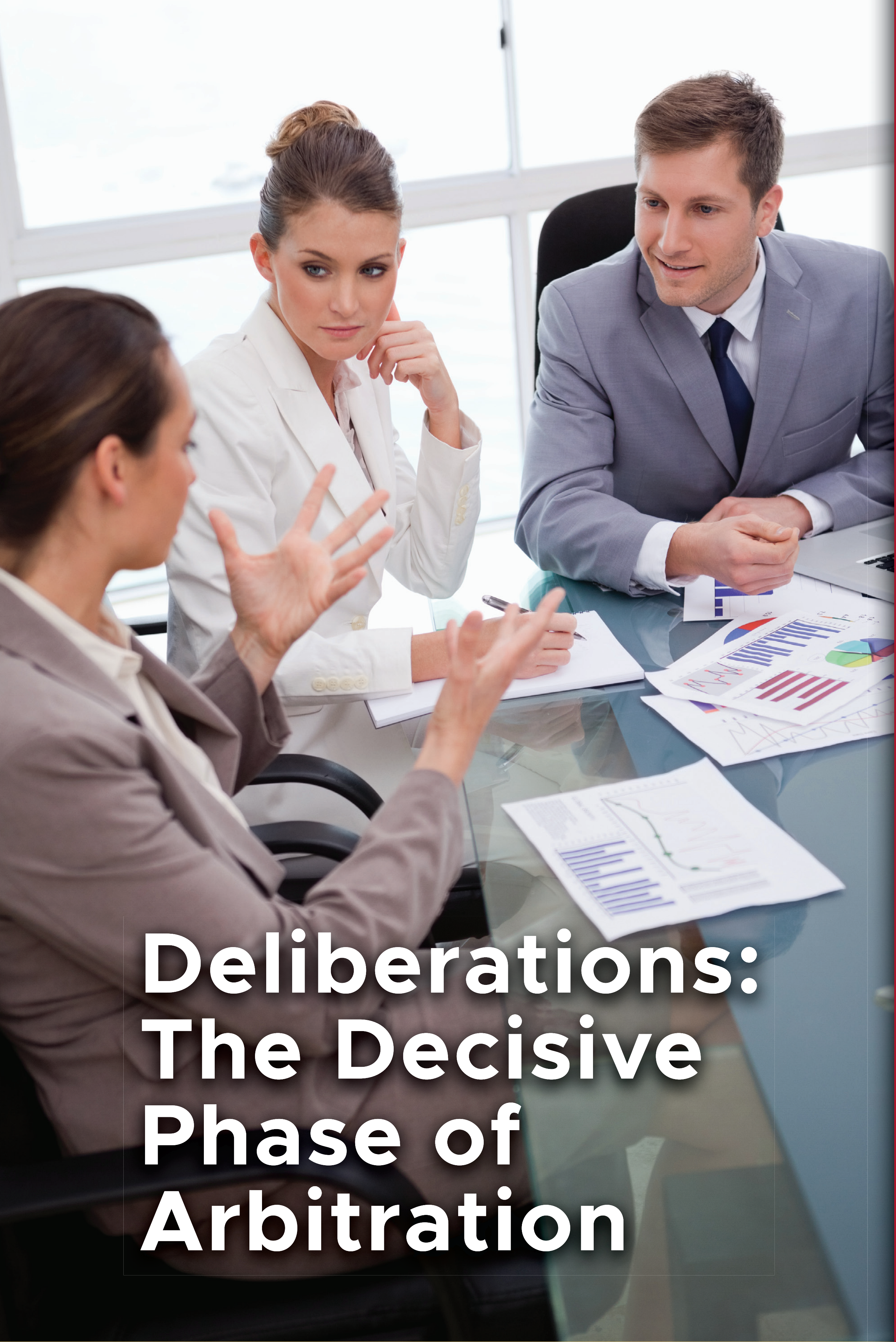
ARIAS US

QUARTERLY



Deliberations: The Decisive Phase of Arbitration

ALSO IN THIS ISSUE

- The Impact of Cosmetic Talc Case Verdicts
- The Bad Faith Exception to the Prejudice Requirement
- The Reinvigorated ARIAS Women's Networking Group

Q4 · 2018

TABLE OF CONTENTS

FEATURES

Welcome to the last *Quarterly* of 2018. It has been interesting and fun being the editor-in-chief of the *Quarterly* for the past year. I want to thank Sara Meier and her editorial staff and, of course, the *Quarterly* editorial board. This is a lively and active board that reads every submission and provides great suggestions for many of the articles you read.

I also want to thank you, the reader. Many of you have contributed articles and ideas. The editorial board and I have some interesting ones teed up for 2019 that we hope you will enjoy. But we need more of you to pick up your virtual pen and share your thoughts and expertise. Choose a topic and let us know. We don't turn down many. The editorial schedule is on the website.

As you read this, the memories of the ARIAS•U.S. Fall Conference in Brooklyn will still be fresh in your mind. But just in case the memories are beginning to fade, you will find a recap of the Fall Conference in this issue to remind you of the great times, great panels and great location we experienced in November.

Speaking of panels, one of the most important events in an insurance or reinsurance arbitration is the deliberation among the panel members. Deliberations are conducted behind closed doors and are not to be spoken of to anyone. Deliberations ultimately lead to the final award. How deliberations shape the final award and what goes into the deliberative process are questions that both counsel and the parties struggle to answer.

To aid in our understanding of the deliberative process, Richard Waterman, president of Northwest Reinsurance, Inc., and a longtime ARIAS arbitrator and umpire, has written "Deliberations: The Decisive Phase of Arbitration." You will find this insightful article helpful in understanding how panels deliberate and how they go about making the decisions to reach a final award.

ARIAS has devoted pages of the *Quarterly* and numerous panels at fall and spring conferences to emerging issues. In this issue, Jesse R. Dunbar and Heidi B. Ruchala of Barclay Damon, LLP, provide us with a review of recent talc case verdicts and an analysis of the impact of those verdicts on claims going forward. Their article, "Understanding the Impact of Cosmetic Talc Case Verdicts," provides a roadmap of what to expect arising out of talc cases as they percolate through the insurance and reinsurance claims process.

Not ones to shy away from strong opinions, Syed S. Ahmad and Patrick M. McDermott of Hunton Andrews Kurth LLP share theirs in their article, "The Bad Faith Exception to the Prejudice Requirement Does Not Represent New York Law." Some may find their article controversial, which may be fair commentary given their involvement as counsel in one the cases being discussed. A counterpoint article would be welcomed from someone with a differing view. Any takers?

The ARIAS Women's Networking Group has been expanding and strengthening over the years. Ann Field, from Willis Towers Watson, and Sarah Gordon, from Steptoe & Johnson, LLP, bring us up to speed and into the fold in their article, "The Reinvigorated ARIAS Women's Networking Group." Learn how you can expand your professional horizons by participating in this important ARIAS group. Other ARIAS committees and groups are invited to submit status reports to the *Quarterly* on what they've been doing.

In our regular Tech Corner, Michael Menapace of Wiggin & Dana LLP and Thomas Cunningham of Sidley Austin LLP bring us up to date on technology terminology in their column, titled "Increase Your Tech IQ." This should give all you Luddites something to study. And for those of you who are more tech-savvy, you might learn something.

Finally, a word about the ARIAS Code of Conduct. The ARIAS•U.S. Board of Directors made some changes to the code, and they are outlined on the ARIAS•U.S. website and on the inside back cover of this issue. Also, the *Practical Guide to Reinsurance Arbitration Procedure (2018 Revised Edition)* has been updated, and information about the updates is on the website as well. Finally, if you have ethical questions or questions about how the Code of Conduct applies in a particular factual setting, please send your questions or concerns to the Ethics Discussion Committee. The committee will respond in a generic manner through an article in the *Quarterly*.

Please enjoy this final *Quarterly* of 2018. We look forward to seeing your article submissions for 2019. In the interim, happy holidays and happy New Year!

—Larry P. Schiffer

Over the Bridge to Brooklyn

The ARIAS•U.S. 2018 Fall Conference, held at the New York Marriott at the Brooklyn Bridge, offered six general sessions and six breakout sessions on topics ranging from policyholder and direct insurer disputes to emerging risks. Following are summaries of some of the conference sessions.

"This was an outstanding conference. Well done! I've been attending the fall meeting for over 10 years and was surprised how fresh and useful this one was."

Women's Networking Luncheon

The conference started off with the Women's Networking Luncheon. Attendees enjoyed the opportunity to network and share ideas with colleagues. A special thank you is due Chaffetz Lindsey LLP and Steptoe & Johnson LLP for their sponsorship of this event.

Conference Kickoff

Scott Birrell, one of the conference co-chairs and incoming ARIAS board chairman, officially opened the conference by warmly welcoming attendees and introducing the keynote speaker, the Hon. Shira A. Scheindlin, a former U.S. district judge.

General Sessions

Expanding ARIAS·U.S. to Policyholder and Direct Insurer Disputes: Delivering the Best Arbitrators and Mediators for ALL Insurance Disputes

A large panel of leading policyholder and insurer litigators, along with ARIAS-certified arbitrators with backgrounds in both the policyholder and insurer sides, presented a report on the status of ongoing ARIAS•U.S./policyholder counsel efforts to bring policyholder-insurer disputes to ARIAS•U.S. This report ultimately envisions an expanded ARIAS•U.S. that resolves all insurance disputes.

"I thought the panel was excellent. I thought it was a very honest assessment of some of the concerns and opportunities."

Emerging Risks

Moderated by one of the conference co-chairs, Cindy R. Koehler of AXA XL, this session was a follow-up from the 2018 Spring Conference. The things that were keeping our underwriters awake at night in May have certainly not gone away; in fact, some have progressed at an alarming rate, while altogether new risks have appeared on the horizon. Using a "rapid fire" format, panelists made the case for their emerging issue (topics included opioids, concussions, talc, climate change/extreme weather, and the #MeToo/sexual harassment movement) as the biggest threat. At the conclusion of the session, attendees participated in live polling, answering such questions as "Which of the following poses the biggest potential threat financially to (re)insurers in the long term?"

"Very well-done session, and extremely interesting topics."

