AIDA REINSURANCE & INSURANCE ARBITRATION SOCIETY

ARIAS U.S. QUARTERLY

EX AEQUO SECOND / THIRD QUARTER 1999

WHY REINSURANCE ARBITRATION?

INSIDE:

by NICK PEARSON

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"Democracy is the worst form of government except for all those other forms that have been tried from time to time."

– WINSTON CHURCHILL

I. INTRODUCTION

Arbitration is the most frequently employed method of dispute resolution for disputes arising out of or relating to reinsurance transactions. The straightforward explanation for this reliance on arbitration by reinsurers and reinsureds is that most reinsurance agreements contain an arbitration clause that, inter alia, commits the parties to resolving their disputes through arbitration. However, the fact that the industry has continued over the years to perpetuate this practice can only reasonably mean that arbitration is perceived to best address the particular needs of ceding and assuming companies.

While there is no uniform arbitration provision, most arbitration clauses found in U.S. reinsurance contracts will share the following common elements: (a) a three-party disinterested panel composed of two-party appointed arbitrators who select the third, neutral umpire: (b) a requirement that the panel members be experienced insurance or reinsurance professionals: (c) a specific mechanism for commencing the arbitration and time frames for selection of party arbitrators, umpire and submission of the issues: (d) a provision relieving the panel from observing judicial formalities and the strict rules of law and instructing the panel to treat the agreement as an "honorable undertaking" giving effect to the business interests of the parties: (e) a requirement that each party bear the cost of its own party arbitrator and share equally the costs of the umpire and the arbitration: and (f) a provision that the award be final and binding upon the parties.

Although every dispute and every disputant are to a degree unique, most parties will agree on the desirability of achieving the following goals as part of the reinsurance dispute resolution process: (1) a cost efficient and relatively quick process, (2) a fair but focused hearing, (3) an equitable, rational and binding result and (4) confidentiality.

Over time it has become clear that arbitration comes closer to realizing these goals then either litigation or mediation.

II. COST EFFICIENT AND QUICK PROCESS

Arbitration has frequently been criticized for taking too long and costing too much. However, this criticism must be viewed relative to the alternatives. While mediation may be quicker and cheaper, there is no guarantee that the parties will reach an agreement and no mechanism for compelling a final binding result. This could leave the parties with the necessity of proceeding with an arbitration or litigation after having incurred the time and expense of mediation.

Litigation, while providing the assurance of a final result, will take many months or, more typically, years before judgment is reached, and substantial additional time and expense may be incurred if one or more appeals are taken from the trial court decision. Moreover, the expense associated with broad discovery available under the U.S. judicial

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International Arbitration — Selecting the Party-Appointed Arbitrator

What to Avoid — What to Look For

by PAUL D. FRIEDLAND

Paul Friedland is a partner at White & Case, specializing in international commercial arbitration. He has served as counsel to parties in numerous arbitrations before the International Chamber of Commerce, the International Centre for the Settlement of Investment Disputes and the American Arbitration Association. This article is adapted from a presentation by Mr. Friedland on Nov. 7, 1997, in New York, at the International Law Association's International Law Weekend.

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The objective of any party facing the selection of a party-appointed arbitrator is to maximize its chances of winning. The perfect party-appointed arbitrator is an individual who, once convinced of the merit of the positions advanced by the appointing party, will be motivated and able to convince the chairman and the other party-appointed arbitrator of this point of view. What kind of individual can best fulfill that role? To answer that question, this article first lists characteristics that should be avoided, and then those that should be sought.

WHAT TO AVOID

- APPEARANCE OF BIAS. It is imprudent to name any individual who, because of a visible link to either the appointing party or counsel, will be seen as predisposed in favor of the appointing side, whether or not the individual actually has any such predisposition. For example, in the case of a government entity appointing an individual with links to and, therefore, knowledge of the government, any advantage that might be derived from the appointee's knowledge would surely be offset by the risk that the two other arbitrators would regard the appointee's independence with skepticism. The likelihood would be that any arguments made by this appointee in favor of the government party during arbitrator deliberations would have diminished impact on the other arbitrators.
- THE RUBBER STAMP. Parties should avoid naming an individual so beholden or thankful for having been named that the appointee will act as a rubber stamp for the positions advanced by the appointing party. Such an individual will inevitably be perceived by the other arbitrators as a cipher for the appointing party, with the result that the tribunal will become, in effect, a two-person panel.
- THE CHAIRMAN. It is dangerous to name an individual so accustomed or predisposed to being a tribunal chairman that this person will feel no compulsion to fulfill what is commonly recognized to be one of the key roles of a party-appointed arbitrator in international arbitration; namely, assuring, insofar as possible, that the chairman of this tribunal and the other arbitrator adequately consider the arguments advanced by the appointing party. This function requires a certain effort by the party-appointed arbitrator, and there are individuals who, one can predict, will have no inclination to make such effort.
- THE OVERWORKED ARBITRATOR. No party should appoint an individual who is overworked, lazy or manifests no enthusiasm for taking on the case. Industriousness is a key characteristic of a good arbitrator, especially a party-appointed arbitrator. As between party-appointed arbitrators, the one who demonstrates both diligence with respect to mastering the factual record and activism with respect to drafting the award will likely be the one with greater input in the decision-making process.
- THE CONTRARIAN. It is risky to name a contrarian; such a person might alienate the other arbitrators and might be eager to write a dissent. No party wants to see a brilliant dissent, written in support of its position.
- SUBSTANTIVE DISSONANCE. One should avoid naming an individual with a history of espousing positions adverse to those that will be advanced by the appointing party in the arbitration. The risk is not that the appointee likely would be hostile or unfair in any way to the appointing party but that an individual with this background might be less able to identify arguments in favor of the appointing party. Arbitrators are typically not passive adjudicators who merely weigh the relative merits of the parties' positions before choosing between them. Rather, arbitrators often take their own view of the facts and the law, and then develop their collective view during joint deliberations. It is during these deliberations that, a party hopes, its appointee, having been convinced of the merits of its position, will persuasively demonstrate an ability to summon arguments in favor of that viewpoint.

The perfect party-appointed arbitrator is an individual who, once convinced of the merit of the positions advanced by the appointing party, will be motivated and able to convince the chairman and the other party-appointed arbitrator of this point of view.

