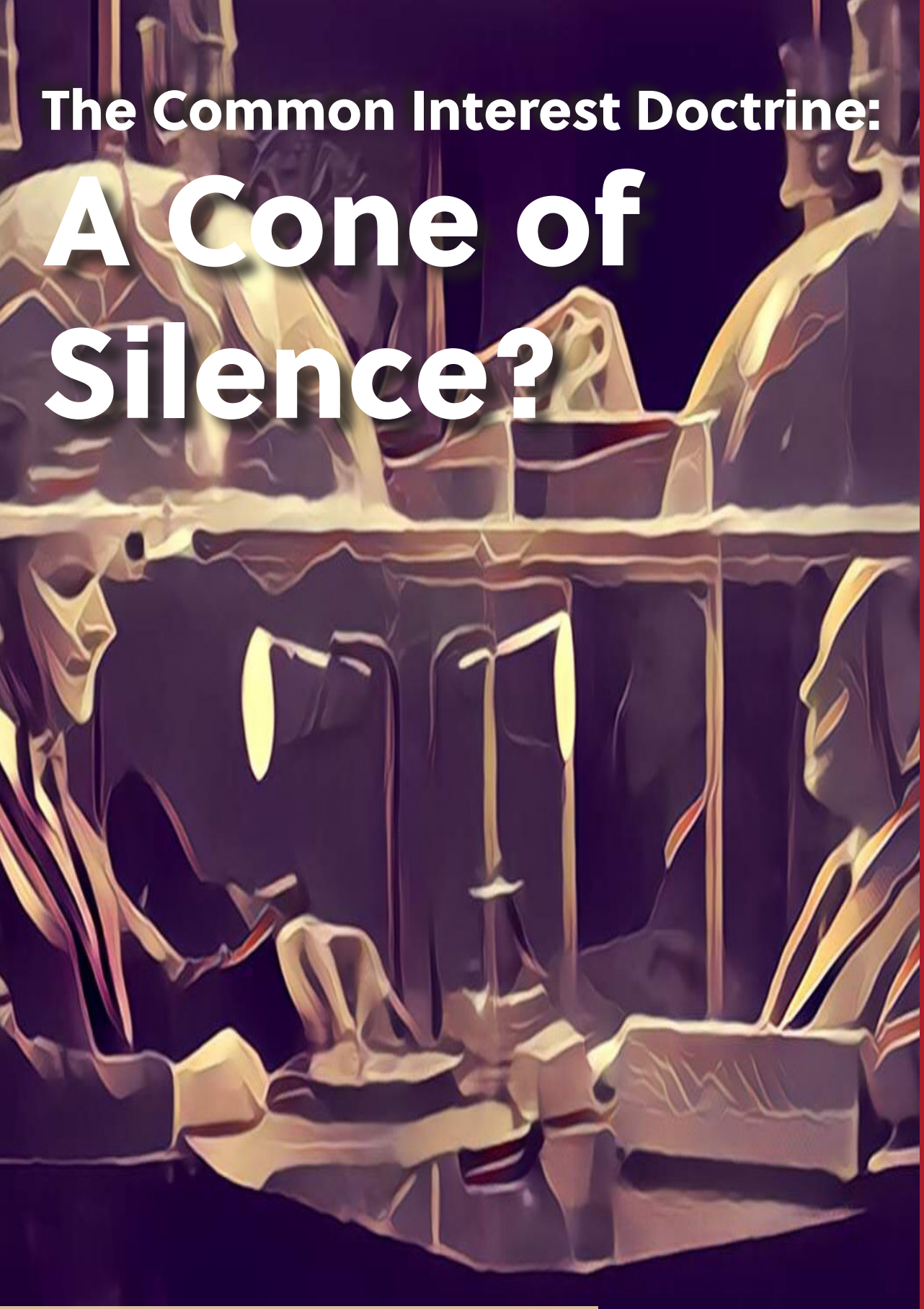

The Common Interest Doctrine: A Cone of Silence?

ARIAS U.S.

QUARTERLY

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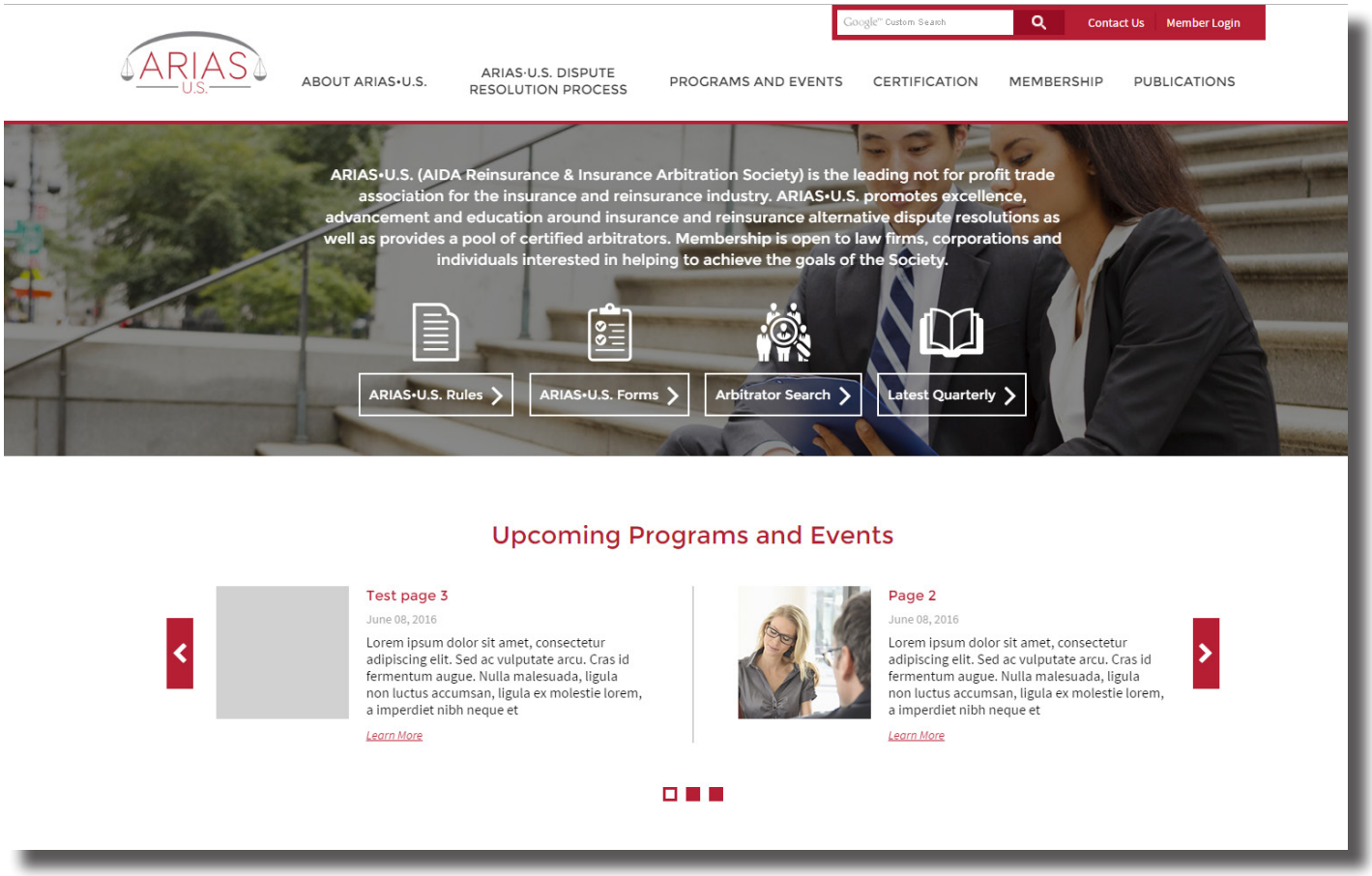
Q2 • 2016

A New Look—and Much, Much More!

Our newly redesigned website, www.arias-us.org, goes live in August.



The first thing you'll notice is that our new site offers ARIAS•U.S. a fresher and more professional look, incorporating bold colors and graphic elements. But the beauty of our new site is more than skin deep. Look inside and you'll find a library with more than 65 issues of the *Quarterly*, a new arbitrator search engine with nearly 200 certified arbitrators and mediators, the latest forms and rules, and page after page of essential information for insurance and reinsurance arbitrations. Finding these resources is easier than ever—the new site is organized to provide direct navigation and quick access, and boasts a new site-wide search engine for those needing to take a deeper dive.

