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A Modest Proposal

By John M. Nonna

The number of reinsurance arbitrations taking place over the last decade has exploded with no signs of decrease in sight. The arbitration process has its supporters and its critics. Both insurers and reinsurers have questioned the merits of the process and have considered deleting arbitration clauses from their reinsurance agreements. There is clearly a measure of dissatisfaction with the process as it now operates. The dissatisfaction does not relate to the individuals but to the process. Even where the results have been satisfactory to a party, the process itself has been questioned. This article presents two suggested modifications to the current procedure that may improve the level of confidence by consumers of the arbitral process.

A. Neutral Panel

The suggestions made in this article are not intended to be critical of the individuals who currently serve as reinsurance arbitrators. Experience has shown that these individuals fulfill their perceived roles with honesty and dedication. Parties are given a full opportunity to present their respective positions and decisions are reached after careful deliberation. However, the system has operated to a great extent with only one real decision-maker — the umpire.

The other arbitrators, who are appointed by the parties and are understood to be non-neutals, generally act as advocates for the party that appointed them. It is common for a party to meet with its arbitrator and in some cases even to seek a commitment from its arbitrator that the arbitrator will vote for that party's position in the arbitration. While such firm commitments may not be common, the party-appointed arbitrator is still under pressure to support the position of the appointing party since the appointing party is paying the fees and expenses of that arbitrator. While the extent to which a party-appointed arbitrator actually advocates a party's position may vary from arbitration to arbitration, the fact remains that a party-appointed arbitrator is viewed as, and usually does serve as, an advocate for a particular party's position.

Even the law takes a somewhat schizophrenic view of the role of the party-

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Training Update

Seminar Set for New York, Jan. 20-21, 1995

ARIAS• U.S. will hold its first training seminar on January 20th & 21st 1995 in New York. The seminar will be held at the Holiday Inn Crown Plaza, Times Square, from Friday 9am. through Saturday 3p.m.

The Program includes featured speakers, seminars and a mock arbitration panel.

Price is set for $350, including continental breakfast and luncheon both days and all materials.

To register, use the **Fax form** on page 8.

ARIAS•U.S. Will Serve The International Insurance And Reinsurance Law Community

We are pleased to announce the formation of the A.I.D.A. Reinsurance and Insurance Arbitration Society (ARIAS•U.S.)

ARIAS•U.S., a not-for-profit corporation, will promote the use and assist in the development of insurance and reinsurance arbitration for the international and domestic market.

ARIAS will provide initial training and continuing education seminars in the skills necessary to serve effectively on a reinsurance arbitration panel. Upon certifying a pool of qualified arbitrators, ARIAS•U.S. will serve as a resource for parties involved in a dispute to find the appropriate persons to resolve the matter in a professional, knowledgeable and cost-effective manner. ARIAS (U.K.) has been successfully providing these services in its jurisdiction.

Edmond F. Rondepierre

The new organization follows to some extent the structure of ARIAS (U.K.) By certifying and training experienced top-quality arbitrators, by setting forth recommended standards and rules of arbitration, and proferring a model arbitration clause, we will reduce costs and streamline the processes. We hope to be better able to curtail unnecessary discovery proceedings and expedite resolution of disputes.

ARIAS•U.S. will seek to promote fair awards, made in accordance with industry practices and procedures.

In order to ensure appropriate representation and balance of viewpoints, the Board of Directors of ARIAS•U.S. will include three representatives each of professional reinsurers, ceding companies, and lawyers in private practice, we are determined to provide a valuable resource for the resolution of national and international insurance and reinsurance disputes on an efficient, economical and joint basis, and will seek to assemble top talent to assist us.

ARIAS•U.S. was formed to act as a clearinghouse for competent, knowledgeable and experienced officials to facilitate domestic and international reinsurance/insurance arbitrations in the United States.

We also see ARIAS•U.S. acting as a policy think-tank for issues affecting the reinsurance arbitration arena — developing alternative contract language designed to streamline the arbitration process and proposing to the industry solutions to intractable problems in arbitrations, such as how to select knowledgeable, impartial umpires quickly.

Essentially, ARIAS•U.S. is an appropriate reaction to changing industry conditions. The increased demand for reinsurance arbitrations requires an increased supply of qualified arbitrators; and the ARIAS structure is a proven method for satisfying this need."

