ARIAS QUARTERLY U.S.

SECOND QUARTER 2002

Manifest Disregard

VACATING ARBITRATION AWARDS: a circuit by circuit review

Issuance and Enforcement of Non Party Discovery Subpoenas in Arbitration

ARIAS • U.S. Certified Arbitrators

ARIAS • U.S.: Its growth and Importance Assured

contents

introducing

William Yankus

William "Bill" Yankus joins ARIAS•U.S. as Executive Director, replacing Maria Sclafani who retired officially on June 30th 2002. Bill has worked as a senior marketing executive with 20 years of advertising experience with General Foods, Lever Bros., GE, Mobil, CIGNA, and other accounts. He was a early adapter of new media, transitioning from mainstream marketing to the Internet in the early 90s. He is experienced in partnership marketing, strategic alliances and association administration. Bill developed corporate sponsorships and co-marketing initiatives with pharmaceutical companies, publishers, and other partners seeking to market online to physicians and to consumers seeking condition-specific health care information. He has run trade shows, and conferences. Bill served in the U.S. Navy with its Nuclear Weapons Disposal Unit where he trained and led emergency teams in responding to accidents involving ordinary and nuclear weapons, on land and under water, earning the rank of Lieutenant. Bill holds a BA in Economics from Williams College and received his MBA from The Wharton School. His personal endeavors include service on the Board of Trustees of the Bronxville Public Library. He is active in skiing and distance running and resides with his family in Bronxville, N.Y.

ARIAS U.S.
AIDA REINSURANCE & INSURANCE ARBITRATION SOCIETY

www.arias-us.org

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November 7-8, 2002

Annual Membership Meeting and Conference

Hilton New York & Towers

1335 Avenue of the Americas

New York, NY

feature

ARIAS•U.S.: Its Growth and Importance in the Process of Resolving Insurance and Reinsurance Disputes

(As published in Journal of Reinsurance)

BY: MARK S. GUREVITZ[1]
T. RICHARD KENNEDY

ARIAS•U.S. is well positioned to remain the preeminent arbitration organization in the insurance and reinsurance industry for years to come.

Virtually all reinsurance treaties and many certificates of facultative reinsurance contain an arbitration clause. For a variety of reasons, arbitration has been historically the preferred method of dispute resolution in the reinsurance industry. Arbitration has been long regarded as a speedy, economical and effective method to resolve differences in a private manner between commercial partners in the context of a continuing relationship before experienced and knowledgeable industry professionals. At least that was how it worked for many, many years.

Beginning in the middle to late 1980's and continuing today, due to the advent of asbestos, pollution and toxic tort claims coupled with the decision of many companies to cease writing and run-off their book of business, the number of arbitrated reinsurance disputes has grown exponentially. Along with the increase in sheer numbers came a sharp increase in the complexity of the disputes and the amount of money at issue. Gone were the days of occasional discrete disputes between commercial partners. Now, reinsurance arbitrations more closely resemble the types of contentious disputes previously found only in the courtroom.

These developments created a great deal of strain on the arbitration process. What had been an informal ad hoc process was now being called upon to respond to disputes that were larger and more complex than many of the cases heard by judges in courtrooms. The growing demands created a need for more well qualified arbitrators. This, in turn, made it desirable to set up a facility to provide training programs for new arbitrators and to help improve the performance of individuals already providing arbitrator services. In addition, it was felt that the establishment of recognized procedural guidelines and standards of ethical conduct were needed to remove the "cloak of secrecy" surrounding the arbitral process (i.e. the mystery of how the process works) and instill confidence in arbitration as a means to deal with these issues in a fair and equitable way. ARIAS•U.S. was established to address these needs and respond to the changing industry conditions.

ARIAS•U.S. was formed due to the efforts of a working group organized in 1992 and spearheaded by T. Richard Kennedy, then the managing partner at Werner & Kennedy in New York City. The working group included representatives of major U.S. reinsurance and insurance companies and industry trade associations, as well as arbitrators and practicing lawyers experienced in reinsurance and insurance disputes. Following almost two years of active meetings and discussion, the working group came up with the present-day framework of ARIAS•U.S. After formal launching in 1994. ARIAS•U.S. now has grown to a total of 257 corporate and individual members. Corporate members

include Travelers, AIG, ACE, Equitas, The Hartford, General Cologne Re and Swiss Re, as well as numerous law firms.

ARIAS•U.S. is a not-for-profit corporation formed to promote, improve and enhance the insurance and reinsurance arbitration process in the United States. The objectives of ARIAS•U.S. as set forth in Article 1, Section 1 of its Bylaws are:

a. To promote the integrity of the arbitration process in insurance and reinsurance disputes.

b. To promote just awards in accordance with industry practices and procedures.

c. To certify objectively qualified and experienced individuals to serve as arbitrators.

d. To provide training sessions in the skills needed to be certified as arbitrators.

e. To propose model rules of arbitration proceedings and model arbitration clauses.

f. To foster the development of arbitration law and practice as a means of resolving national and international insurance and reinsurance disputes in an efficient, economical and just manner."

To ensure that its views and direction are representative of all viewpoints of the principal participants in the arbitration process, the Bylaws at Article VI, Section 1, state that the governing body of the organization shall be a nine-member Board of Directors composed as follows:

> "Three directors shall be current or former officers or executives of ceding insurers, three directors shall be current or former officers or executives of professional reinsurers, and three directors shall be current or former partners in private law practice."

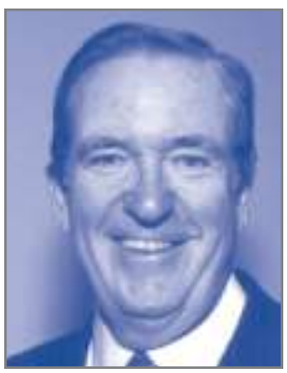
The founding members of the Board of Directors (and their affiliations at the time) were T. Richard Kennedy, Werner & Kennedy; Edmond F. Rondepierre, General Reinsurance Corporation; Susan E. Mack, Aetna Life & Casualty; Charles W. Havens III, LeBoeuf, Lamb, Greene & MacRae; Charles M. Foss, The Travelers Insurance Company; Mark S. Gurevitz, ITT Hartford Insurance Group; Ronald A. Jacks, Mayer, Brown & Platt; Robert M. Mangino, North American Reinsurance Corporation; and Daniel E. Schmidt, IV, Sorema N.A. Reinsurance Company.

The name "ARIAS" stands for the AIDA Reinsurance and Insurance Arbitration Society. AIDA ("Association Internationale de Droit des Assurances") is an international organization of academics, regulators, attorneys and others who are interested in and study comparative aspects of international insurance law and regulation. Founded in 1960, AIDA has grown to an association of some 50 national chapters throughout the world. Although AIDA is the parent organization, ARIAS-US currently operates as an independent organization with only an affiliation to AIDA.

ARIAS•U.S. has done much over the past several years to make the arbitration process effective, professional, fair and responsive to the needs of the industry. Consistent with its goal of expanding the number of qualified arbitrators, ARIAS•U.S. has since 1995 established a pool of over 110 certified arbitrators. These are all highly experienced reinsurance or insurance practitioners and professionals and include a representative mix of cedents and reinsurers. ARIAS•U.S. has also developed a list of qualified umpires. Certified arbitrators qualify for the Umpire List when they have served as arbitrator on at least three completed arbitrations. The lists of Certified Arbitrators and Umpires, as well as printable versions of each arbitrator's biography, are available on the ARIAS•U.S. website at www.arias-us.org.

In addition, a constant complaint in the industry has been the difficulty in finding an umpire both parties will regard as fair and impartial under the typical "drawing of lots" provision that is found in most reinsurance contracts used to select an

MARK S. GUREVITZ



T. RICHARD KENNEDY

umpire in the event of an impasse. To address that concern, ARIAS•U.S. has developed an Umpire Selection Procedure designed to aid the parties in selecting an umpire viewed as neutral to both parties. The key to the procedure is the use of a software program to select randomly an initial group of arbitrators from the list of certified arbitrators maintained by ARIAS. It is believed that the random nature of the initial selection of candidates prevents one party from "stacking the deck." This procedure has been utilized in a number of proceedings since its inception. To encourage use, ARIAS•U.S. makes this procedure available at no cost in arbitrations in which any participant (party, counsel or arbitrator) is a member of the organization and at a modest cost to all others.

Establishment of accepted standards in arbitration, both with regard to procedure and arbitrator conduct, is a critical objective of ARIAS•U.S. In 1998, ARIAS published its "Practical Guide to Arbitration Procedure." This document sets out in clear and concise, easy-to-read terms, general practice pointers for all stages of the arbitration process. These guidelines provide useful advice and guidance for arbitrators, as well as counsel, in reinsurance arbitration proceedings. Where appropriate, best practices and industry custom and practice are identified. These guidelines are not intended to supersede the express agreement of the parties or applicable law but to provide a helpful reference where, as in most situations, the arbitration clause at issue provides little or no guidance. The Practical Guide also includes commonly used forms that can be printed for use in arbitrations, such as Hold Harmless and Confidentiality forms, an Umpire Questionnaire and an Organizational Meeting Checklist. The forms are widely used in arbitrations today.

ARIAS•U.S. has also published "Guidelines for Arbitrator Conduct." It is the firm belief of the ARIAS•U.S. Board of Directors that trust and confidence in the personal and professional integrity of the arbitrators in reinsurance arbitrations is critical to the continued viability of arbitration as a means to resolve disputes. Again, while nothing in the Guidelines should be considered grounds for judicial review or to create a substantive legal duty, ARIAS•U.S. believes that arbitrators must observe high standards of ethical conduct to preserve confidence in the process.

Both the "Practical Guide to Arbitration Procedure" and the "Guidelines for Arbitrator Conduct" can be found on the ARIAS•U.S. website.

