ARIAS QUARTERLY U.S.
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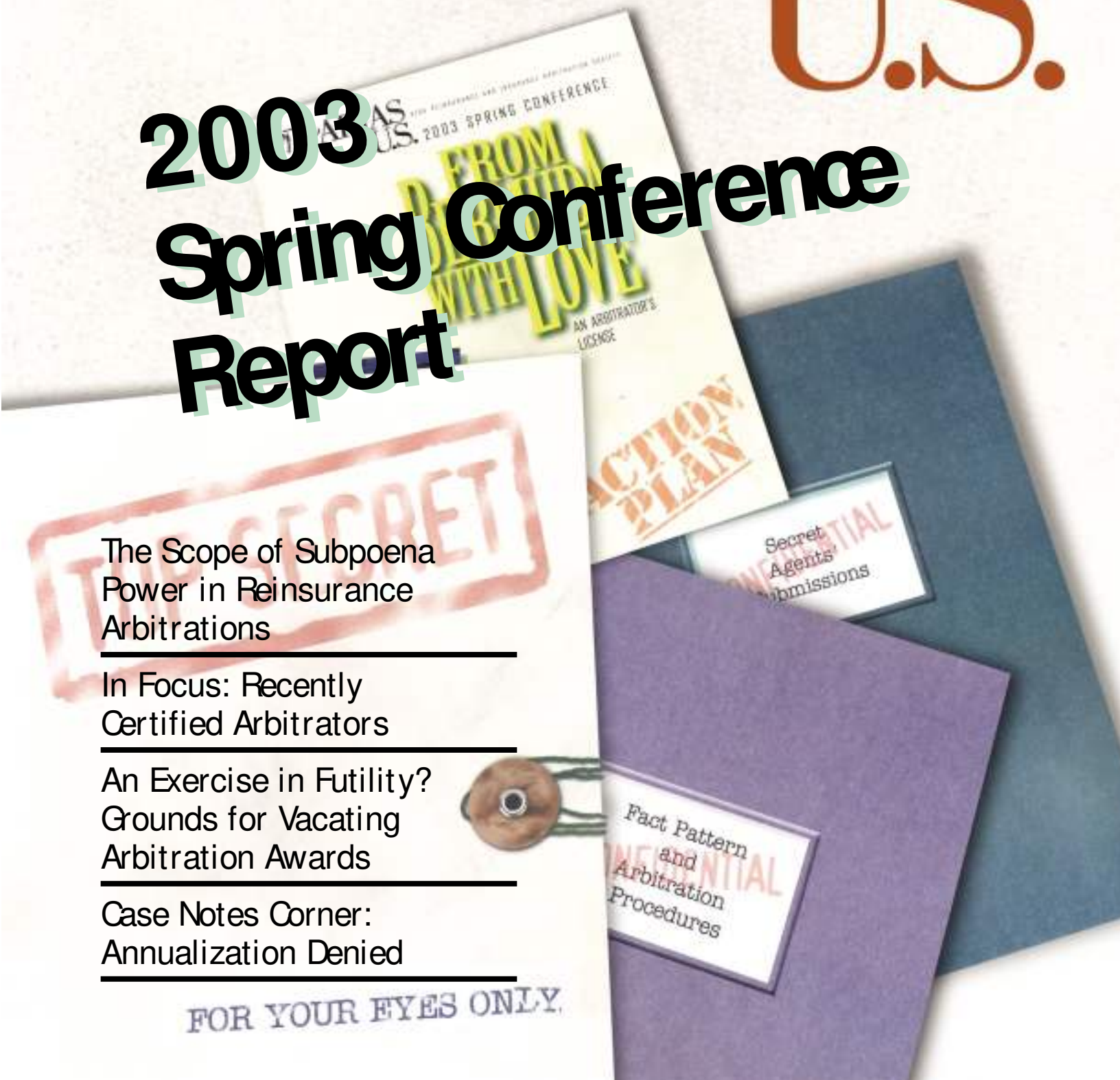
2003 Spring Conference Report



editor's comments

T. Richard Kennedy

Any opinions expressed in articles published in the Quarterly are those of the authors. They do not necessarily represent opinions of the editors or staff of the Quarterly, nor of ARIAS•U.S., its Board of Directors, or members. Comments are welcome.

With this issue, we start with a newly formed Board of Editors, which will assist the ARIAS•U.S. Board of Directors in continuing to improve our Quarterly publication. As you will note from the accompanying list, each editor has responsibility for a particular area of interest covered by our publication. If you are interested in writing an article or have an idea about a topic that might be treated in the Quarterly, please contact one of the editors.

Our featured articles in this issue deal with two subjects of ongoing importance to those involved in reinsurance and insurance arbitrations. In *The Scope of the Subpoena Power in Reinsurance Arbitration,* Linda Dakin-Grimm and Richard Baker discuss problems of discovery of non-parties in arbitrations and why courts may be reluctant to enforce arbitral orders imposing discovery obligations on parties who had never agreed to be part of the arbitration process. The article's excellent analysis should be considered in conjunction with the feature story of our last issue, entitled *Obtaining Pre-Hearing Discovery from the Uncooperative Reinsurance Intermediary: The Current State of the Law and Avenues for Reform,* ARIAS-US Quarterly, First Quarter 2003, page 3. The authors of that article, Michele Jacobson, Robert Lewin, and Royce Cohen, make a strong case for allowing discovery against non-party reinsurance intermediaries, because such persons possess critical information that otherwise may be unavailable in the arbitration. I expect we will be hearing more from the courts on this plausible distinction in the not-to-distant future. In the interim, our authors have provided timely guidance for arbitrators grappling with issues of discovery against non-parties to the arbitration.

In this issue's second featured article, entitled *An Exercise in Futility? Grounds for Vacating Arbitration Awards*, Rhonda Rittenberg and Paul Hummer discuss grounds upon which courts may vacate an award made by an arbitration panel. Arbitrators likely will draw some comfort in the authors' conclusion that courts continue to be disinclined to overturn such awards. Of particular interest is the article's Appendix, which provides up-to-date summaries of judicial decisions in the various jurisdictions of the United States dealing with challenges to arbitral awards.

I would like to take this opportunity to thank each of the persons who specially contribute to the success of our Quarterly. Without our authors, who so obviously spend countless hours and days of their valuable time in analyzing issues important to the arbitration process, we could be little more than a newsletter. Members of our Board of Editors carefully review articles submitted for publication, as well as solicit writers who have respected expertise on subjects that need to be treated. The ARIAS•U.S. Board of Directors has fully supported and contributed to development of a quality Quarterly journal. In particular, Mark Gurevitz, while serving as Chair of the Board, was instrumental in establishing a policy requiring speakers at ARIAS programs to submit papers. Such papers oftentimes are proving to be of a quality suitable for publication exclusively in the Quarterly. Dan Schmidt and Charles Foss, ex officio editors representing the Board of Directors, regularly review and provide prompt and valuable comment on items submitted for publication. Lastly and certainly not least, we all owe a special debt of gratitude to Bill Yankus, who makes each of us strive to keep up with him. In addition to holding us to our deadlines, Bill pulls the content of each issue together, including himself writing nearly every "unsigned" item in the Quarterly.

We hope you find this issue useful in your arbitration work. Your recommendations and comments regarding the Quarterly are always welcome.

T. Richard Kennedy / *Editor*

editorial board

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feature story

The Scope of Subpoena Power in Reinsurance Arbitrations

Linda Dakin-Grimm
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Los Angeles, California

...one of the more difficult and pressing issues arising in arbitrations is the ability of a panel to issue subpoenas to non-parties for pre-hearing discovery, ...

Linda Dakin-Grimm is a Litigation partner at Milbank, Tweed, Hadley & McCloy, LLP, resident in Los Angeles, California. She specializes in reinsurance dispute resolution, and has handled complex reinsurance matters in arbitration, as well as in state and federal courts across the country.

Richard Baker is an associate in Milbank's Los Angeles Litigation Department.

I. Introduction

Reinsurance arbitrations customarily begin with an organizational meeting regardless of whether such a meeting specifically was provided for in the arbitration clause in the reinsurance contract. In preparation for the organizational meeting, parties submit a position statement that apprises the arbitration panel of the facts, the issues, and demands between the parties in order to provide a frame of reference for the procedural decisions the panel will make at the meeting. Following panel disclosures and formal acceptance of the arbitration panel, one of the key procedural issues addressed at the organizational meeting is the scope and scheduling of discovery. Generally, the parties and the arbitration panel must consider the types of discovery necessary, how privilege issues will be handled, the scheduling of discovery, and any procedures for dealing with discovery disputes.

With respect to discovery, the arbitration panel will encourage the parties and their counsel to design and manage a fair and efficient discovery plan. As a general rule, the arbitration panel has the discretion to order or restrict all forms of discovery requests between parties. *See In the Matter of the Arbitration between Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995) ("[T]he arbitrators may order and conduct such discovery as they find necessary."). Counsel for the parties may, with the panel's approval, use the traditional discovery devices of depositions, written interrogatories, requests for documents, requests for admissions and requests for inspection and testing to prepare the case. (In reinsurance arbitrations generally, document productions and depositions are the most commonly used discovery devices, while interrogatories, requests for admissions, and inspections, are rare.) However, given the complex web of relationships inherent to reinsurance arrangements, arbitrating parties are increasingly encountering situations where relevant documents and testimony that can materially change the outcome of the proceeding rest with non-parties to the arbitration. Accordingly, one of the more difficult and pressing issues arising in arbitrations is the ability of a panel to issue subpoenas to non-parties for pre-hearing discovery, whether in the form of the production of documents or depositions of non-party witnesses.

II. Sources of an Arbitration Panel's Discovery Powers

THE ARBITRATION CLAUSE

In order to assess the ability of an arbitration panel to issue subpoenas to non-parties for pre-hearing discovery, the arbitration panel must first look to the underlying arbitration clause between the parties. While the arbitration clause itself rarely will provide guidance on discovery from non-parties, the arbitration panel should examine the arbitration clause to determine the venue of the arbitration and the specified procedural rules. With respect to venue of the arbitration, most arbitration clauses designate a location that is either mutually convenient to the parties and their counsel or where most of the necessary evidence would be located. Apart from considerations of mutual convenience and availability of evidence, the chosen venue for the arbitration may affect the arbitration panel's jurisdiction.[1] Because of the likelihood of the parties resorting to judicial proceedings if a non-party resists a subpoena, the venue and jurisdiction for the arbitration are significant factors.

The arbitration clause may set out the procedural rules to be followed or may adopt the rules of an established arbitration institution such as the International Chamber of Commerce, the American Arbitration Association, ARIAS•U.S., the

London Court of International Arbitration, or the Reinsurance Association of America's Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes. In some instances, the designation of procedural rules in the arbitration clause may affect the feasibility of pursuing non-party pre-hearing discovery. For example, some arbitration clauses provide: "Each party shall submit its case to the arbitrations within thirty days of the appointment of the arbitrators." Such a time limitation would obviously significantly impact the feasibility of discovery between the parties, much less discovery from non-parties. In other cases, the specified procedural rules, such as the Reinsurance Association of America's Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes, may only generally provide that the arbitration panel is authorized to require the disclosure of documents or deposition of any witnesses as reasonably necessary.

THE FEDERAL ARBITRATION ACT

While parties can contract in an arbitration clause as to the venue of the arbitration, to specified procedural rules, and even to the scope of discovery, the parties cannot contract among themselves to impose discovery obligations upon non-parties because non-parties "never bargained for or voluntarily agreed to participate in an arbitration." *Integrity*, 885 F. Supp. at 71 (holding that an arbitrator may not compel attendance of a non-party at a pre-hearing deposition). Because of the inability of parties to impose such obligations on non-parties on a contractual basis, the arbitration panel's authority to subpoena non-parties for production of documents or depositions must derive from the governing arbitration statute.

In the case of reinsurance contracts, the book or class of business generally ceded includes risks located in different states and the ceding companies and their reinsurers are often located in different states or a foreign country. Accordingly, most arbitration clauses in U.S. reinsurance contracts are interpreted pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. sections 1-14, and the body of federal law growing out of the FAA.[2] The FAA specifically 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 worker engaged in foreign or interstate commerce." 9 U.S.C. at sections 1-2.

With regard to the subpoena power, section 7 of the FAA provides that the arbitration panel:

> [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 directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court...

Id. at section 7. 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 State district court for the district in which such arbitrators, or a majority of them, are sitting may compel 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 attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Id.

... the FAA provides that the arbitration panel: [M]ay summon... any person... to bring... any book, record, document, or pages which may be deemed material...

III. Pre-Hearing Discovery From Non-Parties

While section 7 of the FAA clearly allows the arbitration panel to "summon . . . any person to attend before them . . . and . . . to bring with any book, record, document or paper which may be deemed material evidence in the case ...," courts are divided over whether section 7 authorizes an arbitration panel to compel either documents or testimony in advance of the hearing. In addition, there are potential territorial and jurisdictional problems with the statutory enforcement mechanisms for subpoenas under section 7 of the FAA. Given the divisions between courts and potential territorial and jurisdictional problems, the arbitration panel and parties will need to determine the status of the FAA section 7 caselaw in the relevant jurisdiction. In particular, parties should examine two questions to determine the feasibility of non-party pre-hearing discovery subpoenas: (1) Does the arbitration panel have the authority to issue a subpoena to a non-party for pre-hearing discovery; and (2) Does the designated court have the authority to enforce an arbitration panel subpoena to a non-party for pre-hearing discovery?

...the arbitration panel and parties will need to determine the status of the FAA section 7 caselaw in the relevant jurisdiction.

A. Authority of an Arbitration Panel to Issue Non-Party Pre-Hearing Discovery Subpoenas

In assessing the ability of an arbitration panel to issue a non-party pre-hearing discovery subpoena, the first question to consider is whether the arbitration panel has the authority to issue such a subpoena. As discussed previously, the arbitration panel's authority to subpoena non-parties for the production of documents or depositions in most reinsurance arbitrations will derive from the governing arbitration statute, the FAA. Thus, the question becomes whether section 7 of the FAA authorizes an arbitration panel to compel information from non-parties in advance of the hearing. In determining whether section 7 of the FAA authorizes an arbitration panel to compel information from non-parties in advance of the hearing, courts have either determined that section 7 allows some form of limited discovery from non-parties – pre-hearing document discovery, pre-hearing depositions, or both – or held that section 7 provides no authority for pre-hearing discovery of any sort from a non-party, absent a special need or hardship.

1. Limited Pre-Hearing Discovery Allowed From Non-Parties

Notwithstanding the "attend before them" language of section 7 of the FAA, some courts have upheld the right of arbitration panels to allow limited discovery before the hearing as "implicit" in the arbitration panel's power to subpoena "any person," including non-parties, to appear and testify at the hearing and bring any relevant documents. *In re Security Life Ins. Co. v Duncanson & Holt*, 228 F.3d 865, 870 (8th Cir. 2000) ("[T]he efficient resolution of disputes through arbitration . . . is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."); *see also Integrity*, 885 F. Supp. 69 (S.D.N.Y. 1995) ("[C]ourts have permitted arbitrators to order pre-hearing discovery.").

With respect to pre-hearing document discovery, several courts have ruled that an arbitration panel has the authority to issue a non-party pre-hearing subpoena requesting the production of documents. *See Security Life,* 228 F.3d 865; *Integrity*, 885 F. Supp. 69; *In re Arbitration Between Douglas Brazell v. American Color Graphics,* 2000 WL 364997 (S.D.N.Y. Apr. 6, 2000); *Meadows Indem. Co., Ltd., v. Nutmeg Ins. Co.,* 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988). As noted by the court in *Security Life,* "implicit in an arbitration panel's power to subpoena relevant documents for review at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[3] *Security Life*, 228 F.3d at 870-71.

