VOLUME 22 NUMBER 1

# ARIAS U.S.

## QUARTERLY

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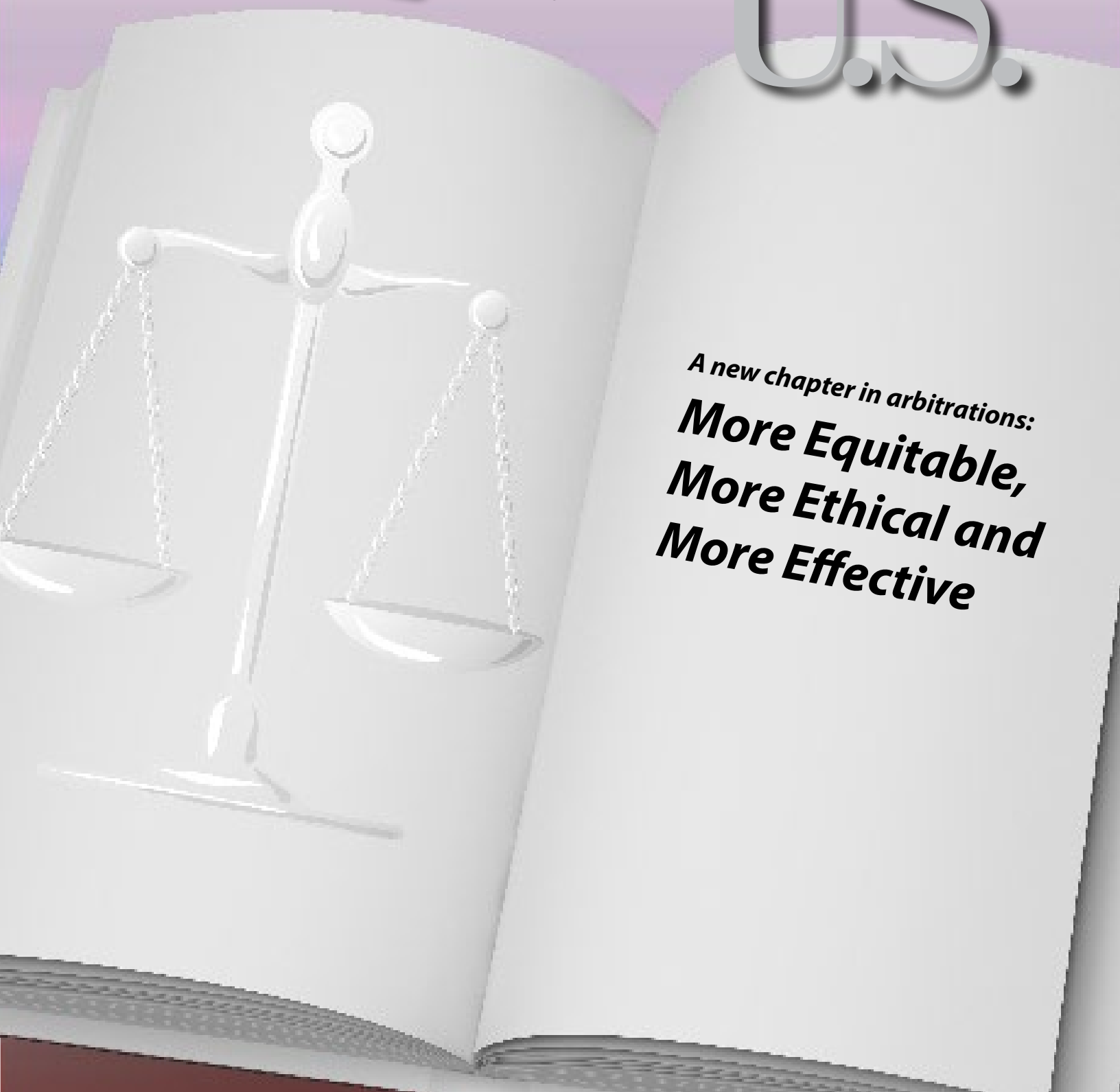

*A new chapter in arbitrations:*

# More Equitable, More Ethical and More Effective

THE ARIAS U.S.
VOL. 22 NO. 1
FIRST QTR. 2015



ARIAS • U.S.
7918 Jones Branch Dr., Suite 300
McLean, VA 22102
Phone: 703-574-4087
Fax: 703-506-3266
info@arias-us.org
www.arias-us.org

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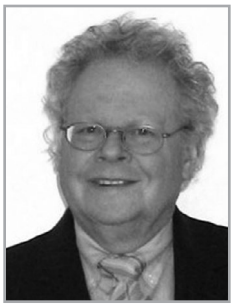

# editor's comments

Thomas P. Stillman

Hungering for the just, speedy and inexpensive determination of your reinsurance disputes? Hopes dashed? Does the following sorry statement accurately capture your perception of how today's arbitrations are conducted?

*The playing field isn't level. Parties can't get a fair shake. Ethical standards are lacking. Umpires aren't neutral. The selection of the Umpire determines the outcome of the hearing. The whole process rewards obstructive behavior. Arbitrations take too long. The costs are too high to take even the most meritorious disputes all the way through a hearing.*

Each year the grumbling becomes louder. Not only have we all heard it but some of us, perhaps many of us, have been among the grumblers.

Here at ARIAS, we've decided to go beyond grumbling and do something about it. Or at least we're going to try. Last year ARIAS adopted new rules governing ethics, neutrality, and cost minimization in an effort to make arbitrations fairer, faster, and financially rational.

In this issue of the *ARIAS • US Quarterly*, we're pleased to be a part of the effort to improve arbitrations by publishing three articles introducing the new rules. In my humble opinion, they're well worth reading.

We begin this issue with a thoughtful and consciousness-raising piece by Ed Krugman entitled "On Ethics," in which he explains the importance of robust discussion and debate in shaping the ethical norms of ARIAS arbitrations.

Rachel Bernie, David M. Raim, Peter Rogan, and Larry P. Schiffer write of the new optional rules for neutral arbitrators, which grow out of concern by some that the present system of party-appointed arbitrators results in panels whose members are pre-committed to rule for the party that appointed them. The use of these rules depends on the agreement of the parties to adopt them. Only time will tell if those who have grumbled about the present system will put their money where their mouths are and actually choose the neutral approach.

We'll also see whether they'll opt to make use of the new Streamlined Rules, which are designed to make it easier and more practical to take smaller disputes to hearing. Dan FitzMaurice, Steve Kennedy, and Tom Farrish have authored an article that explains how the new rules work.

With the current issue, the *ARIAS • US Quarterly* joins the many periodicals and journals that offer additional online content supplementing the articles that appear in their print editions. This will enable us to publish online worthwhile articles, as well as attachments to articles, that normally would be too lengthy to print. The way it works is that the print edition will contain summaries of such articles. Those interested in reading the articles in their entirety, or materials to which articles refer, will be able to access them online. Those reading the print edition itself, online will be able to gain access with a click. The online content will be archived on the ARIAS website in the same manner as the printed content. As this is a first time for our foray into the digital world, we may be fine-tuning the format in future editions. We welcome your comments on how we can make it better.

This edition of the *ARIAS • US Quarterly* features additional articles of interest.

While globalization is a still a relatively new frontier for much of the American economy, reinsurance has long been a global business. Global business gives rise to global

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## Editorial Policy

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

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

Manuscripts should be submitted as email attachments to tomstillman@aol.com .

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

Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

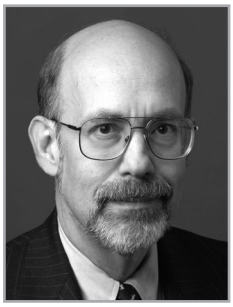
## Copyright Notice

article

# On Ethics

By Edward P. Krugman

Edward P. Krugman



It is precisely because there are tensions in the existing regime that ethical discussions are important.

The Ethics Discussion Committee of ARIAS•U.S. was created in 2011 to provide information and education about ethical issues and concerns. It was tasked with incorporating the 2010 "Additional Guidelines" into the existing ARIAS•U.S. Code of Conduct and revising and updating the Code as appropriate. Since its creation, the Committee has been chaired by Eric Kobrick; with Eric's ascendancy to become Chair of ARIAS•U.S., Jim Rubin has assumed the leadership of the Committee.

Revising the Code took most of 2012 and 2013. The revisions were reported in the 4Q13 issue of the *Quarterly* and became effective on January 1, 2014. They have sparked a substantial amount of discussion, including Richard Waterman's article in the 2Q14 issue of the *Quarterly* and the all-arbitrator ethics panel at the 2014 Fall Conference.

Both to keep that discussion alive and to serve the Committee's broader purpose of providing information and education about ethical issues, members of the Committee will write regularly in the *Quarterly* (we hope in every other issue) on the Code and other ethics topics of interest. There will be reports on the ethics portion of ARIAS•U.S. conference programs, comments on recent cases and, perhaps, discussions of hypothetical fact patterns. ARIAS•U.S. members are encouraged to send in fact patterns for discussion and analysis[2], but it should be clearly understood that we are neither an appeals committee nor an advisory committee. In particular, if the Committee concludes that a submitted fact pattern relates to a pending or recently concluded arbitration, or is submitted by someone hoping to achieve a particular result in such a case, the Committee will not discuss the pattern in these pages. The articles will try to be clear about when the views expressed are those of the Committee and when they are those of the Committee member who wrote the piece. Here, as should be obvious from what follows, the views expressed are mine alone.

## The Ethics Program at the Spring 2014 Conference

One of the more persistent comments about the revised Code — driven, in part, by the phrasing for the first time of a number of provisions in mandatory terms — came from the arbitrator segment within the ARIAS•U.S. community: a number of arbitrators expressed the view that setting standards of behavior for arbitrators was "meaningless, unhelpful, unreasonable, an affront, futile" — the characterizations varied – without some effort to control the behavior of the other segments of the ARIAS•U.S. community as well. In fact, the revised Code had taken a significant step in that direction with the addition of the following language to the Preamble:

> Though these Canons set forth considerations and behavioral standards only for arbitrators, it is expected that the parties and their counsel will conform their own behavior to the Canons and will avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.

Nevertheless, there were real questions as to the effectiveness of such remarks, even if not purely hortatory, and it was decided to use the Ethics segment of the 2014 Spring Conference in Key Biscayne to explore issues related to the conduct of counsel and company representatives as well as arbitrators.

The full fact pattern used in the Ethics segment was distributed with the Conference materials and is available in the Members area of the ARIAS•U.S. website (http://arias-us.org/index.cfm?a=469). Rather than focusing on a single, narrow situation and asking "can so-and-so do X?," the fact pattern followed a reinsurance dispute from selection of arbitrators through the run-up to the Hearing and presented instances of questionable conduct by many of the players in the proceedings at each step along the way. There were many more issues than could possibly have been discussed; one of the purposes of the exercise was to see which issues attracted

**Edward Krugman** is a partner in Cahill Gordon & Reindel. He has thirty years of experience litigating and structuring transactions in insurance and reinsurance and has represented ceding companies and reinsurers in well over a hundred contested reinsurance matters, often involving massive financial exposure. He has been a faculty member at ARIAS•U.S. and Mealey's Reinsurance conferences and has advised on and litigated numerous other matters concerning the business of insurance and the business of insurers, including insolvency, MGA relations, bad faith, complex coverage issues, antitrust issues, and various governmental and regulatory investigations.

attention and discussion and which did not. The problem was framed in a general session and there were then six breakout groups (two each to discuss the issues facing the arbitrators, the lawyers, and the party representatives), followed by a wrap-up session.

My initial impression of the results of the breakout sessions — which I reported at the wrap-up session — was that notwithstanding the ostensible separate focus on party representatives and counsel as well as on arbitrators, it was difficult for participants to break away from an arbitrator-centric perspective. On party-arbitrator appointment, for example, the fact pattern focuses on Fred Forbush, an executive of Empire Re, who is a longtime friend of Gina Gallant and had given her a number of appointments when she retired from the industry and started looking for work as an arbitrator. A new big case comes along, "and Forbush really wants Gallant for his party arbitrator. 'You're the best Gina. You really understand this stuff, and you get along with people as well. We *win* with you.'" Most people agreed that "we *win* with you" was over the line, albeit only slightly. Some thought it was just "cheerleading," but most saw it as asserting that the arbitrator is an advocate whose job is to deliver a win — which is inconsistent with the requirement of Canon II, comment 2, that even party-appointed arbitrators must decide according to the evidence and "should not allow their appointment to influence their decision." Even in the rooms looking at issues regarding party representatives, however, the focus was less on whether Forbush should have said it than on how Gallant should have responded — something like "Thanks, Fred, but I'm sure you understand that I'm going to have to decide this one, like I did all the others, on the evidence in the case."

So what would happen next? Everyone knows the answer to that one: Forbush would say, "Of course, Gina; I never meant to suggest otherwise," and the conversation would move on. There can be, and are, plenty of circumstances in which such an exchange between the company and a potential arbitrator is appropriate and should be taken at face value, but this may not be one of them. Here, one can legitimately ask whether it is all a charade. Forbush knows how many appointments he has given her, and he knows she knows, and Gallant is not saying, "Thanks, Fred, but I guess I'd better not take this one; I'm getting too dependent on you."

I would go further. I suggest that what Forbush said at the outset — "We win with you," with all its implications — is in many circumstances what is being said by a party or lawyer who repeatedly appoints the same arbitrator, ***even if not a word is said on the subject.***

If that is true, then the party or lawyer who makes excessive repeat appointments — and not merely the arbitrator who accepts them — is engaging in unethical behavior and deserves criticism. The party or lawyer is flatly violating the expectation set forth in the Preamble of the Code, putting the arbitrator in a position where s/he ***should*** say "I guess I'd better not take this one," but hoping (or, worse, expecting) that s/he will not say it but will take the appointment. This is true, moreover, even if — as is certainly the case now — there is no mechanism for formally imposing the disapprobation the behavior deserves. It is a characteristic of discussions framed in ethical or moral terms that they speak to norms that exist independently of whether or not they are ever enforced. Bad behavior is bad behavior and should be called out as such, even if the calling out is all anyone can do about it.

For this reason, I have repented of my original view that the participants in Key Biscayne largely ducked the request to focus on Forbush as the party rep and not merely on Gallant as the arbitrator. They *did* focus on Forbush, and they came to a conclusion that his behavior was over the line. They did so, moreover, for a reason that they tied specifically to the Code: Under Canon II, comment 2, an arbitrator is not an advocate, and it is wrong — bad behavior — to tell the arbitrator that s/he is expected to be one. The Key Biscayne participants, in short, did exactly what one should do in a discussion of morals or ethics.

Of course, the conclusion reached in Key Biscayne is not universally shared. There is a respectable body of judicial opinion to the effect that a party-appointed arbitrator *should* be an advocate — or, at least, is always expected to be one. Judge Easterbrook expressed this view in the *Sphere Drake* case a decade ago:

> [I]n the main party-appointed arbitrators are supposed to be advocates. In labor

Wherever the Committee, or ARIAS•U.S., comes out on any particular issue, the existence of a robust debate is essential to make sure that all views are taken into account. It is a goal of this series of articles to spark and maintain that debate.

> arbitration a union may name as its arbitrator the business manager of the local union, and the employer its vice-president for labor relations. Yet no one believes that the predictable loyalty of these designees spoils the award .

Judge Easterbrook's opinion, however, is not the ARIAS•U.S. way. In ARIAS•U.S., party-appointed arbitrators may be pre-disposed to the appointing party's position, but they are not to be committed to it; they may labor to ensure that the appointing party's position is heard and understood, but they are not to advocate it without first having come to their own, independent conclusion that it is correct. And they are not to usurp the role of the party or its counsel by taking over the structuring or presentation of the case. Those are the rules that ARIAS•U.S. arbitrators — and, indeed, *all* ARIAS•U.S. members, including lawyers and company representatives — have agreed to live by.

One can say there are tensions in a system that says, "so far, but no further." There are. In particular, Canon V, Comment 6, which permits very substantive *ex parte* communications , lives in unavoidable tension with the "just decision" obligation of Canon I and the "decide objectively" obligation of Canon II, Comment 2.

One can also believe, as I do, that those tensions cannot be completely resolved under any system in which party-appointed arbitrators are supposed to decide objectively, including systems in which the party-appointed arbitrators are formally "neutral." Consider the International Centre for Dispute Resolution. The ICDR has an all-neutral system, but it permits party appointment. My experience has been that a visitor to an ICDR arbitration who heard enough testimony — and, in particular, who heard the arbitrators' questions of witnesses after counsel was done — would have little difficulty identifying which party appointed which arbitrator. The tensions in a party-appointed system are there, and they will not go away.

But that is just the point. It is precisely *because* there are tensions in the existing regime that ethical discussions are important. It may be difficult to draw a line in any given case, and judgments of behavior must acknowledge that overstepping an unclear line can easily be inadvertent and unintended. The point of Forbush's comment to Gallant — "we *win* with you" — is not so much whether those specific words are a covert message or merely cheerleading: different people can come down on different sides of that issue, although there was a pretty clear consensus in Key Biscayne on the side of "message." The point, rather, is the principle one extracts from the line-drawing discussion itself. Notwithstanding that repeat appointments are addressed in Comment 4 of Canon I of the Code ("should consider") and not in Comment 3 ("must refuse to serve"), lawyers, parties, and arbitrators do not get a free pass on the issue to do whatever they like.

Ethics, like life, can be seen as a series of both absolute rules and 80/20 rules. Some situations are too fraught to permit exceptions, and that is the reason that the provisions of Canon I, Comment 3 of the Code are framed in mandatory terms. The other situations, though, are ***not*** simply "do as you please." In fleshing out and analyzing the non-mandatory provisions of the Code, which is a core purpose of this series of articles, identifying the norm (the 80%) is important, even if there are exceptions (the 20%). The identification sets the frame for the discussion and places the onus on the person claiming an exception in a specific case to justify that claim.

So back to repeat appointments. How much is too much? There is no bright line standard, and the Committee considered and rejected attempting to establish one when it did the revisions to the Code. That the line may be difficult to draw in an individual case, however , does not mean that there is no line at all, or that the line-drawing exercise need not be attempted. There is a level above which repeat appointments corrupt the process, and there will be situations in which that level is clearly exceeded. When that happens, both the party or lawyer who continues to make such appointments and the arbitrator who continues to accept them are behaving unethically and can and should be criticized for their conduct.

> It is a characteristic of discussions framed in ethical or moral terms that they speak to norms that exist independently of whether or not they are ever enforced.

