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Follow the Settlements and Allocation after *USF&G v. American Re*... The "Objectively Reasonable" Standard

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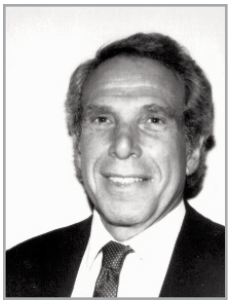

Eugene Wollan

editor's comments

At last! I have been agitating for some time to elicit Letters to the Editor from our readership, and now we finally have one. Dick White's note is, I hope, just the beginning.

Mea Culpa Department: in our last issue there was a typo that I failed to catch. I share the blame with many others, however, who also proofread (or were supposed to proofread) the semi-final version. In my article discussing the unfortunate ubiquity of phrases like, "He gave copies of the exhibits to George and I," I made the point that, contrary to what many folks seem to believe, "me" is not always or necessarily a dirty word. The problem is that "dirty" came out "duty." That's bad enough. What's even worse, however, is that of all the readers who should or could have caught it – ARIAS Editorial Board, CINN staff, innumerable ARIAS members — the only individual who caught it, or at least pointed it out, was my wife. This of course led me inevitably to the speculation that she may be the only person in the world who actually reads my stuff! Is that spousal privilege or marital devotion?

Our lead article in this issue, by Charles Scibetta, is a comprehensive and invaluable analysis of a very recent New York Court of Appeals decision on the super-hot subject of the extent to which a reinsurer is required to accept its cedent's allocation of the underlying settlement. It would behoove us all to be up to date on this subject.

Another topic that seems to be assuming increasing significance is the awarding of interim security. Walter Andrews and Sergio Oehninger have provided a valuable and very readable analysis.

Larry Schiffer, who as we all know could probably moonlight successfully as a computer geek if he weren't busy being a reinsurance lawyer, offers a "Primer" on technology in reinsurance arbitrations. Even though I think of myself as technologically challenged, a good deal of his discussion actually hit home with me.

This issue is so loaded with good, meaty material that we don't actually have room for the usual Law Committee case notes that appear in alternate issues. The notes can, of course, be found on the ARIAS website, and in any event the deviation is only temporary.

By the time you read this, the 2013 Spring Conference will have receded into memory. We hope the memories are pleasant ones for those who attended, and sources of envy for those who didn't!

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VOLUME 20 NUMBER 2

Editorial Policy

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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

Follow the Settlements and Allocation after *USF&G v. American Re*... The "Objectively Reasonable" Standard


Charles J. Scibetta

Charles J. Scibetta

On February 7, 2013, the New York Court of Appeals ruled in *United States Fidelity & Guaranty Co. v. American Re-Insurance Co.*[ii] ("USF&G"), a closely watched case on follow the settlements. Although the Court narrowed in two respects a summary judgment upholding a ceding company's allocation of a complex asbestos settlement, it nevertheless confirmed – and arguably raised – the high bar that reinsurers face when challenging their cedents' allocation of settlement payments among potentially responsive policies.

Like "almost all courts to consider the question," the Court first confirmed that the follow the settlements doctrine applies not just to a cedent's decision to settle a claim, but also to its allocation of the resulting loss among policies.

New York follows the majority rule: Follow the settlements applies to allocation.

Like "almost all courts to consider the question," the Court first confirmed that the follow the settlements doctrine applies not just to a cedent's decision to settle a claim, but also to its allocation of the resulting loss among policies.[iii] Given the weight and clarity of prior case law that had already applied the doctrine to allocation, the Court's ruling on this point broke little new ground. Still, the ruling is important confirmation that New York follows the majority rule.

The standard of review under follow the settlements is objective, not subjective.

In a more significant development, the Court clarified the standard of review in a follow the settlements analysis. Prior cases recognized that follow the settlements requires broad deference to cedents' claims handling, and courts generally have held that a reinsurer must follow its cedents' "good faith" decisions. Before *USF&G*, however, no court had articulated a clear definition of good faith in the allocation context.

In particular, some courts struggled with the question of whether and to what extent a cedent may consider its reinsurance coverage while making its allocation decisions. Most courts recognized that it was not bad faith for a ceding company to be aware of how an allocation would affect its reinsurance recoveries when it made that allocation. Yet some courts have suggested that it is bad faith for a cedent to use its awareness of reinsurance implications to choose an allocation that maximized reinsurance.[iv]

Arguably, that view is paradoxical. While courts generally have agreed on the need for deference to ceding company decisions and on the importance of streamlining reinsurance collection disputes, the focus by some courts on the ceding companies' subjective state of mind was having the opposite effect. Even in cases where ceding companies' decisions were objectively reasonable, some reinsurers were being allowed to delay payments while they took discovery into – and even sometimes held a trial on – the cedent's subjective motivations. Their objective: To invalidate an objectively reasonable allocation by proving that the ceding company chose that allocation to maximize reinsurance.

In *USF&G*, the Court rejected the subjective bad faith exception to follow the settlements. The Court clarified that the standard of review under follow the settlements is "objective reasonableness" and that the "cedent's motive should generally be unimportant."[v] In fact, the Court expressly held that a cedent can intentionally maximize its reinsurance recovery through its choice of allocation, so long as the cedent could also reasonably have made the chosen allocation in the absence of reinsurance considerations. The Court stated:

> Cedents are not the fiduciaries of reinsurers, and [they] are not required to put the interests of reinsurers ahead of their own. ...

Charles Scibetta is a founding partner of the law firm Chaffetz Lindsey LLP. Chaffetz Lindsey was involved in the appellate proceedings in USF&G as counsel for certain amici curiae.

> When several reasonable allocations are possible, the law ... permits a cedent to choose the one most favorable to itself. ... We think it unrealistic to expect that the cedent will not be guided by its own interests ....[vi]

The Court held that "reasonable" in the allocation context means: "The reinsured's allocation must be one that the parties to the settlement of the underlying insurance claims might reasonably have arrived at in arm's length negotiations if the reinsurance did not exist."[vii]

The Court's application of the objective standard to the cedent's summary judgment motion.

After clarifying that an objective standard applies under follow the settlements, the Court applied that standard to the facts before it to determine whether the trial court properly granted summary judgment upholding the cedent's allocation. The Court focused on three "significant, disputed assumptions underlying [the cedent's] settlement allocation" to determine whether, if reinsurance did not exist, those assumptions "might reasonably have been the basis for an arm's length settlement among the asbestos claimants, [the insured], and [the cedent]."[viii] The disputed assumptions were:

> (1) that all of the settlement amount was attributable to [reinsured] claims within the limits of the [cedent's] policies, and none of it to the [unreinsured] claims that [the cedent] acted in bad faith when it refused to defend [the insured] in asbestos litigation;
>
> (2) that claims by claimants suffering from lung cancer had a value of $200,000 each [an amount that reinsurers claimed maximized reinsurance], while certain other [claims fell well below the reinsurance attachment point]; and
>
> (3) that the [cedent's] entire payment should be attributed to [one policy, when multiple policies were settled].[ix]

As a preliminary matter, the Court made clear that the settlement terms agreed between the cedent and policyholder do not, standing alone, control under the objective reasonableness standard. The Court observed that the "record show[ed] that the allocation [the cedent] used in billing the reinsurers was one that [the cedent] discussed and agreed on in negotiations with [the insured] and the asbestos claimants."[x] The Court further noted the cedent's contention that "this in itself establishe[d] the validity of the allocation." However, the Court rejected the cedent's argument:

> We are reluctant to adopt a rule whereby an insurer could insulate its allocation from challenge by its reinsurer simply by getting its, essentially indifferent, insured to agree to it. ... [I]n many cases claimants and insureds ..., far from being indifferent, will enthusiastically support insurers' efforts to fund a settlement at reinsurers' expense. They will do this for the simple reason that insurers, like everyone else, are apt to be more generous with other people's money than their own. ... [A] cedent's allocation of a settlement for reinsurance purposes will be binding on a reinsurer if, but only if, it is a reasonable allocation, and consistency with the allocation used in settling the underlying claim does not by itself establish reasonableness.[xi]

Because it could not rely solely on the terms of the settlement, the Court examined the other facts in the record with respect to the three disputed elements of the allocation.

Concerning the question of whether the full settlement amount was attributable to claims within the policy limits and none to the bad faith claims, the Court catalogued a series of record facts that could support inferences adverse to the cedent.

Several pieces of evidence supported the inference that the bad faith claims had some settlement value. The cedent had taken a "very aggressive position" in denying that its policies ever existed, only to "abandon[] [that defense] at a late stage of the coverage litigation, in the face of strong proof that coverage existed."[xii] While the cedent had a plausible legal defense to the bad faith claims – *i.e.* that the insured lacked standing under the particular policies in issue – the court presiding over those claims denied the cedent's motion for summary judgment. Thus, the cedent faced "the possibility of a jury verdict – possibly a very large one – ... with the uncertain comfort of having a logically persuasive argument it could assert on appeal."[xiii] Just prior to settlement, the insured demanded $167 million for bad faith liability. Then, following agreement on settlement terms, the cedent and insured sought approval of a plan of reorganization, "partly on the ground that the bad faith claims had significant value" in the settlement.[xiv] The court that supervised and approved the bankruptcy plan observed that the bad faith claims had value to the estate.[xv]

In addition to this evidence suggesting that the bad faith claims had some value, the Court held that the record contained a piece of evidence that could call into question the reasonableness of the settlement amount for lung cancer claims. The Court noted that, "[A]n expert retained by the asbestos claimants estimated [the insured's] liability for each lung cancer claim at $91,174." If the cedent had valued the lung cancer claims at $100,000 or less, there would have been no reinsurance for those claims. Instead, the cedent valued the lung cancer claims at $200,000. The Court observed that "[i]t is unusual for claims to be settled for more than twice what the claimant's expert has asserted they are worth."xvi It said, "A fact finder could conclude that the lung cancer claims were priced at an unreasonably high level, and included value that should have been attributed to the bad faith claims."[xvii]

In light of these record facts – and citing no evidence to contradict them other than the fact that the cedent and insured agreed on the valuations – the Court held that it was "impossible to

conclude, as a matter of law, that parties bargaining at arm's length, in a situation where reinsurance was absent, could reasonably have given no value to the bad faith claims. This issue must be decided at trial."[xviii] The Court did not rank the importance of the various pieces of evidence that supported its decision. Nor did it say whether any of these pieces of evidence would have been sufficient by itself to defeat the cedent's summary judgment motion.

