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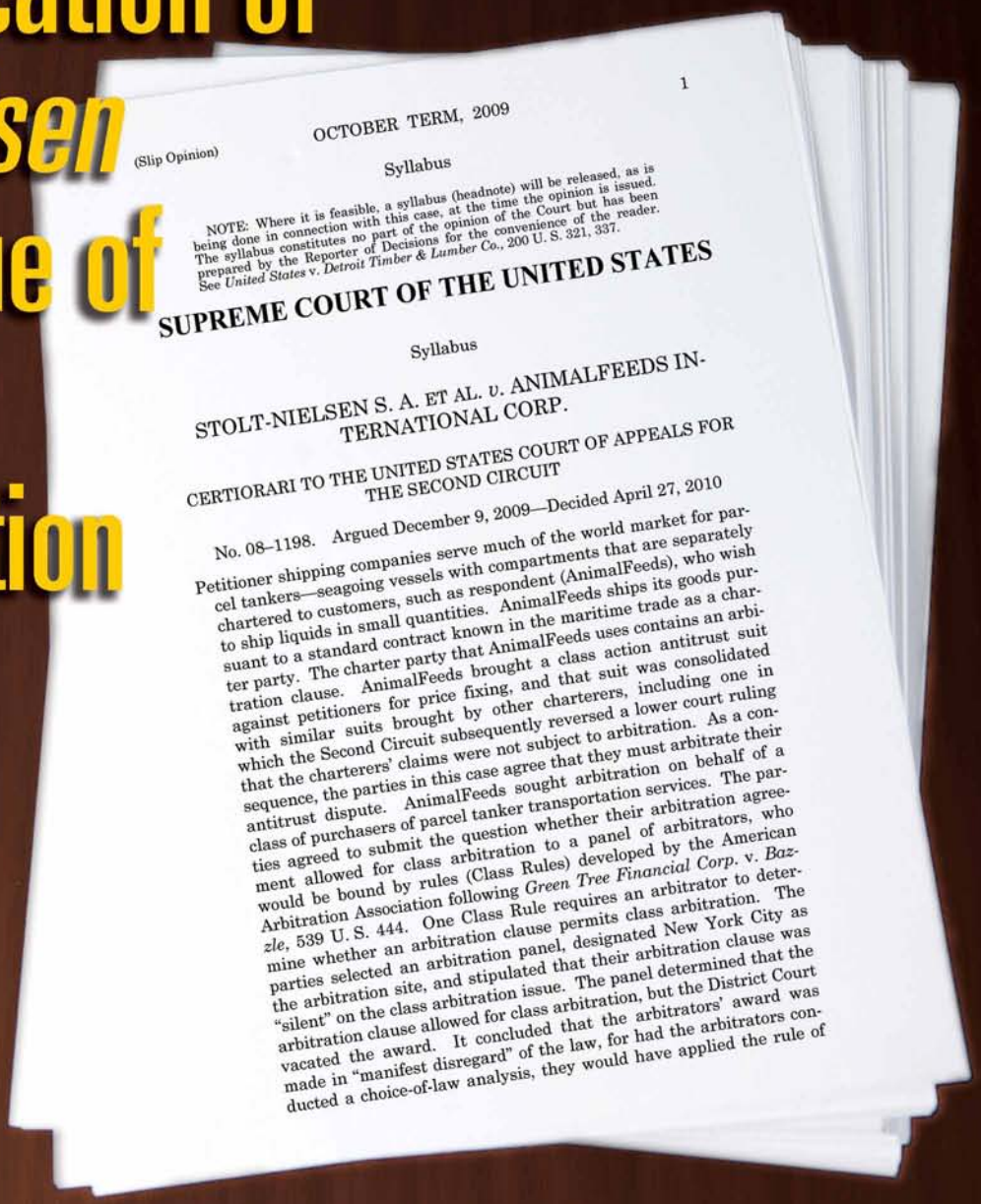
The Application of *Stolt-Nielsen* to the Issue of Arbitral Consolidation



(Slip Opinion) OCTOBER TERM, 2009 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

STOLT-NIELSEN S. A. ET AL. *v.* ANIMALFEEDS INTERNATIONAL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08–1198. Argued December 9, 2009—Decided April 27, 2010

Petitioner shipping companies serve much of the world market for parcel tankers—seagoing vessels with compartments that are separately chartered to customers, such as respondent (AnimalFeeds), who wish to ship liquids in small quantities. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party. The charter party that AnimalFeeds uses contains an arbitration clause. AnimalFeeds brought a class action antitrust suit against petitioners for price fixing, and that suit was consolidated with similar suits brought by other charterers, including one in which the Second Circuit subsequently reversed a lower court ruling that the charterers' claims were not subject to arbitration. As a consequence, the parties in this case agree that they must arbitrate their antitrust dispute. AnimalFeeds sought arbitration on behalf of a class of purchasers of parcel tanker transportation services. The parties agreed to submit the question whether their arbitration agreement allowed for class arbitration to a panel of arbitrators, who would be bound by rules (Class Rules) developed by the American Arbitration Association following *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444. One Class Rule requires an arbitrator to determine whether an arbitration clause permits class arbitration. The parties selected an arbitration panel, designated New York City as the arbitration site, and stipulated that their arbitration clause was "silent" on the class arbitration issue. The panel determined that the arbitration clause allowed for class arbitration, but the District Court vacated the award. It concluded that the arbitrators' award was made in "manifest disregard" of the law, for had the arbitrators conducted a choice-of-law analysis, they would have applied the rule of

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ARIAS•U.S.
P.O. Box 9001
Mt. Vernon, NY 10552
914.966.3180, x112
914.966.3264 fax
info@arias-us.org
www.arias-us.org

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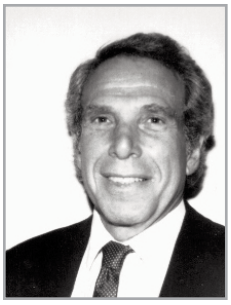

Eugene Wollan

editor's comments

A cartoon in a recent New Yorker pushed a sensitive button for me. A man sits in his living room in a distinctly rigid posture, staring glassy-eyed into space. His wife (presumably), standing in the doorway, explains to the other female character, "Ted was severely edited as a child."

One of my functions around here is, of course, to edit. That's what editors do. Our Editorial Board is always available to "advise and consent" (more effectively in general than the U.S. Senate), but ordinarily I do most of the grunt work. This leads me to wonder whether I've had the same effect on any of our authors as depicted in the cartoon.

I try not to impose my personal style on another author. There are times when I feel some reorganization would make the piece work better, but mainly I try to concern myself more with grammar and linguistic precision than with style per se. We always give the author(s) an opportunity to review the edited version, and they are always free to argue with the edits.

I have been having an extended debate with the editor of another (non-competitive) publication for which I had recently written an article. I insisted that the possessive of a singular noun ending in "s" is formed by adding an apostrophe and another "s". Thus, for example, the possessive of "witness" would be "witness's." (If the phrase "the witness's statement" sounds too sibilant for your taste, change it to "the statement of the witness," but don't just drop that necessary "s.") The editor disputed the additional "s", citing the Associated Press guidelines. I countered with Strunk & White, and trumped that with *The New York Times Manual of Style & Usage*. As of this writing, the dispute remains unresolved.

The moral, if any: if you don't like my editing, by all means challenge it.

This issue includes three significant and timely pieces: Cliff Schoenberg and Brian O'Sullivan on the very hot topic of consolidation of arbitrations; Natasha Lisman on the problems of arbitrating with a liquidator; and Richard Waterman on heuristics in arbitration decisions. (I had to look it up too; essentially it refers to solving problems by referring back to past experience.)

The Law Committee has contributed summaries of three important decisions, and I have indulged in a bit of law school nostalgia.

We are still hoping that the "Letters to The Editor" feature will gain traction, and we continue to solicit articles. What better venue for networking exists in our particular piece of the world?

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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 ewollan@moundcotton.com .

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feature

The Application of *Stolt-Nielsen* to the Issue of Arbitral Consolidation

Clifford H. Schoenberg and Brian O'Sullivan


Clifford H. Schoenberg


Brian O'Sullivan

We take the view that the widespread skepticism about the continued viability of arbitral consolidation and of the authority of arbitrators to make the consolidation decision in the first instance is largely misplaced.

Cliff Schoenberg and Brian O'Sullivan are partners in the New York office of Mayer Brown LLP, where they specialize in complex reinsurance and insurance disputes.

Introduction

The issue of whether multiple arbitrations can be consolidated into a single proceeding is of particular interest in the reinsurance arena, where the same parties often enter into multiple contracts covering different layers or different years of the same program, and where there are often many reinsurers, and occasionally more than one cedent, on the same treaty. When disputes arise under multiple contracts and/or involve multiple parties, consolidation (or its lack) can have a significant influence on the outcome, both in terms of settlement negotiation leverage and because the outcome in the arbitration(s) could depend on the composition of the panel(s).

Obviously, where a contract expressly authorizes or prohibits consolidation, the contract language will govern. The overwhelming majority of arbitration clauses in contracts (reinsurance and otherwise) do not, however, explicitly address consolidation. As a result, there have been many judicial decisions over the years regarding (a) whether it is the province of the courts or the arbitrators to make the consolidation determination, and (b) under what circumstances courts or arbitrators (as the case may be) are authorized to order consolidation where the parties' agreement is silent on the issue.

Following the United States Supreme Court decisions in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and *Green Tree Financial Corporation v. Bazzle*, 539 U.S. 444 (2003), it was generally accepted that the issue of consolidation was for the arbitrators to decide and, absent a specific provision in the arbitration agreement to the contrary, arbitrators had the authority to order consolidation. In April 2010, the Supreme Court issued its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,___ U.S. ___, 130 S.Ct. 1758 (2010), which clarified when and under what circumstances a court or arbitrator can permit class arbitrations. Certain commentators concluded from *Stolt-Nielsen* that, on a going forward basis, (a) courts would decide the consolidation question (either on a motion to compel under § 4 of the Federal Arbitration Act (the "FAA") or a motion to vacate under § 10 of the FAA) and (b) courts would be much less likely to permit consolidated arbitration proceedings than arbitrators had previously been. We take the view that the widespread skepticism about the continued viability of arbitral consolidation and of the authority of arbitrators to make the consolidation decision in the first instance is largely misplaced. Although it is still too early to draw any definitive conclusions, several recent federal court decisions appear to undercut the notion that *Stolt-Nielsen* is the game-changer that others predicted it would be.

Pre-*Stolt-Nielsen* History

Prior to 2002, the general rule was that a consolidated arbitration would be permitted only where the parties had consented to consolidation, and the question of consent was for the courts to decide. In 2002 and 2003, however, the United States Supreme Court rendered its decisions in *Howsam* and *Green Tree*. Although neither was a consolidation case, courts relied on them in ruling that consolidation is a question of arbitration *procedure* that is presumptively for the arbitrators to decide.

In *Howsam*, the issue before the Supreme Court was whether the application of a statute of limitation in a NASD arbitration was an issue for the court or arbitrator to decide. In considering the issue, the Court explained the difference between "gateway" *arbitrability* questions, which are presumptively for the courts to decide, and *procedural* questions, which are

presumptively for the arbitrators to decide. *Howsam*, 537 U.S. at 83-84. Questions of *arbitrability*, *i.e.*, whether the parties have agreed to submit a particular dispute to arbitration, were limited to "the kind of narrow circumstances where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." Id. In support of its conclusion that the applicability of the NASD time limit was a procedural issue, the Court noted that (a) because NASD arbitrators are "comparatively more expert about the meaning of their own rule," they would be "comparatively better able to interpret and to apply it" than a court; and (b) an alignment of the "decisionmaker" with his comparative expertise "will help better to secure a fair and expeditious resolution of the underlying controversy." *Id*. at 85. In short, *Howsam* makes clear that procedural matters that are unrelated to the question of whether the parties had agreed to arbitrate a particular dispute are presumptively for the arbitrator, not the court, to decide.

Green Tree addressed the issue of whether the FAA permitted class arbitration where the arbitration clause was silent on the issue. The South Carolina Supreme Court held that, unless the arbitration clause specifically precluded class arbitrations, they were permitted under South Carolina law "if it would serve efficiency and equity, and would not result in prejudice." *Bazzle v. Green Tree Financial Corporation*, 569 S.E.2d 349, 360 (S.C. 2002) The United States Supreme Court (in a plurality decision) held that it was for the arbitrators, not the court, to determine whether the contract precluded class arbitration:

> The question here — whether the contracts forbid class arbitration — does not fall into this narrow exception [*i.e.*, does not constitute a gateway arbitrability issue]. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute.... Rather, the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question... concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.

539 U.S. at 452 (citations omitted; emphasis in original).

Although this Supreme Court pronouncement was embraced by only a plurality, federal courts consistently relied upon *Green Tree*, in conjunction with *Howsam*, to hold that consolidation was a question of procedure for the arbitrators to decide. *See, e.g., Shaw's Supermarkets Inc. v. United Food & Commercial Workers Union*, 321 F.3d 251 (1st Cir. 2003); *Certain Underwriters at Lloyd's v. Westchester Fire Ins. Co.,* 489 F.3d 580 (3d Cir. 2007); *Dockser v. Schwartzberg*, 433 F.3d 421 (4th Cir. 2006); *Employers Ins. Co. v. Century Indem. Co.*, 443 F.3d 573 (7th Cir. 2006); *Certain Underwriters at Lloyd's v. Cravens Dargan & Co.*, No. 05-56154, 2006 U.S. App. LEXIS 20853 (9th Cir. Aug. 14, 2006).[1]

Stolt-Nielsen

Stolt-Nielsen involved a dispute between various shipping companies (collectively, "Stolt-Nielsen") and AnimalFeeds, which had shipped materials pursuant to a standard charter party agreement. AnimalFeeds brought a class action antitrust lawsuit against Stolt-Nielsen.

In a similar suit brought by another charterer, the Second Circuit Court of Appeals held that the antitrust claims were arbitrable under the arbitration clause in the charter party agreement. Thereafter, AnimalFeeds demanded class arbitration against Stolt-Nielsen on behalf of "all direct purchasers of parcel tanker transportation services" during a specified period, and the parties agreed to submit the class arbitration issue to an arbitration panel in accordance with the AAA Supplementary Rules for Class Arbitrations. In their written agreement, the parties stipulated both that the charter party contract was "silent on whether it permitted or precluded class arbitration," and that the contract was "not ambiguous so as to call for parol evidence." 130 S.Ct. at 1770 (internal quotations and bracket omitted). The arbitration panel issued an interim award holding that class arbitration was permissible. The arbitrators' decision was based principally upon public policy considerations. In particular, the arbitrators "found persuasive the fact that other arbitrators ruling after [*Green Tree*] had construed 'a wide variety of clauses in a wide variety of settings as allowing for class arbitration.'" *Id*. at 1766.

Stolt-Nielsen moved to *vacate* the interim award. The district court granted vacatur on the ground that the arbitrators had failed to conduct a choice of law analysis, and thus had failed to consider maritime law requiring contracts to be construed in light of custom and usage. The Second Circuit reversed, finding that there was no prohibition in federal maritime or New York state law against class arbitration.