The facility's initial organizers included Debra J. Anderson, Vice President & General Counsel, Reinsurance Association of America; Joseph A. Bambury, Jr., Esq., Ronald A. Jacks, T. Richard Kennedy, Werner & Kennedy, Mayer, Brown & Platt; Robert A. Mangino, Senior Vice President & General Counsel, Swiss Re Holding (North America) Inc.; Franklin W. Nutter, President, Reinsurance Association of America; Edmond F. Rondepierre, Senior Vice President, General Reinsurance Corporation; Daniel E. Schmidt, IV, Senior Vice President and General Counsel, Sorema N.A. Reinsurance Company and Bert M. Thompson, retired Vice President and General Counsel, RLI Insurance Company and this writer.

—Edmond F. Rondepierre
President

Pan Atlantic Insurance Company Limited and Republic Insurance Company v. Pine Top Insurance Company Limited

by Steven A. Blair
Alsop Wilkinson, New York

The insurance world has been eagerly waiting for the result in Pan Atlantic Insurance Company Limited and Another v. Pine Top Insurance Company Limited, a decision which is arguably one of the most important decisions in this field within the last decade.

The case climbed the ladder of the English judicial system and reached the House of Lords on February 14 of this year. Their Lordships heard arguments from Counsel on both sides and gave their judgment. Steven Blair and Ian Robinson of this firm have acted for Pine Top and are pleased to report on the decision of the House of Lords which unanimously dismissed the appeal.

Briefly, the facts of this case are as follows:

In 1982, Pine Top agreed to take a line on an excess of loss reinsurance of the casualty account of Pan Atlantic Insurance Company Limited and Republic Insurance Company ("PAICO") for limits of US$75,000 xs US$25,000 any one loss. Pine Top had written smaller lines on the contract for 1980 and 1981.

For the purposes of broking the renewal, the broker produced to Pine Top, amongst other documents, typed premium and loss statistics for all years from 1977 to 1981 ("the long record") and a short form ("the short record") which contained only those statistics for the years in respect of which Pine Top had reinsured PAICO, namely 1980 and 1981.

The court at first was asked to decide whether there was material nondisclosure in respect of the long record or whether there was a waiver of such disclosure by virtue of the fact that the records were available to Pine Top's underwriter.

These documents were available to Pine Top's underwriter at all times, but Pine Top's underwriter did not look at the long record because he was persuaded by the way in which the broking was done to concentrate on the short record and not to rerate the risk.

In early January 1982, PAICO's broker prepared a document containing updated paid and outstanding loss statistics for the years 1977 to 1981 as at December 31, 1981 ("the updated statistics"). This was produced to Pine Top's underwriter as support of the brokers, assertion that, having done a quick update, there was a little movement in the figures. The underwriter then signed the slip for the 1982 year.

A dispute between the parties prompted an investigation of the information provided to Pine Top's underwriter when the risk was placed. Pine Top ceased paying claims in 1985 and, in March 1987, PAICO issued a writ seeking payment of amounts due under the contract.

In their defense, Pine Top argued that they were entitled to avoid the 1982 contracts ab initio for nondisclosure of the loss statistics relating to the 1977 and 1979 underwriting years.

During the inspection of documents by this firm on behalf of Pine Top, a second potential defense was identified, namely that Pine Top was entitled to also avoid the contract on the grounds of nondisclosure (and misrepresentation) with respect to the loss statistics for the 1980 and 1981 underwriting years.

The long record and the updated statistics for the 1977 to 1979 years were accurate. The statistics for the 1980 year were inaccurate in a trivial respect. The typed statistics for the 1982 year were dated November 24, 1981 and purported to show the position as at September 30, 1981. The statistics showed no losses paid but losses outstanding at US$235,768. The correct figure for the total of paid and outstanding losses for the 1981 year was almost twice that amount, US$468,168.

The court at first was asked to decide whether there was material nondisclosure in respect of the long record or whether there was a waiver of such disclosure by virtue of the fact that the records were available to Pine Top's underwriter. In relation to the statistics for the 1980 and 1981 years, the question was whether the losses not disclosed and the misrepresentation in respect of the updated "statistics" were material. Also, had PAICO made a fair presentation of the risk by the time Pine Top renewed its line for the 1982 year having regard to the cumulative effect of the presentations of the long and short records and the updated statistics?

