworn affidavits that, to the extent they ever existed (which is denied), the executives no longer have access to such records on their phones because they routinely delete their messages once they are read.

Diligent has learned that Z-Mobile, the cell phone carrier, can retrieve the messages, but it will be expensive for it to do so and, in any event, the law in the relevant jurisdiction does not allow for third-party discovery in arbitration, including by way of document production. Diligent has, accordingly, asked the Panel for an order instructing Always Right to request the records from Z-Mobile and to pay the costs associated therewith.

What should the Panel do?

Would your answer be any different if each of the executives responded with an affidavit to the effect that they "virtually never" use text messaging for anything other than personal matters? What about if the phones are actually not company phones but, instead, are personal phones that Always Right provides the executives with a monthly stipend for?

781 F.2d 494
United States Court of Appeals,
Fifth Circuit.

MILLER BREWING COMPANY,
Plaintiff-Appellant,
v.
FORT WORTH DISTRIBUTING CO., INC.,
Defendant-Appellee.

No. 85-1156.
|
Jan. 30, 1986.

After distributor notified beer company that it was demanding arbitration pursuant to distributorship agreement, beer company sought stay of arbitration proceedings. The United States District Court for the Northern District of Texas, A. Joe Fish, J., dismissed company's application for injunctive relief, and company appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) distributor waived its right to arbitration by substantially invoking judicial process to the considerable inconvenience, detriment and prejudice of beer company, and (2) even if waiver did not apply, distributor was barred from arbitration under doctrine of res judicata.

Reversed.

West Headnotes (4)

[1] **Alternative Dispute Resolution**
Waiver or Estoppel
Alternative Dispute Resolution
Evidence

Waiver of arbitration is not a favored finding, and there is a presumption against it; nevertheless, under appropriate circumstances a waiver may be found.

50 Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Suing or Participating in Suit

Waiver of arbitration will be found when party seeking arbitration substantially invokes judicial process to detriment or prejudice of the other party.

170 Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Suing or Participating in Suit

Distributor waived its right of arbitration under distributorship agreement with beer company, where distributor only announced its intention to arbitrate nearly eight months after bringing a state court suit, and demand for arbitration laid dormant for three and one-half years, while distributor busily pursued its legal remedies; moreover, beer company's position would be prejudiced and compromised in arbitration by distributor's use of pretrial discovery going to the merits.

64 Cases that cite this headnote

[4] **Judgment**
Nature and Form of Remedy

Distributor could not invoke arbitration clause of distributorship agreement with beer company; arbitration was barred by doctrine of res judicata because distributor could have included, and implicitly did include, in its prior state court proceeding claim for damages it sought to arbitrate.

39 Cases that cite this headnote

Attorneys and Law Firms

***495** John T. Helm, Cecil W. Casterline, Mark M. Petzinger, Drew R. Heard, Dallas, Tex., for plaintiff-appellant.

Goins, Underkofler, Crawford, Durwood D. Crawford, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the District of Northern Texas.

Before GOLDBERG, REAVLEY and GARWOOD, Circuit Judges.

Opinion

GOLDBERG, Circuit Judge:

This case has been brewing far too long. Things came to a head when plaintiff-appellee Fort Worth Distributing Company went into state court in 1980 to prevent Miller Brewing Company from terminating a distributorship agreement between the two companies. After having its state court suit dismissed with prejudice for want of prosecution, however, Fort Worth Distributing now invokes an arbitration clause in order to pursue essentially the same claim. We find Fort Worth Distributing's case flat and stale at this juncture, and direct the district court to grant Miller Brewing's application for a stay of arbitration.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 28, 1978, Miller Brewing Company ("Miller") and Fort Worth Distributing Company, Inc. ("FWDC") entered into a Distributorship Agreement. 2 Record on Appeal ("Rec."), Exhibit A, at 10. This Agreement granted FWDC the right to distribute Miller beer products in Tarrant County, Texas, for five years, but provided that Miller could terminate the Agreement at any time on ten days' notice. *Id.* at 1-2. The Agreement further provided that, in the event of early termination, FWDC could demand that an arbitration panel be formed to hear "[a]ny claim by Distributor arising out of, relating to, or resulting from the termination of this Agreement by Miller...." *Id.* at 2, 9. If an arbitration panel found that Miller had terminated FWDC without "cause," as defined by an accompanying Addendum on Arbitration, the panel could order Miller to pay compensatory monetary damages to FWDC. *Id.* at 9-13.

On the same day that they signed the Distributorship Agreement Miller and FWDC also entered into a supplemental Memorandum Agreement. This Memorandum Agreement addressed certain events and activities that had taken place during the term of FWDC's previous Distributorship Agreement with Miller. Apparently, FWDC employees or officers had been making payments and giving gifts to Miller's ***496** regional managers.[1] The Memorandum Agreement provided that FWDC would furnish to Miller all evidence, documents, and records relating to payments made to Miller employees; in return, Miller agreed that "no information obtained pursuant to this Agreement will be used to terminate, cancel or refuse to renew the ... Distributorship Agreement...." Memorandum Agreement (2 Rec., Exhibit E) at 1.

In a letter dated April 7, 1980, however, Miller notified FWDC that the Distributorship Agreement was being terminated as of July 10, 1980. In response, FWDC brought a lawsuit in Texas state court on April 29, 1980, complaining that Miller's action would result in damages in excess of five million dollars; FWDC sought to enjoin Miller from terminating the Distributorship Agreement and also demanded attorney's fees and "such other and further relief to which it may show itself justly entitled." *Fort Worth Distributing Co., Inc. v. Miller Brewing Company, et al.,* No. 141-60627-80, Plaintiff's Original Petition (2 Rec., Exhibit E), at 10. Miller had the state court action removed to the United States District Court for the Northern District of Texas. The removal decision came before this court on appeal, and the case was remanded to the state district court. *B., Inc. v. Miller Brewing Co.,* 663 F.2d 545 (5th Cir.1981) (companion case).

Meanwhile, FWDC had notified Miller in a letter of January 2, 1981, that it was demanding arbitration pursuant to the Distributorship Agreement and the supplemental Memorandum Agreement. As FWDC acknowledges in its brief, however, "Neither Miller nor FWDC took steps to cause the American Arbitration Association to schedule a hearing until FWDC did so on September 22, 1984." Appellee's Brief at 2. FWDC probably chose that occasion to set arbitration in motion because its state court suit had just been dismissed with prejudice for want of prosecution the day before. Miller sought a stay of arbitration proceedings in the United States District Court, Fish, J., and now appeals the dismissal by that court of its application for injunctive relief.

II. STANDARD OF REVIEW

As it comes before this court, this case presents few, if any, important factual disputes. Jurisdiction is proper under 28 U.S.C. §§ 1332 (diversity of citizenship (Texas and Wisconsin)) and 1291 (final decisions). Both parties have stipulated to the essentials of the factual and procedural history outlined above. Stipulation and Agreement, 1 Rec., at 2. The only question before this court is whether the district court properly dismissed Miller's application for a stay of arbitration proceedings.

In ruling on Miller's application for injunctive relief the district court below saw no witnesses and heard no testimony. As contemplated by Fed.R.Civ.P. 43(e), the matter was determined on affidavits. Of course, the parties are in disagreement as to the legal implications that should be drawn from the facts. But in these circumstances an appellate tribunal has broad authority to substitute its own conclusions of law for those of the trial court. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (the clearly-erroneous standard "does not inhibit an appellate court's power to correct errors of law").

III. WAIVER OF ARBITRATION

[1] We first consider whether FWDC has waived its right to arbitration by invoking the judicial process and forcing Miller to expend substantial amounts of time and money defending itself in that forum. Waiver of arbitration is not a favored finding, and there is a presumption against it. As the Supreme Court stated in *Moses H. Cone Memorial Hospital v. Mercury Construction Company,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), "questions ***497** of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *See* 9 U.S.C. § 2. Nevertheless, under appropriate circumstances a waiver of arbitration may be found. Even in stressing the policy favoring arbitrability the *Moses Cone* Court noted that "Congress' clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." 460 U.S. at 22, 103 S.Ct. at 940.[2] Here, of course, FWDC's first step was to move the parties *into* court; its belated attempt to arbitrate 3 ½ years later, after losing in court, can hardly be seen as moving the parties into arbitration "as quickly and easily as possible."[3]

[2] Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.[4] "The right to arbitration, like any other contract right, can be waived. A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right." *Cornell & Co. v. Barber & Ross Co.,* 360 F.2d 512, 513, 513 (D.C.Cir.1966) (footnotes omitted); *accord Burton-Dixie Corp. v. Timothy McCarthy Const. Co.,* 436 F.2d 405, 407-08 (5th Cir.1971). As this court noted in *E.C. Ernst, Inc. v. Manhattan Const. Co.,* 559 F.2d 268, 269 (5th Cir.1977), "When one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial.... Substantially invoking the litigation machinery qualifies as the kind of prejudice ... that is the essence of waiver."[5]

[3] FWDC has demonstrated a clear and unmistakable "disinclination" to arbitrate, and has done so to the substantial detriment and prejudice of Miller. FWDC's Original Petition in the Texas court suit against Miller did not rely on or even mention the arbitration clause. Only in January, 1981-nearly eight months after bringing its state court suit-did FWDC announce its intention to arbitrate. Thereafter, however, "Neither Miller nor FWDC took steps to cause the American Arbitration Association to schedule a hearing until FWDC did so on September 22, 1984." Appellee's Brief at 2.

While its demand for arbitration lay dormant for 3 ½ years, FWDC was busily pursuing its legal remedies. Lawsuits were filed, at one time or another, in state trial court, the state court of appeals, federal district court, and this court. Of course, Miller had to participate and defend its interests in all these actions. The record reveals that numerous depositions were taken, and that Miller paid over $85,000 in legal fees and expended more than 300 hours of its own employees' time defending ***498** the FWDC claims. Affidavit of Warren H. Dunn, 3 Rec., Exhibit G; Affidavit of John T. Helm, 1 Rec. at 39. *Cf. Brown-McKee, Inc. v. Fiatallis,* 587 F.Supp. 38, 40 (N.D.Tex.1984) (finding waiver of arbitration where defendant in earlier suit expended 100 man-hours and $1,400 in attorney's fees).

Even more significant, perhaps, is the prejudice to Miller's legal position that resulted from FWDC's actions. A party to arbitration does not have a right to the pre-trial discovery procedures that are used in a case at law. A party "may not invoke arbitration and yet seek pre-trial discovery going to the merits.... [A]ny attempt to go to the merits and to retain still the right to arbitration is clearly impermissible." *Graig Shipping Co. v. Midland Overseas Shipping Corp.,* 259 F.Supp. 929, 931 (S.D.N.Y.1966).[6] There is every indication that Miller's position would be prejudiced and compromised in

arbitration by FWDC's use of pre-trial discovery going to the merits. In its Brief in Support of Remand filed in Federal District Court, for example, FWDC notes that

> In the four depositions already taken by Plaintiff of Hall, White, Andrews, and Warren Dunn, General Counsel of Miller Brewing Company, several important and undisputed facts have emerged, already proving many of the elements of the alleged conspiracy.
> Brief in Support of Plaintiff's Motion for Remand (3 Rec., Exhibit I), at 4. Later in the same brief FWDC concludes as follows:
>
> > Plaintiff expects to prove considerably more through its own witnesses at time of trial, but it believes and alleges that the above undisputed facts taken from the testimony or documentary evidence produced by Defendants themselves already establish the major elements of a case against Defendants White, Andrews and Hall, and establish their complicity in the scheme for Miller Brewing Company to terminate Fort Worth Distributing Company in violation of agreements.
>
> *Id.* at 6. Clearly, the discovery taken by FWDC in its legal proceedings goes to the merits of the claim it now seeks to arbitrate, namely the issue of wrongful termination. We have no difficulty concluding from these facts alone that FWDC thus waived its right to arbitration.

IV. RES JUDICATA

[4] Even if the waiver considerations outlined above did not apply, we would still have good grounds for enjoining arbitration proceedings in this case. The doctrine of res judicata, as developed by Texas courts, ensures that when a court of competent jurisdiction has entered a final judgment on the merits of a case, the parties are bound as to all claims that were raised or that *could* have been raised.[7] The Texas Supreme Court has declared that

> the rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried.... Stated differently, a party cannot relitigate matters which he might have interposed, but failed to do so, in an action between the same parties or their privies in reference to the same subject matter.
> ***499** *Abbott Laboratories v. Gravis,* 470 S.W.2d 639, 642 (Tex.1971); *see also Segrest v. Segrest,* 649 S.W.2d 610, 612 (Tex.1983); *State v. Sunray DX Oil Co.,* 503 S.W.2d 822, 827-28 (Tex.Civ.App.-Corpus Christi 1973). The Arbitration Act contemplates that awards made pursuant to arbitration will be confirmed in the federal courts. 9 U.S.C. § 9. Since an arbitration award involves the entry of judgment by a court, parties should be barred from seeking relief from arbitration panels when, under the doctrine of res judicata, they would be barred from seeking relief in the courts. *See Ank Shipping Co. v. Seychelles National Commodity Co.,* 596 F.Supp. 1455, 1458-59 (S.D.N.Y.1984); *N.Y.S. Association for Retarded Children v. Carey,* 456 F.Supp. 85, 96 (E.D.N.Y.1978).

Counsel for appellee and the district court below emphasized repeatedly that FWDC's state court suit involved non-arbitrable matters. This claim is true but irrelevant. As Miller correctly and succinctly notes in its brief,

> It is irrelevant that FWDC did not have a right to arbitrate its claim for injunctive relief. FWDC had the right to seek damages for wrongful termination in the court action against Miller in addition to its seeking injunctive relief. Simply put, when FWDC elected to file its lawsuit, it elected its forum for relief and was required to raise all issues and theories of recovery in that proceeding.

Appellant's Brief at 11. Once FWDC elected state court as its forum for relief, the relevant question is whether the damages provided for in the arbitration clause could have been sought in court, not whether the injunctive relief sought in court could have been granted in arbitration. FWDC's claim is logically of the same form as the claim: "Not all mammals are rabbits." This claim is doubtless true, but who (other than a lawyer) would bother to assert it? The relevant claim would be: "Not all rabbits are mammals." In other words, FWDC should argue that the more inclusive category of claims that can be adjudicated in state court (the "mammals") does not include all its arbitrable claims (the "rabbits"). This claim, if true, would

explain and justify FWDC's attempt to "reserve" its arbitrable claims for later and separate determination, after its lawsuit had been concluded. But FWDC does not, and by all indications cannot, make this claim; instead, it appears that FWDC could have amended its state court pleadings at virtually any point in this protracted litigation to include a claim for the damages (for wrongful breach of the Distributorship Agreement) it now seeks to arbitrate. *See* Texas Rules of Civil Procedure 63 (Amendments), 66 (Trial Amendment), 67 (Amendments to Conform to Issues Tried Without Objection).

Thus, even if we assume that FWDC's state court suit did not include a claim for damages of the sort covered by the arbitration clause, FWDC is nonetheless barred from arbitrating that claim now because such a claim *could* have been included in the state court suit. On closer examination, moreover, it appears that FWDC *did* implicitly make the same claim for damages in state court that it now seeks to arbitrate.

We turn first to FWDC's state court pleadings. Essentially, they allege causes of action for breach of contract, tortious interference with existing and prospective contractual relations, and conspiracy; they estimate that FWDC's damages are in excess of five million dollars and demand injunctive relief, attorney's fees, and "such other and further relief to which [FWDC] may show itself justly entitled." FWDC maintains that these pleadings "*never sought to recover against Miller because of Miller's termination without cause, i.e., for breach of the Distributorship Agreement,*" and characterized the Memorandum and Distributorship Agreements as "totally separate" contracts giving rise to completely different causes of action. Appellee's Brief at 18, 4. To hear FWDC tell it, the state court suit was simply an action for injunctive relief, based solely on the Memorandum Agreement, while the arbitration would be for damages under the Distributorship Agreement.

***500** We cannot help but note, however, that the one-page Memorandum Agreement refers by its terms to the Distributorship Agreement no less than four times and concludes as follows: "Miller agrees that no information obtained pursuant to this [Memorandum] Agreement will be used to terminate, cancel or refuse to renew the above described Distributorship Agreements...." As for the pleadings, in paragraph I FWDC cites the Distributorship Agreement and compliance therewith as the basis for its claims, making no mention of the Memorandum Agreement. Plaintiff's Original Petition (3 Rec., Exhibit E), at 1. In paragraph V FWDC alleges that Miller's planned cancellation of the "Distributorship Agreement ... is in violation and breach of the Memorandum Agreement...." *Id.* at 3. Paragraph VII alleges a "conspiracy ... to intentionally cause great and irreparable damage to Fort Worth Distributing by preventing the renewal of the Distributorship Agreement and thus preventing compliance by Miller with the Memorandum Agreement," and paragraph VIII restates this as a "conspiracy to violate the Memorandum Agreement and to cancel Fort Worth Distributing's Distributorship Agreement." *Id.* at 4. In light of these pleadings, we are unable to view FWDC's state court action as simply an application for injunctive relief premised solely on the Memorandum Agreement. The two agreements are inextricably intertwined, and the Distributorship Agreement is the *sine qua non* of FWDC's state court action.

Further clarification of FWDC's state court claims is provided by other briefs and papers filed in court. In its Brief in Support of Plaintiff's Motion for Leave to File First Amended Complaint, filed in Federal District Court on June 11, 1980, FWDC stated that "There has been no change to the substance of the liability theory or *damages* theories asserted by Plaintiff." 1 Rec. at 66 (emphasis added). In its letter of January 2, 1981, putting Miller on notice that it was demanding arbitration, FWDC asserted:

> This demand for arbitration is made without waiving our claim for *damages* arising out of the matters alleged in Civil Action No. CA 4-80-138-E in the United States District Court for the Northern District of Texas Fort Worth Division, styled *Fort Worth Distributing Company, Inc. v. Miller Brewing Company, et al,* and we continue to insist upon our right to recover in that suit *full damages....*

Id. at 65 (emphasis added). We take FWDC literally at its own word, then in determining that its state court suit could have included, and in fact did include, a claim for damages.

In arguing that its state court suit and its demand for arbitration are based on different causes of action, and that the latter is thus not barred by the doctrine of res judicata, FWDC faces a difficult hurdle. As this court observed recently in *Flores v. Edinburg Consolidated Independent School District,* 741 F.2d 773, 779 (5th Cir.1984), under Texas law "A different cause of action is not merely a different theory of recovery; it should differ in 'the theories of recovery, *the operative facts,* and the

measure of recovery,' *Dobbs v. Navarro,* 506 S.W.2d 671, 673 (Tex.Civ.App.1974) (emphasis added)." As detailed above, the "operative fact" underlying both FWDC's state court suit and its demand for arbitration is the early termination of its Distributorship Agreement with Miller. Without that bedrock fact, neither claim would have any basis.[8] Moreover, it is not altogether clear that the two actions even differ in their theories of recovery or their measures of recovery. As noted amply above, FWDC managed to assess its monetary damages in its Original Petition filed ***501** in state court, and in briefs and other official documents it consistently styled its state court suit an action for damages. We thus conclude that FWDC is barred under the doctrine of res judicata from pursuing essentially the same claim now in arbitration.

V. CONCLUSION

This case has consumed more than its share of judicial resources. We acknowledge that the doctrines of waiver and res judicata are stern ones, and that with more foresight or prescience FWDC might have avoided their harsh consequences. As this case comes before us, however, the equities weigh so strongly in Miller's favor that even a draught from the fabled Pierian Springs would probably not lend FWDC sufficient inspiration to prevail.

We conclude that FWDC has waived its right to arbitration by substantially invoking the judicial process to the considerable inconvenience, detriment, and prejudice of Miller. We conclude further that, even if waiver considerations did not apply, FWDC is barred from arbitration under the doctrine of res judicata because it could have included, and implicitly did include, in its state court proceedings a claim for the damages it now seeks to arbitrate.

Accordingly, we REVERSE and direct the district court to grant Miller Brewing Company's application for a stay of arbitration.

REVERSED.

All Citations

781 F.2d 494

Footnotes

1 FWDC notes in its brief that the gifts, as befits Texas-style bribery, consisted of rifles, hats, and boots. Appellee's Brief at 4.

2 *Cf. Radiator Specialty Co. v. Cannon Mills,* 97 F.2d 318, 319 (4th Cir.1938) ("[I]t is clearly the intention of Congress to provide that the party seeking to enforce arbitration can do so only when not guilty of dilatoriness or delay."); *Prima Paint Corp. v. Flood & Conklin,* 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967) (honoring "clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

3 We are mindful of the admonitions of the Chief Justice and others that arbitration is ordinarily preferable to litigation, but to allow arbitration on top of the protracted litigation in this case would be to add insult to injury. The doctrine of res judicata, *see* section IV *infra,* and its cousin collateral estoppel have probably done more to prevent useless and wasteful litigation than arbitration ever could.

4 The issue of arbitrability under the United States Arbitration Act is a matter of federal substantive law. *Prima Paint,* 388 U.S. at 402-08, 87 S.Ct. at 1805-08; *In re Mercury Const. Corp.,* 656 F.2d 933, 938-41 (4th Cir.1981), *aff'd, Moses Cone,* 460 U.S. at 23-26, 103 S.Ct. at 941-42; *E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas,* 551 F.2d 1026, 1040 (5th Cir.1977). We thus dismiss out of hand FWDC's citation of 60 Tex.Jur.2d 199 for the propositions that "waiver is a question of fact based largely on intent. It is defined as 'an intentional release, relinquishment, or surrender of a right that is at the time known to the party making it.' "

5 *See also Midwest Window Systems v. Amcor Industries,* 630 F.2d 535 (7th Cir.1980) (right to arbitration waived even where issue submitted to court was non-arbitrable).

6 *Cf. Penn Tanker Co. of Delaware v. C.H.Z. Rolimpex, Warszawa,* 199 F.Supp. 716, 718 (S.D.N.Y.1961); *Commercial Solvents Corp. v. Louisiana Fertilizer Co., Inc.,* 20 F.R.D. 359, 361 (S.D.N.Y.1957) ("By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations."); Note, *Developments in*

the Law-Discovery, 74 Harv.L.Rev. 940, 943 (1961) (expense of discovery as inconsistent with desire to arbitrate).

7 In applying the doctrine of res judicata we look to the effect that a Texas state court would give to a prior Texas state court judgment. *Flores v. Edinburg School District,* 741 F.2d 773 (5th Cir.1984); *Southern Jam, Inc. v. Robinson,* 675 F.2d 94, 97-98 (5th Cir.1982); *Allen v. McCurry,* 449 U.S. 90, 95-96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980) (interpreting 28 U.S.C. § 1738); Restatement (Second) of Judgments § 134 (Tent. Draft No. 7, 1980).

8 *See Flores,* 741 F.2d at 777 (" '[A] different cause of action' is one that proceeds not only on a sufficiently different legal theory but also on a different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be maintained even if all the disputed factual issues raised in the plaintiff's original complaint are conceded in the defendant's favor.")

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614 F.2d 389
United States Court of Appeals,
Fourth Circuit.

William G. BURTON t/a William Burton Nurseries, Appellant,
v.
R. E. BUSH; John J. Digges; R. A. Lawson, Jr.; Bush Development Corporation, a Virginia Corporation; Virginia South-Eastern Corporation, a Virginia Corporation; Monroe Construction Corporation, a Virginia Corporation; Baycon Corporation, a Virginia Corporation; All doing business as: The Bush Organization, a General Partnership, Appellees.

No. 78-1826.
|
Argued Dec. 3, 1979.
|
Decided Feb. 7, 1980.

Nursery appealed from a judgment of the United States District Court for the District of Maryland, Herbert F. Murray, J., upholding an arbitration award to an owner of property in the amount of $83,258.35. The Court of Appeals, Donald Russell, Circuit Judge, held that a litigant in arbitration proceedings had no right to pretrial discovery.

Affirmed.

West Headnotes (4)

[1] **Alternative Dispute Resolution**
Mode and Course of Proceedings in General
Alternative Dispute Resolution
Discovery and Depositions

When contracting parties stipulate that dispute will be submitted to arbitration, they relinquish right to certain procedures and niceties which are normally associated with formal trial, including pretrial discovery.

20 Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Discovery and Depositions

Party to arbitration of contract between owner and nursery had no right to pretrial discovery.

6 Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Subpoenas

While arbitration panel may subpoena documents or witnesses, litigating parties have no comparable privilege.

8 Cases that cite this headnote

[4] **Damages**
Particular Cases

Arbitration award of $83,258.35 to owner of real property from nursery on basis of claim for breach of contract to install trees, shrubs and sod was supported by the facts.

Cases that cite this headnote

Attorneys and Law Firms

***389** Samuel Gordon, Gaithersburg, Md. (Robert H. Haslinger, Gordon & Haslinger, Gaithersburg, Md., on brief), for appellant.

S. Leonard Rottman, Baltimore, Md. (Tabor & Rottman, Baltimore, Md., on brief), for appellees.

Before WINTER, RUSSELL and HALL, Circuit Judges.

Opinion

*390 DONALD RUSSELL, Circuit Judge:

William G. Burton, t/a William Burton Nurseries seeks review of an arbitration panel's award in favor of the appellees The Bush Organization. Burton sued The Bush Organization for failure to make payments as called for under the terms of their contract. The Bush Organization counterclaimed for damages based on the alleged breach of certain guarantees in the contract.

In January and February of 1974 the parties entered into two contracts which required Burton to install trees, shrubs, and sod at the appellee's job site. The relationship between the parties was strained by difficulties encountered during the course of performance. Finally in April of 1975 Bush notified Burton that he was replacing him on the contract work. A dispute arose over Burton's claim of payment for part performance and Bush's claim for breach of warranty. The parties agreed to submit their dispute to an arbitration panel, and on February 6, 1978 an award was rendered in favor of the appellees in the amount of $83,258.35.

The appellant challenged the arbitration award on two grounds. First, Burton contended that the award should be set aside due to unfair surprise and prejudice. When testimony before the arbitration panel concluded on September 8, 1977 all parties agreed that the proceedings would be continued to October 27th. On October 5th Burton's counsel requested a continuance until the latter part of November. Counsel argued that a continuance was necessary in light of the prejudice visited upon his client through the "surprise" testimony of opposition witnesses. This request was denied. Given the facts of this case, such an argument is unbelievable, and was so found by both the arbitration panel and the district court.

When the panel first convened more than two years had elapsed since The Bush Organization had given notice to Burton that his work was unsatisfactory. During this time period Burton was well aware of Bush's complaints. The gist of these complaints was that Burton's trees were dying and his grass would not grow. The obvious theory underlying Bush's claim was that these unfortunate results were caused by Burton's negligence. Since the final demise of the trees and the grass was not in issue, Burton knew or should have known that a proper defense required some showing of alternative causation. Thus, even though the applicable arbitration rules did not provide for pre-trial discovery, and the parties chose to forego any voluntary or gratuitous discovery, it cannot be said that Burton was somehow taken unawares.

[1] [2] [3] An arbitration hearing is not a court of law. Walden v. Local 71, International Brotherhood of Teamsters, (4th Cir. 1972) 468 F.2d 196. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. Great Scott Markets Inc. v. Local Union No. 337, International Brotherhood of Teamsters, (E.D.Mich.1973) 363 F.Supp. 1351; Commercial Solvents Corporation v. Louisiana Liquid Fertilizer Co., (S.D.N.Y.1957) 20 F.R.D. 359. One of these accoutrements is the right to pre-trial discovery. While an arbitration panel may subpoena documents or witnesses, Commercial Metals Co. v. International Union Marine Corp., (S.D.N.Y.1970) 318 F.Supp. 1334; the litigating parties have no comparable privilege. Foremost Yarn Mills, Inc. v. Rose Mills, Inc., (E.D.Pa.1960) 25 F.R.D. 9; 9 U.S.C. s 7; Fed.Rules Civ.Proc. Rule 81(a)(3), 28 U.S.C.; 74 Harv.L.Rev. 940, 943 (1961); 4 Moore's Fed. Practice s 26.54 (2d Ed. 1975).

Since Burton never applied to the district court for an order to compel discovery we need not consider those cases allowing discovery upon a showing of special need, Bigge Crane and Rigging Co. v. Docutel Corp., (E.D.N.Y.1973) 371 F.Supp. 240; Ferro Union Corp. v. SS Ionic Coast, (S.D.Tex.1967) 43 F.R.D. 11; International Association of Heat and Frost Insulators and Asbestos Workers, Local 66, AFL-CIO v. Leona Lee Corp., (5th Cir. 1970) 434 F.2d 192; *391 Penn Tanker Co. v. C. H. Z. Rolimpex, Warszawa, (S.D.N.Y.1961) 199 F.Supp. 716; or need we consider those cases allowing the district court to permit limited discovery as to the arbitrability of a particular dispute, H. K. Porter Co. Inc. v. Local 37 United Steelworkers of America, AFL-CIO, (4th Cir. 1968) 400 F.2d 691; International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Westinghouse Electric Corp., (S.D.N.Y.1969) 48 F.R.D. 298. In passing, however, we note that the former cases would not have aided the appellant since there is a total absence of special need or hardship. The latter group of cases is equally unpersuasive, since there was no contention that the controversy in question was not the proper subject of arbitration.

While at least one commentator has referred to the limited discovery provisions during arbitration as a return to the "sporting theory of justice," Jones, The Accretion of Federal Power in Labor Arbitration The Example of Arbitral Discovery, 116 Penna.L.Rev. 830, 837 (1968); we believe that such limitations are in keeping with the policy underpinnings of arbitration speed, efficiency, and reduction of litigation expenses.

[4] Burton's second contention that the arbitration award was contrary to the facts as established at the hearing is without merit.

We conclude that the arbitration award was correct and accordingly we affirm the judgment of the district court.

AFFIRMED.

All Citations

614 F.2d 389

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Thursday, November 2, 2017
2:00 p.m. – 2:50 p.m. & 3:00 p.m. – 3:50 p.m.

BREAKOUT SESSION

Privilege and its Perils: Insights and Strategies for Addressing Privilege Issues in Arbitrations

SESSION MATERIALS:

PRESENTED BY:

Patricia Fox, AIG

Chuck Ehrlich, ARIAS•U.S. Certified Arbitrator

Nick Cramb, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Privilege and its Perils

I. Basics of Attorney-Client Privilege

A. State law applies the rule of decision.

1. Federal Rule of Evidence 501 provides, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

2. Generally speaking, there is a high degree of uniformity between and among states. *See, e.g., Phillips v. C.R. Bard, Inc*., 290 F.R.D. 615, 625 (D.Nev. 2013) ("Nonetheless, Bard recognizes that under New Jersey, Arizona, and Nevada law, the basic substantive elements of the attorney-client privilege are the same . . . [U]nder each state's law, confidential communications between an attorney and client made for the purpose of giving or receiving legal advice are privileged.") *Id.* (internal citations omitted).

B. Purpose of attorney-client privilege

1. "The principle upon which these communications are protected from disclosure applies to every attempt to give them in evidence, without the assent thereto of the person making them. That principle is, that he who seeks aid or advice from a lawyer ought to be altogether free from the dread that his secrets will be uncovered; to the end that he may speak freely and fully all that is in his mind." *Bacon v. Frisbie*, 80 N.Y. 394, 400 (1880); *see also Priest v. Hennessy*, 51 N.Y.2d 62 (1980).

2. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980).

3. The purpose of the protection is to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him or her to give sound and informed advice and to encourage full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of law and administration of justice. *Upjohn, Co. v. United States*, 449 U.S. 383, 389 (1981)

C. Elements of the Privilege

1. Protects confidential communications between lawyer and client that relate to the client's seeking of legal advice or services.

2. Communications need not involve litigation – applies to any matters where the client seeks legal advice. *Bacon v. Frisbie*, 80 N.Y. at 400.

3. "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *U.S. v. United Shoe Machinery Corp*., 89 F.Supp. 357, 358-59 (D. Mass. 1950); *see also People v. Mitchell*, 58 N.Y.2d 368, 373 (1983).

4. In the United States, privilege can be asserted as to communications from the client to/from its in-house counsel, provided the other elements of the privilege are met. *U.S. v. United Shoe Machinery Corp*., 89 F.Supp. 357, 360 (D. Mass. 1950).

5. "The [attorney-client] privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel." *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588, 592 (1989).

6. Communications relating solely to non-legal business matters are not privileged. *People v. Belge*, 1977, 59 A.D.2d 307, 399 N.Y.S.2d 539 (4th Dep't); *see also U.S. v. United Shoe Machinery Corp*., 89 F.Supp. 357, 359-60 (D. Mass. 1950) ("Where a communication neither invited nor expressed any legal opinion whatsoever, but involved the mere soliciting or giving of business advice, it is not privileged."); *TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143, 146 (S.D.N.Y. 2003); *Koumoulis v. Indep. Fin. Mktg. Group*, 295 F.R.D. 28, 48 (E.D.N.Y. 2013).

