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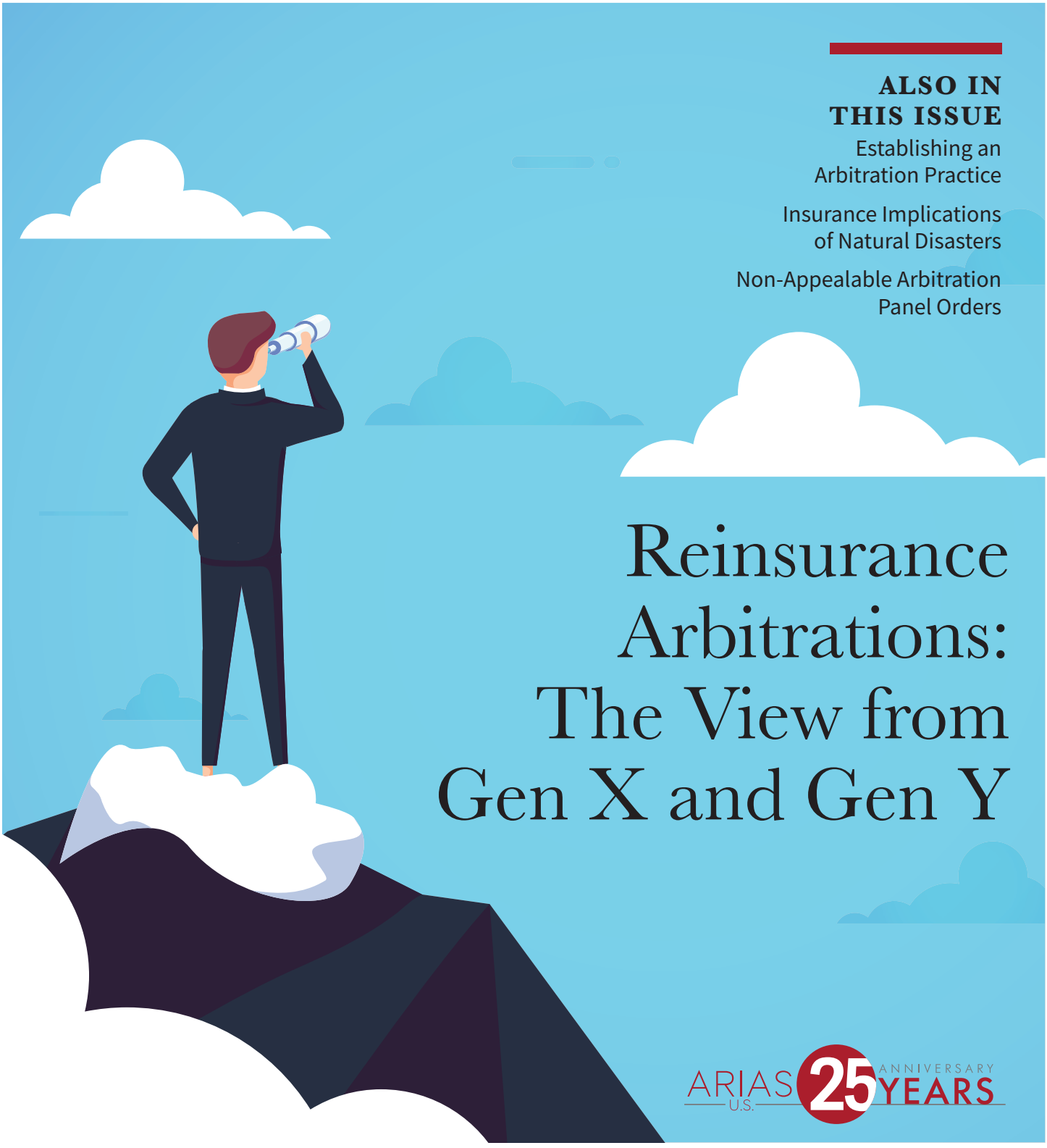

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# Reinsurance Arbitrations: The View from Gen X and Gen Y

ARIAS U.S. 25 ANNIVERSARY YEARS

Q3 • 2019

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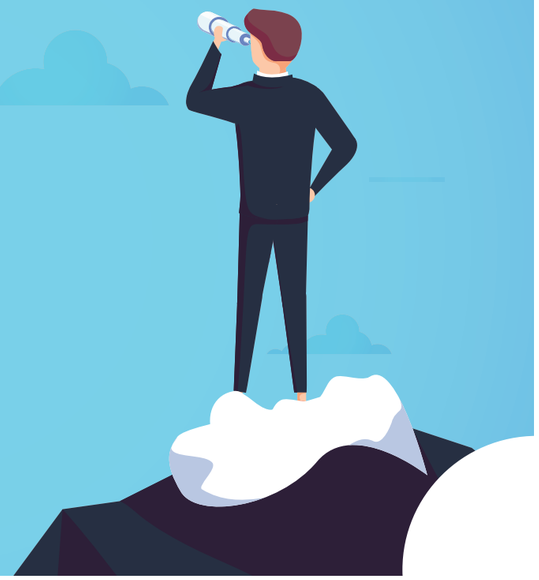




EDITORIAL POLICY — ARIAS • U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution. All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include a brief biographical statement and a portrait style photograph in electronic form. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. In the case of authors wishing to submit more lengthy articles, the Quarterly may require either a summary or an abridged version, which will be published in our hardcopy edition, with the entire article available online. Alternatively, the Quarterly may elect to publish as much of the article as can be contained in 5 printed pages, in which case the entire article will also be available on line. Manuscripts should be submitted as email attachments. Material accepted for publication becomes the property of ARIAS • U.S. No compensation is paid for published articles. Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.



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Our 25th anniversary celebration continues with two symposia in this issue and more coming in the fourth quarter.

For this issue, I had the pleasure of moderating a discussion consisting of several up-and-coming ARIAS members. This symposium brought together Jenna Buda from Allstate Insurance, Suman Chakraborty from Squire Patton Boggs (US) LLP, Sarah Gordon from Steptoe & Johnson LLP, and Eileen Sorabella from Arch Capital Services for a conversation about how they became involved in reinsurance arbitrations, who influenced them, what they think about the state of reinsurance arbitration, and how they see the future of ARIAS. Their comments are important given that Generation X and Generation Y will be the new leaders of this organization.

We also have another terrific roundtable symposium article featuring some of our certified arbitrators. Dee Dee Derrig from Willkie Farr & Gallagher LLP and Dan FitzMaurice from Day Pitney LLP moderated this roundtable, with arbitrators Elaine Caprio from Caprio Consulting and Coaching LLC, John Dore from Sheridan Ridge Advisers LLC, Jonathan Rosen from Arbitration, Mediation and Expert Witness Services, and Jamie Scrimgeour from Travelers Companies sharing tips on establishing and maintaining a successful arbitration practice.

Mark A. Bradford and Damon N. Vocke from Duane Morris LLP give us a fine article about subrogation following natural catastrophes. This article is very timely considering the issues arising out of the recent California wildfires. The article is titled "The Hunt for Yield: Subrogation and Related Implications Following Natural Catastrophes."

We always encourage those who present programs at any ARIAS event to turn them into an article for the *Quarterly*. That's exactly what Michele Jacobson, Beth Clark and Talona Holbert from Stroock & Stroock & Lavan LLP did with their paper from the recent spring conference rapid-fire session on the power of arbitrators to determine gateway issues. For a comprehensive review of the law on gateway issues in light of a recent Supreme Court decision, I recommend you read their article, "Arbitrability: The Implications of *Henry Schein v. Archer and White Sales, Inc.*, 139 S.CT. 524 (2019) for the Reinsurance Industry."

Arbitrator Bob Hall, a prolific author, has written an interesting article uncovering what the courts think about an arbitration clause with non-appealability language. Spoiler alert: Bob concludes that the cases seem consistent in protecting the integrity of the arbitration process, but allowing the merits of the issues to be decided by arbitrators.

From the International Committee, we have a report on the International Arbitration Form (IAF) that was created by the committee under the leadership of co-chairs Jonathan Sacher of Bryan Cave Leighton Paisner and Edward Lenci of Hinshaw & Culbertson LLP. The IAF was approved in March 2019 by the ARIAS Board of Directors for use and is published in this issue after the report. The IAF and the report will also be posted on the ARIAS•U.S. website (arias-us.org).

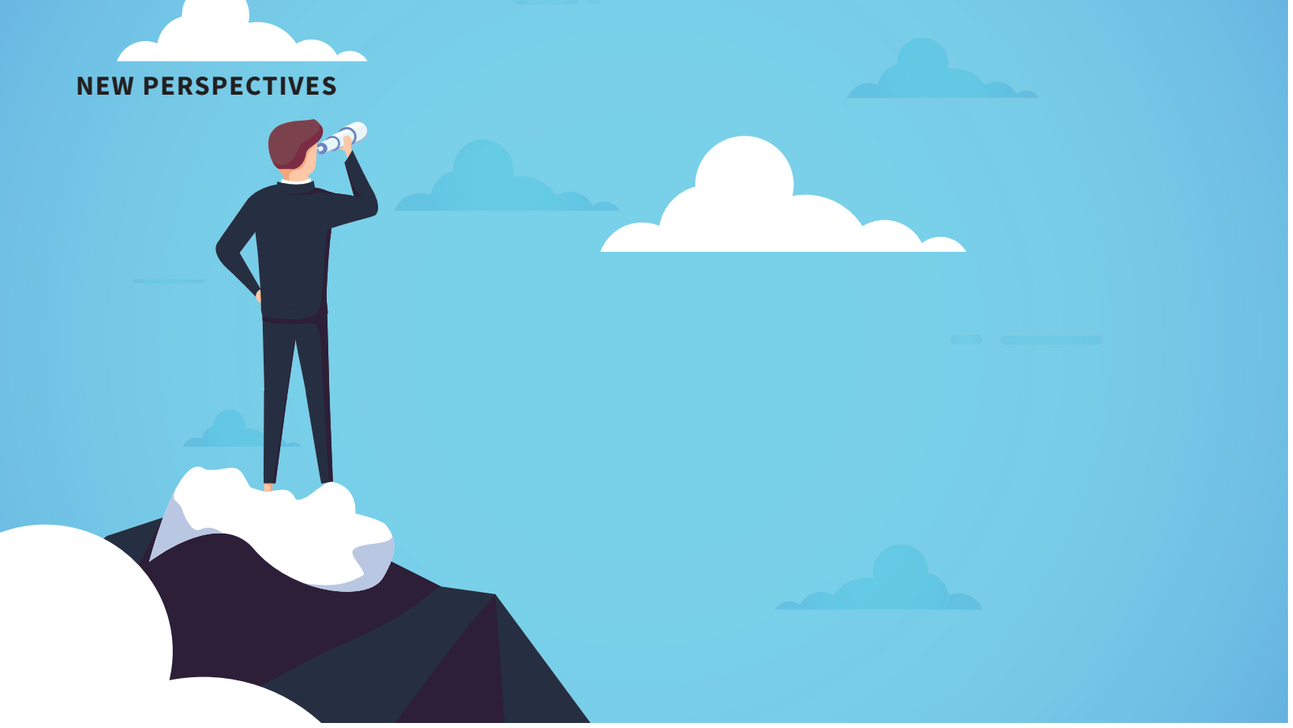
Also from Jonathan Sacher and the International Committee is an article about the affiliation between ARIAS•U.S. and AIDA. Jonathan explains the affiliation and why future collaboration is in the best interest of ARIAS•U.S.

Our Technology Committee continues its torrid pace of providing useful technology-related articles. Following up on the Tech Corner article in the Fourth Quarter 2018 issue, this issue brings us David Winters and Andy Foreman from Porter Wright Morris & Arthur LLP and their article, "Increase Your Tech IQ (Part Two)." The authors explain some additional tech terms that are associated with electronic discovery.

Our fall conference is again being held at the Marriott Brooklyn Bridge. By the time you read this issue, the program should be set and the conference almost upon us. We surely can look forward to another great experience. Don't forget to look back at last year's issues of the *Quarterly* for helpful articles about Brooklyn.

As always, we encourage you to submit articles. If you were on a Spring Conference panel, turn your hard work into an article just like Michele, Beth and Talona did. If you lead a committee, write something up about what your committee is doing, as the International Committee did for this issue. If you've written a blog post or client alert, turn it into an article for the *Quarterly*. We welcome your submissions.

**Larry P. Schiffer**
Editor



# Reinsurance Arbitrations: The View from Gen X and Gen Y

**Moderated by Larry P. Schiffer**

**Schiffer:** Welcome, everybody. I appreciate all of you being here today. We have Suman Chakraborty from Squire Patton Boggs, Jenna Buda from Allstate, Sarah Gordon from Steptoe, and Eileen Sorabella from Arch.

We're going to have what I hope to be a good discussion about yourselves and about the insurance and reinsurance arbitration process. So why don't we start off with just a brief discussion of how you got involved in reinsurance disputes.

**Sorabella:** I got involved in reinsurance disputes when I was a summer associate and then a first-year associate at LeBoeuf, Lamb. I wanted to work in the Litigation Department. There were basically two litigation areas in the firm those days: one was the reinsurance and insurance arbitration and litigation practice, and the other area was the securities litigation practice. It quickly became clear to me that if I went into the securities practice, I would likely be reviewing the same documents six years down the road that I would be reviewing in my first year—or maybe in charge of that document review.

I took a look at the insurance and reinsurance dispute practice, and I really liked the people in that group. I saw that you could really cut your teeth as a litigator early on. You could see a dispute from beginning to end within a relatively short period of time compared to litigation. You could really get a lot of experience in a relatively short period of time.

**Buda:** I started my career as a litigator, but did direct insurance defense. My experience at that time in the arbitration arena was limited to mandatory arbitration and AAA arbitration. About three years into my career, I transitioned to the Chicago office of what was then Sedgwick, Detert, Moran & Arnold and started doing reinsurance and insurance coverage, counseling, and monitoring work for Bermuda, for various European insurers and reinsurers, but primarily in the healthcare space.



While we had reinsurance disputes, many of those were in litigation as opposed to arbitration. And when we were arbitrating disputes, it was a London arbitration subject to the London Court of International Arbitration using English Model Law, very different than what we see in domestic arbitration. I spent about 10 years in that space, primarily representing foreign insurers and reinsurers.

Then, about five and a half years ago, I came to Allstate and made a transition to property and casualty work. That was my first introduction to ARIAS and the ARIAS rules. The transition has been interesting. I've been in the reinsurance dispute arena for many years, but I'm still relatively new to the ARIAS model.

**Gordon:** I came over to Steptoe from a federal clerkship in the Eastern District of Virginia, which is affectionately known as the "rocket docket" because the cases move very, very quickly, and there's a very short period between the start and the trial. I found that that was a pretty effective and efficient way to try cases, and I felt that the lawyers really got to the heart of things a lot faster than elsewhere, from what I was hearing from friends and colleagues.

The clerkship is actually how I arrived at Steptoe. They were presenting a few cases in my courthouse, and I was observing Steptoe lawyers in practice, and I thought, I want to work there, because they're making very complicated matters simple and straightforward. And they're nice, decent people to work with, especially as a clerk. So I came over to Steptoe.

Within maybe two weeks of my starting, there was a large reinsurance arbitration that was just getting under way, with several hundred million dollars in dispute. They needed some help on the case, and I got involved. And similar to what Eileen was saying, it really was fascinating to me and exciting to me that we would be able to try this big and complicated matter within about a year.

We were in a hearing within about a year, and it was great. I got to see the whole case from soup to nuts. It started at the stage where there was demand for arbitration, and it finished with a multi-week hearing and a big team. As a young associate, I loved being able to see every aspect of the case, including expert discovery—which, if you are working on matters in court, you may not see for many, many years in the process.

Shortly thereafter, I had a series of other reinsurance arbitrations, all of a different nature. Each one left me with the same feeling of satisfaction of being able to help companies resolve their dispute in a forum where the decision makers had the necessary expertise, and in a fashion where the dispute was resolved in a timely manner. And I stayed involved in reinsurance for that reason.

It was also fun, as a trial lawyer, to get a lot of stand-up experience and to be able to be creative, which you're not always able to do under the constraints of the court system. But in arbitration, you can exercise some more creative theories and get a lot of stand-up experience, which is very good as a young lawyer. So that's how I became involved, and why I stayed involved.

**Chakraborty:** Well, like Eileen, I was a summer associate at LeBoeuf, then a first-year associate, and then started my career there. I was in the Washington office of LeBoeuf, and at the time, you were either going to be an insurance lawyer or an energy lawyer. I thought I was going to be an energy lawyer. I was more interested in how the government worked. We had a great energy regulatory practice, and I thought that's where my interests were going to lie.

But my first day at work ended up being 9/11, and obviously, given our role in the insurance industry, there were a lot of cases and work coming into the firm in those first few weeks. They needed people to help, and so, as a first-year associate, I took every assignment that came my way. Almost all of those were insurance and reinsurance assignments related to 9/11 lawsuits. So that's what really started my career in the insurance field—certainly not a pleasant reason to start, but once I started working in that area, especially in the Washington office where there were very few associates compared to some of our bigger offices, you got a lot of experience really, really quickly.

I was lucky to have had some great mentors in our Washington office. I happened to sit next to one of the reinsurance partners, and she gave me more and more work as the years went on. So it didn't take long for me to become a reinsurance and insurance specialist.