The court decided that the 1977 to 1979 statistics were either, in fact, disclosed or that disclosure was waived by Pine Top's underwriter. Pine Top, however, succeeded in the second defense of nondisclosure and misrepresentation in respect of the 1981 statistics.

The Court of Appeal unanimously upheld the view of the court at first instance and PAICO appealed the House of Lords. The issues before the House of Lords were:

1. where sections 18(2) and 20(2) of the Marine Insurance Act 1906 ("the Act")1 relate to the test of materiality of a circumstance which "would influence the judgment of a prudent underwriter in fixing the premium, or determining whether he will take the risk," must it be shown that full and accurate disclosure would have led the prudent underwriter to a different decision on accepting or rating the risk, or is a lesser standard of impact on the mind of the prudent underwriter sufficient; and, if so, what is the lesser standard? and

2. is the establishment of material misrepresentations or non-disclosure sufficient to enable the underwriter to avoid the policy, or is it also necessary that the misrepresentation or non-disclosure has induced the making of the policy, either at all or on the terms on which it was made? If the latter, where lies the burden of proof?

On the issue of materiality, and whether the "decisive influence" test is the appropriate test for deciding whether a fact which has not been disclosed is a material fact, there was a difference of opinion among the Law Lords.

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N.Y. Supreme Court Directs Arbitration Under Reinsurance Contract

Source: Insurance Advocate *News Service 1-800-951-2020*

The intervention of an arbitration clause in a reinsurance agreement, specifically its applicability in a situation where fraud and inducement are the underlying subjects of the suit, was provided by a judge in New York Supreme Court, New York County. The decision was handed down late in June.

In this case the reinsurer, General Security Assurance Corporation, was seeking to sustain its refusal to continue to pay the ceding primary insurer claims arising out of Hurricane Andrew, because of its assertion that Capital Assurance Company, Inc., had fraudulently induced it to enter the contract. The alleged fraud was that Capital Assurance failed to disclose the true nature of the risks involved and withheld material information about the geographic concentration of the risks.

General Security was opposed to the arbitration which was favored by the primary insurer, Capital Assurance. The reinsurer said that Capital Assurance had waived its right to arbitration because of its participation in the litigation.

Also involved in the suit was the interstate nature of the transaction which, as the court said, meant that the Federal Arbitration Act governed the interpretation. The court ruled that the strong federal policy favoring arbitration could not be overlooked.

The decision includes interesting and significant commentary and the full decision is presented below for the benefit of our members.

IA Part 19

Justice Lehner

* General Security Assurance Corporation of New York v. Capital Assurance Company, Inc.—The central issues presented in the motion to compel arbitration and stay this action are whether a claim of fraud in the inducement falls within the scope of the arbitration clause at issue and whether, by its participation in the instant litigation, the defendant Capital Assurance Company, Inc. ("Capital") has waived its rights to arbitration.

The gravamen of the complaint of General Security Assurance Corporation of New York ("General Security") is that Capital fraudulently induced General Security to enter into a contract of reinsurance by failing to disclose the true nature of the risks involved. More specifically, General Security claims that Capital intentionally withheld material information possessed by it regarding the location and concentration of the subject policies and affirmatively misrepresented "the geographic concentration of the risks by stating...that the Florida program was 'similar' in geographic distribution to another program in which General Security's manager and underwriter participated and in which the risks were actually more dispersed" (plaintiff's memorandum of law, p. 3).

The agreement whereby General Security agreed to provide reinsurance of Capital's risks was entered into in July 1991 and was renewed in July 1992. Less than two months thereafter, Hurricane Andrew struck resulting in millions of dollars of damage to property reinsured by General Security.

General Security made payments to Capital through January 11, 1993 for damage as a result of the hurricane, but then ceased making payments and filed the instant law suit in April 1993 seeking rescission based on claims of fraud in the inducement and breach of the "duty of utmost good faith." Capital filed an answer to the complaint and asserted counter-claims seeking compensatory and consequential damages for failing to make payments under the reinsurance agreement and for punitive damages. Capital also impleaded California Reinsurance Management Corp., an agent of General Security, as a counterclaim-defendant. All of the defendants excluding Capital filed a motion to dismiss which was denied by Justice Sherman by order dated December 15, 1993.

