VOLUME 14 NUMBER 4

ARIAS U.S. QUARTERLY

FOURTH QUARTER 2007

Preparing a Reasoned Award

An Introduction to Technology in Reinsurance Arbitrations

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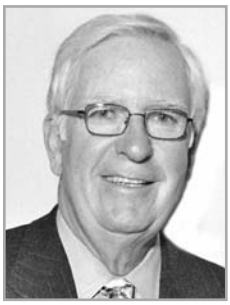

T. Richard Kennedy

Congratulations to Tom Forsyth, Frank Lattal and Susan Stone on their elections as Chairman, President and President Elect of ARIAS•U.S. Tom has served ably as President of the Society before assuming his current role. Frank and Susan also have been effective and active officers and Board members. We are indeed fortunate to have such talented and dedicated people taking over the leadership of the organization.

Congratulations also to Jeff Rubin and Mary Kay Vyskocil on becoming members of the Board of Directors. Jeff and Mary Kay were recommended to the membership by the Nominating Committee from a list of very fine candidates based on their respective exceptional backgrounds and qualifications, we can look forward to their joining the ranks of outstanding board members.

The Society has been extremely well served by Mary Lopatto, who has completed successive terms as Chair, President, President Elect, Vice President, and Board member. We are truly indebted to Mary for her hard work and dedication. Fortunately for all of us, she has promised to remain active in ARIAS•U.S. Our gratitude also must go once again to Past Chairman Tom Orr who, after retiring from the Board, came forward again to serve an unexpired term of a Board member. We look forward to having both Tom and Mary with us for many years to come.

Few issues have created hotter debate among our members than whether arbitration panels should issue reasoned awards. Dan FitzMaurice and Maureen O'Conner in *Preparing a Reasoned Award* outline the arguments typically advanced on both sides of the issue. Sometimes the panel has little choice, for example, where the parties have decided they want a reasoned award. In such instances, the article provides valuable insights into how the arbitrators may go about preparing such an award.

Have you ever been in an arbitration where you observed with awe – and perhaps envy – the individual lawyer or arbitrator who has not a single paper, but instead a computer screen, before him or her, and seems to be able immediately to find any available evidence pertinent to any issue in the proceeding? In *An Introduction to Technology in Reinsurance Arbitrations*, Larry Schiffer points us in the direction of becoming more skillful in the use of technology. Larry, who heads the Society's Technology Committee, has promised in the future to take us beyond the introductory stage to even more advanced uses of technology in arbitrations.

As noted in later pages of this issue, your editors have decided to begin a new column under the heading *Off the Cuff*. The idea is to provide a place for lighter-side commentary about the business of insurance and reinsurance arbitrations. We include here another contribution by our own "professional curmudgeon" (his words), Gene Wollan. I think you will find Gene's *On the Edge* amusing. Let us hear your views on the general concept of *Off the Cuff* as a new feature.

In *Amend the FAA*, John Binning provides a comprehensive review of developments following enactment of the Federal Arbitration Act. The author thoughtfully considers the most frequent criticisms of the process of insurance and reinsurance arbitrations and whether amendment of the Act might serve to overcome some of the complaints.

On behalf of all the editors, I want to take this opportunity to thank Managing Editor Bill Yankus and Creative Director Gina Balog for their continued consistent, quality work throughout the year 2007 in putting together this publication. To them and to all our members, best wishes for a most happy Holiday Season and a healthful and prosperous New Year.

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Editorial Policy

ARIAS•U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution.

All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include also a brief biographical statement and a portrait-style photograph in electronic form.

Manuscripts should be submitted as email attachments to trk@trichardkennedy.com .

Manuscripts are submitted at the sender's risk, and no responsibility is assumed for the return of the material. Material accepted for publication becomes the property of ARIAS•U.S. No compensation is paid for published articles.

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feature

Preparing a Reasoned Award

Man is the Reasoning Animal. Such is the claim. I think it is open to dispute.
- Mark Twain, "The Lowest Animal" (1897)

Daniel L. FitzMaurice
Maureen O'Connor

Maureen O'Connor

...if the parties to a U.S. reinsurance arbitration do choose to have a reasoned award, will the arbitrators know how to provide one?

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Parties to reinsurance arbitrations may dispute whether panels are reasoning bodies. After all, the query expressed in so many important questions in life, science, and business - why? - usually remains unanswered in arbitral awards in the United States.[2] Supporters of reasoned awards maintain that transparency enhances the quality of the panel's analysis by increasing accountability.[3] Moreover, the decision-makers' written exposition of their thinking provides an authoritative and definitive statement that cannot be found elsewhere.[4] Responses to a survey of ARIAS·U.S. members conducted in 2004 indicated a decided preference for reasoned awards.[5] Not everyone, however, favors reasoned awards. Apart from adding time and expense to the process, the very thing that makes this form of award so attractive - providing the *reasons* for the panel's decision - may also make the decision more vulnerable to a challenge in court.[6] Furthermore, the insight that a reasoned award provides in one confidential proceeding produces an informational asymmetry in which one party or law firm may enjoy an advantage in selecting arbitrators or umpires in another dispute over similar issues.[7] Leaving this debate aside, if the parties to a U.S. reinsurance arbitration ***do*** choose to have a reasoned award, will the arbitrators know how to provide one?[8] In conjunction with the recently-adopted Checklist for Reasoned Awards prepared by the Forms & Procedures Committee of ARIAS·U.S., this article will suggest some ways for arbitrators to go about preparing a reasoned award.[9]

What Is a Reasoned Award?

A definitional issue lies at the threshold to the process of writing a reasoned award - exactly what is a "reasoned award?" There is no universal definition or authoritative list of required (or even suggested) elements. Axiomatically, a reasoned award is a ruling that provides some explanation for the result. How detailed an explanation and in what format? The potential variations span a wide range of possibilities.

The rules of the American Arbitration Association ("AAA"), for example, do not define "reasoned awards."[10] Nevertheless, the AAA has used a scheduling form that envisions three different types of awards based upon varying degrees of elaboration: "Standard Award," "Reasoned Award," and "Findings of fact and conclusions of law."[11] These three categories have lead courts to conclude that, in the AAA context, a "reasoned award" falls in the middle of "a spectrum of increasingly reasoned awards," such that a "reasoned award" is "something short of findings and conclusions of law, but more than a simple result."[12] At least one subsequent decision appears to have converted this interpretation of three options on the AAA scheduling form into a generalized definition of a "reasoned award."[13] Before accepting the definition of a "reasoned award" that appears in these cases, however, one must recognize that the courts were not offering a universal definition; they were simply determining whether the arbitrators met the minimal requirements of the parties' agreement in relation to the two other options on the AAA form.[14] Although a reasoned award need not necessarily include findings of fact and conclusions of law, a more elaborate decision that identifies findings and conclusions also represents a form of reasoned award.[15]

In the end, perhaps the best way to define a reasoned award generally in the reinsurance context is by way of contrast to the usual outcome in U.S. arbitrations. Instead of providing only a result, the arbitrators explain the "why" behind their ruling. Thus, regardless of whether the arbitrators attempt to label elements of their decision as "findings of fact," "conclusions of law," or

otherwise,[16] a reasoned award provides some explanation for the outcome the panel reached.

Judicial Opinions as Models for Reasoned Awards

Given that judges generally provide reasons to support their substantive rulings and have a wealth of experience crafting decisions, judicial opinions are an obvious choice for arbitrators looking for guidance.[17] Deciding on the right opinion to use as a model, however, may be a difficult task because the form and content of judicial decisions vary widely. Where some rulings run for hundreds of pages, others are terse. Some opinions appear in standard prose; others look more like outlines, with separate lists of points in distinct, numbered paragraphs. Courts may identify all of the issues and arguments or only those they find worth mentioning. An opinion may read like a play-by-play account of the competing arguments, like a rebuttal to only one party's contentions, or simply a statement of the court's logic without referring to the parties' claims.

In considering judicial decisions as a model, it may be helpful to understand why courts offer explanations. A court's exposition of its analysis serves several purposes, including: (1) to fulfill a legal requirement to state findings of fact and conclusions of law;[18] (2) to improve the quality of court's evaluation and "enhance the court's legitimacy as perceived by judges themselves and [the parties];"[19] (3) to enable a reviewing court to examine a lower court's decision for error or to remand for explication if the reasons are cryptic; (4) to serve as a statement of the necessary reasoning (the "*ratio decidendi*") for courts bound to adhere to precedent under *stare decisis*;[20] and (5) to assist courts in other jurisdictions that not bound by *stare decisis* but which may find the court's reasoning persuasive and illuminating.

Reasoned awards in arbitration serve some of these purposes but not others. Just as procedural rules or statutes may require a court to specify the grounds for its decisions, the parties' agreement or arbitration rules[21] may direct the arbitrators to render a reasoned award.[22] Reasoned awards may also enhance arbitral decision-making, and the ARIAS survey suggests that reasoning may improve the participants' appreciation for the arbitral process. With regard to judicial review, an arbitration panel's statement of reasons may also assist a judge in evaluating an award on a motion to vacate or confirm. Reasoned arbitral awards, however, receive far less scrutiny than judicial rulings.[23] For example, a court may vacate a reasoned award for manifest disregard of the law only if the stated reasons strain credulity, not merely because the award appears internally inconsistent.[24] As for precedential value, except in the most rare of circumstances (*see infra*), arbitral awards generally have none - either as binding or persuasive authority. Indeed, given the confidential nature of most reinsurance arbitration and the absence of any hierarchy among arbitral panels, it appears unlikely that reinsurance arbitrators will compile an extensive body of reasoned awards to be used as precedent in later arbitrations.[25] On the other hand, although arbitrators rendering reasoned awards generally need not worry about leaving their marks on jurisprudence, they may have different and perhaps more immediate incentives to provide quality in their written product. Where judges preside over seemingly endless dockets, arbitrators may worry about maintaining their reputations so that they receive new matters from the parties and others who may hear of their performance through word of mouth. Thus, an arbitration panel that is rendering a reasoned award will certainly be motivated to provide a cogent statement of its analysis, even though its incentives differ from those of judges.

Arbitrators writing reasoned awards also have some other concerns that judges do not share. In issuing a reasoned award, arbitrators may wonder whether they will be viewed as having adopted fixed positions on certain issues, especially issues that recur in reinsurance disputes. Despite confidentiality agreements and orders, the terms of a reasoned award may become known either through post-award proceedings or leaks from someone familiar with the award. The fear of becoming associated with a certain position on a particular issue may be acute where the arbitrators must interpret language that is common in many insurance policies or reinsurance contracts. For example, numerous reinsurance disputes have arisen over the proper allocation of asbestos settlements, requiring panels to interpret the meaning of an "occurrence" and provisions in reinsurance contracts that allow for aggregation of losses arising from a series of occurrences or from the same common origin. The threat of being associated with a particular view on a recurring issue may incentivize some arbitrators to write a reasoned award narrowly and to emphasize the facts in the dispute while avoiding any pronouncements about the meaning of contractual language.[26] In any event, where judges generally have little concern about being associated with a particular point of view in resolving a commercial dispute, arbitrators who write reasoned awards may be affected by that concern.

Many judicial opinions follow a basic outline of providing the factual background including the identities of the parties and a description of their disagreement, listing the issues in dispute, stating the governing legal standards, and then analyzing the facts in light of the controlling law to reach subsidiary conclusions and an ultimate outcome.[27] Despite the seemingly confined context of the law, however, judicial writing styles exhibit enormous range. Some opinions resemble novels,[28] while others are written in doggerel.[29] Opinions may showcase a judge's literary knowledge,[30] extensive vocabulary,[31] or sense of humor.[32] The variation in judicial opinions demonstrates that arbitral panels have many options in deciding how to express their reasoned awards.

Of course, unlike Oliver Wendell Holmes or Benjamin Cardozo, arbitrators who render confidential awards do not write for posterity. Moreover, arbitrators do not need to become judges in order to prepare reasoned awards. Nevertheless,

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Unlike the U.S., the UK employs a default rule that favors reasoned awards: arbitrators must render reasoned awards unless the parties specify otherwise.

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arbitrators required to write a reasoned award may want to review some judicial opinions to see how courts explain their decisions.

Learning from Arbitral Experience in the United Kingdom

Reinsurance arbitrations in the United Kingdom offer another source of information about reasoned awards. Reasoned awards are far more common in the UK by practice and law. Unlike the U.S., the UK employs a default rule that favors reasoned awards: arbitrators must render reasoned awards unless the parties specify otherwise.[33] Moreover, where the U.S. statutes that govern motions to vacate arbitral awards do not distinguish between reasoned and unreasoned awards, UK law specifically addresses the role of the courts in reviewing reasoned awards. The United Kingdom's 1996 Arbitration Act (the "Act") expressly authorizes a court to remand to the arbitrators an award that either contains no reasons or reasons that lack sufficient detail:

> If on an application or appeal it appears to the court that the award, (a) does not contain the tribunal's reasons, or (b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.[34]

The Act limits a party's right to appeal, however, to questions of law arising out of the award.[35]

A British legal scholar has commented on the proper content of an arbitration award. In its most simple form,

> . . .all that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen, and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is[36]

This author, an experienced arbitrator and mediator in the UK, advocates in favor of minimal findings of fact and suggests that panels follow three steps in preparing the award: (a) identify the burdens of proof borne by the respective parties; (b) decide the matter by laying out the facts and reviewing the law based on the evidence and submissions; and (c) perform quality control by reviewing the logical linkage between the results and the expressed reasons.[37] All of these suggestions may prove helpful to arbitrators handling reinsurance disputes in the U.S.

When it comes to fashioning a reasoned award, UK arbitrations differ from US arbitrations in at least two, potentially-significant ways. Generally, UK arbitration panels are comprised entirely of neutrals.[38] Having three, unaffiliated arbitrators likely makes it easier to reach a consensus on the outcome and on the reasons that support the award. By contrast, the presence of party-arbiters changes the dynamic. A non-neutral panel increases the likelihood of a dissent and may encourage the majority to express its reasoning in a more guarded or defensive manner. Even when a panel of non-neutral arbitrators renders a unanimous award, the decision is more likely to reflect a compromise result based on narrow reasons because of the greater difficulty in finding common ground.

A second distinction for reasoned awards in the UK reflects another aspect of the composition of the panel. Arbitration panels in the UK usually have at least one member who is a barrister and, in many instances, a barrister who has attained the high distinction of being named a Queen's Counsel.[39] Indeed, the umpire of the panel is often a QC who, as someone skilled and experienced in legal exposition, will take the laboring oar in drafting the final award. By contrast, a reinsurance arbitration panel in the U.S. may consist entirely of business executives. Moreover, some lawyers who serve as arbitrators on U.S. panels may have been responsible for business transactions or regulatory matters which did not involve preparing briefs or crafting statements of legal reasoning. Thus, the UK practice of preparing reasoned awards may not translate readily to the context of arbitrations before panels in the U.S.

Learning from Our Neighbors to the North

It may be especially helpful to see an actual, reasoned award written in the context of a reinsurance arbitration. Fortunately, one is readily available. In 2003, ARIAS·U.S. Certified Arbitrator Angus Ross wrote of his experience acting as the umpire in a Canadian arbitration in which the parties asked for a reasoned award without confidentiality because of the import of the decision to the market.[40] Ross published his panel's award in the ARIAS·U.S. Quarterly in order to "assist my fellow ARIAS arbitrators and umpires in drafting their own written reasons."[41] The Ross panel's experience was unusual in that it knew, while drafting the award, that the parties intended make the decision public. After providing an introduction, the panel's detailed award set forth the facts, the submissions of the parties, the evidence, and the panel's conclusion.[42] The evidence section discussed the claim, as well as the parties' contractual intentions, based on the testimony presented, documents in evidence, and the parties' submissions to the panel.[43] The decision also analyzed the key terms at issue (event, occurrence, and peril) and the evidence that the parties offered regarding the meaning of these terms.[44] The award cites only one case, but it clearly applies the law to the evidence in reaching its final conclusion. Although the length and detail of the Ross Panel's opinion may be a bit intimidating to those who are new to drafting reasoned awards, it nevertheless provides a useful example of an actual, reasoned award rendered in a reinsurance dispute.

