

VOLUME 16 NUMBER 4

THE ARIAS

QUARTERLY

FOURTH QUARTER 2009

U.S.

Pre-Hearing Security - *A Primer for Arbitrators*

Pre-Hearing Security

Privilege 101 – A Primer
on the Attorney-Client
Privilege, the Work
Product Doctrine and Waiver

Are “Unreasonable”
Arbitration Awards
“Irrational”?

REPORT: Board of
Directors Elections

REPORT: 2009 Fall
Conference

OFF THE CUFF: Is a Good
Client Also Hard to Find?

EDITORIAL BOARD

Editor

T. Richard Kennedy,
trk@trichardkennedy.com

Associate Editors

Mark S. Gurevitz
mgurevitz@thehartford.com

James I. Rubin
jrubin@butlerrubin.com

Daniel E. Schmidt, IV
dschmidt4@comcast.net

Eugene Wollan
ewollan@moundcotton.com

Managing Editor

William H. Yankus
wyankus@cinn.com

International Editors

Christian H. Bouckaert
christian.bouckaert@bopslaw.com

Herbert Palmberger
hpalmberger@heuking.de

Jonathan Sacher
jonathan.sacher@blplaw.com

Ex-Officio

Susan A. Stone
Daniel L. FitzMaurice
Elaine Caprio Brady

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

The ARIAS•U.S. Quarterly (ISSN 7132-698X) is published Quarterly, 4 times a year by ARIAS•U.S., 131 Alta Avenue, Yonkers, NY 10705. Periodicals postage pending at Yonkers, NY and additional mailing offices.

POSTMASTER: Send address changes to ARIAS•U.S., P.O. Box 9001, Mt. Vernon, NY 10552



T. Richard Kennedy

Congratulations to Susan Stone on being elected Chair of our Board of Directors. Susan is a highly respected and experienced lawyer in the field of insurance and reinsurance dispute resolution. She has been active for several years in the affairs of ARIAS•U.S., and is clearly dedicated to the work and goals of our Society.

Congratulations also to Dan FitzMaurice on being elected President of the Society, to Elaine Caprio Brady as President Elect, and to Damon Vocke as a new member of the Board.

It is interesting to note that Damon Vocke is the General Counsel of General Reinsurance. The last person who held that position when coming on the Board, 15 years ago, was our own Ed Rondepierre. Ed was a member of the Founding Board of ARIAS•U.S. and served as the Society's first President.

We are greatly indebted to Tom Forsyth, who is leaving the Board after many years of service, including serving as Chair and President, and to Frank Lattal, who has just completed his term as Chair, but – fortunately for us – will continue on the Board for another year. Both Tom and Frank have made major contributions to the continuing success of the Society, and we hope each will continue to be active for many years to come.

This issue's cover article, *Pre-Hearing Security – A Primer for Arbitrators*, by Peter Chaffetz and Karen Baswell, is an excellent discussion of issues presented on a pre-hearing request for security, including the powers of the panel, the several types of security devices, arguments likely to be made for and against the panel granting security, and the extent of protection afforded to a party that is granted security. Given the number of requests for pre-hearing security in reinsurance arbitrations, the article deserves a close read by all involved in the process.

Kim Marrkand and Fritz Huszagh, in *Privilege 101 – A Primer on the Attorney-*

editor's comments

Client Privilege, the Work Product Doctrine and Waiver, present a careful review of attorney-client privilege and the attorney work product doctrine, including ways either privilege may be lost, even inadvertently. Readers will find the discussion of recent case law dealing with these concepts within the reinsurance context to be particularly helpful.

Parties and panels in reinsurance arbitrations often wish to avoid "reasoned" awards based on an unfounded fear that an articulation of reasons for the award will increase the likelihood of vacatur by a court. Robert Hall, in *Are "Unreasoned" Arbitration Awards "Irrational"?* reviews case law to make the interesting argument that failure to provide reasoning actually may increase rather than decrease the chance of an award being vacated.

Fellow Editor Eugene Wollan in our *Off the Cuff* column completes his thoughts of what qualities make good participants in adversary proceedings. See *Is a Good Client Also Hard to Find?* for his discussion, which I think you will find both thoughtful and amusing.

This being our last issue of the year, I would like to pay special tribute to our Managing Editor, Bill Yankus. Bill is our unsung hero, who keeps us all on schedule – which is far from an easy task – writes reports on such matters as Board of Directors' actions, conferences, and newly certified arbitrators, umpires and mediators. He then, with the help of CINN Creative Director Gina Balog, pulls the whole issue together, complete with an appropriate cover. On behalf of all the Editors, thank you, Bill.

With best wishes to each of our members for a Happy and Healthy New Year,

T. Richard Kennedy

Editor's Comments Inside Front Cover

Table of Contents Page 1

FEATURE: Pre-Hearing Security – A Primer for Arbitrators

BY PETER R. CHAFFETZ AND KAREN C. BASWELL Page 2

News and Notices Page 9

FEATURE: Privilege 101 – A Primer on the Attorney-Client Privilege, the Work Product Doctrine and Waiver

BY FRITZ K. HUSZAGH AND KIM V. MARRKAND Page 11

FEATURE: Are “Unreasoned” Arbitration Awards “Irrational”?

BY ROBERT M. HALL Page 17

Members on the Move. Page 20

REPORT: Board of Directors Elections. Page 21

REPORT: 2009 Fall Conference Page 22

Law Committee Reports Page 28

IN FOCUS: Recently Certified Arbitrators Page 34

OFF THE CUFF: Is a Good Client Also Hard to Find?

BY EUGENE WOLLAN Page 36

Membership Application Inside Back Cover

ARIAS•U.S. Board of Directors. Back Cover

Editorial Policy

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

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

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

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

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

Copyright 2009 ARIAS•U.S. The contents of this publication may not be reproduced, in whole or in part, without written permission of ARIAS•U.S. Requests for permission to reproduce or republish material from the ARIAS•U.S. Quarterly should be addressed to William Yankus, Executive Director, ARIAS•U.S., P.O. Box 9001, Mount Vernon, NY 10552 or director@arias-us.org.

feature

Pre-Hearing Security – A Primer for Arbitrators

This article is based on a paper presented at the ARIAS•U.S. 2009 Fall Conference.

Peter R. Chaffetz



Peter R. Chaffetz
Karen C. Baswell

I. Introduction

One difference between reinsurance disputes and other commercial litigation and arbitration is the frequency with which the tribunal in an insurance or reinsurance matter – whether in arbitration or in court – will order the posting of pre-hearing security. While most courts have the power to fashion provisional remedies, including pre-trial security, the statutory grounds for such relief in other types of commercial contract disputes are narrow and courts enforce the statutory requirements strictly.

Another difference that may surprise many in the arbitration community is that the debtor's financial condition is not even a relevant consideration under most state attachment laws. For example, the New York CPLR authorizes pre-hearing attachment, that is, the seizure of a debtor's assets as security for a future judgment, only where the plaintiff: (1) has stated a claim for a money judgment in an amount greater than all counterclaims against it; (2) can show a probability of success on the merits; and (3) can show that the debtor has disposed or is about to dispose of or remove its assets from the jurisdiction with the intent to defraud its creditors or frustrate enforcement of such future judgment.¹

In contrast, pre-hearing security is common in insurance and reinsurance disputes, where pre-answer security statutes mandate the posting of security by non-admitted carriers in court proceedings and some arbitrations, and many contracts have security provisions that mirror those statutes. And even where the reinsurer is admitted and there is no statutory or contractual security provision, arbitration panels nonetheless consider and sometimes grant prehearing security as a matter of their general authority and discretion.

Indeed, the form of organizational meeting agenda posted on the ARIAS•U.S. web site includes security as a standard issue, and the ARIAS•U.S. practice guide contemplates that panels will receive briefing on the issue of whether and in what amount to award security. However, the practice guide does not indicate what standards should apply to the request, and there is a feeling among some practitioners that the treatment of the issue is not always consistent across panels dealing with similar factual circumstances.

As a start toward identifying best practices in this area, this paper will canvass some of the issues presented by requests for security, including a recap of the scope and sources of the panel's authority, the mechanics of the several security devices, and arguments parties will make for and against requiring security. We conclude by considering whether there is risk for the secured party, even where suitable security is posted.

II. Sources of Authority

A. Statutory and Contractual Sources of Authority for Security.

Although statutory law normally does not control in arbitration, state security statutes often provide the starting point for panel assessment of requests for security. State insurance codes mandate security in two contexts. First, most states allow cedents to take credit for reinsurance placed with non-admitted reinsurers only if the reinsurer maintains security equal to ceded reserves.² Contractual security provisions track this statutory requirement, usually requiring the reinsurer to post security and to adjust the amount based on quarterly reporting of reserves by the cedent. In these cases the contract wording will guide panel consideration of security requests.

The second statutory basis for security is state pre-answer security provisions. While these laws do not directly control in most

As a start toward identifying best practices in this area, this paper will canvass some of the issues presented by requests for security...

arbitration contexts, they still provide clear guidance to panels. These statutes provide that where a policyholder sues an unauthorized insurer, the insurer must post security in an amount sufficient to ensure satisfaction of judgment as a condition to filing a responsive pleading. While these statutes differ slightly from state to state, most are based on the NAIC Model Law,³ and are designed to protect the residents of that particular state from having to enforce judgments in distant forums. Going back at least to 1990 courts have consistently applied these statutes against unauthorized reinsurers as well as insurers.⁴

In most cases, failure to post pre-answer security results in a default judgment entered against the unauthorized insurer or reinsurer.⁵ Entry of a default judgment where the reinsurer fails to meet the security requirement is not a denial of due process.⁶

However, there are circumstances when a court may not require an unauthorized insurer (or reinsurer) to post pre-answer security. Some statutes, such as those in New York and Connecticut, allow the court (or supervising authority) to waive the security requirement if it is shown that the insurer maintains “funds or securities, in trust or otherwise,” within the state sufficient to satisfy any potential final judgment in the proceeding.⁷ Other statutes, such as those in Colorado, Florida, and California, allow this waiver if the insurer can show that it maintains funds or securities available to satisfy the potential judgment in any state in the U.S.⁸

Courts have also declined to require pre-answer security when the party requesting such relief is not the type of party the statute was intended to protect. For example, the Southern District of New York recently rejected a motion for security because the moving party was a Delaware corporation with its principal place of business in Massachusetts.⁹ The court reasoned that the purpose of N.Y. Insurance Law § 1213 was to protect New York state residents from having to resort to distant forums. Therefore, only New York residents or corporations authorized to do business in New York

could invoke that protection.¹⁰

Finally, in a technical exception that has arisen with surprising frequency because of the number of state-owned enterprises engaged in insurance and reinsurance, an unauthorized insurer may be exempt from posting pre-award security if it qualifies for immunity under the Foreign Sovereign Immunities Act (FSIA).¹¹ Section 1609 of the FSIA provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act¹² the property in the United States of a foreign state shall be immune from attachment arrest and execution...

In 1995, the Second Circuit affirmed a district court ruling that the pre-answer security requirement of N.Y. Insurance Law § 1213 is a form of attachment, and was thus forbidden by FSIA § 1609 if the unauthorized insurer qualified as a foreign sovereign.¹³

This does not mean that sovereign immunity protects a state-owned reinsurer from legal action to enforce its contractual obligations. As noted in *Skandia America Reinsurance Corp. v. Caja Nacional de Ahorro y Seguro*,¹⁴ “[u]nder the FSIA, foreign states are not immune from the jurisdiction of foreign courts with respect to their commercial activities, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.”¹⁵ However, FSIA § 1609 does provide a foreign sovereign immunity from attachment and therefore from the operation of pre-answer security requirements.

In arbitration, one further technicality often negates the sovereign immunity exemption from the pre-answer security statutes. FSIA § 1609 makes clear that sovereign immunity from attachment is “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act.” Several courts have held that foreign sovereigns that are signatories to either the N.Y. Convention or the Panama Convention (both enacted prior to the FSIA) have waived their sovereign

immunity to pre-judgment attachment in the context of arbitration.¹⁶

Similarly, some courts have also held that the agreement to arbitrate, in and of itself, may waive foreign sovereign immunity to attachment. The Second Circuit has ruled that a clause providing that arbitrators are “relieved of all judicial formalities and may abstain from following the strict rules of law” constitutes an explicit waiver of immunity from pre-judgment attachment.¹⁷

B. The Panel’s Intrinsic Authority to Require Security

Over the last 20 years, courts have come to recognize broad, intrinsic authority by arbitrators “to order interim relief in order to prevent their final award from becoming meaningless.”¹⁸ This was not always the rule. Some earlier cases, dating back to a 1972 non-insurance-related Third Circuit case, *Swift Industries, Inc. v. Botany Industries, Inc.*,¹⁹ had held that an arbitration panel could only order security if the contract explicitly provided for such relief.²⁰ In *Swift*, the panel had ordered a party to post a \$6 million surety bond as security for a potential tax-related liability of \$1.5 million. The Third Circuit set aside the award because it found: (1) the agreement between the parties did not mention a bond as a remedy in the event of breach; (2) the parties did not provide for any form of security in the agreement; and (3) the amount of the award was “completely irrational” given the maximum potential liability.²¹ A 1992 case from the same circuit, *Recyclers Insurance Group, Ltd. v. Insurance Company of North America*,²² applied this same restrictive approach to a reinsurance case, rejecting the panel’s authority to award security even where the reinsurance contract itself contained a security provision.

We have found no subsequent decision in which a court followed this restrictive approach. Today, courts will generally uphold an award of security (or other provisional remedy), regardless of whether the arbitration agreement specifically provides such authority, so long as there is a colorable justification

State credit for reinsurance statutes generally provide for security to be posted by way of funds withheld, letter of credit, or assets deposited in a single beneficiary reinsurance trust. In the arbitration context, security may also take the form of a surety bond or an escrow account.

CONTINUED FROM PAGE 3

for the relief ordered,²³ the award “draws its essence” from the contract between the parties,²⁴ and the agreement does not specifically prohibit such relief.²⁵

Nonetheless, the panel’s authority is not unlimited. First, there must be due process and fundamental fairness. This means there must be some form of hearing, or opportunity for the parties to submit evidence and argument regarding a request for security.²⁶ This due process requirement applies regardless of whether the language of the underlying agreement requires awards to be based on a hearing.²⁷ Refusal to hear evidence from one party or otherwise denying the losing side a fair opportunity to present its case has been held to violate this requirement.²⁸ In *Home Indemnity Company v. Affiliated Food Distributors, Inc.*, the court vacated an interim security award because the panel refused to permit discovery on a threshold issue unless the respondent first posted security, and the panel had made its order “on the bare assertions of the parties, without even a glance at the underlying dispute or its possible merits.”²⁹

C. Do The Courts Still Have a Role in Ordering Pre-Arbitration Security in Cases Subject to Arbitration?

In modern practice, the principal role of the courts in security disputes has been to enforce interim awards. Cases dating back to the 1980s have held that an interim award is sufficiently final to qualify for judicial review on either a motion for confirmation or a motion to vacate under Sections 9 and 10 of the FAA.³⁰

Sometimes, however, circumstances require that the initial application for security be to the court. The chief drawback to relying on the arbitration panel for security is speed. Because it can take weeks or months to form a panel, cedents sometimes seek provisional relief in court pending panel formation. Federal courts have routinely held that they retain the inherent and equitable power to order preliminary remedies in aid of arbitration, provided the general criteria for those remedies are met.³¹ Some states, including New York, provide by statute that courts can entertain an application for preliminary relief in

connection with an arbitration.³² In most instances, however, the party requesting security from the court will have to meet the high burden for pre-judgment attachment. In contrast, while pre-answer security statutes do not require such a showing, that security obligation is triggered only when the reinsurer seeks to file a responsive pleading. Therefore those laws are not directly applicable pre-arbitration.

There are few reported cases that address disputes over security prior to panel formation. In one, *Founders Insurance Company, Ltd. v. Everest National Insurance Company*,³³ the court took a restrained approach to cross-demands for security. It overturned a preliminary injunction against Everest, the ceding company, enjoining it from drawing down on a trust, and it affirmed the denial of an attachment sought by Everest against the assets of Founders, the reinsurer. The court reasoned that Founders faced no irreparable injury from a draw-down on the trust, because Everest had sufficient assets to repay any amount to which it was not entitled. Likewise, Everest was not entitled to an attachment against Founders because the existing trust provided sufficient protection in the event it prevailed in the arbitration.

