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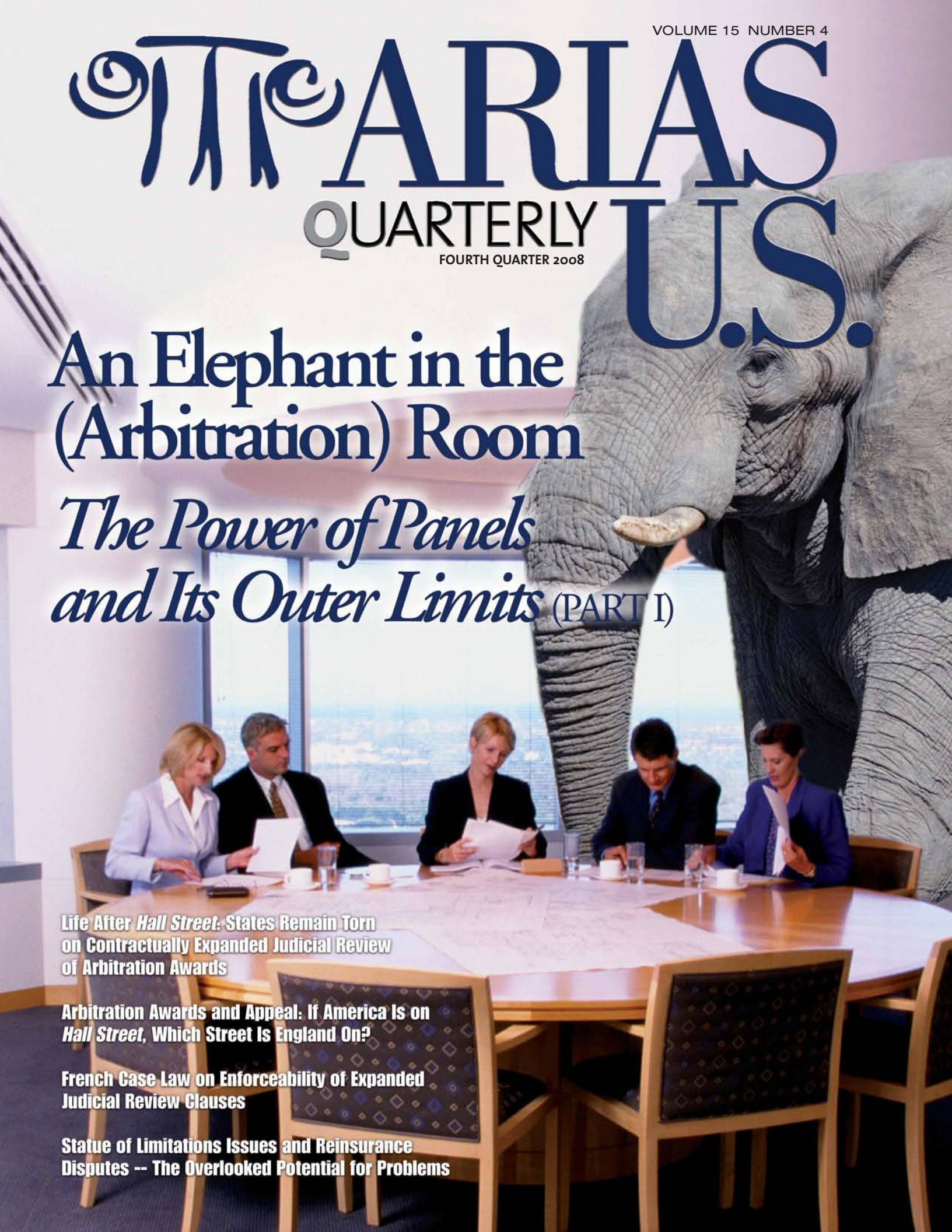

An Elephant in the (Arbitration) Room

The Power of Panels and Its Outer Limits (PART I)

Life After *Hall Street*: States Remain Torn on Contractually Expanded Judicial Review of Arbitration Awards

Arbitration Awards and Appeal: If America Is on *Hall Street*, Which Street Is England On?

French Case Law on Enforceability of Expanded Judicial Review Clauses

Statue of Limitations Issues and Reinsurance Disputes -- The Overlooked Potential for Problems

editor's comments

Congratulations to Frank Lattal and Susan Stone on being elected Chairman and President, respectively, of ARIAS-U.S. Both Frank and Susan are highly respected in the insurance and reinsurance field, and each has been an outstanding contributor to the success of ARIAS-U.S. over the past several years.

Congratulations also to Dan FitzMaurice on becoming President-Elect, and to Elaine Caprio Brady and George Cavell on becoming Vice Presidents.

As our Society heads into its fifteenth year, we are indeed fortunate to be continuing the tradition of such highly qualified and dedicated individuals serving as our leaders.

We owe a debt of gratitude to our outgoing Chairman, Tom Forsyth. Under Tom's calm and steady stewardship, the organization has grown ever stronger. Happily, Tom remains on the Board another year and undoubtedly will continue being active with us for many years to come.

Our cover article, *An Elephant in the (Arbitration) Room—The Power of Panels and Its Outer Limits*, by David Attisani and Jennifer Brennan, provides a thorough review of the authority of arbitration panels and the limitations on a panel's powers. The authors in the current issue describe the principal sources of arbitral authority in the United States and abroad, and examine the question of whether they confer on arbitrators the power to award certain types of damages. A second part of the article, to be published in the next edition of the Quarterly, will analyze whether the same authorities confer on arbitrators certain other powers. Interestingly, the authors describe some of the practical challenges faced by arbitrators in the exercise of their powers.

An important decision limiting the power of arbitration panels is discussed by Ron Gass in *Case Notes Corner*. Ron's analysis of the decision, which was handed down on November 25, 2008, by the U.S. Court of Appeals for the Second Circuit, should be read by all arbitrators.

The U.S. Supreme Court recently ruled in the negative on the question of whether parties to an arbitration agreement can contractually expand the grounds for vacating an arbitral award under the Federal Arbitration Act. Attorney Aluyah Imoisili, in *Life After Hall Street: States Remain Torn on Contractually Expanded Judicial Review of Arbitration Awards,* points out that the question remains open under state law. The article discusses significant state law developments since the Supreme Court's ruling. The author suggests how drafters of arbitration clauses still may be able to fashion expanded grounds for judicial review.

Do laws in other countries permit parties to arbitration agreements to provide for judicial review on grounds other than those specified by statute or judicial rules of the country? The comparative answers to this question under the laws of England and France are considered by Jonathan Sacher and David Parker in Arbitration Awards and Appeal: *If America Is on Hall Street, Which Street Is England On?* and by Christian Bouckaert and Romain Dupeyre in *French Case Law on Enforceability of Expanded Judicial Review Clauses*.

Statute of Limitations Issues and Reinsurance Disputes — The Overlooked Potential for Problems, by Attorney Thomas Klemm, is an important caveat to parties involved in reinsurance disputes and their counsel to be especially alert to statute of limitations issues where claims related to an arbitration may need to be made against parties who are not subject to the arbitration agreement.

Gene Wollan in his usual amusing style tells us how reinsurance after all may be akin to show business in his Off the Cuff piece, *There's No Business Like* .... I guarantee that reading it will bring a smile to your face.

Your editors are especially pleased to present to our readers articles submitted by our reinsurance counsel, such as those appearing in this issue, that demonstrate exceptional quality of legal research and writing on a variety of issues. We appreciate that preparation of such articles requires substantial time and effort by people with busy schedules.

If you have an idea or question about doing an article for the *Quarterly*, please do not hesitate to contact any one of the editors.

Best wishes to all our readers for the Holidays and for a Happy and Healthy New Year.

T. Richard Kennedy

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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 .

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feature

An Elephant in the (Arbitration) Room—The Power of Panels and Its Outer Limits (Part I)

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In turn, arbitrators are frequently required to perform acts which, in the past, remained exclusively within the province of judges.

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I. INTRODUCTION[1]

Arbitration remains the most prevalent method of dispute resolution in the reinsurance world. One of its principal benefits continues to be the available supply of industry professionals who are, unlike most judges, steeped in the practical realities of the reinsurance business. It is further lauded as an efficient, economical, and often confidential means of resolving disputes — goals frequently shared by parties seeking to perpetuate on-going business relationships.

In recent years, however, as the business has evolved, and reinsurance relationships have become increasingly complex, reinsurance disputes have been more adversarial. In response to the number of arbitrations, the increasingly large dollar amounts at stake, and the number of sophisticated parties involved in writing business (and "running off" maturing books), arbitrations have become more formal and trial-like. As a result, participants have resorted more readily to traditional litigation techniques and strategies.[2] In turn, arbitrators are frequently required to perform acts which, in the past, remained exclusively within the province of judges. Common examples include rulings on motions to compel the production of documents, security motions, and disputes involving the participation of third-party witnesses. Although the scope of judicial authority on such matters is generally well-established, the outer limits of an arbitrator's powers are less clear, despite the proliferation of industry arbitrations.

It is, however, widely acknowledged that arbitration is a creature of contract, and that arbitral authority derives from the parties' legally binding agreement to arbitrate. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). But, when the relevant contract is ambiguous, silent, or inconclusive concerning the scope of arbitrators' authority, they — or the proponent of their actions — must find extrinsic authority for their (quasi-) judicial acts or run the risk that their award may be vacated by a reviewing court. The relevant statutory repositories of arbitral authority generally give arbitrators broad latitude to fashion the relief they are authorized to award. *E.g.*, Federal Arbitration Act (the "FAA"), 9 U.S.C. §10(a) (2008) (providing narrow, specific grounds for vacating arbitration awards); Revised Unif. Arbitration Act (the "RUAA") §21(c) (2000) ("an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding"). Parties can, of course, also contract to follow the rules of private organizations, which often specify the species of relief arbitrators may award. An arbitrator's knowledge of the limitations on his or her powers is crucial to ensuring judicial confirmation of awards and to protecting the integrity and efficacy of arbitration as a viable alternative to litigation.

The purpose of this article is to discuss the "elephant in the [arbitration] room" — the outer limits of arbitrators' authority to engage in certain traditionally judicial acts which are incident to and (perhaps, ironically) requisite to the effective conduct of industry arbitrations. Given the breadth of the topic, this article will be published in two parts. The first installment briefly describes the principal sources of arbitral authority in the United States and abroad, and it examines the question whether they confer on arbitrators the power to award multiple damages, including punitive damages, attorney's fees, and interest.[3] The second part, to be published in the next edition of *ARIAS•U.S. Quarterly*, analyzes whether the same authorities confer on arbitrators the power to order injunctive relief, exercise subpoena powers, and issue confidentiality

orders. The discussion aims both to mark the outer limits of an arbitrator's power to engage in these functions and to describe some of the practical challenges faced by arbitrators in the exercise of their powers.

II. SOURCES OF ARBITRAL POWER

A. The Federal Arbitration Act

The Federal Arbitration Act (the "FAA"), 9 U.S.C. §1 *et seq.* (2008), governs any contract involving interstate commerce, which means that most reinsurance contracts fall within its purview. *See* 9 U.S.C. §2. The FAA was enacted in 1925, in an effort to reverse historic judicial hostility towards arbitration and to ensure that arbitration agreements are enforced according to their terms. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995); *Volt Info. Sciences, Inc. v. Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Although it has largely achieved these goals, the FAA is not without its limitations — some of which emanate from its silence concerning the scope of arbitrator power.

Although the FAA does not provide express instructions concerning the nature and scope of arbitrators' authority, it does declare "a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *See Preston v. Ferrer*, 128 S.Ct. 978, 981 (2008). In so doing, it "does not allow courts to 'roam unbridled' in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specific ways." *Marshall & Co. v. Duke*, 941 F. Supp. 1207, 1210 (N.D. Ga. 1995) (citation omitted). In brief, arbitral awards can only be overturned under unusual circumstances — most importantly for present purposes, "[w]here the arbitrators exceeded their powers." 9 U.S.C. §10(a)(4) (2008). Thus, despite its silence with regard to the forms of relief a panel may order, the FAA provides broad latitude for arbitration panels to act in a manner consistent with the mandate advanced in the relevant arbitration agreement.[4]

B. State Law: The Uniform Arbitration Act

Arbitration agreements may also be governed by state law. "Where ... the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." *Volt Info. Sci. v. Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).[5] Many state arbitration statutes are modeled on the Uniform Arbitration Act (the "UAA"), which was originally promulgated in 1955 to buttress arbitration "in the face of oftentimes hostile state law." *Revised Unif. Arbitration Act* (the "RUAA"), *Prefatory Note* at p. 1 (2000). The UAA acknowledges the sanctity of arbitration agreements but, like the FAA, it does not adequately address certain realities of modern arbitration. To that end, in 2000, the UAA was revised in an effort to provide a "more up-to-date statute to resolve disputes through arbitration." *Id.* To date, forty-nine jurisdictions have adopted the UAA, the RUAA (or revised UAA), or substantially similar legislation as their state arbitration statute. Uniform Law Commissioners, A Few Facts About the ... *Uniform Arbitration Act* (2008), http:// www.nccusl.org/ nccusl/ uniformact _factsheets/ uniformacts-fs-aa.asp; Cornell University Law School, *Law by Source*: *Uniform Laws* (2003), http://www.law.cornell.edu/uniform/vol7.html. *See, e.g.*, Mass. Gen. Law ch. 251, §§1-19.[6]

The complexity of modern arbitration (which often rivals the intricacy of judicial proceedings), and the sophistication of the legal arguments raised in those arbitrations, magnifies arbitrators' need to possess authority to address the myriad of issues that may arise during the course of a protracted proceeding. To that end, unlike the (original) UAA, which — in many cases — failed to arm arbitrators with rudimentary powers (for example, it granted no specific power to award non-monetary damages), the RUAA empowers arbitrators to "order such remedies as the arbitrator considers just and appropriate under the circumstances of the proceeding." RUAA at §21(c) (2000). Consistent with the growing importance of judicial functions in arbitration, it also arrogates to arbitrators express authorization for specified quasi-judicial acts. *Id.* at §§8 (injunctive relief); 17(a) (subpoenas); 17(e) (protective orders); 21(a) (punitive damages); 21(b) (attorney's fees). *Infra* at Part III.

C. International Law: The UNCITRAL Rules

The multinational character of the reinsurance business ensures that not all disputes will be governed by the FAA or state arbitration statutes. Disputes between a

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An arbitrator's knowledge of the limitations on his or her powers is crucial to ensuring judicial confirmation of awards and to protecting the integrity and efficacy of arbitration as a viable alternative to litigation.

Like the FAA, however, the UNCITRAL rules give little guidance with respect to the scope of arbitrator powers. They state only that, "[i]n addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards."

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domestic party and a foreign party are governed by the United Nations Commission on International Trade Law Arbitration Rules (the "UNCITRAL rules"), whenever parties agree to their use. *See* UNCITRAL rules at Art. 1.1.

The UNCITRAL rules provide a framework in which geographically diverse parties can resolve disputes with the aid of procedurally neutral guidelines.[7] Like the FAA, however, the UNCITRAL rules give little guidance with respect to the scope of arbitrator powers. They state only that, "[i]n addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards." *Id*. at Art. 32.1.

D. Commercial Rules For Arbitration

In addition to the federal, state, and international statutes governing arbitrator conduct, a few trade groups and other commercial organizations have promulgated arbitration codes that parties may agree to follow. For example, the American Arbitration Association (the "AAA") and ARIAS•U.S. ("ARIAS") have issued guidelines which, in part, seek to define the scope of arbitrator authority. *See* AAA, *Commercial Arbitration Rules and Mediation Procedures* (amended and effective Sept. 1, 2007) ("AAA Rules"), available at http://www.adr.org/sp.asp?id=22440; ARIAS-U.S., *Practical Guide to Reinsurance Arbitration Procedure* (2004) ("ARIAS Practical Guide"), *available at* http://www.arias-us.org/pdf/Practical_Guide.pdf. Similarly, in 1997, an insurance and reinsurance industry task force comprised of international and domestic representatives of insurers, reinsurers, experienced industry arbitrators and industry trade associations was formed, in an attempt to formalize the process used by the reinsurance industry to resolve disputes. Those efforts culminated in the "Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes" ("RAA Procedures"), which provide a framework for the conduct of reinsurance industry arbitrations. *See* RAA Procedures, *available* in RAA Manual for the Resolution of Reinsurance Disputes (2001 & 2007 updates).

Parties who elect contractually to import these (or similar) commercial codes and guidelines may benefit from a more precise delineation of their arbitrators' powers than those who rely on the baseline guidance provided by state or federal law. For instance, the RAA Procedures expressly state:

> The Panel is authorized to award any remedy permitted by the Arbitration Agreement or subsequent written agreement of the Parties. **In the absence of explicit written agreement to the contrary**, the Panel is also authorized to award any remedy or sanctions allowed by applicable law, **including, but not limited to**: monetary damages; equitable relief; pre- or post- award interest; costs of arbitration; attorney fees; and other final or interim relief.

Section 15.3 (emphasis supplied); *see also* ARIAS Practical Guide §§4.4 ("The Panel has the authority to enter interim awards in appropriate cases."); 5.3, Comment C ("[T]he panel may specify a payment date and a rate of interest.").