Perhaps the most important function of ARIAS•U.S. is the training and in-depth seminars which the organization conducts each year. Since 1995, ARIAS•U.S. has conducted an annual meeting in November and a conference in the spring, as well as numerous smaller workshops and training programs. The spring conferences are held in different locations around the country, including California, Florida, Chicago and North Carolina, as well as Puerto Rico and Bermuda. The Annual Meeting is traditionally held in New York City and in 2001 was attended by over 210 participants. All meetings involve an extensive educational component, typically with mock arbitrations conducted by experienced arbitrators and counsel, and extensive high-level group discussion on the issues presented.

All meetings involve an extensive educational component, typically with mock arbitrations conducted by experienced arbitrators and counsel, and extensive high-level group discussion on the issues presented.

In addition, over the past two years, ARIAS•U.S. has developed an intensive arbitrator-training program for newly certified arbitrators with limited actual arbitration experience. These programs allow new arbitrators to "sit" on arbitration panels in simulated role-playing scenarios where they hear arguments of counsel and must decide issues while being observed by experienced arbitrators who provide helpful feedback. The next intensive training program is scheduled for September 2002 in Boston.

The impetus for the formation of ARIAS•U.S. was in large part a response to arbitrations related to problems of the past. Nevertheless, ARIAS•U.S. will have a critical role in the future. There are still many years remaining before the run-off of prior year long-tail claims is completed.

More and more of these claims involve asbestos or pollution or toxic tort. History tells us that the claims are likely to generate arbitrable disputes. Moreover, arbitration clauses continue to be included in the reinsurance contracts written today. Many clauses today contain a provision referring the matter to the ARIAS•U.S. Umpire Selection Process in the event the parties are unable to reach agreement on an umpire. We encourage others to adopt such a provision.

ARIAS•U.S. is well positioned to remain the preeminent arbitration organization in the insurance and reinsurance industry for years to come. This is so for several reasons. One, ARIAS•U.S. represents all segments of the reinsurance arbitration process. This includes equal representation on the Board for cedents, reinsurers and counsel involved in the arbitration process. While professional arbitrators are not a class by themselves, they are represented within these categories. For example, Board members Dan Schmidt and Bob Mangino, our current President and former Chairman, respectively, represent the reinsurer constituency as each previously worked for reinsurers. The equal representation in the governance of ARIAS•U.S. ensures that the organization reflects the views of the industry as a whole and not just one segment. Two, ARIAS•U.S. through its meetings serves as a forum within the industry for airing views related to arbitration procedure and ascertaining whether and the degree to which there is a consensus on various aspects of arbitration procedure. The large attendance at our meetings, with persons from all aspects of the process, allows the participants to self-examine and critique the process. Three, the principal focus of ARIAS•U.S. is on procedural issues. The organization seeks to avoid discussion of substantive issues, which would lead only to presentation of conflicting viewpoints that would not contribute to the major goal of ARIAS-US: to streamline and improve the arbitration process.

ARIAS•U.S. has grown from a start-up enterprise with no funds or funding to an established industry leader within a short period of time. This is due to the tremendous work done by its all-volunteer Board and the support and efforts of its membership. We are fortunate to have a great group of people who are willing (and indeed eager) to offer their time, expertise and offices for our training programs, committees and other efforts.

Beyond where we are today, ARIAS•U.S. is constantly looking to undertake new initiatives consistent with our charter. For example, we are looking at ways to increase programs dealing with insurer-insured disputes, such as arbitrations involving property coverage matters, rather than just insurer-reinsurer disputes. We also want to expand the list of certified arbitrators to include persons experienced in life and health insurance. Additionally, we continue to explore interest among members in training programs related to mediation.

While we are very fortunate to have our current large and broad-based constituency, the continued vitality of ARIAS requires that the companies themselves demonstrate support for our efforts. The list of companies represented in our membership is impressive. However, too many companies are absent from the list. In order to have the greatest ability to influence the arbitration process in the future, we need more companies to show their support. Indeed, it is the companies that are the "consumers" in this process. We encourage all insurers and reinsurers, including the many that have attended our programs, to become active members of ARIAS•U.S.

THE END

1 The authors are founding members of the Board of Directors of ARIAS•U.S. Mark S. Gurevitz is the organization's current Chairman and T. Richard Kennedy is Chairman Emeritus, having served as the first Chairman of ARIAS•U.S. from 1994 to 1997.

Gone were the days of occasional discrete disputes between commercial partners. Now, reinsurance arbitrations more closely resemble the types of contentious disputes previously found only in the courtroom.

arias•u.s.

certified arbitrators

(As of June 20, 2002)

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.

Biographies of certified arbitrators are online at www.arias-us.org

George F. Adams
John P. Allare
Howard N. Anderson
David Appel
Richard S. Bakka
Nasri H. Barakat
Linda Martin Barber
Frank J. Barrett
Peter H. Bickford
John W. Bing
John H. Binning
Mary Ellen Burns
Marvin J. Cashion
Robert Michael Cass
Dewey P. Clark
Peter C. Clemente
William Condon
James P. Corcoran
Dale C. Crawford
John J. Cuff
Patrick B. Cummings
Paul E. Dassenko
Donald T. DeCarlo
John B. Deiner
Anthony L. DiPardo
James F. Dowd
Charles Ernst
Peter J. Flanagan
Charles M. Foss
Caleb L. Fowler
William W. Fox, Jr.
James H. Frank
Peter Frey
Ronald S. Gass
Dennis C. Gentry
Ernest G. Georgi
William J. Gilmartin
George A. Gottheimer, Jr.
Robert B. Green
Thomas A. Greene
Alfred Edward Gschwind
Mark S. Gurevitz
Martin Haber
Franklin D. Haftl
Robert F. Hall
Robert M. Hall
Charles W. Havens, III
Paul D. Hawksworth
James S. Hazard
John Harlan Howard
Robert M. Huggins
Ian Hunter QC
Wendell Ingraham
Ronald A. Jacks
Bonnie B. Jones
James I. Keenan
T. Richard Kennedy
William M. Kinney
Floyd H. Knowlton
Eric S. Kobrick
Anthony M. Lanzone
Mitchell L. Lathrop
Peter F. Malloy
Andrew Maneval
Robert M. Mangino
Merton E. Marks
Richard E. Marrs
Walter R. Milbourne
Robert B. Miller
Edwin Millette
Lawrence Monin
Jeffrey L. Morris
Gerald F. Murray
Thomas Newman
Charles L. Niles, Jr.
Robert J. O'Hare, Jr.
Dr. Herbert Palmberger
James P. Powers
John H. Reimer
Robert Reinarz
David R. Robb
Debra J. Roberts
Robert L. Robinson
Edmond F. Rondepierre
Angus Ross
Daniel E. Schmidt, IV
James A. Shanman
Richard M. Shusterman
Richard D. Smith
Walter Squire
J. Gilbert Stallings
Jack M. Stoke
C. David Sullivan
Bert M. Thompson
N. David Thompson
Paul C. Thomson
John W. Thornton
John J. Tickner
Thomas M. Tobin
Theodore A. Verspyck
Jeremy R. Wallis
Paul Walther
Richard G. Waterman
Norman M. Wayne
Emory L. White
Richard L. White
W. Mark Wigmore
Michael S. Wilder
P. Jay Wilker
Eugene Wollan

arias•u.s. umpires

(As of June 20, 2002)

David Appel
Richard S. Bakka
Frank J. Barrett
Peter H. Bickford
John W. Bing
John M. Binning
Mary Ellen Burns
R. Michael Cass
Dale Crawford
Peter C. Clemente
Paul Dassenko
Donald T. DeCarlo
John B. Deiner
Anthony L. DiPardo
Caleb L. Fowler
James H. Frank
Peter Frey
Dennis C. Gentry
William J. Gilmartin
George A. Gottheimer, Jr.
Thomas A. Greene
A. Edward Gschwind
Martin D. Haber
Franklin D. Haftl
Robert F. Hall
Robert M. Hall
Paul D. Hawksworth
Robert F. Huggins
Ronald A. Jacks
Peter F. Malloy
Robert M. Mangino
Charles L. Niles, Jr.
James J. Powers
Edmond F. Rondepierre
Daniel E. Schmidt, IV
Richard D. Smith
Jack Stoke
Thomas M. Tobin
Peter J. Tol
Bert M. Thompson
N. David Thompson
Richard G. Waterman
Eugene Wollan

The ARIAS•U.S. Umpire List is comprised of ARIAS•U.S. Certified Arbitrators who have provided ARIAS•U.S. with satisfactory evidence of having served on at least three (3) completed (i.e. a final award was issued) insurance or reinsurance arbitration.

Members . . . NEWS ABOUT YOU and YOUR ACTIVITY

A new feature of the ARIAS-U.S. Quarterly, starting with the next issue, is a section reporting on news of ARIAS members. **"ARIAS Members on the Move"**

For this section to be valuable, we need to have you tell us what has happened recently in your life, that you feel fellow members might want to know about. Fill out the form below and send it in or just type the information into an email message.

Tell us about a job or company change, recent honors or promotions, major events in your business, community, or personal life. You can even let us know about changes in your contact information. We'll use it to update our database and list it for other members to bring their Palm Pilots up to date.

Name _____

Type of change (please indicate with a check): ❑News ❑Address ❑Phone ❑Fax ❑E-mail

Old Information: _____

New Information (not necessarily indicative of line spacing): _____

Other News: _____

Fax or mail this sheet, or just send an email with the information to byankus@cinn.com.

If you mail it in, send to ARIAS•U.S., 25 Beechwood Ave., Mount Vernon, NY 10553 • If you fax it, send to 914-699-2025.

photo file

2002 Spring Meeting & Conference

From May 2 to May 4, over 150 ARIAS members and spouses gathered at the Westin Rio Mar Beach Resort for training and discussion of a wide range of topics critical to the arbitration process.

ARIAS-U.S. Members Meet in Puer for 3-Day Spring Conference.

Most of the time was spent in intense, focused discussions of key issues and best practices.

Puerto Rico

But it wasn't all work.

Some attendees even found time for a round of golf.