Breakout Sessions

When Preclusion Is in Play

Attendees at this breakout session were treated to a primer on preclusion in a lively game format. The presentation was marked by animated exchanges and insightful questions, as Catherine Isely of Butler Rubin Saltarelli & Boyd LLP challenged players to answer preclusion-related true/false questions and mark "six across" on game cards to win. The session began with an acknowledgement of arbitrators' competing interests and concerns when faced with a preclusion motion. Participants

also heard a refresher on the elements of claim preclusion (res judicata) and issue preclusion (collateral estoppel) and an overview of panel authority to decide preclusion motions.

As the game commenced, players learned preclusion basics. The questions and answers revealed that, in general—

- the same contract need not be in dispute for issue preclusion to be proper, but the relevant contract language cannot be materially different;
- a later arbitration panel can apply preclusion against a non-party to the earlier arbitration where that non-party is a privy;
- issue preclusion does not require a formal reasoned award by the earlier panel, but the later panel must be able to determine that the issue in dispute was essential to (i.e., actually and necessarily decided in) the earlier award; and
- the earlier award, if final, need not be confirmed to have preclusive effect.

Participants also considered the impact of a confidentiality order governing the earlier award, with reference to ARIAS•U.S. Sample Form 3.3. Finally, participants learned about useful resources on preclusion, including cases summarized by ARIAS•U.S. Law Committee Reports under "Res Judicata/Collateral Estoppel" at https://www.arias-us.org/publications/arias-u-s-law-committee-reports/and articles authored by experienced reinsurance counsel.

"Clever, fun, informative."

Third-Party Litigation Funding and Its Impact on Insurers

Are lawsuits just another asset class? If so, what does that portend for liability insurers and their reinsurers? Tom Cunningham of Sidley Austin LLP and Bill Lohnes of The Hartford explored these and other questions in their breakout session on third-party litigation funding.

Traditionally, litigation finance was viewed as illegal champerty. Beginning in the U.K. and then spreading to Australia and the United States, that view eroded, and litigation finance took hold. Litigation finance is now estimated to be a $5 billion industry. While litigation funding can expand access to justice and level the playing field, it can also encourage vexatious litigation and foster ethical conflicts. As the chief investment officer for the U.S. division of one litigation financer admitted to the *Wall Street Journal*, litigation funders "make it harder and more expensive to settle cases."

Enter liability insurance. Insured parties are seen as ideal defendants because there is unlikely to be any difficulty in enforcing judgments and obtaining the damages awarded. The same is true when the insurance company itself is the defendant. And with litigation financiers increasingly bundling "portfolios" of claims, less meritorious claims can be pursued along with stronger claims, reminiscent of securitized mortgages.

These trends make it more likely that litigation finance will increase both the cost and frequency of lawsuits. Ultimately, this may lead to more settlement dollars being paid by insurers and reinsurers. Many insurers and reinsurers are supporting the efforts of the U.S. Chamber of Commerce and others to regulate and bring more transparency to the litigation finance industry.

"Fascinating topic and very well presented."

Deliberations: The Decisive Phase of Arbitration

By Richard G. Waterman

After all of the evidence has been presented in the evidentiary phase of an arbitration, the arbitrators in a proceeding involving more than one panel member prepare to meet privately immediately after the hearing (or schedule a meeting at a future time) to deliberate by exchanging their views and making decisions for drafting the terms of an arbitration award. The deliberation phase of an arbitration proceeding is obviously a decisive time, when the outcome of an arbitration is determined.

Deliberations can be a pleasant and gratifying experience for arbitration panel members who are able to work together cooperatively, with a spirit of collegiality, to achieve the best possible balanced decision that is fair for the contesting parties. Unfortunately, deliberations are not always an enjoyable experience filled with open-minded, lively debate that produces wonderful results. More often, deliberations have the characteristics of small group decision making, where everyone is not in complete agreement.

Three independent-thinking panel members with diverse backgrounds are bound to develop their own interpretation of the facts and sense a conclusion before deliberations begin. They may strongly disagree with each other, be influenced by a biased assessment of certain case particulars or predisposed toward a party argument, or have a genuine difference of opinion. Perfectly sincere people can look at identical facts and come to radically dissimilar opinions. In deliberations, the work of the arbitrators is to critically examine the strength and validity of their differences in a setting conducive to open-minded debate and good-faith decision making.

Deliberation Procedural Dynamics

Similar to the discretion arbitrators have to determine the procedural process for the arbitration hearing in the absence of specific contractual provisions, arbitral tribunals have wide discretion to determine when, where and how to conduct their deliberations. There are usually no formal procedural guidelines or strict rules to follow. In practice, deliberations are usually scheduled as soon as practicable following the end of the evidentiary hear-

Richard Watermen is a charter member of ARIAS•U.S. and has been an ARIAS Certified Arbitrator since 1998. He is president and chief executive officer of Northwest Reinsurance, Inc., an international management consulting firm specializing in insurance and reinsurance. He has served on more than 100 insurance/reinsurance arbitration panels, including 45 as an umpire.

ing. In common practice, the umpire or presiding neutral arbitrator serves in a leadership capacity to administratively guide the tribunal's discussions and ultimately draft an award reflecting the arbitrators' determinations.[1]

Procedural dynamics in deliberations are flexible and depend on many factors, including the experience and management style of the umpire, the collegiality and experience of the party arbitrators, and the complexity of the issues to be decided. Most commonly, the deliberations begin with a commitment to briefly identify all of the issues the panel has been asked to resolve, followed by a brief exchange of views on each subject to determine where agreement is possible and identify areas of disagreement. The umpire, in consultation with the party arbitrators, then determines the order for debating and deciding each matter. Some panels prefer to tackle the most contentious issues first; others begin by seeking agreement on less controversial matters.

After each issue has been fully deliberated by the panel and a vote is taken, the umpire usually writes a draft award and circulates it among panel members for their review. When the final arbitration award wording is approved and signed by the panel members, it is distributed to the parties. If an arbitrator issues a written dissent, it usually accompanies the final award.

Occasionally, like all human activities, deliberations between panel members who do not agree with each other may create stressful moments. Unwitting blind spots, mistaken beliefs, built-in biases disconnected from the facts, or a limitation in relevant knowledge may contribute to thinking that is not shared by other panel members. Irrespective of the reason, it is difficult to put aside strong emotions.

These conditions may cause a panel member to: take superficial positions in a tendentious manner commonly reflecting cognitive biases; reflect positions closely aligned with a party argument; or exude misguided overconfidence that tends to overstate his or her knowledge and beliefs. A panel member may try to limit or prolong deliberations to win the debate for a particular point of view or use selective evidence to support an argument instead of working together with the other panel members to compare the considered judgments of each member and make sound panel decisions.

An important aspect of small-group decision making, such as arbitration deliberations, is to recognize that unanimous agreement may not be achievable. Some people are not as knowledgeable or unbiased as they like to think. An arbitrator may not have a background in the specific subject, may lack a judicial disposition, or may come to the deliberations inadequately prepared to effectively articulate positions with other panel members. Also, a party-appointed arbitrator may express unreasonably partisan views that do not lead to constructive solutions.

An experienced panel umpire usually will act to facilitate a merit-based debate to give the panel a chance to think through difficult issues under conditions that encourage informed deliberation. To improve the likelihood of high-quality decision making, some arbitration tribunals agree to share their knowledge and thoughts about the developing merits of a case in private panel conversations throughout the proceeding. These informal exchanges can lead to improved decision outcomes by making sure all three arbitrators have an informed understanding of every aspect of the disputed issues as the case progresses. Coincidently, such informal dialogue among arbitrators prior to deliberations is helpful in developing a shared responsibility for the panel's final award. Panels that have not agreed to allow interactive discussion during the hearing usually require more time at the beginning of their deliberations to preliminarily exchange views on key aspects of the case and more intensive deliberations to decide critical issues.[2]

Behind the Deliberation Door

So, what to do if you are selected to serve on an arbitration panel and deliberations are scheduled to begin? Before pre-judging disputed issues, diligently assess the hearing arguments, carefully weigh the facts, and plan to listen to the perspectives of your co-panelists with an open mind. Develop reasoning to clearly articulate your assessment of critical evidence and prepare to stand your ground, if necessary, to gain support from your co-panelists or at least persuade the umpire that your thinking is on the right track for the best possible fair outcome for both parties. Here are some useful strategies to consider in that effort.

Maintain high ethical standards. First and foremost, optimum results in all forms of negotiations are achieved by implementing high ethical standards throughout the proceeding. Serving on an arbitration panel is a highly ethical undertaking. In deliberations as well as during the entire arbitration, arbitrators have an obligation to act ethically. Although the panel umpire has a role in promoting an ethical environment throughout the proceeding, each panel member has an individual obligation to observe high ethical standards.

Codes of professional conduct and the ARIAS•U.S. Code of Conduct are excellent sources of ethical obligations to follow.

Prepare, prepare, prepare. Preparation is the groundwork that is done before deliberations begin to be fully prepared to achieve the primary goal of making a logically fair decision. Preparation involves fact finding by giving careful attention to every argument, every witness, and every material exhibit. It also means giving equal consideration to the presentations of both sides. Keeping industry principles and practices in mind is helpful in getting ready for deliberations.

The best decisions in arbitration emerge from a vigorous debate of multiple viewpoints exchanged in deliberations. That is why a mastery of the evidence presented in the briefing material and during the evidentiary hearing is essential—to effectively bring to bear reasons, justifications, and/or explanations for the parties' positions for optimal decision making. An arbitrator has no excuse for being inadequately prepared for deliberations.

Arbitrators have a shared responsibility to make decisions based on the evidence presented as well as on their training in, and knowledge of, industry practices. Without doubt, the insurance and reinsurance business has become increasingly complex. No one can possibly know about every facet of the business, even if they have been in the business for many years. However, subject matter knowledge acquired during the course of the hearing, and a judicious examination to determine the weight and relevancy of key facts and the credibility of witness testimony in preparation for deliberations, will be of considerable benefit in finding an acceptable solution that provides the greatest possible measure of justice for the parties.

Develop good negotiating skills. Simply winning arguments is not a very useful strategy in arbitration deliberations. The goal is to reconcile opposing arguments and decide the disputed issues, not continue the arguments in deliberations.