Despite these various attempts to codify and/or define the extent of arbitrators' powers, when the applicable rules provide no specific authority to award various forms of relief, and the parties' contract is silent on the issue, a panel's authority to act in traditionally judicial capacities is often unclear. Case law interpreting the FAA and state statutes, together with related policy arguments, has been used to help define the scope of arbitral authority and to justify actions desired by one party over the other side's objections. Some of the most frequently discussed and disputed powers — the power to award multiple damages, interest, injunctive relief, subpoenas, and confidentiality strictures — are discussed in this article.

III. FIVE (QUASI-) JUDICIAL FUNCTIONS

A. Multiple Damages

The prerogative of arbitration participants to shape their proceeding includes the joint ability to select the menu of remedies arbitrators may award at its conclusion. For example, parties can contract to include or exclude multiple or punitive damages and attorney's fees as available remedies. When the subject contract is silent on the issue of remedies, case law and legislation fill the gaps to provide the authority needed to ensure judicial confirmation of awards

prescribing these remedies.

1. The Power To Award "Multiple Damages"

It is not surprising that there is some degree of confusion over an arbitrator's authority to award multiple damages. This uncertainty may derive, in part, from disagreements over the purposes and proper characterization of multiple damages remedies. If they are viewed as a means to punish and deter parties, they serve the same function as punitive damages and should be evaluated according to the considerations that inform a panel's authority to award that type of relief. If, however, they are compensatory in nature, the proper analysis is whether the panel is imbued with the power to award compensatory relief above the principal amount of a contractual loss. In this connection, the United States Supreme Court has recognized that there is often a fine line between compensatory multiple damages and punitive damages. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785-86 (2000) (treble damages under the False Claims Act are "essentially punitive in nature," because "the very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers").

The better view is that multiple damages are more compensatory in nature, which makes them distinguishable from punitive damages. E.g., Investment Partners, L.P. v. *Glamour Shots* Licensing, Inc., 298 F.3d 314, 317 (5th Cir. 2002) ("[u]nlike punitive damages, which punish a wrongdoer, treble-damages compensate an injured party"). Although the FAA does not expressly provide for an award of sanctions, its broad language recognizes, if only by implication, that arbitrators may issue such awards. 9 U.S.C. §10(a) (providing courts with limited, specific grounds for vacating an arbitration award). For example, in **Glamour Shots**, the plaintiff filed a lawsuit in federal court seeking an award of treble damages under federal antitrust law. When the defendants moved to compel arbitration, the plaintiff responded that the arbitration clause was void because it prohibited arbitrators from awarding "punitive damages." **Glamour Shots**, 298 F.3d at 316. The court affirmed the arbitration agreement and held that the arbitrators were free to award multiple damages on the ground that "[u]nlike punitive damages, which are designed to punish a wrongdoer and deter future wrongful conduct, treble-damages compensate an injured party." *Id.* at 317. As a consequence, the court authorized the panel to award treble damages in accordance with federal law, even though the agreement expressly barred punitive damages. *Id.* at 317-18.

In a similar ruling, the Supreme Court of Connecticut recently confirmed an arbitration award of multiple damages where such damages were authorized by state law and not definitively excluded by the arbitration agreement. *Harty v. Cantor Fitzgerald & Co.*, 881 A.2d 139 (Conn. 2005). In *Harty*, the parties' employment contract contained an arbitration clause, stating that "arbitrators are not authorized or entitled to include as part of any award rendered by them, special, exemplary or punitive damages or amounts in the nature of special, exemplary or punitive damages...." *Id.* at 144. The award included double damages, attorney's fees and costs. *Id.* The court affirmed the double damages award on the ground that the relevant state statute allowed them in the circumstances at bar, and because the arbitration clause was ambiguous on the subject of whether such damages were excluded. *Id.* at 155-56. The court, however, vacated the award with respect to attorney's fees and costs, finding that fees and costs were elements of punitive damages, which were expressly barred by the parties' contract. *Id.* at 157; *see also infra* at Section III.A.2.

The RUAA attempts to clarify the parameters of a panel's power to award multiple damages. The RUAA expressly permits arbitrators to award "punitive damages or *other exemplary relief* if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." RUAA at §21(a) (emphasis supplied). Even though an arbitration agreement is a form of contract, the parties cannot confer authority to award multiple damages on an arbitrator by agreement. There must be an independent legal basis for the award. *See* RUAA at §21, Comment 1.[8] In an effort to address concerns over excessive or unjustified awards, the RUAA requires arbitrators to "specify in the award the basis

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The court affirmed the arbitration agreement and held that the arbitrators were free to award multiple damages on the ground that "[u]nlike punitive damages, which are designed to punish a wrongdoer and deter future wrongful conduct, treble-damages compensate an injured party."

On the other hand, when a party engages in egregious conduct, the aggrieved party — regardless of whether it seeks relief in court or in arbitration — should be entitled to the full panoply of available remedies.

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in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief" — unless the parties waive their right to receive these details. *Id*. at §21(e). As a result, barring some other serious infirmity, courts do (and, they should) affirm a wide range of arbitral awards in RUAA jurisdictions, including multiple damages awards.

2. Punitive Damages

Although once considered to be outside the scope of arbitral power, a number of modern authorities agree that arbitrators may award punitive damages under the FAA, UAA, certain state arbitration statutes and private procedural guidelines. *See* RUAA at §21(a), Comment 1; *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52 (1995); see also *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc*., 598 F. Supp. 353, 361 (D. Ala. 1984) ("This Court agrees that there is no public policy bar which prevents arbitrators from considering claims for punitive damages.").

The view that only courts should be vested with the power to award punitive damages may emanate from the perception that arbitrators, who may not (as a group) be as well versed in judicial decisions and procedural safeguards, are unequipped to determine the appropriate quantum of punitive damages to impose. On the other hand, when a party engages in egregious conduct, the aggrieved party — regardless of whether it seeks relief in court or in arbitration — should be entitled to the full panoply of available remedies. These competing considerations highlight the controversy over punitive damages which has recently been at the forefront of the debate concerning the scope of arbitrator power.

(a) State Arbitration Law

As noted above, the RUAA expressly permits imposition of punitive damages. RUAA at §21(a). State statutes modeled on the original UAA, which does not directly reference punitive damages, are less clear. *See* UAA at §§1-25 (1956).

For example, in Massachusetts, a UAA jurisdiction, the state's highest court affirmed an award of punitive damages, even though the state arbitration statute did not expressly authorize them. *Drywall Systems, Inc. v. ZVI Construction Co.*, 761 N.E.2d 482 (Mass. 2002); M.G.L. Ch. 251. In *Drywall*, the Supreme Judicial Court held that, since there was no express statutory or contractual limit on punitive damages or multiple damages under Massachusetts law, both punitive damages and multiple damages could be awarded in arbitration. In the Court's parlance: "Absent contrary statutory direction, the strong public policy in favor of arbitration of commercial disputes should be given effect." *Id*. at 486 (citation omitted).

Other states have attempted to bar punitive damages altogether on the ground that one of the key differences between arbitration and litigation — the essentially private nature of industry arbitration — restricts relief to purely compensatory damages. "[S]uch damages are a social exemplary remedy rather than a private compensatory remedy." Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3D* at §213.45 (2008). For example, under New York law, arbitrators lack authority to award punitive damages, even if the parties to an arbitration have privately agreed otherwise. *Garrity v. Lyle Stuart, Inc*., 353 N.E.2d 793, 795 (N.Y. 1976). The United States Supreme Court has emphasized, however, that the FAA preempts state law barring an arbitration award of punitive damages, unless the parties agree in their contract that their arbitrator(s) may not award such damages. *See Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 62-64 (1995). But, when the FAA does not apply, arbitrators bound to follow New York law (for example) may not award punitive damages.

(b) Federal Arbitration Law

In *Mastrobuono, supra*, the Supreme Court upheld an award of punitive damages under the FAA, in the face of New York's prohibition against such awards in arbitration. *See Garrity v. Lyle Stuart, Inc*., 353 N.E.2d 793, 794 (N.Y. 1976) ("An arbitrator has no power to award punitive damages, even if agreed upon by the parties.").[9]

The Plaintiffs in *Mastrobuono* had signed a contract including an arbitration agreement when they opened a securities trading account with the defendant brokerage firm. *Mastrobuono*, 514 U.S. at 53. The agreement did not expressly reference punitive damages. Instead, it stated only that it was governed by the "laws of the State of New York" which, in turn, prohibit arbitrators from

awarding punitive damages. *Id*. A few years after opening their account, the plaintiffs sued the defendant brokerage firm for mismanaging their assets. *Id*. The brokerage successfully moved to compel arbitration, and the arbitration panel awarded both compensatory and punitive damages. *Id*. The respondent brokerage later argued on appeal that the panel was not authorized to award punitive damages, and the issue ultimately reached the United States Supreme Court.

The Supreme Court held that the general choice of laws provision in the agreement was not sufficient to limit the availability of punitive damages. *Id*. at 62. Rather, "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators." *Id*. at 63-64. Noting that the FAA was enacted to preempt state laws prohibiting arbitration, the Court reasoned that "when a court interprets [choice of law] provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" *Id*. at 62 (quoting Volt, 489 U.S. at 476).

The Court further intimated that, even in states where punitive damages are prohibited, the parties must specifically state in their agreement that punitive damages are outside the scope of arbitral authority if they wish to avoid imposition of punitive damages. The holding highlights, among other values, the judicial deference to an arbitrator's power to fashion circumstantially appropriate relief which has become a regular feature of modern U.S. jurisprudence. *See also Bonar v. Dean Witter Reynolds, Inc*., 835 F.2d 1378 (11th Cir. 1988) (affirming the ability of arbitrators to award punitive damages in an employment arbitration governed by the FAA and the AAA Rules even though the dispute was also governed by New York law, which prohibits punitive damages in arbitration); Am. *Trust v. United Int'l Ins. Co*., 1991 U.S. Dist. LEXIS 18412 (N.D. Ill., Dec. 31, 1991) (affirming an arbitral award of punitive damages assessed against a reinsurer when the arbitration agreement stated that "arbitrators are relieved from all judicial formalities and may abstain from following the strict rule of law").

Interestingly, at least one court has taken *Mastrobuono* a step further. *See Ex parte Thicklin*, 824 So.2d 723, 730-33 (Ala. 2002). In *Thicklin*, the Alabama Supreme Court ruled that an arbitration agreement specifically prohibiting an award of punitive damages in arbitration could not be enforced because such a provision was "unconscionable." In other words, an arbitrator had the power to award punitive damages, even though the parties' own arbitration agreement — from which the arbitrators derived their appointment and their authority — evinced their joint intention to bar that form of recovery. *Id*. The impetus for this extreme ruling was a fact pattern involving "gross, oppressive, or malicious fraudulent acts committed intentionally." *Id*. at 732. The court reasoned that "[i]f parties to an arbitration agreement waive an arbitrator's ability to award punitive damages, the door will open wide to rampant fraudulent conduct with few, if any, legal repercussions." *Id*. at 733. The court struck the provision barring punitive damages from the arbitration agreement, but otherwise upheld the agreement and compelled arbitration. *Id*. at 734.

Taken together, the *Mastrobuono* and *Thicklin* decisions, plus the RUAA — which now expressly authorizes punitive damages — demonstrate the growing acceptance of a panel's power to award punitive damages. Many industry panels, of course, remain reluctant to award punitive damages absent an unequivocal demonstration of knowing and truly egregious conduct. If, however, arbitrators specify in their award a colorable basis in law and fact for a punitive damage award, it will likely be upheld by the courts. This kind of specification of an award's underpinnings, of course, comes close to a "reasoned award," which parties may elect to avoid for other reasons.

(c) Commercial Rules

Even absent statutory guidance, some courts have confirmed arbitrators' authority to award punitive damages in arbitrations governed by commercial rules, provided that the parties' contract does not specifically proscribe this form of relief. For example, notwithstanding the silence of Wisconsin law on the subject of a panel's authority to award punitive damages, a Wisconsin court nonetheless affirmed a punitive damages

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The Court further intimated that, even in states where punitive damages are prohibited, the parties must specifically state in their agreement that punitive damages are outside the scope of arbitral authority if they wish to avoid imposition of punitive damages.

The statutory authorities are mixed. The FAA (again) fails to supply any independent authorization for an award of attorney's fees. Likewise, the UAA permits an award of attorney's fees only upon agreement of the parties.

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award in an arbitration governed by the AAA Rules. *See Winkelman v. Kraft Foods, Inc.*, 693 N.W.2d 756, 758 (Wis. Ct. App. 2005).[10]

In *Winkelman*, the court held that "an arbitrator may award punitive damages if permitted to do so under the rules adopted by the parties, so long as the award is not otherwise proscribed by the parties' agreement." *Id.* at 765. It is worth observing that the punitive damages awarded in *Winkelman* were not statutorily mandated; instead, they were fabricated by the panel to "fill in the interstices in the existing relevant law." *Id.* at 764 (citations omitted). The court added that punitive damages promote good conduct in commercial dealings, and that punitive damages cannot possibly be in violation of any law, since there is no such proscription against them in Wisconsin. *Id.* at 764.

The ARIAS guidelines are silent on this topic. Nevertheless, given the preponderance of state and federal authority upholding punitive damage awards by arbitrators, such awards are likely to be upheld, as long as they are reasonable and do not conflict with the remedies or other principles adopted by the parties.

3. Attorney's Fees

Rising counsel fees and more complex and protracted arbitration proceedings have intensified the efforts of prevailing parties to recoup legal fees expended in arbitration. A panel's authority to award attorney's fees, however, is generally more limited than its power to award multiple and punitive damages. According to the weight of authority, counsel fees are available in arbitration when the parties' contract so specifies, or when there is a statutory basis (such as a civil rights violation or a finding of bad faith) that mandates fee-shifting. There is nothing surprising about these limitations, which reflect U.S. reinsurance arbitration practice and which are consistent with the so-called "American Rule" — absent special legislation or a contract that provides otherwise, each party must pay its own counsel fees. *See, e.g., Rosati v. Bekhor*, 167 F. Supp.2d 1340, 1347 (M.D. Fla. 2001).

But, where arbitrators can ground their award in an exception to the American Rule, courts have concluded that arbitrators do not exceed their powers in awarding attorney's fees. *See Marshall & Co. v. Duke*, 941 F. Supp. 1207 (N.D. Ga. 1995), aff'd, 114 F.3d 188 (1997). In *Marshall*, the losing party sought to vacate an arbitration award that included over $600,000 in attorney's fees, awarded after plaintiffs established that the defendants' contentions were frivolous and that they had conducted the underlying litigation in bad faith and for improper purposes. *See id.* at 1214. The federal trial court found that the arbitrators did not exceed their powers in awarding fees and confirmed the award. *Id.* at 1215; *see also* 9 U.S.C. at §10. In reaching its conclusion, the court noted both that the parties had agreed to submit the fee issue to the panel, and that the "bad faith exception to the American Rule" extends to arbitration. *Id.* at 1213. *See also Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991) ("In light of the broad power of arbitrators to fashion appropriate remedies and the accepted 'bad faith conduct' exception to the American Rule [of paying one's own fees], we hold that it was within the power of the arbitration panel in this case to award attorneys' fees").

The statutory authorities are mixed. The FAA (again) fails to supply any independent authorization for an award of attorney's fees. Likewise, the UAA permits an award of attorney's fees only upon agreement of the parties. *See* UAA at §10. Courts in UAA jurisdictions have nonetheless concluded that a fee award may fall within a panel's powers if there is a statutory or common law basis for it. *See LaRoche v. Flynn*, 771 N.E.2d 792 (Mass. App. Ct. 2002) (attorney's fees are permitted if allowed under a statutory claim submitted to arbitration); *Kolar v. Arlington Toyota, Inc.* 675 N.E.2d 963, 966 (Ill. App. Ct. 1996), *aff'd*, 688 N.E.2d 653 (Ill. 1997) (because a panel has power to dispose of all requests for relief, it had the power to award attorney's fees). In *Drywall*, the Massachusetts Supreme Judicial Court held that an arbitrator may award attorney's fees — despite the lack of a fee-shifting agreement between the parties and the presence of a general statutory prohibition against awarding attorney's fees in arbitration under M.G.L. Ch. 251, §10 — because claims under the Massachusetts consumer protection statute (M.G.L. Ch. 93A) "override[] the general unavailability of Attorney fees."[11] *Drywall Systems, supra*, at 482. At least a few other courts have reached similar conclusions. *E.g., David v. Abergel*, 54 Cal. Rptr.2d 443, 445 (Cal. Ct. App. 1996) (confirming an award including attorney's fees, because the award was based on a California rule of civil procedure, which

authorized awards of attorney's fees for bad faith or frivolous claims); *Todd Shipyards*, 943 F.2d 1056, 1064 (arbitrator could award attorney's fees under the "bad faith" exception to the American Rule).

Other states have acknowledged but circumnavigated the American Rule by prohibiting an award of attorney's fees altogether, unless the relevant arbitration agreement provides otherwise. *See* Md. Code Ann. Cts. & Jud. Proc. §3-221(b) (2002) ("Unless the arbitration agreement provides otherwise, the award may not include counsel fees."); *see also UBS Warburg, LLC v. Auerbach, Pollak & Richardson, Inc.*, No. 119163-00, 2001 N.Y. Misc. LEXIS 1324, *7-8 (Sup. Ct. Oct. 2, 2001) ("Absent any basis for the award in the parties' agreement or by statute, the award of attorneys' fees exceeded the authority of the arbitrators").