Although recognizing that the efficiency of arbitration necessarily entails a more limited discovery process, the court reasoned that efficiency "is furthered by permitting a party to review and digest relevant evidence prior to the arbitration hearing." *Id.*

With respect to pre-hearing depositions of non-parties, some courts have ruled that an arbitration panel has the authority to issue a subpoena for such depositions. *See Amgen Inc. v. Kidney Ctr. of Delaware County, Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995); *Stanton*, 685 F. Supp. 1241. The *Amgen* court reasoned that pre-hearing depositions are permissible under section 7 of the FAA as implicit in the power to compel both testimony and documents at the arbitration hearing. *Amgen*, 878 F. Supp. at 880. However, the Southern District of New York, while permitting pre-hearing document discovery from non-parties, ruled that section 7 of the FAA does not allow an arbitration panel to issue subpoenas to non-parties for a pre-hearing deposition because the burden is too great for non-parties that "never bargained for or voluntarily agreed to participate in the arbitration." *Integrity*, 885 F. Supp. at 71.

2. Pre-Hearing Discovery Not Allowed From Non-Parties

On its face, section 7 of the FAA limits the arbitration panel's powers to compel the attendance of witnesses and production of documents to hearings that are held "before them." Thus, there is arguably no per se right to pre-hearing discovery in arbitration. *See, e.g., Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980) ("When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial."). While some courts have allowed some form of limited discovery from non-parties in advance of the hearing, the Fourth Circuit, in *Comsat Corp. v. Nat'l Science Found.*, 190 F.3d 269 (4th Cir. 1999), ruled that an arbitration panel lacks the authority to issue a subpoena for *any* non-party pre-hearing discovery. The Fourth Circuit 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 at the arbitration hearing. *Comsat*, 190 F.3d at 275. The court reasoned that "[p]arties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes." *Id.* Therefore, the court denied any non-party discovery, absent a showing of "special need or hardship." *Id.* at 276. The court did not define "special need or hardship" but did note that the subpoenaing party did not show that the requested documents and testimony could not be obtained from the other arbitrating party. *Id.*

B. Authority of Courts to Enforce Non-Party Pre-Hearing Discovery Subpoena by an Arbitration Panel

After establishing whether an arbitration panel has the authority to issue a non-party pre-hearing discovery subpoena, the next question to be considered is whether the designated court in connection with the arbitration has the authority to enforce such a subpoena. As mentioned previously, there are potential territorial and jurisdictional problems that will need to be considered to determined whether a non-party pre-hearing discovery subpoena can be given practical effect and enforced by a court.

Section 7 of the FAA authorizes an arbitration panel to subpoena "any person" to attend a hearing before them and provides that the motion to compel compliance with such a subpoena shall be brought in the district court for the district in which the arbitration panel sits. Under Rule 45 of the Federal Rules of Civil Procedure, however, the territorial reach of a district court's subpoena power encompasses only the district in which the court sits or within 100 miles from the arbitration venue. Thus, if an arbitration panel seeks to subpoena a non-party that is not within the district or within 100 miles of the arbitration venue, the federal district court may not have the authority to enforce such a subpoena. As explained below, the enforcement authority depends on whether the relevant jurisdiction strictly enforces Rule 45 of the Federal Rules of Civil Procedure.

1. Territorial Problems With Domestic Non-Parties

In contending with such a territorial problem for domestic non-parties, the parties can have an attorney, who is authorized to practice in the location in which the deposition or document production is to take place, issue a subpoena on behalf of the arbitration panel. If issued in this manner, such a subpoena would be enforceable in the district in which the deposition or document production is to take place, in accordance with Rule 45(a)(3)(b) of the Federal Rules of Civil Procedure. However, the Eight Circuit has discarded all territorial limits to enforcement for any arbitration panel subpoena to a non-party 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. In contrast to the Eight Circuit, the Third Circuit has held that Rule 45 of the Federal Rules of Civil Procedure must be strictly complied with, such that a district court's subpoena power in connection with an arbitration proceeding is limited to persons within the district or within 100 miles of the arbitration venue. *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 2002 WL 537652 (3rd Cir. Apr. 11, 2002).

In light of the different conclusions reached by courts addressing territorial problems, arbitration panels and parties attempting to subpoena a non-party for pre-hearing discovery may also consider moving the venue of the arbitration to a locale where the arbitration panel could issue a subpoena that could be enforced by a court.[4] However, such a move and its appropriateness has not been addressed by any courts; moreover, given that many arbitration clauses require unanimous agreement of the

arbitration panel to change the venue of the arbitration, such a move may not be a reasonable alternative.[5] In addition, the arbitration panel and the parties should consider preparing a joint letter to any non-parties requesting either document production or depositions early in the process; when the parties have close or on-going relationships with non-parties, such a letter often is effective and less time-consuming than formal legal procedures.

2. Territorial Problems with Non-Parties in Foreign Countries

Given the ever-increasing international nature of the reinsurance business, another territorial problem that arbitration panels likely will encounter is whether a pre-hearing discovery subpoena to non-parties located outside of the United States and, thus, arguably outside the reach of any federal district court, may be issued and enforced.

In order to ensure that a subpoena to a non-party outside of the United States is enforced, any subpoenas issued to non-parties must comply with Rule 4(f) of the Federal Rules of Civil Procedure, which concerns service upon individuals in foreign countries. Because Rule 4(f) forbids service by methods that would violate foreign law and to ensure that any foreign requirements for enforcement are not inadvertently violated, arbitration panels and parties should consider consulting foreign legal counsel very early in the process of attempting to subpoena a non-party in a foreign country.[6]

Rule 4(f) allows service upon any individual in a foreign country "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents..." In addition, another means available, particularly for document productions and depositions of non-parties in foreign countries, is the Hague Convention on Obtaining Evidence Abroad in Civil and Commercial Matters. Because there are a number of procedural requirements necessary to take advantage of the relevant Hague Conventions, any arbitration panel or party should consult the text of the Convention and the accompanying U.S. State Department materials available at http://travel.state.gov/judicial_assistance.html.

By way of example, to obtain personal service in the United Kingdom to compel a non-party to appear in a U.S. court under the Convention on Service Abroad of Judicial and Extrajudicial Documents, the documents to be served should be appended to the Convention request form available from the U.S. Marshals Service. The British Central Authorities require that the court in the United States be the applicant for service under the Convention. Therefore, the parties will need to have the subpoena converted to a formal subpoena by the federal district court with jurisdiction over proceedings in connection with the arbitration. After compliance with the Convention, the formal subpoena would be enforceable in the Royal Courts of Justice.

If, on the other hand, the arbitration panel and the parties prefer to have the deposition taken or documents produced abroad, the Convention on Obtaining Evidence Abroad in Civil and Commercial Matters would apply and evidence is obtained pursuant to a letter of request transmitted through a central authority in the receiving country. The request should be accompanied by a list of the questions to be posed to the witness by the foreign court or documents that should be produced.[7]

In the event that a necessary non-party is resident in a country that is not party to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, Rule 4(f) allows service to be effected "in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general justice . . . or as directed by the foreign authority in response to a letter rogatory or letter of request." If a non-party is resident in a country that is not party to the Hague Convention on Obtaining Evidence Abroad in Civil and Commercial Matters, such as is the case with Bermuda, the customary method of compelling evidence is by letter rogatory pursuant to 28 U.S.C. 1781. In order to undertake service and enforcement of a subpoena in a foreign country for an appearance in a U.S. court or compel the taking of evidence abroad, the parties will likely need to consult with foreign legal counsel.

3. Requirement of Federal Subject Matter Jurisdiction

As discussed previously, most reinsurance contracts necessarily will implicate interstate commerce and, thus, fall within the ambit of the FAA. However, the FAA does not confer federal subject matter jurisdiction and, thus, parties to any court action under the FAA must establish an independent basis of jurisdiction when seeking an enforcement action. *See Moses H. Cone Mem'l Hospital v. Mercury Constr. Co.*, 460 U.S. 1, 25, n. 32 (1983) ("There must be diversity of citizenship or some other independent basis for federal jurisdiction before the [enforcement of a section 7 subpoena] order can issue."). Without diversity of citizenship or some other basis for federal jurisdiction, a federal district court will not have the requisite jurisdiction to hear any action seeking to enforce a subpoena under section 7 of the FAA.[8] If the federal district court lacks jurisdiction, the only alternative for enforcement may be to seek enforcement in a state court under the relevant state arbitration statute, provided that the state court would have personal jurisdiction over the non-party.[9] Even if the state court could obtain personal jurisdiction over the non-party, the state court would have to consider whether any enforcement provisions of the state arbitration statute are preempted by section 7 of the FAA. *See generally Volt Info. Sciences, Inc. v. Stanford Junior Univ.,* 489 U.S. 468 (1989) (holding that a state law may be preempted to the extent that it conflicts with the Federal Arbitration Act). If the state court determined that section 7 of the

FAA preempted the enforcement provisions of the state arbitration statute, an arbitration panel or party seeking to enforce a non-party subpoena may well be left without any recourse. *Id.*

IV. Conclusion

Because of the divisions among the U.S. courts on the authority of arbitration panels to issue non-party pre-hearing discovery subpoenas and the enforceability of such subpoenas, the parties to an arbitration will need to thoroughly research and present to the panel the state of the law for the relevant jurisdiction of their arbitration. Moreover, if any necessary non-parties reside outside of the United States, the arbitration panel and parties will need to balance the need for non-voluntary document production or testimony from such parties with the lengthy legal process and the expense of foreign legal counsel.

1. In practice, parties often agree in an arbitration clause to submit to the jurisdiction of a particular court in connection with any judicial proceedings that either party may initiate, which is often a court with jurisdiction in the chosen venue.

2. While the FAA applies to most reinsurance contracts, parties conceivably could invoke state law in the arbitration clause and the scope of subpoena power would need to be considered from the perspective of any state law arbitration statute.

3. The subpoenaed non-party in the *Security Life* case was a risk-bearing member of the insurance pool. *Security Life*, 228 F.3d at 871. The court did not discuss whether the outcome would have been different if the subpoenaed party was an intermediary or a broker.

4. While courts such as the *Amgen* and *Security Life* courts have permitted extraterritorial subpoenas to reach non-parties for pre-hearing document discovery, no courts appear to have permitted extraterritorial subpoenas for non-party deposition subpoenas.

5. Parties drafting an arbitration clause who expect a need for discovery from non-parties may wish to specify that the arbitration panel has such authority; while parties cannot bind non-parties in the arbitration clause, such a provision would at least prevent the other arbitrating party from objecting.

6. In the event that the non-party is merely a U.S. citizen or resident located in a foreign country, 28 U.S.C. section 1783 allows for subpoena of such a person in a foreign country.

7. Under the Convention, each country is allowed to make reservations regarding the applicability of each article of the Convention to itself; in particular, the vast majority of parties to the Convention, including the United Kingdom, have made reservations regarding the pre-trial discovery of documents that may limit the nature of requests by any arbitration panel. Furthermore, under English law in particular, a court cannot order witnesses to submit to depositions in private arbitration proceedings in response to letters of request. *See Viking Ins. Co. v. Rossdale and Others*, [2002] 1 Lloyd's Rep. 219 (QBD 2001).

8. The complete diversity requirement is particularly problematic in actions involving Lloyd's of London, which is treated as an unincorporated association; thus, diversity jurisdiction will only be found where there is complete diversity between the plaintiff and each of the underwriting members of any Lloyd's syndicate. *Chase Manhattan Bank v. Aldridge*, 906 F. Supp. 870, 872 (S.D.N.Y. 1995) (holding that complete diversity necessary to support diversity jurisdiction did not exist between insured corporation and Lloyd's underwriters at least one of whom was citizen of state in which corporation was also citizen).

9 If the contracts at issue, however, fall within the scope of the FAA, state courts would nonetheless be required to apply the FAA. *See Moses H. Cone*, 460 U.S. at 24.

... the parties to an arbitration will need to thoroughly research and present to the panel the state of the law for the relevant jurisdiction of their arbitration.

news and notices

Membership Applications Go Online

In May, the ARIAS•U.S. website, *www.arias-us.org*, was modified to enable candidates for membership to fill out and submit an application online, using a credit card. It will also still be possible to print the application and send it. Now, prospective members who have put off applying because they have been too busy to get around to it, have almost no excuse. The new online system makes applying fast and easy.

Certified Arbitrators Update Biographies

The 2003 Directory will close for printing in Mid-July. All certified arbitrators were notified in early May that they should look at their web profiles and submit any changes by email or fax. If you have not, you might be able to slip under the wire if you email your change to byankus@cinn.com before July 15.

Membership Expiration

The by-laws of ARIAS•U.S. have always required the payment of annual dues within ninety days. However, enforcement has been inconsistent. If members paid up a year later, they were brought up to date.

That lack of enforcement has resulted in a lax attitude about payment of dues among a few members.

Recently, the Board concluded that 90 days was too severe a requirement; it revised the rule to allow 180 days for payment of annual dues. However, at the end of that period, the member will be deemed to have resigned. Reinstatement after that automatic resignation requires re-applying for membership, including payment, again, of the normal initiation fee. Future dues invoices will include a reminder of the rule.

This year, announcements were sent in late May to all individual members and key contacts for corporate members who had not paid their 2003 dues. The automatic resignation was explained. Let's hope we haven't lost anyone.

Certification Expiration

On a similar note, Certified Arbitrators should keep in mind that maintenance of certification requires attending at least one seminar within the two-year certification period. Expiration dates are indicated on every certificate. If you have any question about the date or the rule, contact bparadis@cinn.com.

The purpose of this rule is to ensure that arbitrators maintain their knowledge and involvement in the process of improving arbitration.

Anyone who does maintain certification will be removed from the website and directory, until he or she attends another conference.

Missing Email Addresses

If you have received emails this year from Bill Yankus (for example, the closing of registrations for Bermuda), you are in the member email database. If you have not, you may be among the "missing." When there is information that needs to reach all members quickly, we use the member database for an all-member announcement. If you are not sure whether you have received any messages, send a note with the subject "Confirming Email Address" to bparadis@cinn.com. You may be confident that no spam will ever result from providing this address to ARIAS•U.S.

Spring Will Be a Little Late Next Year... and at The Breakers!

A series of significant scheduling conflicts have pushed the 2004 Spring Conference to a June date . . . the 9th to the 11th, to be exact. That shift has also affected the location, since some that were being considered are just too hot by June.

The great news is that the location will be The Breakers, the classic, elegant resort in Palm Beach, Florida. With two golf courses and a beautifully renovated interior and spa, there could not be a more perfect location for our event. By taking advantage of the early off-season, we get beautiful weather (high in the mid-80s), reasonable rates, and a location that's easy to get to. As long as there are no hurricanes, it

should be an outstanding event. If there is a hurricane, somebody needs to volunteer to join Dick White for 18 holes. Save the Dates! Wednesday noon to Friday noon, June 9-11.

Umpire Selection Procedure Brochure Revised

The brochure explaining the procedure for deciding on an umpire, using the ARIAS•U.S. random selection software system, has been revised. The new brochure features a page that presents the procedure "at a glance" . . . an easy reference listing of the basic steps. All members should have received a copy in the mail. The explanation has been revised on the website. If you need additional copies, just request them through info@arias-us.org. The link is on every page of the website.

Board Decisions

Changes to By-Laws

At its April 9 meeting, the Board approved several changes to the ARIAS•U.S. By-Laws, the principal ones being as follows:

- The first goal of the Society now reads: "To promote the integrity of the private dispute resolution process, particularly in the insurance and reinsurance industry." The change from "arbitration process" broadens the goal to encompass possible involvement with methods other than arbitration.
- A definition of the office of Chairman has been added and that of President has been modified in Article VII to reflect the actual leadership structure.
- Extension of the period for payment of dues to six months, as indicated above.