The ARIAS·U.S. Checklist for Reasoned Awards

The Forms & Procedures Committee of ARIAS·U.S. has prepared a Checklist for Reasoned Awards (the "Checklist"), which is available in the Forms section of the ARIAS·U.S. website (http://www.arias-us.org/forms/Checklist_for_Reasoned_Awards.pdf). An earlier discussion of reasoned awards appears in the ARIAS Practical Guide to Reinsurance Arbitration Procedure. Section 5.4 of the Practical Guide offers this advice:

> If all parties desire a "reasoned" award, Panel members should consider, in appropriate cases, asking the parties to submit sample questions, similar to "jury interrogatories," to highlight particular questions to be answered. If possible, these questions should be submitted jointly and be approved by all parties. Panel members should be guided by these questions in issuing their opinion, but should not be bound to answer them. The form of a "reasoned" award need not be elaborate.[45]

The Checklist offers similar advice with some additional suggestions.

Recognizing that the term "reasoned award" means different things to different people, the Checklist attempts to provide panels with a starting point, a sense of the goal posts, and some help along the way. It recommends that the arbitrators begin the process of preparing a reasoned award by reviewing the parties' agreement(s) and consulting with the parties themselves. The consultation can begin as early as the organizational meeting and continue up to the submission of proposed forms of awards.

Aside from certain administrative information, including the date of the award and the signatures of the arbitrators joining in the award, the Checklist suggests that the panel identify each issue necessary to the decision, the panel's determination regarding each identified issue, and the reason(s) for the panel's decision. The Checklist notes that while the award may describe each party's position with respect to each issue,[46] this undertaking is not required.[47]

The Checklist also suggests that the panel include findings of those facts that provide a significant basis for the award.[48] The panel can decide whether to support these findings by references to particular documents or testimony. The award may also include conclusions of law, although it is not necessary for the panel to provide formal findings and conclusions or to distinguish between its factual findings and legal conclusions.[49] Finally, the Checklist suggests that the award address the type of relief being granted. In that regard, the award may contain a specific amount that one party owes to another, as well as the award of costs or attorney fees, "consistent with the nature of the award and its bases."[50] Where appropriate, an award may also grant declaratory relief.[51]

Just as reinsurance arbitrations often differ - even two arbitrations over the same issues between the same parties - arbitral awards may also vary significantly. The preamble to the Checklist notes that the "contours of a 'reasoned award' may also depend on many other factors, including the specific issues and facts in dispute, the parties' respective positions, and the arbitrators' analysis." Accordingly, the Checklist provides a useful but necessarily brief outline.

Conclusion

A reasoned, arbitral award may take many forms. Faced with the challenge of preparing a reasoned award, an arbitration panel should begin by asking the parties to specify the nature of the award they want. The arbitrators may ask this question more than once, starting with a discussion at the organizational meeting and ending with a request that the parties supply proposed forms of awards at the conclusion of the hearing. In preparing a reasoned award, arbitrators may consider several models of reasoned decisions, including judicial opinions and arbitral awards from other countries. The ARIAS•U.S. Checklist for Reasoned Awards also provides a practical outline for arbitrators to use. In the end, the form of reasoned award most appropriate to an arbitration depends on the parties' requests, the evidence, submissions, and the panel's analysis and resolution of the particular dispute.

The task of preparing a reasoned award certainly requires more from arbitrators.

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Recognizing that the term "reasoned award" means different things to different people, the Checklist attempts to provide panels with a starting point, a sense of the goal posts, and some help along the way.

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For this reason and others, some arbitrators may opt out of these proceedings. Parties and lawyers, in turn, will need to determine whether, apart from a potential arbitrator's knowledge, experience, and reputation, a candidate possesses the willingness and aptitude to participate in framing a cogent explanation for the panel's decision. The good news is that the capacity to prepare a reasoned award is an acquired skill. The challenge can be surmounted with preparation and planning as well as some direction from the parties.▼

1 Daniel FitzMaurice is a Partner of Day Pitney LLP, where he chairs the firm's Insurance and Reinsurance Disputes Practice Group. Ms. O'Connor is Counsel in the Reinsurance Litigation Group at Travelers. During the drafting of this article, Ms. O'Connor was an associate in the Insurance and Reinsurance Disputes practice group in Day Pitney LLP's Hartford office. This article offers the personal views of the authors, which should not be attributed to their clients. The authors thank the Editorial Board of the *ARIAS·U.S. Quarterly* for their valuable thoughts, suggestions, questions, and comments.

2 Given that most reinsurance arbitrations are confidential and do not lead to post-award litigation, there is no authoritative measure of the prevalence of reasoned awards issued in reinsurance arbitrations. Anecdotal evidence suggests that reasoned awards are uncommon. Moreover, it is well-established in American jurisprudence that arbitrators are not required to provide the reasons for their awards. *See, e.g., United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ("Arbitrators . . . need not give their reasons for their results . . . ."); *Nat'l Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 498-499 (1st Cir. 2005) ("[A]rbitrators need not give specific reasons for the decisions they reach.").

3 *See, e.g.*, John Nonna & Marc Abrams, *Of Cabbages and Kings*, ARIAS·U.S. Q., 4th Quarter 2004, Vol. 11, No. 4 at 16; Robert M. Hall, *How Reinsurance Arbitrations Can Be Faster, Cheaper and Better*, ARIAS·U.S. Q., 3rd Quarter 2004, Vol. 11, No. 3 at 3, 37; see also Rhonda L. Rittenberg & David A. Thirkill, *Results of Our Arbitration Survey*, ARIAS·U.S. Q., 3rd Quarter 2005, Vol. 12, No. 3, at 17, 20 (noting that reasoned decisions will provide parties with "transparency of the panel's thought process" and may "deter a panel's desire to 'split the baby'").

4 Although parties often seek insights by debriefing party-arbiters, ethical rules restrict what arbitrators may say after an award. According to the ARIAS·U.S. Code of Conduct, "[i]t is not proper at any time for arbitrators to . . . inform anyone concerning the contents of the deliberations of the arbitrators . . . ." ARIAS·U.S. Code of Conduct, Canon VI, Cmt. 3, *available at http://www.arias-us.org/index.cfm?a=32; see also* Daniel L. FitzMaurice, Robert Lewin, Susan A. Stone & Richard L. White, *Some Ideas About How Arbitrators Can Improve the Process of Reinsurance Arbitrations*, ARIAS·U.S. Q., 4th Quarter 2005, Vol. 12, No. 4, at 10, 14 (recommending that the panel should "concur on the informal feedback that the party appointed arbitrators may provide respective counsel and parties.") Furthermore, unilateral conversations with party-arbiters lack assurances of objectivity and reliability. However well-intended and honest, a single party-arbitrator may not have perceived accurately and objectively all aspects of the matter and may not recall fully details that the party might find important. And, of course, depending upon the nature of the award, the party-arbitrator may have incentives to maximize or minimize his or her role or to distort other aspects of the process.

5 *See* Rittenberg & Thirkill, *Results of Our Survey*, ARIAS·U.S. Q., 3rd Quarter 2005, Vol. 12, No. 3, at 19 (survey results indicate that 86% of clients, 58% of outside counsel, and 73% of arbitrators prefer reasoned decisions). See also Alain Frécon, *Delaying Tactics in Arbitration*, Dispute Resolution J., Nov. 2004/Jan. 2005, at 1, 9 (commenting in the context of AAA commercial arbitration that "[a]necdotal information indicates that parties in domestic arbitration, influenced by the common use of reasoned awards in international arbitration, are now more often requesting a written explanation of the award") (footnote omitted).

6 Of the grounds for vacating an award listed in the Federal Arbitration Act ("FAA"), the existence of stated reasons may aid a party attempting to show that the arbitrators "exceeded their powers," displayed "evident partiality," or were guilty of "misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a). More significantly, reasoning facilitates a party's ability to establish a non-statutory basis for vacating awards for "manifest disregard of the law,' a task that is exceedingly difficult when the arbitrators are not required to provide reasons for their decision. *See, e.g., Bear, Stearns & Co., Inc.* v. *1109580 Ontario, Inc.*, 409 F.3d 87, 90-91 (2d Cir. 2005) ("Absent an explanation, the reviewing court must attempt to infer from the record whether the arbitrators appreciated and ignored a clearly governing legal principle."). In unusual circumstances, however, when considering whether a panel acted in manifest disregard of the law, a court may take into account a panel's failure to supply any explanation for its ruling, particularly where one might expect that the panel would offer some justification. See, e.g., *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 142-43 & n. 7 (2d Cir. 2007) (where District Court had previously vacated an arbitration award for manifest disregard of the law, and the arbitration panel arrived at essentially the same result on remand, the court in evaluating the subsequent award for manifest disregard of the law could take into consideration the panel's failure to offer any explanation).

7 The greater insights that reasoned awards provide may place more pressure on confidentiality. Parties might demand enhanced disclosure to reduce the danger that they will learn too late what their opponents already know about the views of a potential arbitrator or umpire regarding a particular issue. Likewise, this new source of available information may motivate some parties, lawyers, or even arbitrators to breach confidentiality agreements and orders.

8 Rittenberg and Thirkill suggest that one reason arbitrators may be reluctant to issue reasoned awards is because they do not know how. See Rittenberg & Thirkill, *Results of Our Arbitration Survey*, ARIAS·U.S. Q., 3rd Quarter 2005, Vol. 12, No. 3, at 20.

9 Perhaps because of the paucity of reasoned awards, there is a dearth of case law addressing the consequences of arbitrators' providing no reasons or inadequate reasons in a proceeding that calls for a reasoned award. In *Vold v. Broin & Associates, Inc.*, 2005 SD 80, P20, 699 N.W.2d 482, 488 (S.D. 2005), the South Dakota Supreme Court held that an arbitrator exceeded the scope of his authority by issuing an unreasoned decision after he had agreed to issue a reasoned award. Among other things, *Demott v. McDonald*, No. 266301, 2007 WL 486750 (Mich. Ct. App. Feb. 15, 2007), addressed the burden imposed on a party seeking to vacate an award on the ground that the panel's reasoning was inadequate. Although it found the arbitrators' statement of reasons adequate, the Court noted that,

even if the arbitrators did not provide a sufficient explanation, the party challenging the award had failed to meet its burden of demonstrating that, *but for* the alleged deficiency, the arbitrators necessarily would have reached a different result.

10 *See Mangan v. Owens Truckmen, Inc.*, 715 F. Supp. 436, 439 n.3 (E.D.N.Y. 1989) (quoting *A Guide for Commercial Arbitrators*, at 26 (1988), from the AAA to the effect that "'[c]ommercial arbitrators are not required to explain the reasons for their decisions.'"); *see also* AAA Commercial Arbitration Rule 42(b) ("The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.").

11 *ARCH Dev. Corp. v. Biomet, Inc.*, Nos. 02 C 9013, 03 C 2185, 2003 US Dist. LEXIS 13118, at *13 (N.D. Ill. Jul. 28, 2003) (discussing the AAA rules and scheduling form).

12 *Id.*; *see also Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752, 780 (N.D. Ill. 2005).

13 *Sarofim v. Trust Co.*, 440 F.3d 213, 215 n.1 (5th Cir. 2006) ("'[A] reasoned award is something short of findings and conclusions but more than a simple result.'") (quoting *Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752, 780 (N.D. Ill. 2005) (internal citations omitted)).

14 In *Koken v. Cologne Reinsurance* (*Barb.*) Ltd., No. 1:CV-98-0678, 2006 U.S. Dist. LEXIS 59540 (M.D. Pa. Aug. 23, 2006), the Insurance Commissioner of Pennsylvania, as liquidator for American Integrity Insurance Company, moved to vacate an arbitration award. The Commissioner argued, among other things, that the panel's failure to provide a reasoned award constituted a "manifest disregard for [applicable] law." The Court rejected this argument because the record failed to establish that the parties agreed to a reasoned award. *Id.* at 28-29.

15 *See, e.g., Alderman & Alderman v. Pollack*, 100 Conn. App. 80, 94 n.4 (2007) ("A 'reasoned award' means that findings of fact and conclusions of law supporting the ultimate award rendered are stated in the award or in a supporting memorandum." (quoting 21 S. Williston, LAW OF CONTRACTS (4th Ed. Lord 2001). § 57:107, pp. 565-66)) (internal quotation marks omitted).

16 As between "findings of fact" and "conclusions of law," it may be difficult at times to identify the proper rubric. *See, e.g., Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) (noting that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive," and acknowledging "the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis.") (citations omitted).

17 Especially on procedural matters, courts often issue perfunctory rulings, including simple endorsements stating only that a given motion is "granted" or "denied."

18 *See, e.g.*, Fed. R. Civ. P. 52(a) (requiring that, in cases tried without a jury, "the court shall find the facts specially and state separately its conclusions of law thereon"); 28 U.S.C. § 2255 (federal habeas corpus statute requires the district court to "make findings of fact and conclusions of law"); *see also* Virginia Const. of 1851 (requiring for the first time that the Virginia Supreme Court "state in writing its reasons for affirming or reversing a judgment") (description *available* at http://www.courts.state.va.us/scov/cover.htm).

19 *Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140, 147 (1977). Although written in relation to criminal sentencing, where courts exercise considerable discretion with dramatic consequences, the Pennsylvania Supreme Court's listing in Riggins of the "benefits of requiring the trial court to state its reasons" is instructive in other contexts as well:

> First, requiring the trial court to articulate its reasons for selecting a sentence will promote more thoughtful consideration of relevant factors and will help rationalize the sentencing process. It will safeguard against arbitrary decisions and prevent consideration of improper and irrelevant factors. It will minimize the risk of reliance upon inaccurate information contained in the pre-sentence report. A statement of reasons may aid correction authorities if the sentence results in a commitment, and may have therapeutic value if the sentencing judge explains his or her reasons to the defendant. Requiring a trial court to provide a reasoned basis for the sentence imposed may enhance the court's legitimacy as perceived by judges themselves and participants in the criminal justice system. It will aid courts in attaining their institutional objective of dispensing equal and impartial justice and will demonstrate to society that these goals are being met a Reasoned sentencing decisions may encourage the development of sentencing criteria and reduce disparity in sentences — decreasing the number of unusually lenient as well as unusually harsh sentences. Finally, a statement of reasons will be invaluable in aiding appellate courts to ascertain whether the sentence imposed was based upon accurate, sufficient and proper information.

Id. at 129-131 (footnotes omitted).

20 By contrast, judicial analysis or commentary that is not essential to the decision ("*obiter dictum*") is not authoritative. *See, e.g., Rogers v. Tenn.*, 532 US 451 (2001) (5-to-4 decision hinging, in part, on a disagreement over whether the discussion of the *Ex Post Facto* clause of the Constitution in a prior Supreme Court decision reflected *dicta* or the Court's *ratio decidendi*); see also Leading Cases, *Ex Post-Facto* Clause - Retroactive Overruling of Common Law Rule: Rogers v. Tennessee, 115 Harv. L. Rev. 316, 321 (2001) (criticizing the majority in Rogers for characterizing the central holding of the prior decision as dicta).

21 *See, e.g., AAA Employee Benefit Plan Claims Arbitration Rules*, Rule 31 (As Amended and Effective on January 1, 1988) ("The award shall be in writing and accompanied by a brief statement of the reasons for the decision.").

22 *See Vold v. Broin & Assocs.*, 2005 SD 80, 699 N.W.2d 482, 487-488 (S.D. 2005) (vacating an award that failed to provide reasons after the arbitrator had issued an earlier order providing that the final award would provide reasons); *but see Associated Constr. Co. v. Moliterno Stone Sales, Inc.*, 782 F. Supp. 15, 16 (D. Conn. 1992) (even if a statute requiring that the arbitrator issue written findings of fact and a written decision based on those facts applied, the arbitrator's failure to provide reasons would not require that the Court vacate the award).

23 *See, e.g., Van Horn v. Van Horn*, 393 F. Supp. 2d 730, 749-50 (N.D. Iowa 2005) ("in order for an award to be imperfectly executed, the award itself, not the reasoning behind the award . . ., must be indefinite or ambiguous.").