**Schiffer:** So, how did you all get involved in ARIAS? Jenna already spoke about her coming to Allstate and starting to learn about ARIAS.

**Gordon:** Well, Steptoe has had a long-standing membership in ARIAS, and some of the colleagues I worked with on my early matters were in-

volved, so it was always something in my consciousness. But I became an active member through a client who said, Sarah does a lot of work on our cases, and it would make sense to see her here, and it would be a good experience. And that's how I became an attendee at the conferences and a more active member.

As I've been in the organization for some time now, I have found that I really admire many of the individuals I've met, and I've found a lot of excellent strategic thinkers with whom I have wanted to collaborate. And I liked coming to the meetings, and I liked just sitting on the panels and being a part of the community. So I've continued to increase my involvement over the years.

**Sorabella:** I remember the first ARIAS event I went to was the fall conference cocktail party at the New York Hilton about 19 years ago. I wasn't attending the conference, but the associates in our group were invited to attend the cocktail party. I was a first-year associate, and to be quite honest it did give me pause to walk into the room and see that there were very, very few women in the room. And I thought, wow, am I getting myself into an uphill battle in this industry? Fortunately, I didn't spend too much time worrying about that.

From there, I started writing articles and attending conferences and getting to know others in the organization by working on arbitrations. I met many friends and colleagues in the industry working on disputes in the early days—some of them were even once opposing counsel.

**Chakraborty:** Because LeBoeuf was so involved in ARIAS when I started, everyone wanted to go. So if you were an associate, you were not going to go—there were too many partners who had signed up for it. I think we had six slots. And going to ARIAS, particularly the spring conference where you could get a mini-vacation, was like the golden goose that you were trying to reach. But it took a while to get involved.

I don't think I started going to ARIAS conferences until I was a senior associate at Dewey LeBoeuf, when it was finally my turn in the rotation to take one of those slots. It was one of the New York conferences; I wasn't lucky enough to go to a spring conference that early. Once I got involved, it became pretty clear that it was a centerpiece for our industry, that it was hard to be a respected and involved practitioner in the reinsurance field if you were not an active member of ARIAS.

I was also fortunate to have had many mentors and partners who have been very active in the organization. They always created opportunities for us to be even more involved, including running sessions, both general and breakout sessions. Now it's just become an integral part of my calendar during the year.

**Sorabella:** Suman's comments bring to mind the networking aspect of ARIAS. When I really began trying to build business for myself and promote my firm's brand, I became much more involved in ARIAS. Going to conferences and being involved in the organization gave me the opportunity to build relationships with people upon which I would, hopefully, build business.

**Buda:** Like Suman, I think that there was priority given to certain people, even here at Allstate, to attend ARIAS conferences. I didn't attend my first fall conference until I assumed my current position, which was a few years after being at Allstate. And I, too, appreciated the opportunity to network and to learn from some of my peers and colleagues who had more experience with the ARIAS platform, and more experience in different areas of insurance and reinsurance than I had prior to coming to Allstate.

Additionally, I think Sarah might have referenced the community, and Eileen talked about women's networking. The fact that we've been able to build communities and mentoring circles out of the ARIAS platform has really been meaningful to me in terms of networking. Because I'm not in New York, I don't often get to network with a lot of people in our industry outside of Chicago.

And I also appreciated—and I can thank Larry for this—the opportunity to present some continuing education through ARIAS and to educate our industry on non-dispute work. I do a lot of work with reinsurance transactions, and I've had some opportunities to discuss those areas with some of my peers, and I've been very grateful for the opportunity to do that.

**Schiffer:** Any of you have thoughts on how we can get younger or newer members of either firms or companies to attend an ARIAS conference or an event where, otherwise, they're somewhat limited by budgetary or numerical restraints?

**Sorabella:** The easy answer is to give them a discount. Aside from that, one of the things that we have tried to do in the Women's Networking Group is to hold events outside of the conference schedule that are free to attend. We try to target people in more junior roles or who are newer to the organization and have not been involved before, perhaps for the reasons we just spoke about, because it's just hard to get people to attend the conferences given the cost. If we create opportunities to engage with ARIAS outside of the traditional conference structure, I think we have a better chance of bringing the next generation into the fold.

**Buda:** I think the organization has a good start into the virtual learning space in doing continuing legal education and other education online or via webinar. But making a more robust program there, and potentially publicizing it outside of the organization—maybe in other industry publications, or just asking people to share it with their network—might be a good way, a free and easy way, to introduce some people to the organization.

The education presentations are always top notch, I think. And if you get someone introduced to the organization by giving them continuing legal education, which is always something that is highly desired by attorneys in particular, that might be a good way to give them an introduction to the organization and give them some information about the organization. Then hopefully they can attend a conference and do more face-to-face networking with others in the organization. But I think continuing to have a robust virtual presence is something that will be appealing to a younger generation.

**Chakraborty:** The other way is to figure out a way to give younger members of our industry and our community access to speaking slots and presentation slots. I think one of the challenging things, when you go to ARIAS for the first time or if you're still early in your career, is that you're in a room with people who have known each other for decades, who have served on panels together, and who have argued in front of arbitrators. It feels hard to break in. It feels hard to sit in a room or be at a cocktail party where everyone seems to know each other and are you new to the organization. You feel like you don't know anyone except the people from your firm or your company.

> "And I thought, wow, am I getting myself into an uphill battle in this industry?"
>
> —*Eileen Sorabella*

So one of the ways that helps get around that problem is to create opportunities for younger members to be moderators at breakout sessions, to participate in the arbitrator training workshops and in stand-alone CLEs that we run. Get them in front of the people that they are trying to meet and be introduced to. Because, otherwise, it's really hard to come into that space and feel like you can reach out and develop relationships when everyone seems to know each other already.

**Gordon:** I echo what everyone else has said. And one thing I think that people really like about ARIAS is that it's twice a year, there's a set conference, and you're going to see the same group of people at a known time. But, as Suman was referencing, it can create a problem or barrier to entry for new people because they feel like they're trying to break into a circle that already exists. There are more routine and less expensive things that can be done. A monthly happy hour or quarterly happy hour or that kind of thing would go a long way, because seeing people throughout the year and at similar times can help build those relationships so it doesn't feel daunting the first time you're coming to a meeting. And, as Eileen said, there's the cost aspect of it, which is obviously an avenue to consider as well.

**Chakraborty:** I think one thing that happens absolutely in private practice is law firms will pay if their associates have an opportunity for a speaking role, whether that means sending them to a training or sending them to a workshop. If associates can say, hey, I need to go to this conference because I'm going to be in front of a room full of clients, that will convince firms to pay for them to go.

**Schiffer:** These were all great points and important ideas, so thank you for that. What I want to turn to next is who you consider your mentors or role models in the insurance and reinsurance dispute space.

**Gordon:** For me, internally, it's John Jacobus, who is the first person I worked with on a reinsurance matter and with whom I've worked for many

years since. John is an excellent lawyer and a great practitioner, but he also taught me all of the things you can't necessarily pick up from law school.

He taught me how to mentor and train the people with whom you work. He also taught me the importance of providing a lot of good opportunities early on, which he did for me. He taught me how to run a big team, and how to be fair and efficient in what you do. And he taught me how not to lose yourself in the process of your work.

Externally, I've got to say the ARIAS community. I find it to be a really excellent concentration of smart, interesting women lawyers, in-house and outside. And I—there are just too many people to mention that I admire and have learned from in the course of my involvement with ARIAS.

**Sorabella:** Sarah, I would agree with that now. It's a different-looking organization than it was 20 years ago.

**Gordon:** I think it's a particularly good group in the ARIAS community.

**Sorabella:** It sure is. As for mentors, I have had many over the years. As a young associate at LeBoeuf, I was looking to the partners and the more senior associates with whom I worked. I got a lot of guidance, and it was an incredible team of people. And I think the education that I got working with that team was really priceless. Certainly, Mike Knoerzer was someone who I worked with for many years at LeBoeuf and then at Clyde's and I looked to him for guidance at just about every stage.

But I would say that, like Sarah, I kind of view mentorship as something broader than just looking to the more senior people in your organization. Sometimes mentors can be people at your level or people who are coming up behind you as well.

Mentors also can be external to your organization. When I transitioned to an in-house role a couple of years ago, I found several mentors in women I had known through ARIAS. People like Cindy Koehler, Betty Mullins, Stacy Schwartz, Ann Field—I'm certain I'm forgetting someone—all gave me invaluable advice about making that transition. So you can look around, not only internally but within the larger ARIAS community, for people who can contribute to your career and your professional development.

**Buda:** Like Eileen and Sarah, I, too, have had so many mentors over the course of my career who have lifted me up and allowed me to reach goals and achieve things in my career that I probably wouldn't have been able to on my own. But, in this space, I think my most notable mentor started out internal and is now external, and that is Dee Dee Derrig, who serves on the ARIAS Board of Directors currently. Dee Dee was my first manager here at Allstate, and I succeeded her after her retirement when I assumed my current position.

As I mentioned, when I started at Allstate, I had arbitration experience, but I didn't have ARIAS arbitration experience. Dee Dee was a tremendous mentor in teaching me about the space, in that she came with an in-house perspective as someone who worked closely with our business partners and outside counsel on reinsurance disputes, but she also had opportunities here at Allstate to represent the company in reinsurance disputes and to arbitrate the cases directly, without engaging outside counsel.

Dee Dee came with a very holistic view of disputes, a varied view of the disputes, as I think she is a reinsurance savant. She just knows things and sees things in a way that I think not many others do. And while having that knowledge and, indeed, being incredibly talented in the space, she too, as Sarah alluded to in her relationship with John, taught me a lot about work/life balance and the kind of person you want to be when you are making your way in this industry. Also, as a female professional who has achieved great things, she truly was a role model to me, and she continues to be a very important part of both my professional life and my personal life.

So, overall, the industry and the ARIAS organization allow you to surround yourself with talented people with lots of experience, which is always helpful in your development. But in terms of a single individual, Dee Dee definitely has had a profound impact on me in my career.

**Chakraborty**: Well, in terms of my mentors at the firms I've been at, two stand out in particular. My earliest mentor in the reinsurance field was Mary Lopatto. When I was a first-year associate at LeBoeuf in Washington, I was randomly assigned to the office next to Mary. That made it very easy for her to give me assignments, so most of my work in my early career was because of Mary. She was wonderful about giving me opportunities that junior associates did not frequently get, including deposition work as a second-year associate and trial work as a third-year associate. She really gave me opportunities to be on my feet in the litigation setting that was hard to come by at a big firm.

Then John Nonna took over the role of mentor and played such an integral part of my career—in my development as a lawyer, as a reinsurance specialist, and even as a human being, because John was really more than just a mentor, he was a friend. Our team at Squire, and formerly at LeBoeuf, was like family more than anything. We were together for about 15 years.

I do want to say, though, listening to Jenna talk, that it's important to mention that I've had clients who have been mentors as well, because they teach us about this business in a way that, as outside counsel, you don't always get early in your career. I actually had the good fortune of having Dee Dee as a client when I was an associate. And when you talk to your clients and hear how they view the case, how they think about settling the case, how they value a case, and how they value their businesses, you learn so much about how to best serve your clients and how to best serve their business interest, in a way that your partner mentors can't always teach you. So I won't go through the list of my clients who played that role, but it's been an important part of my career development.

**Schiffer:** Those are all great observations and great thoughts. I want to turn to substance now, and I would be interested in each of your observations about the insurance and reinsurance arbitration process as you see it.

**Buda:** As I mentioned, my transition was from international arbitration to domestic arbitration. I started working with arbitrators at ARIAS and using ARIAS•U.S. as the appointing body for panels in our disputes here at Allstate. It was a stark contrast for me. I was used to full statements of claims and detailed witness statements, with no depositions and no direct witness testimony. So, for me, making the transition was much more of a hearkening back to my days as a litigator and seeing that an ARIAS arbitration was far more like the trials that I used to participate in when I was a younger attorney.

Confidentiality wasn't as much of a focus in our international arbitrations. Honorable engagement clauses were not common. There were a lot of things that were very different to me. The primary thing that I have loved about working with ARIAS is the available supply of industry professionals who, unlike judges and even arbitrators that I dealt with earlier in my career, are so well-versed in the practical realities of the reinsurance business. Having that knowledge, and having people who have been in my shoes, is invaluable to me.

One observation that I would make is that it isn't as efficient and economical as my past experience with arbitration was. I think that the disputes may have become a little bit more adversarial, and there might be a lot more back and forth with the panel and more motion practice on discovery disputes. So that's a little bit in contrast to what I was used to, and I think that's evolved over time. But it continues to be our preferred method for dispute resolution because of what I referenced earlier—just the robust knowledge of our party-appointed arbitrators and our umpires that are available to us. And confidentiality, obviously, is important to us.

But I think my primary observation over the last several years has been with the disputes that I have been involved in, and in speaking to my peers at other companies, is how ARIAS a

> "So, overall, the industry and the ARIAS organization allow you to surround yourself with talented people with lots of experience, which is always helpful in your development."
>
> —*Jenna Buda*

rbitration is much more like traditional litigation up until the hearing begins. So those are my observations as someone who was more of an outsider for more of my career than not.

**Gordon:** If I can echo Jenna, it becomes very much similar to litigation up until the point you go to a hearing. And then it becomes the universe that I think people tended to anticipate, where you have your panel of individuals who are experts in the insurance and reinsurance industry, and they're putting on evidence without being constrained by the rules of evidence, and you have the flexible forum of an arbitration. So I have to agree with Jenna that it mirrors litigation a lot more, as the years have gone by, than it did when I started. And it has a lot of the same flavor as litigation with discovery.

I'll reiterate that it gives lawyers a chance to be creative. And I have found in arbitration that you get a lot of common-sense practical arguments presented in a creative and interesting way, because lawyers and panels are not typically constrained by rules of evidence or other rules of procedure, and everybody has a pretty similar baseline knowledge about the industry. And I found, as a practical matter, that you can really put on a lot of evidence and exercise a lot of creativity in the process, which you don't get to do quite as much in litigation.

The thing that has surprised me the most about the arbitration process and going through it is the length of time it can often take to pick a panel, or an umpire, really. It can take quite a significant amount of time to get a panel in place. And I found that interesting because, of course, coming from litigation, you just have a judge who's been selected for you through whatever mechanism that court uses to do it.

**Chakraborty:** I have just a couple of comments about the issue of clients saying that arbitration is turning too much into litigation, traditional litigation at least, until you get to the hearing, and they're concerned about that. It's also hard to strike the right balance there.

We have some people who say the good thing about arbitration is that you're not bound by the rules of evidence, and you can be creative and really go to the practical realities of the business. And yet, the first time an arbitration panel ignores a legal issue, people get upset as well, because they want certainty in that process. I think we continue to struggle with finding that right balance, between wanting some certainty in a dispute resolution process and leaving the flexibility that arbitration is intended to create. Usually, whoever wins the arbitration is fine with the balance, and whoever loses the arbitration is not so fine with the balance.

So figuring out, as an organization, how we keep the essential flavor of arbitration—which is that we have some really knowledgeable people listening to a dispute that they understand because of their background, and they implement a real-life business solution to it, versus, I want my contract interpreted exactly as it is written as a legal matter because that's what my internal folks expect—I think we're going to continue to struggle with that.

In terms of the process going forward, I want to pick up on what Sarah just said about the umpire selection process. I think our challenge will continue to be that panel selection process, and there are a lot of issues that go into that. Part of it is the concern that we have too small a pool of arbitrators to pick from. Are we doing enough to bring in new arbitrators, so that the organization has a good roster going forward? That includes people who have a different view of the industry, because they have come up in the industry at a different time or through a different company.

I think that is such a critical part of the health of the organization going forward, so that we know that we are continuously regenerating the core of our practice: arbitrators who can resolve the issue in a way that our business clients expect them to.

**Sorabella:** I think what Suman just said about striking the right balance between arbitration that looks like litigation and arbitration that is more free-form is exactly right. Imagine a process in which a party believes the other party isn't producing documents that they should be producing, and there is no avenue to address that failure. You would have parties who would be pretty unhappy with the arbitration process. So I think, to some extent, it's necessary to have some of the aspects of traditional litigation present in the arbitration process.

Perhaps I'm overly optimistic, but I do still believe that the arbitration process is a more efficient vehicle than litigation to resolve disputes in our industry. In litigation, the substance of the dispute so often gets consumed by procedure, and so much time and attention and energy are spent on the procedural aspects of litigation, both before hearing and during. Obviously, we can't say that time and attention and energy are not spent on procedure in arbitration. But I think that if you really compare the two side by side, there is much more focus on the substance of the dispute in reinsurance arbitration than you would see if that same dispute were being resolved in a court.

**Schiffer:** I want to give you all a minute or two to let us know your thoughts on how you see the future of insurance and reinsurance arbitration, and the role of ARIAS in that process.

**Chakraborty:** I think the organization is at an important transition time right now, and the people in this symposium are part of that transition. We have people who started off as young associates or young in-house staff who are now in positions of being partners at their firms or general counsel with their companies, who are taking on a larger and larger role in the dispute resolution process, and who are going to take on a larger and larger role in ARIAS. The people who will be running ARIAS in the next few years, and for the next few years after that, are going to be different than the people who started the organization and who have nurtured it for the last couple of decades. That, in and of itself, is going to change the organization.