In one of several areas where the RUAA attempts to address the realities of modern arbitration with greater precision, it expressly adopts the statutory and contractual exceptions to the general rule against counsel fee-shifting: "An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." RUAA at §21(b).[12]

Leaving aside the various written repositories of arbitral authority, the parties and the panel may (on their own) seek to leverage one of the traditional benefits of arbitration: self-help. If both parties request a specific form of relief, the panel is likely to consider granting it — even where it is not expressly authorized by the contract at issue — unless its imposition would violate applicable law. A joint request for an award of attorney's fees, for example, may reflect the parties' intent where the contract is silent or ambiguous on the issue. In the alternative, the parties may simply wish to confer broader authority on the panel during an arbitration proceeding. In either scenario, a panel may consider itself empowered to award the type of relief requested, even though a court would likely demand some evidence of authority for its actions beyond the mandate of the parties themselves.

Even when a panel has authority to award attorney's fees, the award must be reasonable and devoid of "corruption, fraud, or ... evident partiality." FAA at §10(a). Arbitrators should, among other available precautions, review counsel's bills in order to ensure that their award is economically reasonable. As noted above, however, courts generally defer to an arbitrator's judgment with respect to the components of his or her award. *E.g., Softkey, Inc. v. Useful Software, Inc.*, 756 N.E.2d 631 (Mass. App. Ct. 2001) (arbitrator had not exceeded his powers where attorney's fee award was based on the arbitrator's assessment of the degree to which each party had prevailed in the arbitration and their conduct therein).

B. Interest

It is widely acknowledged that a panel's authority to award damages includes the power to impose both pre- and post-award interest. *See, e.g., InterDigital Communications Corp. v. Nokia Corp.*, 407 F. Supp.2d 522 (S.D.N.Y. 2005) (award of prejudgment interest was necessary to compensate patent holder and did not manifestly disregard New York law); *United States v. Praught Constr. Corp.*, 607 F. Supp. 1309 (D. Mass. 1985) (confirming award of interest to promote policy favoring arbitration). Although not expressly articulated in the FAA, the Act has been interpreted to support interest awards. *E.g., Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 62-63 (3d Cir. 1986) (confirming award made under the FAA, which was interest-bearing from the date of issuance); see also *Holz-Her U.S., Inc. v. Monarch Machinery, Inc.*, No. 3:97CV56-P, 1998 U.S. Dist. LEXIS 15394, at *29 (W.D.N.C. July 24, 1998) ("numerous courts have held that arbitrators have the power to award interest").

The RUAA may also be interpreted to authorize interest awards, even though the issue is not addressed squarely. The RUAA states, in relevant part:

> [A]n arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award ... or for vacating an award.

RUAA at §21(c). By contrast, the most recent version of the AAA Commercial Rules leaves little room for dispute. They expressly authorize awards of interest, permitting

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[A]n arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award ... or for vacating an award.

These principles must, however, be understood in light of the arbitration agreement itself. Since an arbitrator's powers ultimately derive from private agreement, parties can (of course) specifically preclude a panel from awarding interest by prohibiting interest awards in their agreement.

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arbitrators to award "interest at such rate and from such date as the arbitrator(s) may deem appropriate." AAA Commercial Rule 43(d)(i). *See also* ARIAS Practical Guide, Ch. 5.3, Comment C ("the Panel may specify a payment date and a rate of interest if payment is not made by the specified date").

The rationale for permitting interest awards in arbitration is closely linked to the policies supporting enforcement of arbitration agreements and promoting an arbitration process insulated from judicial interference. As one court framed the issue:

> Given the current policy of encouraging arbitration, the trend of allowing arbitrators to award interest makes sense ... If interest were only to be awarded by courts, then either successful parties will be forced to spend more time and money to recover interest or unsuccessful parties will be unjustly enriched by the use of someone else's money. The incentive to dispute a contract and to delay resolution of any dispute is greater if interest is not part of the arbitrator's award. Therefore, allowing arbitrators to award interest is not only in line with current case law but also helps to streamline the arbitration process and save court resources.

United States v. Praught Constr. Corp., 607 F. Supp. at 1309, 1312 (D. Mass. 1985).

These principles must, however, be understood in light of the arbitration agreement itself. Since an arbitrator's powers ultimately derive from private agreement, parties can (of course) specifically preclude a panel from awarding interest by prohibiting interest awards in their agreement. *See, e.g, Holz-Her U.S., Inc. v. Monarch Machinery, Inc.*, 1998 U.S. Dist. LEXIS 15397, at *29 (W.D.N.C. July 24, 1998) (confirming AAA panel's award of interest, because "neither party specifically objected to the award of interest"). If, as is common, the agreement is silent, the existing statutes and rules support interest awards, as long as the rate of interest is reasonable. If an interest award appears to be excessive, it may be subject to vacatur on the ground that the arbitrators exceeded their powers. *See* FAA at §10; UCO *Terminals, Inc. v. Apex Oil Co.*, 583 F. Supp. 1213, 1217 (S.D.N.Y.) (arbitrators' award of interest at an annual rate of 12% was not "irrational"), *aff'd*, 751 F.2d 371 (1984). State statutes prescribing the rate applicable in the relevant jurisdiction(s) are frequently used as a metric for the reasonableness of arbitral interest awards.

The next installment of this article will address the authority of panels to order injunctive relief, exercise subpoena powers, and issue confidentiality orders.▼

1 The views expressed in this article do not necessarily reflect the views of Choate Hall & Stewart LLP or any of its clients.

2 The American Arbitration Association reported 20,711 commercial arbitration filings in 2007, a 46 percent increase over the previous year. *See AAA, National News*, available at http://www.adr.org/sp.asp?id=34719.

3 Although there are certainly many other quasi-judicial acts that could potentially fall within the purview of this article, we have elected to focus on these recurring problems in an effort to stake the bounds of arbitral authority in the areas most germane to modern industry arbitrations.

4 In other words, the framework for analyzing arbitral authority is predicated on judicial deference. In order to vacate an arbitration award, a court must find that the award falls within one of the four categories enumerated in Section 10 of the FAA, or shows a "manifest disregard of the law." *Houdstermaatschappij v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (citing Wilko v. Swan, 346 U.S. 427, 436-37 (1953)). Thus, arbitration awards are almost impregnable to attack, and courts generally affirm them, thereby promoting and sustaining arbitrators' authority to fashion appropriate relief.

5 A state arbitration statute will only be preempted by the FAA to the extent that state law may conflict with the FAA and restrict the rights of parties who have agreed to arbitrate. *Volt*, 489 U.S. at 477-79.

6 According to The National Conference of Commissioners on Uniform State Laws, thirteen states adopted the RUAA between 2000 and 2007 — four others introduced it in 2008. Uniform Law Commissioners, *A Few Facts About the ... Uniform Arbitration Act* (2008), www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp.

7 Some countries, like Bermuda, have adopted the UNCITRAL rules in their entirety. *See* Bermuda International Conciliation and Arbitration Act at §§2, 23 (1993). An arbitration seated in Bermuda is, therefore, governed by the UNCITRAL rules, to the extent that it is not governed by other rules invoked through a choice-of-law provision in the parties' agreement or otherwise.

8 Similarly, "there is doubt whether [the contracting parties] can eliminate the right to ... punitive damages or other exemplary relief" under the RUAA. *See* RUAA at §21, Comment 2 (citing cases).

9 New York has a broad arbitration statute, which is similar in scope to the original UAA. It provides that awards can be vacated when an arbitrator has "exceeded his power." N.Y. C.P.L.R. at §7511(b)(1)(iii).

10 The AAA Rules do not expressly grant arbitrators the authority to award punitive damages. Instead, they give an arbitrator authority to issue "any remedy or relief" he or she deems appropriate. See AAA Commercial Arbitration Rule 43.

11 Chapter 93A is intended to address "unfair or deceptive act[s] or practice[s]."

12 In addition to bad faith claims, certain statutes such as those targeting employment discrimination, civil rights, and antitrust violations permit courts to order attorney's fees in appropriate circumstances.

news and notices

First Educational Seminar Discovers Success

The first seminar in the new ARIAS•U.S. Educational Series took place at the Sheraton Hotel in New York City on November 5, the day before the Fall Conference at the Hilton. After lunch at Avenue Restaurant off the lobby of the hotel, ninety-nine students, nine faculty members and five members of the Education Committee squeezed into a room in the Executive Conference Center for a four-part slide show and mock arbitration that focused on "**The Powers of Arbitrators - Discovery**." Faculty members who conducted the opening panel were **Mary Lopatto** (Moderator), **Chuck Ehrlich**, **Peter Scarpato, Larry Schiffer**, and **Barry Weissman**. In the mock arbitration, attorneys **Larry Greengrass** and **Michelle Jacobson** presented the dispute to the arbitration panel of **Marty Haber** (umpire), **Jeff Morris**, and **Connie O'Mara**.

The sessions generated very favorable comments in the evaluations. Future seminars are being planned for more attendees in larger rooms, hopefully achieving a less compressed student body.

Membership Directory Going Online

At its meeting on November 6, the Board of Directors approved a project to install the ARIAS Membership Directory on the website, instead of printing the booklet. The move will save the Society over $20,000 per year in printing and distribution costs. The directory will be located in a password-protected area so that only members have access. Leaving it unprotected would subject it to potential harvesting of email addresses by outsiders.

The formatting of the addresses will be very similar to the current directory. Alphabet sorting and search features will be included to facilitate location of members.

With the new system, changes and additions can be uploaded periodically throughout the year, a distinct advantage over the current once-a-year updating.

The directory is scheduled to first appear online in the spring.

Certified Arbitrators Now Can Manage their ARIAS Profiles

ARIAS•U.S. Certified Arbitrators were informed on November 5 that the new system for data entry was open. Aimed at giving users of the online profiles more detailed information about arbitrators, the system allows arbitrators to enter information into their profiles at any time, rather than sending update emails to ARIAS•U.S. Information is entered through a series of editing screens for different sections of the profile, available only to the arbitrator. A new search system, based on the new profiles, will be added to the website in early 2009.

Anyone wishing to see the information contained in the new profiles can go to the list of arbitrators on the website. Those who have filled out information in the new system have "View New" following their names. Clicking on that link calls up the new profile.

The old profiles will continue to appear on the website until May, after which they will be removed. Search systems will also operate side-by-side during the transition.

The new information system will offer added details to help users select arbitrators who would be most likely to understand the issues in a dispute.

Board Certifies Twelve New Arbitrators

At its meeting in New York on November 6, the Board of Directors approved certification of twelve new arbitrators, bringing the total to 352. The following members were certified; their respective sponsors are indicated in parentheses.

- **Pierre Charles** (Christian Bouckaert, Klaus Kunze, Joseph McCullough)
- **James D. Engel** (Ann Field, David Bowers, Caleb Fowler)
- **Suzanne Fetter** (Thomas Daly, Joseph Loggia, Nick DiGiovanni)
- **Dale S. Frediani, Sr**. (John Morgan, Eugene Wollan, Robert Mangino)
- **Thomas E. Geissler** (Richard Voelbel, Gary Ibello, Janet Kloenhamer)
- **Henry C. Lucas, III** (Robert Federman,

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Anyone wishing to see the information contained in the new profiles can go to the list of arbitrators on the website. Those who have filled out information in the new system have "View New" following their names. Clicking on that link calls up the new profile.

news and notices

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Anthony Lanzone, Douglas Houser)

- **James J. Morris** (Robert Hall, Debra Hall, Jonathan Bank, Ronald Gass)
- **Charles J. Moxley, Jr.** (Daniel Schmidt, Robert Quigley, Walter Squire)
- **Barry R. Ostrager** (Charles Foss, Timothy Yessman, Mark Wigmore)
- **Thomas Paschos** (Spiro Bantis, Donald DeCarlo, Timothy Stalker)
- **William P. Walsh** (John Dore, Sandy Hauserman, Peter Brown)
- **Richard C. Wiggins** (Wendell Ingraham, William Wigmanich, Charles Carrigan)

Long Range Planning Committee Conducts Survey on Ethics

LRPC Chairman Mark Gurevitz announced at the Fall Conference an all-member survey regarding opinions about ethics in reinsurance arbitration. This survey will provide information to the Committee on the nature of any ethics issues and guidance for development of its recommendations on how issues should be addressed by ARIAS•U.S.

Members were asked to go to www.zoomerang.com to take the survey, which required roughly 15 minutes to complete. It was concluded on December 7 after 174 members had responded. The LRPC is analyzing the results.

March 23 Seminar Set for New York Hilton

The second seminar in the new Educational Series will take place on the afternoon of March 23, 2009 at the New York Hilton. The Mercury Ballroom should comfortably accommodate the expected 150 attendees.

Details of the curriculum have not yet been completed, but will be announced by email and on the ARIAS website.

The seminar will begin with a light lunch in the adjoining Rotunda at 11:30. Sessions will run from 12:30 until 5:00, with a break at mid-afternoon.

Registration will begin on Wednesday February 4 at 11:00 a.m. on the ARIAS•U.S. website. The fee of $150 includes the cost of lunch, the refreshment break, and the equipment and facility for the training. This event is for ARIAS members only. CLE credit will be given.

Umbrellas Added to Conference Gifts Offered for Sale

With the shortfall in attendance at the Fall Conference, a bumper crop of bumpershoots has been added to the gifts offered on the ARIAS•U.S. website.

As reported last month, gifts left over from recent ARIAS conferences are now available for purchase at cost (or less) plus shipping. The website has a yellow button on the home page that links to the gift page with ordering instructions and a photo and description of each one. The items offered are ARIAS•U.S. windbreakers, padfolios, blankets, sports bags, coasters, pens (good ones), flash drives, and now umbrellas.

Two non-gift items are there, as well...bunting from this year's spring "convention" and the lottery drum from last year's spring conference. Ordering is on a "first come, first gets it" basis. Every order includes a free ARIAS•U.S. baseball, while they last.

Reservations Are Open for the 2009 Spring Conference

The Breakers reservation system is now open for the ARIAS 2009 Spring Conference.

Guest rooms are available in a range of special group prices for various room types, starting at $280 per night.

Reservations can be made by linking directly to the "Welcome ARIAS-U.S." page of the hotel's reservation system. The group rates are displayed there. Simply go to the ARIAS•U.S. website calendar page for the 2009 Spring Conference and click on the link. A one-night deposit is required at time of reservation.

For those who prefer to make reservations by telephone, the number to call is 888-BREAKERS (273-2537). Be sure to mention that you are attending the ARIAS Conference to receive the group rate.▼

feature

Life After *Hall Street*: States Remain Torn on Contractually Expanded Judicial Review of Arbitration Awards

Aluyah I. Imoisili

Aluyah I. Imoisili

Following the Spring 2008 decision by the U.S. Supreme Court in *Hall Street Associates L.L.C. v. Mattel, Inc.*[1], in which the Court decided unequivocally that parties may not contractually expand the grounds for vacating arbitration awards in enforcement proceedings under the Federal Arbitration Act ("FAA"), many were convinced that the matter was resolved and that states would fall in line. So far, that has not been the case. At least two state courts have considered *Hall Street* and reached different results. In June 2008, a Texas Court of Appeals held, in *Quinn v. Nafta Traders, Inc.*[2] that the Texas General Arbitration Act[3] provided exclusive grounds for vacating arbitration awards that cannot be supplemented or altered by contract. Two months later, the California Supreme Court held just the opposite under the California Arbitration Act[4], in *Cable Connection Inc., et al., v. DirecTV Inc.*[5] This divergence between state and federal law highlights the fact that contract drafters simply must be vigilant when crafting arbitration clauses. Indeed post-*Hall Street*, parties that wish to give courts a second look at arbitration awards must have carefully written arbitration agreements that incorporate clear choice of state law provisions (indicating a favorable state).

This article tracks significant state law developments since *Hall Street* and addresses the practical implications for drafters of arbitration contract wording.

I. *Hall Street* Prevents Parties from Contractually Expanding Grounds for Challenging Arbitration Awards Under the FAA

Hall Street involved a landlord-tenant lease dispute between landlord Hall Street Associates and tenant Mattel, Inc. about which party bore responsibility for environmental clean-up costs under the parties' lease agreement. Litigation ensued in the U.S. District Court for the District of Oregon. After unsuccessful mediation attempts, the parties proposed to submit the issue to arbitration. The district court agreed, and entered, as a court order, an arbitration agreement that had been drafted by the parties. The arbitration agreement provided:

> [t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award, or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.[6]

The arbitration took place and Mattel prevailed. The arbitrator expressly held that Mattel was not required to indemnify Hall Street because the lease obligation (requiring the tenant to follow all federal, state, and local environmental laws) did not impose an obligation to comply with the testing requirements of the Oregon Drinking Water Quality Act (the "Oregon Act"). Hall Street filed a motion in the district court for an order vacating, modifying and/or correcting the arbitration award on the ground that the arbitrator's failure to treat the Oregon Act as applicable was an incorrect interpretation of the lease that constituted an erroneous conclusion of law.