With our new site, we also hope to extend the reach of our programs, events, and other offerings, such as our certification program and the ARIAS•U.S. Dispute Resolution Process. Consider adding the website URL to your e-mail signature to encourage others to visit the site and explore the benefits of ARIAS•U.S. membership!

FEATURES

Cover Artwork: Cone of Silence from Episode 1 ("Mr. Big", 1965) of Get Smart (https://en.wikipedia.org/wiki/Cone_of_Silence#/media/File:Get_Smart-Cone-of-silence.jpg); Photo edited with Prisma App

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 to tomstillman@aol.com. 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.

EDITOR'S LETTER

I'm counting on you to put down your excuses and pick up your pens. This column customarily ends with a call for articles and the friendly reminder that the *Quarterly* is what you, the ARIAS members, make it. Over the life of the magazine, you have been generous. You've stepped up to share your knowledge and expertise by contributing articles. But lately, the *Quarterly* has hit a dry spell, so I'm starting off this column with a call for articles.

To be blunt, without your contributions, the magazine cannot continue. Whether you think the *Quarterly* is already doing a good job bringing you interesting and relevant articles, or whether you'd like to see it do better, I'm asking you to do your part. You don't have to be Hemingway or Fitzgerald, Jane Austen or James Thurber or Edgar Allan Poe. We wouldn't accept articles from them, anyway — that is, unless they joined ARIAS. But if you do belong and you're interested in a topic, chances are others are interested in it, as well.

So, please, step up and contribute an article today. OK, maybe today is too dramatic. How about in time for publication in the next issue? Start by sending your ideas for articles to me at tomstillman@aol.com. If you'd like suggestions for topics, just ask.

Whether you work as an arbitrator or for a company, broker, or law firm, you are an experienced professional. Many ARIAS members have been in the industry since their infancy or a few years thereafter. Or so it seems. That's why you know a privileged document when you see it. What's more, ARIAS members are always in agreement about whether a given document or documents should be produced.

Well, perhaps this is true in fantasy arbitrations, but in real life, disagreements about privilege are not infrequent. So perhaps it's time for some level-setting (admittedly a phrase I learned in corporate-speak class)—or, to put it differently, perhaps you should read the first article in this edition of the *Quarterly*, in which Amy Piccola of Saul Ewing reviews the principles and cases underlying the applicability of the common interest doctrine to the cedent-reinsurer relationship. After that, why not go on to our second article, in which Joseph Froehlich and Mark A. Deptula of Locke Lord examine how privilege

You don't have to be Hemingway or Fitzgerald, Jane Austen or James Thurber or Edgar Allan Poe. We wouldn't accept articles from them, anyway — that is, unless they joined ARIAS.

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plays out when reinsurers seek documents pursuant to the "access to records" clauses found in many reinsurance treaties.

Of course, your point of view on these topics may be different from that of the authors. If so, I encourage you to write your own article in response.

If you've ever tangled with a motion for consolidation, you'll want to read the article by Julie Rodriguez Aldort and Jonathon Raffensperger of Butler Rubin, in which they attempt to untangle when consolidation is available and who decides. I hope you'll find it helpful.

Meanwhile, from across the pond comes proof that even in a tradition-steeped nation, laws do change. Jonathan Sacher of Berwin Leighton Paisner brings news of three new statutes that will come into force in England in 2016 and 2017 and substantially change English insurance and reinsurance law. I'll leave arguments on whether these changes are for the better for another day—or, if any ARIAS members would write one, another article.

Although there was some disagreement among the four of them, Jim Sporleder, Roger Moak, Stephen McCarthy, and Connie O'Mara were able to compile some helpful suggestions for serving as an umpire in an arbitration. Given the disagreements among the authors, I wouldn't expect all of our members to agree, either. Nonetheless, the suggestions raise issues and set forth points to consider in fulfilling the umpire's role.

It just might be that there are some of us, maybe even most of us, who might be a tad reluctant to reveal what we've done on dates (especially first ones). On the other hand, there are always those who feel compelled to indulge their voyeuristic appetites by peeping into the affairs of others. Once more, the *Quarterly* comes to the rescue! In a tell-it-all recounting of his first experiences with ARIAS speed dating, Chuck Ehrlich has written an article (which he begged me to publish anonymously) revealing the nitty-gritty. I hope you enjoy reading it.

I'll close this column by reiterating the *Quarterly's* need for your contributions and urging you to step up and write! •

It just might be that there are some of us, maybe even most of us, who might be a tad reluctant to reveal what we've done on dates (especially first ones).

— Tom Stillman

ARIAS·U.S. launches a new logo!

A new ARIAS logo was unveiled at the Spring Conference a few weeks ago. The Board worked with our management company's design team to create what we hope to be an updated and fresh look for ARIAS. Over the next several months, you will begin to see our new face as we launch a new ARIAS·U.S. website, resource materials and communications. Check it out at www.arias-us.org.

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ARIAS U.S.

Tripartite Privilege?

A Review of the applicability of the common interest doctrine to the cedent-reinsurer relationship

By Amy L. Piccola

The common interest doctrine provides an exception to the general rule that the protections of the attorney-client privilege are waived when a privileged communication is shared with a third party. The doctrine is intended to allow "persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers."[1]

While the nuances of the doctrine vary by jurisdiction, it is essential that the communication first satisfy the general requirements of the attorney-client privilege—that is, the communication must have been made for the purpose of facilitating the provision of legal advice. It is also clear that to retain privilege under the doctrine, information shared with a third party must have been communicated in furtherance of the parties' common interest in developing a joint strategy or defense in light of pending (or impending) litigation. Information merely shared in the ordinary course of business will not qualify under the doctrine's exception to the rule of waiver.

The common interest doctrine has a unique place in the cedent-reinsurer relationship. It has served to shield from discovery communications between cedents and their reinsurers in coverage litigation. It has also been cited by reinsurers as grounds for compelling access to their cedent's coverage opinions and other privileged information.

This article reviews some of the key cases on the law of privilege as applied to the cedent-reinsurer relationship. The first section highlights the use of the common interest doctrine as a shield against policyholders' attempts to access insurers' privileged materials; the second examines reinsurers' efforts to use the doctrine to compel production of those same materials.

Using the Common Interest Doctrine as a Shield

During the course of coverage litigation, policyholders have frequently argued that disclosure of otherwise privileged information to a reinsurer results in a waiver of any applicable privilege. The majority of courts addressing this issue have found that the common interest doctrine shields from disclosure privileged information communicated to a reinsurer during the course of the underlying litigation.

Courts' willingness to find a common interest turns on the type and content of the communications at issue. Communications not otherwise privileged do not become so simply upon transmission to a reinsurer. Similarly, communications that are not made in furtherance of the common interest in the litigation, even if privileged, are not shielded from production—such privilege is considered waived under the circumstances.

Non-privileged Communications Need Not Apply

In *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*,[2] a policyholder sought production of communications between its insurer and a reinsurer regarding the investigation and status of the policyholder's claim. The insurer argued that applicable privileges were not waived when information was passed to its reinsurers because those reinsurers shared a common interest in the policyholder's claim. The court first held that the work product doctrine did not prohibit disclosure, as no document at issue was prepared in anticipation of litigation. Rather, the documents were each created as part of the ordinary course of business between the insurer and reinsurer:

It is the very nature of an insurer's business to investigate and evaluate the claims of its insured, and the fact that the investigation and evaluation continues after litigation commences is not conclusive proof that material has been created to aid in that ligation. Moreover, [the insurer] was contractually obligated to continually notify its reinsurers of the status of the [policyholder's] claim, and such routine notifications do not qualify as work product of an attorney . . . prepared in anticipation of litigation.[3]

Privileged, or ordinary course of business? While courts are split on the issue, the majority of reported decisions have found that the common interest doctrine applies to the cedent-reinsurer relationship.