A commonly overlooked aspect of deliberations is being prepared to negotiate with your panel co-members to promote factual discussions leading to sound decisions with the greatest panel support. Being mindful of interpersonal relationships and respecting the opinions and concerns of co-panelists will encourage goodwill and cooperation during negotiations and diminish the prospect of bitterness arising from panel disagreements. Significant contentious issues should be discussed, negotiated and decided with a respectful awareness of other points of view.

To be successful in negotiations, it is essential to know what you want to achieve. Deliberations are not a time to "wing it" and forego planning a negotiation strategy in advance. When you know the objectives you are pursuing and are prepared to articulate a clear rationale for those objectives, you help your co-panelists understand your positions and why you believe they are correct. A laser-focused and precise presentation will enhance your credibility and more likely influence a desired result.

It is also important to anticipate the goals and objectives your co-panelists are likely to bring to the table and be prepared to respond to those arguments. Once all panel members understand each other's positions, they may be able to work together to formulate an acceptable outcome. Of course, not every arbitrator can be expected to listen to reason and be persuaded by sound arguments. Good negotiators know there must be give and take on both sides to reach an agreement. Be prepared to identify possible concessions in your negotiation strategy and propose alternative solutions that may lead to an acceptable panel agreement.

Thinking is required. Thinking is a conscious reasoning process leading to justified decision making. Arbitrators in deliberations have to make decisions; there is no default alternative. Decisions are based on the available evidence presented at the hearing along with the collective judgment of panel members in deliberations.

A person who accepts an appointment to an arbitration panel should be able and willing to think critically, with a capacity to reach independent conclusions drawn from the available facts, statements, and witness testimony irrespective of a preconceived notion, personal preference, or party appointment influence. Deliberations are not a time to bring up new issues that were not addressed during the hearing or to inject a sudden epiphany that comes to mind. Unsupported, spur-of-the-moment argument is usually not helpful.

Everyone has biases and predispositions. Learning to put them aside to think clearly is an element of good decision making. Before committing to a particular judgment, think through your analysis, consider alternative scenarios, and evaluate the thinking of a co-panelist who disagrees with your assessment. Thinking, in contrast to making hasty judgments that lack deliberate thought, helps to maintain a wider focus on judgment alternatives, leading to a more comprehensive analysis and more accurate decision making.

Learn by listening. One of the key attributes of a good negotiator, including an experienced arbitrator, is a willingness to listen. You already know what you believe. But why settle for what you think you know? Your judgment may be grounded in incomplete information or a misunderstanding of certain facts.

Listen to the reasoning of a panel co-member who has a different point of view or understanding about specific facts or testimony. Assume this panelist has conducted thoughtful work to justify his or her conclusions. By acknowledging others' opinions and showing a willingness to evaluate the basis for them, you open the door to negotiate a mutual judgment that will consist of the knowledge you already have as well as the knowledge you have learned by listening.

Question your assumptions. Cautionary steps can be taken during panel deliberations to reduce the likelihood of making a decision influenced by incomplete information, an inaccurate understanding of the available information, or an overconfident panel member. Be skeptical. Ask questions to clarify a point of view. Question your assumptions by re-examining critical evidence and asking co-panelists if their understanding of identified evidence is similar. What makes sense to one member of the panel may be anathema to another. Each of us is vulnerable to cognitive mistakes. Differing understandings or opinions should be explored so panel members can evaluate each other's specific knowledge and beliefs.

Arbitrators have an obligation to explain their understanding of the facts and share personal experiences that have influenced their judgment. There may not be only one right answer to

Dissenting opinions should be written carefully to articulate the specific reason for dissenting without disclosing the confidential negotiations of the panel members.

resolve arbitrated disputes. With an understanding of differing points of view, the job of a panel is to work together to balance and blend the various viewpoints, with a goal of reaching a consensus instead of arguing partisan positions. Sometimes, after a careful examination of the evidence and discerning the positions of panel members, the best interests of the parties are served with a compromise decision.

Keep an open mind. At various times, all of us have believed to be true—for what seemed to be good reasons—things that were found not to be true after additional consideration. As with all forms of evidence-based decision making, when the evidence changes or your understanding of factual evidence changes, so should your thinking.

Candidates being considered to serve on an arbitration panel are initially given limited information during the selection process. They acquire additional explicit information before and during the hearing, including briefing prepared by the parties' attorneys, document evidence, witness testimony, and (in some instances) expert witness testimony. Given the large amount of information to assimilate and the complexity of some cases, an arbitrator may develop preliminary beliefs and most likely will retain those inclinations when deliberations begin.

Moreover, in the early stages of a deliberation, an arbitrator may mistakenly assume that a co-panelist's opinion about a topic is wrong, only to discover they had misread critical evidence or misunderstood their co-panelist's premise. That does not mean the initial judgment was wrong; it was just incomplete. When the collection of evidence is concluded and evaluated, the analysis may point to a different conclusion.

Write dissenting opinions carefully. The very essence of the deliberation function is to reach a fair and balanced decision and issue a clear award. Most panel umpires strive to produce a high degree of consensus agreement in deciding and drafting an award. When panel members work together reasonably with a spirt of collegiality in the best interests of the parties, that goal is achievable.

Because arbitrations generally involve complex disputes that require difficult decisions, a contentious deliberation may produce an irreconcilable disagreement. Ultimately, it may be necessary to issue a majority award. There is no reason why an award cannot be made by a panel majority with the third panelist simply dissenting.

A dissenting arbitrator is not obliged to issue a written dissenting opinion, although in some instances it may be necessary. Nonetheless, dissenting opinions should be rare and reserved for legitimate reasons—for example, when the majority decision is believed to be fundamentally wrong or to address unethical behavior. In any case, dissenting opinions should be written carefully to articulate the specific reason for dissenting without disclosing the confidential negotiations of the panel members.

The Takeaway

Arbitration decisions are final and generally not appealable. It is, therefore, profoundly important that arbitrators conduct the arbitration in a principled manner and decide disputes consistent with the facts and other relative evidence presented during the hearing, along with a reasonable application of industry practice. Even the best arbitrators can be unconsciously influenced by bias or emotional predispositions or veer away from a conclusion they fear will be unpopular. There is no inoculation to eliminate human tendencies.

The task is to find a way to work together in figuring out the best resolution that is fair for all parties. By challenging our own decision making and earnestly attempting to understand the judgments of our co-panel members, the likelihood of making a wrong decision is greatly reduced.

Serving on an arbitration panel can be challenging at times; it also is a rewarding and learning experience. Despite its imperfections in isolated situations, arbitration has historically been a process to fairly and impartially resolve industry disputes when informed panel members undertake deliberations that are honest, fair minded, and based on the facts presented.

NOTES

1. "Umpire" is the term customarily used in reinsurance arbitration practice when two party appointed arbitrators select a neutral third panel member. When a panel is composed of three neutral members, one member is designated the presiding arbitrator. In this article, the term "umpire" refers to the roles of both.
2. For a comprehensive discussion of how informal conversations among arbitrators during the hearing can benefit decision making, see generally, Richard G. Waterman, "Making Good Arbitration Decisions: An Arbitrator's Viewpoint," *ARIAS•U.S. Quarterly*, Q1, 2018.

Understanding the Impact of Cosmetic Talc Case Verdicts

By Jesse R. Dunbar, Esq., and Heidi Brauer Ruchala, Esq.

While verdicts against pharmaceutical giant Johnson & Johnson have caught the attention of some over the years, a recent $4.69 billion verdict has sparked concerns among insurers and reinsurers and on Wall Street.

In July 2018, a jury in Missouri Circuit Court rendered a verdict against Johnson & Johnson for $550 million in compensatory damages and $4.14 billion in punitive damages.[1] The 22 women who brought the suit alleged Johnson & Johnson's talcum baby powder and body powders caused their ovarian cancer. Not only is the verdict staggering, it marks a disturbing development for any manufacturer and insurer of talc-containing products.

Talc is a clay mineral composed of hydrated magnesium silicate and mined around the world, with China producing 30 percent of the global output.[2] It is used in many different industries and products, such as paper manufacturing, plastics, paints, coatings, and electrical products. There are two types of talc: industrial talc, which is used most frequently in rubber, plastics, and ceramics; and cosmetic talc, which is further refined for use in cosmetics and pharmaceuticals and as a food additive.

The litigation arising out of industrial talc cases versus cosmetic talc cases is different, but raises similar concerns for insurers and reinsurers. Industrial talc claims have been litigated for many years and involve allegations that, given its co-location in the ground with asbestos, the talc was contaminated with asbestos. Plaintiffs who used industrial talc often claim that the inhalation of the talc causes mesothelioma, lung cancer, and asbestosis.

Cosmetic talc cases fall into two types of claims: those in which plaintiffs

Jesse R. Dunbar, Esq. is a partner at Barclay Damon LLP and a member of the firm's Insurance Coverage & Regulation, Professional Liability, and Commercial Litigation practice areas. He represents reinsurers, insurers, and other clients in a variety of general liability, professional liability, environmental, transportation, and other defense, coverage, and counseling matters. In addition to his many years in private practice, he was a general counsel for Aspen Re and Aspen Insurance.

Heidi Brauer Ruchala, Esq. is a partner at Barclay Damon and a member of the firm's Mass & Toxic Torts and Torts & Products Liability Defense practice areas. In her nearly two decades of legal experience, she has defended countless corporate clients involved in asbestos, benzene, beryllium, and lead paint litigation. She handles cases across New York state and in multi-district litigation in the Eastern District of Pennsylvania, and serves as national coordinating counsel in the asbestos exposure hotspots of Illinois and West Virginia.

In considering both the current and future insurance and reinsurance implications of talc, it will be important to distinguish between the asbestos and non-asbestos aspects of talc litigation.

claim that the use of talc causes ovarian cancer, and those in which plaintiffs claim cosmetic talc they used was contaminated with asbestos, causing their mesothelioma. Many of the verdicts over the last several years against Johnson & Johnson involved plaintiffs who claimed their ovarian cancer was caused by talc, but there were no allegations in those cases that the talcum powder was contaminated with asbestos.