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- THE INEXPERIENCED ARBITRATOR. It is usually advisable to avoid an individual with no experience in international arbitration. The difficulty with an inexperienced appointee is nor that there are secret intricacies of the process only the initiated know. Rather, it is that familiarity breeds confidence and the lack thereof in a party-appointed arbitrator may limit the appointee's effectiveness. Inexperience in the appointee also may be harmful when the two party-appointed arbitrators consult to name the chairman. This is because the appointee may be less able to identify or obtain the agreement of the other arbitrator to suitable and experienced individuals willing to act as chairman. Moreover, inasmuch as the chairman usually will be a lawyer experienced in international arbitration, there is an obvious advantage in naming an individual who will be known to the chairman or who, at least, will share some of the chairman's experience.
- THE NONLAWYER EXPERT. The preceding considerations may militate against naming nonlawyer industry experts as party-appointed arbitrators in most international commercial disputes. There are, however, exceptions to any rule, and in certain cases the best course may be to name an individual who is an insider to the trade, even though an outsider to international arbitration.

WHAT TO SEEK

The best party-appointed arbitrator would combine as many of the following traits as possible.

- INTELLIGENCE/STATURE. The appointee should be an individual of intelligence and stature in his or her field, which may be as narrow as the one in question or as broad as the field of international commerce.
- INDEPENDENCE IN FACT AND APPEARANCE. The appointee should be independent of the appointing party in fact as well as in appearance, and should have sufficient eminence and/or interpersonal skills to assure against being perceived as a rubber stamp. There should be no doubt in the minds of the other arbitrators that the appointee will, if the facts and law so require, vote against the appointing party.
- SHARED VIEWS. On the basis of experience, the appointee should have an intellectual predisposition in favor of the positions to be advanced by the appointing party. This does not mean bias; this attribute would be undermined by bias. What this calls for is an individual inclined by experience to identify and sympathize with arguments and equities in favor of the appointing party.

There is an inherent safeguard in the arbitral process…

- MOTIVATION. The appointee should be motivated and have the time and ability to master the facts of the case and play an active role in drafting the award. There is no way to generalize about the type of individual who might possess these critical attributes. Some arbitration practitioners believe academics are best suited for this role because of their drafting ability and that attorneys are often unwilling to spend substantial time on cases that remunerate them at less than their usual hourly rate. Others find attorneys are able and willing to dive into fact-intensive files.
- COLLEGIALITY. The appointee obviously should be capable of acting collegially with the other arbitrators.
- COGNIZANCE OF ROLE. The appointee should be cognizant of the role required of a party-appointed arbitrator: i.e., to make the effort to assure the rest of the tribunal gives due consideration to the facts and the law favoring the appointing party's side.
- KNOWN QUANTITY. As a practical matter, the appointee should either be known to the appointing party or its counsel or well known to others known to them. The appointment is usually the most important decision counsel and the party will make during the arbitration, and common sense dictates that the selection should be made on the basis of either personal knowledge or a careful investigation of the individual's capability to meet these criteria.

CONCLUSION

The fact that arbitrator appointments are made with the objective of maximizing one's chance of winning does not mean appointments should be made in the hope of bias. An appointee can be both independent of the appointing party and faithful to the integrity of the arbitral process, as well as intellectually predisposed in favor of the appointing party.

There is an inherent safeguard in the arbitral process: the neutrality of the chairman of the tribunal. No chairman will find a rubber stamp party-appointee persuasive. This safeguard gives parties the incentive to name arbitrators of stature and independence, even as they look for an individual predisposed by experience in favor of the positions likely to be advanced by their side during the arbitration.

SEEK OUT…

1. Intelligence and high stature.
2. Prior experience as an arbitrator in international cases.
3. Independence of the appointing party.
4. Interpersonal skills.
5. A viewpoint that has commonality with that of the appointing party.
6. Motivation and enthusiasm about participating in the case.
7. A willingness to endeavor to have the appointing party's arguments heard.
8. Collegiality

STAY AWAY FROM…

1. An appearance of bias.
2. A tendency to rubber stamp the views of the appointing party.
3. Laziness or lack of motivation or commitment to the case.
4. A contrarian temperament.
5. Inexperience in international arbitration.

Why Reinsurance Arbitration?

Continued from page 1

system, and substantial motion practice, will routinely result in impressive legal and expert witness fees. All in all, arbitration is reliably cheaper and faster.

III. FAIR AND FOCUSED HEARING

Because the panel is comprised of experts with practical reinsurance experience, the parties are likely to be compelled to concentrate their arguments on the business issues at the heart of the dispute. An arbitration hearing is an interactive process and a responsible, well functioning panel will, through its questioning and rulings, dispense with extraneous or hypertechnical argument. Relieved of judicial formality and freed from strict application of the law, the panel may disregard legalistic arguments and insist that the parties focus on either the fulfillment or frustration of the business intent.

A substantial benefit of this focus can be found in its constraining effect upon discovery. Unlike U.S. litigation, there is no right to discovery in arbitration other than discovery inherently necessary for a party to present material evidence. Typically a panel will allow reasonable discovery but disallow the proverbial "fishing expedition." By reining in discovery, the speed and cost of arbitration can be a substantial improvement over litigation where extensive, wide-ranging discovery is the rule. However, the professionalism of the panel, neutrality of the umpire, and the fact that the panel's refusal to hear material evidence is one of the few grounds for overturning an arbitration award, work to insure that appropriate discovery is granted and the hearing is both fair and focused.

IV. EQUITABLE, RATIONAL AND BINDING RESULT

While the American jury system works marvelously well for the protection of life and liberty, many consider it to have more spotty results in complex commercial cases. Even if both parties agree to a bench trial, there are precious few judges knowledgeable about reinsurance and, among the vast majority of jurists without such knowledge, precious few who have a desire to steep themselves in the subject. Judges have crowded dockets, and the arcana of reinsurance can be a prickly, first-time encounter. By contrast, a reinsurance arbitration panel is, by profession and proclivity, already committed to the subject matter. Panelists do not have a docket of cases to get through, and the parties can usually be assured of having their complete attention.

The panel is charged to reach an equitable result, not a legalistic one. The harsh results of litigation, where a party that "deserves" to win may be deprived of a fair result due to the constraints of the strict application of the law, do not obtain in the arbitration process. Unlike litigation, arbitration is not a zero sum game. The panel has the ability to engage in an analysis of comparative fault and render an award that recognizes that neither party is blameless, although one may be more blameworthy.

This practice has been criticized as "splitting the baby," but a recent survey conducted by the American Arbitration Association has shown that arbitration awards overwhelmingly favor one party. Only 11% of the random sample of 4,500 commercial cases fell into the category where neither party received more than 60% of the monetary relief it sought. Rather than reflecting a flaw in the arbitration process, compromise decisions can be seen as the outcome of a dispute resolution process that allows the panel to render an equitable, reasoned award rather than the "all or nothing" approach of litigation.

Finally, arbitration has the intrinsic attraction of bringing finality to a dispute. Unlike mediation, which does hot guarantee a final resolution, and litigation, where appeal after appeal may be taken before a judgment becomes final, arbitration results in a generally unassailable, final result.