The attorney-client privilege was similarly no shield to production because none of the documents were created by or for an attorney—again, all were generated in the ordinary course of business of the insurer and reinsurer.[4]

Front Royal Insurance Co. v. Gold Players, Inc.[5] also involved a coverage dispute and accompanying claims for breach of contract and bad faith. In that case, the issue was whether the work product doctrine protected from discovery correspondence and information that Front Royal shared with its reinsurer. The specific documents at issue were a reinsurance loss notice and general reinsurance report concerning the underlying claim sent by a Front Royal employee to Front Royal's reinsurer and the reinsurer's response to the loss notice. The court rejected Front Royal's claim that the documents were immune from discovery under the common interest doctrine because they were simply not protected in the first instance. The court found that the documents were "created in the ordinary course of business under the contractual obligations between insurer and reinsurer[,] . . . were not prepared in anticipation of litigation and, therefore, are not protected from production by the work-product doctrine."[6]

It Was Privileged Before, but Let's Talk about Waiver

While courts are split on the issue, the majority of reported decisions have found that the common interest doctrine applies to the cedent-reinsurer relationship. In *Hartford Steam Boiler Inspection & Insurance Co. v. Stauffer Chemical Co.*,[7] a group of policyholders sought production from a reinsurer of certain privileged documents, including correspondence between the insurer and its coverage counsel. The policyholders contended that the insurer waived the attorney-client privilege for the documents at issue when it shared them with the reinsurer.

The court disagreed, noting first that "[t]he legal and economic interests of [the cedent and reinsurer] in the . . . insurance claims and lawsuits are inextricably linked by the reinsurance treaty," such that the reinsurer would "automatically share in any liability suffered" by the insurer in the underlying litigation.[8] The court also found persuasive the fact that the reinsurance treaty required the cedent to cooperate with the reinsurer so the reinsurer could analyze its defense obligations. This cooperation "would naturally include communications between [the cedent's] attorneys and [the reinsurer] and other communications subject to privilege."[9] The nature of the cedent's relationship with the reinsurer was such that the companies had a common interest, and the privilege was not waived.

The court in *Great American Surplus Lines Insurance Co. v. Ace Oil Co.*[10] was

similarly asked to determine whether the disclosure of coverage opinions to a reinsurer waived the attorney-client privilege otherwise applicable to those opinions. In *Great American*, a reinsurer produced correspondence from the insurer's coverage counsel in the underlying coverage litigation in response to a subpoena from the policyholder. The reinsurer had obtained the correspondence from the insurer's general agent, who had retained coverage counsel.

The court, applying a state law rule that permits disclosure of privileged information to persons to whom "disclosure is reasonably necessary for the . . . accomplishment of the purpose for which the lawyer is consulted," concluded that the privilege had not been waived when the documents were shared with the reinsurer. The court held as follows:

[The reinsurer] reinsured the greatest proportion of the policy at issue here. Good business practices would lead [the reinsurer] to peruse documents indicating the extent of exposure determined by [the agent] because [the reinsurer] would be ultimately responsible for a substantial portion of any amount paid on the policy. A finding that disclosure was not reasonably necessary would require undue interference with communications appropriately characterized as confidential by [the insurer and its agent].[11]

The common interest doctrine was also at issue in *Minnesota School Boards Association Insurance Trust v. Employers Insurance Co. of Wausau*.[12] In that case, an insurer moved to quash a subpoena served on its reinsurers by a policyholder. The subpoena sought production of communications between the insurer and reinsurer regarding the status of the underlying litigation. The insurer argued that its communications to its reinsurer were made pursuant to the parties' "common interest in evaluating and minimizing the exposure arising from the [underlying coverage litigation]" and were made with a full expectation of confidentiality. The court agreed with the insurer, finding that there had been no waiver of the privilege because the insurer "always intended and expected their communications would remain confidential and protected from common adversaries such as [the policyholder]."[13]

Despite the consistency with which many courts have found a common interest between cedents and their reinsurers, the doctrine is not without limits. For example, in *McLean v. Continental Casualty Co.*,[14] the District Court for the Southern District of New York held that production of otherwise privileged documents to a reinsurer waived the privilege and made the documents discoverable by the insured. The court reasoned that "the relationship between insurer and reinsurer is simply not sufficient to give rise to the common interest privilege."[15]

Although it did not have to reach the issue, the *Allendale* court similarly explained that even if the documents at issue had been deemed privileged, they would still be subject to production because that privilege was waived by disclosure of the documents to the reinsurer. According to the court, these "normal communications" between the insurer and reinsurer were made pursuant to a contractual obligation to keep each other informed, not in furtherance of developing a joint defense or to maintain a common legal interest in the face of litigation. To shield these documents from production "would be an overly broad use of the common interest doctrine" whereby "a mere contractual relationship would allow entities to exchange privileged information back and forth for any reason, at any time, without third parties ever being allowed access to the information."[16]

Despite the consistency with which many courts have found a common interest between cedents and their reinsurers, the doctrine is not without limits.

Compelling Production of Otherwise Privileged Information

The common interest doctrine has been raised by reinsurers in connection with efforts to discover otherwise confidential communications between a cedent and its counsel relating to an underlying claim. In these cases, reinsurers have argued that the unity of interest with cedents in relation to underlying coverage disputes should permit them to access confidential information, even when a relationship with an insured turns adversarial. Reinsurers have also

To date, no court (in a published opinion) has required the disclosure of a cedent's information to a reinsurer where the parties' relationship has already become adversarial or when the cedent otherwise withholds information in order to protect privileged information from disclosure.

cited "access to records," "cooperation," and "follow the fortunes" clauses in their reinsurance treaties in support of arguments to access cedents' privileged materials. To date, no court (in a published opinion) has required the disclosure of a cedent's information to a reinsurer where the parties' relationship has already become adversarial or when the cedent otherwise withholds information in order to protect privileged information from disclosure.

American Re-Insurance Co. v. United States Fidelity & Guaranty Co.[17] involved a dispute between a pool of reinsurers and an insurer over a settlement of mass asbestos litigation against a bankrupt insured that also resolved the insured's bad faith claims. The reinsurers sought to compel discovery of otherwise privileged materials from the insurer relating to the settlement. The reinsurers argued, among other things, that the parties shared a common interest that required disclosure of the materials.

The court found that there was no automatic waiver of the attorney-client privilege merely because the insurer and the reinsurer had a common interest in the outcome of the underlying claim. Significant to the court was the fact that the parties' interests in the present action were "indisputably adverse." The court found further that a ceding insurer had not placed the bona fides of a settlement at issue simply by alleging that the settlement was entered into in good faith. The court concluded that, where ceding insurer had represented that it would not be asserting an advice of counsel defense, there was no waiver of the attorney-client privilege.[18]

In *North River Insurance Co. v. Philadelphia Reinsurance Corp.*,[19] the court rejected a reinsurer's efforts to discover attorney-client-privileged documents that had been created in the course of alternative dispute resolution proceedings between the cedent and the insured. The reinsurer argued that the documents were discoverable under a variety of theories, including the "common interest doctrine," the "cooperation clause" in the reinsurance agreement, the cedent's "fiduciary obligation of full disclosure," and the "at issue" doctrine.

The court rejected each argument in turn. The court first found that the common interest doctrine was simply not applicable because there was no dual representation of the cedent and the reinsurer. The court held: "In the Court's view, the common interest doctrine is completely unlashed from its moorings in traditional privilege law when it is held broadly to apply in contexts other than when there is dual representation."[20]

The cooperation clause in the reinsurance agreement required the cedent to "make available for inspection . . . any of its records relating to this reinsurance or claims in connection therewith." Based on this clause, the reinsurer argued that it had an enforceable contract right of access that negated any reasonable expectation of confidentiality between the cedent and its counsel. The *North River* court rejected this argument as follows:

Although a reinsured may contractually be bound to provide its reinsurer with all documents or information in its possession that may be relevant to the underlying claim adjustment and coverage determination, absent more explicit language, it does not through a cooperation clause give up wholesale its right to preserve the confidentiality of any consultation it may have with its attorney concerning the underlying claim and its cov-

erage determination. Provided that the reinsured has been forthright in making available to its reinsurer all factual knowledge or documentation in its possession relevant to the underlying claim or the handling of that claim, it has satisfied its obligations under the cooperation clause. The reinsurer is not entitled under a cooperation clause to learn of any and all legal advice obtained by a reinsured with a "reasonable expectation of confidentiality."[21]

The court also rejected the reinsurer's argument that the cedent had a fiduciary duty to disclose all information, including attorney-client information, on the grounds that there simply was no fiduciary relationship between the cedent and the reinsurer. The court reasoned:

Nothing . . . indicates that the duty between a ceding insurer and a facultative reinsurer rises to the level of being a fiduciary one. The presence of sufficient influence and control over the affairs of another necessary to give rise to fiduciary responsibilities is absent between reinsured and reinsurer. The reinsurer's "right to associate" gives it adequate means by which to keep informed of events that may give rise to coverage under its agreement, and also provides a sufficient means to protect its own interests. Reinsurance agreements are negotiated at arms-length between equally sophisticated parties. Reinsurers are well aware of the risks inherent in reinsurance obligations and are adequately situated to protect their interests. The Court therefore rejects CIGNA Re's argument that North River owed it a fiduciary duty to disclose the contents of its attorney-client communications.[22]