7. The test when the communication involves a mixture of legal and business considerations is whether the legal character of the communication is "predominant." *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588, 594 (1989); *United States v. Davis*, 131 F.R.D. 391, 401 (S.D.N.Y. 1990); *In re Currency Conversion Fee Antitrust Litig*., 2002 U.S.Dist.LEXIS 21196, at *5-6 (S.D.N.Y. Nov. 1, 2002).

8. Generally, the protection of privilege extends only to communications, not facts. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

9. The mere delivery of a document to the attorney does not make it privileged. *King v. Ashley*, 96 A.D. 143, 146 (1904).

II. Work-Product Doctrine

A. The work-product doctrine is a rule of discovery.

B. Codified in FRCP 26(b)(3)(A) and state rules of procedure.

C. Protects materials that are prepared in anticipation of litigation from discovery.

D. Protection for work product can be overcome if:

1. the materials are otherwise discoverable (relevant, not privileged) and

2. the party seeking discovery shows that it (i) has a "substantial need" for the materials and cannot obtain their equivalent without "undue hardship"

3. BUT, even if this showing (substantial need and undue hardship) is made, in ordering discovery, the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

   FRCP 26(b)(3)(B)

E. However, "[d]ocuments or portions of documents that qualify as "opinion work product" are 'entitled to virtually absolute protection.'" *United States v. Mount Sinai Hospital*, 185 F.Supp.3d 383, 390 (S.D.N.Y. 2016)

III. Waiver

A. "At Issue" Doctrine

1. "'At issue' waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information." *Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust,* 43 A.D.3d 56, 63-64 (1st Dept. 2007).

   a. Where a party asserts reliance upon the advice of counsel as an affirmative defense (usually to a claim of bad faith) that party puts the privileged advice "at issue" and "waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel's advice was sought." *Village Bd. of Village of Pleasantville v. Rattner,* 130 A.D.2d 654, 655 (2nd Dept 1987).

b. A party does not put its privileged communications "at issue" merely by alleging that it was, for instance, not negligent, or that it did not engage in willful misconduct. *See Bank of New York v. River Terrace Associates, LLC*, 23 A.D.3d 308, 311 (1st Dept. 2005); *American Re-Insurance Co. v. U.S. Fidelity & Guar. Co.*, 40 A.D.3d 486, 492 (1st Dept. 2007) (Ceding insurer does not put privileged communications at issue merely by alleging that its settlement was reasonable and in good faith, nor are the communications put in issue by reinsurer's contention that a portion of the payment was made in settlement of bad faith claims).

2. "[T]hat a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself "at issue" in the lawsuit[.]" *Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 64 (1st Dept. 2007); *see also American Re-Insurance Co. v. U.S. Fidelity & Guar. Co.*, 40 A.D.3d 486 (1st Dept. 2007) ("The only category of potential materials that is subject to disclosure based on substantial need is trial preparation materials.").

3. "Disclosure of the mere fact of a consultation is no basis for a waiver as to the content of that consultation." *AMBAC Indem. Corp. v. Bankers Trust Co.*, 151 Misc.2d 334, 341 (NY Supreme NY Cty 1991).

4. A cedent does not waive the privilege by seeking coverage under its reinsurance. *AIU Insurance Company v. TIG Insurance Co.*, 2008 WL 5062030, *12-13 (S.D.N.Y. 2008).

B. Disclosure to third parties

1. General rule: "communications between an attorney and a client that are made in the presence of or subsequently disclosed to third parties are not protected by the attorney-client privilege." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 620 (2016).

2. Exceptions

a. Inadvertent disclosure

b. Common Interest

(1) "[A]n attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in furtherance of that common legal interest." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 620 (2016).

(2) The New York Court of Appeals recently held that the common interest doctrine permits a limited disclosure of confidential communications only to parties who share (i) "a common legal (as opposed to business or commercial) interest" (ii) "in pending or reasonably anticipated litigation." *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 N.Y. 3d 616, 622 (2016).

(3) In light of *Ambac* and other courts finding that cedents and reinsurers do not share a common interest, cedents risk waiving the attorney-client privilege by sharing privileged communications with reinsurers. *See, e.g., Mass. Bay Ins. Co. v. Stamm*, 700 N.Y.S.2d 707, 708 (App. Div. 2000) ("the insurers waived any attorney-client privilege with respect to documents transmitted to the reinsurers"); *Progressive Casualty Insurance Co. v. Federal Deposit Insurance Corp*, 49 F. Supp. 3d 545 (N.D. Iowa Oct. 3, 2014) ("Progressive also failed to establish that an agreement between it and its reinsurers established a 'cooperative and common enterprise towards an identical legal strategy.'"); *Bancinsure, Inc. v. McCaffree* (D. Kan. Oct. 4, 2013) (same).

(4) However, courts grappling with these issues have reached varying results. *See, e..g, ARTRA 524(g) Asbestos Trust v. Transp. Ins. Co.* 2011 U.S.Dist.LEXIS 110272, at *45 (N.D.Ill. Sep. 28, 2011) (common interest exists in cedent/reinsurer relationship); *Hawker v. Bankinsurance, Inc.*, 2013 WL 6843088 (E.D.Cal. Dec. 27, 2013) (same); *United States v. BDO Seidman*, 492 F.3d 806, 816 (7th Cir. 2007), cert. denied sub. nom *Cuillo v. U.S.*, 522 U.S. 1242 (2008) (no litigation requirement).

(5) Even where there is a common interest, the doctrine does not provide a means for one party to force production of the privileged documents of another. *See, e.g., Am. Re-Insurance Co. v. United States Fid. & Guar. Co.,* 40 A.D.3d 486, 491 (App. Div. 1st Dept. 2007) ("the parties' interests in the present action are indisputably adverse, and 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 USF & G's claimed privileges.")

C. Audit Rights

1. Access to Records and Cooperation Clauses do not require disclosure of privileged communications

a. "Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges. To hold otherwise would render these privileges meaningless." *Gulf Ins. Co. v. Transatlantic Reinsurance Co.,* 13 A.D.3d 278, 279 (1st Dept. 2004).

b. "Paragraphs four and five of the arbitration award discuss the access to records arguments, stating in part: 'The Access to Records clause does not grant Respondents access to Petitioners' documents protected by the attorney-client privilege or the work product doctrine (hereinafter "Confidential Material"). Petitioners have sole discretion to determine the extent to which access to and copies of Confidential Material will be provided.'" *Liberty Mut. Ins. Co. v. Nationwide Mut. Ins. Co.* 87 Mass.App.Ct. 1127, fn. 4 (2015) (affirming arbitration award denying access to privileged documents).

c. "Although a reinsured may contractually be bound to provide its reinsurer with all documents or information in its possession that may be relevant to the underlying claim adjustment and coverage determination, absent more explicit language, it does not through a cooperation clause give up wholesale its right to preserve the confidentiality of any consultation it may have with its attorney concerning the underlying claim and its coverage determination. Provided that the reinsured has been forthright in making available to its reinsurer all factual knowledge or documentation in its possession relevant to the underlying claim or the handling of that claim, it has satisfied its obligations under the cooperation clause.

> The reinsurer is not entitled under a cooperation clause to learn of any and all legal advice obtained by a reinsured with a 'reasonable expectation of confidentiality.'" *North River Ins. Co. v. Philadelphia Reinsurance Corp*., 797 F.Supp. 363, 369 (D. N.J. 1992); *Travelers Cas. & Surety Co. v. Century Indemn. Co*., 2011 WL 5570784 (D.Conn. Nov. 16, 2011) ("reinsurer is not entitled under a cooperation clause to learn … legal advice obtained by a reinsured with a reasonable expectation of confidentiality.")

IV. Conclusion

A. Being mindful of the contours of the attorney-client privilege, exceptions thereto, and methods of waiver is critical, especially in light of jurisdictional differences.

Thursday, November 2, 2017
2:00 p.m. – 2:50 p.m. & 3:00 p.m. – 3:50 p.m.

BREAKOUT SESSION

The Gatekeeper: A Practical Guide to Resolving Evidentiary Disputes at Hearing

SESSION MATERIALS:

PRESENTED BY:

Nina Caroselli, RiverStone Resources, LLC

John F. Chaplin, Compass Reinsurance Consulting LLC

Catherine Isely, Butler Rubin Saltarelli & Boyd LLP

THE GATEKEEPER: A PRACTICAL GUIDE TO RESOLVING EVIDENTIARY DISPUTES AT HEARING[1]

In Breakout Session #1, panelists will present participants with a series of evidentiary disputes that arise in a hypothetical arbitration between a policyholder and its insurer. Participants will then rule anonymously through live e-polling.

Panelists will presume participants are familiar with the attached hypothetical, which provides background facts necessary to make considered rulings on the evidentiary disputes. To simulate the speedy rulings arbitrators must make at hearing, the actual evidentiary disputes will not be presented in advance. The outline below provides guidance that participants may find useful in preparing to rule.

Following a review of voting results on the evidentiary disputes, panelists and participants will discuss how a court hearing a motion to vacate might consider challenges to participants' rulings.

I. IDENTIFY THE RULES

Chapter III: The Organizational Meeting
3.13, Comment D: The Panel should consider whether the relevant arbitration clause designates specified procedural rules (e.g., the American Arbitration Association Commercial Arbitration Rules, or the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes), whether particular rules apply to an international arbitration, and/or whether the parties have agreed to any other set of procedural rules.
ARIAS-U.S. Practical Guide, available at https://www.arias-us.org/arias-us-dispute-resolution-process/practical-guide.

A. Contract Language: Rules Not Specified

Sample Clause: The Arbitration Panel shall not be obligated to follow the strict rules of law or evidence.

Sample Clause: The Panel shall interpret this contract as an honorable engagement, and shall not be obligated to follow the strict rules of evidence. In making their decision, the Panel shall apply the custom and practice of the insurance and reinsurance industry, with a view to affecting the general purpose of this contract.

[1] These written materials, and any associated commentary as part of Breakout Session #1, are provided for general educational purposes. They are not intended to be, and should not be taken as, legal advice. Positions described in these materials or by the presenters during Breakout Session #1 are offered for discussion purposes, and do not necessarily reflect those of the presenters or their organizations or clients.

B. Contract Language: Rules Specified

1. ARIAS-U.S. RULES FOR THE RESOLUTION OF U.S. INSURANCE AND REINSURANCE DISPUTES, available at http://www.arias-us.org/wp-content/uploads/2016/09/ARIASU.S.-Rules.pdf

14. ARBITRATION HEARING

* * *

14.2 The Panel may decide whether and to what extent there should be oral or written evidence or submissions.

14.3 The Panel shall not be obligated to follow the strict rules of law or evidence.

* * *

14.4 Subject to the control of the Panel, the Parties may question any witnesses who appear at the hearing. Panel members may also question such witnesses.

* * *

14.6 The Panel shall require that witnesses testify under oath, unless waived by all Parties. The Panel shall have the discretion to permit testimony by telephone, affidavit, or recorded by transcript, videotape, or other means, and may rely upon such evidence as it deems appropriate. Where there has been no opportunity for cross examination by the other Party, such evidence may be permitted by the Panel only for good cause shown. The Panel may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

* * *

14.8 When the Panel decides that all relevant and material evidence and arguments have been presented, the Panel shall declare the evidentiary portion of the hearing closed.

2. AAA COMMERCIAL ARBITRATION RULES, available at https://www.adr.org/sites/default/files/Commercial%20Rules.pdf

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses

for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.
(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute, and, when involving witnesses, provide an opportunity for cross-examination.
(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-34. Evidence
(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.
(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.
(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving confidentiality of communications between a lawyer and client.
(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

II. SEEK FAIRNESS AND EFFICIENCY

A. **ARIAS-U.S. CODE OF CONDUCT**, available at https://www.arias-us.org/arias-us-dispute-resolution-process/code-of-conduct

CANON II
FAIRNESS: Arbitrators shall conduct the dispute resolution process in a fair manner and shall only serve in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.

CANON VII
ADVANCING THE ARBITRAL PROCESS: Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings, and written awards.

* * *

Comment 3. Arbitrators should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

Comment 4. Arbitrators should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage (and, if necessary, order) similar conduct of all participants in the proceedings.

Comment 5. Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them understand and assess the testimony; however, arbitrators should refrain from assuming an advocacy role and should avoid interrupting counsel's examination unless clarification is essential at the time.

B. **ARIAS-U.S. PRACTICAL GUIDE,** available at https://www.arias-us.org/arias-us-dispute-resolution-process/practical-guide

Chapter V: Hearing and Award
5.1, Comment: The Panel should carefully consider any request to postpone a hearing, including whether a delay could unfairly disadvantage one party. The Panel and the parties should also endeavor to complete the testimony and argument within the allotted time. Requests to reconvene to hear additional testimony in the event the allotted time is not sufficient to complete the hearing should be granted selectively. The Panel, however, should afford the parties ample time to present their case and should allow continuances in appropriate cases.

C. **FEDERAL RULES OF EVIDENCE**, available at http://www.uscourts.gov/sites/default/files/rules-of-evidence.pdf

RULE 102. These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

RULE 611. Mode and Order of Examining Witnesses and Presenting Evidence
(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
(1) make those procedures effective for determining the truth;
(2) avoid wasting time; and
(3) protect witnesses from harassment or undue embarrassment.
(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
(1) on cross-examination; and
(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

III. ASSESS THE RELEVANCE AND RELIABILITY OF EVIDENCE

A. RELEVANCE

RULE 401. Test for Relevant Evidence
Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

Advisory Committee Notes: ". . . The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. . ."

RULE 402. General Admissibility of Relevant Evidence
Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

RULE 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Advisory Committee Notes: "The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful that merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. . . . While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of evidence. . . ."

RULE 406. Habit; Routine Practice
Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Advisory Committee Notes: ". . . It describes one's regular response to a repeated specific situation. . . . The doing of the habitual acts may become semi-automatic."

B. RELIABILITY

RULE 602. Need for Personal Knowledge
A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Advisory Committee Notes: "[T]he rule . . . is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information.'"

RULE 701. Opinion Testimony by Lay Witnesses
If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

RULE 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * *

(c) **Hearsay.** "Hearsay" means a statement that:
  (1) the declarant does not make while testifying at the current trial or hearing; and
  (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

* * *

RULE 803. Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant Is Available as a Witness

* * *

(5) **Recorded Recollection.** A record that:
  (A) is on a matter the witness knew about but now cannot recall well enough to testify fully and accurately;
  (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
  (C) accurately reflects the witness's knowledge.

  If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
  (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
  (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
  (C) making the record was a regular practice of that activity;
  (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
  (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:
- (A) the evidence is admitted to prove that the matter did not occur or exist;
- (B) a record was regularly kept for a matter of that kind; and
- (C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

RULE 807. Residual Exception

(a) **In General.** Under the following circumstances, a hearsay statement is not excluded . . .:
- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

* * *

IV. RULE ON EVIDENTIARY DISPUTES

A. EVIDENTIARY DISPUTE HYPO #1

B. EVIDENTIARY DISPUTE HYPO #2

C. EVIDENTIARY DISPUTE HYPO #3

D. EVIDENTIARY DISPUTE HYPO #4

E. EVIDENTIARY DISPUTE HYPO #5

V. UNDERSTAND THE IMPACT

Survey of decisions where challenges to award included evidentiary rulings:

Panel Award Confirmed

Petroleum Separating Co. v. Interamerican Ref. Corp., 296 F.2d 124 (2d Cir. 1961) (affirming district court's denial of motion to vacate award, explaining that arbitrators were entitled to accept hearsay evidence from both parties and cautioning that parties who "wish to rely on such technical objections . . . should not include arbitration clauses in their contracts").

In re Compudyne Corp., 255 F. Supp. 1004 (E.D. Pa. 1966) (denying motion to vacate award, despite arbitrator's exclusion of other project testimony as irrelevant and alleged admission as hearsay, explaining that "[m]ere errors on points of evidence have never been considered adequate grounds for the vacation of an award").

Barker v. Gov't Emps. Ins. Co., 339 F. Supp. 1064 (Dist. D.C. 1972) (denying motion to vacate award, finding that party's assertion that arbitrator abused his authority in admitting certain hospital records into evidence was "entirely lacking in merit").

Farkas v. Receivable Fin. Corp., 806 F. Supp. 84 (E.D. Va. 1992) (enforcing arbitration award, holding that "as a matter of law, the arbitrators did not exceed their power by considering hearsay evidence").

Warnes, S.A. v. Harvic Int'l, Ltd., No. 92 Civ. 5515(RWS), 1995 WL 261522 (S.D.N.Y. May 4, 1995) (denying motion to vacate award, where party failed to show that arbitrator's refusal to hear rebuttal testimony resulted in fundamentally unfair trial).

Areca, Inc. v. Oppenheimer & Co., 960 F. Supp. 52 (S.D.N.Y. 1997) (denying motion to vacate award for refusal to permit CFO's testimony, because testimony would have been either cumulative of other evidence or documentary evidence or simply irrelevant and scope of inquiry afforded petitioners was sufficient to enable the arbitrators to make an informed decision and to provide petitioners a fundamentally fair hearing).

Nationwide Mut. Ins. Co. v. First State Ins. Co., 213 F. Supp. 2d 10 (D. Mass. 2002) (denying petition to vacate, finding that cedent had received a full and adequate hearing on aggregation issue following two years of discovery, briefing and three days of evidence, and panel's denial of motion to reopen discovery was reasonable).

Commercial Risk Reinsurance Co. v. Sec. Ins. Co. of Hartford, 526 F. Supp. 2d 424 (S.D.N.Y. 2007) (denying motion for reconsideration of court's order denying motion to vacate award, where party argued panel improperly excluded testimony and related documents of damages witness).

OneBeacon Am. Ins. Co. v. Swiss Reinsurance Am. Corp., No. 09-CV-11495-PBS, 2010 WL 5395069 (D. Mass. Dec. 23, 2010) (denying motion to vacate award where party had "had plentiful opportunities to present evidence, and what limitations the Panel did place on witness testimony were entirely within the bounds of its discretion").

Century Indem. Co. v. AXA Belgium, No. 11 Civ. 7263(JMF), 2012 WL 4354816 (S.D.N.Y. Sept. 24, 2012) (denying motion to vacate award, finding that "[t]he fact that respondent declined to call certain witnesses or present certain evidence within the time allotted . . . did not constitute fundamental unfairness").

Rubenstein v. Advanced Equities, Inc., No. 13 Civ. 1502(PGG), 2014 WL 1325738 (S.D.N.Y. Mar. 31, 2014) (denying motion to vacate award, where panel reasonably concluded that additional evidence concerning common scheme argument was not

pertinent and petitioners had not shown that they were unfairly prejudiced by panel's refusal to hear evidence).

Amerisure Mut. Ins. Co. v. Everest Reinsurance Co., 109 F. Supp. 3d 969 (E.D. Mich. 2015) (granting motion to confirm award, where reinsurer failed to show that any evidentiary and procedural errors deprived it of a fair arbitration hearing, explaining that "'evidentiary decisions of arbitrators should be viewed within unusual deference'").

Panel Award Vacated

Harvey Aluminum v. United Steelworkers of Am., AFL-CIO, 263 F. Supp. 488 (C.D. Cal. 1967) (granting petition to vacate award because arbitrator's preclusion of pertinent and material testimony as not proper rebuttal evidence reflected unfair hearing, in the absence of any warning by the arbitrator as to the evidentiary rules to be followed).

Hoteles Condado Beach, La Concha and Convention Ctr. v. Union de Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985) (affirming district court's vacatur of award, where arbitrator accepted trial transcript into evidence but refused to give any weight to unquestionably relevant evidence, effectively denying the party an opportunity to present any evidence in the proceedings).

Westvaco Corp. v. Local 579, United Paperworkers, Int'l Union, No. 90-30091-F, 1992 WL 121372 (D. Mass. Mar. 5, 1992) (adopting magistrate judge's recommendation to vacate award where arbitrator seeking to decrease disputes between the parties decided to accept contract interpretation of arbitrator in prior proceeding as long as it was not clearly erroneous, but then excluded evidence offered by party as to whether that prior interpretation was clearly erroneous).

Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997) (vacating award, finding that panel's refusal to continue the hearings to allow testimony of former president, temporarily unavailable due to wife's illness, amounted to fundamental unfairness and misconduct where there was no reasonable basis for the panel to determine that omitted testimony would be cumulative).

ADDITIONAL ARIAS-U.S. RESOURCES

The ARIAS-U.S. Quarterly, available at https://www.arias-us.org/publications/quarterly-archives, has published articles addressing evidentiary issues of interest to arbitrators and arbitrating parties, including:

- Ronald S. Gass, *Panel Limits on Depositions and Hearing Testimony Did Not Amount to Arbitral Misconduct*, ARIAS-U.S. Quarterly, First Quarter 2011, Vol. 18, No. 1, at 25-26.

- Patricia Taylor Fox and Wm. Gerald McElroy, Jr., *Evidentiary Rules in Reinsurance Arbitrations*, ARIAS-U.S. Quarterly, Second Quarter 2009, Vol. 16, No. 2, at 2-7.

- Robert M. Hall, *Late Named Witnesses: What's a Panel to Do?*, ARIAS-U.S. Quarterly, Second Quarter 2008,

- Vol. 15, No. 2, at 28-29.

- John M. Nonna, *The Power of Arbitrators*, ARIAS-U.S. Quarterly, Winter 1997, Vol. 3, No. 5, at 1, 3-5.

In the Matter of the Arbitration between WidgetKicks and ACME Insurance Company

WidgetKicks is an emerging online athletic shoe retailer founded by Chase Hollywood, a former child actor and husband of heiress and acclaimed humanitarian, Alotta Fortune. WidgetKicks' online-only platform is "the" destination for must-have, celebrity-designed footwear, ranging in price from $1,000 to $5,000 per pair. Each year on New Year's Day, WidgetKicks announces three A-list celebrities who have created portfolios, or limited edition shoe designs, in exchange for WidgetKicks' donation of a share of the sales to their chosen charity. Through a massive public relations campaign at year end, WidgetKicks builds consumer excitement in anticipation of its New Year's Day announcement, and WidgetKicks' customers race to be the first to buy the latest releases before a portfolio sells out. The footwear has both artistic and celebrity memorabilia appeal among high-end collectors, and successful purchasers have been able to resell the footwear for two or three times the original sales price. In 2015, 60% of WidgetKicks $30 million annual revenue was generated in the first week of the calendar year.

Due to exploding sales growth, Patrick Pushover, WidgetKick's Executive Vice President (and a childhood friend of Fortune), asked broker, Justin Between, to review WidgetKicks' insurance program and obtain robust coverage for the 2016 renewal. On Between's recommendation, WidgetKicks purchased a specialty risk policy issued by ACME Insurance Company, including first party computer security coverage, for the period from June 1, 2016 to June 30, 2017. The declaration page listed a policy aggregate limit of $10 million and a sublimit for cyber extortion loss of $1,000,000 each threat and in the aggregate.

The ACME policy included the following provisions under Insuring Agreements:

> <u>First Party Network Business Interruption</u>
> To indemnify WIDGETKICKS for the actual business interruption loss, in excess of the applicable retention, WIDGETKICKS sustains during the period of restoration as a direct result of an actual and necessary interruption of computer systems caused directly by a failure of computer security to prevent a security breach, provided that such security breach first take place on or after the policy effective date and before the end of the policy period.
>
> <u>Cyber Extortion Threat</u>
> To indemnify WIDGETKICKS for loss incurred by WIDGETKICKS as a direct result of a Cyber Extortion Threat first made against WIDGETKICKS during the policy period. We will reimburse you for a Payment made under duress by or on behalf of WIDGETKICKS with ACME's prior written consent to prevent or terminate a Cyber

Extortion Threat and resulting from a Cyber Extortion Threat that first occurs during the policy period.

The ACME policy contained the following definitions:

"Business Interruption Loss" means the actual income loss and expense incurred during restoration, and shall not include loss arising out of liability to a third party, legal expenses, or loss resulting from unfavorable business conditions.

"Cyber Extortion Threat" means any threat or related series of threats to intentionally attack a computer system for the purpose of coercing an Insured into a Payment. A related series of threats, or a continuing threat, shall be considered a single Cyber Extortion Threat and deemed to have occurred at the time of the first Cyber Extortion Threat.

The ACME policy contained the following exclusion:

Any Loss arising out of:

(a) any intentional act or omission committed, approved, participated in, or acquiesced in by:

(1) a current or former director, officer or principal (or the equivalent positions) of WIDGETKICKS; or
(2) any current or former employee of WIDGETKICKS other than those persons referenced in subparagraph (a)(1), if any person referenced in subparagraph (a)(1) knew or had reason to know of the intentional act or omission causing the Loss prior to that intentional act or omission.

WidgetKicks' staff worked at a fever pitch throughout the 2016 holiday season in a buildup to the 2017 Portfolio Reveal, scheduled to go live online at 12:17 a.m, Eastern, on January 1, 2017. Then, at 10:00 p.m., Eastern, on December 31, 2016, WidgetKicks' computer systems froze. Access to internal files and customer access to the online store were both blocked. Hollywood received a panicked call from Pushover, who told Hollywood he didn't know what was wrong with the network, but that he was trying to reach WidgetKick's brilliant, if odd, Technology Specialist, Ima Hacker.

With Pushover screaming into the phone ("We're gonna lose millions! We've got to get back online! The press is gonna have a field day! We'll never recover! No celeb will touch us after this, if we lose the reveal! AHHH!"), Hollywood received a text at 11:15 p.m., Eastern, from an unknown number that read:

STRESSED ABOUT WORK, CHASE? GOOD THING YOU TALKED ALOTTA INTO BUYING BITCOIN, BECAUSE I'VE DECIDED CHARITY STARTS AT HOME – MY HOME. STAND BY. I'LL BE IN TOUCH.

Distracted by Pushover's screaming, and confused by the text, Hollywood told Pushover to try again to reach Hacker, then hung up and paced the floor, waiting for an update. At 12:01 a.m., Eastern, Hollywood got a call from another unknown number. Hollywood later explained that he answered and heard a computerized voice say:

> WIDGETKICKS' NETWORK IS MINE. YOU HAVE EXACTLY ONE HOUR TO TRANSFER $1M IN BITCOIN TO **17VZNX1SN5NtKa8UQFxwQbFeFc3iqRYhem**. THIS IS YOUR ONLY CHANCE. PAY AND I'LL RELEASE YOUR SYSTEM. CALL ANYONE AND WIDGETKICKS IS OVER. I WILL KNOW. DO NOT DOUBT ME. THERE WILL BE NO FURTHER COMMUNICATIONS.

As soon as Hollywood hung up, Pushover called with an update, explaining that he had gotten ahold of Hacker, and Hacker was heading up WidgetKicks' efforts to get the system up and running in time for the 2017 Portfolio Reveal. Pushover said Hacker thought it could be a cyber ransom attack, but was telling Pushover not to pay any ransom demanded, because "once you pay once, they won't stop." Hollywood told Pushover about the call demanding the bitcoin transfer. Pushover told Hollywood: "Just do it! Pay it fast! We've only got moments until the Reveal!" Reeling at the thought of the financial loss WidgetKicks was facing (and of explaining this PR nightmare to his wife's publicist), Hollywood raced to his laptop and transferred $1 million in bitcoin at 12:10 a.m., Eastern.

Hollywood waited. Finally, at noon on New Year's Day, Pushover called to tell Hollywood that the system was operational again. WidgetKick's 2017 Portfolio Reveal went live moments later. Exhausted, Pushover and Hacker headed home to sleep.

Meanwhile, Alotta Fortune's publicist had finally located her at an "off-the-grid" glamping resort and think tank. He alerted her that, last night, comedian Johnny Cimmel had interviewed action film megastar Ashley Terrick (one of the 2016 celebrity designers to be "revealed") on his late night talk show. Terrick, who appeared intoxicated, launched into a profanity-laden rant against baseball and apple pie, and boasted of hunting endangered wildlife with an infamous foreign dictator. Alotta Fortune immediately and publicly distanced herself from WidgetKicks, which she described in the press as "Chase's little hobby," noting that the couple had "different interests" and she was focused on her charitable endeavors.

WidgetKicks' January 2017 sales were 10% of its January 2016 sales.

Hacker never returned to work. The FBI considers Hacker a person of interest, but has yet to locate him.

WidgetKicks gave timely notice of a claim to ACME and submitted a statement of loss. After its claim investigation, ACME denied WidgetKicks' claim. Business personnel at WidgetKicks and ACME were unable to resolve the coverage dispute. Eager to avoid publicity that would follow a court case, WidgetKicks and ACME agreed to arbitrate under the following terms:

> Arbitration shall be conducted before a three-person Arbitration Panel appointed as follows. Each party shall appoint one arbitrator, and the parties shall then appoint the

> Umpire pursuant to the ARIAS-U.S. Umpire Selection Procedure. The arbitrators and umpires shall be ARIAS-U.S. certified, shall not be under the control of either party, and shall have no financial interest in the outcome of the arbitration. The parties shall execute an ARIAS-U.S. Form Confidentiality Agreement, and the Arbitration Panel shall not be obligated to follow the strict rules of law or evidence. The decision of a majority of the Arbitration Panel shall be final and binding, except to the extent otherwise provided by the Federal Arbitration Act. The Arbitration Panel shall issue its award in writing. Judgment upon the award may be entered in any court having jurisdiction, pursuant to the Federal Arbitration Act.

The parties accepted the panel at the Organizational Meeting, and engaged in document and deposition discovery over the next six months. The hearing is scheduled for November 2, 2017.

547912

Thursday, November 2, 2017
2:00 p.m. – 2:50 p.m.

BREAKOUT SESSION

Workers' Compensation Disputes in the Insurance and Reinsurance Sphere – A Practical Guide

SESSION MATERIALS:

AVAILABLE IN ONLINE MATERIALS ONLY

Munich vs. American

Reinsurance Commutation

PRESENTED BY:

Mitch Harris, Day Pitney LLP

Kathleen Perlman, BerkleyRe

Jodi Ebersole, Travelers

Bryce Friedman, Simpson Thacher & Bartlett LLP

KEY ISSUES IN WORKERS' COMPENSATION DISPUTES

I. INTRODUCTION

Workers' compensation insurance spawns disputes between policyholders and insurers; and between insurers and reinsurers. While many arbitrators certified by ARIAS•U.S. have handled reinsurance disputes relating to workers' compensation, fewer certified arbitrators have experience handling direct insurance arbitrations under workers' compensation policies. This program discusses the key issues that are commonly the source of disputes in the direct insurance and reinsurance contexts.

II. WORKERS' COMPENSATION INSURANCE

The vast majority of employers in all states (except Texas) are required by law to carry heavily state-regulated workers' compensation insurance. Workers' compensation insurance is a state-mandated, no-fault system under which an employer provides benefits to an employee for injuries sustained on the job. Premiums vary by state and by each employee's job classification. In exchange for obtaining this insurance, employers generally are not subject to tort claims by employees for workplace injuries. Workers' compensation benefits are the employee's exclusive remedy for such injuries.

The standard Insurance Services Office Workers' Compensation and Employers Liability policy is well-understood. While the vast majority of insurance policies are guaranteed cost policies (*e.g.*, a policy where the insured's costs are guaranteed to remain at a stated manual rate), a larger, qualified employer may negotiate loss sensitive policies with its insurer where the employer shares in the risk associated with the losses through a large deductible, retrospective premium, self-insured retention or other like loss-sharing policy. In those instances, many insurers use a separate agreement to document how the employer will guarantee payment of, and

actually pay for, its loss sensitive obligations in a separate agreements referred to as a "program agreement, "deductible agreement" or a "retrospective premium agreement" (collectively, a "PA").[1] PAs are more common with large employers than with small ones, and unlike the standard form workers' compensation policy, PAs often contain arbitration clauses in their dispute resolution clauses.[2] The workers' compensation insurance contract and the PA operate in parallel, but the PA often is not an endorsement or attachment to the workers' compensation policy.

Premium rates for workers' compensation insurance vary depending on the employer's business, loss history (or experience modification) and the job function of each employee. Employees' functions correspond to "job classification codes," also called "class codes."[3] States that set workers' compensation insurance premium rates, have a rate that corresponds to each employee's class code. Where the state does not set the rates, insurers have rates that correspond to class codes. Premium rates are expressed in terms of dollars per $100 of payroll. An experience modifier (which is a multiplier) based on the employer's loss experience is applied to the basic premium rate. The last element the calculation is the employer's annual payroll, which is estimated for the policy period. The standard policy language requires, the insurer to audit the employer's actual payroll after the expiration of the policy and adjust the premium based on the actual payroll, number and class of employees and experience modifier. In guaranteed costs

[1] Policyholders seeking to invalidate PAs call them "side agreements."

[2] Workers' compensation policyholders are not limited to individual employers. Consortia of employers or Professional Employee Organizations ("PEO") also purchase workers' compensation insurance. (A PEO is an independent business that assumes a separate company's employment obligations for a fee.)