The subject reinsurance agreement contained a clause that provided:

As a condition precedent to any right of action hereunder, any dispute arising out of or related to the interpretation of this Agreement or the rights of either party with respect to any transaction involved, whether arising before or after the termination of the Agreement, shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire..." (Agreement Article XIII(a).

The parties do not dispute the fact that this "matter involves interstate commerce and is thus governed by the Federal Arbitration Act ("FAA") [19 USC 1-16]. "Once a dispute is covered by the Act, federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability." [Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1211 (2nd Cir. 1972)].

"'The issue of arbitrability, i.e., whether a particular dispute is covered by an arbitration clause, being a question of interpretation and construction'" is governed by federal law" (Coenen, supra at 1212). Accordingly, the dispute in this case is governed by federal and not state law.

General Security contends that because there was no intent to include claims of fraud in the inducement in the provision for arbitration, it cannot be compelled to arbitrate the dispute. Capital, on the other hand, contends that a claim of fraud in the inducement falls within the scope of the arbitration clause at issue.

"[Q]uestions of arbitrability must be addressed with a healthy

regard for the federal policy favoring arbitration... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability" (Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983)]. The FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate" [Id. at 25, n. 32]. "[L]anguage excluding certain disputes from arbitration must be 'clear' and unambiguous' or 'unmistakenly clear' and...arbitration should be ordered 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute'" [Wire Service Guild v. United Press International, 623 F.2d 257, 260 (2nd Cir. 1980)]. The federal policy favoring arbitration requires that arbitration clauses be construed as broadly as possible [S.A. Mineracao Da Trindade-Samitri v. Utah International, Inc., 745 F.2d 190 (1984)].

In Prima Paint Corporation v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), the court unequivocally stated that (pp. 403-404):

"If the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally."

The Second Circuit following the lead of the United States Supreme Court in Prima Paint, supra, has held that "[un]less excluded, claims of fraud in the inducement of a contract are arbitrable" (S.A. Mineracao, supra, at p. 195). See also Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840 (2nd Cir. 1987).

General Security's claim is that it was fraudulently induced to enter the reinsurance agreement and not that it was fraudulently induced to include the provision to arbitrate. Therefore, assuming the claim of fraud of the inducement falls within the scope of the arbitration agreement, it is properly a question for the arbitrators and not the court.

Here claims of fraud in the inducement are not specifically excluded from arbitration and no documentary evidence was provided as to the parties' intent with regard to whether such claims should be included or excluded from arbitration. The only argument made by General Security is that co-defendant Southern Underwriters, Inc. and Capital admitted their intent not to include fraud in the inducement claims in the arbitration clause in litigation in Florida involving other parties. The doctrine of judicial estoppel or estoppel against inconsistent positions is not available to General Security because Southern and Capital did not prevail in the Florida litigation. Judicial estoppel generally is applied where a party to an action has secured judgment in its favor by adopting a certain position in another action [Anonymous v. Anonymous, 137 A.D.2d 739 (1987); Hinman Straub, Pigors & Manning P.C. v. Broder, 124 A.D.2d 392 (1986)]. Thus this court must look to the arbitration clause itself to determine whether claims of fraud in the inducement fall within the range of disputes subject to arbitration.

"[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability"

In support of its position that the fraud in the inducement claim in this matter is not subject to arbitration, General Security relies on in re Kinoshita & Co., 287 F.2d 951 (2nd Cir. 1961), where the Second Circuit held that a fraud in the inducement claim was not within the scope of the arbitration agreement of the parties. However, the holding in that case has been specifically limited to the precise wording of the clause in issue therein by both Genesco, supra and S.A. Mineracao, supra. In S.A. Mineracao the court stated (p. 194):

"We decline to overrule in re Kinoshita, despite its inconsistency with federal policy favoring arbitration, particularly in international business disputes, because we are concerned that contracting parties may have (in theory at least) relied on that case in their formulation of an arbitration provision. We see no reason, however, why we may not continue Kinoshita to its precise facts. We are confident that the parties who have actually relied on Kinoshita in an attempt to formulate a narrow arbitration provision, have adopted the exact language of the arbitration provision involved in Kinoshita. The provision involved in Kinoshita required arbitration of 'any dispute or difference arising under' the agreement. Thus, to ensure that an arbitration clause is narrowly interpreted contracting parties must use the foregoing phrase or its equivalent, although the better course, obviously, would be to specify exactly which claims are and are not arbitrable."