24 *See Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 218 (2d Cir. 2002) ("A court may find intentional disregard if the reasoning supporting the arbitrator's judgment 'strains credulity' or does not rise to the standard of 'barely colorable,' . . . .") (internal citations omitted); *Sarofim v. Trust Co.*, 440 F.3d 213, 219 (5th Cir. 2006) (same).

25 Whether a panel's reasoned award should receive res judicata or collateral estoppel effect in a subsequent arbitration between the same or related parties is, itself, a matter to be determined by the later arbitration panel. *See, e.g., Howsam v. Dean Witter Reynolds,*

CONTINUED ON PAGE 8

A reasoned, arbitral award may take many forms. Faced with the challenge of preparing a reasoned award, an arbitration panel should begin by asking the parties to specify the nature of the award they want.

Parties and lawyers, in turn, will need to determine whether, apart from a potential arbitrator's knowledge, experience, and reputation, a candidate possesses the willingness and aptitude to participate in framing a cogent explanation for the panel's decision.

CONTINUED FROM PAGE 7

Inc., 537 U.S. 79, 84-85 (2002) (relying on the Revised Uniform Arbitration Act of 2000 to identify issues of procedural arbitrability to include "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met"); *see also Restatement (Second) of Judgments* § 84 (1980) ("a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court"); *B-S Steel of Kan. v. Tex. Indus.*, 439 F.3d 653 (10th Cir. 2006) (where the plaintiff had lost an arbitration against one company, the district court properly accorded collateral estoppel effect to the arbitral award in litigation the plaintiff brought against related companies).

26 Of course, some arbitrators - particularly those interested in party-appointments - might perceive disclosure not as risky but rather as advantageous, because other cedents or reinsurers might want arbitrators known to favor their positions. Query whether having issued a reasoned award in another, confidential arbitration would necessarily disqualify an arbitrator from serving as an umpire in a subsequent arbitration involving the same issue.

27 Among innumerable examples, see Justice O'Connor's opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which follows this basic format.

28 Judge Brown of the Fifth Circuit began one opinion as follows:

> It was a dark and stormy night. A patchy, low-lying fog covered the murky waters of the river and obscured the banks. Ships, passing in the night, were but phantoms, vague outlines disappearing into the mist. Ships' whistles, echoing across the dark expanse, seemed like mournful cries from another world. Then suddenly, looming out of the darkness, another ship appeared. The distance was too small; time too short; before anyone could do more than cry out, the unthinkable occurred. The ships collided. The tug, helpless, drifted downriver. Floundering like some giant behemoth wounded in battle, the tanker came to ground and impaled itself on some voracious underwater obstruction. And still the whistles, echoing, seemed like cries from another world.

Allied Chem. Corp. v. Hess Tankship Co., 661 F.2d 1044, 1046-47 (5th Cir. 1981) (Brown, J.).

29 One opinion by Judge Becker, then of the U.S. District Court for the Eastern District of Pennsylvania, reads in part in as follows:

> The motion now before us
> has stirred up a terrible fuss.
> And what is considerably worse,
> it has spawned some preposterous
> doggerel verse.
> The plaintiff, a man of the sea,
> after paying his lawyer a fee,
> filed a complaint of several pages
> to recover statutory wages.

Mackensworth v. Am. Trading Trans. Co., 367 F. Supp. 373, 374 (E.D. Pa. 1973) (Becker, J.).

30 *See N.Y. Currency Research Corp. v. CFTC*, 180 F. 3d 83, 85 (2d Cir. 1985) ("Instead, the Commission appears to have acted the role of the Queen who declared in a similar fit of pique during the hurried trial of the Knave of Hearts, 'Sentence first - - verdict afterwards.'") (quoting Lewis Carroll, Alice's Adventures in Wonderland 156 (Justin Todd illus., Crown Publishers 1984)); In re Love, 61 B.R. 558 (Bankr. S.D. Fla. 1986) (a parody of Edgar Allen Poe's "The Raven"); *Fino v. McCollum Mining Co.*, 93 F.R.D. 455, 456 & n.1 (N.D. Tex. 1982) (describing participants in a deposition in relation to Luigi Pirandello, "Six Characters in Search of an Author," published in THREE PLAYS (Samuel French, Inc. , N.Y., 1923)); *Davis v. Williams*, 598 F.2d 916, 917 (5th Cir. 1979) (quoting Dr. Seuss in the opening sentence).`

31 [T]his court is not so naive as to overlook the strain of esurience which sometimes seems to infect certain physicians when they become involved as experts in the litigation process. Indeed, such a virus is most virulent where, as here, the putative payor is the adverse party. In such straitened circumstances, the ordinary checks and balances are neutralized; and the temptation to honor Mammon, rather than Minos, may become irresistible.

Anthony v. Abbott Labs., 106 F.R.D. 461, 463 (D.R.I. 1985) (footnote omitted).

32 *Noble v. Bradford Marine, Inc.*, 789 F. Supp. 395 (S.D. Fla. 1992) (written with lines from the movie "Wayne's World"); *Reuther v. S. Cross Club, Inc.*, 785 F. Supp. 1339 (S.D. Ind. 1992) (opinion written in verse to the Gilligan's Island theme song).

33 The UK Arbitration Act 1996 provides, in part, as follows:

> The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

Arbitration Act 1996, Ch. 23, § 52(4) (U.K.). This law applies when the seat of the arbitration is in England and Wales or Northern Ireland. *Id.* § 2.

34 *Id.*, § 70(4).

35 *See id.* § 69(1). In the United States, there is no right to appeal the decision of an arbitration panel, although a party may move to vacate an award under certain, limited circumstances. *See* 9 U.S.C. § 10(a).

36 Geoffrey M. Beresford Hartwell, *The Reasoned Award in International Arbitration*, http://www.hartwell.demon.co.uk/intaward.htm (internal quotation marks and citations omitted).

37 Geoffrey M. Beresford Hartwell, Preparing to Write an Award, (lecture *available at* http://www.hartwell.demon.co.uk/022.Preparing%20to%20Write%20an%20Award.pdf) (revised September 2003).

38 For an interesting discussion of UK arbitration relative to the arbitral procedures addressed by the Insurance and Reinsurance Dispute Resolution Task Force. See Alan I. Sorkowitz & Navneet K. Dhaliwal, *The Arbitration Task Force's Proposed Procedures for Reinsurance Arbitrations - Defining Best Practices and Moving Toward Neutral Panels*, ARIAS·U.S. Q., 2nd Quarter 2005, Vol. 12, No. 2, at 2.

39 Queen's Counsel are experienced barristers who have been selected for recognition based upon their excellence. For a description of the qualification process currently in place, *see http://www.qcapplications.org.uk/introduction.*

40 Angus H. Ross, *Doing a Reasoned Award without Confidentiality*, ARIAS·U.S. Q., 1st Quarter 2003, at 14.

41 *Id.*

42 *See id.* at 14-21.

43 *See id.* at 15.

44 *See id.*

45 Practical Guide Ch. V § 5.4 A. Cm. B, http://www.arias-us.org/index.cfm?a=42.

46 *See, e.g., Angus H. Ross*, Doing a Reasoned Award without Confidentiality, ARIAS•U.S. Q., 1st Quarter 2003, at 14.

47 *See Checklist* at ¶ 4.

48 *See id.* at ¶ 5.

49 *See id.* at ¶ 6.

50 *Id.* at ¶ 7.

51 *See id.*

news and notices

Board Certifies Thirteen New Arbitrators; Barber, Marrs, Moak, Becker-Jones, Juul, Voelbel, and Cashion Added to Umpire List

At its meeting in New York on **September 20,** the Board of Directors added **Linda Martin Barber**, **Richard Marrs**, and **Roger Moak** to the ARIAS Umpire List, bringing the total to 89.

At the same meeting, the Board approved certification of seven new arbitrators, bringing the total to 338. The following members were certified; their respective sponsors are indicated in parentheses.

- **Jonathan F. Bank** (Nick DiGiovanni, Eugene Wollan, Lawrence Monin)
- **Paul Bates** (Robert Lewin, James Cameron, Vincent Proto, Robert Mangino, Jr, Graeme Mew)
- **David Bowers** (David Raim, Richard Mancino, John Cole)
- **Raymond Dowling** (Jens Juul, Jacobus Van de Graaf, Peter Gentile)
- **Laura A. Foggan** (John Cole, Constance O'Mara, Susan Claflin)
- **André Hassid** (Lawrence Monin, John H. Drew, Joseph Hegedus, Timothy Stalker, Thomas Conneely)
- **Charles E. Mabli** (Robert Mangino, Peter Gentile, N. David Thompson)

Then, at its meeting in New York on **November 1,** the Board added **Clive Becker-Jones, Jens Juul** and **Richard L. Voelbel** to the ARIAS Umpire List. Also, in a Board vote on November 19, **Marvin J. Cashion** was added to the umpire list, bringing the total to 93.

At the November 1 meeting, the Board approved certification of six new arbitrators, bringing the total to 344. The following members were certified; their respective sponsors are indicated in parentheses.

- **Paul Buxbaum** (Colin Gray, Paul Thomson, Peter Suranyi)
- **Stephen Carney** (Bryan Bolton, Michael Cohen, Ronald Gass, Daryn Rush)
- **Stephen J. Kidder** (Paul McGee, Klaus Kunze, John Heath)
- **Stephen Klein** (Charles Foss, Robert Mangino, Daniel Schmidt, IV)
- **Robert Redpath** (Joseph Loggia, Sylvia Kaminsky, Steven Schwartz)
- **Gerald M. Sherman** (Marvin Cashion, Jack Scott, Raymond Prosser)

Board Approves Nine New Mediators

At the meeting on **September 20,** the Board of Directors approved seven applicants as ARIAS•U.S. Qualified Mediators. They were **Therese A. Adams**, **Paul D. Brink**, **John S. Diaconis**, **John A. Dore**, **Ronald S. Gass**, **Anthony M. Lanzone**, and **Peter A. Scarpato**.

Then, at the meeting on **November 1,** the Board approved two more applicants. They were **Michael V. Balzer**, and **Richard L. White**.

The Qualified Mediator Program was established in 2006 to provide a means for ARIAS•U.S. Certified Arbitrators with mediation training to be easily contacted for service in mediation of disputes. The ARIAS website includes a full explanation of how recognition may be obtained, along with links to the contact information of those who have been approved.

Robert Quigley Chosen as ARIAS Treasurer

Robert C. Quigley, a CPA and ARIAS•U.S. Certified Arbitrator, was selected by the Board of Directors on September 20 as the next Treasurer of ARIAS. He replaced **Richard L. White**, who retired on November 1, after seven years in the position.

Mr. Quigley has been involved with the insurance industry for 30 years, as an auditor, financial reporter, controller, treasurer, and consultant. For the past 16 years, he has provided consulting and expert witness services through Quigley & Associates, in areas such as insolvencies, audit failures and contract disputes. He has also served as a team leader on financial standards accreditations, on behalf of the NAIC, working with regulators across the country.

Mr. Quigley resides in Hatboro, Pennsylvania. He is past president of the Penn State Abington Alumni Society.

Spring 2010 Conference Set for Hotel del Coronado

In 2010, for the first time, ARIAS will head to California for a Spring Conference. The location will be the famous and magnificent Hotel del Coronado resort, just over the bridge from San Diego on the ocean in

CONTINUED ON PAGE 10

news and notices

Coronado, California. The Board chose "The Del" from among five luxury resorts in California.

A National Historic Landmark, the del Coronado has been dramatically modernized in recent years and offers outstanding facilities and restaurants. Its proposal described the hotel as "...situated on 28 oceanfront acres, [it] is a grand example of elegant Victorian architecture and is considered one of America's most beautiful resorts."

The 2010 Spring Conference will take place from Wednesday noon until Friday noon, May 5-7. Details will be available on the website calendar as the event draws closer.

Dues Payment for Additional Corporate Representatives Now Online

Traditionally, corporate members adding a representative above the five included in a corporate membership have been required to send a check or send credit card information by fax or email. Now, with a revision to the website's Membership payment system, the additional $150 can be paid online.

Key contacts still have to provide the representative's contact information separately by email or postal mail, but payment is now easier.

California Workshop a Success

The September ARIAS Intensive Arbitrator Training Workshop consisted of a very active day on Tuesday, September 11, with 23 arbitrator participants and ten attorneys. Several cancellations reduced the number of arbitrators from the ideal group of 27. However, four intrepid students volunteered to double up their panel assignments to keep the nine mock arbitration panels fully staffed. The extra-credit students were **Nancy Braddock Laughlin**, **Bernard Friemann**, **James MacDonald**, and **Guy Struve**.

Board members **David Robb** and **George Cavell** led the event. Attorneys from **Barger & Wolen**, **Milbank Tweed**, and **Sidley Austin** manned the three hearing rooms. Experienced arbitrators **John Tickner**, **Larry Monin**, and **Debra Roberts** made up the faculty for the general sessions.

The workshop took place at the Marriott Hotel in Marina del Rey, California...the first time this event has been scheduled on the West Coast.

2008 Fall Conference is November 6-7

Save the dates for next year's Fall Conference. Of course, it will be at the Hilton New York and will take place Thursday all day and Friday morning, as usual. Plan to arrive the night of November 5 if you are traveling, so that you will be ready to register and have breakfast before the 9:00 start.

2011 Spring Conference Set for New Fontainebleau

In an effort to stay out front on planning for the future, ARIAS has signed an agreement with the Fontainebleau hotel in Miami Beach for a conference to be held May 4-6 in 2011. The famous hotel is now closed as it is being totally renovated and expanded. When finished in the summer of 2008, it will be one of the most spectacular facilities in Florida.

By booking for future dates during the renovations, we have been able to arrange a favorable contract that provides a variety of room types with reasonable rates. This takes us away from The Breakers (the member favorite) for a second year, but good news is on the way for Breakers fans.

Sponsor Letters Must Include Reputation

Roughly half of all letters sent to ARIAS to sponsor candidates for certification are rejected because they do not contain a comment about the candidate's reputation. Such a comment must be included in every sponsor letter. The website provides guidelines for letters, including all mandatory requirements.

John W. Bing

John Bing, an ARIAS•U.S. Certified Arbitrator and insurance industry veteran, died November 11. He was 88 years old. A memorial service was held on December 9th at Riverside Memorial Chapel in New York City. ▼

SAVE THE DATE May 7-9, 2008 SAVE THE DATE May 7-9, 2008

The ARIAS 2008 Spring Conference will be located at the beautiful Ritz-Carlton Hotel on Amelia Island. The island is located on the Atlantic Ocean in Florida, near the border with Georgia. All 444 rooms have balconies and an ocean view; it offers an 18-hole golf course, nine tennis courts, and a dramatic new 26,000 square-foot, state-of-the-art spa facility just completed in December 2006. The excellent conference facilities are perfectly sized for ARIAS sessions. **Details will be sent to members in early March and will be available on the website calendar as they develop**.

You will not want to miss this event!

SAVE THE DATE May 7-9, 2008 SAVE THE DATE May 7-9, 2008

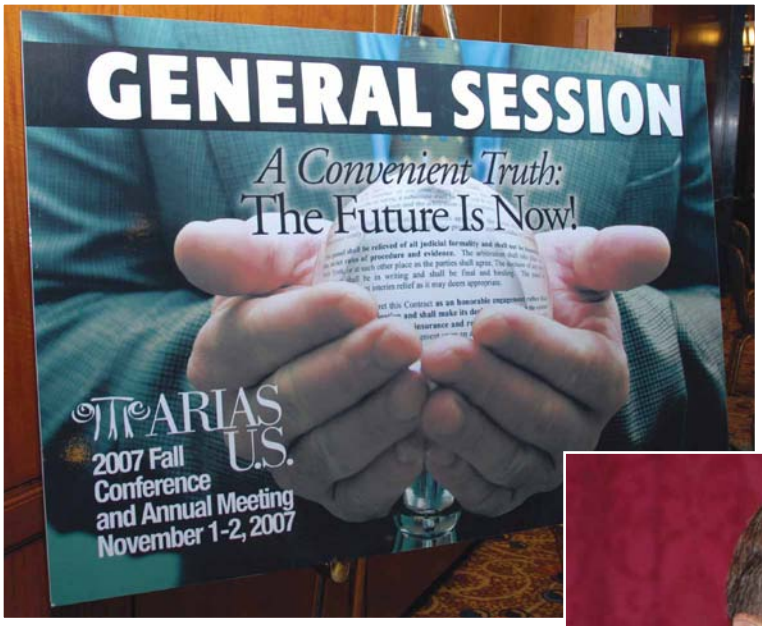
Record 660 Attendees Look to the Future at ARIAS Fall Conference

The Hilton New York Hotel in New York City focused on the future of reinsurance arbitration as it is manifesting itself in the industry today. Entitled "A Convenient Truth: The Future is Now," the conference on November 1st and 2nd drew 660 members and interested non-members to general sessions in the Grand Ballroom all day Thursday and Friday morning. The attendance set a new record, exceeding last year's fall conference by 7%.