Finally, the court rejected the argument that the cedent had put the attorney-client communications "in issue" by suing to recover for the amounts paid in the underlying claim. The court reasoned that the attorney-client communications would be in issue only to the extent the cedent intended to rely on them to prove its claims.[23]

In *Gulf Insurance Co. v. Transatlantic Reinsurance Co.*,[24] a New York appellate court was asked to decide whether a cedent could withhold otherwise privileged documents from its reinsurer, notwithstanding the access to records provision of the reinsurance contract. The court, citing *North River*, held as follows:

Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges. To hold otherwise would render these privileges meaningless.[25]

The court also cited *North River* with approval for its finding that production of documents to a reinsurer during the course of underlying litigation, when a cedent and reinsurer have a common interest, "does not prevent the assertion of privilege of similar documents in an adversary situation."[26] •

ENDNOTES

1. Restatement (Third) of the Law Governing Lawyers § 76 cmt. B.
2. 152 F.R.D. 132 (N.D. Ill. 1993).
3. *Id.* at 136.
4. *Id.* at 137.
5. 187 F.R.D. 252 (W.D. Va. 1999).
6. *Id.* at 258.
7. Nos. 701223 & 701224, 1991 WL 230742 (Conn. Super. Ct. Nov. 4, 1991).
8. *Id.* at *2.
9. *Id.*
10. 120 F.R.D. 533 (E.D. Cal. 1988).
11. *Id.* at 537-38.
12. 183 F.R.D. 627 (N.D. Ill. 1999).
13. *Id.* at 631-32. Still other decisions are in accord. *See, e.g., American Safety Cas. Ins. Co. v. City of Waukegan, Ill.*, No. 07C1990, 2011 WL 180561 (N.D. Ill. Jan. 19, 2011); *United States Fire Ins. Co. v. General Reins. Corp.*, No. 88 Civ. 6457, 1989 WL 82415, at *3 (S.D.N.Y. July 20, 1989).
14. No. 95 Cir. 10415 (HBP), 1996 WL 684209 (S.D.N.Y. Nov. 25, 1996).
15. A similar result was reached in *Massachusetts Bay Insurance Co. v. Stamm*, 700 N.Y.S.2d 707 (N.Y. App. Div. 1st Dept. 2000), where the court, without explanation, affirmed a decision of the New York trial court holding that "insurers waived any attorney-client privilege with respect to documents transmitted to reinsurers." *Accord In Re Dow Corning Corp.*, No. 95-CV-20512-DT, 2010 WL 3927728 (E.D. Mich. June 15, 2010) (documents labeled "reinsurer available" were discoverable; any applicable privilege was waived).
16. 152 F.R.D. at 141.
17. 837 N.Y.S.2d 616 (N.Y. App. Div. 2007).
18. *Id.*
19. 797 F. Supp. 363 (D.N.J. 1992).
20. *Id.* at 367 (criticizing a contrary result in *Waste Management, Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991)).
21. *Id.* at 369. *Accord United States Fire Ins. Co. v. Phoenix Assur. Co.*, 598 N.Y.S.2d 938 (N.Y. App. Div. 1993) (once a coverage dispute has arisen, the cooperation clause cannot act as a waiver of the attorney-client privilege).
22. 797 F. Supp. at 370 (internal quotations omitted).
23. *Id.* at 370-71; *accord AIU Ins. Co. v. TIG Ins. Co.*, No. 07 Civ. 7052 (SHS) (HBP), 2008 WL 5062030 (S.D.N.Y. Nov. 25, 2008). A cedent may, however, be required to produce fee bills or other records supporting a claim for recovery of attorney's fees from a reinsurer. *See, e.g., ERA Franchise Sys., Inc. v. Northern Ins. Co. of N.Y.*, 183 F.R.D. 276 (D. Kan. 1998).
24. 788 N.Y.S.2d 44 (App. Div. 2004).
25. *Id.* at 45-46.
26. *Id.* at 46.

Reinsurer 'Access to Records' and 'Common Interest'

Permitting Access and Preserving Privilege

By Joseph N. Froehlich and Mark A. Deptula

An integral part of the relationship between a reinsurer and cedent is that the reinsurer be permitted access to the ceding company's books and records. A cedent, however, may face the dilemma of risking waiver of privilege[1] if the reinsurer is provided access to privileged documents or records while, on the other hand, being accused of breaching the access to records provision by failing to permit the reinsurer unencumbered access. The interplay between the access to records clause and the common interest doctrine is at the heart of such disputes. This article discusses the issues that can arise.

The 'Access to Records' Clause

Whether by contract or by industry custom, it is generally accepted that reinsurers are allowed access to all of the ceding company's files and records. As an example, a typical "access to records" clause in a reinsurance contract generally provides: "The reinsurer or its designated representatives shall have access at any reasonable time to all books, records and papers of the ceding company which pertain in any way to this reinsurance." Reinsurers may also argue that access is supported by the "claims clause" to the extent the provision includes language that the reinsurers' obligation to pay is conditioned on "receipt of satisfactory evidence of payment of a loss for which reinsurance is provided."

Access to records is of such significance that there is authority that a breach of an inspection clause constitutes a material breach of contract, entitling the reinsurer to terminate its future obligations.[2] On the other hand, some courts have found that the provision does not condition payment of a claim on the production of particular records.[3]

Reinsurers and cedents have disputed whether the access to records clause obligates the cedent to provide access to "all" records, including privileged documents. Although it may depend on the specific language, facts, or venue involved in the dispute, in general, courts have declined to find that the access to records provision entitles the reinsurer to privileged materials.

In *Liberty Mutual Insurance Co. v. Nationwide Mutual Insurance Co.*,[4] the court affirmed the confirmation of an arbitration award denying a reinsurer access to documents the cedent claimed were privileged. Liberty Mutual refused to produce documents it claimed were protected by the attorney-client privilege or work product doctrine, which Nationwide argued it was entitled to under the access to records provision in the treaty. In accordance with the arbitration provision of the treaty, the parties submitted the dispute to arbitration. The arbitration panel determined that the access to records clause did not grant access to privileged documents. The appellate court affirmed the trial court's confirmation of the arbitration

award, noting the court's "severely limited review of arbitration awards."

Other courts have similarly rejected the argument that the access to records clause in reinsurance agreements did not operate as a "per se" waiver of the attorney-client privilege or work product protection.[5]

Common Interest Doctrine

In general, the common interest doctrine permits the sharing of privileged materials with another party with which it shares a "common interest" against a common adversary without waiving the ability to assert privilege as to third parties.[6] In this regard, "[t]he common interest doctrine is an exception to the general rule that [privilege] is waived following disclosure of privileged materials to a third party."[7]

Reinsurers may assert that the common interest doctrine supports access to privileged materials in the cedent's records, arguing that access is permitted because it does not result in waiver of privilege since both the reinsurer and cedent share a stake in the outcome of the underlying claim. Courts, however, have been reluctant to permit the use of the doctrine "offensively" as a mechanism to obtain documents rather than the more traditional "defensive" use of the doctrine as a shield against production.

For example, in *Granite State Insurance Co. v. R&Q Reinsurance Co.*,[8] the court determined that certain records were protected by the attorney-client privilege and not subject to disclosure to the reinsurer. The court held that the documents sought were protected by the attorney-client privilege and neither the common interest exception nor the "at issue" exception to the privilege applied to the dispute. As between the insurer and reinsurer, the court held that the common interest doctrine does not apply to the issue of waiver of privilege. Additionally, the court held that a cedent does not place the bona fides of a settlement at issue merely by alleging in a pleading that the settlement was reasonable and in good faith. The reinsurer sought reconsideration of this ruling, which the court denied.

A similar argument for access based on the common interest doctrine was rejected in *American Re-Insurance Co. v. United States Fidelity & Guaranty Co.*[9] In *American Re*, certain reinsurers sought production of the cedent's communications with its attorney, contending that the common interest doctrine required disclosure. The court declined to order production of privileged materials, finding that the parties' interests were "indisputably adverse" and the mere fact that they shared an interest in the eventual outcome of the underlying coverage litigation was insufficient. In the alternative, the reinsurer argued that disclosure of certain documents to reinsurers resulted in the waiver of privilege as to other documents on the same subjects. The court also rejected this argument, finding that there was a shared interest in the outcome of the underlying litigation at the time the privileged information was disclosed.