In part because people who are coming up in the ranks now have different backgrounds and different experiences, and have had the benefits of being raised in this industry through ARIAS, they are going to have their own views on what makes ARIAS better going forward. And I think that's a challenge for the organization. But it's also what makes the next few years and next decade exciting—that we have an ability to keep what's working really, really well, but also to come up with fresh ideas of how to keep the organization responsive to our industry.

**Sorabella:** To build on what Suman said, I agree that we're seeing a transition within ARIAS. We're trying to figure out what the role of the organization is going to be going forward. How active and empowered will the organization be to try to resolve some of the procedural issues? How involved is the organization going to be in ethical issues among members? Will we look more like the AAA or JAMS as an administrator of arbitration? Do we successfully move into areas like policyholder disputes, or do we stick to the bread and butter of what we've traditionally done? I can't predict what the outcome of all of that will be, but I think it will be interesting to see where we go from here.

> "Are we doing enough to bring in new arbitrators, so that the organization has a good roster going forward?"
>
> —*Suman Chakraborty*

**Gordon:** I agree with what's been said so far. And just taking a step back to the industry as a whole, I think the demand for legal services was down for a period, and the economics of our industry have changed significantly over the last 10 or 11 years. There's been a lot of consolidation and a shrinking of the industry, I think, in many ways.

That is going to have a knock-on effect, if it hasn't already, on the number of disputes and the number of disputes that will being arbitrated or litigated.

And I think, to the extent there are ongoing relationships between companies because they have a future or long-standing existing business, how they resolve those disputes may differ than if they're in a position of runoff or otherwise. And I think those sorts of trends in the industry as a whole are going to have an impact on ARIAS and how we resolve our disputes amongst the various constituents.

**Buda:** I want to piggyback a bit on what Sarah just said, because I think there's other things that contribute to how to view our disputes coming in front of ARIAS panels, and just kind of a decrease in the number of arbitrated and litigated disputes. For us at Allstate, there is a focus on data analytics and using past experience and analyzing data to determine whether or not to go forward with a dispute. We're not using it so much in the reinsurance dispute space, but we're using it more generally with our litigation. And I think a lot of my peers are doing the same thing and looking at decision trees and looking at whether it makes economic sense to go all the way to an arbitration panel or go all the way to trial in a case.

I think companies are relying more and more on data, and I think it's

driving their decision making and often driving their decision making to early resolution as opposed to complete arbitration or litigation. I think it will be interesting to see how that has an impact on the organization and, to Eileen's point, about whether the organization needs to pivot in a way to provide different services or stick to, as she said, its bread and butter of reinsurance disputes.

Another thing I know that we're seeing a lot of, in terms of technological advances and of our growing and changing world, is other arbitration organizations using things like online arbitration for smaller disputes. Really, the way that disputes are resolved generally is changing significantly. It will be interesting to see how the organization pivots and responds to just the way our world is changing as a whole.

**Schiffer:** Well, this has really been an interesting discussion. I'll make a couple of closing observations.

Nobody mentioned neutral arbitration and neutral panels, which I found interesting. That's certainly something that I personally hope is going to be more of a trend in the future, to take away some of the issues associated with selecting the panel and some of the other issues about credibility and interest in continuing the process. So we'll see how that goes.

I also found it interesting that we've talked about whether the organization should get into some of the other insurance-related disputes that are out there, and I think that decision has been made. I think the question is whether it actually comes to fruition. Presently, there's a strong focus on policyholder arbitration, but there are other insurance arbitration opportunities out there that, frankly, are more low-hanging fruit and clearly are in the wheelhouse of our group and our certified arbitrators—those being arbitrations between insurance companies, which can range from contribution, indemnification and allocation, and other kinds of things to disputes with TPAs and MGAs and other service providers. And I'm sure there are other things we can think of as well. So we'll see if the organization focuses somewhat on those issues, because those seem to be easier to incorporate into what the organization is doing.

I want to thank Suman, Jenna, Sarah, and Eileen for taking the time to participate in this symposium. We look forward to seeing what all of you do in the future as you move up and start leading this organization, and as your practices move forward. Thank you all very, very much.

This roundtable symposium was transcribed by Yvette Mosley of Winter Reporting, which provides court reporting services for depositions, arbitrations, meetings, hearings and conferences. The participants and ARIAS thank Winter Reporting and Ms. Mosley for the generous donation of their services. The transcript has been edited for clarity and improved readability.

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# Roundtable: Establishing and Maintaining an Arbitration Practice

**Moderated by Deidre Derrig and Dan FitzMaurice**

This year marks the 25th anniversary of the founding of ARIAS•U.S.[1] Late last year, Deidre Derrig and Dan FitzMaurice moderated a roundtable discussion among four ARIAS•U.S Certified Arbitrators with varying degrees of arbitration experience: Elaine Caprio, John Dore, Jonathan Rosen, and James Scrimgeour. An account of the roundtable discussion appears below.

**Derrig:** Why did you choose to become certified by ARIAS•U.S.?

**Caprio:** I was a company person who was in charge of managing litigation, and that included insurance and reinsurance disputes. Because of that, I was recruited to become a member of ARIAS•U.S. I joined the ARIAS•U.S. board in 2005 and was a board member for seven years. I left my employer, Liberty Mutual Insurance Company, in 2014, and only then did I decide to become certified as an arbitrator.

I believe ARIAS•U.S. is the pre-eminent organization in the United States for the training and education of reinsurance arbitrators. There are other organizations that train and certify insurance arbitrators, but ARIAS•U.S. has the niche for reinsurance arbitrators.

**Scrimgeour:** I'm like Elaine in that my background is in-house, managing arbitrations, primarily reinsurance arbitrations, for the Travelers Companies. I actually completed the arbitrator training offered by ARIAS•U.S. when I first joined Travelers in 2004, because I thought it would give me more insight into the process. I didn't choose to become certified until another 10 or 11 years later.

The main reason I chose to seek ARIAS•U.S. certification was because I thought, and still think, I am filling a need. In my day job, I'm always looking for arbitrators who fit all of the requirements in clauses mandating that the arbitrators be "active" or current employees/officers of insurance or reinsurance companies.

**Rosen:** ARIAS•U.S. is the "go-to" organization to determine who's actually arbitrating reinsurance disputes—who's

playing the game. Once I made the determination that this is a game that I'd like to play from an arbitrator's perspective, having come out of playing it from a lawyer's perspective, participating in ARIAS•U.S. was a no-brainer. You go to where people go to. And that's why I became ARIAS•U.S.-certified, because that's where people go to look for reinsurance arbitrators.

**Dore:** For me, it goes back to probably 1999. We sold our company and the new owners said, "We like you, John, but here's two years of your contract. Now go away." So a friend of mine, Dick Bakka, said, "You should go and do arbitrations, and here's this information about ARIAS•U.S." My background is more underwriting and marketing as opposed to dealing with claims or lawyers per se. That's how I started, and I just continued to do that. It's not my only activity, but it's a good part of it.

**Derrig:** As an arbitrator, why do you attend ARIAS•U.S. conferences, and how do you approach networking at the conferences?

**Rosen:** For me, the almost sole focus of an ARIAS•U.S. meeting is networking, but not networking in the sense of "hard selling" myself to people. Rather, because we live in a small, nuclear center, and it's a collegiate nucleus, it's an opportunity to actually connect with people I haven't seen for six months or might have seen in a more formal, rigorous arbitration capacity as opposed to a social capacity. It's also an opportunity to put yourself again in front of people and talk about things that are of interest—one of which is, for example, whether arbitrations have dried up. It's a way to gain market intelligence and understand the state of the nation, if you will.

The educational forums and the opportunities that ARIAS•U.S. offers to essentially present yourself through training programs and the like are also important. There is a symbiosis between a training program and being the presenter on a training program and then going to a cocktail party afterwards and using that as a segue or a springboard to promote discussion. The two have an inter-related benefit.

**Dore:** I would say it's probably 70 percent networking and 30 percent education. Of course, the longer you've been doing it, it's probably less and less education. But education is still important, and it's still a foundation of our meetings.

At the actual conferences, I sort of do "casual collisions." After you meet somebody at a cocktail party, you have to follow up in some fashion. Another thing I've been doing recently is, if I am turned down after filling out an umpire questionnaire, I go back to some of the attorneys I don't know and try to establish a relationship there.

**Scrimgeour:** As an industry representative, I tend to go to ARIAS•U.S. conferences as a representative of my company first. I'm going not for the purposes of marketing myself as an arbitrator, but really to meet other people, other arbitrators, and to listen to the presentations.

If you're a client, you can learn during the conversations about what arbitrators think, how they think about the process, and whether or not they're going to fit your efficiency-minded view of the way arbitrations should be run. Also, substantively—despite the disclaimers that presenters' opinions are not necessarily reflective of their views—if you listen carefully to the presentations, you can get an understanding of the way an arbitrator thinks.

I definitely have hired arbitrators in part because of watching an ARIAS presentation. I've also selected umpires because I've met them at cocktail parties, and I don't know them other than that. So it's something that I think is valuable to do as an arbitrator—to be out there and to be at these conferences, marketing yourself in these different ways.

**Caprio:** When I was at Liberty Mutual and I went to ARIAS•U.S. conferences, I was in the position of evaluating arbitrators and lawyers to hire for disputes that Liberty Mutual was thinking of bringing into arbitration. I had a different mindset than I do now. I know from that perspective what a company person would be looking for in me. It's less about meeting people at a cocktail party and more about hearing them speak at a conference, on a panel, and at a breakout session.

I'm still considered a newer arbitrator because of the amount of arbitrations that I have done. Even though I know most of the company people and the lawyers at the ARIAS•U.S. conferences, they don't really know me. So it's my job to have them understand who I am and what type of an arbitrator I would be, to see if there's a fit with what they're looking for. Although meeting someone at a cocktail party is not as compelling, it is also very good because that's the beginning of a relationship that you can follow up with over time.

**FitzMaurice:** Often you hear from newer arbitrators about the "Catch-22" problem—you need experience to get work, but you've never worked, so how do you get that experience?

**Rosen:** Personally, I got my first arbitration because I'd been counsel in many reinsurance arbitrations before I became an arbitrator. By reputation, people knew that I was in the game wearing a lawyer hat, and somebody asked me, "If you've been doing it as a lawyer for so many years, surely you have some insight on how to do it as an arbitrator." Somebody put me up in a relatively smallish matter because you can't get your feet wet through the most complex dispute if you've never been involved in it from that perspective. Like a snowball going down the mountain, it either gains its own momentum or it dies on its own because the sun comes out.

**Dore:** I, too, had a few early arbitrations that were small and from people that I knew quite well who said "Let's try this out, let's see how it goes." I'm coming from a background of an operating person or an underwriting person in a company. I had to learn the whole process of arbitration. My insurance company had very few arbitrations when I was the president; I think the three other roundtable panelists here, as lawyers, know the process of arbitration. So either you have somebody strong in the process of arbitration or someone with a company background who actually has done insurance or reinsurance work.

**Caprio:** My first arbitration was as a result of me going on the neutral list of arbitrators within ARIAS•U.S. and getting assigned an all-neutral arbitration.

**Scrimgeour:** One of my former colleagues worked on the direct side and had an office next to me. I would talk to her about reinsurance issues. She went off to another company and started to do reinsurance. When she got into an issue that was reinsurance related, she thought to call me to see if I would be a reinsurance arbitrator.

**FitzMaurice:** If you were asked to give advice to newly certified ARIAS•U.S. arbitrators attempting to establish an arbitral practice, what would you tell them to do and not to do?

**Caprio:** I think everyone would agree, the hard sell is very difficult. My advice would be, do not hard sell, but you do need to have a game plan. By way of example, one of my goals is to become certified as an insurance mediator, so I spent the whole summer of 2018 doing pro bono mediations. I now have 40 hours and an 85 percent success rate in my small-claims mediations, and I am hopefully going to get certified by the AAA.

**Dore:** I perceive fewer arbitrations going on now than 10 years ago, and I think it's very difficult for someone to break into reinsurance arbitrations without experience. Some arbitrators, or those who want to be arbitrators, are also involved in, say, expert witness work, and thus there's cross-over. There are some arbitrators who don't want to be involved in expert work because there's something on the record. I've done arbitrations and I've done expert-witness work; I'm just careful which ones I choose. But that's another way of really getting involved, because you meet a lot of other people doing expert witness work.

**Rosen:** My gut reaction when you asked the question was, do not quit your day job. It is tough to break in. I didn't start off by quitting my day job and putting out a shingle saying I'm an arbitrator. It was a transition for me. I did arbitrations while I still had my job, with the blessing of my employer, and then graduated into a more full-time occupation.

Also, get on a forum where you can prove yourself, because the fact that you've been a senior executive in an insurance company and the fact that you know a lot about reinsurance doesn't necessarily make you a good arbitrator. It's a skill set that's almost a unique skill set—some people have it, and other people don't.

But the nature of the game has definitely changed because asbestos was the bread and butter that is getting largely resolved through protocol or through just natural attrition, because companies swallow other companies and they stop fighting with each other. Also, the more sophisticated financial transactions that are out there have led to a more sophisticated expression of what you're really trying to cover and what risk you've really trying to transfer and have reinsurance respond to. So the more sophisticated you get, probably as a civilization, one hopes the fewer disputes you have.

**Scrimgeour:** First of all, don't expect any immediate appointments, and don't do the hard sell. It's really about cultivating, planting the seed. It also really depends on the person, because some people become an arbitrator after almost 20 years of experience in the reinsurance industry, like me, and know all the players. I guess what I would say is, if you don't have that history, you've got to really work at the relationships that you do have and getting those folks to introduce you to

the players so that you can then start planting the seed and cultivating the future work.

**FitzMaurice:** How do you react if, one morning, you've received five umpire questionnaires to complete?

**Dore:** YIPPEE! You can't win if you don't play the game. It does take a lot of time to fill out the questionnaires, but it's a necessary part of the business if you want to be an umpire.

Those five umpire questionnaires may not be successful. But there are people who have seen your responses, some of whom you know and some of whom you don't know. Those who I don't know or don't know well, I want to see at the next ARIAS•U.S. conferences and will make a point to see.

**Rosen:** I tend to be more of a party-appointed arbitrator than an umpire, and because of that some people perceive me as being conflicted out of the umpire world. If I had to project how I would react to getting three or four questionnaires in pretty hot succession, I don't know if I would anticipate a reaction like "YIPPEE!"

If you have your temperature close to the market or you're a market realist, you will recognize that many, many, many people are being put up or nominated, and your chances of getting those gigs are more removed because so many people are put up. It does take a long time to complete questionnaires, and the chances of getting a hit are sometimes one in 20.

**Caprio:** Cautiously optimistic. As a newer arbitrator, filling out the questionnaire is not difficult for me. For someone who has had many assignments, it is more time consuming. Further, for me, there is the chance that even though the slate of candidates is large, I'm still in play and I may be selected.

**Scrimgeour:** My response is very similar to Elaine's. I do think that with respect to most of the questionnaires I get, I'm there as filler, and it's discouraging. But you go through the process and you hope that people realize that you are going to be neutral and that you actually will have an open mind and can see things from both sides.

At Travelers, I have clients that I represent on both the assumed side and the ceded side. I'm not sure that outside counsel or companies who offer or consider me as a candidate necessarily understand that I have a good grasp of all the issues from both sides and that my experience as a party-appointed arbitrator is fairly balanced. As a result, I think I get somewhat pigeon-holed into one camp and rejected without serious consideration by decision makers, which probably isn't a fair thing to do.

**Derrig:** What has been successful or not successful in developing your arbitral practice?

**Rosen:** There was a training class that I gave a number of years ago, and somebody asked me, "What do you think is the most important attribute of an arbitrator?" My answer was three things: "Know your case, know your case, know your case." This is because the knowledge that you bring to the process is your biggest strength. You've got to be diligent in your understanding of what it is you're being called upon to resolve, and that is the most important thing.

**Caprio:** What has been helpful to me, now and forever, is that I established close relationships with some of my fellow arbitrators. Lately, I'm involved in matters where I am the sole arbitrator. Thus, there are times where having another arbitrator's view dispassionately about a process or a procedure is very helpful. So having another arbitrator who is experienced and who can be there as a sounding board for you can be very helpful as you proceed forward as a new arbitrator.

**Dore:** I remember a very early arbitration I did. I didn't realize how strong my advocacy role should have been. I was treating it more like really and truly a neutral panel. And I now understand the difference.

> "My advice would be, do not hard sell, but you do need to have a game plan."
>
> —*Elaine Caprio*

**Rosen:** But the flip to that is, don't overkill the advocacy. So my advice on what not to do would be don't kill your credibility by overkilling your advocacy.

**Scrimgeour:** If you can establish yourself as an able person with lots of knowledge and as an effective party-appointed arbitrator for a reinsurer and a cedent, you will be in a much better position. A lot of times, if a person has a ceded background, that person can make the most effective party arbitrator for a reinsurer because of his credibility with the umpire. Appreciating your background, a neutral might think, "Oh, this guy knows what he's talking about from the opposing perspective, and he can point out the problems with the opposing arbitrator's case because he's done it so often before."

**FitzMaurice:** If you were sitting down with the general counsel of a major insurance or reinsurance company and she asked you whether the company should put arbitration clauses in their agreements, what would you say?

**Rosen:** A resounding "yes," of course, and not just because it's the business I'm in. There's a reason people go to arbitration, and in the world of reinsurance, it's got nothing to do with the efficiency and speed with which you can get a dispute resolved. It is because the industry is grounded in customs and practices.