It seems at least arguable, however, that the expert evidence valuing lung cancer claims at less than $100,000 was critical, and that a zero-allocation to bad faith claims with apparent settlement value might not, by itself, preclude summary judgment for a cedent. For example, regardless of whether it has reinsurance, a cedent may well resist attributing settlement payments to bad faith claims because crediting the litigation risk of those claims could increase their strike value to future plaintiffs and their counsel. If a cedent has an objective basis to make payments within policy limits, therefore, it may be justified in paying the claims within the limits in consideration of a release on both the covered claims and on any bad faith exposure. Requiring cedents to expressly credit bad faith exposure in these circumstances would arguably be requiring them to put reinsurers' interests before their own, which the Court expressly held that cedents need not do.

It is a different case, however, if the cedent has no objective explanation for the payments it makes within its policy limits. The Court in *USF&G* appeared to find no evidence in the appellate record that it deemed to be an objective explanation for why the cedent and insured might have agreed to value lung cancer claims at more than the amount reflected in the expert estimate. Clearly, the Court looked for that evidence. Judge Smith, who authored the decision, asked the cedent at oral argument:

> [Y]ou valued the lung cancer ... claims at ... 200,000 .... What about the fact that the plaintiffs' experts' valuations were lower than that? ... Could you address specifically those expert valuations ... how did the valuations come to be higher than the plaintiffs' experts' numbers? ... Is there ... a document before the actual settlement ... that puts a higher value on lung cancer ...? [C]an you cite me to one?[xix]

Apparently, the Court found no such document – at least it cited none in its written decision. It is at least arguable that the lack of that evidence led the Court to conclude that it could not rule for the cedent as a matter of law on the disputed assumption that all of the settlement amount was attributable to claims within the policy limits and none to the bad faith claims. The Court remanded this issue for trial, where presumably the cedent would have further opportunity to explain its valuation.

The Court next assessed the relative valuation of lung cancer claims to the other disease claims that were valued below the reinsurance attachment point of $100,000. The Court observed that any over-valuation of lung cancer claims could reflect an undervaluation of other disease claims below the reinsurance attachment point. The Court cited no evidence to impugn the valuation of those other claims on their own. Under examination was the "relative valuation" of lung cancer and other claims.[xx] Again, the Court's failure to find evidence explaining the lung cancer valuation appeared to be key. The court sent this issue back for trial as well.

Finally, the Court upheld summary judgment on the cedent's decision concerning the last disputed assumption – the allocation of all loss to just one policy year. On that issue, the cedent did not simply rely on its agreement with its insured to support its decision. The Court upheld the allocation to a single policy year because case law at the time of the allocation provided viable arguments for doing so.[xxi]

Applying the objective standard in future cases.

Parties to future allocation disputes should be careful not to read too much into the Court's decision to remand the bad faith and lung cancer valuation issues for trial. Some industry observers have suggested that the Court's remand might reflect a material broadening of the grounds for reinsurer challenges to allocation decisions. And, clearly, the Court rejected the argument that an allocation's consistency with the underlying settlement is, by itself, sufficient to uphold the allocation as a matter of law. However, by rejecting reinsurer challenges to cedents' subjective motives, the *USF&G* decision seems to close more avenues for reinsurer challenge than it opens.

The view that *USF&G* materially widens the range of disputes that should go to trial arguably confuses the tort concept of "reasonableness" as used in negligence cases with the contract principle of "objective reasonableness" applied in *USF&G*. "[N]egligence actions do not ordinarily lend themselves to summary disposition because, even if the parties agree on the facts, the reasonableness of a defendant's conduct is a question for the jury."[xxii] In a follow the settlements context, however, cedents can argue that the "objective reasonableness" of their exercise of contractual discretion should rarely raise a jury question.

Even before *USF&G*, the Court of Appeals had already ruled that reinsurers have "little room" to challenge a cedent's claims handling decisions[xxiii] and that follow the settlements "streamlines the reimbursement process and reduces litigation by preventing a reinsurer from continually challenging the propriety of a reinsured's settlement decisions."[xxiv] Those rulings are inconsistent with the negligence concept of reasonableness, where a trial is ordinarily required.

In *USF&G*, the Court went even further to suggest that trials in allocation disputes should be rare. In discussing its rationale for holding that follow the settlements applies to allocation decisions, the Court made clear that it did so because a contrary rule would "invite long litigation over complex issues that courts may not be well equipped to resolve, creating cost and uncertainty and making the reinsurance market less efficient. . . . Deference to a

cedent's decisions makes for a more orderly and predictable resolution of claims."[xxv] Given the Court's view that lengthy reinsurance disputes damage the market, and that courts are ill-equipped to resolve them, it seems unlikely that the Court's adoption of the objectively reasonable standard signals support for the fact-driven negligence concept of reasonableness.

The better reading of *USF&G* seems to be that in adopting the objective reasonableness standard, the Court was simply making clear its rejection of the subjective bad faith test that some prior courts had approved. The question whether to judge the exercise of contractual discretion by objective or subjective standards is not unique to follow the settlements disputes. As one commentator has explained concerning the judging of contractual discretion under the U.C.C., some published court decisions "consider only whether the [discretion-exercising party's] action was reasonable, commercially reasonable, or justified by a reason within the justifiable expectations of the parties. Some consider whether the discretion-exercising party was motivated by the right kind of reasons."[xxvi] The objective approach is "the better view" because it avoids "the well-known difficulties in proving subjective motivation" and "best accommodates the discretion-exercising party's interest in deference by judge and jury with the other party's interest in nonarbitrary and expectable reasons for exercising discretion."[xxvii] New York law follows this "better rule" as a general contract rule.[xxviii] By adopting the objective reasonableness standard in *USF&G*, the Court simply confirmed that New York law also follows this rule in the follow the settlements context.

Under the objective approach, where the record reflects multiple objective explanations for a party's exercise of its discretion, "the discretion-exercising party, not a judge or jury, is entitled to weigh the competing reasons," and a party acts within its contractual discretion "whenever significant contractually permitted reasons for its actions were available."[xxix] In the follow the settlements context, since a judge or jury is not supposed to weigh the competing explanations for the cedent's claims-handling decisions under the objective test, the cedent should win as a matter of law – i.e., the question should never reach a judge or jury as a trier of fact – whenever the cedent can establish that some objective, contractually permissible explanation for the allocation outcome exists. In other words, if a reasonable judge or jury could reach the conclusion that objective evidence in the record can justify a reasonable cedent's decisions, then a reasonable cedent could also rely on that evidence. The judge or jury need not and should not step in to weigh that evidence against potentially conflicting facts.

The Court's specific definition of an "objectively reasonable" allocation is consistent with this view. When the Court held that an objectively reasonable allocation is one that a cedent and its insured "might reasonably have arrived at ... in arm's length negotiations" if there were no reinsurance, the Court put the focus not on what the cedent and insured actually agreed to, but on whether contractually permissible reasons for arriving at the challenged allocation existed. If contractually permissible reasons existed – regardless of whether or not the cedent considered them – then the allocation decision should be upheld. If the only possible objective explanation for the allocation is consideration of reinsurance, then reinsurers need not follow the allocation.

Future court decisions may further refine the rule stated in *USF&G*, but the Court's express adoption of the objective standard of review under follow the settlements stands as an important clarification of prior law.

i Charles Scibetta is a founding partner of the law firm Chaffetz Lindsey LLP. Chaffetz Lindsey was involved in the appellate proceedings in USF&G as counsel for certain amici curiae.
ii 20 N.Y.3d 407 (2013).
iii *Id.* at 419.
iv *See, e.g., Travelers Cas. and Sur. Co. v. Ins. Co. of N. America*, 609 F.3d 143, 159 (suggesting that an allocation is in bad faith if the cedent "was motivated primarily by reinsurance considerations").
v *Id.* at 421.
vi *Id.*
vii *Id.* at 420.
viii *Id.* at 422.
ix *Id.*
x *Id.* at 421.
xi *Id.* at 421-22 (internal quotation marks and citation omitted).
xii *Id.* at 422-23.
xiii *Id.* at 423.
xiv *Id.* at 424-25.
xv *Id.*
xvi *Id.* at 424.
xvii *Id.*
xviii *Id.* at 425.
xix Transcript of Oral Argument, pp. 51 – 53 (www.nycourts.gov/ctapps/arguments/2013/Jan13/Transcripts/010213-1-Transcript.pdf).
xx *USF&G*, 20 N.Y.3d at 425-26.
xxi In addition to assessing these disputed assumptions, the Court also commented on one other assumption underlying the allocation. The Court stated that "[it] seem[ed] to be undisputed (and in any event, it is clear from the record) that the claims for the most serious disease, mesothelioma, were reasonably valued." *Id.* at 424. The Court did not discuss the evidence that made the reasonableness of this valuation "clear from the record."
xxii *Merkley v. Palmyra-Macedon Cent. School Dist.*, 515 N.Y.S.2d 932, 937-38 (4th Dept. 1987).
xxiii *Unigard Sec. Ins. v. N. River Ins. Co.*, 79 N.Y.2d 576, 583 (1992).
xxiv *Travelers Cas. and Sur. Co. v. Certain Underwriters* at Lloyd's of London, 96 N.Y.2d 583, 596 (2001).
xxv *USF&G*, 20 N.Y.3d at 419 (citations omitted).
xxvi Steven J. Burton, *Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View*, 3 Wm. & Mary L. Rev. 1533, 1561 (1994).
xxvii *Id.* at 1562-63.
xxviii *See, e.g., Moran v. Erk*, 11 N.Y.3d 452 (2008) (examining the dangers posed by intrusive factual inquiries into subjective motives); *Kerns, Inc. v. Wella Corp.*, 114 F.3d 566, 570 (6th Cir. 1997) ("New York follows the rule that, if a party has a contractual right to take an action, the court may not inquire into that party's motive for exercising that right.").
xxix Burton at 1563.