Other cases demonstrate that the business relationship between a cedent and reinsurer is insufficient to establish a common interest such that disclosure to the reinsurer results in waiver of privilege. For example, one court found that disclosure to the reinsurer was a waiver of privilege since there was no common interest between the cedent and reinsurer. In *Progressive Casualty Insurance Co. v. Federal Deposit Insurance Corp.*,[10] the FDIC sought certain communications between Progressive and its reinsurers. The magistrate judge overseeing discovery ordered the production of the communications, but permitted Progressive to produce redacted versions of the communications. The FDIC appealed that determination to the district court.

Access to records is of such significance that there is authority that a breach of an inspection clause constitutes a material breach of contract, entitling the reinsurer to terminate its future obligations.

The court rejected Progressive's assertion that case updates, strategy reports, and similar documents provided to its reinsurers in connection with underlying litigation were privileged, either as attorney-client communications or

attorney work product. As to the attorney-client privilege, the court held that disclosure of the communications to its reinsurers was a waiver of the privilege, since there was no common interest between the insurer and its reinsurer. The court noted that the business relationship between those parties, without more, does not trigger the common interest doctrine. The assertions of work product failed because, according to the court, the communications were created in the ordinary course of business and not in anticipation of litigation.

Another court also found a lack of common interest between a cedent and reinsurer. In *Bancinsure, Inc v. McCaffree*,[11] the cedent asserted attorney-client privilege and work product protection and asserted that the common interest doctrine warranted application of the privilege to its communications with its reinsurer.

The court rejected the assertion of a common interest between the cedent and reinsurer because they share only a "common commercial and financial interest." The court found that this was insufficient to meet the burden of proof to establish the privilege. The court noted that the cedent provided the court "nothing but the bare suggestion of any common legal interest between it and its reinsurer" and "offered no evidence of any agreement with its reinsurer to pursue a common legal defense or strategy." Thus, the cedent failed to establish the common interest, and the privilege was waived with respect to documents shared with the reinsurer.

On the other hand, certain jurisdictions have found a common interest in the cedent/reinsurer relationship. For example, in *Hawker v. Bankinsurance, Inc.*,[12] the court found that reinsurance reports were subject to the common interest doctrine and privileged and thereby declined to grant the insured access to such communications. Applying California law, the court found that to the extent the communication with the reinsurer reflected attorney-client communication, the documents were not discoverable and the cedent did not waive the privilege by communicating with reinsurers. Accordingly, the communications were not discoverable.

A similar finding upholding privilege was reached in *Artra 524(g) Asbestos Trust v. Transport*.[13] The asbestos trust sought documents the cedent shared with a variety of reinsurers. The court upheld the common interest privilege, finding that the shared interests between the cedent and reinsurer were not so "materially different from the shared interests of a direct insurer and its insured as to conclude that the common interest does not apply." The court also took into account the fact that a finding of no common interest would leave the cedent with no ability to provide its reinsurers with its attorneys' candid views of the merits of the disputed issues in the coverage litigation or to make recommendations for settlement or otherwise discuss litigation strategy.

Preservation of Privilege

As the foregoing cases demonstrate, privilege rulings can be inconsistent and depend on contract language, particular facts, and the venue or forum of the dispute. Given the potential risk of waiver in sharing privileged documents, cedents will likely want to try to impose limitations on their reinsurers' access to records. A cedent may want to assert the privilege and document that the reinsurer was denied access to privileged documents. Doing so reduces the risk of waiver and the resulting harm caused by disclosing legal strategies.

Business considerations and an ongoing relationship with the reinsurer are likely also a factor. To the extent access to privileged material is contemplated, the execution of a confidentiality agreement (prior to permitting or obtaining access) specifying that access is provided pursuant to a joint defense or common interest may help accomplish the preservation of privilege. A prudently drafted agreement documenting the common interest can help demonstrate the intent to protect against disclosure but also satisfy the reinsurer's desired access to records. •

ENDNOTES

1. Generally, such privileged documents would include attorney-client communications or documents prepared in anticipation of litigation, which are subject to protection as work product.
2. *See Manhattan Life Ins. Co. v. Prussian Life Ins. Co.*, 296 F. 39 (2nd Cir. 1924).
3. *See First State Ins. Co. v. Nat'l Cas. Co.*, 781 F.3d 7 (1st Cir. 2015) (confirming arbitration ruling that reinsurer's payment obligation was not conditioned on the exercise of the reinsurer's right to audit).
4. 87 Mass.App.Ct. 1127, 2015 WL 3540128 (June 5, 2015).
5. *See Gulf Ins. Co. v. Travelers Reins. Co.*, 788 N.Y.S.2d 44, 45-46 (N.Y.App.Div. 2004) ("Access to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges."); *Travelers Cas. & Surety Co. v. Century Indemn. Co.*, 2011 WL 5570784 (D.Conn. Nov. 16, 2011) ("The reinsurer is not entitled under a cooperation clause to learn of any and all legal advice obtained by a reinsured with a reasonable expectation of confidentiality.")
6. It should be remembered, of course, that "[t]he common interest doctrine is not a privilege in its own right. Merely satisfying the requirements of the common interest doctrine without also satisfying the requirements of a discovery privilege [such as attorney-client] does not protect documents from disclosure..."*Hunton & Williams v. DOJ*, 590 F.3d 272, 280 (4th Cir. 2010) (internal citation omitted); *Sokol v. Wyeth, Inc.*, 2008 WL 3166662, *5 (S.D.N.Y.) *citing In re Commercial Money Ctr., Inc., Equipment Lease Litig.*, 248 F.R.D. 532, 536 (N.D. Ohio 2008) ("The common interest doctrine 'is not an independent source of privilege or confidentiality.' If a communication is not protected by the attorney-client privilege or the attorney work-product doctrine, the common interest doctrine does not apply.")
7. *Corning Inc. v. SRU Biosystems*, LLC, 223 F.R.D. 189, 190 (D. Del. 2004).
8. 2015 WL 4467756 (N.Y.Sup.Ct. July 21, 2015).
9. 40 A.D.3d 486 (NY 2007).
10. 2014 WL 4947721 (N.D. Iowa Oct. 3, 2014).
11. 2013 WL 5769918 (D.Kan. Oct. 24, 2013).
12. 2013 WL 6843088 (E.D.Cal. Dec.27, 2013).
13. 2011 WL 4501375 (N.D.Ill. Sept. 28, 2011).

Upcoming Events

Intensive Arbitrator Training Workshop
September 21, 2016

8:30 a.m. - 4:30 p.m. at the office of Foley & Lardner, 90 Park Avenue, New York, NY 10016. Lunch will be provided.

2016 Fall Conference and Annual Meeting
November 17 – 18, 2016

New Location! The New York Marriott Marquis
1535 Broadway, New York, NY

2016 Webinars
Webinars available on demand at www.arias-us.org

September 27, 2016

Coverage for Cyber risk; Cyber risk Insurance Products

December, 2016 (exact date TBD)

Underwriting a Risk Part II

Reminders

ARIAS•U.S. Quarterly – Call for Article Submissions

ARIAS welcomes articles written by its members addressing issues in the field of insurance and reinsurance arbitration and dispute resolution. Articles should be limited to 5 single-spaced or 10 double-spaced pages. If you're interested in penning an article or have suggestions for topics for articles you'd like to see, please contact Tom Stillman at tomstillman@aol.com.

Interested in Advertising in the ARIAS•U.S. Quarterly?

The ARIAS·U.S. Media Kit is now available. Go to the ARIAS website or contact Sara Meier at smeier@arias-us.org.

Call for Nominations

This year, there will be five openings on the Board, consisting of one seat each for representatives of ceding companies, reinsurers and law firms plus two seats for ARIAS • U.S. Certified Arbitrators. Deidre Johnson (law firm representative) and Brian Snover (reinsurer representative) are eligible and have agreed to be nominated for re-election. Eric Kobrick (ceding company representative), who has served two full terms on the board, is stepping down. On behalf of the entire organization, we are grateful to Eric for the significant contributions he has made to ARIAS·U.S. both prior to and during his Board service, including during his Chairmanship.

In accordance with the ARIAS·U.S. bylaws, although two ARIAS • U.S. Certified Arbitrators shall be elected to the Board in November, one of those two shall be elected for a term of two years and the other shall be elected for a term of three years. Nominees who wish only to be considered for the two-year term should make that clear when nominated.