No doubt, Dick and Mark were discussing their article. *(see page 4)*

photo file

Westin Rio Mar Bea;ch Resort Puerto Rico

in focus

Newly Certified Artibrators

John J. Cuff

Ernest G. Georgi

James Ignatius Keenan, Jr.

Richard E. Marrs

Edwin M. Millette

John J. Cuff

John Cuff is a Principal in the Casualty Actuarial and Risk Management practice of Ernst & Young LLP, located in New York.

He has over 25 years experience within the insurance and reinsurance industry. His professional insurance skills include an in-depth familiarity with all lines of property and casualty claims, with demonstrated expertise in products, professional, and general liability exposures as well as property exposures.

At Ernst & Young, he specializes in insurance and reinsurance claims issues providing advice on overall file handling, benchmarking, claims best practices, bad faith issues, claim department reengineering, and performance improvement. He has recently worked with Safeco, Liberty Mutual, Ohio Casualty, Greater New York Insurance Company, Swiss Re, ERC (Denmark), Dai Ichi (Japan), AMP (Australia), and Scandinavian Re (Bermuda).

Mr. Cuff was formerly with Munich Reinsurance Corporation, where he was a Vice President, and directed the claims operations on the Munich-Re United States Branch. He conducted numerous audits of a wide variety of casualty claims operations and provided reports and analyses for the company's home office in Munich, Germany. His additional responsibilities included advice in global reinsurance commutation discussions; analysis of individual loss exposures and books of business for Munich Re's understanding and marketing departments; and, the coordination of claims operations with Munich Re's American subsidiaries.

Mr. Cuff was also a claims executive at General Reinsurance Corporation in Stamford, Connecticut where he was responsible for numerous large treaty facultative and captive accounts on behalf of Gen Re. He conducted claims audits, provided analysis on individual claims, and advised the Gen Re underwriting rating and marketing departments.

An associate at the law firm of Wilson Elser Moscowitz Edelman and Dicker (WEMED), Mr. Cuff also represented Lloyds of London and other insurers, where he concentrated on product and professional liability. A graduate of Manhattan College, he earned his J.D. at St. John's Law School and M.A. at Fordham University.

Ernest G. Georgi

Ernest Georgi's career in the insurance & reinsurance industry started over four decades ago. Reinsurance, being international in scope, allowed him to travel the world seeking opportunities and forging alliances between ceding companies and reinsurers. Throughout the years, he developed good skills in negotiating and placing reinsurance contracts.

In 1978 and after a successful career with Alexander & Alexander, Mr. Georgi was ready to start his own firm. He teamed up with insurance entrepreneur Fred H. Pearson, chairman and founder of AVRECO in Chicago and together launched PEARSON & GEORGI INTERNATIONAL Inc. (Reinsurance Broker & Manager). Mr. Georgi was appointed President/CEO.

He established an office in Athens, Greece to serve cedents based in Europe and Mid East. Another office was set up in Manila, Philippines to serve South East Asian clients. Both offices represented various international reinsurers and underwrote treaty reinsurance in a pooling arrangement.

Mr. Georgi is proud to join the ranks of ARIAS•U.S. Certified Arbitrators.

James Ignatius Keenan, Jr.

James I. Keenan, Jr. has worked for 42 years in the property-casualty insurance industry. Thirty-one of those years were spent as an attorney in the legal department of two separate insurers, eight years with United States Fidelity & Guaranty Company and twenty-three years with Fidelity & Deposit Company of Maryland from which he retired in May of 2000.

At Fidelity & Deposit Company of Maryland, Mr. Keenan was Senior Vice President, General Counsel and Corporate Secretary. His duties as General Counsel included providing all segments of the company with legal advice and counseling on insurance and reinsurance issues, regulatory questions, and corporate matters. He was primarily involved with the solution of legal questions related to surety insurance, to property-casualty insurance, and to commercial credit insurance. He was also deeply involved in surety reinsurance issues both as ceding and assuming company, and provided legal opinion and advice on the interpretation and analysis of reinsurance treaties and in some instances the ab initio development of reinsurance contracts.

Mr. Keenan received a B.S. degree in Business Administration from Loyola College, Baltimore, a Juris Doctor degree from the University of Maryland School of Law and is a member of the Maryland Bar. He received the Chartered Property and Casualty Underwriter (CPCU) designation from the American Institute for Property and Liability Underwriters, Inc. and the Associate in Reinsurance (ARe) designation from the Insurance Institute of America. He has served as Chairman of the Section on Commercial Law and of the Committee of Corporate Counsel, the Committee on Professional Liability Insurance, and served as a Trustee of the Insurance Trust of the Maryland Bar Association. He has also served as President of the Maryland Chapter CPCU, the Barristers Club (a law club in Baltimore), and the Society of Corporate Secretaries of Baltimore. Mr. Keenan and his wife of 40 years, Catherine, the parents of three grown children, reside in Baltimore.

Richard E. Marrs

Richard E. Marrs retired in December, 1990 from his position as a Senior Vice President in charge of the Property-Casualty Claim Department and The Travelers Companies. In the capacity, he was responsible for over $3 billion in annual claim payments. He joined The Travelers in 1956 as a Claim Representative at Baltimore, Maryland and served in various positions, including Home Office Property-Casualty Examiner, Manager at Columbus, Ohio and Nashville, Tennessee, and Regional Director. In 1971, he was appointed Second Vice President in charge of Property-Casualty Claim Field Operations and in 1974 he was appointed Vice President. In June 1984, he was named Senior Vice President and Head of the Property-Casualty Claim Department.

In addition to his Travelers duties, Mr. Marrs was a member of the Board of Directors and the Finance Committee for the Insurance Information Institute. He also served as a Director of Bankers and Shippers Insurance Company of New York. He was a member of the International Association of Defense Counsel, the Lawyers Committee of the National Center for State Courts, and Insurance Advisory Committee of the Center for Public Resources. He was a member and past Chairman of the Claim Administration Committee of the American Insurance Association and past Chairman of the Claim Committee of the American Nuclear Insurers. He was a member of the Board of Governors of the Insurance Crime Prevention Institute, and a member and past Chairman of the Governing Board of the National Automobile Theft Bureau.

Following his retirement, Mr. Marrs has served as a Consultant and Expert Witness in numerous matters involving Property-Casualty insurance disputes, and as an Arbitrator and Mediator of such disputes. He is a member and Certified Arbitrator of AIDA Reinsurance and Arbitration Society (ARIAS U.S.). Mr. Marrs received a B.S. degree in 1955 from West Virginia Wesleyan College. He received a J.D. degree in 1959 from the University of Maryland School of Law. He has been a member of the United States Supreme Court Bar. He completed the Summer Executive Program at USC, and the Program for Senior Executives at the M.I.T. Sloan School of Management.

Edwin M. Millette

Mr. Millette has been part of the Insurance and Reinsurance industries for over 40 years. His early career (10 years) in underwriting and management roles was with such notables as Kemper and CNA. He developed specialties in the emerging Fortune 2000 National Accounts multi-line products and contracts.

His reinsurance career began in the Facultative operations at General Reinsurance Corporation in 1972, where he served in underwriting and senior management roles on a regional and national basis for fourteen years.

In 1985, he co-founded and served as Chief Underwriter for the entity that became Transamerica Reinsurance Company, a large specialty P&C reinsurer regularly ranked in the top 15 domestic reinsurers during his tenure.

In 1993 Mr. Millette, as President, Chief Underwriter and Chief Operating Officer, participated in the spin off of the property and casualty insurance and reinsurance entities of Transamerica Corporation to the public and the birth of TIG RE. Mr. Millette continued to serve as President and COO until 1997, when he became Vice Chairman and subsequently retired in 1998. His international experience included the establishment of the first

CONTINUED

David R. Robb

Debra J. Roberts

P.J. Wilker

US company-owned syndicate at Lloyds and the expansion of TIG RE to Europe.

Currently, Mr. Millette is the President, principal consultant and CEO of Riley, Harper & Sons, Ltd., an Insurance, Reinsurance and Financial consultant.

Jeff Morris

Jeff Morris is currently Senior Vice President for Claim and Legal Management Services of The Hartford Financial Services Group. In this capacity, he is responsible for the strategic direction and resolution for all environmental, asbestos, toxic tort and other mass tort claims for all Hartford System companies.

A 30-year veteran of The Hartford, Mr. Morris has served in claims, staff legal, corporate law, and management. During the course of his career, he has had responsibility for setting coverage positions, strategic direction, reserves and claim authority for all Personal Lines & Commercial Lines Liability claims. During his time in The Hartford's Law Department, he was responsible for litigation and arbitration in the collection of ceded reinsurance recoverables for asbestos, environmental, and other commercial lines claims; and provided Legal Counsel to Hartford's Ceded and Assumed Reinsurance Operations and Reinsurance Asset Management Services.

Mr. Morris is a member of the bar of the U.S. Supreme Court, the United States District Court – District of Connecticut, and the Connecticut Bar. He is a co-founder and Director of the Coalition for Asbestos Justice. A graduate of St. Anselm College and Western New England School of Law, he lives in Simsbury, Connecticut with his wife and two children.

David R. Robb

David R. Robb is Executive Vice President of The Hartford Financial Services Group, Inc. of Hartford, Connecticut. He graduated from Bowling Green University, Bowling Green, Ohio and holds a juris doctor degree from George Washington University in Washington, D.C. He was admitted to the District of Columbia Bar in 1973, and joined the Hartford in 1976.

Having held a number of increasingly responsible positions in Government Affairs, Corporate Law, Financial Controls and Executive Management, Mr. Robb is currently responsible for the reinsurance and catastrophe management operations of The Hartford. He also manages the runoff of all discontinued insurance and reinsurance business for the company. These responsibilities include the management of six companies in the U.S., Bermuda and the U.K.

Mr. Robb is a member of the District of Columbia Unified Bar, Federation of Insurance and Corporate Counsel and is a former member of the American Bar Association. Locally, he serves on the Board of Directors for the Connecticut Capitol Region Growth Council and on the Board of Directors for the Riverfront Recapture. He is a former member of the Board of Directors of the RAA. He and his wife Jan live in Avon, Connecticut with their son. David enjoys golf, tennis and anything having to do with the ocean.