If the only possible objective explanation for the allocation is consideration of reinsurance, then reinsurers need not follow the allocation.

news and notices

This class is the first in a series of new seminars designed to provide additional education programs geared to the more experienced certified arbitrators who would like to improve their umpire skills. This will be a full morning of instruction, with "educational seminar" credit toward certification renewal.

Susan Grondine-Dauwer Recertified as ARIAS•U.S. Arbitrator

At its meeting on May 8, the ARIAS•U.S. Board of Directors approved certification of **Susan E. Grondine-Dauwer**, a long-time ARIAS member and previously certified arbitrator. Ms. Grondine had not re-applied in 2010 when the requirements changed. She recently completed a full application, including sponsors, which is now required of former arbitrators.▼

Neff and Pratt Certified as ARIAS•U.S. Umpires

Also, at its meeting at the 2013 Spring Conference, the Board approved **Raymond M. Neff** and **George C. Pratt** as ARIAS•U.S. Certified Umpires, bringing the total number to 58. The full list of Certified Umpires can be found under the "Arbitrators/Umpires" menu of the website.▼

ARIAS•U.S. Announces Two New Simultaneous Training Events on September 18 in White Plains, New York

1. A Newly Recreated Intensive Arbitrator Training Workshop

The Education Committee is reorganizing the previous workshop to provide a more intense arbitration experience for attendees. This all-day training program is for anyone planning to apply for initial certification and for all arbitrators who would like to hone their skills. It is not considered an "educational seminar" for certification renewal purposes.

2. The First Ever Umpire Master Class!

This class is the first in a series of new seminars designed to provide additional education programs geared to the more experienced certified arbitrators who would like to improve their umpire skills. This will be a full morning of instruction, with "educational seminar" credit toward certification renewal.

Reception and dinner on the evening before the classes!

A unique networking experience...faculty and student participants from both courses will attend the reception and dinner on the evening of September 17.

The location will be the recently renovated Crowne Plaza Hotel in White Plains, N.Y.

Complete details of both programs will be announced in June. Registration will open in July.▼

Scrimgeour is Approved as Certified Arbitrator

At its meeting on March 12, the ARIAS•U.S. Board of Directors approved **James D. Scrimgeour** as a Certified Arbitrator, bringing the number of arbitrators to 238. His profile will be on the website shortly.▼

Edmund F. Rondepierre, Founding Director

Edmund Rondepierre, one of the founding directors of ARIAS•U.S. died on Wednesday, May 15 at his home in Darien, Connecticut. A memorial service was held on Wednesday, May 22 at St. Thomas Moore Church in Darien.

After a long career in insurance at Insurance Company of North America and General Reinsurance Company, Mr. Rondepierre retired in 1995, helped found ARIAS•U.S., and became an active arbitrator in reinsurance arbitrations, mostly as an umpire. He served as President of ARIAS•U.S. for several years.▼

DID YOU KNOW...?

DID YOU KNOW?...THAT ARIAS•U.S. HAS A MENTORING PROGRAM FOR NEW ARBITRATORS WHO HAVE NOT YET SERVED ON AN ARBITRATION PANEL THROUGH TO AN AWARD? IT GIVES NEW ARBITRATORS THE ABILITY TO SEEK ADVICE AND ASSISTANCE DIRECTLY FROM EXPERIENCED ARIAS ARBITRATORS ON ISSUES RELATING TO ARBITRATION PROCEDURE, CASE MANAGEMENT, ETHICS, AND PRACTICE MANAGEMENT. FULL DETAILS ARE UNDER THE PROGRAMS MENU OF THE WEBSITE.

feature

Interim Security: A Powerful Tool for Protecting the Integrity of Reinsurance Arbitrations

Walter J. Andrews
Sergio F. Oehninger

As reinsurance practitioners know, parties to reinsurance arbitrations are with increasing frequency requesting panels to issue interim awards requiring adverse parties to post prehearing security. The purpose of prehearing security is to maintain the financial *status quo* in order to ensure that any eventual award does not become meaningless because the assets of the adverse party have been dissipated elsewhere. Courts have consistently recognized arbitrators' authority to issue interim orders of security in the absence of a contractual provision expressly precluding it, and have routinely upheld such orders where a colorable justification for the award exists. Despite the clear recognition of a panel's broad authority to require security, some arbitrators have on occasion been reluctant to require security unless the movant demonstrates that its adversary already suffers from a deteriorated financial position or has through its past conduct raised questions about its compliance with a panel's ultimate award. The problem with such an approach is that it might be too late — ordering security only after compliance with a final award is in question frustrates the purpose of security. To better preserve the meaning of any ultimate award, this article suggests that arbitrators should exercise their clear authority to order interim security *before* the collectability of the ultimate award has already become an issue. Ordering security where the possibility exists that any final award could be rendered meaningless serves to better protect the integrity of the arbitration process by *preventing* the dissipation of assets. This approach can be particularly valuable in these uncertain economic times.

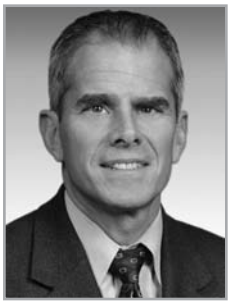
Arbitrators' broad authority to require interim security

There is no question that arbitrators have broad power to order interim security, as recently reaffirmed by the Southern District of New York in *CE International Resources Holdings LLC v. S.A. Minerals Ltd. Partnership*, No. 12 Civ. 8087 (S.D.N.Y. Dec. 10, 2012) (upholding interim security award where parties' agreement indirectly granted arbitrator such authority). In *CE International*, a sole arbitrator issued an interim award ordering respondents to post $10 million in security. The petitioner sought to confirm and enforce the award in court, arguing that the parties' agreement authorized arbitrators to award interim security under the agreed-upon rules, which provided that "the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property...[including]...an interim award, and...may require security...."

Respondents argued that the parties' adoption of those rules did not support a finding that the arbitrator acted within his powers in ordering security because the agreement was to be construed and enforced in accordance with New York law, under which prejudgment security is not allowed. The Southern District rejected respondents' argument, stating:

> It lay with the parties to confer on the arbitrator whatever powers they wished. Having adopted rules that allowed the arbitrator to award interim security, Respondents are bound by their bargain. Nothing about enforcing an order rendered in accordance with the procedures to which the parties agreed offends either New York law or New York public policy.

CE International at 6. The court held that by



Walter J. Andrews

Sergio F. Oehninger

The purpose of prehearing security is to maintain the financial status quo in order to ensure that any eventual award does not become meaningless...

Walter J. Andrews is the head of Hunton & Williams LLP's insurance and reinsurance practice group. Sergio F. Oehninger holds the position of Counsel in that group.

The arbitrator's authority to order security was sufficient reason for the court to confirm the interim arbitral award, because "the public policy favoring the enforcement of arbitration agreements and the confirmation of arbitral awards trumps any other."

consenting to rules authorizing arbitrators to order interim security the parties had consented to such authority even in the absence of an explicit grant of that specific authority in their contract. *Id.* at 7. The court focused on the broad authority of the arbitrator, and — significantly — did not consider whether the arbitrator had required a showing that respondents *already* suffered from a dire financial position or had *already* endangered compliance with any eventual award. The arbitrator's authority to order security was sufficient reason for the court to confirm the interim arbitral award, because "the public policy favoring the enforcement of arbitration agreements and the confirmation of arbitral awards trumps any other." *Id.* at 9.[1]

In reaching its conclusion, the court in *CE International* relied on the often cited opinion in *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003). There, the Second Circuit held that arbitrators had the authority to require that the reinsurer post prehearing security. *Id.* at 262. The reinsurer argued that the panel had exceeded its authority, manifestly disregarded the law, and violated public policy and principles of fundamental fairness. The court rejected each of the reinsurer's arguments and enforced the terms of the parties' contract, which granted arbitrators broad authority and required the posting of a letter of credit. In determining whether the security award should be upheld, the court in *Banco de Seguros* did not consider whether the panel had required a showing that the reinsurer already suffered serious financial troubles or already had engaged in conduct placing the eventual award in danger. Rather, the court focused on whether the arbitrators had the power to reach the issue of security under the arbitration agreement, "not whether the arbitrators correctly decided that issue." *Id.* In affirming the confirmation of the panel's interim award, the Second Circuit explained that it was "not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting an arbitral security measure that ensures a meaningful final award." *Id.* (internal citations omitted). The court held that the panel had the power to order security because the arbitration agreement did not preclude such a remedy. *Id.* at 262-263.[2]