V. CONFIDENTIAL

Unlike litigation, where obtaining a sealing order to maintain the confidentiality of legal proceedings is unusual and problematic, confidentiality is an expected and routine aspect of arbitration. This expectation of confidentiality not only encompasses the award, but normally materials obtained in discovery, hearing records and briefs as well.

The basis for the confidential nature of arbitration lies in the fact that it is a private dispute resolution mechanism, created by voluntary agreement between the parties. As a creature of contract, an arbitration can be confidential, or not, as the parties may designate. However, if confidentiality is desired, it should be specified before a dispute evolves, as one of the parties may not be inclined to agree to it afterwards.

A primary rationale for confidentiality in arbitrations is to promote a full and open exchange between the parties. Arbitration offers disputants the opportunity to make disclosures that for competitive or other reasons they may be reluctant to, or feel it impossible to, make. Additionally, a party may not want the precedential effect of a decision that would arise out of litigation.

Of course, a confidentiality agreement in connection with arbitration is not a guarantee that information will not be disclosed. First and foremost, it does not bind nonsignatories. Additionally, regulatory or judicial process may compel some disclosure. However, compared to litigation, arbitration affords a far more confidential process and result.

VI. SUMMARY

Although arbitration is far from perfect, it is less deeply flawed than the alternatives. If the parties have included a sufficiently detailed, well-drafted and reasonable arbitration clause in their reinsurance contract, and at least one of the parties is willing to insist on compliance with the timeframes and other requirements set out in that clause, arbitration should prove to be a more efficient, speedier and less costly route to a fair, equitable and final result than would litigation. However, if the parties are diffident about maintaining the rigors of the process, delay will be almost inevitable and discovery and costs can get out of hand. Ultimately, it is up to the parties and their counsel to keep arbitration on track. Both the strength and weakness of arbitration lies in its role as a private dispute mechanism.

This article is drawn from a presentation made by Nick Pearson at the 12th International Reinsurance Congress in Bermuda (October 14-16, 1998).

ARIAS U.S.

Certified Arbitrators

AS OF JUNE 21, 1999

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Although ARIAS•U.S. believes certification is a significant and reliable indication of an individual's background and experience, it should not be taken as a guarantee that every certified member is an appropriate arbitrator for every dispute. That determination should be preceded by a review of several factors, including but not limited to, the applicable arbitration provision, potential conflicts or bias and the type of business involved in the dispute. In addition, ARIAS•U.S. wishes to acknowledge that its certified arbitrators are not the only qualified arbitrators. As noted above, the Society is gratified that many of the most respected practicing arbitrators sought and obtained certification from ARIAS•U.S. Others who are similarly qualified and experienced, have not yet sought certification.

ARIAS U.S.

Annual Meeting & Conference

NOVEMBER 4-5, 1999 • EMPIRE HOTEL, NEW YORK, NY

Dear Colleague:

On behalf of the ARIAS•U.S. Board of Directors it give us great pleasure to invite you to participate at the ARIAS•U.S. 5th Annual Meeting and Conference at the Empire Hotel in New York City on November 4-5, 1999.

ARIAS•U.S. has had a truly successful year, accomplishing several goals with one central purpose — to educate and inform individuals in the skills necessary to serve effectively on insurance/reinsurance arbitration panels.

Toward that end, we plan to close the year by focusing our attention at the Annual Meeting and Conference on ***"International Aspects of Reinsurance Arbitration Practices and Procedures"*** - an area of growing concern as we head into the 21st century.

During the Annual Meeting portion of our program, we will feature the announcement and demonstration of the new ARIAS•U.S. Umpire Selection Procedure. The Procedure will be described in detail and the process demonstrated by the actual selection of umpires for service on hypothetical panels.

Co-chairing this year's program is Charles W. Havens III, a partner at LeBoeuf, Lamb, Greene and MacRae and Ian Hunter, QC, of Essex Court Chambers in London.

Among our featured faculty are leading industry professionals such as T. Richard Kennedy, General Counsel, American Skandia Group, Mary Lopatto of LeBoeuf, Lamb, Greene and MacRae, Bert Thompson, an ARIAS•U.S. Certified Arbitrator and Narinder Hargun of Conyers Dill & Pearman in Bermuda.

Highlights of this year's program include:

- Globalization of Reinsurance Arbitration;
- How U.K. arbitrations differ from those in the U.S;
- Written statements in cross-examination in the U.K., versus live testimony;
- Pre-hearing depositions in the U.S.;
- The use of expert witnesses;
- Interactive panel discussion with audience participation.

And, of course, the conference provides the opportunity for participants to network with leading professionals in the industry. Last year, the ARIAS Annual Meeting and Conference had representatives from more than five countries!

This year you have the opportunity to register early at a reduced rate. Kindly take a moment to fill out the early registration form and secure your place at what will be one of the truly leading edge conferences on International Arbitration Practice and Procedures.

Looking forward to seeing you at the Empire Hotel on November 4-5, 1999!

Sincerely,

Robert M. Mangino
CHAIRMAN

Mark S. Gurevitz
PRESIDENT

ARIAS U.S.

Early Registration Information

Hotel Arrangements:

Empire Hotel (44 West 63rd Street)

Standard Room	$198 per night
Deluxe Room	$225 per night

Accommodations available on a first-come, first-served basis.
Local taxes not included in room rate.

For Reservations Call: Toll-free:
1-888-822-3555 or 212-265-7400
Refer to: "ARIAS•U.S. Conference"

NOTE: TO BE GUARANTEED THE CONFERENCE GROUP RATE, ALL HOTEL RESERVATIONS MUST BE MADE NO LATER THAN OCTOBER 15, 1999.

Meeting Registration Fee Includes:

- Meeting Materials;
- Thursday Coffee Breaks, Evening Cocktail Reception;
- Friday Continental Breakfast, Coffee Breaks and Luncheon.