The website By-Laws page has been updated to reflect these changes.

New Certifications/Umpire

At the April 9 Board meeting in Bermuda, the following members were certified as ARIAS•U.S. Arbitrators. Biographies of recently certified arbitrators begin on page 29.

- Paul Bellone
- Christian Bouckaert
- Thomas Daly
- Brian Donnelly
- John Drew
- Diane Nergaard
- Barbara Niehus
- Jim Phair
- Elizabeth Thompson
- William Wigmanich

Paul Bellone was added to the Umpire List.

Save the Dates!

Two Great Conferences Coming Up!

November 6-7, 2003
ARIAS•U.S. Fall Conference and Annual Membership Meeting
New York Hilton, New York City

June 9-11, 2004
ARIAS•U.S. Spring Conference
The Breakers
Palm Beach, Florida

Watch www.arias-us.org for more information.

cover story

Spring Conference Report

Bermuda Training Receives High Marks! ...

There was no joy in Pagetville when heavy rain and wind hit Bermuda just as 56 ARIAS•U.S. golfers prepared to head out to the Port Royal course. A loud thunderclap that echoed through the meeting room at 11:20 sealed the fate of the outing that had looked increasingly doubtful as the weather deteriorated throughout Friday morning. Only intrepid golfer Dick White refused to be deterred and battled the elements for 18 holes.

Apart from that disappointment, the Spring Conference, entitled "From Bermuda with Love: An Arbitrator's License," was rated by several ARIAS•U.S. veterans as "the best ever." This year, the annual event was held April 10-12 at the Elbow Beach Hotel.

A James Bond theme was carried out through the brochures, posters, fact pattern, and conference materials, giving extra interest and substance to the mock interactions among counsel and panelists. Faculty members became intensely involved in their roles as they handled the many complicated issues that must be dealt with in the organization meeting. As Goldfinger Insurance sought various forms of relief from Moonraker Reinsurance, impassioned arguments could be heard in all three breakout rooms.

Disqualification, Pre-Judgment Security, Subpoena Power, and Summary Disposition were just some of the major issues that were addressed by the faculty experts. Leading the dispute was the question of

... But Golf Outing Washes Out!

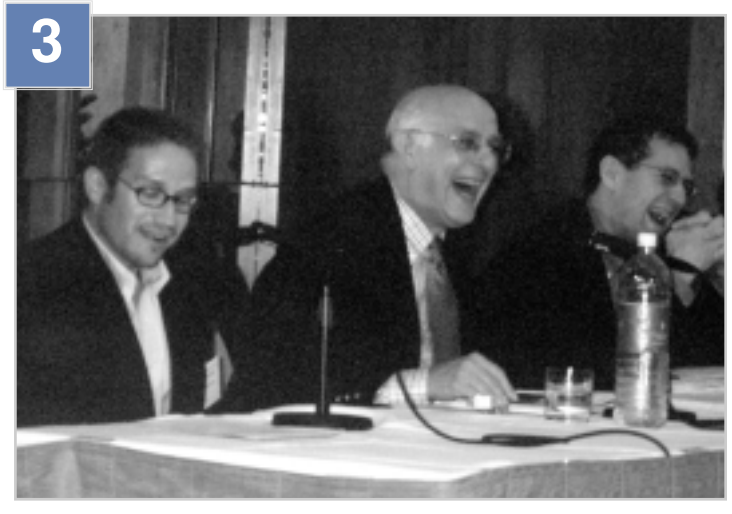
whether previous employment at Her Majesty's Secret Service Re constituted conflicts among the panel members. Not only had Roger Moore reported to Sean Connery in the 70's, but Pierce Brosnan reported to Moore in the 80's, each eventually replacing his superior. Intricate facts of the dispute provided many other moments of controversy. *Photo Number 2*

The two rounds of breakouts were each followed by reports to the full assembly on the nature of the interactions, so that the different ways that issues were addressed could be appreciated by all. Not all ways were completely serious. *Photo Number 3*

At the end of the day on Thursday, a short, but high-interest discussion of all-neutral panels resulted in expressive pros and cons about the benefits and problems of using random selection to choose all three panel members. In spite of divergent views on the desirability of this approach, the group was nearly unanimous in wanting to further investigate whether such a system should be offered by ARIAS•U.S. *Photo Number 4*

On Saturday morning, presentations to the full conference covered several key issues relating broadly to the practice of arbitration.

- The off-shore venue provided an opportunity to compare and contrast arbitration law and procedure in Bermuda, UK, and US.
- The ethics discussion centered on evident partiality and other behaviors that could



1 *Dan Schmidt, Chris Milton, Eric Kobrick*

2 *Mock arbitration in breakout session.*

3 *Neal Moglin, Chris Milton and Eric Kobrick*

4 *Gene Wollan and Mark Gurevitz discuss all-neutral panels*

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constitute grounds for vacating arbitration awards. *Photo number 9*

- The final panel looked ahead to the future of arbitration as a preferred method of resolving disputes. *Photo number 10*

The Bermuda conference set a record for faculty size, with a total of thirty-five members. It also set a record for spring attendance. Including faculty, the total was 175, plus 55 spouses. Executive Director Bill Yankus estimates that another fifty participants (not counting spouses) would probably have attended. Registrations had to be closed on March 4, twenty-five days before the deadline because the number was beyond the capacity of the main Elbow Beach meeting room. Larger, expandable facilities have already been planned for future conferences.

Eric Kobrick and Chris Milton have received rave reviews for bringing together this program and the people to implement it.

In addition, the advance delivery of conference materials to registrants was frequently mentioned as providing a significant contribution toward the educational benefits to attendees. Every effort will be made to continue that practice for future events.

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5 *Wind and rain kept receptions indoors, but spirits were high.*

6 *Chairman Dan Schmidt sets the stage with opening remarks.*

7 *Marty Haber, with Chris and Eric, makes a point.*

8 *If you stood up, you could lose your seat.*

9 *Serious ethics issues were addressed.*

10 *Steve Richardson and Frank Lattal discuss the future of arbitration.*

11 *Tom Daly, standing for applause, was one of ten arbitrators newly certified by the Board in Bermuda.*

feature

An Exercise In Futility?

Grounds for Vacating Abritration Awards

By Rhonda L. Rittenberg and Paul M. Hummer

...in practice courts have demonstrated a reluctance to vacate arbitration awards.

OVERVIEW OF THE LAW GOVERNING REINSURANCE ARBITRATIONS

Most reinsurance agreements are contracts involving interstate commerce and thus fall within the ambit of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.[1] For all contracts covered by the FAA, federal "common" law governs questions involving the interpretation, construction, validity, revocability and enforceability of a contractual arbitration provision.[2] Federal law, however, directs a court to the relevant state law to determine whether the parties have in fact agreed to arbitrate their disputes.[3]

Arbitrations involving persons not citizens of the United States are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq. The purpose of the Convention is to "secure for United States citizens predictable enforcement by foreign governments of certain arbitral contracts and arbitral awards made in this and other signatory nations" and to "unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[4] The Convention applies to all "commercial" legal relationships, whether arising out of contract or otherwise.[5] Unlike the FAA, claims arising under the Convention "arise under the laws and treaties of the United States" and, therefore, fall within the federal question subject matter jurisdiction of the federal courts.[6]

At times, the interplay between the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), and the FAA creates issues unique to the insurance and reinsurance industry. In those states where state liquidation statutes contain prohibitions against forcing a liquidator or rehabilitator to arbitrate disputes, the McCarran-Ferguson Act may bar application of the FAA and, thus, enforcement of arbitration provisions.[7] Courts in other states, which do not have such restrictive legislative schemes, have enforced arbitration agreements and either compelled liquidators or rehabilitators to arbitrate or enforced demands by liquidators to arbitrate.[8] Courts have also relied on the McCarran-Ferguson Act to uphold state statutes or common law doctrines which do not permit insurance or reinsurance agreements to contain arbitration provisions.[9]

The FAA does not confer federal question jurisdiction.[10] Thus, absent some other basis for federal jurisdiction (such as diversity of citizenship), disputes over an arbitration clause must be litigated in state court. Where federal jurisdiction is present, the general federal venue rules apply.[11]

CHALLENGES TO ARBITRATION AWARDS[12]

I. GENERAL SCOPE OF REVIEW OF CHALLENGES TO ARBITRATION AWARDS

A court reviewing an arbitration award has a very limited scope of review. The Supreme Court has held that "[as] long as the arbitrator is even arguably construing or applying the contract and is acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."[13] Thus, in practice, courts have demonstrated a reluctance to vacate arbitration awards. The Seventh Circuit expressed the prevailing judicial philosophy as follows: "[t]he standards for judicial intervention are therefore narrowly drawn to assure the basic integrity of the arbitration process without meddling in it."[14]

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II. CHALLENGING AN AWARD FOR EVIDENT PARTIALITY OR CORRUPTION (9 U.S.C. §10(a)(2))

The Federal Arbitration Act permits a losing party to seek to have an arbitration award vacated for a variety of reasons, including evident partiality or corruption on the part of the arbitrators. In practice, this has been a difficult standard to satisfy.

A. Pre-Hearing Challenges To The Impartiality of Arbitrators

Arbitration provisions typically identify certain minimal criteria that the arbitrators must meet, such as being a disinterested current or former officer of an insurance or reinsurance company. Courts are divided on the propriety of judicial review of an arbitrator's qualifications or apparent biases prior to the arbitration hearing. Many courts have refused to hear pre-hearing challenges, leaving the litigant with little choice but to proceed to arbitration and raise a challenge to any subsequent award.[15] The Fifth Circuit in *Gulf Guaranty Life Insurance Co. v. Connecticut General Life Insurance Co.*,[16] reversed a lower court ruling removing an arbitrator. The district court ordered the removal of the third arbitrator based on the arbitrator's failure to meet the qualifications set forth in the arbitration clause of the reinsurance agreement. In reversing , the Fifth Circuit held that the courts do not have the authority to remove an arbitrator from service prior to the issuance of an award, unless the challenge to the arbitrator calls into question the validity of the agreement to arbitrate under general contract principles.

Some courts, however, have entertained pre-hearing challenges to allegedly interested arbitrators or to arbitrators who do not satisfy other contractual requirements.[17] At least one court, while not disqualifying any arbitrator, did imply into the arbitration agreement an obligation on the part of the arbitrators to complete "disclosure" statements to enable the parties to confirm that the arbitrators were in fact disinterested.[18] Another court noted, without citation to any authorities, that "although the FAA does not explicitly provide for removal of arbitrators, federal or state courts acting in equity can remove biased or corrupt arbitrators prior to the commencement of the arbitration.[19]

Parties challenging the qualification or impartiality of an arbitrator face a high hurdle. In *In re Arbitration Between Certain Underwriters at Lloyd's London & Continental Casualty Co.*,[20] for example, the issue was whether a district court should disqualify certain party-appointed arbitrators on the grounds that they were not impartial. The arbitrators in question worked for an insurance company which had an attorney-client relationship with the law firm representing the cedent and which was itself currently in negotiations with certain of the reinsurers on issues similar to those involved in the arbitration. The court held first that although it lacked jurisdiction under section 10 of the FAA to entertain a pre-award challenge to an arbitrator, it had jurisdiction to review a pre-award challenge to an arbitrator's impartiality as part of its jurisdiction to enforce arbitration agreements under section 4 of the FAA. The court rejected the challenges, however, because it found that the arbitration provision, which provided that each party would choose one arbitrator and the two arbitrators would then choose an umpire, "appear to suggest advocacy arbitration and implicitly concede that some bias may exist." The court concluded that while there was perhaps evidence of "potential bias," there was no evidence of the sort of "actual misconduct" which should result in pre-award disqualification.

B. Post-Hearing Challenges To Arbitration Awards Based On Arbitrator Interest Or Qualifications

1. *Challenges To Party-Appointed Arbitrators*

Most reinsurance arbitrations are conducted pursuant to provisions whereby the parties each pick an arbitrator and those arbitrators collectively pick the umpire or "neutral." As noted above, courts have recognized that a certain level of partiality is inherent in this structure and have generally been unsympathetic to post-award claims that the other party's arbitrator was biased in favor of that party.

The strongest expression of this judicial philosophy is found in *Sphere Drake Insurance Ltd. v. All American Life Ins. Co.*,[21] which involved an appeal from a district court decision vacating an arbitration award on the basis of the evident partiality of an arbitrator who had failed to reveal that he had previously represented as outside counsel the party that appointed him. The court of appeals reversed. Noting that the district court decision was "the first time since the Federal Arbitration Act was enacted in 1925 that a federal court has set aside an award because a party-appointed arbitrator on a tripartite panel, as opposed to the neutral, displayed 'evident partiality'," the court held that where the arbitration agreement entitled parties to select interested arbitrators, the "evident partiality" provision of section 10(a)(2) of the FAA "has no role to play."

Even in cases where courts have recognized that the "evident partiality" restriction of the FAA may be applicable, parties have generally been unsuccessful in challenging awards based upon the lack of partiality of a party appointed arbitrator. In *Nationwide Mutual Insurance Co. v. Home Insurance Co.*,[22] for example, the court rejected a series of challenges to an arbitration award based upon evident partiality. The court found that disclosure that one of the panel members was engaged in a "runoff relationship" with the party challenging the award was sufficient to put the party on notice that there might be disputes that arose in the course of that relationship.

Similarly, *Nationwide Mutual Insurance Co. v. First State Insurance Co.*,[23] involved a cedent's cross-motion

to vacate an arbitration award because of apparent bias on the part of one of the arbitrators. The cedent alleged that the arbitrator had reached a conclusion in the past identical to that urged by the reinsurer, had impermissible ex parte communications with the reinsurer, and had improperly influenced the resolution of a discovery dispute. The Court noted that the Federal Arbitration Act allows a district court to vacate an arbitration award where there was "evident partiality or corruption in the arbitration," but that this burden was even greater because the arbitrator was the reinsurer's party-appointed arbitrator on a three-person panel. The Court then rejected the argument that the arbitrator's views during an arbitration involving the cedent almost twenty years prior irreversibly biased her against their position. The Court noted that "[a]ny person of substantial experience would over the course of her career have developed some opinions about issues arising in the field of experience, but that general circumstance would not automatically disable such a person from fairly evaluating the merits of a particular controversy." [24]

2. Challenges To Umpires

There are few reported decisions involving challenges to umpires. These cases, too, evidence a judicial inclination to avoid upsetting arbitration awards. In *In re Arbitration Between Northwestern National Insurance Co. & Generali Mexico Compania de Seguros*,[25] the court rejected a series of challenges to an arbitration award in favor of the ceding company. The first challenge related to the composition of the panel, with a claim that the umpire did not meet the qualification requirements for arbitrators in the reinsurance agreement. The court held that the reinsurer failed to sustain its burden of proof on the issue of whether or not the umpire had the requisite qualifications and, in any event," 'in light of the compelling policy reasons favoring arbitration, the Court will not overturn [an award] based upon a technical procedural irregularity.'"[26]

In addition to evident partiality and corruption, an award may be set aside where it is completely irrational, evidences a manifest disregard of the law or is the result of a fundamentally unfair proceeding. These may be difficult standards to meet especially when arbitrators do not issue reasoned decisions and are disengaged from applying the strict rules of law. The following highlights the standards applied by courts as well as legal and practical considerations when evaluating these grounds.

III. CHALLENGING AN AWARD AS BEING "COMPLETELY IRRATIONAL" (9 U.S.C. §10(a)(4))

An arbitration award will be considered "completely irrational" if it fails to draw its essence from the contract or bears no rational relationship to the evidence presented to the arbitrators. As a threshold matter, because many reinsurance arbitration awards do not include a reasoned decision, courts may not be in a position to glean whether an award meets this standard. Perhaps for this reason, few courts have vacated an arbitration award based on complete irrationality. In those rare instances where a court considered an award to be completely irrational, the reasons were not subtle. The basis for such a finding was invariably apparent from the record.