The Supreme Court (in a 5-3 decision) reversed the Second Circuit and vacated the interim award on the ground that the panel had exceeded its powers by "impos[ing] its own conception of sound policy" rather than "applying a rule of decision derived from the FAA[,] ... maritime or New York law." *Id*. at 1769-70. The Court rejected the notion that *Green Tree* required that arbitrators decide whether a contract permitted class arbitration, because "only the plurality [had] decided that question." *Id*. at 1772. The Court declined, however, to revisit that issue because the parties had expressly agreed that the arbitrators would decide the issue of whether class arbitrations were permitted under the parties' arbitration clause. *Id*.

The Court also rejected the notion that *Green Tree* established the rule to be applied in deciding whether class arbitration was permitted under the parties' agreement. *Id*. Rather, the Court held that that issue needed to be decided in light of certain all-encompassing principles embodied in

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While the Court stated that the parties' agreement to class arbitration need not be explicit, and arbitrators are permitted "to adopt such procedures as are necessary to give effect to the parties' agreement," the Court held that "because class-action arbitration changes the nature of arbitration to such a degree ... it *cannot be presumed* the parties consented to it by simply agreeing to submit their disputes to an arbitrator."

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the FAA, most importantly that:

- "[a]rbitration is a matter of consent, not coercion" (id. at 1773 (internal quotations and citations omitted)); parties are "generally free to structure their arbitration agreement as they see fit" (*id*. at 1774);
- "[p]arties may specify with whom they choose to arbitrate their disputes" (*id*.; emphasis in original); and
- parties "may agree on the rules under which any arbitration will proceed" (*id*.).

The Court emphasized that, under the FAA, both courts and arbitration panels are required to "give effect to the intent of the parties." *Id*. at 1774-75.

Relying upon these principles, the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id*. at 1775 (emphasis in original). While the Court stated that the parties' agreement to class arbitration need not be explicit, and arbitrators are permitted "to adopt such procedures as are necessary to give effect to the parties' agreement," the Court held that "because class-action arbitration changes the nature of arbitration to such a degree ... it *cannot be presumed* the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id*. at 1775-76 (emphasis added).

In particular, the Court noted these material differences between a bilateral arbitration and a class arbitration:

- complexity, in that the arbitrators in a class arbitration will be required to resolve "many disputes between hundreds or perhaps thousands of parties" (*id*. at 1776);
- any award in a class arbitration will implicate the rights of absent parties (*id*.);
- privacy and confidentiality may not be preserved in a class arbitration, "thus potentially frustrating the parties' assumptions when they agreed to arbitrate" (*id*.); and
- the commercial stakes of class-action arbitrations are much higher (and, indeed, are comparable to class action litigations even though the scope of judicial review is much more limited) (*id*.).[2]

Accordingly, the Court held that the arbitrators' interim award was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id*. at 1775. Rather than remanding the consolidation issue to the arbitrators, however, the Court decided the issue itself. The Court reasoned that, given the parties' stipulation that their contract was "silent on whether it permitted or precluded class arbitration" and "not ambiguous so as to call for parol evidence," there could "be only one possible outcome on the facts before [it]," *i.e*., a finding that the parties to the Stolt-Nielsen charter party agreement had not consented to class arbitration. *Id*. at 1770.

The Impact of *Stolt-Nielsen* on Consolidated Reinsurance Arbitrations

While *Stolt-Nielsen* addressed only class arbitration, it has reignited the debate on two fundamental questions regarding consolidated arbitration proceedings:

1. Who decides issues of consolidation — the arbitrators or the courts?
2. Under what circumstances is consolidation permitted where the arbitration clauses are silent on the issue?

A. Who Decides Consolidation Issues?

In *Stolt-Nielsen*, the parties had expressly agreed to submit the class arbitration issue to an arbitration panel. Thus, the Supreme Court did not address whether, in the absence of such an agreement, arbitrators or courts should decide in the first instance whether class arbitrations are permitted under a particular arbitration clause. Both sides of the issue can garner support for their respective positions in *Stolt-Nielsen*. On the one hand, Stolt-Nielsen made clear that the parties' intent regarding class arbitration should control. The parties' intent is a question of fact, which arbitrators ought to

be better equipped to decide than the courts. On the other hand, the Court's conclusion that class arbitrations are fundamentally different from bilateral arbitrations provides support for the notion that the class arbitration issue is not a mere procedural issue, and thus is for the courts to decide.

In the class arbitration context, the Second Circuit recently weighed in forcefully to limit the effect of *Stolt-Nielsen* on the issue of which forum decides whether a class arbitration is proper. In *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), the Second Circuit made clear that, in the Second Circuit, the issue of class arbitration continues to be one for the arbitrators to decide and that courts are foreclosed from substituting their judgment for that of the arbitrators on the issue.[3] In *Sterling*, the arbitration agreement was silent on the subject of class arbitrations, but provided that "[t]he Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction." In June 2009 (before the Supreme Court's decision in *Stolt-Nielsen*), the arbitrator issued an interim award, holding that the parties' arbitration agreement permitted class arbitrations.

In December 2009, the district court confirmed the arbitrator's interim decision, and Sterling appealed. Following the Supreme Court's decision in *Stolt-Nielsen*, Sterling moved in the district court for relief from the December 2009 order, and in August 2010, the district court vacated the interim award on the ground that it exceeded the arbitrator's authority. *See Jock v. Sterling Jewelers Inc.*, 725 F.Supp.2d 444, 449-50 (S.D.N.Y. 2010). The court held that that award was "plainly incompatible with the Supreme Court's subsequent pronouncements in *Stolt-Nielsen*," which the court said could not be distinguished on the facts. While acknowledging that *Stolt-Nielsen* "does not foreclose the possibility that the parties may reach an 'implicit' — rather than express — 'agreement to authorize class action arbitration,'" the court held that "the record here provide[d] no support for such an implied agreement." Id. at 449-50.

The Second Circuit reversed, holding that the district court had failed to undertake the appropriate inquiry, which was whether "the arbitrators had the authority to reach an issue, not whether the arbitrator decided the issue correctly." *Sterling*, 648 F.3d at 115 (emphasis added). The Second Circuit confirmed that § 10(a)(4) of the FAA, which permits vacatur of an award where the arbitrators have exceeded their authority, should be "accorded the narrowest of readings." *Id*. at 122 (citations and internal quotations omitted).

> Put simply, section 10(a)(4) does not permit vacatur for legal errors. If the arbitrator's award draws its essence from the agreement to arbitrate, then the scope of the court's review of the award is extremely limited. Notably, *we do not consider whether the arbitrators correctly decided the issue*. We will uphold an award so long as the arbitrator offers a barely colorable justification for the outcome reached.

Id. (citations and internal quotations and brackets omitted; emphasis in original.) In a nutshell, "under [Second Circuit] precedent it is not for the district court to decide whether the arbitrator 'got it right' when the question has been properly submitted to the arbitrator and neither the law nor the agreement categorically bar [sic] her from deciding that issue." *Id*. at 124.

The Second Circuit also held that *Stolt-Nielsen* did not require a contrary result because Stolt-Nielsen "did not create a bright-line rule requiring that arbitration agreements can only be construed to permit class arbitration where they contain express provisions permitting class arbitration." *Id*. Rather, under *Stolt-Nielsen*, an implicit intent will suffice. *Id*. at 121.

> The [Supreme] Court's interpretation of the parties' "silence" is key. Our dissenting colleague states that he believes the "silence" in *Stolt-Nielsen* was interpreted as "simply reflecting the fact that each party recognized the arbitration clause neither specifically authorized nor specifically prohibited class arbitration." The dissent, however, fails to acknowledge that although that is the interpretation that the Respondent in *Stolt-Nielsen wished* the Court to adopt, that is not the interpretation that the Court *did* adopt. To the contrary, the Court interpreted the stipulated silence to mean that "the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration." The Court further noted that "parties were in complete agreement regarding their intent." That is to say, according to the majority in *Stolt-Nielsen*, there was no express or *implicit* intent to submit to class arbitration.

Id. at 120 (citations omitted; emphasis in original). In short, in the Second Circuit, while *Stolt-Nielsen* sets forth the framework for determining whether class arbitration is permitted under the parties' arbitration agreement, it is for the arbitrators to decide that issue and a court can vacate such a decision only on extremely limited grounds.

We expect that most courts will likewise find that *Stolt-Nielsen* does not change the legal landscape regarding whether courts or arbitrators should decide the consolidation issue. As an initial matter, litigants will be hard-pressed to persuade courts in the First, Third, Fourth and Seventh Circuits that their prior holdings that consolidation is a procedural issue for the arbitrator(s) to decide are no longer good law as a result of *Stolt-Nielsen*. Indeed, *Stolt-Nielsen* is plainly distinguishable because consolidation alters the nature of arbitration to a much lesser extent than does a class arbitration. Moreover, most of the Courts of Appeals that decided the issue pre-*Stolt-Nielsen* relied upon both Howsam and Green Tree, and there is nothing in *Stolt-Nielsen* that calls into question the continued viability of *Howsam*. In fact, in its consolidation decision, the Seventh

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Even in the circuits in which there is no binding Court of Appeals authority on the issue, courts will likely be inclined to follow the prevailing precedent in sister circuits and permit arbitrators to decide the consolidation issue in the first instance. That prediction is informed, in part, by the fact that, under *Stolt-Nielsen* the principal mandate of whichever forum decides the consolidation issue is to ascertain and effectuate the parties' intent.

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Circuit explicitly noted that it was *not* relying on *Green Tree* because that was a plurality decision, for which the Seventh Circuit was unable to identify any single rationale endorsed by a majority of the Supreme Court. *See Wausau*, 443 F.3d at 581.

In *Allstate Insurance Company v. Liberty Mutual Insurance Company*, Civ. Action No. 11-10415-RGS (D. Mass. May 19, 2011), the district court for the District of Massachusetts (which is in the First Circuit) recently invoked the First Circuit's pre-*Stolt-Nielsen* decision as being dispositive of the consolidation issue. There, Allstate reinsured Liberty Mutual on various excess of loss reinsurance treaties over a fourteen-year period. In December 2010, Allstate demanded arbitration under the treaties seeking declaratory relief regarding the scope of the treaties' access to records clause. Liberty Mutual issued a counter-demand for arbitration, seeking reinsurance payments from Allstate for asbestos losses. Allstate then sent a second arbitration demand seeking a declaration that Liberty Mutual had improperly presented the asbestos claims. Allstate thereafter filed a motion to compel Liberty Mutual to proceed with the two separate arbitrations, and Liberty Mutual filed a cross-motion to compel Allstate to participate in selecting a single umpire to preside over a single arbitration between the parties. Relying on pre-*Stolt-Nielsen* First Circuit precedent, the district court granted Liberty Mutual's motion to compel, stating:

> Here, as in *Shaw*, disputes between the parties are concededly arbitrable, and there is no evidence in the agreements between the parties that they did not expect disagreements over issues such as consolidation to be resolved through arbitration. Thus, the determination of whether to consolidate the two arbitrations demanded by Allstate is a procedural matter for the arbitration panel, not the court, to decide.

Even in the circuits in which there is no binding Court of Appeals authority on the issue, courts will likely be inclined to follow the prevailing precedent in sister circuits and permit arbitrators to decide the consolidation issue in the first instance. That prediction is informed, in part, by the fact that, under *Stolt-Nielsen* the principal mandate of whichever forum decides the consolidation issue is to ascertain and effectuate the parties' intent. Obviously, an arbitration panel consisting of industry professionals should be "comparatively more expert" on reinsurance matters, and thus "comparatively better able" to determine whether the parties intended to be subject to a consolidated arbitration under certain circumstances, and, if so, under what circumstances. *See Howsam*, 537 U.S. at 85. Moreover, having arbitrators decide the consolidation issue in the first instance would likely be more efficient and economical because arbitrators, unlike courts, should not need to hear expert testimony regarding relevant custom and practice.

In two recent decisions pre-dating *Sterling* (but reinforced by the *Sterling* rationale), the district court for the Southern District of New York (which is in the Second Circuit) refused to issue an injunction preventing a consolidated arbitration from going forward. *See Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp.2d 462 (S.D.N.Y. 2010); *Safra National Bank of New York v. Penfold Investment Trading Ltd.*, No. 10 Civ. 8255(RWS), 2011 WL 1672467 (S.D.N. Y. April 20, 2011). In *Anwar*, thirty-eight individuals and entities had a total of twenty-four brokerage accounts with two investment firms that had invested those monies in a Madoff feeder fund. Pursuant to an arbitration clause in their brokerage agreements, the thirty-eight claimants commenced a single consolidated arbitration against the investment firms. The investment firms objected to proceeding in a consolidated arbitration. The issue of whether the parties would be permitted to proceed in a consolidated arbitration was heard by an arbitration panel, which ruled that consolidation was proper. Thereafter, the investment firms commenced an action in which they sought an injunction prohibiting the consolidated arbitration from proceeding. The district court dismissed the action, holding that, in accordance with the federal Court of Appeals authorities, questions of consolidation are procedural in nature, and thus presumptively for the arbitrators to decide. *Anwar*, 728 F. Supp.2d at 477. The court also held that *Stolt-Nielsen* did not require a different result because, unlike class arbitrations, consolidation does not fundamentally change the nature of arbitration. *See id.* ("Unlike the differences between bilateral and class arbitration, the differences between the limited consolidation here and bilateral arbitration are

not so great"); *Safra*, 2011 WL 1672467, *5 ("joinder and consolidation remain distinct procedural issues of the sort parties would intend for the arbitrator to decide").[4]

Finally, the question of which forum should decide the consolidation issue should not be affected by whether the issue is first raised before a court on a motion to compel under § 4 of the FAA or a motion to vacate under § 10 of the FAA. Under § 4, a party aggrieved by the alleged failure or refusal of another to arbitrate can move for an order compelling arbitration "in the manner provided for" in the agreement, and the court can order arbitration "in accordance with the terms of the agreement." At first blush, determining whether a party resisting consolidated arbitration should be compelled to arbitrate "in accordance with the terms of the agreement" would appear to fall squarely within the ambit of the FAA, and thus would be for the court to decide. Prior to *Stolt-Nielsen*, this argument was consistently rejected by the courts. *See*, *e.g.*, *Westchester Fire*, 489 F.3d at 588; *Wausau*, 443 F.3d at 581-82.

Indeed, in *Wausau*, the reinsurer argued that a court could not grant a motion to compel a consolidated arbitration without first deciding the consolidation issue because otherwise its order could "conflict with the terms of the arbitration clauses, for example, by not allowing each party to appoint its arbitrator." The Seventh Circuit flatly rejected the notion that courts should decide the consolidation issue when raised in the context of a motion to compel:

> We should not and will not consider this argument. The question before us is whether the parties' Agreements specify *who* is to decide whether consolidated arbitration is allowed — the court or the arbitrator. We have determined that the Agreements do not specify and that questions regarding consolidation are presumptively for the arbitrator. Wausau is free to argue at the arbitration that separate arbitrations ... are required under the contracts' terms. If the arbitration panel agrees, it can require the parties to proceed as it deems appropriate.