The plaintiffs' attorney in the most recent verdict against Johnson & Johnson combined these two approaches and argued the 22 women developed ovarian cancer from asbestos-contaminated talc.[3] That argument's success could open a disturbing new front in talc litigation, wherein plaintiffs may have an easier path in proving causation, which has been the battleground of the litigation.[4] Johnson & Johnson maintains the science does not support a causal connection between talc and ovarian cancer and that its talc is not contaminated with asbestos.

With the National Institutes of Health reporting in 2010 that nearly 22,000 women nationwide were diagnosed with ovarian cancer and about 14,000 women died from it,[5] the pool of potential plaintiffs is not insignificant. Ovarian cancer is the fifth deadliest cancer among women in the United States and causes the most deaths of all reproductive system cancers. The disease has a high mortality rate, consistent with a lack of early symptoms and effective screening tests.[6]

With ovarian cancer cases becoming a growing concern, cosmetic talc manufacturers are being named in a number of mesothelioma cases alleging their products were contaminated with asbestos. These cases have resulted in sizable verdicts. In April 2018, a New Jersey state jury hit Johnson & Johnson and its talc supplier with a $37 million verdict in compensatory damages and a combined punitive damages award of $80 million.[6]

Similar trials are also taking place in New York state, including a notable verdict involving the estate of Joan Robusto, a 76-year-old Long Island woman who died of mesothelioma as a result of her use of cosmetic talcum powder contaminated with asbestos in the 1960s and 1970s. After a six-week trial ending in November 2015, a Manhattan jury awarded the estate a $7 million compensatory damages verdict against Whitaker, Clark, and Daniels, Inc., the minerals and chemical distributor that supplied the talcum that went into the cosmetic products. This was reportedly the first asbestos-contaminated consumer talc trial in New York state.

As the media give prominent attention to these verdicts (which will likely be reduced on appeal), many questions about who will bear the costs of these verdicts are surfacing. As highlighted in many articles, the insurance industry has been heavily involved in this issue. In an August *Insurance Journal* article titled "Insurers Being Asked About Asbestos-Talcum Exposure After J&J $4.6 Billion Verdict,"[7] for example, executives of various insurers were asked to comment on the recent verdicts in connection with company earnings calls and other events.

In considering both the current and future insurance and reinsurance implications of talc, it will be important to distinguish between the asbestos and non-asbestos aspects of talc litigation. Asbestos claims have been the subject of countless insurance coverage matters as well as reinsurance claims, litigation, and arbitration. This will continue, and it is unclear how different the underlying policies and reinsurance contracts may be in relation to talc-specific asbestos exposure. As one of the executives commented in the August *Insurance Journal* article, it is not unusual for a new industry to be brought into asbestos-related litigation.

This is consistent with the experience of many defense lawyers in asbestos matters, including the New York County Asbestos Litigation (NYCAL). In NYCAL, new non-bankrupt target defendants have been brought into asbestos-related litigation, and the number of asbestos-case target defendants is much larger than when NYCAL formed two decades ago. This, in turn, may bring new insurers and reinsurers into asbestos-related claims, litigation and arbitration. This has been driven in part by countless bankruptcy filings of earlier target asbestos defendants, like Johns Manville's 1982 bankruptcy filing. If the talc cases continue to expand, develop, and lead to significant settlements and verdicts, certain talc-related companies may also enter into bankruptcy proceedings, meaning their insurance and potential reinsurance assets may become even more important for litigants.

The insurance implications of talc claims involving ovarian cancer will be similar to other "long-tail" product-liability claims in which many different policies may be implicated. Similarly, many different reinsurance contracts—some more recent, others underwritten decades ago—may be brought into talc claims involving ovarian cancer. Given the number of talc products defendants and the widespread use of those products, the recent large verdicts will likely continue the trend toward more self-insurance beyond typical targets such as Johnson & Johnson. It may also spur the growth of insurance market alternatives such as captives, various self-insured programs, and potential punitive-damage wrap coverage offshore.

As important as it will be to follow legal updates, including verdicts in talc ovarian cancer cases, the development of scientific evidence in the courtroom will likely have profound impacts on trigger of coverage, allocation among several potential insurance policies, and even potential relevant exclusions or limitations to coverage. This will, in turn, have a direct impact on reinsurers, altering the contracts that may be implicated as well as the theory of recovery that will be supported by underlying scientific evidence.

This is a lesson that insurers and reinsurers have already learned in connection with asbestos. They, as well as their insureds and cedents, will likely devote considerable resources to trying to obtain favorable expert and additional rulings to reduce the amount of exposure for talc-related matters. Just as in a typical asbestos case, the role of scientific data will be at issue almost daily in courtrooms, with specific expert witness challenges in state and federal courts throughout the country.

As the talc ovarian cancer cases have developed, they have implicated many different policies and reinsurance contracts. While the initial exposure may extend back decades from the manifestation of the disease, the initial diagnosis often occurs well after the cancer has spread. So, even though asbestos was removed from talc products several decades ago, individuals could have been exposed to a significant number of products containing talc, extending

Unlike with asbestos, insurers likely will not have the benefit of specific exclusions, which means that more current insurers—and, by extension, more current reinsurers—may face potential exposure.

well beyond baby powder.

This means that insurers and reinsurers should evaluate important trigger-of-coverage determinations as to when an exposure constitutes a "bodily injury" and how that relates to a particular jurisdiction's allocation case law as either pro rata or all sums. If a jurisdiction has a pro rata approach, the costs of defense and indemnity are spread across all triggered policies. In the all sums approach, however, a policyholder may select policies with the most favorable terms and avoid lost policy periods, insurer insolvency situations and policies with larger deductibles, and self-insured retentions.

Like a typical asbestos case, talc ovarian cancer cases may involve multiple policies, but they might extend even further back in time because the exposure might have occurred when a plaintiff was a child. Given the number of possible talc defendants, it would be prudent to conduct a thorough analysis by asking questions and carefully evaluating applications and other underwriting means to determine how a particular insured or cedent may face this potential future exposure. Industry groups like ARIAS, as well as insurance brokers and reinsurance intermediaries, can also be an important source of more general information.

The focus for reinsurers should not be limited to the application and future underwriting reinsurance audits. Claims are equally important, and especially future annual and other claim audits, given that individual case reporting and billing may not be required.

Unlike with asbestos, insurers likely will not have the benefit of specific exclusions, which means that more current insurers—and, by extension, more current reinsurers—may face potential exposure. This is unlike the situation in the 1980s, when general liability insurers began to insert asbestos exclusions. Even though talc asbestos litigation has been widely reported for some time, it is doubtful that many insurers or reinsurers had the foresight to include talc-specific exclusions in their policies and contracts until relatively recently. They are likely adopting them now and more closely analyzing their insureds and cedents regarding their potential exposure for non-asbestos talc ovarian cancer claims.

There will likely be a significant amount of future case law regarding specific "talc exclusions" and how they apply and whether any exceptions exist. Insurers and reinsurers would be well advised to review and evaluate legal developments with talc exclusions in relation to their future potential exposure.

Finally, it is worth noting that the talc ovarian cancer cases have led to significant punitive damage awards. This, in turn, immediately raises questions about insurance and reinsurance coverage, including whether the specific punitive damage award can be insured or reinsured under the governing law of a particular policy or contract.

Plaintiff lawyers are doubtless aware of this limitation of coverage and may seek to "forum shop" for more favorable jurisdictions if they have concerns about a particular defendant's ability to satisfy a punitive damage award, which would first be the subject of an appeal. Forum shopping is well established in typical asbestos cases, but it is not as easily done as before given recent Supreme Court rulings on general and specific jurisdiction requirements, as in *BNSF Railway Co v. Tyrell* (citation omitted).

Insurers and reinsurers should take great interest in the development of talc ovarian cancer cases (including non-asbestos-related cases), given recent verdicts and the substantial number of existing and potential future cases associated with ovarian cancer. They raise very important scientific issues that will have a significant impact on current and future cases as well as the ultimate exposure to be borne by insurers and reinsurers. Talc ovarian cancer cases have many similarities to asbestos, including trigger, allocation, and exclusions, but are significant on their own merits. Insurers and reinsurers would be well advised to continue to evaluate and analyze exposure, insurance and reinsurance, and coverage for both current and legacy policies and contracts.

NOTES

1. Rockoff, Jonathan D., and Sara Randazzo. 2018. "J&J Hit With $4.7 Billion Jury Verdict in Baby Powder Suit." *The Wall Street Journal*, July 12.
2. Sergeeva, Anna. 2018. "Global Talc Market—China, Brazil, the US, and India Remain the Major Consumers." IndexBox Marketing and Consulting, July.
3. Hsu, Tiffany. 2018. "Johnson & Johnson Told to Pay $4.7 Billion in Baby Powder Lawsuit." *New York Times*, July 12.
4. Siegal, Daniel. 2018. "Asbestos Link in $4.7B J&J Verdict Adds Twist to Talc Suits." Law360, July 19.
5. National Institutes of Health. 2011. A Detailed Look at Ovarian Cancer. Washington, D.C.: National Institutes of Health.
6. Wichert, Bill. 2018. "J&J Hit With $80M Punitive Damages Verdict in NJ Talc Case." Law360, April 11.
7. Barlyn, Suzanne. 2018. "Insurers Being Asked About Asbestos-Talcum Exposure After J&J $4.6 Billion Verdict." *Insurance Journal*, Aug. 1.

The Bad Faith Exception to the Prejudice Requirement Does Not Represent New York Law

By Syed S. Ahmad and Patrick M. McDermott

The early 1990s spawned several notable reinsurance rulings by courts. Some of those decisions, which have been in the spotlight recently, relate to the applicability of reinsurance limits.[1] Another category relates to reinsurers' late-notice defenses. In particular, the New York Court of Appeals ruled in 1992 that, unlike direct insurers, reinsurers must show prejudice resulting from alleged late notice.

In subsequent decisions in 1993, the Second Circuit made certain statements—since relied on by reinsurers–to argue that they actually need not show prejudice if they meet a purported bad faith exception to prejudice. The oft-cited example is establishing that a cedent lacked practices and procedures to ensure notice to reinsurers. Just like it recently did with the decisions regarding reinsurance limits,[2] the Court of Appeals should rein in the case law about the purported bad faith exception to the prejudice requirement.