By putting in an arbitration clause, you are asking your judges essentially to be cloaked in those customs and practices so that they understand the risk transfer concepts at play in the reinsurance relationship. I think the industry is much better served by relying on experienced people who understand how the game is played to resolve its disputes. The alternative is to have disputes resolved in a vacuum, with rules that operate like square pegs in round holes.

**Dore:** I agree that arbitration in our industry makes a lot of sense, but I think the problem may be that the process gets a little bit broken. A lot of times, counsel is asking for a large amount of information that doesn't necessarily seem relevant, but they want to cover all of their bases.

Excessive advocacy by party arbitrators can also detract from the process. The best arbitrations are ones where, as an umpire, I sometimes don't remember which party appointed which arbitrator. That's when you know that you're working together to find a good solution.

**Caprio:** I would say, "Yes, generally use arbitration clauses." There are circumstances, however, where a company may want to opt out of arbitration and pursue litigation. And there are companies in our industry that have done that, that have opted out of arbitration. So, in speaking with the general counsel, I would present the state of the field in terms of utilizing arbitration clauses in reinsurance contracts—that they are still widely used, but that some companies go in a different direction if they feel there is a higher threshold or if the need to be able to appeal overrides the confidentiality and other benefits behind the arbitration process.

**Scrimgeour:** It does depend a little bit on the philosophy of the company, what types of contracts are involved, and whether you are viewing it from the cedent's side or reinsurer's side. It also depends on what jurisdiction governs the contracts, because the law is different in certain states on reinsurance issues. Another question is whether or not the jurisdiction permits the company to put an arbitration clause in an insurance policy.

In general, I agree with Jonathan that, if your company is really trying to get at the right answer for the industry, then an arbitration clause is appropriate. As arbitrators, we hope that ARIAS•U.S. and our past background and experience have prepared us to make the right decision as a community.

**Rosen:** The typical arbitration clause dispenses with strict rules of law and evidence and is designed to avoid a literal construction of language by giving effect to the business purpose of the arrangement. A business purpose, by definition, requires stepping away from legal analysis and strict construction. Again, I'd come out and say in trumps that I would vote for arbitration.

**Derrig:** The final question is, what do you think ARIAS•U.S. could do better to help arbitrators and umpires?

**Rosen:** What ARIAS•U.S. could do better to help the buying public is to better educate, through the arbitrator identification section of the website, the actual experience of arbitrators *as arbitrators* as opposed to businesspeople. When you conduct an arbitrator search on the current ARIAS•U.S. website, what you will learn about me, or about any of the people who are sitting here with me on this roundtable panel, is that we worked for certain years for certain insurance companies and that we dedicated our time to lots

of stuff in the world of property-casualty insurance, maybe a little bit of life and maybe a little bit of accident and health.

You'll know perhaps where I went to high school and perhaps where I went to college and law school, but you won't know what I've done as an arbitrator. You won't know which cases I've been exposed to. As chief operating officer of the Home Insurance Company, I dealt with an enormous amount of environmental and asbestos work. You will have no idea that, as an arbitrator, I have dealt with warranty business and certain boutique lines of business that didn't fall within my traditional working world, but that I've been exposed to during the 16 or 17 years that I've been an arbitrator.

**Caprio:** I believe the number-one thing ARIAS•U.S. should do is continue its efforts to increase its reach, because it is part of the ARIAS•U.S. bylaws to expand into insurance as well as reinsurance arbitrations and because it presents a great opportunity for ARIAS•U.S.-certified arbitrators to do this insurance work. Although there are challenges with respect to policyholders counsel and how they get integrated into the ARIAS•U.S. group, in terms of keeping the ARIAS•U.S. operations sustainable for the long term, increased reach to insurance would be key to keeping the arbitrator population of ARIAS•U.S. This is not, I believe, what is happening with respect to the current roster.

**Dore:** Expanding ARIAS•U.S. to the TPA and the MGA communities probably makes a lot of sense. I always thought insurance was part of ARIAS•U.S., but maybe that's just my ceding-company background. I really think it's going to be difficult when you start putting in policyholders, because it's such a different set of clients and there will be a concern about bias. So that's something we would have to address.

**Rosen:** That's why I think bringing the policyholders in is the way to go—to essentially educate that whole market about the fact that people can behave without bias. And then, if you trust in the process, the process works a lot better than being fragmented, because right now it is fragmented. You get the insured side and you get the insurer side. It's not the same in the world of reinsurance. The lines are a lot more blurred in that world, and I think people perceive them as a lot more blurred. But in the world of insured and insurer, you've got two very, very demarcated markets.

**Scrimgeour:** Although ARIAS•U.S. has done speed dating in the past, I think it could perhaps come up with a creative way to involve law firms and insurers and reinsurers in some kind of situation where you have more of an interview than speed dating allows. So something like the process used for a request for proposal, with a company or law firm identifying the type of arbitrator they are seeking. You set out the request for proposal, and newer arbitrators or all the arbitrators attending a conference can say, "Okay, I want to respond to that request for proposal," or something like that.

It would give newer arbitrators the experience of really being vetted, as if they were being interviewed for a party-appointed arbitrator, rather than the two-minute try to make a connection, such as "maybe-your-kids-both-play-soccer" type of connection that you might have during speed dating. It would be a little bit more substantive.

**Dore:** With respect to the policyholders, I've been involved in too many insurance arbitrations where there was no reason why that policyholder should have bought that particular insurance product. The type of policyholder that I would think that ARIAS•U.S. would want to court would be a large company with arbitration clauses in its policies to begin with. But there are many policyholders that have no business accepting arbitration clauses in their insurance policies. The size differential, the power differential, is so vast that it's unfair, similar to what happens with consumers and big banks.

**Rosen:** I don't think it's the role of ARIAS•U.S. to find jobs for arbitrators. I think it's the role of ARIAS•U.S. to certify people who they believe have the ability to perform a function, but it's not the role of ARIAS•U.S. to get those people employed.

But by being a certifying body and creating that forum, ARIAS•U.S. needs to essentially make people comfortable with the people that they've certified. The way to do that is to expose those people to the market constituents that ARIAS•U.S. is trying to attract. We have the insured marketplace, the MGA, the TPA, or the traditional reinsurance market, and it's that springboard or that visibility that I think ARIAS•U.S. could improve upon.

*The authors of this article extend their sincere thanks to the arbitrators who participated in the roundtable and to Winter Reporting, which donated the services of a court reporter to capture the discussion.*

**NOTES**

1. Two articles, written respectively on the tenth and twentieth anniversaries of ARIAS•U.S., capture the history and accomplishments of the cociety: M. Gurevitz and T.R. Kennedy, "ARIAS•U.S.: Its Growth and Importance in the Process of Resolving Insurance and Reinsurance Disputes," ARIAS•U.S. *Quarterly*, 2d Q. at 5 (Sept. 2002); and D. L. FitzMaurice, "ARIAS•U.S.: Twenty Years of Improving Ways to Resolve Insurance and Reinsurance Disputes," ARIAS•U.S. *Quarterly*, Vol. 21, No. 3, 3d Q. at 4 (Sept. 2014).

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# Subrogation and Related Implications Following Natural Catastrophes

**By Mark A. Bradford and Damon N. Vocke**

In recent years, the insurance industry has faced mass exposures—the California wildfires, climate change, the opioid epidemic, and molestation claims, to name a few. Other challenges await unseen on the horizon. At present, rarely a day passes without extensive media coverage of climate change-related developments of one sort or another, with recent examples including the Extinction Rebellion shutdown in London (followed by Parliament's declaration of a national emergency on climate change), news reports of the extinction of over a million species as a result of climate change, and other grave warnings of rising sea levels and population displacement.

Against this backdrop, the devastating 2017-2018 California wildfires followed historically unprecedented conditions of heat and drought, coupled with high winds. Wildfire-related losses to the insurance industry across both years are estimated to exceed $30 billion and involve homes, businesses, autos, human lives, and other insured risks.[1] While the drought has since subsided due in large part to heavy rains in early 2019, this change in fortunes has created more foliage, which is cause for concern as more "natural fuel" (along with more than 100 million dead trees) could contribute to further wildfire risks when the dry season returns.

## The Search for Yield

At the same time, various investors and hedge funds have sought to capitalize on climate change opportunities related to the insurance sector. For example, the insurance-linked securities sector arose in recent years as a means to provide institutional investors a non-correlated investment in a low interest rate environment. Even more recently, the search for yield has also found its way into post-event opportunities to capitalize on subrogation recoveries arising from the California wildfires. Why were these claims attractive, and what are the implications insurers and reinsurers should note?

Article I, Section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for a public use and only when just compensation ... has first been paid to ... the owner," which is similar to the Takings Clause of the U.S. Constitution.[2] Under California law, this concept has been termed "inverse condemnation" when applied to state-empowered utilities, and it imposes strict liability against the utility if it is determined to have caused a loss, regardless of fault or the exercise of reasonable care.[3] Hence, the attractiveness of subrogation claims is that, if causation is established, the legal inquiry on who should pay concludes, and the subrogation plaintiff can dispense with any need to adduce evidence of negligence.

## Principal Types of Subrogation

So, back to the fundamentals: What is the basis for the subrogation claims?

"Subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss."[4] The purpose of subrogation is to apportion ultimate responsibility for the paid loss "to the person who in equity and good conscience ought to pay it."[5] The law recognizes two general types of subrogation: (1) based on contract (also known as "conventional subrogation" in some jurisdictions) and (2) based on equitable considerations (also referred to as "legal subrogation" in some jurisdictions because it arises as a matter of law).[6] "In the case of either equitable or contractual subrogation, 'the insurer stands in the shoes of the insured, obtaining only those rights held by the insured against a third party, subject to any defenses held by the third party against the insured.'"[7]

It is also important to note that, under California law, an insurer has no standing in court to seek subrogation for the policyholder's deductible amount, but nevertheless has an obligation to demand payment of the deductible solely for purposes of settlement negotiations.[8]

## Standard Reinsurance Provisions

Most reinsurance agreements contain a provision requiring the cedent to pay or credit the reinsurer with the reinsurer's portion of any recovery related to a net loss obtained from salvage or subrogation.[9] A fairly common industry wording provides that the reinsurer...

... [s]hall be subrogated, as respects any loss for which the Reinsurer shall actually pay or become liable, but only to the extent of the amount of payment by or the amount of liability to the Reinsurer ... The Company [cedent] agrees to enforce such rights, but in case the Company shall refuse or neglect to do so, the Reinsurer is hereby authorized and empowered to bring any appropriate action in the name of the Company or its insureds, or otherwise to enforce such rights ... Any recoveries, salvages or reimbursements applying to risks covered under this Agreement shall always be used to reimburse the excess carriers (from the last to the first, beginning with the carrier of the last excess), according to their participation, before being used in any way to reimburse the Company for its primary loss.[10]

This common language provides for top-down recovery—that is, that recoveries inure to the benefit of the highest layers of excess reinsurance first.[11] This approach is logical in recognizing that if the subrogation recovery were taken into account when allocating the loss exposures in the first instance, this protects any excess layer that otherwise would not have been exposed to the loss (in whole or in part). And, in general, the higher the layer, the lower the premium received by the excess reinsurer as a percentage of limits exposed.

The essential purpose of contractual subrogation and non-assignment provisions is to protect the financial interests of both the cedent and reinsurer in third-party recoveries, and to better ensure that any recoveries are allocated in an equitable manner. For example, on a $10 million loss, a reinsurer with $9 million of XOL exposure above a $1 million retention by the cedent would have a substantially higher degree of interest regarding any potential subrogation recovery because it bore 90 percent of the total loss. The reverse would be true on a $10 million loss involving a $9 million retention by the cedent and only $1 million of excess reinsurance coverage.

The foundation of reinsurance rests upon the duty of utmost good faith

that covers "the entire relationship between the parties to a reinsurance contract, not only the contracting stage."[12] In that sense, the duty of utmost good faith implies mutual duties of both the reinsured and reinsurer, and this concept has implications for the mutual rights and responsibilities of these counterparties as respects subrogation claims and potential sale or assignment of such claims.[13]

So, what happens if and when an equity fund contacts an insurer to solicit the purchase of rights to subrogation claims?

> "When a major claims event arises, insurers may face credit risk..."

If the insurance program is not reinsured, the insurer should be free and clear to negotiate the sale of its rights, taking into account the likelihood (or not) of recovery, both in terms of legal merits as well as the creditworthiness of the subrogation target. Depending on the significance or materiality, the insurer may also need to determine whether notification and/or approval of the transaction may be warranted or required from a regulatory or internal corporate governance perspective.

If, on the other hand, the program is reinsured, the insurer should carefully review the reinsurance contract terms relating to subrogation and assignment of rights. Here, reinsurance wordings often prohibit the assignment of rights, duties or obligations of the parties under the agreement without prior written consent of the other party.[14] Even if there is no such contractual language, prudence suggests that an insurer should (1) consult with any potentially affected reinsurer about the possibility of an assignment or sale of subrogation rights, including the material terms being contemplated (e.g., price, timing, litigation expense allocation, and allocation of the transaction proceeds), and, even better, (2) obtain advance written consent from the reinsurer(s) on the material terms of the deal. The parties to the reinsurance agreement would benefit from this transparency and be in better position to avoid disputes that might arise from the sale or assignment of subrogation rights that otherwise could lead to allegations of breach of contract or the duty of utmost good faith.

## The Potential for Bankruptcy

When a major claims event arises, insurers may face credit risk (i.e., solvency risk) on their subrogation claims against one or more third parties who are responsible for the losses.[15] Pacific Gas & Electric (PG&E)—which services approximately 16 million customers, mostly in Northern California—is a recent example of a credit risk in the context of subrogation. The unprecedented California wildfires in 2017 and 2018 burned hundreds of thousands of acres and destroyed thousands of structures.[16] PG&E was implicated in the investigation into the alleged cause of those wildfires under a theory of inverse condemnation, and the utility faces billions of dollars in potential liability (indeed, on May 15, the California Dept. of Forestry and Fire Protection announced its conclusion that PG&E-owned transmission lines caused the deadly 2018 Camp Fire).

On January 29, 2019, PG&E (and its parent, PG&E Corp.) voluntarily filed bankruptcy under Chapter 11.[17] At the time of the filing, PG&E estimated that the company had between 50,000 and 100,000 creditors, on a consolidated basis, to whom more than $50 billion was owed.[18]

Before the deadliest of the 2018 wildfires occurred late that year, hedge fund Baupost purchased the rights to $1 billion of California insurer CSAA's subrogation claims arising from the 2017 California wildfires at 35 cents ($350 million) on the dollar.[19] Presumably, the specter of additional wildfires and PG&E's creditworthiness were considered, but following the 2018 wildfires that resulted in even greater losses, we can only assume that CSAA must feel somewhat vindicated by the 65 percent discount it agreed to accept on the sale of its subrogation rights.

PG&E's Chapter 11 filing will certainly affect the consideration of these kinds of transactions in the future, especially as respects the discount valuations that may be assessed for credit risk.[20] That said, if the doctrine of inverse condemnation is not stricken or modified by the California Supreme Court, the California legislature, or the U.S. Bankruptcy Court overseeing the PG&E Chapter 11 proceeding (whether it even has the power to pre-empt California law is a separate question altogether), the buyer's market for rights to subrogation claims is likely to remain alive and well, especially if, as expected, we have not seen the last of the devastation wrought by the likes of the 2017 and 2018 catastrophic wildfires in California.

## Conclusion

The potential opportunities for a sale or assignment of post-event subrogation rights are likely to resurface when the maximum recovery value is high, the risk and timing of recovery are uncertain, and (re)insurers may be inclined to accept the certainty and cash flow benefits of a discounted payment from a third party that is willing to assume those various risks. If presented with such an opportunity, a cedent should consult with any potentially affected reinsurer(s) about the material terms of the deal. Prudence would dictate that both the cedent and its reinsurer(s) should take appropriate steps to ensure compliance with any contractual obligations to pursue subrogation, assign rights under the contract, properly allocate the funding of any legal expense to pursue subrogation claims, and properly allocate any recovery. This will help ensure all parties to the reinsurance program are satisfied with any structured transaction with a third party, and avoid costly disputes thereafter relating to an alleged breach of contract terms or perceived failure to discharge the duty of utmost good faith.