[3] Job classification codes are very specific. *See* https://classcodes.com/numerical-ncci-code-list/

policies, an insured employer only pays estimated premiums and whatever premiums, if any, become due after an audit. Under loss sensitive programs, the insured employer usually pays an initial premium and thereafter will also pay retrospective premiums or its share of losses as bargained for when the policy was purchased, calculated periodically after the policy incepts.[4] Workers' compensation policies have a "long tail" in that they cover losses that can continue to develop over an extended period of years. Consequently, the adjustments for loss sensitive policies often continue over the course of many years.

Common features of PAs include:[5]

- Premium financing – PAs often operate as vehicles to finance premium payments. This is often done in two ways. First, a PA may provide for installment payments of basic premiums. Second, retrospective premiums and other loss sensitive payments, discussed below, often are included. Unlike other financing transactions, in which the lender may repossess the item that is financed, the workers' compensation insurance itself cannot return lost value to the insurer. This is why PAs often include collateral provisions, which are discussed below.

- Collateral – Some PAs require that the policyholder post collateral to secure the policyholder's premium payment obligation. PAs often provide that the insurer has exclusive and unilateral right to establish and adjust the amount of collateral the policyholder must post.

[4] PAs may be used in connection with multi-line insurance programs as well. We focus here only on PAs used in workers' compensation insurance programs.

[5] All of these features may be incorporated into a workers' compensation insurance policy, as long as the policy form containing these features is approved by the insurance regulator of the state in which the policy is issued.

- Initial premiums – PAs generally provide that the policyholder must pay an initial premium when the policy incepts. This initial premium usually is the absolute minimum the policyholder must pay.

- Retrospective premiums – PAs generally provide for additional retrospective premiums to be paid based on a formula that principally focuses on incurred losses. Retrospective premiums are usually calculated periodically after the policy incepts. For example, a PA may provide that retrospective premiums will be calculated annually for three years following the policy's inception.

- Deductibles – Some PAs provide for high deductibles under which the policyholder retains responsibility for a substantial amount of risk.

- Audits – Workers' compensation policies provide that the insurer may audit the policyholder's books and records and interview the policyholder's management, to determine the actual exposure base, which is a function of number of employees the policyholder has and those employees' job classifications. PAs can set out more fulsome audit requirements (or a different audit schedule) than would otherwise apply under the policy. Review of the financial condition of the insured is also contemplated within PAs given the collateral requirements within many PAs. Accurate and complete audits are particularly critical for policyholders that perform task-based or seasonal work because the number of employees often fluctuates significantly. Premiums may be adjusted based on these audits.

- Miscellaneous payments – A PA may specify the types taxes, assessments or surcharges that the policyholder must pay in connection with a workers' compensation policy.

- Claim Handling Charges and Development Factors – A PA often outlines "development factors" and claim handling charges to be applied based on the losses incurred or paid for the policy term.

- Attorneys' fees – A PA may provide that the policyholder must pay the fees an insurer incurs in enforcing the policyholders' obligations under the PA.

- Interest - The PA may also provide that the policyholder must pay interest on any amounts the policyholder does not pay when they become due.

- Arbitration – Many PAs contain arbitration clauses.

- Cancellation – Some PAs provide that the insurance program may be cancelled if the policyholder breaches the PA.

Common disputes under PAs include:

- Propriety of PAs – If loss experience – and, by extension, retrospective premium or other loss-sensitive charges – are worse than expected, policyholders often seek to escape the liability by claiming that the PA is unenforceable if it is not approved by the state's insurance regulator. For example, at least one court has held that California bars PAs to the extent that they are not filed and approved by the California Department of Insurance. *See Am. Zurich Ins. Co. v. Country Villa Serv. Corp.*, 2015 U.S. Dist. LEXIS 89452, **695-**696 (C.D. Cal. 2015); Cal. Code Regs., tit. 10, § 2268(b) (An insurer shall not use a policy form, endorsement form, or ancillary agreement except those filed and approved by the Commissioner in accordance with these regulations.")

Although some policyholders have taken the same position in other jurisdictions, they have generally not fared as well. For example, a bankruptcy court concluded that it would be

unjust to allow a policyholder to escape its obligation to pay premiums under a PA after having received the benefit of the insurance, including workers' compensation coverage. *In re Stone & Webster, Inc.*, 547 B.R. 588, 603 (Bankr. D. Del. 2016); *see also Reliance Ins. Co. v. Woodward-Clyde Consultants*, 243 F. App'x 674, 675 n.3 (3d Cir. 2007); *In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 998 (2d Cir. 1996).

Further, most courts have declined to deliver the policyholder a windfall by invalidating PAs on the ground that they are not regulatorily-approved. *See Stone & Webster*, 547 B.R. at 603 – 604. Those courts rely on the longstanding rule that failing to file a form does not render a contract unenforceable as between the parties. "The majority of jurisdictions addressing the effect of an insurer's failure to file an insurance policy form as required by a state statute have concluded that the failure to file . . . does not render it invalid." *John Beaudette, Inc. v. Sentry Ins.*, 94 F. Supp. 2d 77, 140 (D. Mass. 1999) (internal quotation omitted); *id.* at 140-41 (noting that the insurance commissioner, and not a private party, has the right to enforce the filing requirements, and therefore, the insurer's "apparent failure to file" the forms at issue did ***not*** render them "null and void" (emphasis in original)); *see also FDIC v. Am. Cas. Co.*, 975 F.2d 677 (10th Cir. 1992); *Highlands Ins. Co. v. Am. Marine Corp.*, 607 F.2d 1101 (5th Cir. 1979); *Cananwill, Inc. v. Emar Grp., Inc.*, 250 B.R. 533 (M.D.N.C. 1999).

- Arbitrability[6] - Where a PA contains an arbitration clause, a challenge to the PA's propriety as a matter of a particular state's insurance law must be arbitrated. *Home Quality Mgmt. v. Ace Am. Ins. Co.*, 381 F. Supp. 2d 1363, 1366-1367 (S.D. Fla. 2005) (question of

[6] The State of Washington prohibits arbitration provisions in insurance contracts. RCW 48.18.200(1)(b). A Washington appellate court has held that PAs are "part and parcel" of a workers' compensation insurance policy and, therefore, may not require arbitration. *Oak Harbor Freight Lines, Inc. v. XL Ins. Am., Inc.*, 2017 Wash. App. LEXIS 1549 at *13 (Wash. Ct. App. 2017).

whether PA is enforceable under Florida law must be arbitrated); *accord, Matter of Argonaut Insurance Company v Grove Lumber & Building Supply Inc.*, 2008 N.Y. Misc. LEXIS 9418, 5-6 (N.Y. Misc. 2008); *and see, Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."). While the validity of a PA is a question for the arbitration panel, a policyholder's challenge to the *existence* of an agreement to arbitrate is for the court. *Cont'l Cas. Co. v. Staffing Concepts, Inc.*, 2011 U.S. Dist. LEXIS 153827, at *36 (M.D. Fla. Dec. 20, 2011).

- Employee classification – As shown above, employee classification significantly drives workers' compensation premiums. Obviously, the classifications with lower risks of employee injury yield lower premiums. Classification is a major area of dispute from several different perspectives. *See Premium Assignment Corp. v Utopia Home Care, Inc.*, 2010 N.Y. Misc. LEXIS 3107, *7-*8 (N.Y. Misc. 2010). The employer may claim that the insurer mis-classified its employees and, therefore, charged an inflated premium. The insurer may claim that the employer mis-identified the job functions of its employees and, therefore, paid too little premium. As most premium adjustments are primarily based on audits of the employer's records and interviews of the employer's management, unscrupulous employers may misrepresent the number of people they employed during the audit period and the functions those employees performed, among other things. Employers also may attempt to classify employees as "independent contractors,"[7] who are not subject to workers' compensation. As these audits are

[7] Whether an individual qualifies as an independent contractor generally depends on the degree to which the employer could control an individual's performance of his or her work. *See Travelers Prop. Cas. Co. of Am. v. Universal Drywall, LLC*, 85 Mass. App. Ct. 1125, 1125 (2014).

retrospective, employers who had few or no losses during audit period often bristle at paying for the coverage the insurer provided.

- Claim payment – Claim payment frequently is the subject of disputes in the workers' compensation context because claims drive retrospective premiums and the employer's experience modification factor. Employers often argue that insurers paid claims that should not have been paid or were overpaid, usually contending that the insurer failed to investigate the claims properly or was otherwise negligent in evaluating the claims. *See, e.g,. Northwinds Abatement v. Employers Ins.*, 69 F.3d 1304, 1306 (5th Cir. 1995). These types of disputes are fact-specific. Unlike reinsurance agreements, where insurer's claims-handling decisions usually receive deferential treatment under follow-the-fortunes clauses, little or no deference may apply to the same decisions in a dispute between the insurer and a policyholder -- though the policyholder alleging negligent claim-handling will likely bear the burden of proving that assertion. *See, e.g., Stone & Webster*, 547 B.R. at 608.

- Collateral – Policyholders often contend that the insurer is holding more collateral than is necessary to satisfy the policyholder's obligations. These cases also are very fact specific. The degree of deference accorded to the insurer's assessment of its collateral needs will usually depend on the language in the PA.

III. WORKERS' COMPENSATION REINSURANCE

Common Workers' Compensation Reinsurance Disputes

- Familiar issues – Almost all of the issues one encounters in connection with property-casualty reinsurance, including: notice; retention/aggregation; application of limits; number of occurrences/accidents/events; follow the fortunes; and compliance with the duty of utmost good faith, may arise in a workers' compensation reinsurance dispute. There are, however, two particular areas in which workers' compensation reinsurance disputes commonly arise.

- Mandatory commutations – Some workers' compensation reinsurance contracts contain mandatory commutation clauses that require the cedent and reinsurer to commute existing claims or all claims (i.e., projected to ultimate). (These clauses are most prevalent in high-layer workers' compensation contracts.) These provisions offer benefits to the cedent and the reinsurer. The reinsurer limits or terminates its going-forward liability and hedges against potentially catastrophic losses. The ceding company benefits by receiving cash up-front, which it can manage an use consistently with its priorities.

Mandatory commutation clauses are simple in concept but often complex in application. Fundamentally, the clauses generally require that the reinsurer pay the present value of existing losses and, in cases of total commutations, IBNR. As with most things, the devil is in the details. Better commutation clauses often specify in detail: the losses to be commuted; the discount rate; the medical escalation rate; mortality factors; the formula governing the commutation calculation; and other key inputs. Some clauses contain dispute resolution provisions under which an actuary or panel of actuaries will determine the amount the reinsurer must pay. Commutation clauses also may contain sunset provisions (discussed below).

Notwithstanding detailed and specific commutation clauses, disputes over: the scope of such clauses (some may arguably address commutation of known claims only); the manner in which the commutation calculation must be performed (including the order of operations to be applied); the collection and calculation of the data inputs for the commutation formula including medical escalation rates ; .

- Sunset clauses – Sunset clauses, depending on their wording, may bar claims that are not reported to the reinsurer by a specified date. The most notable decisions are sunset clauses are a series from the United States District Court for the District of New Jersey, in which Munich Reinsurance America, Inc. ("Munich") was the cedent and American National Insurance Company ("ANICO") was the reinsurer.[8]

In *Munich* line of cases, Munich reinsured the workers compensation liabilities of Everest National Insurance Company ("Everest") from 1998 to 2001. Munich retroceded some of this risk to ANICO under two agreements. Munich sued ANICO, claiming ANICO improperly failed to pay certain cessions.[9]

> The Munich/ANICO retrocessional agreements contained a sunset clause that provided:
>
> Seven years after the expiry of this Agreement, the Company shall advise the Reinsurer of all claims for said annual period, not finally settled which are likely to result in a claim under this Agreement. No liability shall attach hereunder for any claim or claims not reported to the Reinsurer within this seven year period.

Munich I at __. The agreements contained the following loss notice provisions:

> A. The Company [(Munich)] agrees to advise the Reinsurer [(ANICO)] promptly of all

[8] *See Munich Reinsurance Am., Inc. v. Am. Nat'l Ins. Co.,* 893 F. Supp. 2d 686 (D.N.J. 2012) ("Munich I"); *Munich Reinsurance Am., Inc. v. Am. Nat'l Ins. Co.,*936 F.Supp.2d 475 (D.N.J. 2013) ("Munich II"); and *Munich Reinsurance Am., Inc. v. Am. Nat'l Ins. Co.,* 999 F. Supp. 2d 690 (D.N.J. 2014) ("Munich III").

[9] ANICO counterclaimed for rescission, arguing that Munich withheld material facts from ANICO when the agreements were underwritten.

> claims coming under this Agreement on being advised by the Original Ceding Company, and to furnish the Reinsurer with such particulars and estimates regarding same as are in the possession of the Company. An omission on the part of the Company to advise the Reinsurer of any loss shall not be held to prejudice the Company's rights hereunder.
>
> B. In addition, the following categories of claims shall be reported to the Reinsurer immediately, regardless of any questions of liability of the Company or coverage under this Agreement:
>
> 1. Any accident reserved at 50% of the reinsured attachment point;
> 2. Any accident involving a brain injury;
> 3. Any accident resulting in burns over 25% or more of the body; or
> 4. Any spinal cord injury.

Id. at 701.

Everest notified Munich of the workers' compensation claims at issue beginning in 2003, but Munich did provide notice to ANICO until 2008. When it did, Munich sent ANICO a lengthy spreadsheet that "listed all of the claims submitted by Everest to Munich," not only the claims that fell under the Munich-ANICO agreements (the "Omnibus Notice"). *Munich II* at 493. The Omnibus Notice "included the name of each insured, the date of loss, and the attachment point, however, the . . . [Omnibus Notice] did not delineate which of the claims were likely to result in a claim under the retrocessional agreements." *Id.* The Omnibus Notice also "was overbroad, and included claims arising from years outside the" scope of the applicable agreement." *Munich III* at 173. In response, the intermediary claimed that the Omnibus Notice "is not considered adequate notice of loss." *Munich II* at 492. Munich agreed. *Id.* This exchange did not, however, address whether the Omnibus Notice was sufficient for the reporting the sunset clause required.[10]

---

[10] Discussing the sunset clause's purpose, the court said:

> On its face, the sunset provision here is straightforward: it prevents Munich from reporting claims *in perpetuam*, by excluding from coverage those claims not noticed within seven years following the expiration of each retrocessional agreement. . . . The

Munich III followed a trial on the merits. It contains the court's ultimate conclusions about whether the Omnibus Notice sufficed for sunset reporting purposes. Distinguishing sunset reporting from everyday loss reporting, the court reasoned that sunset reporting must provide information that allows the reinsurer "to determine which claims appeared likely to impact . . . [its] coverage." *Id.* at 173. In the court's view, the Omnibus Notice did not contain sufficient information to make such a determination. *Id.*

The *Munich* cases show (at least in that court's view): (1) reporting losses and providing loss information for sunset purposes are distinct; and (2) reporting for sunset purposes must contain sufficient information to show whether that loss may reach the reinsurer's coverage.

> likely impetus behind . . . [the sunset clause] is to ensure that both parties have an accurate understanding of ANICO's exposure at the seven-year mark. Such an accurate appreciation of ANICO's economic liability would undoubtedly inform each party's position on commutation.

Id. at 495.

Friday, November 3, 2017
8:30 a.m. – 9:20 a.m.

GENERAL SESSION

Captives in Reinsurance Disputes

SESSION MATERIALS:

PRESENTED BY:

Peter A. Halprin, Anderson Kill

Robert M. Horkovich, Anderson Kill

Larry Zelle, L. Zelle LLC

Sandra J. Sutton, MCIC Vermont LLC

Fine Print

Three Issues for Captives When Arbitrating Reinsurance Disputes

by Robert M. Horkovich and Peter A. Halprin

As companies increasingly look to captive insurance structures as an alternative to traditional insurance policies, they should be aware that a captive's resolution of its insurance disputes (which are disputes in the reinsurance forum) will involve reinsurance issues that may be new to those with only direct insurance experience.

There are three issues that captive insurance companies should be prepared to address in their reinsurance disputes with their captive's reinsurance companies:

1. *Follow the fortunes and collusion allegations.* The convention that a reinsurer will generally "follow the fortunes" of the primary insurance company's underwriting decisions is intended to limit disputes. Sometimes, however, reinsurers will argue that a captive's settlement with a policyholder was collusive and need not be covered.
2. *Selection of arbitrators.* For a captive, the requirement that arbitrators in reinsurance disputes be former or current reinsurance company executives can be troubling as such individuals may be used to traditional reinsurance that may not involve captive structures and may be biased as a result.
3. *Relief from judicial formalities.* As reinsurance arbitration provisions often relieve the arbitrators of following judicial formalities, captives may find their disputes are subject to equities rather than law.

FOLLOW THE FORTUNES AND COLLUSION ALLEGATIONS

In general, the "follow the fortunes" doctrine requires a reinsurer to follow its cedent's underwriting fortunes. Thus, where a "follow the fortunes" clause is present, a reinsurer generally must respect a cedent's decision to pay or contest underlying claims. According to commentators, the only proper inquiry under the doctrine is whether the cedent's determination was reasonable and in good faith. As set forth by the United States District Court for the Southern District of Ohio in *International Surplus Lines Ins. Co. v. Certain Underwriters & Underwriting Syndicates Lloyd's of London*, 868 F. Supp. 917, 921 (S.D.Ohio 1994):

"This standard is purposefully low. Were the court to conduct a de novo review of [the cedent's] decision-making process, the foundation of the cedent-reinsurer relationship would be forever damaged. The goals of maximum coverage and settlement that have been long established would give way to a proliferation of litigation. Cedents faced with de novo review of their claims determinations would ultimately litigate every coverage issue before making any attempt at settlement. Such a consequence this court will not abide."

Assuming a captive insurance company finds itself in a reinsurance dispute, the reinsurance company may seek to avoid payment by arguing that there was collusion between the policyholder and the captive insurance company. As noted above, one exception to "follow the fortunes" is bad faith, and this can take the form of collusion. In *Hartford Accident & Indem. Co. v. Columbia Cas. Co.*, the court found that bad faith was a possibility where the reinsured failed to follow its customary practice of retaining an environmental expert before settling an asbestos claim. (98 F. Supp. 2d 251 (D.Conn. 2000)). In *Mentor Ins. Co. (U.K.) Ltd. v. Norges Brannkasse*, however, the United States Court of Appeals for the Second Circuit rejected the notion that there should be greater scrutiny of settlements between captive insurance companies and their policyholders due to a greater likelihood of collusion. (996 F.2d 506, 515 (2d Cir. 1993)). The court ruled that the captive's settlement with its parent

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company was *not* "tainted…by inbred corporate relationships" as the reinsurers "were aware of those corporate relationships from the outset" and failed to provide evidence that the settlement was tainted, fraudulent, collusive, or made in bad faith.

Given the high bar required to prove collusion, captive administrators can take some comfort. Scrupulously following and documenting the captive's established procedures when handling claims should protect the captive from coverage defenses based on collusion.

ARBITRATOR SELECTION

While finding the right arbitrator for a dispute can present a challenge in the best of circumstances, provisions in some insurance and reinsurance policies setting forth the required qualifications for arbitrators can further tilt the playing field against a captive. In both the insurance and reinsurance context, for example, qualifications provisions may provide as follows:

"The arbitrators shall be active or retired executive officers of insurance or reinsurance companies."

Requiring all arbitrators to have served as executive officers of an insurance or reinsurance company can be challenging for captive insurance companies, as the arbitrators may be unfamiliar with captives or have some bias against them.

That said, given the abundance of captives, there should be directors or officers of captives who are willing to serve. Developing relationships within the industry and preparing a list of potential arbitrators in advance of any conflict can offset any inherent advantage that might otherwise fall to the reinsurance company.

RELIEF FROM JUDICIAL FORMALITIES

Some reinsurance policies contain a so-called "Honorable Engagement" clause permitting equitable rather than legal considerations, with language such as the following:

"The arbiters shall consider this agreement an honorable engagement rather than merely as a legal obligation and they are relieved of all judicial formalities and may abstain from following the strict rules of law."

It has been noted that such clauses "have [been] read generously [by courts], [with courts] consistently finding that arbitrators have wide discretion to order remedies they deem appropriate." (See *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 261 (2d Cir. 2003).) Indeed, in the reinsurance industry, arbitrators often look to industry trade practices in reaching their decision.

Captive owners should regard the dispute resolution provisions in reinsurance contracts as negotiable, and be proactive about establishing procedures they are comfortable with in connection with the purchase of the reinsurance. Maintaining a list of pre-vetted arbitrators, as suggested above, may render proceedings less of a risk.

CONCLUSION

Captives involved in reinsurance disputes should be aware of the rarefied world that they are entering—and take proactive measures both to forestall disputes and to ensure that they take place on a level playing field. The deferential standard of "follow the fortunes" can limit the grounds upon which a reinsurance company can challenge the claims decisions of a captive insurance company. However, in a dispute, a captive insurance company may need to fend off the argument that a claim was resolved in a collusive matter—and should make sure that its claims-handling procedures will position them to do so, keeping in mind that the notion that a captive-policyholder relationship inherently is collusive has been rejected. In the advance of a dispute and in the event of a dispute, a captive insurance company will also need to find arbitrators who will give it a fair hearing—including, if necessary, in proceedings in which judicial formalities may be relaxed, and where a decision may be made in equity. ■

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Peter A. Halprin *is an attorney in Anderson Kill's New York office. His practice concentrates in commercial litigation and insurance recovery, exclusively on behalf of policyholders, and he also acts as counsel for U.S. and foreign companies in domestic and international arbitrations.*

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15th CICA Captive Market Study Results Highlights

March 2016

15th CICA Captive Market Study – Results Highlights

After a year's hiatus for a strategic review, the Captive Insurance Companies Association (CICA) again engaged Veris Consulting to conduct a newly focused, confidential survey of captive insurance company owners from September 9, 2015 to November 2, 2015. The following presents highlights of the results from 255 survey participants. CICA members can access the full, compiled results, including open-ended responses and a breakout for single parent captives, on the members-only section at www.cicaworld.com.

Survey Objectives

- To encourage the discovery, or reconsideration, of how a captive can add increasing value
- To better understand how CICA can support this continued value proposition

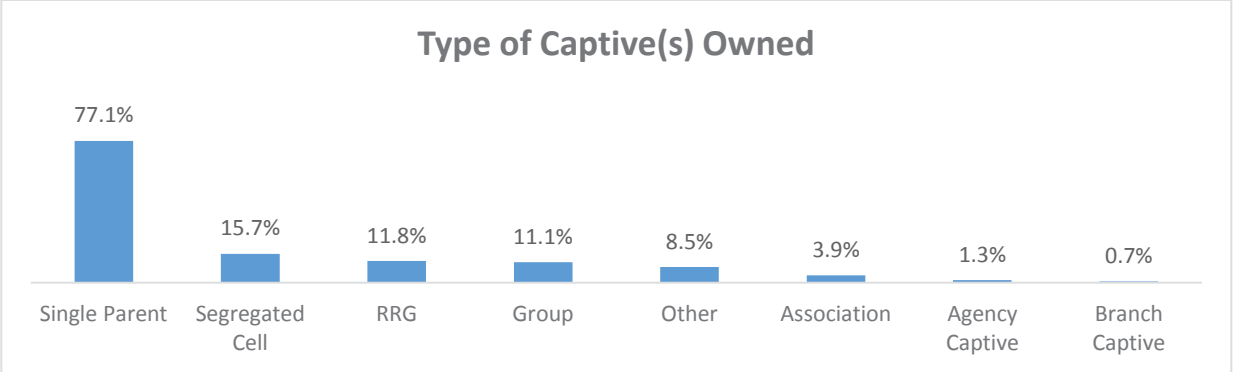
Key Findings

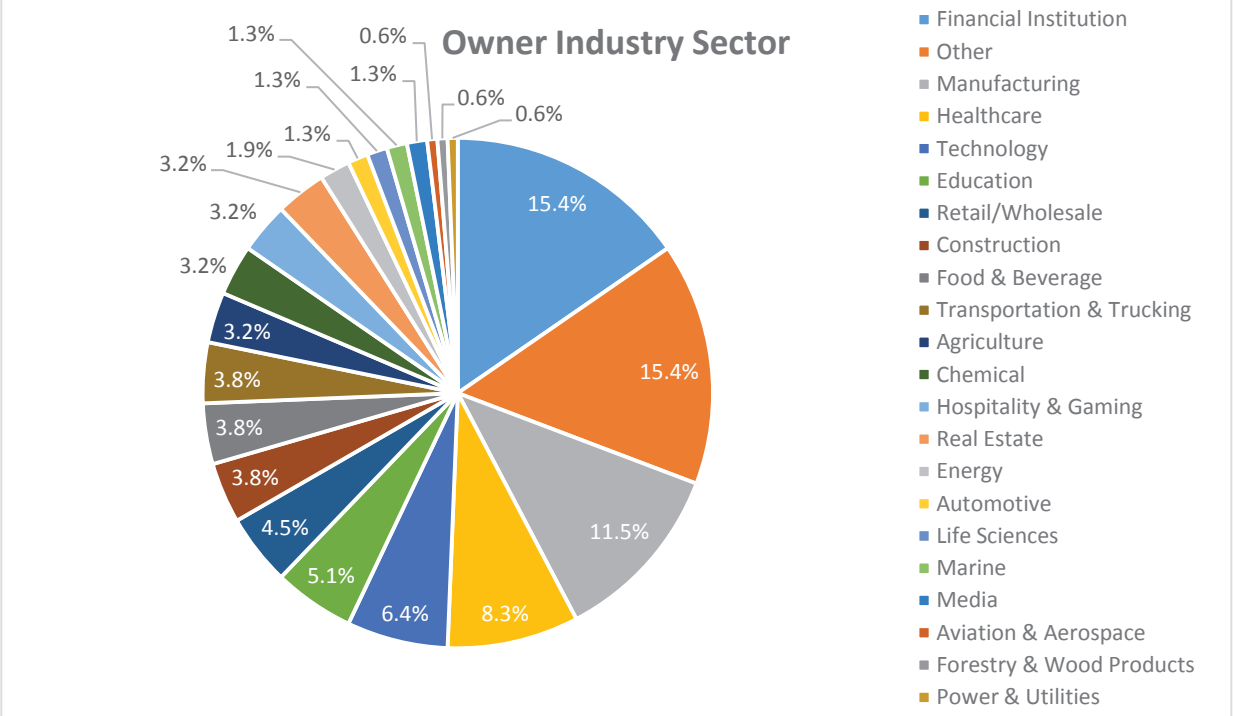
- While single parent captive owners still represent more than three quarters of the participants, the respondents to this year's survey represent a broader cross section of industries and domiciles than in previous surveys. That said, the survey responses were similar across captive types, industries and domiciles.
- Nearly 30% of the 'Other' industry sector is comprised of captive managers who own captives in order to assist existing and prospective clients with their risk management needs. They present a unique set of captive owner issues not previously captured by the survey.
- Cyber risk, mentioned by slightly more than three-quarters of respondents, is the number one emerging risk and the number one non-traditional risk that the survey participants are currently grappling with, with the more specific cyber issues from emerging technologies (drones, Internet of Things, etc.) mentioned by a quarter of respondents. In the 'Other' category, the issues arising from the sharing economy (Uber, Airbnb, etc.) are just beginning to emerge as risk management concerns.
- Health insurance (employee medical stop loss) is the number two non-traditional risk in captives, also mentioned by more than two-thirds of respondents. It is the number three emerging risk in captives.

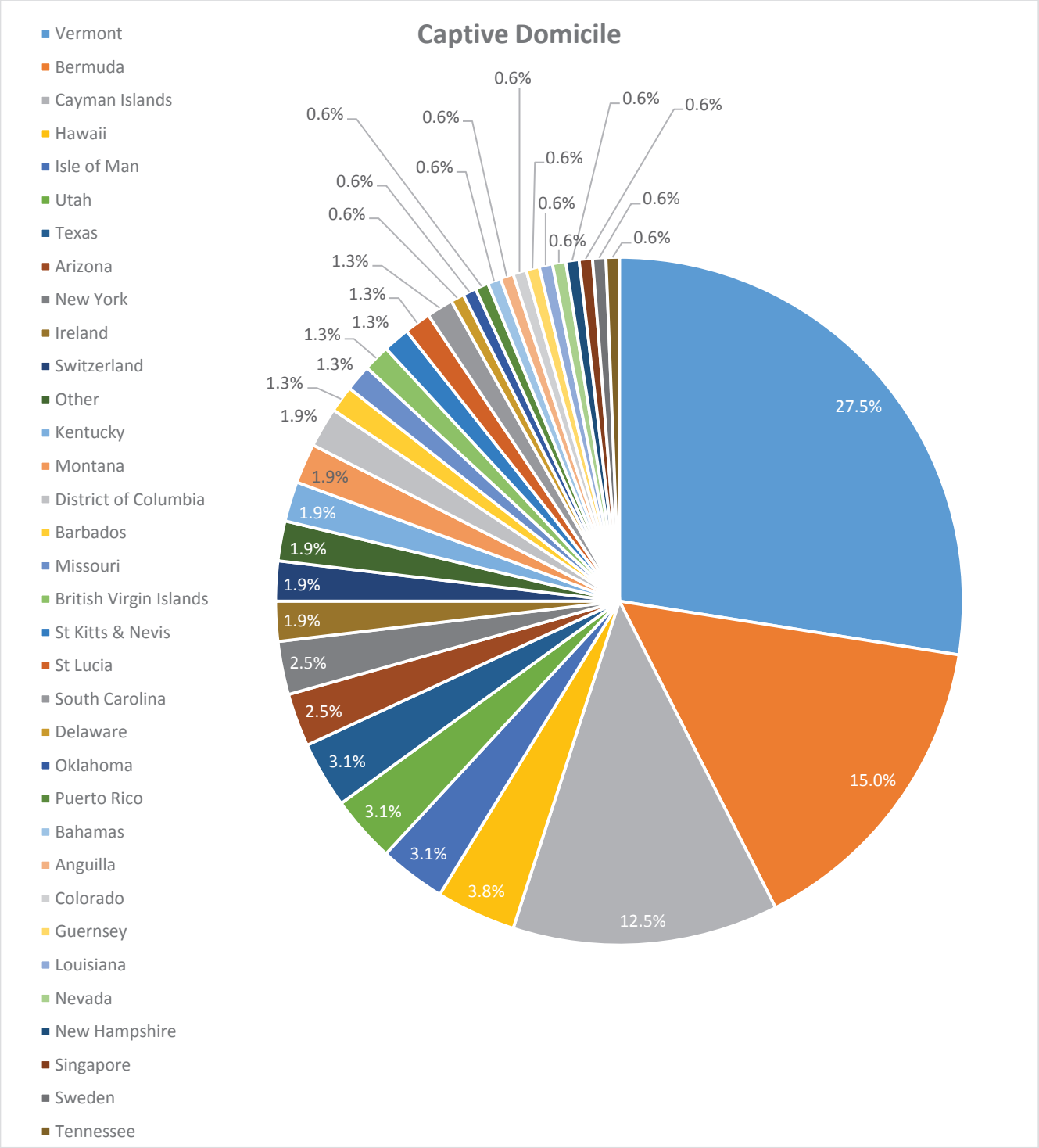
Key Findings cont.

- Captive owners are planning to use captives more frequently for non-traditional insurance solutions.
- About 50% of the survey participants are considering putting one or more new coverages in their captive in the next 12-24 months, while the other 50% are either already insuring non-traditional risk in their captive or are satisfied that the traditional coverage(s) in their captive meet their current risk financing needs.
- According to the survey participants, the top five ways that their captive currently creates value are (1) plugging holes in their insurance program (73.7%); (2) recapturing premiums that would otherwise be spent in the commercial insurance market (67.4%); (3) providing unique coverage solutions (59.4%); (4) accessing reinsurance market (54.9%); and (5) funding retentions / centralizing buying (54.3%).
- To enhance their ability to maximize the value their captive can create 25.8% of the survey respondents thought they would need a consistent, supportive regulatory environment, 25.1% reported that they would need an aligned partnership with their fronting carriers, reinsurers and service providers, 23.2% felt they would need greater senior management support, 18.7% said they would need a supportive tax code and 7.1% cited other things they would need to enhance their ability to get the most value from their captive.
- By far the biggest challenge cited by the survey participants in doing more with their captive was resources (30.1%); lack of management support (21.5%); ongoing use of capital (12.0%); upfront costs of new programs (11.4%); and lack of knowledge about other, new ways to use their captive (10.8%).
- When asked how they might overcome these challenges, the participants used many different words. However, the message was clear that the keys to overcoming the challenges were twofold: (1) effective communication by and among all stakeholders as respects the value and benefit of a captive, especially in quantitative terms that senior management at the parent company can relate to, and (2) enhanced partnerships/alignments among all stakeholders regarding the vision, goals, objectives and expectations throughout the life cycle of the captive.