In S.A. Mineracao the court found the phrase "any question or dispute arising or occurring under" sufficiently different from that used in Kinoshita so as to make the holding in that case inapplicable.

In Genesco, supra, the Second Circuit again limited Kinoshita. The arbitration clause there required arbitration or "all claims and disputes of whatever nature arising under this contract." The court concluded that the phrase "of whatever nature" indicated the parties intent to submit all claims and disputes arising under the contract to arbitration and thus sufficiently broad to encompass the fraud claims. The Second Circuit while recognizing that they were once again invited to overrule Kinoshita declined to do so noting that because "the instant clause is distinguishable from the Kinoshita clause, we need not discuss the continued viability of Kinoshita," but did observe that Kinoshita was inconsistent with the federal policy favoring arbitration (81 5 F.2d at 854, ftnt. 6).

In Meadows Indemnity Co. v. Baccala & Shoop Ins., 760 F. Supp. 1036 (E.D.N.Y.) 1991), the court, after thoroughly analyzing Kinoshita and its progeny, found that claims of fraud in the inducement did fall within the scope of the arbitration agreements at issue. The Meadows case also involved claims arising out of contracts for reinsurance, and concerned two different arbitration clauses in thirty-four different contracts. The court found the clause which required arbitration of "any dispute...either before or after termination of this contract, with reference to the interpretation of this contract or the rights of either party with respect to any transactions under this contract" different and broader than the clause in Kinoshita (p. 1044). The other contracts required arbitration of "any dispute arising out of" the contract. With regard to those contracts, the court found that clause was broader than the clause in Kinoshita which provided for arbitration of "any dispute or difference...arising under" the agreement [pp. 1044-1045]. A

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appointed arbitrator. Under the Canons of Ethics of the American Arbitration Association and American Bar Association for Arbitrators in Commercial Disputes, which admittedly are advisory only, a non-neutral party-appointed arbitrator may be predisposed towards the appointing party. A party-appointed arbitrator must still act in good faith and with integrity and fairness in all other respects. Party-appointed arbitrators must disclose to all parties and the other arbitrators all interests and relationships that a neutral arbitrator must disclose. However, non-neutral arbitrators need not disclose as much detailed information as a neutral arbitrator, and are not obligated to withdraw if requested to do so by the non-appointing party.

The only case that has cast doubt on the practice of meeting with a party appointed arbitrator to discuss the merits of an arbitration was *Metropolitan Property & Casualty Insurance Co.* v. *J.C. Penny Casualty Insurance Co.*, 780 F. Supp. 885 (D. Conn 1991). In that case, the court determined whether a case should be remanded to the state Court because joinder of the challenged arbitrator would destroy diversity. The court stated that there could be a claim against the arbitrator because a party-appointed arbitrator is not excused from acting in a fair, honest, and good faith manner. The court criticized the conduct of the party-appointed arbitrator and suggested that it may be a ground for disqualification.

In another case, *Barcon Associates Inc.* v. *Tri-County Asphalt Corp.*, 430 A.2d 214 (N.J. 1981), the New Jersey Supreme Court observed that state law drew no distinction between neutral and party-appointed arbitrators and even the party-appointed arbitrators must be non-partisan in deciding the case.

On one hand, a party-appointed arbitrator must be "fair" and "impartial," but on the other hand he or she can be predisposed toward the appointing party. These rules seem to be in conflict.

It might be claimed that recent experience exhibits a high percentage of unanimous awards. Unanimous decisions, however, do not mean that party-appointed arbitrators are not acting as advocates. Rather, in many cases a unanimous award is the result of a compromise between two party-appointed arbitrators who act as settlement negotiators for third respective parties. The parties usually have attempted settlement prior to the arbitration and want the arbitration panel to give them a decision, not impose a compromise settlement. Of course, there are cases where reasonable minds cannot differ and party-appointed arbitrators vote against their parties' positions. However, it is in the close and difficult cases where three decisionmakers are most needed, rather than two advocates and one decisionmaker.