The district court agreed with Hall Street and vacated the award, pointing to the erroneous conclusions of law language in the parties' arbitration agreement. The court remanded the case for the arbitrator to reconsider the award. The arbitrator then adopted the district court's ruling and amended the

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Indeed post-*Hall Street*, parties that wish to give courts a second look at arbitration awards must have carefully written arbitration agreements that incorporate clear choice of state law provisions (indicating a favorable state).

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The FAA is not the only way into court for parties wanting review of arbitration awards: *they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.*

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decision in Hall Street's favor. Both parties sought modification of the award. The district court (although modifying the arbitrator's calculation of interest) upheld the award on the basis of the "erroneous conclusions of law" standard of judicial review in the parties' arbitration agreement.

The parties then appealed to the Ninth Circuit, where Mattel argued that the provision in the arbitration agreement that allowed for judicial review of "erroneous conclusions of law" was unenforceable under the FAA. The Ninth Circuit reversed the district court, ordering that court, on remand, to confirm the original arbitration award in Mattel's favor unless grounds existed under FAA §§ 10 or 11 for an alternative result.[7]

The district court vacated the award, reasoning that it exceeded the arbitrator's powers, in contravention of FAA § 10, because it relied on an implausible interpretation of the lease. The Ninth Circuit *again* reversed, holding that "implausibility" is not a ground for vacating or correcting arbitration awards under FAA §§ 10 or 11. The Ninth Circuit ordered the district court to enforce the original arbitration award in favor of Mattel.[8] Hall Street then appealed to the U.S. Supreme Court to decide whether the grounds for vacating and modifying arbitration awards under FAA §§ 10 and 11 are exclusive.

After recognizing the split among the various federal courts of appeal on the issue, the Court held that the grounds for vacating and modifying arbitration awards *are limited* to those enumerated under FAA §§ 10 and 11. The Court's ruling rested on two bases. First, the Court rejected Hall Street's contention that a prior Supreme Court decision in *Wilko v. Swan*[9] added "manifest disregard of the law" as an additional ground to vacate arbitration awards under FAA § 10 and contracting parties could do the same.[10] The Court explained that the "manifest disregard of the law" language in *Wilko* may have "merely referred to the § 10 grounds collectively" but did not mean that parties could add additional grounds for vacatur under the FAA.[11]

Second, the Court considered whether the "the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration."[12] Interpreting the language of the FAA, the Court construed §§ 10 and 11 to limit the grounds for vacating an award to the expressly enumerated categories. The Court rejected a reading of the FAA that would "expand the stated grounds to the point of evidentiary and legal review generally."[13] Combining the language of §§ 10 and 11 with the § 9 text that a district court "must grant" the order confirming an arbitration award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title," the Court found that the FAA limited judicial review solely to the expressly stated provisions of §§ 10 and 11.[14]

The Court did not completely foreclose all other grounds for vacating or modifying arbitration awards that were not obtained under the FAA. Instead, the Court explicitly preserved the rights of parties to pursue review of arbitration awards under state law alternatives to the FAA schematic:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: *they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10 and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.*[15]

II. Applying *Hall Street*, State Courts Have Offered Divergent Views on Whether Parties May Expand Grounds for Challenging Arbitration Awards Obtained Under State Arbitration Statutes

The U.S. Supreme Court in *Hall Street* foreclosed the possibility of challenging arbitration awards obtained under the FAA, based on language inserted into the contract by the parties expanding judicial review. However, with respect to arbitration awards obtained under state law schemes, the Court permitted parties to pursue "state statutory and common law, where judicial review of a

different scope is arguable."[16] The problem though is that it is not clear which state courts, in light of *Hall Street*, would also limit parties' right to agree to subject their arbitration award to expanded judicial review under state law.

A. Texas Court of Appeals Follows *Hall Street*

On June 17, 2008, a Court of Appeals in Texas applied the reasoning of *Hall Street* to the Texas Arbitration Act and agreed to limit the grounds for vacating arbitration awards under the Texas General Arbitration Act ("TAA") to those enumerated in the statute.[17] In *Quinn*, Margaret A. Quinn sued her former employer Nafta Traders, Inc. for violations of the Texas Commission for Human Rights Act. The trial court ordered the parties to arbitrate their dispute, pursuant to a provision in Nafta's employee handbook. The provision provided that "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law."[18]

The arbitrator ruled in favor of Quinn and she filed a motion to confirm the award and requested additional attorney's fees. Nafta filed a motion to vacate the arbitration award. The trial court denied Nafta's motion to vacate and granted Quinn's motion to confirm the award, but denied her request for additional attorney's fees. Both parties appealed.

On appeal, Nafta argued that expanded judicial review was permitted in the parties' arbitration agreement, and that the arbitrator made several legal errors, in applying the wrong law and finding in Quinn's favor in spite of insufficient evidence, that required a vacatur or modification of the arbitration award.

The *Quinn* court disagreed with Nafta. Considering the *Hall Street* decision "persuasive," the court compared that the "textual features" of the TAA to the FAA.[19] Because the TAA provided "extremely narrow" grounds for vacating or modifying arbitration awards, as the FAA in *Hall Street*, and contained no language allowing parties to contract for expanded judicial review, the *Quinn* court held that "parties seeking judicial review of an arbitration award covered under the TAA cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute."[20]

B. California Supreme Court Rejects *Hall Street*

On August 25, 2008, the California Supreme Court refused to apply *Hall Street's* reasoning to the California Arbitration Act. In *Cable Connection*, satellite television provider DirecTV entered into contracts with retail dealers to provide customers with the equipment needed to receive its satellite signal. These agreements included arbitration clauses that stated that "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and [that] the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error."[21] Dealers from four states brought suit in Oklahoma, asserting on behalf of a nationwide class that DirecTV had wrongfully withheld commissions and assessed improper charges. DirecTV successfully moved to compel arbitration.

The arbitration panel addressed whether the parties' agreement permitted the arbitration to proceed on a class-wide basis and concluded that even though "the contract is silent and manifests no intent on this issue," arbitration on a class-wide basis was authorized under precedential state law. The majority of the panel deemed the question one of substantive California law, though it also relied on AAA rules and policy governing class arbitration. The award was clear that class arbitration was not necessarily required in this case; it was merely permitted by the contract.

DirecTV filed a petition to vacate the award in the California state court. Both parties proceeded on the assumption that the California Arbitration Act ("CAA") (not the FAA) governed the proceeding. The trial court vacated the decision of the arbitrator. The Court of Appeal reversed, holding that the trial court had exceeded its jurisdiction by reviewing the merits of the arbitrators' decision.

The California Supreme Court reversed, holding that "[t]he California rule is that the parties may obtain judicial review of the merits by express agreement."[22] The court distinguished the *Hall Street* holding as limited squarely to federal courts applying the FAA. Instead of engaging in *Hall Street*'s textual analysis, the court focused on the policy rationales driving the enforcement of contractual arbitration arrangements.

The California Supreme Court reasoned that "[i]ncorporating traditional judicial review by express agreement preserves the utility of arbitration as a way to obtain expert factual determinations without delay, while allowing the parties to protect themselves from perhaps the weakest aspect of the arbitral process, its handling of disputed rules of law."[23] The court also noted that "[t]he benefits of enforcing agreements like the one before us are considerable, for both the parties and the courts. The development of alternative dispute resolution is advanced by enabling private parties to choose procedures with which they are comfortable."[24] Agreeing with commentators, the court recognized that "provisions for expanded judicial review are a product of market forces operating in an increasingly 'judicialized' arbitration setting" which feature many of the attributes of court proceedings.[25] The court fashioned its holding to address the desire of parties to have protection from legal error by arbitrators, a desire resulting "from the experience of sophisticated parties in high stakes cases, where the arbitrators' awards deviated from the parties' expectations in startling ways."[26] Moreover, the court recognized that "[t]he judicial system reaps little benefit from forcing parties to choose between the risk of an erroneous arbitration award and the burden of litigating their dispute entirely in court. Enforcing contract provisions for review of awards on the merits relieves pressure on congested trial court dockets."[27] The court indicated that parties should provide for expanded judicial review "clearly and unambiguously" in their contract.[28]

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Such parties must be careful at the contract drafting stage to designate a state arbitration law and venue – such as California – that permits such review. This plainly constitutes a forward-looking, litigation-oriented drafting approach.

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III. Forum Conscious Litigation Strategy and Clear Choice of Law Provisions are Now Essential to Protect a Party's Ability to Obtain Substantive Judicial Review of Arbitration Awards

Given the ability of states, interpreting their own arbitration laws, to deviate from the *Hall Street* reasoning, it remains possible for parties to obtain heightened judicial scrutiny of arbitration awards in a post-*Hall Street* world. Such parties must be careful at the contract drafting stage to designate a state arbitration law and venue - such as California [29] - that permits such review. This plainly constitutes a forward-looking, litigation-oriented drafting approach.

First, the parties must specify an arbitration act other than the FAA as governing their relationship, and must clearly provide for expanded judicial review in their arbitration agreement. They must select the law of a jurisdiction that will enforce such a provision. To accomplish this, the parties may use language similar to that in *Cable Connection*: "the arbitrators shall not have the power to commit errors of law or legal reasoning, and [that] the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error."[30] This language may also be beneficial because it allows the challenging party to argue, in the alternative, that the arbitrator exceeded his powers - a common enumerated ground for vacating arbitration awards under state law.

Second, the parties should specify, in a forum-selection provision in their arbitration agreement, a state court in a jurisdiction that favors contractual expansion of judicial review. The parties should also identify, in a choice of law provision, the specific state arbitration act[31] - not the FAA - that allows the parties to expand the grounds for judicial review by contract.

Finally, the losing party in arbitration must win its race to the courthouse in the state court jurisdiction specified in the contract that permits expanded review. The party must bear in mind that it has to decide in advance to pursue its challenge under state law, or federal law, but not both if it seeks to take advantage of the expanded judicial review afforded by state courts. The federal courts are unlikely to be hospitable to efforts to employ state law to arbitration enforcement proceedings.

IV. Conclusion

Hall Street resolved the issue of whether parties may contractually expand judicial review under the FAA, but not under state arbitration acts. In the wake of *Hall Street*, states have come out on both sides of the issue. A party that desires the option to have a court take a second look at the arbitrators' decision should be careful at the time of contract drafting to ensure that the agreement is not subject to the FAA but instead is subject to favorable state law.▼

** The author would like to thank Stuart D. Allen, Esq. for his tremendous contributions to this article.*

1 128 S. Ct. 1396, 1407-1408 (2008).
2 257 S.W.3d 795, 799 (Tx. Ct. App. 2008).
3 Tex. Civ. Prac. & Rem. Code Ann. §§171.087-171.088 (Vernon 2008).
4 Cal. Civ. Proc. Code §§ 1280 et seq. (West 2008).
5 44 Cal. 4th 1334, 1364, 82 Cal. Rptr. 3d 229, 254 (2008).
6 Hall Street Assocs., 128 S. Ct. at 1400-01.
7 Hall Street Assocs., L.L.C. v. Mattel, Inc., 113 Fed. Appx. 272, 272-73 (9th Cir. 2004).
8 Hall Street Assocs., L.L.C. v. Mattel, Inc., 196 Fed. Appx. 476, 477-78 (9th Cir. 2006).
9 346 U.S. 427 (1953).
10 Hall Street Assocs., 128 S. Ct. at 1404.
11 Id.
12 Id.
13 Id.
14 Id. at 1405.
15 Id. at 1406 (emphasis added).
16 Id.
17 Quinn, 257 S. W.3d at 798.
18 Id. at 799.
19 Id. at 798-99.
20 Id. at 799. On August 1, 2008, a petition for review was filed with the Texas Supreme Court.
21 Cable Connection, Inc., 44 Cal. 4th at 1341, 82 Cal. Rptr. 3d at 234.
22 Id. at 1340, 82 Cal. Rptr. 3d at 233.
23 Id. at 1363, 82 Cal. Rptr. 3d at 253.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id. at 1361, 82 Cal. Rptr. 3d at 251.
29 Some other state laws provide a cushion for parties seeking to increase judicial review of their arbitration awards. For instance, New Jersey expressly authorizes parties to stipulate to expanded judicial review. See N.J. Stat. Ann. § 2A:23B-4(c) (West 2008) ("nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion...").
30 Cable Connection, Inc., 44 Cal. 4th at 1341, 82 Cal. Rptr. 3d at 234.
31 California, for example, has two arbitration acts - the California Arbitration Act (Cal. Civ. Proc. Code §§ 1280 et seq.) and the California International Arbitration and Conciliation Act (Cal. Civ. Proc. Code §§ 1297.11 et seq.). For avoidance of doubt, parties should specify in their contract that it is the former that governs post-arbitration enforcement of the arbitration award.

feature

Arbitration Awards and Appeal: If America Is on *Hall Street*, Which Street Is England on?

Jonathan Sacher and David Parker

Jonathan Sacher

David Parker

Where commercial parties agree that disputes between them should be referred to arbitration (rather than courts), the law chosen to govern any arbitration is often agreed with one eye on achieving a final and binding determination at arbitration without recourse to the courts. A major consideration in choosing English law or the laws of a US state (or US federal arbitration law) is that English law allows the parties to appeal a decision of an arbitrator to the English court on a point of law[1], unavailable in America.

A recent decision of the US Supreme Court (*Hall Street Associates v Mattel Inc*[2]) confirms that where parties submit a dispute to arbitration under federal arbitration law, the grounds on which the arbitrator's decision can be appealed are limited to those set out in section 10 of the Federal Arbitration Act ("the FAA")[3] and confirms that there can be no appeal to a US federal court on a point of law (even in the face of agreement between the parties).

Hall Street

In *Hall Street*, the US Supreme Court decided (by majority), based on an analysis of the wording of the provisions of the FAA, that the statutory grounds of review at sections 9 to 11 of the FAA were exclusive. The Court rejected a construction of the FAA which would "*...expand the stated grounds to the point of evidentiary and legal review generally...*"

Whilst confirming that it is not open to parties to arbitrations under the FAA to agree between themselves additional grounds upon which an arbitration award can be vacated by the federal court (and by implication to contract out of any of those grounds), the Supreme Court expressly stated that parties are free to pursue "*state statutory and common law... where judicial review of a different scope is arguable*". In this way, it might be possible for parties to agree expanded grounds on which American courts are able to review arbitration awards by careful selection of a state law governing the arbitration, whose courts are favourable to interpreting their own laws more widely than the Supreme Court[4].

England?

The English Arbitration Act includes three statutory mechanisms for "contesting" a domestic award: (a) a challenge based on the tribunal's substantive jurisdiction[5]; (b) a challenge based upon serious irregularity[6]; and (c) an appeal on a point of (English) law[7]. The two "challenges" are mandatory and parties cannot agree to oust them in an arbitration agreement.

The Parties are free to agree to exclude an appeal to the court on a point of English law, however[8]. This can be done expressly, or by agreeing that an award shall not be supported by written reasons (English arbitration awards are supported by written reasons unless otherwise agreed).

The right to appeal is severely restricted by the provisions of the AA[9]. Before an appeal can be brought (unless an appeal is agreed, see below), the court must grant permission to appeal. Leave to appeal will only be granted if the applicant can satisfy the court: (1) that the determination of the question of law "will" (not "may") substantially affect the rights of one or more parties; (2) that the question of law is one which the tribunal was asked to determine; (3) that, on the basis of the findings of fact in the award, the decision of the tribunal on the question of law is obviously wrong or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (4) that, despite the agreement of the parties to resolve the matter by

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The right to appeal is severely restricted by the provisions of the AA[9]. Before an appeal can be brought (unless an appeal is agreed, see below), the court must grant permission to appeal.

Jonathan Sacher is a Partner and David Parker is an Associate in the Insurance/Reinsurance group at London law firm, Berwin Leighton Paisner LLP.

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arbitration, it is just and proper in all the circumstances for the court to determine the question.

The extent to which parties are free to expand/limit the grounds set out above by contract appears to be untested in the English courts. It is likely that an English court would be unwilling to find that any attempt to do so was effective. Constitutionally, the court would be reluctant to allow parties to agree expanded grounds affecting its discretion and grounds at odds with the limits imposed by the AA.

That said, one important avenue is open to parties as regards appealing an English arbitration award which might be seen to extend the scope of appeal in practical terms. The AA allows the parties to agree that there can be an appeal on a point of law[10], and by so doing, the requirement to obtain the permission of the court is circumnavigated. Any appeal must be on a point of English law (e.g. it is not open to agree that there will be an appeal on a question of fact), but the restrictions on when a court can grant permission to appeal are avoided.

Conclusion

In the light of the restrictions on potential appeals in *Hall Street* in federal arbitrations, and the wider scope available in England, even greater importance is attached to the law chosen to govern any arbitration dispute. This is especially so where parties want to have the option of reverting to the courts where they consider that an arbitrator has made a mistake on a point of law.▼

1 Section 69 of the English Arbitration Act 1996 ("the AA")
2 552 U.S. 1 (2008)
3 Section 10 of the FAA empowers the (federal) court to vacate an arbitration award: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct or of any other misbehaviour by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers.
4 See, for example, the Californian court's views in Cable Connection Inc v DirecTV Inc
5 Section 67 of the AA
6 Section 68 of the AA
7 Section 69 of the AA
8 Section 69(1) of the AA
9 section 69(3) of the AA
10 Section 69(2)(a) of the AA

members on the move

In each issue of the Quarterly, this column lists employment changes, relocations, 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** director@arias-us.org, so that it can be included in the next Quarterly.