Participant Profile



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Cayman Islands
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District of Columbia
Barbados
Missouri
British Virgin Islands
St Kitts & Nevis
St Lucia
South Carolina
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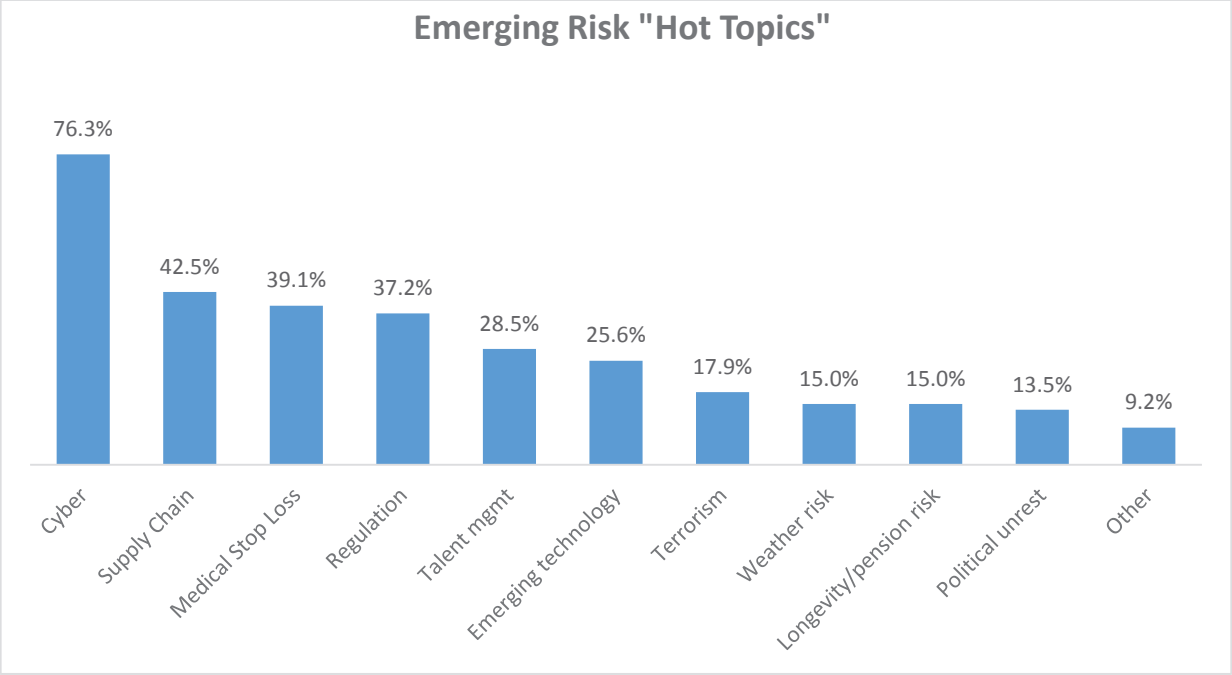
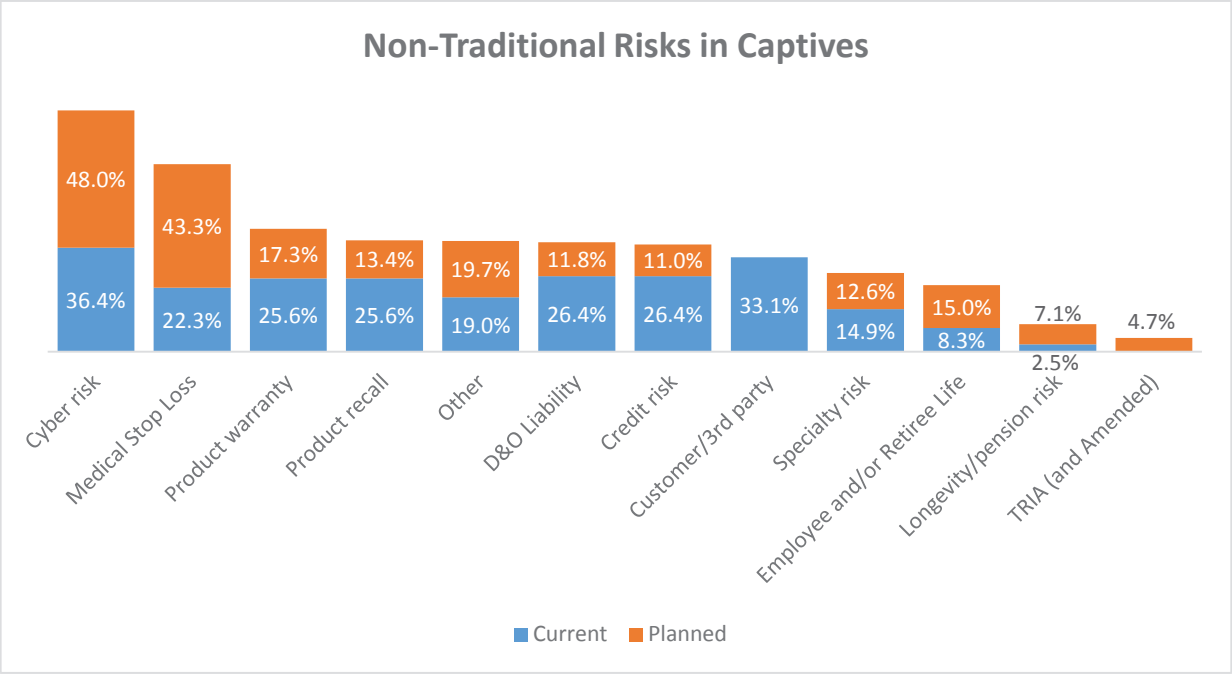
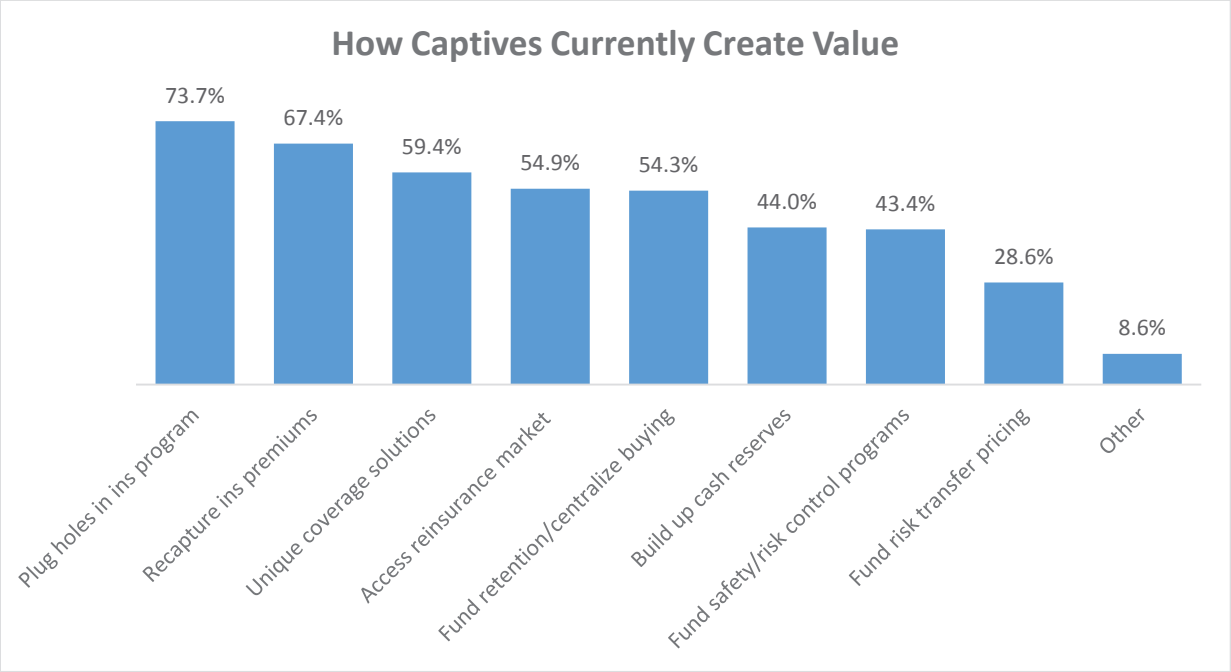
Result Highlights






How Captives Currently Create Value
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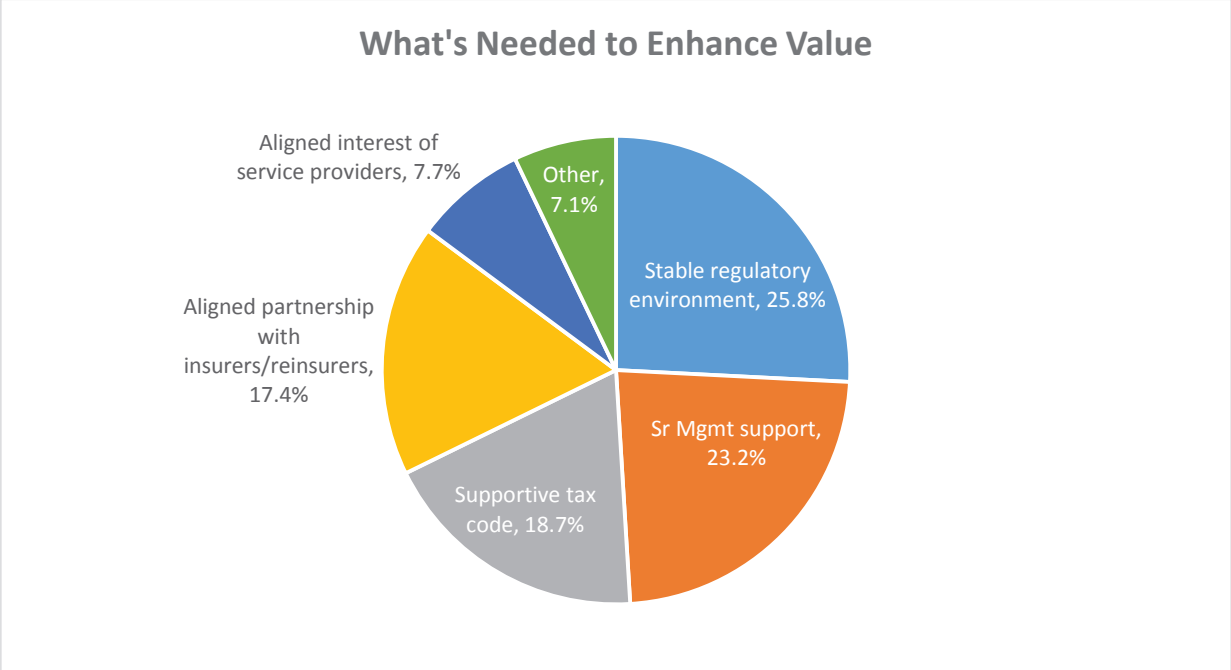
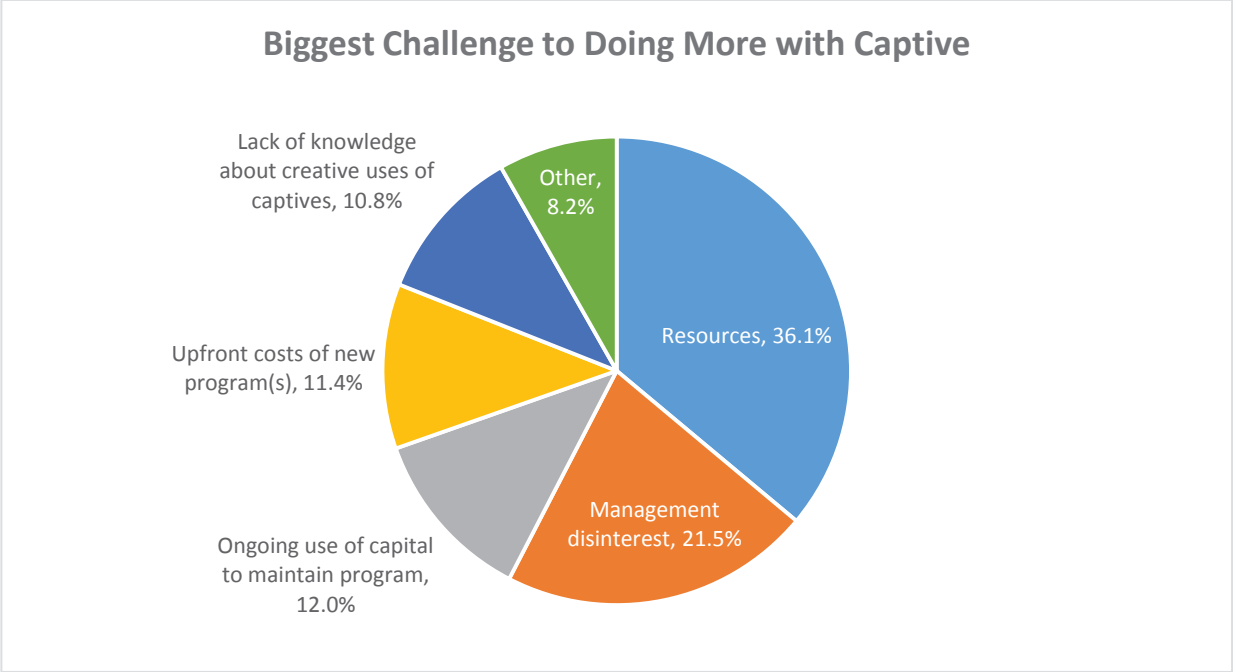
Recapture ins premiums
Unique coverage solutions
Access reinsurance market
Fund retention/centralize buying
Build up cash reserves
Fund safety/risk control programs
Fund risk transfer pricing
Other


What's Needed to Enhance Value
Aligned interest of service providers, 7.7%
Other, 7.1%
Stable regulatory environment, 25.8%
Aligned partnership with insurers/reinsurers, 17.4%
Sr Mgmt support, 23.2%
Supportive tax code, 18.7%



Contacts

For more information about the CICA 15th Annual Captive Insurance Market Study, contact Dennis Harwick, President, Captive Insurance Companies Association at dharwick@cicaworld.com.

About CICA

CICA is the only global domicile-neutral captive insurance association. CICA is committed to providing the best source of unbiased information, knowledge, and leadership for captive insurance decision makers. CICA is your advocate around the world, key to the captive industry and *the* resource for captive best practices.

About Veris

Veris Consulting, Inc. was formed in 2000 and consists of technology-based survey and research services (such as CICA's market study), forensic accounting and litigation support, outsourced internal auditing and accounting, and information technology consulting. It serves a diverse clientele throughout the United States, as well as clients in Europe and the Caribbean. Services are provided from its headquarters in Reston, Virginia. Further information is available at www.verisconsulting.com.

About Participant Support

CICA acknowledges the ongoing support and participation of CICA members in the annual market study, as well as the captive domicile associations that encouraged their members to participate in the 2016 Market Study, including the Arizona Captive Insurance Association, the Bermuda Insurance Management Association, the Captive Insurance Council (DC), the Insurance Managers Association of Cayman, the

Kentucky Captive Association, the Montana Captive Insurance Association, the Texas Captive Insurance Association, and the Vermont Captive Insurance Association. CICA also acknowledges those clients of Aon and Marsh that participated via the link sent to them by their captive manager.

The survey results are only representative of this year's participants and may, or may not, reflect all constituencies within the captive insurance industry. Anyone that wishes to participate in future studies should contact Dennis Harwick, President, Captive Insurance Companies Association at dharwick@cicaworld.com.

2016 Annual CICA Market Study Committee

Joel Chansky, Committee Chair – Milliman, CICA Board Member

Ken Arguello, Dow Corning, CICA Board Member

Ryan Ralston, Ralston RMC, CICA Board Member

Tracy Buckholz, Marsh

Ellen Charnley, Marsh

Nancy Gray, Aon

Lisa Poulin, Milliman

Sean Rider, Willis Towers Watson

Michael Serricchio, Marsh

Friday, November 3, 2017
9:20 a.m. – 10:10 a.m.

GENERAL SESSION

The ARIAS Ethics Code in Practice

SESSION MATERIALS:

AVAILABLE IN ONLINE MATERIALS ONLY

ARIAS•U.S. Umpire Questionnaire

Session PowerPoint Presentation

PRESENTED BY:

Mark Gurevitz, MG Re Arbitrator & Mediator Services

Peter Gentile, ARIAS•U.S. Certified Arbitrator

Jeanne Kohler, Carlton Field

Steve Schwartz, Chaffetz Lindsey LLP

Mark Megaw, ARIAS•U.S. Certified Arbitrator

July 18, 2017

ARIAS•U.S. Code of Conduct

This version of the Code of Conduct was revised and became effective as of January 1, 2014, for conduct taking place after that date. It is an integration, with significant updates and amendments, of the original Guidelines and the Additional Ethics Guidelines adopted by ARIAS in 2010. The date on the PDF version of the Code reflects subsequent amendments to the Code as approved by the Board.

INTRODUCTION

ARIAS·U.S. is a not-for-profit corporation organized principally as an educational society dedicated to promoting the integrity of the arbitration process in insurance and reinsurance disputes. Through seminars and publications, ARIAS·U.S. trains knowledgeable and reputable professionals for service as panel members in industry arbitrations. The ARIAS·U.S. Board of Directors certifies as arbitrators individual members who are qualified in accordance with criteria and procedures established by the Board.

The continued viability of arbitration to resolve industry disputes largely depends on the quality of the arbitrators, their understanding of complex issues, their experience, their good judgment and their personal and professional integrity. In order to properly serve the parties and the process, arbitrators must observe high standards of ethical conduct and must render decisions fairly. The provisions of the Code of Conduct should be construed to advance these objectives.

PURPOSE

The purpose of the Code of Conduct is to provide guidance to arbitrators in the conduct of insurance and reinsurance arbitrations in the United States, whether conducted by a single arbitrator or a panel of arbitrators, whether or not certified by ARIAS•U.S. and regardless of how appointed. Comments accompanying the Canons explain and illustrate the meaning and purpose of each Canon. These Canons are, however, not intended to override the agreement between the parties in respect to arbitration and do not displace applicable laws or arbitration procedures. Though these Canons set forth considerations and behavioral standards only for arbitrators, ***the parties and their counsel are expected to conform their own behavior to the Canons and avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.*** *Parties and counsel should provide prospective arbitrators and umpires with sufficient information concerning the dispute and all of its potential participants so that they may fairly consider whether to serve.*

DEFINITIONS

1.Affiliate: an entity whose ultimate parent owns a majority of both the entity and the party to the arbitration and whose insurance and/or reinsurance disputes, as applicable, are managed by the same individuals that manage the party's insurance and/or reinsurance disputes;

2.Arbitrator: a person responsible to adjudicate a dispute by way of arbitration, including the umpire on a three (or more) person panel of arbitrators;

3.Party: the individual or entity that is named as the petitioner or respondent in an arbitration, as well as the affiliates of the named party;

4. Umpire: a person chosen by the party-appointed arbitrators, by an agreed-upon procedure, or by an independent institution to serve in a neutral capacity as chair of the panel.

CANON I

INTEGRITY: Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently.

COMMENTS:

1. The foundation for broad industry support of arbitration is confidence in the fairness and competence of the arbitrators.

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

3. The parties' confidence in the arbitrator's ability to render a just decision is influenced by many factors, which arbitrators must consider prior to their service. There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve:

a) where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings;

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

c) where the candidate currently serves as a lawyer for one of the parties (where the candidate's law firm, but not the candidate, serves as lawyer for one of the parties the candidate may not serve as an arbitrator unless the candidate derives no income from the firm's representation of the party and there is an ethical wall established between the candidate and the firm's work for the party);

d) where the candidate is nominated for the role of umpire and is currently a consultant or expert for one of the parties;

e) where the candidate is nominated for the role of umpire and the candidate was contacted prior to nomination by a party, its counsel or the party's appointed arbitrator with respect to the matter for which the candidate is nominated as umpire; or

f) where the candidate sits as an umpire in one matter and the candidate is solicited to serve as a party-appointed arbitrator or expert in a new matter involving a new matter by a party to the matter where the candidate sits as an umpire.

4. Consistent with the arbitrator's obligation to render a just decision, before accepting an appointment as an arbitrator the candidate should consider whether any of the following factors would likely affect their judgment and, if so, should decline the appointment:

a) whether the candidate has a financial interest in a party;

b) whether the candidate currently serves in a non-neutral role on a panel involving a party and is now being proposed for an umpire role in an arbitration involving that party;

c) whether the candidate has previously served as a consultant (which term includes service on a mock or shadow panel) or expert for or against one of the parties;

d) whether the candidate has involvement in the contracts or claims at issue such that the candidate could reasonably be called as a fact witness;

e) whether the candidate has previously served as a lawyer for either party;

f) whether the candidate has previously had any significant professional, familial or personal relationships with any of the lawyers, fact witnesses or expert witnesses involved such that it would prompt a reasonable person to doubt whether the candidate could render a just decision;

g) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a party involved in the proposed matter;

h) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a law firm or third-party administrator or manager involved in the proposed matter;

i) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a party involved in the proposed matter;

j) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a law firm or third-party administrator or manager involved in the proposed matter; and

5. ***Relationship between comments 3 and 4***. Comment 3 sets forth circumstances in which an arbitrator must refuse to serve. If none of those circumstances applies, comment 4 sets forth circumstances an arbitrator should nevertheless consider in deciding whether to serve. In some cases, comment 3 will "almost" apply – usually because the arbitrator has a relationship described in comment 3 with an entity that is related to a party to the current arbitration, but that is not strictly within the definition of "party." Thus, one of the circumstances set forth in comment 3 may apply

(i) to an entity that is an affiliate of a party to the current arbitration, but that is not within the definition of "party," or

(ii) to an entity having the same third-party administrator or manager as a party to the current arbitration.

In such a case, the arbitrator should refuse to serve, in line with the general principle that in upholding the integrity of the arbitration process an arbitrator should not get too close to the edge on issues of ethics or process fairness. If, however, it is clear that the relationship between the entity with the "comment 3" relationship to the arbitrator and the party to the current arbitration is attenuated, and that, by reason of the attenuation, the reasons for the mandatory "do not serve" rules in comment 3 are not implicated, then the arbitrator may (but need not) choose to serve.

6. The parties to a proceeding in which an individual is sitting as an umpire or is being proposed as umpire may, by agreement reached without the involvement, knowledge, or participation of the umpire or candidate, waive any of the provisions of paragraphs 3 (c), (d), (e), or (f) above and 5. The umpire or candidate shall be informed of such agreement.

7. Consistent with the arbitrator's obligation to render a just decision, an arbitrator should consider whether accepting an appointment as a consultant or expert in a new matter by a party to the arbitration where the person sits as an arbitrator would likely affect his or her judgment in the matter where he or she sits as an arbitrator.

CANON II

FAIRNESS: Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.

COMMENTS:

1. Before accepting an appointment, a person contacted to serve as an arbitrator should consider whether the identity of the parties and their counsel, or factual issues anticipated to be implicated in the matter (as well as related issues that might be relevant such as the identity of affiliates of the parties, third-party managers, intermediaries, witnesses, etc.), would impact the arbitrator's ability to render a just decision in a fair manner.

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

3. Party-appointed arbitrators should not offer a commitment to dissent, or to work for a compromise in the event of a disagreement with the majority's proposed award. Party-appointed arbitrators may advise the party appointing them whether they are willing to render a reasoned decision if requested.
4. After accepting an appointment, arbitrators should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, that would likely affect their ability to render a just decision.

CANON III

COMPETENCE: Candidates for appointment as arbitrators should accurately represent their qualifications to serve.

COMMENTS:

1. Candidates should provide up-to-date information regarding their relevant training, education and experience to the appointing party (or parties if nominated or selected to serve as the umpire) to ensure that their qualifications satisfy the reasonable expectations of the party or parties.

2. Individuals who serve on arbitration panels have a responsibility to be familiar with the practices and procedures customarily used in arbitration that promote confidence in the fairness and efficiency of the process as an accessible forum to resolve industry disputes.

CANON IV

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

COMMENTS:

1. Before accepting an arbitration appointment, candidates for appointment as arbitrators should make a diligent effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be arbitrators or potential witnesses. Such disclosures should include, where appropriate and known by a candidate, information related to the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer's existing or past financial or business relationship with the parties that others could reasonably believe would be likely to affect the candidate's judgment.

2. A candidate for appointment as arbitrator shall also disclose:

a) relevant positions taken in published works or in expert testimony;

b) the extent of previous appointments as an arbitrator by either party, either party's counsel or either party's third party administrator or manager; while it may be true in some circumstances that only the party technically appoints the arbitrator, the purpose of this rule is to require disclosure of the relationships between the candidate and the parties as well as the candidate and either parties' counsel or third party administrator or manager; such relationships that must be disclosed include appointments as an arbitrator where the party's counsel and/or the party's third party administrator or manager acted as counsel or third party administrator or manager for a party making the appointment; and

c) any past or present involvement with the contracts or claims at issue.

3. No later than when arbitrators first meet or communicate with both parties, arbitrators should disclose the information in paragraphs 1 and 2 above to the entire panel and all parties. When confronted with a conflict between the duty to disclose and the obligation to preserve confidentiality, an arbitrator should attempt to reconcile the two objectives by providing the substance of the information requested without identifying details, if that can be done in a manner that does not breach confidentiality and is not misleading. An arbitrator who decides that it is necessary and appropriate to withhold certain information should notify the parties of the fact and the reason that information has been withheld.

4. It is conceivable that the conflict between the duty to disclose and some other obligation, such as a commitment to keep certain information confidential, may be irreconcilable. When an arbitrator is unable to meet the ethical obligations of disclosure because of other conflicting obligations, the arbitrator should withdraw from participating in the arbitration, or, alternatively, obtain the informed consent of both parties before accepting the assignment.

5. After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw and should not withdraw at his or her own instigation absent good reason, such as serious personal or family health issues. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator must do so. In the event that an arbitrator is requested to with-draw by less than all of the parties, the arbitrator should withdraw only when one or more of the following circumstances exist.

a) when procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal;

b) if the arbitrator, after carefully considering the matter,- determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly; or

c) if required by the contract or law.

6. The duty to disclose all interests and relationships is a continuing obligation throughout the proceeding. If any previously undisclosed interests or relationships described in -paragraphs 1 and 2 above are recalled or arise during the course of the arbitration, they should be disclosed immediately to all parties and the other arbitrators together with an explanation of why such disclosure was not made earlier.

CANON V

COMMUNICATION WITH THE PARTIES: Arbitrators, in communicating with the parties, should avoid impropriety or the appearance of impropriety.

COMMENTS:

1. If an agreement between the parties or applicable arbitration rules establish the manner or content of communications among arbitrators and the parties, those procedures should be followed.

2. Party-appointed arbitrators may communicate with the party who is considering appointing them about their fees and, excepting those who by contract are required to be "neutral" or the equivalent, may also communicate about the merits of the case prior to acceptance of the appointment until the date determined for the cessation of ex parte communications.

3. A party-appointed arbitrator should not review any documents that the party appointing him or her is not willing to produce to the opposition. A party-appointed arbitrator should, once all members of the Panel are selected, disclose to the other members of the Panel and the parties all documents that they have examined relating to the proceeding. Party-appointed arbitrators may consult in confidence with the party who appointed them concerning the acceptability of persons under consideration for appointment as the umpire.

4. Except as provided above, party-appointed arbitrators may only communicate with a party concerning the dispute provided all parties agree to such communications or the Panel approves such communications, and then only to the extent and for the time period that is specifically agreed upon or ordered.

5. When party-appointed arbitrators communicate in writing with a party concerning any matter as to which communication is permitted, they are not required to send copies of any such written communication to any other party or arbitrator.

6. Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and

(c) provide his or her impressions as to how an issue might be viewed by the Panel, but may not disclose the content or substance of communications or deliberations among the Panel members. An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.

7. Whenever the umpire communicates in writing with one party on subjects relating to the conduct of the arbitration or orders, the umpire should at the same time send a copy of the communication to each other arbitrator and party. Whenever the umpire receives any written communication concerning the case from one party on subjects relating to the conduct of the arbitration that has not already been sent to every other party, the umpire should promptly forward the written communication to the other arbitrators and party.

8. Except as provided above or unless otherwise provided in applicable arbitration rules or in an agreement of the parties, the umpire should not discuss a case with a single arbitrator, party or counsel in the absence of the other arbitrator, party or counsel, except in one of the following circumstances:

a) Discussions may be had with a single arbitrator, party or counsel concerning ministerial matters such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the umpire should promptly inform the other arbitrator, party or counsel of the discussion and should not make any final determination concerning the matter discussed before giving each arbitrator, party or counsel an opportunity to express its views.

b) If all parties request or consent to it, such discussion may take place.

c) If a party fails to be present at a hearing after having been given due notice, the panel may discuss the case with any party or its counsel who is present and the arbitration may proceed.

CANON VI

CONFIDENTIALITY: Arbitrators should be faithful to the relationship of trust and confidentiality inherent in their position.

COMMENTS:

1. Arbitrators are in a relationship of trust with the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain a personal advantage or advantage for others, or to affect adversely the interest of another.

2. Unless otherwise agreed by the parties, or required or allowed by applicable rules or law, arbitrators should keep confidential all matters relating to the arbitration proceedings and decision.

3. Arbitrators shall not inform anyone of an arbitration decision, whether interim or final, in advance of the time it is given to all parties, or assist a party in post-arbitral proceedings,

except as is required by law. An arbitrator shall not disclose contents of the deliberations of the arbitrators or other communications among or between the arbitrators. Notwithstanding the previous sentence, an arbitrator may put such deliberations or communications on the record in the proceedings (whether as a dissent or in a communication to all parties and panel members) to the extent (but only to the extent) reasonably necessary to expose serious wrongdoing on the part of one or more panel members, including actions that are contemplated by Section 10(a) of the Federal Arbitration Act.

4. Unless otherwise agreed by the parties or by applicable rules, arbitrators are not obligated to return or retain notes taken during the arbitration. Notes, records and recollections of arbitrators are confidential and shall not be disclosed to the parties, the public, or anyone else, unless (1) all parties and the panel agree to such disclosure, or (2) a disclosure is required by law.

CANON VII

ADVANCING THE ARBITRAL PROCESS: Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings, and written awards.

COMMENTS:

1. When the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrators to comply with such procedures or rules unless the parties agree otherwise.
2. Individuals should only accept arbitration appointments if they are prepared to commit the time necessary to conduct the arbitration process promptly.

3. Arbitrators should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

4. Arbitrators should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage (and, if necessary, order) similar conduct of all participants in the proceedings.

5. Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them understand and assess the testimony; however, arbitrators should refrain from assuming an advocacy role and should avoid interrupting counsel's examination unless clarification is essential at the time.

CANON VIII

JUST DECISIONS: Arbitrators should make decisions justly, exercise independent judgment and not permit outside pressure to affect decisions.

COMMENTS:

1. When an arbitrator's authority is derived from an agreement between the parties, arbitrators should neither exceed that authority nor do less than is required to exercise that authority completely.

2. Arbitrators should, after careful review, analysis and deliberation with the other members of the panel, fairly and justly decide all issues submitted for determination. Arbitrators should decide no other issues.

3. Arbitrators should not delegate the duty to decide to any other person. Arbitrators may, however, use a clerk or assistant to perform legal research or to assist in reviewing the record.

4. In the event that all parties agree upon a settlement of issues in dispute and request arbitrators to embody that agreement in an award, they may do so, but are not required to do so, unless satisfied with the propriety of the terms of settlement. Whenever arbitrators embody a settlement by the parties in an award, they should state in the award that it is based on an agreement of the parties.

CANON IX

ADVERTISING: Arbitrators shall be truthful in advertising their services and availability to accept arbitration appointments.

COMMENTS:

1. It is inconsistent with the integrity of the arbitration process for persons to solicit a particular appointment for themselves. However, a person may indicate a general willingness to serve as an arbitrator.

2. Arbitrators shall make only accurate and truthful statements about their skills or qualifications. A prospective arbitrator shall not promise results.

3. In an advertisement or other communication to the public, an individual who is an ARIAS U.S. certified arbitrator or umpire may use the phrase "ARIAS U.S. Certified Arbitrator (or Umpire as the case may be)" or "certified by ARIAS U.S. as an arbitrator (or umpire as the case may be)" or similar phraseology.

CANON X

FEES: Prospective arbitrators shall fully disclose and explain the basis of compensation, fees and charges to the appointing party or to both parties if chosen to serve as the umpire.

COMMENTS:

1. Information about fees should be addressed when an appointment is being considered. The better practice is to confirm the fee arrangement in writing at the time an arbitration appointment is accepted.

2. Arbitrators shall not enter into a fee agreement that is contingent upon the outcome of the arbitration process. Arbitrators shall not give or receive any commission, rebate or similar remuneration for referring a person for alternative dispute resolution services.

Friday, November 3, 2017
10:30 a.m. – 11:20 a.m.

GENERAL SESSION

The State of Play: An Insider's Perspective on Insurance and Reinsurance Arbitrations in 2017 and Beyond

SESSION MATERIALS:

PRESENTED BY:

Marc L. Abrams, Mintz Levin Cohn Ferris, Glovsky and Popeo P.C.