We encourage you to propose one or more worthy candidates for membership on the Board. You should also feel free to propose yourself for membership if you believe that you meet the criteria outlined. When submitting the names of potential nominees, it would be most helpful if you would please include information concerning a proposed nominee's background and his or her past involvement with, and service to, ARIAS·U.S. You are invited to submit the names of potential nominees for the Board along with the information outlined above to the ARIAS·U.S. Executive Director, Sara Meier, via email (smeier@arias-us.org) as soon as possible but in all events no later than 5:00 p.m. EST on Tuesday, August 23, 2016.

Members on the Move

Butler Rubin Saltarelli & Boyd LLP has recently moved locations. The new office address is: 321 North Clark Street | Suite 400 | Chicago, IL 60654; 312.696.4443 | 312.873.4373 fax; www.butlerrubin.com

Clyde & Co has opened a sixth U.S. office through the acquisition of the entire team from Miami litigation firm Thornton Davis Fein. Miami is the 10th office in the Americas and brings the headcount in the region to 250 legal professionals.

Looking Beyond Efficiency in Arbitration

In a tangle of parties, contracts, and claims, when is consolidation available, and who decides?

By Julie Rodriguez Aldort and Jonathon Raffensperger

Arbitration can often involve multiple parties, multiple claims, and multiple contracts. Given such complexity and the accompanying potential for conflict, delay, and duplication of effort, consolidation of related disputes into a single arbitration proceeding might appear to be an obvious and practical solution.

Efficiency and economy alone do not justify consolidation, however, and to make matters more difficult, both the necessary showing to achieve consolidation and the process for making such a showing are, to some degree, open questions. The Federal Arbitration Act (FAA) makes no mention of consolidation, and the case law on consolidation is sparse and sometimes inconsistent. Nonetheless, some basic rules have emerged to provide direction in determining whether, and how, disputes may be consolidated.

A Matter of Agreement

Arbitration is a creature of contract, and its parameters are defined by the terms of the parties' agreement. Accordingly, whether related proceedings may be consolidated depends on whether the parties intended that consolidation be permitted. If such intent is explicit in the terms of the parties' agreement, consolidation is proper. Consolidation is also proper if it is specifically provided for in the arbitration rules that the parties agreed to adopt, although rules that are silent on the issue of consolidation neither authorize nor prohibit the procedure.[1]

If consolidation is not explicitly contemplated by the parties' contract or

the applicable arbitration rules, courts have typically held that arbitrators[2] are nonetheless empowered to interpret the terms of the arbitration agreement and may find an implicit intent to permit consolidation.[3] This general consensus was arguably called into question in 2010 by the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, in which the Court held that an arbitrator may not compel parties to submit to class arbitration absent a contractual basis for concluding that the parties agreed to do so.[4] The Court explained that "[a]n implicit agreement to authorize class arbitration … is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."[5]

However, because the parties in *Stolt-Nielsen* stipulated that their agreement reflected no intent whatsoever as to the permissibility of class arbitration, the Court's reasoning does not extend to cases where the parties disagree as to their intent. Further, recent cases have distinguished *Stolt-Nielsen* on the basis that consolidation does not change the nature of the proceeding to the same degree that class arbitration does, and does not implicate the same concerns.[6] Finally and most notably, the Third Circuit observed, in a decision affirmed by the Supreme Court, that "*Stolt-Nielsen* did not establish a bright line rule that class arbitration is allowed only under an arbitration agreement . . . that expressly provides for aggregate procedures."[7] Where the relevant arbitration clauses were silent on class arbitration and intent to permit it was a disputed issue, the Third Circuit held that the arbitrator was empowered to interpret the terms of the contract to discern the parties' intent and did not exceed his authority so long as his decision stood on some contractual basis.[8]

An arbitrator faced with an arbitration agreement that is silent on the issue of consolidation should apply the usual methods of contract interpretation to discern the parties' intent. The interpretive methods available to the arbitrator are not limited to textual analysis; practical and equitable considerations may also factor into her decision.

Judicial approaches are instructive. In *Connecticut General Life Insurance Co. v. Sun Life Assurance Co. of Canada*, the Seventh Circuit,[9] finding the text of the parties' arbitration agreement inconclusive, examined the practical consequences of consolidation that "are relevant to disambiguating a contract, because parties to a contract generally aim at obtaining sensible results in a sensible way."[10] The court observed that "the same considerations of adjudicative economy that argue in favor of consolidating closely related court cases argue for consolidating closely related arbitrations."[11] Litigating the same dispute before different panels can give rise to unnecessary duplication of effort, as well as thorny issues concerning the preclusive effect of the panels' awards upon one another.[12]

Ultimately, the court was convinced by "the balance of both the textual and the practical arguments" that the parties more likely than not intended to permit consolidation, and it reversed the district court's decision denying consolidation and compelling separate arbitrations.[13] On remand, the district court ordered the parties to proceed with a single consolidated arbitration. It is important to remember, however, that there is no universal rule of "arbitral economy" permitting arbitrators to order consolidation simply because it might be more efficient than separate proceedings.[14] Practical considerations are only relevant to the extent they shed light on the parties' intent.[15]

Consolidation of Disputes under Different Contracts with Different Parties

Courts have differed on the degree to which arbitration proceedings must be identical to warrant consolidation. Some have concluded that consolidation cannot be had unless the disputes are between the same parties and arise under the same agreement.

In *Rolls-Royce Industrial Power, Inc. v. Zurn EPC Services, Inc.*, the Northern District of Illinois distinguished the Seventh Circuit's holding in *Connecticut General Life* and found insufficient evidence of intent to allow consolidation where the disputes involved separate agreements between different parties. As the court pointed out, "[i]t is more difficult to rely on textual inferences from two separate agreements even if they do happen to incorporate some (but not all) of the same terms," and "the fact that there are

The Federal Arbitration Act (FAA) makes no mention of consolidation, and the case law on consolidation is sparse and sometimes inconsistent.

two agreements with different parties makes it less likely that the disputes will be identical . . ."[16] Further, where the same parties did not sign both agreements, they "reasonably may have concluded that they would be better off arbitrating with just [one other party], thereby avoiding the additional complexity and delay that likely would arise by allowing additional parties to participate in the proceeding."[17]

However, there are also cases in which courts have acknowledged arbitrators' power to decide the issue of consolidation, even where the proceedings to be consolidated involved different parties, different agreements, or both.[18] For example, in *Dorinco Reinsurance Co. v. Ace American Insurance Co.*, an insurer sought to consolidate disputes with sixteen different reinsurers under sixteen individual reinsurance agreements reinsuring pro rata shares of the same underlying policy. The district court held that, for each occurrence giving rise to claims under the reinsurance agreements, a single panel of arbitrators should decide whether the various disputes would be arbitrated separately or in a consolidated fashion. [19] Taken together, these authorities seem to indicate that, while identity of parties and contracts makes it more likely that intent to permit consolidation will be found, they are not strictly required for an arbitrator to infer such intent.

Power to the Arbitrators, but Which Ones?

Recent decisions have overwhelmingly concluded that consolidation is not a "threshold" issue of arbitrability of the sort that courts are empowered to resolve under the FAA, but is instead a matter of arbitral procedure and thus presumptively the province of the arbitrator or the panel.[20] In many cases, however, there remains a question as to *which* arbitrators should decide the issue. There might be one, two, or many arbitrators or panels available, or if the question of consolidation arises at the demand stage of the proceeding, there may be none at all.

Unfortunately, the courts have not yet provided clear direction on this point. Judges considering the issue have differed on the power of the court to favor one panel over another, and the outcome appears to depend heavily upon the facts and procedural posture of the case at the time it comes before the court.

In some instances, the arbitration administrators may be called upon to appoint an arbitrator for the sole purpose of deciding the consolidation issue if the rules the parties have adopted require that procedure. For example, the AAA Construction Industry Arbitration rules specify that "[i]f the parties are unable to agree to consolidate related arbitrations . . . the AAA shall directly appoint a single arbitrator . . . for the limited purpose of deciding whether related arbitrations should be consolidated or parties joined."[21] Further, at least one court has implied that an administrator may not properly decline to appoint an arbitrator on the consolidation issue if requested to do so.[22] However, the AAA has repeatedly explained that, as its general practice, it will not grant requests for consolidation absent the consent of all parties or a contractual provision specifically calling for it.[23]

More typically, the issue of consolidation falls to the arbitrators appointed to resolve the parties' substantive disputes, but it is not always clear *which* arbitrators should make the decision. If multiple demands have been filed, there may be several prospective, partially, or fully formed panels, each with authority to interpret the parties' agreement.