Again this year, speakers' images were projected onto large screens at either side of the stage, giving the panels much more presence in the room and greatly improving communication of the subjects being discussed.

V. J. Dowling of Dowling & Partners Securities, LLC provided the keynote address on the first day. He gave an intense, data-filled insurance industry analysis that positioned the business today in historical perspective. He ended by urging companies to change the way arbitrations are conducted in the future by speeding up the arbitration process and shifting to winner-take-all conclusions as a cure for the delays that too often occur in disputes.

The general sessions reflected "The Future is Now!" theme by featuring elements of disputes today that are setting the course for better arbitrations in the future. New types of contracts, new forms, and specific, special-purpose clauses were discussed, as well as new and alternative dispute resolution provisions. Friday morning sessions focused on techniques available to a panel to



Above: Mary Lopatto opened the Fall Conference.

Left - V.J. Dowling delivered the Keynote Address.

preserve orders when dealing with financially troubled participants and on the future of international disputes. Considering the shift of capital among global markets, arbitrations in the future are more likely to include foreign parties. The pitfalls, issues, rules, and expectations outside the U.S. were explained.

The Long Range Planning Committee's initial recommendations were presented to the general session by Mark Gurevitz, the LRPC Chairman. The proposal specified more rigorous requirements for certification of arbitrators and for listing of umpires to the ARIAS Umpire List. He stressed that the Board had just received the recommendations and had taken no action. Opportunities for member feedback were offered through a dedicated email address and telephonic conferences that were being scheduled.

Six workshops were presented twice on Thursday afternoon. At registration, attendees had to indicate their top three choices, however, the distribution of choices made it possible for everyone to attend their top two. All workshops generated significant participation. The following topics were presented:

- Ethics
- Subpoena Power of a Panel
- Technology in the Hearing Room...and Beyond
- Life/Health Orientation - "Life Re 101" for Non-Lifers
- Marketing - Best Practices
- Discovery from a (Re)Insurance Company Perspective

The last topic generated a level of interest that required conducting the two sessions in the Hilton's ballrooms to accommodate the 322 who signed up for it.

Tracey Laws moderated "Disputes in the Future" with panelists Larry Johnsen, Scott Belden, Michael Pickel, and Jonathan Sacher.

Evaluation sheets gave generally high grades to the training sessions and the keynote speaker.

The reception on Thursday evening generated lively interactions among the 700+ who attended. The reception space was expanded this year with an additional room to allow for easy circulation and access to food and beverages. ▼

WORKSHOPS...

"Ethics"

"Subpoena Power of a Panel"

Left & Right: "Technology in the Hearing Room...and Beyond" with Larry Schiffer and Caleb Fowler

"Life/Health Orientation - 'Life Re 101' for Non-Lifers"

"Marketing - Best Practices"

(Peter A. Scarpato in the middle)

Rick Rosenblum moderated "Discovery from a (Re)Insurance Company Perspective" with panelists Rhonda Rittenberg, Mark Megaw and Chuck Ehrlich.

ANNUAL MEETING...

After seven years as the ARIAS Treasurer, Dick White retired.

After six years on the Board, the last two as Chairman, Mary Lopatto received her crystal trophy from new Chairman Tom Forsyth.

Having returned to the Board to fill in for a year and a half, former Chairman Tom Orr retired again.

Dick Kennedy has awarded the ARIAS Pin to retiring Board Members since the tenth anniversary of ARIAS in November 2004, when he first presented them to the original Board members.

"...and I finally have my ARIAS Gold Pin"

RECEPTION...

The traditional aquatic attendees

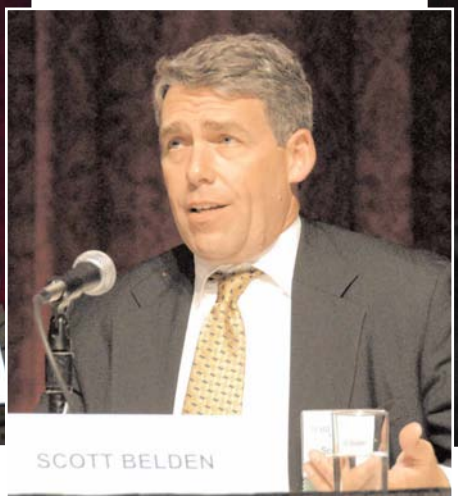
A Certified Couple...Certified Arbitrators Carolyn and Jim Corcoran

AROUND THE CONFERENCE...

Conference Co-Chair David Robb

Conference Co-Chair Deirdre Johnson

Jonathan Sacher



Tracey Laws

report

Forsyth and Lattal Chosen as Chairman and President

Stone Named President Elect; Rubin and Vyskocil Elected to Board

Thomas L. Forsyth

Frank A. Lattal

At the Board of Directors meeting held during the 2007 Fall Conference on November 1, Thomas L. Forsyth, Executive Vice President and General Counsel of Partner Reinsurance Company of the U.S., was elected Chairman of ARIAS•U.S. He succeeds Mary A. Lopatto, a partner in Chadbourne & Parke LLP, who has retired. Frank A. Lattal, Chief Claims Officer for ACE Ltd., was elected President, succeeding Mr. Forsyth.

Also at the meeting, Susan A. Stone, a litigation partner at Sidley Austin LLP's Chicago office, was chosen as President Elect.

At the Annual Membership Meeting, Jeffrey M. Rubin, Senior Vice President, Director Global Claims of Odyssey America Reinsurance Corporation and Mary Kay Vyskocil, a litigation partner at Simpson Thacher & Bartlett LLP, were elected as new members of the Board of Directors. They replace departing Board members Mary A. Lopatto and Thomas S. Orr, of General Reinsurance Corporation. Also at that meeting, Mr. Lattal and Ms. Stone were re-elected to the Board for three-year terms.

Prior to joining PartnerRe, Chairman Forsyth had been General Counsel and Secretary of OneBeacon Insurance Group and, previous to that, General Counsel of Swiss Reinsurance America Corporation and Chief General Counsel of the Americas Division of Swiss Re's Property and Casualty Business Group.

From 1983 to 1994, Mr. Forsyth was with Travelers Insurance Companies, where he focused on asbestos and environmental coverage claims and litigation. He was an associate at Barger & Wolen in Los Angeles from 1981 to 1983.

Mr. Forsyth is also Co-Chair of the ARIAS Mediation Committee.

Mr. Lattal is the senior executive responsible for all aspects of claims management and administration for the ACE Group of Companies, worldwide. He has held that position since 2003. He joined ACE in December 1998 as Senior Vice President and Claims Counsel and, in January 2002, was appointed Executive Vice President and General Counsel with responsibility for the consolidated Claims and Legal departments of ACE Bermuda.

Prior to joining ACE, Mr. Lattal spent 14 years in private practice specializing in tort and insurance law as a partner in the New Jersey law firm of Connell, Foley & Geiser, LLP.

Mr. Lattal is Co-Chair of the Nominating and Publications Committees.▼

Susan A. Stone

Jeff Rubin

Mary Kay Vyskocil

An Introduction to Technology in Reinsurance Arbitration

feature

Larry P. Schiffer

Technology has been used in reinsurance arbitrations for years. Nearly all practitioners and arbitrators are familiar with real time transcription of a witness' testimony (one such product is LiveNote) and the use of PowerPoint for openings and closings. This paper will outline some of the uses of technology in reinsurance arbitrations and will discuss some of the more "high-tech" solutions available to practitioners and arbitrators.

Is Technology Necessary?

The short answer is of course not. There is no question that a reinsurance arbitration can take place without the use of any modern trial technology. The only technology needed for a simple "non-tech" arbitration is a computer for word processing (a typewriter will do if you can find one that works), a photocopier, a fax machine, and an overnight delivery service.

What technology brings to any litigated matter is a more efficient and environmentally friendly way of organizing large quantities of information and the ability to display that information in a useful and interesting format. Because we live in a visual society and have relatively short attention spans, the use of technology helps both the practitioner and the arbitrator in focusing in on the important and relevant documents and issues.

This does not mean that arbitrators who want to have binders of documents are luddites. Not all cases require the latest and greatest in technology and not all arbitrators need to have everything in electronic format.

Technology in the Discovery Phase

It is nearly universal today that every deposition transcript is produced electronic format (ASCII disk) along side the traditional transcript and min-u-script. An electronic version of a deposition transcript lets the parties use various software packages to analyze, organize, and annotate the testimony for later use in the arbitration brief and at the hearing. For arbitrators, electronic transcripts allow for ease of storage, review, and manipulation in advance of the hearing on those occasions where the arbitrators have requested all deposition transcripts or the parties submit to the panel transcripts or transcript excerpts for certain witnesses.

While an electronic transcript can be read in any standard word processing program, typically practitioners use specialized software packages meant for the storage and manipulation of transcripts. LiveNote is one product familiar to most practitioners and arbitrators. LiveNote and similar software packages allow for searching based on key words. More sophisticated uses include the creation of issues and annotations, as well as synching up with exhibits and even video.

Document discovery is also often electronic as well. Client files are scanned into various formats depending on the expected use of the electronic data. Simple electronic production of documents may only require production in PDF format. PDF format is essentially a picture of the document, but in a format that allows some searching and annotating. More sophisticated software allows for full search capability and the ability to add production numbers electronically along with annotations and linking of attachments.

Where the parties agree to produce documents in electronic format it is important to have a clear understanding of the format in which the documents will be produced. If the intent is to be able to word search a document upon receipt, then the parties must agree that documents be produced in the appropriate format. Otherwise, the parties will merely exchange CDs or DVDs of documents in either PDF or TIFF format, with each side left to manipulate and convert the electronic files as necessary for their use.

Larry P. Schiffer

What technology brings to any litigated matter is a more efficient and environmentally friendly way of organizing large quantities of information and the ability to display that information in a useful and interesting format.

Larry Schiffer is chair of the ARIAS·U.S. Technology Committee. He is a partner in the New York office of Dewey & LeBoeuf LLP. This article was presented at the ARIAS•U.S. Fall Conference and Annual Meeting, Workshop C: Technology in the Hearing Room ... and Beyond, November 1, 2007.

A simple electronic brief in a word processing format with PDF copies of the exhibits is relatively easy to accomplish in a short amount of time. A true electronic brief with integrated hypertext links to cases, testimony, and documents takes some time for a technology consultant to put together.

CONTINUED FROM PAGE 19

It is important to know at the organizational meeting whether the arbitration panel will want all exhibits at the hearing produced on disk to the panel. If this is so, then document production in electronic format, with embedded production numbers, makes the most sense and is the most efficient way to proceed.

Technology in the Briefing Phase

Various techniques may be used to present the hearing briefs and exhibits to the panel. This is a matter that needs to be discussed with the panel at the organizational meeting and in advance of the date to submit briefs to make sure that the submissions are in a format that is usable and useful to the panel. A simple CD or DVD with an electronic version of the brief and PDFs of the exhibits may be sufficient for those arbitrators who wish to have everything in electronic format. A more sophisticated electronic brief, where the exhibits, case law, and the deposition testimony all appear as hypertext links to the actual transcripts, cases, and documents in electronic format, may also be produced for those arbitrators that wish that level of technology. With an electronic brief produced in conjunction with a trial technology consultant, the software necessary to read and manipulate the information on the brief is embedded in the CD or DVD. Arbitrators need to advise counsel of their technology interests and requirements so that counsel is aware of what needs to be provided to the panel well in advance of the submission date.

A simple electronic brief in a word processing format with PDF copies of the exhibits is relatively easy to accomplish in a short amount of time. A true electronic brief with integrated hypertext links to cases, testimony, and documents takes some time for a technology consultant to put together. Often, the parties will submit a simple electronic copy of the brief on the exchange date and then agree to provide the panel with the full-blown integrated electronic brief a week or so before the hearing. This gives the panel a chance to read the parties' arguments in advance if the arbitrators chose to do so, but then have the fully functional electronic brief before the hearing when the panel is more likely in a position to study the materials.

Not all arbitrators need or want a fully functional hypertext electronic brief and there is a cost associated with producing such a document. It is important for the panel to discuss the scope of any electronic hearing submissions with the parties early on so that both the parties and the panel understand the cost and timing of preparing a more sophisticated electronic presentation in advance of the hearing.

Additionally, it may be necessary for the parties to coordinate and cooperate on the electronic version of the exhibit sets being provided to the panel. Duplicate electronic versions of the same document do not assist anyone and can lead to confusion. Coordination among counsel to eliminate redundant exhibits so that the panel only has one set of exhibits submitted jointly by both sides is something to consider when using a sophisticated electronic brief with hyperlinks to the exhibits.

If electronic briefs with hyperlinks are not going to be used, but the panel wants exhibits electronically, it will be necessary to determine in what manner the exhibits are to be produced. If the panel wishes to annotate the exhibits in digital format, then the exhibits must be saved to the CD or DVD in the proper format to allow for annotation. This may be PDF format if the arbitrators have the appropriate software version that allows for annotations or in some other format as long as the annotation capability is imbedded in the disk sent to the panel. If the panel only wants to have the electronic version of the exhibits as a resource and does not plan annotating the documents on disk, then a simple PDF or TIFF file for each exhibit should suffice.

Technology at the Hearing

Technology at the hearing can be extremely sophisticated or quite simple depending on the needs and wants of the parties and the arbitrators. The key is that the technology used should match the needs of the case and should not be used just for the sake of the technology itself. Not every case requires everything to be shown on a big screen or a monitor. The more sophisticated the technology the more likely the cost will rise. Having a technologist from a trial consultant sit at the hearing and run the presentation is not inexpensive.

Nearly all reinsurance arbitrations have some version of real time testimony transcription available to the arbitrators and the parties. This allows the panel to read the testimony on a laptop or shared monitors while the witness is testifying. If each arbitrator has a personal laptop hooked up to the real time transmission, each arbitrator can mark the transcript on the fly if there is testimony the arbitrator wishes to review more carefully later. Obviously, using shared monitors precludes the ability of each arbitrator to tag testimony on an individual basis.

Real time transcription is very helpful where witnesses speak softly or in a pattern that is difficult to hear. It also makes it easier for the arbitrators to follow up with a witness to confirm or question testimony after the direct and cross-examination has concluded. On the other hand, staring at a screen and reading the testimony instead of watching the witness can be distracting and can cause arbitrators to miss important aspects of the testimony. Arbitrators that use real time transcription need to balance these factors to make the most use of the technology.

Presentation software, like PowerPoint, is another common technology product used in reinsurance arbitrations. PowerPoint can be used for opening statements and is also very useful in closing statements to pull the evidence together. Many practitioners are also using much more sophisticated trial software packages to meld together testimony, video, exhibits, and charts into a seamless presentation. What this more sophisticated software can do is link testimony with specific exhibits and highlight the relevant testimony and portion of an exhibit to demonstrate admissions, conflicts in testimony, or other points counsel wishes to make.

Trial presentation software, often in conjunction with a technologist, can be used during direct and cross-examination to lead a witness and direct the panel to specific portions of documents or testimony. While there are different techniques and methodologies, trial presentation software allows counsel to bring up an exhibit on a screen and then highlight or "call-out" a specific portion of the exhibit for emphasis. Trial consultants will work with counsel on both direct, cross-examination, and closing examinations to put documents into a proper order and allow for swift display and manipulation of exhibits for maximum effect and impact.

When all exhibits are available in this fashion, the arbitrators can also ask for documents to be displayed during questioning of witnesses or counsel to answer any open questions or clarify certain issues.