Alysa B. Wakin, Odyssey Re

Scott Birrell, Travelers

Brad Rosen, Berkshire Hathaway Group

Jeffrey Burman, AIG

Josh Schwartz, Chubb

feature

Altering the Structure of Reinsurance Arbitrations: Are Old Habits Too Hard to Break?

Michael S. Olsan[1]

Michael S. Olsan

Since the early 1800s, particularly in English marine reinsurance disputes, the reinsurance industry has been using arbitration as a dispute resolution mechanism.[2] The utilization of a three-member panel is similarly historic.

Michael S. Olsan is a partner with White and Williams LLP and Chair of the Reinsurance Practice Group. Mr. Olsan focuses his practice on the litigation and arbitration of reinsurance and complex insurance coverage disputes.

I. Introduction

For over a century, reinsurance disputes, as rare as they may have been in the past, have been resolved through arbitration as opposed to litigation. Ceding companies and reinsurers alike felt so strongly about this method of dispute resolution that it became commonplace to include an arbitration clause in most reinsurance contracts, and this practice largely continues today. Given the important and ongoing business relationship between cedent and reinsurer, arbitration was seen as a better way to resolve disputes. Some of the advantages to arbitration, which continue to this day, include: (1) having a case decided by experienced and knowledgeable decision-makers rather than a judge or jury to whom reinsurance is foreign; (2) maintaining the confidentiality of the dispute; (3) providing a method of dispute resolution generally considered to be more economical and efficient; and (4) basing an award on custom and practice in the industry rather than simply on the literal meaning of the contract itself or on applicable state law.

Recently, however, with the proliferation of reinsurance arbitrations combined with increased contentiousness and expense, some in the industry have begun to question the efficacy of arbitration. Among the reasons for this disillusionment are: (1) the fact that interim procedural rulings are unpredictable; (2) a few select arbitrators are used over and over again by the same party; (3) there are insufficient ethical boundaries and restraints on arbitrators; (4) some arbitrators have an economic incentive to rule in favor of the party most likely to appoint them in the future; and (5) the willingness of certain panel members to issue a compromise award. These issues have caused some parties to contemplate eliminating arbitration clauses from new reinsurance contracts. But maybe this drastic measure can be avoided and the current concerns about arbitration can be resolved by altering the structural way in which arbitrations are conducted.

The purpose of this paper is to introduce some structural alternatives to what has become the typical arbitration process with two party appointed arbitrators and an umpire; a process largely controlled by the parties and not the arbitrators, as originally envisioned. Some or all of these structural changes can be achieved under old contracts by agreement of the parties and should be considered by companies when negotiating renewals or new reinsurance agreements.

II. The Origins of the Three-Member Panel with Two Party-Appointed Arbitrators and an Umpire and the Increased Frequency of Arbitrations

Since the early 1800s, particularly in English marine reinsurance disputes, the reinsurance industry has been using arbitration as a dispute resolution mechanism.[2] The utilization of a three-member panel is similarly historic. For example, a Munich Reinsurance Company contract from 1895 contained this provision:

> In the event of any difference hereafter arising between the contracting parties with reference to any transaction under this treaty the same shall be referred to two Arbitrators who are to be chosen amongst the Managers or Secretaries of Accident Insurance Companies, one to be chosen by each Company and to an Umpire chosen by the said two Arbitrators, who shall interpret the present contract rather as an honourable engagement than as a merely legal obligation, and their award shall be final and binding on both parties.[3]

Historically, the industry turned to arbitration, utilizing arbitrators experienced in the business, in part to maximize the

chances of resolving a dispute without jeopardizing a business relationship.[4] Before the 1990s, arbitrated disputes were the exception as cedent and reinsurer worked to amicably resolve any disputes in the interest of their ongoing business relationship.[5] It is not surprising, then, that the parties had a level of trust that the panel would be selected as envisioned when the treaty was underwritten and not in a way to "game the system," with each side vying for control and undue advantage. This historical approach changed dramatically with the increase in cessions involving environmental, asbestos and other long-tail claims, coupled with the fact that an increasing number of ceding companies and reinsurers were in runoff. With runoff, the goal of maintaining a future relationship was gone, the need for arbitrations increased, and contentiousness both in panel formation and in the arbitration process as a whole -rose.

As the stakes got higher, arbitration began to look more like litigation, starting with maneuvering for the "best" panel, just as some litigants engage in forum shopping. This maneuvering tactic became most prevalent in umpire selection as many parties began to feel that the case could be won or lost depending upon the umpire. Many contracts, including the quoted 1895 Munich Re treaty, require the two party-appointed arbitrators to choose the umpire. Notice that the umpire was to be elected by the arbitrators, not by the parties or -counsel. In many contracts that contain a similar provision, it is only if the two arbitrators cannot agree on an umpire that some alternative method, like drawing lots, is undertaken. In other words, drawing lots was designed to be a last resort. Now, however, drawing lots has become the norm, is done with the heavy influence of counsel or the parties, and is often viewed as a mechanism for parties to "game the system."[6] This method of panel selection may also provide an avenue for delay, minimizing one of the advantages of arbitration quick resolution.[7]

While there are alternatives to this usual arbitration structure, some of which are discussed here, the wheels of change move so slowly that it may be years (or even decades)before we see any real shift in the structure of reinsurance arbitrations. Of course, change can come in different shapes and sizes, including how a panel is selected, the number of arbitrators, the role of the arbitrators, and the general procedures followed throughout the course of the proceeding.

III. Arbitration Before a Single Arbitrator

One obvious alternative to the three-person panel is to have a single arbitrator. In the United Kingdom, for example, a single arbitrator is the default mechanism when there is no agreement between the parties or contract provision mandating the number of members on the panel. As the U.K. Arbitration Act of 1996, § 15(3) provides: "If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator."[8] Of course, self evident benefit to a single arbitrator proceeding is economics; each party pays for half an arbitrator instead of one- and a half arbitrators (party-appointed plus half the umpire).

Where the rubber hits the road in the single arbitrator proceeding is the method of selection. There are some organizations like AAA that provide procedures for the selection of the arbitrator.[9] Pursuant to section R-1 5 of AAA's Procedures for the Resolution of Intra Industry U.S. Reinsurance and Insurance Disputes Supplementary Rules, "if the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed."[10] The appointment of a single arbitrator may be achieved in accordance with Rule R-l 1(a) and (b) of AAA's Commercial Arbitration Rules.[11] Under that provision:

> (a) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.
>
> (b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.[12]

While the parties and counsel have a role in this method of arbitrator selection, the fact that the original slate is chosen for them should reduce each party's ability to "game the system" and will decrease the "over-use" of certain arbitrators.

The recently enacted AIRROC Dispute Resolution Procedure similarly offers a mechanism for the selection of a single arbitrator)[13] Under that Procedure, AIRROC will select 15 names at random from its list of approved arbitrators, or from an alternative list as agreed by the parties, and submit a disclosure form for

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The basic premise of the mini-trial is to provide an opportunity to a senior executive from each party to assess the strengths and weaknesses of the case in a controlled environment that is not emotionally charged.[29] The senior executives who participate should not be involved in the underlying claim that is at the heart of the dispute.[30] This helps to remove the emotions that the day-to-day handlers have in the dispute.

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those candidates to complete.[14] Once those disclosure forms are returned, AIRROC will notify the parties about those candidates available to serve.[15] Each party will then select just over half of the candidates on the list (*e.g.* if 11 candidates remain on the list, each party will select 6) and exchange those names.[16] By selecting just over half, there will be at least one common name on each list.[17] If there is just one match, that person will be the arbitrator)[18] If there is more than one match, AIRROC will decide the arbitrator by lot among the matched candidates.[19]

The Insurance and Reinsurance Dispute Resolution Task Force provides another appointment method for a single neutral in the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes ("Procedures"). Pursuant to the Alternative Streamlined Procedures contained in the Procedures, selection of the neutral is as follows: (1) each party submits a list of 8 candidates; (2) questionnaires are sent to each candidate; (3) each party strikes the other party's list down to three arbitrators; (4) if there is a common individual, that person is the arbitrator; (5) if there is more than 1 common individual, the parties draw lots to select the arbitrator; (6) if there are no common individuals, each party ranks the six candidates in order of preference (1 being the most preferred) and exchange rankings.[20] The individual with the lowest combined number is the arbitrator.[21] If there is a tie, the parties draw lots to select the arbitrator.[22]

Finally, the ARIAS•U.S. Newer Arbitrator Program contains an option for expedited proceedings with a single arbitrator selected from the newer arbitrator list.[23] The neutral is selected in accordance with the ARIAS Umpire Selection Procedure.[24] Briefly, the process for selecting the neutral consists of: (1) obtaining a random list of candidates from ARIAS; (2) sending a questionnaire to the first 10 candidates; (3) each party selecting five candidates from the list of 10; and (4) each party selecting 3 candidates from the other party's list of 5. If there is one name appearing on both lists, that person will be the neutral. If there is more than one common candidate, the neutral is selected by drawing lots. If there is no common candidate, each party will rank the candidates, with the person with the lowest number being named the neutral.[25]

In a single arbitrator proceeding, there may be some time savings. First, for the purposes of scheduling, there is only one calendar with which to contend (in addition to those of counsel and parties) instead of three. Second, during the course of the arbitration, there is no conferring necessary among decision-makers, so discovery or evidentiary rulings may be made more quickly. Third, following the hearing, there is no debate among decision-makers so deliberations may be shorter. Fourth, there may be less chance of a compromise award. There are many who believe that compromise awards are becoming all too frequent and are not serving the needs of the parties. One philosophy is that 3-person panels issue compromise awards as a way to achieve a unanimous result or as a consequence of one of the two party-appointed arbitrators exerting some influence on the umpire. With only one arbitrator, those reasons for compromise awards disappear.

IV. The Mini-Trial: A Chance for Resolution

The mini-trial was born in 1977 in an effort to resolve a complex patent dispute between TRW Inc. and Telecredit, Inc.[26] The *Telecredit* case had languished in court for years with no imminent trial date set.[27] The parties had each spent several hundred thousand dollars in legal fees and decided there must be another way to resolve the dispute.[28] Over several months, the parties negotiated a procedure for a mini-trial.[29] Once there was an agreement over the procedure, the mini-trial itself took place over a two- day period.[30] After the respective presentations, the parties were able to achieve a settlement within a half-hour.[31]

The basic premise of the mini-trial is to provide an opportunity to a senior executive from each party to assess the strengths and weaknesses of the case in a controlled environment that is not emotionally charged.[32] The senior executives who participate should not be involved in the underlying claim that is at the heart of the dispute.[33] This helps to remove the emotions that the day-to-day handlers have in the dispute.

In a mini-trial, a business executive from each party, as well as a neutral, jointly selected by the parties, sit on a panel to hear the dispute.[34] In *Telecredit*, each party nominated 2 people to act as a neutral and then came to an agreement as to whom should be appointed.[35]

Subsequently, the parties engaged in an expedited period of targeted discovery, including a limited exchange of documents and abbreviated depositions of key witnesses.[36]

Typically, counsel present each side's "best case;" however, on occasion, witnesses, fact and/or expert, may be used.[37] Questions may be asked by any of the panel members, including the neutral.[38] To make sure the case that is presented is the most comprehensive possible, it is best if the mini-trial takes place towards the end of discovery.[39] Following the presentations, the two business executives meet in an attempt to achieve some amicable resolution.[40] To the extent the executives cannot reach a compromise, they can request the neutral to provide a non-binding advisory opinion setting forth the strengths and weaknesses of each side's case.[41] Once that advisory opinion is reviewed, the parties may return for another round of negotiation.[42]

The mini-trial process is designed to be flexible rather than a one-size-fits-all.[43] The parties are free to agree on the rules and procedures that will apply to the mini-trial.[44] Although. the selection of the umpire in an arbitration is often viewed as the "game changer," the nonbinding nature of the mini-trial puts the neutral in a different light. The neutral should have technical expertise with respect to the issues in dispute and should be someone whom both parties respect.[45] Generally, the parties agree that the mini-trial is confidential, that rules of evidence will not apply, and that the scope of evidence presented should not be limited, even if it may be precluded in litigation or arbitration.[46] This elimination of restrictions ensures that the business executives fully appreciate the strengths and weaknesses of both side's cases.

An important component of the mini-trial is that it is confidential.[47] This is of critical importance especially when the procedure is non-binding.[48] Each party needs assurance, for example, that the neutral's opinion about each side's strengths and weaknesses, and about a likely outcome, to the extent given, is not used in the later arbitration or litigation.[49]

While most mini-trials are non-binding in nature, there is nothing to prevent the parties from agreeing in advance to make it binding. The parties could agree that the business executives will first attempt to reach a resolution, but if that is not achievable, the neutral will issue a binding award. The downside to such an approach is that the selection of the neutral becomes all the more important, which can lead to more contentiousness in the neutral selection process. The prospect of an amicable resolution, however, may outweigh this risk.

Even if there is no final resolution of the dispute following the mini-trial, it can help to narrow the issues that need to be litigated or arbitrated. While some have argued that an unsuccessful mini-trial just adds to the cost of an already expensive litigation or arbitration,[50] others argue that the work done in preparation for the mini-trial needed to be done anyway, so any additional cost (i.e., the neutral) is minimal.[51]

V. "Baseball" Arbitration

As the name suggests, the *origin* of "baseball" arbitration is Major League Baseball. Certain players in Major League Baseball are eligible for salary arbitration.[52] Prior to the arbitration, the team and the player each submit a proposed salary figure to the panel of three arbitrators.[53] At the hearing, each side presents its case in support of the figure submitted and each side has an opportunity to rebut the other's case. Following the hearing, the Panel only has authority to order one salary or another, that's it. [54]

"Baseball" arbitration can be applicable to other fields, including reinsurance disputes. It could be particularly useful if a reinsurer acknowledges it owes an amount of money to its ceding company, albeit less than the amount claimed by the ceding company. In such a scenario the two sides can present their cases to a panel of arbitrators and the arbitrators can award either the amount the reinsurer submitted or the one submitted by the ceding company. This would, of course, eliminate any risk of a compromise award. However, this type of arbitration would be unworkable if, for example, the reinsurer claimed to owe nothing or was seeking declaratory relief or rescission. In other words, "baseball" arbitration would appear to be less appealing if the parties are at opposite extremes.

There are a couple of variations on the "Baseball' arbitration theme that parties may wish to consider. One alternative would be where two amounts are presented to the Panel but those amounts form a high and a low for the Panel, so that it can award either extreme or any number in between. Similarly, the parties can decide on a high and a low figure about which the Panel is unaware. In that case the parties decide on the highest amount the party seeking damages can recover and the lowest amount. If the Panel awards an amount higher or lower than the extremes, the high-low number will apply. If the Panel awards anything in between, that is the amount that will be awarded. Again, compromise awards under this scenario would be minimized and there would be less risk that the umpire (or party-appointed arbitrators) would rule out of a sense of loyalty to one party or the other.

VI. Mediator-to Arbitrator or Arbitrator-to-Mediator

In litigation a potential conflict may present itself if the judge who will act as the trial judge compels the parties to attend a settlement conference before him or her. In that situation, parties may be required to reveal weaknesses about their case before the very person who will preside over the case. While some judges recognize this dichotomy and send the parties to another judge for a settlement conference, some see nothing wrong with the practice, believing they can discount whatever was said during the course of settlement negotiations. Of course, the trial judge who serves as finder of fact in a bench trial may be more likely to ask another judge to conduct the settlement conference.

In an arbitration, which is consensual by nature, the parties could agree on almost anything, including having a mediator become the arbitrator if in fact mediation fails. The central problem with such an arrangement is that the

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parties may be disinclined to be forthright during the mediation, fearing that facts (that may otherwise be inadmissible) will be revealed that would hurt their case if arbitration is necessary. On the other hand, the mediator will be familiar with the case as he puts on his arbitrator hat, reducing the cost of getting someone else up to speed on the case.

The reverse situation, arbitrator turned mediator, may be less of a problem in terms of a conflict situation. This may be particularly so in a single arbitrator scenario. If, at the conclusion of the hearing but prior to the rendering of any award, the single arbitrator indicated to the parties that she thinks the parties could reach a compromise with her help in light of what she has heard, the parties may want to take advantage of that facilitation service. To protect the parties and encourage absolute candor, the arbitrator could issue an award and seal it. She can then offer her services to the parties in an effort to facilitate a compromise. In the event the case does not settle, the award will be unsealed. This arrangement guarantees that settlement discussions will not sway the decision-maker one way or the other. The disadvantage is that the parties have already expended considerable time and expense going through a full blown hearing. At that point, one or both parties may just prefer to get the award. On the other hand, given the uncertainties of arbitration, business minds may prevail in favor of an amicable compromised resolution.[55]

VII. Conclusion

While it is understandable that some members in the industry are disenchanted with the current structure of reinsurance arbitrations, there are alternatives to consider before parties begin to abandon reinsurance arbitrations altogether. The benefits of arbitration (having experienced decision-makers, maintaining confidentiality, realizing economical benefits, maintaining efficiencies, relying on custom and practice, etc.) still abound and should not be disregarded arbitrarily or casually. The intent of this paper was to provide a few alternative structures that parties in existing contracts should consider and possibly agree upon, and contract drafters should consider including in new contracts; it in no way is meant to be exhaustive. As an industry of experts, all we need is some creativity and we should be able to reduce some of the negative aspects of arbitration we currently face while holding on to the time- honored custom of arbitrating, rather than litigating, reinsurance disputes.▼

1. The views expressed in this paper do not necessarily reflect the views of White and Williams LLP, any of its attorneys, or those of its clients.
2 Bank & Winters, *Reinsurance Arbitration: A US. Perspective*, 7 Journal of Insurance Regulation 324 (1989).
3 Reinsurance Association of America, *Manual for the Resolution of Reinsurance Disputes, A Historical Perspective on the Growth of Arbitration in the US. and its Introduction to the Reinsurance Industry*, 8n.. 17(2008 ed).
4 *Id*. at 9.
5 Bank at 323.
6 Some contracts provide for the two arbitrators to decide the case with the umpire playing a role only if the two arbitrators are unable to agree on a final disposition. This practice is still followed in the United Kingdom but appears to have been abandoned in the U.S. even if a strict reading of the contact requires it.
7 One way to minimize this distraction is to select a panel in accordance with the literal language of the contract, that is let the two party appointed arbitrators select an umpire without the influence of the parties or counsel as is the case in the United Kingdom.
8 Arbitration Act, 1996, ch. 23.
9 AAA's Procedures for the Resolution of Intra Industry U.S. Reinsurance and Insurance Disputes Supplementary Rules can be found at www.adr.org.
10 American Arbitration Association, Resolution of Intra-Industry U.S. Reinsurance Disputes Supplementary Rules, R-I 5 (2005).
11 *Id*. at 4.
12 American Arbitration Association, *Commercial Arbitration Rules and Mediation*, R-1 1(2009).
13 Association of Insurance and Reinsurance Run-Off Companies, *The AIRROC Dispute Resolution Procedure*) § *III (2009).*
14 *Id*.
l5 *Id*. at IIIA.
16 *Id*. at IIIB.
17 *Id*.
18 *Id*.
19 *Id*.
20 [1] *Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes*, § 16 (2009)
21 *Id*.
22 *Id*.
23 ARIAS Newer Arbitrator Program, www.arias-us.org.
24 *Id*.
25 ARIAS Umpire Appointment Procedure, www.arias-us.org.
26 Davis & Omlie, *Mini-Trials: The Courtroom in the Boardroom*, 21 Willamette L Rev. 531,535(1985).
27 E. Green, The CPR Legal Program Mini-Trial Handbook, MH-22 (1982).
28 *Id*.
29 *Id*.
30 *Id*.
31 *Id*.
32 Davis at 541.
33 *Id*.
34 American Arbitration Association, *Mini-Trial: Involving Senior Management*, 2(2007).
35 Green at MII-I-23.
36 *Id*.
37 Green at MI-I-24.
38 Davis at 542.
39 *Id*. at 537.
40 *AAA Mini-Trial* at 3.
41 *Id*.; Davis at 532.
42 AAA Mini-Trial at 3.
43 Green at MI-I2 I.
44 *Id*.
45 Davis at 534.
46 *Id. at* 539, 543.
47 *Id. at* 543.
48 *Id*.
49 *Id*.
50 Civil Litigation: The Judicial Mini-Trial, Alberta Law Reform Institute 5(1993).
51 Davis at 532.
52 Ray, How Baseball Arbitration Works: MLB Rules Governing the Eligibility and Process of Arbitration, www.baseball.suite101.com (2008).
53 *Id*.
54 *Id*.
55 Pursuant to some arbitration clauses in newer reinsurance contracts, the parties agree to attend mediation in advance of any arbitration. Such a clause helps to ensure that parties, especially those in an ongoing business relationship, make an attempt to amicably resolve their disputes short of arbitration, Those responsible for contract drafting would be wise to consider this approach, as well as any other alternatives discussed herein.

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How Reinsurance Arbitrations Can Be Faster, Cheaper and Better

feature

By Robert M. Hall

I. Introduction

There is a good deal of criticism of reinsurance arbitrations. Many observe that they are no longer disputes among gentlemen and gentlewomen. The process has become very expensive, elongated and contentious. Some question whether litigation is now a better alternative.

While many make negative observations about the arbitration process, fewer assign responsibility and even fewer attempt to devise remedies. Responsibility lies with the players in the process. Attorneys are ethically required to be zealous in the representation of their clients and to some this means overturning every rock that has a remote possibility of covering relevant information and making every possible legal argument, no matter how unlikely. Their clients are often engaged in very high stakes disputes, sometimes in a runoff context, where continuing business relationships are not an issue. Therefore, clients may have little incentive to dissuade counsel from exercising their competitive instincts in full. Panels are sometimes reluctant to manage the process aggressively for fear of taking it out of the hands of the parties who agreed to it and their counsel.

Regardless of which group bears more responsibility for problems in the arbitration process, the primary issue is remedies. The purpose of this paper is to explore possible remedies for the very real problems in the arbitration process.

II. Discovery Standards in Arbitrations

A major problem in arbitrations is discovery. While most counsel are responsible in terms of discovery, arbitration panels sometimes field requests for massive deposition and document discovery, some of which is not well targeted or would produce information largely tangential to a resolution of the dispute on the merits. Not only is this burdensome, costly and time consuming, it may be functionally impossible to execute (due in part to limitations on subpoena power) when the discovery is sought from disbanded or disaffected third parties such as agents. When a party is unable to convince such a third party to cooperate, it may be accused of playing hide the ball.

One of the hurdles with placing reasonable boundaries on discovery is acquiescence by panels in the views of counsel as to standards for discovery. The Federal Rules of Civil Procedure allow discovery of documents which may lead to admissible evidence. Since there is no standard for admissible evidence in arbitrations, this rule is not very meaningful in the arbitration context. Moreover, very broad discovery is less necessary for arbitrations than litigation since: (a) arbitration is supposed to be faster and less costly than litigation; (b) arbitrators are expert in the business and require less detail than a court to understand the transaction at issue and what went wrong; and (c) arbitration panels are familiar with the business records of insurance and reinsurance entities and can focus discovery on those locations most likely to contain probative evidence.

In this light, perhaps arbitration panels should adopt a standard for discovery more appropriate for arbitrations: that which is likely to produce evidence probative to the issues in dispute. This would reduce high volume, low result discovery and the time and cost related thereto and provide the panel with the information most useful to resolve the dispute.

III. Panel Involvement in Shaping Issues

In the typical arbitration, the parties define the issues to be placed in front of the panel. Often, the panel first becomes involved in shaping issues when discovery disputes arise. However, such involvement usually deals with the connection between the discovery desired and a line of inquiry thought to be significant by counsel. The panel sometimes makes little effort during the discovery phase to connect the line of inquiry with the issues identified in the dispute.

This relatively passive role is not surprising. Arbitration is the creature of the contract between the parties. The authority of the

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feature

panel is limited to that granted in the arbitration clause. In addition, the partisan aspects of the party arbitrator process makes it difficult to force counsel into an early definition of the issues. However, a relatively passive role for the panel has significant disadvantages in large, complicated and hotly contested arbitrations. Counsel may have very different views of the case leading to a failure to meet squarely on the issues. This can lead to inefficient efforts of counsel and, occasionally, a tragic failure to grasp the panel's priorities and inclinations. This, in turn, can lead to a lopsided result on a matter that could have been settled with more panel intervention.

While it may be hard for the panel, and painful to counsel, the speed and efficiency of the arbitration process may benefit from more panel involvement in shaping and prioritizing the issues in the dispute. This can start at the organizational meeting with counsel being required to reveal the substantive reasons for non-performance on either side. It can continue with a discovery plan that is tied to specific issues plus a conference call prior to filing the briefs to further define the issues. Finally, there should be a conference call after the briefs but before the hearing so as to prioritize testimony to the issues most important to the panel and most in controversy. This would serve to better focus and shorten the hearing.

While it may be hard for the panel, and painful to counsel, the speed and efficiency of the arbitration process may benefit from more panel involvement in shaping and prioritizing the issues in the dispute.

IV. Saving Time and Money Prior to the Hearing

There are a number of factors which influence the scheduling of an arbitration hearing. Many players must be available: counsel, arbitrators, witnesses and company representatives. They must be available for a block of time (one or more weeks for the hearing and a week before for preparation). Discovery must be completed (eight or more months) and briefs written and issued (one month). Therefore twelve months is often the minimum lead time necessary to schedule a hearing.

Sometimes counsel believe that more lead time is necessary. This can result from their schedules or their view of necessary discovery, i.e., audits can be cumbersome to arrange and time consuming. It can also result from intervening motion practice, i.e., security, dispositive motions and discovery disputes. Some parties and their counsel are in no hurry to bring a dispute to resolution. Some very active arbitrators are not available for a hearing for over a year. This has led to wry commentary within the arbitration community, sometimes from those who wish they were equally in demand. One side of the debate is the marketplace argument that arbitrators who are viewed as particularly skilled and experienced should not be criticized if the parties accept an attenuated hearing to obtain the services of such individuals. The other side is that such arbitrators may be chosen because of their heavy schedule rather than despite it, i.e., by a party in no hurry for a resolution of the dispute. Very active arbitrators should consider the latter argument in determining the point at which they decline to accept new assignments.

Slippage in the schedule prior to the hearing can have a disastrous result. If the hearing has to be rescheduled, this may add many months to the duration of the arbitration due to the necessity of juggling the schedules of all the relevant parties. Therefore, it is incumbent on the relevant players to achieve interim steps within the designed time periods. This can be done in several ways:

- Arbitrators need to identify issues of relationships with relevant parties early on so as to resolve them without disrupting the proceeding at a later time;
- Telephonic organizational meetings to avoid the scheduling conundrum at the front end;
- Counsel have to identify with some particularity the reason for non-performance early on so as to focus discovery, e.g., general statements of misrepresentation, concealment and breach of contract are not useful;
- Firm dates for the interim discovery and briefing must be established at the organizational meeting with consequences for failure to meet them without good cause;
- Periodic status reports from counsel to detect slippage in the schedule and identify emerging problems;
- Meet and confer requirements for counsel before bringing disputes to the panel in order to avoid piecemeal and confusing presentations of such disputes to the panel;
- Deciding interim issues on written submissions and/or argument by conference call to reduce scheduling problems; and
- Dealing with dispositive issues first (see Section V., *infra*.).

One the best ways in which pre-hearing delays can be avoided is for parties to be very involved in the discovery requested by counsel in order to focus on important witnesses and documents and to be efficient in the way that information is sought. I have received requests (*I am not making this up*) for 90 depositions and copies of each and every one of tens of thousands of policy and claim files plus all documents related to payment and reporting of premiums and losses. Parties who allow their counsel to make such punitive requests are not interested in a quick and efficient resolution of the dispute. Parties know how to focus requests to get maximum result from modest amounts of information. For instance, if the issue is the reason for entering and exiting a line of business, focusing on the business plans for the years in question will reveal more concise and useful information than a vague request for *all documents* related to a company's involvement in a line of business (every piece of paper and electronic file?).

V. Saving Time and Money at the Hearing

Hearings are very expensive. Teams of lawyers and arbitrators are billing by the hour. Executives are taken away from other duties to testify. Hotels charge considerable amounts to provide space, room, board and equipment for the event. To the extent that a hearing cannot be completed within the time allowed, more expenses are incurred. Therefore, a reduction in hearing time is directly responsive to common criticisms of reinsurance arbitrations.

In some disputes, there are threshold issues which might be decided on a summary basis in that they have no or few disputed facts. For instance, a common defense of reinsurers is that the cedent misrepresented the program on placement so as to justify rescission and administered the program so poorly as to violate the duty of utmost good faith. The placement defense involves limited players and documents and if successful, will obviate the rest of the hearing. The administration defense involves many players, many transactions and time-consuming audits. Panels and counsel should consider bifurcating such a dispute to focus on the placement issue first and to allow the administration issue to follow on at its naturally slower pace. If the cedent is found to have misrepresented the business in material fashion, discovery on administration can stop and a time-consuming hearing thereon is avoided. If no material misrepresentation is found, the dispute is in a better posture for settlement.

Another means by which hearing time can be saved is for the panel, after it has reviewed the briefs, to give counsel direction as to the issues and witnesses of most interest to the panel. Counsel are often grateful for this because it helps them prioritize their efforts and decide which witnesses are needed for live testimony. While consensus may be difficult to achieve absent an all-neutral panel (see Section VII., *infra*), it is a worthwhile tactic in an effort to achieve an efficient and focused hearing.

Whatever their familiarity with the arbitration process, it is difficult for counsel to resist giving extensive opening statements. It is their first opportunity to argue the merits of the case live before the panel and their experience with litigation suggests that this is an important opportunity to shape the issues in their favor. However, by the time the hearing has arrived, the panel has spent many hours reviewing the issues and the counsels' disparate view of them. What is more useful to the panel at the outset is a list of the witnesses, their areas of testimony and a time table for counsel's case. This helps the panel understand how the case is to be presented and to keep the hearing on track from a timing standpoint.

For major witnesses at the hearing, considerable time can be saved by the use of British-style direct testimony, i.e., written statements submitted to the panel prior to the hearing. Cross and re-direct is handled live. In this fashion, direct testimony is more organized and concise and does not take up hearing time. The panel has already absorbed the testimony and opposing counsel are better prepared for cross.

For minor witnesses, deposition designations, rather than live testimony, can save considerable hearing time. They can be prepared by counsel and read offline by the panel. This may require somewhat more complete depositions of minor witnesses by both sides as would ordinarily be the case. However, it saves hearing time where the aggregate costs are much higher.

Technology has added a new dimension to the arbitration process, however, technology can add costs without real benefit. Written deposition designations precludes segments of videotaped depositions of minor witness-

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es. However, demeanor evidence, which is the primary benefit of videotaped depositions, is seldom a significant factor. The businessmen and businesswomen who are the subject of the depositions are used to presenting themselves well so the benefits of viewing them as they give their testimony is often marginal. The panel can read the testimony much faster than it can be given on videotape and they can read it offline, thus saving considerable hearing time.

Certain technology is very helpful to the panel before, during and after the hearing. Exhibits and attachments to the briefs on disk allows the panel to be productive even while traveling. LiveNotes or similar technology provides the panel a live feed to testimony as it is given. This helps the panel to absorb it better and to annotate it so that the panel can more easily find it later and use it in their deliberations.

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VI. Awarding Costs in Reinsurance Arbitrations

Absent a contractual provision to the contrary, it is clear that an arbitration panel can award costs (e.g. attorneys' fees and other costs of the arbitration) to the prevailing party. Until recently, there has been considerable reluctance on the part of arbitration panels to do so.

This reluctance may have several sources. One source may be the American rule in litigation that each party must pay its owns costs, absent extraordinary circumstances. The American rule is in contrast to the rule in other jurisdictions (e.g., England) where costs are granted routinely to the prevailing party as a means of deterring marginal litigation.

Traditionally, reinsurance arbitrations were largely good-faith disputes between business partners which could be resolved relatively quickly and cheaply with the aid of some market practitioners. There were few costs to award and the dispute was something the parties wished to put behind them so they could continue trading. This is no longer the case.

Finally, the party arbitrator system creates a certain degree of partisanship which may deter a panel from awarding costs even when deserved. While a panel, or a majority thereof, may be willing to rule on all issues for one party, they know that awarding costs may subject the losing party arbitrator to the considerable disappointment of the party and its counsel who may believe that their arbitrator has failed in his or her partisan responsibility.

Obviously, the arbitration process has changed in recent years. It is no longer a low cost, expeditious resolution of good faith disputes between trading partners. All too often, it has become a scorched-earth proceeding involving parties in runoff or with discontinued operations and no interest in a future trading relationship.