In general, courts have recognized that, as a matter of efficiency and good policy, it is preferable for a single panel to rule on consolidation rather than leave the issue to be decided by multiple panels.

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rule on consolidation rather than leave the issue to be decided by multiple panels.[24] Entrusting the decision to a single panel avoids duplication of effort and prevents "strategic behavior that would only serve to frustrate a resolution of the parties' dispute."[25] Further, if separate panels reached conflicting conclusions as to whether the parties' agreement permits consolidation, a court would ultimately be required "to decide which panel's interpretation of the agreement was correct," a task that is supposed to be the sole province of the arbitrators.[26]

Even so, some courts have held that, while resolution by a single panel would be the preferred solution, the court has no power to require it. In *Argonaut Insurance Co. v. Century Indemnity Co.*, Century, the ceding company, presented Argonaut, its reinsurer, with three arbitration demands relating to three distinct disputes, and Argonaut duly appointed its arbitrator for each of the three arbitrations.[27] Prior to appointing its own arbitrators, Century issued a fourth demand that encompassed the three disputes on which it had previously issued arbitration demands as well as sixteen new disputes, and took the position that its prior demands were superseded by and consolidated with the new demand.[28] Argonaut objected, and filed a petition to compel separate arbitrations and dismiss Century's consolidated proceeding.[29]

Both parties argued to the court that a "first in time" rule applied, and thus the court should direct the first fully formed panel to resolve the consolidation dispute.[30] The court held that, while such an approach might be favored by "principles of efficiency," it was "hamstrung" by Section 4 of the FAA, under which it lacked any authority to dismiss or stay competing arbitrations once it determined that the disputes were arbitrable.[31] Therefore, the court was "left only with the conclusion that all four panels must proceed" and attempt to "agree upon a reasonable solution as to which panel must decide the issues."[32]

Some courts have held that, while resolution by a single panel would be the preferred solution, the court has no power to require it.

Similarly, in *Clearwater Insurance Co. v. Granite State Insurance Co.*, the court declined to stay proceedings in four separate California arbitrations pending the decision of a Massachusetts panel on whether the arbitration proceedings should be consolidated.[33] The court stated that, under Section 4, its role was limited to ordering the parties to arbitrate in accordance with their agreement, and "the issue of whether, when and how to consolidate these arbitrations is for the arbitration panels to decide."[34]

Not all courts addressing this issue have perceived themselves to be so tightly constrained. In cases where there are multiple arbitration demands but only one panel of arbitrators (or a subset of all panels) has been fully formed, several courts have determined that the existing panel(s) should decide whether consolidation is permitted and appropriate rather than allow all demanded panels to separately address the question.

For instance, in *Arrowood Indemnity Co. v. Harper Insurance Co.*, three disputes arose under a reinsurance treaty involving different insurance claims, and the cedent filed three separate demands for arbitration against the reinsurer.[35] A panel was formed in accordance with one of those demands. Harper took the position that this first-formed panel should hear all three of the parties' disputes, whereas Arrowood sought to compel the completion of the other two panels so that the arbitrations could proceed separately.[36]

The court recognized that whether the parties' contract contemplated consolidated arbitration is a decision solely for an arbitrator, and there was only one panel "that currently exists to do the job . . . Therefore, it is for that panel to decide whether these three disputes should be heard by a single arbitration panel or by three."[37] The court distinguished *Argonaut* and *Clearwater* on the basis that, in those cases, "the parties had failed to fully form even one arbitration panel," so there was no arbitrator to whom the disputes could be sent.

Likewise, in *Aegis Security Insurance Co. v. Philadelphia Contributionship*, the court held that whether a newly filed arbitration should be consolidated into an ongoing proceeding should be decided by the panel that was already formed and able to address the question.[38] In that case, Aegis was already engaged in arbitration with multiple reinsurers regarding disputes arising under a reinsurance treaty when the Contributionship demanded arbitra-

tion under the same treaty.[39] Aegis sought to have the new claims consolidated into the ongoing arbitration, but the Contributionship refused, preferring to arbitrate separately.[40] Aegis then petitioned the court to order that the question of consolidation be submitted to the existing panel.[41]

The court granted the petition, holding that, by failing to submit the consolidation issue to the existing panel, the Contributionship had refused to arbitrate and should be compelled to do so.[42] Because the ongoing arbitration "was already initiated when the Contributionship attempted to bring arbitration against Aegis, . . . the issue is whether the claims should be consolidated into [that] Arbitration. This is a decision best made by the [existing] panel."[43]

In cases where a consolidated arbitration has been demanded but no panel has yet been formed, courts have ordered that the single demanded panel be completed so that it can decide whether a consolidated proceeding is permitted and appropriate. In *Markel International Insurance Co. v. Westchester Fire Insurance Co.*, a ceding company demanded a single arbitration to resolve disputes with two reinsurers that arose under two separate reinsurance treaty programs.[44] The reinsurers filed a motion with the court to compel separate arbitrations, one for each contract, but the court denied the reinsurers' motion and granted the cedent's cross-motion to compel arbitration before a single panel so that panel could decide whether consolidated arbitration was appropriate.[45] The court's rationale was that permitting multiple panels to address the issue of consolidation would be inefficient and could result in conflicting rulings, which could "ultimately require a district court to decide which panel's interpretation of the agreement was correct . . . exactly the type of activity the Supreme Court wanted to leave to the arbitrators."[46]

Finally, when faced with a request to consolidate separately demanded arbitrations where none of the panels were yet fully formed, one court has indicated that the first panel to be completed should be the one to decide the issue. In *IRB-Brasil Resseguros S.A. v. National Indemnity Co.*, a reinsurer commenced two separate arbitration proceedings, nearly two years apart, against its cedent for disputes arising under two different reinsurance policies.[47] Each party selected its arbitrator for the first arbitration and nominated umpire candidates, although no umpire was selected. In the second arbitration, party-appointed arbitrators were selected, but the umpire selection process had not yet begun. The parties reached an impasse, and the cedent petitioned the court to consolidate the two proceedings.

The court denied the petition, holding that consolidation was a procedural issue for the arbitrators, and it declined to order the formation of a separate panel to determine whether consolidation should occur. Rather, the court stated that it saw "no further barrier to the parties concluding the relatively straightforward process of selecting the arbitrators in [the first-commenced arbitration] according to the terms of their agreement. Once that panel is chosen, it can address these issues if the parties choose to have it do so."[48] While the court did not actually order the parties to submit the consolidation issue to the first panel, its decision arguably could indicate a preference that the question be decided by the first arbitrators available to hear it.[49]

Conclusion

While the case law on most issues pertaining to consolidated arbitration is far from robust, we can extract these two general principles:

1. Whether consolidated arbitration is permitted is a matter of the parties' intent, determined by analyzing both their agreement and, if necessary, the practical and equitable consequences of consolidation.

2. Whether consolidation is permitted and proper is a decision for arbitrators, not the courts, but precisely which arbitrators should rule on consolidation may depend largely on the particular facts and procedural posture of the case. •

ENDNOTES

1. See *AAA Handbook on Arbitration Practice*, Chapter 11, "Consolidation, Joinder and Class Actions: What Arbitrators and Courts May and May Not Do," at 140 (noting that the AAA's Commercial Arbitration rules are silent on the issues of consolidation and joinder, and thus "do not authorize arbitrators to order either procedure"); *Delta Mine Holding Co. v. AFC Coal Properties, Inc.*, 280 F.3d 815, 823 (8th Cir. 2001) (rejecting argument that arbitrators improperly consolidated arbitrations conducted under AAA Commercial Arbitration Rules, which are silent on consolidation, noting that "[t]he arbitrators' rulings were well within their procedural discretion").
2. It should be noted that, while *arbitrators'* power to interpret the parties' agreement on the issue of consolidation appears to be well established, the case law is mixed on whether a *court* may do the same. The Seventh Circuit has held that a court may find implicit intent to consolidate in an agreement to arbitrate. *Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771, 773-73 (7th Cir. 2000). By contrast, several other circuits have held that a court, unlike an arbitrator, lacks power to consolidate arbitration proceedings over the objection of a party when the agreement is silent on the issue. See *American Centennial Ins. Co. v. Nat'l Casualty Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Govt. of the U.K. v. The Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993); Baesler v. Continental Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990); *Prospective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).
3. See *Blimpie Int'l, Inc. v. Blimpie of the Keys*, 371 F. Supp. 2d 469, 474 (S.D.N.Y. 2005) (Whether consolidation "is permissible in the absence of any language in the agreement is a question of contract interpretation and arbitration procedures, which arbitrators are well situated to answer.").
4. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1775 (2010).

continued on page 33...