443 F.3d at 581-82 (emphasis in original).

B. When is Consolidation Appropriate?

In deciding the consolidation issue, arbitrators should, of course, feel constrained to follow the Supreme Court's overriding guideline, which is to effectuate the parties' intent, but they should also recognize that the fact that the parties did not address the consolidation issue in the arbitration clause does not end the intent inquiry. Arbitrators, especially in the context of a reinsurance arbitration governed by an arbitration clause with "honorable engagement" language, are free to consider extrinsic evidence, including custom and practice, that bears on intent. Although arbitrators do not have unfettered discretion under *Stolt-Nielsen* to decide the consolidation issue, they nevertheless retain broad discretion in weighing the evidence concerning intent.

Moreover, as the Supreme Court noted in *Stolt-Nielsen*, the principle that procedural issues are presumptively for the arbitrators to decide "is grounded in the background principle that 'when the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.'" *Stolt-Nielsen*, 130 S.Ct. at 1775 (quoting Restatement (Second) of Contracts § 204; internal brackets omitted). The Court held that principle was inapplicable in the class arbitration context because of the fundamental differences between bilateral and class arbitrations. *Id*. At least absent some extremely unusual circumstances, consolidated arbitrations more closely resemble bilateral arbitrations than class arbitrations. This conclusion is bolstered by a review of the four differences between a bilateral arbitration and a class arbitration noted by the Court in *Stolt-Nielsen*:

- complexity: while the arbitrators in a class arbitration will be required to resolve "many disputes between hundreds or perhaps thousands of parties," the order of magnitude difference will invariably be much lower in a consolidated arbitration;
- rights of absent parties: an award in a consolidated arbitration will not implicate the rights of absent parties to any greater extent than would an award in a bilateral arbitration;
- privacy and confidentiality: with respect to the outside world, a consolidated arbitration should be just as private and confidential as separate bilateral arbitrations; the fact that privacy and confidentiality may be lost vis-à-vis the additional parties in the consolidated arbitration can be addressed to some extent in the parties' confidentiality agreement and, in any event, is not such a fundamental change that the parties could not have intended a consolidated arbitration; and
- commercial stakes: while the commercial stakes of a consolidated arbitration are higher, the order of magnitude difference will almost certainly not be such that the parties could not have intended a consolidated arbitration. *See Anwar*, 728 F. Supp.2d at 477 (noting that the investment firms' "liability (if they are held liable) will be the same whether awards are parceled out piecemeal or decided in one proceeding").

In sum, because consolidation does not alter the fundamental nature of arbitration (at least absent some extremely unusual circumstances), arbitrators have the authority to order consolidation in the absence of any evidence regarding intent if they

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determine that consolidation would be a "reasonable" term of the arbitration clause under the circumstances.

Obviously, both the determination of the parties' intent and whether it is reasonable to order consolidation under certain circumstances (independent of the parties' intent) are fact-intensive exercises. In deciding these issues, the arbitrators will need to consider carefully a whole host of factors, including whether (a) consolidation is being sought on contracts between the same parties, (b) the contracts are related (*e.g.*, covering different layers or years of the same reinsurance program) or unrelated (*e.g.*, covering different lines of business) and (c) there are material differences in the relevant arbitration clauses.

Stated simply, depending upon the relevant facts, a panel's decision whether or not to order consolidation can range from a "no brainer" to extremely difficult.

We suspect that most panels would take little pause in ordering consolidation where a single reinsurer was disputing whether a single claim was covered under multiple contracts reinsuring different layers and/or years of the same reinsurance program, and the arbitration clauses in those contracts were identical. In this situation, it should prove difficult to conjure up any persuasive argument that the parties did not intend that disputes regarding a single claim would be resolved in a consolidated proceeding or that consolidation would somehow be unreasonable.

The consolidation issue becomes far more nuanced the further one departs from this very simple example. Even in the bilateral context (*i.e.*, a single cedent and single reinsurer), consolidation may arguably be inappropriate where a ceding company is seeking to recover on different kinds of claims under different kinds of contracts. Depending upon the facts involved, a party may be able to argue persuasively that, for example, it bargained for the right to appoint different arbitrators (and seek different umpires) on the basis of their experience or expertise on one kind of claim or contract versus another.

An added level of complexity is present where there are material differences in the relevant arbitration clauses, such as where the arbitration clauses contain:

- different choice of law or honorable engagement provisions;
- different forums for the arbitration;
- different scopes of authority granted to the arbitrators; or
- different arbitrator qualification/selection provisions.

Although these differences can certainly support an argument that consolidation would be inappropriate, there are legitimate counterarguments as well.

For example, different choice of law provisions can be addressed in the same way courts deal with choice of law analyses that result in different laws controlling different causes of action. The courts address the issue by applying the applicable law to each particular cause of action. An arbitration panel can similarly resolve disputes under contracts with different governing law provisions by applying the applicable law to the parties' dispute under each contract. Accordingly, different choice of law provisions do not require a determination that consolidation would be inappropriate. After all, the advantages of a single discovery and hearing process and a single deliberation by the panel in which it reaches findings of fact should not be underestimated. And, of course, if any of the contracts contains a provision comparable to an honorable engagement clause, the panel would be free to disregard strict principles of law, rendering any differences in the governing law provisions not particularly meaningful.

Likewise, a consolidated arbitration would not necessarily fly in the face of arbitration clauses that provide for different forums for the hearing. Panels can simply convene the hearing in one location and reconvene in another (although, of course, whether it would be reasonable for a panel to do so would depend upon the specific facts and circumstances). Moreover, as a practical matter, once a panel announces that it is prepared to do so unless the parties consent to a single forum for the consolidated hearing, any party sensitive to costs and desirous of a seamless hearing process will consent to a single forum.

Nor should different scopes of authority granted to the arbitrators under different arbitration clauses be a necessarily disabling factor. In a dispute involving both fraudulent inducement and breach of contract claims under a contract with a narrow arbitration clause that excludes fraudulent inducement claims from its scope, the arbitrators would determine the breach of contract claims and the courts would determine the fraudulent inducement claim. Similarly, where there is a consolidated arbitration encompassing disputes under two different contracts, one with a broad arbitration clause and one with a narrow one, the arbitrators would decide the fraudulent inducement claim under the contract with the broad clause, leaving for the courts to decide the fraudulent inducement claim under the contract with the narrow clause. Of course, depending upon the specific facts, the losing party could be collaterally estopped from relitigating the fraudulent inducement issue for a second time.

Perhaps the differences least likely to be compatible with a consolidated arbitration are those involving different arbitrator qualifications. Even in the face of those differences, however, arbitrators may be able to fashion a consolidation decision that is not inconsistent with the parties' intent (for example, by applying only those qualifications that are found in all of the arbitration clauses). As a practical matter, the courts will likely become involved in any dispute regarding the composition of the panel through a motion for the appointment of an arbitrator or umpire under § 5 of the FAA.[5]

The Louisiana federal court's decision in *Safety National Cas. Corp. v. Certain Underwriters at Lloyd's London*, Civ. Action No. 02-cv-1146 (M. D. La. August 16, 2011) is instructive. There, after years

of litigation, the parties were ordered to proceed with arbitration under twenty-two different reinsurance contracts containing several different arbitration clauses with differing arbitrator qualification provisions. After six months of negotiations, the parties had not agreed on any umpire candidates because they could not agree on the requisite qualifications for the umpire candidates. As a result, the reinsurers sought leave from the court to move to compel the appointment of an umpire.

> Underwriters seek an umpire who is an expert in the field of workers compensation reinsurance — a qualification required by several of the 22 contracts. With so many different contracts involved, Underwriters argue that the most narrow or strict requirements for the qualifications of an umpire should control.

The court granted the reinsurers' motion and ordered the parties to proceed with the umpire selection process and that, "[c]onsistent with the most restrictive and narrow provisions of the contracts at issue ... all umpire candidates [must] possess the requisite experience in workers compensation insurance." Whether utilizing the "most restrictive and narrow" arbitrator qualification criteria is reasonable (as opposed to, for example, using the qualification criteria common to all of the relevant arbitration clauses) will, of course, depend upon the specific facts and circumstances of the case.

The consolidation issue becomes even more complicated when there are multiple cedents and/or reinsurers involved. That said, the Seventh Circuit's decision in *Connecticut General Life Insurance Company v. Sun Life Assurance Company of Canada*, 210 F.3d 771 (7th Cir. 2000) ("*Unicover*") offers guidance on how arbitrators can resolve consolidation issues involving multiple parties. In *Unicover*, the issue was whether it was appropriate to order the consolidation of multiple arbitrations involving five different ceding companies (all of which were part of the Unicover Pool) and the Unicover Pool's three reinsurers. The arbitration clause in the parties' reinsurance contract was silent on the issue of consolidation among the various cedents, while explicitly authorizing consolidation among the various reinsurers.[6] Because *Unicover* predated *Howsam* and *Green Tree*, it was for the court, not the arbitrators, to decide the consolidation issue.

The Seventh Circuit recognized that, under controlling precedent, it could not order consolidation if the relevant contract did not authorize it. 210 F.3d at 774. The court held, however, that the parties' intent to permit consolidation did not need to be "clear" from the parties' arbitration agreement itself. Accordingly, after "resorting to the usual methods of contract interpretation," the Seventh Circuit held that the parties' arbitration clause permitted consolidation where there was only a single dispute. *Id. at 775*. Critical to the court's finding was its determination that, as used in the arbitration clause, "party" was synonymous with "side," so that the cedents and the reinsurers would each collectively appoint a single arbitrator (and that the two party-appointed arbitrators would choose the umpire). According to the Seventh Circuit, this determination was supported by both the language in the arbitration clause and common sense:

> We cannot say that these textual inferences are conclusive in favor of consolidation, but they support it, as do practical considerations, which are relevant to disambiguating a contract, because parties to a contract generally aim at obtaining sensible results in a sensible way. To have the identical dispute litigated before different arbitration panels is a formula for duplication of effort and a fertile source, in this case, of disputes over esoteric issues in the law of res judicata .... All these problems are avoided by interpreting the contract to allow the reinsurers to demand a single arbitration, provided there is a single dispute.

210 F.3d at 775-76. Under the *Unicover* rationale, arbitration clauses providing that disputes "between the parties" must be arbitrated and that "each party" has the right to appoint its own arbitrator are not fatal to a consolidated arbitration. Consequently, *Unicover* offers panels a road map for the consolidation of arbitrations involving multiple parties where practical considerations of efficiency and fairness auger in favor of consolidation.

Finally, state arbitration acts may provide an

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An arbitration panel can similarly resolve disputes under contracts with different governing law provisions by applying the applicable law to the parties' dispute under each contract. Accordingly, different choice of law provisions do not require a determination that consolidation would be inappropriate.

In sum, while it is still too early to reach any definitive conclusions, it seems likely that (a) most courts will continue to hold that arbitrators, not the courts, have the authority to decide the consolidation issue; and (b) arbitrators will continue to have flexibility to order consolidation consistent with principles of cost-effectiveness and fairness.

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additional basis for arbitrators to order consolidation where there is no evidence of the parties' intent regarding consolidation. As the Supreme Court stated in *Stolt-Nielsen*, where the parties had not reached agreement on the class arbitration issue, "the only task that was left for the panel" was to identify the governing rule of law applicable in cases "in which neither the language of the contract nor any other evidence established that the parties had reached any agreement on the question of class arbitration." *Id*. at 1770. Numerous state arbitration acts authorize consolidated arbitrations.

For example, § 10 of the Uniform Arbitration Act, which has been enacted in fourteen states, permits the consolidation of separate arbitration where, *inter alia*, the disputes "arise in substantial part from the same transaction or series of related transactions" and "the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings." Other states, such as California and Massachusetts, have enacted similar statutes permitting the consolidation of arbitrations. *See* Cal. Civ. Proc. Code. § 1281.3; Mass. Gen. Laws Ann., ch. 251, § 2A. While these statutes authorize courts (not arbitrators) to order the consolidation of separate arbitration proceedings, they provide authority that would permit arbitrators deciding the issue under contracts governed by the law of a state having such statutes to consolidate arbitration proceedings in the absence of any evidence regarding intent. *See Security Insurance Company of Hartford v. TIG Insurance Company*, 360 F.3d 322 (2d Cir. 2004) (California choice of law provision in reinsurance agreement incorporated California state arbitration laws that did not restrict the party's arbitration rights or limit the authority of arbitrators).

Conclusion

In sum, while it is still too early to reach any definitive conclusions, it seems likely that (a) most courts will continue to hold that arbitrators, not the courts, have the authority to decide the consolidation issue; and (b) arbitrators will continue to have flexibility to order consolidation consistent with principles of cost-effectiveness and fairness.▼

1 Because *Cravens Dargan* is an unpublished decision, it is not precedent under the Federal Rules of Appellate Procedure for the Ninth Circuit. Moreover, because it was issued prior to January 1, 2007, parties are precluded from citing that decision to any court in the Ninth Circuit except under certain very limited circumstances.

2 In its recent decision in *AT&T Mobility LLC v. Concepcion*, ___U.S.___,131 S.Ct. 1740 (2011), the Supreme Court elaborated on the differences between a bilateral arbitration and a class arbitration. It noted that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 131 S.Ct. at 1751. The Court also stated that "[a]rbitration is poorly suited to the higher stakes of class litigation" and that it was "hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts for force such a decision." *Id*. at 1752.

3 The Second Circuit is not the only court to rule post-*Stolt-Nielsen* that the class arbitration issue is one for the arbitrators to decide. *See, e.g., Vilches v. The Travelers Companies, Inc.,* 413 Fed. Appx. 487 (3d Cir. 2011) (the *Vilches* decision has been designated by the Third Circuit as "Not Precedential"); Araci *v. Dillard's, Inc*., No. 1: lOcv253, 2011 WL 1388613 (S.D. Ohio March 29, 2011).

4 Not all post- *Stolt-Nielsen* courts have ruled that it is the prerogative of the arbitrators to decide the consolidation issue. In *United Food and Commercial Workers, Local 21 v. Multicare Health System*, Case No. C10-1646R,SL, 2011 WL 834141 (W.D. Wash. March 3, 2011), a Washington state federal district court held that, under Stott-Nielsen, the issue of whether to consolidate multiple arbitrations arising under different contracts (involving different arbitration clauses) was one for the court, not the arbitrators. (Washington is in the Ninth Circuit. Although the Ninth Circuit has previously held that consolidation is a procedural issue, that decision is not binding precedent and cannot be cited to any court in the Ninth Circuit except under certain very limited circumstances.) The court declined to follow the Court of Appeals authority in the other circuits that consolidation is a procedural issue for the arbitrators because those cases did not appear to have "involved contracts with conflicting procedures for choosing an arbitrator" and, in addition, were "decided prior to *Stolt-Nielsen* and focused on the *absence* of evidence that the parties disfavored consolidated arbitration." 2011 WL 834141, *3 (emphasis in original). It should be noted, however, that these distinctions more appropriately go to the issue of whether consolidation is appropriate, *not* who should decide the question.

5 Under § 5 of the FAA, the court has authority to appoint an arbitrator or umpire if, for any reason, there has been a lapse in the naming of an arbitrator or umpire.