Technology Horror Stories

The use of sophisticated technology and trial presentation software can make for an efficient and well-organized hearing if used properly and if staffed appropriately. On the other hand, lack of preparation or technology failures can result in inefficiencies and delays, which can defeat the purpose in using technology in a reinsurance arbitration. Even the use of real time transcription can delay and interfere with the hearing if participants are not prepared for the technology or the technology fails. Counsel must always be prepared to move forward with the "traditional" method for trying the case if the technology breaks down because of human or mechanical failure. Over-reliance on technology may lead to disaster and proper planning and training is necessary if the more sophisticated technologies are going to be used. The use of technology in reinsurance arbitrations requires balance and forethought. It should be discussed at the organizational meeting and all parties, including the arbitrators, must understand the cost and requirements associated with the use of sophisticated technology.

Conclusion

We live in today's world and today's world requires the use of technology in reinsurance arbitrations. For some, the technology will be basic and simple. For others, it will be sophisticated and complex. In all cases, technology should be used solely for the purpose of organizing and presenting the evidence in a useful and efficient way so that the arbitration panel can come to the right and fair decision. ▼

Trial presentation software, often in conjunction with a technologist, can be used during direct and cross-examination to lead a witness and direct the panel to specific portions of documents or testimony. While there are different techniques and methodologies, trial presentation software allows counsel to bring up an exhibit on a screen and then highlight or "call-out" a specific portion of the exhibit for emphasis.

members on the move

In each issue of the Quarterly, this column lists employment changes, re-locations, and address changes, both postal and email, that have come in during the last quarter, so that members can adjust their address directories and PDAs.

Do not forget to notify us when your address changes. Also, **if we missed your change below, please let us know** at info@arias-us.org, so that it can be included in the next Quarterly.

Recent Moves and Announcements

Thomas L. Forsyth has returned to the New York area and is now Executive Vice President and General Counsel at Partner Re U.S. His address is One Greenwich Plaza, Greenwich, CT 06830, phone 203-485-8356, email thomas.forsyth@partnerre.com .

Claudia M. Morehead has become a partner at Lewis Brisbois Bisgaard & Smith, LLP and is now at 650 Town Center Drive, Suite 1400, Costa Mesa, CA 92626, phone 714-668-5576, fax 714-850-1030, cell 949-322-0813, email cmorehead@lbbslaw.com .

Theodor Dielmann has moved from Hannover to Seville, where his new address is Calle Peru 19 Bajo, E-41012, Seville, Spain, phone +34 95 4241657, fax +34 95 4624376. His email has not changed.

John M. Kwaak is now located at JMKRe, Inc., 40 Railroad Avenue, Glen Head, NY 11545, phone 516-609-0004, fax 516-609-0004, email jmkre@verizon.net .

Jeffrey M. Phillips is now with The Claro Group, LLC at 27282 Viana, Mission Viejo, CA 92692, phone 949-209-8781, cell 949-632-0337, email jphillips@theclarogroup.com .

John C. McKenna's mailing address is now P.O. Box HM 321, Hamilton HM BX, Bermuda.

Paul E. Dassenko can now be found at Azure Advisors, Inc., 445 Park Avenue, 9th Floor, New York, NY 10022, phone 212-223-1606, fax 212-223-1607, cell 860-866-7145.

Henry T. French, Jr.'s new address is XL Insurance, 100 Constitution Plaza, Hartford, CT 06103, phone 860-293-7749, fax 860-293-7754, email Henry.French@xlgroup.com .

On October 1, Dewey Ballantine LLP and LeBoeuf, Lamb, Greene & MacRae LLP became **Dewey & LeBoeuf LLP**.

The next day, Locke Liddell & Sapp PLLC and Lord, Bissell & Brook LLP combined to form **Locke Lord Bissell & Liddell LLP**.

Jonathan F. Bank's new address is Locke Lord Bissell & Liddell LLP, 300 S. Grand Avenue, Suite 800, Los Angeles, CA 90071-3119, phone 213-687-6700, efax 213-341-6700, email jbank@lockelord.com .

Edward K. Lenci is now a partner at Hinshaw & Culbertson LLP, 780 Third Avenue, 4th Floor, New York, NY 10017, phone 212-471-6212, fax 212-935-1166, email elenci@hinshawlaw.com .

Andrew A. Magwood's new address is Wood, Smith, Henning & Berman LLP, 7580 N. Ingram Avenue, Suite 108, Fresno, CA 93711, phone 559-437-2872, email AMagwood@wshblaw.com .

Robert Buechel has joined Imagine Group Holdings Limited as its General Counsel in Bermuda. His new contact information is 7 Reid Street, 4th Floor, Hamilton HM 11 Bermuda, phone 441-504-8155, fax 441-296-4475, email Robert.Buechel@imagine.bm .

George G. Zimmerman's new business phone number is 941-388-7433.

Emily Canelo has been named EVP & General Counsel, Worldwide Reinsurance at Endurance Reinsurance Corporation of America, while **David Griff** has moved up to Vice President & Associate General Counsel. Contact information has not changed.

Charles Ernst has moved his office downtown. His new address is XL America Inc., One World Financial Center, 200 Liberty Street, New York, NY 10281, phone 212 384-0615, fax 212 384 6270, email charles.ernst@xlgroup.com .

Email Changes

Paul Steinlage psteinlage@solarus.net

Michael Gabriele
mgabriele@tmo.blackberry.net ▼

With this issue, the Quarterly begins a new column that will appear periodically. The nature of the column will be to offer thoughts and observations about reinsurance and arbitration that are outside the normal run of professional articles, often looking at the humorous side of the business. We hope you will find these articles interesting and/or enjoyable.

off the cuff

On the Edge

Eugene Wollan

Eugene Wollan

- The pedestrians waiting to cross the street when the light changes don't stand on the curb; they inch out into the traffic, sometimes dangerously so.
- The car idling next to yours at the red light glides slowly forward before the signal actually changes. (Incidentally, have you ever noticed that if you turn your head to look directly at that other driver, he or she will somehow sense it and look back? But that's for another article.)
- A driver careens across three lanes of traffic to get into the E-Z Pass line containing only four cars instead of five.
- The couple in the supermarket, approaching two checkout lines of apparently equal length, splits up, so that as soon as one line shows signs of moving more rapidly, the one in the slower line can bolt over.
- The hacker at a local tennis club, warming up with a soon-to-be opponent, ignores the customary warm-up protocol and lambastes every ball in what is clearly intended to be an exercise in intimidation.
- The passenger at the airport gate whose boarding pass says Zone 4 tries to board with Zone 3 in the hope of finding more space in the overhead storage bins.

What are all these folks doing? What are they thinking of? What do they have in common?

The answer is easy: they're trying to get an edge — some advantage, however slight, over the rest of the herd.

And, even though we may occasionally resent someone who pulls it off and actually gets an edge over us, the fact is that it's really human nature and just about everyone does it. (There is a story, probably apocryphal, that a legendarily successful CEO was once heard to say, "All I want in life is an unfair advantage." Like so many apocryphal stories, it encapsulates a reality that applies to humanity at large.) We see this behavioral characteristic every day and in every phase of life. After all, at the most basic level, isn't that the principle underlying a capitalist society, that competition — the urge to get an edge — produces the beneficial results envisioned by Adam Smith?

And of course we encounter the very same phenomenon in our own beloved area of reinsurance arbitrations.

The most obvious example that leaps to mind is umpire selection. When the lawyers and the parties say that they want a neutral umpire, what they're really saying is that they don't want an umpire who might favor the other side's view, and would much prefer one who favors their own view. Indeed, many experienced professionals view umpire selection as the most critical single step in the entire process, so it's not really a surprise that a good deal of strategizing and maneuvering accompanies it.

An arbitration, no matter how collegial, is an adversarial process, and it is hardly surprising that the parties and their counsel, most of whom are very experienced litigators, are always probing for whatever edge they can get. This can manifest itself in infinite ways, some obvious, some far more subtle.

- Counsel who suggests adjourning for the day at about 4:50 PM so that he can "review his notes" and thereby expedite completion of his cross-examination the next morning may really just want the results of his cross to sink in with the Panel overnight, before his adversary has had a crack at re-direct.
- The frequent tap-dance between the law firms on both sides of the table about whose offices should be used for the

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After all, at the most basic level, isn't that the principle underlying a capitalist society, that competition — the urge to get an edge — produces the beneficial results envisioned by Adam Smith?

Eugene Wollan is a former senior partner, now counsel, of Mound Cotton Wollan & Greengrass. He is resident in the New York Office.

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hearing is usually attributable to a perception there really is a "home field" advantage to be achieved. Personally, the only real difference I have found has to do with access during recess to my own desk, mail, etc., but the blackberry solves most of those problems.

- The party arbitrator who thinks he is giving his appointing party some kind of advantage by arguing forcefully and interminably for every position taken by his party, no matter how inconsequential or even silly it may be.
- The expert witness who attempts to one-up the credentials of the other side's expert by volunteering that he has testified as an expert in hundreds of proceedings, and then hastens to explain, "But I'm not a hired gun."
- The cedent who automatically asks for security at the Organizational Meeting, even though there is absolutely no danger that the reinsurer will fail to honor an adverse award.
- The cedent's lawyer who announces at the Organizational Meeting that he needs no discovery and is ready to proceed to Hearing, knowing full well that it is always the reinsurer that needs more discovery (because it's the cedent that has most of the relevant information) and that the Panel will certainly see through this posturing and allow discovery.
- The reinsurer who asserts a late notice defense in a situation where the timing of the notice made no conceivable difference and there is no possibility of showing prejudice.
- The lawyer who seduces an opposition witness into believing they are engaged in a high-level, Socratic, intellectual exchange and dialogue, when what he is really doing is leading him gently into a minefield from which there will be no escape short of self-destruction.

Sometimes the attempt to gain an edge will backfire; vide, the periodic insider trading scandals. Sometimes it will succeed. Sometimes it will not even be recognized for what it is, which of course increases exponentially its chances of succeeding. All we can really do is live with the fact that it's all around us. ▼

feature

Amend the FAA

John H. Binning

John H. Binning

Introduction

The following article considers the most frequent criticism of the insurance and reinsurance arbitrations following the enactment of the Federal Arbitration Act (FAA) and whether amendments may be needed.

When, on February 13, 1925, President Coolidge signed the United States Arbitration Law[1] the extended project of drafting that Act by a committee of the American Bar Association[2] came to a successful conclusion. The Report to the Committee on the Judiciary of the House of Representatives by Congressman Graham of Pennsylvania clearly states the purpose of H.R. 646, which is now referred to as the FAA.

> The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in Federal courts.[3]

The Committee Report describes the bill and the benefits of arbitration in reducing technicality.

> The procedure is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties.
>
> ... It is particularly appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.[4]

After adoption and for a number of years, comments about arbitration and the FAA were favorable. In recent years, numerous complaints about the FAA and the arbitration process have surfaced. Criticism has been focused principally in three areas: (1) the process of selecting arbitrators (party and umpire); (2) length, cost and discovery in some arbitrations which are excessive and are becoming comparable to litigation; and (3) difficulty in obtaining testimony and records of third parties, intermediaries principally.

(1) Selection of the Arbitration Panel

Section 5 of the FAA gives the selection process for arbitrators to the parties. The only direction contained in Section 5 is that a court should appoint an umpire if the parties fail to do so or were unable to act. Section 10 of the FAA addresses the conduct of arbitrators which may affect confirmation of the award but does not deal with selection.

Section 5 of the FAA provides that when the parties have an agreement for the naming of an arbitrator, arbitrators, or an umpire, that method shall be followed. Should the parties fail to do so a court will designate and appoint an umpire as may be required. The parties may establish qualifications for party arbitrators and umpires in that agreement. When an umpire as a third arbitrator or a single umpire is to be selected, the parties may provide that an independent organization such as the American Arbitration Association or a judge of the United States district court in whose jurisdiction the arbitration is to be conducted will select the arbitrator or umpire.

The procedure followed in many reinsurance cases is the selection of one of two nominated or selected candidates for umpire who have been selected by the parties to be

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After adoption and for a number of years, comments about arbitration and the FAA were favorable. In recent years, numerous complaints about the FAA and the arbitration process have surfaced.

John H. Binning is of Counsel at Rembolt Ludtke LLP. He was formerly CEO of Great West Casualty Co., director of several insurance companies, and Director of Insurance for the State of Nebraska. He is an ARIAS·U.S. Certified Arbitrator and ARIAS Umpire.

Use of the ARIAS•U.S. process may result in an umpire who is not the first choice of a party. However, both parties, by exercising proper choices, will be assured that the umpire will be a qualified person not objectionable to them and the parties will have meaningful participation in the selection of the umpire.

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decided by lot. The criticism of that umpire selection process is that one party will have a party arbitrator and an umpire of its choice as members of a three-person arbitration panel which will make all of the procedural decisions and the award. The other party appears to be at substantial initial disadvantage. This criticism of that umpire selection process, however, indicates dissatisfaction with the procedure adopted by the parties and not with any provision of the FAA. The parties may agree on other procedures to be followed in the selection of an umpire.

There is a process of umpire selection which provides for participation by the parties that avoids the criticism of selection by lot. That process is the ARIAS•U.S. Umpire Selection Procedure[5]. Under that procedure, ARIAS•U.S. provides an initial list of umpire candidates by random computer selection from a list of umpires on the ARIAS•U.S. umpire list (at present 89). Through use of questionnaires, a group of ten qualified candidates are selected who are without conflict as viewed by the parties. After a review of preference designations by the parties, an umpire is selected.

The ARIAS•U.S. Umpire Selection Procedure is available to members and non-members of ARIAS•U.S. Use of the ARIAS•U.S. process may result in an umpire who is not the first choice of a party. However, both parties, by exercising proper choices, will be assured that the umpire will be a qualified person not objectionable to them and the parties will have meaningful participation in the selection of the umpire. The American Arbitration Association and other similar organizations in their umpire selection process make use of questionnaires to identify conflicts and have some participation by the parties.

(2) Arbitrations Are More Like Litigation

Criticism that some arbitrations have taken on the characteristic of and have become comparable to litigation may be valid, especially from the viewpoint of a party who has been confronted with the direct and indirect cost of an arbitration which took several years to conclude with months of discovery, depositions, hearing and motions. Some arbitration disputes by their nature will require extensive proceedings, i.e., a multi-year asbestos or pollution damage dispute with several different combinations of primary and reinsurance carriers with different terms of coverage. Determining issues of liability and the amount of damages in dispute in such cases and other complicated disputes may require an extended period of time with substantial direct and indirect arbitration costs. It is difficult to be critical of the FAA in terms of the time and costs of arbitrating such complex disputes.

The arbitrators, counsel on behalf of the parties, and the parties control the arbitration. The arbitrators may discuss discovery matters with the parties and attempt to have the parties agree to voluntarily limit discovery. Those discussions between the parties and their counsel with firm and dedicated arbitrators, principally the umpire, can be effective in limiting discovery. Although seldom used, the arbitrators have the authority to limit discovery upon which the parties have agreed. The arbitrators have authority to grant or deny motions for discovery. If abuses exist where reinsurance arbitrations have become more like litigation, it is not the fault of the FAA. Reinsurance arbitrations involve complicated disputes which may require a more litigation type proceeding. If discovery and the proceedings are overly burdensome, it is most likely the fault of counsel, the parties and the arbitrator who have more than a limited role in controlling the arbitration.

(3) Third-Party Testimony and Records

The arbitration procedure which has received the most recent criticism relates to discovery - compelling testimony and production of documents from unrelated third parties, including intermediaries.

Intermediaries participate in and have meaningful roles in placement, formation and negotiation of contract terms, wording and sometimes have exclusive knowledge of the transaction and of the parties. Participation of intermediaries and their knowledge in many reinsurance transactions begins with the desire of a cedent for reinsurance and concludes with the submission of the final reinsurance treaty for signature by the parties. If counsel is denied full access to the information and records and an opportunity to take testimony of the principal intermediary, counsel and the panel

may be denied evidence that is relevant to disputed issues.

Section 7 of the FAA contains one short provision concerning discovery authority for summons by the arbitrators.