### NOTES

1. California Department of Insurance. 2019. "Wildfire Insurance Losses from November 18 Blazes Top $12 Billion." Press release. See also Kathleen Ronayne, "California Wildfire Insurance Claims Top $11.4 Billion," *Claims Journal*, Jan. 30, 2019.
2. CAL. CONST. art. I, §19.
3. E.g., *Locklin v. City of LaFayette*, 7 Cal. 4th 327 (Cal. 1994); *Pacific Bell Tel. Co. v. Southern California Edison Co.,* 208 Cal. App. 4th 1400 (Cal. Ct. App. 2012).
4. *In re September 11 Litig.,* 328 F. Supp. 3d 178, 184 (S.D.N.Y. 2018) (quoting *Winkelmann v. Excelsior Ins. Co.,* 85 N.Y.2d 577, 581 (N.Y. 1995)).
5. *North Star Reinsurance Corp. v. Continental Ins. Co.,* 82 N.Y.2d 281, 294 (N.Y. 1993); see also *Chicago Hosp. Risk Pooling Program v. Illinois State Med. Inter-Insurance Exch.,* 397 Ill. App. 3d 512, 525 (Ill. App. Ct. 2010) ("Thus its purpose is traditionally grounded in equity to work out an adjustment between the parties 'by securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it.") (quoting 16 COUCH ON INS. 3D §222:8).
6. *Continental Cas. Co. v. North American Capacity Ins. Co.,* 683 F.3d 79, 85 (5th Cir. 2012); *Millennium Holdings LLC v. Glidden Co.,* 27 N.Y.3d 406, 414-15 (N.Y. 2016); *Wausau Ins. Co. v. All Chicagoland Moving & Storage Co.,* 333 Ill. App. 3d 1116, 1126 (Ill. App. Ct. 2002).
7. Continental Cas. Co., 683 F.3d at 85 (quoting *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.,* 236 S.W.3d 765, 774 (Tex. 2007).
8. *Pacific Gas & Elec. Co. v. Superior Court,* 144 Cal. App. 4th 19, 23-24 (Cal. Ct. App. 2006).
9. Examples of certain salvage and subrogation reinsurance contract wording may be found in commercially available decisions: *United Heritage Prop. & Cas. Co. v. Farmers Alliance Mut. Ins. Co.,* No. CIV. 1:10-456 WBS, 2012 WL 640884 at *2 (D. Idaho 2012); *Nova Cas. Co. v. Santa Lucia,* No. 8:09-cv-1351-T-30AEP, 2011 WL 862041 at *1 (M.D. Fla. 2011); *Turner Const. Co. v. Seaboard Sur. Co.,* 85 A.D.2d 325, 330 (N.Y. App. Div. 1982).
10. An example, pulled from a publicly available federal case—*Alabama Municipal Ins. Corp. v. Munich Reinsurance Am., Inc.,* No. 2:16-cv-948-WHA-SRW (M.D. Ala.), ECF #23-3 at 21—and representative of common subrogation and salvage language found in an excess of loss treaty, is as follows:

**SUBROGATION AND SALVAGE**

A. The Reinsurer shall be subrogated, as respects any loss for which the Reinsurer shall actually pay or become liable, but only to the extent of the amount of payment by or the amount of liability to the Reinsurer, to all the rights of the Company against any person or other entity who may be legally responsible in damages for said loss. The Company hereby agrees to enforce such rights, but in case the Company shall refuse or neglect to do so the Reinsurer is hereby authorized and empowered to bring any appropriate action in the name of the Company or its insureds, or otherwise to enforce such rights.

B. Any recoveries, salvages or reimbursements applying to risks covered under this Agreement shall always be used to reimburse the excess carriers (from the last to the first, beginning with the carrier of the last excess), according to their participation, before being used in any way to reimburse the Company for its primary loss.

C. All salvages, recoveries or reimbursements, after deduction of expenses applicable thereto, recovered or received subsequent to a loss settlement under this Agreement shall be applied as if recovered or received prior to the aforesaid settlement and all necessary adjustments shall be made by the parties hereto, provided always, that nothing in this clause shall be construed to mean that losses under this Agreement are not recoverable until the Company's ultimate net loss has been ascertained. Expenses hereunder shall exclude all office expenses of the Company and all salaries and expenses of its officials and employees except those of salaried adjusters.

11. *State Sec. Ins. Co. v. Frank B. Hall & Co.,* 109 F.R.D. 99, 100 (N.D. Ill. 1986); see also *United Heritage Prop. & Cas. Co.,* 2012 WL 640884 at *2.
12. *Munich Reinsurance Am., Inc. v. Am. National Ins. Co.,* 999 F. Supp. 2d 690, 738 (D. N.J. 2014); see also *Unigard Sec. Ins. Co., Inc. v. North River Ins. Co.,* 4 F.3d 1049, 1054 (2d Cir. 1993).
13. *Id.*
14. *Alabama Municipal Ins. Corp. v. Munich Reinsurance Am., Inc.,* No. 2:16-cv-948-WHA-SRW (M.D. Ala.), ECF #23-3 at 22.
15. It may or may not be simple to recover on a subrogated claim in bankruptcy, though at a minimum there will be an element of time delay. The U.S. Bankruptcy Code broadly defines *claim* to include any "right to payment,

whether or not such right is reduced to judgment, liquidated, unliquidated . . . .” 11 U.S.C. §101(5)(A). Bankruptcy courts have held that subrogation claims are claims for purposes of the Bankruptcy Code that reasonably may be asserted against the debtor. *In re XTI Xonix Tech., Inc.,* 156 B.R. 821, 826-28 (Bankr. D. Or. 1993) (holding that subrogation claim was a claim under 11 U.S.C. §101(5)); see also I*n re Burton*, Adversary no. 08-5065, 2009 WL 537163 at *5 n.2 (Bankr. E.D. Tenn. 2009).

Like liquidated claims, unliquidated claims (or at least a percentage thereof, depending upon the amounts available for distribution) may be recovered in bankruptcy. However, it typically takes more time, energy, and resources to recover on an unliquidated claim, as the amount must be established. To further complicate matters, disputes can arise as to whether a claim is liquidated or unliquidated.

In theory, the concept is simple. A claim is liquidated if its value is “easily ascertainable,” whereas a claim is unliquidated if its value depends on a “future exercise of discretion, not restricted by specific criteria.” *In re Mazzeo*, 131 F.3d 295, 304 (2d Cir. 1997) (quoting 2 L. King, Collier on Bankruptcy ¶109.06[2][c] (15th ed. rev. 1997) and *United States v. Verdunn,* 89 F.3d 799, 802 (11th Cir. 1996)); see also *In re Slack,* 187 F.3d 1070, 1075 (9th Cir. 1999) (collecting cases); *In re Pantazelos,* 540 B.R. 347, 351-52 (Bankr. N.D. Ill. 2015) (same); *In re A&E 128 North Corp.,* 528 B.R. 190, 198 (B.A.P. 1st Cir. 2015) (addressing whether claim was liquidated for purposes of voting on Chapter 7 trustee). It is a fact-based determination that turns on the specifics of the subrogation claim at hand. Bankruptcy courts have held that certain subrogation claims are liquidated, even if not reduced to judgment or if litigation over the subrogated claim remains, and that other subrogated claims are not liquidated. Compare *In re Guzman*, No. 10-10169-8-JRL, 2011 WL 5909522 at *4 (Bankr. E.D. N.C. 2011) (holding that subrogation claim of worker’s compensation carrier was liquidated for purposes of the Bankruptcy Code, even though debtor contested liability for event that gave rise to injury that caused worker’s compensation claim, and claim was pending and had not been reduced to judgment when bankruptcy was filed) and *In re Clark*, 91 B.R. 570, 574 (Bankr. D. Colo. 1988) (holding that subrogated claim on payment made under fidelity bond was liquidated for purpose of bankruptcy, even though insurer had not obtained judgment) with *In re Lottes*, 226 B.R. 634, 636 (Bankr. E.D. Mo. 1998) (holding that title insurer’s subrogated claim was unliquidated and that subrogee filed claim in bankruptcy out of time).

The holding of certain bankruptcy decisions regarding subrogation could be classified as having turned on bankruptcy-specific consideration (e.g., whether a creditor has a liquidated claim that would afford that creditor’s voting rights in the estate, whether a debtor qualifies to proceed under Chapter 13, etc.). Regardless of the basis for the bankruptcy court’s determination, the bottom line is that litigating in bankruptcy can be expensive, which ultimately transfers credit risk and attendant cost to the subrogee. The pre-bankruptcy uncertainty as to the cost and expense to perfect and recover on a subrogation claim arguably reduces the value of any subrogation claim that an insurer might have against a third party operating in or near the zone of insolvency. “When a corporate becomes insolvent, the fiduciary duty of the directors shifts to the creditors of the corporation.” *In re Joseph Walker & Co.*, 522 B.R. 165, 197 (Bankr. D. S.C. 2014) (predicting that South Carolina would not follow the Delaware rule and would permit direct breach of fiduciary duty claims by creditors). An insurer subrogated against a third party operating in the zone of insolvency may be owed fiduciary duties and might, therefore, have claims for breach of fiduciary duty in the event of an insolvency. See *In re Adelphia Communications Corp.*, 323 B.R. 345, 386 (Bankr. S.D. N.Y. 2005) (holding that duties were owed to creditors when operating in the zone of insolvency); but see *RSL Commcations PLC v. Bildrici*, 649 F. Supp. 2d 184, 203-07 (S.D. N.Y. 2009) (holding that New York law did not recognize zone of insolvency claim).


16. Pacific Gas & Electric Corporation. 2019. Form 8-K, U.S. Securities and Exchange Commission. January 13.
17. I*n re PG&E Corporation*, Bankruptcy Petition Number 19-30088 (Bankr. N.D. Cal.), ECF #1, Voluntary Petition for Non-Individuals Filing for Bankruptcy.
18. *In re PG&E Corporation*, Bankruptcy Petition Number 19-30088 (Bankr. N.D. Cal.), ECF #1, Voluntary Petition for Non-Individuals Filing for Bankruptcy at 3.
19. Freund, John. 2019. “Hedge Funds Showing Increased Interest in Litigation Claims.” *Litigation Finance Journal*. January 15.
20. Id.; *In re PG&E Corporation*, Bankruptcy Petition Number 19-30088 (Bankr. N.D. Cal.), ECF #971, Verified Statement of the Ad Hoc Group of Subrogation Claim Holders Pursuant to Bankruptcy Rule 2019.


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# The Implications of *Henry Schein V. Archer & White Sales, Inc.* for the Reinsurance Industry

**By Michele L. Jacobson, Beth K. Clark, and Talona Holbert**

Arbitration has been the principal dispute resolution forum among parties in the reinsurance industry for decades. This is so because the industry places a premium on having experts familiar with industry custom and practice resolve disputes. However, not all disputes are arbitrable; arbitration is a creature of contract.

Where there is a disagreement as to whether a particular dispute is subject to arbitration, who decides whether that dispute is, in fact, arbitrable? Should a court decide issues of arbitrability, or do the arbitrators have that authority? Courts and arbitration panels alike have been navigating so-called gateway issues like arbitrability as well as other relevant threshold arbitration issues, such as waiver, estoppel and laches.

As set forth in this article, the U.S. Supreme Court’s decision in *Henry Schein v. Archer & White Sales, Inc*.[1] confirms that, if the parties’ agreement grants the arbitration panel the authority to determine questions of arbitrability, the courts will enforce the parties’ choice in that regard.

In the reinsurance industry, it is generally understood that whether a dispute is heard by an arbitration panel as opposed to a court may be outcome-determinative. Take for example, classic reinsurance “*Bellefonte* disputes.” In *Bellefonte Reinsurance Co. v. Aetna Casualty and Surety Co.,* the Court of Appeals for the Second Circuit determined, based solely on the contract language, that the reinsurance limit of liability in a facultative certificate capped both reinsurance liability and expenses regardless of how expenses were paid under the reinsured policy.[2] Many in the reinsurance industry felt that the *Bellefonte* decision was contrary to long-standing reinsurance industry custom and practice.[3]

The rumor mill has taught us that arbitration panels presiding over “*Bellefonte* disputes” typically eschewed *Bellefonte* and issued their decisions in accord with industry custom and practice.[4] Many courts, however, particularly in New York, closely adhered

to the *Bellefonte* precedent, issuing like decisions for more than 20 years.[5] This dichotomy between how the courts and arbitrators resolved *Bellefonte* disputes often rendered where a *Bellefonte* dispute was resolved—in court or through arbitration—determinative of the merits of the ultimate fight.[6]

The issue of "who decides" the threshold question of arbitrability can equally be outcome-determinative. Indeed, not only can the answer to "who decides" influence the outcome of major industry rows, it can also affect the efficiency and costs associated with alternative dispute resolution, as court involvement in the arbitral process often causes delays and increases expense. As such, parties to reinsurance contracts need to pay close attention to the language they use in their arbitration clauses. Not only must cedents and their reinsurers clearly state the types of disputes that are subject to arbitration under their reinsurance agreements, they also must plainly set forth who—the arbitration panel or the court—should resolve the threshold issue of arbitrability. The Supreme Court has affirmed that, if they do, the courts must strictly enforce that language.

## Procedural versus Substantive Questions

Under long-standing Supreme Court precedent, questions surrounding arbitrability are typically classified into two types: procedural and substantive. Procedural questions of arbitrability involve those that "grow out of the dispute and bear on its final disposition."[7] They include, for example, whether a party has waived the right to arbitrate, whether a litigant is precluded from arbitrating on statute of limitation grounds and/or under the equitable doctrines of laches or estoppel, and whether a party has met contractual condition precedents to arbitration under the agreement at issue (among others).[8] As the Supreme Court explained more than 50 years ago in *John Wiley & Sons v. Livingston*, "[q]uestions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it."[9] Given the nexus of the questions to the merits of the principal controversy, the Supreme Court has for decades uniformly ruled that procedural questions of arbitrability should be decided by arbitrators.[10]

In contrast, "substantive" questions of arbitrability involve the threshold or gateway issue of whether a dispute must be sent to arbitration. They include questions akin to whether a binding arbitration agreement between the parties exists and whether an arbitration clause in a binding contract applies to a particular type of controversy.[11] Because these issues arise independently from the actual dispute and are fundamental to whether the parties must proceed in arbitration, the Supreme Court has repeatedly affirmed that they are presumptively for the courts to decide.[12] Importantly, however, the Supreme Court has also made clear that, under the Federal Arbitration Act[13] (FAA), parties to a contract involving interstate commerce (as many insurance/reinsurance contracts do) may delegate to an arbitrator, in place of a court, all issues arising out of the contract—including, without limitation, the threshold issue of substantive arbitrability.[14]

An "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."[15] Thus, if the arbitration clause at issue assigns questions of arbitrability to arbitrators, the arbitral tribunal decides—and, importantly, courts have extremely limited ability to review and set aside that decision under Section 10 of the FAA.[16] If, however, no such delegation exists, the Supreme Court has held that courts are empowered to settle the arbitrability dispute under the very standards that courts are empowered to adjudicate all other legal questions that are not subject to alternate dispute resolution (i.e., independently).[17] This "flow[s] inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."[18]

The controversies that have been born out of the law on arbitrability primarily involve whether contracting parties have, in fact, delegated questions of substantive arbitrability to arbitrators under their contracts. There exist two main avenues for doing so: (1) expressly providing for delegation in an arbitration provision, and (2) implicitly providing for delegation by incorporating into an arbitration clause arbitration rules and procedures that authorize arbitrators to determine the boundaries of their jurisdiction, such as those established by third-party organizations such as the American Arbitration Association (AAA).[19]

No matter which avenue is selected, when parties to a contract disagree over whether they have assigned the issue of arbitrability to an arbitration tribunal, the Supreme Court has instructed courts to apply ordinary state law principles governing the formation of contracts to resolve the contest—with a caveat.[20] The Supreme Court has also instructed that, under the FAA, regardless of the applicable state-law contract principles, courts must not assume that the parties have agreed to arbitrate the threshold issue of arbitrability; there must, instead, exist "clear and unmistakable evidence" that they reached this agreement.[21] If no such evidence exists, a court must decide the issue of arbitrability itself. In other words, when an arbitration agreement in a reinsurance contract is silent or ambiguous about who should decide substantive arbitrability, a judge will undertake the task.[22]

Delegation clauses (i.e., those provisions in a contract that "delegate" or "assign" substantive questions of arbitrability to the arbitrators) can require a party to submit to arbitration claims that are highly attenuated from the parties' agreement and that were never intended to be subject to arbitration. As a result, over the last decade and in the run-up to the *Schein* decision, several federal appeals courts—including the Fourth, Fifth, Sixth and Federal Circuits—invoked a judicially crafted exception to the Supreme Court precedent on delegation, known as the "wholly groundless exception."[23] Pursuant to the wholly groundless exception, courts took it upon themselves to decide the issue of arbitrability, even where the contract at issue contained a clear and unmistakable delegation clause. These courts contended that they were authorized to take this action under the FAA in circumstances where the arguments in support of arbitration were "wholly groundless."[24]

As the Fifth Circuit explained in *Douglas v. Regions Bank*, "what must be arbitrated is a matter of the parties' intent."[25] Therefore, when a party advocates for arbitration with a wholly groundless position, a court can deduce that the opposing party "never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration."[26] The wholly groundless exception, although only available in certain jurisdictions, served as an important tool for parties resisting arbitration in the face of an unmistakable delegation clause. That tool no longer exists.

> "The issue of 'who decides' the threshold question of arbitrability can equally be outcome-determinative."