ARIAS•U.S. encourages members to apply for certification.

For procedure, see our website. www.arias-us.org

Debra J. Roberts

Debra J. Roberts is President and CEO of Debra Roberts & Associates, Inc., a company she founded in 1993. The company provides specialized services to the insurance and reinsurance industry. Areas of expertise focus on the intersection of capital needs and the array of solutions available to the insurance industry. Most assignments fall into one of the following categories: completing acquisitions, obtaining private capital or arranging finite risk insurance programs.

From 1986 until 1993, Ms. Roberts concurrently served as Vice President of Atrium Corporation and of European International Reinsurance Company, Ltd., two subsidiaries of the Swiss Reinsurance Group that provided financial reinsurance products. Ms. Roberts was primarily responsible for the formation of European International Re in Barbados, which included raising capital from outside sources. She also participated in structuring financial reinsurance transactions and served on the acquisitions team for several U. S. acquisitions on behalf of Swiss Re. Prior to joining Atrium, she was Senior Underwriter at North American Reassurance Company, a life reinsurance subsidiary of Swiss Reinsurance Group.

Ms. Roberts received an MBA in Finance from Fordham University, and holds a BA in English from Furman University. She achieved the Chartered Financial Analyst designation in 1986. In 1997, she became certified as an arbitrator in the specialized area of reinsurance disputes. Ms. Roberts resides just north of San Diego in Carlsba d, CA.

John W. Thornton, Sr.

John Thornton grew up in northwestern Ohio and received his undergraduate degree from Notre Dame. He served three years as an officer in the U.S. Navy, before returning to Notre Dame Law School, where he graduated second in his class in 1956.

Mr. Thornton began his legal career in Miami over thirty-five years ago. He has practiced a wide variety of defense litigation, including personal injury, environmental torts, governmental liability, commercial liability, professional liability, including medical and dental malpractice, hospital, ER, nursing home, and ALF defense, and coverage disputes for insurers and insureds. In 1968, he formed the partnership of Stephens, Demos, Magill & Thornton. In 1976, he formed his own firm John W. Thornton, P.A., which now operates in conjunction with the law firm of Thornton & Mastrucci.

Over the years, Mr. Thornton, in addition to successfully trying hundreds of lawsuits, has also served the legal profession through chairmanships of and membership in numerous professional organizations, including the American Bar Association, International Association of Defense Counsel, Federation of Insurance and Corporate Counsel, and Defense Research Institute. He has presented and prepared over seventy speeches and articles for lawyers, insurance claims personnel, and other professionals. Mr. Thornton has also produced expert analyses and expert testimony concerning insurance coverage and bad faith litigation, as well as providing state and federal legislative support in tort and insurance matters.

P. Jay Wilker

Mr. Wilker has over twenty years experience as an attorney representing reinsureds and reinsurers in arbitration proceedings. He has handled approximately one hundred such matters, of which roughly twenty-five have gone to a full hearing on the reinsurance coverage disputes. Mr. Wilker also has served as an arbitrator in a complex international commercial dispute.

On May 1, 2001, Mr. Wilker founded his own firm with Ed Lenci, with whom he has worked closely over the past eight years. His firm, Wilker & Lenci, LLP, concentrates on reinsurance and complex commercial disputes. In addition to his extensive experience in the litigation and arbitration of reinsurance matters, he has served as lead counsel in a variety of litigations and arbitrations involving corporate issues, ERISA and employment matters. He successfully tried the first case to hold that spot transactions in foreign currencies are not subject to regulation under the Commodities Exchange Act. He has been lead counsel of two separate intellectual property, ten-lawyer trial teams, one a patent infringement case before the International Trade Commission, the other, a trade secret case in the Northern District of Ohio.

Mr. Wilker's experience also includes securities and antitrust litigations while at Skadden Arps Slate Meager & Flom and Mudge Rose Guthrie & Alexander. Prior to founding Wilker & Lenci, Mr. Wilker had been a partner in Townley & Updike and, then, Oppenheimer, Wolff & Donnelly, LLP, where for five years he headed up that firm's reinsurance practice.

Mr. Wilker has participated in many industry seminars and has published numerous articles on various reinsurance topics.

Richard M. Shusterman

Robert B. Miller

Mr. Miller is the Chief Claim Officer and Senior Vice President of Claims for Mitsui-Sumitomo Marine Management. Located in Warren, New Jersey, he is currently responsible for claim management operations within the United States for a large International Property and Casualty insurer. Prior to joining Mitsui-Sumitomo, he served as a claim consultant with Tillinghast, a division of Towers Perrin. Mr. Miller spent most of his insurance career with Crum & Forster Insurance Group, where he served as a Senior Vice President and Senior Claim Officer. He is a member of The Federation of Defense and Corporate Counsel, The Excess and Surplus Lines Claim Association, ARIAS and The Society of CPCU. He is also a Registered Professional Adjuster.

Mr. Miller's industry experience includes numerous assignments involving the development of operational claim units, in both the primary and ceding re-insurance areas. He has also been involved in the direct management and handling of numerous large claim matters on both the direct and ceding re-insurance side. During his career with Crum & Foster, Mr. Miller was responsible for the management of the Home Office Claim Department, which included all technical claim management, supervision of twenty-two regional claim offices, three excess surplus claim units, an ocean marine claim unit, eight staff counsel offices, and the environmental claim department. His accomplishments also include the initiation and development of an environmental and asbestos claim unit, several ceding re-insurance claim units and a specialty large claim litigation unit.

Over the last few years, Mr. Miller has also been involved in several arbitration matters, serving as either an umpire or an arbitrator. He has also attended several ARIAS workshops and seminars.

Richard M. Shusterman

Mr. Shusterman is a partner in and past chair of the Commercial Litigation Department of White and Williams LLP, where he organized and chaired the firm's Insurance Coverage and Reinsurance Practice Groups. He currently chairs the firm's ADR Practice Group. He has over thirty (30) years experience in representing and advising insurance, reinsurance and business clients in the resolution of complex – frequently multi-party – disputes through negotiations, mediation, arbitration and/or litigation. He is a member of both the Pennsylvania and New York Bars.

Mr. Shusterman's national practice has included some of the insurance industry's most visible litigation , including the MGM Retroactive Coverage Litigation in Las Vegas; the San Juan DuPont Hotel Fire Litigation in San Juan; the Love Canal Environmental Coverage Litigation in Niagara, New York; TMJ Litigation in Texas; the Pittsburgh Corning Bankruptcy and Coverage Litigation and the related PPG Industries Coverage Litigation and Mediation in Pittsburgh and numerous asbestos, mass tort, environmental, D&O, and professional liability coverage litigations.

In recent years, Mr. Shusterman's practice has concentrated on the use of ADR techniques to resolve complex multi-party disputes. He has served as Umpire, Arbitrator, Mediator or party advocate in a variety of ADR proceedings. He serves as a member of the panel of Distinguished Neutrals of the CPR Institute for dispute Resolution and as an Advisory Board Member of CPR's Insurance Mediation Forum. He is a Certified Mediator for the U.S. District Court for the Eastern District of Pennsylvania. He has recently been appointed to the Appellant Panel for the resolution of disputes concerning entitlement for victims of the 911 disaster. He is an active member of the Federation of Defense and Corporate Counsel and has served on its Board, as Vice President and as Chair of its Publication Committee and its Insurance Coverage, Technology, and E-Commerce substantive law Sections. He has been a frequent author and speaker on issues of concern to the insurance and reinsurance industries.

Mr. Shusterman graduated in 1961 from Lafayette College, magna cum laude, with honors in history and in 1964 from the Law School of the University of Pennsylvania, cum laude. He lives in Berwyn, Pennsylvania with his wife, Joan, a psychotherapist and has three adult children, Douglas, a radiologist in Greenville, NC; Melissa, a TV producer, who has recently moved from Denver to the Philadelphia area and Tamlyn Brooks, an actress living in New York, who is currently performing in 42nd Street, the musical.

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calendar of events

November 7-8, 2002

2002 Annual Meeting
and Conference
Hilton New York
1335 Avenue
of the Americas
(53rd to 54th Streets)
New York City

April 10-12, 2003

2003 Spring
Meeting
Elbow Beach Hotel
60 South Shore Road
Paget, Bermuda

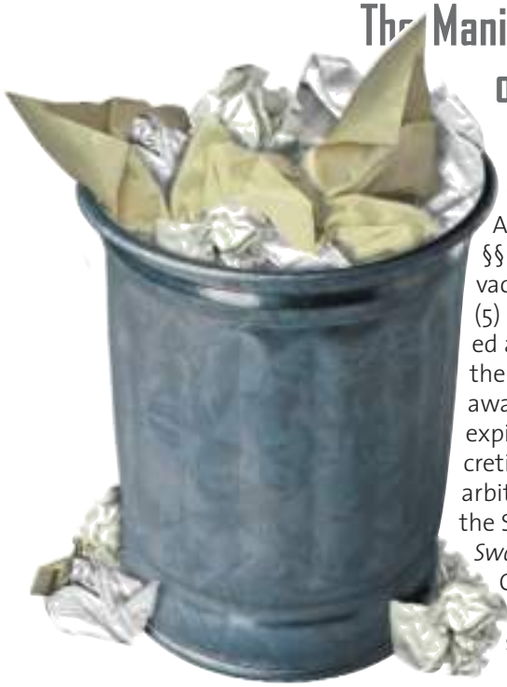
cover story

VACATING ARBITRATION AWARDS

By JOHN H. BINNING and ROBERT L. NEFSKY

[John H. Binning is Of Counsel with Rembolt Ludtke & Berger LLP, in Lincoln, Nebraska. He is an ARIAS•US certified arbitrator, on the ARIAS•US umpire list, listed on American Arbitration Association Panel of Neutrals and National Umpire Roster for Insurance and Reinsurance Industry, a former insurance company chief executive officer, a director and former Chairman of the Federation of Insurance Counsel, and a former Director of Insurance for Nebraska. Robert L. Nefsky is a partner of Rembolt Ludtke & Berger LLP, in Lincoln, Nebraska, specializing in business organizations (including insurance organizations), acquisitions, dispositions, securities, banking and finance.]