In *Continental Casualty Company v. Certain Underwriters at Lloyd’s*,³⁴ the district court for the Northern District of California declined to order pre-arbitration security pursuant to the Illinois pre-answer security statute.³⁵ There, each party had selected its arbitrator, but no umpire had been chosen. The court ruled that while it had authority, and broad discretion, to fashion preliminary remedies in aid of arbitration, part of that discretion included the ability to “commit to the arbitrators the question of whether and how the Illinois security posting statute should be applied.”³⁶

III. How Does Security Work?

State credit for reinsurance statutes generally provide for security to be posted by way of funds withheld, letter of credit, or assets deposited in a single beneficiary reinsurance trust. In the arbitration context, security may also take the form of a surety bond or an escrow account. Each form of security provides different benefits and costs to the cedent and the reinsurer.

A. Letters of Credit

The unconditional letter of credit (“LOC”) is the most common form of credit for reinsurance security as well as the most common security device in reinsurance arbitrations. In the credit for reinsurance context, the ceding company has an unrestricted right to draw on the letter of credit. Because the LOC is unconditional, the issuing bank will not look past the cedent’s demand and the cedent need not establish a failure to pay or other default by the reinsurer to draw on the LOC. However, a draw down not based on a contractual default is itself a breach of contract and the reinsurer may bring an action or arbitration to require the cedent to repay the improper draw.

In contrast, when the Panel directs or approves the posting of security by LOC in the arbitration context, the LOC is usually not unconditional. Rather, the panel commonly requires that draw down on the LOC be authorized by order of the panel. Assuming the letter of credit is posted prior to any applicable preference period, it provides a high degree of security for the ceding company. It is now firmly established that the proceeds of a letter of credit drawdown are the property of the issuing bank, not of the purchasing debtor’s estate.³⁷

However, LOC’s are an expensive security option for the reinsurer. To obtain an LOC, the reinsurer must either have a line of credit at the bank, or must provide the bank with acceptable collateral for up to 100% of the value of the LOC. While the LOC is outstanding, the reinsurer loses control of the assets pledged, and the bank will foreclose on the collateral if it pays on the LOC. In addition, the bank will charge a fee, usually calculated as a percentage of the value of the LOC, with additional costs and fees payable for drawing down and for amending the LOC to adjust the amount of security required. Since the recent economic downturn, credit constraints have caused banks to increase LOC fees and to be more conservative in their collateral requirements. As a result the LOC is now a more expensive and burdensome form of security.

B. Regulation 114 Trusts

Another common form of security is the single beneficiary reinsurance trust. Often called a “Regulation 114 Trust,” after the applicable New York regulation,³⁸ these trusts provide a cheaper alternative to letters of credit. A Regulation 114 Trust is entered into between the ceding insurance company, the reinsurance company, and a bank (the Trustee). Regulation 114 requires that the bank be a member of the Federal Reserve System, or a New York State-chartered bank or trust company, and that the bank not be a parent, subsidiary or affiliate of either the ceding company or the reinsurer.³⁹ The reinsurer must fund the trust using certain assets with a market value at least equal to the reinsurer’s obligations under the reinsurance agreement.⁴⁰ Equitable title to those assets is transferred to the trustee.

While the ceding company has the right under the trust agreement to demand possession of the trust funds or assets if the reinsurer does not meet its obligations, the reinsurer maintains certain control over the assets in the trust. The reinsurer maintains the right to vote any shares of stock in the trust account, to receive payments of dividends or interest from shares or investments in the trust account, and to withdraw and substitute trust assets (with prior approval of the ceding company), so long as the withdrawals or substitutions do not have the effect of decreasing the total amount of trust assets to a point below the amount of the reinsurer’s obligations.⁴¹

Regulation 114 Trusts can also be less expensive for the reinsurer to create. A trust involves no extension of credit by the trustee bank. Thus, rather than charging a percentage or basis point fee, many trustees will charge only a small fixed fee to create and administer a trust account. Finally, as the reinsurer’s obligations change, it is fairly easy to add or withdraw funds or assets, so long as the liabilities from the underlying reinsurance agreement are covered. Such adjustments do not usually require an amendment of the trust agreement itself.

C. Escrow Accounts

Escrow accounts differ from trusts in that title to the assets is not transferred. The funds or assets are placed into a separate account, and are earmarked for transfer if certain conditions are met. Panels ordering security in the form of an escrow account will often retain control over the account and any draw-downs on the assets. Alternatively, they may request that counsel for the secured party hold the escrow account.

IV. When Should a Panel Award or Deny a Request for Security?

Since the panel’s authority to award security is broad, and essentially subject to review only on rational basis and procedural fairness grounds, it necessarily falls to the reinsurance arbitration community to develop consistent standards that will best serve the interest of our market. The authority to award security means only that courts will not substitute their discretion for that of the arbitrators; it does not mean that panels should award security in every case.

Broadly speaking panels face two questions: (1) where there is a statutory or contractual basis for the moving party’s security request, are there nonetheless circumstances in which it is better to deny security; and (2) absent an explicit statutory or contractual basis for the request, what circumstances make such an award appropriate as a matter of the panel’s discretion.

A. How Should the Panel Evaluate Statutory or Contract-Based Security Requests?

For many cases in this category, the award of security is not controversial. While pre-answer security statutes and even the strict construction of the contract do not bind the panel, panels are usually receptive to requests for security in these cases and courts have upheld these awards so long as there has been procedural fairness in

CONTINUED FROM PAGE 5

measuring the amount of security required. The statute and or contract provide clear-cut authority for security to be awarded. Normally, a panel will enforce a contractual security requirement pending arbitration, even where the reinsurer seeks to rescind the contract or denies coverage for all or a portion of the claimed reserves.

But what if the reinsurer claims that the cedent has inflated its reserve estimates as a bad faith pressure tactic, or that the cedent's entire coverage position is frivolous? Arguably, the best approach in this situation is for the panel to consider the reinsurer's argument, but to hold it to a very high burden of proof. Several factors will usually favor this restrictive approach. With respect to a claim of inflated reserves, the contract itself has conferred on the cedent broad discretion to set reserves. It will be the rare case where the panel is in a position to second guess the ceding company's judgment on the record of a preliminary hearing.

The same applies to the merits of most coverage disputes. The posting of security merely preserves the ceding company's ability to collect if it prevails. In a case where the reinsurer would be subject to a pre-answer security requirement or where the contract provides for security, a panel will normally require security unless the correctness of the reinsurer's denial of coverage is stark and obvious from the terms of the contract and the parties' position statements.

In the reported case law, where the counter-party disputes a request for security, courts have sometimes required that a preliminary hearing be conducted before an award of security is made.⁴² However, the scope of this hearing can be quite limited and still meet due process requirements. This party requesting security need only establish proof of the existence of a reinsurance contract between the parties, evidence of billings submitted pursuant to that contract, and that those billings remain unpaid.⁴³ A court may also require that the panel at least "glance" at the merits of the underlying dispute.⁴⁴ But, if the panel has honored

these procedural requirements, the court will enforce its award.

In a second, more common, scenario, the reinsurer claims that it has no liability for the claim. It further claims that it is solvent if the disputed claim is not payable, but that it cannot afford to secure the allegedly invalid claim pending arbitration. In these circumstances, reinsurers have argued that requiring security as a prerequisite to presenting a defense is unfair and denies due process. As noted, courts have repeatedly rejected that position.⁴⁵ In fact, courts are more likely to deny security where the reinsurer has already been judged insolvent, as in that case the transfer of security creates a preference over the claims of other creditors.⁴⁶

While panels have the authority to deny a request for statutory or contractual security because of financial hardship, it will probably be the rare circumstance where it makes sense to do so. As courts have reasoned, the reinsurer was aware of and in most cases agreed to the security procedures at inception of the contract. To deny security where the counter-party most needs it is a material change in the deal and defeats the other party's reasonable contractual expectations.

Finally, some reinsurers may argue that state pre-answer security statutes should not be applied in arbitration. Outside of Illinois, most state pre-answer security statutes, as written, only require unauthorized *insurers* to post security before filing a responsive pleading. Reinsurers may argue that these statutes are really consumer protection laws – designed to prevent state residents from having to "resort[] to distant forums for the purpose of asserting legal rights under [insurance] policies,"⁴⁷ – and thus should not apply in the reinsurance context. While these statutes have been consistently applied against unauthorized reinsurers in court,⁴⁸ these decisions do not bind a panel. There may be cases in which the nature of the dispute and/or identity of the parties make the rationale of those statutes inapplicable.

B. When Should a Panel Order Security That is Not Authorized by Statute or Contract?

This is the issue on which there may be the least amount of consistency among panels. Cedents routinely invoke the panel's intrinsic authority to award security and seek to justify it in particular cases relying on such factors as the reinsurer's alleged slowness or recalcitrance in paying claims, the cedent's assessment of the strength of its case, and questions about the reinsurer's financial strength.

However, the fact that security awards are so common where there is a statutory or contractual basis says nothing about when security should be awarded in the absence of such authority. In evaluating such requests, panels do not always consider that security is a term that can be and is bargained for at contract formation. Arguably, the absence of a security provision is as much a reflection of the parties' contractual intent as the inclusion of such a provision.

Panels should also at least be aware of the standards that apply in court, where judges view all forms of provisional relief as extraordinary, equitable remedies to be granted with caution. As noted, courts do not generally consider the defendant's solvency or ability to meet a judgment as a relevant factor. They focus instead on the requirements that the party seeking security establish both a high likelihood of success on the merits and that there is an imminent danger that the debtor will put its assets beyond the reach of creditors, usually by removing them from the jurisdiction.⁴⁹

This is not to dispute the panel's unquestionable authority to order security in order to preserve its ability to award effective relief at the conclusion of the proceedings. But panels should recognize that imposing security may be a change in the contract and that it does require the reinsurer to tie up resources that may be needed to meet other, less controversial, claims. Therefore, absent a statutory or contractual basis for requiring security, panels should consider such requests with caution.

V. Is Security Really Secure?

Panels properly focus on doing justice between the parties before them, and should not normally concern themselves with how their award may affect the rights of other creditors who are not parties.

However, ceding companies and panels should both be aware of how competing principles of insurance insolvency law may negate a security award as a preferential transfer of assets that are properly a part of an insolvent reinsurer's estate.

Today most states have adopted a version of either the Uniform Insurers Liquidation Act or the NAIC Insurer Receivership Model Act.⁵⁰ Borrowing from long-established bankruptcy principles, these statutes all authorize the liquidator of an insolvent insurer or reinsurer to recover for the benefit of the estate payments or other transfers in respect of an existing debt that are made within a certain period before the company entered liquidation. To illustrate, in New York a liquidator may avoid any transfer of an insolvent insurer's or reinsurer's property that was made within a twelve month preference period, if the transfer was made with the intent to give the receiving creditor a greater percentage of recovery than other creditors in the same class.⁵¹

The preferential transfer laws will have no effect where the debtor transfers the security awarded before the preference period. Conversely, however, if the transfer occurs within the preference period the liquidator can set it aside, regardless of the imprimatur of a panel order.

There is no potential ambiguity as to the date of transfer in the case of a trust or escrow. In contrast, there have been occasional disputes as to when a liquidator may recover LOC proceeds. Fortunately, courts have consistently recognized that payment on the LOC is a transfer of assets by the issuing bank, not assets of the debtor. Therefore, an LOC posted before the preference period creates an enforceable security protection for the beneficiary.

Some creditors have tried to extend that principle to support the position that the *posting* of the LOC does not constitute a preferential transfer of the debtor's property, and that therefore an LOC may be given and enforced even during the preference period. For example, *In re Compton Corp.* involved an LOC issued to a creditor the day before an

involuntary bankruptcy petition was filed against the debtor. The debtor gave the bank a promissory note for the amount of the LOC, secured by a pledge of collateral, and a cash payment for the relevant fees. In exchange, the bank issued an LOC in favor of the creditor, which stated on its face that it was "for an antecedent debt" owed to the creditor by the debtor.

The court found no preference involved in the giving of a promissory note, the pledge of security, and payment of fees by the debtor to the bank. This was because issuance of the LOC gave full value in exchange for what the bank received. Nonetheless, the court required the creditor to refund the LOC proceeds. It reasoned that the LOC was specifically issued to satisfy an antecedent debt, and that it was issued within the preference period. Of critical importance, had the LOC not been issued, the beneficiary would have only had an unsecured claim against the debtor's estate, and its recovery would have been limited to the level of other unsecured creditors in its class. Instead, the beneficiary was able to recover in full by drawing down the LOC, and in its place, the bank had a claim against the debtor that was fully secured by the collateral pledged by the debtor.

Subsequent case law gives little guidance as to the current strength of the *In re Compton* ruling.⁵² But cedents and panels should be aware of the likelihood that a liquidator will challenge payments under an LOC where the letter is based on collateral pledged during the preference period.

The main lesson from this case applies generally to the goal of making security awards truly secure: The party seeking security should bring the issue before a panel as early as possible. Once formed, panels should act quickly on such requests. The sooner the award is in place, the less likely it is to face subsequent challenge.▼

1 N.Y. C.P.L.R. §§ 6212(a), 6201(3) (McKinney 2008).

2 Robert M. Hall, *Pre-Answer Security and Reinsurance Arbitrations*, 12-18 Mealey's Litig. Rep. Reinsurance 10 (2002). Mr. Hall's article provides an excellent detailed review of pre-answer security statutes and case law on this topic through 2002.

3 Nat'l Ass'n of Ins. Comm'rs, Unauthorized Insurers Process Act, in 6 Model Laws, Regulations and Guidelines 850-1, §3 (2008).

4 *Morgan v. Am. Risk Mgmt.*, 1990 WL 106837 (S.D.N.Y. Jul 20, 1990). See also *British Int'l Ins. Co. Ltd. v. Seguros la*

Fortunately, courts have consistently recognized that payment on the LOC is a transfer of assets by the issuing bank, not assets of the debtor. Therefore, an LOC posted before the preference period creates an enforceable security protection for the beneficiary.