But it is not enough simply to identify miscreants for criticism. If the tensions are structural, one must look for structural solutions. And if complete solutions are not possible without wholly forbidding the party appointments that most arbitration clauses require and many parties prefer, one must do the best one can in the context of the existing structure. Accordingly, the Ethics Discussion Committee is looking at the intersection between procedural and ethical rules in areas such as *ex parte* communications. Because we have chosen a system with inherent tensions, how do we manage the procedures to reduce, to the extent possible, the strains on parties, arbitrators, and counsel who *want* to behave ethically? How do we reduce the temptation to get as close to the line as possible, citing (as lawyers are wont to do) the obligation to represent the client "zealously" within the bounds of the law? These are complicated questions, and there are tradeoffs involved in any set of procedural rules one adopts. None of this would be simple even if the Ethics Discussion Committee had arbitration procedure in its jurisdiction, which it does not, and even if ARIAS•U.S. could prescribe procedural rules as the AAA does, instead of adopting a set of suggested rules and procedures for parties and arbitrators to accept or not as they choose. Wherever the Committee, or ARIAS•U.S., comes out on any particular issue, the existence of a robust

debate is essential to make sure that all views are taken into account. It is a goal of this series of articles to spark and maintain that debate. ▼

ENDNOTES

1. Edward P. Krugman is a member of Cahill Gordon & Reindel LLP and co-chairs its insurance and reinsurance practice. Commentary in this article is solely that of Mr. Krugman and should not be attributed to his Firm or its clients. Nor should it be attributed to the other members of the Ethics Discussion Committee.
2. Use the e-mail address ethicsdiscussioncommittee@arias-us.org or send the material directly to one of the members of the Committee.
3. Submitters of fact patterns for consideration should state that the pattern is not intended for use in an existing or recently concluded arbitration. The time lag between submission and possible use in an article would, we expect, be long enough to make attempted instrumental use of these discussions ineffective in any event.
4. Under Article II, § 5 of the ARIAS•U.S. By-Laws, the Board has the power to expel or suspend a member "for cause," and "cause" includes "violation of any of the by-laws or rules of The Society." The Code is part of the "rules of The Society" for these purposes, and the power of the Board extends to all members, including lawyers and company representatives, and not merely to arbitrators. Whether and how that power should be exercised (in the 20 years since ARIAS•U.S. was founded, the power has never been used), including whether there should be a true disciplinary process such as exists in some other organizations, is a subject of current discussion in the Committee and on the Board.
5. *Sphere Drake Insurance Co. v. All American Life Insurance Co.*, 307 F.3d 617, 620 (7th Cir. 2002) (emphasis in original).
6. Canon V, Comment 6 provides:
Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and (c) provide his or her impressions as to how an issue might be viewed by the Panel, but may not disclose the content or substance of communications or deliberations among the Panel members. An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.
7. Comments 4(g) to 4(j) to Canon I address the repeat appointments issue in various forms, focusing on whether the series of appointments is a "significant" source of revenue for the arbitrator. If they are so significant that the arbitrator believes his or her judgment will be affected, the situation becomes "must refuse to serve" under Comment 3(b). The point of the discussion here is to suggest that repeat appointments can be inappropriate *even if the arbitrator subjectively believes that s/he can render a fair decision.*
8. In commenting on a draft of this essay, one Committee member made a number of points on the way to suggesting that strongly discouraging multiple appointments might not be wise:

- What is a large number of appointments for a small company might not be for a larger one.
- There are times where repeat appointments should be seen not merely as permissible but almost necessary — as, for example, if a ceding company's diet of arbitrations arises from a single ceded treaty roster whose reinsurers tactically refused to consolidate, but where the same argument is made repeatedly against them, by a single arbitrator who has been hired by multiple reinsurers.
- In specialized markets such as London aviation, the same people are necessarily repeatedly sought out for their expertise in the particular market, and they do enough work for both cedents and reinsurers that the concept of "repeated" appointments, when looked at only from the perspective of one party, is not terribly meaningful.

I agree with all of these points (and further examples are surely possible), but I do not agree that multiple appointments do not in general present a serious issue. Most lawyers and company reps will acknowledge having a few "go to" arbitrators for high stakes cases, and it is not realistic to believe that the arbitrators in question do not understand that. Within certain limits, that is a fact of life one must live with, but the limits exist, and the Forbush comments present what appears to me to be a not uncommon way of getting closer to (or past) the limits than is healthy for the process.

# news and notices

## Caprio, Fortune, Harris, and Pinckney become ARIAS•U.S. Certified Arbitrators

At its meeting on January 29, the Board of Directors approved **Elaine A. Caprio**, **Charles W. Fortune, Carl M. Harris,** and **Fred J. Pinckney** as ARIAS•U.S. Certified Arbitrators, bringing the total to 197. Their biographies are on page 36; their profiles are available on the website.

## Spring Educational Seminar Blows into Boston on April 1

Unless it is cancelled due to a snowstorm, the 2015 Spring Educational Seminar will take place on the afternoon of April 1. Entitled **Reinsurance in the Information Age: Access, Impediments, and Burden**, the seminar will explore the opportunities and challenges created by the legal rules and customary practices around the sharing, use, and exchange of information. Specifically, the panel will address:

- **Missing Documents**
- **Access to Records, Payment Provisions, and Claim Protocols**
- **Restrictions on Sharing Information**
- **The Role of Experts in Reconstruction, including Custom & Practice and Forensics**

The seminar will be held in the offices of Choate, Hall & Stewart starting at 12:00 Noon. Complete details are on the website calendar. The registration deadline is March 27.

This seminar applies toward initial certification under Option C and toward certification renewal.

## 2015 Spring Conference Highlights Streamlined Procedures

This year's Spring Conference will be filled with a number of sessions for parties to explore and debate how best to avoid unnecessary delay and costs of the arbitration process, while preserving the goal of obtaining a fair and commercially predictable resolution of disputed issues. Entitled **Streamlining for Greatness: Paring the Process Down to its Potential**, the conference will focus on more efficient and effective ways for streamlining arbitrations, from neutral panels to awarding of costs. It will also include a session devoted to introducing the streamlined rules, developed for smaller value disputes.

The 2015 ARIAS•U.S. Spring Conference will take place on May 6-8 at The Breakers in Palm Beach, Florida. Details are in the announcement brochure, which was mailed and emailed to members and is on the website. Register by April 9th to receive early bird registration rates. The regular registration deadline is April 22nd.

## Ethics Committee Solicits Questions

Do you have ethics questions or concerns that you think ARIAS•U.S. should consider? The Ethics Discussion Committee wants to hear from you. Please submit ethics questions and related fact patterns to ethicsdiscussioncommittee@arias-us.org. When you do, please phrase your questions and fact patterns so that they neither reveal identifiable circumstances or people, nor relate to pending or recently concluded arbitrations. We require this because the Committee is not an appeals or advisory committee. Instead, the Committee hopes that many of your questions can form the basis of ARIAS U.S. articles for the Quarterly, create new ARIAS•U.S. programming of general applicability, or prompt discussion about possible changes to the Code of Conduct.

## Rodney D. Moore

Long-time ARIAS•U.S. member and arbitrator **Rodney Moore** passed away on February 12, 2015. He was a well-known attorney primarily involved in insurance, and a director and officer of a number of insurance companies, including Western National, American General, and Bankers Multiple Line. Along the way, he was heavily engaged in complex arbitration and mediation of insurance disputes. After his retirement in 1989, he continued as an ARIAS•U.S. arbitrator until 2013.

Services were held on February 26 at Watermark Community Church, in Dallas.

# editor's comments continued

disputes. We're all familiar with traditional American-type arbitrations, such as those that come before us at ARIAS. In contrast, international arbitrations proceed under the rules imposed by such bodies as the International Chamber of Commerce or the International Center For Dispute Resolution, and those rules are quite different from our own. We're thankful to Peter Chaffetz and his associates Andrew Poplinger and Gretta Walters for their article illustrating the differences been US and International reinsurance arbitrations.

Moving back to arbitrations back home, since the U.S. Supreme Court's 2006 decision in *Hall Street Associates v. Mattel*, lower courts have been trying to puzzle out what the decision means for the viability of "manifest disregard" as a ground to challenge arbitration awards under the Federal Arbitration Act. By now, every circuit and numerous district courts have had occasion to weigh in with their views. John Diaconis and his son Ari, a recent law school graduate now clerking for a federal district judge, have written a comprehensive article reviewing these decisions and synthesizing their meaning.

Courts often have declined to respect confidentiality agreements in contexts other than arbitration. It's not surprising that the same view carries over to arbitration as well. Lou Aurichio deals with the tension between the arbitral process, which favors confidentiality, and the court system, which tilts toward transparency, when a party petitions to confirm, modify or vacate an award. He suggests ways by which confidentiality might be preserved. For more on confidentiality, Ron Gass discusses two recent cases on the issue in his Case Notes Corner column.

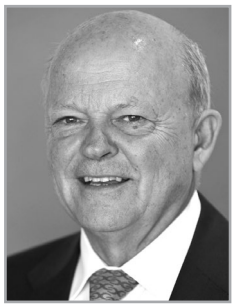
As always, we end by soliciting our readers for contributions to the *ARIAS•US Quarterly*. The diversity of articles in this edition illustrates the variety of the subjects that are of interest to our members. If there's a matter related to arbitrations which interests you, don't just think about it, write! Send your opus to me at tomstillman@aol.com. ▼

article

# The New ARIAS•U.S. Neutral Rules for the Resolution of U.S. Insurance and Reinsurance Disputes


Rachel Bernie


David M. Raim


Peter Rogan


Larry P. Schiffer

By Rachel Bernie, David M. Raim, Peter Rogan, and Larry P. Schiffer

ARIAS•U.S. has now promulgated the ARIAS•U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (the "Neutral Rules"). The Neutral Rules compliment and will operate alongside of the standard ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (the "Standard Rules"). Until such time as the parties have the opportunity to provide for the application of the Neutral Rules to disputes in their reinsurance agreements, the Neutral Rules likely will only be used when, after an arbitration has commenced, both parties agree to arbitrate under the Neutral Rules. This article will discuss how the Neutral Rules came about, their underpinnings and the relationship to the neutral rules used in England and Wales, and how the Neutral Rules compare to the Standard Rules.

## Why Neutral Arbitrator Rules?

The idea behind the Neutral Rules was presented at the Fall 2013 ARIAS•U.S. meeting[1]. As explained at the meeting, the impetus for the Neutral Rules came from perceived concerns with the current arbitration process in which party-appointed arbitrators do not have to remain strictly neutral, but can be, as one court described it, "an amalgam of judge and advocate." *Cia De Navegacion Omsil, S.A. v. Hugo Neu Corp.*, 359 F. Supp. 898 (S.D.N.Y. 1973). Among some in the ARIAS•U.S. community, there is a concern about party-appointed arbitrators who are appointed frequently by the same company or law firm. Similarly, there is also a concern about umpires who are frequently appointed in cases involving the same law firm, company or party-appointed arbitrator.

At the Fall 2013 meeting, the presenters explained that, by attempting to provide for an alternative neutral arbitration process, ARIAS•U.S. was not agreeing that the perceived concerns held by some in the ARIAS•US community were justified. Rather, ARIAS•U.S. wanted to be responsive to the concerns expressed by some in the ARIAS•US community. In order to do this, ARIAS•US commissioned an Arbitration Task Force comprised of representatives of reinsurance companies and ceding companies. The Arbitration Task Force also contained advisor representatives from the arbitrator, broker, and counsel community. After the Arbitration Task Force was constituted, it explored ideas and concepts to address the perceived concerns about the current arbitration process. These concepts and ideas were reported to the association's membership at the Annual and Spring Meetings. One of the ideas that was conceived and developed by a subcommittee of the Arbitration Task Force was an alternative neutral process that drew upon concepts and principles central to the neutral arbitration process used in England and Wales, and the European continent.

As stated above, one of the principal concerns about the current U.S. system, among some in the ARIAS•US community, is that perceived biases may be created when a party or its law firm appoints the same person as its arbitrator frequently, or a party, law firm, or party-appointed arbitrator agrees to the same person as umpire

**Rachel Bernie** is a litigator with Ince & Co. She advises clients on matters in the English Courts and London arbitrations as well as litigation internationally. Rachel's practice has a particular emphasis on shipping, including maritime casualties, offshore work and both marine and non-marine insurance. She acts for ship owners, charterers, operators, P&I Clubs and their respective insurers. **David Raim** is chairman and practice group coordinator of Chadbourne & Parke's reinsurance and insurance practice group. He is experienced in handling domestic and international arbitration and litigations on behalf of cedents and reinsurers. He has been involved in hundreds of reinsurance arbitrations and litigations over the past 35 years. **Peter Rogan** now serves as a consultant to Ince & Co and a neutral on the JAMS International panel in London and New York. Prior to his current position, Mr. Rogan spent eight years with Ince & Co. Under his tenure, the firm expanded geographically with the addition of five new offices. In a career spanning 36 years in private practice, he has been instructed in many of the world's largest and most complex disputes. **Larry Schiffer** is a partner in the New York office of Squire Patton Boggs (US) LLP, where he practices in the areas of commercial, insurance, and reinsurance litigation, arbitration, and mediation. He is Co-Chair of the ARIAS-U.S. Technology Committee.

frequently. While the same potential for biases in these situations exists in England and Wales, participants there generally perceive that the potential for abuse is less because the arbitrators in those jurisdictions have always operated in a strictly neutral system.

In contrast, the same tradition of neutrality does not exist in U.S. reinsurance arbitrations and more significantly, any proposed neutral system in the U.S. would, for the foreseeable future, need to operate in tandem with the Standard Rules. Thus, it is probable that many of the same arbitrators serving on arbitration panels in proceedings governed by the Standard Rules would also be asked to serve on panels governed by the Neutral Rules. In order to address concerns regarding perceived bias by arbitrators being asked to serve in arbitration proceedings under the Neutral Rules who are also simultaneously serving in arbitration proceedings under the current system, it was determined by the Arbitration Task Force that certain new limitations governing arbitrator and umpire appointments should be included in the neutral rules.

At the Fall 2013 meeting, the presenters described proposed criteria for service on neutral arbitration proceedings that included the following limitations: (a) on a neutral arbitrator concurrently serving as an expert, counsel, or arbitrator for the parties or law firms involved in this arbitration; (b) on the number of times in recent years that an arbitrator or umpire in a neutral arbitration could have been appointed as a party-appointed arbitrator by a party or a law firm involved in this arbitration; and (c) on the number of times an umpire in a neutral proceeding could have served as an umpire in proceedings involving one of the parties, law firms, or party-appointed arbitrators in this proceeding. Both at the 2013 Fall meeting and thereafter, there was substantial discussion about these proposed limitations. Following the Fall 2013 meeting, the Arbitration Task Force undertook the drafting of proposed Neutral Rules. The Arbitration Task Force commissioned Larry Schiffer as the principal drafter and David M. Raim, who devised the original neutral criteria, to complete the proposed Neutral Rules. The drafting process was simple in concept and difficult to craft: take the Standard Rules and recast them for a neutral process. Drafts were submitted and resubmitted between the draftsman and members of the Arbitration Task Force. Drafts were then reviewed by the Arbitration Task Force and the Board of Directors, resulting in additional refinements and revisions. The final Neutral Rules, as approved by the Board of Directors, are described below. Before discussing the Neutral Rules and how they differ from the Standard Rules, it is important to understand the underpinnings of the Neutral Rules from the neutrality perspective of England and Wales, and continental Europe, and how those underpinnings helped inform the drafting of the Neutral Rules.

## The Principles of Neutrality

The neutrality of the arbitration panel is an unquestioned part of the arbitration process in England and Wales. These principles of neutrality are generally followed in arbitral proceedings in other countries and jurisdictions worldwide. *See, e.g.*, Section 33(a) of the UK's Arbitration Act 1996; Article 1456 of the French Code of Civil Procedure; Article 1690 of Belgium's Judicial Code; Section 1036(1) of Germany's Arbitration Law 1998; Section 14(3)(a) of Singapore's Arbitration Act 2001. It is generally appreciated among users of legal services that independence and impartiality are key to encouraging a fairer and more efficient resolution of disputes.

Having considered the benefits that emulating such a system would bring to the dispute resolution process in the U.S., ARIAS•U.S. has specifically incorporated the most fundamental aspects of the neutral arbitration system into the Neutral Rules. The key principles of impartiality, and how these principles have been adopted into the Neutral Rules, are examined in turn below.

## Neutrality of Arbitrators

An obvious starting point to the adoption of a neutral arbitration system is that the appointed arbitrators must act independently. Closely linked to this is the need for the parties to have confidence that the arbitrators are not predisposed to decide in favor of the party that appointed them. The Arbitration Act of 1996 ("AA 1996") regulates arbitrations in England and Wales where no other rule or institution is provided for in the contract. Section 33(a) AA 1996 assigns a mandatory duty upon the tribunal to:

> act fairly and impartially as between the parties, giving each party a reasonable

There has been a consistent drumbeat by some in the ARIAS•U.S. community for U.S. neutral arbitration procedures, which would bring U.S. reinsurance arbitration more in line with the procedures used in other jurisdictions in the commercial arbitration world. Arbitrators, who for many years since the introduction of detailed umpire questionnaires have kept careful records of their appointments, must now make sure to record not only appointments as an arbitrator or umpire, but also services as an expert or consultant, outside lawyer or employee.

opportunity of putting his case and dealing with that of his opponent.

In England and Wales, §33(a) AA 1996 is regarded as sufficient to ensure the impartiality of the arbitrator(s). Such an overriding general statement is reflected in the Neutral Rules at Section 1.6, which provides:

> The object of these Rules is to obtain the fair resolution of disputes by an independent and impartial arbitration panel free of any bias or predisposition. The arbitration panel selected under these Rules is assigned the mandatory duty to act fairly and impartially as between the Parties.

In England and Wales, the impartially of the arbitrator is simply assumed. In the U.S., it was recognized that greater protection must be put in place in any neutral process that ARIAS•U.S. might draft because a newly implemented neutral process would exist side-by-side with the current system. The Neutral Rules thus establish the criteria that an appointed arbitrator must meet in order for the tribunal to be considered as neutral.

The Neutral Rules therefore provide, at Section 6.1, that either an arbitrator must be on the ARIAS•U.S. Certified Neutral Arbitrator List (a new list that will be created as discussed below), or that an arbitrator must qualify as a "neutral arbitrator" under the ARIAS•U.S. Neutral Arbitration Panel Criteria. The conditions required in order to meet the standard of a "neutral arbitrator" are set out at Section 6.3 of the Neutral Rules.