For example, in *Missouri River Servs., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848 (8th Cir. 2001), the court vacated an award where the award failed to draw its essence from the contract. At issue was an agreement between the Native American tribe and a casino developer which expressly provided that the satisfaction of a monetary award was limited to the profits generated by the tribe's gambling casino in Nebraska. Notwithstanding this express and unambiguous contractual provision, the arbitrator ordered that profits generated by a different casino owned by the tribe be used to satisfy the award. Consistent with the well established principle that an arbitrator may interpret ambiguous language but not disregard or modify unambiguous language, the court concluded that the arbitrator improperly disregarded the unambiguous language and crafted her own remedy. Because the award failed to draw its essence from the contract, the court vacated it as being "completely irrational" under the FAA.

In *Sawtelle v. Waddell & Reed, Inc.*, 2003 N.Y. App. Div. LEXIS 1243 (Feb. 11, 2003), the New York Supreme Court Appellate Division recently held that an NASD arbitration panel acted irrationally in awarding $25 million in punitive damages, almost twen-

An arbitration award will be considered "completely irrational" if it fails to draw its essence from the contract or bears no rational relationship to the evidence presented to the arbitrators.

ty five times the $1.8 million compensatory damages award. The case centered on a securities brokerage firm's wrongful efforts to interfere with prospective clients of its terminated employee.

On appeal from the confirmation of the arbitration award under the FAA, the Appellate Division applied the "grossly excessive" due process standard established by the U.S. Supreme Court in *BMW of North America v. Gore*, 517 U.S. 559 (1996). Under *Gore*, punitive damage awards may be set aside as grossly excessive only if they fall into a "zone of arbitrariness." The *Sawtelle* court noted that a grossly excessive award that is arbitrary and irrational under *Gore* should be equally arbitrary and irrational under the FAA. After considering the arbitration evidence concerning the brokerage firm's attempts to compete with its former employee, the court concluded that the punitive damage award bore no rational relationship to the compensatory damages sustained by the employee or to the severity or extent of the brokerage firm's misconduct. Accordingly, it vacated the award as being, among other things, "completely irrational."

IV. CHALLENGING AN AWARD FOR "MANIFEST DISREGARD OF THE LAW"

Proving that an award is in manifest disregard of the law requires more than a showing of an error of law or failure on the part of the arbitrators to understand or apply the law. To constitute manifest disregard of the law, arbitrators must have knowledge of a well defined, explicit and clearly applicable legal principle, yet refuse to apply it or ignore it altogether. The burden of proving a panel's manifest disregard of the law is particularly difficult when numerous legal theories are presented to a panel and the award is rendered without an opinion.[27] Moreover, as a general proposition, arbitrators' factual findings and contractual interpretation are not subject to challenge.[28]

The primary consideration to any analysis of the manifest disregard of the law standard is that many reinsurance arbitration clauses contain "disengagement" language. This language typically provides that the reinsurance agreement is to be construed as an honorable engagement rather than merely a legal obligation and relieves a panel of judicial formalities and from applying the strict rule of law. Based on broad "disengagement" language, a panel may not be bound to apply a particular jurisdiction's law, but rather, may have the discretion to be guided by the law it considers applicable, equity and industry custom and practice. If a panel has been disengaged from strictly applying the law, it may prove even more difficult to establish a manifest disregard of the law, even if well defined law was deliberately ignored. Absent a reasoned decision, an award based on equitable considerations and in disregard of a clear rule of law may be fairly insulated from any successful subsequent challenge. Similarly, a panel that is not disengaged from applying the strict rule of law may, as a practical matter, minimize the risk of a successful subsequent challenge of an award by declining to issue a reasoned decision

Notwithstanding these hurdles, there have been limited instances where courts have vacated an award based on the arbitrators' manifest disregard of the law. In *Wallace v. Buttar*, 2003 U.S. Dist. LEXIS 316 (S.D.N.Y. Jan. 14, 2003), for example, the United States District Court for the Southern District of New York vacated a $1.8 million award in a securities fraud arbitration. The court found the panel manifestly disregarded the law and the facts by incorrectly imposing respondeat superior liability on the wrong entity; imposing fraud liability absent the requisite proof of intent; and imposing control liability absent the requisite proof of mental culpability.[29]

Although the award itself provided no reasoning to support the ultimate findings of liability, the *Wallace* court concluded that it may infer that the arbitrators manifestly disregarded the law if it finds that the error made by the arbitrators "is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator."[30] Nonetheless, a reviewing court "must proceed with caution" when making an inference because if there is "even a barely colorable justification for the outcome reached," the award must be confirmed. *Id.*[31]

V. CHALLENGING AN AWARD RESULTING FROM A FUNDAMENTALLY UNFAIR HEARING (9 U.S.C. §10(a)(3))

Generally, arbitrators are not bound by the procedural and evidentiary precepts applicable in court settings and have wide latitude in conducting the arbitration proceedings. Nonetheless, the FAA requires that arbitrators provide the parties with a fundamentally fair hearing requiring notice and an opportunity to be heard and to present relevant and material evidence. While arbitrators are not bound to hear all of the evidence tendered by the parties, they must give each of the parties an adequate opportunity to present arguments.[32] Misconduct in this regard typically arises where there is proof of either bad faith or gross error on the part of the arbitrator.[33]

In a recent case before a New York state court, egregious misconduct by an AAA arbitration panel resulted in the vacatur of an award and a remand to a new arbitration panel. In *Coty v. Anchor Construction*, 2003 N.Y. Misc. LEXIS 13 (N.Y. Sup. Ct. Jan. 8, 2003), the arbitrators refused to hear evidence from the defendant after learning that it did not pay the panel's fees due to financial hardship. While arbitrators are afforded great latitude in determining what evidence to hear, the court found them guilty of affirmative misconduct when they prohibited the defendant from presenting evidence in support of its counterclaim and expressly disregarded prior evidence submitted by that party. The court noted that while the AAA rules allowed the panel to suspend or terminate the proceedings, it did not permit the panel to continue the proceedings for a paying party while terminating participation by a non-paying party.

VI. CONCLUSION

Given the judicially circumscribed review of arbitration awards, it is difficult to vacate an award. This is especially true when an arbitration clause contains broad "disengagement" language relieving the arbitrators from applying the strict rules of law and when the panel does not issue a reasoned decision. Nonetheless, courts have vacated awards that were completely irrational, resulted from fundamentally unfair proceedings or were in manifest disregard of the law. Arbitrators are encouraged to give careful consideration to these points when handling an issue as routine as a discovery request or as fundamental as providing a full and fair hearing to the parties.

1 *See, e.g., Stephens v. American Int'l Ins. Co.,* 66 F.3d 41 (2d Cir. 1995); *New England Reins. Corp. v. Millers Mut. Fire Ins. Co.*, No. 93 CIV 8303 (JFK), 1995 WL 617217 (S.D.N.Y. Oct. 20, 1995); *Duryee v. American Druggists' Ins. Co.*, No. C2-92-931 (S.D. Ohio May 10, 1993), *reprinted in Mealey's Litigation Reports - Reinsurance,* Vol. 4, No. 2 (May 26, 1993).

2 *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir.), *cert. denied* , 406 U.S. 949 (1972); *accord General Sec. Assurance Corp. v. Capital Assurance Co.*, No. 110807/93. (N.Y. Sup. Ct. N.Y. Co., IAS Part 19 June 8, 1994), *reprinted in Mealey's Litigation Reports - Reinsurance* , Vol. 5, No. 6 (July 27, 1994); *Old Republic Ins. Co. v. Lanier,* 644 So.2d 1258 (Ala. 1994).

3 P*rogressive Cas. Ins. Co. v. C.A. Reaseguradora Nactional de Venezuela*, 991 F.2d 42 (2d Cir. 1993).

4 *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1207-08, 1212 (5th Cir. 1991).

5 9 U.S.C. § 202.

6 9 U.S.C. § 203.

7 *See, e.g., Davister v. United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), cert. denied, 525 U.S. 1177 (1999); *Munich Am. Reins. Co. v. Crawford*, 141 F.3d 585 (5th Cir.), *cert. denied* , 525 U.S. 1016 (1998); *Stephens v. American International Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) (applying Kentucky law); *Washburn v. Corcoran,* 643 F. Supp. 554, 556 (S.D.N.Y. 1986); *In re Union Admin. Ins. Co.*, 521 N.Y.S.2d 506 (N.Y.A.D. 1st Dep't 1994); *cf. Gerling-Konzern Globale Rueckversicherungs-Ag v. Selcke,* No. 93 C4439, 1993 WL 443404 (N.D. Ill. Oct. 29, 1993) (abstaining from deciding case in which reinsurer sought to compel arbitration of disputes with the liquidation of an insolvent insurance company).

8 *See, e.g., Bennett v. Liberty Nat'l Fire Ins. Co.,* 968 F.2d 969 (9th Cir. 1992); *Selcke v. New England Ins. Co.*, 995 F.2d 688 (7th Cir.), *petition to vacate denied* , 2 F.3d 790 (7th Cir. 1993); *Koken v. Cologne Reins. Ltd.*, 34 F. Supp. 2d 240 (M.D. Pa. 1999); *Comm'r of Ins. & Liquidator for Glacier General Assur. Co. v. Woodworth*, No. 94-M-2787 (D. Colo. June 13, 1995), *reprinted in Mealey's Litigation Reports - Insurance Insolvency* (Nov. 1, 1995); *Capitol Life Ins. Co. v. Gallagher,* 839 F. Supp. 767 (D. Colo. 1993), *aff'd*, 47 F.3d 1178 (10th Cir. 1995); *Costle v. Fremont Indem. Co.,* 839 F. Supp. 265 (D. Vt. 1993); *Ainsworth v. Allstate Ins. Co.*, 634 F. Supp. 52 (W.D. Mo. 1985); I*n re Liquidation of Integrity Ins. Co.: Arkwright Mut. Ins. Co. in Liquidation,* No. C-70-95 (N.J. App. July 31, 1995), *reprinted in Mealey's Litigation Reports - Reinsurance* (Aug. 20, 1995).

9 *See, e.g., Mutual Reins. Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931 (10th Cir.), *cert. denied,* 506 U.S. 1001 (1992); *St. Paul Fire & Marine Ins. Co. v. Employers Reins. Co.*, 919 F. Supp. 133, 137-38 (S.D.N.Y. 1996); *Federated Rural Elec. Ins. Co. v. Nationwide Mut. Ins. Co.*, 874 F. Supp. 1204 (D. Kan. 1995).

10 *Harry Hoffman Printing, Inc. v. Graphic Communications, Int'l Union,* 912 F.2d 608, 611 (2d Cir. 1990); *Wisconsin Comm'r of Ins. v. California Reins. Mgmt. Corp.*, 819 F. Supp. 797, 802 (E.D. Wis. 1993).

11 *See Constitution Reins. Corp. v. Stonewall Ins. Co.*, 872 F. Supp. 1247 (S.D.N.Y. 1995).

12 Attached is an Appendix that contains a survey of recent and relevant case law by circuit concerning the various grounds for vacating arbitration awards. The authors wish to express their appreciation to Michael Calawa at Prince, Lobel, Glovsky & Tye for his efforts in compiling the Appendix.

13 *United Paperworkers Int'l Union*, 484 U.S. at 38; *see also Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731,* 990 F.2d 957 (7th Cir. 1993) (errors in an arbitrator's interpretation of law or findings of fact do not merit reversal).

14 *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983), mandate amended, 728 F.2d 943 (7th Cir. 1984). *See also Employers Reins. Corp. v. Admiral Ins. Co.*, No. CIV. A. 90-3147, 1990 WL 169756 (D.N.J. Oct. 30, 1990) (describing the scope of review as "very narrow).

15 *See, e.g., Insurance Co. of N. Amer. v. Pennant Ins. Co.*, No. 97-MC-154, 1998 WL 103305 (E.D. Pa. Feb. 18, 1998); *Old Republic Ins. Co. v. Meadows Indem. Co.*, 870 F. Supp. 210 (N.D. Ill. 1994); *Metro. Prop. & Cas. Ins. Ltd. v. American Centennial Ins. Co.*, No. 3:94-1014 (N.D. Tex. Oct. 31, 1994).

16 304 F.3d 476 (5th Cir. 2002).

17 *See, e.g., Evanston Ins. Co. v. Kansa General Int'l Ins. Co.*, No. 94-C-4957 (N.D. Ill. Oct. 17, 1994), r*eprinted in Mealey's Litigation Reports - Reinsurance,* Vol. 5, No. 14 (Nov. 23, 1994); *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885 (D. Conn. 1991); *Hartford Steamboiler Inspection & Ins. Co. v. Industrial Risk Insurers,* No. CV94-705105, 1995 WL 645971 (Conn. Super. Ct. Oct. 26, 1995); *Hartford Steam Boiler Inspection & Insurance Co. v. Industrial Risk Insurers*, No. CV 960562970, 1997 WL 94089 (Conn. Super. Ct. Feb. 18, 1997), involved a pre-hearing challenge to the constitution of an arbitration panel. The court did not address the question of whether a pre-hearing challenge to the constitution of an arbitration panel was appropriate. Instead, the court analyzed the contractual requirements for the constitution of the panel and concluded that the panel was properly constituted.

18 *Fireman's Fund Ins. Co. v. Sorema N. Am. Reins. Co.*, No. C 94-3617 SC, 1995 WL 597266 (N.D. Cal. Jan. 11, 1995).

19 *Hartford Steamboiler Inspection & Ins. Co.*, 1995 WL 645971.

20 No. 97 C 3638, 1997 WL 461035 (N.D. Ill. Aug. 11, 1997).

21 307 F.3d 617 (7th Cir. 2002).

22 278 F.3d 621 (6th Cir. 2002).

23 213 F. Supp. 2d 10 (D. Mass. 2002).

24 The Court similarly rejected the cedent's last two arguments, finding that any ex parte communication occurred during the time such communications were expressly countenanced by the parties, and that the discovery decision was squarely within the discretion of the panel.

25 No. 00 Civ. 1135 (NRB), 2000 WL 520638 (S.D.N.Y. May 1, 2000).

26 Similarly, the court rejected a claim that the panel's award was in manifest disregard of the law, nothing that this standard was "severely limited" and that there was at least a "colorable" basis for the panel's decision.

27 *See Wall St. Assoc., L.P. v. Becker Paribas, Inc.*, 818 F.Supp.679 (S.D.N.Y. 1993), aff'd 27 F.3d 845 (2d Cir. 1994).

28 *See e.g., Providence & Worcester R.R. Co. v. National R.R. Passenger Corp.*, 2002 U.S. Dist. LEXIS 25198 (Dec.16, 2002).

29 The *Wallace* court also recognized that a manifest disregard of the facts, which occurs when an award runs contrary to "strong" evi-

dence favoring the party moving to vacate the award, could be grounds for a vacatur, citing *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2nd Cir. 1986.)

30 While the *Wallace* court did not elaborate on the "average person qualified to serve as an arbitrator" standard, its ruling raises the question whether an award issued by an arbitration panel comprised of lawyers may be subject to heightened scrutiny based on their presumptive knowledge of the law.

31 *See also Sawtelle v. Waddell & Reed, Inc.*, 2003 N.Y. App. Div. LEXIS 1243 (Feb. 11, 2003)(court found $25 million punitive damages award grossly disproportionate to the compensatory damages award and in manifest disregard of law); *New York Tel. Co. v. Communications Workers of Am. Local 1100*, 256 F.3d 89, 93 (2nd Cir. 2001)(court vacated award for manifest disregard of law where arbitrator explicitly ignored Second Circuit case law and applied law from outside the controlling circuit.)