## *Henry Schein v. Archer & White*

On January 9, 2019, the Supreme Court, in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, held that the "wholly groundless" exception to arbitrability is inconsistent with the FAA and Supreme Court precedent.[27] The Supreme Court held, consistent with its prior decisions, that the FAA requires courts to enforce arbitration agreements as written; therefore, when a delegation clause is present, it must be enforced.[28]

In *Schein*, Archer and White Sales, Inc. sued Henry Schein, Inc. seeking monetary damages and injunctive relief for alleged violations of federal and state antitrust law.[29] The dispute arose under a contract between Archer and White and Schein's predecessor-in-interest, Pelton and Crane, in which Archer and White agreed to distribute dental equipment manufactured by Pelton and Crane.[30] That contract contained an arbitration clause that provided, *inter alia*, that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief ...) shall be resolved by binding arbitration in accordance with the arbitration rules of the [AAA]."[31]

In response to the lawsuit, Schein moved to compel Archer and White to arbitrate the parties' antitrust dispute. Archer and White opposed the application on the grounds that, because its complaint sought injunctive relief, the dispute was not subject to arbitration per the plain language of the arbitration clause.[32] The disagreement then centered on who—the court or the arbitrators—was empowered to decide whether the parties' dispute was arbitrable.[33]

Under the AAA rules, which had been incorporated into the parties' arbitration agreement, arbitrators possess jurisdiction to resolve questions of arbitrability. On that basis, Schein argued

that the parties had delegated the arbitrability issue to arbitrators in their contract, and therefore it was not for the court to determine.[34] In response, Archer and White contended that Schein's argument that the controversy was arbitrable was "wholly groundless," and, therefore, the district court was empowered to determine the issue.[35]

In denying Schein's motion to compel arbitration, the district court, in accord with Fifth Circuit precedent, concluded that Schein's arguments for arbitration were wholly groundless.[36] Despite the delegation clause, the district court relied on the fact that the arbitration provision carved out claims involving injunctive relief. On appeal, the Fifth Circuit affirmed the district court's decision.[37]

Given the split among certain federal circuit courts over the legitimacy of the wholly groundless exception, the Supreme Court granted certiorari.[38] In a unanimous decision authored by Justice Kavanaugh, the Supreme Court reversed the Fifth Circuit and held that, under the FAA, a court may not rewrite or override an arbitration provision that delegates the threshold issue of arbitrability to the arbitrators.[39] Justice Kavanaugh, writing for the Supreme Court for the first time, stated that the FAA requires courts to interpret and enforce contracts pursuant to their plain terms and that, in circumstances where the contract clearly assigned questions of arbitrability to the arbitrators, courts are powerless to resolve that issue—even when the court believes that the argument for arbitration is wholly groundless.[40]

The Supreme Court affirmed, in accord with its precedent, that the parties' agreement must include "clear and unmistakable evidence" of delegation and that a court must first conclude that a valid arbitration agreement exists.[41] Moreover, the Supreme Court rejected Archer and White's arguments that, as a practical and policy matter, it would be a waste of the parties' time and economical resources to send a wholly groundless arbitrability contest to arbitration. The Supreme Court was not convinced that the wholly groundless exception actually saved time or money on a macro basis, since the exception "would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is wholly groundless, as opposed to groundless."[42] Justice Kavanaugh found "no reason to create such a time-consuming sideshow."[43]

Finally, in *Schein*, the Supreme Court expressed no view as to whether the contract at issue actually delegated the gateway question of arbitrability to an arbitrator (the issue had not been decided by the Fifth Circuit).[44] The high court, instead, remanded the case to the Fifth Circuit to make that determination.[45] As a result, what precisely constitutes "clear and unmistakable" evidence of intent to have substantive arbitrability questions answered by the arbitrators, rather than a judge, remains unsettled, and room for future litigation on the subject still exists.

## Lessons Learned from *Schein*

Many reinsurance contracts involve interstate commerce; therefore, many (if not most) arbitrations in the industry are governed by the FAA. While *Schein* does not involve a reinsurance controversy, its holding will certainly have an impact on dispute resolution within the industry.

First and foremost, *Schein* reinforces the Supreme Court's long-standing position that the FAA must be interpreted broadly in favor of arbitration and that arbitration provisions must be strictly enforced, including those provisions that delegate gateway issues of arbitrability to arbitrators. As a result, it is more important than ever for cedents and reinsurers to fully and plainly set forth in their contracts those disputes that are subject to arbitration and those that are not. As *Schein* reinforces, this principle applies equally to all threshold or gateway issues.

In other words, do not stay silent. Expressly describe in your arbitration clauses whether you want a court or an arbitration panel to resolve your disputes, including disputes over gateway issues. And, when incorporating an arbitration body's arbitration rules, be sure to ascertain whether those rules address the question of arbitrability.

Notably, with the elimination of the wholly groundless exception, players in the reinsurance industry can feel more assured that their disputes will be resolved in arbitration so long as they make it clear that this is their desired result. While this is likely good news for many in the reinsurance industry who seek to have industry experts resolve industry controversies, it is important to remember that reinsurance arbitrators will not necessarily conclude that a particular dispute is arbitrable. It is therefore essential that the arbitration provisions in reinsurance agreements leave no room for doubt whom the parties wish to handle their disputes—including disputes over arbitrability.

**NOTES**

1. *Henry Schein v. Archer & White, Inc.*, 139 S. Ct. 524 (2019).
2. *Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co.,* 903 F.2d 910 (2d Circ. 1990).
3. See, e.g., Eugene Wollan, *Handbook of Reinsurance Law*, 2-31 (2003 Supplement) ("[The industry generally views [capping recovery of expense at the loss limit] as diametrically opposed to long-standing practice and by and large continues to ignore the cases and adhere to the practice.").
4. Of course, since arbitration awards are confidential, this industry "scuttlebutt" cannot be definitively established.
5. See, e.g., *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 4 F.3d 1049, 1071 (2d Cir. 1993) (holding that, "*Bellefonte's* gloss upon the written agreement is conclusive".); *Excess Ins. Co. v. Factory Mut. Ins. Co.*, 3 N.Y.3d 577 (2004) (determining that the reinsurers' liability was capped without regard to industry custom and practice).
6. Although the *Bellefonte* decision reigned supreme for over two decades, its precedential effect was effectively eliminated in 2018 when the Second Circuit held that it had been premised on an erroneous interpretation of New York state law. See *Global Rein. Corp. of Am. v. Century Indem. Co.*, 890 F.3d 74 (2018).
7. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 556-57 (1964); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79,84 (2002).
8. *Howsam*, 537 U.S. at 79; *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).
9. *John Wiley*, 376 U.S. at 556-57.
10. *Id.; Moses H. Cone Memorial Hosp*., 460 U.S. at 24-25; *Howsam*, 537 U.S. at 84. But note that questions of waiver by litigation are typically for the courts to decide. See, e.g., *Cusimano v. Schnurr,* 26 N.Y.3d 391, 399 (2015) (whether a party has waived arbitration by litigation-related conduct is an issue for courts).
11. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).
12. Howsam, 537 U.S. at 85; *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion).
13. 9 U.S.C. §§ 1 et seq.
14. See, e.g., *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 68-70 (2010) (parties can agree to arbitrate arbitrability); *Schein*, 139 S. Ct. at 527 ("Under the [FAA] and this Court's cases, the question of who decides arbitrability is itself a question of contract. The [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.").
15. *Schein*, 139 S. Ct. at 529.
16. See 9 U.S.C. § 10 (courts may set aside arbitration awards procured by corruption, fraud, evident partiality or undue means, or where arbitrator exceeded powers).
17. *First Options*, 514 U.S. at 944.
18. Id.
19. *Schein*, 139 S. Ct. at 528 ("The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions.").
20. *Id*.
21. *AT&T Technologies., Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986) (the question of whether the parties have submitted a particular dispute to arbitration is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise."); *First Options*, 514 U.S. at 944 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.").
22. *Id*. (quoting *AT&T Technologies*, 475 U.S. at 649).
23. See, e.g., *Simply Wireless, Inc. v. T-Mobile US, Inc*., 877 F.3d 522, 528-29 (4th Cir. 2017); *IQ Products Co. v. WD-40 Co.,* 871 F.3d 344, 350 (5th Circ. 2017); *Turi v. Main Street Adoptions Servs., LLP*, 633 F.3d 496, 511 (6th Cir. 2011); *Qualcomm, Inc. v. Nokio Corp*., 466 F.3d 1366, 1373-375 (Fed. Cir. 2006).
24. *IQ Products*, 871 F.3d at 350.
25. *Douglas v. Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014).
26. *Id*.
27. *Schein*, 139 S. Ct. at 529.
28. *Id*.
29. *Id*. at 526.
30. *Id*. at 528.
31. *Id*.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id.*
36. *Archer & White Sales, Inc. v. Henry Schein, Inc.,* No. 2:12-cv-572 (JRF), 2016 WL 7157421 at *1, *8-*9 (Dec. 7, 2016).
37. *Archer & White Sales, Inc. v. Henry Schein, Inc.,* 878 F.3d 488 (5th Cir. 2017).
38. See supra at fn.23; *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1286 (10th Circ. 2017) ("[h]aving thoroughly considered its merits, we decline to adopt the 'wholly groundless' approach."); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1269 (11th Cir. 2017) ("We join the Tenth Circuit in declining to adopt what has come to be known as the wholly groundless exception.").
39. *Schein*, 139 S. Ct. at 527-28.
40. *Id*.
41. *Id*. at 530.
42. *Id*. at 531.
43. *Id*.
44. *Id*.
45. *Id*.


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# When is a Non-Appealable Arbitration Panel Order Appealable?

**By Robert M. Hall**

Arbitration clauses sometimes provide that the order of the arbitrator is "final, binding and non-appealable." If the parties so agree, is such a clause literally binding, or are there exceptions? What about § 10 of the Federal Arbitration Act, which allows vacatur of a panel order when (1) the award was procured by corruption or fraud, (2) there was evident partiality or corruption of the arbitrator(s), (3) the panel violated due process rights, or (4) the arbitrator(s) exceeded their authority? This article examines selected case law on this point.

## Two Options

*In re Wal-Mart Wage & Hour Employment Practices Litigation v. Class Counsel & Party to Arbitration,* 737 F.3d 1262 (9th Cir. 2013), involved a settlement agreement that called for any disputes to be subject "to binding, non-appealable arbitration" by a retired judge. The settlement agreement pertained to the distribution of attorney fees to multiple counsel in successful litigation. One set of attorneys contested the arbitrator's distribution order and sought to vacate the order. The district court declined to vacate, and an appeal was taken to the Ninth Circuit, which noted that the non-appealability clause could be interpreted in two ways.

First, as the district court concluded, the phrase "binding, non-appealable arbitration" may be understood to preclude only federal court review of the merits of the arbitrator's decision and not to eliminate the parties' right to appeal from the arbitrator's decision under § 10 of the FAA, which provides grounds for the vacatur of an arbitration award. A second possible construction of the "binding, non-appealable arbitration" clause is that the arbitration clause divests both the district court and our court of jurisdiction to review the arbitrator's fee allocation on any grounds, including those enumerated in § 10 of the FAA.[1]

The *Wal-Mart* court found that the first option was applicable—that the district court had jurisdiction over the motion to vacate and that this court correctly declined to vacate.

An arbitration clause that called for the order of the arbitrator to be "final, binding and non-appealable" was involved in the recent case of *Axia Nemedia Corp. v. Massachusetts Technology Park Corp.,* No. 17-10482-TSH, 2019 U.S. Dist. LEXIS 88549 (D. Mass. May 28, 2019). The court noted the two options of "foreclosing any judicial review, including on the grounds enumerated in section 10 of the FAA . . . [or] it may simply preclude a district court from re-adjudicating the merits."[2] The court found that the intent of the relevant language was not to preclude the court from reviewing the arbitrator's abuse of authority or bias as addressed by § 10 of the FAA.

## Rationale for No Preclusion of § 10 of the FAA

The rationale for the no-preclusion rulings is well stated in *Hoeft v. MVL Group, Inc.*, 343 F.3d 57 (2nd Cir. 2003), overruled on other grounds, *Hall St. Assoc. LLC v. Mattel, Inc.*, 522 U.S. 576 (2008):

"Arbitration agreements are private contracts, but at the end of the process the successful party may obtain a judgment affording resort to the potent public legal remedies available to judgment creditors. In enacting § 10 [of the FAA], Congress impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct. This balance would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards flawed for any of these reasons, must nevertheless be blessed by federal courts. Since federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with § 10.[3]"

> "The district court declined to vacate, and an appeal was taken to the Ninth Circuit, which noted that the non-appealability clause could be interpreted in two ways."

The Ninth Circuit expanded on this rationale:

"Permitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but would also frustrate Congress' attempt to ensure a minimum level of due process for parties to an arbitration. Through § 10 of the FAA, Congress attempted to preserve due process while still promoting the ultimate goal of speedy dispute resolution. The [] grounds [in § 10] afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit unnecessary public instruction into private procedures."[4]

## Other Case Law

One of the earlier cases on point is *Goodall-Sanford, Inc. v. United Textile Workers*, 233 F. 2d 104 (1st Cir. 1956). This case involved an arbitration related to a collective bargaining agreement that called for a "final and binding" award. With respect to the jurisdiction of the district court to hear an appeal related to the arbitrator's award, the court ruled, "The contract itself provides for finality of an award, so that the provision of the decree has no particular effect. Of course, despite 'finality,' an award

is subject to some degree of judicial review through 9 U.S.C. §§ 10 – 11 or other proceedings."[5]

*Tabas v. Tabas,* 47 F. 3d 1280 (3rd Cir. 1995), involved a settlement agreement calling for "final, binding and non-appealable" arbitration by a retired judge. The court rejected a challenge to the judge's order:

"Defendants have not alleged any action on the part of Judge Yohn amounting to corruption, fraud, or partiality. In addition, defendants have presented no evidence that Judge Yohn failed to provide a hearing to consider each party's views prior to his decision. In fact, the record clearly indicates that Judge Yohn held a hearing on this question and considered numerous exchanges of correspondence before ruling on this matter."[6]

The party that prevailed in an arbitration was successful in its motion to confirm the award in *Southco, Inc. v. Reell Precision Manufacturing Corp.,* 331 Fed. Appx. 925 (3rd Cir. 2009). When the losing party appealed, the winning party argued that the appellate court had no jurisdiction due to a "non-appealability" clause in the relevant arbitration clause. The court rejected this argument, ruling "[A] contract provision stating that arbitration is 'non-appealable' signifies that the parties to the contract may not appeal the merits of the arbitration, not that the parties agree to waive a right to appeal the district court's judgment confirming or vacating the arbitration decision."[7]

In *Rollins, Inc. v. Black,* 167 Fed. Appx. 798 (11th Cir. 2006), both parties appealed an order of the district court confirming in part and vacating in part a panel award. The court ruled that it had jurisdiction to hear the appeal:

"[One of the parties] contends the district court lacked jurisdiction to review the arbitration award because the arbitration agreement provided the award would be 'binding, final, and non-appealable.' A 'binding, final, and non-appealable' arbitral award does not mean the award cannot be reviewed. It simply means the parties have agreed to relinquish their right to appeal the merits of their dispute; it does mean the parties relinquish their right to appeal an award resulting from an arbitrator's abuse of authority, bias, or manifest disregard of the law."[8]

A similar issue was presented in *Team Scandia v. Greco*, 6 F. Supp. 795 (S.D. IN. 1998). The court ruled, "It is presumed that the parties intended to relinquish their right to appeal the merits of the dispute, not their right to appeal an arbitration award that resulted from the arbitrator's abuse of authority or bias. Accordingly, judicial review of the arbitrator's award is permissible on the grounds set forth in the FAA."[9]

It is hard to know whether the authors of arbitration clauses with non-appealability provisions intended them to apply only to the merits of arbitrators' decisions or to foreshorten the entire process. Case law, however, seems to be consistent in protecting the integrity of the arbitration process, but allowing the merits of the issues to be decided by arbitrators.

**NOTES**

1. 737 F. 3d 1262 at 1265 – 6.
2. 2019 U.S. Dist. LEXIS 88549 *10.
3. 343 F.3d 57 at 64.
4. 737 F.3d 1262 at 1268 (citations omitted).
5. 233 F. 2d 104 at 107.
6. 47 F. 3d 1280 at 1288.
7. 332 Fed. Appx. 925 at 927 (emphasis in the original).
8. 167 Fed. Appx. 798 fn. 1.
9. 6 F. Supp. 795 at 798.

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# A Briefing Note on the New International Arbitration Form

**By Jonathan Sacher and Edward Lenci**

For some time, the International Committee of ARIAS•U.S. has been considering a model or standard international arbitration form (IAF). The form that follows this report received the approval of the ARIAS•U.S. Board of Directors at its March 2019 meeting.

The idea behind the IAF is that it may encourage participants in some international reinsurance transactions to apply this form. The IAF is along the lines of "Bermuda Form" arbitration clauses in that it is designed to—
(1) deal with the situation where the cedent and the reinsurer are in different jurisdictions and may need a neutral forum to resolve their disputes;
(2) give the parties the opportunity to select an applicable substantive law that may differ from the substantive law in one of their jurisdictions;
(3) be flexible, although the likelihood is that the applicable law (if any is selected) for contracts between U.S. cedents and non-U.S. reinsurers would be New York substantive law, whereas the jurisdiction or forum for the resolution of the dispute and, therefore, the procedural law will often be outside the United States, such as Bermuda, England (London), or Canada (Toronto); and
(4) provide for all-neutral panels, which will make it more acceptable to international commerce.[1]

The IAF may not be of interest to a U.S. cedent who has a strong negotiating position and may insist on U.S. law and U.S. jurisdiction for any dispute resolution. It may also not assist any non-U.S. reinsurers who have a strong negotiating position and who can insist on their own applicable law and jurisdiction. However, it is more likely to be chosen where there is an equal bargaining position, or if the balance of the cedent's and reinsurer's negotiating position changes and the cedents might have to concede the applicable law and/or the jurisdiction of the contract.