6 The arbitration clause stated in relevant part:

> Any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, will be submitted for decision to a panel of three arbitrators. . . . One arbitrator will be chosen by each party [and the party-designated arbitrators will then choose a third, a neutral to preside over the panel and presumably cast the deciding vote in a close case] . . . Unless otherwise mutually agreed by the parties, arbitration will take place in Chicago . . . If more than one Retrocessionaire is involved in arbitration where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results, all such Retrocessionaires will constitute and act as one party for purposes of this Article [the arbitration provision] . . . .

news and notices

Gurevitz Is Second Recipient of The ARIAS Award

At the 2011 ARIAS•U.S. Annual Meeting held on November 3 at the Hilton New York Hotel, retiring Chairman **Daniel L. FitzMaurice** presented **The ARIAS Award** to **Mark S. Gurevitz**.

Mark Gurevitz was a founding Board member who went on to become Chairman for two years in 2000-2002. He presided over the period when ARIAS•U.S. began transitioning from a small to a large and significant factor in the industry. He accepted chairmanship of the Long Range Planning Committee in 2006 and carried through until it completed its mission in 2010, after recommending a complete change in the certification requirements, among other initiatives. In 2009, he joined the Editorial Board of the *ARIAS•U.S. Quarterly* and was recently appointed to the Ethics Discussion Committee.

The ARIAS Award was created in 2004 and was first awarded in that year, the tenth anniversary of the Society's founding, to **T. Richard Kennedy**, Founding Chairman.

Board Approves Peduto as Certified Arbitrator

Also at its meeting on November 3, the Board of Directors approved **Robert M. Peduto** as an ARIAS•U.S. Certified Arbitrator. He had been sponsored by Joseph Carney, Peter Gentile, and Robert Mangino.

Claflin Is Certified Umpire

At the same meeting, the Board named **Susan S. Claflin** as an ARIAS•U.S. Certified Umpire, bringing the total number to 56.

de Lacroix Approved as ARIAS•U.S. Qualified Mediator

On November 8, the Board of Directors approved **Joelle de Lacroix** as a Qualified Mediator, bringing the total number to 38.

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

ARIAS Begins Ethics Discussion

In the last issue of the Quarterly, ARIAS announced the formation of an Ethics Discussion Committee. At the Fall Conference, the discussion began.

The new Committee is charged with providing information and education about ethical issues and concerns. It will not opine on specific issues arising in pending arbitrations, but instead will offer guidance about ethics issues of general interest to the membership.

The Committee proposes to accomplish this objective in two principal ways: First, it intends to prepare ethics hypotheticals for the Quarterly in which ethics issues will be raised and discussed. It hopes to solicit suggestions from the membership on topics to be addressed. Second, the Committee will lead ethics sessions at the ARIAS•U.S. Fall and Spring Conferences. Towards that end, it incorporated a three-part ethics component into the 2011 Fall Conference, including breakouts.

The Committee Chair is **Eric Kobrick**. The other members are **Mark Gurevitz**, **Elizabeth Mullins**, **John Nonna**, **James Rubin**, **Daniel Schmidt**, and **Mary Kay Vyskocil**.

ARIAS Now Provides Online Ethics Course

ARIAS•U.S. recently concluded a year-long project to create proprietary educational software that allows us to offer courses on our website.

The software for the course was written by Mountain Media and the course content was input directly by ARIAS•U.S. We no longer need to involve an outside provider. The content was created by members of the Education Committee.

ARIAS•U.S. certification renewal requirements provide that a certified arbitrator must have taken an ARIAS•U.S. Online Ethics Course during the two years prior to the expiration of certification. This course is available for any member to take at any time.

The course is located in the Members Area of the website. However, you can still start with the yellow button on the home page, and then log in to enter using your email address. Once inside, just click on "Ethics Course." If you are interrupted while taking the course, you can come back later. When you log back in to the Members Area and select "Ethics Course," you can pick up where you left off. The system will know that you have paid and will open to where you last worked.

The cost of the course is $250, plus $8 for the credit card processing fee.

Board Approves Swierkiewicz as Certified Arbitrator

At its meeting on September 22, 2011, the ARIAS Board of Directors approved **Akos Swierkiewicz** as an ARIAS•U.S. Certified Arbitrator. He had been sponsored by Robert Lippincott, James MacDonald, and Reinhard Obermueller.

Board Certifies Three New ARIAS Umpires

At the same meeting, the Board approved **Leo J. Jordan**, **Robert M. Mangino, Sr., and Robert B. Miller** as ARIAS•U.S. Certified Umpires.

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news and notices

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Board Re-certifies Braithwaite

Also at its meeting on September 22, the Board of Directors approved **Paul Braithwaite** as an ARIAS-U.S. Certified Arbitrator. He had previously been certified, but had not re-qualified at the June 2010 deadline.

R. Michael Cass

Mike Cass, a long time member of ARIAS•U.S. suffered a fatal heart attack on Friday, September 30. Mike joined ARIAS•U.S. in 1995 and became a Certified Arbitrator in 2000.

During his 43-year career in the insurance industry, Mike was active with professional associations, such as ARIAS•U.S. and the Society of CPCU. He was President of his own company, R. M. Cass and Associates, and served on panels in 62 arbitrations.

A memorial to celebrate his life was held on Tuesday, October 4 at the Radisson Hotel Harrisburg in Camp Hill, Pennsylvania.

William A. Wilson

Bill Wilson, an ARIAS•U.S. member and Certified Arbitrator, died Saturday, August 13 of heart failure.

Shortly after the 2011 Spring Conference at the Fontainebleau, Bill entered the hospital with severe back pain, which turned out to be a staph infection. He fought the complications of that for three months.

A memorial service was held on August 19 at Good Shepherd Episcopal Church, 2929 Woodland Hills Dr., Kingwood, TX 77339.▼

members on the move

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

Although we will continue to highlight changes and moves, remember that the ARIAS•U.S. Membership Directory on the website is updated frequently; you can always find there the most current information that we have on file. If you see any errors in that directory, please notify us at director@arias-us.org.

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

Recent Moves and Announcements

The partnerships of Edwards Angell Palmer & Dodge LLP and Wildman, Harrold, Allen & Dixon LLP merged on October 1, 2011. The new firm is known as **Edwards Wildman Palmer LLP**. For more information visit edwardswildman.com.

Susan Claflin has joined the Alea Group / Alea North America Insurance Company as Senior Vice President, General Counsel and Secretary of the member companies. At Alea, she can be reached at 55 Capital Boulevard, Corporate Ridge, Rocky Hill, CT 06067, phone 860-258-6550, email susan.claflin@aleagroup.com. Ms. Claflin continues her arbitration practice with Claflin Consulting Services LLC, phone 203-907-9141.

Andrew Barile has moved to 2929B Badajoz Place, Carlsbad, CA 92009, phone 619-507-0354, fax 760-652-5735, email abarile@abarileconsult.com.

Charles F. Barr is now Senior Vice President & General Counsel of the Louisiana Workers' Compensation Corporation. He can be contacted there at 2237 South Acadian Thruway, Baton Rouge, LA 70808, phone 225-231-0593, business cell 225-333-2004, personal cell 203-733-8221, email cbarr@lwcc.com.

Andreas Stahl can now be found at 50 Pensford Avenue, Richmond TW9 4HP, UK, phone 44 0208 255 66 71, Cell 44 07917 185681, email Andreas.stahl6@gmail.com.

Mark S. Gurevitz is now in business at MG Re Arbitrator and Mediator Services LLC, 26 Copper Kettle Road, Trumbull, CT 06611, phone 203-556-4049, email gurevitz@aol.com.

Harry Tipper has moved to 2070 Isles of St. Marys Way, St. Marys, GA 31558, phone 912-576-6659.

Email Changes

Jeremy R. Wallis has a new email address, wallisresolutions@gmail.com. ▼

feature

Arbitration Wars in Insurance Insolvency

Natasha C. Lisman

Natasha C. LIsman

While the once reigning judicial hostility to arbitration agreements as unenforceable "attempt[s] to wholly oust the courts of jurisdiction"[1] has generally been consigned to ancient legal history, resistance to honoring arbitration agreements has survived in one environment — insurance insolvency. In that context, the enforceability of arbitration agreements, and specifically, whether an insolvent insurer's pre-insolvency arbitration agreement with a third party is binding on the insurer's liquidator as one standing in the insurer's shoes, is a live, highly controversial, and actively litigated issue. This article presents a general overview of the main legal strands in the extensive case law engendered by this litigation.

Background

The wars over the arbitrability of disputes in insurance liquidations are triggered by a clash of preferences for the resolution forum. Insurance liquidators prefer to submit disputes for adjudication by the state courts supervising liquidations, and strenuously resist having to abide by arbitration clauses in the insolvent insurers' contracts with third parties, even when seeking to recover under them.[2] The third parties, on the other hand, have exactly the opposite preference and respond by seeking court orders compelling arbitration.

The ensuing battles have been waged in a number of state and federal jurisdictions and have produced such sharp divisions among, and even within, the courts that on most key issues, for each line of reasoning and conclusion one can find in the case law an equal and opposite line of reasoning and conclusion.

This intersection of insurance and arbitration law is of particular interest to reinsurance practitioners. Reinsurers are disproportionately represented among the targets of liquidators' claims because reinsurance contracts are typically the largest and most collectible potential assets that a liquidator can marshall for the insolvent estate. Since reinsurance contracts tend to include arbitration clauses, reinsurers figure prominently as liquidators' opponents in the wars over arbitration in insurance liquidation.

The Legal Arsenal

The law supplying the arguments and counterarguments in the arbitration wars depends on whether the arbitration agreement at issue is part of a transaction in intrastate, interstate, or international commerce. For contracts in purely intrastate commerce, the binding effect of arbitration provisions on liquidators turns solely on the state law governing insurance liquidation and arbitration. For contracts in interstate commerce, the analysis begins with the same areas of state law but then requires consideration of federal constitutional and statutory law bearing on preemption, arbitration, and insurance, while cross-border contracts add to that mix an international arbitration treaty and its federal implementing legislation.

State Law

Since the insolvency of a US insurance company is governed by the law of the state in which it is domiciled, the first issue in a case involving any arbitration agreement is whether the law of that state either bars or requires liquidators to abide by such agreements. While most states have adopted general laws favoring arbitration and enforcement of arbitration agreements, laws that expressly address the enforceability of arbitration agreements specifically in the context of insurance insolvency are extremely rare.[3] Thus, in most cases, courts confront the significance and consequences of the

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The law supplying the arguments and counterarguments in the arbitration wars depends on whether the arbitration agreement at issue is part of a transaction in intrastate, interstate, or international commerce.

Natasha C. Lisman is a partner in the Boston litigation firm Sugarman, Rogers, Barshak & Cohen, P.C. She represents parties and serves as an arbitrator in commercial, intellectual property, insurance, and reinsurance disputes.

Although the issue has significant federal and international law facets – which, in today's commerce, apply to most arbitration agreements – the US Supreme Court has not yet stepped in to resolve the conflict among the state highest courts' and the federal circuits' rulings on those facets, as it will inevitably have to.

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absence of a specific legislative provision either allowing or prohibiting arbitration in insurance liquidation. The decisions vary, and the outcomes seem rooted in the judges' underlying attitudes toward arbitration.

Some courts have found arbitration to be incompatible with insurance liquidation on grounds that echo the traditional jurisdictional turf concerns that once informed judicial hostility toward arbitration generally. These courts have ruled that the reach of state pro-arbitration statutes stops at insurance insolvency and that only legislation expressly and affirmatively *authorizing* arbitration in insurance liquidation can compel a liquidator to submit to arbitration. In the absence of such authorization, they find *prohibition* of arbitration implicit in the overall statutory liquidation scheme charging state courts with supervising insurance liquidation proceedings. As one court put it, "it would seem in keeping with the overall scheme and plan of [the liquidation statute], and in view of the fact that [it] contains no statutory authorization for arbitration, that that court may not be ousted of jurisdiction in favor of an arbitrative tribunal."[4]

By contrast, other courts find general pro-arbitration laws fully applicable in the insurance liquidation context and, invoking the presumption required by these laws in favor of the enforcement of arbitration agreements, hold that this presumption can be overcome only by legislation specifically *preventing* the enforcement of arbitration agreements against insurance liquidators.[5]

The resolution of the state law issues is all that is required for contracts in intrastate commerce, and for all other contracts when the state law issues are resolved in favor of the enforceability of arbitration agreements against liquidators. If, however, state law expressly or as construed, bars such enforcement, cases involving interstate or cross-border agreements implicate federal law, and for the latter, international law as well.

Federal Law

The federal law that bears on the enforceability of interstate arbitration agreements includes the Supremacy Clause of the US Constitution[6], the Federal Arbitration Act (FAA)[7], and a provision of the McCarran-Ferguson Act.[8] The FAA embodies the federal policy favoring arbitration and requires the courts to "rigorously enforce agreements to arbitrate."[9] Normally, by operation of the Supremacy Clause, the FAA preempts any conflicting anti-arbitration state law. In the field of insurance, however, the preemptive force of general federal laws can be blocked by the McCarran-Ferguson Act, which protects state laws enacted "for the purposes of regulating the business of insurance" from being "invalidat[ed], impair[ed], or supersede[d]" by "any Act of Congress" that does not "specifically relate[] to the business of insurance." Since this protective effect of the McCarran-Ferguson Act causes state laws to prevail over conflicting federal laws, it is commonly referred to as "reverse preemption."

Consequently, where an arbitration agreement is embedded in a pre-insolvency transaction subject to federal as well as state law, the court must determine whether the McCarran-Ferguson Act applies to insurance liquidation and, if so, whether it reverse-preempts the FAA. Since the FAA is indisputably an Act of Congress that does not specifically relate to the business of insurance, the determination boils down to the McCarran-Ferguson Act's other two prongs: is the state law at issue designed to regulate the business of insurance and, if so, would applying the FAA to compel arbitration against an insurance liquidator invalidate, impair or supercede the state law. Once again, the courts have split on both issues.

In some courts' view, "the business of insurance" within the meaning of the McCarran-Ferguson Act does not encompass the liquidation of insolvent insurance companies either generally or at least with respect to the resolution of the liquidators' contract claims. This view leaves the FAA to operate in its normal preemptive manner.[10] Other courts, however, have held that the state law governing the winding up of insolvent insurers is an intergral part of regulating the business of insurance and that state anti-arbitration provisions are part and parcel of the regulatory scheme.[11]

Courts also differ in their assessment of the impact of compelling arbitration of disputes between liquidators and third parties on the state insurance liquidation scheme. These differences, once again, seem strongly colored by the judges' underlying attitudes toward arbitration. Echoing the historic

"ouster of jurisdiction" theme, some courts have held that resolution of liquidators' claims in arbitration would undermine the jurisdiction of the courts to which the insurance liquidation scheme entrusted the oversight of insurance liquidations, as well as impair the implementation of the important state policy of orderly liquidation of insurance companies.[12] Other courts, however, fail to see why a liquidation court's jurisdiction cannot accommodate arbitration,[13] particularly since liquidators, for reasons of lack of personal jurisdiction or existence of diversity jurisdictions, often find themselves litigating their claims against third parties in judicial forums other than the court overseeing a particular liquidation.[14] Courts have also rejected the notion that arbitration is inimical to the public interest in the implementation of state insurance liquidation schemes. Citing "the trend toward arbitration of controversies implicating [diverse] public policy concerns," one court concluded that arbitration in the insurance liquidation setting was equally acceptable.[15]

International Law

Arbitration agreements in international commerce are governed by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chapter 2 of the FAA implementing it, both of which express the same pro-arbitration policy as Chapter 1 the FAA, the statute's domestic portion. The preemptive mandate of the Supremacy Clause, of course, applies to the nation's international treaties. But, as with the FAA, disputes over arbitration in insurance liquidation have engulfed the Convention as well. The issue in those cases is whether the McCarran-Ferguson Act applies to the Convention and thus can cause it to be reverse-preempted by state law barriers to the enforcement of arbitration agreements in insurance liquidation.