This article addresses vacation of arbitration awards under the Federal Arbitration Act only where the arbitrators are found to have evidenced a manifest disregard of the law. Court decisions vacating domestic arbitration awards due to manifest disregard of the law are based on the general standard for vacation, i.e. "[w]here the arbitrators exceeded their powers." Federal Arbitration Act, 9 U.S.C. § 10(a)(4). Current holdings of all circuits are cited and decisions reaching different conclusions are compared.



The Manifest Disregard of the Law Standard

Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, limits the basis for vacating an arbitration award.1

> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. Until the decision of the Supreme Court in *Wilko v. Swan*, 346 U.S. 427 (1953), the Court had not specifically addressed the general subject.

Wilko involved a case for damages under Section 12(2) of the Securities Act of 1933, 15 U.S.C. §§ 77 et seq. In order to pursue arbitration, respondents moved to stay the action and to refer the action to arbitration pursuant to Section 3 of the FAA. The District Court denied that motion. In reversing the District Court, thereby permitting the arbitration to proceed, the Second Circuit addressed the FAA, and raised the "manifest disregard" standard:

> [T]he agreement in the case at bar is "subject to" the 1933 Act; consequently the arbitrators are bound to decide in accordance with the provisions of section12(2). Failure to do so would, in our opinion, constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act, 9 U.S.C.A. § 10.
>
> *Wilko v. Swan,* 201 F.2d 439, 444-45 (2d Cir. 1953).

The Supreme Court granted certiorari, held that security law actions should not be referred to arbitration and reversed the Second Circuit. *Wilko v. Swan*, 346 U.S. 427 (1953) In its opinion, the Court set the standard for vacating arbitrators' awards:

> Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions, such as present margin agreements envisage, the interpretations of law by the arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation.
>
> *Id. at 436-37 (emphasis added).*

The dissenting opinion by Justice Frankfurter, which Justice Minton joined, stated in regard to this issue:

> Arbitrators may not disregard the law. Specifically they are, as Chief Judge Swan pointed out, "bound to decide in accordance with the provisions of section 12(2)." On this we are all agreed. It is suggested, however, that there is no effective way of

assuring obedience by the arbitrators to the governing law. But since their failure to observe this law "would . . . constitute grounds for vacating an award pursuant to section 10 of the Federal Arbitration Act," 201 F.2d 439, 445, appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award.

Id. at 440.

Thirty-six years later the Supreme Court overruled *Wilko v. Swan* by holding that the provisions of an arbitration agreement in a securities case were enforceable, but did not discuss the issue of manifest disregard of the law. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

The Supreme Court revisited the "manifest disregard" issue in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) and in its discussion of arbitration procedures stated:

The party can still ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. *See, e.g.*, 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953) (parties bound by arbitrators decision not in "manifest disregard" of the law), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989).

Id. at 942.

The Supreme Court in *Wilko* and *First Option* considered the issue of manifest disregard of the law as a basis for vacating the award of an arbitration panel and clearly stated its position, *albeit in dictum*, that manifest disregard of the law is a basis for vacating an arbitration award. The following cases set forth the current holdings of each of the circuits after *Wilko* and *First Option* which considered setting aside arbitration awards for manifest disregard of the law.

First Circuit

In *Bull H N Information Systems, Inc., 229 F.3d 321 (1st Cir. 2000)*, the First Circuit confirmed an award which had been vacated by the District Court. In regard to the standards for setting aside awards, the Court held:

Beyond the specific grounds enumerated in Section 10, courts "retain a very limited power to review arbitration awards". Essentially, arbitration awards are subject to review "where an award is contrary to the plain language of the [contract]" and "instances where it is clear from the record that the arbitrator recognized the applicable law–and then ignored it". (Citations omitted.) In the parlance of this and other circuits, a reviewing court may vacate an arbitration award if it was made in "manifest disregard" of the law.

Id. at 331 (quoting *Advest, Inc. v. McCarthy,* 914 F.2d 6, 9 (1st Cir. 1990)).

Second Circuit

The Second Circuit was initially consistent with the other circuits following *Wilko* and *First Options* in *Merrill Lynch v. Bobker*, 808 F.2d 930 (2d Cir. 1986) and *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corporation*, 103 F.3d (2d Cir. 1997). However, *Halligan v. Piper Jaffray*, 148 F.3d 197 (2d Cir. 1998) in considering an appeal from a district court confirming an award denying relief to the petitioner Halligan, the Court made an extensive review of the evidence at the arbitration hearing. The opinion makes reference to a lower court's statement that the record "does not indicate the Panel's awareness, prior to its determination, of the standards for burden of proof." The circuit court without any other reference to disregard of a specific law, after observing the Panel made no explanation of its award and further observing the strength of the evidence that support of the allegations of discrimination (termination due to age) of *Halligan*, concluded:

At least in the circumstances here, we believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so, we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both.

Id. at 204.

The Second Circuit in *Halligan* introduced for the first time that consideration and weighing of the evidence by the Court could be a factor in determining whether an award should be confirmed. In addition, the failure of the Panel to explain its award could be considered by the Court.

Third Circuit

Although the issue in the case concerned interpretation of a contract, the Third Circuit in *United Transportation Union Local 1589 v. Suburban Transit Corporation*, 51 F.3d 376, 380 (1995), recited the following rule:

Only when an arbitrator "acted in manifest disregard of the law, or if the record before the arbitrator reveals no support whatsoever for the arbitrator's determination," may a district court invade the province of the arbitrator.

(Citations omitted.)

The United States District Court for the Eastern District of Pennsylvania in *Personnel Data Systems, Inc. v. Openplus Holdings PTY LTD,* 2001 U.S. Dist. LEXIS 403 (2001) followed that rule.

Fourth Circuit

The holding of the Fourth Circuit was well expressed in *Richmond, Fredericksburg & Potomac Railroad Company v. Transportation Communications International Union*, 973 F.2d 276, 282 (1992):

We thus examine the arbitrator's decision to determine only "whether the arbitrators did the job they were told to do–not whether they did it well, or correctly, or reasonably, but

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simply whether they did it." So long as an arbitrator makes a good faith effort to apply the law as he perceives it, the courts may not upset his decision simply they are able to poke a few holes in the arbitrator's analysis. Reversal is appropriate only where the arbitrator "understand(s) and correctly states the law, but proceeds to disregard the same." (Citations omitted.)

That holding was followed subsequently in *Howard Hypes v. Cyprus Kanawha Corp.*, 40 F.3d 1244 (4th Cir. 1994).

Fifth Circuit

Prior to the decision of *First Options v. Kaplan*, 514 U.S. 938 (1995), the Fifth Circuit had declined to recognize the manifest disregard standard in FAA cases involving commercial contract disputes between securities brokers and investors. *See generally, McIlroy v. PaineWebber, Inc.*, 989 F.2d 817 (5th Cir. 1993); *R. M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534 (5th Cir. 1992). Another Fifth Circuit case stated in dictum that judicial review of a commercial arbitration award was limited to Section 10 and 11 of the FAA. *Forsythe International, S. A. v. Gibbs Oil Co.*, 915 F.2d 1017 (5th Cir. 1990). *Arthur H. Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999), was the first case considered by the Fifth Circuit since the manifest disregard standard was approved by the Supreme Court in *Wilko* and *First Options*. The Court held:

In our opinion, clear approval of the "manifest disregard" of the law standard in review of arbitration awards under the FAA was signaled by the Supreme Court's statement in *First Options* that "parties (are) bound by (an) arbitrator's decisions not in manifest disregard of the law." (Citations omitted.). . . . Accordingly, each of the other numbered federal circuit courts and the DC circuit have recognized manifest disregard of the law as either an implicit or non-statutory ground for vacating under the FAA.

Id. at 760.

After a review of evidence from the verbatim manuscript of the arbitration proceedings, the Court concluded:

> Consequently, we conclude that based on the record presented for our review it is not manifest that the arbitrators acted contrary to the [**29] applicable law and that their award should be upheld.

Id. at 764.

Sixth Circuit

The position of the Sixth Circuit Court of Appeals is clearly set forth in *Dawahare v. Spencer*, 210 F.3d 666, 669 (2000):

An arbitration decision "must fly in the face of established legal precedent" for us to find manifest disregard of the law. An arbitration panel acts from manifest disregard if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refuse to heed that legal principle." (Citations omitted.) Thus, to find manifest disregard a court must find two things: the relevant law must be clearly defined and the arbitrator must have consciously chosen not to apply it." Citing *M & C Corp. v. Erwin*, 87 F.3d 844, 851 n.3 (6th Cir. 1996).

A prior Sixth Circuit case, *Gibson Guitar Corp. v. MEC Import*, 1999 U.S. App. LEXIS 300169 (1999), set forth similar standards for application of manifest disregard.

Seventh Circuit

After reviewing the decisions of other circuits, the Seventh Circuit in *Watts v. Tiffany*, 2001 U.S. App. LEXIS 6442 (2001), stated:

The law in other circuits is similarly confused, doubtless because the Supreme Court has been opaque. The dictum in *Wilko* and *First Options* was unexplained and unilluminated by any concrete application. *Dictum in Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991), is similarly unhelpful.

Id. at 7.

The Court went on to state its position in regard to manifest disregard of the law which is substantially different from the opinions of other circuits:

> There is, however, a way to understand "manifest disregard of the law" that preserves the established relation between court and arbitrator and resolves the tension in the competing lines of cases. It is this: an arbitrator may not direct the parties to violate the law. In the main, an arbitrator acts as the parties' agent and as their delegate may do anything the parties may

do directly.

Id.