This bad faith exception was highlighted in the last issue of the *Quarterly* in an article titled "No Harm, No Foul: Jury Rejects Reinsurer's Late-Notice Defense."[3] In that article, the authors reviewed the recent jury verdict and related court decision in *Utica Mutual Insurance Company v. Fireman's Fund Insurance Company*.[4] Utica ultimately prevailed in that suit, and the court entered judgment for $64.1 million in damages and pre-judgment interest. Yet Utica still had to overcome Fireman's Fund's defense that, under the alleged bad faith exception, it need not show prejudice resulting from alleged late notice simply because, according to Fireman's Fund, Utica lacked practices and procedures to ensure notice to reinsurers.

No Basis in New York Law

Utica should not have been required to do so. The purported bad faith excep-

Syed S. Ahmad is a partner in the Washington, D.C., office of Hunton Andrews Kurth LLP. He advises clients in connection with reinsurance disputes and matters involving direct insurance policies, including general liability, errors and omissions, directors and officers, commercial property, and representations and warranty insurance.

Patrick M. McDermott is an associate in Hunton Andrews Kurth LLP's Washington, D.C., office. He counsels clients on all aspects of insurance and reinsurance coverage, assists clients in obtaining appropriate coverage, and represents clients in disputes over coverage, including in litigation and arbitration proceedings.

tion to the prejudice requirement stems from a series of decisions in a dispute between Unigard Security Insurance and North River Insurance and a subsequent decision involving Christiania General Insurance and Great American Insurance. As discussed below, a close examination of those decisions reveals that the exception arises out of dicta and has no basis in, and is inconsistent with, New York law.

The Second Circuit's First Unigard Decision (*Unigard I*). In *Unigard I*, the reinsurer (Unigard) asserted that the cedent (North River) provided late notice of certain underlying claims. The district court found that North River provided notice late, but rejected Unigard's late-notice defense after concluding that Unigard had not shown that the late notice caused prejudice.

On appeal, the Second Circuit Court of Appeals found "no New York appellate court decision addressing the question of whether a reinsurer must prove that it was prejudiced by untimely notice of loss in order to successfully invoke a late-notice defense."[5] Thus, the court certified a question to the New York Court of Appeals, asking: "Must a reinsurer prove prejudice before it can successfully invoke the defense of late notice of loss by the reinsured?"[6]

The New York Court of Appeals' Unigard Decision (*Unigard II*). The New York Court of Appeals—the state of New York's highest court—answered that question affirmatively. The Court of Appeals recognized that New York did not require direct insurers to show prejudice resulting from late notice,[7] but emphasized that there were "significant and basic differences between primary insurance and reinsurance."[8] Thus, the court held "that this 'no prejudice rule' does not apply to a failure to comply with the prompt notice requirement in a contract of reinsurance."[9] In its ruling, the court created no exception to its holding that "the reinsurer must demonstrate how [late notice] was prejudicial …."[10]

The Second Circuit's Christiania Decision. The *Unigard* case then went back to the Second Circuit. While the case was under consideration, the Second Circuit decided *Christiania*, another reinsurance case involving late-notice allegations.[11] In *Christiana*, the court reviewed a lower court's decision on late notice in a section titled "I. Notice."

The Second Circuit reversed the district court's decision on that issue, finding a question of fact about when notice was due.[12] In its ruling, the Second Circuit acknowledged the New York Court of Appeals' *Unigard* decision requiring reinsurers to show prejudice resulting from the cedent's late notice. The ruling further stated that the reinsurer (Christiania) might be able to demonstrate prejudice on remand.[13]

In a different section titled "III. Other Claims," the Second Circuit evaluated Christiania's claim that the cedent breached "its duty to deal in utmost good faith by virtue of its conscious decision not to provide notice sooner."[14] The court found this claim "difficult to understand" because "the significance of defendant's 'conscious,' or knowing decision not to provide notice sooner is not explained by Christiania."[15] According to the court, if the cedent "should have provided notice earlier than it did—whether its failure was conscious or otherwise—then the 'prompt notice' requirement has not been satisfied."[16] Under that scenario, the court noted, Christiania still would have had to establish prejudice.[17]

Significantly, the Second Circuit then rejected a notion similar to the purported bad faith exception to the prejudice requirement. "It seems that what Christiania would have us do is supplant the New York rule that a reinsurer must prove prejudice as a result of late notice by holding that 'consciously' late notice, without more, is sufficient to entitle the reinsurer to relief. We reject this invitation."[18] That is, the court held that the reinsurer could not avoid showing prejudice by establishing that the cedent consciously provided late notice. Thus, the court affirmed the dismissal of the reinsurer's claim that the cedent breached its duty of utmost good faith.[19]

Despite that, the court stated, in dicta, that "[a]t most, a reinsured's failure to provide prompt notice may entitle the reinsurer to relief without showing prejudice if the reinsured acted in bad faith."[20] Even in qualified dicta, this was an unusual statement given that in the separate section dealing with the reinsurer's late-notice defense, the court had already acknowledged the Court of Appeals' requirement that the reinsurer show prejudice.

Moreover, as a New York state court recognized, "to the extent that *Christiania* relied on New York law [with respect to the bad faith exception to prejudice], its citations were not in the reinsurance context or in the context of notice."[21] Rather, the two New York cases the *Christiania* court cited involved "primary insurers placing their interests above those of excess insurers."[22] The court's reliance on those direct insurance cases is particularly strange because the New York Court of Appeals' ruling that reinsurers must show prejudice resulting from late notice was based in part on the differences between direct insurance and reinsurance.[23]

In sum, *Christiania* did not hold that a reinsurer may avoid showing prejudice resulting from late notice if it can show that a cedent acted in bad faith with respect to notice. Rather, it held that a reinsurer could not avoid showing prejudice even if the cedent consciously withheld notice.

The qualified statement in *Christiania* that reinsurers might be able to avoid showing prejudice if they establish that their cedent acted in bad faith does not represent New York law for four reasons:

First, it is contrary to the Court of Appeals' ruling in *Unigard II*. In that decision, the court held that reinsurers must show prejudice and identified no exception to that requirement.

Second, the *Christiania* court's actual ruling was that a reinsurer must show prejudice even if the cedent consciously withheld notice. Thus, the dicta that bad faith "may" excuse a reinsurer from showing prejudice is inconsistent with the *Christiania* court's actual decision, which would *require* a reinsurer to show prejudice even where the cedent consciously withheld notice.

Third, the New York case law cited by *Christiania* does not support the statement. Those cases dealt with direct insurance, not reinsurance. The Court of Appeals' ruling in *Unigard II* that reinsurers must show prejudice was based on the "significant and basic differences between primary insurance and reinsurance."[24] Therefore, cases about direct insurance cannot support an exception to the reinsurance-specific rule that reinsurers must show prejudice.

Fourth, even ignoring the problems above, the statement is dicta. Dicta is not binding.[25]

The Second Circuit's Second Unigard Decision (*Unigard III*)

Following the *Christiania* decision, the Second Circuit issued its decision in *Unigard III*. The court began by reviewing the New York Court of Appeals' answer to the certified question. It stated that "we certified to the New York Court of Appeals the question whether a reinsurer must prove prejudice to prevail on a late loss notice defense. The Court of Appeals held that prejudice must be shown."[26] Then, applying the New York Court of Appeals' ruling, the Second Circuit found that Unigard could not establish prejudice resulting from North River's late notice.[27]

Nevertheless, the court cited the *Christiania* court's statement that "a [ceding insurer's] failure to provide prompt notice may entitle the reinsurer to relief without showing prejudice if [the ceding insurer] acted in bad faith."[28] Notably, the Second Circuit cited no authority other than *Christiania* to support this proposition. As shown above, *Christiania's* actual holding was to the contrary, and the cited statement is inconsistent with New York law.[29]

The Second Circuit appears to have raised this bad faith issue because the lower court had stated that "North River might have violated the duty of utmost good faith if it inadvertently failed to disclose material information to its reinsurer."[30] The Second Circuit rejected that statement because, rather than inadvertence, "the proper minimum standard for bad faith should be gross negligence or recklessness."[31]

The *Unigard III* court then went even further than the dicta in *Christiania*, stating that if a cedent "does not implement" "routine practices and controls to ensure notification to reinsurers," the cedent "has willfully disregarded the risk to reinsurers and is guilty of gross negligence." The court cited no authority, much less New York law, supporting this dicta.

Ultimately, the Second Circuit did not even apply its "gross negligence or recklessness" bad faith standard, instead concluding that because there was "no intent to deceive Unigard," the cedent did not act in bad faith.[32]

It appears that the New York Court of Appeals needs to rule on this issue, as was the case with the federal courts' continuous misinterpretation of Bellefonte *and* Unigard III.

Subsequent Court Decisions

After *Unigard* and *Christiania*, one court assumed, without analysis, that the bad faith exception to the prejudice requirement constituted New York law.[33] The court in *Utica v. Fireman's Fund* also invoked the bad faith exception and actually addressed the issues raised above, but was unwilling to find that the dicta in *Christiania* and *Unigard* did not represent New York law.[34] Thus, at trial, Utica had to and did disprove Fireman's Fund's unsupported assertion that Utica lacked practices and procedures to notify reinsurers.[35]

A New York state case, however, has recognized that the bad faith exception to the prejudice requirement "has not been implemented by the courts of this state [i.e., New York]" and that the New York law cited by Christiania to support that exception involved direct insurance, not reinsurance.[36] When that decision was appealed, the intermediate New York appellate court did not reject those statements; instead, it remanded for a determination of whether the reinsurer has suffered prejudice as a result of late notice.[37]

Conclusion

In *Unigard II*, the Court of Appeals held unequivocally that "the reinsurer must demonstrate how [late notice] was prejudicial."[38] The Second Circuit's statements in *Christiania* and *Unigard III* regarding a purported bad faith exception to that unequivocal rule do not represent New York law because (1) they are contrary to *Unigard II*, (2) they are unsupported by New York law, (3) they were not even applied in those decisions, and (4) they are dicta.