Recent Moves and Announcements

James W. Macdonald can now be found at JW Macdonald Associates LLC, 241 Monroe Street, Philadelphia PA 19147, phone 215-925-2188, cell 215-908-4766, email jwmacdonald@msn.com, website www.jwmacdonald.net.

Gregg Frederick has relocated to 230 Paxson Avenue, Glenside, PA 19038, email greggcfrederick@gmail.com.

James Howley of FTI Consulting has always been at 3 Times Square, 11th Floor, New York, NY 10036, but his home address and phone number were in the directory. That has now changed. His numbers are phone 212-841-9383, cell 203-313-4044.

Debra Hall is now with Global Risk Coalition, as Executive Director. Her address has not changed, but her phone number is 202-746-1303, email debra.hall@globalriskcoalition.org.

Clive Becker-Jones' new address and numbers are 9 Quail Lake Road West, Pinehurst NC 28374, phone 910-420-2566, cell 603-714-5563.

Klaus H. Kunze has joined DLA Piper LLP (US), where his address is 1251 Avenue of the Americas, 27th Floor, New York, NY 10020, phone 212-335-4885, fax 212-884-8485.

Savannah Sellman's whole office has moved. She is now at Clyde & Co US LLP, 101 Second Street, 24th Floor, San Francisco, CA 94105, phone 415-365-9830, fax 415- 365-9801.

Douglas W. Oliver has moved to Alan Gray, Inc., 9 East 40th Street, New York, NY 10016, phone 646-218-0504, fax 212-685-9067, cell 732-501-7099.

Dave Behnke's new contact information is 630 Rosedale Avenue, Roselle, Illinois 60172, cell 630-309-5650, email dbehnke@sbcglobal.net .

Charley Havens has a new address in Florida, specifically, 1515 Ocean Drive, Vero Beach, Florida 32963.

New Email Addresses

Thomas Greene
thomas.a.greene606@gmail.com.

David L. Rader rader@wvmic.com

feature

French Case Law on Enforceability of Expanded Judicial Review Clauses

Christian H. Bouckaert
Romain S. Dupeyré

Christian H. Bouckaert

Romain S. Dupeyré

At a time when the U.S. Supreme Court has rendered an important decision rejecting expanded review of arbitral awards (*Hall Street Associates LLC c/ Mattel Inc., March 25, 2008, 522 U.S. 1 (2008)*), it may be interesting to look at the law prevailing in other jurisdictions, such as a continental European one.

French law lays out different rules for domestic and international arbitrations. International arbitration is defined in Article 1492 of the French Code of Civil Procedure as arbitration involving "the interests of international trade." French courts adopt a broad approach to the concept of international arbitration and hold that arbitration is international whenever it involves cross-border movement of funds, goods or services, irrespective of the nationalities of the parties (D. Vidal, *Droit français de l'arbitrage commercial international*, 2004, paras. 48 *et seq*.). Moreover, it is not possible for the parties to a contract to stipulate that any arbitration proceedings between them shall be international and, therefore, submitted to French international arbitration law (see, e.g., Paris Court of Appeals, March 29, 2001, Rev. arb. 2001.543, note Bureau).

French domestic arbitration law is more protective of the parties' interests. For example, Article 1482 of the French Code of Civil Procedure allows an appeal on the merits against a domestic arbitral award when so provided by the parties in their arbitration agreement or when appeal has not specifically been excluded in an *amiable composition* type of arbitration (honorable engagement clause). Expanded review is therefore possible for some domestic arbitral awards.

In international arbitration, the recourse available against arbitral awards is the action for vacation under Article 1502 of the French Code of Civil Procedure. This article lists the grounds on which an international arbitral award may be set aside, *viz*:

1. The arbitrator has ruled upon a dispute in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired;
2. The arbitral tribunal has been irregularly constituted or designated;
3. The arbitrator ruled without complying with the mission conferred upon him;
4. Due process has not been respected; or
5. Recognition or enforcement of the award is contrary to public international policy.

Prohibition of Expanded Review of International Arbitral Awards

The French Supreme Court (*Cour de cassation*) has held that the grounds listed in Article 1502 of the Code of Civil Procedure are limitative and may not be departed from by contract (Cass., 1st Civ. Div., Apr. 6, 1994, Rev. arb. 1995.263, note Level; see also Paris Court of Appeals, Dec. 12, 1989, Rev. arb. 1990.863, note Level). Consequently, parties may neither waive nor add to by contract the statutory grounds of vacation of international arbitral awards and, especially, may not provide that the award shall be subject to judicial review on the merits. As a result, the debate in France has focused on another issue, namely, the consequences when an international arbitration clause provides for judicial review of the award.

Partial Voidance of the Arbitration Clause Providing for Expanded Review

Initially, the Paris Court of Appeals held, in the above-mentioned decision dated December 12, 1989, that the provision of an

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Expanded review is therefore possible for some domestic arbitral awards.

Christian H. Bouckaert is the senior partner of Bouckaert, Ormen, Passemard & Sportes (Cabinet BOPS), avocats in Paris. He is an ARIAS*U.S. Certified Arbitrator, a member of the board of a reinsurance company and Secretary General of the French chapter of AIDA. Romain S. Dupeyré is an attorney at the Paris and New York bars and an associate at Cabinet BOPS. Both practice in the areas of insurance and reinsurance litigation and arbitration and have represented insurers and reinsurers in international arbitration proceedings both as claimants and defendants.

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appeal on the merits in an international arbitration clause rendered the entire arbitration clause void. Again, in a decision dated October 27, 1994, the Paris Court of Appeals held that, since parties do not have the power to create a recourse against arbitral awards that is not provided for by the mandatory law of the place designated as the seat of arbitration, an arbitration clause providing for appeal is void in its entirety because the appeal provision is a substantial element of the clause (Paris Court of Appeals, Oct. 27, 1994, RTD Com. 1995.398, note Dubarry and Loquin).

In a ruling dated March 13, 2007, the French Supreme Court reversed the above case law, holding that a provision for appeal in an arbitration clause is void but does not render the clause void in its entirety (*Chefaro International v Barrère et al*., Cass., 1st Civ. Div., Mar. 13, 2007, Rev. arb. 2007.499, note Jaeger). The Court's reasoning is that the insertion of a provision allowing for appeal against the arbitral award did not contradict the parties' initial consent to resolve their dispute by arbitration and, therefore, voiding the entire arbitration clause would go against the will of the parties. Voidance is therefore limited to the provision for appeal.

This ruling makes it possible to "save" a specific category of defective arbitration clauses, namely, those providing for an expanded review of international arbitral awards. Not only is the arbitration agreement severable from the contract in which it is inserted (see Dalico, Cass., 1st Civ. Div., Dec. 20, 1993, Rev. arb. 1994.116, note Gaudement-Tallon), but it is also severable from the provisions it contains providing for appeal against international arbitral awards (J. Ortscheidt, *Un nouvel exemple de l'effacement du droit commun des contrats en ce qui concerne les conventions d'arbitrage international*, JCP G No. 12, March 21, 2007).

This ruling is in line with prevailing judicial doctrine in France, where the courts take a very liberal approach to the validity of arbitration agreements and have gone as far to recognize the "principle of validity of arbitration clauses irrespective of any reference to a national system of law" (*Zanzi*, Cass., 1st Civ. Div., Jan. 5, 1999, Rev. arb. 1999.260, note Fouchard).

The ruling confirms that the French Supreme Court is favorable to the validity of arbitration clauses when their defectiveness can be remedied. ▼

This column appears periodically in the Quarterly. It offers 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.

off the cuff

There's No Business Like...

Eugene Wollan

Eugene Wollan

For as long as I can remember, I have been an aficionado of musical theater, from opera to cabaret to Broadway. I draw the line at anything loosely characterized as "Rock" (which to my mind equals "noise"), and at such desecrations as Aida and Rent, which I consider to be insults to the operas they purport to be based on, but by and large I am a huge fan of the genre.

I am of course always on the prowl for possible subject matter for a new article, and some recent aimless meanderings on the Internet deposited me on a site containing an alphabetical listing, some thirty pages long, of Broadway and West End musicals dating back many years. (My friend who wrote his doctoral dissertation on *The American Musical Stage* would be delighted at the inclusion of *The Black Crook*, an 1866 gem that many experts apparently consider to be the springboard of the modern American musical theater.) At any rate, I began to ponder how this website might mutate into the subject matter of an article. Then it simply became a matter of speculating on how some of the better known titles of these shows could be applied to subject matter more familiar to me and my readers. Here are some results of these musings.

Anything Goes. An extravaganza depicting the joys of cash flow underwriting.

Follies. A blistering exposé of the investment of insurance company portfolios in sub-prime mortgages and credit default swaps.

Billion Dollar Baby. The inspiring biographical story of Warren Buffett.

Dirty Rotten Scoundrels. The FBI's relentless search for certain MGAs now happily ensconced in Rio beyond extradition.

The Fantasticks. An inside look at the success story of a typical Public Adjuster.

Golden Boy. The rags-to-riches saga of a lawyer who has never lost a reinsurance arbitration.

How To Succeed In Business Without Really Trying. A do-it-yourselfer's guide, in words and music, to marketing yourself as an arbitrator.

Carousel. Riding the ups and downs of the cyclical market.

Gypsy. A look behind the scenes at the lives and loves of a Claims Examiner who changes jobs every two years.

Mr. Wonderful. Share in the dreams and aspirations of the underwriter who continues to post loss ratios in the single digits.

1776. Follow the fate of the underwriter who insured the cargo of tea in Boston Harbor.

Ain't Misbehavin'. The inspiring story of the only major insurer that has never had to restate its earnings.

West Side Story. The Jets and the Sharks clash again as The Cedents and The Reinsurers.

Born Yesterday. The sad tale of the claim handler who paid the insured on a fire claim without including the mortgagee as loss payee on the check.

By Jupiter. Insuring satellites.

Cats. Hurricanes, tornadoes, earthquakes, and more.

On Your Toes! The reinsurer is coming to audit.

Assassins. A tribute to a typical

CONTINUED ON PAGE 22

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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liquidation bureau.

Can-Can. Product recall insurance for melamine-laced soup from China.

A Chorus Line. How to make money in the following market.

Sunset Boulevard. The sad tale of film finance insurance.

Paint Your Wagon. All about auto theft rings and chop shops.

Some Like It Hot. An arson how-to manual, starring Marvin the Torch.

Titanic. The history of AIG.

Song of Norway. How to write coverage on oil rigs in the North Sea.

No Strings. Drafting an all-risk policy without any exclusions.

Pennies from Heaven. A detailed look at how to structure and present a business interruption claim.

Merrily We Roll Along. A close examination of the hi-jinks and excesses at the Monte Carlo Rendezvous.

South Pacific. The problems and pitfalls of adjusting the brush fire claims from Western Australia.

The Most Happy Fella. The heart-warming story of the Lloyd's non-marine underwriter who always refused to write US casualty business.

Some of these are obviously more of a stretch than others. But if the shoe fits . . . [Sometimes I wonder how a psychiatrist would explain my obsession with trying to shoehorn entirely unrelated subjects into an insurance/reinsurance context. I doubt that I'll ever try to find out, though.]▼

Frank Lattal and Susan Stone Chosen as Chairman and President

FitzMaurice Named President Elect; Brady and Cavell are Vice Presidents

At the Board of Directors meeting held during the 2008 Fall Conference on November 6, Frank A. Lattal, Chief Claims Officer for ACE Group Management and Holdings Ltd., was elected Chairman of ARIAS•U.S. He succeeds Thomas L. Forsyth, who remains on the Board with one additional year remaining in his second term. Susan A. Stone of Sidley Austin LLP was elected President, succeeding Mr. Lattal.

Also at the meeting, Daniel L. FitzMaurice, a partner at Day Pitney LLP's Hartford office, was chosen as President Elect. Elaine Caprio Brady of Liberty Mutual and George A. Cavell of Munch Re America were named Vice Presidents.

At the ARIAS•U.S. 2008 Annual Meeting just before the Board meeting, members re-elected three Board members to their second three-year terms. Re-elected were Mr. Cavell, reinsurer representative; Mr. FitzMaurice, law firm representative; and David R. Robb, a former executive of The Hartford Financial Services Group, Inc., insurer representative.

Chairman 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 Chairman of the ARIAS Nominating Committee and Co-Chair of the Publications Committee.

President Stone is a litigation partner in Sidley Austin LLP's Chicago office. She handles a variety of commercial litigation matters, and has had significant trial experience in both federal and state courts.

A former federal prosecutor, Ms. Stone has particular expertise in the areas of reinsurance disputes. She has represented cedants, reinsurers and brokers in a myriad of issues involving property and casualty, life/health/accident, and surety business. Her practice encompasses disputes relating to workers' comp carve-out, reinsurance pools, non-products asbestos exposure, September 11th losses, environmental claims, Enron and other types of surety losses.

Ms. Stone is currently Co-Chair of the Forms & Procedures Committee.▼

Frank A. Lattal

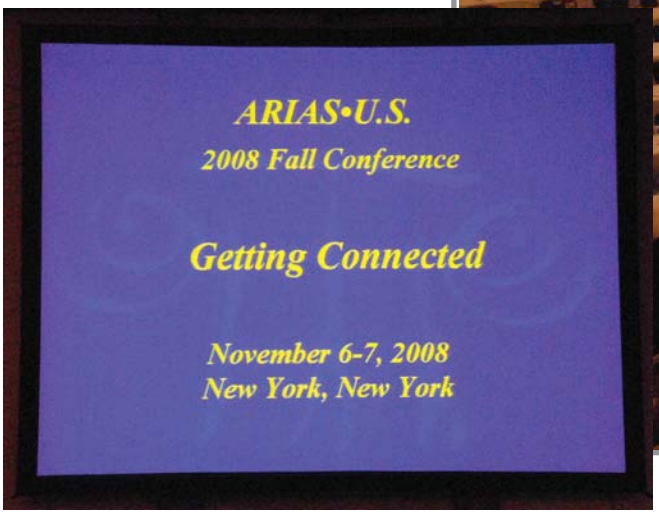
Susan A. Stone

George A. Cavell

Elaine Caprio Brady

Daniel L. FitzMaurice

Fall Conference Sets Record *for* Mock Sessions



The ARIAS•U.S. 2008 Fall Conference at the Hilton New York, which took place on November 6 and 7, featured 16 separate mock sessions, the most ever. On Thursday morning, attendees broke into eight rooms for mock arbitrations about a consolidation dispute; in the afternoon, they split into eight rooms for mock mediations about a sexual abuse dispute.

Staging these sixteen sessions required 80 participants and eight reporters for the mediations. In each case, the discussion leaders set up the scenario at a general session in the Grand Ballroom, then attendees divided into the eight rooms. After the mock sessions, reports on the breakouts were given to all attendees back in the Grand Ballroom. Comments from the evaluation sheets indicate that this concept was very well received because it allowed attendees to be more closely involved in the mock interactions and ask questions at the end.

Of course, also very well received was the insightful and timely keynote address by Ted Kelly, CEO of Liberty Mutual Group. He discussed the current global financial crisis and how insurance companies are being and will be impacted.

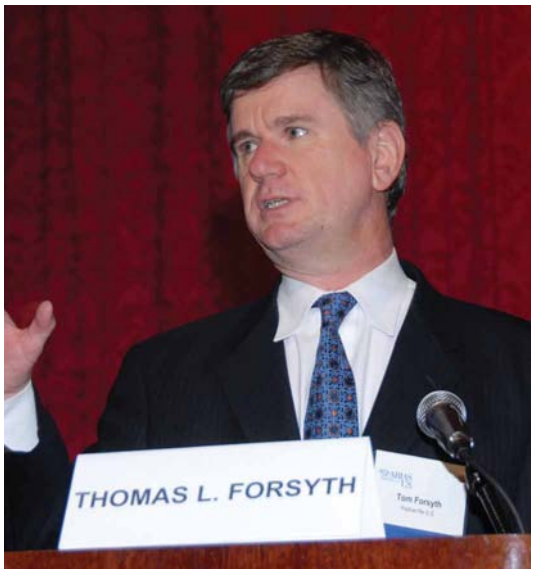
At lunchtime, Professor John Feerick of Fordham Law School spoke about changes taking place in the world of alternative dispute resolution, emphasizing, especially, the value of mediation in many circumstances.

On Friday morning, a blue ribbon panel looked at future trends in the reinsurance business and dispute resolution, including topics, such as, new clauses in contracts and the fallout that can be expected from the Supreme Court's *Hall Street* decision regarding judicial review of arbitration decisions.

In the final session of the morning, Mark Gurevitz, Chairman of the Long Range Planning Committee outlined a survey that he asked members to fill out online. The purpose of the survey is to provide information to the Committee on the nature of any ethics concerns and guidance for development of the LRPC's recommendations on how ethics issues should be addressed by ARIAS•U.S. He was followed by Committee member Ann Field, who announced and showed slides of the new arbitrator data entry system that has been installed on the ARIAS•U.S. website.