I would like to propose the adoption of neutral panels for reinsurance arbitrations. Neutral panels are used in arbitrations in other industries quite effectively. A neutral panel provides three decisionmakers who can decide the matter without concern about allegiance to the appointing party. Elimination of the party-appointed arbitrator would also simplify appointment of the third arbitrator. The third arbitrator would not be chosen by the party-appointed arbitrators based upon a lot where each side submits its own candidates and the ultimate winner is the result of a coin toss.

While it is not difficult to theorize panels of neutral arbitrators as a desirable alternative to the current system of reinsurance arbitration, implementation of such a system would require institutional change. First, it requires a list from which such a panel can be chosen. Prior communications would not be permitted with any of the persons on the list.

A list of qualified arbitrators cannot exist unless there is someone — an institution or organization — to create and maintain the list. The Reinsurance Association of America maintains a list of arbitrators, which includes some information about the arbitrator's background and experience. ARIAS•U.S. also intends to create a list of arbitrators and certify arbitrators after training as its counterpart in the United Kingdom has done. Maintaining a list of certified arbitrators would not only assure neutrality, but also indicate that the arbitrators have at least participated in a minimal amount of training on how to conduct a reinsurance arbitration. The list would make parties aware of the background and experience of potential arbitrators in both the insurance/reinsurance business and their arbitration experience.

On one hand, a party-appointed arbitrator must be "fair" and "impartial," but on the other hand he or she can be predisposed toward the appointing party. These rules seem to be in conflict.

Having a list, of course, is not enough. A selection system must be devised to choose a panel from the list. The American Arbitration Association's rules of commercial arbitration provide a model for how such a panel could be chosen. Under Rule 13 of the AAA Commercial Arbitration Rules, the parties are provided with a list of arbitrators are permitted to strike names from that list until three remain. If the parties fail to agree, the AAA makes the selection. The final candidates, of course, must make the required disclosures of any relationships with parties and counsel, which may subject them to disqualification. The result of application of this rule is that a neutral panel is selected to proceed with the arbitration. In cases below a certain monetary threshold, parties may wish to proceed in a more cost efficient manner and select a single neutral arbitrator to decide the dispute.

B. Reasoned Awards

Another suggestion for improving the overall satisfaction level of the arbitration process is to require that the award be a reasoned one. That is, the award should set forth the reasons for the panel's ruling. Why do the parties care about a reason for the decision when they have proceeded to arbitrate simply to obtain a result? The answer is that parties wish to know why the result has occurred. It is difficult, after much briefing and argument of serious issues, to accept an award that simply states in one line an amount that is owed. This is particularly so when that amount cannot be tied to any rational basis in the contract or the testimony, documents, or evidence in the case. Again, the tendency of some panels to achieve a compromise resolution in

the form of a forced settlement would lead them to express the basis for their award. This is not to say that there are not cases where there are grey areas and a panel must fashion relief that essentially turns out to be a compromise. But even in those cases, the panel can explain the reasons why it has reached a particular result. Those reasons should be logical. A reasoned award may also help guide the parties in their future relations.

Two objections have been asserted against reasoned awards. First, any discussion of the basis for the award might make a motion to vacate the award more likely. The theory here is that having said something, the panel will give someone something to attack. This logic is self-defeating. It essentially leads to the proposition that the best decision is simply a number between zero and the amount demanded. But that is not what the parties have bargained for. They have bargained for a process which reaches a comprehensible decision.

Under the case law, arbitration decisions are almost impossible to set aside, even on the basis of lack of logic or misconstruction of the facts or law. The case reporters are replete with examples of decisions where courts have upheld arbitration awards without examining the basis in fact of in law for the arbitration panel's decision. Therefore, there should be little concern that reasoned decisions are more amenable to being vacated or modified.

Another objection raised for not revealing the basis of the award is that parties may try to use awards for precedential value. It is clear, however, that one panel is not bound to follow the decision of another panel, certainly not one which involved completely different parties.

C. Conclusion

The purpose of this article is not to criticize the existing arbitral process. ON the contrary, the modes suggestions described herein are intended to improve the level of confidence and satisfaction in the aribitral process. This article is intended to provide a stimulus for discussion and debate as to whether the arbitral process can be improved. ▲

Mr. Nonna is a partner in New York based Werner & Kennedy.