In a concurring opinion, Circuit Judge Williams agreed with the final decision of her two colleagues in that the District Court had properly enforced the arbitration award. However, she was critical of the reasoning of the Court and its pronouncement of what appeared to be a new, at least different, definition of manifest disregard when she stated:

Because the majority has effectively rejected the manifest disregard doctrine, I will briefly express my concern with that holding. It should be noted that the doctrine of manifest disregard has been substantively uniform in federal courts, requiring that (1) the arbitrator knew of a governing legal principle yet refused to apply it or ignore it altogether, and (2) the law ignored by the arbitrator was well-defined, explicit and clearly applicable to the case. [citing cases] Every court of appeals, including our own, has held that a court may review the decision of an arbitrator for "manifest disregard of the law," and has adopted, in substance, that very definition. Moreover, the words in the doctrine itself are more accord with such an interpretation. (Citations omitted.) The majority's holding conflicts with that precedent, and leaves the doctrine internally inconsistent and effectively impotent.

Id. at 11-12.

The decision by the Seventh Circuit Court of Appeals in Watts differs substantially from its prior holding in *National Wrecking Company v. International Brotherhood of Teamsters*, 990 F.2d 957 (1993). In response to an argument by National that if the award was enforced National would be forced to violate federal laws and public policy, the Court's holding was consistent with those of the other circuits:

In order for a federal court to vacate an arbitration award for manifest disregard of the law, the party challenging the award must demonstrate that the arbitrator deliberately disregarded what the arbitrator knew to be the law in order to reach a particular result.

Id. at 961.

Eighth Circuit

The Eighth Circuit in *Homestake Mining Co. v. United Steelworkers*, 153 F.3d 678 (1998), considered an appeal from the District Court which overruled a Motion to Vacate an arbitration award. One of the grounds for the Motion was that the arbitrator's decision evidenced a manifest disregard for law. The Court opinion affirmed the District Court and reinstated the arbitration award:

The arbitrator's interpretation of this regulation in plain language is neither "completely irrational [nor] evidences a manifest disregard for law," *Lee v. Chica*, 993 F.2d 883, 885 (8th Cir. 1993), and is therefore "insulated from review".

Id. at 681.

In *Hoffman v. Cargill*, 236 F.3d 458 (2001), the Eighth Circuit overruled a decision of the District Court which vacated an arbitration award on manifest disregard grounds and because the arbitration panel decision was irrational:

We have allowed that "beyond the grounds for vacation provided in the FAA, an award will only be set aside where it is completely irrational or evidence of manifest disregard of the law." (Citations omitted). These extra-statutory standards are extremely narrow: An arbitration decision may only be said to be irrational where it fails to draw its essence from the agreement, and an arbitration decision only manifests disregard for the law where the arbitrators clearly identified the applicable, governing law and then proceed to ignore it. (Citation omitted). "We may not set an award aside simply because we might have interpreted the agreement differently or because the arbitrators erred in the interpretation interpreting the law or in determining the facts." (Citation omitted.)

Id. at 461-62.

Ninth Circuit

In *Barnes v. Logan*, 122 F.3d 820 (1997), the Ninth Circuit reviewed its prior holdings in setting forth their standards of review:

[J]udicial review of an arbitrator's decision "is both limited and highly deferential." *Sheet Metal Workers' Int'l Ass'n v. Madison Indus. Inc.*, 84 F.3d 1186, 1190 (9th Cir. 1996). An award will not be set aside unless it manifests a complete disregard of the law. Id. Thus, an award must be confirmed if the arbitrators even arguably construed or applied the contract and acted within the scope of their authority. *United Food and Commercial Workers Int'l Union v. Foster Poultry Farms*, 74 F.3d 169, 173 (9th Cir. 1995). We may affirm the judgment of the District Court on any ground fairly supported by the record. Kruso v. Int'l Tel. and Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989).

Barnes at 821-22.

In a subsequent case in the Ninth Circuit, *Investors Equity Life Insurance Co. of Hawaii, Ltd. v. ADM Investor Services, Inc.*, 1997 U.S. Dist. LEXIS 23881, 22 (1997), the District Court held:

Before the Court can conclude that arbitrators acted in "manifest disregard", "it must be clear from the record that the arbitrators recognize the applicable law and then ignored it." *Michigan Mutual*, 44 F.3d at 832; see also *Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234, 240 (1st Cir. 1995) ("there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.").

Tenth Circuit

Kelley v. Michaels, 59 F.3d 1050 (10th Cir. 1995), was an appeal from a district court ruling confirming an arbitration award in a securities law arbitration. One of the grounds for the appeal and for setting aside the award was that punitive damages

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were awarded in a case where the parties had agreed in a choice of law provision that any dispute would be governed by New York law, which prohibited the award of punitive damages. The uniform submission agreement provided for arbitration pursuant to National Association of Securities Dealers, Inc. (NASD). The NASD arbitrators' manual provided for a possible award of punitive damages. The identical matter had been before the Supreme Court in *Mastrobuono v. Shearson Lehman,* 514 U.S. 52 (1995). The Supreme Court in that case stated that:

> . . . [t]he FAA insures that (parties') agreements will be enforced according to (their) terms even if a rule of state law would otherwise exclude such claims from arbitration.
>
> *Id.* at 58.

In resolving this matter the Supreme Court noted:

> The best way to harmonize the choice of law provision with the arbitration provisions is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast respondents' reading sets up the two clauses in conflict with one another; one foreclosing punitive damages, the other allowing them. This interpretation is untenable.
>
> *Id.* at 63-64.

Based on the holding in the *Mastrobuono*, the Tenth Circuit in *Kelley v. Michaels* stated that they were compelled to reach a conclusion that the arbitration panel did not exceed its authority in awarding the Kelleys punitive damages. *Kelley*, 59 F.3d at 1055.

Mastrobuono and *Kelley* hold that where there are specific conflicts between the arbitration clause and the choice of law provisions, full effect shall be given to the arbitration clause as it defines the limits of the authority of arbitrators, notwithstanding a conflict with a choice of law provision.

Eleventh Circuit

In *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (2000), the Eleventh Circuit disposed of the appeal from the District Court refusal to vacate the arbitrator's award. One of the grounds for vacation of the award was manifest disregard of the law. The Court held that the party alleging manifest disregard had the burden:

Brown has also failed to show that the arbitrator acted with manifest disregard of the law. Arbitration awards will not be reversed due to an erroneous interpretation of the law by the arbitrator. *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460 (11th Cir. 1997). "To manifest disregard the law, one must be conscious of the law and deliberately ignore it." *Id.* at 1461.

Brown at 1223.

District of Columbia Circuit

In *Laprade v. Kidder, Peabody & Co., Inc.*, 2001 U.S. App. LEXIS 7381 (2001), the DC Circuit considered an appeal from the district court which had rejected an argument that the arbitration panel had acted in manifest disregard of the governing law:

Manifest disregard of the law "means more than error or misunderstanding with respect to the law." *Kanuth v. Prescott, Ball & Turben, Inc.*, 292 U.S. App. D.C. 319, 949 F.2d 1175, 1178 (D.C. Cir. 1991), (citing *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 280 U.S. App. D.C. 7, 882 F.2d 529, 532 (D.C. 1989)). Consequently, "to modify or vacate an award on this ground, the Court must find (1) that the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.

Laprade at 6-7.

Conclusion

Nine of the 12 circuits have adopted the following similar criteria in determining whether an arbitration award should be set aside for manifest disregard of the law:

1. More than an error or misunderstanding with respect to the law.

2. The error in interpretation must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.

3. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit and clearly applicable.

4. Vacation of an arbitration award is allowed only if there is absolutely no support in the record justifying the arbitrators determinations.

5. The arbitration decision must fly in the face of established legal precedent for the court to find manifest disregard of the law.

6. The court may not set aside an award simply because the court might have interpreted the agreement differently or because the arbitrators erred in interpreting the law or in determining the facts.

7. There must be some showing in the record other than the result obtained that the arbitrators knew the law and expressly disregarded it.

8. The party alleging manifest disregard to the law has the burden of establishing it to the appellate court.

The Second, Seventh and Tenth Circuits deviate from the above standards.

The Second Circuit in *Halligan* provides authority to the reviewing court to consider and weigh the evidence before the Panel along with considering the failure of the Panel to explain their award in determining whether there was manifest disregard of the law or of the evidence or both.

The Seventh Circuit in *Watts* stated the law under the other circuits was confused because the Supreme Court had been opaque in its dictum announcing the manifest disregard of the law concept in *Wilko* and *First Options*. The Seventh Circuit has held that the single standard to be applied should be that "an arbitrator may not direct the parties to violate the law."

The Tenth Circuit in *Kelley* held, that consistent with the holding of the Supreme Court in *Mastrobuono,* where there is a grant of authority to the arbitrators in the arbitration clause which is in conflict with the rule of law election in the contract, an award which was consistent with the arbitration clause but contrary to the choice of law provision would not be set aside for manifest disregard of the law.

It will be worthwhile for parties and practitioners to follow closely future circuit court and district court decisions which continue or which may alter their holdings in regard to manifest disregard of the law. With consistent holdings in nine of the circuits, it appears doubtful that the Supreme Court will further expand the definition of manifest disregard of the law beyond holding that manifest disregard of the law is grounds for vacation of an arbitration award, leaving to the other federal courts the clear delineation of standards in reaching such a decision based on the facts before them.

Endnotes

1 Section 10(a) of the FAA states, in pertinent part:

In either of the following cases the . . . court . . . may [vacate] the award upon the application of any party to the arbitration–

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

...the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.

Even Infinity May Have Its Limits: Issuance and Enforcement of Nonparty Discovery Subpoenas in Arbitration

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As the frequency and stakes of commercial arbitration increases, a key issue emerges concerning the discovery of evidence from nonparties to the arbitration.