Essentially, a candidate is prohibited from serving on the panel if the candidate has acted for one of the parties in a variety of forms (the limitation may apply, for example, if the potential candidate has previously acted as an arbitrator, umpire or expert, etc.) for more than a fixed percentage of times (this percentage varies depending on the role(s) in which the candidate had previously acted) within the previous five years.

## A Reasoned Award

Unless parties otherwise agree, an arbitration panel in England and Wales must issue a reasoned award. This is reflected in the Neutral Rules at Section 14.4, which provides:

> The final award shall consist of a written statement signed by a majority of the Panel setting forth a reasoned statement supporting the disposition of the claims and the relief, if any, awarded.

This provision was included in the Neutral Rules in an effort to facilitate the neutral system. Having a reasoned award demonstrates to the parties that the arbitrators understood the issues in dispute and that the points made to the tribunal during the hearing have been given fair consideration. The concern that an arbitrator may not receive future appointments should it be perceived that he or she has not considered both parties interests fairly is real.

Another concern that parties often have about switching to a neutral process, and which can be alleviated by a reasoned award, is created by the current lack of information in the non-neutral process as to the rationale behind the panel's decision. Most parties are interested in having some idea of the panel's reasoning so that they can factor in that reasoning in future disputes. Absent such guidance in an award, a party's appointed arbitrator is likely to be the only available source of information. And a party-appointed arbitrator is often constrained by what he or she can disclose. A reasoned award removes the need for a party to have an arbitrator providing otherwise unobtainable feedback after the arbitration. Furthermore, a provision in the Neutral Rules setting out that the arbitration panel will render a "reasoned decision" will provide further reassurance in the general validity of the neutral process and in the arbitrators involved.

## *Ex-parte* Communications

In England and Wales, there is a presumption of impartiality throughout the whole arbitration process, which encompasses both pre-appointment communications and communications once the panel has been constituted. As a general rule, before they are appointed, arbitrators in England and Wales have no or only minimal contact with the appointing party or law firm and, to the extent that they do, discussions would not concern the issues in the case. The only information that tends to be relevant is a current biography, so the appointer can assess the type of experience that the proposed individual has had, and also such information as is necessary to assess whether there may be a conflict.

Once appointed, most institutions in England and Wales prohibit communications between arbitrator and appointer and, to the extent that such communications occur, most institutions require that the other two arbitrators and party/parties to the dispute receive copies.

This approach is reflected in the Neutral Rules at Sections 6.13 and 6.14. These paragraphs provide as follows:

> Unilateral contact between a Party or its representative(s) on the one hand, and an individual considered for appointment as an arbitrator on the other hand about the arbitration, shall not be permitted at any time.
>
> No ex parte communications shall be permitted between a Party or its representatives and any potential arbitrator either before or after the appointment of the arbitrator.

## The Neutral Rules and How They Compare to the Standard Rules

### The Drafting Process

In drafting the Neutral Rules, the drafter began with the Standard Rules and interlined the Standard Rules with the neutral proposals made at the Fall 2013 meeting, including the various

criteria for service on a neutral panel. Some of the changes were made for consistency and others for clarity. Many of the changes were simply removing the party-appointed references and changing them to neutral references. The most difficult to draft were the neutral criteria by which the arbitrators would be chosen to serve on the neutral panel.

**The Introduction to the Neutral Rules**

A user must read the *Introduction for Adoption and Application of the Neutral Rules* to understand the purpose behind the Neutral Rules and the flexibility given to the parties to adopt all or part of the Neutral Rules for use in their contracts or arbitration agreements. Suggested contractual language for adoption and modification of the Neutral Rules is provided in the introduction.

The introduction declares that the Neutral Rules require that a reasoned decision be issued by the panel. But because not all parties want a reasoned award, the introduction makes it clear that the parties have the ability to agree expressly not to require a reasoned award. While this is not encouraged for the reasons discussed above, it was thought that this flexibility would make the Neutral Rules more acceptable to some consumers of arbitration services.

The introduction also makes clear that selection of the arbitrators under the Neutral Rules requires compliance with the ARIAS•U.S. Neutral Arbitration Panel Criteria (the "Neutral Criteria") set forth in Section 6.3 of the Neutral Rules, but only if a candidate is not on the new ARIAS•U.S. Certified Neutral Arbitrator List. The Neutral Criteria were developed specifically to enhance the fairness of the arbitration process by eliminating as much of the perceived bias as possible. The introduction describes how parties can make the Neutral Criteria more stringent or less stringent as the parties deem appropriate. In other words, the Neutral Criteria developed and approved by the Board of Directors can be altered by specific agreement of the parties on a contract-by-contract basis. Section 6.19 specifically authorizes the parties to enter into a written agreement adjusting the Neutral Criteria for any or all arbitrator candidates. For example, this allows parties to preclude any arbitral candidate from serving on a neutral panel if he or she has had even one appointment by either of the parties in order to eliminate any possible bias or, conversely, to allow for the appointment of arbitrators even if they had more than the number of prior appointments generally allowed in the Neutral Rules.

As set forth above, Section 1.6 expresses that the purpose of the Neutral Rules is to obtain the fair resolution of disputes by independent and impartial arbitrators free of any bias or predisposition. Section 1.6 assigns a mandatory duty to arbitrators to act fairly and impartially between the parties.

**New Definitions**

Two new definitions are contained in the Neutral Rules that do not appear in the Standard Rules: Section 2.2: "Certified Neutral Arbitrator" and Section 2.5: "Neutral." A Certified Neutral Arbitrator is a new species of ARIAS•U.S. Certified Arbitrator that will be listed on a new ARIAS•U.S. Certified Neutral Arbitrator List. To become a Certified Neutral Arbitrator, an arbitrator must be an ARIAS•U.S. Certified Arbitrator in good standing who has pledged in writing to serve only as an arbitrator in insurance and reinsurance disputes under a neutral arbitration process (like the Neutral Rules or similar rules) or as an umpire in a "non-neutral" arbitration and who meets the Neutral Criteria at the time the pledge is made. In other words, if a person wants to be listed as a Certified Neutral Arbitrator, he or she must agree to only serve as an arbitrator in arbitrations governed by a truly neutral process. As noted above, service as an umpire under the Standard Rules or in ad hoc non-neutral proceedings will not violate the pledge or disqualify an arbitrator from being placed on the ARIAS•U.S. Certified Neutral Arbitrator List. For purposes of the Neutral Rules, "Neutral" is defined as an arbitrator who is disinterested, unbiased and impartial, who meets the standards of the Neutral Rules, and who does not advocate for any party during the arbitration proceedings. To be clear, however, neutral does not mean that an arbitrator has no previous knowledge of, or experience concerning, the issues involved in the dispute. Thus, neutrality is not about substantive knowledge, it is about process and relationships.

**Appointment and Composition of the Panel**

Article 6 sets forth the criteria for service as a panel member under the Neutral Rules. The panel, as set forth in Sections 6.1 and 6.2, still consists of three arbitrators, but all the panel members must be neutral and they must either be on the ARIAS•U.S. Certified Neutral Arbitrator List or qualify under the Neutral Criteria of Section 6.3. Arbitrators who wish to serve in a dispute under the Neutral Rules have two avenues to qualify: (a) become an ARIAS•U.S. Certified Neutral Arbitrator by making the neutral pledge and meet the Neutral Criteria for the preceding five years or (b) satisfy the Neutral Criteria. The Neutral Criteria only applies if the candidate is not on the ARIAS•U.S. Certified Neutral Arbitrator List.

The Neutral Criteria requires some explanation. The proposed neutral rules that were presented at the Fall 2013 meeting assumed that in a neutral arbitration there would be a tri-partite panel with two party-appointed arbitrators and an umpire appointed in a similar manner to how the procedure operates in England and Wales. As such, the proposed limitations on arbitrators' relationships presented at the 2013 Fall meeting contained different rules for party-appointed arbitrators and umpires.

The Neutral Rules, as ultimately adopted by the ARIAS•U.S. Board of Directors, do not provide for party-appointed arbitrators. Rather, all three panel members are chosen by the ranking and limiting procedures set forth in Section 6.3 of the Neutral Rules. This change, in and of itself, made it somewhat easier to draft less complex rules to govern whether a person could serve on a neutral panel based on his or her past and present relationships with the other participants in the proceeding. Now, there is no need for one set of

limitations for party-appointed arbitrators and a different set for umpires; rather, there could be one set of limitations governing all three members of the neutral panel.

The Neutral Criteria has four sets of limitations based on the relationships between the candidate and others: (a) prior service as a party-appointed arbitrator; (b) prior service as an umpire or neutral arbitrator; (c) prior expert or consultant service; and (d) prior service as counsel or employment by one of the parties.

Arbitrators, who for many years since the introduction of detailed umpire questionnaires have kept careful records of their appointments, must now make sure to record not only appointments as an arbitrator or umpire, but also services as an expert or consultant, outside lawyer or employee. Most arbitrators already keep this information, but to avoid as much unearthing of archived records as possible, the Neutral Criteria only requires that the candidate look back five years. It was believed by the Task Force and the Board that the five-year look back period was sufficient and appropriate.

Essentially, Section 6.3 of the Neutral Rules establishes a threshold for relationships that, if reached, would preclude a candidate from serving on that neutral panel. Because prior appointment as a party-appointed arbitrator by a party or law firm is the most talked about indicia of potential bias, the threshold percentage in Section 6.3(a) is purposefully low. A candidate is prohibited from serving on a neutral panel if during the preceding five years the candidate has served as a party-appointed arbitrator for one of the parties in more than 10% of the candidate's total appointments as a party-appointed arbitrator. As Section 6.3(a) states, this threshold also applies to appointments by one of the party's outside law firms or by the party's in-house counsel or claims departments, if no outside counsel was used.

To illustrate, if a candidate has been appointed as a party-appointed arbitrator a total of ten times in the last five years and was appointed by one of the parties to this dispute twice during the previous five years, that candidate cannot serve on the neutral panel. That is because 20% of the candidate's total party-appointed appointments in the previous five years were made by one of the parties to the dispute for which the candidate is being considered as an arbitrator in a neutral arbitration. Because 20% exceeds the 10% threshold, the candidate is prohibited from serving under the Neutral Criteria.

Similar Neutral Criteria exist for other relationships at different percentage thresholds. For example, prior service as an umpire or neutral arbitrator in an arbitration involving one of the parties or their law firms of more than 20% of the candidate's total appointments as an umpire or neutral arbitrator during the preceding five years would preclude the candidate from service under the Neutral Criteria. For prior expert or consultancy service, the percentage is higher, 50%. But for prior service as counsel or employment by one of the parties the percentage returns to 10%.

Calculating when service begins for purposes of the Neutral Criteria was resolved by defining service in Section 6.3(f) to mean commencing at the time of retention. This means that for purposes of calculating the percentage of appointments in any of the four categories of the Neutral Criteria, a candidate must include every appointment from the time the candidate was retained regardless of whether the arbitration or engagement went forward. While this will increase the counts for many arbitrators, it was felt that service for the purpose of identifying potential bias should commence once the candidate had been retained.

| Type of Prior Appointment | Threshold Percentage Compared to Total Appointments | Look Back Period |
|---|---|---|
| Party-Appointed Arbitrator | 10% | 5 years |
| Umpire or Neutral Arbitrator | 20% | 5 years |
| Expert or Consultant | 50% | 5 years |
| Counsel or Employee | 10% | 5 years |

Section 6.3(g) addresses the definition of "Party" for purposes of applying the Neutral Criteria. A "Party" means:

> the named Party and its parents, subsidiaries, and affiliates whose insurance and reinsurance disputes, as applicable, are managed by the same group of individuals that managed the named Party's insurance or reinsurance disputes, and a non-affiliated entity (including that entity's agent) that manages the named Party's claims at issue in the arbitration.

The definition of "Party" in the Neutral Criteria was designed to incorporate third-party runoff managers and agents and runoff affiliates whose employees are often the persons involved in appointing arbitrators for their principals.

The chart below illustrates the Neutral Criteria and the relevant percentage thresholds:

Once selected on a panel under the Neutral Rules, the arbitrators must refuse to accept appointments or engagements as an expert, consultant, counsel, or non-neutral arbitrator from either party prior to the disposition of the arbitration. This provision reinforces the neutral nature of the process.

The panel selection process is set out at Sections 6.4 through 6.9 of the Neutral Rules. ARIAS•U.S. will administer much of the selection process. Essentially, within the stated time periods, each party will nominate six candidates by sending the names of the nominees to the Executive Director of ARIAS•U.S. and the opposing party (6.4)[2]. ARIAS•U.S. will then distribute a new ARIAS•U.S. Neutral Arbitrator Questionnaire to the twelve nominees (6.5)[3]. If they are not on the ARIAS•US Certified Neutral Arbitrator List or if they do not meet the Neutral Criteria, the candidates have the duty and obligation to advise ARIAS•U.S. that they cannot serve and they should not submit a response to the

questionnaire. If any of the candidates are unable or unwilling to serve or are not on the ARIAS•US Certified Neutral Arbitrator List or if they do not meet the Neutral Criteria, a procedure exists for the parties to nominate alternative candidates until each side has nominated six candidates qualified and willing to serve (6.7).

Once twelve qualified and willing candidates are nominated, each party will rank the twelve nominees (6.8). ARIAS•U.S. will determine the three nominees with the highest rankings and those three candidates will become the arbitration panel (6.9). There are various tie-breaking scenarios discussed in the Neutral Rules, which may result in some panel members selected by lot should ties result (6.9). The key feature in the selection process is to have ARIAS•U.S. communicate with the candidates to ensure neutrality and avoid any appearance of bias. Section 6.10 of the Neutral Rules specifically prohibits ARIAS•U.S. or any of the parties from disclosing who made the nominations or how the candidates were ranked. The chair of the arbitration panel is selected by the three neutral arbitrators without the involvement of the parties or ARIAS•U.S. to further enhance the independence and neutrality of the proceeding.

**The Neutral Arbitration**

As discussed above, *ex parte* communication is prohibited under the Neutral Rules (6.13). This includes contact between a party or a party's representative and an individual being considered for appointment. After appointment, *ex parte* communication remains prohibited (6.14). The Neutral Rules make it clear that none of the panel shall act as advocates on behalf of any of the parties (6.15).

Article 7, Confidentiality, is essentially the same as in the Standard Rules, as are the sections for Interim Decisions (Art. 8) and Location of the Proceedings (Art. 9). The Pre-Hearing Procedure (Sections 10.3 and 10.6) has been amended in the Neutral Rules to eliminate the necessity for disclosures at the organizational meeting concerning *ex parte* contacts because *ex parte* contacts are prohibited under the Neutral Rules. Article 11, Discovery, is unchanged from the Standard Rules. Article 12 in the Standard Rules, Mediation or Settlement, has been eliminated from the Neutral Rules. Minor changes have been made to what is now Article 12 of the Neutral Rules, Summary Disposition and Ex Parte Hearing. The rules for the hearing itself have also been retained from the Standard Rules with minor changes (Art. 13).

**The Award**

Article 14 of the Neutral Rules addresses the final award. This differs from the Standard Rules because it requires a reasoned award (14.4). Other minor changes were also made to this article. As discussed above, a reasoned award is essential to a neutral proceeding. Nevertheless, as discussed in the introduction section of the Neutral Rules, parties may opt not to require a reasoned award.

## Conclusion

There has been a consistent drumbeat by some in the ARIAS•U.S. community for U.S. neutral arbitration procedures, which would bring U.S. reinsurance arbitration more in line with the procedures used in other jurisdictions in the commercial arbitration world. ARIAS•U.S. has provided this alternative neutral arbitration process. It is now up to the parties to choose whether they wish to arbitrate their disputes under the Standard Rules or the Neutral Rules. ▼

ENDNOTES

1. The call for neutral rules is not new. In the first issue of the ARIAS•U.S. Quarterly in December 1994, an article entitled "A Modest Proposal" was published. In it, the author, John Nonna, a current ARIAS•U.S. Board Member, suggested all-neutral panels and reasoned awards for reinsurance arbitrations. Other neutral proposals were contained in "Leveling the Playing Field: An Analysis of Neutrality of Issues in Reinsurance Arbitration," Larry P. Schiffer, ARIAS•U.S. Quarterly, Vol. 13 No. 1 (2006); "The Evolving Standard of Arbitrator Neutrality," Vincent Vitkowsky and Jeanne M. Kohler, ARIAS•U.S. Quarterly, Vol. 12 No. 1 (2005); "Of Cabbages and Kings," John Nonna and Marc Abrams, ARIAS•U.S. Quarterly, Vol. 11, No. 4 (2004).
2. Section 6.12 of the Neutral Rules provides that if a party fails to provide its nominees within the time required (thirty days from receipt of a response to the demand for arbitration), the non-defaulting party may nominate six candidates for the defaulting party.
3. The ARIAS•U.S. Neutral Arbitrator Questionnaire is only used for those candidates who are not on the ARIAS•U.S. Certified Neutral Arbitrator List. For nominees from the ARIAS•U.S. Certified Neutral Arbitrator List, the current ARIAS•U.S. Umpire Questionnaire will be used.

# 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.

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

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

## Recent Moves and Announcements

**Elaine A. Caprio, CapLaw Advisors, LLC**

Elaine, formerly of Liberty Mutual Insurance, is pleased to announce the formation of CapLaw Advisors LLC, 598 Salem Street, P.O. Box 611, Lynnfield, MA 01940.
CapLaw is providing Management Consulting, Mediation and Arbitration Services to the Insurance and Reinsurance Industries.
For further information, please visit www.CapLawAdvisors.com.

**Royce F. Cohen, Tressler LLP**

Royce is now a Partner at Tressler LLP, One Penn Plaza, Suite 4701, New York, NY 10119, phone 646-833-0875, fax 646-833-0877, rcohen@tresslerllp.com.

**Squire Patton Boggs (US) LLP**

Effective Monday, December 15, 2014, the New York Squire Patton Boggs office will be combined at the following address. Please update your records for all your contacts from Squire Patton Boggs in New York:

Squire Patton Boggs (US) LLP
30 Rockefeller Plaza, 23rd Floor
New York, New York 10112
General Phone and Fax numbers:
Phone: +1 212 872 9800
Toll Free: +1 800 743 6773
Fax: +1 212 872 9815

Individual personal direct phone numbers will remain the same.

**Susan Mack**

Susan recently changed addresses from 1510 Birkdale Lane to 265 Royal Tern Road, Ponte Vedra Beach, Florida.