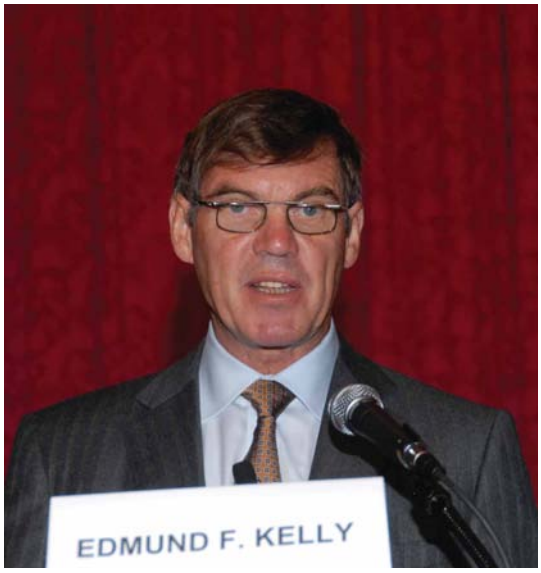
After fourteen years of ever larger fall conferences, this year was the first with lower attendance. The final count of 546 was 17.7% below last year. Most of the falloff occurred in the last few weeks of registration, as the scope of the country's financial problems became more apparent. The signup had been ahead of last year's pace until the middle of October.

In general, opinions seemed to be that it was a solid and valuable set of training sessions. The only casualty in the process was the disappearance of the "ARIAS•U.S. Fall Conference" banner that was to have been across the curtain at the back of the Grand Ballroom stage. Whoever walked off with it must have been disappointed. To give attendees a view of what it would have looked like, the photo on the opposite page has been digitally enhanced to include the banner.▼



Chairman Thomas L. Forsyth opens the Conference.

Elaine Caprio Brady introduces Ted Kelly



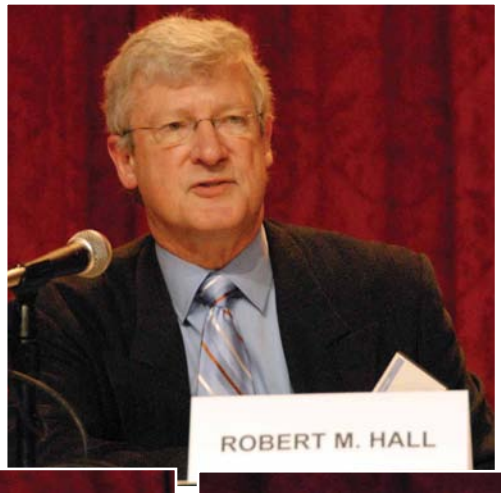
Keynote Speaker Edmund F. Kelly of Liberty Mutual

Bill Yankus explains the latest CLE signing procedure

Arbitrations on Consolidation Issue

Discussion leaders lay out the scenario

Arbitrations on Consolidation Issue…



Around the Eight Mock Arbitrations

Panel in session

Susie Wakefield

Alexandra Furth

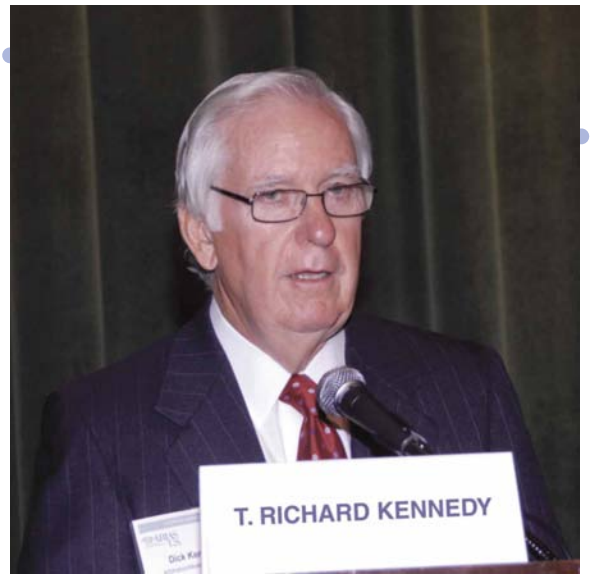
Around the Eight Mock Arbitrations

Umpire Reports

Dianne M. Nergaard, *Richard S. Bakka* *Ronald S. Gass* *Mary Ellen Burns*

Caleb L. Fowler *Martin D. Haber* *Thomas M. Tobin* *Elizabeth M. Thompson*

Luncheon Speaker



Richard Kennedy introduces Professor Feerick

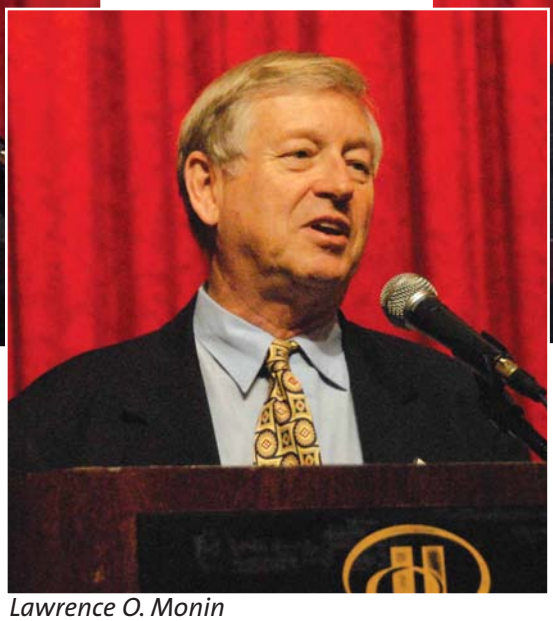
Professor John Feerick of Fordham Law School

Mediations on Sexual Abuse Issues

Discussion leaders lay out the scenario

David A. Attisani

David M. Spector



Lawrence O. Monin

Around the Eight Mock Mediations

Full panel in session

Paul E. Dassenko

Mediator Richard Waterman addresses one of the parties.

2008 Annual Meeting

Chairman Forsyth reviews events of the past year

Treasurer Quigley reviews results of the last fiscal year

Nominating Committee Chair Lattal nominates three Board members for re-election to second terms

Around the Reception

The Trianon Ballroom provided a regal décor.

The Sonnenschein team: Bruce Baty, Jodie Hoss, and Katie Evans.

Adjoining Petite Trianon was a more intimate scene

feature

Statute of Limitations Issues and Reinsurance Disputes—The Overlooked Potential for Problem

Thomas E. Klemm

Statutes of limitations are largely unimportant because the vast majority of reinsurance disputes are resolved through private arbitration. In this setting, a specific jurisdiction's statute of limitations is almost always inapplicable.

Thomas Klemm is an associate in Gibbons P.C. in the firm's Philadelphia office. He works extensively on reinsurance and related disputes

I. Why Reinsurance Attorneys Generally Do Not Care About Statute of Limitations and Other Time-Barring Issues?

Ask a reinsurance attorney about statute of limitations (and related) issues and you are likely to get a shrug of the shoulders or a confused, baffled look. The more blunt answer you might get is "Who cares?" or "Do they really matter?"

This is, of course, an exaggeration — as with all areas of law, reinsurance attorneys generally have a solid understanding and concern of statute of limitations issues — but it is based on a semblance of truth. Compared to other legal fields, in reinsurance law, statute of limitations and other time-barring issues are typically not a major concern. This relative indifference is contrary to the way the vast majority of attorneys operate in other fields of law. For example, in other fields of law, one of the first (and most important) things one determines when addressing a new client is what statute of limitations might apply to that client's case.

The reinsurance legal world does not operate this way — in fairness, it usually does not need to. Statutes of limitations are largely unimportant because the vast majority of reinsurance disputes are resolved through private arbitration. In this setting, a specific jurisdiction's statute of limitations is almost always inapplicable. "Honorable Engagement Clauses," found in most reinsurance arbitration clauses, relieve arbitration panels from following strict rules of law — statute of limitations being just one example.

These Honorable Engagement clauses apply with equal force to the stipulated time limits for raising an arbitrable claim sometimes found in reinsurance contracts. (ex. "All demands for arbitration must be filed within X days of ...."). Regarding these provisions, often called "private statute of limitations," it is well settled that it is an arbitration panel, not a court who determines whether such provisions should be applied. The U.S. Supreme Court has held that "issues of procedural arbitrability, i.e., whether prerequisites *such as time limits* ... and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 154 L. Ed. 2d 491, 123 S. Ct. 588 (2002) (holding that the issue of whether an arbitration claim was barred by a six-year limitations period embedded in the arbitration rules under which the parties had agreed to arbitrate was an issue for the arbitrator and not for the court) (emphasis added). Several courts, citing *Howsam*, have issued similar rulings.[1] Since issues regarding contractual time limits for demanding arbitration are, themselves, arbitrable, the Honorable Engagement clauses apply to any decisions an arbitration panel makes regarding them. As such, an arbitration panel is not required to apply the "private statute of limitations" found in reinsurance contract arbitration provisions.

Thus, in most reinsurance disputes, arbitration panels (not courts) decide whether to apply a state's statute of limitations or the "private statute of limitations" found in the reinsurance contract itself. And in almost all of these situations — via Honorable Engagement Clauses — an arbitration panel is not required to apply either.

Of course, an arbitration panel *can* apply a jurisdiction's statute of limitations or a contract's "private statute of limitations" and deny a plaintiff's claim, but, unlike a presiding judge, an arbitrator is not obligated to do so. If a plaintiff can show equitable reasons for its delay in filing its claim or that the amount of time it took to file its claims was not unusually long (i.e., it was perfectly acceptable under industry custom and practice), a presiding arbitration panel — based on an Honorable Engagement clause — will very likely "forgive" the plaintiff for any failure to meet a statute of limitations or

contractual time limit requirement. A presiding court, obligated to follow a statute of limitations provision (as a state law) or to apply only the "four corners" of a contract's "private statute of limitations" provisions, would have no such discretion. For a judge, in these situations, equities and industry custom and practice are largely irrelevant.

This is why reinsurance attorneys, for the most part, pay relatively little attention to time-barring issues. In the end, they know it is not the dispositive issue it tends to be in most courts. In the arbitration setting, where the vast majority of reinsurance disputes are resolved, time barring issues are largely discretionary. These attorneys know with a good argument (and most delays in filing an arbitration demand can be based on legitimate or semi-legitimate reasons), the chances of an arbitration panel ruling a plaintiff's claims are time-barred are relatively low.

II. Why Reinsurance Attorneys *Should* Care About Statute of Limitations and Other Time Barring Issues.

As suggested above, reinsurance attorneys' relative lack of concern for statute of limitations issues is based on the fact that most reinsurance disputes are arbitrable. Thus, it is not surprising that in situations where reinsurance disputes are not subject to arbitration clauses, statute of limitations issues take on a much more prominent role.

One type of reinsurance dispute that may not be subject to arbitration is a dispute between one or both of the contracting parties (i.e., the cedent or reinsurer) and third parties involved in the reinsurance relationship. While there are typically only two parties to a reinsurance contract (i.e, the cedent and the reinsurer), there are often a whole set of other parties who play a key role in the reinsurance relationship. Brokers, managing agents and underwriters, third party administrators, etc. can be involved in every aspect of the reinsurance relationship from the original contract placement and negotiations to the day-to-day management and administration of the business.

Cedents and reinsurers can become embroiled in legal disputes with these third parties. In these situations, there is often no arbitration agreement (many times there is no formal contract at all!) between the two disputing parties.[2] As such, arbitration as a means of resolving these disputes is much more the exception than the rule (the very opposite of the typical reinsurance dispute between a cedent and reinsurer).

Given these facts, statute of limitation issues are much more common in these third-party disputes. As mentioned, reinsurers and cedents are accustomed to the typical reinsurance dispute where the dispute is subject to arbitration and is solely between the cedent and the reinsurer. When contractual disputes arise involving third parties, cedents and reinsurers often are unable to include third parties into the arbitrations between the two contracting parties (as mentioned, third parties usually are not subject to any arbitration provisions). In these situations, cedents and reinsurers then often neglect to sue these third party actors in separate litigations — even when reasons prompting the original dispute between the cedent and reinsurer (e.g., negligence, bad faith, etc.) arise out of the conduct of these very parties. In other words, plaintiffs often neglect considering that these third party actors can be sued until after the statue of limitations in a given state has expired — which is, of course, too late.

Two recent cases demonstrate how perilous such oversight can be and how statute of limitations issues can arise in multi-party situations.

A. Gerling Global Case

In *Gerling Global Reinsurance Corp. of Am. v. Fremont Gen. Corp.*, the statute of limitations issue involved the parent company of the cedent.[3] In this case, the reinsurer, Gerling Global Reinsurance ("Gerling") initially accused its cedent, Fremont Indemnity Company ("Indemnity"), of taking advantage of the fact that it was passing risk off to its reinsurers to underprice the policies to its insureds. Based on this allegation, Gerling demanded arbitration against Indemnity. The two parties eventually settled the dispute.

Gerling then sued Indemnity's parent companies, Fremont General Corporation and Fremont Compensation Insurance (collectively "Fremont"), alleging that Fremont knew about the underpricing and "lured Gerling to provide reinsurance through material misrepresentations and omissions."[4] Fremont argued that Gerling's

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In other words, plaintiffs often neglect considering that these third party actors can be sued until after the statue of limitations in a given state has expired — which is, of course, too late.

According to Fremont, when Gerling demanded arbitration against Indemnity, Gerling should have also have sued Fremont. Because Gerling did not do this, and because the statute of limitations had expired, Fremont argued Gerling's claims against it were time-barred.

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claims were time-barred under California law. It claimed that Gerling's cause of action accrued against Fremont on the same day that Gerling's cause of action accrued against Indemnity. According to Fremont, when Gerling demanded arbitration against Indemnity, Gerling should have also have sued Fremont. Because Gerling did not do this, and because the statute of limitations had expired, Fremont argued Gerling's claims against it were time-barred.

The trial court agreed and granted summary judgment in Fremont's favor. The Ninth Circuit affirmed the ruling holding that "Gerling is not suing Fremont . . . for 'new' claims of a 'wholly different sort' than those asserted against Indemnity" and as such the "causes of action accrued at the same time."[5]

Gerling attempted to argue that the discovery rule applied. Under this rule, the accrual of a cause of action is "postponed until the plaintiff discovers or has reason to discover the cause of action."[6] Citing this rule, Gerling argued that its cause of action against Fremont had not accrued on the day Gerling demanded arbitration against Indemnity because at that time, Gerling was unaware of the omissions and misrepresentations made by Fremont.

The court rejected Gerling's argument. It pointed to multiple sources of evidence suggesting Gerling knew about Fremont's possible wrongdoing prior to the arbitration demand against Indemnity. Most notable was evidence of a "senior Gerling Vice President" — four years prior to the actual filing of the lawsuit — being asked whether Gerling had been "misled by Fremont" and whether Gerling could "make a case out of this."[7] (The court record offers no explanation on Gerling's part on why these concerns were not addressed).

The court appeared sympathetic that the evidence suggested Fremont had attempted to cover up any alleged wrongdoing on its or Indemnity's part. It, likewise, observed that Fremont and Gerling shared an "alleged fiduciary relationship."[8] In the end, however, the court ruled that these facts were insufficient in light of "the other evidence of wrongdoing" that existed and suggested Gerling had "inquiry notice" of Fremont's wrongdoing.[9]

B. TIG Insurance Case

TIG Ins. Co. v. Aon Re, Inc. involves a statute of limitations issue regarding a ceding company and its broker.[10] In this case, TIG Insurance Company ("TIG") provided workers' compensation insurance policies to various employers across the country. TIG also reinsured policies issued by other insurance companies. Importantly (for the facts of the case), it reinsured certain risk from Virginia Surety Company ("Virginia Surety"). TIG's general practice was to retain liability for individual workers' compensation claims up to a cap of $ 1 million and to purchase excess of loss reinsurance to cover claims exceeding that amount. TIG retained AON Re, Inc. ("AON Re") to act as its agent in "soliciting and negotiating proposals for reinsurance" regarding TIG's workers compensation business.[11]

In May 1998, AON Re sent various underwriting information to an agent for U.S. Life Insurance Co. ("U.S. Life") regarding a potential reinsurance arrangement. In sending the materials, AON Re specifically stated the information contained historical loss data involving Virginia Surety. Based on these materials, in June 1998, U.S. Life submitted a reinsurance bid which was accepted by TIG. Several years later, U.S. Life stopped paying claims under the reinsurance treaty claiming that a requested audit of "TIG's operations" was not completed and because TIG had failed to provide requested information. TIG demanded arbitration claiming that it was entitled to further payments.

After arbitration proceedings began, U.S. Life specifically alleged that the materials AON Re sent to U.S. Life (when the reinsurance relationship between TIG and U.S. Life were being negotiated) were "materially incomplete" in that they omitted "the loss data for the entire Virginia Surety segment" which, according to U.S. Life, "comprised a significant portion of TIG's insurance business."[12] In the arbitration, the panel determined U.S. Life was, indeed, entitled to rescind the treaty — holding (in its findings of fact) that "AON Re, as TIG's agent, had omitted the information regarding the Virginia Surety historical loss data."[13]

In June 2004, TIG filed a lawsuit against AON Re alleging negligence, negligent misrepresentation, and breach of fiduciary duty. AON Re sought summary judgment claiming that all of TIG's claims were time-

barred. The court granted AON Re's summary judgment motion, specifically ruling that TIG's causes of action against AON Re accrued when TIG and U.S. Life entered into the reinsurance treaty in June 1998.