In some judges' view, the answer turns on whether the Convention is a selfexecuting treaty. If so, the Convention operates independently of any implementing legislation and cannot be deemed to be "an Act of Congress" within the meaning of the McCarran-Ferguson Act.[16] If, on the other hand, the Convention is not self-executing and required the passage of Chapter 2 of the FAA for its implementation, then it is that Act of Congress that governs the enforceability of arbitration agreements in cross-border transactions and, as an Act of Congress, it is subject to the McCarran-Ferguson Act's reverse preemption doctrine.[17] Yet another view is that the self-executing force of the Convention is ultimately immaterial, essentially because Congress could not have intended international treaties, even those legislatively implemented, to be treated the same as domestic federal acts for purposes of the McCarran-Ferguson Act, or to expose the important policy of enforcing international arbitration agreements to the vagaries and inconsistencies of state laws.[18]

Conclusion

Given the wide divergence of reasoning and conclusions in the decisions that have addressed the enforceability of arbitration agreements against insurance liquidators, and the fact that in many jurisdictions the question has yet to be presented or definitively settled, there is no generally accepted answer to the question and each case depends on the state of the law in the jurisdiction in which it arises. Although the issue has significant federal and international law facets - which, in today's commerce, apply to most arbitration agreements - the US Supreme Court has not yet stepped in to resolve the conflict among the state highest courts' and the federal circuits' rulings on those facets, as it will inevitably have to. In the meantime, lawyers dealing with the issue in a state or federal jurisidiction without a binding decision have a wealth of conflicting and persuasive precedent to sift through and marshall.▼

1 See, e,g, *Bauer v. International Waste Co.*, 201 Mass. 197, 302-03 (1909).

2 The arbitrability of third party claims against liquidators is normally not an issue because it is generally accepted that such claims are subject to ordinary creditor claim approval or disallowance procedures. See. e.g. *Quackenbush v. Allstate Insurance Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997); *Credit General Insurance Company v. Insurance Service Group, Inc., et al.*, 2007 WL 2198475 (Tenn.Ct.App. 2007).

3 See, e.g. WIS. STAT. ANN. § 645.04 (3) ("An arbitration provision of any contract with an insurer that is subject to a delinquency proceeding under subch.III in is not enforceable unless the receiver elects to accept arbitration"); OKLA. STAT. TITLE, 36, § 1902 ("Except as to claims against the estate, nothing in this article shall deprive a party in interest of any contractual right to pursue arbitration of any dispute under any law. Where an insurer subject to this article is a party to an arbitration proceeding, the venue of such arbitration proceeding shall be in Oklahoma County.")

4 *Knickerbocker Agency v. Holz*, 149 N.E.2d 885, 890 (N.Y. 1958); *Benjamin v. Pipoly*, 800 N.E.2d 50, 59 (Ohio App. 2003). Some courts also rely on the statutory grant of power to liquidators to disavow the insolvent insurers' pre-insolvency contractual obligations, even selectively when a liquidator seeks to enforce other duties arising out of a contract containing the disavowed arbitration clause. *Hudson v. John Hancock Financial Servs*, 2007 WL 4532704, Ohio App. 10 Dist., 2007); *Wagner v. Kay*, 722 N.W.2d 348 (Neb. App. 2006).

5 *Credit General Insurance Company v. Insurance Service Group, Inc., et al.*, 2007 WL 2198475 (Tenn.Ct.App. 2007)

6 U.S. Const. art.VI, cl. 2.

7 9 U.S.C § 1 et seq.

8 15 U.S.C. §10129b).

9 *Shearson/American Express, Inc. v. McMahon*, 482 U. S. 220 (1987); *Nichols v. Vesta Fire Insurance Corp.*, 56 F.Supp.2d 778, 781-82 (E.D. Ky. 1999).

10 *Midwest Employers Cas. Co. v. Legion Ins. Co.*, 2007 WL 3352339 E.D.Mo. (2007); *Everest Reinsurance Co. v. Howard*, 950 S.W.2d 800 (Tex.App.-Austin,1997); *Costle v. Fremont Indemnity Co.*, 839 F.Supp. 265 (D.Vt. 1993); *Phillips v. Lincoln National Health & Casualty Ins. Co.*, 774 F. Supp. 1297 (D.C. Colo. 1991); cf. *Grode v. Mutual Fire, Marine and Inland Insurance Co.*, 8 F.3d 953, 959-60 (3d Cir. 1993).

11 *Hudson v. John Hancock Financial Servs*, 2007 WL 4532704 (Ohio App. 10 Dist., 2007); *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585, 592-93, 596 (5th Cir. 1998); *Stephens v. American Intern. Ins. Co*, 66 F.3d 41 (2d Cir. 1995).

12 *Ernst & Young, LLP v. Clark*, 2010 WL 3374414, * 4-8 (KY, 2010); *Union Indemnity Insurance Co. v. American Centennial Insurance Co.*, 521 N.Y.S.2d 617, 619-20 (N.Y. Sup. Ct., 1987); *Stephens v. American Intern. Ins. Co*, 66 F.3d 41 (2d Cir. 1995).

13 *In re Liquidation of Integrity Ins. Co.*, 2006, WL 2795343, *7 (N.J.Super. 2006), (*rev'd on other grounds* 193 N.J. 86 (2007)); *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 161 (3d Cir. 2000).

14 *Knickerbocker Agency v. Holz*, 149 N.E.2d 885 (N.Y. 1958)(dissent). *Ainsworth v. Allstate Ins. Co.*, 634 F.Supp. 52, 57 (W.D. Mo. 1985); *Selcke v. New England Ins. Co.*, 995 F.2d 688, 691 (7th Cir. 1993); *Suter*, 223 F.3d at 161.

15 *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969, 972-73 (9th Cir. 1992); *Phillips*, 774 F.Supp. at 1300.

16 *Safety National v. Certain Underwriters at Lloyds, London*, 2009 WL 37222727 (5th Cir. 2009) (concurring opinion).

17 *Stephens*, 66 F.3d at 45; *Corcoran v. Ardra Insurance Co.*, 567 N.E.2d 969 (N.Y. 1990).

18 *Safety National v. Certain Underwriters at Lloyds, London*, 2009 WL 37222727 (5th Cir. 2009); *Certain Underwriters at Lloyds, London v. Simon*, 2007 WL 3047128 (S. D. Ind. 2007).

feature

Debiasing the Biased

Richard G. Waterman, CPCU

Richard G. Waterman

Becoming better informed and more open to new evidence, and being aware of how heuristic biases influence decision making is not merely desirable, it is essential to provide equitable dispute decision making.

Richard G. Waterman, CPCU, is an ARIAS US certified arbitrator and umpire who has studied and written about small group decision making strategies and the influence of heuristic principes that arbitrators use in judging and deciding. He has served on numerous industry arbitration panels and has served as an industry expert in litigation.

Everyone possesses certain biases and prejudices. These biases are usually not attributable to motivational effects such as wishful thinking or the distortion of judgments by rewards and penalties. Instead, leading research in decision making suggests that in many contexts decision makers employ intuitive, common-sense judgments to guide the simplification of complex information processing that must be integrated to yield a decision. For many purposes these simplifying methods, called heuristics, result in reasonable judgments, even though these intuitive judgments are often biased in a predictable manner. It is not surprising that the reliance on useful judgmental heuristics and the prevalence of biases has been found to influence people who are encouraged to be accurate and are rewarded for correct answers.

In recent years, a large body of research has been devoted to uncovering judgmental heuristics and exploring their effects.[1] We know, for instance, that people gain considerable life experience and practical knowledge. We also know that people use intuitive heuristics, or heuristic methods, in problem solving because such techniques have worked well in their life experience. Problem solving requires the use of knowledge that is already acquired. Heuristic methods allow us to search our memories for possibilities and evidence that are already there.

Decision making in an arbitration setting is a form of problem solving. Arbitration, like court adjudication, is a process to decide between disputed alternatives under conditions of uncertainty. Arbitrators seek to interpret facts and search for the truth. Arbitration decision making involves a large component of judgment, intuition, and educated guesswork. Abundant evidence from psychological research suggests that in many contexts decision makers' intuitive, common-sense judgments can be faulty and may be held with great confidence. Indeed, the opinions, intuitive judgments, and misunderstanding can often be traced to biased experiences. Even well-informed people have difficulty judging accurately if they are not aware of factors that might bias their assessment of evidence and final judgment.

People selected to serve on arbitration panels have gained considerable life experience and practical knowledge in their business careers. Experienced people have insight, but often at the cost of heuristic biases and prejudices. Arbitrators are not expected to suddenly forget all that lifetime of experiences; they are, however, asked to judge fairly. The challenge for arbitrators is to acknowledge their experience limitations, learn to recognize the existence of potential bias or prejudice, and learn techniques to control those influences. Arbitrators must exercise their best judgment to decide cases on their own merits. Becoming better informed and more open to new evidence, and being aware of how heuristic biases influence decision making, is not merely desirable, it is essential to provide equitable dispute decision making. Two common heuristic biases prevalent in arbitration decision making are confirmation bias and overconfidence bias.

Seek and Ye Shall Find

Studies have shown that background information provided to expert fact finders prior to an evaluation of evidence has a whopping influence on their subsequent interpretation and analysis of the evidence. The heuristic effect is known as confirmation bias whereby greater weight is put on evidence that supports the background story in the process of integrating all the available evidence. Confirmation bias is defined as an inclination to retain, or a disinclination to abandon, a currently favored hypothesis.

We like to think of ourselves as rational observers of the world, weighing the facts and reaching well-reasoned decisions.

Nonetheless, we all have our beliefs and we latch on to nuggets of information that support them while shrugging off dissenting views and conflicting evidence. We like to think that we are immune to confirmation bias. Studies of decision making have shown, however, that the confirmation bias is so pervasive that it affects people without their realizing it. One reason we think we are relatively immune to the risk of confirmation bias is that we exaggerate the extent to which we can control the tendency that fosters poor decision making. We are erroneously confident in our experiential knowledge and underestimate the probability that our information retrieval from memory or our beliefs will be proven wrong. That is why we tend to seek additional information in ways that confirm what we already believe.

For one example, in a confirmation bias experiment conducted with professional polygraphers, three polygraphers identified as A, B, and C were enlisted to help in discovering which of three suspected employees, identified as X, Y, and Z, were stealing from a commercial business in a mock scenario. A was told that X was suspected, B was told that Y was suspected, and C was told the Z was suspected. The three polygraphers, who were unaware of each other's existence, conducted a standard investigation of the three suspects and provided their conclusions. A found X to be guilty. B put the blame on Y, and C determined that Z was the culprit. The experiment confirmed that a polygraph investigation, like many expert information gathering activities conducted in good faith, may yield biased results. Even expert fact finders have a tendency to see in their analysis what they hypothesized to be there.

In a similar fashion, a threat to objective information processing in tripartite arbitration decision making is the tendency of party appointed panel members to focus on particular interpretations of the facts. Before evidence is presented at a hearing, party appointed arbitrators are already aware of the disputed situation and assessment favored by the party that appointed them. Party arbitrators must learn to withhold judgment while integrating the prior theory with their own interpretation of the evidence. To minimize the negative impact of reaching a decision without a critical evaluation of alternative viewpoints, an arbitrator should attempt to make a fresh and independent analysis of the evidence. Repeated research has shown, however, that such prior knowledge can jeopardize a decision maker's judgmental analysis. The results show that when given a prior interpretation, both experienced and inexperienced fact finders considered the favored assessment more likely. Even a temporary commitment to the favored interpretation of the facts increased confidence in the favored theory and ultimate judgment. Studies on the confirmation bias also show that people with prior knowledge tend to seek confirmation evidence and select information that is in line with a current belief.

For example, crime analysts are often called in by law enforcement investigation teams to provide an independent interpretation of the evidence at hand. The analyst's main job is to counteract potential tunnel vision or groupthink. A well-known tendency of investigation teams is to converge on a single shared interpretation of facts without a critical examination of the underlying assumptions. In a study experiment, independent crime analysts who knew about the favored interpretation of the facts before examining the case arrived at the same interpretation much more often than crime analysts who did not know the team's opinion in advance. This bias was observed in the interpretation of very complex cases as well as simpler cases. The study revealed that such prior knowledge may seriously compromise the independence of the analysis.

We also need to think about how we process information. For instance, many commentators from various media outlets have repeatedly reported that Barack Obama's press conferences, speeches, and interviews were packed with the word "I." Some people think that people who are self-confident use I-words all the time while others believe that frequent use of the I-word is proof that a person is arrogant. Contrary to the belief of highly respected news outlets, a recent analysis revealed that Barack Obama has distinguished himself as the lowest I-word user of any of the modern presidents.[2] No one in the media outlets bothered to actually count his use of I-words and compare the results with the I-word usage of other presidents. Many of the commentators who observed Barack

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Careless generalizations of findings must certainly be avoided. Studies of how well confidence matches accuracy, referred to as confidence calibration, show that certainty about decisions can become entirely out of proportion to accurate decisions. Therefore, errors in confidence calibration often can have negative consequences.

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Obama's frequent use of I-words are people who do not share his political views. The study demonstrated that if we think that someone uses the I-word frequently, we have a tendency to hear and search for evidence that confirms our beliefs.

A technique to reduce the likelihood of confirmation bias is called hypothesis testing, which is looking for features or evidence not expected to be present if the hypothesis is true. If, for example, in the process of examining evidence a fact finder is aware of confirmation bias influences and makes sufficient allowances for the presence of evidence that does not support a hypothesis, the effect of prior expectations may be diminished. Another technique to mitigate confirmation bias is the consideration of alternative or competing hypotheses. By thinking of specific alternative hypotheses, we may get a better idea of the probability of another outcome if the evidence does not support the favored hypothesis. It has been observed, however, that the persistent illusion of the validity of a hunch or initial hypothesis can be enhanced by virtue of being the hypothesis tested. Nonetheless, research findings indicate that there is reason to believe that an awareness of confirmation bias and training to learn to facilitate consideration of alternative hypotheses may reduce confirmation-based judgment.

Overconfidence Heuristic Bias

Overconfidence bias refers to a situation in which people are surprised more often than they expect to be. For instance, when teachers ask a class who will finish in the top half, on average around 80 percent of the class think they will. Effectively people are generally much too sure about what they know. This tendency is particularly pronounced amongst experienced people in specialized fields. Experts, for instance, are far more overconfident than lay people. This is consistent with the illusion of knowledge driving overconfidence.