Some federal courts, however, have relied on those statements as if they are New York law. Accordingly, it appears that the New York Court of Appeals needs to rule on this issue, as was the case with the federal courts' continuous misinterpretation of *Bellefonte* and *Unigard III*.

NOTES

1. See, e.g., Amy S. Kline et al., Global Domination? What's Left of the Bellefonte Rule After *Global Reinsurance Corp. of America v. Century Indemnity Co.*?, *ARIAS•U.S. Quarterly*, Q1, 2018, at 9.
2. *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*, 903 F.2d 910 (2d Cir. 1990); *Unigard Sec. Insurance Co. v. N. River Insurance Co.*, 4 F.3d 1049 (2d Cir. 1993).
3. Tancred V. Schiavoni III & Vincent Weisband, No Harm, No Foul: Jury Rejects Reinsurer's Late-Notice Defense, *ARIAS•U.S. Quarterly*, Q3, 2018, at 6.
4. *Utica Mutual Insurance Co. v. Fireman's Fund Insurance Co.*, 287 F. Supp. 3d 163 (N.D.N.Y. 2018).
5. *Unigard Sec. Insurance Co. v. North River Insurance Co.*, 949 F.2d 630, 631 (2d Cir. 1991).
6. Id. at 632.
7. *Unigard Sec. Insurance Co., Inc. v. North River Insurance Co.*, 594 N.E.2d 571, 574 (N.Y. 1992).
8. Id.
9. Id. at 571.
10. Id. at 575.
11. *Christiania Gen. Insurance Corp. of N.Y. v. Great American Insurance Co.*, 979 F.2d 268 (2d Cir. 1992).
12. Id. at 277-78.
13. Id. at 274.
14. Id. at 280.
15. Id. at 281.
16. Id.
17. Id. at 274.
18. Id. at 281.
19. Id.
20. Id. (emphasis added).
21. *New Hampshire Insurance Co. v. Clearwater Insurance Co.*, No. 653547/2011, 2013 NY Slip Op 32812(U), at *8-9 (N.Y. Sup. Ct. Nov. 1, 2013). The non-New York decision relied upon by the *Christiania* court applied North Carolina law. See *Fortress Re, Inc. v. Cent. National Insurance Co. of Omaha*, 766 F.2d 163, 165-66 (4th Cir. 1985).
22. Id. at *8-9 (citing *St. Paul Fire & Marine Insurance Co. v. U.S. Fid. & Guar. Co.*, 375 N.E.2d 733, 733 (N.Y. 1978) (finding that record adequately supported finding that primary insurer breached obligation owed to excess insurer "to manage its insureds' defense in good faith"); *Hartford Accident & Indemnity Co. v. Mich. Mutual Insurance Co.*, 93 A.D.2d 337, 342 (N.Y. App. Div. 1983) (finding that primary insurer breached duty owed to excess insurer "to exercise good faith in handling the defense and to safeguard the rights and interest of the excess carrier" by not proceeding against particular third-party defendant).
23. *Unigard*, 594 N.E.2d at 574-75.
24. Id.
25. See *New Shows, S.A. de C.V. v. Don King Prods., Inc.*, 1999 WL 553780, at *11 n.12 (S.D.N.Y. July 29, 1999) (jury need not decide party's contractual right to attorneys' fees notwithstanding Second Circuit's statement to the contrary because the "statement was dicta, and need not be followed"), aff'd, 210 F.3d 355 (2d Cir. 2000); *New York v. U.S. Army Corps of Engineers*, 896 F. Supp. 2d 180, 196 (E.D.N.Y. 2012) (because language in Supreme Court decision was dicta, the court "need not follow it"); *United States v. Gotti*, 413 F. Supp. 2d 287, 292 (S.D.N.Y. 2005) (problem with reliance on excerpt from Second Circuit decision was that the "passage is dicta and, as such, does not have binding precedential value"), aff'd, 166 F. App'x 517 (2d Cir. 2006).
26. *Unigard Sec. Insurance Co. v. North River Insurance Co.*, 4 F.3d 1049, 1053 (2d Cir. 1993).
27. Id. at 1067-69.
28. Id. at 1069 (alteration in original) (quoting *Christiania*, 979 F.2d at 281).
29. See *Unigard*, 594 N.E.2d at 575 (holding that "the reinsurer must demonstrate how [late notice] was prejudicial"); New Hampshire Insurance, 2013 NY Slip Op 32812(U), at *8-9 (recognizing that Christiania did not rely on New York reinsurance law).
30. *Unigard*, 4 F.3d at 1069 (citing district court opinion).
31. Id.
32. Id. at 1069-70 (emphasis added).
33. *Granite State Insurance Co. v. Clearwater Insurance Co.*, 2014 WL 1285507, at *21-22 (S.D.N.Y. Mar. 31, 2014).
34. *Utica Mutual. Insurance. Co. v. Fireman's Fund Insurance. Co.*, 2015 WL 521024 (N.D.N.Y. Feb. 9, 2015). The authors represented Utica in connection with the motion that led to that decision.
35. According to the authors of the "No Harm, No Foul" article, Utica prevailed on that issue because it had provided evidence "on the supposed effectiveness and implementation of" its reporting policies and because "Utica had a reporting process (however flawed) …." Tancred V. Schiavoni III & Vincent Weisband, "No Harm, No Foul: Jury Rejects Reinsurer's Late-Notice Defense," *ARIAS•U.S. Quarterly*, Q3, 2018, at 6, 8. In fact, the alleged late notice to Fireman's Fund resulted from missing certificates and Utica provided notice immediately upon locating the certificates. Thus, any late notice had nothing to do with Utica's policies and procedures for providing notice to reinsurers. In any case, based on Utica's reporting procedures, Utica provided "early notice to over a dozen facultative reinsurers that Utica was aware of before notice was due." *Utica Mut. Insurance Co. v. Fireman's Fund Insurance Co.*, 287 F. Supp. 3d 163, 173 (N.D.N.Y. 2018). The sole bases for Fireman's Fund's claim that Utica somehow acted in bad faith were that Utica's document retention policies in the 1960s and 1970s (before the advent of asbestos and environmental claims) and that Utica did not locate certain primary insurance policies. Neither of those had anything to do with policies for providing notice. These circumstances show how far reinsurers can try to expand a purported requirement that cedents have policies for providing notice or risk letting their reinsurers off the hook for late notice without any resulting prejudice.
36. *New Hampshire Insurance*, 2013 NY Slip Op 32812(U), at *8-9.
37. *New Hampshire Insurance Co. v. Clearwater Insurance Co.*, 129 A.D.3d 99, 117-18 (N.Y. App. Div. 2015).
38. 594 N.E.2d at 575.

The Reinvigorated ARIAS Women's Networking Group

By Ann Field and Sarah Gordon

ARIAS is proud that its membership has grown increasingly diverse in the past decade. Gender diversity, in particular, has expanded significantly. Many members can recall ARIAS conferences where fewer than 10 women were in attendance. At the most recent Spring Conference, more than 60 women attended.

That growth is due, in part, to the ARIAS Women's Networking Group (WNG). The WNG was formed approximately 10 years ago in recognition of the unique challenges faced by women in the workplace and that women are a minority in the ARIAS membership. The WNG was an initiative to help the women of ARIAS get to know one another better and support one another in the industry. Through informal, ad hoc events and meetings at conferences, the WNG provided attending members with opportunities for camaraderie and career development.

Building on their success, WNG members decided to bring additional structure and direction to the group. To that end, approximately 20 women gathered during the WNG event at the November 2016 ARIAS Conference to brainstorm about the group's future. This "think session" generated myriad ideas regarding the mission and goals of the WNG as well as particular programming that could be useful to WNG members. The group decided the best way to achieve these ends would be to develop a formal committee structure.

The committee was formed in early 2017. Committee members are Cecilia Moss, Eileen Sorabella, Kelly Nickerson, Royce Cohen, Sarah Gordon, Stacey Schwartz, Susan Claflin, Wendy Shapss, and Ann Field (chairperson). The committee got to work immediately, and there has been no stopping this dynamic team ever since.

The committee's first opportunity to introduce more formal programming was the Spring 2017 ARIAS Conference. The committee decided that

Ann Field is an ARIAS•U.S. Certified Arbitrator and Certified Mediator and a licensed attorney with more than 22 years of significant experience in reinsurance and insurance coverage issues, arbitration, and litigation. She served on the ARIAS•U.S. Board of Directors from 2011 through 2017 and chairs the ARIAS Women's Networking Group. She is a senior vice president and the executive director of client services in North America with Willis Re, Inc.

Sarah Gordon maintains a multifaceted litigation practice as a partner with Steptoe and Johnson LLP, that encompasses insurance and reinsurance, employee benefits, and professional liability. She represents insurance com-panies in a wide range of coverage disputes, including latent health coverage claims, long-tail environmental cover-age claims, and claims against directors and officers. Most recently, she has been involved on behalf of insurers in coverage disputes over sports-related brain injury claims (concussions), personal and advertising injury claims, cyber coverage claims, and abuse claims. On the reinsurance side, she has extensive experience representing cedents and reinsurers in the life, health, and property/casualty industries.

The Women's Networking Group has developed "mentoring circles" where groups of women gather across the United States to share ideas, gain skills, seek advice, and assist one another in achieving their goals.

marketing and branding would be a good focus for their first official event. Speakers and WNG members addressed a range of business and leadership topics, including identifying and developing your brand, preparing and delivering an elevator speech, and effective tools for networking to build your business. Working together, the committee designed a successful event that left the women of ARIAS inspired and asking for more!

Successful WNG events followed at the Fall 2017 and Spring 2018 conferences. These events continued to focus on leadership, branding, and the unique challenges that women face in the industry and the workplace in general. More than 30 women attended each event, and survey feedback was extremely positive. Women are now ensuring they come to the conference early so they do not miss WNG events. Many have reported finding significant benefit in these events for a variety of reasons, all closely aligned with the mission of the WNG ("to develop opportunities and programming that emphasize women's networking strategies, career advancement, and mentorship in the ARIAS•U.S. community").