TIG appealed the decision to the Fifth Circuit. TIG argued that its cause of action against AON Re could not have accrued in June 1998 (as the trial court decided) because it did "not suffer a legal injury" where it "could seek a judicial remedy" until after the arbitration decision rescinded the reinsurance treaty between TIG and U.S. Life.[14]

The court disagreed. Citing Texas law, the court observed that "a person suffers legal injury from faulty professional advice when the advice is taken."[15] As such, TIG suffered a legal injury from AON Re's wrongdoings when "TIG acted on AON Re's misrepresentations" regarding Virginia Surety and "accepted U.S. Life's proposal and entered into the reinsurance treaty."[16] Thus, TIG's causes of action against AON Re accrued on the date the treaty was entered into.

According to the court, TIG could have sued AON Re at any time within the statute of limitations after June 1998 and "simultaneously" pursued a "declaratory judgment or other action against U.S. Life to clarify or determine the validity or extent of coverage of the treaty."[17]

The court rejected all arguments by TIG that the discovery rule postponed the accrual of the causes of action. The court ruled that to apply, the discovery rule had to involve an injury that was "inherently undiscoverable."[18] This was not such a case. A company in TIG's position "had numerous sources from which it could determine whether accurate information was sent to one with whom it was negotiating."[19] Indeed, according to the court, there was significant evidence that TIG was fully aware that the materials AON Re gave U.S. Life were incomplete. For example, evidence showed TIG's vice president sent an internal e-mail prior to receiving U.S. Life's bid that he wanted "to make sure the data AON sent to the market is good" — ultimately suggesting that he had his doubts.[20] Additional evidence showed that TIG's vice president, on realizing that U.S. Life's bid was very low, sensed a potential problem and "instructed an employee in TIG's actuarial department to follow up on his concern."[21]

Whether a fiduciary relationship existed between TIG and AON Re was determined by the court to be largely irrelevant. Again, finding that Texas' discovery rule only applied when a plaintiff's injuries were "inherently undiscoverable," the court reviewed TIG's argument that in certain fiduciary relationships an injury caused by the fiduciary would automatically be considered "inherently undiscoverable" (i.e., if a fiduciary relationship existed, a plaintiff need not prove that its injury was "inherently undiscoverable" — this would be presumed by the court.).

The court rejected TIG's argument. It acknowledged that caselaw had held that in the fiduciary context certain injuries caused by the fiduciary were "inherently undiscoverable." However, these were only in situations where the person to whom the fiduciary duty is owed is "either unable to inquire into the fiduciary's actions or unaware of the need to do so."[22] This, according to the court, was not the situation here. First, TIG was clearly aware that it had to "inquire" into AON Re's actions.[23] This is best demonstrated by TIG's actions when realizing U.S. Life's bid was so low. Second, TIG "was not relying upon AON Re's expertise or superior knowledge to obtain reinsurance coverage."[24] Indeed, while utilizing AON Re "to obtain bids from some reinsurers" TIG had directly negotiated and obtained similar bids from reinsurers itself.[25] It was only upon having reviewed all the bids, that TIG would make its decision. Evidence showed that "TIG not only could, but did audit information that AON Re said it had distributed to the reinsurance market to determine whether that information was congruent with what TIG had given to AON Re."[26]

For these reasons, the court ruled that any fiduciary relationship between TIG and AON Re did not affect the court's conclusion that AON Re's wrongdoing was not "inherently undiscoverable." In other words, given the facts of the case (and TIG's inquiry notice of AON Re's potential wrongdoing), the fact a fiduciary duty existed between the parties did not toll the statute of limitations.

III. Conclusion

Both *Gerling* and *TIG* demonstrate the statute of limitations dangers that may lurk in reinsurance disputes involving third parties (agents, brokers, etc.). Accustomed to

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According to the court, TIG could have sued AON Re at any time within the statute of limitations after June 1998 and "simultaneously" pursued a "declaratory judgment or other action against U.S. Life to clarify or determine the validity or extent of coverage of the treaty."

Simply put, a cedent or reinsurer cannot "bury its head in the sand" and then claim, after a statute of limitations has expired, that it did not know about a third party's wrongdoing.

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typical reinsurance disputes between cedents and resinsurers, where arbitration provisions dominate, reinsurance attorneys often fail to consider suing third parties — who are usually not subject to any arbitration agreement — until after a given statute of limitations has expired.

The cases demonstrate why a cautious party might want to file claims against these third parties even if the actual dispute between the cedent and reinsurer is not resolved. In the alternative, parties may want to consider seeking a tolling agreement with the third parties to avoid statute of limitations problems. Such actions might seem premature and many in-house counsel might be hesitant about starting another legal action (when the lawsuit or arbitration between the reinsurer and cedent is in full swing), but such actions might prevent the extremely unfortunate situation when a party realizes that their claims against a third party (regardless of amount or validity) are time-barred.

The cases also demonstrate that cedents and reinsurers must take active measures to monitor the various third-party actors with whom they transact business. As both *TIG* and *Gerling* suggest, courts are not so much concerned about what a cedent or reinsurer knew as opposed to what they *should* have known. Simply put, a cedent or reinsurer cannot "bury its head in the sand" and then claim, after a statute of limitations has expired, that it did not know about a third party's wrongdoing. If warning signs are there, a cedent or reinsurer has "inquiry notice" of the wrongdoing, and the statute of limitations may begin begins to accrue.

In summary, reinsurance attorneys *should* care about statute of limitations issues. While they are usually only a subsidiary concern in the typical reinsurance arbitrations between cedents and reinsurers, such issues can become extremely important when third parties and lawsuits (as opposed to arbitrations) are involved.▼

1 *See Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1 (1st Cir. Mass. 2005) (holding time limitation issues are to be decided by arbitration panel unless clear language suggesting otherwise); *Town of Amherst v. Custom Lighting Servs., L.L.C.*, 2007 U.S. Dist. LEXIS 88296 (W.D.N.Y. Nov. 30, 2007) (holding that arbitration panel is to decide whether notice of claim was made during appropriate timeframe); *United Steelworkers of Am. v. Saint Gobain Ceramics & Plastics, Inc.*, 505 F.3d 417, 2007 U.S. App. LEXIS 23048 (6th Cir. 2007) (en banc) (dispute over contractual time limits for seeking arbitration is presumptively for arbitrator to decide, unless there is contractual language rebutting presumption and requiring judicial resolution of disputes over time limits); *Perry v. N.Y. Law Sch. & Collegis, Inc.*, 2004 U.S. Dist. LEXIS 14516 (S.D.N.Y. July 27, 2004) ("The Supreme Court has held that in matters concerning the time limit rules involved in an arbitration dispute, courts should defer to the arbitrator."). *But see Nat'l Refrigeration, Inc. v. Travelers Indemnity Co. of Am.*, No. 2007-252 (R.I. May 29, 2008) (Upholding lower court decision granting summary judgment on the grounds that the plaintiff initiated its petition for arbitration years after the two-year limitations provision expressly provided for in the contract between the two parties).

2 This is often a major frustration to cedents and reinsurers who are used to having the vast majority of their disputes (against each other) subject to arbitration requirements. As one leading treatise comments: "[o]ne perceived shortcoming to the [reinsurance] arbitration process is that the intermediary, whose role in the system is critical, is not a signatory to the reinsurance contract and therefore cannot be compelled to participate in the arbitration." EUGENE WOLLAN, HANDBOOK OF REINSURANCE LAW (2003) §8.06[c] (Wollan goes on to explain that "on a few occasions" third party actors have "been held bound, or equitably estopped, by an arbitration decision on an agency theory. . . .").

3 2008 U.S. App. LEXIS 13667 (9th Cir. Cal. June 24, 2008) (unpublished).

4 Id. at 5.

5 Id. at 5 (internal citations omitted).

6 Id. at 6.

7 Id. at 7.

8 Id. at 6.

9 Id. at 6

10 521 F.3d 351 (5th Cir. Tex. 2008)

11 Id. at 353.

12 Id at 353.

13 Id. at 354.

14 Id. at 355.

15 Id. at 355.

16 Id. at 355.

17 Id. at 356.

18 Id. at 358.

19 Id. at 358.

20 Id. at 358.

21 Id. at 358.

22 Id. at 359.

23 Id. at 359.

24 Id. at 359.

25 Id. at 359.

26 Id. at 359.

Recently Certified Arbitrators

George A. Cavell

George Cavell is a Senior Vice President of Munich Re America's Claim Division, and manages their Environmental/Mass Tort, Property, and Bond/Surety Claim Departments. He is responsible for the oversight of a professional claim staff who manage pollution, asbestos, toxic product and other latent claims and coverage litigation, and also first party property and bond/surety losses and litigation.

Prior to joining Munich Re America, Mr. Cavell was with Royal Insurance Company in New York where he held various technical and then managerial positions in Royal's Home Office Claim Division.

He is a graduate of the Insurance Executive Development Program of the Wharton School of the University of Pennsylvania and the American Institute for Chartered Property and Casualty Underwriters, has a B.A. from Fordham University, a J.D. from Pace University School of Law, both in New York, and is a member of the New York State Bar.

Mr. Cavell is currently a Vice President and member of the ARIAS•U.S. Board of Directors, Co-Chair of the Member Services Committee, and a member of both the Certification and Education Committees.▼

Pierre Charles

Pierre Charles is Executive Vice-President of SCOR Global Property & Casualty Reinsurance Company and is in charge of the Claims & Commutation Division, with worldwide responsibility. In this role, he manages the claims teams in the Company's main hubs - i.e. Paris, London, Zurich, Cologne and New York - for all lines of business, treaties, facultatives and specialty lines. He conducts a proactive commutation policy with teams based in Paris, Zurich and New York. In addition, as President & CEO of two reinsurance subsidiaries in Bermuda and in the US, he is in charge of run-off activities. Mr. Charles is directly involved in the settlement of large, litigious claims for the Group and participates actively in a number of arbitrations and mediations, notably in the US and UK markets.

He has more than 32 years of experience in Insurance and Reinsurance, mostly at the international level. Over a period of 14 years in his previous employment at AIG Europe Headquarters, he was successively in charge of underwriting and claims operations in 13 European countries and of strategic development for products distribution and joint ventures with financial and non-financial partners. In addition, Mr. Charles had responsibilities in Reinsurance Captives Management and acquisitions projects, and was in charge of relations with European Insurance Regulators. He started his insurance career at the International Division of the French Group GAN and for six years was in charge of development of activities in Continental Europe, the UK and the US, where he was instrumental in the creation of an insurance joint venture with the Chubb Group and a joint Reinsurance Company with a leading US Reinsurer.

After this initial international experience, Mr. Charles was appointed Senior Vice-President in charge of GAN's personal lines French portfolios (Motor, Homeowners, Personal Accident, etc.) and managed the General Agents distribution network. He then worked for Allianz in France as Deputy General Manager in charge of Reinsurance, Personal Lines Division and held the office of General Secretary.

During his career, he has held various positions as Member of Boards of Directors and Executive Committees in a number of Insurance and Reinsurance subsidiaries.

Pierre Charles holds an Engineering degree from ENSEM, a Master of Science from the California Institute of Technology (CALTECH), and an MBA from INSEAD.▼

Peter Christie

Since 1999, Peter Christie has been a principal with CFC Advisors (www.peterchristie.com). CFC provides a broad range of advisory services to insureds, mutuals and captives, insurers,

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George A. Cavell

Pierre Charles

Peter Christie

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

James D. Engel

Clifford English

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reinsurers and investors in the insurance and risk sector. Additionally, Mr. Christie has frequently acted as an expert witness and litigation advisor.

From 1997 to 1999, he was vice chairman of Aon Group Inc of Chicago. In that role he worked with the Chairman and CEO on global strategies, and was Board sponsor for the global Financial Institutions and Professions practice.

Mr. Christie was with the Minet Group from 1968 until it was acquired by Aon in 1997. He joined Minet in Montreal, spending time in New York and ultimately moving to London in 1992 to become Chairman and CEO of the group. During his career with Minet, he built and led Minet International Professional Indemnity (MIPI), a globally recognized leader in provision of risk services to professionals. He served as Chairman of Swett & Crawford during its return to profitability, and when Chairman of Minet he was a member of the St Paul Companies six-person Executive Management Group.

Mr. Christie is an acknowledged expert in risk protection needs of professions and professional societies. He has been an innovator in the use of Mutuals and Captives. He has extensive experience in many insurance markets around the world and is particularly familiar with the London market.

Mr. Christie is a Director of IPC Holdings Ltd of Bermuda (Nasdq-IPCR). He maintains offices in New York City and Vermont.▼

James D. Engel

James Engel has worked in the insurance/reinsurance industry for 38 years, including 25 years as the Chief Claim Officer in North America for three major firms: CIGNA, ACE, and Zurich. He has broad experience in all commercial P&C lines, and in Treaty and Facultative reinsurance, both as a cedant and a reinsurer. He also has international experience managing runoff claims facilities in London and Belgium, and as the CEO of Brandywine Holdings.

Mr. Engel retired in 2008 after 6 years with Zurich, where he served as Executive VP of Customer Services and Chief Claim Officer in North America. He was responsible for all commercial lines insurance claims, reinsurance claims, 50 Staff Counsel offices, risk engineering operations, and premium auditing. He managed 4500 employees and several billion dollars of claims paid annually.

Prior to joining Zurich, Mr. Engel was Executive VP and Chief Claim Officer for ACE in North America. In this role he was responsible for all commercial lines insurance claims, reinsurance claims, risk engineering operations, and ESIS - ACE's third party administrator. He also held the position of CEO of Brandywine Holdings - ACE's acclaimed runoff facility. Brandywine included US insurance and reinsurance, and European and London Market reinsurance managed in London. ESIS was the US market's third largest TPA specializing in WC and Liability claims.

Mr. Engel was Executive VP and Chief Claim Officer for CIGNA P&C for 14 years. His responsibilities during these years included all personal and commercial lines claims in the US and in 45 foreign countries, ceded claims, and TPA claim operations. He was part of the executive committee which created Brandywine Holdings and prepared the P&C Companies for sale. He was Brandywine's first CEO.

Mr. Engel has a BS degree in corporate finance from Gannon University. He completed the Executive Education Program at the Wharton School of the University of Pennsylvania, and Executive Negotiation Programs at Harvard University. He has served on several insurance industry boards.▼

Clifford English

Clifford English has over 50 years experience in the insurance and reinsurance business. He began his career with the Insurance Company of North America in 1958, advancing to Senior Fire, Inland Marine and Package underwriter.

In 1962, Mr. English joined the American Casualty Company (ACCO) as the number two underwriter in the Commercial Inland Marine Department. In1964, ACCO was acquired by Continental National to become CNA. During his term with CAN, Mr. English advanced to Senior Home

Office Underwriter for Fire and Commercial Inland Marine.

In 1965, Mr. English joined Towers, Perrin, Forster and Crosby (TPF&C) as a treaty broker and subsequently as manager of facultative operations, which consisted of overseeing several branch offices in the open market placement of facultative business and the underwriting of several large property and casualty binding authorities.

Mr. English moved to Constellation Reinsurance Company in 1970, as a treaty underwriter ultimately advancing to become the company's chief underwriter. In this role, he served as a lead underwriter on reinsurance programs for both jumbo and regional companies in nearly all lines of property and casualty reinsurance.

In 1978, Mr. English joined Intere Intermediaries (Intere), as Senior Vice President and New York Branch Manager ultimately advancing to Executive Vice President responsible for the Northeast as well as National Accounts production and servicing. He was, also, a member of the company's board of directors. During his time with Intere, Mr. English produced a number of major and large regional reinsurance programs.

Mr. English joined E.W. Blanch Company (Blanch) in 1987, initially as Senior Vice President. He subsequently became a General Partner and helped lead Blanch through a successful IPO in 1992, at which time he became an Executive Vice President as well as a member of E. W. Blanch Co's board of directors. He also served as President of E.W. Blanch International and as a member of Swire Blanch Company's board of directors where he played an active role in developing the company's international operations. Again while with Blanch, he produced and serviced a number of major and large regional company reinsurance programs.

In 2002, Blanch Co. was acquired by Benfield Inc. and Mr. English continued as an Executive Vice President. During his time with Benfield, Mr. English produced a number of large new reinsurance programs.

In January of 2006, Mr. English left Benfield and formed English Re-Sources, Inc. an independent reinsurance consultant. In this role, Mr. English has served as an expert reinsurance witness for three major companies as well as continuing to serve as a consultant in the production and servicing of accounts for Benfield. ▼

Suzanne Fetter

Suzanne Fetter

Suzanne Fetter has over 15 year experience in the insurance and reinsurance industry, with concentration in P&C and Run-Off operations. She currently serves as Senior Vice President of Claims and Head of Office for Alea North America Company. Prior to joining Alea, Ms. Fetter was an internal Consultant and Auditor for the Hartford Insurance Group, providing support in the areas of reserving, claims and litigation management.