As the frequency and stakes of commercial arbitration increases, a key issue emerges concerning the discovery of evidence from nonparties to the arbitration. The ability to marshal relevant evidence within the control of a nonparty may determine the result of an arbitration. Although courts have taken divergent views on the issue, the trend appears to be towards permitting arbitration panels to subpoena nonparties for prehearing discovery. Such powers are meaningless, however, if a nonparty subpoena cannot be enforced. The Seventh Circuit has held that a nonparty discovery subpoena issued pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., could not be enforced thereunder in the absence of federal subject matter jurisdiction, rendering the subpoena a practical nullity. Moreover, the Third Circuit and the Eighth Circuit have split on whether an arbitrator's subpoena may be enforced outside the territorial reach of the federal district court for the district in which the arbitrator sits. Enforcement of an arbitrator's nonparty subpoena by state courts under the Uniform Arbitration Act ("UAA")2 is likewise problematic, involving unsettled issues of both jurisdiction and federal preemption. In response, some panels seeking extraterritorial discovery from a reluctant third-party reportedly have sought to move the hearing to the location of the nonparty to minimize obstacles to issuance and enforcement of the subpoena, a tactic not yet tested in the courts.

This article will briefly discuss the developing case law concerning issuance and enforcement of nonparty discovery subpoenas in arbitration and will consider some procedural methods for attempting to secure such discovery.

I. Discovery Powers of Arbitrators Over Nonparties

An arbitration panel's authority with respect to third parties ultimately is defined by statute. Although parties can contract as to the scope of discovery among themselves, absent statutory authority, parties cannot contract among themselves to impose discovery obligations on nonparties. The FAA governs written agreements to arbitrate in maritime contracts or contracts involving interstate commerce, other than "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." *See* 9 U.S.C. at §§ 1, 2. An arbitrator's power with respect to third-parties emanates from Section 7 of the FAA, which states that a majority of the arbitrators:

> [M]ay 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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court...."

Id. at § 7. Likewise, section 7 of the UAA provides:

> (a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence...

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

Section 7 of the FAA also provides that a federal district court may enforce compliance with an arbitrator's summons:

[I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. at § 7. Significantly, both the FAA and the UAA focus on the arbitrators' power to compel the testimony of a witness at the actual arbitration hearing (either in person, or in the case of the UAA, by way of an evidence deposition). Neither the FAA nor the UAA explicitly addresses an arbitration panel's authority to order discovery of third parties prior to the hearing. Courts have split on this important issue, but as discussed below, the recent trend appears to be towards permitting pre-hearing subpoenas of third parties for discovery purposes.

A. The *Security Life* Line of Authority: Recognizing an Arbitration Panel's Broad Authority to Compel Nonparty Discovery

In *In re Security Life Insurance Company*, 228 F.3d 865 (8th Cir. 2000), the U.S. Court of Appeals for the Eighth Circuit held that an arbitration panel has the authority to compel production of documents by a nonparty prior to the hearing for discovery purposes. The Eighth Circuit found that implicit in the arbitrators' statutory power to compel production of documents for a hearing was the lesser power to compel production of documents for prehearing discovery.

In the case, Security Life Insurance Company ("Security") purchased certain reinsurance from a pool of reinsurers managed by Duncanson & Holt ("D&H"). When the pool refused to reimburse Security for a loss, Security demanded arbitration against D&H. The arbitration was to take place in Minnesota. Security then sought a subpoena requiring one of the pool members, Transamerica Occidental Life Insurance Company ("Transamerica"), to produce certain documents and the testimony of a certain employee. The arbitration panel issued the subpoena to Transamerica at its offices in Los Angeles. Transamerica refused to respond to the subpoena on the grounds that it was not a party to the arbitration and that the arbitration panel had no authority to issue the subpoena under the FAA. Security petitioned the U.S. District Court for the District of Minnesota to compel Transamerica's compliance. Before this court, Transamerica further argued that the court did not have the power to enforce the subpoena under Rule 45 of the Federal Rules of Civil Procedure because the subpoena was served outside of the territorial district of the district court.

The court disagreed with Transamerica's arguments and concluded that the subpoena could be issued and enforced. As for the territorial reach of the subpoena, the court directed Security's attorney to issue the subpoena as an officer of the court on behalf of the federal court for the district in which the deposition or document production was to be compelled – the federal court in Los Angeles.3 Security's attorney did so, and the subpoena was served on Transamerica in Los Angeles. Transamerica, however, failed to appear in response to the subpoena, leading Security to move the federal court in Los Angeles to hold Transamerica in contempt. After briefing and argument, Transamerica was held in contempt. Thereafter, Transamerica complied with the subpoena but also appealed the contempt order to the U.S. Court of Appeals for the Ninth Circuit.

In the interim, Transamerica also appealed to the Eighth Circuit the District Court of Minnesota's decision respecting enforcement of the subpoena. As a threshold matter, the Eighth Circuit considered whether Transamerica's compliance with the subpoena mooted the appeal and concluded that the appeal was mooted as to the request for testimony but was not mooted as to the request for documents, because Security could be ordered to return Transamerica's records.

On the merits, the Eighth Circuit held that implicit in an arbitration panel's power to order the production of material documents for review at the hearing was the lesser power to order production of material documents prior to the hearing. Although acknowledging that the efficiency of arbitration necessarily entails a limited discovery process, the court reasoned that efficiency "is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."

The court further held that the panel's exercise of this implicit power was proper whether or not the subject of the subpoena (Transamerica) was a party to the arbitration. *See also Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994) ("The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing"). The court emphasized that Transamerica was "not a mere bystander pulled into this matter arbitrarily," but was a party to the underlying reinsurance contract which formed the basis of the dispute and was therefore "integrally related to the underlying arbitration, if not an actual party." Indeed, the court's decision seemed heavily influenced by the fact that Transamerica was a risk-bearing member of the reinsurance pool. The court did not address whether the outcome

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would have been different had Transamerica been further removed from the dispute, such as if Transamerica were a broker or an intermediary. Even more significantly, the Eighth Circuit did not discuss the competing line of authority on the issue of an arbitration panel's ability to subpoena nonparties for discovery purposes.

With respect to the territorial reach issue, the Eighth Circuit acknowledging that it presented a "thorny question indeed" on witness testimony, but held that the territorial limit of Rule 45 of the Federal Rules of Civil Procedure did not apply to an order for the production of documents because "the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel." *Security Life*, 228 F.3d at 872.

Courts have not limited nonparty discovery in the arbitration context to the production of documents, but have also endorsed the concept of third-party depositions. In *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988), the arbitration panel issued subpoenas for nonparty records at the request of the defendants. The plaintiffs objected (but, notably, not the subpoenaed party), and sought a court order barring any nonparty discovery. The court concluded that it had no power under the FAA to interfere with the arbitration panel's procedures. While not speaking directly to the issue of nonparty depositions, the court broadly determined that "arbitrators may order and conduct such discovery as they find necessary." See also *Amgen Inc., v. Kidney Center*, 879 F. Supp. 878, 880 (N.D. Ill. 1995) (noting that implicit in the power to compel both testimony and documents for purposes of a hearing is the lesser power to compel both testimony and documents prior to the hearing).

B. The Comsat Line of Authority: Cases Restricting an Arbitration Panel's Power to Compel Nonparty Discovery

The persuasive value of the *Security Life* line of cases is unclear, however, given the failure of the *Security Life* court to address a prior opinion by the Fourth Circuit reaching an opposite conclusion on the issue of an arbitrator's authority to subpoena nonparties for pre-hearing discovery. In *Comsat Corporation v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999), the U.S. Court of Appeals for the Fourth Circuit held that the FAA does not authorize a federal court to compel a nonparty's compliance with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship.

In *Comsat*, an arbitration panel issued a pre-hearing subpoena to nonparty National Science Foundation ("NSF") to produce certain records and employee testimony related to a construction contract between Comsat Corporation ("Comsat") and Associated Universities, Incorporated ("AUI"). NSF refused to comply with the subpoena, arguing that, *inter alia*, the FAA does not authorize a arbitrator to subpoena third parties for prehearing discovery, and that most of the documents requested were the subject of a prior Freedom of Information Act request by Comsat, to which NSF had responded. The district court ordered NSF to comply with the subpoenas and NSF appealed.

On appeal, the Fourth Circuit closely parsed the language of Section 7 of the FAA. The court noted that by its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel production of documents and testimony by nonparties *at the arbitration hearing*. Furthermore, the court emphasized that parties to an arbitration forego certain procedures involved in formal litigation in exchange for a more efficient resolution to their dispute. For that reason, the court interpreted the arbitrator's power narrowly and denied nonparty discovery, absent a showing of "special need or hardship." Id. at 276. The court did not attempt to define "special need or hardship," but did note that Comsat had not attempted to show that the documents requested and the information expected from testimony were unavailable from party AUI.

A slightly more expansive view of an arbitrator's power to order prehearing discovery from nonparties was taken in *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995). In *Integrity*, the district court granted a nonparty's motion to quash an arbitrator's subpoena to appear for pre-hearing depositions, but denied the motion to quash the arbitrator's subpoena to produce documents prior to the arbitration hearing. The court noted that an arbitration panel's authority over

the parties derives from the FAA and the parties' mutual arbitration agreement. Because parties to an arbitration agreement cannot bind nonparties, the court deduced that an arbitration panel's authority over nonparties derives solely from the FAA. The court went on to hold that an arbitration panel has the authority to compel the production of documents from a nonparty before the hearing, but not the authority to compel a nonparty to appear for a deposition. The court distinguished between the two on the basis that documents are produced only once, whether at the arbitration hearing or beforehand, whereas depositions may require that a witness testify twice—once at the deposition and again at the hearing. Because the nonparty never consented to be part of the arbitration, the court determined that a nonparty should not be forced to endure the burden of testifying at a deposition.

II. Authority of Courts to Enforce An Arbitrator's Prehearing Discovery Subpoena Of A Nonparty

Even assuming that an arbitrator is authorized to subpoena a nonparty for prehearing discovery, that subpoena has no practical effect unless it can be enforced. As discussed below, however, there are territorial and jurisdictional problems with the statutory enforcement mechanisms for arbitrator subpoenas.