It is part of human nature to expect that a long track record of past performance in a field will lead to a sense of overconfidence, sometimes inappropriately. Once an experienced decision maker has the minimum information necessary to make an informed judgment, attaining additional information generally does not improve the accuracy of that judgment. Additional information may actually lead to becoming more confident in the original judgment to the point of overconfidence. Even when respondents in various judgmental experiments were cautioned to be aware of the overconfidence bias, overconfidence was only partially reduced. Without specific prompting of respondents to consider reasons why they might be wrong, people seem to be insufficiently critical of their thinking or even intent on justifying their initial assessment.

Research has demonstrated that a major cause for the phenomenon of overconfidence when confidence is high is a tendency to seek evidence in favor of an initial belief, as opposed to evidence against it. The overconfidence bias can be reduced but not completely eliminated by considering reasons in favor of something we would like to be true and also generate reasons why the favored judgment might be wrong. Inappropriate high confidence is the failure to think of reasons that possibly support a contrary position. Such inappropriate confidence could cause an arbitrator to stop searching for alternative possibilities, leading to insufficient thinking and incorrect decisions.

The ability to consider and evaluate our own thinking or to demonstrate what evaluations provide accurate or useful information to support our level of confidence is crucial to fair decision making. Also, for a better basic understanding of our decision making process we need to consider possible reasons for error or uncertainty and how well we assess the possibility that a high level of confidence is not always a reliable indicator of accuracy. Careless generalizations of findings must certainly be avoided. Studies of how well confidence matches accuracy, referred to as confidence calibration, show that certainty about decisions can become entirely out of proportion to accurate decisions. Therefore, errors in confidence calibration often can have negative consequences. For instance, unwarranted high levels of confidence in eyewitness testimony have been shown to influence juries to convict innocent people, particularly if highly confident assertions are assumed to be accurate. Most of the convictions overturned by DNA evidence were based on erroneous eye witness testimony. The

overconfidence heuristic can also affect the level of confidence in a group decision such as arbitration deliberations if it is assumed that a more confident member of the group is more knowledgeable.

An important step in reducing arbitrators' overconfidence based on inaccurate inferential judgments would be taken by learning to recognize that interpretations of information and evidence, rather than being simple readouts of historical events, may include inferences that make heavy use of theory. Once the heuristic tendency is recognized, the same information may look quite different and could easily support different beliefs if the information were viewed from the vantage point of alternative theories. Such recognition would invite arbitrators to consider logical alternatives before adopting a theory about a case and adjusting their confidence accordingly. When the theory is well-founded, its heavy use in the interpretation of ambiguous events is correspondingly justified. But when the origin of the theory is dubious, interpretation of events must be severely circumscribed.

Are experienced arbitrators who have decided many cases less sensitive to the effects of judgmental biases than less experienced arbitrators? Experienced arbitrators are thought to be able to integrate prior knowledge and their own interpretation of the evidence before making a final assessment. Only a few studies have investigated whether the decision making of experienced fact finders is less affected by heuristic influences than their less experienced colleagues. Given the mixed results, it is not clear whether experienced arbitrators are less likely to be susceptible to the confirmation bias or if they become unjustifiably overconfident. Since experienced arbitrators have encountered more situations in which their independent analysis diverged from that of a prior interpretation, they may be more aware of the practical importance of independent analysis. Expertise may lead to a somewhat more critical attitude towards other people's beliefs and interpretations. Furthermore, experienced arbitrators have seen many more cases that may cause them to question the possibility of alternative explanations. Generally, when alternative possibilities and explanations are acknowledged, further investigation and independent assessment would likely reduce the influence of judgmental biases.

Debiasinq Techniques

Most arbitration decision making, like many other areas of complex activity, is done under conditions of uncertainty. Consequently, arbitrators are encouraged to focus their attention on the relevant and objective facts and thereby reduce any possible overutilization of inappropriate heuristic tendencies. But the extent to which every arbitrator is subject to unconscious biases and utilizes heuristic systems is not known. The research of human judgment shows, however, that people are influenced by judgmental biases. Therefore, the question about fairness in making arbitration decisions is not whether arbitrators are influenced by intuitive biases, but rather how judgmental heuristics affect the assumption of fairness and whether an awareness of heuristic principles improves arbitration decision making.

There is no proven antidote to heuristic biases, and it is not clear whether biases can be unlearned. Some partial remedies include an understanding of how to avoid them when processing incomplete information and second-guessing post-events. Other partial remedies are devoted to training to understand our decision-making process. Another aspect is developing an awareness of our own feelings of confidence in present knowledge that controls our pursuit of new information and the interpretation of past events. Essentially, debiasing techniques facilitate learning. Optimistically, debiasing methods can teach arbitrators to avoid the biases that arise from being captives of their personal perspectives.

Arbitration decision making is different from other types of decision making in several ways. Arbitrators range from highly qualified industry professionals who serve frequently on arbitration panels, making repeated decisions, to less experienced arbitrators making fewer decisions. Moreover, service on arbitrations panels does not provide an opportunity to learn how arbitrators make decisions, and pertinent information may not be available to the arbitration decision makers to receive much feedback about the quality of their decisions. Arbitrators rarely suffer any consequences for making poor decisions. In spite of good intentions, arbitrators may not know how judgmental heuristics, including confirmation bias and

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When serving on an arbitration panel, be challenged to understand the strengths and weakness of the other side, work through an analysis of reasoning and opinions that disagrees with your judgment, and be forced to constantly reevaluate your initial positions. Then decide the case justly with great confidence to the best of your ability.

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overconfidence bias, influenced the accuracy of their decisions.

Educational programs providing concrete examples of intuitive errors and teaching judgmental maxims would offer many clues that might help arbitrators to identify and understand the effects of judgmental heuristics. A better understanding of informal heuristics should prompt caution about extreme judgments and predictions that may be wrong and result in poor decision making. An appreciation of heuristic principles should also serve to make arbitrators stop and reconsider the theory underlying an assessment to determine whether the interpretation is free of bias and is sufficiently well-grounded. Even if biases cannot be unlearned and survive considerable contradictory evidence, we can learn to recognize their existence and take the necessary precautions.

Actively open-minded thinking can help avoid heuristic bias. Consider carefully the goals of seeking information that will be useful in the decision making process with other goals, such as the goal of seeking information in general or seeking information that supports a preconceived favored result. In addition, try to think of alternative probable outcomes. If we fail to consider alternatives, we may end up learning afterwards that a favored interpretation of facts was wrong. Thinking about alternative outcomes may also be useful when we do not have a favored probability of a result. In formulating alternative outcomes, we must think about what we already know. The better we know and understand the facts, the better we can think about them. We must make sure that alternative outcomes are consistent with the evidence already available before we attempt to collect new information.

When serving as arbitrators, we have an obligation to judge cases fairly to best of our ability based on the facts presented. In carrying out our obligation, we need to recognize that we might have some prior knowledge about the preferred interpretation of the facts and we may have a preconceived bias or prejudice. If we recognize the possibility that bias exists and determine techniques to set aside those biases and prejudices, we will be better able to judge the case fairly and justly.

Concluding Comments

Judgment and reasoning frequently allow for our expectations, preconceptions, and prior beliefs to influence our interpretation of new information. When examining evidence relevant to a given belief, we are inclined to see what we expect to see and conclude what we expect to conclude. Information that is consistent with our preexisting beliefs is often accepted at face value, whereas evidence that contradicts them is critically scrutinized and discounted. Our beliefs may thus be less responsive than they should be to the implications of new information.

Experienced people who serve on arbitration panels rely on their life experiences to critically examine the facts and to assist them in judging the credibility of witnesses and assigning weight to testimony. The debiasing techniques presented here are based on general notions about heuristic principles. One of the best ways to internally establish beliefs and filter heuristic biases is to think through the decision you have reached and the basis for that decision. When serving on an arbitration panel, be challenged to understand the strengths and weakness of the other side, work through an analysis of reasoning and opinions that disagrees with your judgment, and be forced to constantly reevaluate your initial positions. Then decide the case justly with great confidence to the best of your ability.▼

1 For their original research reports in three fundamental judgment heuristics, representativeness, availability and anchoring, see Daniel Kahnemann and Amos Tversky.

2 Pennebaker, James W., The Secret Life of Pronouns: What our Words Say About Us, Bloomsbury Press, New York, NY, 2011.

Elaine Caprio Brady and Mary Kay Vyskocil Chosen as Chairman and President

• Rubin is President Elect
• Field and Nonna Replace FitzMaurice and Robb

At the Board of Directors meeting held during the 2011 Fall Conference, **Elaine Caprio Brady**, Vice President and Manager of Ceded Reinsurance for Liberty Mutual Group, was elected Chairman of ARIAS•U.S. She succeeds **Daniel L. FitzMaurice**, Partner in Day Pitney LLP's Hartford office, who has retired from the Board. **Mary Kay Vyskocil**, a litigation Partner at Simpson Thacher & Bartlett LLP, was elected President succeeding Ms. Brady.

Also at that meeting, **Jeffrey M. Rubin**, Senior Vice President and Director, Global Claims, of Odyssey America Reinsurance Corporation, was elected Vice President and designated as President Elect.

At the Annual Membership Meeting, ARIAS•U.S. members elected two new members to the Board of Directors. They are **Ann L. Field**, Vice President and Director of Reinsurance Recoveries, North America at Zurich American Insurance Company, and **John M. Nonna**, Partner and head of the insurance and reinsurance practice group at Dewey & LeBoeuf LLP. Ms. Field and Mr. Nonna replaced **David R. Robb** and **Daniel L. FitzMaurice**, who both retired, under the term limits requirement, after six years on the Board. **Elizabeth M. Mullins** of Swiss Re America Holding Corporation was re-elected to a new term on the Board.

As Vice President and Manager of Ceded Reinsurance for Liberty Mutual Group, **Elaine Caprio Brady** is responsible for reinsurance purchasing, managing credit risk, and global reinsurer and broker relationships. In her former role as Senior Corporate Counsel at Liberty Mutual, Ms. Brady advised Liberty departments worldwide who handle ceded and/or assumed facultative, treaty and retrocessional reinsurance matters. She handled arbitrations, analyzed coverage issues, drafted reinsurance-related contracts, negotiated reinsurance collections and commutations, and advised on insolvencies and schemes of arrangement.

Ms. Brady received a B.A., *magna cum laude*, from Providence College and a J.D., *cum laude*, from Suffolk University Law School. She was featured as a Woman to Watch by *Business Insurance* in 2007. She is a frequent lecturer on reinsurance placement, reinsurance coverage and women's leadership issues.

As a Litigation Partner at Simpson Thacher & Bartlett LLP, **Mary Kay Vyskocil** handles general commercial litigation. Her practice is concentrated in insurance and reinsurance coverage litigation and cases involving the financial services industry.

Ms. Vyskocil has represented major domestic and foreign insurers in complex coverage litigations (including numerous jury trials and appellate arguments) throughout the U.S. in a wide variety of contexts, including environmental, asbestos, breast implants and other mass tort claims. She is also active in reinsurance litigations and arbitrations in the U.S., Great Britain and Bermuda. At ARIAS•U.S., she chairs the Education and International Committees.

Outside the insurance area, Ms. Vyskocil currently represents UBS in connection with major litigations involving residential mortgage backed securities and former officers of Washington Mutual Bank in litigation with the FDIC. She has also served as outside counsel to the Archdiocese of New York.

Ms. Vyskocil is co-author of the leading treatise, *Modern Reinsurance Law & Practice*, 2d ed. (Glasser LegalWorks 2000) and is a frequent lecturer and author on insurance and reinsurance coverage issues and on litigation and trial skills.▼


Elaine Caprio Brady


Mary Kay Vyskocil


Jeffrey M. Rubin

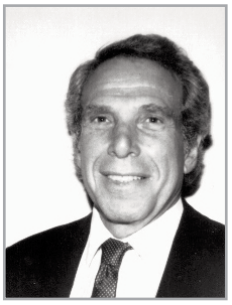

Ann L. Field


John M. Nonna

off the cuff

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 unconventional side of the business.

Rules of Reason and Rules For Reasons



Eugene Wollan

I'm not sure about any other professions, but medicine and law (medicine even more so) have seemingly gone out of their way to preserve the Latin contributions to their heritage. For reasons I will explain later, a relatively obscure Latin maxim that recently came to my mind is: *cessante ratione cessat ipsa lex*. This translates literally as: The reason ceasing, the law itself ceases. As more loosely and more commonly translated: when the reason for the rule ceases to apply, the rule itself should cease to apply.

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I first encountered this principle in my Property Law class during the first year of law school, which was taught by a very dynamic professor name Leach (no relation, I'm sure, to Archibald Leach, a/k/a Cary Grant). In those antediluvian days, our class did not include any women. (The first group of women entered the September right after I had graduated in June, and I have always assumed that this was purely coincidental.) The class met on Thursday, Friday, and Saturday mornings, and the only concession to co-ed activity was that on Saturday mornings during the football season we were permitted to bring our dates for the game to the Property class.

Professor Leach loved performing on those Saturday mornings. He once actually called on one of the female visitors, after having masterfully constructed a scenario in which several class members had been led up a series of blind alleys but the response he was looking for became glaringly evident to the visitor. This, of course, enabled him to complain to the class that even the visitor was smarter than the rest of us.

Although most of his classes were lively, every so often a subject would seem so difficult or abstruse that even his wit couldn't do much to make it appealing. (I never really understood the Rule against Perpetuities anyhow.) One such occasion prompted a class humorist to compose this ditty, which Professor Leach himself gleefully recited to us:

> "Professor W. Barton Leach was at his very best
>
> When in back of Langdell South there sat a lady guest;
>
> He was not quite so vital when the class was just one sex
>
> *Cessante ratione cessat ipsa lex*."

A prime example of the way this axiom is - or should be - applied in our world of insurance and reinsurance law lies in the use and/or abuse of the principle know as (here comes another Latin-ism) *contra proferentum*. This is the rule dictating that any ambiguity in a document should be construed "against" the draftsman of the document. The reasoning behind this principle is obvious enough: the creator of the ambiguity is responsible for its ambiguous nature, so should not be permitted to benefit from the situation of his (or hers, or its) own making.

Time and time again we have seen this concept invoked against an insurer in the interpretation of insurance policy wordings. This certainly made sense in the days when policies were written only by underwriters, and it still makes sense today in dealing with contracts of adhesion such as boilerplate homeowners' forms. But what about the more contemporary situations, especially involving major commercial and industrial risks, in which the wording is actually negotiated between the underwriter and a sophisticated insured or, even more commonly, the wording has actually been put together by the broker, who is of course the agent of the insured?

Some courts still adhere to the notion that *contra proferentum* calls for any ambiguity to be construed against the insurer, regardless of who actually created the wording,

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

presumably because the insurer has adopted the language by issuing the policy (or because the court has simply not thought it through, but let's not go there). Other, more enlightened, courts have recognized the realities and construed broker-created wordings against the insured, or at least have refused to adopt an anti-insurer interpretation. This seems to me to be as much simple common sense as it is a matter of technical legal analysis.

I wonder if the "*cessante*" principle hasn't also functioned in some other more subtle, unspoken ways. For example, most states used to have a rule that late notice of a loss to the insurer automatically voided coverage of that loss. (Leave aside the question of when is "late.") Now, most states hold that late notice will only serve as a sustainable defense against the claim if the insurer can show that it was actually prejudiced by the lateness. (Leave aside also the question of what constitutes "prejudice.") Is it possible that one of the factors behind this shift is the development of improved technological capabilities that create what is essentially a new environment for the investigation and adjustment of insurance claims, so that the reason for the old late notice rule has ceased to apply?