Interim security has been ordered as long as there is a "specter" that any final award could be rendered "meaningless"

Courts have recognized that the purpose of interim security is to ensure that any eventual award does not become "meaningless." *See, e.g., Banco de Seguros*, 344 F.3d at 262; *British Ins. Co. of Cayman v. Water Street Ins. Co.*, 93 F. Supp. 2d 506, 516 (S.D.N.Y. 2000) (confirming panel's interim award requiring security where "specter" was raised that any final award could be rendered "meaningless"); *Nw. Nat'l Ins. Co. v. Generali Mexico Compania de Seguros*, S.A., No. 00 Civ. 1135, 2000 WL 520638, at *11 at n.13 (S.D.N.Y. May 1, 2000) (holding that arbitrators have authority to order interim relief in order to prevent final award from becoming meaningless); *Rakower v. Aker*, No. 98 Cir. 2652, 1998 WL 432092, at *3-4 (E.D.N.Y. May 27, 1998) (confirming arbitrator's award of temporary equitable relief to prevent final award from being meaningless); *Yasuda Fire & Marine Ins. Co. of Eur., Ltd v. Cont'l Cas. Co.*, 37 F.3d 345 (7th Cir. 1994) (affirming interim security order to prevent final award from becoming meaningless); *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019 (9th Cir. 1991) (same).[3]

Interim security's primary goal is therefore to prevent a Pyrrhic victory that leaves the prevailing party unable to collect on the resulting award. *See, e.g., id.* This purpose is likely to be frustrated if the panel requires a movant to demonstrate that the award has *already* been placed in doubt or rendered meaningless before security is ordered. Requiring a showing that the adverse party *already* is insolvent or in run-off or has *already* diverted or expended funds elsewhere does not ensure a meaningful final award, because it may well mean that the assets are not going to be available to satisfy the award; it will be too late to order security if the assets have already been dissipated or diverted.

Ordering security where a specter is raised that the final award could be rendered meaningless serves to better protect the integrity of the arbitration process by preventing the dissipation of assets before it is too late. In *British Ins. Co. of Cayman v. Water Street*, *supra*, a dispute arising under a facultative reinsurance contract, British

Insurance requested that Water Street provide prehearing security to ensure that any recovery awarded to British Insurance would be available. British Insurance proffered evidence of Water Street's financial instability, regulatory troubles, and possible future liquidation proceedings. *Id*. at 511. Water Street maintained that "no exigent circumstance or equitable basis" justified an order of security. The panel rejected Water Street's arguments and ordered it to provide $1.7 million in security. Water Street challenged the security award in court on grounds of manifest disregard of the law, arbitrator misconduct, evident partiality, and certain underlying defenses. The court rejected Water Street's arguments, saying that they overlooked the "essence of arbitration...to provide a speedy and inexpensive determination." *Id*. at 514 (citations omitted). Recognizing the purpose of interim relief to ensure a meaningful award, the court found that evidence of Water Street's "maneuvers" raised the "specter" that any final award could be rendered "meaningless" and that a "colorable justification" for the interim award existed. *Id*. at 516. The court accordingly confirmed the interim award and directed that security be provided as directed by the panel. Had the panel waited until Water Street underwent liquidation or insolvency proceedings, any final award would likely have been rendered meaningless. As *British Ins. Co. of Cayman v. Water Street* recognizes, ordering security when a threat to compliance with a final award is present better protects the integrity of the arbitration process and is well within a panel's authority. *Id*.[4]

Courts have consistently upheld arbitrators' interim awards of security

Courts are "reluctant to vacate interim arbitration orders aimed at preserving the ability of the parties to pay final awards that result from arbitration proceedings" and have afforded great deference to arbitration panels on these issues. *Great E. Secs., Inc. v. Goldendale Invs., Ltd.*, 2006 WL 3851159, at * 2 (S.D.N.Y. Dec. 20, 2006) (denying petitioner's request to vacate interim order requiring petitioner to place disputed amount into escrow account pending conclusion of arbitration). *See also Hynix Semiconductor, Inc. v. Rambus, Inc*., 2010 WL 3719086 (N.D. Cal. Sept. 17, 2010) (denying motion to reconsider order requiring $250 million bond); *Knox v. Palestinian Liberation Org*., 2009 WL 1591404 (S.D.N.Y. Mar. 26, 2009) (requiring posting of $120 million in security); *Everest Nat'l Ins. Co. v. Sutton,* 321 Fed. App. 192 (3d Cir. 2009) (requiring $70 million in security); *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392 (7th Cir. June 7, 2002) (affirming prejudgment security order against reinsurer); *Konkar Mar. Enter., S.A. v. Compagnie Belge D'Affertement*, 668 F. Supp. 267 (S.D.N.Y. 1987) (affirming panel's authority to require sums be placed into interest-bearing escrow account for benefit of prevailing party as determined in final award); *E. Asiatic Co., Ltd. v. Transamerican Steamship Corp*., 1988 A.M.C. 1086, 1089 (S.D.N.Y. 1987) (confirming interim order directing party to deposit money into interest-bearing escrow account pending arbitrator's final determination); *Southern Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) (confirming interim arbitration award); *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301, (2d Cir. 1982) (affirming arbitrators' order requiring proceeds of disputed $15 million letter of credit be placed in escrow).[5]

This trend in favor of interim security reflects the strong public policy favoring the enforcement of arbitration agreements and the confirmation of arbitral awards. Arbitrators can take guidance from recent court opinions reaffirming their power to order interim security and increase their willingness to order interim security to protect the meaning and effect of any ultimate arbitration award when there is a possibility that the final award could be rendered meaningless.[6] This approach will strengthen the integrity of the arbitration process.[7]

Practical Considerations

The facts of each particular case will of course play a critical role in an arbitration panel's decision as to whether there is a sufficient prospect of noncompliance with the final award to warrant an order of interim security. Parties to reinsurance disputes should be vigilant in identifying any indication that an adversary's compliance with a final award may be at risk from the time a dispute is anticipated and, under certain circumstances, may need to be prepared to request security along with the demand for arbitration or in connection with the organizational meeting. These are among some of the factors that may weigh in favor of requiring security:

- financial instability or distress
- threats of insolvency
- bankruptcy discussions
- contemplated winding down of operations
- regulatory problems potentially affecting ability to conduct business
- questionable financial or geographic maneuvers
- diversion of significant funds to related or offshore entities
- reluctance or failure to provide assurances of financial viability
- ongoing breach of obligations under reinsurance agreements
- repeated failure to make payments due
- failure to respond to demand for arbitration
- unexpected corporate changes occurring privately during or just prior to dispute or proceedings
- failure to comply with prior orders in arbitration
- other conduct or conditions raising doubts about compliance with any ultimate award

Whether any of these factors constitutes a ground for security will depend on the particulars of each dispute. Arbitrators should not, however, require a showing that the award has already been placed in doubt before ordering security.

Instead, they can require security where a "specter" is raised that any final award could be rendered "meaningless."[8]

Conclusion

With the recent downturn in the world economy, requests for prehearing security in reinsurance arbitrations have increased. Requiring a showing that the adverse party *already* suffers from a dilapidated financial condition or has *already* engaged in conduct that endangers collectability likely means that any eventual award has *already* become meaningless. The better approach is for an arbitration panel to require security when the possibility is raised that the panel's eventual award will be rendered meaningless. The steadfast recognition by courts of arbitrators' authority to order interim security – which reflects the strong public policy favoring the enforcement of arbitration agreements and confirmation of arbitral awards – means that an arbitration panel's order of interim security is likely to be upheld if challenged in court. Arbitrators' clear authority to require security therefore represents a powerful tool for protecting the integrity of reinsurance arbitrations in these uncertain economic times, and panels need not hesitate to exercise that authority when there exists a doubt concerning a party's compliance with a final award.▼

Endnotes

1 *CE International* reaffirmed that the standards for security that may be required in court are not required in arbitration, confirming the interim award "even though, had the underlying action been brought in this court or in the New York State Supreme Court, no such interim security could have been ordered." *CE International*, No. 12 Civ. 8087 at 7. The court recognized that arbitrators may be "presumptively free from principles of substantive law" and "in the arbitral context, there is a strong countervailing policy of enforcing arbitral awards in accordance with their terms, as long as the arbitrators have not exceeded their powers." Id. at 8 (citing cases).

2 Other courts have also consistently held that arbitrators are authorized to order interim security. *See, e.g., Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, No. C-03-1100 EMC, 2003 U.S. Dist. LEXIS 8796 (N.D. Cal. May 13, 2003) (holding that contract "implicitly empowered" panel to "formulate appropriate relief" including interim payments); *Meadows Indem. Co. Ltd. v. Arkwright Mut. Ins. Co.*, 1996 WL 557513 (E.D. Pa. Sept. 30, 1996) (ordering prehearing security where contract granted arbitrators broad powers without precluding remedies but did not specify security as authorized remedy); *Yasuda Fire & Marine Ins. Co. of Eur., Ltd v. Cont'l Cas. Co.*, 37 F.3d 345 (7th Cir. 1994) (affirming interim order requiring security where arbitration clause did not explicitly authorize it but did contain broad grant of authority and did not preclude security); *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019 (9th Cir. 1991) (upholding panel's prehearing security order where arbitration clause relieved arbitrators of following judicial formalities and strict rules of law).