Ms. Fetter is also an experienced insurance lawyer. She began her legal career in private practice as an insurance defense attorney, and has extensive experience in workers' compensation disputes, asbestos and general liability litigation, and coverage disputes. After joining Alea in 2002, she became actively involved in MGA program business and has developed a background in multiple lines of business, including construction defect; Director & Officer liability; ERISA, securities and financial class action suits.

More recently, Ms. Fetter has negotiated domestic and global commutations for Alea. She received her Bachelor of Arts Degree in Psychology from Dartmouth College, where she graduated *cum laude* and was awarded the honor of Milton L. Shifman Scholar; and her law degree from the University of Connecticut School of Law. She is licensed to practice law in Connecticut.▼

Dale S. Frediani, Sr.

Dale S. Frediani, Sr.

Dale Frediani is currently a Principal of RMG Consulting where he brings his extensive and successful claim management and technical experience to the areas of property claims, general property/casualty claim management, special investigation needs, recovery management and programs, large loss

CONTINUED ON PAGE 42

Doouglas G. Houser

Charles J. Moxley, Jr.

CONTINUED FROM PAGE 41

measurement and adjustment, quality/best practices audits and training, and litigation and dispute resolution services.

Mr. Frediani began his career with the General Adjustment Bureau as an Inland Marine and Fire Adjuster, experience that provided a strong foundation for his technical and investigative expertise. He later joined Chubb & Son, Inc. where he was steadily promoted to positions of increasing technical and management responsibilities, culminating as Assistant Vice President, National Manager Non-Marine Property Claims.

Mr. Frediani was recruited by CNA in Chicago, where he was Senior Manager - Property/Casualty Claim Operations. In that capacity, he was responsible for personal and commercial lines property and automobile claims, subrogation, salvage and the special investigation unit. While at CNA, he implemented extensive training programs to improve customer service and business retention, claim handling quality and expense control. He managed the adjustment of large property losses, recoveries, fraud investigations and the defense of policyholders' lawsuits, including those seeking extra-contractual damages.

Subsequently, he was recruited by Reliance National Risk Specialists in New York where he was First Vice-President, Property/Custom Casualty Claims. There he developed nationally respected organizations for property and casualty claims, marine claims, the Special Investigation Unit and Central Recovery Unit. He has pioneered innovative approaches to large claim adjustments and litigation evaluation and management, including jury research and alternate dispute resolution processes. Mr. Frediani has published two articles, "After the Hurricane" and "Do I Need Jury Research?"▼

Douglas G. Houser

Douglas Houser has been practicing insurance law for approximately 48 years and is a recognized authority in insurance and coverage disputes of all types. He has represented literally hundreds of different insurance and reinsurance companies in more than half of the United States and numerous countries in Europe and Asia.

Having tried cases to jury verdict in 21 of the United States, Mr. Houser is a firm believer in the value of arbitration by knowledgeable, experienced insurance experts who understand the insurance and reinsurance industry and the importance of dispute resolution in private, speedy, and reasonably priced arbitration.

Mr. Houser served as an arbitrator in the Boston "Big Dig" insurance claim dispute and has experience both as an umpire and arbitrator in reinsurance and excess insurance inter-company disputes.

In addition to his law practice emphasizing the representation of insurance and reinsurance companies, Mr. Houser has served as General Counsel to the Pacific Northwest Life Insurance Company and as General Counsel to NIKE, Inc. He has served on the NIKE Board of Directors since the inception of the company.

Douglas Houser is a graduate of the Stanford Law School (1960) and Willamette University (1957), and is a Senior Partner with Bullivant Houser Bailey, a west coast law firm with six offices, with whom Mr. Houser has been employed for 48 years. Mr. Houser has served as Chair of the 34,000 lawyers that make up the Tort Insurance Practice Section of the American Bar Association. He is a Fellow of the American Law Institute, Fellow of the American College of Trial Lawyers, and a Past President of the Federation of Defense and Corporate Counsel and has served as an Oregon State Circuit Court Judge by special appointment of the Oregon Supreme Court.▼

Charles J. Moxley, Jr.

Charles Moxley has specialized in insurance industry cases as a litigator in New York for over 35 years, representing insurance and reinsurance companies and State Regulators in a wide range of coverage, fraud, and commercial tort cases. His practice has primarily consisted of large complex cases involving high stakes, multiple parties, scores of witnesses, and intricate factual and legal issues.

A substantial portion of Mr. Moxley professional life is spent serving as an

arbitrator and mediator. He has been an arbitrator on American Arbitration Association commercial and large and complex case panels for over 30 years, presiding over more than 125 cases, including numerous coverage cases. He was umpire in many of these cases, and, in others, was a panelist or sole arbitrator. He has also served as court-appointed mediator in complex commercial cases, settling many of them.

Mr. Moxley is Adjunct Professor of Law at Fordham Law School and previously taught at St. John's and New York Law Schools, teaching primarily in the litigation/dispute resolution area. He has written on ADR, including recent articles on discovery in arbitration, in the American Arbitration Association's Dispute Resolution Journal and in the New York Dispute Resolution Lawyer, a publication of the Dispute Resolution Section (DR Section) of the New York State Bar Association (NYSBA).

Mr. Moxley is active in bar association activities relating to ADR. He is currently Co-Chair of the Legislation Committee of the NYSBA's DR Section and a member of the Arbitration Committee of the New York City Bar and of the Arbitration and Mediation Committees of the American Bar Association.

Mr. Moxley is Of Counsel to Kaplan Fox & Kilsheimer LLP in New York City. He is a graduate of Columbia Law School and Fordham University and received his legal training at Davis Polk & Wardwell following a federal court clerkship.▼

Barry R. Ostrager

Barry Ostrager is a senior litigation Partner at Simpson Thacher & Bartlett LLP and Head of the Litigation Department. He has tried dozens of cases and argued scores of appeals throughout the country. He successfully represented Andersen Consulting against a $14 billion claim by Arthur Andersen in connection with Andersen Consulting's successful bid to win a separation without cost from the Andersen Worldwide organization in the largest ICC arbitration in history. He was lead trial counsel in the successful representation of Swiss Re in the highly publicized insurance coverage dispute involving the World Trade Center. He also successfully represented Hanwha in a multi-billion dollar dispute with the Korean government that was the subject of a multi-week trial and resulted in a complete win for Hanwha. In addition, he successfully represented J.P. Morgan Chase in a breach of guarantee contract action against Motorola in which J.P. Morgan Chase obtained a $370 million verdict against Motorola.

Barry R. Ostrager

Mr. Ostrager has successfully argued before the United States Supreme Court.

Mr. Ostrager has been prominently involved in supervising the firm's major insurance and reinsurance practices in both its New York and Los Angeles offices. He has been lead trial counsel in many major insurance coverage cases, including, *Shell Oil Co. v. Winterthur Swiss Insurance Company*, a multi-billion dollar environmental insurance coverage dispute in which the jury returned a verdict for the insurers after a sixteen month trial.

In June 2006, Mr. Ostrager was named the "Leading U.S. Litigation Business Trial Lawyer" by Chambers & Partners. For the second consecutive year, Mr. Ostrager was recently recognized as one of the "Top Ten Trial Lawyers" in the U.S. by The Legal 500.

Mr. Ostrager is co-author of the *Handbook on Insurance Coverage Disputes* (Aspen Law & Business 2008), a widely-used, two-volume treatise now in its fourteenth edition and *Modern Reinsurance Law and Practice* (Glasser LegalWorks, 2d Ed. 2000).▼

case notes corner

Second Circuit Rules that FAA Does Not Authorize Arbitrators To Issue Third-Party Pre-Hearing Document Subpoenas

Ronald S. Gass

Ronald S. Gass

In an important and undoubtedly influential new decision, the U.S. Court of Appeals for the Second Circuit ruled that § 7 of the Federal Arbitration Act ("FAA") does not authorize arbitrators to compel pre-hearing document discovery from third parties, thereby siding with the Third Circuit and rejecting the Eighth and Fourth Circuits' positions on an arbitration discovery issue that has divided the federal appellate courts over the past decade.

This case involved a dispute between a special purpose vehicle, Life Receivables Trust (the "Trust"), and Lloyd's Syndicate 102, which issued a $5 million contingent cost insurance ("CCI") policy to the Trust. The policy was intended to protect the Trust against the risk that the projected life expectancy of the original insured under two multi-million dollar life insurance policies, which had been purchased from the insured in exchange for a pre-death discounted cash payment, would exceed that calculated by Peachtree Life Settlements ("Peachtree"). Peachtree was the entity that initially purchased, serviced, and subsequently sold these life insurance policies to the Trust and obtained the CCI protection for it.

The policy was intended to protect the Trust against the risk that the projected life expectancy of the original insured under two multi-million dollar life insurance policies...

The CCI policy was executed by Syndicate 102 as the underwriter, the Trust as the assured, and Peachtree as the originator and servicer. It included a fairly typical arbitration clause calling for American Arbitration Association rules and giving the arbitration panel "the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions." When the insured lived more than two years beyond his anticipated life expectancy, the CCI policy was triggered and the Trust sought payment of its $5 million net death benefit from Syndicate 102. When Syndicate 102 refused to pay, claiming that the Trust had fraudulently misrepresented the date on which it acquired the insured's policies and fraudulently calculated his life expectancy, the Trust initiated an arbitration.

During the arbitration, Syndicate 102 sought to join Peachtree as a party; however, it refused to consent to joinder, and joinder was not ordered by the panel. Syndicate 102 then sought document discovery from both the Trust and Peachtree, but when Peachtree demurred claiming that it was not a party to the arbitration, the panel, at Syndicate 102's request, issued a third-party subpoena requiring the production of responsive documents. Peachtree moved to quash the subpoena in New York federal district court, and Syndicate 102 cross-moved to compel compliance. The federal district court judge granted Syndicate 102's motion and ordered compliance by Peachtree. Although Peachtree complied with the subpoena, it reserved its rights and subsequently filed an appeal to the Second Circuit.

Noting that it had not previously taken a side in the ongoing circuit split over whether FAA § 7 may be invoked as authority for compelling pre-hearing depositions and document discovery from third parties, the Second Circuit opted for a strict construction aligning itself with the Third Circuit's decision in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004):

A statute's clear language does not morph into something more just because courts think it makes sense for it to do so. Thus, we join the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing

Mr. Gass is an ARIAS•U.S. Certified Arbitrator and umpire. He may be reached via e-mail at rgass@gassco.com or through his website at www.gassco.com.

document discovery from entities not party to the arbitration proceedings.

The court rejected the Eighth Circuit's view that although § 7 did not explicitly authorize the arbitration panel to require third-party production of documents, implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing was the power to order the production of relevant documents from a party prior to the hearing. *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865 (8th Cir. 2000). It also rejected the Fourth Circuit's attempt at a compromise. While arbitral powers are bounded by the express provisions of the FAA, which does not authorize third-party pre-hearing discovery, "arbitral efficiency would be 'degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing'"; therefore, the Fourth Circuit read into the FAA an exception under which a party could petition the district court to compel discovery "upon a showing of special need or hardship." *COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269 (4th Cir. 1999).

So where does that leave us with regard to third-party pre-hearing document discovery? Veteran arbitrators know that § 7 of the FAA provides that panels "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." [Emphasis added.] Thus, third parties may be subpoenaed to appear before *one or more* panel members and to bring relevant documents with them. Section 7's arbitral authority, according to other Second Circuit precedent, "is not limited to witnesses at merits hearings, but extends to hearings covering a variety of preliminary matters." *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577-79 (2d Cir. 2005). Under these circumstances, the inconvenience of making a personal appearance may cause testifying witnesses to waive their presence and simply deliver the documents (an observation also made in the concurring opinion to the *Hay Group* decision). If only one of the three arbitrators in a tripartite arbitration is present for this purpose, he or she can then adjourn the proceedings, which would give the parties an opportunity to digest the produced third-party documents prior to the hearing on the merits.

In short, strict compliance with FAA § 7 will be enforced in the Second Circuit and will now require that documents be produced by *testifying* non-party witnesses with the understanding that the hearing need not be held before all of the arbitrators nor must it necessarily be done at a merits (as opposed to a "preliminary matters") hearing. Although not expressly addressed by the Second Circuit, enforcement of panel subpoenas seeking third-party pre-hearing deposition discovery outside the confines of a § 7 hearing seem unlikely to succeed in light of this recent ruling. For significant and useful insights into the Second Circuit's views on arbitration panels taking third-party testimony and evidence at "preliminary" hearings, readers are encouraged to review the court's 2005 *Stolt-Neilsen* opinion.

Life Receivables Trust v. Syndicate 102 at Lloyd's of London, No. 07-1197-cv, 2008 WL 4978550 (2d Cir. Nov. 25, 2008).▼

In short, strict compliance with FAA § 7 will be enforced in the Second Circuit and will now require that documents be produced by testifying non-party witnesses with the understanding that the hearing need not be held before all of the arbitrators nor must it necessarily be done at a merits (as opposed to a "preliminary matters") hearing.

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as of November 2008

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ARIAS·U.S. Umpire List

The ARIAS·U.S. Umpire List is comprised of ARIAS·U.S. Certified Arbitrators who have provided the Board of Directors with satisfactory evidence of having served on at least three completed (i.e., a final award was issued) insurance or reinsurance arbitrations. The ARIAS Umpire Selection Procedure selects at random from this list. Complete information about that procedure is available on the website at www.arias-us.org.

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ARIAS U.S.

Do you know someone who is interested in learning more about ARIAS•U.S.?

If so, pass on this letter of invitation and membership application.

An Invitation...

The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of November, 2008, ARIAS•U.S. was comprised of 471 individual members and 123 corporate memberships, totaling 1,160 individual members and designated corporate representatives, of which 352 are certified as arbitrators.

The Society offers its *Umpire Appointment Procedure*, based on a unique software program created specifically for ARIAS•U.S., that randomly generates the names of umpire candidates from the list of ARIAS arbitrators who have served on at least three completed arbitrations. The procedure is free to members and non-members. It is described in detail in the Umpire Selection Procedure section of the website.

Similarly, a random, neutral selection of all three panel members from the list of ARIAS Certified Arbitrators is offered at no cost. Details of the procedure are available on the website under Neutral Selection Procedure.

The website offers the "Search for Arbitrators" feature that searches the detailed background experience of our Certified Arbitrators. The search results list is linked to their biographical profiles, containing specifics of experience and current contact information.

New types of profiles are emerging on the site as well. The Certified Arbitrators section shows those profiles on the list of arbitrators. Clicking on "View New" after a name brings you to the new format, with much more detailed information about the arbitrator's experience. Soon, a new search system will enable bringing up lists from these new profiles.

Over the years, ARIAS•U.S. has held conferences and workshops in Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Washington, Boston, Miami, New York, Puerto Rico, Palm Beach, Boca Raton, Las Vegas, Marina del Rey, Amelia Island, and Bermuda. The Society has brought together many of the leading professionals in the field to support its educational and training objectives.

Each year, the Society publishes the *ARIAS•U.S. Membership Directory*, which is provided to members. In 2009, it will be published online, for members only. ARIAS also publishes the *ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure* and *Guidelines for Arbitrator Conduct*. These publications, as well as the Quarterly journal, special member rates for conferences, and access to educational seminars and intensive arbitrator training, are among the benefits of membership in ARIAS.

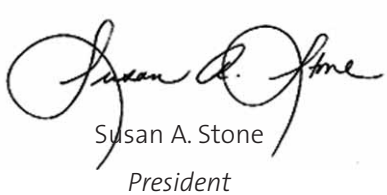
If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Bill Yankus, Executive Director, at director@arias-us.org or 914-966-3180, ext. 116.

Join us and become an active part of ARIAS•U.S., the leading trade association for the insurance and reinsurance arbitration industry.

Sincerely,

Frank A. Lattal

Chairman



Susan A. Stone

President

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AIDA Reinsurance & Insurance Arbitration Society
PO BOX 9001
MOUNT VERNON, NY 10552

Complete information about ARIAS•U.S. is available at www.arias-us.org. Included are current biographies of all certified arbitrators, a current calendar of upcoming events, online membership application, and online registration for meetings.

914-966-3180, ext. 116

Fax: 914-966-3264

Email: info@arias-us.org

Online membership application is available with a credit card through "Membership" at www.arias-us.org.

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Fees and Annual Dues: Effective 10/1/06

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$275	$825
FIRST-YEAR DUES AS OF APRIL 1	$183	$550 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$92	$275 (JOINING JULY 1 - SEPT. 30)
TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

* Member joining and paying the full annual dues after October 1 is considered paid through the following calendar year.

NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $150 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

Payment by check: Enclosed is my check in the amount of $_____
Please make checks payable to ARIAS·U.S. (Fed. I.D. No. 13-3804860) and mail with registration form to: ARIAS·U.S.
PO Box 9001, Mt. Vernon, NY 10552

Payment by credit card (fax or mail): Please charge my credit card:

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By signing below, I agree that I have read the By-Laws of ARIAS•U.S., and agree to abide and be bound by the By-Laws of ARIAS•U.S. The By-Laws are available at www.arias-us.org in the About ARIAS section.

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Signature of Individual or Corporate Member Applicant

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