CONTINUED FROM PAGE 7

- Republica, S.A.*, 212 F.3d 138 (2d Cir. 2000) (upholding the applicability of N.Y. Insurance Law § 1213 to reinsurers); *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392 (7th Cir. 2002) (affirming default judgment entered against reinsurer by district court for reinsurer's failure to post pre-answer security pursuant to Illinois Insurance Code); *Curiale v. Ardra Ins. Co. Ltd.*, 667 N.E.2d 663 (N.Y. 1996).
- 5 See *Am. Centennial Ins. Co. v. Seguros La Republica, S.A.*, 1992 WL 147626 (S.D.N.Y. Jun. 16, 1992), *aff'd sub nom. British Int'l Ins. Co. Ltd. v. Seguros la Republica, S.A.*, 212 F.3d 138 (2d Cir. 2000); *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 2001 WL 322005 (N.D. Ill. Apr. 2, 2001), *aff'd*, 293 F.3d 392 (7th Cir. 2002); *Skandia Am. Reins. Corp. v. Caja Nacional de Ahorro y Seguros*, 1997 WL 278054, at *2 (S.D.N.Y. May 23, 1997); *Curiale v. Ardra Ins. Co. Ltd.*, 667 N.E.2d 313 (N.Y. 1996).
- 6 *British Int'l Ins. Co. v. Seguros la Republica, S.A.*, 212 F.3d 138, 139, 144 (2d Cir. 2000); *Curiale v. Ardra Ins. Co. Ltd.*, 667 N.E.2d 313, 314, 319-20 (N.Y. 1996).
- 7 N.Y. Insurance Law § 1213 (McKinney's 2009); Conn. Gen. Stat. § 38a-27 (2008); *Curiale*, 667 N.E.2d at 317; Hall, *supra* note 2.
- 8 Colo. Rev. Stat. § 10-3-1004 (2009); Fla. Stat. § 626.908 (2009); Cal. Insurance Code § 1620(b)(1) (2009); Hall, *supra* note 2.
- 9 *Quanta Specialty Lines Ins. Co. v. Investors Capital Corp.*, 2008 WL 1910503, at *7-8 (S.D.N.Y. Apr. 30, 2008).
- 10 *Id.* See also *Morgan v. Am. Risk Mgmt.*, 1990 WL 106837, at *6 (S.D.N.Y. Jul. 20, 1990); *Allstate Ins. Co. v. Administratia Asigurarilor de Stat.*, 875 F. Supp. 1022 (S.D.N.Y. 1995).
- 11 28 U.S.C. §§ 1602-1611.
- 12 This clause will be important to the protection of the FSIA in the context of arbitration, discussed *infra*.
- 13 *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229 (2d Cir. 1995).
- 14 1997 U.S. Dist. LEXIS 7221, at *11-12 (S.D.N.Y. May 23, 1997).
- 15 See 28 U.S.C. § 1602.
- 16 See *Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 230 F. Supp. 2d 362 (S.D.N.Y. 2002), *aff'd* 344 F.3d 255 (2d Cir. 2003); *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392 (7th Cir. 2002).
- 17 *Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003).
- 18 *British Ins. Co. v. Water Street Ins. Co., Ltd.*, 93 F. Supp. 2d 506, 516 (S.D.N.Y. 2000). See also *Yasuda Fire & Marine Ins. Co. v. Cont'l Cas. Co.*, 37 F.3d 345 (7th Cir. 1994); *Home Ins. Co. v. Banco de Seguros del Estado*, 1999 U.S. Dist. LEXIS 22478 (S.D.N.Y. Feb. 26, 1999); *Certain Underwriters at Lloyd's v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926 (N.D. Cal. 2003); *Meadows Indem. Co., Ltd. v. Arkwright Mut. Ins. Co.*, 1996 U.S. Dist. LEXIS 14318 (E.D. Pa. Oct. 1, 1996).
- 19 466 F.2d 1125 (3d Cir. 1972).
- 20 *Id.*
- 21 *Id.* at 1132-34.
- 22 1992 U.S. Dist. LEXIS 8731 (E.D. Pa. June 16, 1992).
- 23 *Landy Michaels Realty Corp. v. Local 32 B-321, Serv. Employees Int'l Union*, 954 F.2d 794, 797 (2d Cir. 1992); *British Ins. Co. v. Water Street Ins. Co., Ltd.*, 93 F. Supp. 2d 506, 515 (S.D.N.Y. 2000).
- 24 See *Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1024 (9th Cir. 1991); *Recyclers*, 1992 U.S. Dist. LEXIS 8731, at *9.
- 25 See *Yasuda Fire & Marine Ins. Co. v. Cont'l Cas. Co.*, 37 F.3d 345, 350-51 (7th Cir. 1994); *Home Ins. Co. v. Banco de Seguros del Estado (Uruguay)*, 1999 U.S. Dist. LEXIS 22478, at *15 (S.D.N.Y. Feb. 26, 1999); *Meadows Indem. Co., Ltd. v. Arkwright Mut. Ins. Co.*, 1996 U.S. Dist. LEXIS 14318, at *22 (E.D. Pa. Sep. 30, 1996).
- 26 *Yasuda Fire & Marine*, 37 F.3d at 352-53; *Meadows*, 1996 U.S. Dist. LEXIS 14318, at *23.
- 27 *Yasuda Fire & Marine*, 37 F.3d at 353; *Bell Aerospace Co. Div. of Textron v. Local 516, Int'l Union Etc.*, 500 F.2d 921, 923 (2d Cir. 1984).
- 28 *Global Reins. Corp. v. Sompo Japan Ins., Inc.*, 2005 U.S. Dist. LEXIS 37969, at *7-8 (S.D.N.Y. Dec. 29, 2005); *Home Indem. Co. v. Affiliated Food Distribs., Inc.*, 1997 U.S. Dist. LEXIS 19741, at *12-14 (S.D.N.Y. Dec. 12, 1997).
- 29 *Home Indem.*, 1997 U.S. Dist. LEXIS 19741, at *13-14.
- 30 See *Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 230 F. Supp. 2d 362, 369-70 (S.D.N.Y. 2002); *British Ins. Co. v. Water Street Ins. Co.*, 93 F. Supp. 2d 506, 514 (S.D.N.Y. 2000) ("[A]n award of temporary equitable relief such as a security award, separable from the merits of the arbitration, is subject to federal review."); *Yasuda Fire & Marine Ins. Co. v. Cont'l Cas. Co.*, 37 F.3d 345, 348 (7th Cir. 1994); *Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991) ([T]emporary equitable orders calculated to preserve assets or performance needed to make a potential final award more meaningful . . . are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA."); *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 532 F. Supp. 901, 906 (S.D.N.Y. 1982) (rejecting the argument that a panel's interim award of injunctive relief was not ripe for confirmation when the award itself provided that either party could seek confirmation, and the contract which provided for arbitration stated that any arbitration award "shall be deemed final and may be enforced.");
- 31 See *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1991); *Cont'l Cas. Co. v. Certain Underwriters at Lloyd's*, 1998 U.S. Dist. LEXIS 23547, at *10-13 (N.D. Cal. Nov. 30, 1998) (collecting cases and discussing the power of the Court to order preliminary remedies under the Federal Arbitration Act and the New York Convention).
- 32 N.Y. C.P.L.R. § 7502(c).
- 33 2007 N.Y. Slip Op. 5651 (N.Y. App. Div. Jun. 28, 2007).
- 34 1998 U.S. Dist. LEXIS 23547 (N.D. Cal. Nov. 30, 1998).
- 35 215 Ill. Comp. Stat. 5/123(5).
- 36 *Cont'l Cas. Co. v. Certain Underwriters at Lloyd's*, 1998 U.S. Dist. LEXIS 23547, at *13.
- 37 *Compton Corp. v. Blue Quail Energy, Inc. (In re Compton)*, 831 F.2d 586, 589 (5th Cir. 1987) (collecting cases).
- 38 See N.Y. Comp. Codes, R. and Regs., tit. 11, § 126 et seq. (2009).
- 39 § 126.3.
- 40 The form of such assets is limited to cash or cash equivalents, certificates of deposit issued by a United States Bank and payable in United States legal tender, and certain specified securities and investments. § 126.5.
- 41 § 126.4.
- 42 *Yasuda Fire & Marine Ins. Co. v. Cont'l Cas. Co.*, 37 F.3d 345, 352-53 (7th Cir. 1994); *Meadows Indem. Co., Ltd. v. Arkwright Mut. Ins. Co.*, 1996 U.S. Dist. LEXIS 14318, at *23 (E.D. Pa. Sep. 30, 1996).
- 43 *Hartford Accident & Indem. Co. v. Ace Amer. Reins. Co.*, 2008 Conn. Super. LEXIS 2470, at *9 (Conn. Super. Ct. 2008); *British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 212 F.3d 138, 144 n.3 (2d Cir. 2000).
- 44 *Home Indem. Co. v. Affiliated Food Distribs., Inc.*, 1997 U.S. Dist. LEXIS 19741, at *12-14 (S.D.N.Y. Dec. 12, 1997).
- 45 See *John Hancock Prop. & Cas. Ins. Co. v. Universale Reins. Co., Ltd.*, 1993 U.S. Dist. LEXIS 9411, at *4 (S.D.N.Y. Jul. 12, 1993) (holding that financial weakness did not exempt the reinsurer from having to file pre-answer security under New York Insurance Law § 1213); *Curiale v. Ardra Ins. Co., Ltd.*, 667 N.E.2d 313, 319 (N.Y. 1996) ("[T]he State's interest in ensuring the availability of funds from which a judgment against a foreign or alien unlicensed insurer may be promptly paid . . . justifies striking the answer of a foreign or alien insurer if that insurer fails to provide adequate preanswer security . . . [T]he importance of the State interest here outweighs appellant's interest in litigating the merits of the [] claims.")
- 46 *In re Petitions of Laitasalo*, 193 B.R. 187 (Bankr. S.D.N.Y. 1996).
- 47 N.Y. Insurance Law § 1213 (McKinney's 2009).
- 48 See *supra* note 4.
- 49 N.Y. C.P.L.R. §§ 6212(a), 6201(3) (McKinney 2008).
- 50 Nat'l Ass'n of Ins. Comm'rs, *Insurer Receivership Model Act*, in 3 Model Laws, Regulations and Guidelines 555-1 (2008). The language adopted in each statute varies by state.
- 51 New York Insurance Law § 7425 (2009). New York has adopted a version of the Uniform Insurer's Liquidation Act. New York Insurance Law §§ 7408-15. In contrast, the NAIC Insurer Receivership Model Act provides for a two year time period to avoid preferential transfers. NAIC Insurer Receivership Model Act § 604.
- 52 The U.S. Supreme Court cited the decision in *dicta* for the proposition that "in certain circumstances, transfers from the debtor to another for the benefit of a third party may be recovered from that third party." *Celotex Corp. v. Edwards*, 514 U.S. 300, 312 (1995). The Eleventh Circuit followed the ruling of *In re Compton in American Bank of Martin County v. Leasing Service Corp. (In re Air Conditioning, Inc. of Stuart)* 845 F.2d 293 (11th Cir. 1988), but other subsequent cases applying the direct/indirect benefit analysis utilized by the *In re Compton* court have not allowed the trustee to recover from the LOC beneficiary, due to distinguishing facts. See *ITXS, Inc. v. F&S Hayward, LLC (In re ITXS, Inc.)*, 318 B.R. 85, 88 (Bankr. W.D. Pa. 2004) (finding that because the letter of credit had been issued to the beneficiary well before the 90-day preference period, the funds drawn by the beneficiary during the preference period could not be recovered as a preferential transfer, as the transfer of the debtor's property which indirectly benefited the creditor (the collateral pledged for the LOC) occurred outside the preference period.); *Litzler v. Chamblee & Ryan, P.C. (In re TIC United Corp.)*, 2008 Bankr. LEXIS 2040, at *36-37 (Bankr. N.D. TX 2008) (rejecting the Trustee's reliance on *In re Compton* for several reasons, including the fact that the letter of credit was not used to enhance the creditor's recovery on an antecedent debt).

Five Qualified Mediators Approved

The ARIAS Board of Directors recently approved five more Certified Arbitrators as ARIAS-U.S. Qualified Mediators. Newly designated mediators were as follows:

- **Lydia Kam Lyew**
- **R.E. (Pete) Kenyon III**
- **Lawrence Monin**
- **Diane Nergaard**
- **Michael J. Toman**
- **Brian E. Williams**

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

Board Certifies Five New Arbitrators

At its meeting on September 24, the ARIAS-U.S. Board of Directors approved certification of the following arbitrators who had not been previously certified. Their sponsors are indicated in parentheses.

- **Glenn E. Brace** (John Heath, Edward Muhl, Steven Richardson)
- **Michael L. Cohen** (Ronald Gass, John Heath, Jonathan Rosen)
- **Daniel W. Gerber** (Thomas Segalla, Sheila Carpenter, Steven Paris)
- **Thomas F. Segalla** (Daniel Gerber, Stephen Paris, Richard Shusterman)
- **Robert A. Whitney** (Sylvia Kaminsky, Diane Nergaard, Mark Wigmore)▼

Board Certifies Thirty Previous Arbitrators under New Requirements

Also, at its meeting on September 24, the Board of Directors approved certification of the following arbitrators under the new certification requirements:

- **Nasri H. Barakat**
- **John W. Dattner**
- **Donald T. DeCarlo**
- **Paul Feldsher**
- **William W. Fox, Jr.**
- **Y. John Lee**
- **Richard S. March**
- **Lawrence O. Monin**
- **George C. Pratt**
- **Joseph W. Rachinsky**
- **Daniel E. Schmidt, IV**
- **Richard M. Shusterman**
- **Thomas Stillman**
- **Harry Tipper III**
- **Eugene Wollan**

Then, at its meeting on November 12, the Board of Directors approved certification of the following arbitrators under the new certification requirements:

- **Spiro K. Bantis**
- **Daniel Brehm**
- **R. Michael Cass**
- **Paul E. Dassenko**
- **John A. Dore**
- **Robert B. Green**
- **William D. Hager**
- **Leo J. Jordan**
- **Jens Juul**
- **Reinhard W. Obermueller**
- **Barry R. Ostrager**
- **Thomas Paschos**
- **Jonathan Rosen**
- **Andrew N. Rothseid**
- **Jeremy R. Wallis**

All had previously been certified.▼

news and notices

CONTINUED FROM PAGE 9

Twelve ARIAS-U.S. Umpires are Certified

In addition, at the September 24 meeting, the Board approved certification of eight umpires.

The following arbitrators are now ARIAS-U.S. Certified Umpires:

- **Nasri H. Barakat**
- **Peter H. Bickford**
- **Donald T. DeCarlo**
- **Lawrence O. Monin**
- **Robert M. Hall**
- **Daniel E. Schmidt, IV**
- **Eugene Wollan**
- **Ronald L. Wobbeking**

Then, at its November 12 meeting, the Board approved certification of the following four umpires.

- **Paul E. Dassenko**
- **John A. Dore**
- **Robert B. Green**
- **David A. Thirkill**

The complete list of Certified Umpires can be seen on the website under "Selecting an Umpire." ▼

Chicago Workshop Trains 22 Students and 8 Attorneys

The Fall Intensive Arbitrator Training Workshop took place in Itasca, Illinois on September 9. Several last-minute cancellations reduced the number of students to 22, with the result that five lucky participants doubled up and filled two panel roles each (at no extra cost to them).

Eaglewood Resort provided the venue for three mock hearings and two general sessions (in a very fine amphitheater). The firms of **Bates & Carey LLP**, **Butler Rubin Saltarelli & Boyd LLP**, and **Sidley Austin LLP** provided the highly motivated attorneys who argued the dispute in the three hearing rooms. Two general sessions featured experienced arbitrators **Michael Cass**, **John Dore**, and **Richard Bakka**.

These workshops not only are basic training

for new arbitrators, but also, are great refreshers for those who are already accepting panel assignments. In addition, they are required for certification if a member does not have two significant arbitrations already completed.

At the same time, the attorneys who are involved in reinsurance arbitration work have the benefit of a realistic practice session presenting complex arguments, as well as the chance to see how arbitrators see their roles and deal with relevant issues, such as ex parte communications and controlling the process.

The next intensive workshop will take place on May 4, in California. Additional information is on the website calendar. ▼

Board Modifies Certification Sponsor Requirements

At its recent meeting, the ARIAS-U.S. Board of Directors voted to change the requirements for a member to sponsor a candidate for certification as an arbitrator. Under the previous rules, a member who was not certified could only be a sponsor if he/she met all the requirements for certification (except the Recommendation Component). While this was the same requirement as had always been in place, it had become a higher hurdle since the new requirements for certification include completing the online ethics course.

Now, a sponsor, in addition to the basic certification requirements (except recommendation and ethics course), must be familiar with the arbitration process and must have read and be familiar with the *ARIAS-U.S. Guidelines for Arbitrator Conduct*. Anyone asked to be a sponsor is required to complete the sponsor questionnaire and provide it to the candidate for submission with the application. ▼

John K. Shea (1953-2009)

ARIAS-U.S. member John Shea died on October 28 as a result of mantle cell lymphoma. He was 56 years old. John was President and CEO of Atlantic Mutual Insurance Company. He had lived with his family in Yardley, Pennsylvania. ▼

Privilege 101 - A Primer on the Attorney-Client Privilege, the Work Product Doctrine and Waiver

This article is based on a paper presented at the ARIAS•U.S. 2009 Spring Conference.

Kim V. Marrkand
Fritz K. Huszagh

Disagreements concerning the validity of assertions of the attorney-client privilege and of work product protection are central in many legal disputes, and not surprisingly, claims of privilege and work product protection frequently arise in instances implicating reinsurance. This article provides a primer on the attorney-client privilege, the attorney work product doctrine and waiver, and includes a discussion of recent case law applying these concepts within the reinsurance context.

I. The Contours of the Attorney-Client Privilege

The attorney-client privilege protects communications between a client and his or her lawyer sent under confidential conditions for purposes of seeking or rendering legal advice. A client may refuse to disclose confidential communications with counsel and can prevent others from disclosing the communications as well.¹ The purpose of the privilege is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.²

The specific requirements for asserting the privilege vary somewhat by jurisdiction. In state court actions, state law on privilege applies. Federal courts apply the governing state law in diversity cases and apply federal privilege law to federal and pendant claims.³ As the vast majority of insurance-related disputes in federal courts involve diversity jurisdiction, state law on privilege will often apply.

Federal law and most state jurisdictions will apply the privilege where: (i) the party asserting the privilege is (or sought to

become) a client; (ii) the communication is among some combination of the client, the client's representatives, the lawyer or the lawyer's representatives; (iii) the communication relates to a fact that the attorney was informed of by the client, and not in the presence of strangers, and was made for the purpose of seeking legal advice; and (iv) the privilege has been claimed and not waived.⁴

With respect to business entities, when a corporation retains counsel, the company is the client, not its employees, board of directors, or individual shareholders. In the corporate context, communications between employees and counsel will retain the protection afforded by the privilege if they involve matters within the scope of the employees' corporate duties and the employees themselves were aware that they were communicating with counsel to facilitate the corporation's obtaining legal advice.⁵

There are, of course, exceptions to the attorney-client privilege. For instance, the privilege does not protect from disclosure those communications with counsel in an instance where the services of the lawyer were obtained in furtherance of a crime or fraud.⁶ Similarly, communication that would otherwise be cloaked with the privilege, may be discoverable in a situation where the communications themselves are central to the dispute, such as litigation concerning claims of attorney malpractice or claims seeking payment of an attorney's unpaid fee for services.