3 *See also Atlas Assurance Co. of Am. v. Am. Centennial Ins. Co.*, 1991 WL 4741 (S.D.N.Y. Jan. 16, 1991) (confirming arbitrators' interim order placing disputed amounts in interest-bearing escrow account); *Compania Chilena de Navegacion Interoceanica, S.A. v. Norton Lilly & Co.*, 652 F. Supp. 1512 (S.D.N.Y. 1987) (confirming interim order directing party to post bond); David Martowski, *Ordering Security From An Arbitrator's Perspective*, The Arbitrator, Vol. 42, No. 1, at 6, April 2011.

4 In a different context, a New York state court recently recognized that CPLR 7502(c) permits provisional relief in aid of arbitration, such as pre-award attachments, where a later award would be "rendered ineffectual" without provisional relief. *See Sojitz Corp. v. Prithvi Info. Solutions, Ltd.*, 26 Misc. 3d 670, 891 N.Y.S.2d 622 (N.Y. Sup. Ct. N.Y. C. 2009) (confirming creditor's attachment of debtor's assets as security for potential award of panel). Courts also have held that in situations where there is a risk that assets will be dissipated or diverted before judgment, a party can be required to furnish security. *See, e.g., H.I.G. Capital Mgmt. Inc. v. Ligator*, 233 A.D.2d 270, 650 N.Y.S.2d 124 (N.Y. App. Div. 1996) (the "uncontrolled disposal of respondents' assets, which may have rendered arbitration award ineffectual, presented risk of irreparable harm"); *Palm Beach Realty Co. v. Harry J. Kangieser, Inc.*, 36 Misc. 2d 1058, 233 N.Y.S.2d 641 (N.Y. Sup. Ct. 1962) (requiring party to post security to avoid dissipation of assets).

5 Courts have consistently held interim security awards reviewable and enforceable prior to the entry of a final award. *See, e.g, Banco de Seguros, supra*; *CE International, supra; British Ins. Co. of Cayman v. Water Street Ins. Co., supra.*; *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986); *Southern Seas Navigation, supra*.

6 Requiring security as a matter of course already occurs in disputes involving foreign or unauthorized reinsurers. *See, e.g*, N.Y. Ins. L. §1213(c)(1)(A) (McKinney) (requiring unauthorized insurers and reinsurers to post pre-answer security); Conn. Gen. Stat. § 38a-27(a) (requiring unauthorized insurer to post security "to secure the payment of any final judgment which may be rendered in the action or proceeding"); *Travelers Indem. Co., v. Excalibur Reins. Corp.*, Case 3:12-cv-1793-RNC (D. Conn. December 24, 2012) (motion for order requiring reinsurer post pre-answer security); *British Int'l Ins. Co. Ltd. v. Seguros la Republica*, S.A., 212 F.3d 138 (2nd Cir. 2000) (holding that New York's pre-answer security statute applied to reinsurance and required reinsurer to post security); *Skandia Am. Reins. Corp. v. Caja Nacional de Ahorro y Seguros*, 1997 WL 278054 (S.D.N.Y. May 23, 1997) (applying pre-answer security statute to unlicensed reinsurer seeking to avoid compliance with the panel's order); Am. *Centennial Ins. Co. v. Seguros la Republica*, S.A., 1992 WL 162770 (S.D.N.Y. June 22, 1992) (applying New York's pre-answer security statute to reinsurance); *Nw. Nat'l Ins. Co. v. Kansa Gen. Ins. Co.*, No 92 Civ. 7422 (LJF), 1992 WL 367085 (S.D.N.Y. Nov. 25, 1992). *See also* Robert M. Hall, Pre-Answer *Security and Reinsurance Arbitrations*, 12-18 Mealey's Litig. Rep. Reinsurance 10 (2002) (analyzing pre-answer security statutes and case law).

7 Commentators have noted that arbitrators' powers to enforce interim awards may be limited. *See, e.g.*, Ronald S. Gass, *Panel Exceeded Powers by Imposing $10,000/Day Sanction for Party's Noncompliance with Interim Security Order*, ARIAS•U.S. Q., 3Q 2003 at 28. The general willingness of courts to confirm interim security awards, however, may be sufficiently coercive to support the practice. Moreover, parties may voluntarily comply to avoid the costs of unsuccessful motions to vacate or to avoid alienating the panel or risking an adverse inference on the merits. *See, e.g.*, Peter Skoufalos, *Having Arbitrators Order the Posting Of Security And Other Interim Measures*, The Arbitrator, Vol. 42, No. 1, at 2, April 2011.

8 Another benefit of interim orders of security may be that they are likely to foster early dispute resolution in certain cases. For instance, faced with an order requiring security as well as the willingness of courts to confirm such an order, a party facing significant exposure may be compelled to perform a full and frank evaluation of the claim's merit sooner than it might otherwise. This is likely to encourage early settlement talks and may lead to more swift and less costly resolution of certain disputes, thereby advancing one of the traditional advantages and goals of arbitration.

Arbitrators' clear authority to require security therefore represents a powerful tool for protecting the integrity of reinsurance arbitrations in these uncertain economic times...

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.

Recent Moves and Announcements

Susan Claflin's address is now Claflin Consulting Services LLC, c/o Alea Group, 55 Capital Boulevard, Rocky Hill, CT 06067, phone 860-258-6550, cell 203-907-9141, emails susan.claflin@aleagroup.com and claflin.arbs@gmail.com.

After several years of commuting to north San Diego, **Mitchell L. Lathrop** is returning to downtown San Diego. His new contact information is as follows: Law Office of Mitchell L. Lathrop, 401 B Street, Suite 1200, San Diego, CA 92101-4295, phone 619-955-5951, fax 619-866-4034, email mllathrop@lathropadr.com, website www.LathropADR.com.

Andrew Rothseid can now be reached at RunOff Re.Solve LLC, Two Bala Plaza, Suite 300, Bala Cynwyd, PA 19004, phone 610-660-7738, email andrew.rothseid@runoff resolve.com. Cell phone and facsimile numbers remain the same.

Susan E. Grondine-Dauwer can be found at 16 Northey Farm Road, Scituate, MA 02066, cell 617-642-3113, email segboston@comcast.net

Freeborn & Peters LLP has made emailing them a little easier. The shortened tail of all email addresses is now "@freeborn.com" and its new website has a new domain name: "www.freeborn.com." You should update the email addresses of Joseph McCullough Robin Dusek, Edward Diffin, Kathleen Ehrhart, and John O'Bryan.

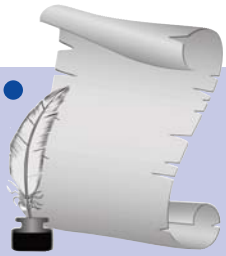
Andrew Pinkes has arrived at XL Group, Insurance Operations to be Executive Vice President, Global Head of Claims. He can be reached at 100 Constitution Plaza, 12th Floor, Hartford, CT 06103, phone 860-293-7762, mobile: 860-830-3485, email andrew.pinkes@xlgroup.com.

John Cashin is returning to the U.S. He is a long-time member of ARIAS•U.S., but has been out of the U.S. for nearly ten years, functioning from Dubai as Zurich's General Counsel and Head of Compliance for Middle East and Africa. He has now also taken on the role of General Counsel for General Insurance and, in the middle of this year, will relocate to New York to focus entirely on General Insurance. His contact information remains the same for now.

Frank DeMento has joined the Insurance/Reinsurance Group in Crowell & Moring's New York office. His contact information is Crowell & Moring LLP, 590 Madison Avenue, 20th Floor, New York, NY 10022, phone 212-895-4272, email fdemento@crowell.com.

Kevin Thompson's new email address is pkt812@yahoo.com.▼

To the Editor...



ARIAS•U.S. *Quarterly* readers are indebted to Professor Moxley not only for the substance of his recent piece, Some Tips for Conducting Muscular Arbitration Hearings, but also for condensing his paper on this subject to a bulletized format easily accessible to busy ARIAS members.

His article is organized generally as tips for lawyers and good practices for arbitrators and undoubtedly will assist those readers. There is one section, however, where Professor Moxley also introduces a normative policy judgment that is anything but normative. I refer to the section Form of Award, and specifically what I would characterize as a slant against reasoned awards.

A letter to the editor is not the forum for a broad consideration of reasoned awards. More importantly, it would require one more knowledgeable than I, to offer that consideration. Suffice it to say, for this forum, that reasoned awards conveying to the parties the essence of why one party prevailed on one or more issues, may be more satisfying and even-handed than the current practice, albeit Panel sanctioned, of informal limited feedback from party arbitrators.

Of course as Professor Moxley states, there is a risk of complexity, cost and delay. That said, presiding Judge Pollock observed some one hundred and fifty years ago in a succinct judgment illustrative of a model reasoned award, "...there are certain cases of which it may be said res ipsa loquitur, and this seems one of them."[1]

Sincerely,

Richard L. White
Deputy Liquidator
Integrity Insurance Company
625 From Road
Paramus, NJ 07652

1 Chief Baron Jonathan Frederick Pollock in Byrne v. Boodle 159 Eng. Rep. 299, 300-01 (Ex 1863)

Letters to the Editor may be sent to Eugene Wollan at ewollan@moundcotton.com

feature

A Primer on Technology in Arbitrations

This article is based on a paper presented at the ARIAS-U.S. Educational Seminar, "Difficult Issues in Arbitration – Even for Experienced Arbitrators," on March 14, 2013


Larry P. Schiffer

...we will review the various types of technology available for use in a reinsurance arbitration from the organizational meeting through the hearing phase, and discuss the dreaded issue of whether and how to use and manage e-discovery.