**John H. Howard**

John's new email address is JohnHarlanHoward@gmail.com. His bellsouth email account has been deactivated and emails sent to that address will not be received.

**Howard D. Denbin**

Howard can now be reached at HDDRe Strategies LLC, Two Bala Plaza, Suite 300, Bala Cynwyd, PA 19004, phone 610-660-7723, email howarddenbinre@gmail.com, mobile: 484-437-7243.

# The ARIAS • U.S. Streamlined Rules for the Resolution of U.S. Insurance and Reinsurance Disputes

article

By Daniel L. FitzMaurice, Stephen Kennedy, and Thomas O. Farrish

## INTRODUCTION

The concept of using simplified mechanisms to resolve smaller disputes is not new. In 17th-century England, local "courts of conscience" expeditiously adjudicated suits over modest sums[1]. Arbitration might appear to be especially amenable to creating a speedy and economical process for small controversies, because parties are able to specify how they will arbitrate and can dispense with many of the trappings of litigation[2]. As the United States Supreme Court has noted, "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[3]

In practice, however, the promise of achieving greater efficiencies in arbitration may prove to be illusive. Timing presents a significant obstacle, because parties frequently choose their arbitral process when they contract to exchange goods or services, long before any particular dispute has emerged. Where parties anticipate potential disputes that are large, complex, and multifaceted, they are likely to provide for a more elaborate process. For example, arbitration clauses in insurance and reinsurance agreements typically contemplate tripartite panels, opportunities for discovery, and evidentiary hearings on the merits. When a simple dispute arises under a contract with an intricate arbitration clause, the parties may be able to stipulate to an abbreviated process. Post-dispute agreements may not materialize, however, because the parties' relationship and trust have deteriorated, because one side perceives strategic advantages in applying an existing arbitration clause, or for other reasons.

Furthermore, even if both sides desire a simpler process, they face the challenges and transaction costs of creating an appropriate form of arbitration for a single dispute. To help solve these problems and more, ARIAS • U.S. recently adopted a new set of arbitration rules: the ARIAS • U.S. Streamlined Rules for the Resolution of U.S. Insurance and Reinsurance Disputes ("Streamlined Rules").

The Board of Directors adopted the Streamlined Rules in 2014.[4] Like the ARIAS • U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (the "Standard Rules") that the ARIAS board adopted in 2013, the Streamlined Rules originated as a recommendation from the Arbitration Task Force, a group whose voting members consisted exclusively of industry representatives focused on improving arbitration.[5] Although the Streamlined Rules share a common platform and certain provisions with the Standard Rules, they have several unique features designed to simplify and reduce the process and, thereby, permit parties to resolve small disputes efficiently and economically.

The Streamlined Rules are designed for controversies where the amount at stake is relatively low. Initially, the most a claimant may seek to recover is $1,000,000. After the organizational meeting, however, the Umpire has discretion to allow a party to increase its affirmative claim to up to $2,000,000. Moreover, as discussed below, the Streamlined Rules limit the nature of the relief available and any spillover effects of the award to avoid implicating rights and obligations worth more than the monetary limit.

The Streamlined Rules adhere to the philosophy that less is more. Instead of three arbitrators, there is one. The process begins with an organizational meeting that, unless the Umpire orders otherwise, proceeds via video conference or telephonically. Position statements are short; exhibits are generally non-existent. The organizational meeting produces a bare-bones schedule. Discovery is generally limited to an automatic exchange of prescribed categories

Daniel L. FitzMaurice

Stephen Kennedy

Thomas O. Farrish

**Daniel FitzMaurice** is a partner in the Hartford Office of Day Pitney LLP, where he handles arbitrations, trials, and appeals of complex commercial disputes, including insurance and reinsurance. **Stephen Kennedy** is a partner in Clyde & Co US LLP's New York office. He has extensive experience representing insurers and reinsurers in complex coverage disputes involving a wide range of issues across all lines of business. **Thomas O. Farrish** is a partner at Day Pitney LLP, resident in the firm's Hartford office. His practice focuses on the representation of cedents, reinsurers and brokers in complex litigation and arbitration.

Although the Streamlined Rules share a common platform and certain provisions with the Standard Rules, they have several unique features designed to simplify and reduce the process and, thereby, permit parties to resolve small disputes efficiently and economically.

of documents. Motion practice is heavily circumscribed.

The contemplated process is also quick: the organizational meeting takes place within thirty days of the Umpire's appointment; the automatic exchange of documents happens within sixty days of the organizational meeting; and the hearing on the merits proceeds within one hundred and eighty days of the organizational meeting. The hearing itself is limited to a maximum of eight hours and consists of little or no testimony from fact witnesses and no expert submissions. As described in greater detail below, the Streamlined Rules minimize the process used to resolve smaller disputes and, thus, cut costs and time.

Set out below is a description of the Streamlined Rules, numbered to correspond to their eleven sections.

## 1. The Introduction

The Introduction identifies the range of disputes to which the Streamlined Rules apply, once the parties have adopted them. Unless the parties expressly agree otherwise, the Streamlined Rules apply "only to claims for monetary relief . . . where the amount in dispute is $1,000,000 or less."

Operating in tandem with Rule 11.8, the Introduction therefore puts claims for declaratory relief, injunctive relief, rescission or other equitable relief outside the scope of the Streamlined Rules. During the adoption process some commenters observed that without these limitations, a party could potentially circumvent the $1,000,000 monetary limitation. For example, a party could demand arbitration under the Streamlined Rules of a small dispute implicating a commonly-contested issue, and then claim that the Umpire's award had *res judicata* or collateral estoppel effect on other, much larger disputes with the same counterparty implicating the same issue. The reference to "only claims for monetary relief" in the Introduction is consistent with the prohibition of other, potentially more expansive forms of relief and the elimination of ripple effects from the award in the small dispute to other disputes between the parties.

The Introduction provides that, if a respondent makes a counterclaim, the Streamlined Rules will apply if neither the petitioner's claim nor the respondent's counterclaim individually exceeds $1,000,000. Stated differently, the claim and the counterclaim are not to be combined for purposes of determining whether the dispute fits within the rules' $1,000,000 limitation. The Introduction further provides that the Umpire has discretion to permit a party to increase its claim up to a total amount of $2,000,000 after the organizational meeting, without bringing the claim outside the Streamlined Rules, upon a showing of good cause. For purposes of calculating whether the parties' dispute fits within the rules' monetary limitations, interest claims are not considered.

The Introduction gives the rules their formal name – the "ARIAS • U.S. Streamlined Rules for the Resolution of U.S. Insurance and Reinsurance Disputes" – and provides contracting parties with some guidance on language to be included in the insurance or reinsurance agreement in the event that the parties wish to adopt them. The Introduction vests the Umpire with the power to interpret the rules, and also grants him or her "all powers and authority not inconsistent with these Rules, the agreement of the Parties, or applicable law."

## 2. Definitions

The Streamlined Rules incorporate the definitions of key terms found in Rule 2 of the Standard Rules. The Streamlined Rules anticipate the possibility that the Standard Rules may be amended from time to time, and accordingly they incorporate the definitions "in effect at the time the parties adopt" the Streamlined Rules.

## 3. Notice and Time Periods

The Streamlined Rules similarly borrow their "Notice and Time Periods" provisions from the version of the Standard Rules in effect at the time of the parties' adoption.

## 4. Commencement of Arbitration Proceedings

Rule 4 of the Streamlined Rules specifies that "[a]n arbitration shall be initiated by Notice of Arbitration, in writing, that identifies the (1) Petitioner and the name of the contact person to whom all communications are to be addressed (including telephone and e-mail information); (2) Respondent against whom arbitration is sought; (3) contract(s) at issue; and (4) a short and plain statement of the nature of the claims and/or issues, including the amount in dispute." The requirement of a statement of the amount in dispute is unique to the

Streamlined Rules and is not found in the Standard Rules.

The Standard Rules contain a provision respecting the amendment of arbitration demands, but in the interest of simplicity the Streamlined Rules do not. Because the Streamlined Rules do not apply when a party seeks non-monetary relief, presumably most requests to amend demands or counter-demands will concern the sum demanded. Such requests are addressed in the Introduction.

## 5. Response by Respondent

Rule 5 of the Streamlined Rules states that "Parties who receive a Notice of Arbitration shall respond to it, in writing, within thirty (30) days." The written response must contain at least three elements – the "identification of the entities on whose behalf the Response is sent," including the "name of the contact person to whom all communications are to be addressed (including telephone and e-mail information)"; "a short and plain response to the Petitioner's statement of the nature of its claims and/or issues"; and "a short and plain statement of any claims and/or issues asserted by Respondent against Petitioner, including the amount in dispute."

Like Rule 4, Rule 5 omits the provision respecting the amendment of responses that is found in the Standard Rules.

## 6. Appointment and Composition of the Panel.

Some of the most significant differences between the Streamlined Rules and the Standard Rules are found in Rule 6. Under the Streamlined Rules, the arbitration is conducted by a single Umpire rather than by the tripartite panel contemplated by the Standard Rules.

Rule 6 provides that if the parties are able to agree on the Umpire, that person will serve. If the parties are unable to agree, the rule directs each party to select four candidates from the list of ARIAS-certified arbitrators. After Umpire questionnaires are sent and returned, the rule instructs each party to strike three candidates from the other's list, and to select from among the two remaining candidates "by drawing lots or another method acceptable to both Parties." The rule forbids parties and their representatives from engaging in unilateral contacts with any candidate while his or her appointment is being considered.

Rule 6 anticipates situations in which an Umpire will become unable or unwilling to serve after being appointed. In such situations, the rule directs the parties to attempt to choose a replacement Umpire within fourteen days. If they are unable to do so, the replacement Umpire shall be appointed using the "name four, strike three, draw lots" procedure described above.

The rule directs the parties to "share equally the cost of the Umpire," "[u]nless otherwise awarded by the Umpire pursuant to" Rules 8.2 or 11.8. Rule 8.2 permits the Umpire to sanction a party for failure to comply with an interim decision or for discovery abuse. Rule 11.8 authorizes the Umpire to "award . . . costs of arbitration and attorneys' fees," although as discussed below it does not permit awards of punitive damages.

## 7. Confidentiality

Like the Standard Rules, the Streamlined Rules establish confidentiality as a default. The arbitration proceedings are deemed confidential – and no one other than the Umpire, the parties, their duly authorized representatives, or persons participating in the proceedings are permitted to attend meetings or hearings, except in two circumstances. First, the parties may agree to waive confidentiality – although if they do so, the rule obliges them to inform the Umpire as soon as reasonably practical. Second, the Umpire may order that the arbitration not be confidential "upon the motion of a Party and a showing of good cause."

Rule 7 contains several exceptions to confidentiality. These generally mirror the exceptions found in the ARIAS-form confidentiality agreement. Parties may disclose arbitration information "as necessary in connection with a judicial proceeding relating to the arbitration or any [arbitration] Decision," or "as otherwise required by law, regulation, independent accounting audit or judicial decision." In direct insurance arbitrations, insurers may disclose arbitration information "to support the insurer's reinsurance recoveries," and in reinsurance arbitrations the reinsurer may disclose such information to support their retrocessional recoveries. If one of these exceptions applies, the party contemplating disclosure of arbitration information is nevertheless required to use its best efforts to maintain the confidentiality of the information, including the filing of pleadings under seal when permitted.

## 8. Interim Decisions

Rule 8 expressly confirms the Umpire's authority to issue interim decisions. The rule, however, is subject to Rules 9.7 and 10.4 – two rules which, in the interest of streamlining proceedings, respectively forbid motions on the merits and formal discovery motions.

Rule 8 empowers the Umpire to sanction any party for failing to comply with any interim decision. The rule contains a non-exhaustive list of permissible sanctions, including "striking a claim or defense; excluding evidence on an issue; drawing an adverse inference against a Party; and imposing costs, including attorneys' fees, associated with" discovery abuse or a failure to comply with an interim decision.

## 9. Pre-Hearing Procedure

The Streamlined Rules require that pre-hearing matters take place expeditiously. The organizational meeting, for example, must occur no later than thirty days after the appointment of the Umpire, and be held by telephone or videoconference unless the Umpire directs otherwise. This provision is similar to the requirement in the Association of Insurance and Reinsurance Runoff Companies' Dispute Resolution Procedure ("AIRROC Rules") that the organizational meeting takes place by telephone within twenty one days of the appointment of a single arbitrator. [6]

As with the Standard Rules, the parties under the Streamlined Rules must confer prior to the organizational meeting to discuss the issues they

By adopting both sets of rules in one arbitration clause, the parties can better tailor their dispute resolution process to the varying types of issues that may arise.

expect to be addressed at the meeting. However, unlike the Standard Rules, the Streamlined Rules direct the parties to focus on two discrete issues: establishing (1) a date certain for the hearing on the merits; and (2) a date for the exchange of documents required under Rule 10.1.

Five days before the organizational meeting, each party must submit a position statement that does not exceed five double-spaced pages using 12 point font and does not attach any exhibits other than the (re)insurance contract in the absence of an agreement by the parties or a request by the Umpire. Rule 9.4 limits the range of exhibits that the Umpire may require At the organizational meeting, the Umpire is obligated to make the same disclosures required under Rules 10.2 and 10.3 of the Standard Rules concerning his or her relationships with the parties and parties' counsel and whether either party or counsel have offered the Umpire any other work for compensation. As under the Standard Rules, the Umpire's duty of disclosure is ongoing.

In contrast to the Standard Rules, the Streamlined Rules require that an arbitration schedule be set at the organizational meeting that includes dates for the hearing on the merits and the automatic exchange of documents required under Rule10.1 of the Streamlined Rules. The Umpire may, but is not required to, address other matters at the organizational meeting, including, for example, whether to enter into hold harmless and indemnification agreements for the benefit of the Umpire or a confidentiality agreement. Parties, however, are permitted to ask that the Umpire order the production of documents beyond the categories that must be automatically exchanged under Rule 10.1.

Consistent with the goal of streamlining the arbitral process, Rule 9 forbids the parties from making any motions on the merits prior to the hearing.

## 10. Discovery

Unlike the Standard Rules, the Streamlined Rules restrict the amount of discovery between the parties and the period of time in which discovery must take place. The Streamlined Rules, however, are more liberal than the AIRROC Rules which do not permit any discovery unless agreed to by the parties.[7]

Under Rules 10.1 and 10.3 of the Streamlined Rules, the parties must, within sixty days of the organizational meeting, automatically exchange the following limited categories of documents: (i) the (re)insurance contracts in dispute and their relevant underwriting/placement files; (ii) billings and documents provided specifically in support of the billings; (iii) correspondence between the parties specifically relating to the matter in dispute; (iv) where the dispute does not concern a billing, any documents specifically relating to and which "succinctly captures" the disputed matter; (v) ceded and assumed reinsurance claims files (if a reinsurance dispute); and (vi) any other category of documents determined by the Umpire at the organizational meeting to be relevant to the dispute, including but not limited to the underwriting and claims files concerning the reinsured policy[ies].

The parties are not authorized under the Streamlined Rules to serve document demands for information that is in addition to or beyond that found in the documents automatically exchanged under Rule 10.1. Nevertheless, as noted above, they may ask the Umpire for, and Umpire has the discretion to order, the production of additional categories of documents including: (i) documents relating to other (re)insurance contracts not in dispute; and (ii) underwriting or claims handling manuals. The Umpire may also, upon a showing of good cause and in consideration of the purpose of the Streamlined Rules to bring about quick resolution of disputes, order parties to produce documents relating to non-parties. To the extent there is a disagreement concerning a party's document discovery obligations, discovery motions are not permitted. Instead, discovery-related disputes are to be resolved by the Umpire after a telephonic or video conference with the parties unless the dispute was previously raised in a party's position statement and/or during the organizational meeting.

The parties are free to agree to expand or restrict the categories of documents to be exchanged under Rule 10.1 but that agreement must be in writing and sent to the Umpire. To the extent that a party fails to produce one or more categories of documents required under Rule 10.1, the Umpire may draw an adverse inference against that party.

Depositions are not allowed unless granted

by the Umpire upon a showing of good cause. To the extent depositions are permitted by the Umpire, they are limited to no more than two per party and must be completed within ninety days of the organizational meeting. Under no circumstances is expert discovery permitted.

## 11. Hearing on the Merits

A hearing on the merits must take place no more than one hundred and eighty days after the organizational meeting and last no longer than one eight hour day, excluding breaks.

No later than twenty days prior to the hearing, the parties must submit pre-hearing briefs along with any supporting documents (which were exchanged in discovery) and deposition transcripts. The briefs cannot be more than ten double spaced pages using 12 point font. Parties may, but are not required to, submit reply briefs within fifteen days of the hearing which may not exceed three doubled spaced pages.

After receiving the briefs, the Umpire will decide whether an in-person hearing is required. The parties and the Umpire may, however, agree to conduct the hearing by telephone or video conference. Live testimony at the hearing is not permitted unless agreed to by the parties or requested by the Umpire. To the extent it is permitted and the hearing is in-person, witnesses may nevertheless testify by telephone or video conference.

Importantly, the Streamlined Rules provide that the Umpire's award does not have any *res judicata* or collateral estoppel effect. It is not uncommon for a cedent to bill a reinsurer for amounts under $1,000,000 with respect to a claim or issue which will likely have future billings related to it that far exceed $1,000,000. By providing that an Umpire's award does not have a preclusive effect, the Streamlined Rules eliminate the risk that a party may seek a quick and favorable resolution of a claim or issue with a minimal amount of discovery and process in order to argue later that its counterparty is barred from challenging that same claim or issue under *res judicata* and/or collateral estoppel principles.