> The arbitrators selected either as prescribed in this title (9 USCS §§ 1 et seq.) or otherwise, or a majority of them, may 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.[6]

This sentence is the sole authority in the FAA for arbitrators to issue a summons. That authority extends to issuing a summons to any person to appear before the arbitrators. That statute does not restrict such an appearance to the time of the hearing. The reference "to attend before them or any of them..." indicates such an appearance can be made at a time not during the hearing. The authority of a United States district court to enforce such a summons only for failure of the witness to appear further confirms that the summons must require attendance of such person before the arbitrator or arbitrators.

> ... if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the Untied States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.[7]

The legislative history of the FAA in the proceedings of the House of Representatives and in Congress is clear that the purpose of enacting the FAA was to ensure judicial enforcement of privately made agreements to arbitrate.[8] Although benefits and results of the enactment of the FAA are recited in the legislative history, the sole purpose is clear.

The Supreme Court of the United States in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 220 (1985) held:

> The legislative history of the Act establishes that purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We, therefore, reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement - upon the motion of one of the parties - of privately negotiated arbitration agreements. The House Report accompanied by the Act makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs," (Citation omitted) and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate. This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it, the House Report expressly observed:
>
> > FN6. According to the Report: "The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction."...[9]
> >
> > It is particularly appropriate that the action should be taken at this time where there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

Notwithstanding that opinion and that legislative history, several courts have granted arbitrators additional and expanded authority in obtaining documents from third parties on the basis of legislative intent or implied authority in disregard of the clear, concise and direct authorization of arbitrators in Section 7 of the FAA which requires the summons to mandate the person to attend before the arbitrators as a precedent to compelling production of records.

In *Integrity Insurance Company, in Liquidation v. American Centennial Insurance Company*, 885 F.Supp. 69, 73 (S.D. NY 1995) the arbitrators had issued a subpoena duces tecum for the production of records and directed the petitioners to appear for a pre-hearing deposition. The court modified the subpoenas by finding that the arbitrators may not compel attendance of a non-party at a pre-hearing deposition and permitted the subpoena for the production of documents to remain in effect. In regard to the production of the documents, the court held:

> The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to the hearing.

In *Meadows Indemnity Company, Ltd. v. Nutmeg Insurance Company*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994), the third-party reinsurers had filed a motion for a protective order from an order issued by

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Intermediaries participate in and have meaningful roles in placement, formation and negotiation of contract terms, wording and sometimes have exclusive knowledge of the transaction and of the parties.

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the arbitration panel requiring it to produce numerous documents, not for the review by the panel at a hearing, but for inspection by the parties and copying by Meadows prior to a hearing before the panel. The memorandum opinion of the United States Magistrate Judge found as follows:

> The power of the panel to compel production of documents from third parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing.

In the matter of arbitration between *Security Life Insurance Company of America and Duncanson and Holt, Inc*., 228 F.3d 865, 870 (8th Cir. 2000), the arbitrators had issued a subpoena duces tecum to require a reinsurer to produce documents and for a deposition of a certain employee. During the course of the proceedings, the employee testified in another matter in response to a California court subpoena and the arbitration subpoena of the employee of the reinsurer was dismissed as moot. The court went on to consider the merits of the remainder of the appeal to produce documents. It cited Section 7 of the FAA and observed:

> It does not, however, explicitly authorize the arbitration panel to require the production of documents for inspection by a party. Although the efficient resolution of disputes to arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.

In *Stanton v. Paine Webber Johnson & Curtis, Inc*., 685 F.Supp. 1241, 1242 (S.D. Fla. 1988) the court considered a motion for a temporary restraining order and permanent injunction enjoining the defendants from requesting the issuance of serving subpoenas for the attendance of witnesses or production of documents, other than for attendance or production before the arbitration panel. The court found that:

> They are asking the court to impose judicial control over the arbitration proceedings. Such action by the court would vitiate the purposes of the Federal Arbitration Act: to facilitate and expedite the resolution of disputes, ease court congestion, and provide disputants with a less costly alternative to litigation. (Citation omitted.)
>
> ... Furthermore, the court finds that under the Arbitration Act, the arbitrators may order and conduct such discovery as they find necessary. (Citation omitted.).

In *Amgen, Inc. v. Kidney Center of Delaware County, Ltd*., 879 F.Supp. 878 (N.D. Ill. 1995), the parties had agreed to arbitrate under the Federal Rules of Civil Procedure and the court held that the subpoena to a third party to testify at a deposition and produce documents was proper. That case is not authority or relevant to the interpretation of 9 USCA § 7.

In *American Federation of Television and Radio Artists, AF-CIO v. WJBK-TV* (New World Communications of Detroit, Inc.), 164 F.3d 1004, 1009 (6th Cir. 1999), the argument was conducted under a grievance pursuant to a collective bargaining agreement under the National Labor Relations Act. The court held that:

> We hold that under Section 301, the labor arbitrator is authorized to issue a subpoena duces tecum to compel a third party to produce records he deems material to the case either before or at an arbitration hearing. We caution that this decision should not be read to mean that a party to the arbitration is entitled to any such discovery, only that a labor arbitrator may issue such a subpoena.

The opinion went on to state that it did not have any relevance to discovery under the FAA. That case is not precedent for any authority or interpretation of 9 USCA § 7.

The following cases have held to a strict interpretation of Section 7 of the FAA.

In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407, 408, 410 (3rd Cir. 2004), the district court had issued an order enforcing a subpoena for a party to produce documents. The Third Circuit considered the case and it is noteworthy that the opinion of the court was written by then Circuit Judge Alito. The court reviewed the legislative history of the FAA to determine whether or not the Act was ambiguous or subject to interpretation from its legislative history and held in that regard:

> Thus, Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.

After discussing two cases to the contrary[10], the *Hay* court said:

> We disagree with the power-by-implication analysis. By conferring the power to compel a non-party witness to bring items to an arbitration proceeding while saying nothing about the power simply to compel the production of items without summoning the custodian to testify, the FAA implicitly withholds the latter power. If the FAA had been meant to confer the latter, broader power, we believe the drafters would have said so, and they would then had no need to spell out the more limited power to compel a non-party witness to bring items with him to an arbitration proceeding.

In commenting upon the Eighth Circuit in *Security Life*, the *Hay* court said:

> In *Security Life*, the Eighth Circuit reasoned that...
>
> > the interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. (Citation omitted.) In our view however, this policy argument cannot supersede the statutory text.

In reference to other prior District Court cases agreeing with the *Security Life* decision on this matter[11], the *Hay* court said:

> None of these cases provides an adequate justification for disregarding the plain meaning of Section 7's text.

In *Comsat Corporation v. National Science Foundation*, 190 F.3d 269, 275 (4th Cir. 1999), the Fourth Circuit considered a case where a subpoena required the agency who was not a party to the arbitration agreement produce documents and employee testimony relating to a contract involved in the arbitration. The court held as follows:

> The subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA. ... Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating party with documents during pre-hearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear "before them," that is, to compel testimony by non-parties at the arbitration hearing.

However, the *Hay* court made a comment in that case as follows:

> In dicta, however, the *Comsat* court suggested that an arbitration panel might be able to subpoena a non-party for pre-hearing discovery "under unusual circumstances" and "upon showing of special need or hardship." (Citation omitted.) While we agree with *Comsat's* holding, we cannot agree with this dicta because there is simply no textual basis for allowing any "special need" exception. Again, while such a power might be desirable, we have no authority to confer it.

In *Stolt-Nielsen SA v. Celanese, AG*, 430 F.3d 567, 577, 578 (2nd Cir. 2005), the Second Circuit considered a subpoena issued by an arbitrator panel to a non-party to appear and provide testimony and documents to the arbitration panel at a hearing held in connection with the arbitration. The Second Circuit affirmed the action of the district court in granting a motion to compel and denying the motion to quash. The court held:

> The subpoenas at issue in this appeal directed Mr. O'Brien and the Stolt custodian to appear and testify, and also provide documents, at a hearing convened before the arbitration panel. No party to this appeal contested the materiality of the evidence sought by the subpoenas. Therefore, as the District Court rightly recognized, in issuing the O'Brien and Stolt's subpoenas, the arbitration panel precisely provided the authority that Section 7 unambiguously grants them.

The court went on to find the witness was directed to appear at a hearing before the arbitrators and all three arbitrators were present at that hearing; the arbitrators heard testimony directly from the witness and unlike a deposition, the panel ruled at the hearing on evidentiary issues such as admissibility and privilege and reserved on other evidentiary issues; and the testimony provided at the hearing became a part of the arbitration record to be used by the arbitrators in their determination of the dispute before them; and, finally, the *Stolt-Nielsen* court concluded:

> Nothing in the language of the FAA limits the point and time in the arbitration process when (the subpoena) power can be invoked or says that

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> the arbitrators may only invoke the power under Section 7 at the time of the trial-like final hearing.

Several cases have held consistent with the *Hay* court in regard to the requirement that the summons must direct the witness to appear before the arbitrators but have added in dicta a modifying condition where there is showing of special need or hardship.

The dicta in *Comsat citing Burton v. Busch*, 614 F.2d 89 (4th Cir. 1980) that pre-hearing depositions and discovery of documents of third parties may be cases of "unusual circumstances", "specific need" or "hardship" has been previously discussed and not approved by *Hay*.

In *Gresham v. Norris*, 304 F.Supp.2d 795, 796 (E.D. Va. 2004), the arbitrators issued a subpoena compelling a third-party witness to produce documents requested in the subpoena and to appear at a deposition. In denying enforcement of the subpoena, the court quoted the opinion in Comsat:

> A federal court may not compel a third party to comply with an arbitrator's subpoena for pre-hearing discovery, absent a showing of special need or hardship.

The above cases hold that under Section 7 of the FAA, the panel may summon a witness to testify before the panel or some of them and may require the witness bring relevant documents. Those cases hold that the summons for documents without prior summons for testimony is not valid.

The FAA makes specific provision for the arbitrators, by the issuance and enforcement by a United States district court of summons, to obtain the testimony and documents from any person. In order to obtain discovery by issuance of summons from any party, a requesting party, in support of a motion or request to the arbitrator for the issuance of summons under the provision of Section 7 of the FAA, can make a showing that the summons is necessary in order to produce evidence pertinent and material to the controversy. The arbitrators will then be required to determine whether the showing demonstrates that the evidence sought is pertinent and material to the controversy. If the arbitrators deny the motion or request for summons, a court in determining whether an award by those arbitrators should be set aside may reach a different conclusion as to whether the evidence was relevant and material to the controversy and may set aside the award.[12] Denying that motion or request by the arbitrators may cause another arbitration hearing on the same subject and the expenses and inconvenience of the first hearing will be substantially wasted. Provided that a reasonable showing is made that the evidence sought is admissible and material to the controversy, it would be compelling on the arbitrators to grant such a motion. When such a motion or request is granted by the arbitrators and the summons issued, procedures for location of the appearance and service of summons will be determined by the requesting party.

Robert M. Hall's article Discovery from Intermediaries: Winning the Peace, ARIAS•U.S. Fourth Quarter 2006, Vol. 13 No. 2, quotes the National Association of Insurance Commissioners (NAIC) Amendment to the NAIC Reinsurance Intermediary Model Act (Model Act) which requires intermediaries to furnish documents (or) the testimony of an employer or other individual under the control of the intermediary to testify. Under the Model Act, an order for testimony or production of documents can be combined or can be separate orders. Mr. Hall raises interesting questions which concern extraterritorial action California may take after passage of the amendment to the Model Act to enforce that section against intermediaries licensed in California who are required to produce records or testimony in other states. The action by the NAIC deals only with discovery from intermediaries. Section 7 of the FAA and previously cited cases are authority of an arbitration panel to summon any witness to testify and produce documents in any arbitration.

The Model Act as amended has been adopted by the NAIC as an accreditation standard which requires that the state enact that law before it can meet the accreditation requirements of the NAIC. The state legislatures cannot increase the authority of an arbitration panel under the FAA to issue summons for testimony and documents. That authority at this time is found only in the FAA. That authority along with the potential additional pressure on intermediaries arising from the amendment to that Model Act should demonstrate to intermediaries that testimony will be required and documents will be required to be produced. Mr. Hall in his conclusion makes reference to cooperation among the relevant parties in regard to these issues.

Where the witness can properly be required to appear before the panel or a majority of them is a question that could and should be resolved by agreement and by cooperation as suggested by Mr. Hall. The umpire and counsel along with the prospective witness could agree on an acceptable time and place where the witness can be served and which is agreeable and convenient to the witness. Summons could be issued by the arbitrators consistent with that agreement for the witness to appear (with or without documents as required) to testify before the panel or a majority of them. If counsel and the party desiring to obtain the records does not want to incur the expense of the arbitrators appearance at that time and place, an offer could be made to the prospective witness to release the summons to testify if the summoned party would voluntarily produce the records. In most cases, it would be foreseeable that the witness would be willing to produce the records because they could be otherwise obtained by compelling the witness to testify.

Obtaining testimony and records of third parties in reinsurance arbitrations is of vital importance in some arbitrations. It is suggested that the Board of Directors of ARIAS•U.S. might see fit to appoint a committee to discuss and clarify non-adversarial procedures to achieve that testimony and those records with representatives

of reinsurance intermediaries. If agreeable procedures could be arranged, all parties concerned would forego the cost of litigation similar to that which has taken place in the past and the interests of the arbitrators, the parties and the intermediaries could benefit by such an agreement.

If counsel for either party desired the testimony and documents of any party witness who would not voluntarily appear, a summons could be issued by the arbitrators under Section 7 of the FAA. A satisfactory means for obtaining the testimony and records of third parties including intermediaries is presently available under the FAA and amendment of the FAA is not required.

Conclusion

(1) Selecting party arbitrators and umpires. The FAA makes agreements for arbitration valid and enforceable. It does not restrict the parties in their decision to approve the arbitrators or umpire except to provide for designation of the umpire by the court when the parties cannot agree. With all of the available means of selecting umpires, including the ARIAS•U.S. Umpire Selection Procedure, criticism of the process of selecting party arbitrators or the umpire is properly directed to the parties, not to the FAA. There appears to be no need to amend the FAA for party and umpire selection.

(2) Arbitrations appearing to be more like litigation. The FAA contains no restriction on the ability of the parties by agreement to establish the procedures for the hearing. Other than the authority to limit excessive discovery agreed upon by the parties, the authority of the arbitrators is to decide disputed matters and to issue summons is contained in Section 7 of the FAA. If past or future arbitrations appear to be more like litigation than arbitration, it may be due to the complexity of the issues and the type of dispute involved. The responsibility to control the arbitration is subject to the agreement of the parties and approval of the arbitrators. The control of the length and complexity of the hearing is primarily the responsibility of the parties. However, the arbitrators have authority to decide whether to hear specific evidence and testimony. There appears to be no reason to amend the FAA due to some arbitrations appearing more like litigation.

(3) Obtaining third party and intermediary testimony and records. With the sole authority of the arbitrators to issue summons contained in Section 7 of the FAA, there is a clear and direct statutory procedure to obtain testimony before the arbitrators along with production of documents from all parties including third parties. The strict interpretation of that procedure has received the approval of the Second, Third and Fourth Circuits with the Eighth Circuit to the contrary. The weight of the authority appears to be clearly in favor of strict interpretation of Section 7 of the FAA means of obtaining testimony and records from any person including intermediaries by the arbitrators. The parties may agree to take specific depositions of other witnesses who will appear voluntarily, however, the arbitrators can not issue summons to require those depositions to be taken.

Endnotes

1. Public, No. 401, 68th Congress.
2. H.R. Rep. No. 96, 68th Congress, 1st Sess. (1924).
3. Id.
4. Id. 2.
5. At www.arias-us.org. See Umpire Selection Procedure.
6. 9 U.S.C. § 7.
7. Id.
8. H.R. No. 96, 68th Congress, 1st Sess. (1928).
9. Id.
10. Cases referred to were Security Life and Meadows Indemnity.
11. District Court cases listed were *In re Arbitration Between Douglas Brazell and America Color Graphics, Inc.*, 2000 WL 364997, 2000 U.S. Dist. Lexis 4482 (S.D.N.Y. April 6, 2000); *Meadows Indemnity Co., Ltd. v. Nutmeg Insurance Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994); *Stanton v. Paine Webber*, 685 F.Supp. 1241, 1242 (S.D. Fla. 1988).
12. 9 U.S.C. §10(a)3

With the sole authority of the arbitrators to issue summons contained in Section 7 of the FAA, there is a clear and direct statutory procedure to obtain testimony before the arbitrators along with production of documents from all parties including third parties.