With a low probability of costs being awarded, there is little disincentive to taking novel if not outrageous positions. Sometimes arbitrators encounter highly skilled advocates making earnest arguments in favor of the most unlikely positions in support of totally unacceptable behavior by their clients. Fortunately, a growing number of panels are willing to grant costs under such circumstances. This trend would accelerate with a move to all-neutral panels which will eliminate partisanship in arbitration proceedings. It has become evident that granting costs in appropriate circumstances is a tool that must be wielded to combat legitimate criticisms concerning the length and costliness of the arbitration process.

VII. All-Neutral Panels

Reinsurance arbitrations in the United States traditionally have used two arbitrators appointed by the parties and a neutral umpire. To most, the role of the party arbitrator is to make sure his or her party's position is articulated and fully considered by the panel and then to seek a just result. To a minority, the role of the party arbitrator is simply to advocate the position of the party. Others have a view of their role somewhere in between.

Regardless of where party arbitrators fall within this spectrum, their role is difficult and ambiguous. Only with a struggle can a party arbitrator put behind him or her the appointment process, discussions with counsel prior to the cut off of ex-parte communications and the effort to assure balance to the proceeding. The result often is a partisan element to the proceeding which can impact virtually all phases: (1) umpire selection; (2) timing of the hearing; (3) scope and nature of discovery; (4) length and focus of the hearing; (5) the nature of panel deliberations; and (6) the nature and clarity of panel rulings.

The impact of this partisan element takes several forms. Debate within the panel is

elongated to little purpose. Negotiations tend to be distributive in nature, i.e., working toward the middle from outer parameters determined by the positions of the parties. Unfortunately, this tends to reward the party which takes the most extreme position and tends not to consider that the proper answer may be within entirely different parameters. Hearings may be longer than necessary to assure that each counsel can present their arguments in full, regardless of whether the panel finds all of such arguments useful. The reasoning behind the panel's ruling on the merits may be mushy and poorly articulated. Common denominator approaches to findings and remedies are easier to cobble together than creative ones.

All-neutral panels may increase the efficiency and quality of the arbitration process significantly by eliminating the partisan element. Without party identification, arbitrators can focus on obtaining the right answer rather than positioning themselves with respect to other arbitrators. Panels can act more decisively and efficiently with less lawyering. They can give more effective direction to counsel as to witnesses and the focus of issues at the hearing which can result in a better hearing in less time and with less cost. Finally, they are better able to produce clear and decisive answers which proceed from the evidence rather than an internal negotiation process.

There are several methods of obtaining all-neutral panels. ARIAS•U.S. currently is studying the feasibility of providing a program for all-neutral panels. A cross section of interested parties have produced a set of arbitration procedures which includes a different method for selecting all-neutral panels. This may be accessed at www.arbitrationtaskforce.org. In addition, there is discussion among arbitrators of offering themselves as fixed, three-member panels.

VIII. Reasoned Awards

British arbitrators regularly issue rulings of 20 or more pages, notwithstanding the ability to appeal the arbitration tribunal's decision on the law pursuant to the Arbitration Act of 1996. There is no right to appeal the decision of a US arbitration panel although its ruling may be vacated on very limited grounds focused on conflict of interest and lack of due process. One might conclude that US arbitrators might be more inclined to issue "reasoned awards" as final rulings on the merits but this is not the case. Many have a sincere belief that "reasoned awards" may prolong the dispute, by providing fodder for a motion to vacate, rather than conclude it.

For purposes of this discussion, I will define a "reasoned award" as 2 - 3 pages of findings of fact and conclusions of law. No more is necessary to tell parties and their counsel why they won or lost.

Reasoned awards contribute to better arbitrations for several reasons. First, composing a reasoned opinion requires clarity of thought concerning what the panel decided and why. Mushy reasoning and "split-the-difference" approaches to damages can seldom survive this process. Panels often render awards which do not match the reasoning or damages claimed by either party and there is absolutely nothing wrong with this. It is important, however, for the panel to have a logical reason for doing so and be able to express it in writing. This will provide better rulings by arbitration panels.

The second reason why reasoned awards produce better arbitrations is feedback to the parties and their counsel. Arbitrated disputes are becoming very large in size and considerable legal and other expenses are associated. If the parties choose to have their dispute resolved by experienced senior members of the insurance community, they have a right to know the basis upon which the panel decided. This is not merely an matter of idle curiosity. An adverse decision by a panel may cause a party to re-examine its position on similar disputes with the same party (due to failure to agree on consolidation) or with other parties. The decision may cause the party to re-examine its decision-making process when problems with clients and markets arise so as to make better evaluations as to which matters to compromise and which to pursue to an adversarial conclusion.

To lose an arbitration and not know why causes parties and their counsel to disrespect the arbitration process itself. When the process is disrespected, parties and their counsel either turn away from it or engage in some of the negative behavior cited in earlier sections. Either is detrimental to the arbitration process.

IX Conclusion

The reinsurance arbitration process is legitimately criticized as having become too long, costly and contentious. In part, this results from marketplace changes i.e. larger disputes between parties with no continuing business relationship. However the relevant players (arbitrators, parties and their counsel) must also accept a share of the responsibility. Such players must be willing to adopt techniques to promote efficiency and clarity, such as those described above, if arbitration is to remain a viable alternative to litigation. ▼

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Let's Break the Mold...or at Least Reshape It a Bit

Peter Scarpato

Peter Scarpato

President, Conflict Resolved, LLC

Let's face it: companies, counsel, and even some arbitrators want the system to change in a big way. If you didn't think so before the November 2011 meeting, you should now be a believer. Criticism of the process on the street has grown exponentially. Just ask any lawyer or company involved in the process and you'll get an earful: unpredictability, damaging non-disclosures, unfair collaboration among certain panel members, outright monetary greed... and the list goes on and on.

Of late, even traditionally deferential courts have placed arbitrators and lawyers under the microscope. Recently, decisions criticizing and reversing previously sacrosanct awards, and chastising and sanctioning lawyers and arbitrators, have multiplied like vengeful rabbits. Why is this happening? Was this conduct previously under the radar? Is it new? To current naysayers of arbitration, the answers are irrelevant. The resulting cause and effect, however, are patent: lawyers are recommending that clients omit arbitration clauses from new reinsurance agreements, and adversaries opt out of arbitration despite clauses in existing agreements, preferring the more predictable, rule-friendly and appealable (in a legal way) court system.

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To its credit, ARIAS•U.S. seized the opportunity and market momentum to fashion a very topical and necessary agenda for this past November's meeting. The wrap-up of topics discussed during breakout sessions was illuminating, including many suggestions for improving the process: more on-the-papers decisions, more panel questioning, development of best practices, more active use of discovery limits, justification requirements for experts and depositions, use of active company-umpires who never act as arbitrators, use of a non-judicial body to select the umpire if the parties can't agree, earlier cutoff of ex parte communications, and published feedback on panel/panelists' performance (to name a few).

Mediation garnered serious attention. In general, introduction of mediation into the process was broadly accepted. The issue was timing: should it be before discovery, after discovery, just before the hearing? Though mediation is often misjudged as solely a tactical weapon, breakout attendees recognized its many benefits, including evaluation of the strengths/weaknesses of your case, your opponent's case, and even of the parties' respective lawyers and witnesses. And while ARIAS arbitrators may serve as mediators, the groups felt that some would need "re-engineering" and specialized training in mediation techniques. Many felt the broker community should do more to open the dialogue and ultimately introduce refurbished arbitration/mediation clauses into new treaties.

All fine ideas; all useful suggestions. But can we do more? Should we do more to face the "hue and cry"?

What follows are suggestions - some aggressive and unique; some vaguely familiar - designed to generate more dialogue and suggestions for improving the process.

Lest there be any misunderstanding, this is not "arbitration bashing." I am and will continue to be an ARIAS member, an avid supporter of arbitration, and ready, willing, and able panelist. Like my colleagues, I believe in the process ***and*** the positive power of change.

Umpire/Mediator Pre-Dispute Selection

Instead of trudging through the often frustrating, quixotic attempt to agree on an umpire mid-dispute, the parties should mutually agree upon an umpire and one alternate in advance, even when the treaty is executed, to expedite the panel appointment

process later. Similarly, to resolve issues quickly and less expensively, the parties could also designate a standing and alternate mediator, available quickly to help the parties resolve smaller disputes without the need for arbitration.

At what point are the parties most agreeable? Most of the time, it's when they successfully negotiate the terms and execute the signature page of an agreement. Why not seize the moment and have the parties discuss and agree upon a person whom they trust to act as a fair and impartial umpire (plus at least one alternate of similar reputation)?

This serves several purposes: first, it eliminates the typical, multi-month wrangling and gnashing of teeth to arrive at what many feel is the lopsided selection of one party's candidate for umpire. Once the parties select their arbitrators, the panel can immediately proceed with a qualified, acceptable umpire. Second, it avoids potential "jury rigging" of the umpire selection process. And finally, the selected umpire and alternate must disclose any subsequently accepted, potential conflicts to the contracting parties, keeping them up to date on their candidates' qualifications to serve in any future dispute.

If, after disclosure of additional appointments, a standing umpire crosses the parties' comfort line, they may move the alternate up and choose another alternate. Even if the parties must obtain a replacement standing umpire, the very act of recognizing the conflict and agreeing upon a replacement, keeps the parties in discussion mode, not aggression mode. In fact, the parties may trust their nominee enough to have him or her serve solo in any subsequent dispute, especially if the amount at issue is small.

The parties could also designate a standing (and alternate) mediator. This serves many important goals: first, once again, the mediator is easily selected at the beginning of the business relationship when all is sweet. Second, he or she is quickly available by email or phone to help the parties address any issue, large or small, before it festers and boils over into full-blown, "in-the-trenches" warfare. Third, the mediator's role is designed to maintain the standing umpire's strict neutrality, shielding him/her from the candid, sometimes damaging, disclosures parties make in private caucuses. And, last but certainly not least, the mediator can prevent the unnecessary time and expense of arbitrations that should never have been filed.

Pre-Organizational Meeting Disclosures, Panel Approval, and Hold Harmless.

Panelists should make their disclosures, and parties should accept and hold the panel harmless, immediately after the umpire is selected and before the organizational meeting.

The weeks and months between umpire selection and organizational meeting are the "no man's land" of the arbitration process. Little if anything is accomplished, other than the parties' submissions of position statements, and discussion and occasional approval of a case schedule. The as yet unapproved and unprotected panel logically leaves the drab and difficult issues for the organizational meeting, typically conducted in person regardless of the amount in dispute, often at significant time and expense for parties, counsel, and arbitrators.

With the help of a standing, qualified panel, the parties can agree upon and eliminate much of the organizational meeting agenda in advance, making telephonic meetings (or even no meeting) the rule, not the exception. The fully functioning, indemnified panel can be available by phone to conduct status conferences and even entertain on the spot oral arguments to resolve logjams in the parties' search for a mutually acceptable schedule. And if early motion practice is necessary (e.g., motion for pre-hearing security), a fully functioning panel can help the parties set a pre-OM briefing schedule. If an in-person organizational meeting is unnecessary, the panel can rule on the papers; if needed, they are ready to hear oral argument and rule on the spot or soon thereafter, saving the usual post-OM time to brief and entertain the motion, accelerating the schedule even more.

Make the Schedule Fit the Dispute

Panels must affirmatively and proportionately streamline the length and scope of the proceedings to the amounts in dispute.

Starting with communications with counsel before the OM, the panel should affirmatively announce that the parties, armed with as comprehensive an evaluation of their case as possible, must develop a schedule that fits the amount in dispute. Does a $250,000 case require eight depositions? Must the hearing in this case be two years away? Like the rule about running water following the course and filling the space available, the more time it takes to get to hearings, the more that can be plugged into the schedule, resulting in less focused, more costly, discovery.

The parties and their lawyers are smart, analytical problem solvers — if the panel says "absent (really) good cause shown, you're doing this in twelve months with three deps," they will figure out how to do it. If discovery reveals evidence that breaks the small case open, the panel can address any necessary schedule adjustments at the time. And a reduction in depositions (which are not, by the way, as of right) can still be accommodated: for example, the direct testimony of less important witnesses can be submitted in written form, subject to cross-examination at the hearing, eliminating any "trial by ambush" arguments and allowing opposing counsel to "pick their spots" and decide whether and to what extent they wish to cross the witness at all.

From the beginning, ask the parties to ultimately prepare and agree upon stipulations of fact. This avoids the mindless repetition of duplicate information in future filings and makes the parties focus and agree on certain items in the record, further streamlining future discovery and arguments to a more limited set of factual issues. If the parties can agree to the authenticity of

CONTINUED ON PAGE 4

The parties and their lawyers are smart, analytical problem solvers — if the panel says "absent (really) good cause shown, you're doing this in twelve months with three deps," they will figure out how to do it.

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CONTINUED FROM PAGE 3

documents one of them produced, depositions solely to authenticate such documents become unnecessary.

Separate Discovery Master Arbitrator

Either the panel or the parties can appoint one Discovery Master Arbitrator to decide all non-dispositive, discovery motions.

- A perennial harangue is that discovery in arbitration is out of control. How many times in how many conferences have we discussed this topic?
- But wherever your case falls on the "out-of-control" meter, simple non-dispositive discovery motions often cause complex problems:
- Even though submissions must follow approved motion protocols, some counsel fall prey to the addictive "last word" email syndrome, continuing to sur-surreply to the last surreply to the original reply — despite the fact that such exchanges require panel approval;
- If oral argument is required and the potential evidence is critical and time sensitive, you now must undo the Gordian knot of coordinating the schedules of three panelists, two lawyers, and possibly two (or more) client representatives;
- A complex motion (e.g., over e-discovery) can redirect the panel and parties' attention for weeks away from other items on the often tight discovery calendar;
- Deliberations on motions involving arguably privileged and confidential, sometimes prejudicial, documents could poison the umpire and/or arbitrators' view of the case, even if the documents are ultimately excluded.

An independent Discovery Master Arbiter can:

- reduce the schedule coordination problem by two arbitrators. In fact, if the parties agree, the one Discovery Master Arbiter can be freely and informally available for on the spot conference calls to resolve minor discovery-related issues;
- shield the entire panel from the potential prejudice of reviewing disputed privileged documents;
- free up the panel and counsel to handle other, non-discovery matters, especially if counsel can delegate non-dispositive discovery work to other lawyers in their firms;
- come down harder than the panel on "last-word-email syndrome" abusers, giving them a second chance to mend their ways without aggravating the panel;
- report to the panel, as necessary, on the progress and resolution of discovery issues and coordination of the remaining discovery schedule.

Simultaneous Depositions and Questioning of Experts

Truncate and expedite the deposition schedule by simultaneously deposing competing experts.

In addition to the occasional questionable need for them, expert witnesses seriously complicate and extend the discovery schedule, which must accommodate the identification of affirmative experts, filing of their initial reports, depositions, identification of rebuttal experts, filing of their rebuttal reports, depositions, and testimony. Counsel must prepare for, take, and defend separate depositions for each of them — if you have more than one affirmative/rebuttal expert in the case, good luck! At the hearing, the availability of experts often complicates the hearing schedule. Who goes on when, who has to wait until tomorrow, who has been hanging around all day in the hall, etc. Also, given the length of an expert's direct and cross-examination and the occasional need to take them out of order, the panel may hear petitioner's expert on Monday and respondent's on Thursday, making it harder to compare the substance and credibility of their respective testimony.

One answer: allow the two opposing experts to testify at the same time, whether in depositions or at the hearing. With counsels' input, the panel can develop a protocol for this procedure in advance. The process is simple: place opposing experts on the stand simultaneously, ask them the same questions and have them respond to each other's answers (subject to either a determined limit or the umpire's discretion), followed up by panel questions similarly handled.

If this is properly controlled, you now have a

reasoned debate (monitored by the panel if done at the hearing stage) and a record of the experts' competing arguments in one section of the transcript. One major benefit is that the panel can explore critical issues without waiting days between opposing expert's testimonies. The consolidated record reduces the time and cost of finding and comparing the experts' opinions. Simultaneous direct and cross of the experts avoids any actual or perceived unfairness to the party whose expert testifies first. Since the parties had the benefit of analyzing and reacting to their opponents' experts' reports in advance, they don't need it again at the hearing. And finally, though experienced counsel generally conduct effective cross-examinations, this procedure affords the parties' experts — the true specialists — the opportunity to ask the questions most important to them and the opinion they seek to defend.

Permit the Panel to Suggest Mediation

Since panels are dispute resolution experts with a seasoned sense for the good and bad case, allow either the umpire or the entire panel to suggest mediation to the parties at any point in the case.

First and foremost, panelists are dispute resolution experts. In some cases, they have collectively participated in hundreds of arbitrations, seen the rise and fall of parties' cases, and judged the probative/putative value of evidence and solid/sinking credibility of dozens of witnesses. They have a "gut" sense for where a case may be heading. In fact, more and more arbiters are also trained, experienced mediators who can see the right vs. wrong case for mediation a mile away, regardless of any prediction of an ultimate winner or loser at trial.

Why isn't it in the parties' best interests to allow the very panel that may decide their fate to open the discussion and even recommend mediation? Judges do it all the time. True, the settlement judge is usually not the trial judge, but not always. And what is better for the parties — knowing or not knowing before hearings that the three people to whom you will hand over your case recommend mediation? Isn't the answer obvious?

Protections can be built into the process to avoid unfairness. For example:

- parties can agree in advance to allow discussion of the "M" word ***only if all panelists agree***. A unanimous recommendation is a pretty strong, very valuable hint to the parties (not necessarily both of them) that a mediated settlement offers better options for proper relief than an arbitrated award;
- following the panel's recommendation, the case can be referred to a third party mediator selected either by the parties or the panel ***in advance***. This allows the parties to be more candid to the mediator and shields the panel from confidential disclosures made at the mediation, especially if it proves unsuccessful and the disputants return.
- ***in advance of the organizational meeting***, parties and the panel can insert dates into the schedule to discuss mediation, avoiding inferences or fears of panel prejudgment when the topic is raised later in the case;
- draft the mediation process into the arbitration clause for new contracts or amend the clause to include it in existing contracts;

Conclusion

ARIAS's November 2011 meetings have set an excellent tone for improvements in the arbitration process. Collectively, arbitrators, counsel, and parties have the opportunity to work together to address the rising tide of complaints — some unique, some long-standing — with all phases of the process. The trick is not to hold on to the past for the past's sake, but to keep what works and fix what's broken for the future.

This article hopes to open a dialogue with suggested changes to certain elements of the process — but there are more ideas and better suggestions out there. Advance selection of umpires, mediators, and the panel, making the case schedule fit the amount in dispute, using independent discovery arbiters, conducting simultaneous expert testimony, and using mediation where appropriate — all of these have the capacity to make arbitration more efficient; it still is, and always will be, arbitration.▼

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Friday, November 3, 2017
11:20 a.m. – 12:10 p.m.

GENERAL SESSION

The Bermuda Form: Can ARIAS Disrupt the Traditional Model?

SESSION MATERIALS:

PRESENTED BY:

John L. Jacobus, Steptoe & Johnson, LLP

Jonathan Goodman, General Electric

Leonard Romeo, Arch Bermuda

Mike Merlo, Aon (Bermuda) Ltd

Robin Saul, XL Bermuda Ltd/Insurance

Greg Hoffnagle, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

THE BERMUDA FORM

Interpretation and Dispute Resolution of Excess Liability Insurance

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INTRODUCTION TO THE BERMUDA MARKET

1.01 This chapter is a very brief discussion of the environment in which the 'new' Bermuda-based international insurers created in the mid-1980s, and the policy forms they chose to implement, initially took root and grew. The story of how that took place has been told at length by others.[1] The authors of this work do not propose to duplicate those efforts. By the same token, the continued development of the international Bermuda insurance market represents a much longer story, to be told by others. This chapter represents only a brief overview and context for the introduction of the Bermuda Form between 1985 and 1986.

1.02 The founding of the new companies was in reaction to changed conditions in the market for liability coverage available to US buyers. The sea change spurring the birth and development of the Bermuda international insurance market occurred in 1984, when the US- and European-based insurance environment for large corporate commercial liability risks changed radically. Prices rose and capacity diminished for all insurance buyers, but for difficult-to-place corporate risks[2] in 1984, premium rates had tripled, and available excess limits of liability had plummeted. Many insurers had simply withdrawn from the liability arena; others had drastically reduced their exposure, still others had gone insolvent.[3]

1.03 Many factors contributed to this situation. Long dormant, but newly emerging and massive long-tail liabilities plagued industrial America. The two best-known examples of these liabilities, asbestos and pollution, were each the result of operations commenced in the long distant past, causing toxic exposures silently developing over the intervening decades. The bill for the injuries and damage caused by these exposures began to come due for payment in the litigation explosion commencing in the late 1970s, and continuing unabated since.

1.04 The corporate defendants ultimately held responsible[4] for compensating the multitude of injured parties not surprisingly looked to their contemporary and historic insurers for indemnity and defence, the costs of which often proved to be well in excess of the total limits of liability of their current policies. Accordingly, the corporate defendants looked to all

[1] See, for example, Duffy *Held Captive. A History of International Insurance in Bermuda* (Oakwell Boulton, 2004); Jacobs, Masters and Stanley *Liability Insurance in International Arbitration* (Hart, 2011) Chapter 1.

[2] Chemical, pharmaceutical, and energy companies, for example.

[3] See Kim, Anderson, Amburgey and Hickman 'The Use of Event History Analysis to Examine Insurer Insolvencies' (1995) 62(1) *Journal of Risk and Insurance* 94–110.

[4] Typically, these were corporate successors responsible for long discontinued or abandoned operations.

insurers on the risk during any part of the development of these problems, from the first occasion of toxic discharge or exposure, to the time of recognition of the ensuing injuries, illnesses and damage, and including all intervening years. For the most part, in the onslaught of coverage litigation that accompanied the underlying tort litigation, policyholders found a sympathetic reception in courts in the United States.

1.05 The most often cited example of this warm reception was the decision in *Keene Corp v. Insurance Co. of N. America*.[5] This decision, addressing coverage under occurrence-based policies responding to liabilities for asbestos-related illness, held that policies in force at any point in time beginning with claimant's first exposure, through and including the time of injury or death, were 'triggered', and responsible for the compensation for the entirety of the injury. Accordingly, a single injured worker whose exposure to asbestos began in 1940, and whose injury was recognized only in 1985, could trigger some 45 years of coverage.

1.06 Thus, insurers using versions of the liability policy forms most commonly in use faced massive liabilities for which they were unprepared. With regard to the older, historic policies, where the insurers had long since 'closed the books' and to which no reserves were attached, the companies faced newly recognized financial exposures that could not be paired with current premium income streams. With regard to the newer policies, bearing larger limits of liability consistent with contemporary insurance, insurers now faced liabilities for the consequence of toxic exposures that commenced years or decades prior to their current policies' inception. Further, and usually in the cases of older policies, including a duty of defence, the insurers' liabilities were often not subject to any aggregate limit of liability, such that claims could be presented perpetually,[6] and the insurer's response would be limited only by any per accident, per occurrence or per person limit of liability that was stated in the policy.

1.07 Other factors also contributed to the capacity crisis, which not coincidentally emerged on the heels of historic lows in premiums for liability coverages. This premium nadir accompanied a period of very high inflation, motivating some insurers to balance unrealistically high loss ratios against short-term, high returns on investments. The high inflation rates also, however, resulted in inflated verdicts. Other factors were at work here as well, and economists and other experts do not agree on exactly what caused the crisis, but there was no doubt about the result: massively higher premiums, and substantially reduced capacity.

1.08 Responding to this shrinkage of capacity, but recognizing a continuing need for coverage, the insurance broker Marsh McLennan, led by Robert Clements, organized new alternative markets domiciled in Bermuda,[7] beginning with ACE Limited[8] in 1985 and XL Capital Ltd[9] in 1986. In each case, these companies were organized for the purpose of providing high-limit excess coverage for major commercial risks, regardless of industrial class, and these new companies were owned and financed by their founding insureds.

1.09 The Bermuda insurance community in 1984 was by no means moribund, but had not yet developed into the international insurance market it is now. It served as home to a domestic

[5] 607 F 2d 1034 (DC Cir 1981).
[6] Or as long as claimants continued to emerge.
[7] But incorporated elsewhere.
[8] Then American Casualty Excess.
[9] Then EXEL Ltd.

insurer market serving the needs of its 60,000 residents, and it was the domicile of hundreds of 'captive' insurers. These insurers, typically, wholly owned subsidiaries of their typically Fortune 500 creators, were formed to serve the needs of their corporate parents, and usually only wrote policies for those companies within the corporate family of the parent. Similarly, the island spawned 'industry captives', organized for the benefit of designated industries, which shared common needs and interests. In each case, the driving force behind the formation of these entities was the perception that the commercial insurance market was not adequately serving the needs of these companies and industries, and Bermuda tax and regulatory policies created an attractive domicile for alternative ways to address these risks. Bermuda-based insurers participated in international, non-captive placements, but only to a limited degree.

1.10 The remaining problem was designing a form to be used by the new companies that would permit them to provide the high excess coverages desired by corporate buyers, while avoiding the very problems that were visited on the historic insurers of US risks. Primarily, the goals were to avoid 'legacy' exposures such as long-term gradual pollution and asbestos, and provide increased certainty of response. That is, the new insurers, while prepared to commit large limits, required advance knowledge that those limits would be required to respond to any one occurrence only once. The Bermuda Form, designed to alleviate these problems, while filling an urgent and continuing market need, was the result.

1.11 It is appropriate here to explain what we mean by the 'Bermuda Form'. While the policy form, introduced in 1985, has gone through numerous evolutions by those insurers routinely using the form, and has been modified and hybridized extensively by others, by 'Bermuda Form' we refer to a form that is at least generally similar to those historically issued by ACE Bermuda Insurance Ltd, and XL Insurance (Bermuda) Ltd, on their 'Occurrence Reported' forms, and which include the following characteristics:

(1) a trigger of coverage, or linkage of loss to policy period and terms that is accomplished solely via the policyholder's affirmative act of providing written notice to the insurer;
(2) a continuous policy—regardless of how long the insurer–insured relationship continues, it will generally be documented in a single, annually extended contract;
(3) a bifurcated definition of 'occurrence'—treating injuries and damage derived from products liability exposures differently from those derived from premises and other non-products exposures;
(4) integrated occurrence—a definition of 'occurrence' which permits policyholders to consider multiple instances of personal injury or property damage to be considered as falling within one occurrence (for purposes of eroding retentions and underlying insurance) where all resulted from a common cause;
(5) 'maintenance deductible', a term undefined in any policy seen by the authors, but which, in industry practice, has colloquially become known as representative of that component of loss that is not covered because not 'vastly greater in order of magnitude' than what had been previously expected or experienced;[10]
(6) an express statement of principles governing interpretation of the policy, including designation of which forum's law applies to construction of the policy;

[10] The 'maintenance deductible' feature, while included in the large majority of the Bermuda Forms, is not in all. Chartis Excess, successor to Starr Excess, does not include this feature in its version of the form.

(7) dispute resolution by means of binding, mandatory, non-US arbitration; and
(8) an absolute exclusion of 'long-tail' exposures preceding the policies.

1.12 There are other distinguishing features, but for the most part, the remaining components of the Bermuda Form have much in common with those of contemporary US insurers. The significantly different features are discussed at some length in the next chapter.

Bermuda Form arbitration: a policyholder perspective

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Introduction

With the globalisation of the world economy, private arbitration is fast becoming the favoured forum to resolve international business disputes, with London being a primary venue. While most decisions to arbitrate as well as the terms of the arbitration are negotiated by the parties, there is one contract that requires a party to arbitrate and sets forth the terms without negotiation – that contract is a Bermuda Form excess insurance policy.

In today's insurance market, most multinational and US Fortune 500 companies purchase high-level excess insurance in the Bermuda market, primarily because the market has substantial capacity. The purpose of this article is to comment briefly on several aspects of this arbitration process that by design favours the insurer, and how a policyholder can secure a more level playing field.

There are a number of Bermuda forms covering different risks.[1] They all, however, have one feature in common – the dispute resolution provision.[2] Briefly, that provision provides for an arbitration seated in London and procedurally governed by the (British) 1996 Arbitration Act.

It is widely acknowledged that the Bermuda Form and its arbitration provision resulted from the insurance industry's dissatisfaction with insurance coverage decisions in United States courts[3] and, more broadly, with an American judicial system that insurers believe favours policyholders. The Bermuda Form arbitration provision somewhat alleviates the insurers' perceived mistreatment at the hands of the American judicial system by featuring several pro-insurer procedural mechanisms.

London venue

Seating the arbitrations in London presents several advantages to insurers. First, for most American companies it will greatly increase costs and complexity to bring company and third-party witnesses to London. Second, many of the evidence-gathering tools available in US court proceedings (eg, third-party document subpoenas, depositions de bene esse) are not available to litigants. Since the presentation of factual evidence is almost the sole burden of policyholders in coverage disputes, the absence of these tools adds further difficulties to the prosecution of the claim.

English procedural rules

Particularly distressing and burdensome to the insurers is the American discovery process, especially when insurer underwriters are asked probing questions at depositions about the meaning of the policies the insurers are selling. While the Bermuda Form dictates the substantive law of New York should apply, British law governs procedural issues. Thus, the procedural rules governing a Bermuda Form arbitration do not allow depositions and restrict written discovery. Practically speaking, the policyholder has no means to test the document productions of Bermuda insurers, nor is there any threat of sanctions or penalties to compel the complete and ethical production of documents.

The abrogation of contra preferentem

The substantive law of almost every jurisdiction in the United States, including New York, provides that if a policy term is ambiguous and subject to two reasonable interpretations, the one favouring the policyholder will be used. The Bermuda Form expressly abrogates New York's contra proferentem rule – a major advantage for the insurers who drafted the contract. Many 'policyholder friendly' court decisions in New York rely at least in part upon this doctrine; its abrogation provides a means for Bermuda insurers to distinguish these cases.

Payment of punitive damages

The threat of punitive damages is a useful lever to prevent an insurer from refusing to pay a claim even though there is no credible basis to deny it. The Bermuda Form expressly prohibits the award of any punitive damages. The result is that a Bermuda insurer has little or no incentive to resolve a large claim quickly – the longer the insurer holds the money, the more it will earn, ultimately reducing the insurer's net payout.

Confidentiality

In the insurance context, confidentiality acts as a sword rather than a shield. The purpose of confidentiality in most business arbitrations is to protect sensitive business data from being publicly disclosed. In the insurance context, confidentiality (in tandem with the unavailability of punitive damages) permits insurers to advance specious defenses with no accountability. Arbitral decisions are not reported, so there is no way for an insured to investigate an insurer's position or to root out whether the same insurer has taken a contrary position in a prior proceeding.

Confidentiality also allows insurers to work together while leaving the policyholder to fend for itself. Most insurance is purchased in layers, with no one insurer providing the totality of the limits. When a coverage dispute occurs, separate arbitrations must be brought against each insurer.[4] In a situation where, for example, a policyholder commences simultaneous arbitrations against two insurers, the insurers – even though they are in separate arbitrations – are permitted to work together under the guise of a joint defence agreement, while the policyholder cannot seek assistance from other, similarly situated, policyholders because such a request would violate the confidentiality of the arbitration.

Another way in which confidentiality tilts the playing field against the policyholder is that insurers are repeat players in Bermuda Form arbitrations. Hence, because the same issues arise in multiple arbitrations over time, insurers are able to fine-tune their arguments and, as discussed below, they know which arbitrators have ruled in their favour in the past and are disposed to be swayed by such arguments in a pending arbitration. On the other hand, it is unusual for a policyholder to be a repeat player in insurance arbitrations in the same way that insurers are.

Selection of arbitrators

As explained above, Bermuda Form arbitrations create unique circumstances that set them apart from more traditional international business arbitrations. In most business disputes, the players have never been involved in prior arbitrations; namely, an arbitration is a unique event for most businesses. Bermuda insurers, on the other hand, may be involved in multiple arbitrations each year. This gives the Bermuda insurers an unparalleled advantage in choosing an arbitrator. Because it arbitrates year in and year out, a Bermuda insurer can winnow its arbitrator choices to those few who share its interpretation of the Bermuda Form in connection with similar issues that have arisen in the past. The policyholder, on the other hand, does not have access to this same information because, more likely than not, the instant arbitration is the only one the policyholder has experienced. Hence, it cannot determine the track record of any potential arbitrator. Moreover, given the confidential nature of arbitrations, the policyholder cannot make a general inquiry to uncover the experience of potential arbitrators.

Finally, the process for selecting arbitrators provides that each party selects an arbitrator and those two arbitrators, in turn, select the third arbitrator. If the two arbitrators cannot agree on the selection of the third arbitrator, either party can petition the High Court of Justice of England and Wales to appoint the third arbitrator. This process means that, more often than not, the third arbitrator will be a British barrister or former British jurist. Further, the third arbitrator, who is not appointed by either party unilaterally, is the chair of the tribunal.