This provision in the Streamlined Rules is similar to the one found in the AIRROC Rules which states that an arbitration award will not have any precedential or preclusive effect.[8]

## CONCLUSION

Consistent with the consensual nature of arbitration, the Streamlined Rules apply whenever parties agree to adhere to them.[9] It is possible, of course, for parties to agree to specify that they will proceed under the Streamlined Rules for smaller disputes and under the more elaborate, Standard Rules for all other disputes. By adopting both sets of rules in one arbitration clause, the parties can better tailor their dispute resolution process to the varying types of issues that may arise. In that way, they may also realize the promise that "[a]rbitration is intended to provide the parties to a dispute with a speedy and relatively inexpensive trial before specialists."[10] ▼

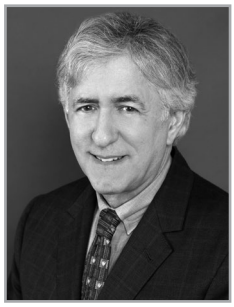
ENDNOTES

1. *See,* e.g., Patrick Polden, A *History of the County Court, 1846-1971* (Cambridge Univ. Press. 1999) at 10-12 (sample available at http://catdir.loc.gov/catdir/samples/cam032/98043621.pdf).
2. The term "arbitration" encompasses a wide variety of dispute resolution processes that generally share the common feature of entrusting a third party to reach a binding resolution of the parties' dispute. See, e.g., *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013) (noting that the Federal Arbitration Act does not define "arbitration" and that an agreement to arbitrate is one in which "the language clearly manifests an intention by the parties to submit certain disputes to a specified third party for finding resolution) (citations and internal quotations omitted); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.") Moreover, arbitration often employs simpler and more limited procedures than litigation. For example, "[i]t is well recognized that discovery is generally more limited in arbitration than in litigation." *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 212 n. 9 (3d Cir. 2010) (citation and internal quotations omitted).
3. A*T & T Mobility LLC, v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 1748, 179 L. Ed. 2d 742 (2011).
4. *See* ARIAS•U.S. Quarterly, Vol. 21, No. 4 at 20 (2014) ("at the 2014 Annual Membership Meeting, outgoing Chairman Jeffrey M. Rubin summarized the accomplishments of the past year, principally completion of the ARIAS • U.S. Neutral Panel Rules and the Streamlined Rules for Small Claim Disputes").
5. D. L. FitzMaurice & E. Caprio Brady, *ARIAS • U.S. Announces Company Project to Improve Arbitration*, ARIAS • U.S. Quarterly, Vol. 18, No. 3 at 2 (2011); D. L. FitzMaurice, S. Kennedy, & T. O. Farrish, *The ARIAS • U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes*, ARIAS • U.S. Quarterly, Vol. 20, No. 4 at 17 (2013).
6. AIRROC Dispute Resolution Procedure at 4 (Procedural Rules IV(A)) (Sept. 2015 Ed.)
7. *Id.* at 4 (Procedural Rules IV(B)).
8. *Id.* at 7 (Absence of Precedential or Preclusive Effect VIII).
9. Streamlined Rules § 1 ("When an agreement, submission or reference provides for or otherwise refers to arbitration under the ARIAS•U.S. Streamlined Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, the Parties agree that the arbitration shall be conducted in accordance with these Rules.").
10. *Conticommodity Services, Inc. v. Philipp & Lion*, 613 F.2d 1222, 1224 (2d Cir. 1980) (citation omitted).

article

# Points of Departure: Procedural Differences Between International Arbitration and U.S. Reinsurance Arbitration*

Peter R. Chaffetz



Andrew L. Poplinger

Gretta L. Walters

By Peter R. Chaffetz, Andrew L. Poplinger, and Gretta L. Walters

## I. Introduction

This paper reviews the main differences between domestic reinsurance arbitrations and "international arbitration." The latter has gained an increasingly important role in resolving cross-border commercial disputes, prominently including certain classes of direct insurance coverage disputes. Some of these differs flow from the procedural rules imposed under the various international arbitration institutions (e.g., the International Chamber of Commerce ("ICC"), the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"), the London Court of International Arbitration ("LCIA")). Others, however, reflect differences in culture. While it is true that reinsurance arbitration is less formal than litigation, most practitioners in this field also work or have worked as trial lawyers, making their frame of reference U.S. litigation and the parallel federal and state civil procedure rules. These rules do not govern reinsurance arbitrations, but their underlying principles, such as those regarding the scope and form of discovery, have substantial influence. In contrast, the international arbitration community is decidedly not U.S.-centric, instead frequently adopting practices from the English law model or civil law jurisdictions that do not rely on the discovery rules familiar to American practitioners.

## II. Main Points of Comparison

### A. Panel Composition and Neutrality

Panel Composition:

- *Domestic Reinsurance Arbitration:* In most reinsurance arbitrations, the parties' arbitration agreement will require that the Panel consist of industry experts.[1]
- *International Arbitration:* Under most international arbitration regimes, any neutral person may be selected as an arbitrator. Although the parties' contract may impose specific qualifications going to professional or industry qualifications, extensive contractual qualifications are not recommended to allow parties to focus on the specific traits required once a dispute materializes.[2]

Panel Neutrality:

- *Domestic Reinsurance Arbitration:* Domestic reinsurance arbitration usually has non-neutral, party-appointed arbitrators and a neutral "umpire." All arbitrators must be "disinterested," meaning they cannot have a direct personal pecuniary stake in the outcome or be under party control.[3] Subject to the agreement of the parties at the preliminary organizational meeting, ex parte communications between party-appointed arbitrators and their respective parties can remain open for much of the proceeding. [4] *Ex parte* communication between a party and the umpire is not permitted other than for limited, logistical matters.

**Peter Chaffetz** has first-chaired more than 40 arbitrations and trials, with a practice focus in reinsurance for 25 years. In 2009 Mr. Chaffetz co-founded Chaffetz Lindsey LLP, a New York-based litigation/arbitration boutique, having previously served as global head of litigation for one of the world's largest firms.

**Andrew Poplinger** is an associate with Chaffetz Lindsey and joined the firm in 2012. Andrew has experience representing public and private companies, partnerships and individuals in general commercial litigation, reinsurance disputes and arbitration. Immediately prior to joining Chaffetz Lindsey Andrew clerked for the Honorable Richard K. Eaton of the United States Court of International Trade.

**Gretta L. Walters** joined Chaffetz Lindsey in June 2014. She has experience representing individual and corporate clients in complex litigation matters in state and federal court and in international and cross-border disputes.

- *International Arbitration:* International arbitration laws and arbitral rules universally require that each member of the tribunal be and remain both independent and impartial.[5] This not only bars all *ex parte* communications with any member after the tribunal is formed, but it also bars substantive discussion of the merits of the dispute with potential arbitrators prior to their appointment.[6]

**B. Prehearing Procedures**

Before the Panel/Tribunal is Established:

- *Domestic Reinsurance Arbitration:* A reinsurance arbitration generally proceeds as an *ad hoc* procedure and commences when one party serves a demand for arbitration, usually in the form of a letter. During this initial phase, the procedure is subject to the parties' agreement.
- *International Arbitration:* International arbitrations begin when a party files a request for arbitration and frequently proceed under formal rules, such as those of an institution like the ICC, ICDR, or the LCIA. These rules provide a framework for the arbitration and contain detailed provisions on the initial phases of the arbitration. During this initial phase, the institution will assist in administering the arbitration and, if the parties are not able to agree, can appoint arbitrators or select the language or seat.

Written Submissions

- *Domestic Reinsurance Arbitration:* The panel will typically request that the parties submit "position statements" in advance of the organizational meeting, consisting of a short statement of a party's substantive position and procedural issues that a party wishes to raise at the organizational meeting, such as scheduling or the scope of discovery. [7]The parties typically also later submit pre-hearing briefs and reply briefs that contain vastly greater detail than the position statements, typically consisting of a full statement of facts supported by evidentiary exhibits, legal arguments and supporting authority, and a prayer for relief.
- *International Arbitration:* Written submissions are given considerable weight and will likely have a greater impact on the tribunal's ultimate ruling than the written submissions to a domestic reinsurance panel.[8] Once the tribunal is constituted, parties are typically given the opportunity to elaborate on their initial, commencing claims and defenses in further formal written submissions.[9] Although the form of these documents depends on the complexity of the arbitration, it is not uncommon for these submissions to take months to prepare and to consist of hundreds of pages.

Procedural Rules/Discovery:

- *Domestic Reinsurance Arbitration:* The parties and the panel typically agree on basic procedural ground rules at the organizational meeting. It is customary to have full document disclosure and depositions, at least of witnesses expected to testify at the hearing.[10] The scope of such discovery will depend upon considerations such as the amount in dispute, complexity of the issues, and availability of evidence.[11] In all cases, unless the arbitration agreement provides otherwise, the scope of discovery is left to the panel's discretion.[12]
- *International Arbitration:* The formal rules that often apply do not typically contain detailed requirements for taking and presenting evidence in the arbitration.[13] Instead, the procedures may be agreed by the parties or set by the tribunal.[14] If no rules apply, the tribunal might refer to the IBA Rules on the Taking of Evidence in International Arbitration to prescribe the procedure for exchanging and presenting documents and factual and expert witnesses.[15] Depositions and American-style discovery are rarely permitted within this framework.

**C. Hearing: Form/Presentation of Arguments and Evidence**

Hearing Procedures and Presentation:

- *Domestic Reinsurance Arbitration:* In U.S. reinsurance arbitration, the panel may dictate the form of any interim or final hearing, including whether the presentation will involve a full blown evidentiary hearing or whether the matter requires only briefing and an oral argument. Such evidentiary hearings are common and generally follow the pattern of U.S. litigation, with each party making an opening presentation followed by live witness testimony and cross-examination from each side. The most pronounced difference from proceedings in court is the

In common law proceedings, case law may be very important to the tribunal's analysis.

relaxed approach to the admission of evidence. Reinsurance panels almost always hear closing arguments, and sometimes permit post-closing briefs.

- *International Arbitration:* The tribunal in an international arbitration also has broad discretion to regulate the taking of evidence and presentation of arguments, either as written submissions or at an evidentiary hearing.[16] Most arbitral rules require, however, that the tribunal hold a hearing if requested by the parties.[17] It is therefore common that a tribunal will hold at least one hearing in which a party may submit its factual and legal evidence. The hearing departs from the practices of U.S. reinsurance arbitration, however, as parties typically do not make full opening and closing statements and limit witness examination to cross-examination. Parties will frequently submit post-hearing briefing.

Language:

- *Domestic Reinsurance Arbitration:* The proceedings will always take place in English.
- *International Arbitration:* In cross-border disputes, the parties may operate in different native languages. Often times, parties choose English as a neutral language. But regardless of the language of the proceeding, there will frequently be documents in a different language and witnesses who require translation.

**D. Role of Statutory and Case Authority**

- *Domestic Reinsurance Arbitration:* It is common for reinsurance clauses to include an "honorable engagement clause," which will typically frees the panel from the obligation to follow strict rules of law.[18] The direction given by that clause and the composition of most U.S. reinsurance panels favor argument based on commercial practicality and fairness rather than technical legal rules. Still, legal precedents may still be persuasive, as they reflect industry practice and cases that are themselves grounded in practical considerations or that can be shown to have reached a fair result on similar facts.
- *International Arbitration:* "Honorable engagement" clauses are not common in international arbitrations, and most arbitration agreements direct the tribunal to apply the law of a specified jurisdiction. In common law proceedings, case law may be very important to the tribunal's analysis. In civil law proceedings, expert testimony from legal scholars and scholarly commentaries will have a greater role.

**E. Confidentiality**

- *Domestic Reinsurance Arbitration:* Reinsurance arbitrations are almost always confidential. The confidentiality of the proceedings is typically memorialized in an agreement executed by the panel members and the parties at the organizational meeting requiring that, with limited exceptions, such as when required by court order or in connection with enforcement proceedings.[19]
- *International Arbitration:* While arbitrators and arbitration institutions are typically required to maintain the confidentiality of an international arbitration,[20] parties are not typically bound to the same confidentiality requirements, absent an express agreement.[21] As with U.S. reinsurance arbitration, even where such an agreement exists, parties are still typically allowed to disclose arbitration awards as necessary to request or resist enforcement.

**F. Form of Award**

- *Domestic Reinsurance Arbitration:* Although a subject of perennial discussion, the "unreasoned" award is still most common in U.S. reinsurance arbitration. As few contracts address this issue, the choice of whether to require a reasoned award will be an agenda item for the organizational meeting. If the question has not already been decided, parties often urge one approach or the other in closing argument.
- *International Arbitration:* The reasoned decision is the norm in international arbitration. In fact, most arbitral rules require this,[22] and it is not uncommon for tribunals to issue findings of fact and conclusions of law that run for tens and even hundreds of pages.

## III. Conclusion

As an introductory comparison, this paper has necessarily focused on differences in rules and procedures. In actual practice, this is only a starting point. Lawyers and arbitrators who have the opportunity to move from domestic to international cases

must of course learn these procedural differences and to appreciate the cultural differences discussed. But they will also need to adjust their strategic thinking to adapt to unfamiliar practices. For arbitrators, there will be not only the transition to neutrality, but also new responsibility for negotiating and drafting detailed procedural orders and potentially lengthy, reasoned awards. Hopefully, this overview will help both lawyers and arbitrators making this transition to anticipate the new demands they will face.▼

ENDNOTES

1. ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure, Chpt. 1, Illust. 1.1, available at http://www.arias-us.org/index.cfm?a=38 (last visited Oct. 5, 2014) (providing a model clause recommending industry experts).
2. Nigel Blackaby et al., R*edfern and Hunter on International Arbitration* 258-63 (5th ed. 2009) [hereinafter *Redfern Hunter*].
3. ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure § 2.3 (Rev. Ed. 2004). ("The parties and Panel should interpret arbitration clauses requiring "disinterested" arbitrators to mean that arbitrators may have no financial interest in the arbitration outcome and are not under any party's control."); ARIAS•U.S. Code of Conduct, Canon 1(3) (Mar. 24, 2014) (providing a list of disqualifying conflicts of interest) *available* at http://www.arias-us.org/index.cfm?a=27 (last visited Oct. 5, 2014.)
4. ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure § 3.9.
5. *See* Julian D. M. Lew et al., Comparative International Commercial Arbitration 255 (2003) [hereinafter Lew] ("It is a fundamental and universally accepted principle of international arbitration that arbitrators have to be impartial and independent of the parties and must remain so during the proceedings."). The IBA has published Guidelines on Conflicts of Interest in International Arbitration to assist parties, institutions, and courts in assessing an arbitrator's independence and impartiality. IBA Guidelines on Conflicts of Interest in International Arbitration (2004), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#.
6. *See* Gary B. Born, International Commercial Arbitration 1739, 1697 (2d ed. 2014) [hereinafter Born] ("no ex parte contacts between the arbitrators and parties about the dispute may take place").
7. Steven C. Schwartz, Reinsurance Law: An Analytic Approach §13.05[3] (2009) [hereinafter Schwartz].
8. *See* D. Caron L. Caplan, The UNCITRAL Arbitration Rules: A Commentary 409 (2d ed. 2013) ("Written pleadings are often given primary emphasis throughout the proceedings . . . .").
9. *See* Born at 2250 (explaining that some national arbitration laws and rules, in fact, require that parties have the opportunity to present these further submissions).
10. *See* Schwartz at §13.05[6] ("Although discovery in reinsurance arbitrations may once have been rare, today it is common. Parties exchange documents and take depositions in much the way they would in court, and, just as in court, the extent of discovery that is appropriate varies with every case.")
11. ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure § 4.1, Comment E ("No particular pattern fits all reinsurance arbitrations. In resolving disputes, the Panel should exercise its discretion and strike the appropriate balance for the given case between enabling the parties to obtain relevant discovery necessary to their respective cases, and protecting the streamlined, cost-effective intent of the arbitration process.")
12. *E.S. Originals, Inc. v. Totes Isotoner Corp.*, 2011 WL 4527417 (S.D.N.Y. Sept. 30, 2011) (finding that disputes concerning "discovery requests are properly decided by the appointed arbitrator, not the Court" and "any requests to limit the scope of discovery are denied without prejudice to renewal before the arbitrator").
13. *See* William W. Park, "Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion (The 2002 Freshfields Lecture)," 19 Arb. Int'l 279, 282 (2003) reprinted in 19 Int'l Arb. Rep. 30 (May 2004) ("For better or for worse, rules in the first sense (prefabricated provisions) contain few rules in the second sense (canons for conduct of the proceedings), but leave the latter questions to the arbitrators.").
14. Most arbitration laws affirm that parties are free to agree to the procedure of the arbitration and that, absent such agreement, arbitrators have broad discretion to establish the procedure. See, e.g., UNCITRAL Model Law on International Commercial Arbitration Art. 19 (1985 with 2006 amendments).
15. IBA Rules on the Taking of Evidence in International Arbitration (2010) available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.
16. *See* Lew at 553 (explaining that arbitrators have wide discretion in taking evidence in international arbitration).
17. *See,* e.g., ICC Arbitration Rules Art. 25(6); SCC Arbitration Rules Art. 27(1) (2010); UNCITRAL Arbitrations Rules Art. 17(3).
18. *See*, e.g., ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure Illustration 1.1.
19. ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure § 3.8 (providing a link to the ARIAS•U.S. sample confidentiality agreement).
20. *See*, e.g., French Code of Civil Procedure, Art. 1479; ICDR Arbitration Rules Art. 37(1); LCIA Arbitration Rules Art. 30.2.
21. See Born at 2783-84 ("most national courts and other authorities have held that parties are in principle free to agree to either confidential or non-confidential arbitrations and that their agreements will generally be given effect as an element of the parties' general procedural autonomy.").
*22. See*, e.g., ICC Rules Art. 31(2); ICDR Arbitration Rules Art. 30(1); LCIA Arbitration Rules Art. 26.2; SCC Arbitration Rules Art. 36(1); UNCITRAL Arbitration Rules Art. 34(3).

***This is a summary version of an article which appears in full on the Arias website at http://arias-us.org/index.cfm?a=469.**

article

# Six Years After Hall Street: The Continued Viability of Manifest Disregard, Jurisdiction by Jurisdiction*

John S. Diaconis

Ari J. Diaconis

By Ari J. Diaconis and John S. Diaconis

## I. INTRODUCTION

The Federal Arbitration Act ("FAA") generally requires that state and federal courts enforce or "confirm" arbitration awards.[1] FAA Section 10 sets forth four exceptions to this general rule—four grounds under which courts may "vacate" arbitration awards. In *Hall Street Associates v. Mattel (2008)*, the United States Supreme Court declared that these four grounds for vacatur are exclusive and that parties to an arbitration agreement cannot expand them through contract or otherwise.

Early commentators predicted that *Hall Street* would bar any further use of the manifest disregard doctrine, which allows for vacatur upon a court's finding that an arbitrator disregarded recognized law while rending an award. Indeed, as a ground for vacatur not expressly stated in FAA Section 10, manifest disregard seemed doomed under *Hall Street*'s broad language, especially to the extent the doctrine was understood as independent from rather than implicit within FAA Section 10.