Larry P. Schiffer is a partner in the New York office of Patton Boggs LLP, where he concentrates his practice on commercial litigation, including insurance and reinsurance disputes, mediation, and arbitration. He is Co-Chair of the ARIAS-U.S. Technology Committee.

Larry P. Schiffer

INTRODUCTION

Technology is ubiquitous in our personal and professional lives. We live in a technological world where new advances quickly render what was the latest and greatest software and hardware obsolete. In dispute resolution, whether in arbitration or litigation, technology plays a significant role. Technology has been used in reinsurance arbitrations for years. Nearly all arbitrators are familiar with real time transcription of a witness's testimony (one such product is LiveNote) and the use of PowerPoint for openings and closings. In this part of the seminar, we will review the various types of technology available for use in a reinsurance arbitration from the organizational meeting through the hearing phase, and discuss the dreaded issue of whether and how to use and manage e-discovery.

TECHNOLOGY DURING THE ARBITRATION

Discovery

The available technology for use during an arbitration, including at the arbitration hearing, is myriad. But the question of what technology will be used, particularly in discovery, and how will information be provided to the panel are important issues to consider at the outset of the arbitration.

Document discovery is the first area to consider. Insurance and reinsurance companies today are typically paperless. This means that underwriting, contract, and claims records are typically kept electronically and e-mail is used more frequently then writing letters. Many companies routinely scan all paper documents into their systems and discard the paper. Many legacy files are also often in some sort of electronic format. Nevertheless, there are some companies that still use paper and some older contracts or claims that remain in paper as well.

How documents are produced between the parties is not a big concern for arbitrators, but because it has ramifications for how exhibits will be created for the hearing (or any pre-hearing applications), it is useful to understand the parties' protocols early on in the dispute. Some arbitrators are more involved than others in how documents are produced, and it is an issue worth considering.

When the parties decide to produce documents in electronic format, client files may be scanned into various formats depending on the expected use of the electronic data. Simple electronic production of documents may only require production in PDF (portable document) format. A PDF is essentially a picture of the document, but in a format that allows some searching and annotating depending on the grade of the software used to create the PDF. The more sophisticated software allows for full search capability and the ability to add production numbers electronically along with annotations and linking of attachments.

Another format is TIFF (tagged image file format), which is merely an image of the document. This format is often used to load documents into more complex document management software programs. These programs, of which there are many, generally require the TIFF image to run through optical character recognition (OCR) so that the document can be word searched. Documents can also be provided in "native" format, but that comes with its own set of issues, including the concern about the ability to edit or manipulate the document.

Before an arbitration panel considers mandating a particular document

production protocol, it is useful to hear the parties out, consider the cost associated with the document production, and address whether e-discovery is relevant to the situation. More importantly, an arbitration panel needs to consider how it will want documents presented to the panel for the hearing, as that will dictate the most efficient way of exchanging documents in discovery.

Depositions

It is nearly universal today that every deposition transcript is produced in electronic format by nearly every court reporting service alongside the traditional paper transcript and short form min-u-script. For arbitrators, electronic transcripts allow for ease of storage and manipulation in advance of the hearing on those occasions where the arbitrators have requested all depositions in advance.

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

Technology in the Briefing Phase

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

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

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

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

If electronic briefs with hyperlinks are not going to be used, but the panel wants exhibits electronically, it will be necessary to determine in what manner the exhibits are to be produced. If the panel wishes to annotate the exhibits in digital format, then the exhibits must be saved to the CD or DVD in the proper format to allow for annotation. This may be PDF format if the arbitrators

CONTINUED ON PAGE 22

LiveNote and TextMap are two products familiar to most arbitrators. LiveNote, TextMap, and similar software packages allow for searching that is based on key words. More sophisticated uses include the creation of issues and annotations, as well as synching up with exhibits and even video.

2013 Spring Co
Explores Emerging Risks

nference

With the scenario of a messy hospital dilemma providing the context for several sessions and videos dramatizing three emerging risk areas, the 2013 ARIAS•U.S. Spring Conference delved into new territories that are expected to become much more important in the dispute resolution landscape of the future. The conference sessions focused on "**Emerging Risks and Products**" that will impact the reinsurance and insurance industry in potential arbitrations over the horizon.

To bring about this focus, the Co-Chairs produced an interesting and entertaining fact pattern designed to enlighten attendees about various risks that are emerging such as cyber liability, climate change, complications of medical claims, and business interruption of supply chains.

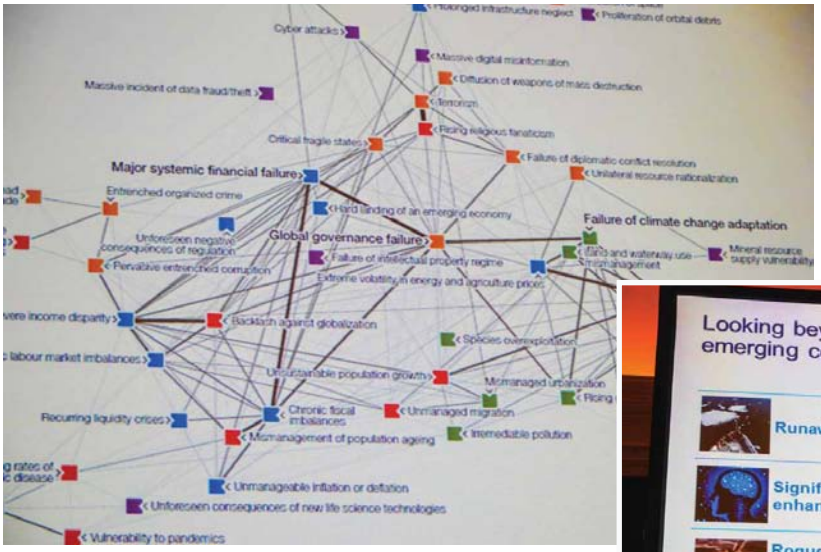
Ann L. Field introduces Keynote Speaker

The faculty also introduced several cutting edge products that have been developed and that are designed to protect companies from these same emerging risks. Additionally, sessions explored how captive insurance companies and brand protection play a role in addressing current risks. The overarching goal of the conference was to alert arbitrators, industry representatives, and attorneys to issues and disputes that they may grapple with as these new risks and products emerge.

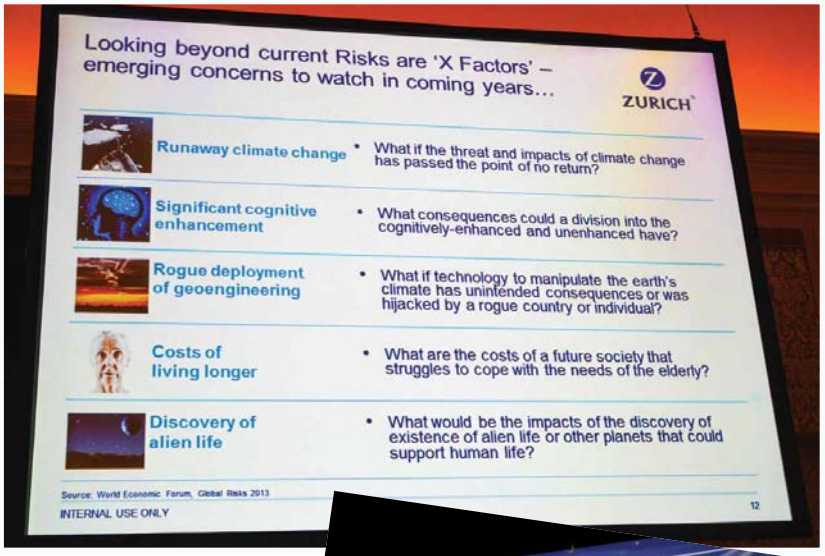
Keynote Speaker Michael G. Kerner

Complementing the conference theme, from Zurich Switzerland, was Keynote Speaker, **Michael G. Kerner**, Zurich's CEO of General Insurance. Using the recent World Economic Forum as a point of departure, he presented an extensive analysis of risks, both evolving and emerging, that the industry is evaluating as it prepares for the possibilities of major impacts from societal, environmental, economic, geopolitical, and technological changes and events. The address was the most theme-relevant presentation ever at an ARIAS conference.

In addition, as part of its mission to maintain ARIAS member attention on the proper handling of ethics issues, the Ethics Discussion Committee led breakout sessions that focused on how umpires should deal with potential conflicts of



Keynote address graphics showed a broad range of potential risks.



interest stemming from appointments or expert witness testimony in other disputes. The results of the breakouts were then reported in general session.

For the first time in recent years, a report from ARIAS•U.S. committees was included in the conference. The purpose was to ensure that the ARIAS•U.S. membership is aware of the extensive activities that are in progress within the organization and to encourage joining by those who have skills they wish to offer.

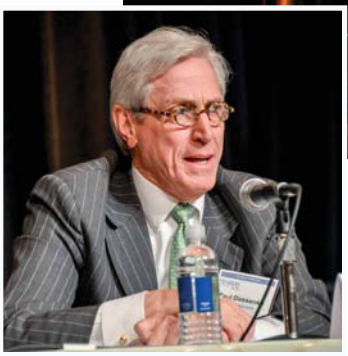
The conference attracted 302 paid attendees, plus six non-member faculty guests. In addition, 31 spouses and guests attended the food events and recreational activities.