Beyond the conferences, the WNG is sponsoring other events for its membership. For instance, the WNG has developed "mentoring circles" where groups of women gather across the United States to share ideas, gain skills, seek advice, and assist one another in achieving their goals. Mentoring circles can range in size, but most WNG groups have approximately 10 women in each circle. Early feedback on the mentoring circles has been positive and powerful. The WNG met again at the 2018 Fall Conference, and the mentoring circles were an agenda item.

Looking ahead, the WNG is working on programming that will continue to develop opportunities for women in ARIAS. The group has considered programming involving both internal and external speakers on marketing, professional development, flexible career paths, leadership roles, and other topics of interest to the membership. Future programming could also include team building exercises, social events, and an "Improv for Business" session. The group is simply looking for good opportunities to assist women in our industry, as diverse and inclusive workforces are critical for ARIAS and the insurance and reinsurance industry as a whole.

And diversity is good for business. According to a recent McKinsey study, "Gender diversity is correlated with both profitability and value creation."[1] This is particularly true for executive teams. Companies in the top quartile for gender diversity on their executive teams were 21 percent more likely to experience above-average profitability than companies in the fourth quartile.[2] To the extent the WNG can help women become members of those executive teams, the entire industry benefits.

We are thrilled that the WNG is a leader in this space, and we welcome all female members of ARIAS who are not already engaged in the WNG to join us for our programs at future conferences. For further information, please contact Ann Field, Sarah Gordon, or Sara Meier.

NOTES

1. Hunt, Vivian, Lareina Yee, Sara Prince, and Sundiatu Dixon-Fyle. 2018. Delivering through Diversity. New York: McKinsey & Company.
2. Id.

Increase Your Tech IQ

By Thomas Cunningham and Michael Menapace

The pace of change in technology can confuse most of us from time to time. Technology professionals will often use terms and jargon that they assume we all understand, and we may use terms without understanding what they really mean. Most of us in ARIAS are not technology professionals—we are consumers and users of technology—so the goal of this article is to provide a short definition of some terms to help increase your technology IQ and understanding. Some terms relate to technology on a general level, while others are specific to the insurance industry.

Following are some basic terms that you have undoubtedly used but may not be able to define.

Operating system: Your computer is a collection of components, called hardware, that run on electricity. The hardware requires software for the components to know how to interact with each other. That particular system software is the operating system. In addition to allowing the computer components to interact, the operating system manages all of the other programs loaded into the computer.

Windows: The dominant operating system for PCs (basically all computers except those made by Apple) is Microsoft Windows, which has many versions, including Windows XP, Windows Vista, and Windows 10.

macOS: MacIntosh desktop and laptop computers (Apple computer products) run on some version of the operating system macOS. The most recent versions of macOS are named after places in California, such as Mojave and High Sierra; earlier versions were named after cats, such as Lion and Snow Leopard.

iOS: The mobile operating system created and developed by Apple that powers most of the company's mobile devices, including the iPhone and iPad.

Android: Most smartphones manufactured by companies other than Apple

Thomas Cunningham is a member of the ARIAS•U.S. Technology Committee and a partner in the insurance, reinsurance, and privacy practice groups of Sidley Austin LLP. He has 20-plus years of experience representing insurers and reinsurers in litigation, arbitration, regulatory investigations, and market conduct examinations. He also advises insurance companies and self-insured health plans on compliance matters, including HIPAA, GDPR, cybersecurity, and data breach laws.

Michael Menapace represents insurers in court and arbitrations and has litigated disputes concerning bad faith, insurance coverage, reinsurance, premium calculations, and allocation among policies. He advises insurers on policy construction, coverage, compliance, and regulatory issues and often represents stock, mutual, and captive insurers on their dealings with state regulators. In addition, he advises companies on a variety of privacy and data protection issues and defends companies facing potential data breach liability.

Only a small fraction of the web is searched by any one search engine, and the displayed results can be influenced by economic and commercial considerations and political processes.

run on the Android operating system.

www: www is the abbreviation for World Wide Web (aka "the web"), which is part of the Internet (though the two terms are commonly used interchangeably). Basically, the web is a system of connected computer servers that support specially formatted documents in a computer language called HTML (HyperText Markup Language), which supports links to other documents as well as to graphics, audio, and video files. These documents are identified by their location (i.e., their URL, which stands for uniform resource locator), a digital website address. The World Wide Web was invented in 1989 by English scientist Tim Berners-Lee (not Al Gore).

Browser: To access and navigate the web, a computer uses a type of program called a browser. Common browsers include Internet Explorer, Firefox, and Google Chrome.

Search engine: A search engine is a software system that is designed to search for information on the web. The search results may be a mix of web pages, images, and other types of files. Google, Bing and Yahoo are common examples of search engines, but there are hundreds of specialized search engines for topics such as business, education, food, and religion.

Search engines are programmed to rank websites based on some combination of their popularity and relevancy, but they do not provide links to all relevant websites. Only a small fraction of the web is searched by any one search engine, and the displayed results can be influenced by economic and commercial considerations (e.g., companies that advertise with a search engine can become more popular in its search results) and political processes (e.g., the removal of search results to comply with local laws). For example, Google will not surface certain neo-Nazi websites in France and Germany, where Holocaust denial is illegal.

Advanced Tech Terms

Dark web: The part of the World Wide Web that is only accessible by means of special software, configurations, or authorization to access. The dark web allows users and website operators to remain anonymous or untraceable. Technically, the dark web is part of the deep web, which is the part of the web not indexed to search engines. [Note: If you are learning anything new by reading this article, you should not be trying to access the dark web.]

Tor: Tor is free software for enabling anonymous communication. It is a browser (see above) often used to access the dark web. Its name is an acronym for the original software project name, "The Onion Router." Tor directs Internet traffic through a free, worldwide, volunteer overlay network consisting of more than 7,000 relays to conceal a user's location and usage from anyone conducting network surveillance or traffic analysis. Using Tor makes it more difficult to trace Internet activity.

IoT: An abbreviation for the Internet of things, the IoT is a network of physical devices (such as appliances and vehicles) and other objects embedded with electronics to allow the exchange of data over the Internet. IoT devices are estimated to number in the billions. For example, your FitBit, your daughter's Hello Barbie, and your Amazon Echo are IoT devices. The IoT promises to advance consumer applications, such as smart homes or assistance for elderly or disabled persons, and commercial applications such as remote medical monitoring. IoT devices have been criticized on privacy and security grounds.

Big data: A term used to describe data sets so large and complex that they require specialized tools to analyze. With the rise of inexpensive and ubiquitous sources of data, such as IoT devices, cameras, software logs, consumer purchases, and smartphones, big data tools can help companies identify and market to specific consumers in a more efficient manner. It is also being used by insurers to predict and price risks. Big data has been criticized for privacy and security concerns, as well as an over-reliance on potentially flawed models.

Predictive analytics: A variety of statistical techniques, often computerized, to analyze current and historical factors to make predictions about future events. One of the best-known applications is credit scoring, in which an individual's income, credit history, debt load, and other factors are considered to predict their likelihood of repaying loans or making future credit payments on time. Insurers have used predictive analytics for underwriting, pricing, claim adjustment, fraud detection, and other aspects of their business.

Blockchain: A growing list of records, called blocks, that are linked using encryption techniques. Each block is encrypted with information about the prior block, a timestamp, and transaction data. By design, this series of blocks (i.e., a blockchain) is readable to the public and distributed across a broad computer network; it is not stored in one location, which is why it is sometimes referred to as a distributed ledger. Data recorded in a particular block cannot be altered retroactively without altering all subsequent blocks, making blockchains secure by design. Blockchain was originally used for so-called cryptocurrencies, but its technology is being adapted for use in many other commercial sectors, including financial services.

Cryptocurrency: Based on a blockchain, a cryptocurrency is a kind of digital currency that uses strong encryption to secure financial transactions, control the creation of additional units, and verify the transfer of digital assets. Cryptocurrencies are used and exchanged in a decentralized manner, independent from formal banking systems. Cryptocurrencies, such as Bitcoin, have been criticized as a tool to enable online black markets, tax evasion and money laundering. Since 2014, the IRS has treated Bitcoin as property subject to capital gains tax.

AI: An acronym for artificial intelligence, which can also be referred to as machine intelligence, AI is the ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings. The term is frequently applied to the project of developing systems with the ability to reason, discover meaning, generalize, or learn from past experiences. Common uses include facial recognition by computers, understanding speech, and autonomous cars.

Terms Related to the Insurance Industry

Insurtech: A combination of the words *insurance* and *technology*, inspired by the earlier term *FinTech*. The belief is that the insurance industry is ripe for technological innovation and disruption, which has spawned a host of new technologies affecting every aspect of the traditional insurance company structure, from user interfaces that companies use to customer acquisition to computer-based underwriting.

Gig economy: The growing labor market characterized by independent contractors working on a short-term, or "gig," basis as opposed to permanent jobs. For example, a person may drive for Uber at intermittent times throughout the week, or may be hired on a temporary basis to design an app for a company. AirBnB is another example of the gig economy. In 2017, the Bureau of Labor Statistics reported that 55 million people in the U.S., or roughly 35 percent of the U.S. workforce, are gig workers.

Episodic insurance: Short-duration insurance purchased on demand, often from a mobile device and targeting those participating in the gig economy. Examples include insurance purchased for a single aircraft flight or a single car rental or that is in effect only when an Uber driver is logged in as a driver. The belief is that tech-savvy Millennials will wish to purchase insurance when and where they need it, akin to what Uber and AirBnB have done for ride sharing and travel lodging.

There are many more terms we could have included, but we thought this set of terms was most relevant for establishing a baseline. If you have questions about technology terms, please contact a member of the ARIAS Technology Committee.

In November, ARIAS•U.S. held a successful fall conference in Brooklyn, N.Y. More than 300 attendees gathered to hear the Hon. Shira Scheindlin kick off the conference and then spend time together networking with and learning from their colleagues on topics such as third-party litigation funding and its impact on insurers, preclusion in play and emerging risks throughout the industry.

In addition to hosting two great conferences, the association has accomplished much this year, thanks to the voluntary work of our members. Volunteer committees have developed engaging educational programs, created content for conferences and seminars, written articles and case studies, developed a data protection guide, and carefully reviewed our finances and business plan. MCI has efficiently guided our activities at every step and has been instrumental in every element of our operations. The board has carefully reviewed the association's finances (which remain healthy), examined the organization's business plan, and begun an effort to expand the reach of ARIAS to new categories of disputes.