EARLY REGISTRATION FEES:
(Deadline September 30, 1999)
ARIAS•U.S. Member (please check appropriate box)

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ARIAS•U.S. Member (please check appropriate box)

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- ❑ Spouse $ 95

Payment and Registration Information:

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ARIAS•U.S., P.O. Box 9001, Mt. Vernon, NY 10552
Phone: 212-699-2020
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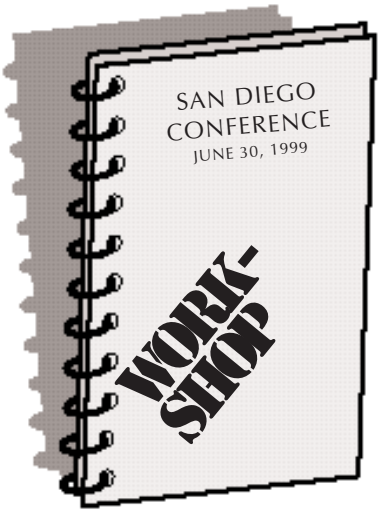
Arbitration: The Rules of the Game



by LINDA M. LASLEY
and PATRICIA WINTERS
REINSURANCE COUNSEL:
A LAW CORPORATION

Many reinsurance agreements, particularly treaties, provide for mandatory arbitration of disputes. Most reinsurance agreements involve interstate or foreign commerce, and therefore are usually governed by the Federal Arbitration Act, 9 U.S.C. sections 1-16 (the "FAA"), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. sections 201-208, and the Inter-American Convention on International Commercial Arbitration (the "Inter-American Convention"), 9 U.S.C. sections 301-307. The FAA and the two conventions give the courts the power to enforce arbitration agreements by compelling arbitration, staying litigation and confirming arbitration awards. The wording of individual arbitration clauses, as interpreted by the courts and the arbitrators, determines the nature and scope of the arbitration proceeding.

The increasing use of arbitration has focused attention on the process and raised the following questions: How detailed must an arbitration demand be? What are the powers of the arbitration panel to control the proceedings, determine their scope and fashion remedies? Can the parties object to the composition of the panel and, if so, when? And what is the precedential effect of awards rendered in such private proceedings?

ARBITRATION DEMANDS AND THE PANEL'S RIGHT TO DETERMINE THE SCOPE OF THE PROCEEDINGS

Arbitration demands are not subject to the same technical rules as court pleadings. Such restrictions would be counter to the entire purpose of arbitration—to resolve disputes in an efficient, businesslike manner. Rather, under the FAA, arbitration demands are liberally construed; a general statement regarding the subject of the dispute is all that is required to vest the panel with jurisdiction to resolve it. The subsequent submissions of both parties serve to further refine the issues in dispute and, hence, the scope of the evidence necessary for the panel to resolve those issues. See, *Employers Reins. Corp. v. Admiral Ins. Co.,* 1990 U.S. Dist. LEXIS 14580 (D.N.J. October 30, 1990): "Under 9 U.S.C. § 1 0, a court reviewing an arbitration award only determines whether the parties received a fair and honest hearing on a matter within the arbitrators' authority." The arbitrators' authority is comprehensive: Any issue that is "inextricably tied up with the merits of the underlying dispute" is deemed by the federal courts to be within the scope of the submission, and may be addressed by the arbitrators. *McAllister Bros. Inc. v. A&S Transp. Co.,* 621 F.2d 519, 522-23 (2d Cir. 1980).

Several recent cases have analyzed the scope of arbitration submissions and the panel's jurisdiction to determine a broad range of issues. Indicative of the wide latitude granted panels is *Employers Ins. of Wausau v. Certain Underwriters at Lloyd's London,* 202 Wis. 2d 674 (1996) in which Employers Insurance of Wausau ("Employers") was reinsured by several Lloyd's syndicates from 1966 to 1973 in varying layers of coverage.

When Lloyd's refused to reimburse Employers for certain asbestos-related losses, Employers demanded arbitration, identifying seven first-layer contracts by number in the caption of the demand letter. However, the demand omitted reference to the upper-layer contracts, and Lloyd's objected to consideration of any contract other than the seven identified in the original demand. The panel, however, overruled Lloyd's objections and determined that the scope of the arbitration included claims against the signatories to all 16 treaties which formed the reinsurance program.

In its motion to vacate the award, Lloyd's argued that the panel was limited to determining the issues under the seven contracts identified in the arbitration demand. The court disagreed:

> An issue falls within the scope of the issues presented to the arbitrator if a common intent to submit that particular issue appears with reasonable certainty. [citation omitted] In our case, . . the parties raised the issue of the scope of the submission to the panel, and it ruled on that issue. . . . Appellate courts uphold an arbitrator's contract interpretation if the arbitrator's interpretation drew its essence from the contract so it was not a manifest disregard of the parties' agreement. [citation omitted]. This standard fosters recourse to arbitration for dispute resolution and forecloses the possibility that our courts will become flooded with disputes involving the exact scope of arbitration proceedings. [citation omitted] *We conclude that the panel's decision to include all policies affected by the aggregation issue derived its essence from the request for arbitration and did not show a manifest disregard for the agreement between the parties....* [N]o language in any of the correspondence explicitly states that the arbitration request pertains only to the seven policies Employers listed in its caption. Lloyd's notes the caption of the letter lists seven specific insurance policies by number. Lloyd's also presents other evidence indicating the parties intended the submission for arbitration to only refer to seven policies. We note that Employers' statement of its case showed it had only submitted reimbursement claims under the seven first-layer policies contained in the caption of the demand for arbitration, and four second-layer policies. At best, these facts make the parties' intent ambiguous. Our standard of review requires us to defer to the panel's choice in such a case. (Emphasis added.)

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From our photo files…

SECOND QUARTER CONFERENCES

1999 SPRING CONFERENCE

Co-sponsored by ESLA

APRIL 22-24, 1999
MARCO ISLAND FLORIDA

"The Importance of Being Earnest"

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LARRY SCHIFFER
ESLR Co-Chair

NICK DiGIOVANI
Golf Outing Chair

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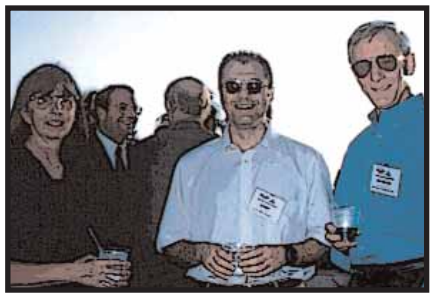

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From our photo files…

NICK DIGIOVANI,
GOLF OUTING CHAIRMAN,
PRESENTS ARIAS•U.S.
FIRST ANNUAL
GOLF OUTING
MOMENTO
TO WINNERS

SECOND DAY SESSION OF THE MOCK ARBITRATION ORGANIZATIONAL MEETING FFEATURED RICHARD G. WATERMAN AND THOMAS A. GREENE AS ARBITRATORS, LOUIS G. ADOLFSEN AND DEBORAH H. COHEN AS COUNSEL AND CAROL A. RENNIE AS UMPIRE.

SPECIAL GUEST, THE HONORABLE
DENNIS G. JACOBS,
U.S. COURT OF APPEALS,
SECOND CIRCUIT,
LISTENS TO ORAL ARGUMENTS
FROM COUNSEL IN
"THE COURT ROOM - DRAFTING THE AWARD AND ITS SEQUELLAE - MOTIONS TO CONFIRM, VACATE AND MODIFY."