Ann L. Field summarizes the Conference Fact Pattern...

...and shows first video about a medical center dilemma

At the break on Thursday afternoon, 46 golfers took to the Ocean Course and 16 tennis players competed on the Breakers courts in their respective tournaments, under clear skies. **Jennifer Devery** and **Eric Kobrick**, chaired the golf and tennis tournaments.

While praise for the quality of the training sessions was often heard, the positive comments about The Breakers continued from last year. This was the second year in a row for ARIAS•U.S. To avoid Breakers boredom, there will be a change of pace next year, as the Spring Conference travels down the road to the Ritz-Carlton on Key Biscayne. The 2014 Spring Conference will take place on **May 7-9. Save the Dates!**▼



Captive Insurance Companies *Session...(from left) Eric A. Haab, Michael G. Furgueson, Paul E. Dassenko, and Samantha B. Miller*

Aggregating/Batching Medical Claims *Session – W. Neil Rambin, Joy L. Langford*

Lunchtime on opening day was cool inside. The Women's Networking Luncheon is in the foreground.

Exploring the Interruption of Supply Chains after an ARkStorm *...(from left) Anthony Clark, Linda Conrad, Lloyd A. Gura*

...with news of the storm leading the way

***Cyber Liability** Session – (from left) Laurie A. Kamaiko, Robert A. Parisi, Jr., Stewart Baker, and John L. Jacobus*

...with a dramatic example of cyber theft to start

***Bad Faith, Attorneys Fees, and Interest – Oral Arguments** – Adam H. Fleischer makes a reasonable point...*

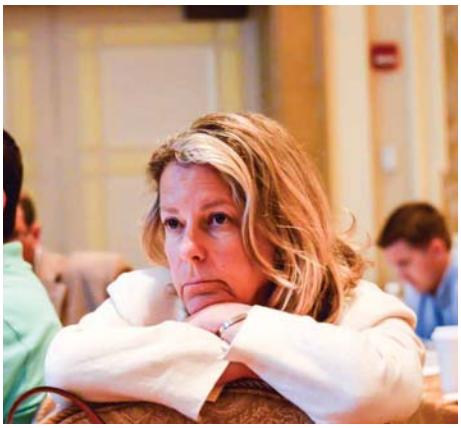
...Scott M. Seaman begs to differ

***Bad Faith, Attorneys Fees, and Interest – Panel Deliberations** – (from left) Cynthia Koehler, Daniel E. Schmidt, IV, Clive Becker-Jones*

ARIAS•U.S. Committees Report on Recent Activities *– (from left) Elizabeth Kniffen (Technology), Mary Ellen Burns (Education), Ann Field (Forms ansd Procedures), Jeffrey Rubin (Arbitration Task Force), Mary Kay Vyskocil (Strategic Planning and International)*

Ethics Wrap Up *– (from left) Peter J. H. Rogan, Mark L. Abrams, Mina Matin, Edward P. Krugman, Eric S. Kobrick*

Two receptions gave plenty of time for discussion of the days training sessions.



AROUND *the* CONFERENCE

Breaks provided time to catch up.

CONTINUED FROM PAGE 13

have the appropriate software version that allows for annotations or in some other format as long as the annotation capability is imbedded in the disk sent to the panel. If the panel only wants to have the electronic version of the exhibits as a resource and does not plan on annotating the documents on disk, then a simple PDF or TIFF file for each exhibit should suffice.

TECHNOLOGY AT THE HEARING

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

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

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

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

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

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

E-DISCOVERY

E-Discovery is about the biggest issue in litigation in the past several years. There are seminars and books on E-Discovery and every bar association, law firm, and court system has E-Discovery experts, committees, rules, and procedures. So what is E-Discovery?

E-Discovery is the manner in which electronically stored information (ESI) is collected and produced as part of a party's discovery obligation. Because companies and individuals are storing records in electronic media and moving away from paper files, nearly every case involves ESI. In 2006 and 2007, the Federal Rules of Civil Procedure were amended to address E-Discovery. Most states now have similar rules. Do these rules apply to reinsurance arbitration? Not unless the arbitration clause and/or contract wording specifically require the application of federal or state procedural law to the arbitration proceeding.

Regardless of whether federal or state rules on the collection and discovery of ESI apply to reinsurance arbitration, the underlying issue needs to be considered because of the proliferation of electronic communications and electronic storage of business information. So we look to what the federal and state courts have done to see what may be applicable in a particular dispute.

One of the biggest issues in E-Discovery is the failure of a party to preserve ESI. The failure of a party to keep evidence and what to do about the missing evidence is not a new issue. Procedural rules and court cases have existed for many years dealing with spoliation of evidence and the use of an adverse inference against the party that fails to preserve important evidence. With the advent of ESI, preserving electronically stored records and communications in the face of corporate records retention and destruction policies has become a big issue.

Because the failure to maintain ESI has resulted in significant spoliation of evidence sanctions in many courts, the first thing that counsel must do is make sure their clients put a hold on the destruction of any ESI and notifying all relevant company personnel to preserve all relevant records. The issue of when and how a litigation hold was issued and when and how relevant company personnel were notified to preserve and collect documents may arise in a reinsurance arbitration if relevant documents were not preserved after the time it became reasonably known that a dispute as arisen. In those instances, arbitrators may need to consider how the courts approach this issue when faced with a request to sanction a party for destroying ESI.

Under Federal Rules of Civil Procedure

37(f), a "safe harbor" exists where a party destroys or alters documents "as a result of the routine, good-faith operation of an electronic information system." In practical terms, the "safe harbor" is intended to protect parties from sanctions if spoliation of discoverable ESI occurs as a result of the routine operation of the party's information technology systems. This assumes, however, that the party with the duty to preserve acted in "good faith," and therefore could not have anticipated and prevented the spoliation through reasonable preservation measures. Thus, the "safe harbor" is by no means a green light to allow the "automatic" destruction of discoverable information by recurrent document management practices. In fact, the "safe harbor" is very limited and will not protect against other actions a court might take because of spoliation of evidence, including an adverse inference or the requirement that additional witnesses be made available. While FRCP 37(f) does not apply to arbitrations, it does give arbitrators some guidance on how to address requests for sanctions where ESI has been altered or destroyed.

FRCP 34 governs the production of ESI. Under the revised Rule 34, parties now can seek the production of ESI in a particular format (e.g., in native format (Excel, Word, Outlook), hard copy, or PDF, TIFF or other image format). How ESI is collected and produced depends on the capabilities and cost of the software used to store, search, view and use ESI, and which format is best for the software being used. If an arbitration requires the production of complex ESI, arbitrators need to be cognizant of the cost of collecting, storing, and searching ESI before granting ESI discovery requests.

If E-Discovery is going to be an issue in an arbitration, the best time and place to resolve questions concerning production of ESI is at the organizational meeting and not after document requests are served. Coordination of the production and search of ESI is complex and time-consuming, not to mention expensive, and resolving issues up front is the best way to avoid unnecessary delay and motion practice. The Federal Rules require the parties to engage in a discovery conference before the initial scheduling conference to address E-Discovery issues. FRCP 26(f).

Sometimes ESI is not readily available from a party's computer systems. In these circumstances, many jurisdictions allow for cost-shifting to address requests for ESI that cannot be easily obtained. Additionally, cost sharing agreements may make sense for both parties where there is a significant amount of ESI in one party's systems that both parties need to assess and search. Under the Federal Rules, parties are to discuss these issues and try to work them out at the discovery conference. In a reinsurance arbitration, this can be accomplished before the organizational meeting at an initial meet and confer or at the organizational meeting. The arbitrators should inquire about whether any E-Discovery issues are anticipated and should encourage the parties to meet and resolve those issues in advance of the organizational meeting if possible.

While E-Discovery is daunting, it needs to be kept in perspective. Very few reinsurance disputes require the kind of E-Discovery described above. Most parties have no difficulty exchanging e-mails, the relevant claim or contract files, and other ESI relevant to the dispute. Managing E-Discovery is required only in the most complex case where it is necessary to delve into large amounts of ESI contained in extensive databases and numerous computers. Arbitrators need not impose unnecessary procedural requirements if the parties do not have any real issues concerning E-Discovery to address.▼

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DID YOU KNOW...?

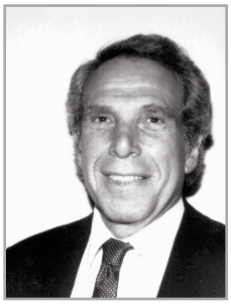
DID YOU KNOW?...THAT THERE ARE 14 DIFFERENT FORMS AND LISTS RELATING TO ARBITRATION AND MEDIATION AVAILABLE ON THE WEBSITE. THEY CAN BE ACCESSED THROUGH THE RESOURCES MENU.

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 Engagement

Eugene Wollan



Thus, we frequently encounter items like: "The insured shall submit ..." Entirely apart from strictly grammatical considerations, the question of ambiguity rears its ubiquitous head. Is this statement a prediction or a mandate? If it's a requirement, why not make this clear by using "must"?

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

One of my pet complaints, as my faithful readers are by now undoubtedly tired of hearing, is the pretentious assumption by the drafters of insurance policies and other contracts that their modest work product occupies a literary status second only to Biblical writings. This is most often reflected in the abandon with which they throw around the word "shall," apparently under the impression that it sounds particularly stately or elegant or imperative, when a single "will" or "must" would be grammatically more accurate and semantically more appropriate. I was taught that in ordinary parlance "shall" is used for the first person and "will" is used for the second and third persons; this is reversed only when extraordinary emphasis is desired. One more rule of grammar that's honored more nowadays in the breach than in the observation!