32 *See e.g., Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F.Supp.2d 10, 19 (D. Mass. 2002).

33 *See Bisnoff v. King*, 154 F.Supp.2d 630 (S.D.N.Y. 2001).

Review of Circuit Rulings

GROUNDS FOR VACATING ARBITRAL AWARDS UNDER 9 U.S.C. §10

I. Award was procured by corruption, fraud or undue means (9 U.S.C. §10(a)(1)).

FIRST CIRCUIT

Int'l Bhd. of Firemen and Oilers, Local 261 v. Great N. Paper Co., 1984 U.S. Dist. LEXIS 22582, 118 L.R.R.M. (BNA) 2317 (D. Me. Oct. 22, 1984) (In order to vacate an arbitral award on the ground of fraud, "[t]he fraud must not have been discoverable upon the exercise of due diligence prior to the arbitration . . . must materially relate to an issue in the arbitration ... [and] must be established by clear and convincing evidence." Where the party alleged that there was a misstatement of facts and that testimony was perjured, the court rejected the suggestion that an arbitrator was not capable of distinguishing the evidence presented from a recitation of nonevidence in a post-hearing brief.)

SECOND CIRCUIT

Masters Choice, Inc. v. Cowie, 1997 U.S. Dist. LEXIS 5607 (W.D.N.Y. April 23, 1997) (Court found that respondent not entitled to vacatur of award based on corruption, fraud, or undue means, as he failed to demonstrate (1) that [Petitioner] engaged in fraudulent activity; (2) that he could not have discovered, by exercising due diligence, the alleged fraud before the award was issued; and (3) that the alleged fraud materially related to an issue in the arbitration.")

THIRD CIRCUIT

Perna v. Barbieri, 1998 U.S. Dist. LEXIS 5365 (E.D.Pa. April 16, 1998) ("In order to show 'corruption, fraud or undue means," a plaintiff must show an occurrence that so infected the arbitration process that the result was 'immoral if not illegal.'" Court found that late responses to discovery were not fundamentally unfair because they did not taint the outcome of the proceeding.), *aff'd*, 176 F.3d 472 (3d Cir. 1999).

FOURTH CIRCUIT

Rymer v. United Parcel Serv., Inc., 2000 U.S. Dist. LEXIS 11482 (M.D.N.C. April 10, 2000) (Where the alleged undue means was discovered by the complaining party during the arbitration and presented to the panel, the court found that the party could not establish the essential element of his claim that the fraud must not have been discoverable prior to or during the arbitration), *aff'd*, 9 Fed. Appx. 88, 2001 U.S. App. LEXIS 7938, 168 L.R.R.M. (BNA) 2394 (2001).

FIFTH CIRCUIT

Forsythe Int'l, S.A., v. Gibbs Oil Co., 915 F.2d 1017 (5th Cir. 1990) ("[W]here the panel hears the allegation of fraud and then rests its decision on grounds clearly independent of issues connected to the alleged fraud, the statutory basis for vacatur is absent.")

In Re Arbitration Between Trans Chem., Ltd. v. China Nat'l Mach. Import and Export Corp., 978 F. Supp. 266 (S.D. Tex. 1997) (The untimely production of a report did not result in the arbitral award being procured through fraud or undue means where the improper behavior was known prior to the arbitration and the complaining party did not seek any relief from the arbitrators), *aff'd*, 161 F.3d 314 (5th Cir. 1998).

SIXTH CIRCUIT

Pontiac Trail Med. Clinic, P.C. v. Painewebber. Inc., 1993 U.S. App. LEXIS 20280 (6th Cir. July 29, 1993) (Partially because the appellant did not show that it exercised due diligence in attempting to discover the alleged fraud prior to the arbitration, the court found that allegations that a party fraudulently withheld documents and gave misleading discovery responses did not establish fraud or undue means by clear and convincing evidence.)

SEVENTH CIRCUIT

Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328 (7th Cir. 1995) (Party's allegations that opposing party caused an indispensable party to be absent from the arbitration hearing did not meet the elements of vacatur under § 10(a)(1) because of the failure to show that the absence was procured by the opposing party or that it could not have been prevented.)

Shearson Hayden Stone, Inc. v Liang, 493 F. Supp. 104 (N.D. Ill. 1980) (Court found that it could not rely on "newly discovered evidence" to vacate an award under §10(a)(1) because the party did not demonstrate that it could not have discovered the "newly discovered evidence" prior to the arbitration proceeding), *aff'd*, 653 F.2d 310 (7th Cir. 1981).

EIGHTH CIRCUIT

PaineWebber Group, Inc. v. Zinsmeyer Trusts Partnership, 187 F.3d 988 (8th Cir. 1999) (Court reversed and remanded the judgment of the district court vacating the arbitration award because PaineWebber did not employ undue means in asserting that documents were privileged and the Appellee failed to prove that PaineWebber's conduct "procured" the arbitration award), *cert. denied*, 529 U.S. 1020 (2000).

NINTH CIRCUIT

Lafarge Conseils Et Etudes, S.A., v. Kaiser

Cement & Gypsum Corp., 791 F.2d 1334 (9th Cir. 1986) (Court found that even if the motion to vacate was timely, the Party's statement that during the arbitration it suspected that the opposing party falsified documents vitiated its claim that the alleged fraud was not discoverable by due diligence.).

A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401 (9th Cir. 1992) (Court did not recognize "mere sloppy, overzealous lawyering or offering a meritless defense as constituting 'undue means.'"), *cert. denied,* 506 U.S. 1050 (1993).

TENTH CIRCUIT

Foster v. Turley, 808 F.2d 38 (10th Cir. 1986) ("The party asserting fraud must establish it by clear and convincing evidence, and must show that due diligence could not have resulted in discovery of the fraud prior to arbitration." Court reversed district court, in part, and remanded the case for determination of whether fraud was proven by clear and convincing evidence and whether the fraud could have been discovered prior to the arbitration.)

ELEVENTH CIRCUIT

Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988) (Court reversed and remanded the district court's confirmation of the punitive damages portion of arbitral award where the credentials of an expert witnesses testifying on punitive damages were found to be completely false. Court reasoned that under AAA arbitration rules, parties do not provide a pre-hearing exchange of witness lists and, therefore, there was no opportunity to thoroughly investigate the expert's credentials and the expert's perjury materially related to an issue in the arbitration.)

II. Evident partiality or corruption in the arbitrators, or either of them (9U.S.C. §10(a)(2))

FIRST CIRCUIT

Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co., 866 F.2d 11, 13 (1st Cir. 1989) (Court found that an arbitrator's interruptions and interjections of comments or explanations favorable to the opposing party would not constitute evident partiality where there was no objection to the conduct at the arbitration hearing. The court "will not entertain a claim of bias where it could have been raised at the arbitration proceedings but was not.")

Nationwide Mut. Ins. Co. v. First State Ins. Co., 213 F.Supp.2d 10 (D. Mass. 2002) (Court rejected a claim of improper bias as to a "party arbitrator" due to the arbitrator's position taken in a previous arbitration, an ex parte communication with the arbitration panel that was corrected within a matter of days, and adverse panel rulings.).

SECOND CIRCUIT

Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Hollywood Heating & Cooling, Inc., 1 Fed. Appx. 30, 2001 U.S. App. LEXIS 328 (2d Cir. Jan. 5, 2001) (Court stated that in order to have an award vacated because of evident partiality, a party "must show more than an appearance of bias and must demonstrate that 'a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" Court found that the defendant's affidavit describing the alleged swearing and screaming of an arbitrator "failed to raise an issue of fact regarding evident partiality.")

THIRD CIRCUIT

Kaplan v. First Options, 19 F.3d 1503 (3d Cir. 1994), ("In order to show evident partiality, the challenging party must show a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration." Evident partiality requires proof of circumstances powerfully suggestive of bias."), reh'g denied, 29 F.3d 111 (3d Cir. 1994), *cert. granted,* in part, 513 U.S. 1040 (1994), and *aff'd*, 514 U.S. 938 (1995).

FOURTH CIRCUIT

ANR Coal Co., Inc. v. Cogentrix of N. Carolina, Inc., 173 F.3d 493 (4th Cir. 1999) (Finding no evident partiality where an arbitrator did not fully disclose his relationship to a party, the court stated that to vacate an award due to evident partiality, a party must demonstrate "that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration." The court identified four factors to determine if a claimant has demonstrated evident partiality: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding"), *cert. denied*, 528 U.S. 877 (1999).

FIFTH CIRCUIT

Bernstein Seawell & Kove v. Bosarge, 813 F.2d 726, 732 (5th Cir. 1987) (Request that an arbitration award be vacated because of evident partiality or corruption failed because "Appellant had the obligation to make his objection to the composition of the arbitration panel at the time of the hearing.")

SIXTH CIRCUIT

Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621 (6th Cir. 2002) (Court affirmed the judgment of the district court, rejecting each of Home's five declared instances of "evident partiality." In setting forth the standard to be applied, the court noted that "evident partiality will only be found where a reasonable person would have to conclude that an arbitrator was partial to one party" and that "alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator.")

SEVENTH CIRCUIT

Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617 (7th Cir. 2002) (Party appointed arbitrator failed to disclose that during previous employment, he had been engaged by the subsidiary of a party as counsel on a matter unrelated to the arbitration. Court reversed district court's vacatur of

award due to evident partiality, noting that for someone in the arbitrator's position "as a party appointed arbitrator, and one who could have presided in court under the standards of §455 –failure to make a full disclosure may sully his reputation for candor but does not demonstrate "evident partiality" and thus does not spoil the award."), reh'g denied, 2002 U.S. App. LEXIS 23017 (7th Cir. Nov. 4, 2002.), *petition for cert. filed*, (U.S. Feb. 3, 2003) (No. 02-2458).

EIGHTH CIRCUIT

Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815 (8th Cir. 2001) (Court reversed district court's vacatur of arbitral award due to evident partiality because the issue of evident partiality was never raised to the arbitrators, the contractual language contemplates partial party arbitrators, and AFC failed to show that the "evident partiality" had a prejudicial impact on the arbitration awards.), reh'g denied, 2002 U.S. App. LEXIS 2600 (8th Cir. Feb. 20, 2002), and *cert. denied*, 154 L. Ed. 2d 23, 123 S. Ct. 87 (2002).

NINTH CIRCUIT

American Tel. & Tel. Co. v. United Computer Sys., Inc., 7 Fed. Appx. 784, 2001 U.S. App. LEXIS 7630 (9th Cir. April 16, 2001) (The court affirmed the district court's confirmation of the award finding no evidence of bias, corruption, or prejudice.)

ELEVENTH CIRCUIT

Gianelli Money Purchase Plan And Trust v. ADM Investor Servs., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998) (Court reversed and remanded the district court's order vacating the award where the district court had made a factual finding of no actual bias and the arbitrator had no actual knowledge of the information upon which the alleged conflict was founded), *cert. denied*, 525 U.S. 1016 (1998).

III. 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 (9 U.S.C. §10(a)(3)).

FIRST CIRCUIT

Morani v. Landernberger, 196 F.3d 9, 11-12 (1st Cir. 1999) ("Because arbitration proceedings do not necessarily follow typical courtroom procedure, there may be cases in which unexpected application of strict procedural rules could rise to the level of 'misconduct ... in refusing to hear evidence pertinent and material to the controversy.'" Court found that the lawyer "should have realized that, after presenting witness testimony for several days and then resting his case, he might not be able to introduce additional non-rebuttal testimony.")

Nationwide Mut. Ins. Co. v. First State Ins. Co., 213 F.Supp.2d 10, 19 (D. Mass. 2002) ("[A]n arbitrator is not required to hear newly discovered evidence, and such evidence is not a basis for vacating an arbitration award ..." "Arbitrators are not bound to hear all of the evidence tendered by the parties, though they must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments." The court found that the arbitrator's were not guilty of misconduct for refusing to reopen discovery into an issue that was already decided.)

Hoteles Condado Beach, La Concha and Convention Center v. Union de Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985) (Court vacated arbitration award where the arbitrator's refusal to give any weight to evidence effectively denied a party the right to present evidence.).

SECOND CIRCUIT

Alexander Julian, Inc., v. Mimco, Inc., 29 Fed. Appx. 100, 2002 U.S. App. LEXIS 2650 (2d Cir. Feb. 19, 2002) ("Generally courts have interpreted 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review." Court did not find it fundamentally unfair for the panel to set dates when one party's counsel was unavailable where the party had ample notice of the decision and could have substituted counsel or chosen alternate representation, but instead the counsel chose not to appear without taking precautions not to prejudice his client.)

Bisnoff v. King, 154 F.Supp.2d 630, 638 (S.D.N.Y. 2001) (Panel's decision to deny an adjournment of the hearing "was reasonable and did not preclude the Petitioner from presenting evidence 'pertinent and material to the controversy,'" where an adjournment had been sought due to the heart condition of a witness that was able to work 30 hours a week as a stockbroker.)

Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997) (Court found that the panel's refusal to continue the hearings to allow a witness to testify amounted to fundamental unfairness and misconduct sufficient to vacate the arbitration award.)

North River Ins. Co. v. Philadelphia Reinsurance Corp., 1998 U.S. Dist. LEXIS 1945 (S.D.N.Y. Feb. 24, 1998) (The court found that that in making its decision to exclude the testimony of a witness, the panel did not engage in misconduct because a degree of "prejudice tantamount to manifest injustice" was not demonstrated, there was ample time for the party to present its case and the "panel made the decision [to exclude testimony] to preserve the fundamental fairness of the proceeding, not to undermine it.")

THIRD CIRCUIT

Carmel v. Circuit City Stores, Inc., 2000 U.S. Dist. LEXIS 12065 (E.D. Pa. August 22, 2000) (Court found that the party failed "to show how he was prejudiced, since the arbitration award addressed each of his claims and arguments.")

Maiocco v. Greenway Captial Corp., 1998 U.S. Dist LEXIS 836 (E.D. Pa. Feb. 2, 1998) (The court found that the panel's taking of testimony by phone did not constitute misconduct that

stripped a party of its right to confront and cross-examine a witness.)

Pacilli v. Philips Appel & Walden, Inc., 1991 U.S. Dist LEXIS 13355 (E.D. Pa. September 23, 1991) (Where the panel failed to allow a party to cross-examine a witness and failed to adjourn the proceedings to allow the party to participate in a colloquy, the court vacated a portion of the arbitration award that went against that party, finding that the arbitration panel had engaged in 10(a)(3) misconduct.)

FOURTH CIRCUIT

E.Spire Communications, Inc. v. CNS Communications, 39 Fed. App. 905, 2002 U.S. App. LEXIS 14196 (4th Cir. July 15, 2002) (Arbitration panel's failure to rule on a jurisdictional motion was an insufficient basis to justify vacatur of the arbitration award under § 10(a)(3).)

Int'l Union, United Mine Workers of Am., District 17 v. Marrowbone Development Co., 232 F.3d 383 (4th Cir. 2000) (Finding that a party had been denied a "full and fair hearing," court affirmed district court's order vacating an arbitration award and remanded to the arbitrator for the evidentiary hearing required under the collective bargaining agreement.)

FIFTH CIRCUIT

Gulf Coast Indus. Workers Union v. Exxon Co., USA, 70 F.3d 847 (5th Cir. 1995) (Court affirmed district court's vacatur of an arbitration award because the arbitrator failed to consider pertinent and material evidence and prevented a party from presenting evidence.)

SIXTH CIRCUIT

Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621 (6th Cir. 2002) (Panel's decision not to allow discovery into an opposing party's costs submission met the standard of fundamental fairness where the party both received copies of the submission and was given the opportunity to respond to the submission.)