Nevertheless, now six years after *Hall Street*, manifest disregard lives on, albeit in varying degrees of force across the country. In a jurisdiction by jurisdiction analysis, the full online version of this Article examines the current state of manifest disregard, directing readers to recent decisions in every United States Court of Appeals. In this condensed Article, we provide readers with a broad overview, highlighting the more noteworthy manifest disregard approaches adopted by the various Courts of Appeals.

In concluding, we recommend that the Supreme Court soon supplement its *Hall Street* decision with a decisive declaration that manifest disregard is no longer viable, at least not when understood as a ground for vacatur independent of FAA Section 10. Out of over 250 cases reviewed in preparation for this Article, only three post-*Hall Street* decisions vacated arbitration awards based on manifest disregard. Thus, while many Courts of Appeals technically recognize manifest disregard post-*Hall Street*, the doctrine is dead in practice, existing at this point almost exclusively as an added cost of litigation and a drain on judicial resources.

## II. BACKGROUND

### A. FAA Overview

In 1925, Congress enacted what is now referred to as the Federal Arbitration Act, or FAA. Enacted during a rapidly expanding economy, the FAA declared a national acceptance of arbitration and dramatically altered the landscape of alternative dispute resolution. Having undergone several modifications since 1925, the FAA currently has three chapters. Chapter 1, titled "General Provisions," constitutes the FAA's thrust and is the primary focus of this Article. Chapters 2 and 3 constitute implementing legislations for two distinct international arbitration conventions, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the Inter-American Convention on International Commercial Arbitration ("Panama Convention").

Note that the FAA applies in both state and federal court. The FAA, however, is not a jurisdiction-creating statute. To litigate under the FAA in federal court, therefore, parties must show either: (i) diversity of citizenship and the requisite jurisdictional amount; or (ii) federal question subject matter.

#### *1. FAA Chapter 1*

FAA Chapter 1 is comprised of FAA Sections 1-16. Section 1 delineates Chapter 1's scope, which the Supreme Court interprets as reaching to the "broadest permissible exercise of Congress' Commerce Clause power." Accordingly, virtually all arbitra-

**John S. Diaconis** is a partner at Bleakley Platt & Schmidt LLP. He is a former vice-president and claims counsel of Hartford Financial Services Group, Inc. and acts as arbitrator and mediator in insurance and reinsurance disputes.

**Ari J. Diaconis** is a 2014 graduate of Cornell Law School and currently serves as Law Clerk to the Hon. Edward R. Korman, United States District Court, Eastern District of New York. He expects to join the Litigation Department of Sullivan & Cromwell LLP after his clerkship and hopes one day to litigate reinsurance disputes. The views expressed in this Article are those of the authors and do not represent the views of, and should not be attributed to, Judge Korman.

tion agreements fall under Chapter 1's scope, so long as they are contained within contracts that implicate interstate commerce. Section 2 is Chapter 1's most powerful provision, mandating that courts enforce agreements to arbitrate in much the same way they would any other contract. Section 9 then states that courts "must" confirm arbitration awards upon a party's motion "unless" Section 10 permits vacatur or "unless" Section 11 permits modification. Section 10(a) then lists four grounds for vacatur, which serve as the only expressly stated grounds for vacatur in all of FAA Chapter 1. It is these four grounds listed below that the Supreme Court analyzed in *Hall Street* and which comprise the focus of this Article:

where the award was procured by corruption, fraud, or undue means;

where there was evident partiality or corruption in the arbitrators, or either of them;

where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

***2. FAA Chapters 2 and 3***

FAA Chapter 2 is comprised of FAA Sections 201-208, and Chapter 3 is comprised of FAA Sections 301-307. Chapters 2 and 3 are the implementing legislations for the New York Convention and the Panama Convention, respectively. While much of this Article's analysis indirectly implicates arbitration disputes governed by the New York and Panama Convention, we reserve an in-depth overview of the Conventions for this Article's full version available on the ARIAS website.

**B. Early Interpretation of the FAA**

Congress' enactment of the FAA in 1925 left numerous unanswered questions for the courts. In fact, early litigants questioned the constitutionality of the Act altogether. Courts eventually came to wrestle with more narrow questions, like under what circumstances was vacatur of an arbitration award appropriate under FAA Section 10(a). While paying lip service to the notion that Section 10(a)'s language forbid vacatur except upon the four limited grounds it outlined, all courts ultimately develop "judicially named" grounds for vacatur. Today, most of the various judicially named grounds—*e.g.*, irrationality, arbitrary and capricious—are generally referred to simply as "manifest disregard."

**C. Introducing Manifest Disregard**

The phrase manifest disregard comes from dicta in the 1953 case of *Wilko v. Swan*, where the Supreme Court wrote, "[T]he interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject . . . to judicial review[]." In distinguishing an arbitrator's "interpretation" of the law from its "manifest disregard" of the law, the Court cited to *The Hartbridge*, which in turn cited to *Wilkins v. Allen*, a pre-FAA New York Court of Appeals case declaring that "a court will not [vacate] an [arbitration] award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established." By the time of the Supreme Court's 2008 decision in *Hall Street*, parties routinely challenged arbitration awards based on manifest disregard and each federal circuit court had declared its own articulation of the doctrine.

## III. THE *HALL STREET* DECISION

The *Hall Street* case began as a dispute between landlord Hall Street Associates and tenant Mattel, Inc. Hall Street and Mattel ultimately agreed to arbitrate the issue of whether Mattel must indemnify Hall Street for various costs associated with environmental pollution. The ensuing arbitration agreement called for judicial vacatur or modification of the arbitration award "(i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." In providing for this broad judicial oversight, the parties' arbitration agreement arguably contravened FAA Section 10(a), which as outlined above provides only limited grounds for judicial vacatur of arbitration awards.

Indeed, the question eventually litigated before the Supreme Court was whether arbitration agreements subject to the FAA may call for judicial review above that which Congress set out in FAA Section 10(a). The Court answered in the negative, stating that the grounds for vacatur listed in Section 10(a) are "exclusive" and not amenable to contractual expansion. In reaching this conclusion, the Court stated that the FAA's purpose was not merely to honor agreements to arbitrate, but also to provide great deference towards arbitration through limited judicial review and expedited enforcement of arbitration awards. The Court noted that FAA Section 9 states that courts "must" confirm arbitration awards "unless" Section 10(a)'s vacatur or Section 11's modification standards apply.

In the course of ruling that parties may not expand FAA Section 10(a), the Court rebuffed a strong argument from Hall Street: the contractually expanded judicial review set out in the Hall Street's arbitration agreement was enforceable because it called for a standard that was no more expansive than that regularly applied by the courts—manifest disregard. That is, Hall Street argued that its contract merely called for judicial review in accordance with that condoned by the Supreme Court's 1935 language in *Wilko v. Swan*: "[T]he interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject . . . to judicial review for error in interpretation."

The Court first responded that it was not immediately clear that the Hall Street arbitration agreement called merely for a manifest disregard standard, the agreement seeming to go beyond manifest disregard in naming *any* legal error as grounds for vacatur. But more important for our purposes, the Court called into question the very

meaning of its earlier *Wilko* language, writing:

Then there is the vagueness of *Wilko*'s phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

Indeed, before the Court's *Hall Street* decision, although lower courts had all applied a manifest disregard standard, they had done so without express authorization from the Supreme Court. The Court's *Hall Street* decision highlighted this lack of authorization. The decision, moreover, suggests that manifest disregard is improper to the extent it represents a standard of review independent from the four listed vacatur grounds in FAA Section 10(a). On the other hand, the manifest disregard doctrine might remain viable under *Hall Street* to the extent the doctrine represents a standard of review already implicit within Section 10(a)'s stated grounds.

## IV. POST *HALL STREET* LANDSCAPE

Every federal circuit has reacted in one way or another to the difficult question that *Hall Street* left open. While the reactions differ in significant ways, one theme is clear: post-*Hall Street* courts will vacate virtually no arbitration awards based on manifest disregard. Indeed, no matter how much lip service a circuit pays to the doctrine's survival, review of over 250 cases revealed only three successful manifest disregard challenges.[2] While the full online version of this Article thoroughly details the standards currently applied in each of the Courts of Appeals, in this condensed Article we provide only a brief overview. Specifically, we focus on the standards applied in the Second, Fourth, and Eighth Circuits, feeling as though these standards present a useful sampling of the varying approaches currently applied.

Second Circuit. The Second Circuit has expressly stated that manifest disregard survives *Hall Street*, albeit with limited force to be applied only in egregious circumstances. The Circuit reached this conclusion in *Stolt-Nielsen v. AnimalFeeds (2008)*, reasoning that while *Hall Street* bars manifest disregard when understood as a standard of review distinct from FAA Section 10(a), manifest disregard is viable when understood as implicit within Section 10(a). Specifically, Section (10)(a)(4) calls for vacatur when arbitrators "exceed[] their powers." The Circuit argues that Section 10(a)(4) implicitly encompasses at least a limited manifest disregard doctrine, since arbitrators necessarily "exceed their powers" when they know "of the relevant legal principle, appreciate[] that this principle control[s] the outcome of the disputed issue, and nonetheless willfully flout[] the governing law by refusing to apply it."

The Circuit has not addressed the scope of manifest disregard since its *Stolt-Nielsen* decision. Instead, in a series of non-binding summary orders, the Circuit has merely reiterated *Stolt-Nielsen*'s manifest disregard standard: "(1) we first consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators, (2) we must then find that the law was in fact improperly applied by the Arbitrator, leading to an erroneous outcome, and finally (3) we determine whether the arbitrator must have known of the applicable law's existence, and its applicability to the problem before him." No Second Circuit decision since *Hall Street* has vacated an arbitration decision based on manifest disregard.

District courts within the Second Circuit seem to apply manifest disregard in accordance with *Stolt-Nielsen* insofar as they recognize manifest disregard but refuse to actually vacate arbitration awards based on the doctrine. In reviewing over thirty post-*Hall Street* cases from the Southern District of New York, we found not one vacating based on manifest disregard.

Fourth Circuit. Manifest disregard survives in the Fourth Circuit pursuant to *Wachovia Securities v. Brand (2012)*. In *Brand*, the Circuit declared that its pre-*Hall Street* standard still controls: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle."

While the *Brand* decision itself ultimately confirmed the arbitration award at issue, research revealed one recent Fourth Circuit opinion vacating an arbitration award based on manifest disregard. Although unpublished, *Dewan v. Walia (2013)* exhibits at least a minimal commitment to vacating those arbitration decisions which are totally divorced from the law. *Dewan* involved a release agreement that an employee signed during termination negotiations with his employer. The agreement released the employer from any potential claim brought by the employee and provided for arbitration should a dispute arise. After various conflicts arose, the parties proceeded to arbitration, wherein the arbitrator found for the employee, ruling that although the release agreement barred the employee from bringing claims against the employer in court, the agreement did not bar the employee from bringing claims in arbitration. The Fourth Circuit found this ruling fatally flawed, stating that the arbitrator "rewrote the release," which in reality "impose[d] no qualification whatsoever concerning the forum in which [the employee's] claims could [or could not be] brought."

*Dewan* aside, courts within the Fourth Circuit have been unwilling to vacate arbitration awards based on manifest disregard—review of over twenty post-*Hall Street* cases revealed not one decision vacating an arbitration award based on manifest disregard.

Eighth Circuit. The Eighth Circuit does not recognize manifest disregard post-*Hall Street*. In *Air Line Pilots v. Trans State (2011)*, the Circuit referred to manifest disregard as a "defunct vacatur standard," reasoning that manifest disregard is a non-statutory ground

for vacatur and thus impermissible under *Hall Street*'s pronouncement that FAA Section 10 is to be read exclusively.

The *Air Line Pilots* decision, coupled with a recent *en banc* ruling in *Reyco Granning v. International Brotherhood of Teamsters (2014)* speaks substantially to the Eighth Circuit's unwillingness to question arbitrators. *Reyco Granning* vacated an Eight Circuit panel decision that itself had vacated an arbitration award based on an arbitrator "exceeding its power" under FAA Section 10(a)(4). The panel, over a dissenting judge, argued that the arbitrator to a labor dispute exceeded its power by deciding matters based on the parties' course of prior dealings rather than an applicable written contract. Although the *en banc* decision did not result in a written opinion, it was likely grounded in a sentiment expressed by the dissenting member of the Eighth Circuit panel—namely, that vacatur based on FAA Section 10(a) is to occur only where the arbitrator is totally wayward in refusing to apply the law, like where he refuses to read a pertinent contract or where he applies a contract not at all relevant to the dispute at hand.

## V. CONCLUSION

Studies suggest that litigants challenging arbitration awards use manifest disregard more than almost any other vacatur ground. Yet these challenges remain among the least successful, and they continue decreasing in effectiveness post-*Hall Street*. Indeed, pre-*Hall Street* studies found that manifest disregard was successful in approximately three to seven percent of cases, whereas our research, while not purporting to constitute a robust study, suggests that manifest disregard is successful post-*Hall Street* in around one percent of cases. Manifest disregard has become a desperate, last-ditch effort to avoid unfavorable arbitration awards. In asserting hopeless manifest disregard challenges, litigants thwart the FAA's goal of expedited arbitration and impose substantial costs on their adversaries and the judiciary.

A declaration from the Supreme Court asserting manifest disregard's end as an independent ground for vacatur will prove helpful in furthering the FAA's goals. Even the Court's ambiguous *Hall Street* decision has helped in narrowing judicial review of arbitration, working to funnel litigants with meritorious claims towards more satisfactory grounds for vacatur, like arbitrator partiality or an arbitrator exceeding its power. A declaration from the Supreme Court, moreover, will work no real disservice to litigants, since FAA Section 10(a)(4) arguably includes a limited review for those egregious instances of manifest disregard, as some of the cases outlined above have concluded. If nothing else, a declaration from the Court will clarify the current state of manifest disregard, providing courts and litigants with consistent terminology, helping to further the goal of uniform federal law. ▼

ENDNOTES

1. This is a condensed version of the same Article appearing with footnotes, citation, and additional text on the ARIAS website.
2. Of course, this Article does not purport to constitute a proper empirical study. There are likely more than three successful manifest disregard challenges post-Hall Street. We highlight only the ratio: out of the 250 cases we reviewed, only three successful challenges emerged.

***This is a summary version of an article which appears in full on the ARIAS website at https://www.arias-us.org/wp-content/uploads/2018/08/Six-Years-After-Hall-St..pdf**

article

# The Effect on Confidentiality of Petitions to Vacate, Modify or Confirm Arbitral Awards

By Louis J. Aurichio

Louis J. Aurichio

The ARIAS Quarterly recently included a case summary of the opinion issued by the U.S. District Court for the Southern District of New York in *Eagle Star Ins. Company Ltd. v. Arrowhead Indemnity Company*. *Eagle Star* addressed whether confidential arbitration information can remain sealed from public access when submitted to a federal court in support of a petition to confirm an arbitral award. The court ordered that the information -- deemed confidential "Arbitration Information" by the parties to the underlying reinsurance arbitration -- should be unsealed. In reaching its decision, the court first determined that the information qualified as "judicial documents" to which a presumption of public access attached. Second, the court concluded that the weight of the presumption was high because the information contained in the movant's petition and the respondent's motion to dismiss "constitute[s] the heart of what the Court is asked to act upon." Third, the court determined that the balance of competing considerations against the presumption of public access were insufficient to demonstrate that sealing was necessary. The court found that neither the parties' confidentiality agreement nor the risk that disclosure would impair the respondent's position in separate arbitrations in which it was engaged outweighed the presumption of public access to the documents.[1]

The opinion in *Eagle Star*, of course, is just one among a multitude of federal decisions addressing whether moving to vacate, modify, or confirm an arbitration award affects the confidentiality of documents generated by parties in private arbitration proceedings. Confidentiality is typically one of the key distinguishing features motivating parties to choose arbitration over litigation. The degree to which seeking relief in federal court may result in the public airing of confidential documents is therefore relevant to cedents and reinsurers alike, who often include arbitration clauses in their reinsurance contracts and sometimes seek to vacate, modify or confirm awards in court.

First, this article briefly reviews the presumption in favor of public access to judicial records -- a common law principle often invoked by federal courts faced with a motion to seal records to preserve the confidentiality of documents or information contained in court filings. Next, the article surveys the balancing tests employed by federal courts adjudicating motions to seal, paying particular attention to decisions involving motions to seal filed in connection with petitions to vacate, modify or confirm arbitral awards. [2]

## I. The Right to Inspect and Copy Judicial Records

In *Nixon v. Warner Communications, Inc.*, the U.S. Supreme Court acknowledged that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." [3] The Supreme Court noted that American courts do not condition enforcement of this common law right on a proprietary interest in the document or a need for the records as evidence in a lawsuit. Rather, the interest necessary to support the right has been found "in the citizen's desire to keep a watchful eye on the workings of public agencies" and "a newspaper publisher's intention to publish information concerning the operation of government."[4] The Supreme Court made clear, however, that the right to inspect and copy judicial records is not absolute. For example, the Court noted that courts had the power to prevent records in a divorce case being used "to gratify private spite or promote public scandal," or, in the context of a business dispute, "as sources of business information that might harm a litigant's competitive standing."[5] The Court declined to identify all factors to be weighed in determining whether access to records is appropriate, stating that "the decision as to access is one best left to the sound discretion of the trial court, a discre-

**Louis J. Aurichio** is a partner at Butler Rubin Saltarelli & Boyd LLP. He focuses his practice on the arbitration and litigation of reinsurance and other complex commercial disputes. The author wishes to thank Jiadai (Daisy) Dong, a second-year student at Northwestern University School of Law and 2014 summer associate at Butler Rubin, for her research assistance. The views expressed in this paper do not necessarily reflect the views of Butler Rubin Saltarelli & Boyd LLP, any of its attorneys, or those of its clients.

tion to be exercised in light of the relevant facts and circumstances of the particular case."[6]

Since *Nixon v. Warner Communications* was decided the contours of the common law right of public access to judicial documents has been shaped by federal appellate and district courts decisions. The federal case law establishes that there is a presumption in favor of public access to judicial records, but that the presumption may sometimes be overcome depending on the circumstances presented. Given the lack of a definitive test for balancing the presumption of public access against the harm caused by disclosure, the federal circuits have developed their own legal standards to determine when to seal court records and when to make them publicly accessible.

Below is a survey of some of the cases, identifying the major factors that federal courts consider and the relative weight those factors are accorded in the various circuits.[7] The balancing tests employed by the circuits are not uniform. For the purposes of this article, the circuits can be sub-divided into three groups.