While this process does not appear to provide either side with an advantage, the likely result is a majority British panel that will apply New York law through an English law 'prism'. On most insurance issues, English law is more favourable to insurer positions than the law of most American jurisdictions, including New York. Insurers rely on this prism (and the abrogation of contra proferentem) to advance aggressive, pro-insurer interpretations of New York law and arguments that can lack the commercial sense American courts require.

Levelling the playing field

While there is no doubt that the playing field is tilted toward the insurer at the outset of a Bermuda Form arbitration, there are steps the policyholder can take that even the odds. In our experience the following steps can certainly assist in the successful outcome described at the outset.

Assemble the right team

A Bermuda Form arbitration requires an international team of lawyers. The events that are the subject of disputed coverage more than likely took place in the United States or, at the very least, did not take place in the United Kingdom. In addition, New York is the governing law. Hence, American lawyers are needed to develop the facts and evidence under New York law. In our experience, however, it would be a mistake for an American lawyer to be the lead trial counsel. George Bernard Shaw was reputed to have said that 'England and America are two countries separated by a common language.' That statement is amplified in how trials are conducted on either side of the Atlantic.

British counsel have a unique style that American attorneys cannot replicate, and, given that the chair of the arbitration tribunal is invariably from the United Kingdom, the wise policyholder chooses a British barrister, who will speak the same language as the chair. The search does not end there, however. While the UK is modern in almost all respects, legal representation remains determinedly less so. Barristers are the lead trial lawyers, who are 'instructed' by solicitors. Traditionally, barristers seldom meet clients, do not interview witnesses, and become deeply involved in the case only in the last few months before the hearing. Given today's complex disputes, with key decisions made during the many months of preparation, it is imperative that the chosen barrister has a 'modern' view of practice, and will engage with the client and the American lawyers as a full participant from the outset.

Many experienced practitioners believe that one of the most important decisions in an arbitration is the selection of the tribunal. As discussed above, the policyholder has the right to choose an arbitrator, and has input through that arbitrator in the selection of the chair. Given that the chair will most probably be from the UK, an accessible and experienced barrister will be an invaluable resource in the selection process.

Prepare the case early and carefully

US practice permits American litigators to often sue first and develop the facts and theories later. Most American jurisdictions permit notice pleading, namely, describing generally what the dispute is about. The specific facts and theories can be and are developed almost up to the first day of trial. The pleadings can be freely amended and the legal arguments can change daily. Your case is told through direct testimony of the witnesses during trial. Because they are governed by British procedural rules, the arbitrations have come to replicate in large part British court trials and therefore this approach will not work in a Bermuda Form arbitration.

The first major difference compared with the American judicial system is that pleadings take a central role in a Bermuda Form arbitration. Rather than simply give notice in general of the dispute, the pleadings, which are exchanged shortly after the commencement of the arbitration, set forth in detail each party's legal and factual position. If an argument is not laid out in these pleadings – which consist of a statement of claim by the claimant, a statement of defence by the respondent, and a reply by the claimant – the tribunal will be reluctant to allow amendments as the date of hearing approaches. Additionally, a 'directions order' is negotiated among the tribunal and the parties early in the proceedings. This order, similar to a case management order, sets forth the case calendar working backward from the hearing date, which is set in stone along with the length of the hearing; a contrast to the often multiple changes in the trial calendar one sees in American courts.

Another major difference between an American judicial proceeding and a Bermuda Form arbitration that requires a party to prepare the case early and carefully is the manner in which witnesses are presented to the tribunal. The direct testimony of all witnesses is submitted to the tribunal and the opposing party months before the hearing in the form of written witness statements or expert reports.[5] Live testimony of both fact witnesses and experts is conducted only as cross-examination. This allows the insurer at the final hearing, who will often have far fewer witnesses than the policyholder, the benefit of weeks of challenging the policyholder's case before the tribunal – without the benefits that accrue from presenting direct testimony.

Hence, the policyholder must make the tactical and strategic investment necessary to develop the legal theories and facts before invoking the arbitration provision in order to avoid being straitjacketed later by the contents of its early pleadings and direct testimony. Given the absence of direct testimony, the policyholder must also take great care in selecting which witnesses to present.

Prepare and maintain a claim-cost analysis

By prohibiting recovery for punitive damages against insurers in their insurance policies, the insurers removed any financial incentive to settle early or for a reasonable amount. If an insurer loses an arbitration, however, one recovery element remains for the policyholder – attorneys' fees, which can be significant. The losing party in a Bermuda Form arbitration is liable for the winning party's costs, which include legal fees and expenses, expert witness fees, the arbitrators' fees and expenses, and any other expenses associated with the conduct of the arbitration. The tribunal has almost unlimited discretion to award costs as well as in the matter of the amount.

In order to maximise an arbitration award, it is imperative that meticulous records be kept of all expenditures, especially if the policyholder is engaged in multiple arbitrations with different Bermuda insurers involving the same occurrence. In that situation, the policyholder can expect each insurer to attempt to pass its award burden on to one of the other insurers or argue for an equal division of the award. To counter this argument and maximise the cost award, the policyholder should maintain separate expense records for each arbitration to the extent possible.

Conclusion

As should be obvious from the foregoing, Bermuda Form arbitrations are very different from both American trials and arbitrations. Many of the differences are designed to give the insurer an advantage. What we have tried to do in this chapter is to provide some ideas about how policyholders can counter those inbuilt advantages. These ideas are by no means the totality of steps a policyholder can take to insure a fair hearing, but they should give policyholders an appreciation that they can vindicate their rights in spite of playing on the insurers' custom-made playing field.

Notes

1 For example, for most North American utilities the Bermuda policy purchased follows the form of the AEGIS primary policy, AEGIS being the industry mutual that provides much of the North American utility industry's primary liability coverage.

2 The Bermuda Form contains an arbitration provision, which replaces any underlying dispute resolution provision with a lengthy provision specifying, among other things, that:

> *Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Act of 1996 . . . by a Board composed of three arbitrators...*

An additional provision specifies that '...any dispute, controversy or claim arising out of or relating to this Policy shall be governed by and construed in accordance with the internal laws of the State of New York.' See, for example, FORM-AE02 Ed 9/08 ('Excess Liability Insurance Policy Follow Form Claims Made Policy Insuring Agreements').

3 Richard Jacobs, Lorelie Masters and Paul Stanley, *Liability Insurance in International Arbitration: the Bermuda Form* (Second edition, January 2011), paragraph 1 at 1-21; David Scorey, Richard Geddes and Chris Harris, *The Bermuda Form: Interpretation and Dispute Resolution of Excess Liability Insurance* (December 2011), paragraph 1 at 3-6.

4 Consolidation of the disputes is only by consent of the insurers, which seldom happens.

5 For example, the authors submitted 21 fact witness statement and seven expert reports in a current arbitration, as well as submitting supplemental statements in rebuttal of the respondent's witness statements and expert reports, several months before the actual hearing.

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The Bermuda Form Arbitration Process: A Glimpse Through The Insurers' Spectacles

By Mina Matin

Introduction

1. It is reported that, in recent years, there has been a threefold increase in U.S. citizens giving up their citizenship and becoming British, a process known in U.S. tax circles as renunciation. The reason is principally U.S. tax law and not any other. Otherwise, U.S. citizens are not enamoured of the U.K. Indeed, the climate in England is notoriously atrocious, the English accent is curious, and the humour is dubious. However, U.K. tax is preferable to U.S. tax. Yet, despite their renunciation, these erstwhile citizens harbour a passion for U.S. laws and are really U.S. citizens with UK tax clothing.

2. The same might be said about Bermuda Form arbitrations, where U.S. policyholders have embraced the idea of (mainly) English arbitrations for U.S. disputes. English arbitration laws and practices can be preferable to U.S. arbitration laws and practices in certain respects even though the policyholders are truly U.S. entities. For this reason, they have retained New York law to protect them whilst opting for English arbitration clothing with which to cover them. In the same vein, it might be said that Bermudian insurers have retained the cloak of protection of English arbitration laws and practices whilst agreeing to New York law (subject to certain modifications) in an effort to maintain an "even-handed" and "fair" level playing field even though in all other respects their cultural affinity is towards English law.

3. In this context, this Article explores some of the practical issues that might arise in Bermuda Form arbitration proceedings. In particular, it takes a look at these issues from the perspective of both insureds and insurers who have each come to the Bermuda Form playing field with inevitably different and competing objectives but yet must abide by the same set of rules.

Governing Law

A. Relevant Provisions

4. Condition O of the standard Bermuda Form Policy provides insofar as material as follows:

"This Policy, and any dispute controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance ***with the internal laws of the State of New York [Bermuda or England and Wales]****,* except insofar as such laws:

(1) may prohibit payment in respect of punitive damages hereunder;

(2) pertain to regulation under the New York Insurance Law or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insureds situated in the State of New York; or

(3) are inconsistent with any provision of this Policy..." (emphasis added).

5. The standard Bermuda Form Policy will therefore engage New York law, English law or Bermuda law, depending on the selection of the parties. The normal selection is New York law. It is rare for the parties to select English or Bermuda law to be the governing law of the contract because of the perception of policyholders (who tend to be North American) that English and Bermuda law tends to be more favourable to insurers than to policyholders. The Insurance Act 2015, which came into force in England in August 2016, might change that perception to a degree so far as English law is concerned but Bermuda has no such law and there are no signs that it is considering enacting any equivalent.

6. The arbitration provision in Condition N of the Policy provides, in relevant part, as follows:

> *"Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975, 1979 and/or any statutory modification or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected as follows..."*

7. This provision not only makes London, England the place where the arbitration will be held (although there is a discretion in the arbitration tribunal exceptionally to hold the arbitration elsewhere if the circumstances demand)[1] but also makes England the juridical seat of the arbitration: in other words, the arbitration is an English arbitration and is subject to the supervision and oversight of the English Courts in accordance with English legislation. The general effect is that no other courts in any other jurisdiction may interfere with the tribunal or have jurisdiction in relation to the conduct of the arbitration and any challenges to its procedures or substance.

8. In general, therefore, the governing law of the substantive rights and obligations of the parties will be New York law whilst the law of the arbitration will be English law with the juridical seat of the arbitration being London, England. I shall proceed on this basis for the purposes of this Article.

9. There are two consequences of the juridical seat of the arbitration being that of London, England:

   a. *Firstly*, the procedural law that is applicable to the arbitration will be that of the English Arbitration Act 1996.

   b. *Secondly*, the arbitration will be subject to the supervisory jurisdiction of the English High Court under the Arbitration Act 1996.[2]

B. Procedural Law Applicable to the Arbitration

10. The Arbitration Act 1996 confers expansive powers on the parties and the Tribunal. The Tribunal is required to *"act fairly and impartially as between the parties"* and to *"adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."*[3]

11. The Tribunal also has a broad discretion to determine *"all procedural and evidential matters, subject to the right of the parties to agree any matter."*[4] This includes but is not limited to matters such as: (a) whether and if so, what form of pleadings are to be used and when they should be served, (b) disclosure issues, (c) whether to apply strict rules of evidence as to the admissibility, and relevance of weight of materials.[5]

12. What this means is that a tribunal has the discretion to adopt procedures that are not generally applied in English Court (or any other country's court) proceedings. For example, a tribunal may determine that depositions, which are not deployed in English proceedings, should be deployed. That said, the tribunal would typically tend to adopt English or international arbitration procedures for the conduct of the arbitration.

1 *See section 34(2)(a) of the Arbitration Act 1996.*

2 *See section 2(1) of the 1996 Act.*
3 *See section 33(1) of the 1996 Act.*
4 *See section 34(1) of the 1996 Act.*
5 *See section 34(2) of the 1996 Act* which sets out a list of procedural and evidential matters which the tribunal has a discretion to determine.

C. Supervisory Jurisdiction of the Arbitral Process

13. Issues that fall within the ambit of the English High Court's powers include: (a) the removal or the appointment of arbitrators[6] (see further section C(iii) below), (b) the substantive jurisdiction of the tribunal,[7] (c) challenges to an arbitral award on the basis that the tribunal did not have substantive jurisdiction or on the ground of serious irregularity and appeals.[8]

D. Applicable Substantive Law

14. As noted above, the express law governing substantive legal issues is that of the internal law of New York. As a result, it is unlikely that New York's choice of law rules would apply.

15. Disputes have sometimes arisen as to whether New York law governs issues of misrepresentation and/or non-disclosure. Parties have purported to assert that New York law applies solely to matters of construction and interpretation, and that misrepresentation and/or non-disclosure issues are not disputes that arise out of or relate to the policy.

16. Under English law, disputes regarding: (a) the contractual interpretation of the contract, as well as (b) the validity of the contract including issues of misrepresentation or material non-disclosure are governed by the law chosen by the parties as applicable to the substance of the dispute.[9] If the policy provides for English arbitration in London, a tribunal applying English law (as would normally be the case in London arbitrations where choice of law clauses are ordinarily interpreted in accordance with the *lex fori*, the law of the forum)[10] would likely conclude that New York law applies to all issues of substance between the parties, including therefore issues of misrepresentation and/or non-disclosure.

17. The two express qualifications to the application of New York law are as follows:

    a. *Firstly*, the application of New York's regulatory law is excluded. The reference to "*regulation under the New York Insurance law*" is likely a reference to regulatory statutes and not to New York's Insurance Law that pertains to issues of misrepresentation and/or material non-disclosure. Indeed, as noted above, the general practice is that New York Insurance Law applies to issues of misrepresentation and material non-disclosure.

    b. *Secondly*, punitive damages are not, as a matter of public policy under New York law, insurable. It follows that the modification to the application of New York law that relates to "punitive damages" is likely intended to provide for the recoverability of punitive damages under the Bermuda Form Policy so that a tribunal may award an indemnity in respect of punitive damages.

E. "Modified" New York

18. Condition O of the Bermuda Form Policy also provides insofar as is material as follows:

> *"[T]he provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between the Insured and the Company; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, exclusions and conditions (without regard to authorship of language, without any presumption or arbitrary interpretation of construction in favor of either*

6 *See sections 18, 19 and 24 of the Arbitration Act 1996.*

7 *See section 32(1) of the 1996 Act* which provides that the court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the Tribunal. Such an application will not be considered, however, unless it is made with the agreement of all the parties to the arbitration or the permission of the Tribunal (see section 32(2) of the Arbitration Act 1996).

8 *See sections 67 and 68 of the Arbitration Act 1996.*

9 *See section 46(1)(a) of the 1996 Act; Evans Marshall & Co. Ltd. v. Bertola SA* [1973] 1 WLR 349.

10 Under English conflict of laws principles, which apply to an arbitration seated in London under an arbitration agreement governed by the English Arbitration Act 1996, the effect of a choice of law clause is a matter for the lex fori, and is determined by applying the normal English rules of interpretation: see, for example, *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.* [1971] AC 572 at p.603 (per Lord Diplock).

the Insured or the Company or reference to the "reasonable expectations" of either party or to contra proferentem and without reference to parol or other extrinsic evidence."

19. What this means is that the following are all outlawed, namely: (i) any presumptions in favour of the insured or, in the same vein, any anti-insurer principles, (ii) any rule that applies an interpretation of the policy in accordance with the reasonable expectations of the parties, (iii) any rule that states that any ambiguity must be resolved in favour of the insured or against the insurer, (iv) any recourse to the rule of contra proferentem (i.e., applying any ambiguity in favour of the insured), and (v) any recourse to extrinsic evidence such as the subjective views of the parties or negotiations.

F. The Role of Extrinsic Evidence

20. The rationale for excluding extrinsic evidence is to prohibit contractual interpretation based upon the subjective views of the parties as to the meaning of the policy terms. It does not follow, however, that the Bermuda Form Policy should be construed in isolation without regard, for example, to the contextual circumstances in which it was entered into, the commercial purpose of the policy and its terms, and the knowledge of both parties of extraneous facts that might have influenced their agreement.

21. This is not considered to be inconsistent with New York law which provides that the fundamental rule in the construction of all contracts, including insurance contracts, is to enforce the mutual intent of the parties at the time that the contract was formed as expressed in the unequivocal language employed in the contract.[11]

22. Examples of extrinsic evidence that might be deployed include: issues as to the custom and practice or known purpose of a particular provision; or the structure of the program of which the policy forms a part.[12] Examples of extrinsic evidence which may not be deployed include: pre-contractual or contemporaneous or subsequent declarations by the one of the parties as to the meaning of the policy, pre-contractual or contemporaneous or post-contractual conduct or correspondence of any one of the parties from which one might be able to infer their subjective understandings of what the policy means, and testimony of the parties' subjective intentions.

G. Are there alternatives to "modified" New York law that should be considered?

23. Of all the laws of the individual States of the Union, New York law is probably regarded as the most even-handed as between insured and insurer. There is no doubt that English or Bermuda insurance laws are regarded as less favourable to insureds than even New York law but, in truth, that is probably as much a consequence of the applicable New York legal principles, themselves, as of the disposition of English arbitrators who tend to be English Queen's Counsel and former English judges. These arbitrators are in fact notoriously even-handed as between insureds and insurers but, from the perspective of North American insureds and their lawyers, who have come generally to expect tribunals to be pro-insured, they *therefore* seem to be more favourable to insurers. That is simply the product, however, of their even-handedness.

24. It would be rare (and possibly ill-advised) for a policyholder to choose English or Bermuda governing law above New York law. Similarly, it would be rare (and possibly ill-advised) for an insurer to choose arbitration other than in London, England, or Bermuda. The combination that has worked reasonably well until now is to have modified New York governing law with English or Bermuda arbitration. In that way, the competing interests of the parties are reasonably well balanced.

11 *See Breed v. Insurance Co. of North Am.*, 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 355 (1978); *United States Fidelity & Guaranty Co. v. Annuziata*, 67 N.Y.2d 229, 232, 501 N.Y.S.2d 790, 791 (1986) ("Where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement.")

12 *See e.g., Newmont Mines Limited v. Hanover Insurance Company* 784 F.2d 127, 135 (2d Cir. 1986): *"The cardinal principle for the construction and interpretation of insurance contracts – as with all other contracts – is that the intentions of the parties should control.* See, e.g., *29 N.Y. Jur. Insurance §§ 593-594 (1963). Unless otherwise indicated, words should be given the meanings ordinarily ascribed to them and absurd results should be avoided. As we have stated before, the meaning of particular language found in insurance policies should be examined 'in the light of the business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes.' Champion International Corp. v. Continental Cas. Co., 546 F.2d 502, 505 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977)."*

Selection of Arbitrators

A. The Selection Process

25. One of the critical first steps and often the key to success in the arbitral process is the selection of arbitrators. As Alexander Graham Bell said, *"[b]efore anything else, preparation is the key to success."* A poor selection of an arbitral tribunal can lead to devastating results.

26. In a Bermuda Form arbitration, there will generally be three (impartial) arbitrators: two party appointed arbitrators together with a chairperson.

27. The decision to appoint an arbitrator often involves detailed investigations into proposed arbitrators having regard to their experience and qualifications and the merits of the case. That said, unlike U.S. proceedings, detailed interviews with prospective candidates are not commonplace."

28. A good guide to those communications that are appropriate are set out in the Chartered Institute of Arbitrators International Arbitration Practice Guideline on "Interviews for Prospective Arbitrators" ("CIA Guidelines on Interviews"). The CIA Guidelines on Interviews provide that it is permissible to have initial contact with a prospective arbitrator and to interview the arbitrator but only to the extent of ascertaining: (i) his past experience in international arbitration, (ii) expertise in the subject matter of the dispute, (iii) his availability, including the expected timetable of the proceedings and estimated timings and length of hearing and/or (iv) the arbitrator's fees and other terms of appointment.[13] Matters that should not be discussed include: (i) the specific facts or circumstances giving rise to the dispute, (ii) the positions or arguments of the parties, (iii) the merits of the case, and (iv) the prospective arbitrator's views on the merits, parties' arguments and/or claims.[14] Moreover, ex parte communications between an arbitrator and those appointing him are generally forbidden.

29. As a general practice, insurers in a Bermuda Form arbitration tend to appoint English Queen's Counsel or retired English Commercial Court Judges as their party appointed arbitrator and/or put forward their names as the chairperson. This practice has arisen in part for cultural reasons (see above) but also because of their analytical approach to contractual interpretation which is often key to an insurer's defences. Whilst insureds also appoint English Queen's Counsel, they also often seek to appoint U.S. arbitrators who, they think, might be more inclined to be understanding of, and more favourable, to policyholders.

30. Unlike the more adversarial systems in other parts of the world, all three arbitrators must be "impartial" and "independent." Impartiality and independence extend to those instances where an arbitrator has already expressed a view adverse to a party in the same or a related case. Thus, it has been held by the English Court of Appeal that, *"[t]he mere fact that a judge earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or a witness to be unreliable, would not without more found a sustainable objection."* It should, therefore, be noted that the fact that an arbitrator has been appointed for one party in a prior arbitration and/or has determined certain issues which may well arise in a subsequent arbitration, does not preclude that arbitrator from acting in a subsequent related arbitration (see further paragraphs 32 to 37 below). Quite often in these situations, a party might make noises of unhappiness without, however, formally objecting. The arbitrator might then decide to resign or not to accept the appointment - but that will be in order to avoid any sense of grievance rather than because of any legal imperative.

B. Frequent Flyer appointments

31. A recurrent criticism levied by policyholders against insurers is what has been described as "frequent flyer" appointments i.e., repeated and frequent appointment of the same arbitrator as the gateway to a favourable outcome. Such criticisms are usually entirely baseless (with the specific exception of the circumstances that are identified below in section E(iii)). Indeed, the same could be said of insureds in their selection of arbitrators. In light of the select pool of truly expert and appropriate arbitrators for a Bermuda Form dispute, it is inevitable that the same arbitrator may be appointed in multiple

13 *See Article 2 (Matters to discuss at an interview prior to appointment) of the Chartered Institute of Arbitrators International Arbitration Practice Guideline on "Interviews for Prospective Arbitrators."*

14 *See Article 3 (Matters that should not be discussed) of the Chartered Institute of Arbitrators International Arbitration Practice Guideline on "Interviews for Prospective Arbitrators."*

arbitrations.

32. In a recent decision in the Commercial Court, England, Mr. Justice Popplewell held that the appointment of an arbitrator in related arbitrations was insufficient to create an appearance of bias *per se* to justify his or her removal under section 24(1) of the Arbitration Act 1996.[15]

33. Section 33 of the Arbitration Act 1996 requires the tribunal to act fairly and impartially between the parties. The question whether circumstances exist which give rise to justifiable doubts as to an arbitrator's impartiality is to be determined by applying the common law test for apparent bias,[16] namely, whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[17] The test is an objective one.

34. Mr. Justice Popplewell relied upon the case of *Amec Capital Projects Ltd. v. Whitefriars City Estates Ltd.* [2004] EWCA Civ. 1418 in support of the proposition that, *"the mere fact that the tribunal has previously decided the issues [in a separate adjudication] is not of itself sufficient to justify a conclusion of apparent bias. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons."*

35. He went on to say that these comments apply with as much force to arbitrators in international reinsurance arbitrations. He specifically commented that, in relation to Bermuda Form arbitrations,

> *"[a] number of arbitrations may be commenced around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. Another possibility is that there are successive arbitrations, for example because the policyholder wishes to see the outcome of an arbitration on the first layer before embarking on further proceedings. A policyholder, who has been successful before one tribunal, may then be tempted to appoint one of its members...as arbitrator in a subsequent arbitration. Similarly, if insurer A has been successful in the first arbitration insurer B may in practice learn of this success and the identity of the arbitrators who have upheld insurer A's arguments. It follows from Locabail and Amec that an objection to the appointment of a member of a previous panel would not be sustained simply on the basis that the arbitrator had decided a particular issue in favour of one or other party. It equally follows that an arbitrator can properly be appointed at the outset in respect of a number of layers of coverage, even though he may then decide the dispute under one layer before the hearing on another layer."*[18]

36. Mr. Justice Popplewell's ruling might be considered a little naïve and unworldly by some, especially any who have had an unsettling experience of serial appointments and serial appointees. However, extrapolating from the fundamental principle that the English arbitral process requires "impartiality," the relevance of an arbitrator having acted in related arbitrations is, at least conceptually, diminished.

37. Moreover, the decision did not address the frequency with which an arbitrator may act in related proceedings and repeated appointments on behalf of a party. To this end, in my experience, most parties to the Bermuda Form arbitral process abide by the IBA Guidelines on Conflict of Interest. The IBA Guidelines provide, among other things, that doubts as to an arbitrator's impartiality or independence may arise if the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.[19]

C. Methods of agreeing the Third Arbitrator

38. Typically, the chairperson or third arbitrator is selected by the two party appointed arbitrators. A list of names might be given by each side to the two party appointed arbitrators with view to those arbitrators selecting a third who is common to both lists. In some arbitrations, where

15 *See H v L & Ors.* [2017] EWHC 137 (Comm.)
16 *See Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] QB 451 at 17; *A v. B* [2011] 2 Lloyd's Rep. 591 at 22 and *Sierra Fishing Co. v. Farran* [2015] EWHC 140 at 51.
17 *See Porter v. Magill* [2002] AC 357 per Lord Hope at 103.
18 *Id* at para. 28 (citing with approval an extract from *"Liability Insurance in International Arbitration,"* 2nd Edn at 14.32).
19 *See paragraph 3.1.3 of the IBA Guidelines on Conflicts of Interest.*

the parties cannot come together, and where even the two appointed arbitrators cannot agree, the third arbitrator is selected by a drawing of lots. In the event, however, that both parties are unable to select a common arbitrator as the chairperson, the dispute can be referred to the English / Bermuda High Court which will make the final choice.

D. Default Selection by the English High Court

39. Section 16 of the Arbitration Act 1996 provides as follows:

> a. *The parties are free to agree on a procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.*
>
> b. *If or to the extent there is no such agreement, the following provisions apply.*
>
> *... (Emphasis added).*
>
> *(5) If the tribunal is to consist of two arbitrators and an umpire-*
>
> *(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.*
>
> *(7) In any other case (in particular, if there are more than two parties) section 18 applies as in the case of a failure of the agreed appointment procedure. (Emphasis added).*

40. Section 18 of the Act provides as follows:

> a. *The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.*
>
> b. *If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.*
>
> c. *Those powers are-*
>
> *1. To give directions as to the making of any necessary appointments;*
>
> *2. To direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;*
>
> *3. To revoke any appointments already made;*
>
> *4. To make any necessary appointments itself. (Emphasis added).*

41. Section 27 of the Act further provides:

> a. *Where an arbitrator ceases to hold office, the parties are free to agree-*
>
> *1. Whether and if so how the vacancy is to be filled...*
>
> b. *If or to the extent that there is no such agreement, the following provisions apply.*
>
> c. *The provisions of section 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment. (Emphasis added).*

42. In order to invoke these provisions, a party must satisfy the court that there is no agreement as to the procedure for the appointment of a third arbitrator or that the procedure has failed.

43. It is rare for the Court to have to intervene. Normally, the parties and/or the two appointed arbitrators find some means for the appointment of the third arbitrator even if the final result satisfies nobody very much or entirely.

Choice of Counsel

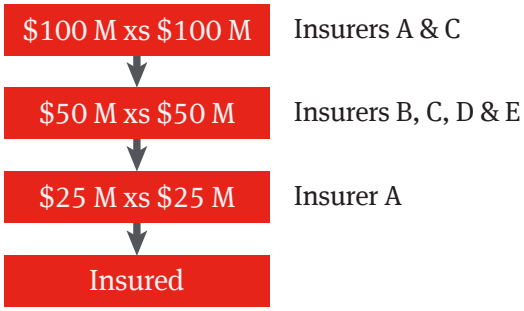
A. Is English Counsel desirable?

44. "*Unless otherwise agreed by the parties,*" either party may be represented in the arbitration proceedings by "*a lawyer or other person chosen by him.*"[20]

45. Given that the juridical seat of the arbitration is in London and the applicable procedural law of the arbitration will

20 *See section 36 of the 1996 Act.*

be that of English law pursuant to the provisions of the Arbitration Act 1996, the general trend is towards the choice of English Counsel, usually a Queen's Counsel, as the lead advocate. This is also partly for cultural reasons as well as the fact that the tribunal will commonly have two English lawyers on the panel. Counsel will likely have appeared before the arbitrators in other Bermuda Form disputes and will therefore have some familiarity with the workings of the Form and with Bermuda Form arbitrations. There is, of course, nothing to prevent the use of U.S. Counsel as the lead advocate on the matter. Both English and/or U.S. Counsel are equally effective.



B. Can English Counsel be from the same chambers as an arbitrator?

46. The short answer is, yes. Instinctively, this might appear unjust especially to those accustomed to the U.S. adversarial system. It is also not uncommon to find that Counsel from the same set of chambers are on opposite sides. In the latter instances, these arbitrations sometimes are the most bitterly fought.

Consolidation of Related Proceedings Among Insurers In the Same Tower or Layer

A. Is Consolidation Desirable?

47. Section 35 of the Arbitration Act 1996 provides that the parties may agree that: (a) arbitral proceedings shall be consolidated with other arbitral proceedings, or (b) that concurrent hearings shall be held, on such terms that are agreed between them. The tribunal has no independent power to order the consolidation of proceedings or concurrent hearings.

48. Insurance coverage to an insured under the Bermuda Policy generally consists of several layers of excess of loss coverage that are placed with one or more insurers usually in the Bermudian market. For example, a basic program might be as follows:

49. Let us assume that the insured faces multiple claims amounting to over $200 million in losses which it seeks to recover from its insurers. All insurers A, B, C, D and E deny coverage. The insured therefore commences arbitration proceedings against all of the insurers to recover $175 million.

B. How would it work?

50. In this scenario, the insured may well desire to consolidate the proceedings in order to minimize its costs. In certain cases, consolidation may be desirable and more cost effective for both parties. For example, the dispute between the insured and insurers B, C, D and E in respect of the layer $50 million excess of $50 million.

51. From an insurer's perspective, however, consolidation of all the disputes may be not be desirable for the following reasons:

    (a) The Bermuda Form Policy is a standalone Policy such that the terms and conditions pertaining to each Policy are separate and unique.

    (b) It is possible that the issues pertaining to each layer of coverage will be different, especially in circumstances where a defence of misrepresentation and/or non-disclosure is raised which is contingent upon the subjective expectation and belief of the underwriter for each insurer.

    (c) It is possible that one insurer does not wish to be associated with another for commercial and other reasons. It is possible that one insurer will wish to take certain points but not others while another insurer wishes to take a different line. One insurer might be more inclined to compromise with the insured than another insurer and might wish, therefore, to have separate lines of communication. There are a myriad of reasons why insurers might not want to be joined with others in a common defence.

    (d) Even if the issues pertaining to each dispute are the same, it does not follow as a matter of course that a consolidated arbitration will be less costly. Each

insurer might want, despite likely discouragement from the insured and the tribunal, its own counsel to present its case.

52. These are just some of the factors that might bear upon an insurer's decision whether to seek agreement for consolidation or not. Each arbitration must, of course, be viewed upon the facts specific to that arbitration and insurers may well be willing to consolidate proceedings with other insurers in the tower under the appropriate circumstances.

C. Implications of the policyholder choosing the same arbitrator in different arbitrations in the same tower

53. A policyholder may well desire to choose the same arbitrator in different arbitrations against different insurers but in the same tower. The logical reason being that the particular arbitrator selected will be well versed in the factual matrix and the issues (which are likely to be similar) in each of the respective arbitrations.

54. From the perspective of each respective insurer in the tower of insurance, selection of the same arbitrator is wholly undesirable. Even though the arbitrator is required to act impartially and independently, that arbitrator will inevitably glean and be privy to facts and information (including factual and/or expert evidence) from some of the arbitration proceedings that are absent in other proceedings and which will most likely colour his views even if not always consciously).

55. 55. As noted above, the mere fact that an arbitrator takes a view in one proceeding does not per se preclude him from acting in another proceeding involving the same issue. To this end, the recent U.K. Commercial Court decision of H v L (see paragraphs 32 to 37 above) might be said to inure to the benefit of the policyholder (over that of insurers) in its ability to appoint the same arbitrator in multiple arbitrations against other insurers who participate in higher layers in the Bermuda Form Tower.

56. That said, if and insofar as it can be shown that the repeated appointment of a particular arbitrator gives rise to "justifiable doubts as to his impartiality" which is the ground for challenging an arbitrator's appointment pursuant to section 24 of the Arbitration Act 1996, proceedings may be brought before the UK High Court for his or her removal. As highlighted above, the test that the court will apply is that of a "fair-minded and informed objective observer" and whether there is, based upon the facts of the case, a reasonable possibility that the arbitrator is biased.[21]

Confidentiality of Proceedings

A. Are the proceedings inherently confidential?

57. The genesis of the confidentiality of arbitration proceedings arose under English common law as an adjunct to the implied obligation and/or an implied term of the arbitration agreement in relation to the discoverability of documents.[22] The Court of Appeal has held that:

> *"...there is an obligation, **implied by law and arising out of the nature of arbitration,** on both parties not to disclose or use for any purpose any documents prepared for and used in arbitration, or disclosed or produced in the course of arbitration, or transcripts or notes of the evidence in the arbitration or the award."*[23]

58. The Court of Appeal recognized, however, an overriding public interest favouring the disclosure of documents in circumstances where: (a) the parties expressly or impliedly consent to disclosure, (b) where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party, and (c) where the interests of justice require disclosure.