A. Extraterritorial Enforcement of Nonparty Subpoenas

Section 7 of the FAA authorizes an arbitrator to subpoena "any person" to attend a hearing before them and provides that any motion to compel compliance with such a subpoena shall be brought in the district court for the district in which the arbitrators sit. However, what happens if a person refuses to comply with the subpoena and that person is outside of the territorial reach of the district court in which the arbitrators sit? The few courts which have considered the issue have come to different conclusions.

In *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 95 F.3d 562 (7th Cir. 1996), plaintiff Amgen Inc. and Ortho Pharmaceutical Corp. were involved in arbitration proceedings in Chicago. Both parties had agreed to arbitrate in accordance with the Federal Rules of Civil Procedure. In connection with the arbitration proceedings, the arbitrator issued a subpoena to nonparty Kidney Center of Delaware County, Ltd. ("Kidney Center") to produce documents and employee testimony during prehearing discovery. Kidney Center refused to comply with the subpoena on the grounds that the arbitrator did not have authority to issue the subpoena and because the documents were confidential. Amgen then filed a Section 7 enforcement action in the Eastern District of Pennsylvania, the district in which Kidney Center is located and where the deposition was to occur. Kidney Center opposed the motion on several grounds, including that Amgen had petitioned the wrong court for relief. The court determined that under Section 7, Amgen was required to bring its enforcement action in the district in which the arbitrator sits, and therefore transferred the action to the Northern District of Illinois.

After the transfer, Kidney Center renewed its opposition on, among other grounds, that it was outside of the territorial reach of the arbitrator and the district court. Kidney Center argued that Section 7 provides that an arbitrator's subpoena is to be served in the same manner as a court's subpoena, and that such a subpoena can be enforced only by the district court in the district in which the arbitrator sits. Accordingly, Kidney Center asserted that an arbitrator's subpoena power reaches only as far as the subpoena power of the district court in which the arbitration is pending. Under Rule 45 of the Federal Rules of Civil Procedure, a district court's subpoena power encompasses only the district in which the court sits or an area 100 miles from the courthouse. Because Kidney Center was outside of

> "the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel."

the court's district and the 100 mile "bulge," Kidney Center concluded that it was beyond the subpoena power of both the arbitrator and the district court. *See also Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 362-63 (S.D.N.Y. 1957) ("the arbitrators could not perhaps compel the attendance of witnesses whose depositions are sought to be taken because service of subpoenas could not be made upon them within the Southern District of New York or within 100 miles of the place the hearing is to be held"). In essence, Kidney Center argued that only the Northern District court could enforce the arbitrator's subpoena, but the Northern District court could not compel Kidney Center to attend a deposition scheduled in the Eastern District of Pennsylvania.

Noting that the parties had agreed to arbitrate under the Federal Rules of Civil Procedure, the court concluded that the subpoena was enforceable. Rule 45(a)(3)(B) of the Federal Rules of Civil Procedure permits an attorney to issue a subpoena on behalf of the district court in which the deposition or document production is to take place, provided that the attorney is authorized to practice in that district. So issued, the subpoena is enforceable by the district for which the deposition is to take place. The court then instructed Amgen to use this procedure to obtain a valid and enforceable subpoena.

The Eighth Circuit, by contrast,

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brushed aside the procedural problems relating to extraterritorial enforcement of an arbitrator's document subpoena in *Security Life*, discussed in Section I(A) above. Among the arguments presented in that case was whether Federal Rule of Civil Procedure 45 limited the subpoena power of the arbitration panel such that it could not properly serve a person outside the territorial limits of the district court for the district in which the panel sits. The District Court ruled that counsel for Security could use the procedure employed in *Amgen,* despite the fact that the record did not indicate that the parties had agreed to abide by the Federal Rules of Civil Procedure (or why such rules should apply to a nonparty). On appeal, the Eighth Circuit recognized the "thorny issue" of enforcing extraterritorial witness subpoenas under the FAA, an issue which was not before the court. Turning to the document subpoenas, the Eighth Circuit discarded all territorial limits to enforcement: "[W]e do not believe an order for the production of documents requires compliance with Rule 45(b)(2)'s territorial limits. This is because the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel." *Id.* at 872.

The Third Circuit recently came to the opposite conclusion in *Legion Insurance Company v. John Hancock Mutual Life Insurance Company*, No. 01-4213, 2002 U.S. App. LEXIS (3rd Cir. April 11, 2002). In *Legion*, Legion Insurance Company ("Legion") and John Hancock Mutual Life Insurance Company ("Hancock") were parties to an arbitration in Philadelphia. The arbitration panel issued a subpoena to a nonparty, Stirling Cooke Insurance Services ("Stirling Cooke") to produce certain documents and employee testimony. Stirling Cooke, located in Florida, declined to comply and Hancock filed a Section 7 enforcement action in the Eastern District of Pennsylvania. The district court concluded that it lacked personal jurisdiction over Stirling Cooke because Stirling Cooke was outside of the territorial limits of the court under Rule 45. 2001 WL 1159852 (E.D. Pa. Sept. 5, 2001). On appeal, the Third Circuit affirmed, holding that the territorial limits of subpoena service under Rule 45 applied to Section 7 actions to enforce an arbitrator's subpoena.

Given this split in authority, some arbitration panels intent on subpoenaing a reluctant nonparty to give testimony outside the territorial scope of Rule 45 have reportedly attempted to move the situs of the hearing to the location of the nonparty and then issue their order. Whether this tactic will ultimately prevail in the face of objections by a third-party remains to be seen. Moreover, this strategy probably would not work in situations where one of the parties opposes the move because most arbitration provisions require unanimous agreement of the arbitrators to change the location of the arbitration.

B. Federal Jurisdiction Over Enforcement of an Arbitrator's Subpoena

Even if the witness or documents sought are within the district in which the panel sits, the enforcement mechanism of Section 7 is unavailable if there is no federal subject matter jurisdiction. In this regard, the FAA applies to written arbitration clauses in maritime transactions and contracts involving interstate commerce. *See* 9 U.S.C. at §§ 1, 2. Given the extensive reach of modern reinsurance contracts, most arbitration clauses thereunder will fall within the scope of the FAA. The FAA, however, does not confer federal subject matter jurisdiction and thus parties to an action thereunder must establish an independent basis of jurisdiction. See *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 n.32 (1983). If there is not diversity of citizenship or some other basis of federal jurisdiction, then no federal jurisdiction exists to hear a Section 7 enforcement action.

This issue was addressed in the appeal of the Amgen case, discussed in Section II(A) above. On appeal, the Seventh Circuit set aside the question of the enforcement mechanism to consider whether there was federal subject matter jurisdiction for the action. The court phrased the question as whether "the dispute that underlies the arbitration would come within the [subject matter] jurisdiction of the court." *Amgen*, 95 F.3d at 567. Noting no apparent federal question, the Seventh Circuit then examined the inconclusive evidence of diversity between the petitioner and respondent in the underlying arbitration. On remand, the district court determined that federal subject matter jurisdiction did not exist and the enforcement case was dismissed.

Where the federal courts lack subject matter jurisdiction, the only alternative may be state court enforcement under the UAA (or similar state arbitration statute). *See* UAA at § 7(c) ("All provisions of law compelling a person under subpoena to testify are applicable"). The UAA, however, will be of little assistance if the state court lacks personal jurisdiction over the nonparty. As with the FAA, the location of the panel when it issues the order may determine the order's enforceability under the UAA.

Even if the state court has personal jurisdiction over the nonparty, however, it is unclear whether the enforcement mechanisms of the UAA are pre-empted by Section 7 of the FAA. The FAA contains no express pre-emption clause, nor it does not reflect a congressional intent to occupy the entire field of arbitration. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477 (1989). Nevertheless, a state law may be preempted to the extent that it conflicts with federal law addressing the same subject – that is, "to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*., citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

But to ever reach this pre-emption analysis, a court must first conclude that Section 7 is a substantive provision which would apply in a state court proceeding, as opposed to a purely procedural rule which would apply only in federal court. Whether Section 7 constitutes a substantive or procedural provision has only been obliquely addressed in the case law. *See Volt* , 489 U.S at 477, n.6 ("While we have held that the FAA's 'substantive' provisions—§ §1 and 2—are applicable in state as well as federal court, we have never held that § § 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court") (citations omitted); *but see* Prefatory Note to Revised Uniform Arbitration Act (2000) ("State law provisions regulating purely procedural dimensions of the arbitration process (e.g., discovery [RUAA Section 17]) likely will not be subject to preemption"). If a court were to find that Section 7 of the FAA was a substantive provision, the court would then have to determine whether pre-emption was required because Section 7 of the UAA (the UAA analog to FAA § 7) clearly frustrates the goals of Congress as expressed in the FAA. If the court ruled that FAA § 7 preempted UAA § 7, then a party seeking to enforce a subpoena of a third-party to the arbitration may be left without recourse in the absence of federal subject matter jurisdiction.

III. Conclusion

Courts have taken divergent views on an arbitrator's authority to issue pre-hearing subpoenas to nonparties and the ability of courts to enforce such subpoenas under the FAA. Given the growing insistence by parties of the critical need for third-party discovery in arbitration and the increasing willingness of arbitrators to exercise the broadest extent of their powers, it is likely that this issue will continue to be litigated with some frequency in the years to come.

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2 The UAA has been adopted in original or modified fashion by 35 states.

3 Fed. R. Civ. P. 45(a)(3)(B) authorizes this form of subpoena practice in federal court litigation.

Because the nonparty never consented to be part of the arbitration, the court determined that a nonparty should not be forced to endure the burden of testifying at a deposition.

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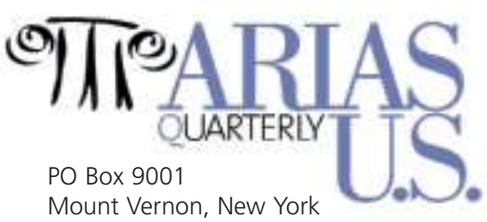

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