Recently Certified Arbitrators

Jonathan A. Bank

Paul Bates

Laura A. Foggan

Jonathan A. Bank

In his more than 35 years of corporate and private practice, Jonathan Bank has been involved in all phases of insurance and reinsurance transactions. He has worked on numerous insurance insolvencies, representing or working with many state insurance departments, including the representation of liquidators/provisional liquidators in many of the largest foreign insurance restructurings.

Mr. Bank was the Senior Vice President of Tawa Associates Ltd, a company formed to acquire, restructure and manage insurance companies in run off. Prior to that, he was the Insurance Practice Leader of PricewaterhouseCoopers' US insurance/reinsurance regulatory and restructuring practice.

Mr. Bank has spoken at the RAA Annual Claims Conference, the Guernsey Captive Forum, the IRU Claims Workshop, the Excess/Surplus Lines Claims Association. He organized/chaired/co-chaired the first two Mealey's Insurance Insolvency and Reinsurance Roundtable conferences as well as Mealey's Run Off Conference, Mealey's Corporate Counsel Conference and Mealey's Global Reinsurance Forum. In 2007, he co-chaired the Educational Session of the AIRROC/Cavell Commutations Event. He has participated in seminars sponsored by PLI, DRI and the NAIC's Rehabilitator and Liquidators Task Force (of which he was a member).

Mr. Bank testified before the Finance and Insurance Committee of the California Assembly on Reinsurance, has served as an arbitrator and umpire in reinsurance arbitrations, and as an expert witness in reinsurance disputes. He is a panel member of the American Arbitration Association and previously served on the Advisory Committee on Reinsurance for the NAIC. He was Vice-chair of the Public Regulation of Insurance Law Committee and a member of the Insurance Insolvency Task Force Steering Committee for the ABA.

He is on the Board of Directors for Platinum Underwriters Holdings, Ltd., and serves as Chairman of the Compensation Committee.

Paul Bates

Paul Bates is certified as a specialist in civil litigation by the Law Society of Upper Canada.

He recently established "Bates Barristers", a prominent litigation boutique in Ontario, Canada, to carry on his practice in complex commercial and insurance litigation. Prior to founding his own firm, Mr. Bates was a partner in a leading Canadian business law firm located in Toronto. His practice includes large-value international commercial arbitrations and disputes related to insurance and reinsurance.

Mr. Bates has appeared at all levels of the Canadian court system, including the Supreme Court of Canada, generating countless reported decisions on diverse areas of financial services, including major briefs on behalf of international reinsurers carrying on business in Canada.

His experience includes these areas of insurance and reinsurance: accident and health, asbestos, auto (including AB), commercial liability and property, facultative and treaty reinsurance (including contract wordings), life, D&O, E&O, product liability, specialty lines, and technology.

Lawyers in Canada, the United States of America, Europe and Asia trust Bates Barristers to provide effective representation as experienced counsel in Canadian and international litigation and arbitration. Bates Barristers is frequently retained by clients referred by other law firms due to conflicts of interest, or who need experienced co-counsel to assist with a major matter.

Laura A. Foggan

Laura Foggan, a partner in the firm of Wiley Rein LLP, is co-chair of the firm's Appellate Practice and a senior member of its Insurance Practice. She has nearly 25 years of trial and appellate experience in insurance-related litigation. Named one of "The Best Lawyers in America" in the Insurance Law category (2008) and recognized in Euromoney's *Guide to the World's Leading Insurance and Reinsurance Lawyers* (2006, 2007), Ms. Foggan is noted for her contributions to key insurance law precedents and for insurance trade group representations and amicus submissions in the courts. She currently serves as co-chair of the Insurance Coverage Litigation Committee of the ABA Litigation Section.

André Hassid

Ralph C. Hemp

Ms. Foggan's experience includes major complex commercial litigation in courts nationwide. She has been lead counsel in trial and appellate matters involving insurance for terrorism, technology, environmental, asbestos, employment, product liability, mass tort and pharmaceutical claims. She also has participated in more than 200 appellate cases including key national precedents on insurance issues, arguing before numerous federal circuits and state appellate courts. In addition to her litigation work, Ms. Foggan provides crucial legal and strategic advice to insurers and reinsurers in other areas, including technical analysis of insurance issues and testimony before state legislatures regarding legislative proposals. She often represents insurance industry members in arbitration and mediation settings. In addition to her qualifications as an ARIAS•U.S. Certified Arbitrator, she has been named as a member of the Center for Public Resources (CPR) Distinguished Panel of Neutrals for the Inter-Insurer Program.

Ms. Foggan received her J.D. with high honors from the George Washington University and holds a B.A., *magna cum laude,* as well as an M.S. in Education from the University of Pennsylvania. In addition to her many other honors and awards, Ms. Foggan has been named one of "America's Leading Business Lawyers" by *Chambers USA* (2002-2007), one of "*Lawdragon's 3000 Leading Lawyers in America*" (2006, 2007), and was included as one of Business Insurance magazine's "100 Leading Women" in insurance (2000). She looks forward to additional responsibilities as an arbitrator in insurance and reinsurance matters.

André Hassid

André Hassid has over thirty years experience as an attorney involved in all facets of insurance services including trial experience, bad faith litigation, reinsurance disputes, insurance coverage advice and consulting on underwriting matters. He served as Vice President in charge of the Coverage Counsel Department of Industrial Indemnity Company where he was in charge of all insurance coverage disputes and all extra-contractual litigation.

Mr. Hassid spent seventeen years with Industrial Indemnity dealing with underwriting, claims and legal issues involving Workers Compensation and Employers Liability policies, CGL policies, Excess and Umbrella Insurance policies and specialty programs such as Municipal and School policies. He headed the department's oversight over all claims involving Advertising and Personal Injury tenders, and was co-counsel on the one of the leading cases in the field. *Bank of the West v. Industrial Indemnity*. He has several published decisions involving Workers Compensation and Employers Liability policies including the leading case of *La Jolla Beach* and *Tennis Club v. Industrial Indemnity*. Mr. Hassid formed the legal bill auditing function of *Industrial Indemnity*, and was in charge of substantive live audits of staff counsel and outside counsel.

From 1998 to 2000, Mr. Hassid headed the Insurance Coverage and Insurance Litigation Department of Laughlin, Falbo, Levy & Moresi. Subsequently he formed his own firm, where he expanded his insurance expertise into matters involving Reinsurance Policies, as well as Errors & Omission, Directors and Officers, Homeowners and Auto policies.

Mr. Hassid has been selected as an arbitrator in 10 cases and has served as a mediator in about 20 cases and regularly serves as Judge Pro Tem in Superior Court. He received a Certificate for Mediation and Conflict Resolution in 2003 from UC, Berkeley. He received his BA from UC Berkeley in 1972, and his JD from McGeorge School of Law in 1975.

Ralph C. Hemp

Ralph Hemp began his insurance and reinsurance career in 1961, as an adjuster for Crawford & Company and left in 1967 as an Office Manager. He then became Home Office Claims Examiner for Olympic Insurance Company. In 1968, he joined Leatherby Insurance as Claims Manager. While at Leatherby, Mr. Hemp was involved not only in setting up a claims department, but also in setting up and managing an in-house legal department, all worker's comp statistical reporting, monitoring and supervising of MGAs. By the time he left Leatherby Insurance Company, he was Senior VP, responsible for an eight-western-state region.

In 1976, Mr. Hemp joined North American Insurance Company for Property & Casualty as VP, responsible for all activities of this P&C company, reporting to the President. Shortly after arriving at NACPAC, he undertook a complete evaluation of the company and its operation, and laid out a plan for future operations. This plan was accepted by the President and senior officers of CIT, the parent of NACPAC.

Mr. Hemp set up offices in NYC and Connecticut, and took over the operations of

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Stephen J. Kidder

Stephen C. Klein

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several large MGA books of business. He worked with foreign and domestic brokers and agents, insurance departments, outside and in-house counsel, to manage the run off of this large volume of reinsurance and insurance business. He also was able to maintain licenses in all 50 states and Canada, and a satisfactory AM Best rating. At his direction, NACPAC was one of the first companies to set up a claims, underwriting and accounting audit department.

Mr. Hemp was promoted to President and, as the run-off came under control, he started to write reinsurance assured treaty business.

At about this time, the parent company of CIT was sold to RCA. Mr. Hemp and a group of investors approached RCA Corporation and were successful in buying NACPAC. NACPAC was operated as a private company for approximately one year and then went public. He retired in 1986 as CEO of NACPAC and Vice Chairman of NAC Re, the parent company.

Since 1986, Mr. Hemp has provided consulting services to insurance companies and reinsurance companies, and has been an active arbitrator serving on over 100 panels. He has also served as an umpire in arbitrations and has testified as an expert witness on approximately five occasions.

Mr. Hemp received his Bachelor of Arts degree from San Diego State University in 1961 and an LLB and JD in 1971.

Stephen J. Kidder

Stephen Kidder received his Bachelor of Arts (German) degree from UCLA in 1970 and his Juris Doctor from Southwestern University School of Law in Los Angeles in 1976. Between the B.A. and the J.D. Mr. Kidder served in the United States Navy as a division officer on board USS Long Beach CGN-9.

After being admitted to the State Bar of California in 1976, Mr. Kidder left Los Angeles and initially worked as a lawyer associate for the law firm of Dr. C. Ladenburger in Pforzheim, Germany. He started in the law department of Audi NSU Auto Union AG in Ingolstadt in 1977 working closely with engineers and dealing with product liability cases cooperating with Audi's mother company Volkswagen AG, becoming head of Audi's division "Recht USA" (Law USA). In 1982, he started with Munich Re's German headquarters setting up a common law claims team and dealing mostly with casualty losses from business written primarily from Munich and London. He returned to the USA in 1988 working for Elliston, Inc. in New Hope, PA as a claim manager and auditor and in support of transcontinental insurance and reinsurance litigation. He moved to Cleveland, Ohio where he set up the international department for the law firm Reminger & Reminger Co., L.P.A. dealing again with automobile manufacturers as well as European insurers and reinsurers and was admitted to practice law in the State of Ohio.

Mr. Kidder started the consulting company German Link, Inc. in 1993 to serve commercial and governmental clients' interests in German speaking Europe and as an auditor for reinsurance companies. Since 2000 he has been a Senior Consultant for casualty and accident/health inspections for Buxbaum, Loggia & Associates, Inc. which offers consultant services to the insurance and reinsurance industry.

Stephen C. Klein

Stephen Klein, a partner in the Los Angeles office of Barger & Wolen LLP, has been with the firm since its inception in 1976 and, since 1994, has been its administrative partner. He is a graduate of the University of California at Los Angeles and Southwestern University School of Law. Mr. Klein is a business litigator specializing in the trial and appeal of disputes involving reinsurance, insurance coverage and bad faith claims. He has tried or arbitrated cases in California, Oregon, Connecticut, New York, Arizona and Michigan on behalf of insurers, cedents and reinsurers. He has also appeared as counsel before the California Court of Appeals and the California Supreme Court.

Mr. Klein is admitted to the California Supreme Court (1975), the Ninth Circuit Court of Appeal (1978), and United States District Courts in California (Central 1975; Southern 1979; Northern 1981; Eastern 1983), Arizona (1998) and the Eastern District of Michigan (2001).

His publications include "Reinsurance," *California Insurance Law & Practice, Matthew Bender*, 1991; "Issuance of Insurance Policies," *California Insurance Law & Practice*, Matthew Bender, 1986; "*Legal Perspectives*," Risk & Benefits Management, 1987; and, "Antirebate Law, Standing and Judicial Review of Administrative Policymaking: Recent Developments," 1 Journal of Insurance Regulation 133 (1982). Published decisions include *Truck Insurance Exchange v. County of Los Angeles* (2002) 95 Cal. App. 4th 115; *Associated California Loggers, Inc. v. Wesley J. Kinder*, as Insurance Commissioner (1980) 110 Cal. App. 3d 673;

Profiles of all certified arbitrators are on the web site at www.arias-us.org

and *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal. App. 3d 147.

In addition to ARIAS•U.S., Mr. Klein is a member the International Association of Defense Counsel, the Defense Research Institute, the American Bar Association, the and State Bar of California Los Angeles Bar Association.

Charles E. Mabli

Charles Mabli is a seasoned business executive with 30 years of diversified insurance and reinsurance company experience. He began his career with Peat Marwick Mitchell and Co., specializing in audits of property and casualty insurance and reinsurance companies. In 1968 he joined American Home Assurance Company as Assistant Vice President and Comptroller, responsible for all financial reporting functions including reports to state and federal regulatory bodies as well internal management reports to division profit center heads.

In 1971, Mr. Mabli joined Agency Managers Ltd. and Dominion Insurance Company of America. There he served as Senior Vice President, Secretary, Treasurer, and as a member of the Board of Directors. As Chief Financial Officer of this reinsurance pool manager and affiliated domestic reinsurance company, he was responsible for all financial, accounting, and data processing operations, as well as corporate secretarial duties. He was extensively involved in resolving disputes between the pools and their members, reinsurers and ceding companies. During this time frame, he successfully served as a party appointed arbitrator in an unrelated case.

In 1978, Mr. Mabli joined North American Reinsurance Corporation which later became Swiss Reinsurance America Corporation, where he ascended to the position of Executive Vice President and Chief Financial Officer. During his career with Swiss Re, he was responsible for the casualty and property treaty underwriting department, the claims department, the actuarial department, as well as traditional CFO duties. He was a member of the company's environmental claims task force. He has a thorough working knowledge of reinsurance treaty language, environmental claims issues and IBNR reserve methodologies. He served two terms as chairman of the RAA Technical Committee and was a member of the AICPA task force on disclosure of environmental claims exposures. He retired from Swiss Re in October 1998.

Robert Redpath

Robert Redpath is Senior Vice President, General Counsel and Secretary of Clarendon Insurance Group based in New York. He is an officer and director of various insurance and holding company affiliates. In 2002, Mr. Redpath was transferred from the parent company, Hannover Re in Germany, to Clarendon as Vice President to oversee all of Clarendon's reinsurance and MGA related litigation as well as corporate litigation arising from the acquisition of Clarendon. In early 2006, following the corporate decision to place Clarendon into run-off, Mr. Redpath was appointed Senior Vice President and General Counsel, responsible for all legal and administrative matters of the group. Prior to entering into run-off, Clarendon was one of the largest writers of program business in the U.S., licensed to write various personal and commercial lines business in all 50 states.

Prior to moving to Clarendon, Mr. Redpath worked for Hannover Re in Hannover, Germany. He started with Hannover Re in 1996 in the reinsurance claims department responsible for English and Commonwealth jurisdictions, as well as Life, A&H and facultative claims areas. In 1998, he moved on to the legal department as Senior Legal Counsel, dealing with various corporate areas including reinsurance contract wordings, financial reinsurance and capital market products, such as life and non-life securitizations.

Mr. Redpath started his legal career in 1990 at the London solicitors firm of Lawrence Graham, where he spent most of his time involved in insurance defense work and subrogation for UK domestic insurers and Lloyd's syndicates, relating to personal injury, property damage and professional negligence.

Mr. Redpath obtained his LLB at University College London and a Diploma in Business Studies at the London School of Economics. Subsequently he obtained a Masters in German Law (LLM) at the Johannes Gutenberg University in Mainz, Germany. He is qualified as a solicitor (non-practicing) in England and Wales and admitted as an attorney in the State of New York. He is also a fluent German speaker.

in focus

Charles E. Mabli

Robert Redpath

Law Committee Case Summaries

Since March of 2006, in a section of the ARIAS•U.S. website entitled "Law Committee Reports," the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration and reinsurance-related issues. Individual members are also invited to submit summaries of cases, legislation, statutes or regulations for potential publication by the committee.