Here's the recent experience that triggered my recollection of the maxim. I was involved in a litigation arising out of a first-party property insurance claim. For reasons too complicated to go into, the insured was entitled to collect replacement cost value for the plant where the loss occurred, even though it was actually being replaced (by agreement) at an entirely different location. The replacement cost adjustment was, however, to be based on the hypothetical cost of replacement at the original location, not the actual cost of the replacement elsewhere. The parties both had their own experts who opined on the amount of replacement cost at the original location. The insured's experts included in their numbers an item for "contingency" on the ground that any construction estimate ordinarily and regularly includes a contingency allowance, often as much as 10%. The insurer's experts took a different view, that the purpose of a contingency allowance is to provide for the possibility of cost overruns or inaccuracies in the original estimate when the construction is actually done - in other words, to allow for the eventuality that the reality might turn out to be more expensive than the estimate; here, however, since the figures were strictly notional to begin with, there was no possibility of a disparity between the estimate and the reality, and hence no need for a contingency allowance.

The case was settled before it became necessary for the court to resolve this particular disputed item, but it seems to me to present a clear case for application of the principle that was invoked against Professor Leach: the reason for the contingency having ceased to apply, the contingency should be dispensed with.

Professor Leach has long since left us, but I have a feeling he would have approved of this application of the rule he ingrained so thoroughly in the minds of so many of us.▼

A prime example of the way this axiom is – or should be – applied in our world of insurance and reinsurance law lies in the use and/or abuse of the principle know as (here comes another Latin-ism) *contra proferentum*. This is the rule dictating that any ambiguity in a document should be construed "against" the draftsman of the document. The reasoning behind this principle is obvious enough: the creator of the ambiguity is responsible for its ambiguous nature, so should not be permitted to benefit from the situation of his (or hers, or its) own making.

DID YOU KNOW...?

...THAT THE "FORMS" SECTION OF THE ARIAS•U.S. WEBSITE CONTAINS A LARGE NUMBER OF FORMS THAT CAN BE USED TO FACILITATE THE WORK OF ARBITRATORS? THE ARIAS WEBSITE IS AT WWW.ARIAS-US.ORG.

Daniel FitzMaurice welcomes attendees.

FALL CONFERENCE CONFRO

Mary Kay Vyskocil introduces Judge Martin.

Former Federal Judge John S. Martin, Jr.

ONTS SIGNIFICANT ISSUES

Input for the Task Force

Daniel FitzMaurice (far right) moderates panel on The Task Force, with (from left) Stacey Schwartz, Anthony Vidovich, Michael Frantz, Maxine Verne, and Scott Birrell.

The ARIAS•U.S. 2011 Fall Conference this year took on discussion of some of the most important and basic issues affecting reinsurance arbitration today. Entitled "**Finding Solutions: An Industry Task Force on How Companies Can Use Improved Arbitration Procedures for Future Disputes Arising under Older Contracts**," the conference leaders sought attendee participation to aid an industry task force that is being created to find new approaches to improving the arbitration process. The conference also focused on issues relating to ethics in arbitration, another high interest subject in dispute resolution today.

In the opening general session, as a workup to the launch of the task force, a range of issues was presented. These then became the focus of six working groups, whose deliberations were summarized in a wrap-up general session. These sessions explored solutions to some of the vexing problems in current arbitration practice. Is there a way to make meaningful changes in arbitrations under older contracts? Could a collection of willing companies join together to implement improved procedures for resolving all or some subset of their disputes? What should those procedures be? Should the much-discussed but seldom-used approach of all-neutral panels be part of those procedures? Are there ways for companies to recapture the less

SESSIONS

Discussing Ethics

Members of the Ethics Discussion Committee, James, Rubin, Eric Kobrick, and Mark Gurevitz, lay out the ethics guidelines and hypotheticals for breakout sessions.

legalistic, more business-friendly processes of the past? Should other ADR methods, such as mediation, be built into the arbitration process as precursors and/or proceed along parallel tracks? Attendees contributed their perspectives through the breakout sessions. The 2012 Spring conference will take the results of this process for further development.

Ethics tracked across the two days in a similar manner. The Ethics Discussion Committee outlined its plan to address the key ethical issues, discussed the new additional ethics guidelines approved by the Board of Directors, and demonstrated the application of these guidelines using five hypothetical scenarios. Breakout groups then discussed those scenarios and a wrap-up session reported on those discussions. It was the most complete airing of opinions about ethics to date at an ARIAS•U.S. conference.

The event took place on Thursday, November 3 and Friday, November 4 at the Hilton New York Hotel in New York City. It was preceded, on the previous afternoon, by two half-day educational seminars presented by the Education Committee that ran in simultaneous sessions. One seminar took a fresh look at "Organizing the Arbitration." The other offered the second advance-level seminar on "Difficult Issues, Even for Experienced Arbitrators." These seminars were designed to support the requirements for arbitrator certification renewal.

Leading off the conference on Thursday morning was a keynote address by Hon. John S. Martin, former United States District Judge for the Southern District of New York. In his address, Judge Martin discussed a wide range of arbitration-related subjects and

CONTINUED ON PAGE 28

e-Discovery in Arbitrations: How Do We Keep Arbitrations from Paralleling Litigation?

With Royce Cohen moderating, Seth Eichenholtz, Frank Bria, Daniel Kulakofsky, and Elizabeth Thompson explain what arbitrators need to know about electronic discovery.

CONTINUED FROM PAGE 27

experiences. His unique position as one who has passed judgment from the bench in disputes and has also served as an arbitrator in many disputes provided him with a wealth of suggestions for attendees.

The Fall Conference also included two educational panels. An e-discovery panel on Thursday explained the technical aspects of electronic discovery and what arbitrators need to know about it. The panel also looked at ways to allow for reasonable access to electronic information without adopting all of the procedures that might apply in litigation? The second panel, Case Law Update, on Friday examined substantive questions that the courts have considered recently and what their rulings mean for reinsurance arbitrations going forward.

In all, this was a practical, hard-working conference that gave attendees a valuable refresher and update on basic principles and current developments. It provided opportunities for an exchange of information and opinions on a number of key aspects of reinsurance arbitration.

SESSIONS

Working Group Wrap-up

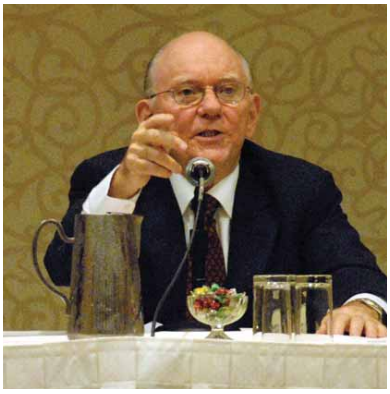
Paul Aiudi, Kathleen Carroll, Denis Loring, Lee Routledge, and Moderator Elaine Brady summarize the input from Task Force breakout sessions.

Case Law Update

Neal Moglin, Linda Dakin-Grimm, and Mary Kay Vyskocil review recent court decisions.

WORKING

Attendees were assigned to one of six groups, based upon their selections of the three topics listed in the announcement brochure: "Neutral Panels" (led by John Andrews and Maureen O'Connor)...

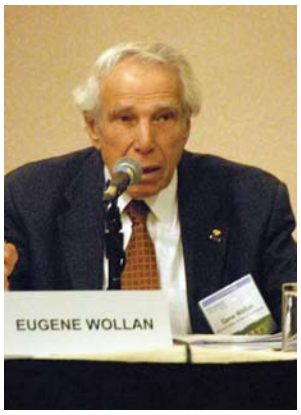


GROUPS

...“Recapturing the Past” (led by Robert Mangino and Rajiv Raval), and “Mediation” (led by Rhonda Rittenberg and Robert Lewin).

ETHICS BREAKOUTS

For small group discussion of ethics hypotheticals, attendees were randomly assigned to six groups. Leaders were Nasri Barakat, Dale Crawford, Richard Marrs, Andrew Maneval, Joseph Scully, and Eugene Wollan.



ANNUAL MEETING

Left: Daniel FitzMaurice, Elaine Caprio Brady, Mary Kay Vyskocil, and Peter Gentile address the 2011 Annual Meeting.

Right: Treasurer Peter Gentile summarizes 2011 financial results and 2012 budget.

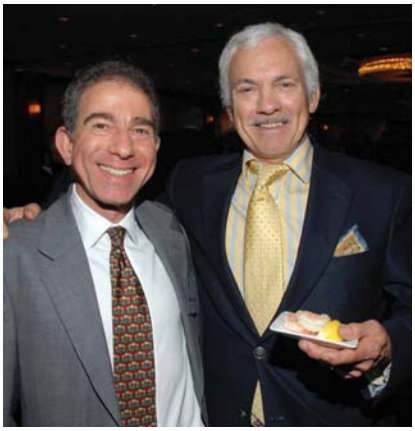
Left: Daniel FitzMaurice reviews his year as Chairman.

Right: Chairman FitzMaurice presents "The ARIAS Award" to Mark S. Gurevitz (see News and Notices on Page 11).

New Chairman Brady presents Meritorious Service Award to Outgoing Chairman FitzMaurice.

George A. Cavell (L) and David R. Robb (R) receive Meritorious Service Awards.

Then, It Was Time to Exchange Thoughts on the Day's Events



Steve Schwartz and Bill Ray

Henry McGrier and Ed Lenci

Key Colemen, Mark Welshons, Nick DiGiovanni, and Jonathan Sacher

Tom Tobin, Mark Megaw, and Jim Dowd.

Jim Corcoran and FTI...Elaine Lehnert, Richard Hershman, and Paul Braithwaite

The Whites...Dick, Patricia, and Emory

Law Committee Case Summaries

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

As of the middle of February 2009, there were 48 published case summaries and three regulation summaries on the website. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions

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

Trustmark Insurance Co. v. John Hancock Life Insurance Co., No. 09-3682 (7th Cir. Jan. 31, 2011)

Court: United States Court of Appeals for the Seventh Circuit

Date Decided: January 31, 2011

Issue Decided: Whether an arbitrator who had served on prior related arbitration panel was "disinterested."

Submitted by Amy S. Kline & Caitlin M. Piccarello*

Summary:

The Seventh Circuit reversed the decision of the Northern District of Illinois that a party-appointed arbitrator's service on the panel of a prior related arbitration rendered him ineligible to serve on the subsequent panel. The Court held that knowledge, even if gained during a prior confidential proceeding, did not amount to a disqualifying "interest." The Court also held that the only possible injury in proceeding with the arbitration was delay and out of pocket costs, neither of which arose to the level of irreparable harm. Background: Trustmark Insurance Co. ("Trustmark") and John Hancock Life Insurance Company ("John Hancock") were parties to certain reinsurance agreements. A dispute arose concerning certain contracts that Trustmark claimed it did not reinsure. In March 2004, an arbitration panel issued an award supporting Hancock's view of Trustmark's obligations. After the award was issued, Trustmark refused to indemnify Hancock arguing that the arbitration award "governed all of the party's dealings."

Hancock commenced a new arbitration proceeding. Hancock sought to appoint the same arbitrator who had participated in the March 2004 arbitration. A dispute arose between the parties as to whether the same arbitrator could preside over the second arbitration, what weight (if any) to give to the March 2004 award and whether a confidentiality agreement governing the March 2004 arbitration precluded the new arbitrators from knowing the details of the March 2004 arbitration.

District Court Proceeding:

Trustmark filed an action in the Northern District of Illinois arguing that Hancock could not appoint the same arbitrator who had presided over the March 2004 proceeding because he was not "disinterested" and that only a judge (not an arbitration panel) could interpret the confidentiality agreement. The Court agreed with Trustmark and enjoined the arbitration. The Court held that Trustmark could not "be forced to arbitrate issues that it did not agree to arbitrate" and thus allowing the arbitration to proceed would cause irreparable harm. Hancock appealed to the Seventh Circuit.

Seventh Circuit:

The Seventh Circuit reversed. On whether an injunction should have been ordered, the Court held that Trustmark had not demonstrated irreparable harm. The Court reasoned (1) that Trustmark had agreed to arbitrate whether the contracts provide reinsurance for certain risks, and (2) the "only potential injury" that would result from proceeding in arbitration was delay and out-of-pocket costs. The Court stated that "[l]ong ago the Supreme Court held that the delay and expense of adjudication are not 'irreparable injury' – if they were, every discovery order would cause irreparable injury." In reaching this conclusion, the Court notably added that "the sort of argument Trustmark advances in its effort to establish 'irreparable injury' is frivolous."

The Seventh Circuit "could [have] stop[ped] here." It chose, however, to also address the merits of whether Hancock's party-appointed arbitrator was "disinterested." The Court noted that "the district court's decision leaves a cloud over this arbitration and the reputation of [the] arbitrator . . . , a reputation that Trustmark seems determined to tarnish."

The Court found that the arbitrator was "disinterested." The term "disinterested" – when used with respect to an adjudication – "means lacking a financial or other personal stake in the outcome." The fact that the arbitrator had knowledge about the March 2004 arbitration did not make him "interested" because "[k]nowledge acquired in a judicial capacity does not require disqualification." To the contrary, the Court credited the finding that "private parties often select arbitrators precisely because they know something about the controversy."

Finally, the Court found that the lower court erred in holding that the arbitrators could not construe the confidentiality agreement. The 7th Circuit reasoned that "among the powers of an arbitrator is the power to interpret the written word, and this implies the power to err; an award need not be correct to be enforceable."▼

Amy S. Kline is a Partner and Caitlin M. Piccarello is an Associate at Saul Ewing LLP. As members of the firm's Insurance Practice Group, they represent cedents and reinsurers in arbitration and litigation matters.

Dinallo v. Dunav Ins. Co. No. 09-5235-cv, 2010 U.S. App. LEXIS 24583 (2d Cir. Dec. 1, 2010).

Court: United States Court of Appeals for the Second Circuit

Date Decided: December 1, 2010

Issue Decided: Service-of-suit provision in reinsurance agreements served as a waiver of reinsurer's right to remove the case to federal court.

Submitted by Nicole A. Vasquez*

In *Dinallo v. Dunav Insurance Co*., the Court of Appeals for the Second Circuit concluded that a service-of-suit provision in reinsurance agreements operated as a waiver of the reinsurer's right of removal. No. 09-5235-cv, 2010 U.S. App. LEXIS 24583 (2d Cir. Dec. 1, 2010).

Background

On May 12, 2009, Eric R. Dinallo, New York's Superintendent of Insurance ("Dinallo"), in his capacity as Midland Insurance Co.'s liquidator, sued Dunav Re a.d.o. ("Dunav"), a Serbian company, in the New York County Supreme Court. *Dinallo v. Dunav Ins. Co*., 672 F. Supp. 2d 368, 369 (S.D.N.Y. 2009).

Dinallo seeks $840,801.18 Dunav allegedly owes Midland under four agreements pursuant to which Dunav reinsured Midland. *Id.* Dinallo also sought an order for Dunav to post an irrevocable letter of credit for $2,177,961.18. Id.