SEVENTH CIRCUIT

Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328 (7th Cir. 1995) (Claim that arbitrator committed misconduct by failing to notify party of arbitration was without merit because a copy of the demand had been sent via regular mail to the party's last known address in accordance with the AAA's rules for service.)

EIGHTH CIRCUIT

El Dorado Sch. Dist. # 15 v. Continental Cas. Co., 247 F.3d 843, 848 (8th Cir. 2001) ("Courts will not intervene in an arbitrator's decision not to postpone a hearing if any reasonable basis for it exists." Arbitral decision was affirmed because the arbitrator's determination not to postpone the hearing did not amount to misconduct that deprived the party of a fair hearing.)

NINTH CIRCUIT

U.S. Care, Inc. v. Pioneer Life Ins. Co. of Illinois, 53 Fed. Appx. 491, 2002 U.S. App. LEXIS 27154 (9th Cir. Dec. 6, 2002) (Court rejected the contention that the arbitrators failed to order or consider relevant evidence because the appellant "failed to show what, if any, evidence was contained in third party documents that were not produced at the hearing and, thus, there [was] no basis for an argument that the arbitrators refused to hear pertinent and material evidence.")

TENTH CIRCUIT

Bad Ass Coffee Co. of Hawaii v. Bad Ass Coffee Ltd. Partnership, 2001 U.S. App. LEXIS 23612 (10th Cir. Oct. 30, 2001) ("Even if the arbitrator erroneously excluded material evidence, [the court] will not vacate the award unless the error deprived a party of a fundamentally fair hearing." The court found that the party's assertion that it was denied a fundamentally fair hearing was baseless.)

ELEVENTH CIRCUIT

Scott v. Prudential Sec., Inc., 141 F.3d 1007 (11th Cir. 1998) (Court found that the panel's refusal to postpone the hearing and refusal to allow counsel to participate by telephone did not amount to misconduct by the arbitrators.)

IV. The arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, definite award upon the subject matter submitted was not made (9 U.S.C. §10(a)(4))

FIRST CIRCUIT

Wonderland Greyhound Park, Inc. v. Autotote Sys., Inc., 274 F.3d 34 (1st Cir. 2001) (Arbitrator did not exceed the scope of his authority by interpreting the contract where the parties agreed to accept the arbitrator's interpretation of the contract.)

SECOND CIRCUIT

Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200, 220 (2d Cir. 2002) (The court's "inquiry under § 10(a)(4) focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." The court found that because the parties questioned whether the arbitrator properly awarded expectancy damages in the case at bar, the award could not be vacated under 10(a)(4).)

THIRD CIRCUIT

Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 301 (3rd Cir. 2001) (The court enumerated the following principles for determining whether an arbitrator has exceeded the scope of his authority: "(1) a reviewing court should presume that an arbitrator acted within the scope of his or her authority; (2) this presumption may not be rebutted by an ambiguity in a written opinion; but (3) a court may conclude that an arbitrator exceeded his or her authority when it is obvious from the written opinion." The court affirmed the district court's order to vacate an award, finding that the arbitrator's opinion demonstrated that he had ruled on an issue that was not properly before him), *cert. denied*, 534 U.S. 1020 (2001)

FOURTH CIRCUIT

E.Spire Communications, Inc. v. CNS Communications, 39 Fed. App. 905, 2002 U.S. App. LEXIS 14196 (4th Cir. July 15, 2002) (Given the language of

the parties' settlement agreement, the court found the argument that the panel exceeded its authority because the substantive dispute was not arbitrable was baseless.)

Poston v. National Football League Players Ass'n., 2002 U.S. Dist. LEXIS 23085, 171 L.R.R.M. (BNA) 2158 (E.D. Va. Aug. 26, 2002) (Court found that an arbitration award was within the arbitrator's authority stating that the award "draws its essence from the agreement between the parties in the sense that it was: (1) within the arbitrator's prescribed role; (2) in accordance with the plain language of the agreement; and (3) was within the proper scope of the arbitrator's discretion.")

FIFTH CIRCUIT

Brook v. Peak Int'l, Ltd., 294 F.3d 668 (5th Cir. 2002) (Where the party failed to make a plain and timely objection so that a responsible party (AAA, arbitrator or federal court) could enforce terms of the agreement, the arbitration award could not now be vacated due to the improper selection process used.)

SIXTH CIRCUIT

Green v. Ameritech Corp., 200 F.3d 967, 976 (6th Cir. 2000) (Court would not vacate an award due to arbitrator's failure to provide a detailed arbitral opinion. "Ordinarily . . . arbitrators have no obligation to the court to give their reasons for an award." "If parties to an arbitration agreement wish a more detailed arbitral opinion, they should clearly state in the agreement the degree of specificity required.")

SEVENTH CIRCUIT

Smart v. Int'l Bhd. of Elec. Workers, Local 702, 315 F.3d 721, 725 (7th Cir. 2002) ("The purpose of [section 10(a)(4)] is merely to render unenforceable an arbitration award that is either incomplete in the sense that the arbitrators did not complete their assignment (though they thought they had) or so badly drafted that the party against whom the award runs doesn't know how to comply with it." Court found that the arbitration award was complete and definite), reh'g denied, 2003 U.S. App. LEXIS 376 (7th Cir. Jan. 9, 2003).

EIGHTH CIRCUIT

Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC, 319 F.3d 1060 (8th Cir. 2003) (Court found that the panel did not fully decide the issue of prejudgment interest because it expressly left the award open for judicial determination on that issue.)

Missouri River Servs., Inc. v. Omaha Tribe of Nebraska, 267 F.3d 848 (8th Cir. 2001) (The court vacated an award where arbitrator disregarded unambiguous contractual language failing to draw the award from the essence of the agreement), cert. denied, 535 U.S. 1053 (2002)

NINTH CIRCUIT

Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 830 (9th Cir. 1995) ("When arbitrators rule on a matter not submitted to them, or act outside the scope of the parties' contractual agreement, the award may be overturned because the arbitrators exceeded the scope of their authority." The court found that the panel addressed matters within the parties' submissions where the parties must have been aware that an award of partial relief would put the particular question before the panel and was thus, implicit in the submissions.)

Bennet v. Alaska Elec. Trust Funds, 45 Fed. Appx. 640, 2002 U.S. App. LEXIS 17399 (9th Cir. Aug. 6, 2002) ("An arbitrator who decides a question that is 'implicit in the submission' does not exceed his or her authority.")

TENTH CIRCUIT

Bowen v. AMOCO Pipeline Co., 254 F.3d 925 (10th Cir. 2001) (Panel did not exceed its powers in awarding punitive damages pursuant to language stating that the parties authorize "any remedy of relief.")

ELEVENTH CIRCUIT

Kahn v. Smith Barney Shearson Inc., 115 F.3d 930, 933 (11th Cir. 1997) (Court held that "the arbitrators exceeded their power in ruling on Smith Barney's limitations defenses since the New York Court of Appeals ruled that the parties, in choosing New York law, had chosen to have limitations determinations made by the court and not the arbitrators"), *reh'g denied*, 124 F.3d 223 (11th Cir. 1997)

EXTRA-STATUTORY GROUNDS FOR VACATING ARBITRATION AWARDS

I. Manifest Disregard of the Law

U.S. SUPREME COURT

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (cites to Wilko v. Swan, 346 U.S. 427, 436-437 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989) in support of proposition that an award can be set aside if the arbitrator's decision is in manifest disregard of the law.)

FIRST CIRCUIT

Wonderland Greyhound Park, Inc. v. Autotote Sys., Inc., 274 F.3d 34, 36 (1st Cir. 2001) ("An award is in manifest disregard of the law if either 'the award is contrary to the plain language of the contract,' or 'it is clear from the record that the arbitrator recognized the applicable law, but ignored it'" (quoting *Gupta v. Cisco Sys., Inc*., 274 F.3d 1 (1st Cir. 2001.) Court found that the arbitral award was neither internally inconsistent nor in manifest disregard of the law.)

SECOND CIRCUIT

Sawtelle v. Wadell & Reed, Inc., 2003 N.Y. App. Div. LEXIS 1243 (February 11, 2003) (Court vacated the portion of an arbitration award granting punitive damages finding that the award was irrational, excessive and in manifest disregard of applicable law.)

Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200 (2d Cir. 2002) (Court found that the arbitration award was not in manifest disregard of the law where, among other things, there was not sufficient evidence to demonstrate that the arbitrator was aware of New York's "law of the case" doctrine.)

New York Tel. Co. v. Communications Workers of Am. Local 1100, 256 F.3d 89 (2d Cir. 2001) (The court vacated an

arbitration award finding that the arbitrator explicitly ignored Second Circuit case law and applied law from outside the controlling circuit.)

DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818 (2d Cir. 1997) (Arbitrator's failure to award attorney's fees as proscribed by a statute was not in manifest disregard of the law where the court found there was not sufficient evidence that the arbitrators actually knew of and intentionally disregarded the mandatory aspect of the statute's fee provision), *cert. denied*, 522 U.S. 1049 (1998), and reh'g denied, 522 U.S. 1154 (1998).

Wallace v. Buttar, 2003 U.S. Dist. LEXIS 316 (S.D.N.Y. Jan. 8, 2003) ("Manifest disregard of the law requires more than a mere error in the law or failure on the part of the arbitrators to understand or apply the law." (citing *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892 (2d Cir. 1985) "Manifest disregard of the law occurs when (1) arbitrators know of a governing legal principle yet refused to apply it or ignored it all together, and (2) the law ignored was well defined, explicit and clearly applicable to the case." (citing *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997)).

Wall St. Assocs., L.P. v. Becker Paribas, Inc., 818 F. Supp. 679, 686 (S.D.N.Y. 1993) (Court could not determine that the panel acted in manifest disregard of the law because it was not demonstrated that the award was "based on impermissible grounds."), *aff'd*, 27 F.3d 845 (2d Cir. 1994).

THIRD CIRCUIT

Hruban v. Steinman, 40 Fed. Appx. 723, 2002 U.S. App. LEXIS 14976 (3d Cir. July 24, 2002) (Court acknowledged that one ground for vacatur of an arbitration award is where it was procured in "manifest disregard of the law," but found that the party did not establish that the arbitrators acted in manifest disregard of the law.).

FOURTH CIRCUIT

Syncor Int'l Corp. v. McLeland, 1997 U.S. App. LEXIS 21248 (4th Cir. Aug. 11, 1997) (General standard is that "[a] legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law. An arbitration award is enforceable even if the award resulted from a misinterpretation of law, faulty legal reasoning or erroneous legal conclusion, and may only be reversed when arbitrators understand and correctly state the law, but proceed to disregard the same." The court, in this instance, reviewed the issue de novo applying a different standard because the parties had contractually expanded the scope of judicial review of arbitration awards. The court concluded that the arbitrator "did not commit error, either legal or factual, in issuing his award"), *cert. denied*, 522 U.S. 1110 (1998).

FIFTH CIRCUIT

Brook v. Peak Int'l, Ltd., 294 F.3d 668, 672 (5th Cir. 2002) (Court stated that the FAA provides the "only grounds upon which a reviewing court may vacate an arbitrative award." (quoting *McIlroy v. Painewebber, Inc.*, 989 F.2d 817 (1993) (5th Circuit only applies statutory grounds for vacating of arbitration award.)

American Nat'l Ins. Co. v. Everest Reinsurance Co., 180 F.Supp.2d 884 (S.D. Tex. 2002) (Court found that the limited duration of the panel's post-hearing deliberations was acceptable and that the award was not issued in manifest disregard of the law.)

SIXTH CIRCUIT

Trivisonno v. Metro. Life Ins. Co., 39 Fed. Appx. 236, 2002 U.S. App. LEXIS 12805 (6th Cir. June 24, 2002) (The arbitrators' failure to explain their reasoning does not constitute a manifest disregard of the law.)

SEVENTH CIRCUIT

George Watts & Son, Inc. v. Tiffany and Co., 248 F.3d 577 (7th Cir. 2001) ("[I]n dictum the Supreme Court has suggested that an arbitrator's 'manifest disregard' of legal rules justifies judicial intervention." In trying to preserve the established relation between court and arbitrator, the court limited "manifest disregard of the law" to two possibilities: "an arbitral order requiring the parties to violate the law. . ., and an arbitral order that does not adhere to the legal principles specified by the contract and, hence, unenforceable under § 10(a)(4).)

EIGHTH CIRCUIT

Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC, 319 F.3d 1060 (8th Cir. 2003) ("Where an arbitration panel cites relevant law, then proceeds to ignore it, it is said to evidence a manifest disregard for the law." Court affirmed district court's ruling vacating the award of attorneys' fees finding the award evidenced a manifest disregard for Minnesota law.)

Hoffman v. Cargill Inc., 236 F.3d 458 (8th Cir. 2001) ("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 identify the applicable, governing law and then proceed to ignore it." The court found that the record "does not sustain the conclusion that the arbitrators acted irrationally or identified applicable law and then ignored it.")

NINTH CIRCUIT

Koruga v. Fiserv Correspondent Servs., Inc., 40 Fed. Appx. 364, 2002 U.S. App. LEXIS 6439 (9th Cir. Feb. 7, 2002) (Where panel requested a briefing on all law governing the interpretation of certain statutes and neither party cited any direct authority, the panel's award could "not be said to have been entered in manifest disregard of the law.")

TENTH CIRCUIT

Curtiss Simmons Capital Res., Inc. v. Edward Kraemer & Sons, Inc., 23 Fed. App. 924, 2001 U.S. App. LEXIS 25970 (10th Cir. Dec. 3, 2001) (Because there was not a clear expression of the law on the relevant issue, the court determined that it could not "conclude that the arbitrators willfully disregarded applicable . . . law.")

ELEVENTH CIRCUIT

University Commons-Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331 (11th Cir. 2002) (The record contained no indication of the arbitrators' reasons for making the award, and,

thus, the court had no reason to believe that the panel disregarded the law in making the award.")

Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1462 (11th Cir. 1997) (The court vacated an arbitration award where it "was able to clearly discern from the record that . . . the arbitrators recognized that they were told to disregard the law . . .in a case in which the evidence to support the award was marginal" and with "nothing in the record to refute that the law was disregarded.")

D.C. CIRCUIT

LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702 (D.C. Cir. 2001) (The court considered arguments that the panel manifestly disregarded both the facts and the law in coming upon its conclusion to vacate the award.)

II. Fundamental Unfairness

EIGHTH CIRCUIT

Hoffman v. Cargill Inc., 236 F.3d 458 (8th Cir. 2001) ("If a 'fundamental unfairness' standard exists, it must apply to arbitration schemes so deeply flawed as to preclude the possibility of a fair outcome." Court did not find there to be a fundamental unfairness.)

III. Public Policy

U.S. SUPREME COURT

Eastern Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57 (2000) (The Court affirmed the arbitration award finding that it was not contrary to "explicit, well defined, dominant public policy.")

United Paperworkers Int'l Union, AFL-CIO v. MISCO, Inc., 484 U.S. 29 (1987) (The public policy must be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." The Court found that no violation of the public policy was clearly shown and reversed the Court of Appeals order vacating an arbitration award.)

FIRST CIRCUIT

New England Health Care Employees Union, District 1199 v R.I. Legal Servs., 273 F.3d 425, 428 (1st Cir. 2001) (Court rejected argument that it should overturn arbitral award, finding that there was "no explicit, well-defined public policy to require a party to arbitrate claims it has agreed not to arbitrate.")

SECOND CIRCUIT

Saint Mary Home, Inc., v. Service Employees Int'l Union, Dist. 1199, 116 F.3d 41, 46 (2d Cir. 1997) (Court affirmed the judgment of the district court confirming an arbitration award where the evidence did not show the existence of an established public policy "against the reinstatement of a long term employee after a seven-month suspension without pay or benefits following an arrest for possession with intent to sell marijuana.")