MARK S. GUREVITZ,
ARIAS•U.S. PRESIDENT,
CHARLES M. FOSS,
ARIAS•U.S. PROGRAM CO-CHAIR
THANK FACULTY
FOR THEIR PARTICIPATION
AND SUPPORT

From our photo files…

SECOND QUARTER CONFERENCES

Arbitration practice seminar series

A SERIES OF ONE-DAY SEMINARS & WORKSHOPS FOCUSED ON ARBITRATION PRACTICES AND PROCEDURES

JUNE 30, 1999
SAN DIEGO CALIFORNIA

3RD IN A SERIES

"Solving Procedural Disputes in Arbitration Proceedings - Law, Practice and Ethics"

Attendees "*talk to the animals…*" as they enjoy a relaxing pre-conference cocktail party and dinner, hosted by LUCE FORWARD HAMILTON & SCRIPPS LLP at the SAN DIEGO ZOO.

Continued…

From our photo files…

Program Committee Co-Chairs, Mitchell L. Lathrop of Luce Forward Hamilton & Scripps, LLP, and Linda Lasley of REinsurance Counsel, moderate the discussion regarding issues and reactions reached by participants during breakout sessions.

Panel disucssions and group breakouts are the focus of a hypothetical situation regarding complicated issues raised during an arbitration.

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Wausau, at 682-683. Thus, the scope of the submission is determined by the issues presented, not by a formulistic listing or technicality.

As noted by the court in *Wausau,* the panel is empowered to determine the scope of the issues submitted. The courts grant arbitrators wide latitude in determining the scope of the submission and, thus, of their own authority. See, e.g., *National Gypsum Co. v. Oil, Chemical & Atomic Workers Int'l,* 147 F.3d 399, 402 (5th Cir. 1998). In National Gypsum, the losing party in a labor arbitration argued that the arbitrator exceeded his authority by framing the issue differently than that urged by the party:

> Although an arbitrator is generally "not free to reinterpret the parties' dispute and frame it in his own terms, [citations omitted] it is appropriate for the 'arbitrator to decide just what the issue was that was submitted to it and argued by the parties'," [citations omitted]. In this case the Company went forward with arbitration, initiated at its own request, knowing that it had been unable to agree with the Union as to the precise issue presented. Indeed, the Company indicated to the arbitrator in its opening argument that the parties disagreed on the issue presented for the arbitrator's resolution and presented argument to the arbitrator regarding the scope of the issue presented. In doing so without objecting that the arbitrator lacked the authority to determine the issue presented, the Company impliedly consented to allow the arbitrator to frame the issue.

Similarly, in *International Ass'n of Machinists and Aerospace Workers v. Tennessee Valley Auth.*, 155 F. 3d 767 (6th Cir. 1998), a labor dispute in which the parties presented written submissions to the arbitrator, the arbitrator was granted broad powers to determine the scope of the proceedings. When the employer lost the arbitration, it argued that the arbitrator exceeded the scope of his authority. However, the Court disagreed, holding that

> An arbitrator's authority is not strictly confined to the 'technical limits of the submission.' [citation omitted] 'The extraordinary deference given to an arbitrator's ultimate decision on the merits applies equally to an arbitrator's threshold decision that the parties have indeed submitted a particular issue for arbitration.' [citation omitted] Thus, an arbitration award may not be overturned unless it is 'clear' the arbitrator 'exceeded the scope of the submission'. Id. see also *International Chemical Workers Union Local No. 566 v. Mobay Chemical Corp.,* 755 F.2d 107, 1110 (4th Cir. 1985) (holding that the scope of issues submitted for arbitration may be broadened by the conduct of the parties during an arbitration).

ID., at 772

As a rule of thumb, any issue that is inextricably tied up with the merits of the underlying dispute is within the jurisdiction of the panel. The cases interpreting the FAA make it clear that when a broad arbitration clause is coupled with a broad demand for arbitration, the arbitrators have the authority to decide issues relating to all aspects of that contractual relationship. See, *Valentine Sugars, Inc. v. Donau Corp.,* 981 F.2d 210, 213 (5th Cir. 1993). In Valentine, which involved a dispute under several different contracts relating to the production and spray drying of liquid resin, the losing party complained that the panel had exceeded its powers by awarding ownership of the spray dryer as part of its award. The court, however, refused to modify the arbitrators' award, explaining:

> We sympathize with Valentine, as Donau wrote a broad notice of arbitration that seems to give the arbitrators jurisdiction over anything under the sun relating to the joint venture agreement. The parties agreed to arbitration, however, and must accept the loose procedural requirements along with the benefits which arbitration provides. An arbitrator, in his discretion, may choose not to address an issue without giving the opposing party better notice and an opportunity to respond. *Federal law, however, does not impose any requirements as to how specific a notice of arbitration must be. In the absence of a congressional mandate, we will not develop a code of pleading here* [emphasis added].

981 F.2d at 213.

An arbitrator, in his discretion, may choose not to address an issue without giving the opposing party better notice and an opportunity to respond.

The only other restriction on the panel's discretion to hear claims is one of procedural due process; that is, the other party must have notice of the claim and an opportunity to defend it. In summary, a broad arbitration provision combined with a general arbitration demand gives the panel wide discretion to control the scope of the proceedings and further the purpose of arbitration—equitably resolving disputes in an efficient, businesslike manner.

DUE PROCESS IN THE CONDUCT OF THE HEARING

Although the arbitration clause may incorporate certain standardized rules, such as those of the American Arbitration Association, the arbitrators retain wide discretion in how they conduct the hearing, particularly regarding discovery and evidence.

There is no absolute right to any discovery in arbitration. See, e.g., *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 57-58, 94 S. Ct. 1011, 39 L. Ed.2d 147 (1974), noting that in arbitration discovery is often unavailable. Discovery is limited by the terms of the contract, the agreement of the parties and case-by-case rulings of the particular arbitration panel. In addition, it is unclear whether third parties can be compelled to cooperate in discovery. See, 9 U.S.C. § 7, allowing the panel to "summon in writing any person to attend *before them or any of them* as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case". (emphasis added.)

It is generally well accepted that arbitration proceedings are not governed by formal rules of evidence. *Sunshine Mining Co. v. United Steelworkers of Am.*, 823 F.2d 1289, 1295 (9th Cir. 1987), "Arbitrators may admit and rely on evidence inadmissible under the Fed-

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eral Rules of Evidence." See, also, *Hoteles Condado Beach v. Union de Tronquistas Local 901,* 763 F.2d 34, 39 (1st Cir. 1985), "The arbitrator is the judge of the admissibility and relevancy of evidence submitted in an arbitration proceeding." *See, also,* American Arbitration Association Rules of Commercial Arbitration, Rule 31: "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...The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary." Thus, "barring a clear showing of abuse of discretion, the Court will not vacate an award based on improper evidence or the lack of proper evidence." *Petroleum Transport, Ltd. v. Yacimientos Petroliferos Fiscales,* 419 F. Supp. 1233,1235 (S.D.N.Y. 1976) *aff'd,* 556 F.2d 558 (2d Cir. 1977), holding that an arbitrator was entitled to accept hearsay evidence, and finding that "If parties wish to rely on such technical objections, they should not include arbitration clauses in their contracts."