As of the middle of November 2007, there were 21 published case summaries and one regulation summary on the website. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions

Provided below are four case summaries taken from the Law Committee Reports...

Zurich American Ins. Co. v. Ace American Reinsurance Company, 2006 WL 3771090 (S.D.N.Y.)

Court: United States District Court for the Southern District New York

Date Decided: December 22, 2006

Issue Decided: Under the federal rules of civil procedure, the court found allegations that a reinsurer had a pattern and practice of denying ceded claims in violation of the duty of utmost good faith sufficient to open discovery into other claims and litigation involving claim denials by that reinsurer.

Submitted by Rick Rosenblum*

Background

Zurich American Insurance Company ("Zurich"), the cedent, sued its reinsurer Ace American Reinsurance Company (n/k/a R&Q Reinsurance Company), alleging breach of contract for Ace's alleged failure to pay its full share of a settlement reached by Zurich with its insured. Additionally, Zurich alleged claims for breach of the utmost duty of good faith arising from Ace's claim denial and its alleged pattern of conduct in denying payment to its reinsured based upon artificial disputes over allocation.

During discovery, Zurich sought production from Ace of categories of documents including:

a) documents relating to two other lawsuits in which Ace was found to have wrongly denied reinsurance claims; and,

b) all documents relating to any claims denied by Ace on the basis of improper allocation.

Ace objected to producing documents under either category, arguing the documents were irrelevant and overly burdensome. In turn, Zurich filed a motion to compel under Federal Rule 37.

Rulings

The magistrate judge sustained Ace's relevance objection, finding that motive is generally irrelevant in breach of contract claims. The court found that whether Ace breached its contractual obligations depends upon whether it failed to "follow the fortunes" or "follow the settlements" of Zurich as defined under the specific policies at issue in this case.

Nevertheless, the Court went on to order broad document production from Ace. The court found that Ace's handling of similar claims may shed light on the meaning the parties ascribed to the terms incorporated into the policies at issue.

With respect to Ace's undue burden objection, the court noted Ace's affidavit, which averred that Ace's claim systems were incapable of segregating claim information by amount of claim, type of claim, identity of cedent, or the basis for Ace's denial of the claim. The court was not persuaded, finding that "[a] sophisticated reinsurer that operates a multimillion dollar business is entitled to little sympathy for utilizing an opaque data storage system, particularly when, by the nature of its business, it can reasonably anticipate frequent litigation." But, in light of the volume of information requested, the court ultimately ordered the parties to propose a sampling protocol through which a number of examples of Ace's claim files involving allocation issues could be selected for review and production. The court also granted leave to Ace to re-urge its burdensomeness objection, supported by specific evidence, if Ace objected to the sampling protocol.

**Rick Rosenblum heads the litigation section of Akin Gump's San Antonio office. Rick has represented insurers and reinsurers across the United States, Bermuda and Europe for the past nineteen years.*

In Re: Vital Basics Incorporated, Debtor
Vital Basics Incorporated v. Vertrue Incorporated Case No. 05-2741

Court: United States Court of Appeals for the First Circuit

Date Decided: December 29, 2006

Issue Decided: When may an arbitration award be vacated on grounds that it violated the plain language of the parties' contract.

Submitted by John R. Cashin*

In a non-insurance case, the Court of Appeals for the First Circuit affirmed the lower court's confirmation of an arbitration award that it found to be based upon a plausible reading of the contract between the parties. Vital Basics Inc (VBI) markets and sells nutritional and dietary supplements directly to consumers. Vertrue Incorporated (Vertrue) sells membership programs that provide consumers with discounts on health care and related services. The two companies had a long term marketing agreement whereby VBI would attempt to sell Vertrue memberships to consumers who called to order products from VBI. Vertrue would pay a commission to VBI for memberships that were sold and remained in force for a full year. A dispute arose over the payment of commissions for memberships that were paid but subsequently cancelled with the customer receiving a partial refund and Vertrue retaining a portion of the membership fee. VBI contended it was entitled to a commission on the portion of the membership fees retained by Vertrue. While the dispute was being debated between the parties, VBI was quietly developing its own competing membership program. VBI launched the program in violation of the contract's exclusivity clause which banned VBI from marketing or selling any competing membership program. Vertrue initiated arbitration before a three-judge arbitration panel as provided in the contract. Vertrue alleged breach of contract, fraud and violation of the Connecticut Unfair Trade Practices Act. VBI asserted counterclaims for breach of contract.

After numerous days of complex testimony, the panel ordered VBI to pay Vertrue $3.5 million in compensatory damages and $1.3 million in punitive damages and attorney fees. After the arbitration process commenced VBI became insolvent and sought protection of the United States Bankruptcy Court, District of Maine. After the arbitration panel issued its award, VBI sought vacation of the award before the bankruptcy court. The bankruptcy court found no grounds to vacate and confirmed the award. VBI appealed to the United States District Court, District of Maine alleging that the panel disregarded the law, exceeded its authority, was biased and failed to hear relevant evidence. The district court received extensive briefs from both sides and affirmed the bankruptcy court in all respects, holding that "the arbitration award represents a final and definite award based upon a 'plausible' reading of the contract between VBI and Vertrue." *Vital Basics, Inc. v. Vertrue Inc.* 332 B.R. 491 at 494 (D. ME. 2005). VBI appealed alleging that the Panel's award violated the express language of the contract and that Vertrue was the first party to breach the contract thereby nullifying VBI's subsequent breach of the exclusivity clause.

In affirming the District Court's confirmation of the award the Court of Appeals acknowledged that any review of an arbitral panel's award is "exceedingly narrow" *Wonderland Greyhound Park, Inc. v. Autotote Sys., Inc.,* 274 F. 3d 34 at 35 (1st Cir. 2001) and that confirmation of an award is required where the arbitrator was "even arguably construing or applying the contract." *Gupta v. Cisco Sys., Inc.*, 274 F. 3d 1 at 3 (1st Cir. 2001). The court held that the panel's conclusion was not contrary to the plain language of the contract and therefore left no basis to vacate the award. The Court concluded "having presented its arguments to the arbitration panel, the bankruptcy court, the district court and this court, VBI must now abide by the reasonable conclusions reached by the arbitration panel, a body that they themselves selected to resolve disputes under the contract." *Bull HN Info. Sys., Inc. v. Hutson*, 229 F. 3d 321 at 330 (1st Cir. 2000). "It is the arbitrator's view of the facts and of the meaning of the contract that (the parties) have agreed to accept." *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

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Reliance Insurance Company of Illinois v. Raybestos Products Co.; Rayteck Corporation v. United States Fidelity and Guaranty Co., Westchester Fire Insurance Co., and National Union Fire Insurance Co. Case No. 97-0027

Court: United States District Court for the Southern District of Indiana

Date Decided: January 24, 2007

Issue Decided: An arbitration panel is not required to apply state substantive law in contract interpretation if not so required by the parties' arbitration agreement or the rules of the AAA.

Submitted by Michael T. Walsh and Polina Shklyanoy Schultz*

Reliance v. Raybestos is not a newcomer to the courts. It first appeared in the Southern District of Indiana in 1997 when Reliance Insurance Company instituted a declaratory judgment action against Raybestos to determine if coverage was available for the alleged environmental contamination of property located adjacent to the Raybestos manufacturing facility in Crawfordsville, Indiana. After several years of litigation, Raybestos filed for bankruptcy, which led to the filing of third-party complaints against its other insurers to recover the costs of the environmental cleanup of the property. Some of the other insurers moved the court to stay the action and compel arbitration under Sections 3 and 4 of the Federal Arbitration Act ("FAA") which stated, in pertinent part:

Should any dispute arise out of or related to this endorsement and contract of insurance which cannot be resolved in the normal course of business with respect to the validity or interpretation of this insurance contract... the matter or matters upon [which] this agreement cannot be reached shall be settled by arbitration in accordance with the rules of the American Arbitration Association...

The District Court denied the motions to stay and compel arbitration, but on appeal, the Seventh Circuit Court of Appeals reversed and directed the parties to arbitrate "in accordance with the Rules of the American Arbitration Association ("AAA") and Federal Arbitration Act."

Raybestos filed a Demand for Arbitration to be pursuant to Indiana law. By this point, Raybestos had settled with all but one of its insurers, Westchester, who objected to Raybestos' Demand. Pursuant to Indiana law, the absolute pollution exclusion of the Westchester policy would be considered ambiguous and thus unenforceable to bar claims arising out of a government-mandated environmental clean-up. The Panel, however, was aware that Indiana law was anathema to the law of every other jurisdiction that had tried this issue. In their decision, the Panel noted that

Indiana is the only jurisdiction, of the 48 that have ruled on this issue, that has declared the pollution exclusion ambiguous and, as a matter of law, unenforceable to bar claims arising out of a government-mandated environmental clean up.

After each party filed its motion for Summary Determination, the Panel, comprised of three former judges, agreed with Westchester, finding that "there is nothing in the arbitration provision or in any other policies that compels the application of the substantive law of any particular jurisdiction." Applying Seventh Circuit case law, the Panel held that it was free to interpret the insurance contract according to its collective best judgment and ultimately determined that the absolute pollution exclusion in the Westchester insurance policy barred Raybestos' claim.

Raybestos then appealed the Panel's decision to the Southern District of Indiana in the instant litigation. In order for the Southern District of Indiana to overturn an arbitration ruling, Raybestos would have to show, in pertinent part, that the Panel exceeded its powers or that the arbitration award was in manifest disregard of the law. *See Butler Mfg. v. United Steelworkers of Am*., 336 F.3d 629, 632 (7th Cir. 2003), *Wise v. Wachovia Securities*, 450 F.3d 265, 268 (7th Cir. 2006), 9 U.S.C. §10. Raybestos argued exactly that, i.e. the Panel, which was aware of the Indiana interpretation of the absolute pollution exclusion, "manifestly disregarded the law" and/or "exceeded their powers under 9 U.S.C. §10(4)," by not applying state substantive law in their contract interpretation, thereby necessitating vacatur of their decision. *Heath Services Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992).

The Southern District of Indiana, however, looked to the arbitration agreement itself and the rules of the AAA to determine the scope of the Panel's powers. The Southern District of Indiana found that neither the agreement nor the rules required the Panel to apply substantive law, and both allowed an arbitrator fairly free reign "in the formulation of remedies." *Bavarti v. Josephthal, Lyons & Ross,* 28 F.3d 704, 710 (7th Cir. 1994). Therefore, under Seventh Circuit case law, the Panel was free to interpret the contract any way it deemed fit. Thus, as long as the Panel interpreted the absolute pollution exclusion without exceeding its powers, (even if the interpretation is "incorrect or even wacky"), the Southern District of Indiana must uphold the Panel's award. *See Wise*, 450 F.3d at 269. Accordingly, the Southern District of Indiana found that the Panel's interpretation of Westchester's absolute pollution exclusion as barring Raybestos' claims to be conclusive and binding.

Lastly, Raybestos argued that the arbitrators' award should be vacated as violative of Indiana public policy, since Indiana courts specifically held that certain pollution exclusions contained in insurance policies were ambiguous and unenforceable. The Southern District of Indiana, however, found that as public policy did not play a role in the outcome of those previous decisions, Raybestos failed in identifying a well-defined and dominant public policy, and therefore none could be violated by the Panel's ruling. *Chicago Fire Fighters Union Local No. 2 v. City of Chicago,* 751 N.E.2d 1169 (Ill.App. 2001).

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Liberty Mut. Ins. Co. v. White Mountains Ins. Group, Ltd. No. 06-11901-GAO (D. Mass. 2007)2006 WL 2460902 (M.D. Pa)

Court: United States District Court, District of Massachusetts

Date Decided: February 26, 2007

Issue Decided: Can an arbitration panel subpoena a non-party to produce pre-hearing discovery in connection with an arbitration between the subpoena-seeking party and a subsidiary of the non-party?

Submitted by Jennifer R. Devery and Margot L. Green *

In *Liberty Mut. Ins. Co. v. White Mountains Ins. Group, Ltd.*, the United States District Court for the District of Massachusetts dismissed a petition made by Liberty Mutual Insurance Company ("Liberty") to enforce a pre-hearing subpoena issued by an arbitration panel to White Mountains Insurance Group, Ltd. ("White Mountains"). The Court, in an oral opinion rendered from the bench, held that the subpoena, which called only for the production of documents, did not fall within the scope of Section 7 of the Federal Arbitration Act ("FAA"). That section authorizes arbitrators to "summon in writing any person to attend before them or any of them as a witness …." 9 U.S.C. § 7.

In 2001, Liberty entered into a series of transactions with White Mountains through which Liberty acquired certain of White Mountains' insurance business operations. In addition to the "Master Agreement," an ancillary "Pre-Closing Serviced Policy Administrative Services Agreement" (the "PCASA") was executed under which One Beacon Insurance Co. ("One Beacon"), a subsidiary of White Mountains, along with a number of other parties, appointed Liberty to administer claims made against certain One Beacon entities arising under pre-2001 policies of insurance. One Beacon later initiated arbitration against Liberty in Boston, Massachusetts, alleging that Liberty had failed to administer One Beacon's claims and had thereby breached the PCASA.

During the course of arbitration, Liberty sought White Mountains documents that Liberty asserted were relevant to the parties' claims and defenses in the arbitration as indicated by White Mountains' 2001 Form 10-K filing. One Beacon objected on the ground that White Mountains documents were not within One Beacon's control, and Liberty moved the arbitration panel to compel production. The panel granted Liberty's motion. When One Beacon persisted in its objections to the production of White Mountains documents, Liberty asked the arbitration panel to then issue a subpoena to White Mountains, which the panel did in September 2006. The subpoena was served on White Mountains in Hanover, New Hampshire, where White Mountains maintains its principal place of business, and required White Mountains to produce its relevant documents at Liberty's Portsmouth, New Hampshire location. White Mountains responded to the subpoena by indicating that it would produce all "non-privileged, responsive documents," and, in October 2006, produced 299 pages of documents at Liberty's Portsmouth office.

Shortly thereafter, on October 18, 2006, Liberty sought enforcement of the subpoena by the U.S. District Court for the District of Massachusetts, arguing that White Mountains' production could not possibly comprise all relevant documents required by the subpoena. White Mountains moved to dismiss the petition on the grounds that the subpoena was both issued and served improperly. Specifically, White Mountains argued that Section 7 of the FAA does not authorize an arbitration panel to subpoena documents for pre-hearing discovery and that an arbitral subpoena cannot be issued more than 100 miles beyond the place of arbitration. White Mountains further argued that it had not waived its right to object to the subpoena when it agreed to produce responsive documents.

Although the First Circuit, in which Massachusetts sits, has not addressed the issue, the Court considered the opinions of three other circuits in making its determination. In *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000), the Eighth Circuit held that Section 7 of the FAA implicitly authorizes an arbitration panel to subpoena the production of relevant documents prior to hearing. Conversely, the Third and Fourth Circuits in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) and *Comsat Corp. v. Nat'l Science Found.*, 190 F.3d 269 (4th Cir. 1999), respectively, concluded that Section 7 precludes issuance of pre-hearing discovery subpoenas, except perhaps where special need or hardship has been shown. Recognizing that split of authority and finding the Third and Fourth Circuit decisions more persuasive, the Court held that the subpoena issued by the arbitration panel was a discovery subpoena and thus not authorized by Section 7.

With regard to the service issue, the Court ruled that service of an arbitral subpoena must be made in accordance with the federal practice – that is, within 100 miles of the place of issuance of the subpoena. In the instant case, the subpoena was served beyond 100 miles of the place of arbitration, and thus the Court found it improperly served. The Court further noted that Liberty's proposed interpretation of the service provisions was too expansive, allowing a judge to issue or enforce a subpoena so long as the place of production was no more than 100 miles from the location of the subpoenaed party, regardless of where the court or tribunal issuing or enforcing the subpoena sat.

Finally, the Court concluded that White Mountains' voluntary production of the documents did not constitute a waiver because it was not a "knowing relinquishment of a known right" to oppose the subpoena. The Court accordingly granted White Mountains' motion to dismiss Liberty's petition for enforcement of the arbitral subpoena.

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