Pan Atlantic Insurance

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The majority of the Law Lords rejected the "decisive influence" test and, in doing so, found that the words in section 18(2) denote no more than an effect on the mind of the insurer in weighing up the risk. The subsection does not require that the circumstance in question should have a decisive influence on the judgment of the insurer. The court did not accept PAICO's argument that the expression calls for the disclosure only of such circumstances as would, if disclosed to the hypothetical prudent underwriter, have caused him to decline the risk or charge an increased premium. "Influence the mind" was found not to be the same as "change the mind".

On the second question, i.e. whether or not material misrepresentation or non-disclosure was sufficient to enable the underwriter to avoid the policy or whether inducement was a necessary element, the House of Lords found that a material misrepresentation will only entitle the insurer to avoid the policy if it induced the making of the contract.

In short, the answers provided by the House of Lords to the two issues identified earlier, are:

1. a circumstance may be material even though a full and accurate disclosure of it would not in itself have had a decisive effect on the prudent underwriter's decision whether to accept the risk and, if so, at what premium; and

2. if the misrepresentation or non-disclosure of a material fact did not in fact induce the making of the contract, the underwriter is not entitled to rely upon it as a ground for avoiding the contract.

Lord Mustill, who gave the leading judgment in the House of Lords, concluded his decision by stating that even though the propositions do not go as far as several critics of the CTI -v- Oceanus2 case would wish, they do, however, "maintain the integrity of the principle that insurance requires the utmost good faith whilst avoiding the consequences" which were, in his mind, unacceptable, "of upholding Pine Top's arguments in full."

Turning to the facts, as regards the first presentation (i.e., the short record) by the broker, the House of Lords found that broker's conduct "scarcely seemed redolent of the utmost good faith required by the Act or of the fair representation required in these cases. As, however, an argument of waiver would be unanswerable, the House of Lords did not disturb the decision of the court at first instance in relation to this issue.

With respect to the second presentation (i.e., the updated statistics by the broker, the House of Lords upheld the Court of Appeal's decision that the misrepresentation with regard to the 1981 statistics was material thus entitling the insurers to avoid the contract.

We hope that this letter provides a useful summary of the judgment in a matter that has had the insurance world waiting for quite some time.

NOTES:

1 The Act is equally applicable to non-Marine contracts of insurance and reinsurance.

2 The previous leading authority on what constitutes a material circumstance. ▲

Supreme Court Arbitration

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similar conclusion is appropriate here, the language in Kinoshita being more limiting than the language of the arbitration clause in the present case.

Thus, mindful of the strong federal policy in favor of arbitration and the limitations placed on Kinoshita, this court finds that the arbitration clause at issue is broad enough to encompass claims of fraud in the inducement.

The next issue confronted by the court is whether Capital has waived its right to arbitrate. "Any examination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring arbitration for dispute resolution." [Rush v. Oppenheimer, 779 F.2d 885, 887 (2nd Cir. 1985)]. Given this dominant federal policy favoring arbitration, waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated." [Id. at p. 887.] Nevertheless, "litigation of substantial issues going to the merits may constitute a waiver of arbitration" [Sweater Bee By Banff, Ltd. v. Manhattan Industries, Inc., 754 F.2d 457, 461 (2nd Cir.)] ▲

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Charter Membership Application

Limited to the first 200 members

ARIAS•U.S. is a not-for-profit corporation organized principally as an educational society dedicated to improving reinsurance and arbitration panels and procedures. The Society provides education for arbitrators, attorneys, insurers and reinsurers in practices and procedures which will improve the arbitration of commercial disputes. The Society, through seminars and publications, seeks to make the arbitration process meet the needs of today's insurance/reinsurance marketplace by:

- Training and certifying individuals qualified to serve as arbitrators and/or umpires by virtue of their experience, good character and participation at ARIAS•U.S. sponsored training sessions;
- Empowering its members to access certified arbitrators/umpires and to provide input into developing efficient economical and just methods of arbitration; and
- Providing model arbitration clauses and rules of arbitration.

Membership is open to law firms, corporations and individuals interested in helping to achieve the goals of the Society.

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Initiation Fee:	$500.00	$1,500.00
Annual Dues:	$250.00	$750.00
Total	$750.00 ☐	$2,250.00 ☐

Amount Enclosed: $_____

Return this application with check for Initial Fee and Annual Dues to:

ARIAS•U.S. Membership Committee
Stephen H. Acunto
Chase Communications
P.O. Box 9001 Mount Vernon, NY 10552