The only constraint in the FAA on the arbitrators' conduct is that an award may be vacated for "misconduct" of the arbitrator in "refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. §10(a)(3) (1998). The inclination, therefore, is always toward admissibility. This may include allowing hearsay and admitting privileged information.

Thus, while courts must follow strict rules of procedure, arbitrators are bound only to provide the parties with a "fundamentally fair" hearing. *Yasuda Fire & Marine Ins. Co. of Eur v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994), holding that an arbitration panel had conducted a fundamentally fair hearing over the issue of pre-hearing security despite the reinsurer's complaints about the panel's refusal to hear certain evidence. See also, *North River Ins. Co. v. Philadelphia Reins. Corp.,* 1998 U.S. Dist. LEXIS 1945 (S.D.N.Y. Feb. 23, 1998), finding that the arbitrators had met the requirements of a fundamentally fair hearing despite their decision to exclude testimony from a witness not previously identified. In *North River,* North River arbitrated a dispute with various London market reinsurers (the "London Market Reinsurers") and the panel found in favor of North River. The London Market Reinsurers sought to vacate the award, contending that the panel had refused to hear the testimony of the Assistant General Counsel of GAF, Mr. Poyourow.

When the London Market Reinsurers had attempted to call Mr. Poyourow to testify at the hearing, counsel for North River objected because Mr. Poyourow had not been identified on any pre-hearing witness list. The London Market Reinsurers argued that Mr. Poyourow had responded to a subpoena duces tecum as the document custodian and they had designated a custodian of records. However, Mr. Poyourow also allegedly had personal knowledge about how North River handled the underlying GAF asbestos claims, and the London Market Reinsurers sought to have him testify on the retained limit issue. The panel ruled that

> to bring in at the last moment the assistant general counsel of GAF at this stage at least suggests some disingenuous approach to these proceedings and I think it would be unfair to counsel for [North River]. So the ruling is that we will not hear the witness from GAF.

The reviewing court found that the panel's decision to exclude the testimony did not amount to misconduct. The panel considered what it perceived to be the apparent misconduct of the London Market Reinsurers in concealing the identity of the witness, as well as the surprise and prejudice to North River. While the panel could have allowed the testimony, it would probably have required a disruptive continuance of the proceeding to allow North River to cure any possible prejudice. Moreover, the London Market Reinsurers did not demonstrate that they were unfairly prejudiced by the exclusion of the testimony.

They presented several witnesses during the four day hearing and were denied the use of only one witness who would have offered at most 15 minutes of testimony. Accordingly, the court concluded that, "The panel made this decision to preserve the fundamental fairness of the proceeding, not to undermine it."

An arbitrator's authority is not strictly confined to the 'technical limits of the submission.'

REMEDIES

The growth since the early 1980's in both the number and complexity of reinsurance disputes has been paralleled by a corresponding increase in the dollar amounts at issue, particularly in disputes involving asbestos and environmental pollution losses. An inevitable byproduct of that increase is the incentive for delay which a large dispute provides to the party holding the money, generally the reinsurer. Since the majority of reinsurance disputes are resolved through some iteration of the traditional "industry" arbitration, a question which arises with increasing frequency is whether the cedent may recover interest, in addition to the principal amount at issue.

As a preliminary matter, it is well recognized that, absent a specific contractual provision to the contrary, arbitrators have broad equitable powers to fashion a wide range of remedies, in order "to protect the bargain giving rise to the dispute". See, *Yasuda Fire & Marine Ins. Co. v. Continental Cas. Co.*, 37 F.3d 345, 351 (7th Cir. 1994). As discussed above, generally an arbitrator's authority is quite broad, limited only by the explicit restrictions limiting that authority. See, e.g., *Rhone-Poulenc, Inc. v. Gould Electronics, Inc.*, 1998 U.S. Dist. LEXIS 15848, *7-*15 (N.D. CA. Oct. 6, 1998). Rhone and Gould were both parties to a superfund CERCLA action and entered into a settlement specifying that they would arbitrate certain issues. The panel awarded Gould damages and prejudgment interest, which is ordinarily recoverable under CERCLA. Rhone, however, asked the panel to strike that part of the award, contending that the panel had exceeded its authority by awarding prejudgment interest. The court found that there was no explicit agreement between the parties to eliminate the panel's ability to award certain damages:

> Notably, courts have, consistent with the federal policy favoring arbitration, been hesitant to find that the arbitrator

exceeded his authority where the arbitration agreement fails to affirmatively or otherwise clearly limit the arbitrator's authority [citations omitted] Here, [Rhone] argues that although the contract on its face does not affirmatively remove prejudgment interest from the scope of the arbitration, extrinsic evidence—namely the parties' correspondence regarding the deletion of p. 22—demonstrates that the parties intended this result...While this correspondence is certainly consistent with an agreement between [the parties] to deprive the panel of authority to award prejudgment interest, it is not conclusive. Gould counters that it never intended to eliminate its claim for prejudgment interest...Thus, while it is clear that the parties both agreed to delete paragraph 22, the mutually intended effect and meaning of this deletion is somewhat less clear...

Moreover, . . .the parties' conduct at the arbitration supports the conclusion that the parties had not, in fact, reached an understanding to remove prejudgment interest from the authority of the panel...[T]he Court is left with substantial doubts as to whether the parties intended the arbitration agreement to eliminate prejudgment interest from the panel's jurisdiction. While that is one possible scenario, the record also contains evidence from which it can be inferred that the parties did not, in fact, enter into such an agreement. Accordingly, we apply the well-established principle that ambiguity and doubts should be resolved in favor of arbitrability, and thus find that the parties' arbitration agreement did not deprive the panel of the authority to arbitrate the issue of post-judgment interest.

State laws generally support the assumption that interest is necessary to make a party whole. For example, under California law, interest has long been considered a part of the compensation to which a party is entitled for breach of a contract to pay money:

> The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, *with interest* thereon (Emphasis added).

California Civil Code section 3302 (enacted 1872). The cases construing that statute, which has counterparts in the laws of most other states, make it clear that

> [p]rejudgment interest must be granted as a matter of right if damages are certain or ascertainable, and the interest runs from the date when the damages are certain or ascertainable and when the sum due is made known to the defendant. [Citations omitted] (Emphasis added).