**II. The "Compelling Reasons" Standard**

Seven of the twelve federal circuits follow what can be referred to as the "compelling reasons" standard.[8] These seven circuits include the First and Second, which encompass (among others) the federal district courts in New York, Massachusetts and Connecticut, where a significant amount of reinsurance litigation occurs. The other circuits that follow the "compelling reasons" standard are the Sixth, Seventh, Eighth, Ninth and Tenth Circuits.

Under this standard, "only the most compelling reasons can justify non-disclosure of judicial records."[9] Examples of reasons cited by these courts that are sufficiently compelling to overcome the presumptive right of access to judicial records include: improper use of material for libelous purposes; infringement upon trade secrets; information covered by a recognized privilege; and information required by statute to be maintained in confidence (such as the identity of a minor victim of a sexual assault).[10] Simply asserting that disclosure of the information would be harmful to a company or detrimental to its reputation is not sufficient to overcome the common law presumption in favor of public access to court records.[11] Similarly, without a "compelling justification," these courts hold that a litigant's preference to keep the subject matter of the case from its business rivals and customers does not outweigh the longstanding tradition that litigation is open to the public.[12] There is also broad consensus in these circuits that confidentiality agreements between litigants, pre-litigation confidentiality agreements between arbitration participants, and protective orders designating documents "confidential" for discovery purposes carry little, if any, countervailing weight against the common law right of public access to judicial documents.[13]

Some of the courts begin their analysis by asking whether the documents at issue are indeed "judicial documents" to which the presumption of public access attaches. The threshold for qualifying as a "judicial document" is not high. One district court stated that, "as a general rule, documents filed with a court in connection with a pending case" are presumptively public.[14] The Second Circuit requires slightly more, stating that "the item filed must be relevant to the performance of the judicial function and useful in the judicial process."[15] We have not located any federal decision holding that documents filed in connection with a petition to confirm an arbitration award do not qualify as judicial documents to which the presumption of public access would apply. And, according to the U.S. District Court for the Southern District of New York, "[i]t is well settled that the petition, memoranda, and other supporting documents filed in connection with a petition to confirm an arbitration award (including the Final Award itself) are judicial documents . . ."[16]

These general principles are placed in sharper relief when considered in light of the district court opinions discussed below, in which the "compelling reasons" standard was applied in connection with petitions to vacate or confirm arbitral awards.

In *Global Reinsurance Corp. v. Argonaut Insurance Co.*, the U.S. District Court for the Southern District of New York was asked to reconsider its decision to seal portions of arbitration awards filed in connection with petitions to confirm.[17] After giving Global Re an opportunity to explain how disclosure of the awards might impair its rela-

Confidentiality is typically one of the key distinguishing features motivating parties to choose arbitration over litigation. The degree to which seeking relief in federal court may result in the public airing of confidential documents is therefore relevant to cedents and reinsurers alike, who often include arbitration clauses in their reinsurance contracts and sometimes seek to vacate, modify or confirm awards in court.

tionships with retrocessionaires and others, the court found that Global Re had failed to establish how disclosure "would cause direct or immediate harm."[18] Further, the court concluded that Global Re's argument that disclosure might have a chilling effect on the free exchange of information between parties to a reinsurance agreement "does not provide an adequate basis to overcome the presumption of access."[19] In ordering the arbitration awards unsealed, the court noted that, "[i]n the circumstances where an arbitration award is confirmed, the public in the usual case has a right to know what the Court has done." [20]

The court's analysis in *Century Indemnity Co. v. AXA Belgium,* a decision also out of the U.S. District Court for the Southern District of New York, is similar. There, in connection with competing petitions to vacate and confirm arbitral awards, both parties moved to seal portions of their federal court motions and certain supporting exhibits, including the arbitration award and position statements and briefs submitted to the arbitration panel. The court found that the documents at issue "are indisputably judicial documents to which the presumption of access attaches."[21] The parties' argument that disclosure "would undermine the objectives of their Confidentiality Agreement and the reinsurance arbitration process in general" was insufficient to overcome the presumption in favor of access. The court reasoned that

[a]t bottom, the confidentiality agreement at issue in this case may be binding on the parties, but it is not binding upon the Court. And while parties to an arbitration are generally permitted to keep their private undertakings from the prying eyes of others, the circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, i.e., the arbitration award.[22]

For these reasons, the court denied both parties' motions to seal.[23]

In *Zimmer, Inc. v. W. Norman Scott, M.D.*, the arbitration panel specified in the body of its award that the hearing record, including the award itself, would be maintained in confidence pursuant to the Confidentiality Agreement and Order.[24] The party moving to vacate the award in the U.S. District Court for the Northern District of Illinois relied on the language of the award to support its motion to seal. The court rejected this argument, stating that "once a party seeks judicial review of an arbitration award the confidentiality of that award is lost absent compelling justification." The movant's reliance on the confidentiality language in the award coupled with its failure to show "specific justification" for keeping the award confidential, resulted in the court's order unsealing the award.[25]

The U.S. District Court for the Western District of Michigan was similarly unimpressed with the plaintiff's proffered justification for moving to seal the petition to vacate an arbitral award and all future pleadings in *Martis v. Dish Network*.[26] Echoing Sixth Circuit precedent, the court stated that sealing court records is a "drastic step" that must be justified by "the most compelling reasons." The party moving to seal court records bears the burden of showing that disclosing the records "would reveal some trade secrets or other truly confidential information."[27] As in *Zimmer*, the movants reliance on the parties' agreement to maintain their arbitration proceedings in confidence was found to be "of little moment."

Once the parties resort to the courts . . . their confidentiality agreement does not, and cannot, authorize the sealing of a presumptively public record. The parties are privileged to arbitrate in secret, but they must litigate in public.[28]

Finding no evidentiary showing that particular information was entitled to confidential treatment, the court denied the request to place the petition to vacate and future pleadings under seal.[29]

**III. The Cendant Corp. Test**

The U.S. Court of Appeals for the Third Circuit applies a test for motions to seal judicial records that appears similar to the circuits discussed above. However, the cases in this circuit are addressed separately because, in at least one instance, a district court in this circuit granted a motion to seal a reinsurance arbitration award to protect the business privacy interests of the arbitration participants and the integrity of the reinsurance arbitration process generally.

In *Cendant Corp. v. Forbes*, the Third Circuit set forth the standards governing motions to seal judicial records. The court stated that the "well settled" common law public right of access to judicial records strengthens confidence in the courts by fostering a fuller understanding of the judicial system. This right creates a strong presumption in favor of public access that can be overcome by showing that the interest in secrecy outweighs the presumption. "Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." The burden is on the party seeking to seal the records to show (1) "that the material is the kind of information that courts will protect" and (2) "that disclosure will work a clearly defined and serious injury to the party seeking closure."[30]

There are two contrasting decisions by the U.S. District Court for the Eastern District of Pennsylvania, both of which apply the test articulated in *Cendant Corp.*, that are noteworthy. The first is *Zurich American Insurance Co. v. Rite Aid Corp.*, where the issue of sealing the case record arose in the context of a motion to vacate or modify a (non-reinsurance) arbitration award pursuant to the Federal Arbitration Act. Citing *Cendant Corp.*, the court stated that the legal standard "for assessing the propriety of sealing . . . is a finding of compelling countervailing interests, including a requirement that the district court make specific findings on the record regarding this standard before sealing the record."[31] Except for the federal tax returns of two individuals, the court denied the request to maintain the case records under seal. In so doing, the court noted that "judges should carefully and skeptically review privately-reached confidentiality agreements that are

submitted to the court for approval before approving them," and that courts "should not rubber stamp any agreement among the parties to seal the record."[32]

The second case, *Century Indemnity Co. v. Certain Underwriters at Lloyds*, involves a petition to confirm a reinsurance arbitration award where the parties had entered into a standard ARIAS-U.S. Confidentiality Agreement. In support of its unopposed motion to seal the arbitration award, Century Indemnity cited the terms of the Confidentiality Agreement and the integrity of the reinsurance arbitration process, which it argued could be jeopardized if the typically confidential proceedings were open to public scrutiny. After reciting the standard set forth in *Cendant Corp.*, the court granted Century Indemnity's motion. Among other factors the court considered that weighed in favor of sealing the award was a "significant business privacy interest that would affect Defendant if the award is disclosed."[33] The court also reasoned that the purpose behind sealing was "legitimate" because "[t]he parties entered into a Confidentiality Agreement and it is the practice in the reinsurance industry to keep arbitration proceedings, including final awards, confidential."[34] The district court found that upholding the Confidentiality Agreement "will promote the voluntary execution of private arbitration agreements; a sound public policy objective."[35] In light of these factors, and given the lack of any public health and safety issues compelling disclosure, the court entered an order sealing the award.[36]

**IV. The "Competing Interests" Test**

In adjudicating motions to seal, the Fourth, Fifth and Eleventh Circuits follow what can be referred to as the "competing interests" test. Rather than positing that "compelling reasons" are necessary to rebut the presumption of public access, these courts employ a more neutral test, which contemplates that, when resolving motions to seal, courts must determine whether "the public's right of access is outweighed by competing interests" favoring disclosure.[37] Or, as expressed by the Fifth Circuit, "[i]n exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring disclosure."[38] The Fifth Circuit noted that, while "other circuits have held that there is a strong presumption in favor of the public's common law right of access to judicial records . . . we have refused to assign a particular weight to the right."[39]

Some district courts within these circuits applying the "competing interests" test have given significant weight to the litigating parties' confidentiality agreements as a factor favoring nondisclosure. In *Kaufman v. The Travelers Companies, Inc.*, the plaintiffs moved to seal two confidential settlement agreements which, by their terms, required the plaintiffs to "take reasonable precautions to prevent disclosure of any term."[40] The plaintiffs argued that sealing the confidential settlement agreements would "protect the expectations of the settling parties . . ." For other documents containing confidential information referenced in the settlement agreements, the plaintiffs sought leave to redact such information. The U.S. District Court for the District of Maryland granted the plaintiffs' motion to seal.[41] For similar reasons, the U.S. District Court for the Northern District of Texas granted a motion to seal a petition to confirm an arbitration award and all supporting exhibits in *Decapolis Group, LLC v. Mangesh Energy, LTD.* The contract at issue contained a provision that the parties would not disclose confidential information, such as information "relating to the business, products, affairs and finances of a Party . . ." The parties also agreed that the underlying arbitration proceedings would be confidential. Rejecting the plaintiff's contention that the information in the arbitration award came from "open sources," the court granted the motion to seal, finding that "any public interest in the Award is minimal and counterbalanced by the interest in confidentiality expressed in the parties' agreement."[42]

By way of contrast, a U.S. District Court in Florida denied an unopposed motion to seal an arbitral award that was based solely on the bald assertion that the award contained confidential business information. In *Mayo Clinic Jacksonville. v. Alzheimer's Institute of America, Inc.*, the defendant sought an order confirming an arbitration award. The defendant did not attach the award to its petition, citing the plaintiffs' concern about disclosure of their confidential information, which plaintiffs contended was protected pursuant to a confidentiality provision in the License Agreement at issue in the arbitration. The court found the unsupported assertion concerning disclosure of confidential business information an insufficient basis on which to seal a presumptively public document.[43]

**V. Conclusion**

The federal case law demonstrates that moving to vacate, modify or confirm arbitral awards usually results in public disclosure of the petition, the award and other documents filed in support of the motion. This is particularly true in the seven federal circuits that require a showing of "compelling reasons" to overcome the presumption of public access to judicial records. Courts in those circuits (including the district courts in New York, Connecticut and Massachusetts where reinsurance litigation is concentrated) hold that private confidentiality agreements are insufficient to justify sealing presumptively public records. Indeed, unless the information constitutes a trade secret or is protected from disclosure by statute or a recognized privilege, these courts are unlikely to seal information from public view. Even in the three circuits that apply the less onerous "competing interests" test, the courts typically find that conclusory assertions of commercial harm are insufficient to support a motion to seal. To overcome the right of public access, most courts require the presentation of specific facts establishing a likelihood of significant harm resulting from public disclosure of the documents or information in question.

Because they are nearly always at-

tached as an exhibit to any motion to vacate, modify or confirm, the panel's award is the single arbitration document that is most often subject to public disclosure. When crafting final awards, arbitrators should be cognizant of the courts' bias in favor of public access to judicial documents.

The common law presumption in favor of public access might also influence the parties' conduct in connection with seeking post-award relief in court. Under the ARIAS-approved Confidentiality Agreement, the parties agree that, in connection with motions to confirm, modify or vacate an award, "all submissions of Arbitration Information to a court shall be sealed." To comply with this provision, the moving party typically files a motion with the court seeking leave to file its pleadings under seal. This motion, in turn, triggers the presumption of public access and the balancing tests discussed above, which usually result in public disclosure despite the contrary intent evidenced by the parties' Confidentiality Agreement.

In connection with motions to confirm an award (as opposed to motions to vacate or modify, which are almost always contested) there may be an opportunity for parties to minimize the erosion of confidentiality that typically results from such proceedings. Specifically, if the motion to confirm is not going to be contested, the parties could attempt to agree on a streamlined filing that limits the disclosure of Arbitration Information to a mutually acceptable minimum. The parties could then agree to waive the provision in the Confidentiality Agreement that requires sealed court filings, and the streamlined motion to confirm could be filed as a public document. This approach will not preserve the confidentiality of arbitration proceedings in their entirety. But it at least allows the parties to maintain some control over what information will and will not become a matter of public record.

Finally, in connection with an unopposed motion to confirm, a court might be persuaded to limit the extent of the public disclosure by permitting the filing of a redacted arbitration award. The recent decision in *Nationwide Mutual Insurance Co. v. Continental Casualty Co.* is instructive on this point. There, the district court judge noted that it was not necessary for her to even review the arbitration award to adjudicate the unopposed motion to confirm.[44] Because, in this case, the substance of the arbitration award "[did] not 'influence or underpin the judicial decision' to confirm it," the district court permitted the petitioner to file a redacted version of the final award that omitted two paragraphs.[45] The court reasoned that, in the context of an unopposed motion to confirm, "the presumption in favor of public filing . . . is not triggered," and "no public interest is compromised by omission of that information from the public record."[46] ▼

## ENDNOTES

1 *Eagle Star Insurance Co. Ltd. v. Arrowood Indemnity Co.*, No. 13 CV 3410, 2013 WL 5322573, at *1-3 (S.D.N.Y. Sept. 23, 2013).

2 In addition to a common law right, courts have also recognized a right of access to court records that derives from the first amendment to the United States Constitution. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone*, 263 F.3d 1304, 1310 (11th Cir. 2001) (discussing scope of constitutional right of access). The constitutional right of access has rarely been invoked in a context relevant to this article.

3 *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978).

4 *Id.*

5 *Id.* at 598.

6 *Id.* at 599.

7 This article does not address the thirteenth federal circuit court, the United States Court of Appeals for the Federal Circuit.

8 The D.C. Circuit applies its own unique six-part test for adjudicating motions to seal, with a strong yet rebuttable presumption in favor of public access. *See, e.g., U.S. v. Hubbard*, 650 F.2d 293, 317-322 (D.C. Cir. 1998); *DBI Architects v. American Express Travel Related Services Co.*, 462 F. Supp. 2d 1, 7-8 (D.D.C. March 30, 2006). We have not located any cases in this circuit applying the standard in connection with a motion to vacate, modify or confirm an arbitral award.

9 *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *Union Oil Co. of Cal. V. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000); *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *Lugosch v. Pyramid Co. of Onandaga*, 435 F.3d 110, 121 (2d Cir. 2006); *Neal v. The Kansas City Star*, 461 F.3d 1048, 1053 (8th Cir. 2006). Courts in the Tenth Circuit do not use the "compelling reasons" nomenclature, but their analysis and decisions align most closely with courts in the circuits that employ the "compelling reasons" test. *See, e.g.*, *Mann v. Boatwright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (common law right of access "can be rebutted if countervailing interests *heavily outweigh* the public interest in access") (emphasis added); *Stormont-Vail Healthcare, Inc. v. Biomedix Vascular Solutions, Inc.*, No. 11-4093-SAC, 2012 WL 884926, at *1-3 (D. Kan. Mar. 14, 2012) (applying standard articulated in *Mann* in denying motion to seal).

10 *See, e.g.*, *Foltz*, 331 F.3d at 1136; *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002).

11 *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); *see also Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1182 (9th Cir. 2005) (compelling reasons standard not met where movant makes "conclusory statements about the contents of documents -- that they are confidential and that, in general," their disclosure would be harmful to movant); *Stormont-Vail Healthcare*, 2012 WL 884926, at *3 ("a concern for a business public image is not sufficient enough to rebut the presumption of public access").

12 *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000); *see also Allstate Ins. Co. v. Balle*, No. 2:10-cv-02205, 2014 LEXIS 42192, at *2 (D. Nev. March 27, 2014) (fact that "production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records").

13 *See, e.g., Brown*, 710 F.2d at 1180; *Baxter*, 297 F.3d at 546; *Corvello v. New England Gas Co.*, No. 05-221T, 2008 WL 5245331, at *7-8 (D.R.I. Dec. 16, 2008); *Century Indem. Co. v. AXA Belgium*, No. 11 Civ. 7263, 2012 WL 4354816, at *14 (S.D.N.Y. Sept. 24, 2012).

14 *Corvello*, 2008 WL 5245331 at *6.

15 *Lugosch*, 435 F. 3d at 119.

16 *Aioi Nissay Dowa Ins. Co. v. ProSight Specialty Mgmt. Co., Inc.*, No. 12 Civ. 3274, 2012 WL 3583176, at *6 (S.D.N.Y. Aug. 21, 2012). The Ninth Circuit has held that a showing of "good cause" is sufficient to support the sealing of discovery material attached to non-dispositive motions. *Foltz*, 331 F.3d at 1135. However, this exception to the "compelling reasons" standard does not apply to petitions to vacate, modify or confirm arbitration awards, which are case dispositive.

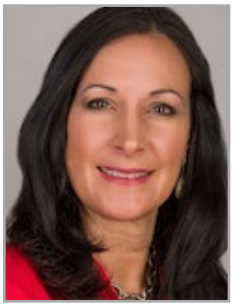
17 *Global Reinsurance Corp. v. Argonaut Ins. Co.*, Nos. 07 Civ. 8196, 07 Civ. 8350, 2008 WL 180545, at *1-2 (S.D.N.Y. Apr. 21, 2008).