Highlights of the year's activities include the following:

Education and Networking Opportunities

The Education Committee held four new webinars:

- What are the "CAT" Bonds and How do they Differ from Insurance and Reinsurance?
- The Year in Review: A Discussion of Significant 2017 Cases Arbitrators Need to Know
- Putting the Brakes on Arbitration Cost: The Arbitrators Perspective
- 'Til Death Do Us Part: Troubling the Long-Term Partnerships Between Life Insurers and Their Reinsurers

In addition to the well-attended fall and spring conferences, ARIAS held multiple seminars and networking sessions, including the Intensive Arbitrator Training and a spring seminar in Boston focused on Reinsurance Beyond APH.

Committee Accomplishments

In addition to the Education Committee's work on the various webinars and seminars, a number of ARIAS committees accomplished several major tasks.

The **Technology Committee** published several articles for the *Quarterly* and submitted proposals for the fall and spring conferences this year. In response to a request by a number of members and arbitrators, the committee also looked into making a change to the arbitrator profiles. The word limit for the narrative sections of the arbitrator profiles has been eliminated, and visitors to the website are able to conduct a more specific search of arbitrator experience based on key words.

The **Law Committee** produced numerous case studies and an article for the *Quarterly*. A list of the case summaries can be found at https://www.arias-us.org/publications/arias-u-s-law-committee-reports/. The committee has started a new initiative to provide citations for each state arbitration statute, which will be located on the ARIAS website.

The *Quarterly* Editorial Committee has been energized with new articles and new contributors. As always, submissions are encouraged.

The **Forms & Procedures Committee** recently reviewed and updated the ARIAS Practical Guide to Reinsurance Arbitration Procedure. The new 2018 edition can be found on the ARIAS website.

The **Ethics Committee** took a closer look at Canon I, Comment 5 of the Code of Conduct following comments from members. The ethics session at the fall conference discussed the change to the code, and a letter was sent to members. More information about the change can be found on the inside back cover.

The **Women's Networking Committee** has been busy this year with formal and informal gatherings. Sarah Gordon and Ann Field share more about what the group has been up to on page 15.

Other committees met regularly, contributed articles to the *Quarterly*, and are in the process of setting their deliverables for 2019.

Birrell Becomes Board Chair; Abrams Joins Board

Scott Birrell became the chairman of the ARIAS•U.S. Board of Directors following the association's annual meeting on November 8. He replaces Deirdre Johnson, who finished her term as chairwoman. Marc Abrams, a partner with Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., and co-chair of the ARIAS Education Committee, joined the board.

Scott Birrell

Marc Abrams

A full Board listing can be found on the ARIAS website. The officers for 2019 are as follows:

- Scott Birrell, Chairman
- Mike Frantz, President
- Steve Schwartz, Vice President
- Cindy Koehler, Vice President
- Peter Gentile, Treasurer

Saiber Expands Its Insurance and Reinsurance Practice

Saiber LLC has added seven new attorneys to its insurance and reinsurance practice group in Florham Park, N.J. ARIAS members Joseph J. Schiavone, Jeffrey S. Leonard, Vincent J. Proto, and Michael J. Balch, and associates Lori J. Zeglarski, David I. Satine, and Robert P. Vacchiano, all joined Saiber from Budd Larner, P.C. in Short Hills, N.J. The insurance and reinsurance practice group, led by Mr. Schiavone, advises a broad range of domestic and international clients in high-stakes insurance and reinsurance disputes.

Snider Named Top 500 Lawyer

Butler Rubin partner Teresa Snider has been named one of America's Leading 500 Lawyers by Lawdragon and profiled in its Lawyer Limelight series. The honor is only the latest for Snider: Intelligent Insurer listed her among the Most Influential Women in Re/Insurance 2017, and Business Insurance recognized her as a 2017 Woman to Watch. Chambers USA has named her a leader in reinsurance law for eight consecutive years (2011-2018).

In Memoriam: David Knoll

David Knoll, a longtime ARIAS member, passed away September 4 in Somerville, Texas. He was the co-chair of the insurance industry practice group of Winstead Sechrest and Minick, PC, a Texas-based business law firm focusing on clients in the financial services, real estate, and technology industries. Over the course of his 35-year career, Knoll gained extensive experience representing clients in the insurance industry, both as in-house and outside counsel.

ARIAS Updates Procedure Guide

The ARIAS•U.S. Forms & Procedures Committee recently reviewed and updated the ***ARIAS Practical Guide to Reinsurance Arbitration Procedure***. The new 2018 edition can be found on the ARIAS website at https://www.arias-us.org/arias-us-dispute-resolution-process/practical-guide/.

Newly Certified Arbitrators

Jim Jorden is a partner at Carlton Fields Jorden Burt. For more than 30 years, he has represented many of the country's largest insurance companies in complex litigation and general corporate counseling. His experience includes providing risk counseling and regulatory advice on complex reinsurance transactions and as lead counsel on numerous reinsurance arbitrations, including in hearings to award for both cedents and reinsurers. He has served as lead counsel for insurance companies in more than 50 individual cases in federal and state courts throughout the United States and more than 100 class actions. He has argued before the U.S. Supreme Court and eight of the U.S. Circuit Courts. Jim writes and speaks frequently on issues in these practice areas and chairs the firm's 50-lawyer Life Insurance Industry Group. He previously served as general counsel and on the board of American Bankers Insurance Group and its life and P/C subsidiaries.

Mary Lopatto began her reinsurance arbitration practice on day one of her legal career 33 years ago at LeBoeuf Lamb Greene & MacRae. She continued to represent cedents and reinsurers while at Chadbourne & Parke, Cozen O'Connor, and at her own firm, Williams Lopatto PLLC, formed in 2014 to eliminate a conflict situation for a longstanding client. She has rendered contract wording and regulatory advice and arbitrated disputes in both the property and casualty and life insurance areas, including matters involving asbestos liability, pollution liability, workers compensation, financial reinsurance, product liability, and catastrophe reinsurance. A particular focus of her practice has been complex and large-scale international arbitrations in Bermuda and London. Mary is a former chairman of ARIAS•U.S. and initiated the major reform of the arbitrator certification process.

ARIAS•U.S. Code of Conduct

Revision to Canon I, Comment 5

The ARIAS•U.S. Ethics Committee and the Board of Directors regularly review the Code of Conduct in response to comments from Ethics Committee members and members at large. In response to some member comments and a recommendation from the Ethics Committee, the board has revised and simplified (but not changed the meaning of) Canon I, Comment 5, of the Code of Conduct. This change is effective January 1, 2019.

The revised Comment 5 provides as follows:

5. Relationship between Comments 3 and 4. If a candidate has a relationship described in Comment 3 with an entity that does not fall strictly within the scope of Comment 3, but the relationship is sufficiently significant that the principles set out in Comment 3 are clearly implicated, then in these circumstances the candidate should refuse to serve in the current arbitration, in line with the general principle that in upholding the integrity of the arbitration process arbitrators will avoid the perception of bias. If, however, the relationship described above is remote and pursuant to Comment 4, would not affect the candidate's judgment, then the candidate may choose to serve.

Comment 5 is intended to cover situations where the mandatory prohibitions of Comment 3 almost apply. Typically, this occurs where the candidate has a relationship described in Comment 3 with an entity that is related to a party to the current arbitration, but where the Code's definition of affiliate or party is not met. Comment 5 establishes a rebuttable presumption that a candidate will decline to serve in such situations unless the relationship is remote.

Following are three examples covered by Comment 5:

Example 1. Assume there is an entity that is related to a party to the current arbitration, although not "affiliated" as the Code of Conduct defines affiliated because the related entity owns only 49 percent (not 50.1 percent) of the party to the arbitration. Assume the same individuals manage both entities' reinsurance disputes (those of the related entity and the party to the current arbitration).

A candidate is solicited to serve as the party-appointed arbitrator in the current arbitration by the party that is 49 percent owned by the related entity, while already serving as the umpire in an arbitration involving the related entity. Under the Code of Conduct, the definition of affiliate isn't met, and Comment 3's mandatory prohibitions (here Comment 3(f)) are not triggered. Under Comment 5, the candidate must not serve in this circumstance because the relationship is not remote (49 percent ownership and the same people managing the two disputes).

Example 2. Similarly, assume a candidate currently serves as the lawyer for an entity that owns 49 percent of the party to the current arbitration. Assume the same individuals manage both entities' reinsurance disputes (those of the entity that owns 49 percent of the party to the current arbitration and the party). The candidate is solicited to serve as the party-appointed arbitrator for the party that is 49 percent owned by the entity for which the candidate serves as a lawyer. Under the Code, the definition of party is not met, and Comment 3(c)'s mandatory prohibitions are not triggered. Under Comment 5, the candidate must not serve in this circumstance because the relationships are not remote.

Example 3. In a third example, assume there are two entities that are separately owned, but whose losses are entirely reinsured by the same entity. Assume also that the two separate entities' reinsurance disputes are managed by the same individuals who are employed by the common reinsurer. A candidate is solicited by one of the two reinsured entities to serve as its party-appointed arbitrator in the current arbitration while already serving as the umpire in an arbitration involving the second of the two reinsured entities.

Under the Code, the definition of affiliate isn't met (the two reinsured entities are separately owned, even if reinsured by the same entity) and Comment 3(f)'s mandatory prohibitions are not triggered. Under Comment 5, the candidate must not serve, because the relationship is not remote (there is a common reinsurer at risk for all losses, and the same individuals are managing both disputes).

These examples are not meant to be exhaustive, but illustrative. Admittedly, Comment 5 requires candidates to exercise judgment rather than follow a black-and-white rule. Nevertheless, Comment 5 serves an important purpose: it is intended to advance the general principle that in upholding the integrity of the arbitration process, a candidate should not get too close to the edge on issues of ethics.

ARIAS U.S.

AIDA Reinsurance & Insurance Arbitration Society
7918 Jones Branch Dr., Suite 300 • McLean, VA 22102
Phone: 703-506-3260 • Fax: 703-506-3266
Email: info@arias-us.org

BOARD OF DIRECTORS