E.L. White v. City of Huntington Beach, 138 Cal. App. 3d 366, 377, 187 Cal. Rptr. 879 (1982).

It is noteworthy that in *White,* which involved a liability insurer's action for indemnity against its insured's co-defendant, the court expressly rejected the defendant's argument that the damages were not "ascertainable" for purposes of the accrual of interest until judgment was entered, because the amount of damages was in dispute. The court found that the amount was still ascertainable, even though it was

> subject to a possible reduction if [one of the plaintiffs] was found to have been more than vicariously liable. *The possibility of that reduction, or even an actual reduction, does not render [the plaintiffs] damages any less certain."* (Emphasis added).

White, at 377-78.

Thus, one of the risks inherent in any contract dispute is that it may be resolved against the debtor, and that the debtor may not only have to pay the amount due under the contract, but interest as well. Reinsurers who withhold payment pending resolution of a dispute must be deemed to have adopted that strategy with full knowledge of the prevailing law. An alternative approach which has been employed with some success, particularly in situations where there is some legitimate concern over the reinsurer's continued viability, or where the reinsurer is a foreign company with no assets in the U.S., is to establish an escrow or trust account under control of the arbitrators. The agreement establishing the account generally specifies the types of instruments in which the funds may be invested, and provides for release of all earnings on the escrowed funds to the prevailing party. See, *PRMC v. Ohio Reinsurance Corp.,* 935 F.2d 1019, 1023 (9th Cir. 1991).

There is no absolute right to any discovery in arbitration. … Discovery is limited by the terms of the contract, the agreement of the parties and case-by-case rulings of the particular arbitration panel.

The reinsurer's initial response to a request for interest is usually to point out that the reinsurance agreement does not provide for interest on overdue balances. However, the fact that the contract under which payment is sought does not itself provide for the payment of interest has no bearing on the right to recover interest as part of compensatory damages. Looking once more to the California statutes as an example, California's Civil Code section 3289 provides that

> (a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.
>
> (b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.

The award of pre-judgment interest in cases arising under federal law rests within the sound discretion of the trial court, although similar principles govern such awards. Thus, for example, it has been widely recognized in the federal cases that

> The effect of a refusal to grant prejudgment interest ... would be to allow an interest free loan to [one party] on funds belonging to another . . . . Disallowance of interest would encourage delay in payment.

Monsanto Co. v. Hodel, 827 F.2d 483, 485 (9th Cir. 1987). As the Ninth Circuit Court of Appeals has observed, "prejudgment interest is a well-established remedy in this circuit." *Hopi Tribe v. Navajo Tribe,* 46 F.3d 908, 922 (9th Cir.), *cert. denied,* 516 U.S. 931, 116 S. Ct. 337, 133 L. Ed. 2d 236 (1995).

In a similar vein, a federal appellate decision

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confirming an arbitration award under the Convention (enacted in the United States as Chapter 2 of the FAA, 9 U.S.C. Sections 201-208) explained:

> Absent persuasive reasons to the contrary, we do not see why pre-judgment interest should not be available in actions brought under the Convention. First, the Convention provides that such actions "shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. sec. 203. Second, the Convention is silent on the question of pre-judgment interest. Third, the same policy considerations that call for the award of pre-judgment interest in the cases that we have cited above call for such awards in cases involving arbitration under the Convention. *In these days in which all of us feel the effects of inflation, it is almost unnecessary to reiterate that only if such interest is awarded will a person wrongfully deprived of his money be made whole for the loss.* (Emphasis added).

Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd., 737 F.2d 150, 153 (2d Cir. 1984).

The primary purpose of this presumption, that the damages recoverable for breach of a contract involving payment of money will include interest on the funds ultimately found to be due, is to ensure full compensation to the plaintiff for loss of use of the funds in dispute. It, therefore, represents a recognition that parties (particularly profit-making businesses) do not put money into a mattress; they generally put it to work in some form of commercial investment. Thus, merely recovering the principal amount due, often after a protracted dispute and recovery process, does not fulfill the purpose of fully compensating the party deprived of the funds.

The presumption that interest will be awarded has another, somewhat subsidiary purpose, that of avoiding unjust enrichment to the party who wrongfully (although not necessarily maliciously) withheld the funds. Particularly where the amounts at issue are in the tens of millions of dollars, the earnings on those balances are more than sufficient to fund litigation and still result in a substantial profit to the party holding the funds. Thus, unless that party is required to compensate the claimant for both the principal and the interest that could have been earned on it, there is simply no incentive to resolve disputes expeditiously; indeed, the incentive is to delay and "stonewall" for as long as possible.

Having established that interest is an appropriate component of the compensatory damages due the cedent in a reinsurance dispute, the next question is: When does that interest begin to run? The answer is usually found in the contracts themselves, which generally provide that payment is due from the reinsurer within a specified period of time after the account is rendered.

A federal court applying New York law recently addressed a similar question relating to the date interest begins to accrue on unpaid reinsurance balances. In *Aetna Cas. & Sur. Co. v. Home Ins. Co.,* 882 F. Supp. 1328, 1353 (S.D.N.Y. 1995), the court held that New York law provided that

> interest shall be recovered upon a sum awarded because of a breach of performance of a contract. *Interest is computed from the "earliest ascertainable date the cause of action existed."* [citation omitted]. Here, the accrual of Aetna's cause of action can be identified as maturing when [the reinsurer] failed to comply with Aetna's demand that it indemnify Aetna for payments made in connection with its settlement with [its insured]. (Emphasis added).

As noted above, it makes no difference that the reinsurer disputed the balances claimed due by its cedent; as long as those amounts were "ascertainable" at the time they became due under the reinsurance agreement, interest will begin to run from that time.

PRECEDENTIAL EFFECT

An arbitrated case has limited precedential value. Some courts have recognized that arbitration awards may be entitled to collateral estoppel effect. *See, Kelly v. Vons Companies, Inc.,* 67 Cal. App. 4th 1329 (1998). Vons and a teamsters union arbitrated a dispute over closure of a Vons facility. (A second labor dispute was pending during this arbitration.) The arbitrator ultimately held that Vons closed the facility for economic reasons. Later, several individual drivers who were laid off due to the closure sued Vons, alleging that when they were hired Vons failed to notify them of the labor dispute and arbitration with the teamsters, and that this concealment caused them to leave secure employment. Vons moved for summary judgment, contending that the individuals were collaterally estopped from seeking damages for misrepresentations about the labor dispute. The court held that "Parties to an arbitration...are often afforded the opportunity for a hearing before an impartial and qualified officer, at which they may give formal recorded testimony under oath, cross-examine and compel the testimony of witnesses, and obtain a written statement of decision. When an arbitration has these attributes, it is not unjust to bind the parties to determinations made during the proceeding."