18 *Id.* at *1.
19 *Id.*
20 *Id.* at *2.
21 *Century Indem. v. AXA*, 2012 WL 4354816, at *12-13 (S.D.N.Y. Sept. 24, 2012) (internal quotations omitted).
22 *Id.* at 14 (internal quotations omitted).
23 *Id.* at *15 (internal quotations omitted).
24 *Zimmer, Inc. v. W. Norman Scott, M.D.*, No. 10 C 3170, 2010 WL 3004237, at *1-2 (N.D. Ill. July 28, 2010) (internal quotations omitted).
25 *Id.* at *2-3 (internal quotations omitted).
26 *Martis v. Dish Network*, No. 1:13-cv-1106, 2013 WL 6002208, at **1-2 (W.D. Mich. Nov. 12, 2013).
27 *Id.* at *2.
28 *Id.*
29 *Id. Accord Amerisure Mut. Insurance Co. v. Everest Reinsurance Co.,* No. 14-cv-13060, 2014 U.S. Dist. LEXIS 153013, at *3-6 (E.D. Mich. Oct. 29, 2014) (denying request to seal in its entirety reinsurance arbitration panel's award, noting that "the Sixth Circuit has stressed that a corporation's interest in shielding 'prejudicial information' from public view, standing alone, cannot justify the sealing of that information").
30 *In re Cendent Corp.*, 260 F.3d 183, 192-94 (3d Cir. 2001). The court stated that the act of filing a document with the court clearly establishes a record as a "judicial document" to which the presumption of public access attaches. *Id.* at 192.
31 *Zurich Am. Ins. Co. v. Rite Aid Corp.*, 345 F. Supp.2d 497, 503-04 (E.D. Pa. 2004) (internal quotations omitted).
32 *Id.* at 504 (internal quotations omitted).
33 *Century Indem. Co. v. Certain Underwriters at Lloyds*, 592 F. Supp.2d 825, 828 (E.D. Pa. 2009).
34 *Id.*
35 *Id.*
36 *Id.* at 827-28.
37 *In re The Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984); *accord Chicago Tribune Co. v. Bridgestone/Firestone*, 263 F.3d 1304, 1310-12 (11th Cir. 2001) (("The common-law right of access as it applies to particular documents requires the court to balance the competing interests of the parties").
38 *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993).
39 *Id.* at 850 fn.4.
40 *Kaufman. v. The Travelers Co., Inc.*, No. DKC 2009-0171, 2010 WL 2639879, at *4 (D. Md. June 29, 2010).
41 *Id.* at *3-4.
42 *Decapolis Group, LLC v. Mangesh Energy, Ltd.*, No. 3:13-cv-1547-M, 2014 WL 702000, at *1-2 (N.D. Tex. Feb. 24, 2014).
43 *See generally Mayo Clinic Jacksonville. v. Alzheimer's Inst. of Am., Inc.*, No. 8:05-cv-639-T-23TBM, 2008 WL 4998427, at *1-2 (M.D. Fla.. Nov. 24, 2008).
44 *Nationwide Mutual*, 14-cv-844, Dkt. No. 21 at *2 (N.D. Ill. June 3, 2014).
45 *Id.* at 2-3.
46 *Id.* at 3.

in focus

# Newly Certified Arbitrators

## Elaine Caprio



Elaine Caprio is President of CapLaw Advisors LLC, providing management consulting, mediation and arbitration services to the insurance and reinsurance industries.

Before forming CapLaw, Ms. Caprio worked at Liberty Mutual Insurance (Liberty) for 26 years in various executive roles. As Vice President and Manager of Ceded Reinsurance, she was responsible for purchasing property and casualty reinsurance protection, managing credit risk, and optimizing global reinsurer and broker relationships. Ms. Caprio produced significant savings in reinsurance premiums, negotiated best-in-class treaties, broker contracts, indemnity catastrophe bonds and swaps, and carefully managed enterprise-wide reinsurer participations.

Prior to her Ceded Reinsurance role, Ms. Caprio held the role of Senior Corporate Counsel at Liberty, and advised departments worldwide that handled ceded and/or assumed facultative, treaty and retrocessional reinsurance matters. She successfully negotiated commutation agreements, and obtained collateral of billions in recoverables, in addition to achieving millions of dollars of disputed reinsurance collections.

Because of her proficiency with operational restructuring, Ms. Caprio was selected to serve as Vice President and Manager of Corporate Procurement for Liberty, charged with developing a strategy to coordinate the management of billions of spend. She transformed strategic sourcing and supplier management at Liberty by forming and guiding a new management team, creating corporate governance, a new branding and marketing strategy, and co-creating a procurement data repository for planning and analysis.

Ms. Caprio served on the Board of Directors for ARIAS-U.S. from 2005 to 2012, and was Chairman from 2011 to 2012.

Ms. Caprio earned her J.D. from Suffolk University Law School (cum laude) and a B.A. in Humanities from Providence College (magna cum laude). She was featured as a Woman to Watch by Business Insurance in 2007.

## Charles W. Fortune

Charles Fortune has worked in and with the insurance industry for thirty years. He began his career as a commercial lines underwriter with The Travelers, and then helped manage the development of Travelers' first commercial property-casualty policy rating and issuance system. Since attending law school, Mr. Fortune has represented insurance and reinsurance companies in a broad range of matters for 23 years. Mr. Fortune's experience includes work with property-casualty lines, intellectual property insurance, worker's compensation, warranty cover, and D&O. He has advised clients and handled direct and reinsurance claims involving environmental liabilities, sexual abuse, asbestos bodily-injury, captive facilities, claim-handling practices, and discrimination, and has represented clients in the context of insurance regulatory matters and insurance company insolvencies.

While in private practice, Mr. Fortune was seconded for six months to Equitas, in London, where he worked on North American reinsurance claims. He also served as an adjunct faculty member at the University of Connecticut School of Law, in the LL.M in Insurance program. He is a long-standing member of ARIAS-U.S., where he currently serves on the Arbitrator Education Committee.

Mr. Fortune practices law with Seiger Gfeller Laurie LLP in West Hartford, Connecticut, where he represents clients in court proceedings and in arbitration. He has appeared in numerous arbitration proceedings for reinsurers, ceding companies, and direct carriers.

Mr. Fortune received his law degree, *with honors*, from the University of Connecticut School of Law, where he was the Managing Editor of the *Connecticut Law Review*, and he received his bachelor's degree from the University of Rochester.

## Carl M. Harris, FSA, MAAA, FCA

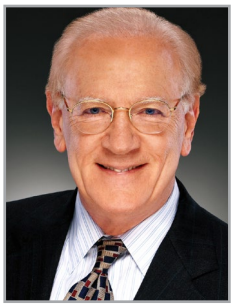
Carl is Managing Principal and Consulting Actuary for Insurance Strategies Consulting, LLC and ISC Strategies Consulting, Inc., both full service actuarial consulting firms. He is a Fellow of the Society of Actuaries, a Member of the American Academy of Actuaries and a Fellow of the Singapore Society of Actuaries. Carl has worked in the life insurance industry since 1979 with experience in the U.S.A., Canada, South America and the Caribbean and has worked for stock life insurance companies and as a consultant. Prior to starting his own consulting firms, Carl was a Principal with Deloitte Consulting where he advised clients both domestically and internationally.

Mr. Harris has worked with clients in such areas as litigation support (testified in both Federal and State Court and Arbitrations); product development and pricing; mutual reorganizations; demutualization & mutual insurance holding company; reinsurance strategies including financial reinsurance; corporate appraisals, mergers & acquisitions, statutory, GAAP and tax reporting; strategic planning; cash flow testing; financial modeling; financial projections; distribution and compensation systems; not-for-profit; HMO, Medicare and Medicaid pricing; and valuation issues and regulatory valuation. He has been a frequent speaker at actuarial and other insurance industry meetings and seminars including the Society of Actuaries, Conference of Consulting Actuaries and the Caribbean Actuarial Association. Carl has served on the Education and Examination committees of the Society of Actuaries, the NAIC Working Group on Mutual Insurance Holding Companies, the AICPA Task Force on Demutualization and the AAA Task Force on Demutualization.

Carl's publications include "What Is This Thing Called Mutual Insurance Holding Company" - IASA Interpreter, April, 1997; "Forthcoming NAIC White Paper Could Spur MHC Formation" – National Underwriter, June 22, 1998; and "Regulators and Insured's also have a stake in mergers and acquisitions" – The Actuary, May, 2003

Carl earned his B.S. in Clinical Psychology from the University of Florida.

## Fred J. Pinckney



Fred Pinckney has commercial liability insurance and reinsurance experience covering more than 20 years. He assisted as outside legal counsel in (1) the regulatory formation and capitalization in 1985 of American Safety Insurance Group, Ltd., a Bermuda licensed specialty casualty insurance company, which insured the general liability risks of general contractors and asbestos abatement contractors , and (2) the regulatory formation and capitalization in 1987 of American Safety Risk Retention Group, Inc., a Vermont licensed group captive, which also insured the general liability risks of general contractors and asbestos abatement contractors . As outside legal counsel, together with company executives, he was responsible for regulatory, insurance and reinsurance treaties, and major claims and arbitration matters for American Safety Risk Retention Group, Inc. as a direct insurer, and American Safety Insurance Group, Ltd., as its reinsurer.

In 1997, Mr. Pinckney became in-house General Counsel and Corporate Secretary for American Safety Insurance Group, Ltd. in connecting with its initial public stock offering. Together with company executives, he was primarily responsible for insurance and reinsurance treaties, major claims and arbitration matters, compliance and coordination of all insurance regulatory and financial filings, New York Stock Exchange filings, as well as periodic and annual reporting to the Securities and Exchange Commission from 1997 to 2005.

Since 2006, Mr. Pinckney has been involved in the healthcare industry and related insurance benefits matters. He is the principal of Business Law & Arbitration Services, Inc. in Atlanta Georgia.

Mr. Pinckney has also been a member of the Commercial Panel of Arbitrators of the American Arbitration Association since 2003, where he has served as a panel member, chair, or sole arbitrator in over 75 commercial arbitrations, including several insurance and reinsurance disputes.

He received his undergraduate Bachelor of Arts degree from the University of Pittsburgh and his Juris Doctor degree from the University of Michigan Law School. Mr. Pinckney has received an "AV" (Highest Standard) Legal Expertise and Professional Reputation Peer Rating from Martindale-Hubbell. ▼

case notes corner

# Protecting Confidential Arbitration Information: Recent Federal Cases Reject Broad Motions To Seal

By Ronald S. Gass

Ronald S. Gass

Typically, the party seeking confirmation of an award in federal court will also request permission to file its pleadings and any accompanying arbitration information under seal pursuant to the parties' confidentiality agreement and ask the opposing party to join in on its motion.

Most parties and arbitrators would agree that the protection of panel awards, proceedings, and documents against public disclosure is sacrosanct in arbitration, and this core principle is commonly memorialized at the outset of the organizational meeting by execution of a confidentiality agreement, often along the lines of the ARIAS•U.S. sample form found on its Web site at http://www.arias-us.org/index.cfm?a=43. The ARIAS•U.S. Confidentiality Agreement provides in pertinent part:

[The parties] agree that all briefs, depositions, and hearing transcripts generated in the course of this arbitration, documents created for the arbitration or produced in the proceedings by the opposing party or third-parties, final award and any interim decisions, correspondence, oral discussions, and information exchanged in connection with the proceedings (hereinafter collectively referred to as "Arbitration Information") will be kept confidential.

ARIAS•U.S. Sample Form 3.3: Confidentiality Agreement ¶ 2. In the next paragraph, the form includes several specific exceptions to this general nondisclosure rule, with the following one most relevant to subsequent court proceedings:

Disclosure of Arbitration Information may be made: . . . (b) in connection with court proceedings relating to any aspect of the arbitration, including but not limited to motions to confirm, modify or vacate an arbitration award . . . . In connection with any disclosures pursuant to subparagraph (b), the parties agree, subject to court approval, that all submissions of Arbitration Information to a court shall be sealed. . . . In all contexts, all parties will make good-faith efforts to limit the extent of the disclosures, if any, to be made, and will cooperate with each other in resisting or limiting disclosure of Arbitration Information.

Id. ¶ 3 (emphasis added). Such agreements formally establish the confidentiality rules governing the arbitration proceeding, and disclosure disputes during the arbitration are rare. However, once a party petitions a court for confirmation of the award, judicial treatment of confidential arbitration information may diverge from what the parties had originally envisioned.

Typically, the party seeking confirmation of an award in federal court will also request permission to file its pleadings and any accompanying arbitration information under seal pursuant to the parties' confidentiality agreement and ask the opposing party to join in on its motion. What happens next was the subject of two recent federal district court decisions, one in Michigan and the other in New York. They aptly illustrate the tension between the parties' quest to preserve the confidentiality of their arbitration information and the court's reluctance to stray from the long-established judicial principle of public access to court documents.

In the October 2014 Michigan case, the cedent apparently won a favorable reinsurance arbitration award and subsequently sought federal court confirmation. The judge's quotes from the parties' confidentiality agreement suggest that a form similar to the ARIAS•U.S. sample quoted above had been executed. Therefore, the cedent also petitioned the court for permission to file under seal both the award and portions of its confirmation petition discussing it. The reinsurer opposed this motion, in part, arguing that the complete sealing of the award and any references to the panel's decision-making process was inconsistent with Sixth Circuit precedent. Instead, it asked the court to seal only those portions of the award that identified and contained testimony from nonparties to the arbitration and that reflected the substantive rulings of the panel majority.

Acknowledging the court's inherent right to exercise "supervisory power" over its own records and files, including the authority to allow parties to file certain

documents under seal, the Michigan judge weighed the parties' requests to seal, one broad and the other narrow, against the public's right to access, observing that "[o]nly the most compelling reasons can justify non-disclosure of judicial records."

With regard to the privacy rights of third parties not involved in the arbitration proceeding, the court agreed with the parties' joint position that those portions of the award identifying them should be sealed. Redaction of that information was consistent with the foregoing governing principles, i.e., nonparties have legitimate privacy interests worthy of protection such that their identities may be protected from public disclosure.

However, the judge declined to seal all or even portions of the award setting forth the panel's discrete substantive rulings. Citing Sixth Circuit precedent, the reinsurer had argued that public disclosure of the award would precipitate actions by other similarly situated cedents who would cite the award's "blanket pronouncements" in support of their claims, thereby harming the reinsurer's "financial interests." Distinguishing that precedent, the judge noted that it might support sealing parts of an arbitration award if, for example, disclosure of detailed financial statements created a substantial risk of economic harm for a closely-held business operating in a highly competitive and specialized market. However, in this case, the reinsurer was not seeking to protect its own confidential business data or trade secrets. It simply sought to prevent unhelpful portions of the award from becoming public in order to avoid future litigation and its citation by potential litigants. The court found that the reinsurer's argument conflicted with other precedent holding that a corporation's interest in shielding "prejudicial information" from public view to avoid, for example, exposure to future litigation, standing alone, cannot justify sealing it. The judge ordered the redaction of the third-party references, leaving the remainder of the award intact in the public record.

In the January 2015 New York federal district court case, the court wrestled with similar confidentiality issues but in a non-reinsurance arbitration context. The parties had entered into a confidentiality agreement protecting all arbitration submissions from disclosure and requiring them to make application to seal these documents upon the filing of any petition to confirm the award. When the prevailing party filed a confirmation petition, it did not do so under seal prompting the opposing party to move to seal the arbitration record.

Citing the same public access to judicial documents principle, the court first analyzed whether the documents met the definition of "judicial documents," i.e., "relevant to the performance of the judicial function and useful in the judicial process." Acknowledging that arbitration proceedings are premised on the parties' private agreement and that they are permitted "to keep their private affairs from the prying eyes of others," the court noted that this perspective changes when a party seeks federal court enforcement of an arbitration award because in that forum a party cannot have a legitimate expectation that arbitration documents will be kept private given the well-known presumption of public access to judicial proceedings. Because the parties' agreement, arbitration award, and petition to confirm and any reply will guide and inform the court's ruling on whether to grant or deny the confirmation petition, they must be deemed "judicial documents."

Next, the court examined whether these judicial documents should be sealed despite the public access presumption. It found that the parties' contractual indemnification dispute relating to certain payments made to a foreign government for a specific type of worker's benefit was of relatively low public interest and that the award was principally for money damages and not injunctive relief, i.e., if the award were sealed, no declaratory elements would be shielded from public view. The major impediment, however, was the respondent's failure to offer any compelling reasons by way of affidavits, exhibits, or substantive pleadings explaining why these documents should be sealed other than conclusory assertions and the confidentiality agreement itself. Denying the requested petition to seal without prejudice, the court left the door open for further argument on this point and for consideration of "tailored" redactions supported by affidavit or declaration from a knowledgeable witness explaining the nature of the privacy interest, the harm from disclosure, and any prior disclosures of the material to third parties such as regulatory authorities.

These two cases highlight the federal court's reluctance to seal confidential arbitration information in the absence of compelling reasons sufficient to overcome the presumption of public access to judicial documents. Meeting this burden requires factual specificity through sworn affidavits or declarations setting forth exactly what privacy interests are at stake and the potential harm disclosure will cause along with evidence that the information was kept confidential from third parties. Vague allegations of harm to financial interests due to public disclosure such as the risk of generating future litigation brought by other similarly-situated parties, embarrassment, or incrimination are typically insufficient to overcome the public access presumption. Even if a party is successful in proving harm to its privacy interests, it should not expect the wholesale sealing of the arbitration award and record. As these cases suggest, courts are likely to wield their power to seal sparingly, favoring the redaction of just those specific parts of the confidential documents meriting protection from public disclosure. Therefore, counsel should anticipate the laborious chore of preparing and submitting judiciously redacted versions of the arbitration documents for the court's consideration during a confirmation proceeding.▼

Robert Bosch GmbH v. Honeywell Int'l, Inc., No. 14 cv 9432 (PKC), 2015 U.S. Dist. LEXIS 967 (S.D.N.Y. Jan. 6, 2015); Amerisure Mut. Ins. Co. v. Everest Reins. Co., No. 14-cv-13060, 2014 U.S. Dist. LEXIS 153013 (E.D. Mich. Oct. 29, 2014).

Ronald S. Gass is an ARIAS-U.S. Certified Umpire and Arbitrator. He can be reached via e-mail at rgass@gassco.com or through his Web site at www.gassco.com. 

# ARIAS U.S. Board of Directors



## Administration

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

*Executive Director/Corporate Secretary*
**Sara Meier**
ARIAS • U.S.
7918 Jones Branch Dr., Suite 300
McLean, VA 22102
Phone: 703-506-3260
Fax: 703-506-3266
smeier@wearecoulter.com