Thus, we frequently encounter items like: "The insured shall submit ..." Entirely apart from strictly grammatical considerations, the question of ambiguity rears its ubiquitous head. Is this statement a prediction or a mandate? If it's a requirement, why not make this clear by using "must"? If it's a prediction, what effect does it have? (When will the insured "submit" whatever it is? Next Tuesday?)

I have been known in the past to fall victim to exactly the same behavior that I criticize in others, and I fear that I am about to repeat that here. In the process of trying to instill good writing habits into the (sometimes impenetrable) minds of many generations of young lawyers. I have distilled much of my accumulated "wisdom," which is really just a euphemism for pontification, into a few sets of rules that are deliberately phrased in quasi-Biblical terms. Why? you ask. Perhaps in the hope of making a more lasting impression than the proverbial footprint in the snow. Perhaps because of my admiration for the elegant poetic language of Genesis, Exodus, etc, etc. Or maybe just because I'm showing off.

Whatever the reasons, though, here is my own personal list of Literary Commandments.

The Ten Commandments

1. Thou shalt write English, not jargon.
2. Thou shalt write thoughtfully, not mechanically.
3. Thou shalt honor precision over vagueness.
4. Thou shalt honor correctness over fad.
5. Less is more.
6. Thou shalt honor the basic principles of grammatical form and structure.
7. Thou shalt honor the integrity of the sentence.
8. Write unto others as you would have them write unto you.
9. Thou shalt proofread diligently.
10. Strunk & White are thy twin Deities, and thou shalt consult them frequently.

All of these are — or at least should be ... self-explanatory. Some of them overlap (#s1 and 2, for example), and at least one (#10) has a distinctly sacrilegious sound to it. But they all make sense, they are all irrefutable, and if they were all scrupulously followed the world of lawyer writing would undoubtedly be " a far, far better place."

If I were asked to identify the most important theme that underlies all my grumblings and rumblings about the way lawyers write, it would probably be this admonition: think about what you're writing; don't fall into the trap of taking the path of least resistance simply because that path contains the words that spring most readily to mind. It may take an iota of extra thought to say what you want to say without going straight via automatic pilot to the handiest cliché, but it's worth the effort. Clichés are

the booby traps that ambush the lazy writer.

Here's a typical booby trap. I would guess that 99% of the lawyers out there (rough estimate!), in describing an action taken under a statute, begin with the phrase "pursuant to." OK in its place, even though it sounds a bit pretentious to begin with. But why not vary it from time to time with, say, "in accordance with," or "by virtue of," or even "under"? Because, I suppose, "pursuant to" beckons with the familiarity of an old friend.

Sometimes a thought process can be just as much of a cliché as a particular word or phrase. What percentage of the briefs or memos of law that you have seen end with something very much like this: "Conclusion

> For the foregoing reasons, this motion should be granted/denied in its entirety."

(My rough guess: 96.3%)

Just another example of lazy thinking. Or, more accurately, failure to think. Put aside the unnecessarily legalistic word "foregoing." Does this sentence contain a single syllable that advances the writer's cause? Does it do anything to capture the reader's interest? Clearly not. The conclusion section offers the skillful advocate a final opportunity to persuade. It should be pithy and original, perhaps even dramatic. But the one thing it should certainly not be is humdrum.

As a related part of my personal crusade, I have also devised a list of corollaries to the Ten Commandments, which I have chosen, in keeping with my quasi-Biblical approach, to designate The Seven Deadly Sins. Some are just restatements of one or more Commandments, to flesh out the ideas or even just reiterate them. The major difference is that the Commandments are positive – they tell you what to do – whereas the Sins are negative – they tell you what not to do.

Anyhow, here they are.

The Seven Deadly Sins

1. Committing basic grammatical solecisms.
2. Writing with less than total clarity and precision.
3. Overwriting.
4. Trying too hard to sound elegant or literary or, especially, "lawyerly."
5. Writing in a dull, mechanistic, unthinking way.
6. Not organizing properly.
7. Failing to proofread carefully.

I hope no one will take it amiss that my commandments use language formulations that might have been lifted from The Dead Sea Scrolls. I certainly have no quasi-deistic pretensions or aspirations. Nor am I in the same league as Daniel Dravot (in The Man Who Would Be King), who encouraged the natives to regard him in those terms. I'm just a slightly obsessive-compulsive lawyer who spends too much time focusing on the mistakes of others, perhaps in order to avoid confronting his own!▼

in focus

Recently Certified Arbitrators

Susan E. Grondine-Dauwer

Susan E. Grondine-Dauwer

Susan Grondine-Dauwer has recently left her position as Senior Vice President and General Counsel of R&Q Solutions. After a short hiatus from taking on arbitration assignments, she has now been re-certified by ARIAS•U.S.

After 25 years in the industry working for over a dozen ceding companies and reinsurers, Ms. Grondine-Dauwer is an independent consultant providing technical and peer review services in conjunction with her arbitration practice.

James D. Scrimgeour

James D. Scrimgeour

James (Jamie) Scrimgeour is Senior Counsel in the Reinsurance Legal Group of The Travelers Companies, Inc., where he manages insurance and reinsurance disputes and analyzes various complex legal matters directly affecting the insurance operations of the Company and its subsidiaries. He also specializes in general business counseling to the group's placement, captive and runoff client base and is co-chair of the Company's Internal Resolution Committee, which facilitates resolution of internal disputes through mediation and, in certain cases, streamlined arbitration. Mr. Scrimgeour moved into his current role from a position as Senior Counsel in the Company's Special Liability Group (responsible for managing asbestos and environmental liabilities).

Prior to joining Travelers in 2003, he clerked for the Hon. Richard N. Palmer of the Connecticut Supreme Court and specialized in reinsurance and insurance coverage litigation as well as general corporate law for several years at the Hartford-based law firm of Day Pitney, LLP where he also was a member of the Oliver Ellsworth Inn of Court.

Mr. Scrimgeour has presented or facilitated at numerous industry conferences and seminars, including Mealey's. AIRROC, and ARIAS-U.S. He is also founding member of the Mediation Task Force of the Re/Insurance Mediation Institute.

Throughout his career, Mr. Scrimgeour has managed or participated in approximately 100 arbitrations resulting in nearly 60 hearing days involving live testimony. Mr. Scrimgeour received his degrees from Amherst College and The University of Connecticut School of Law.

DID YOU KNOW...?

THAT ARIAS•U.S. OFFERS TWO METHODS FOR SELECTING AN UMPIRE. THE BASIC PROCEDURE RANDOMLY SELECTS FROM THE FULL LIST OF CERTIFIED ARBITRATORS OR UMPIRES, WHILE THE ENHANCED SELECTION PROGRAM RANDOMLY SELECTS FROM A LIST THAT IS FILTERED BY EXPERIENCE PARAMETERS. COMPLETE DETAILS CAN BE FOUND UNDER "SELECTING AN UMPIRE" IN THE ARBITRATORS/UMPIRES MENU OF THE WEBSITE.

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

Intensive Workshop and Umpire Master Class

September 18, 2013

Two New Simultaneous ARIAS•U.S. Training Events:

1. A newly recreated Intensive Arbitrator Training Workshop

The Education Committee is reorganizing the workshop to provide a more intense arbitration experience for attendees. This workshop is for anyone planning to apply for initial certification and for all arbitrators who would like to hone their skills. It is an all-day training program. It is not considered an "educational seminar" for renewal purposes.

2. Announcing the first Umpire Master Class!

The first in a series of new seminars designed to provide additional education programs geared to the more experienced certified arbitrators who would like to improve their umpire skills. A full morning of instruction, with "educational seminar" credit toward certification renewal.

Reception and dinner on the evening before the classes!

A unique networking experience…faculty and student participants from both courses will attend a reception and dinner on the evening of September 17.

Location and Schedule

The location will be the recently renovated
Crowne Plaza Hotel in White Plains, New York.

Complete details of both programs will be announced in June.

Registration will begin in Mid-July.

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 May 2013, ARIAS•U.S. was comprised of 335 individual members and 929 corporate memberships, totaling 940 individual members and designated corporate representatives, of which 225 are certified as arbitrators and 58 are certified as umpires.

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 *Selecting an Umpire* 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,

Mary Kay Vyskocil
Chairman

Jeffrey M. Rubin
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.

NAME & POSITION _____

COMPANY or FIRM _____

STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____ CELL _____

FAX _____ E-MAIL _____

Fees and Annual Dues: Effective 10/1/12

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$415	$1,200
FIRST-YEAR DUES AS OF APRIL 1	$277	$800 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$138	$400 (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 $415 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

Payment by check: Enclosed is my check in the amount of $_____
Please make checks payable to
ARIAS·U.S. (Fed. I.D. No. 13-3804860) and mail with
registration form to: ARIAS·U.S.
Dept. CH 16808, Palatine, Il. 60055-6808

Payment by credit card: Fax to 914-966-3264 or mail to ARIAS·U.S., P.O. Box 9001, Mt. Vernon, NY 10552.
Please charge my credit card: (*NOTE: Credit card charges will have 3% added to cover the processing fee.)*

☐ AmEx ☐ Visa ☐ MasterCard in the amount of $_____

Account no. _____

Exp. _____/_____/_____ Security Code _____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

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

_____

Signature of Individual or Corporate Member Applicant

P.O. Box 9001
Mt. Vernon, NY 10552

ARIAS U.S. Board of Directors

Administration