An arbitrated case has limited precedential value.

However, this rule is not as absolute in the arbitration context as it is when dealing with ordinary court judgments. *See, e.g., Vandeberg v. Superior Court,* 59 Cal. App. 4th 898 (1997), *rev. granted,* 73 Cal. Rptr. 2d 195 (1998), holding that "in view of the relaxed standards applicable to an arbitration, and the nonreviewability of an arbitrator's decision, we hold that such a decision may not be given effect beyond that to which the parties to the arbitration agreed". Recognizing the potential problems occasioned by arbitrators' lack of legal training, as well as their power, in many cases, to decide cases on equitable, rather than legal, grounds, the Federal Circuit has set out a test to determine whether a given arbitration award should be afforded preclusive effect. In *Gonce v. Veterans Admin.,* 872 F. 2d 995, 997 (Fed. Cir. 1989), *cert. denied,* 493 U.S. 890 (1989), the court concluded that "[f]rom what the Supreme Court has said, it appears that the preclusive effect of prior arbitration awards is for individual resolution", and set out the following guidelines for making that determination:

a) the issue previously adjudicated is identical with that now presented;

b) that issue was "actually litigated" in the prior case;

c) the previous determination of that issue was necessary to the end-decision then made; and

d) the party precluded was fully represented in the prior action.

This is a heavy burden to sustain, particularly given the relatively informal procedures employed by many arbitrators, and the lack of any requirement that they give reasons for their decisions.

The next question — whether it is for a court or a panel of arbitrators to decide if a prior award should preclude re-arbitration of the same issue — is potentially more significant, and may end up nullifying the impact of collateral estoppel in the case of a subsequent arbitration. It was this issue that was addressed by the District Court in *North River Ins. Co. v. Allstate Ins. Co.*, 866 F. Supp. 123 (S.D.N.Y. 1994). In *North River,* the parties were in disagreement over the proper application of the definition of "occurrence" in their reinsurance treaties to asbestos claims which arose under original insurance policies issued by North River, U. S. Fire Insurance Co. and their affiliates. The plaintiff insurers contended that all of the asbestos claims arose out of a single "occurrence", and that, therefore, they need take only a single retention under their reinsurance treaties with Allstate. For its part, Allstate argued that each asbestos claim arose out of multiple occurrences, requiring the cedents to take multiple retentions. With the consent of all parties, a number of pending arbitrations on that issue were consolidated, and the plaintiff ceding companies prevailed. The two-page arbitration award did not state the grounds for the majority's decision, nor did the dissenting arbitrator provide any reasons for his disagreement. The arbitration award was confirmed by a New York state court.

The ceding companies then filed suit against Allstate under additional contracts, and Allstate moved to stay the litigation and to compel arbitration. In response, the cedents argued that the doctrine of collateral estoppel barred Allstate from further arbitrating the liability issue, since the central issue in each of the remaining disputes was the meaning of the term "occurrence" as it applied to the asbestos claims at issue. Neither party disputed either the existence or validity of the arbitration clauses in the reinsurance agreements, nor did they contend that the dispute over the meaning of the term "occurrence" was not covered by those arbitration clauses. North River, however, argued that the federal court was bound under the Full Faith and Credit Act to give the state court judgment obtained on the prior consolidated arbitration award the same preclusive effect as would be given that judgment under the laws of the state where it was rendered. The federal court disagreed, finding that

> state law does not determine what forum - a court or arbitrators - hears the merits of a dispute between parties and decides whether to give preclusive effect to a prior arbitration between parties.... the issue before this Court is not governed by the Full Faith and Credit Act because the issue before the court is what is arbitrable and arbitrability is determined by rules of federal law, not state law.

866 F. Supp. at 128.

Significantly, the court went on to note that

> [a]n arbitrator faced with a case with issues resolved in a prior arbitration has discretion as to whether to follow a previous award. While "it is the usual practice of arbitrators to find prior awards final and binding ... subsequent arbitrators may set aside or modify a previous award in certain circumstances." [citation omitted]. These circumstances include cases where "(1) the previous decision was clearly an instance of bad judgment; (2) the decision was made without the benefit of some important and relevant facts or considerations; or (3) new conditions have arisen questioning the reasonableness of the continued application of the decision." [citation omitted]. Where two arbitrators render inconsistent decisions, neither award will be set aside where they both draw their essence from the underlying contract.

Id. Since the court found the arbitration clauses at issue to be "broad", *i.e.,* that the parties agreed to let the arbitrators "consider this contract an honorable engagement rather than merely a legal obligation", and the clauses absolved the arbitrators "from following the strict rules of law", it concluded

> Thus, the arbitration agreements themselves are broad enough to encompass the power of the arbitrators to adopt or reject "the strict rules of law", i.e., the preclusive effect of a prior award. This question of whether to apply collateral estoppel to the defenses of a party in arbitration is no different from an adjudication by the arbitrators of any other matter in dispute between the parties.

Id. at 129. While not all federal circuits follow this approach, which leaves the question of the preclusive effect of prior arbitrations to the arbitrators in the later cases, it appears also to be the rule in the Ninth Circuit. See, *Local Union No. 370, Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co.*, 786 F.2d 1356, 1358 (9th Cir. 1986).

Particularly in the context of reinsurance disputes, arbitrations are largely ad hoc affairs, in that the governing statutes—usually the FAA—provide only the most general procedural framework. It is then up to the parties, their counsel and the panel to "fill in the blanks". This lack of formal structure is at the same time both a challenge and an opportunity: A challenge, because until the advent of organizations like ARIAS-U.S., inexperienced participants had little to guide them, but also an opportunity for the exercise of creativity, providing the ability to tailor the proceedings to fit the dispute.

It is in this spirit that the foregoing discussion is offered, to further the goals of the arbitration process: offering a swift, economical and businesslike resolution of disputes according to the custom and practice of the insurance industry.

...arbitrations are largely ad hoc affairs, in that the governing statutes—usually the FAA—provide only the most general procedural framework.

ARIAS U.S.

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Do you know someone who is interested in learning more about ARIAS•U.S.? If so, pass on this letter of invitation and membership application.

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Sincerely,

Robert M. Mangino
Chairman

Mark S. Gurevitz
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ARIAS U.S.

MEMBERSHIP APPLICATION

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ARIAS·U.S. is a not-for-profit corporation that promotes the improvment of the insurance and reinsurance arbitration process for the international and domestic markets. The Society provides continuing in-depth seminars in the skills necessary to serve effectively on an insurance/reinsurance panel. The Society, through seminars and publications, seeks to make the arbitration process meet the needs of today's insurance/reinsurance market place by:

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