Looking it at from the ARIAS•U.S. point of view, the form is an attempt to

encourage cedents and reinsurers who may currently not be involved with ARIAS to consider the IAF. The IAF ideally provides for New York law, which is likely to be seen as favorable to cedents, and a jurisdiction that is likely to be seen to be more efficient in the handling of disputes, such as London.

One of the International Committee's concerns has been that U.S. attorneys might not encourage their clients to use the IAF for fear they will be deprived of work. Our experience with Bermuda Form arbitrations, however, is that they primarily provide work for U.S. attorneys, but with some input from lawyers in the jurisdiction in which the dispute is resolved, such as London. Often the insured who is U.S.-based (in a Bermuda Form arbitration) or its offshore captive will instruct U.S. attorneys, whereas the insurers or reinsurers who are often based in Europe (or Bermuda) may instruct their local lawyers to defend them.

Bermuda Form tribunals tend to be a mixture of a U.S. appointee on behalf of the insured and a non-U.S. appointee on behalf of the foreign insurers, with (ideally) a third arbitrator/umpire/chair from an independent/unconnected jurisdiction. As the IAF tribunal will be neutral and impartial, it addresses one of the concerns of foreign reinsurers in the U.S. market, in which they feel they do not have an equal bargaining position or may lose the arbitration purely on the basis of the "coin toss" as to who the umpire might be. So, essentially, the proposal is that ARIAS will offer an alternative form of arbitration clause, the IAF, on the basis that it will offer mixed jurisdiction and applicable law provisions and a neutral panel.

> "The idea behind the IAF is that it may encourage participants in some international reinsurance transactions to apply this form."

**NOTES**

1. "Bermuda Form" insurance contracts are typically between U.S. insureds (or the offshore captives of U.S.-based insureds) and Bermuda-based insurers/reinsurers, where the insurers/reinsurers are not keen to be exposed to courts and tribunals in the United States but recognize that the insureds prefer a substantive law with which they are familiar or are prepared to accept New York substantive law, which is considered more balanced in protecting the interests of insureds and insurers. The parties often opt for London arbitration, where the tribunals are neutral and the process is considered to be more efficient and less expensive.

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## ARIAS (US) Model International Arbitration Form

1. Any dispute, claim, or controversy arising out of or relating to this Agreement (but no other agreement between the parties), including but not limited to the breach, termination, interpretation, validity, formation or application of this Agreement, or the scope, interpretation, validity, formation or application of this arbitration provision, shall be arbitrated by three neutral arbitrators ("the Panel") in [place, e.g., London], who shall follow, for procedural purposes, the [statute, e.g., the English Arbitration Act 1996] and any statutory modifications or amendments thereto, for the time being in force.

2. In the event of any dispute, claim or controversy covered by the preceding section 1, a party to this Agreement shall send a written Demand for Arbitration to the other party, or parties, to this Agreement concerning each dispute, claim or controversy to be arbitrated and, in the Demand for Arbitration, shall also state the name of the neutral arbitrator it appoints. Within thirty (30) days of receipt of the Demand for Arbitration, the other party, or parties, shall in writing notify the party that requested arbitration of the name of the second neutral arbitrator it appoints and may assert counterclaims but only those encompassed by section 1. If a party shall fail or refuse to nominate the neutral second arbitrator within thirty (30) days of receipt of the Demand for Arbitration, the party which sent the Demand for Arbitration shall have thirty (30) days to apply to [ARIAS [UK], [US] [Other] [or] name the court, e.g., the High Court of Justice of England and Wales] to request appointment of the second neutral arbitrator by that court, in which case the second arbitrator appointed shall be deemed to have been appointed by the party that refused or failed to select the second arbitrator. Within thirty (30) days of appointment of the second arbitrator, the two arbitrators shall choose a third neutral arbitrator who shall serve as Chair of the Panel. In the event of the failure of the first two arbitrators to agree on a third arbitrator within thirty (30) days of appointment of the second arbitrator, any of the parties may apply to [same [ARIAS] or court] for the appointment of a neutral third arbitrator. The Panel shall be deemed fully constituted and empowered upon appointment of the third arbitrator and must be a neutral panel at all times.

3. The Arbitrators shall be persons (including those who have retired) with not less than ten (10) years' experience of insurance or reinsurance as an officer or director within the industry or as a lawyer or other professional adviser serving the industry.

4. The Panel may, in its sole discretion, make such orders and directions as it considers necessary for the final determination of the disputes, claims or controversies being arbitrated, and the Panel shall have the widest discretion in making such orders or directions.

5. Notwithstanding any provision of the [statute in section 1] or any other statute or law, the Panel is, unauthorized to, and shall not, award punitive or exemplary damage or a party's attorneys' fees except a) where all parties to the arbitration request them, or b) a controlling statute authorizes an arbitrator or arbitration panel to award them. Other than as already set out in this arbitration agreement, the Panel shall render its final decision in a written, reasoned, final award. [Option 1 : In rendering that award, the Panel shall, other than as already set out in this arbitration clause, interpret this Agreement as an honorable engagement and shall not be obligated to follow the strict rules of law or evidence and, instead, shall apply the customs and practices of the insurance and reinsurance industry with a view to effecting the general purpose of this Agreement] [or Option 2 : The Panel shall apply the proper law of the Agreement[/New York law] without regard to its conflict of laws principles].

# ARIAS•U.S. and Its Affiliation with AIDA

**By Jonathan Sacher**

AIDA is a nonprofit international insurance law association (www.aida.org.uk) formed in 1960. Its purpose is to promote and develop, at an international level, collaboration between its members, with a view to increasing the study and knowledge of international and national insurance law and related matters. AIDA aims to propose measures that the insurance industry will adopt at the national and international levels, leading to the harmonization of insurance law or a means for resolving insurance disputes.

AIDA's membership is composed of some 50 national chapters—nationally organized insurance law associations that are members of AIDA, the parent organization. AIDA does not have individual members; those who are interested in the work of AIDA are encouraged to join their relevant national chapter. There are also AIDA regional groupings: CILA (the Spanish, South and Central American regional grouping), and AIDA Europe (see the AIDA Europe section of the AIDA website).

AIDA (the name derives from "Association Internationale de Droit des Assurances") organizes a World Congress every four years, arranged by one (or more) of its national chapters. AIDA issues periodicals reporting on the association's activities, including updates on national section and working party (i.e., committee) activities and developments in insurance law around the world. AIDA has alliances with relevant organizations, including educational institutions, with the aim of researching and collaborating on insurance law and related matters on an international and national level.

Members are required to collaborate in the implementation of AIDA's aims and, in particular, to prepare reports for the World Congresses and communicate, at least once a year, information on the development of insurance law in their own countries.

A presidential council defines AIDA's working program at an international level. The presidential council comprises the president, honorary presidents, up to four vice presidents, the chairs of the working parties, and a maximum of 25 councillors. Members of the presidential council are elected for a term of four years, except for the honorary presidents. The presidential council is elected by the general assembly, which endeavors to achieve fair geographical and linguistic representation on the council.

The presidential council generally meets twice a year where possible. Meetings are organized to coincide with meetings of the working parties, often at a colloquium (conference) organized by a national chapter.

The presidential council has established a number of working parties (committees) to carry out research in specific fields of insurance law and related areas. These fields and areas include the accumulation of claims and subrogation, civil liability, climate change, consumer protection and dispute resolution, credit insurance and surety, personal insurance and pensions, reinsurance, and state supervision of insurance.

The newly elected president of AIDA is Peggy Sharon, a partner in an Israeli law firm. Peggy is the first female president of AIDA and the first from the Middle East.

## ARIAS and AIDA

Under the AIDA presidency of John Butler (1992-2000), the AIDA Reinsurance and Insurance Arbitration Society (ARIAS) was established by AIDA, and the AIDA bylaws were amended.

AIDA Reinsurance and Insurance Arbitration Societies were established to afford the market and legal practitioners alike the comfort of knowing that if required to submit a dispute (commonly cross-border) to an arbitration panel, those panelists would not simply be well versed in arbitration law and procedure. They would also be wholly familiar not just with the culture and practice in which many classes of insurance and reinsurance business are conducted, but with some of the technical and even academic legal challenges that could commonly be encountered and need to be overcome.

> "AIDA's membership is composed of some 50 national chapters..."

There are now five ARIAS organizations affiliated with AIDA: ARIAS Asia, ARIAS Germany, ARIAS LATAM, ARIAS (UK) and CEFAREA/ARIAS France.

In the recent past, members of ARIAS Germany, ARIAS (UK) and CEFAREA/ARIAS France have contributed to sessions of AIDA Europe Conferences concerned with the role and practice of arbitration (among other forms of dispute resolution). There have been conference themes adopted and AIDA International Committee sessions (notably on dispute resolution and reinsurance) where it has been highly beneficial for everyone to call upon the practical experiences of those actively engaged in arbitration proceedings.

From time to time, the British Insurance Law Association (the main U.K. chapter of AIDA) and ARIAS (UK) (as mentioned above, also a U.K.-affiliated chapter of AIDA) have joined forces on topics and events, as have ARIAS Germany and ARIAS France with their AIDA national section counterparts. On the strength of this cross-border collaboration, an umbrella organization, ARIAS Europe, has developed, both to enhance the means to engage interest at the regional level and to help develop arbitration capacity in smaller emerging insurance countries where there has not previously been sufficient expertise or business to make this viable.

Discussions about all aspects of arbitration practice in the Asia-Pacific region and, similarly, across Latin American jurisdictions now also stand

to be better informed by the creation and affiliation of the two most recent additions to AIDA's ARIAS affiliates, ARIAS Asia and ARIAS LATAM.

## AIDA US (US Insurance Law Association)

AIDA US is the U.S. chapter of AIDA, but it has been dormant for some time. It is being resurrected with the intention of being more active in the AIDA world and to provide a forum for discussion about insurance, reinsurance, or insurance law. The goal is to improve the understanding of insurance law and the insurance industry though educational initiatives and to raise awareness of issues that affect insurance law and the insurance industry through informed commentary.

It may be that, in the future, AIDA US and ARIAS•U.S. (which will remain independent) will have joint events. As there is no ARIAS international umbrella body, AIDA offers an international structure for the affiliation of international insurance organizations, both on substantive law and arbitration.

Over the years, it has been recognized that arbitration practice in different jurisdictions is likely to (and does) follow different paths and needs to serve sometimes differing rules and expectations. This obviously does not mean that there is nothing to learn from how others fare, thrive or falter elsewhere. Just as lawyers, market practitioners, academics and regulators among the 10,000 or so individuals associated with AIDA worldwide may often confine their comparative studies and discussions to narrow topics within their chosen areas of specialization, this does not reduce the value of individuals becoming acquainted first-hand with direct counterparts elsewhere.

AIDA affiliation facilitates this interaction. Also, through the meetings and activities of the organizations, members have the means to engage in informed discussion and engage and influence others as well. The very existence of international members of ARIAS•U.S. bears this out.

## Value of Affiliation

Against this background, it would seem entirely fitting that ARIAS•U.S., like its counterparts within the other ARIAS entities and within AIDA more widely, would benefit from more formal affiliation and active association and collaboration. That would be consistent with AIDA and, indeed, ARIAS seeking to have a global footprint in most areas of insurance law and practice. As with the support shown by the FDCC to various AIDA activities (and enjoying many common individual members), affiliation with AIDA does not compromise the independence of ARIAS•U.S. in any way.

Being an affiliated chapter of AIDA will not require ARIAS • U.S. board members to attend AIDA events or meetings, but AIDA does encourage all members of affiliated chapters to attend its meetings. AIDA-affiliated chapters are also not guaranteed membership on the presidential council, but, as stated previously, the council is meant to be representative of all geographies associated with AIDA. Thus, ARIAS•U.S. is very likely to have a representative elected to the AIDA council.

The annual fee that chapters (such as ARIAS•U.S. would become) pay for AIDA affiliation is 250 Swiss Francs.

**Jonathan Sacher** is co-leader of the insurance practice at Bryan Cave Leighton Paisner and is rated one of the top three insurance and reinsurance lawyers in Europe by Who's Who Legal. He is co-chair of the ARIAS•U.S. International Committee.





# Increase your Tech IQ (Part Two)

**By David Winters and Andy Foreman**

Technology is constantly changing, and technology and litigation professionals use terms and jargon that can be confusing. In addition, even those of us who are comfortable with technology can, from time to time, use terms without knowing what they really mean. The goal of this article is to provide short definitions of some technology terms to help increase your technology IQ and understanding.

This article is the second installment of a two-part series. The first installment focused on both basic and advanced technology terms as well as terms used in the insurance and reinsurance industry. This installment focuses on technology terms that are often used in insurance and reinsurance litigation, with a particular focus on terms used in e-discovery and arbitrations.

## Electronic Discovery in Litigation

**Electronic discovery:** Electronic discovery or (e-discovery) is simply the electronic form of traditional discovery in litigation. As with traditional discovery, parties engaged in electronic discovery preserve, gather, review, and produce information in response to discovery requests, but with electronic discovery, the information is in electronic format and all of those steps take place electronically. For example, a party might copy all emails from a certain person's email account (from a custodian, defined below), then review and produce the emails in their original format or as image files.

**ESI:** ESI is an acronym for electronically stored information, a term of art defined in the Federal Rules of Civil Procedure. Broadly speaking, ESI is information created, manipulated, transmitted or stored in an electronic medium or in a manner otherwise requiring the use of computer hardware or software. Everything saved on your computer is ESI. So is everything on your smartphone. The vast majority of documents produced or exchanged in modern arbitration will be ESI.

**Gigabyte and megabyte:** A byte is a term describing the quantity of electronic information expressed as a unit of memory size. A gigabyte is roughly one billion bytes of information; a megabyte is roughly one million bytes of information. Because ESI cannot always be measured in terms of pages of information (think videos or databases), parties in litigation sometimes use terms like gigabyte or megabyte to quantify electronic information. Even where ESI can be measured in pages, the number of pages of information contained with a gigabyte or megabyte will vary depending on the types of files in question. For example, a gigabyte could contains anywhere from 15,000 pages to more than 670,000 pages, depending on the file type.

**Metadata:** Metadata is data about data; it is the information that describes the characteristics of ESI, such as sender, recipient, author, the date a document was created, and the date a document was modified. An electronic document's metadata is stored within the document itself. For example, a Microsoft Word document may contain metadata such as who created it, when it was created, and when it was edited. If someone were to change the text of that Word document, even though it might not be evident later from the text that a change was made, the metadata will show that it was changed and when.

## Where Files Are Found

**Custodian:** The custodian is most often the individual from whose files a group of records were collected or extracted. This person is not necessarily the author of the documents. For example, you're the custodian of all of the emails in your own email account, even though you received the ones in your inbox and only authored the ones in your sent folder.

**The cloud:** The cloud is a network of offsite electronic storage locations for holding ESI. The computers and servers that make up the cloud are networked and accessible through the internet. Information stored in the cloud is generally saved in more than one location to ensure that if one copy is lost—for example, due to malware or flooding—other copies remain.

**Archive:** A separate storage device or location for long-term preservation of ESI that is no longer actively used. This can also refer to the process of moving ESI to a long-term storage device or location.

**Backup:** A backup is a copy of one or more files created as an alternate in a different storage location—on a disk, a drive, or, increasingly these days, in the cloud—in case the original data is lost or becomes unusable.

## How Files Are Organized

**Document family:** All parts of a group of files that are attached or connected to each other, such as an email and its attachments. For example, an email and its attachments together would be collectively called the "document family."

**Parent document:** Within a document family, the file to which other files are attached. In the case of emails, the email itself is the parent.

**Child document:** Within a document family, a file that is attached to another file. In the case of emails, an attachment to an email is a child.

**Attachment:** A file that is connected to another file either externally, such as a file connected to an email so as to send the file with the email, or a file embedded in another file, such as an image in a word processing document.

## File Processing and Review

**OCR:** Optical character recognition (OCR) is a process by which a computer analyzes images of text, such as scans of printed pages, to convert the images into electronic text that can be electronically searched using search queries. OCR does not always work perfectly—for example, handwriting can be particularly difficult if not impossible to convert into searchable text. But since OCR is dependent on current technology and the bounds of artificial intelligence, it is getting better all the time.

**Search:** The process of looking within a data set for data that matches, or is related to, specified criteria (a query). Searches can be as simple as a keyword search, where the search looks for a specified word, or as sophisticated as a concept search, where the search identifies documents based on a query but where the query term itself is not in the document.

**De-duplication:** Also referred to as de-duping, de-duplication is the process of comparing electronic documents or files to identify and/or remove duplicate records. For example, if emails from multiple custodians who exchanged emails with each other are collected, de-duplication can remove copies of the same email that appear across multiple different email files—in the sent folder of one and the inboxes of others.

**Predictive coding:** Also known as "technology assisted review" (TAR) or "computer assisted review" (CAR), predictive coding is a tool involving the use of computer software that is used in litigation to manage the review of large quantities of ESI. Predictive coding is a process of categorizing documents by extrapolating the tagging decisions of a reviewer across a larger data set, using artificial intelligence. It is an iterative tool that increases accuracy throughout the reviewing and tagging process. Predictive coding can be used as a more economical alternative to having attorneys review each and every document collected for production.

**Redact:** To intentionally conceal or censure, usually via an obscuring overlay or by removing data or portions of a document considered privileged, proprietary, confidential or otherwise objectionable. Redaction of ESI can be somewhat more complicated than with paper documents—it is not always enough simply to hide the text being redacted, as files can contain text that is not visible but that can nevertheless be discovered.