Likewise, simply putting a legend on a document that reads "Attorney Client Communication" or "Work Product" does not, in and of itself, protect a document from disclosure. Rather, the document must satisfy all the elements of a privileged communication between a client and counsel. Similarly, the fact that a lawyer is copied on a document does not, in and of

feature



Kim V. Marrkand

Fritz K. Huszagh



A client may refuse to disclose confidential communications with counsel and can prevent others from disclosing the communications as well.

Kim V. Marrkand, a partner in the Boston office of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., chairs the firm's Insurance/Reinsurance Practice Group. Fritz Huszagh is a partner in the Chicago office of Hinshaw & Culbertson LLP. His practice includes reinsurance and commercial insurance matters.

CONTINUED ON PAGE 12

Certain documents or tangible things obtained for or produced by attorneys in anticipation of litigation are protected, and not discoverable, except in limited circumstances. The purpose of the attorney work product doctrine, the Supreme Court has reasoned, is that, without such a doctrine, inefficiency, unfairness, and “sharp practices” would develop.

CONTINUED FROM PAGE 11

itself, protect a document from disclosure. If two business people are discussing a business question, including a lawyer in the conversation or copying the lawyer on a subsequent e-mail or memorandum, does not guarantee protection. The lawyer must be rendering legal advice and acting in the capacity of providing counsel to avoid disclosure.

II. The Work Product Doctrine

Certain documents or tangible things obtained for or produced by attorneys in anticipation of litigation are protected, and not discoverable, except in limited circumstances. The purpose of the attorney work product doctrine, the Supreme Court has reasoned, is that, without such a doctrine, inefficiency, unfairness, and “sharp practices” would develop.⁷ The doctrine applies to both state and federal court proceedings under applicable rules of civil procedure. *See, e.g.*, Fed. R. Civ. P. 26(b)(3); Mass. R. Civ. P. 26(b)(3). The U.S. Supreme Court first recognized the doctrine in *Hickman v. Taylor*, 329 U.S. 495 (1947). At that time, Fed. R. Civ. P. 26 granted mandatory discovery of certain documents and materials when requested, and protected only privileged information.⁸ Under the attorney work product doctrine, however, attorney memoranda, notes, and other materials⁹ generated by or for counsel in conjunction with a dispute are protected from disclosure to one’s adversary. The protection, of course, does not apply to materials created in the ordinary course of business or to all materials “prepared in law offices or reviewed by lawyers.” Instead, the protection applies to “work done in anticipation of or for trial.”¹⁰

As with the attorney-client privilege, there are exceptions to the protection from disclosure afforded by the work product doctrine. While work product protection will apply to protect certain materials prepared by counsel in the course of an adversary proceeding, the protection is not absolute, and work product can be discoverable if the party seeking it can establish that: (i) there is a substantial need for the discovery to prepare their case; and (ii) that the party seeking the discovery has no other means of obtaining it without undue hardship (such as in an instance where a witness left the

country).¹¹ But even in those instances where a party has made the requisite showing, courts will still protect the mental impressions of an attorney by allowing the part of a document that contains an attorney’s mental impressions to be redacted. An attorney’s mental impressions are typically protected and subject to disclosure only in extraordinary circumstances or when a waiver has occurred.¹²

There are distinct differences between work product protection and the attorney-client privilege. The work-product doctrine is broader in scope than the attorney-client privilege in that work-product includes: (i) materials prepared by persons other than the attorney, his or her representatives, or the client; and (ii) materials collected for the attorney such as signed statements and other information.¹³ But while the work-product doctrine is broader in scope as to what is covered, its protection comes with less certainty than the protection afforded by the attorney-client privilege in that work product protection can be overcome by a showing of a substantial need for the information coupled with an inability to obtain the information from another means.

III. Waiver of the Privilege and of Work Product Protection, and Two Emerging Aspects of Current Waiver Law

With respect to the attorney-client privilege, waiver generally occurs when the content of a confidential communication is disclosed to a third person outside the attorney-client relationship. Waiver may occur even though the client does not intend to waive the privilege, such as instance where the client carelessly allows the information to be disclosed to others. Waiver may also result from failure to object to the demand for disclosure in litigation.

With respect to work product protection, because the doctrine is intended to foster the adversary system, any disclosure that is inconsistent with keeping material from adversaries waives the protection.¹⁴ For instance, the disclosure of trial preparation material to non-party witnesses, can lead to a waiver of the work product protection that would otherwise apply.¹⁵ Consequently, before a lawyer shares trial preparation material with a non-client witness, such as an expert, he or she must evaluate whether, in the

relevant jurisdiction, that will be deemed a waiver.¹⁶ Similarly, confidential information disclosed during settlement negotiations may be found to be a waiver as to the information disclosed.¹⁷

One topic that arises within the context of waiver law and is frequently implicated in current litigation, is inadvertent production of documents. As both privileged communications and attorney work product may be inadvertently produced, this facet of the law impacts both subjects. Historically, a party that inadvertently produced privileged communications or work product was subject to claims that any protection that may have attached to the material, and to other materials concerning the same subject matter, had been waived.¹⁸ The traditional rule – described as “subject matter waiver” – had been that, waiver as to one privileged document, waives the privilege for other documents on the same subject matter.¹⁹ Generally, a waiver of work product protection will not extend to all documents on the same subject,²⁰ but it can if limiting the waiver will create an injustice or impose an undue burden on the judicial system.²¹

With the increasing prevalence of voluminous electronic documents involved in modern-day discovery practice, however, the law is changing with respect to the treatment of materials that are produced inadvertently. In September of 2008 Congress revised the Federal Rules of Evidence to, among other things, provide a framework for determining whether or not an inadvertent production constitutes a waiver by establishing that no waiver exists where: (i) disclosure was inadvertent; (ii) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (iii) the holder promptly took reasonable steps to rectify the error.²² The revisions to the Federal Rules of Evidence also foster the use of stipulations and judicially-endorsed protective orders addressing, in advance, how inadvertently produced material will be handled, and allowing for things such as “clawback agreements,” for example, whereby a

party may retrieve inadvertently produced material.²³

A second emerging aspect of the law that falls within the rubric of waiver and is prevalent in modern litigation is the “common interest” doctrine and the use of joint defense agreements. Where multiple defendants in a lawsuit share a common legal interest, the defendants may agree to pursue a joint defense and enter a joint defense agreement. Under what is referred to as the “common interest” doctrine, parties pursuing a joint defense and sharing a mutual legal interest may exchange confidences without their doing so constituting a waiver of the attorney-client privilege. The common interest doctrine is not a separate privilege, but instead, extends the attorney client privilege to any privileged communication shared with another represented party’s counsel in a confidential manner for the purpose of furthering a common legal interest.²⁴

The common interest doctrine protects both an attorney’s shared work product as well as shared communications. The contours of the common interest doctrine can vary by jurisdiction, but generally, “if two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege unless it has been waived by the client who made the communication.”²⁵

Whether communications among policyholders, insurers, reinsurers, and brokers are protected, depends upon whether the common interest doctrine applies to the situation presented.²⁶ Parties seeking to establish a joint defense litigation strategy need only prove the following to establish their common interest: (i) the communications were made in the course of a joint defense effort; (ii) the statements were designed to further the effort; and (iii) the privilege has not been waived.²⁷

As the common interest doctrine creates no new privilege, but instead prevents a

waiver of material that was otherwise protected attorney client communication or attorney work product, one cannot use a joint defense agreement to protect material that does not otherwise qualify for attorney-client or work product protection. Courts require an actual or at least potential litigation or ongoing transaction for the doctrine to apply. Courts will not recognize “rolling” joint defense agreements where there was no particular litigation, investigation or transaction in prospect.²⁸

While it appears some aspect of joint defense protection applies in all jurisdictions, the boundaries of joint defense protection vary, requiring a jurisdiction – specific assessment of the elements needed to justify joint defense protection. The overwhelming majority of jurisdictions throughout the country recognize some aspect of the common interest doctrine even where the co-defendants asserting it have some degree of divergent interests.²⁹

IV. Privilege Issues In the Context of Reinsurance Relationships

Claims of privilege, and responses to such claims, can arise in several ways as respects reinsurers, their cedants, and their cedants’ insureds. In coverage litigation between insureds and their insurers, it is not atypical for the insured to request documents related to the insurer’s relationships and communications with its reinsurer, including communications between the insurer and its lawyers pertaining to coverage analysis where those communications might have been shared with the reinsurer. Also, as between a cedant and a reinsurer, oftentimes the reinsurer will request documentation regarding a claim cession, including analysis by inside and/or outside counsel for the cedant who was involved in the evaluation and settlement of the claim which forms the basis for the cession.

CONTINUED FROM PAGE 13

A. Insured's Request for Documentation Shared Between the Insurer and its Reinsurer

A request by an insured for communications between the insurer and the reinsurer, and for copies of the applicable reinsurance agreement, where such requests were predicated on the notion that the terms of the insurance policy were ambiguous and, therefore, the communications and contract might shed light on any ambiguity, resulted in a ceding company being ordered to turn over the reinsurance contract.³⁰ The only objection raised by the insurer went to relevance, not privilege. Though the court didn't clearly say whether the communications were to be disclosed, it did order disclosure of the contract, analogizing to Federal Rule of Civil Procedure 26(a), under which insurance contracts are discoverable.

In instances where the insured requests communications between its insurance company and its reinsurer, including those authored by counsel for the cedant that have been shared with the reinsurer, the response from the insurance company is often that the communications between it and its reinsurer are protected by their common interest in evaluating and minimizing the exposure arising from the underlying claim, and are not discoverable.

Two cases, both from the federal court in Illinois, reach contrary results in this respect. In *Allendale Mutual Insurance Company v. Bull Data Systems, Inc.*,³¹ the court observed that while privileged information is discoverable when it has been disclosed to a third party, an exception exists where the disclosure is to a third person who shares a common interest with the disclosing party. While noting that some courts have recognized that the common interest doctrine exists as between an insurer and its reinsurer, the court stated there are limitations on the doctrine in that context. Specifically, the court said that the interests must be identical, not merely similar; and that the interests

must be legal, not solely commercial. The reason is that the privilege exists in order that parties may adequately prepare their case against a common opponent. Here, because the communications were generated in the ordinary course of business, the court determined that these communications constituted typical commercial communications not entitled to a claim of privilege. Moreover, the communications were done not by attorneys, but by non-attorneys.

In contrast, see *Minnesota School Boards Association Insurance Trust v. Employers Insurance Company of Wausau*.³² There, the communications sought by the insured consisted of letters written by an attorney, and a letter written by a non-attorney where its subject matter related to communications with counsel. The letters pertained to the claim. The court rejected the notion that the letters were not protected by the common interest extension of the attorney-client privilege. The court determined that the insurer and its reinsurer had a common interest worthy of protection, since the documents were principally authored by counsel or by agents on behalf of counsel. The interests of the cedant and its reinsurer, in juxtaposition to the interests of the insured, were such that the cedant company and the reinsurer were aligned against a common opponent. Therefore, an invasion of the privilege was not warranted.

B. Reinsurer's Requests for Documentation of the Cedant

As mentioned, a usual situation involves a reinsurer who is seeking materials from its cedant in connection with a loss cession. The materials the reinsurer seeks might typically include communications to/from the cedants' attorneys, in which items such as allocation, defenses and/or bad faith, etc., may have been discussed. Naturally, the reinsurer is interested in those documents to the extent that they may bear on the obligation of the reinsurer. One obvious basis upon which to request the material is the access to records clause, by which the cedant ordinarily gives the reinsurer the

right to review or inspect all records of the cedant that pertain in any way to the contract. Additional arguments made by reinsurers in support of their right to review such material include the common interest doctrine, as well as the "at issue" doctrine.

1. The access to records clause

A "standard" access to records clause contains no express restrictions as to the reinsurer's ability to review records, save for the requirement that the records pertain in some way to the contract of reinsurance. One could imagine, therefore, that reinsurers would have an unfettered right to any documents in the cedant's possession related to a claim. That notion has not generally been accepted by the courts, however. In *North River Insurance Company v. Philadelphia Reinsurance Corporation*,³³ the reinsurer requested documents, including privileged communications between the cedant and its counsel, bearing on the cedant's decision to abandon its appeal of an arbitration by which the cedant was held responsible for payment of defense costs. Notwithstanding a broad access to records provision, which the court likened to a cooperation clause, the court determined that absent very explicit language to the contrary, the cedant does not give up wholesale its right to preserve confidentiality of consultations it may have had with its attorney concerning the underlying claim and the coverage determination in connection with that claim. So long as the cedant provided the reinsurer with all factual information and documentation in its possession relevant to the underlying claim and its handling of the claim, the court determined that it had satisfied its obligation under the clause. The reinsurer was not entitled, by virtue of the access to records clause, to any and all legal advice obtained by the reinsured if the reinsured had a reasonable expectation of confidentiality which, according to the court, it did.

The same result was reached in *Gulf Ins. Co. v. Transatlantic Reins. Co.*³⁴ The reinsurer sought records from its cedant, including files of inside and

outside counsel. That request was refused, based on a claim of privilege. Citing to *North River Ins. Co. v. Philadelphia Reins. Corp.*, the Court went one step further and said that no matter how broadly phrased, access to records clauses are not intended to act as a per se waiver of the attorney-client or work product privileges, lest the privileges be meaningless. *Gulf* might be read to suggest, going even beyond the holding of *North River*, that virtually anything a reinsurer could write would not allow for the production of otherwise privileged materials.

2. Common interest doctrine, used affirmatively rather than defensively

At its heart, the common interest doctrine is nothing more than an extension of the attorney-client privilege, as applied to multiple clients who share the same counsel, or multiple clients who employ separate counsel who work together based on their unified legal interests as against a common opponent. Under these circumstances, the attorney-client privilege is extended such that communications among the clients, or among counsel for the clients, remain privileged from disclosure. In the event, however, that the interests of the clients later become adverse, one is not in a position to assert a privilege as against the other. In this way, instead of acting as a shield, the common interest doctrine can be employed as a sword by two previously allied parties who, later on, become adverse.

In this regard, several reported decisions relate to situations where reinsurers asserted the right to review ostensibly privileged material contained within their cedants' file. Where the reinsurer and cedant are now adverse, the theory is that the cedant can no longer maintain any claim of privilege as against a party with whom it formerly had a common interest. In *North River Ins. Co. v. Philadelphia Reins. Corp.*³⁵, the court hewed to a narrow view of the common interest doctrine, explaining that it applied when two or more parties are represented by the same counsel. The court observed that in the typical insurer/insured situation,

counsel is paid by the insurer to represent the insured, and the insured and the insurer expect confidentiality because their interests are aligned. According to the court, the relationship between a reinsurer and reinsured is not imbued with an expectation of confidentiality, because the cedant retains its own counsel wholly independent from the reinsurer, the reinsurer has no input into the relationship between the cedant and its counsel, and it does not control the relationship.

The same question was addressed in *North River Ins. Co. v. Columbia Casualty Co.*³⁶ There, the court took a broader view of the common interest doctrine, noting that it can apply where parties are represented not just by the same, but by separate, counsel, so long as they are engaged in a common legal enterprise. But the question according to the court was whether the doctrine can apply to communications between entities that have parallel legal interests, but who are not actively pursuing a common legal strategy. Noting that one of the predicates behind the doctrine is that parties must demonstrate actual cooperation towards a common legal goal, a common interest would not be assumed based solely on a basis of the relationship of the two parties. Where the reinsurer does not contribute to the expenses of the cedant, nor exercise any control over its conduct, and where there is no evidence that the two were pursuing a coordinated litigation strategy, the court determined that merely because the two parties stand in a relationship of reinsurer and cedant, a common interest did not necessarily exist. Under the circumstances, the reinsurer was not able to obtain privileged material in the control of the cedant.