59. The English courts consider the private and confidential nature of arbitration under English procedure as being paramount unless the interests of justice dictate otherwise. This extends to confidentiality in every aspect of the arbitration, not just documents. It extends to evidence, arguments, pleadings and the award.

B. Is confidentiality desirable?

60. Confidentiality of the arbitral proceedings and of the documents produced in those proceedings may be desirable from the perspective of both the insured and the

21 *See Laker Airways v. FLS Aerospace* [1999] 2 Lloyd's Rep. 45 at 48 (per Rix J).
22 *See Dolling-Baker v. Merrett* [1990] 1 W.L.R. 1205; *Ali Shipping Corp. v. Shipyard Trogir* [1991] 1 W.L.R. 314.
23 *See Emmott v. Michael Wilson & Partners Ltd.* [2008] EWCA Civ. 184.

insurer:

a. In the case of the insured who may still be litigating the underlying claims throughout the U.S., the insured may wish to preserve privilege in respect of documents produced in the arbitration to avoid disclosure in the underlying proceedings, or alternatively to conceal arguments that were ultimately successful in the arbitration. This might also be especially so in circumstances where the insured is fighting multiple concurrent and separate arbitrations with each of the insurers in the tower of insurance. Knowledge of key arguments deployed, documents produced and so forth might have a detrimental effect upon the result of the arbitrations in each of the proceedings.

b. In the same vein, insurers may wish to prevent arguments that have been successfully maintained against them from being adopted by other insureds and/or documents (in particular the arbitration award itself) from being produced in other and/or similar arbitration proceedings involving similar claims against the insurer. Insurers are also motivated by a desire to avoid any publicity that would likely be generated by an arbitral process that was not private and confidential.

C. Is confidentiality actually observed in practice?

61. Criticisms have been raised that confidentiality is moot since it is not observed in practice. In my view, such criticisms lack merit. Those who are involved in the Bermuda Form arbitral process generally abide by its rules and if they do not, they ought to.

Document Disclosure Issues

A. What is the appropriate process for requests, objections and search efforts?

62. Pursuant to the English Civil Procedure Rules ("CPR") which apply to court proceedings, "standard disclosure" requires a party to disclose and make a reasonable search for those documents: (a) upon which he relies, and (b) the documents which (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case.[24]

63. Many Bermuda Form arbitrations will adopt "standard disclosure" as the springboard for disclosure with further and specific provision (generally in the Order for Directions) for the further disclosure of specific documents. Usually requests for further and specific disclosure are presented in the form of a "Redfern Schedule" with each party identifying: (a) the specific categories of documents sought, (b) the basis for their relevance, and (c) any objections to the requests for disclosure. Insofar as there are objections to requests (which is often the case), the dispute will be heard and dealt with by the tribunal which has the jurisdiction (pursuant to its broad powers to determine evidential and procedural matters) to make any such orders for the production and/or withholding of documents. Generally, a procedure for the resolution of disclosure disputes is provided for in the Initial Order for Directions to prevent any disclosure disputes from derailing the timetable of the arbitration proceeding itself.

64. The parties, however, may agree to adopt an alternative procedure for the production of documents. A common approach is that taken pursuant to the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules"). The starting point is Article 3 of the IBA Rules, which places the onus upon each party to produce to the other party the documents upon which it *relies*. Either party may, in response, serve a "Request to Produce" to additional documents. The IBA Rules encourage the parties to resolve any disputes regarding disclosure and only failing which the tribunal will consider the Requests to Produce and whether additional disclosure should be provided. A fundamental difference between the IBA Rules and the English CPR Rules is that only those documents upon which a party "relies" are required to be produced in the first instance. By contrast, the CPR Rules require a party to disclose those documents not only upon which it relies, but which are also *adverse* to its case.

B. Should there be reasonable limits on electronic discovery?

24 *See Part 31 of the CPR and the supplemental Practice Direction.*

65. The intrinsic nature of Bermuda Form disputes is such that the claims often arise out of extensive underlying litigation between the insured and plaintiffs (commonly in multiple class action lawsuits) throughout the United States in a number of jurisdictions. Consequently a vast number of documents is produced including fact and expert deposition transcripts and exhibits, experts' reports and so forth. Insureds are sometimes reluctant to produce voluminous and irrelevant documentation whilst insurers similarly find the voluminous production of largely irrelevant material to be burdensome. Moreover, the general trend in U.S. proceedings is for attorneys to provide disclosure of documents as they appear in their clients' files or alternatively in response to document requests. Notoriously, in the former case, the documents that are produced are not organized in any or any orderly fashion much to the dissatisfaction of insurers. By contrast, disclosure in English proceedings is by reference to relevant categories of documents that are often ordered chronologically.

66. This begs the question as to the appropriate limits of electronic discovery especially in circumstances where there will undoubtedly be enormous quantities of documentation and the parties will be required to have made a reasonable search for documents. In this regard, the advantage of an English arbitration is that the tribunal will only order disclosure insofar as it is: (a) relevant to the issues in dispute, and (b) is necessary and proportionate having regard to the issues and complexities of the case. It follows that a tribunal may consider it appropriate for a reasonable search of electronic documents to have been made and to be produced by reference to pertinent keyword searches and also having regard to the cost and ease with which particular electronic documents may be retrieved. Guidance may be obtained from the Practice Directions that supplement Part 31 of the CPR Rules.

C. What privilege law applies?

67. During the course of the disclosure process questions and/or disputes sometime arise as to the applicable law insofar as privilege is concerned i.e., whether English law, New York law or the law of another U.S. state applies. The choice of law rules that are applicable to any dispute are generally governed by the *lex fori* (i.e., the law of forum) which, in a Bermuda Form dispute, will typically be that of England or Bermuda. Pursuant to English conflicts of law rules, procedural issues are governed by English law as determined by the Arbitration Act 1996.

68. Generally, therefore, an arbitral tribunal in a London arbitration with its juridical seat in England will apply English law to the question of privilege on the basis that English law is the law of the forum where the arbitration is taking place.[25] Indeed, it has been commented that, *"[t]he cases demonstrate that the English courts apply the simple rule under English Conflict of Law rules that it is the lex fori that applies to determine whether a communication is privileged."*[26] It is therefore irrelevant whether (in the case of disclosure issues) a document would be a privileged communication under a foreign (i.e. non-English) law, not privileged under a foreign law or whether privilege has been waived as a matter of foreign law.

69. It has been suggested that section 34 of the Arbitration Act 1996 which provides that the tribunal shall determine all procedural and evidential matters including whether any documents should be disclosed, extends to privilege such that a tribunal may decline to apply English laws pertaining to privilege. It has been commented, however, that *"[p]rivilege is not a matter of discretion: it is a fundamental rule of law"*[27]:

> *"Legal professional privilege is...much more than an ordinary rule of evidence, limited in its application to the facts of the particular case. It is a fundamental condition on which the administration of justice as a whole rests."*[28]

70. It follows that, in an English arbitration that is subject to English curial and procedural law, the tribunal would be very unlikely to order the disclosure of those documents that are, under English law, privileged in the absence of an agreement between the parties otherwise. As to those documents that are not privileged under English law but are privileged under some other, relevant law, it always lies in the discretion of the tribunal not to order disclosure: not necessarily on the basis of non-English privilege but on the basis of the tribunal's discretion

25 *See Bourns v. Raychem* [1993] 3 All ER 154; *British American Tobacco Investments Ltd. v. United States of America* [2004] EWCA Civ. 1064.
26 *See Thanki, The Law of Privilege (2006) at § 4.79*
27 *See "Liability Insurance in International Arbitration: The Bermuda Form" (Second Edition)* by Jacobs QC, Masters and Stanley QC at §16.20, p. 317.
28 *See R v. Derby Magistrates' Court ex parte B* [1996] 1 AC 487, 507; *See also R (Morgan Grenfell Ltd.) v. Special Commissioner* [2003] 1 AC 563.

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ARIAS•U.S. is firmly committed to free competition. In particular, ARIAS•U.S. stresses that members have and retain full and exclusive authority for making their own decisions in arbitrations or litigations in which they are involved, as well as in all of their business activities. ARIAS•U.S. does not in any way serve to facilitate agreements among competitors to coordinate their activities with respect to billing practices, collections, underwriting, or any other competitively sensitive activity of insurers or reinsurers. Rather, ARIAS•U.S. exists solely in order to provide educational and informational assistance in connection with the dispute-resolution process of arbitration or litigation.

Although the activities of ARIAS•U.S. are not intended to restrain competition in any manner, it is always possible that meetings involving competitors could be seen by some as an opportunity to engage in anti-competitive conduct. Good business judgment requires making substantial efforts to safeguard against any appearance of an antitrust violation -- both because ARIAS•U.S. has a firm commitment to the principle of free competition, and because the penalties for antitrust violations are severe. Certain violations of the Sherman Act, such as price fixing, are felony crimes for which individuals may be imprisoned or fined. In recent years, corporations have paid hundreds of millions of dollars in fines for these antitrust offenses. In addition, class actions and other treble damage claims by private parties are very expensive to litigate and can result in large judgments. Penalties might be imposed upon ARIAS•U.S., its individual and corporate members, and their individual representatives if they were adjudged to have violated the antitrust laws in connection with their ARIAS•U.S. activities. Members should not count on an antitrust immunity simply because insurance is a highly regulated industry.

It is the responsibility of every member of ARIAS•U.S. fully to comply with the antitrust laws in all ARIAS•U.S. activities. In order to assist members in recognizing situations that may raise the appearance of an antitrust problem, the meeting chair shall furnish at each meeting a copy of this Policy Statement and the following Guidelines.

Guidelines to Ensure Antitrust Compliance

Many ARIAS•U.S. members are skilled in the legal process and may be expected to understand their responsibility under the antitrust laws. Nonetheless, it is useful to state, as a reminder, some basic guidelines that will minimize potential antitrust risk.

1. ARIAS•U.S. members may freely discuss matters that are not competitively sensitive, such as legal developments, ethical principles, procedures, laws that affect the industry, ways to make proceedings more efficient, and technical problems involved in arbitration or litigation. It is permissible, for example, to draft sample arbitration clauses that parties may select on a voluntary basis.

2. ARIAS•U.S. meetings and activities shall not be used as an occasion to reach or attempt to reach any understanding or agreement among competitors -- whether written or oral, formal or informal, express or implied -- to coordinate their activities with regard to billing, collections, premiums, terms or conditions of contracts, territories or customers. Thus, for example, competing cedents (or competing reinsurers) should not agree with one another that they will require use of a particular arbitration clause, and especially should not agree that they will boycott parties that reject the clause.

3. The best way to guard against the appearance of such an agreement is to avoid any discussion of subjects that might raise concern as a restraint on competition. Accordingly, ARIAS•U.S. meetings and activities shall not be used as the occasion for competitors to exchange information on any competitively sensitive subjects, including the following:

(a) ARIAS•U.S. activities and communications shall not include discussion among competitors to coordinate their activities with respect to billing practices, collection activities, premium setting, reserves, costs, or allocation of territories or customers.

(b) ARIAS•U.S. members shall not use the occasion of any ARIAS•U.S. activities to discuss coordinated actions involving other competitors, suppliers or customers. Such discussions could be misconstrued as an agreement to boycott third-parties. For example, if a member decides it will decline to pay certain types of billings from a customer, the member should not discuss this decision with a competitor, because a common plan on such a subject could be considered an unlawful conspiracy or boycott. Accordingly, ARIAS•U.S. members should not discuss any proposal: to coordinate policies or practices in, billings or collections; to prevent any person or business entity from gaining access to any market or customer; to prevent any business entity from obtaining insurance or reinsurance services or legal or consulting services freely in the market; or to influence the availability, terms, provisions, premiums or other aspects of any reinsurance policy or line of insurance.

4. A written agenda shall be prepared in advance for every formal ARIAS•U.S. meeting. Where practical, the agenda shall be reviewed in advance by counsel. The written agenda shall be followed throughout the meeting. Where minutes are kept, the minutes of all meetings shall be reviewed by counsel (if possible) and, after such review, shall be distributed to all members of the body holding the meeting. Approval of the minutes shall be obtained after review at the next meeting.

5. Members are expected to observe the standards of conduct stated above in all informal discussions that take place at the site of ARIAS•U.S. meetings, and in all communications concerning ARIAS•U.S. business.

6. If a member suspects that any unlawful agreements are being discussed, the member should leave the discussion immediately and should consult counsel.

7. Questions concerning these Guidelines may be directed to the Chairman of the Law Committee of ARIAS•U.S.

Conference Registration List

(as of October 16, 2017)

Marc Abrams	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.	New York, NY
Steve Agosta	XL Catlin	Stamford, CT
Syed Ahmad	Hunton & Williams	Washington, DC
Walter Andrews	Hunton & Williams	Miami, FL
John Andrews Jr.	Andrews Consulting	Califon, NJ
Christopher Ash	Robertson and Ash LLC	Boulder, CO
Christopher Assise	Sidley Austin LLP	Chicago, IL
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Jonathan Bank	Locke Lord LLP	Los Angeles, CA
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Paul Bates	Bates Barristers	Toronto, ON
Robert Bates	BatesCarey LLP	Glencoe, IL
Alan Bialeck	Alan R. Bialeck LLC	New York, NY
Adam Bialek	Wollmuth Maher & Deutsch LLP	New York, NY
Katherine Billingham	KB ReSolutions, Inc.	Charlotte, NC
Scott Birrell	The Travelers Insurance Company, Inc.	Hartford, CT
Hannah Ruehlman Blase	Zurich North America	Schaumburg, IL
Andrew Boris	American Agricultural Insurance Company	Schaumburg, IL
Bill Bouvier	Riverstone Resources LLC	Manchester, NH
David Bowers	Arbitrator & Consultant	Winnetka, IL
David Bradford	Zurich North America	Saint Charles, IL
Paul Braithwaite	FTI Consulting, Inc.	New York, NY
Jenna Buda	Allstate Insurance Company	Northbrook, IL
Rob Buechel	Trisura International	Sausalito, CA
Jeffrey Burman	AIG - American International Group, Inc.	New York, NY
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Cecil Bykerk	CDBykerk Consulting	Omaha, NE
Matthew Byrne	XL Catlin	Stamford, CT
Joe Carney	JEC Consultants, Inc.	Cranford, NJ
Michael Carolan	Crowell & Moring LLP	Washington, DC
Nina Caroselli	Riverstone Resources LLC	Manchester, NH
Greg Caruso	Munich RE	Princeton, NJ
John Cashin	Law Office of John R. Cashin	New York, NY
Lauren Cavanaugh	FTI Consulting, Inc.	New York, NY
Peter Chaffetz	Chaffetz Lindsey LLP	New York, NY
Suman Chakraborty	Squire Patton Boggs (US) LLP	New York, NY
Gil Chandler	Arrowpoint Capital Corp	Charlotte, NC
John Chaplin	Compass Reinsurance Consulting, LLC	Grantham , NH
Pierre Charles	A M S	Paris, France
Kathryn Christ	Swiss Re Management (US) Corporation	Armonk, NY
Mark Chudleigh	Kennedys LLP	Hamilton, Bermuda
Martin Cillick	Allstate Insurance Company	Northbrook, IL

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(as of October 16, 2017)

Beth Clark	Stroock & Stroock & Lavan LLP	New York, NY
Mitchell Cohen	Wechsler & Cohen	New York, NY
Royce Cohen	Tressler LLP	New York, NY
John Cole	Wiley Rein LLP	Baldwin, MD
Key Coleman	Marcum LLP	Philadelphia, PA
Tatiana Connolly	W. R. Berkley Corporation	Greenwich , CT
James Corcoran	James P. Corcoran LLC	New York, NY
Nick Cramb	Mintz Levin	Boston, MA
Glenn Cunningham	Cunningham Advisory LLC	Charlotte, NC
Thomas Cunningham	Sidley Austin LLP	Chicago, IL
Tim Curley	Allianz Resolution Management	Washington, DC
Everett Cygal	Schiff Hardin LLP	Chicago, IL
David D'Aloia	Saiber LLC	Florham Park, NJ
Thomas Daly	Horseshoe Insurance Advisors US LLC	Danbury, CT
Mary Ann D'Amato	Mendes & Mount, LLP	New York, NY
Paul Dassenko	Azure Advisors, Inc.	New York, NY
John DeLascio	Hinshaw & Culbertson LLP	Chicago, IL
Frank DeMento	Transatlantic Reinsurance Co.	New York, NY
Anthony Dempster	Herbert Smith Freehills LLP	London, London
Howard D. Denbin	HDDRe Strategies LLC	Bala Cynwyd, PA
Deidre Derrig		Barrington, IL
Nick DiGiovanni	Locke Lord LLP	Chicago, IL
Rob DiUbaldo	Carlton Fields	New York, NY
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James Dolan	Enstar US	New York, NY
Michell Dolin	Covington & Burling LLP	Washington, DC
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David Edwards QC	Queen's Counsel	London, NA
Charles Ehrlich	Arbitrator	Menlo Park, CA
Randi Ellias	Butler Rubin Saltarelli & Boyd LLP	Chicago, IL
Bruce Engel	Freeborn & Peters LLP	Chicago, IL
Chuck Ernst	XL Catlin	New York, NY
Matthew Ferlazzo	Hinshaw & Culbertson LLP	New York, NY
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Christopher Foster	HFW	London, London

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(as of October 16, 2017)

Patricia Taylor Fox	AIG - American International Group, Inc.	New York, NY
Ana Francisco	Foley & Lardner LLP	Boston, MA
Costas Frangeskides	HFW	London, UK
Glenn Frankel	The Hartford Financial Services Group, Inc.	Hartford, CT
Richard Franklin	RC Franklin Consulting LLC	Glenmoore , PA
Michael Frantz	Munich RE	Princeton, NJ
Donald Frechette	Locke Lord LLP	Hartford, CT
Dale Frediani	RMG Consulting LLC	Parsippany, NJ
Bruce Friedman	Rubin, Fiorella & Friedman LLP	New York, NY
Bryce Friedman	Simpson Thacher & Bartlett LLP	New York, NY
Cia Froelich Moss	Chaffetz Lindsey LLP	New York, NY
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Matt Furton	Locke Lord LLP	Chicago, IL
Anthony Gambardella	Rivkin Radler	Uniondale, NY
Ron Gass	The Gass Company, Inc.	Redding, CT
Peter Gentile	Certified Arbitrator	West Palm Beach, FL
Michelle George	Norton Rose Fulbright	London, UK
Andrea Giannetta	Enstar US	Basking Ridge, NJ
Andrew Gifford	General Re Corporation	Stamford, CT
Steven Gilford	Proskauer Rose LLP	Chicago, IL
James Gkonos	Saul Ewing LLP	Philadelphia, PA
Joe Goldberg	Arbitrator	Edina, MN
Sarah Gordon	Steptoe & Johnson LLP	Washington, DC
Kenneth Gorenberg	Barnes & Thornburg LLP	Chicago, IL
Perry Granof	Granof International Group LLC	Glencoe, IL
Elspeth Gray	Argo Group	Pembroke, Bermuda
Susan Grondine-Dauwer	SEG-D Consulting, LLC	Scituate, MA
Lloyd Gura	Mound Cotton Wollan & Greengrass	New York, NY
Mark Gurevitz	MG Re Arbitrator and Mediator Services LLC	Trumbull, CT
Bob Hall	Hall Arbitrations	Rockport, ME
Debra Hall	Hall Arbitrations	Rockport, ME
Daniel Hargraves	Freeborn & Peters LLP	New York, NY
Judy Harnadek	Resolute Management	Philadelphia, PA
Carl Harris	Insurance Strategies Consulting, LLC	West Des Moines, IA
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Aimee Hoben	The Hartford	Hartford, CT
Gregory Hoffnagle	Mintz Levin	New York, NY
Kim Hogrefe	Kim Dean Hogrefe, LLC	Washington Township, NJ
Michael Holmes	7 King's Bench Walk	London, UK
Paul Huck	ADR Solutions	New York, NY
Paul Hummer	Saul Ewing Arnstein & Lehr LLP	Philadelphia, PA
Joe Hynes	XL Catlin	Stamford , CT
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Debbie Irving	Riverstone Resources LLC	Manchester, NH
Catherine Isely	Butler Rubin Saltarelli & Boyd LLP	Chicago, IL

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(as of October 16, 2017)

John Jacobus	Steptoe & Johnson LLP	Washington, DC
Ivan Jaffa	RiverstoneResources LLC	Manchester, NH
J.P. Jaillet	Choate, Hall & Stewart LLP	Boston, MA
Deirdre Johnson	Crowell & Moring LLP	Washington, DC
Paul Kalish	Crowell & Moring LLP	Washington, DC
Amy Kallal	Mound Cotton Wollan & Greengrass	New York, NY
Lydia Kam Lyew	REnamics LLC	San Diego, CA
Sylvia Kaminsky	Sylvia Kaminsky	Upper Montclair, NJ
Keith Kaplan	Anselma Capital, LLC	Chester Springs, PA
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Sean Keely	Freeborn & Peters LLP	New York, NY
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Shawn Kelly	Dentons US LLP	Short Hills, NJ
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Marcelline Kochan	Arrowpoint Capital Corp	Charlotte, NC
Jeanne Kohler	Carlton Fields Jorden Burt	New York, NY
Robert Kole	Choate, Hall & Stewart LLP	Boston, MA
Mark Kreger	Tressler LLP	Chicago, IL
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Klaus Kunze	Consulting	Cincinnati, OH
Mike Kurtis	Maiden Re	Mt. Laurel, NJ
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Joy Langfod	Norton Rose Fulbright US LLP	Washington, DC
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Jim Leatzow	Leatzow & Associates, Inc.	Three Lakes, WI
Michael Ledley	Wollmuth Maher & Deutsch LLP	New York, NY
Y. John Lee	CPCU Arbitrator	Charlotte, NC
Jeffrey Leonard	Budd Larner, P.C.	Short Hills, NJ
James Liell	SCOR Global Life Americas	Charlotte, NC
Bill Littel	Allstate Insurance Company	Cary, IL
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Denis Loring	RGA Worldwide Reinsurance Company	Palm Beach Gardens, FL
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Susan Mack	Adams and Reese LLP	Jacksonville, FL
Maryanne Maier	Chubb	Philadelphia, PA
Scott Maier	Penn National Insurance	Harrisburg, PA
Richard Mancino	Willkie Farr & Gallagher LLP	New York, NY
Jane Mandigo	Swiss Re Management (US) Corporation	Overland Park, KS

Conference Registration List

(as of October 16, 2017)

Andrew Maneval	Chesham Consulting	Harrisville , NH
Derek Manison	Chubb	Philadelphia , PA
Dominic Marinari	Chubb	Philadelphia, PA
Fred Marziano	CIM	Sea Girt, NJ
Ray Mastrangelo	Mound Cotton Wollan & Greengrass	New York, NY
Joe McCullough	Freeborn & Peters LLP	Chicago, IL
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John McKenna	Finance & Risk Services, Ltd.	Hamilton, BM
Edward McKinnon	Claims Resource Management, Inc.	Acton, CA
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Brendan McQuiggan	Brandywine Group of Insurance and Reinsurance Companies	Philadelphia, PA
Adrian Mecz	Norton Rose Fulbright LLP	London, UK
Kyle Medley	Hinshaw & Culbertson LLP	New York, NY
Jim Meehan	Arrowpoint Capital Corp	Nantucket, MA
Mark Megaw		Earlysville, VA
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Mike Merlo	AON	Chicago, IL
Samantha Miller	Norton Rose Fulbright LLP	Washington , DC
Seema Misra	AIG	New York, NY
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Kelly Nickerson	FTI Consulting	New York, NY
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Tom Perry	Hutt & Shimanowitz, P.C.	Woodbridge, NJ

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(as of October 16, 2017)

David Pi	Schiff Hardin LLP	Chicago, IL
Kim Piersol	Huggins Actuarial Services, Inc.	Media, PA
Joe Pingatore		St. Paul, MN
Lawrence Pollack	JAMS	New York, NY
Andrew Poplinger	Chaffetz Lindsey LLP	New York, NY
Ray Prosser	Arbitrator	Waxhaw, NC
Vinnie Proto	Budd Larner, P.C.	Short Hills, NJ
Leah Quadrino	Steptoe & Johnson LLP	Washington, DC
Anne Quinn	Berkley Custom	Stamford, CT
Richard Ranieri	Weber Gallagher	Bedminster, NJ
Erik Rasmussen	Rasmussen Advisory Services	Shoreview, MN
Robert Redpath	Enstar US	New York, NY
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David Reston	Herbert Smith Freehills LLP	London, UK
Krystal Riebesell	Saiber LLC	Florham Park, NJ
Randy Rinicella	HCC Insurance Holdings, Inc.	Houston, TX
Debra Roberts	Debra Roberts & Associates, Inc.	New York, NY
John Rodewald	BatesCarey LLP	La Grange Park, IL
Peter Rogan	Ince & Co. LLP	London, Uni
Steve Rogers	Stephen M Rogers, LLC	Bloomfield, CT
Eve Rosen	Attorney	Cincinnati, OH
Jonathan Rosen	Arbitration, Mediation and Expert Witness Services	New York, NY
Peter Rosen	Latham & Watkins LLP	Los Angeles, CA
Linsey Routledge	Clyde & Co US LLP	New York, NY
Melanie Rouvray-Kampe	Hannover Re	Hanover, Lower Saxony, DE
Jeff Rubin	Odyssey Reinsurance Company	Stamford, CT
Jim Rubin	Butler Rubin Saltarelli & Boyd LLP	Chicago, IL
Daryn Rush	White and Williams LLP	Philadelphia, PA
Christine Russell	Brandywine Group of Insurance & Reinsurance Companies	Philadelphia, PA
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Stephanie Sado	Chaffetz Lindsey LLP	New York, NY
Robin Saul	XL Bermuda	Hamilton, Bermuda
Joseph Schiavone	Budd Larner, P.C.	Short Hills, NJ
Larry Schiffer	Squire Patton Boggs (US) LLP	New York, NY
Dan Schmidt, IV	Dispute Resolution Services Int'l.	Scottsdale, AZ
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Josh Schwartz	Chubb	Philadelphia, PA
Stacey Schwartz	Swiss Re Management (US) Corporation	Armonk, NY
Steve Schwartz	Chaffetz Lindsey LLP	New York, NY
Charlie Scibetta Jr.	Chaffetz Lindsey LLP	New York, NY
Thomas Segalla	Goldberg Segalla LLP	Buffalo, NY
Sylvia Semerdjian	Everest Reinsurance Company	West Orange, NJ
Wendy Shapss	FTI Consulting, Inc.	New York, NY

Conference Registration List

(as of October 16, 2017)

Dan Sheehan	Everest Reinsurance Company	Liberty Corner, NJ
Regan Shulman	Arch Insurance Group Inc.	Jersey City, NJ
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William Sneed	Sidley Austin LLP	Chicago, IL
Teresa Snider	Butler Rubin Saltarelli & Boyd LLP	Chicago, IL
Kiran Soar	INCE & Co. LLP	London, UK
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Tom Stillman	Tom Stillman Arbitrations	Chicago, IL
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John Sullivan	Mass Re Advisors	Brewster, MA
Peter Suranyi	LZG Insurance Consulting	Port Chester, NY
Bob Sweeney	CNA Insurance	Chicago, IL
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David Thirkill	The Thirkill Group, Inc.	Bedford , NH
Mike Thompson	Wiggin and Dana LLP	Stamford, CT
Kevin Tierney	Kevin J. Tierney, Esq.	Sarasota, FL
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TOM Tobin	Law Office of T.M.Tobin	Mystic, CT
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Jack Vales	Dentons US LLP	New Jersey , NJ
Matthew Vinciguerra	Arch Insurance Group	Jersey City, NJ
Damon Vocke	Vocke Law Group LLP	Chicago, IL
Jerry Wallis	Wallis Resolutions	Basking Ridge, NJ
Andy Walsh	Legion Insurance Company *(In Liquidation)*	Philadelphia, PA
Mike Walsh	Michael Walsh ADR	New York, NY
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Ciaran Way	White and Williams LLP	Philadelphia, PA
Richard White	Integrity Insurance Company	Cedar Knolls, NJ
Rob Whitney	Neighborhood Health Plan	Boston, MA
Kay Wilde	Allstate Insurance Company	Northbrook , IL
Michael Wilder		West Hartford, CT
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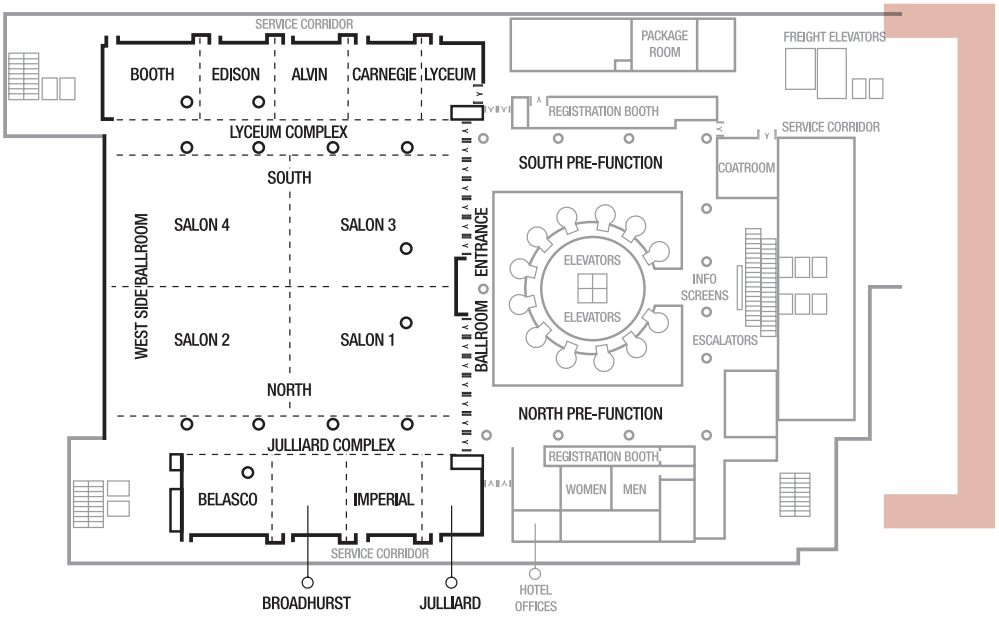
Paul Zevnik	Morgan, Lewis & Bockius LLP	Washington, DC
Edward Zulkey	Baker & McKenzie	Chicago, IL
Tom Zurek Zurek	OneAmerica Financial Partners	Indianapolis, IN



5th Floor

REGISTRATION
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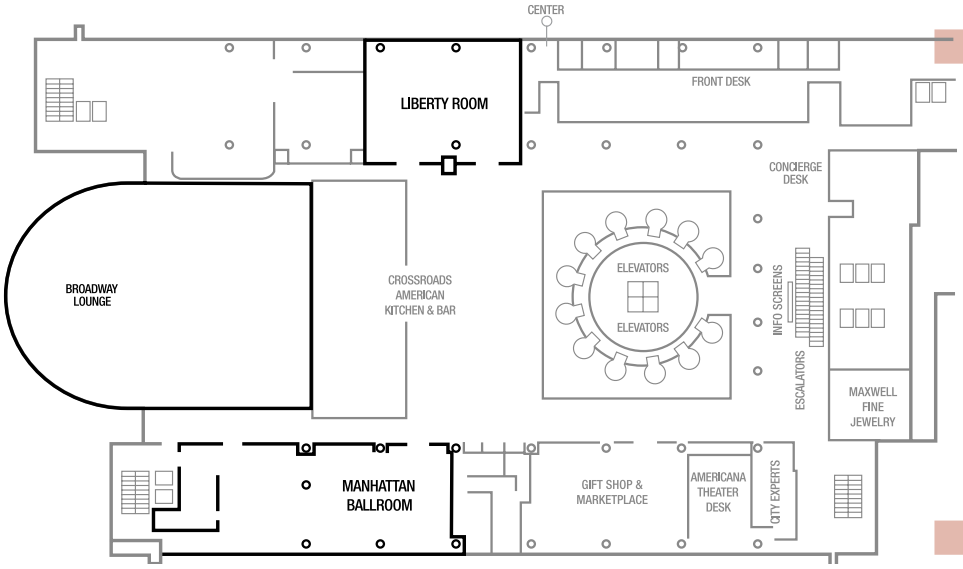
GENERAL SESSIONS
BREAKOUT SESSIONS
COMMITTEE MEETINGS



8th Floor

LUNCHEON
COCKTAIL RECEPTION

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