## Producing Documents in Litigation

Parties in litigation produce documents in a variety of different ways. To illustrate, imagine a Microsoft Word document. The following terms illustrate different ways this same Microsoft Word document could be produced in litigation.

**Native format:** An electronic file that is in the same format in which it was created. A native format file can contain metadata about its creation that might be lost if the file is converted to an image format for production, although the metadata can be separately recorded and produced with the image file and production of a native file can alter its metadata. In the case of our Word document example, an electronic copy of the original Microsoft Word document file is in native format.

**PDF:** Portable document format (PDF) is a file format consisting of either an electronic image of text (or text and graphics) or searchable text, when the PDF is output directly from a native document. While a PDF can be created from a document in native format, a PDF file can also be created by scanning a hard-copy document, which results in a PDF that contains an image of the document. For our Word document example, it would be possible either to "print" the Word document "to PDF," resulting in a file with searchable text, or print the Word document on paper and then scan it into a PDF.

**TIFF:** Tagged image file format (TIFF) is a type of image file that can be created directly from a file in native format or by scanning a hard-copy document. Unlike a PDF, even a TIFF created directly from a native document will not contain searchable text. Parties in discovery sometimes exchange ESI in the form of single-page TIFFs, where each TIFF is an image of a single page. As with PDFs, our example Word document could be converted to a TIFF directly or printed and scanned to become a TIFF.

**Legacy data:** Data for which the format has become obsolete. This can include file formats for programs that have been discontinued—think of a document created with outmoded word processing software, or a spreadsheet created using Lotus-1-2-3—as well as media in formats that are no longer used, such as floppy disks and tape backups.

The definitions used in this article were derived from a variety of sources, including the following: The Federal Rules of Civil Procedure; Legal Dictionary at Law.com, available at https://dictionary.law.com; "How Many Pages in a Gigabyte?" available at https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf; "The Tech Terms Computer Dictionary," available at https://techterms.com; and "52 eDiscovery Terms You Should Know," available at https://cdslegal.com/wp-content/uploads/2012/07/52-ediscovery-terms-you-should-know.pdf.

**David Winters** and **Andy Foreman** are partners at Porter Wright Morris & Arthur LLP. They are trial lawyers who represent insurance and reinsurance companies. They have had extensive experience with the technological issues that arise in litigation and arbitration.

# Limiting Courts' Authority to Vacate Arbitration Awards

Since March 2006, the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration- and insurance-related issues. Individual ARIAS•U.S. members are also invited to submit summaries of cases.

**Case:** *Matter of Daesang Corporation et al. v. NutraSweet Company et al*. 167 A.D.3d 1(1st Dept. Sept. 27, 2018)

**Court:** New York State Supreme Court, Appellate Division, First Department

**Date decided:** September 27, 2018

**Issue decided:** Whether, under the Federal Arbitration Act, a court is authorized to substitute its own judgment regarding the law and the facts for that of an arbitration tribunal in determining whether to vacate the tribunal's international arbitration award under the doctrine of manifest disregard of the law.

**Submitted by:** Michele L. Jacobson and Beth K. Clark

In *Matter of Daesang Corporation v. The NutraSweet Company*, the First Department of the Appellate Division of the New York Supreme Court held that, under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (FAA), courts could not impose their own conclusions of the relevant facts and law to vacate an international arbitration award on the grounds that the arbitration tribunal had acted in manifest disregard of the law.

In 2002, Daesang Corporation and the NutraSweet Company entered into a joint defense and confidentiality agreement (JDA) in connection with NutraSweet's potential acquisition of Daesang's aspartame business. Under the JDA, NutraSweet had the authority to rescind the ultimate acquisition if a customer with annual worldwide aspartame requirements in excess of 1 million pounds commenced legal proceedings against the parties to challenge the deal as an antitrust violation. The parties closed the acquisition in 2003 and, in turn, entered into an asset purchase agreement (APA) and a processing agreement. Both the APA and processing agreement were governed by New York law and included clauses providing that disputes were to be resolved in arbitration pursuant to the International Chamber of Commerce Rules. *Daesang Corp.*, 167 A.D.3d at 5-6.

For the first two years following the transaction's closing, NutraSweet complied with its obligations and paid two of the annual installment payments on the purchase price under the APA. In the third year, however, NutraSweet defaulted, causing Daesang to invoke its contractual right to accelerate the $55 million balance on the purchase price and inform NutraSweet that it planned to manufacture aspartame for its own account. In response, NutraSweet advised Daesang that it was exercising its rights under the JDA to rescind the acquisition based on an antitrust class action lawsuit filed against the parties by several industrial aspartame customers. *Id*. at 6.

In 2008, Daesang commenced arbitration against NutraSweet under the APA and purchasing agreement seeking monetary damages for NutraSweet's breach of those agreements. In response, NutraSweet asserted four defenses and counterclaims: (1) it had appropriately rescinded the acquisition under the JDA based on the antitrust lawsuit; (2) equitable rescission based on allegations that Daesang had issued a false compliance-with-law warranty in the APA and had fraudulently induced NutraSweet into the acquisition; (3) equitable rescission based on Daesang's allegedly false representations and warranties in the APA and processing agreement concerning its product quality, manufacturing processes, production capacity, production costs, and customer complaints; and (4) Daesang was in breach of the APA and processing agreement based on its failure to maintain the plant, timely manufacture aspartame, and supply sufficient amounts of saleable aspartame. *Id*. at 7.

In December 2012, after a nine-day evidentiary hearing and oral argument on post-hearing submissions, the arbitration panel issued a 34-page "Partial Final Award" unanimously ruling in Daesang's favor on all of its claims and dismissing all of NutraSweet's defenses and counterclaims. Among the reasons asserted for its ruling, the arbitrators stated that NutraSweet's breach of contract counterclaim "'ha[d] not asserted any alleged breaches of the APA and [p]rocessing [a]greement as a claim independent of its claim for rescission of those agreements.'" *Id*. at 8. After the partial final award, the parties addressed the appropriate remedy for NutraSweet's breaches, on which the arbitration panel had reserved decision.

On June 14, 2016, the tribunal issued its final award and awarded Daesang over $100 million in monetary damages. In the award, the tribunal reaffirmed its decision to dismiss NutraSweet's defenses and counterclaims, including its breach of contract claim, which decision NutraSweet had challenged during the remedy phase of the proceeding. In response to NutraSweet's contention that its breach of contract claim was independent of its claims for rescission, the arbitrators ruled that, to the extent that was true, NutraSweet had waived its right to assert the independent claim during the course of the proceedings. *Id*. at 11-12.

In September 2016, Daesang commenced a proceeding in the New York Supreme Court, New York County to obtain confirmation of the final award under the Federal Arbitration Act, 9 U.S.C. § 1 et al. The parties agreed that the FAA applied to the proceeding in this international dispute per the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 UST 2517, TIAS No. 6997 (1958) ("Convention"). NutraSweet answered and cross-moved to vacate both the partial and final awards on the grounds that "'the arbitrators manifestly disregarded the law and evidence, violated public policy, and utterly failed to discharge their duties in accordance with the law and the Terms of Reference governing the arbitration.'" *Id*. at 13.

The New York Supreme Court granted NutraSweet's motion to vacate the awards to the extent that the awards dismissed its counterclaims based on fraudulent inducement and breach of contract, and remanded the matter to the arbitration panel for a "redetermination" of those claims. *Id*. In so doing, the court determined that the panel had manifestly disregarded the law by ignoring the well-established rule that a fraudulent inducement claim may be based on a breach of contractual warranty if the misrepresentations are of present, as opposed to future, facts and caused actual loss. The court also concluded that, based on the record (which it had carefully reviewed), NutraSweet had clearly not waived its breach of contract claim. The court held that "'[t]he refusal to consider the merits of NutraSweet's breach of contract counterclaim and the baseless determination of waiver goes beyond mere error of law or facts, and amounts to an egregious dereliction of duty on the part of the Tribunal.'" *Id*. at 13-14.

On appeal, the Appellate Division reversed the Supreme Court's decision. In so doing, the Appellate Division noted that Section 10 of the FAA sets forth only four grounds upon which a court may vacate an arbitration award; NutraSweet had only moved on one of those grounds, namely, "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." 9. U.S.C. § 10(a)(4). *Id*. at 15. NutraSweet also moved on the grounds that the arbitrators had manifestly disregarded the law—which ground the Appellate Division stated was "a 'severely limited' doctrine." "It is a doctrine of last resort limited to the rare occurrence of apparent 'egregious impropriety' on the part of the arbitrators, where none of the provisions of the FAA apply." *Id*. at 16.

With that background, the Appellate Division held that, vis-à-vis the arbitrators' decision to dismiss NutraSweet's equitable rescission counterclaims, it must stand because it did not meet the "high standard required to establish manifest disregard of the law, namely a showing that 'the arbitrator[s] knew of the relevant principle, appreciated that

this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it'." *Id*. at 18 (quoting Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 217 (2d Cir. 2002). The record established that the arbitrators had considered and analyzed the competing case law presented by both parties with respect to the viability of those fraud-based claims. Regardless of whether the arbitrators had ultimately reached the wrong conclusion, manifest disregard of the law requires more than an error of law or a miscomprehension by the arbitrators (and that was the most NutraSweet could establish). Moreover, given the existence of competing case law, the law at issue was not sufficiently "well-defined" to support a finding of manifest disregard of the law. *Id*. at 19.

As regards the arbitrators' dismissal of NutraSweet's breach of contract counterclaim, the Appellate Division rejected NutraSweet's argument that it constituted an imperfect execution of the tribunal's powers such that the final award was not "a mutual, final and definite award upon the subject matter submitted" under Section 10(a)(4) of the FAA. NutraSweet had proffered this argument on the basis that the arbitrators had dismissed the breach of contract counterclaim only on procedural grounds, without reaching the counterclaim's substantive merits. The Appellate Division held that this was not a basis under the FAA to vacate an award. Rather, an award is subject to vacatur under Section 10(a)(4) of the FAA if it leaves the parties unable to discern their rights and obligations and fails to resolve the submitted dispute or creates a new one.

Moreover, the Appellate Division held that the Supreme Court lacked authority to carefully review the underlying hearing transcript to ascertain whether NutraSweet had, in fact, waived its breach of contract counterclaim; proceedings to confirm and/or vacate arbitration awards under the FAA do not allow for such a review. *Id*. at 20-22. "A court is not empowered by the FAA to review the arbitrators' procedural findings, any more than it is empowered to review the arbitrators' determinations of law or fact." *Id*. at 22. Instead, a court is only empowered to ascertain whether the arbitrators arguably interpreted the procedural record; if they did, the court cannot inquire further.

Finally, the Appellate Division rejected NutraSweet's argument that the Supreme Court's decision should be upheld on the ground that enforcing the partial and final awards would be contrary to public policy of the United States. Under the Convention, a court may deny enforcement of an arbitral award if it "would be contrary to the public policy of that country" Convention, art V, § 2 [b]. The Appellate Division explained that this provision must be construed narrowly and applied only where enforcement would violate the basic notions of morality and justice. In this case, NutraSweet had not argued that the transactional contracts were unlawful; it claimed, instead, that it had been fraudulently induced into entering into those agreements by Daesang, and that enforcing the monetary damage award would permit Daesang to profit from unclean hands. The Appellate Division rejected this argument because the tribunal did not conclude that Daesang had fraudulently induced NutraSweet to enter into the deal; therefore, there existed no basis to vacate the award on public policy grounds. *Id*. at 24-25.

**Michele Jacobson** is a partner in the litigation department and member of the executive committee of Stroock & Stroock & Lavan, LLP.

**Beth Clark** is special counsel in the litigation department of Stroock & Stroock & Lavan.

## STATE STATUTES

The Law Committee recently worked to update a complete listing of connections to state statutes relating to reinsurance, insurance and arbitration. Because these statutes often are implicated in current reinsurance arbitrations, the Law Committee thought it would be helpful for members to have one place that would provide easy access to all of them. You can find the updated links on the ARIAS website at:

https://www.arias-us.org/publications/arias-u-s-law-committee-reports/state-statutes/





## THOMAS ZUREK JOINS SCHIFF'S INSURANCE/REINSURANCE PRACTICE IN CHICAGO

Thomas M. Zurek has joined Schiff Hardin LLP as of counsel in its Insurance and Reinsurance and Litigation and Dispute Resolution Practice Groups in Chicago.

Zurek is an ARIAS-Certified Arbitrator and focuses on life insurance-based arbitration, having rendered verdicts in more than 10 arbitration proceedings, primarily in the life insurance industry. In addition to practicing law at Schiff Hardin, Zurek serves as president and CEO of Sargasso Mutual Insurance Company, an offshore D&O company that represents the largest mutual financial services companies in the United States.

Prior to joining Schiff Hardin, Zurek was senior chief legal counsel, executive vice president and secretary of OneAmerica Financial Group. Previously, he was general counsel at American General Life Companies (now AIG).

## DAVID ATTISANI NAMED GLOBAL THOUGHT LEADER

David Attisani has been named a global thought leader in the field of insurance and reinsurance by Who's Who Legal, which also ranks him the second-highest-rated insurance lawyer in the world out of more than 1,400 individuals considered.

Who's Who Legal, describes its Thought Leaders as "worthy of special mention owing not only to their vast expertise and experience advising on some of the world's most significant and cutting-edge legal matters, but also their ability to innovate, inspire and go above and beyond to deliver for their clients."

During his career, Attasani has served as lead counsel in several high-profile claims, including those related to the September 11 terrorist attacks, Obamacare, Superstorm Sandy, the Las Vegas shooting, and the "Big Dig" tunnel collapse.

## CARLTON FIELDS TEAM MOVES TO DRINKER BIDDLE & REATH

Fourteen litigation partners and three associates with Carlton Fields Jorden Burt have relocated to Drinker Biddle & Reath LLP, with some joining Drinker Biddle's Washington, D.C., office and the rest establishing a new office in Hartford, Connecticut.

The partners joining the Washington, D.C., office are Frank G. Burt, Josephine Cicchetti, James F. Jorden, Roland C. Goss, W. Glenn Merten, Shaunda Patterson-Strachan, Brian P. Perryman, Waldemar J. Pflepsen Jr., Kristen Reilly, Kristin Ann Shepard and Dawn B. Williams.

The partners helping launch the new office in Hartford are Stephen J. Jorden, Ben V. Seessel and Michael A. Valerio.

## FIVE FROM SQUIRE PATTON BOGGS EARN CHAMBERS RECOGNITION

Five partners at Squire Patton Boggs were honored in the 2019 edition of Chambers USA: America's Leading Lawyers for Business, as follows:

- Suman Chakraborty: insurance/dispute resolution/insurer (New York)
- Deirdre G. Johnson: insurance/insurer (District of Columbia)
- Paul W. Kalish: insurance/dispute resolution/insurer (nationwide); insurance/insurer (District of Columbia)
- Larry P. Schiffer: insurance/dispute resolution/insurer (New York)
- Mark D. Sheridan: litigation/insurance (New Jersey)

## FREEBORN GARNERS HIGH RANKING FROM CHAMBERS USA

Five insurance and reinsurance partners at Freeborn & Peters LLP are ranked in the Chambers USA 2019 legal industry guide, as is the firm's Reinsurance Practice.

The partners ranked as among the leading insurance and reinsurance practitioners in Illinois, and their recognized practice areas, are as follows:

- James J. Boland: insurance/dispute resolution/reinsurance
- Mark R. Goodman: insurance/transactional and regulatory
- Joseph T. McCullough: insurance/dispute resolution/reinsurance

The partners ranked as among the leading insurance and reinsurance practitioners in New York, and their recognized practice areas, are as follows:

- Daniel Hargraves: insurance/dispute resolution/insurer
- Sean Thomas Keely: insurance/dispute resolution/insurer

## September 18, 2019 Webinar: Price Optimization and Unfair Rate Discrimination – Emerging Regulatory and Litigation Issues in the Era of "Big Data"

**Learning Objectives:**

- Overview of industry use of predictive pricing models and increasing complex rating approaches
- Regulatory views of unfair discrimination
- Examples of class action lawsuits against insurance companies
- Relevant guidance including actuarial standards of practice

**Faculty:**

Richard Piazza, ACAS MAAA, Chief Actuary, Louisiana Department of Insurance. Additional faculty will be announced at a later date.

## November 6, 2019: Intensive Arbitrator Training

The Intensive Arbitrator Training Workshop is a full-day session focused on the effective engagement of party arbitrators. Presentations by industry veterans and involvement in mock sessions will emphasize the role of the party-appointed arbitrator in the arbitration process. The program is structured so that all arbitrator participants have the opportunity to function in the arbitrator's role in a hands-on mock arbitration. Panel members will be presented with arguments by participating attorneys. They will then deliberate "in private" in front of the other participants, including instructors, who will provide feedback.

This program is designed for newer or aspiring arbitrators; this training is also a great way for veteran arbitrators to refresh their knowledge and skills. It is required for anyone who intends to apply for arbitrator certification under Options B or C of the Arbitration Experience / Knowledge Component.

**Course Faculty:**

- Sean Keely (Freeborn & Peters LLP; ARIAS•US Education Committee)
- Lisa Keenan (Odyssey Re; ARIAS-US Education Committee)
- William O'Neill (Troutman Sanders; ARIAS-US Education Committee)

Additional faculty will be announced at a later date.



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