Finally, in *American Re-Insurance Co. v. US Fidelity & Guaranty Co.*³⁷, the court followed the lead established in the two *North River* cases, and stated that the relationship between an insured and insurer stands in "stark contrast"³⁸ to the relationship between an insurer and reinsurer. Noting further that the reinsurer and the cedants' interest were adverse, the mere fact that they previously shared an interest in the

eventual outcome of the underlying case was not sufficient to create a common interest so as to defeat the claim of privilege asserted by the cedant.

3. "At issue" doctrine

Those cases that have discussed a claim of privilege asserted by a cedant as against a reinsurer in the context of the common interest doctrine have generally also addressed another theory by which the attorney-client privilege could be waived. The "at issue" doctrine is an exception to the application of the attorney-client privilege, where a party's claim, or defense to a claim, is grounded on advice that the party received from counsel. For example, if a party is accused of tax evasion, and its defense to that claim is that it did not think it was improperly avoiding taxes based on advice received from counsel, then the advice of counsel, as conveyed in communications between counsel and the party, is "at issue". In that instance, the communication is not privileged, because a party cannot in fairness ground its defense on a communication but then shield the communication from the other party.

In *North River Ins. Co. v. Philadelphia Reinsurance Company*³⁹, the reinsurer contended that information in the cedant's control was not shielded by the attorney-client privilege because the subject matter of the claim was in issue with respect to the cession. Thus, the reinsurer asserted that the attorney-client privilege had been waived. Construing the at issue doctrine narrowly, the court held that it can only be employed where the party has asserted a claim or defense that it intends to prove by disclosure of an attorney-client communication. Since the cedant insisted that it was not going to prove its position based on communications it had with counsel, the court determined that the doctrine did not apply. Hence there was no waiver of the attorney-client privilege. The court determined that the reinsurer's goal in seeking production of privileged documents was to test the veracity and completeness of the disclosures relating to the facts of the cession, and

CONTINUED FROM PAGE 15

concluded that application of the doctrine under the circumstances would allow any litigant who offers evidence that it had discussed with counsel to be questioned about its communications with counsel.

To like effect is *North River Ins. Co. v. Columbia Casualty Co.*⁴⁰ In adopting the reasoning of *North River v. Philadelphia*, the court determined that the reinsurer had not identified any matter through which the cedant had placed the advice of its counsel, or the contents of any privileged communications, in issue. The court stated that the mere fact that the cedant had placed the question of coverage in issue was not sufficient to constitute a waiver of the attorney-client privilege vis-à-vis its reinsurer.

In *American Re-Insurance Company v. U.S. Fidelity & Guaranty*⁴¹, the reinsurers contended that the cedant waived claims of privilege by placing in issue the reasonableness and good faith of the settlement of the underlying claim. The court summarily rejected the notion, stating that an insurer does not place the bona fides of a settlement at issue merely by alleging that a settlement was reasonable and in good faith. However, one of the witnesses in the case testified regarding the advice he received from counsel in the preparation of the cession. Consequently, the court determined that the advice he received from counsel in that regard was in issue, and the reinsurers were able to obtain testimony and production of documents regarding the presentation of the claim, but only to the extent that the discovery related to disclosures made in the testimony of that witness.

Finally, in *AIU Insurance Company v. TIG Insurance Company*⁴², similar arguments were made by the reinsurer for production of materials. The court stated that the mere seeking of coverage is not an affirmative act sufficient to place privileged documents at issue. Moreover, the court noted that the communications were not at issue because the cedant did not intend to rely upon the contents of any privileged

communications. In addition, the court determined that the reinsurer was able to obtain factual material related to the dispute with its cedant and, therefore, was in a position to attempt to prove its defense without the need to obtain privileged information.

The opinion contains an interesting discussion of a distinction the court drew between late notice by an insured to an insurer, and late notice by an insurer to a reinsurer. Pursuant to New York law, in the former relationship the advice of counsel may be in issue. But the court felt that with respect to the latter relationship, advice of counsel would not be in issue. Finally, the court concluded that the discovery of privileged information was not necessary for the reinsurer to challenge the reasonableness of the settlement, because the reasonableness of a settlement generally rests on objective criteria related to the possibility of recovery and the probability of success, as opposed to legal advice which might speak to those issues.▼

This article is intended to be a discussion of general principles of law and is not intended to convey opinions of the authors, the authors' firms, their lawyers, or their clients.

1 See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1980).

2 See *id.*

3 Fed. R. Evid. 501; 1 David M. Greenwald et al., *Testimonial Privileges* § 1:7 (3d ed. 2008).

4 See, e.g., *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684 (1st Cir. 1997).

5 *Upjohn Co.*, 449 U.S. at 394-95.

6 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2017 (2d ed. 1994).

7 *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

8 See *id.* at 506.

9 In addition to attorney memoranda and notes, work product protection can extend to preclude an attorney from having to disclose their mental impressions and recollections. *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (finding attorney's recollections about witness interviews he conducted "within the rubric of work product protection").

10 *U.S. v. Textron*, 577 F.3d 21, 30 (1st Cir. 2009).

11 *Id.* at 512-13; see also Fed. R. Civ. P. 26(b)(3)(A).

12 See *In re Grand Jury Subpoena*, 220 F.R.D. 130, 145 (D. Mass. 2004). Outside of the context of waiver, the most common fact pattern in which courts have allowed the discovery of "opinion work product" is when the mental impressions of the attorney are at issue in the case and the need for the material is compelling. See, e.g., *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7, 17 (D. Mass. 1997) (insured showed substantial need for document containing opinion work product of insurer's attor-

neys whose mental impressions were directly at issue).

13 *United States v. Nobles*, 422 U.S. 235, 238-39 (1975).

14 *Mass. Inst. of Tech.*, 129 F.3d at 687.

15 23 Am. Jur. 2d Depositions and Discovery § 49.

16 *Id.* see also Fed. R. Civ. P. 26(a)(2)(B)(ii) calling for the disclosure of "data or other information considered" by an expert informing their opinion.

17 23 Am. Jur. 2d Depositions and Discovery § 49.

18 *Id.*

19 1 McCormick on Evid. § 93 (6th ed.).

20 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2024 (2d ed. 1994) ("Disclosure of some documents does not destroy work-product protection for other documents of the same character").

21 *United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.C. Cir. 1994); *Fleet Nat'l Bank v. Tonneson & Co.*, 150 F.R.D. 10, 15 (D. Mass. 1993).

22 Fed. R. Evid. 502(b).

23 *Id.*

24 *Hanover Ins. Co. v. Rapo & Jepsen Ins. Services*, 449 Mass. 609, 612-13 (2007).

25 *Id.* at 614 quoting Section 76 of the Restatement (Third) of the Law Governing Lawyers.

26 1 David M. Greenwald et al., *Testimonial Privileges* § 1:82 (3d ed. 2008).

27 *Hanover*, 449 Mass. at 619 quoting *U.S. v. Bay State Ambulance & Hosp. Rental Serv. Inc.*, 874 F.2d 20, 28 (1st Cir. 1989).

28 *In re Grand Jury Subpoena*, 274 F.3d 563, 575 (1st Cir. 2001) (finding "more vice than virtue" in rolling JDA's with limitless breadth).

29 See, e.g., *United States v. Stotts*, 870 F.2d 288, 290 (5th Cir. 1989), *cert. denied*, 493 U.S. 861 (1989); *Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3rd Cir. 1985), *cert. denied*, 474 U.S. 946 (1985); *United States v. McPartlin*, 595 F.2d 1321, 1335-36 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604-05 (N.D. Tex. 1981); *In the Matter of a Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 392 (S.D.N.Y. 1975).

30 *Machinery Movers, Riggers, & Machinery Erectors, Local 136 Defined Contribution Pension Plan, et al. v. Fidelity & Deposit Co. of Maryland*, 2007 WL 3120029 (N.D.Ill. 2007).

31 152 F.R.D. 132 (N.D.Ill., E.D. 1993).

32 183 F.R.D. 627 (N.D.Ill., E.D. 1999).

33 797 F. Supp. 363 (D.N.J. 1992).

34 13 A.D.3d 278, 788 N.Y.S. 2nd 44 (Sup. Ct., App. Div. NY 2004).

35 *Supra.*

36 1995 WL 5792 (S.D.N.Y. 1995).

37 40 A.D.3d 486, 837 N.Y.S.2nd 616 (Sup.Ct., App.Div. NY 2007).

38 *Id.*, 491.

39 *Supra.*

40 *Supra.*

41 *Supra.*

42 2008 WL 5062030 (S.D.N.Y. 2008).

Are “Unreasoned” Arbitration Awards “Irrational”?

Robert M. Hall

Introduction

The title of this article is tongue-in-cheek for two reasons. The term “unreasoned award” is a misnomer since all arbitration awards are supported by reasons even if they are not expressed or explained in this type of award. Second, such awards are very seldom irrational in the general sense of the term but may be in the sense of that term used and applied by the courts under the Federal Arbitration Act.

The purpose of this article is to examine a recent unreasoned award found to be irrational by a federal district court, along with selected case law in order to support the argument that failure to provide the reasoning to an arbitration award increases rather than decreases the chance of an award being vacated by a court.

I. *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 2009 U.S. Dist. Lexis 85046 (E.D. Pa.)

A. The Facts¹

St. Paul Re reinsured PMA from 1999 through 2001 under a finite aggregate excess treaty that contained: (a) an experience fund to which premiums were paid; and (b) a deficit carry-forward provision with respect to losses in excess of the experience fund which were paid by St. Paul Re. Any excess in the experience fund after losses ran off would revert to PMA.

In 2003, St. Paul Re was spun off and became Platinum Re. At that point, Platinum Re and PMA entered into another treaty (an aggregate stop loss) that allowed any deficit from the 1999 – 2001 treaty to be rolled into the 2003 treaty. Any unused portion of the experience fund for the 2003

treaty would be returned to PMA upon the “finalization” of losses, *i.e.*, the earlier of a commutation of losses, losses reaching Platinum Re’s limits, or December 31, 2021. The decision does not specify the class of business involved but such transactions usually involve long tail business.

PMA challenged the validity of the carry forward of losses from the 1999 – 2001 treaty into the 2003 treaty. The parties also disputed the method of calculation of the deficit. At one point, PMA made a regulatory filing that placed the deficit at just over \$6 million, but in the arbitration PMA argued that there was no deficit. Platinum Re calculated the deficit as \$10.7 million. Given the structure of the transaction as described, PMA and Platinum Re faced the potential for a very long running dispute *i.e.* until December 31, 2021. This was particularly troublesome for the panel as Platinum asked the panel to retain jurisdiction over the dispute to insure PMA’s compliance with the deficit carry forward calculation.

The 2003 treaty contained this arbitration clause:

The arbitrators will interpret this Agreement as an honorable engagement and not merely as a legal obligation. They are relieved of all judicial formalities and may abstain from following the strict rules of law. They will make their award with a view to effecting the general purpose of this Agreement in a reasonable manner rather than in accordance with a literal interpretation of the language.

Platinum Re demanded arbitration seeking “a declaration that, in the calculation of the balance of the Experience Account under Article 15 of the [2003 treaty], Platinum is entitled to the benefit of the [d]eficit carry forward from [the 1999 – 2001 treaty].”² In an unreasoned opinion, the arbitration panel



Robert M. Hall

Mr. Hall is a former law firm partner and former insurance and reinsurance company executive. He acts as a reinsurance and insurance consultant and expert witness as well as an arbitrator and mediator of insurance disputes.

CONTINUED ON PAGE 18

CONTINUED FROM PAGE 17

ordered PMA to pay Platinum Re \$6 million and ordered that reference to the deficit carry forward from the 1999 – 2001 treaty be stricken from the 2003 treaty. In essence, the panel commuted the deficit carry forward from the earlier contract and eliminated it as an issue for the 2003 treaty.

Obviously, the panel's order went somewhat beyond the declaration originally sought as to whether the deficit carry forward from the 1999 – 2001 treaty should be rolled into the 2003 treaty and how it should be calculated. (For those readers who think the panel did exactly the right thing, see § IV B, *infra*.) PMA filed a motion to vacate the panel's award arguing that the panel contradicted the 2003 treaty by: (a) not allowing the losses to develop and be finalized in the manner required by the treaty; and (b) ordering a current payment of \$6 million. In so doing, PMA argued, the panel exceeded its proper authority.

B. The Ruling of the Court

Initially, the court acknowledged the broad discretion of an arbitration panel generally and particularly with respect to a contract with the "honorable engagement" clause. However, it held that such discretion did not allow the panel to rewrite the 2003 treaty:

Even broad discretion has limits, however. The Honorary (sic) Engagement Clause allowed the Arbitrators to stray from "judicial formalities" and the 2003 Contract's "literal language" to effect in a "reasonable manner" the Contract's "general purposes." No court has held that such a clause gives arbitrators authority to re-write the contract they are charged with interpreting. Rather, courts have held just the opposite

The 2003 "contract itself" requires the enforcement of the Deficit Carry Forward Provision, not its elimination....

In these circumstances, the Panel's award cannot be rationally derived from the 2003 Agreement.³

The court concluded that the panel's ruling could not be derived rationally from the issues submitted by the parties for resolution by the panel:

The Parties never asked the Panel to

eliminate the Deficit Carry Forward Provision. Rather, they disputed the size of the 1999 – 2001 deficit, how it should be calculated, and whether Platinum was entitled to carry forward the deficit St. Paul Re had incurred...

Moreover, the Parties did not ask the Panel to order PMA immediately to pay any such deficit (whether \$6 million or some other amount) to Platinum. PMA argued, *inter alia*, that even if Platinum could "carry forward" St. Paul's 1999 – 2001 losses, Platinum was not entitled to any offset because contractual pre-conditions had not been met.⁴

Finally, the court held that the panel's award was completely irrational:

Even when an arbitration award cannot be rationally derived from the underlying agreement or from the parties' submissions, that award is not subject to judicial revision unless it is "completely irrational." An arbitration award based on the interpretation of a contract is irrational if the award "does not draw its essence" therefrom

The Panel apparently believed it could "reasonably" resolve these disagreements [over the deficit carry forward provision] by eliminating the Provision itself. ... This, in my view, is "completely irrational," the Panel's broad discretion notwithstanding.⁵

The court noted that its holding of "complete irrationality" was based in part on the unreasoned nature of the award: "Any evaluation of the Arbitrators' decision is made more difficult by their failure to offer any supporting explanation or reasoning."⁶

II. Selected Case Law on Point

A good deal of the relevant case law on point seems to follow a case involving arbitration under a collective bargaining agreement in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), where the court stated:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulated remedies.

There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, *yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement*. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. (Emphasis added)⁷

A. Cases in Which Awards Were Vacated

A case cited often by the *PMA Capital* court is *Swift Industries Inc. v. Botany Industries, Inc.*, 466 F.2d 1125 (3rd Cir. 1972). This involved a warranty of no tax liability when a corporation was sold. A claim for taxes was asserted by the IRS, and while that claim was being litigated, an arbitration was initiated between the buyer and seller of the corporation in order to determine whether the seller would be liable for any taxes that were ultimately due. The arbitrator ruled that the Seller was liable for taxes and ordered the seller to pay to the buyer \$6 million, or provide a surety bond in equal amount, to secure the buyer with respect to any tax ultimately found to be due. The court vacated the award on the basis that it did not draw its essence from the contract:

We have sought to distill from the Agreement the essence of the arbitrator's authority. Whatever that authority may be, it is clear to us that it does *not* include the authority to award a six million dollar cash bond to cover a liability which contrary to the requirements of the applicable breach of warranty clause, has not yet been (and may not be)

"incurred or suffered," in a situation where the parties did not provide for such security in their agreement, although they might have done so. (Emphasis in the original)⁸

Inter-City Gas Corp. v. Boise Cascade Corp., 845 F.2d 184 (8th Cir. 1988), involved an arbitration over rates for natural gas. The court found that the relevant contract clearly called for a certain rate. The arbitrator did not provide written findings but clearly used a different rate in his award of damages. The court held that the arbitrator had exceeded his authority, commenting: "The arbitrator's authority, however, is not unlimited. Although the arbitrator may interpret ambiguous language, the arbitrator may not disregard or modify unambiguous contract provisions."⁹

A similar case is *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848 (8th Cir. 2001). This involved damages concerning construction of a casino on tribal land in Nebraska. The relevant contract called for damages to be paid from revenues from the Nebraska casino but the arbitrator's order called for damages to be paid from revenues in other states as well. The court held that the award did not draw its essence from the contract because the award was contrary to the contract and an effort to re-write it.