Dunav removed the case on June 17, 2009 to the U.S. District Court for the Southern District of New York on the basis of diversity jurisdiction, and Dinallo moved to remand to state court on July 21, 2009. *Id*. at 369, 371.

Dinallo argued that Dunav waived its right of removal to federal court because the service-of-suit provision in the reinsurance agreements required Dunav to submit to jurisdiction in any proper forum selected by the plaintiff. *Id*. at 369. The service of suit clause reads as follows:

> ARTICLE XVIII
>
> SERVICE OF SUIT
>
> (Applies only to those Reinsurers who are domiciled outside the United States of America)
>
> In the event of the failure of the Reinsurer hereon to pay any amount claimed to be due hereunder, *the Reinsurer hereon, at the request of the Company, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction* and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

Id. at 370.

Dunav argued that the service-of-suit clause did not operate as a waiver of its right of removal because the language was ambiguous and any waiver of the right of removal must be clear and unequivocal. *Id*. at 370-71. The district court disagreed. On November 19, 2009, Judge Denise Cote granted Dinallo's motion and held that the service-of-suit clause operated as a waiver of Dunav's right to remove to federal court. *Id*. at 370.

Notably, however, Judge Cote distinguished cases where a defendant removed to federal court pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 205, rather than the general removal statute, 28 U.S.C. § 1441(a). *Id*. at 371. Judge Cote explained that, in cases where removal is sought pursuant to the FAA, "the insertion of an arbitration clause into reinsurance contracts create[s] an ambiguity upon which courts have relied to enforce removal rights . . . ." Id. In this case, however, the arbitration clauses in the reinsurance agreements became ineffective upon Midland's liquidation. Id. at 371, n.6. As such, Judge Cote held that "the basis for the defendant's removal is not the existence of an arbitration agreement enforceable in federal court under the Convention, but instead the general removal statute, 28 U.S.C. § 1441(a), supported by the existence of diversity jurisdiction. Here, there is no ambiguity preventing enforcement of the service of suit clause." *Id*. at 371.

Dunav appealed to the Second Circuit.

Holding

On December 1, 2010, the Court of Appeals for the Second Circuit affirmed Judge Cote's opinion, holding that the service-of-suit provision in the reinsurance agreements effectively waived Dunav's right of removal. *Dinallo v. Dunav Ins. Co*., No. 09-5235-cv, 2010 U.S. App. LEXIS 24583, at *3 (2d Cir. Dec. 1, 2010).▼

**Nicole A. Vasquez is a litigation associate in the law firm of Milbank, Tweed, Hadley & McCloy LLP.*

Ario, Insurance Commissioner of the Commonwealth of PA v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account ___ F.3d ____, 2010 WL 3239474 (3rd Cir. Aug. 18, 2010)

Court: United States Court of Appeals, Third Circuit

Date Decided: August 18, 2010

Issue Decided: Opting Out of the Federal Arbitration Act

Submitted by Natasha C. Lisman*

In this case, the Third Circuit decided that a provision in an arbitration clause of a reinsurance treaty requiring arbitration to be conducted in accordance with the rules and procedures established by a state arbitration statute does not operate as a means to opt out of the Federal Arbitration Act, either in its entirety or, more narrowly, as to (1) the removal of an action to

confirm/vacate an arbitral award from state to federal court, and (2) the standards for vacatur.

Background:

The case arose out of a dispute between the statutory Liquidator of two insolvent Pennsylvania insurers and their foreign reinsurers over the propriety of the insurers' underwriting of the business ceded under four treaties. The dispute was submitted to arbitration, which resulted in an award rescinding all but one of the treaties.

Each of the treaties at issue contained an arbitration clause providing that "the arbitration shall be in accordance with the rules and procedures established by the Uniform Arbitration Act as enacted in Pennsylvania." Each treaty also included a service-of-suit clause providing, among other things, that "[n]othing in this Clause constitutes or should be understood to constitute a waiver of Reinsurers' rights . . . to remove an action to a United States District Court."

Proceedings in the US District Court:

Judicial review of the award began in state court, where the Liquidator filed a motion to confirm the award in part and vacate in part. However, the reinsurers removed the case to federal court under 9 U.S.C. § 205, the removal provision of Chapter 2 of the FAA, which implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In response, the Liquidator moved to remand the case to state court, arguing that the federal court lacked subject matter jurisdiction because, by selecting the Pennsylvania Uniform Arbitration Act ("PUUA") to govern the arbitration, the parties had opted out of the FAA in its entirety, or at least with respect to the removal provision. The district court disagreed with the Liquidator and declined to remand.

The Liquidator then proceeded with his motion to vacate. With respect to the standards to be applied in the court's review of the award, the Liquidator again invoked the contractual choice of the PUAA to assert that the parties had opted out of the FAA vacatur standards in favor of those under the PUAA (which, according to the Liquidator, allowed for a broader scope of judicial review). The district court rejected this contention as well and, applying the FAA, not the PUAA, standards, denied the Liquidator's motion to vacate and confirmed the arbitration award. The Liquidator appealed.

The Third Circuit's Ruling:

On appeal, the Third Circuit Court of Appeals affirmed both of the district court's rulings, albeit with partial dissent. With respect to the Liquidator's global opt-out theory, the Court held that parties may not opt out of FAA coverage in its entirety, because an arbitration agreement does not cease being subject to the FAA merely because the FAA permits parties to specify the rules for the conduct of arbitrations, including rules borrowed from state law. Citing Supreme Court and its own precedent establishing these principles with respect to Chapter 1 of the FAA, governing domestic arbitrations, the Third Circuit concluded that they apply with equal force to Chapter 2 of the FAA, implementing the Convention with respect to cross-border arbitrations.

At the same time, the Third Circuit acknowledged that the right of removal under Chapter 2 can validly be waived by agreement of the parties. However, reiterating its prior holding that, consistent with the "strong and clear preference for a federal forum,'" waiver of the right to remove may be effected only by "clear and unambiguous language," the Court found that the parties' choice of PUAA did not constitute sufficiently clear and unambiguous language, particularly when read in conjunction with the express preservation of the right to remove in the service-of-suit clause.

Turning to the applicable standards for vacatur, the Third Circuit began its analysis by expressing agreement with the Second Circuit's holding that even an award falling under the Convention is subject to the FAA standards for vacating domestic awards when the award is rendered in the United States, as opposed to a foreign jurisdiction. The Court then reaffirmed its prior holding that, while the FAA allows parties to agree to supplant the FAA vacatur standards with state law standards, they must express "clear intent" to do so and doubts must be resolved in favor of the FAA standards. Applying this test, the majority of the Third Circuit panel found that the parties' choice of the PUAA rules and procedures for arbitrations under the reinsurance treaties was not an expression of clear intent to opt out of the FAA vacatur standards because it addressed only the conduct of arbitrations and not the judicial enforcement of resulting awards. One member of the panel dissented from this part of the Court's opinion because, in his view, the reinsurance treaties did reflect a clear intent to adopt the vacatur standards of the PUAA.

Conclusion

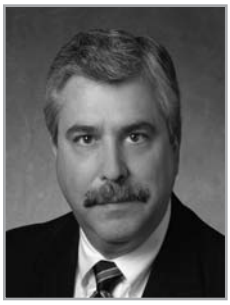
For domestic or cross-border arbitrations subject to the FAA, the principle of party autonomy does not encompass the right to opt out of the FAA altogether. As to those provisions of the FAA that are subject to waiver or substitution by agreement, such as the right to remove to federal court and standards for vacatur, the intent to effectuate such waiver or substitution must be expressed in language that is specific, crystal clear, and not inconsistent with any other provision in the parties' agreement.▼

**Natasha C. Lisman is a partner at the Boston law firm of Sugarman, Rogers, Barshak & Cohen, P.C. and Co-Chair of its Insurance and Reinsurance Practice Group.* *She gratefully acknowledges the assistance of Robert M. Kaitz, a Northeastern University law student interning at the firm, in the preparation of this report.*

in focus

Recently Certified Arbitrators

Christopher E. Barnes



Robert M. Peduto

Akos Swierkiewicz

Christopher E. Barnes

Christopher Barnes has more than thirty years of experience in insurance, primarily as an insurance claims executive. He has experience across all lines of property and casualty insurance both domestically and internationally.

Mr. Barnes has held numerous senior level technical and management positions within Zurich, ACE, CIGNA and Reliance. Over the course of his career, he has held senior level technical responsibility for primary lines at various insurers, has led field claim organizations nationally, and has held the position of president of ACE's TPA, ESIS.

Mr. Barnes is currently Executive Vice President and Chief Claim Officer for Zurich's Global Corporate Segment. In addition, he has global responsibility for large and complex losses across Zurich's General Insurance Division. While based in the United States, he has responsibility for claims across Zurich's network spanning 170 countries. In this role, he is regularly involved in the resolution of Zurich's largest claims around the globe.▼

Robert M. Peduto

Robert Peduto has more than thirty years' experience, holding senior underwriting and leadership positions in both insurance and reinsurance with major companies. His experience encompasses individual risk and treaty underwriting where he set lead terms for major insurance and reinsurance programs.

Mr. Peduto has held multiple underwriting leadership and Chief Underwriter roles over the course of his career. He held the highest level underwriting referral authority for deals beyond the authority of senior underwriters in the field. This encompassed both Property & Casualty and Life & Health business globally.

Mr. Peduto has built and led large underwriting organizations. He has developed and implemented strategy and underwriting guidelines. He has overseen and negotiated outwards reinsurance and retrocession programs and has negotiated commutations.

He has led the design and implementation of two major underwriting systems, one of which was implemented in North America and one that was implemented globally.

Mr. Peduto has participated in due diligence reviews for the acquisition of insurance and reinsurance companies and subsequently the integration of the acquired organizations.

Mr. Peduto represented both Swiss Reinsurance America Corporation and GE Insurance Solutions on the RAA Natural Disaster Committee and has spoken in industry forums on natural catastrophe, terrorism, pollution, and other significant topics. He served as the Reinsurance Industry Representative on the Advisory Council to the Florida Hurricane Catastrophe Fund from 1993 to 2011, where he held the posts of Vice Chairman in 2010 and Chairman in 2011.

Mr. Peduto is a graduate of The Johns Hopkins University with a bachelor's degree in International Relations. He was nominated for and attended a number of senior executive seminar programs at General Electric and Swiss Re.▼

Akos Swierkiewicz

Akos Swierkiewicz has extensive experience in property and casualty insurance and reinsurance underwriting, management, company startup, marketing, and product research and development.

He is the founder and principal of IRCOS LLC, which offers property and casualty insurance and reinsurance services, including arbitration, due diligence, company startup and runoff, feasibility studies, expert witness, litigation support, product research, development and marketing, policy reviews and underwriting audits.

Mr. Swierkiewicz established the property insurance division for Kemper Casualty Insurance Co., where he was Senior Vice President.

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

He had a key role in the startup of SOREMA N.A. Reinsurance Co. and he was its Senior Vice President and Chief Underwriting Officer. He was also Executive Vice President of Fulcrum Insurance Co, a wholly owned excess and surplus lines subsidiary of SOREMA and served as a member of the board of directors of both companies.

Prior to joining SOREMA, Mr. Swierkiewicz had been Senior Vice President, Research and Special Risks at SCOR, where he established reverse flow casualty, surety and fidelity bond operations and developed a building guarantee product.

Mr. Swierkiewicz began his career at the Insurance Company of North America (INA). There, he held various underwriting positions over sixteen years, first in the International Department and later in the INA Special Risk Facilities (which became CIGNA Special Risk Facilities). At CIGNA he was Vice President and Senior Product Line Officer for energy and technical business nationwide.

Mr. Swierkiewicz is former Chairman of the Conference of Special Risk Underwriters and member of the Coverage, Litigators, Educators and Witnesses Interest Group Committee of the CPCU Society. He holds a BA in Economics from Temple University and the CPCU designation from the American Institute for Property and Casualty Underwriters.▼

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 December 2011, ARIAS•U.S. was comprised of 370 individual members and 118 corporate memberships, totaling 1,012 individual members and designated corporate representatives, of which 269 are certified as arbitrators.

The Society offers its *Umpire Appointment Procedure,* based on a unique software program created specifically for ARIAS, that randomly generates the names of umpire candidates from the list of ARIAS•U.S. Certified Umpires. 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 a 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 "Arbitrator, Umpire, and Mediator Search" feature that searches the extensive background data of our Certified Arbitrators who have completed their enhanced biographical profiles. The search results list is linked to those profiles, containing details about their work experience and current contact information.

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.

For many years, the Society published the *ARIAS•U.S. Membership Directory*, which was provided to members. In 2009, it was brought online, where it is available 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 *ARIAS•U.S. Quarterly* journal, special member rates for conferences, and access to educational seminars and intensive arbitrator training workshops, 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,

Elaine Caprio Brady
Chairman

Mary Kay Vyskocil
President

ARIAS U.S. Membership Application

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 10/1/11

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$400	$1,175
FIRST-YEAR DUES AS OF APRIL 1	$267	$783 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$133	$392 (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.*

*** As a benefit of membership, you will receive the ARIAS·U.S. Quarterly, published 4 times a year. Approximately $40 of your dues payment will be allocated to this benefit.*

NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $400 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.

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ARIAS U.S.
P.O. Box 9001
Mt. Vernon, NY 10552

ARIAS U.S. Board of Directors

Chairman
Elaine Caprio Brady
Liberty Mutual Group
175 Berkeley Street
Boston, MA 02116
617-574-5923
elaine.capriobrady@libertymutual.com

President
Mary Kay Vyskocil
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
212-455-3093
mvyskocil@stblaw.com

Vice President (President Elect)
Jeffrey M. Rubin
Odyssey America
Reinsurance Corp.
300 First Stamford Place
Stamford, CT 0690
203-977-0137
jrubin@odysseyre.com

Ann L. Field
Zurich Financial Services
1400 American Lane
Schaumburg, IL 60196
847-605-3372
ann.field@zurichna.com

Eric S. Kobrick
American International Group, Inc.
180 Maiden Lane
New York, NY 10038
212-458-8270
eric.kobrick@aig.com

Elizabeth A. Mullins
Swiss Re America Holding
Corporation
175 King Street
Armonk, NY 10504
914-828-8760
elizabeth_mullins@swissre.com

John M. Nonna
Dewey & LeBoeuf LLP
1301 Avenue of the Americas
New York, NY 10019
Phone: 212-259-8311
Email: jnonna@dl.com

Susan A. Stone
Sidley Austin LLP
One South Dearborn
Chicago, IL 60603
312-853-2177
sstone@sidley.com

Damon N. Vocke
General Reinsurance Company
120 Long Ridge Road
Stamford, CT 06902
203-328-6268
dvocke@genre.com

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Administration

Treasurer
Peter A. Gentile
7976 Cranes Pointe Way
West Palm Beach, FL. 33412
203-246-6091
pagentile@optonline.net

Executive Director/ Corporate Secretary
William H. Yankus
Senior Vice President
CINN Worldwide, Inc.
P.O. Box 9001
Mt. Vernon, NY 10552
914-966-3180 ext. 116
wyankus@cinn.com

Carole Haarmann Acunto
Executive Vice President & CFO
CINN Worldwide, Inc.
P.O. Box 9001
Mt. Vernon, NY 10552
914-966-3180 ext. 120
cha@cinn.com