THIRD CIRCUIT

Hruban v. Steinman, 40 Fed. Appx. 723, 2002 U.S. App. LEXIS 14976 (3d Cir. July 24, 2002) (Court found that the party failed to establish any of the grounds for vacatur and set out the following elements that warrant vacatur on public policy grounds: the arbitration award must violate a well-defined and dominant public policy, which the court must ascertain by reference to the laws and legal precedents and not from general considerations of supposed public interests.)

FOURTH CIRCUIT

Yusa, Inc. v. Int'l Union of Elec., Elec., Salaried, Mach. And Furniture Workers, AFL-CIO, Local 175, 224 F.3d 316, 321 (4th Cir. 2000) ("[Court] may vacate an arbitrator's award only if it violates clearly established public policy. . ."), *cert. denied*, 531 U.S. 1149 (2001)

FIFTH CIRCUIT

Weber Aircraft Inc. v. General Warehousemen and Helpers Union Local 767, 253 F.3d 821 (5th Cir. 2001) (Where an arbitrator, pursuant to a collective bargaining agreement, ruled for the reinstatement of an employee that had been accused of sexually harassing a co-worker, the court reinstated the arbitrator's award because it could not find an "explicit, well defined, dominant public policy" to which the arbitration award was contrary.)

SIXTH CIRCUIT

Ohio Valley Coal Co. v. Pleasant Ridge Synfuels, L.L.C., 2002 U.S. App. LEXIS 27193 (6th Cir. December 23, 2002) (In concluding that the award should not be vacated, court stated that "an arbitration award violates public policy when it would violate some explicit public policy that is well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from the general considerations of supposed public interests.")

SEVENTH CIRCUIT

EEOC v. Indiana Bell Tel. Co., 256 F.3d 516, 524 (7th Cir. 2001) (Court noted that no award requiring an employer to tolerate an ongoing violation of Title VII of the Civil Rights Act of 1964 could be enforced as no arbitrator is entitled to direct a violation of positive law.)

EIGHTH CIRCUIT

Painewebber, Inc. v. Agron, 49 F.3d 347, 351 (8th Cir. 1995) (Court found that appellant did not identify a "well-defined and dominant public policy" and even if he had, the appellant failed to show that the award violated that policy.)

NINTH CIRCUIT

Spicuzza v. Securities Servs. Network, Inc., 32 Fed. Appx. 327, 2002 U.S. App. LEXIS 4155 (9th Cir. March 11, 2002) (Court found there was no evidence that the arbitration award violated public policy.)

TENTH CIRCUIT

Kennecott Utah Copper Corp. v. Becker, 195 F.3d 1201 (10th Cir. 1999) (Court found that arbitration award reinstating employee who had tested positive for drugs one time, with no evidence of impairment and no evidence of workplace possession or use, did not demonstrate the alleged public policy violation), *cert. denied*, 531 U.S. 1035 (2000).

ELEVENTH CIRCUIT

Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1458 (11th Cir. 1997) (Court recognized that an arbitration award may be vacated if enforcement of the

award is contrary to public policy.)

D.C. CIRCUIT

LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702 (D.C. Cir. 2001) ("In addition to the limited statutory grounds on which an arbitration award may be vacated, arbitration awards can be vacated only if they are in manifest disregard of the law or "if they are contrary to some explicit public policy that is well defined and dominant and ascertained by reference to the laws or legal precedents. "Consequently, to modify or vacate an award on this ground, a court must find that (1) the arbitrators 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." (citing DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2nd Cir. 1997)).

IV. Arbitrary and Capricious

ELEVENTH CIRCUIT

Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000) (Where the court could not say that the arbitrator's decision was not grounded in fact, the assertion that the award was arbitrary and capricious failed.)

Scott v. Prudential Sec., Inc., 141 F.3d 1007, 1017 (11th Cir. 1998) ("An arbitration award will not be held to be arbitrary and capricious unless "a ground for the arbitrator's decision cannot be inferred from the facts of the case"), *cert. denied*, 525 U.S. 1068 (1999), and *reh'g denied*, 526 U.S. 1034 (1999).

TIMING OF CHALLENGE FOR PARTIALITY

SECOND CIRCUIT

Aviall, Inc. v. Ryder Sys. Inc., 110 F.3d 892, 897 (2d Cir. 1997) ("The FAA's lack of provision for pre-award removal of an arbitrator . . . prevents us from removing [the arbitrator] on account of whatever assistance it may have lent to [the defendant] so far in connection with the arbitration.")

Metropolitan Property and Cas. Ins. Co. v. J.C. Penny Cas. Ins. Co., 780 F.Supp. 885 (D. Conn. 1991) (Court found that under the circumstances, it could enjoin an arbitrator prior to the completion of the arbitration.) *But see, Aviall, Inc.*, 110 F.3d at 834 (2d Cir. 1997)(stating that courts removing arbitrators prior to the completion of the arbitration "have done so in the exercise of their inherent judicial authority, rather than pursuant to a statutory provision.")

THIRD CIRCUIT

Insurance Co. of N. Am. v. Pennant Ins. Co., Ltd., 1998 U.S. Dist. LEXIS 2466 (E.D. Pa. Feb. 18, 1998) ("[A] district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award.")

Vera v. First USA Bank N.A., 2001 U.S. Dist. LEXIS 9052 (D. Del. April 19, 2001) (Challenges "to the impartiality of an arbitrator cannot be entertained by a district court until after the conclusion of arbitration and the rendition of an award.")

FOURTH CIRCUIT

The Burlington Inc. Co. v. Trygg-Hansa Ins. Co. AB, 2002 U.S. Dist. LEXIS 19526 (M.D.N.C. April 19, 2002) (Court concluded that it lacked the authority to review the arbitrator's qualifications before the arbitration panel had issued an award.)

FIFTH CIRCUIT

Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co., 304 F.3d 476, 490 (5th Cir. 2002) (Court found that "the FAA does not expressly endorse court inquiry into the capacity of any arbitrator to serve prior to issuance of an arbitral award.")

SIXTH CIRCUIT

Third Nat'l Bank In Nashville v. Wedge Group, Inc., 749 F.Supp. 851, 855 (M.D. Tenn. 1990) ("Where the potential bias of a named arbitrator makes arbitration proceedings a prelude to later judicial proceedings challenging the arbitration award, a court can appoint a neutral substitute arbitrator." The court found that it was reasonable to conclude that the arbitrator would be partial to one party and granted a motion to stay the proceedings, subject to the appointment of a neutral arbitrator and ordered that the parties, within thirty days, submit the name of a mutually acceptable arbitrator for the court to appoint.)

SEVENTH CIRCUIT

Paul Davis Sys. Of N. Ill., Inc. v. Paul W. Davis Sys., Inc., 1998 U.S. Dist. LEXIS 16912 (N.D. Ill. Oct. 15, 1998) (FAA permits court to consider arbitrator bias only in the context of a post-award challenge.)

D.C. CIRCUIT

Black v. NFL Players Ass'n., 87 F.Supp.2d 1 (D.D.C. 2000) (Court rejected preemptory challenge to the neutrality of a party's arbitrator stating that the party remained free to challenge any final award on the ground of evident partiality.)

Recently Certified Arbitrators

Paul A. Bellone

Janet J. Burak

Thomas M. Daly

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

For procedure, see our web site at www.arias-us.org

Paul A. Bellone

Paul Bellone has been in the insurance/reinsurance industry since 1961, following his graduation from the University of Pittsburgh. His entire career has been in claims. His first position was as a field adjuster in the Brooklyn office of Liberty Mutual Insurance Co. During the next 12 _ years, while employed by Liberty Mutual, his assignments ranged across various supervisory and training positions. Mr. Bellone's reinsurance claims experience began with American Reinsurance Co., as a Regional Claims Supervisor, and concluded when he retired on April 1, 2002.

Subsequent to his position at American Re, Mr. Bellone had managerial responsibilities in the Claim Departments of Skandia America Reinsurance Co. as an Assistant Vice President, at Resolute Management Corp., as a Vice President, and as a Senior Vice President at both SCOR US Corp. and Commercial Risk Reinsurance Company. SCOR and Commercial Risk are wholly owned subsidiaries of SCOR Paris. Since retiring from Commercial Risk, he has been actively pursuing a supplemental career as an arbitrator and expert witness.

Mr. Bellone's professional claim responsibilities have dealt with a multitude of treaty and facultative contract and/or coverage issues that include; late notice, bad faith, follow the fortunes, loss allocation related to asbestos, environmental and latent defects, excess policy limits, extra contractual obligations, aggregate extension clauses and punitive damages. He also has experience with losses covered by auto, general liability and various professional liability policies.

Paul Bellone has an extensive background in performing reinsurance audits that concentrate on evaluating exposures and the claim handling practices and procedures of a ceding company. He developed and expanded the audit program at Skandia, SCOR and Commercial Risk.

Mr. Bellone was an active member of the RAA Claim and Environmental Committees, the IRU Claim Committee, BRMA Claim and Electronic Data Interchange Committees, and the Reinsurance Dispute Resolution Task Force that published a procedures booklet in September 1999.

Janet J. Burak

Janet Burak joined the law department of Everest Reinsurance Company (formerly Prudential Reinsurance) in 1980. Previously, she worked several years with a private law firm specializing in bankruptcy matters. At Everest Re (including its affiliated companies), she served as General Counsel from 1985 and additionally as Senior Vice President from 1994 until 2002. She is a graduate of Bucknell University and Seton Hall University School of Law and is admitted to practice law in New Jersey.

At Everest Re, Ms. Burak was responsible for all regulatory and compliance matters which enabled business to be written within legal parameters. She worked with underwriting and accounting on structuring surplus relief treaties, funded covers and loss portfolio transfers. Most recently, her work involved various derivative-based transactions generally underwritten by off-shore Bermuda companies, given the regulatory flexibility there. She also has a great deal of experience in resolving reinsurance and insurance disputes, including asbestos, environmental, late notice, misrepresentation and allocations, among others. Also, she is experienced in drafting appropriate contracts, including facultative certificates, treaties, commutation agreements and agency agreements.

During her 22-year reinsurance and insurance career, Ms. Burak served on several NAIC Advisory Committees addressing reinsurance and financial insurance issues and was a member of the RAA Law Committee, where she was Chairperson for two years. She is currently a member of the American Bar Association's Tort and Insurance Practice and Dispute Resolution sections.

Thomas M. Daly

Tom Daly is a product of New York City having grown up in the Chelsea section of Manhattan, the eldest of seven children and the son of a longshoreman and working mother. He attended grammar school in Greenwich Village, high school in the East Village and then ventured upstate to Dominican College in Blauvelt, N.Y. where he earned a B.S. in Business Administration.

Mr. Daly began his insurance career in 1977 as a Claims Adjuster for Liberty Mutual where he learned his craft handling general liability, automobile, property damage, and workers compensation claims for policyholders involved in heavy

construction activities. He entered the field of reinsurance claims when he joined Skandia America Reinsurance Company in 1981 as a Claims Analyst, responsible for Umbrella, Ocean Marine, and Medical Malpractice accounts.
In 1984, Mr. Daly joined the Yasuda Fire and Marine Insurance Company of America, where he started up the claims department; his responsibilities included underwriting and contract wording review. In 1990, He accepted the position of Vice President of Claims with Chartwell Reinsurance Company in Stamford, CT. Two years later, he was appointed to the Committee of Inspection for the Focus Insurance Company in Liquidation in Bermuda. Mr. Daly was directly responsible for merging the facilities and operations of the recently acquired Reinsurance Company of New York (RECO). He was subsequently promoted to Senior Vice President in charge of Claims and Administration and assumed responsibility for all program business. He also created the company's first environmental unit to handle all latent disease (asbestos, pollution, lead paint, etc) type claims.
In 1997, he was appointed to the Board of Directors of Chartwell Advisers Ltd., London that performed due diligence reviews of Lloyds' Syndicates for corporate capital clients. His duties have taken him to various parts of England and Scotland where he performed file reviews on general liability, professional liability and motor accounts. Three years later, he joined the Alea Group (formerly Rhine Re) as Senior Vice President in charge of Claims and Administration. His primary objective was to develop a professional reinsurance claims department with the requisite expertise to handle complex casualty lines including professional liability, finite, program and alternative risk business.
In 2002, Mr. Daly formed his own company, Thomas M. Daly & Associates (www.tmdaly.com) to provide litigation support and loss-consulting services to the insurance industry. His largest client is presently the Alea Group where he provides claims services to the U.S. operations and the international franchises located in Canada, London and Bermuda.
Mr. Daly is a member of the Federation of Defense and Corporate Counsel (FDCC), ARIAS• U.S., and served on the RAA Claims Committee from 1993 to 1999. He also served two terms (1987-88) as the Claims Chairman for the Independent Reinsurance Underwriters Association (IRU). He lives in New Fairfield, CT with his wife, Maryann, and their five children. He is the founder his own thoroughbred racing company and races in the New York circuit. He invites anyone who has ever dreamed of owning a thoroughbred to visit him on the web at (www.canterburystables.com).

Brian J. Donnelly

Brian Donnelly has more than 30 years of experience as a hands-on, business-oriented legal professional whose insurance regulatory, expert witness, and mediation and arbitration practice has focused on the life and health insurance and managed care industries. His background includes eight years as senior vice president, general counsel and secretary to Blue Cross of California; five years as senior vice president, general counsel and secretary to American General Life Insurance Company; and nine years as vice president and associate general counsel to Beneficial Standard Life Insurance Company.
In the course of his career, Mr. Donnelly has participated in the legal aspects of virtually all activity of a health or life insurer, including reinsurance, product development, provider contracting, underwriting and claims, human resources and employment, discrimination and sexual harassment claims, litigation and arbitration, regulatory and legislative affairs, investments, and corporate reorganizations.
Upon leaving Blue Cross of California, he was of counsel to the law firm of Paul, Hastings, Janofsky and Walker, LLP, in its Los Angeles office, and served as president of the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) from 1997 to 1998. Most recently, Mr. Donnelly has developed his own legal and consulting practice, where he focuses on mediations and arbitrations, California and multi-state regulatory issues, and expert witness matters. He has mediated over 50 cases, and is an ARIAS• U.S. certified arbitrator.
Mr. Donnelly attended St. Joseph's College and received his B.A. degree from Youngstown State University, his J.D. degree from the American University Washington College of Law, and a Certificate in Dispute Resolution from Pepperdine Law School's Straus Institute. He is a member of ARIAS• U.S., and of the American, California, Texas, Virginia, District of Columbia, Los Angeles County and Ventura County Bar Associations.

John H. Drew

John Drew is currently self-employed, doing business as J. Drew Insurance Claim Services in Princeton, New Jersey. He is a private consultant in various insurance claim matters, including primary and excess insurance and reinsurance coverage analysis, complex claim evaluations,

in focus

Brian J. Donnelly

John H. Drew

in focus

I. Davis Jessup, II

Barbara Niehus

James J. Phair

catastrophic case management, expert testimony, claim management services, audits and other consultations. On November 30, 2001, he was appointed the Administrator in charge of winding down the business of Custom Risk Solutions, LLC.

Mr. Drew practiced law in Wisconsin for over ten years, where he was a partner in the firm of Steele, Smyth, Klos & Flynn. His practice principally involved personal injury and insurance litigation. In 1984, Mr. Drew joined the insurance industry in California, serving in claim positions at A.I.A.C., Wausau International Underwriters and Industrial Indemnity. In 1989, he became a Senior Claims Counsel for Crum & Forster Corporation in New Jersey. From 1991-1993, he was the Assistant Secretary and London Representative of Crum & Forster Managers (ILL), where his primary task was to expedite reinsurance recoveries from the London market. Most recently, Mr. Drew's company employment was as Vice President and Claims Counsel for A.C.E. Insurance Company, Ltd, now known as ACE Bermuda Insurance, Ltd. In that position, he was personally involved with the largest and most complex Excess Liability and D&O claims, and made coverage determinations and issued the opinion letters for most of the Excess Liability claims, involving policies of up to $200 million in limits. He supervised and, as necessary, was the company witness for several involved arbitrations in London.