B. Cases in Which Arbitration Awards Were Not Vacated

An arbitration award reinstating an employee without back pay was the basis for *St. Mary Home, Inc. v. Service Employees Int'l Union*, 116 F.3d 41 (2nd Cir. 1997). The plaintiff argued that the decision was beyond the authority of the arbitrator under the collective bargaining agreement. The court found that the arbitrator resolved the issues put to him, and commented: "Since the arbitrator explained his conclusions in terms that offer a 'colorable justification for the outcome reached,' our inquiry is at an end." (Internal citations omitted)¹⁰

Whether "any loss" paid by the cedent was reinsured by the reinsurer was the issue for the arbitrators in *Industrial Risk Insurers v. Hartford Steam Boiler Co.*, 779 A2d 737 (Conn. 2001). The arbitration panel affirmed coverage and went on to

value the cedent's claim as \$22 million. The court characterized the submission to the panel as requiring "the panel to determine what amount Hartford Steam Boiler was required to pay Industrial Risk under the terms of the reinsurance contract."¹¹ Apparently, the court did not recognize the difference between liability and damages. Relying on this generous reading of the submission to the arbitrators, the court held that the panel did not exceed its authority under the relevant arbitration agreement.

In the Matter of the Arbitration between Andros Compania Maritima and Marc Rich & Co., 579 F.2d 691 (2nd Cir. 1977), is a case in which the court declined to vacate an award on the basis that it did not draw its essence from the contract, noting: "When arbitrators explain their conclusions . . . in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result."¹²

III. Analysis and Commentary

A. Reasoned Award Reduces Chance It Will Be Vacated

In terms of motivation, an overworked and underpaid judge has no incentive to vacate arbitration awards. Reinsurance disputes can be highly technical, meaning that a judge must spend considerable time and effort to understand business context and relevant custom and practice. Realistically, courts are reluctant to vacate arbitration awards unless there seems to be a serious miscarriage of justice. An example is *Industrial Risk Insurers, supra*, in which the court went considerably out of its way to reinterpret the issue posed to the arbitrators to match the award. In that case, it made a great deal of sense to quantify coverage as well as determine whether or not there was coverage.

Because reinsurance disputes can be quite technical, it can be difficult for a judge to understand how a terse,

CONTINUED FROM PAGE 19

unreasoned award relates to the questions which the judge understands to be at issue in the arbitration. Several of the cases described above indicate that a reasoned award which helps the judge understand the connection between the issues and the award will avoid a vacation of the award.

Cases in which the court vacated the award after commenting specifically on the arbitrators' lack of explanation are *Inter-City Gas Corp. and PMA Capital*. Cases in which the court declined to vacate and noted the benefit of the reasoned award are *St. Mary Home, Inc.* and *In the Matter of the Arbitration between Andros Compania Maritima*. In words of the court in the latter decision, "even a barely colorable justification for the outcome reached"¹³ counters an allegation of irrationality.

B. A Second Look at PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.

It is difficult to deduce the rationale of a panel for a particular award when the award is unreasoned and the record of the arbitration is not available. However, it is possible for one experienced in the business to speculate that the panel concluded that: (a) determining that the deficit from the 1999 – 2001 treaty should be rolled into the 2003 treaty and how it should be calculated would not resolve the dispute; (b) this dispute might not be finalized until 2021 and then only by another arbitration; (c) there was sufficient evidence to quantify the net present value of the deficit carry forward at \$6 million; (d) using such a net present value did no violence to the "finalization" conditions in the 2003 treaty; and (e) removing the 1999 – 2001 deficit carry forward issue allowed the 2003 treaty to roll forward without the drag of prior year losses.

With such an explanation, court might not have found the panel's award to be irrational.▼

ENDNOTES

The views expressed in this article are those of the author and do not reflect the views of his clients. Copyright 2009 by the author. Questions or comments may be addressed to Mr. Hall at bob@robertmhall.com.]

- 1 The facts are derived from the decision itself as well as the briefs involved in the motions to confirm and vacate which were published in Mealey's Litigation Report, Reinsurance, Vol. 20 Issue #11, October 2, 2009.
- 2 2009 U.S. Dist. Lexis 85046*7.
- 3 *Id.**15.
- 4 *Id.**15-17.
- 5 *Id.**20-21.
- 6 *Id.**20.
- 7 363 U.S. 593, 596-97.
- 8 466 F.2d 1125, 1133.
- 9 845 F.2d 184, 187.
- 10 116 F.3d 41, 44.
- 11 779 A.2d 737, 745.
- 12 579 F.2d 691, 704.
- 13 *Id.*

members on the move

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

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

Do not forget to notify us when *your* address changes. Also, **if we missed your**

change below, please let us know at director@arias-us.org, so that it can be included in the next Quarterly. ▼

Recent Moves and Announcements

NEW

William Kinney has moved and has new phone numbers. His email address and cell phone number remain the same. He is now at One Channel Drive, Suite 707, Monmouth Beach, New Jersey 07750, phone 732-222-4396, fax 732-222-4546.

Janet Burak also has a new address, specifically, 322 Karen Avenue, Unit 1408, Las Vegas, NV 89109, phone 702-685-4249, cell 862-596-1047, emailjjburak@msn.com.

John Rosenquest is now at the Providence office and can be found at Edwards Angell Palmer & Dodge LLP, 2800 Financial Plaza, Providence, RI 02903, phone 401-276-6505, cell 860-593-3481, fax 888-325-9058. Email has not changed.

Susan Claflin's address is now 70 Pine

Brook Court, Cheshire CT 06410, 203-699-1711, email susanclaflin@cox.net.

Robert M. Hall has relocated to 150 Russell Avenue, P.O. Box 1110, Rockport, ME 04856, phone 207-266-2967, fax 239-236-0639, email bob@robertmhall.com.

Richard S. March is now doing business as March Resolution Services, LLC, phone 856-435-5089, cell 609-534-3499, fax 856-435-8517, email richardmarch@aol.com.

Eugene Wollan has been named a Vice President of AmTrust International Insurance, Ltd. However, his contact information does not change, since he continues as Senior Counsel to Mound Cotton Wollan & Greengrass.

Harold (Bud) Sofield has a new address of PO Box 1029, New London, NH 03257, phone 603-526-6177. Cell phone and email remain the same. ▼

New Email Address

Martin Haber mar-ty@martinhaberlaw.com. ▼

Susan Stone and Daniel Fitzmaurice Chosen as Chairman and President

Elaine Caprio Brady is President Elect; Vocke Replaces Forsyth; Brady Re-elected

At the Board of Directors meeting held during the 2009 Fall Conference, Susan A. Stone, Co-Chair of the Global Insurance and Reinsurance Group of Sidley Austin LLP and a litigation partner based in Sidley's Chicago and New York offices, was elected Chairman of ARIAS•U.S. She succeeds Frank A. Lattal, Chief Claims Officer for the ACE Group of Companies, who has retired as chairman, but remains on the Board for another year. Daniel L. FitzMaurice, a partner in Day Pitney LLP's Hartford office, was elected President, succeeding Ms. Stone.

Also at that meeting, Elaine Caprio Brady, Vice President and Manager of Ceded Reinsurance at Liberty Mutual Group, was elected President Elect.

In addition, at the Annual Meeting held at the conference, Damon N. Vocke, General Counsel of General Reinsurance Company, was elected as a new member of the Board of Directors, replacing departing Board member Thomas L. Forsyth. Elaine Caprio Brady was re-elected to the Board for a second three-year term.

At Sidley Austin, Ms. Stone handles a variety of commercial litigation matters, and has had significant trial experience in both federal and state courts. She has particular expertise in the areas of reinsurance disputes and has represented cedants, reinsurers and brokers in a myriad of issues involving property and casualty, life/health/accident, and surety business. Her practice has encompassed disputes

relating to workers' comp carve-out, reinsurance pools, asbestos and environmental exposure, September 11th losses, and Enron.

Ms. Stone is consistently recognized as a leading practitioner in *Chambers USA* and *Who's Who of International Business Lawyers*, and has been recently singled out as a "Woman to Watch" by *Business Insurance*. Prior to joining Sidley, she was a federal prosecutor.

Mr. FitzMaurice represents clients in trials, arbitrations, and appeals of complex commercial disputes in the United States and internationally. He has extensive experience trying cases before judges, juries, and arbitrators. He has also handled appeals in the U.S. Courts of Appeals for the Second, Third, Ninth, and District of Columbia Circuits, as well as the Connecticut Supreme Court. He has represented ceding companies and reinsurers in reinsurance disputes regarding property-casualty insurance, surety, mortgage insurance, financial guaranty, life insurance, annuities, health insurance, disability insurance, and long-term care. He speaks frequently at national and international conferences on issues relating to reinsurance, insurance, financial services, arbitration, and trial practice.

Mr. FitzMaurice received degrees from the University of Michigan School of Law, J.D., *cum laude*, and the University of Connecticut, B.S., *summa cum laude*. ▼

report



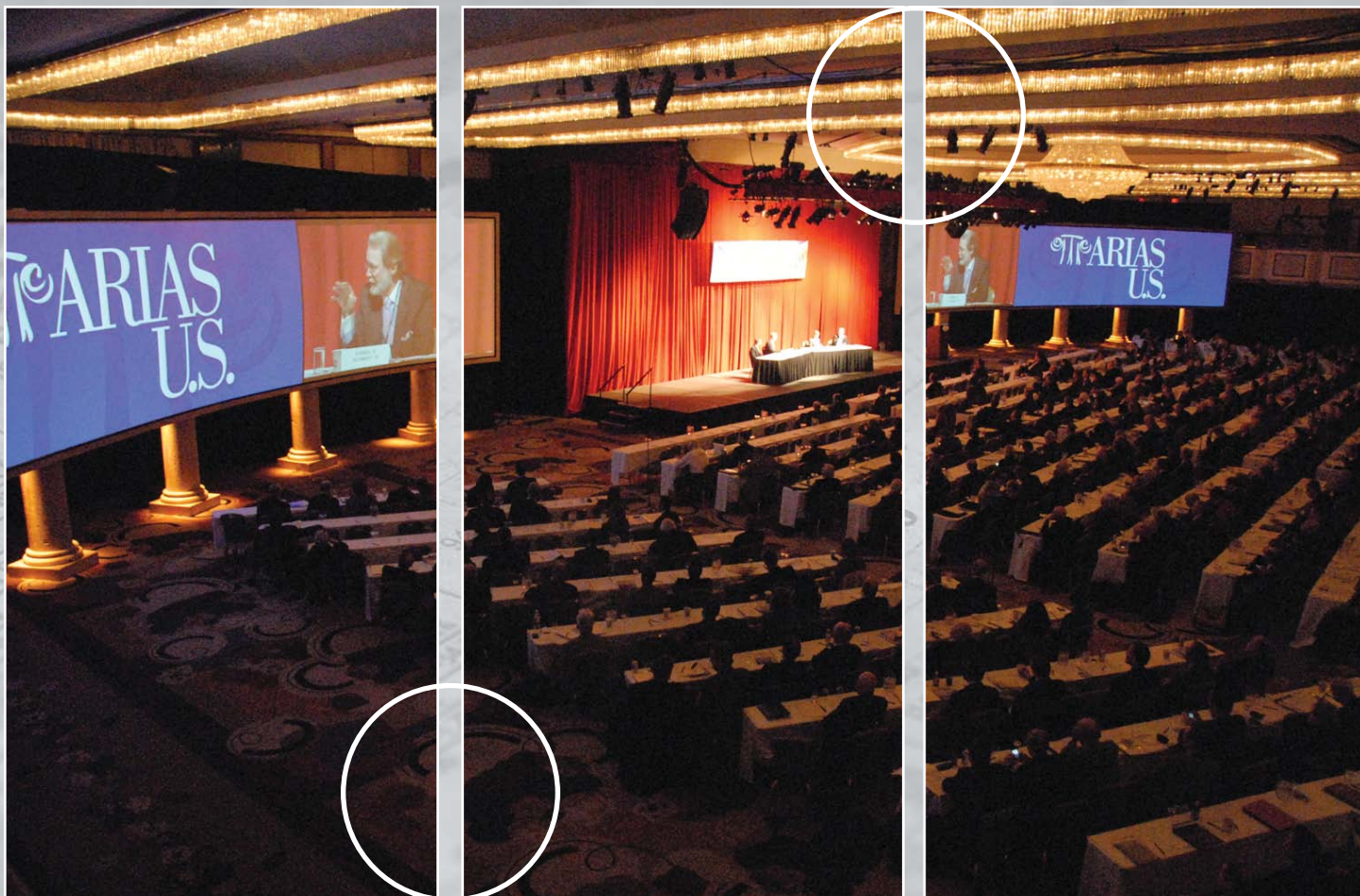
Susan A. Stone



Daniel L. FitzMaurice



Elaine Caprio Brady



Fall Conference Debates Handling of Arbitrations in Tough Times

The ARIAS•U.S. 2009 Fall Conference took on some challenging issues. Entitled “Stimulating Debate: Tough Talk and Tough Economic Times,” the conference tackled the tough questions facing parties and arbitrators in the current deep recession.

GENERAL SESSION

The ARIAS•U.S. 2009 Fall Conference took on some challenging issues. Entitled “Stimulating Debate: Tough Talk and Tough Economic Times,” the conference tackled the tough questions facing parties and arbitrators in the current deep recession.

The event took place on Thursday, November 12 and Friday, November 13, 2009 at the Hilton New York Hotel in New York City. It was preceded by a half-day educational seminar presented by the Education Committee that focused on “The Arbitration Hearing and Award.” These seminars are designed to support the requirements for arbitrator certification and renewal.

At the conference itself, arbitrators, corporate representatives and counsel confronted the controversial issues associated with arbitrating in the current economic climate. The training took place in various formats, including general sessions, workshops, and mock proceedings. The opening panel took up the difficulties that result from dealing with carriers who may be increasingly in



Frank Lattal welcomes attendees.



A full Grand Ballroom greeted speakers.

trouble and how to judge when to order extra security to cover a potential award. The

next panel addressed the challenges that result when hard times trigger bad behavior, such as misleading arguments, missing documents, or false testimony.



Peter Gentile moderates Economics and Arbitration panel of Peter Chaffetz, Kathryn Ellsworth, David Robb, and David Thirkill.

At the end of lunch on Thursday, Dr. Norman Baglini, Professor of Risk Management, Insurance, and Business Ethics of Temple University, spoke about business ethics, establishing codes of ethics in professional organizations, and the seriousness of reputation risk.

Workshops ranged widely in topic, but all appealed to various segments of the membership and were well attended. From arbitrating small-dollar disputes, to managing the costs of discovery and technology, to economics in panel selection, cost considerations were much in evidence. Also addressed were how to effectively present accounting matters to panels, the complexity of dealing with interest and penalties, and a review of the significant reinsurance court cases of the past year. With so

many good options, registrants reported difficulty in deciding which two to attend.

On Friday morning, a spirited debate took place between counsel in presentations to a panel on whether summary disposition should be granted in a fictitious reinsurance dispute. The panel, deliberating in the mock session, decided not to grant summary judgment. Therefore, the arbitration on this dispute will carry over to the Spring Conference in California.

The keynote speaker fit the theme nicely. Much debate has been stimulated by Kenneth R. Feinberg, Special Master of the Federal September 11th Victim Compensation Fund of 2001 and newly-appointed "Compensation Czar." He described his thought processes in trying to come up with executive compensation schemes for the seven companies that received significant TARP funds. He compared that analysis to what he had brought to bear in his arbitration work. He stated that his goal in executing his assignment was to get back the taxpayer money that had been given to them by creating incentives for these executives that would result in lasting success for their companies. ARIAS•U.S. members wished him success in that quest.



Larry Schiffer (top left) moderates the discussion of False Testimony and other Misbehaviors with Richard Mason, Mary Ellen Burns (top right), and Daniel Schmidt (lower right).



After lunch, Professor Norman Baglini emphasized the importance of building a reputation for ethical behavior.



Kenneth Feinberg explains how, when he pursues his assignment as Compensation Czar, he uses the same evaluation skills as in arbitrations.



An interesting physical aspect of the conference was the presence of very wide screens mounted on pillars at both sides of the stage in the Grand Ballroom. Stanford University had planned an elaborate construction for an alumni fundraising event on Saturday. Since they could not build it in the time available after the ARIAS•U.S. conference, we agreed to have the screens be in place during the conference and had the benefit of being able to use them. While the effect was dramatic, the 2010 Fall Conference may end up appearing stark by comparison.

WORKSHOPS



Thomas Stillman, Sanjoy Mukherjee, and John Parker discuss **Economies of Scale: Arbitrating Small Dollar Disputes**.



John Rosenquest, Ann Field, Caleb Fowler, and Daniel Neppel present **Discovering Dollars in Your Budget: the True Cost of Discovery and Technology in Arbitration**.



Richard Hershman, John Green, and Richard White get down into the details with **Arbitration by the Numbers: Accounting Issues in Arbitration**.



Paul Dassenko, Steven Schwartz, and Peter Scarpato look at **Questions of Interest...and Penalties**.



Jennifer Devery and Alexandra Furth review key cases of the year in **Reinsurance Case Law – 2009**.



Susan Grondine, Amy Kelley, and Scott Birrell analyze costs in **The Price of Justice: Economic Considerations in Panel Selection**.

Summary Disposition DEBATE



Attorneys David Attisani and Neal Moglin hear panel responses to their arguments.

Arbitrators Paul Thomson and Sylvia Kaminsky consider arguments.



Umpire Robert Reinarz questions attorneys.

ANNUAL MEETING



Frank Lattal cites recent changes and accomplishments.

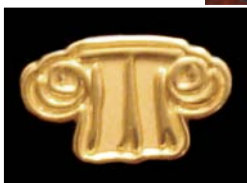


Peter Gentile reviews the financial record and 2010 budget.



Susan Stone calls for show of hands to elect Board members.

T. Richard Kennedy has awarded the ARIAS Pin to retiring Board Members since the 10th anniversary of ARIAS in November 2004, when he first presented them to the original Board members.

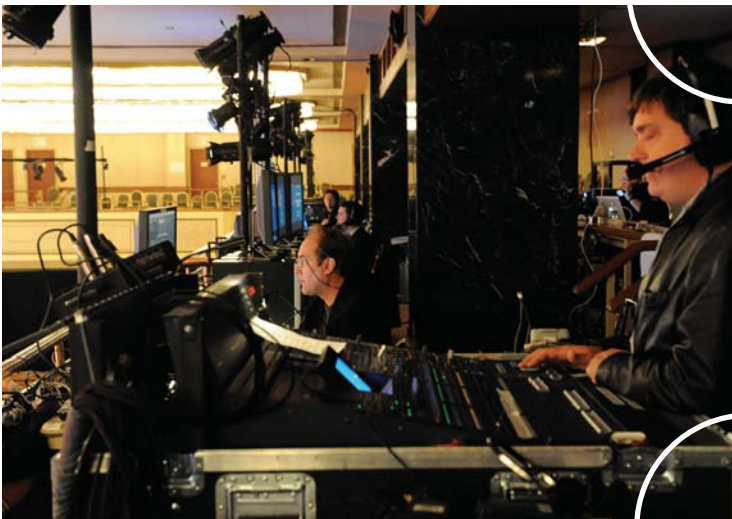


Above, Kennedy presenting pin to retiring member Thomas Forsyth.



Thomas Forsyth receives Meritorious Service Award as he leaves the Board of Directors.

AROUND *the* CONFERENCE



Law Committee Case Summaries

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

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

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

Wasa Int’l Ins. Co. Ltd. v. Lexington Ins. Co. [2009] UKHL 40

Court: U.K. House of Lords

Date Decided: July 30, 2009

Issue: Follow the Fortunes

Submitted by Ethan Torrey*

In *Wasa Int’l Ins. Co. Ltd. v. Lexington Ins. Co.*, [2009] UKHL 40, the United Kingdom House of Lords held that facultative certificates, governed by English law, did not cover liability for damages incurred both before and during the certificate period, even though the identical primary policies reinsured by the certificates, governed by Pennsylvania law, *did* cover liability for damages that had occurred both before inception and during the policy period. The Lords noted the “strong presumption” that liability under a proportional facultative reinsurance certificate is co-extensive with liability under the primary policy it reinsures. However, they emphasized that the reinsurance certificate comprised an independent contract, and that, under English law, reinsurance covers only damage to property caused during the policy period.

Background:

Lexington Insurance Company issued a policy to Aluminum Company of America insuring against “all physical loss of, or damage to, the insured property,” and covering the period July 1, 1977 – July 1, 1980. The policy contained a service of suit clause, providing that Lexington submitted to the jurisdiction of any court within the United States, but did not contain an express choice of law provision. Alcoa sought indemnification for environmental damages incurred between the years 1942-1986, and the ensuing litigation in Washington state court ultimately involved 70 insurers, hundreds of policies, and 58 sites. The Washington court applied Pennsylvania law to the *entire* action under conflicts of laws principles, and declined to select governing law with respect to individual policies, with the caveat that if unique issues arose with respect to specific insurers or sites, it would revisit the issue. The court held that joint and several liability applied and, accordingly, Lexington was liable for environmental damages that occurred both *before inception and during* its policy period. The ruling exposed Lexington to potential liability of \$180 million, and Lexington settled the matter for \$103 million.

Lexington purchased facultative certificates from its reinsurers that were identical in every relevant respect to the underlying policies (including the policy period of July 1, 1977 – July 1, 1980), except that they were governed by English, not Pennsylvania, law. The certificates contained a follow the settlements provision. The reinsurers declined to reimburse Lexington, because Lexington could not identify the portion of the settlement that was attributable solely to the contract period of the certificates.

House Of Lords’ Ruling:

The House of Lords concluded that “there is no principled basis for treating the scope of the 3 year reinsurance as the same as the insurance, which has been interpreted under the law of Pennsylvania not to contain any limitation as to time of the physical loss or damage to property,” because such construction would be fundamentally inconsistent with English law and the nature and effect of reinsurance. The Lords noted the “strong presumption that liability under a proportional facultative reinsurance policy is co-extensive with liability under the primary policy.” However, they emphasized that the reinsurance comprised an independent contract and that, under English law, “nothing could be clearer” than the rule that reinsurance covers only damage to property caused during the policy period. The Lords also concluded that it would “change completely” the “nature and effect” of reinsurance contracts if they were held to cover liabilities from damage that occurred during any period, as long as some of the damage occurred during the policy period.

Critically, according to the Lords, it could not have been predicted, at the time of the reinsurance contract, that Pennsylvania law would govern the insurance contract. The Washington state court applied Pennsylvania state law globally to all insurance policies implicated in a complex coverage action involving 70 insurers and hundreds of policies, based on factors unconnected with the primary insurance policies issued by Lexington. The Lords held that there was “no basis for interpreting [the reinsurance] as covering

any liability which might subsequently be held to arise under the insurance in any State whose law might, after disputes had arisen under it and other separate insurances, be applied *by reference to factors extraneous to the particular insurance to which alone the reinsurance related.*" The Lords concluded that it was "fanciful" to posit that it could have been predicted in 1977, when the policies were bound, that Pennsylvania law would have applied to the primary insurance. Instead, they concluded that "there was in 1977, when the insurance contract and the reinsurance contract were concluded, no identifiable system of law applicable to the insurance contract which could have provided a basis for construing the contract of reinsurance in a manner different from its ordinary meaning in the London insurance market." In such situation, they concluded, where the governing law of the primary policies was not ascertainable, neither that law nor the follow the settlements doctrine can override a clear temporal limitation in the reinsurance certificates.

Conclusion:

The Lords held that "[t]he reinsurance contract cannot reasonably be construed to mean that it would respond to any liability which 'any court of competent jurisdiction within the United States' (the phrase in the Service of Suit clause) would impose on Lexington irrespective of the period of cover in the reinsurance contract," because such a construction would be fundamentally inconsistent with English law. The principle that liability under a proportional facultative reinsurance policy is co-extensive with liability under the primary policy does not apply where, at the time the reinsurance contract is entered into, the law governing the primary policy is not identifiable or ascertainable.▼

* *Ethan Torrey is a senior litigation associate in the Boston law firm of Choate, Hall & Stewart LLP, specializing in insurance and reinsurance law.*

Saipem America v. Wellington Underwriting Agencies Limited, et. al. 2009 WL 1616122 (C.A. 5 (Tex))

Court: United States Court of Appeals Fifth Circuit

Date Decided: June 9, 2009

Issue Decided: Scope of the Arbitration, Power to Award Attorneys' fees and Grounds for Vacatur.

Submitted by John R. Cashin*

In *Saipem America v. Wellington Underwriting Agencies Limited, et. al.* The Court of Appeals for the Fifth Circuit affirmed the district court's confirmation of an arbitration award that included actual damages, attorneys' fees and 50% of the costs of the arbitration.

This dispute arose from damage caused to an offshore platform while it was being transported from Texas to Israel. Samedan Mediterranean Sea ("Samedan") contracted with Heerema Marine Contractors Nederland B. V. ("Heerema") for the transportation and installation of the platform. Under the terms of the towing contract, Heerema was required to purchase insurance covering the load-out, transportation and installation of the platform. Several underwriters ("Underwriters") provided the necessary insurance, naming both Heerema and Samedan as insureds.

During the course of the transport, the platform was extensively damaged when the main boom broke free. Both insureds filed claims with the Underwriters. The Underwriters then made claims against Saipem America, Inc. ("Saipem"), under two contracts Saipem had with Samedan and Heerema, whereby Saipem agreed to act as Samedan's Certified Value Agent and as Marine Warranty Surveyor for both insureds. The Underwriters claimed that Saipem's performance as marine surveyor was inadequate, that Saipem was negligent and that Saipem was guilty of negligent misrepresentation. The negligent misrepresentation claim was based on Saipem's issuance of a certificate of approval that the platform could be safely towed to Israel from Texas.

The contract between Heerema and Saipem contained an arbitration clause stating that any dispute would be referred to arbitration in The Hague under the Rules of the International Chamber of Commerce. Any settlement agreement or arbitration award was to be final and binding on both parties.

The arbitral tribunal found that Saipem was liable on the negligent misrepresentation claim and awarded Underwriters \$1,110,657, attorneys' fees and expenses of \$399,000 and 50% of the costs of the arbitration in the amount of \$105,000. The district court confirmed the award in all respects and Saipem appealed.

Saipem asserted that the arbitrators exceeded their authority because the award is solely for a claim for negligence, a claim upon which the contract has no applicability or bearing and, therefore, it is not rationally inferable from the contract and thus beyond the scope of the arbitration contemplated under the contract. Saipem further claimed the tribunal exceeded its authority by awarding attorneys' fees.

In a Per Curiam opinion with the Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation, the court confirmed the district court's decision. In stating the standard of review of arbitration awards the

court stated: “Our review of the arbitration award is exceedingly deferential and the award must be upheld if it is rationally inferable from the letter or purpose of the underlying agreement.” *Am. Laser Vision, P.A. v. Laser Vision Inst. L.L.C.*, 487 F.3d 255 (5th Cir. 2007) and *Kegosien v. Ocean Energy, Inc.*, 390 F.3d 346, 352 (5th Cir. 2004).

While the court acknowledged that it had previously recognized both statutory as well as common law grounds for vacating an arbitration award, it had since accepted that Fifth Circuit precedents holding that nonstatutory grounds can support vacatur have been effectively overruled by the Supreme Court’s recent decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008.) Citing its own previous decision in *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009) the court stated “manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.” *Id.* at 358. “Accordingly, we may vacate the arbitration award in this case only if a statutory ground supports the vacatur.”

The court then considered Saipem’s assertion that a claim of negligence went beyond the contact between the parties and was therefore not an issue to be decided by the arbitration tribunal. In order to determine whether the parties agreed to submit an issue to the arbitrator, the court turned to the contract and the Terms of Reference submitted to the tribunal.

The parties agreed to and submitted the following Terms of Reference to the tribunal: “The Arbitral Tribunal is to resolve, by a preponderance of the evidence all issues of fact and law that shall arise from claims and pleadings as duly submitted by the parties, including, but not limited to, the following issues as well as any additional issues of fact or law which the Arbitral Tribunal, in its own discretion, may deem necessary to decide upon for the purpose of rendering any Arbitral Award....”

The tribunal record indicated that Samedan and Underwriters submitted the claim of negligent misrepresentation before the tribunal and Saipem argued that such claims were barred. Separately, Saipem also argued that it was not negligent and that it conducted its work in a professional and diligent manner. Both parties requested an award of costs, including attorneys’ fees and submitted the issue to the tribunal in the Terms of Reference. The court held that because the parties submitted all of these issues to the tribunal it was empowered to consider them. The court found the arbitral tribunal made detailed findings which were well supported by governing law, and it did not exceed its powers or so imperfectly execute them that a mutual, final and definite award was not made.▼

* John R. Cashin is the Group Chief Compliance Officer at Zurich Financial Services, Zurich, Switzerland. He is an ARIAS Certified Arbitrator.

In the Matter of the Application of Ramy Lakah and Michel Lakah, 2009 WL 577663, — F.Supp.2d — , (S.D.N.Y. March 6, 2009)

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

Date Decided: March 6, 2009

Issue Decided: Does an arbitration panel have the authority to determine whether non-signatories to an arbitration agreement may be subject to the arbitration proceedings?

Submitted by Michele L. Jacobson, Esq.* and Royce F. Cohen, Esq.**

In *In the Matter of the Application of Ramy Lakah and Michel Lakah*, petitioners, two non-signatories to arbitration agreements moved for a preliminary injunction before the United States District Court for the Southern District of New York, seeking to prevent an arbitration panel from determining whether they were bound by the arbitration agreements at issue in the arbitration, such that they were proper parties to the arbitration. The district court preliminarily enjoined the arbitration proceeding against the non-signatories pending the court’s own determination as to whether they were bound by the arbitration agreements.

UBS, *et al.*, commenced an arbitration against Lakah Funding Limited, four guarantors of the bonds, and *inter alia*, Ramy and Michel Lakah. Significantly, Michel Lakah was not a signatory to the applicable arbitration agreements, and Ramy Lakah signed only on behalf of Lakah Funding Limited and guarantors. Ramy Lakah did not sign in his personal capacity. Ramy and Michel Lakah petitioned the Supreme Court of the State of New York to stay the arbitration as against them on the basis that they were not parties to the arbitration agreements. UBS, *et al.*, removed the petition to federal court. The arbitration panel advised counsel that the next phase of the arbitration would address the issue of whether the arbitration panel had jurisdiction over Ramy and Michel Lakah. In response, Ramy and Michel Lakah moved for a preliminary injunction to enjoin the arbitration panel from making that determination. 2009 WL 577663.

Citing the Supreme Court’s decision in *AT & T Techs. v. Commc’ns Workers of America*, 475 U.S. 643, 649 (1986), the district court held that “the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.” *Id.* Finding that being forced to spend significant time and resources litigating whether they were proper parties to the arbitration before a body lacking authority to decide that issue would irreparably injure the petitioners, the district court granted their motion for a preliminary injunction.

The district court further held that the respondents were enjoined from participating in any arbitration proceeding on the issue of whether the petitioners were bound by the arbitration agreements at issue. The district court also ordered that its decision be delivered to the arbitration panel, admonishing that the court was certain that the arbitrators would “follow the law” and forebear from making any determinations as to whether the petitioners were required to arbitrate.▼

* Michele L. Jacobson is a partner in the litigation department of Stroock & Stroock & Lavan, L.L.P., concentrating her practice on insurance and reinsurance litigation and arbitration.

**Royce F. Cohen is an associate in the litigation department of Stroock & Stroock & Lavan, L.L.P., concentrating on insurance and reinsurance litigation and arbitration.

American Bankers Ins. Co. of Florida v. Nat’l Casualty Co., 2009 U.S. Dist. LEXIS 8621 (E.D. Mich.)

Court: United States District Court for the Eastern District of Michigan

Date Decided: February 3, 2009

Issue Decided: Whether diversity jurisdiction must be separately established for a motion to confirm an arbitration award

Submitted by Eric A. Haab and Peter B. Steffen*

In *American Bankers Ins. Co. of Florida v. Nat’l Casualty Co.*, the United States District Court for the Eastern District of Michigan held that a motion to confirm an arbitration award with no monetary judgment could not be resolved in federal court because it failed to allege diversity jurisdiction, even though the dispute between the parties had already been before the same federal court on a procedural issue and the amount at issue in the arbitration, though not the award itself, exceeded \$75,000. The petitioners could seek to have the award confirmed in a state court of competent jurisdiction.

Background

In the mid-1970s, the petitioners entered into two excess of loss casualty retrocessional agreements which provided for reinsurance by National Casualty Co. In 2005, a dispute among the parties reached the federal court for the first time, when the court dismissed National Casualty’s action for appointment of an umpire. Subject matter jurisdiction was not raised as an issue at that time.