I. Davis Jessup, II

In 1999, Dave Jessup established Tattersall, Inc., a reinsurance consulting company specializing in arbitration, mediation, and pre-trial investigation. Mr. Jessup, an ARIAS• U.S. Certified Arbitrator focusing on insurance and reinsurance, brings 30+ years of extensive experience to the process. Prior to establishing Tattersall, Inc., Mr. Jessup held executive management positions at AEGIS Insurance Services and Mony Reinsurance Corporation. In addition to developing strategies for placement of ceded reinsurance with European, American and Lloyds companies, he was responsible for structuring, implementing, and monitoring reinsurance security guidelines. At Mony Reinsurance, Mr. Jessup led the formation of the casualty facultative department and implemented underwriting policy. He secured retrocessional coverage with leading domestic and foreign reinsurers.

In addition, he specializes in underwriting professional liability and commercial accounts. He holds a current State of New Jersey Property and Casualty license. Dave Jessup received a B.A. from Parsons College and an M.S. from St. Francis University.

Barbara Niehus

Barbara Niehus is an actuary with over 30 years of life and health insurance/reinsurance experience. Her background encompasses a broad range of management and technical functions such as: product design, pricing, underwriting, administration, reinsurance, mergers and acquisitions, regulatory compliance, financial reporting, and litigation support and management. She has overseen a wide range of products including: traditional group, small group, and individual medical insurance; long term care insurance; disability insurance; accidental death and specialty accident insurance, and life insurance.

Since founding Niehus Actuarial Services, Inc. in 2001, Ms. Niehus has been retained in more than ten matters involving insurance and reinsurance disputes, providing expert support in the form of analysis, consulting advice, or testimony. In one such case, on behalf of the American Bar Endowment, Ms. Niehus testified with respect to industry custom and practice, and calculated the amount of damages. Judgment was entered in favor of the Endowment and they were awarded the full amount of damages as well as prejudgment interest (The American Bar Endowment v Mutual of Omaha Ins. Co., 2002 WL 480960 (N.D.Ill. March 21, 2002)).

Immediately prior to entering the consulting field, she was Chief Financial Officer for Group Operations of CNA. Previously, she had worked at Celtic Life Insurance Company where she was Executive Vice President responsible for the small group lines of business. Ms. Niehus began her career in group benefits with Allstate Insurance Company, where she was responsible for group underwriting, and also managed plans for Sears, Roebuck & Co. and its subsidiaries.

Barbara Niehus has participated in industry activities through the Society of Actuaries and the Health Insurance Association of America. She has addressed groups including the Society of Actuaries and the American Bar Association Torts and Insurance Practice Section.

James J. Phair

James Phair is currently Executive Vice President of SCPIE Re Management, Inc. where he is involved in the company's assumed reinsurance operation. Prior to joining SCPIE Re Management, Inc., he served for fourteen years as President, Chief Executive Officer, and Director of Tokio Re Corporation.

Mr. Phair has been active in the insurance/reinsurance business for 42 years, of which five

years have been in the primary insurance business with Chubb & Son and the remainder have been in affiliation with reinsurance companies and a reinsurance brokerage firm. He has held executive positions at Constitution Re Corp., Booth Potter Seal, and Tokio Re Corp. His underwriting background embraces all lines of property and casualty, as well as accident and health.

He has been an active arbitration panel member since 1979 and has participated in over 200 arbitrations, of which he has served as umpire in 70+ cases. He has also been involved with the American Arbitration Association for over 15 years. For more than twelve years, Mr. Phair served as the Board of Directors liaison person for the Contract Wording Committee of the Brokers & Reinsurance Markets Association (BRMA).

Mr. Phair is a graduate of Villanova University and served in the United States Marine Corps.

Elizabeth M. Thompson

After a fifteen year career as a trial attorney, Elizabeth Thompson became Vice President – Special Litigation of Electric Mutual Liability Insurance Company in 1992. Three years later, she became Chief Legal Officer/General Counsel of Electric Insurance. She left Electric Insurance in 2000 to relocate to the Vail Valley in Colorado.

At Electric Insurance, Ms. Thompson was responsible for all legal affairs of the company. At various times with Electric Insurance and Electric Mutual, she had operational responsibility for the commercial and personal lines litigation and claims departments for general, products liability, toxic, environmental, fidelity, property, commercial and private passenger automobile, personal excess liability and homeowners coverages. She was also extensively involved in coverage issues, particularly related to toxic and environmental exposures, and for reinsurance recoveries. She developed and implemented a mediation process for all claim departments, including a mediation training program.

Ms. Thompson's legal practice emphasized insurance issues and the defense of personal injury matters, including products liability, toxic tort, and hospital liability actions. She served as national trial counsel for several companies defending asbestos products liability actions.

Ms. Thompson earned a B.A. with honors from the University of California at Davis in 1974, and a J.D. from the University of San Diego, magna cum laude in 1977.

William Wigmanich

After graduating from Boston University and completing military service, William Wigmanich started his insurance career with the Travelers in Boston, where he handled property and casualty claims and supervised others in that area. In 1981, Mr. Wigmanich joined Cameron & Colby Company as a property supervisor, progressing to Vice President and property claims manager. As a key employee in a large excess and surplus lines underwriter of insurance and reinsurance, Mr. Wigmanich had ultimate responsibility for all property claims nationwide, in addition to supervisory duties on casualty claims. He assumed responsibility for the London & Edinburgh stamp participation with H.S. Weavers, for numerous run-off contracts with Lloyd's syndicates and for assorted stop loss and financial run-off contracts with both American and English companies. He was active in audits of reinsureds on behalf of New England Re and worked closely with underwriters in assessment of risks and wording of policies, as well as handling both ceded and assumed reinsurance claims.

In 1993, Mr. Wigmanich began working on the run-off of First State Insurance Co. and New England Re, and is currently handling the same as First V.P. and Reinsurance Director of Horizon Management Group. His primary duties involve managing the reinsurance recoveries for property and casualty facultative, quota share, and excess of loss treaty contracts, where he has been instrumental in securing recoveries in excess of $ 3.0-billion over the past ten years. His current duties involve administration of reinsurance arbitrations, planning and negotiating commutations of ceded and assumed reinsurance contracts, planning and collecting reinsurance recoveries from domestic reinsurers, and coordinating with legal on reinsurance audits.

Mr. Wigmanich obtained his Chartered Property and Casualty Underwriter designation in 1987.

in focus

Elizabeth M. Thompson

William Wigmanich

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case notes corner

Case Notes Corner is a regular feature in which Ron Gass reports on a significant court decision related to arbitration.

Ronald S. Gass

Multi-Year Fac Certs' Liability Limits Trump "Follow Form" Clause – Annualization Denied Despite Cedent's Conflicting Settlement Allocation

by RONALD S. GASS* - The Gass Company, Inc.

In this intriguing and significant decision, a Massachusetts federal district court held that the per occurrence liability limits of certain 3-year facultative reinsurance certificates were not subject to annualization because they trumped the certs' preprinted "follow form" provisions; thus, the reinsurer need not pay more than this limit even though the cedent's settlement of an insured's environmental contamination loss was premised on the annualization of the underlying occurrence limits of its multi-year excess umbrella policies.

In this case, the cedent wrote $5 million limits, each occurrence and in the aggregate, excess liability coverage above either another insurer's primary limits or a self-insured retention between 1962 and 1974 for W.R. Grace and Co. ("Grace") under four 3-year umbrella policies. The policies did not state whether the limits applied on an annualized basis.

Between 1965 and 1971, the reinsurer issued three 3-year quota share fac certs to the cedent with varying per occurrence limits typewritten on each cert's declaration page in the "Reinsurance Accepted" blank. Each certificate also included a version of a preprinted "follow form" provision, which provided, in essence, that the specified liability of the reinsurer would follow the terms and conditions of the cedent's excess umbrella policies.

Due to litigation arising from Grace's environmental contamination at numerous sites across the country, the cedent reached a $57.6 million cash settlement of all its liabilities under all of its umbrella policies premised on the annualization of the occurrence limits of its multi-year excess policies. In 1999, it billed the facultative reinsurer over $18.3 million as its share of the settled loss under the three multi-year certs. The reinsurer paid nearly $7.8 million as its share of the loss but objected to paying the remainder claiming that the cedent's settlement allocation was inappropriate because it was based on a full annualization of the claims in contravention of the single per occurrence limits set forth in the 3-year fac certs. Both the cedent and reinsurer brought declaratory judgment actions in Massachusetts federal district court and subsequently filed summary judgment motions.

The reinsurer argued that the single per occurrence limitation of liability set forth in its 3-year fac certs trumped the "follow form" provision, i.e., its exposure was strictly limited to the stated amount and could not be annualized regardless of the cedent's conflicting settlement allocation. The cedent countered that the "follow form" clause must be construed broadly to encompass the entire underlying policies' "terms and conditions," including the annualized limits of liability. Contending that the "terms and conditions" should be read narrowly, the reinsurer responded that the purpose of the preprinted "follow form" provision was to ensure concurrency of the reinsurance coverage with that of the underlying policy and not to cause the reinsurer to exceed its bargained for limits of liability as expressed in the certs.

Granting partial summary judgment in favor of the reinsurer, the court concluded that the "follow form" clause was not ambiguous, that the question of annualization was one of limits, and that the clear language of the fac certs did not per-

> The reinsurer argued that... its exposure was strictly limited to the stated amount...

*Mr. Gass is an ARIAS•U.S. Certified Arbitrator. He may be reached via email at rgass@gassco.com or through his website at www.gassco.com

mit the imposition of annualized limits on the reinsurer in excess of the certs' stated per occurrence and aggregate limits.

The court also rejected the cedent's argument that the inclusion of the "by endorsement made part of this Certificate" language in some of the certs and the absence of any such endorsements expressly limiting the reinsurer's obligation to follow form with the cedent meant that the limits of liability were controlled by the "follow form" provisions. Analyzing the fac certs as a whole, the court held that the lack of any such endorsements did not mean that they provided no limits whatsoever to the reinsurer's liability to the cedent given that the "crucial terms" of the reinsurance contract (i.e., policy period, per occurrence and aggregate limits, and premium charged) were not generally expressed as endorsements but rather set forth on the certs' declarations pages. In this case, each of the three fac certs provided for per occurrence and aggregate limits for a 3-year period, "crucial terms," according to the court, that existed prior to any endorsement and formed the "framework" to which any future endorsements would attach, i.e., "the mere fact that endorsements were not added to the policy is irrelevant to the existence, and preeminence, of the stated policy term and limits of liability." Finding that the fac cert wording, when read as a whole, was not ambiguous regarding the annualization issue, the court held that the limits of liability applied to the entire 3-year policy term and could not be annualized.

Finding no conflict between the fac certs' standard pre-printed "follow form" provisions and the limitation of liability provisions, the court further held that the typewritten limits wording trumped the "follow form" wording based on the legal principle that when there is a conflict between written or typewritten terms and standard or form language in an insurance contract, the written or typewritten language prevails. Observing that "the force of the limitations of liability as a specific, bargained for term, decisively outweighs the boilerplate follow form provisions which [the cedent] claims are controlling here," the court ruled that the limitations of liability, which were specifically drafted to govern the parties' relationship, may not be overwritten by the operation of the standard "follow form" language in the certs, citing the Second Circuit's decisions in *Unigard Security Insurance Co. v. North River Insurance Co.*, 4 F.3d 1049 (2d Cir. 1993), and *Bellefonte Reinsurance Co. v. Aetna Casualty and Surety Co.*, 903 F.2d 910 (2d. Cir. 1990), as precedent. Because the stated limits of liability were both clear and unambiguous, judicial interpolation of the word "annual" into the express language of the certs would be "inappropriate" because there was no language remotely suggesting that "each occurrence" should be read as "each occurrence each year," thereby rewriting the coverage and making the reinsurer liable for up to three times its express and bargained for liability.

In response to the cedent's invocation of the controversial *Seven Provinces* follow-the-settlement decisions, *Commercial Union Insurance Co. v. Seven Provinces Insurance Co., Ltd.*, 9 F. Supp. 2d 49 (D. Mass. 1998), aff'd, 217 F.3d 33 (1st Cir 2000), *cert. denied*, 531 U.S. 1146 (2001), which held that this doctrine required the reinsurer to pay its share of a cedent's settlement of an environmental loss, the court deemed them "instructive" but not helpful as to what it characterized as the "threshold" question of whether the certs' "follow form" provisions may be fairly read to require the reinsurer to pay for claims that exceed the stated limit of coverage. "Follow form" provisions, observed the court, are primarily intended to avoid litigation between cedents and reinsurers over whether a claim is "of a type" to be covered by the primary insurance and to achieve concurrence between the reinsured contract and the reinsurance.

Notwithstanding the importance of enabling concurrence between primary and excess policies, the court concluded that the "follow form" provisions should not be read to "erase the limitations of liability" set out in the fac certs. Such limitations of liability must be viewed as an "express statement of the terms and conditions of the policy sufficient to resolve an apparent ambiguity regarding the coverage." Summing up, the court held that the "follow form" provisions may not be read through the "unexpressed vehicle of annualization" to increase the reinsurer's aggregate liability beyond that stated in the limitations of liability. Those limitations stood as a "ceiling" for the reinsurer's liability to the cedent during the three-year policy period.

Readers should keep an eye on this important case, which reportedly goes to trial later this year, ...

Readers should keep an eye on this important case, which reportedly goes to trial later this year, as it is likely to have a significant impact on the course of the "follow form" and "follow-the-settlements/allocations" debate. Depending on the outcome of this litigation at trial and the fate an another parallel case raising a similar "follow form" issue now wending its way through the Massachusetts federal district court, albeit before a different judge, an appeal to the U.S. Court of Appeals for the First Circuit may be in the offing.

Commercial Union Insurance Co. v. Swiss Reinsurance America Corp., Civ. Action No. 00-12267-DPW, 2003 U.S. Dist. LEXIS 4974 (D. Mass. Mar. 31, 2003).

members on the move

Recent Moves

In each issue, we'll list employment changes, re-locations, and address changes, both postal and email, that have come in over the quarter, so that members can compare the list with their address books and Palm Pilots. Don't forget to notify us when your address changes.

If we missed your change here, please fill out and fax the form below so we'll be sure to catch you next time. Or email us at byankus@cinn.com with the subject "Quarterly Changes."

Tom Daly has certainly been on the move . . . or at least, one of his horses has. On May 18, a horse from Tom's stable broke a record at Belmont. Here's the quote from the www.nybreds.com/ website:

"Golden Damsel shatters Bouwerie Stakes record. In a glittering display of stretch-running talent, . . . Canterbury Stables' GOLDEN DAMSEL captured Belmont's $108,700 Bouwerie Stakes for New York-bred three-year-old fillies by 9 3/4 lengths on Sunday, breaking the 16-year-old seven-furlong stakes record . . ."

For more information about Tom's second love, after arbitration, see http://www.canterburystables.com.

Ernest G. Georgi, an ARIAS•U.S. certified arbitrator, spent a month in Paris visiting various insurers and reinsurers. Ernest, who is fluent in French and close to many prominent French reinsurers, became a member and arbitrator of CEFAREA (Center Francais d'Arbitrage de Reassurance et d'Assurance). His expertise is available to U.S. insurers and reinsurers who require assistance in the French market.

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