The dispute proceeded to arbitration, following which the arbitrators issued a December 2007 award in favor of the petitioners, stating that the petitioners had no obligation to indemnify National Casualty for any of the unpaid losses or future claims at issue. In August 2008, the petitioners filed a motion to confirm the award before the same federal court that had heard the 2005 umpire appointment dispute. The respondent opposed the motion, alleging that the award did not satisfy the amount-in-controversy requirement of diversity jurisdiction.

Holding

The Federal Arbitration Act permits a federal court to confirm an arbitration award, but it does not provide an independent basis for subject matter jurisdiction. Thus, without another source of jurisdiction, the parties must establish diversity jurisdiction, which requires that the parties be citizens of different states and that the amount in controversy exceed \$75,000.

The petitioners first claimed that the court retained jurisdiction from its 2005 decision regarding the umpire appointment. The court at that time, however, had merely interpreted the parties’ contract and did not order arbitration. The 2009 court also ruled that even though National Casualty argued in its 2005 action that the amount in controversy exceeded \$75,000, the court could still determine sua sponte in 2009 that the amount did not meet the diversity threshold.

The petitioners next claimed that because the amount at issue in the arbitration was greater than \$75,000, it did not matter for jurisdictional purposes that the award itself was for \$0. The court disagreed, stating that when a party seeks to confirm an arbitration award, the amount in controversy is the amount of the award itself. The court relied on a Sixth Circuit opinion regarding a motion to vacate an award and was not convinced by the petitioners’ reliance on non-Sixth Circuit precedents.

Finally, the court noted that the petitioners were not without relief, because they could still seek to have the award confirmed in a state court of competent jurisdiction.▼

*Eric Haab and Peter Steffen are partner and senior associate, respectively, in the insurance/reinsurance group of Lovells LLP. They each represent cedents and reinsurers in disputes involving a wide variety of issues.



“Spring Training

May 4-7, 2010



During the first week of May 2010, ARIAS•U.S. will present a three-part spring-training event in California. Anyone who needs an intensive workshop or educational seminar for certification or renewal has the chance to put in a little extra time at the 2010 Spring Conference and take care of two, or even three, requirements with only one trip.



Intensive Arbitrator Training Workshop

The intensive workshop will take place starting at 2:00 p.m. PDT on Tuesday, May 4 and concluding at 12:30 on Wednesday, May 5, just in time for the opening of the Spring Conference. There will be the usual reception and dinner on Tuesday evening.

The ARIAS•U.S. 2010 Spring Conference

The Spring Conference will follow the usual pattern, running from Noon on Wednesday, May 5 until Noon on Friday. There will be a break on Thursday afternoon for golf, tennis, recreation, shopping, and touring.





Triple-Header”

Educational Series Seminar

The half-day educational seminar will begin on Friday, May 7 just after the adjournment of the Spring Conference with lunch at 12:30 p.m. The seminar sessions will begin at 1:15 and conclude by 5:30.

Sessions for all three events will be held at the historic Hotel del Coronado in Coronado, California, just over the bridge from San Diego International

Airport. A National Historic Landmark, the Hotel del Coronado opened in 1888 and has, over time, become the most famous hotel in the West, serving as a vacation spot for celebrities from around the World and as the location for many movies, including the award-winning Some Like It Hot with Marilyn Monroe in 1958. It provides excellent meeting facilities and, after a complete renovation, offers outstanding restaurants and accommodations.

Complete details about these training events will be on the website calendar and will be announced to members as the time draws closer.

Be sure to mark your calendar with these dates.



in focus

Recently Certified Arbitrators

Glenn E.
Brace



Glenn E. Brace

Glenn Brace has been based in London since 1998 when he joined Equitas, the reinsurer and runoff agent for Lloyd's of London's pre-1993 liabilities. Equitas was the largest insurance runoff in history, a transaction that encompassed more than 750 separate reinsurance programs. He became its first Head of Asbestos, Pollution and Health Hazard Claims, managing the "long-tail" exposures that posed the great risks to Equitas.

In early 2003, Mr. Brace was appointed Equitas Claims Director. He joined the Equitas Board of Directors and assumed responsibility for all direct and reinsurance liabilities, including professional liability, catastrophe, sexual abuse and personal injury claims, as well as the significant information processing requirements that accompany losses written on a subscription basis.

During Mr. Brace's tenure as Claims Director, Equitas resolved direct liabilities at an unprecedented pace and settled some of its largest cedent relationships. By 2006, Equitas had reduced undiscounted liabilities by more than 70% and increased its solvency margin to 12.0% (from 5.6% at inception). He led successful efforts to recover hundreds of millions owed to Equitas, including amounts from the Government of Libya and the United Nations Compensation Commission.

In March of 2006, Berkshire Hathaway began discussions with Equitas that culminated in Berkshire's agreement to provide up to \$7 billion of reinsurance cover to Equitas. That transaction was described as "a triumph for Equitas" (Financial Times). In 2007, Mr. Brace became the Chief Claims Officer of Resolute Management Services Limited, the company created to continue the Lloyd's runoff on behalf of the Berkshire Hathaway group.

Prior to his work in London, Mr. Brace was in private law practice in Connecticut and Massachusetts specializing in the analysis and litigation of complex insurance and reinsurance matters. He is an honors graduate of the University of Virginia and the University of Virginia School of Law.▼

Daniel W. Gerber

Daniel Gerber chairs Goldberg Segalla LLP's Global Insurance Services Practice group throughout its ten offices in New York, Pennsylvania, New Jersey and Connecticut. He maintains an international practice in complex insurance and reinsurance disputes and analysis, as well as mediation and arbitration. He is an author of the renowned Insurance Treatise, New Appleman's Insurance Law Practice Guide, as well as a regular contributor to Mealey's Emerging Insurance Disputes. He is the editor of the Reinsurance Review, as well as The Insurance and Reinsurance Report web blog.

Mr. Gerber is admitted to the United States Supreme Court, as well as all federal and state courts in New York and Pennsylvania. He has received the Chairperson of the Year Award for his work as Chair of the Insurance Coverage Committee for the NYSBA's Torts, Insurance and Compensation Law Section (TICL), and is the immediate past chair of the almost 4,000 member TICL Section. In addition, he is the 2010 Annual Seminar chair for the Defense Research Institute's (DRI) Life, Health and Disability Committee. He has served on DRI's Annual Meeting Steering Committee, chairs DRI's Counsel Task Force, and is the current Vice-Chair of DRI's Insurance Roundtable. He is an active member of the International Association of Defense Counsel (IADC), and has repeatedly presented at its Arbitration Academy. He is the publications chair for the IADC's Insurance and Reinsurance Committee.

Mr. Gerber frequently publishes and lectures internationally on reinsurance, insurance and ERISA issues. He possesses an AV rating from Martindale Hubbell, a New York Super Lawyer designation from Law & Politics Magazine (2005-2009), and has been named by his peers to Business First's Who's Who in Law (2005-2009).▼



Daniel W.
Gerber

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

Thomas F. Segalla

Thomas Segalla is the co-author of the renowned insurance law treatise *Couch on Insurance* 3d and is one of the founding partners of Goldberg Segalla LLP.

Mr. Segalla is a nationally recognized reinsurance and insurance expert who has been retained by numerous insurance carriers and policyholders. His active practice focuses on the defense and insurance coverage aspects of matters involving bad faith; construction site personal injury accidents (Labor Law §§ 200, 240(1) and 241(6)); and toxic tort and environmental issues.

As a member of the Defense Research Institute (DRI), Mr. Segalla is the Past Chair of the Insurance Law Committee, he served on the Board of Directors and he is the past Chair of the Law Institute. In addition, as a member of the Federation of Defense and Corporate Counsel, he is integrally involved in the relationship between the Insurance Industry and defense counsel. He has published and lectured extensively for many professional organizations.

Mr. Segalla possesses an AV rating from Martindale-Hubbell and has been named to the Top 50 of the New York Super Lawyers.▼

Robert A. Whitney

Robert Whitney has over 20 years of experience in the insurance and reinsurance industry. He is currently of counsel in White and Williams's Insurance Coverage and Bad Faith Practice Group, where he represents advises clients regarding reinsurance and insurance issues. Prior to joining White and Williams, Mr. Whitney was Assistant Vice-President and Associate General Counsel at Resolute Management, a Berkshire Hathaway company, which provides claims management services to insurance and reinsurers, where he managed insurance coverage litigation and arbitration for direct claims and reinsurance matters involving environmental, asbestos, toxic and mass torts, and product liability claims. He also represented ceding companies and reinsurers as counsel in reinsurance litigation and arbitration.

Preceding his employment at Resolute Management, Mr. Whitney served as Associate General Counsel at Cavell,

a claims administrator for the national and international insurance market, where he managed insurance and reinsurance arbitration and litigation matters, and was part of the Cavell Management Committee. Prior to his joining Cavell, Mr. Whitney was a partner and Chair of the Insurance Coverage Practice Group at Holland & Knight, where he advised clients in the areas of insurance and reinsurance law; insurance policy interpretation and reconstruction, regulatory, compliance and insurance claims handling practices on behalf of insurers and policyholders. He also litigated insurance disputes in both state and federal courts, and in arbitration.

Mr. Whitney has also served as the Corporate Secretary for the Stonewall Insurance Company and Seaton Insurance Company; he also was Corporate Secretary for the Transport Insurance Company, where he also was on the Board of Directors.

Mr. Whitney is a frequent speaker and author on issues relating to insurance and reinsurance, and he is one of the editors of the *Massachusetts Liability Insurance Manual* (Revised Ed. 2008). He received his J.D. degree in 1984, from Boston University School of Law, where he was a G. Joseph Tauro Scholar. Mr. Whitney is licensed to practice in Massachusetts, and before the United States Supreme Court, the First Circuit Court of Appeals and Massachusetts and Illinois federal courts. He received his A.B. degree with honors from Brown University in 1981."▼



Thomas F. Segalla

Robert A. Whitney



off the cuff

Eugene
Wollan



The number three has some very special qualities, even aside from its religious significance:

- A triple play in baseball is exceedingly rare and always extraordinary;
- Some great works of art, especially in early Renaissance times (Giotto et al), were in triptych form;
- It figures in many superstitions (“three on a match”) and social formulations (“three’s a crowd”);
- One of my personal operatic favorites is Puccini’s *Il Trittico*, a trio of complementary one-act operas.
- Many of the most popular films of recent years have consisted of trilogies (*Godfather*, *Lord of the Rings*, etc.)
- In certain sports (hockey, cricket), a “hat trick” refers to scoring three times.

All of which is a preamble to my own effort at a hat trick, to round off my earlier discussions of what qualities make a good lawyer and a good judge. This time – heaven help me – I will close out the subject by touching briefly on what attributes make a good client.

1. Let’s get the most obvious one out of the way first, and then say no more

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

This column appears periodically in the Quarterly. It offers thoughts and observations about reinsurance and arbitration that are outside the normal run of professional articles, often looking at the humorous side of the business.

Is A Good Client Also Hard To Find?

about it: a good client pays his (or her) bills. That doesn’t necessarily mean that he does so blindly or unquestioningly; he certainly has the right to ask questions, discuss rates, and so on. But what he should not do is relegate the Statement to the bottom of the “not now” pile at the far corner of his desk, and let it sit there for months on end. He also does not ask for a copy of the bill every time he receives a polite reminder because he “can’t seem to locate” the original.

2. A good client has a sense of proportion about his involvement in the case. He should – and wants to – be involved in the strategic judgment calls and the tactical game plan, but he does not attempt to micromanage the litigation. He knows the difference between discussing the advisability of a motion for partial summary judgment and deciding the sequence of deposition witnesses. He recognizes when it’s appropriate, or even necessary, to defer to the instincts and experience of the litigator on the firing line.
3. A good client makes a real effort to dig into, and understand, the psychodynamics of the case. He understands that litigation is just as much a chess game and an exercise in psychological warfare as it is a presentation of facts and application of the law.
4. A good client has a good memory. He has absorbed lessons from earlier experiences, and applies them appropriately to new situations. He probably has a personal file of past decision in his cases and landmark rulings in his area of expertise. He is perfectly capable, for example, of participating in a discussion about a war risk exclusion with an erudite reference to *Spinney*’s case. (This

applies to non-lawyer clients just as much as it does to clients who are themselves members of our much-abused profession.)

5. A good client has sound practical judgment and reliable instincts. He recognizes a lost cause when he sees it. He does not send his lawyers out on suicide missions or indulge in the luxury of fighting to the last drop of their blood. On the other side of the coin, he is willing to go to the mat to defend a strong position and even, occasionally, to support a matter of principle. He has the wisdom to know the difference – when to hold’em and when to fold’em.
6. A good client uses appropriate criteria in selecting counsel: ability, experience, special skills and expertise, reputation, sometimes geography – not being a good golfer or a frequent dinner host. It’s not, of course, a bad idea for lawyer and client to socialize and get to know each other outside the strictly professional context, but the social relationship should never be the determinative factor in the selection of counsel. He should have the insight to see the difference between being valued as a friend and simply being hustled.
7. A good client has the perspective to accept the bitter with the sweet. He is aware that “you can’t win them all.” Naturally, he has every right to look into the reasons for a setback, especially an unexpected one, but he does not reflexively blame the lawyer for every adverse result. He knows the difference between scrutinizing the message and killing the messenger.
8. Last, but hardly least, the good client comes to your Holiday party and invites you to his. ▼

ARIAS•U.S. Membership Application

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

Complete information about

ARIAS•U.S. is available at

www.arias-us.org.

Included are current

biographies of all

certified arbitrators,

a current calendar of

upcoming events,

online membership

application, and

online registration

for meetings.

914-966-3180, ext. 116

Fax: 914-966-3264

Email: info@arias-us.org

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

NAME & POSITION _____

COMPANY or FIRM _____

STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____

CELL _____

FAX _____

E-MAIL _____

Fees and Annual Dues: Effective 10/1/09

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	\$500	\$1,500
ANNUAL DUES (CALENDAR YEAR)*	\$350	\$995
FIRST-YEAR DUES AS OF APRIL 1	\$233	\$663 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	\$117	\$332 (JOINING JULY 1 - SEPT. 30)
TOTAL		
(ADD APPROPRIATE DUES TO INITIATION FEE)	\$ _____	\$ _____

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

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

NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional \$250 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

Payment by check: Enclosed is my check in the amount of \$ _____

Please make checks payable to

ARIAS•U.S. (Fed. I.D. No. 13-3804860) and mail with

registration form to: ARIAS•U.S.

PO Box 9001, Mt. Vernon, NY 10552

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

(NOTE: Credit card charges will have 3% added to cover the processing fee.)

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

Account no. _____

Exp. ____/____/____ Security Code _____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

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

Signature of Individual or Corporate Member Applicant

THARAS
U.S. Board of Directors

Chairman

Frank A. Lattal

ACE Ltd.
17 Woodbourne Avenue
Hamilton, HM08 Bermuda
441-299-9202
acefal@ace.bm

President

Susan A. Stone

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

President Elect

Daniel L. FitzMaurice

Day Pitney LLP
242 Trumbull Street
Hartford, CT 06103
860-275-0181
dlfitzmaurice@daypitney.com

Vice President

Elaine Caprio Brady

Liberty Mutual Group
175 Berkeley Street
Boston, MA 02116
617-574-5923
elaine.capriobrad@libertymutual.com

Vice President

George A. Cavell

Munich Re America
555 College Road East
Princeton, NJ 08543-5241
609-243-4530
gcavell@munichreamerica.com

Damon N. Vocke

General Reinsurance Company
120 Long Ridge Road
Stamford, CT 06902
203-328-6268
dvock@genre.com

David R. Robb

2 Conifer Lane
Avon, CT 06001-451
860-673-0871
robb.re@comcast.net

Jeffrey M. Rubin

Odyssey America
Reinsurance Corp.
300 First Stamford Place
Stamford, CT 0690
203-977-0137
jrubin@odysseyre.com

Mary Kay Vyskocil

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

Chairman Emeritus

T. Richard Kennedy

Directors Emeriti

Charles M. Foss
Mark S. Gurevitz
Charles W. Havens III
Ronald A. Jacks*
Susan Mack
Robert M. Mangino
Edmond F. Rondepierre
Daniel E. Schmidt, IV

**deceased*

Administration

Treasurer

Peter A. Gentile

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

Executive Director/ Corporate Secretary

William H. Yankus

Senior Vice President
CINN Worldwide, Inc.
P.O. Box 9001
Mt. Vernon, NY 10552
914-966-3180 ext. 116
wyankus@cinn.com

Carole Haarmann Acunto

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