Newly Certified Arbitrators

John A. Damico, CPA is retired from Matson Driscoll & Damico LLP, a global forensic accounting firm he co-founded in 1979 and managed until 2008.

With a career that spans more than five decades, Jack has represented his many insurance, reinsurance, legal and corporate clients. A globally recognized and respected expert in his field, he has been called upon to help quantify numerous complex and high-profile industry claims/disputes involving contractual, economic and liquidated damage matters. He has also served on domestic and international appraisal, arbitration and mediation panels.

Jack has provided expert testimony in federal, state and foreign courts on a wide range of property, casualty, specialty insurance and commercial litigation matters that include lost profits, class actions, political risk, construction defects, fraud, environmental, cyber risk and product(s) liability/recall matters.

After graduating from Boston College in 1967, Damico served in USS Berkeley DDG15 and is a decorated Viet Nam veteran. He resides in Atlanta, Georgia.

Frank J. DeMento is an experienced insurance and reinsurance lawyer and prior insurance company executive. Currently, he is counsel in the Insurance Reinsurance Group in Crowell & Moring's New York office. Mr. DeMento's practice specializes in managing complex insurance and reinsurance disputes, arbitrations, litigations, and mediations involving a broad spectrum of issues. Prior to joining Crowell & Moring, DeMento was a Vice President and the head of run-off claims, the head of retroceded claims, and claims counsel for XL Reinsurance America, Inc. He also was a partner in the Insurance and Reinsurance Litigation Group at Mendes & Mount, LLP.

Frank has been a member of ARIAS since 2003. He was also a member of the board of directors of ROM Reinsurance Management Co., Inc. for six years and served as its chairman. Frank also served as a member of the board of directors of the Association of Insurance and Reinsurance Run-off Companies (AIRROC) for three years and served as co-chairman on its education committee. Additionally, Frank holds the following industry designations: Associate in Reinsurance; Chartered Property Casualty Underwriter; and Certified Legacy Insurance Professional.

Mr. DeMento received his undergraduate degree from Washington and Lee University and his Juris Doctor degree from St. John's University School of Law.

Newly Approved Neutral Arbitrators

Andrew S. Amer
Simpson Thacher & Bartlett LLP

Lydia Kam Lyew
REnamics LLC

Albert McComas
Insurance Consultant

Fred J. Pinckney
Business Law & Arbitration Services, Inc.

Michael S. Wilder
Arbitrator and Consultant

Changes in English Insurance and Reinsurance Law

Three new statutes will materially change the way English law governs insurance and reinsurance.

By Jonathan Sacher

The first and most important of these is the Insurance Act of 2015 (the new act), which is the most significant reform of English insurance contract law since the Marine Insurance Act of 1906 (the 1906 act), which became law the same year as the San Francisco earthquake when Cuthbert Heath, the Lloyd's underwriter, famously declared, "Pay all policyholders in full, regardless of policy terms." The new act will come into force on 12 August 2016. All contracts of insurance, reinsurance, and retrocession, as well as variations to existing contracts made after that date, will be governed by the new act. Contracting out is possible except for "basis clauses."

The new act is intended materially to change the way in which the business of insurance and reinsurance governed by English law is conducted. I set out below some of the more important changes. When I refer to *insured* and *insurer*, my comments apply equally to *reinsured* and *reinsurer*.

Duty of Fair Presentation

Under the new act, although insurance contracts remain contracts of utmost good faith, the pre-contractual duty of disclosure is now known as the "Duty of Fair Presentation."

Under the 1906 act, the pre-contractual duty of utmost good faith involves (i) the duty not to make misrepresentations to the insurer and (ii) the duty to disclose all material matters to the insurer. The new act does not materially change the following:

- The truth of any material representation of fact made by the insured must be "substantially correct."
- The test for what amounts to a material matter for disclosure is codified in section 7(3) as anything that "would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms." This mirrors the existing law.

However, under the new act (and in an important change from the past), the insured may positively satisfy its duty of disclosure in one of two ways. Under the first limb, as in current law, the insured discloses every material circum-

The new act was intended to be more insured-friendly, so it would be an unintended consequence if it caused the burden of disclosure to increase.

stance it knows or ought to know. If the insured fails to fulfil the first limb, the new act introduces a fallback position whereby the insured will satisfy the duty of disclosure if it gives the insurer "sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances."

The introduction of the second limb means that an insured may positively satisfy the duty by doing something that falls short of actually disclosing every material circumstance. If the insured says enough to put a prudent insurer on notice that it needs to ask further questions, the duty has been fulfilled.

The requirement for disclosure that is "reasonably clear and accessible" is intended to discourage the practice of "data dumping," whereby an insured provides vast quantities of undigested information to the insurer in an attempt to safeguard itself.

Knowledge of the Insured and the Insurer

In the corporate insured context, there are also important changes.

A corporate insured is taken to know that which is actually known to any individual who is part of the "senior management" of the insured, and that which is actually known to the individuals who are responsible for the insured's insurance (e.g., the insured's risk manager or its broker).

What ought an insured to know?

This area amounts to one of the most significant changes embodied in the new act, and potentially one that will increase the insured's burden of disclosure quite substantially. For the purposes of what it must disclose under the duty of fair presentation, an insured "ought to know what should reasonably have been revealed by a reasonable search of information available to the insured", including information that is "held within the insured's organisation or by any other person (such as the insured's agent or a person for whom cover is provided by the contract of insurance)." The information can be revealed by "making enquiries" or by "any other means."

Under the old law, the insured's constructive knowledge is qualified as being that which it ought to know "in the ordinary course of business." Under the new act, this is entirely replaced by a "reasonable search" of a potentially broad range of sources. The "reasonable search" will, therefore, assume a position of importance. It seems probable that in many cases, this alteration of the law could materially increase the insured's burden of disclosure.

The new act was intended to be more insured-friendly, so it would be an unintended consequence if it caused the burden of disclosure to increase. The London market has therefore developed standard form clauses that seek to limit this duty and the senior management to which it applies.

What does the insurer know under the new act? The insured is not obliged to disclose matters that the insurer knows, ought to know, or is presumed to know.

Actual knowledge: The insurer actually knows whatever is known to any individual who participates in the underwriting decision on the specific risk in question, including the insurer's agent (such as a coverholder).

Constructive knowledge: One change is that the new act appears to envisage that insurers should also undertake a search of information that is readily available to them. For example, where an insurer has written cover for an insured over a number of years, information about it and its claims history is likely to qualify as "readily available." Information on the Internet will not qualify, since it is not "held by" the insurer.

Presumed knowledge: The insurer is presumed to know things that are common knowledge. It is also presumed to know the "things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business." These provisions do not materially alter the current law.

Remedies

What happens if the insured breaches the duty?

Perhaps the most significant change under the new act relates to the remedies available if an insured breaches

the duty of disclosure/duty of fair presentation. Under the old law, the only remedy for breach of the duty of utmost good faith by the insured is avoidance of the policy ab initio, regardless of the severity of the breach. This has been widely criticised as overly harsh, and something of a blunt instrument.

Under the new act, while the duty of utmost good faith survives, the sole remedy of avoidance for its breach is abolished and replaced by a new range of proportionate remedies. These remedies depend on whether the insured's breach of the duty was deliberate or reckless and what the insurer would have done if the duty had been fulfilled.

Deliberate or reckless breach: Unlike the old law, which essentially treats all breaches of the duty of utmost good faith in the same way, the new act distinguishes between breaches of the duty depending on their severity. If a breach is deliberate or reckless, the insurer may avoid the policy and need not return the premium. A breach will be considered deliberate if the insured knows that he is in breach of the duty; it will be considered reckless if the insured does not care whether he is in breach of the duty.

There may be a practical difficulty about an insurer pleading a deliberate or reckless breach of the duty. The potential difficulty arises because the insurer has the burden of proving that the insured's breach was either deliberate or reckless.

Breach not deliberate or reckless: If the breach is neither deliberate nor reckless, the position is entirely different, and a range of proportionate remedies is potentially available (quite unlike the current law). Which of these remedies is available depends on what the actual underwriter who wrote the risk in question would have done if there had been a fair presentation of the risk (i.e., the question of inducement).

Avoidance: If the underwriter in question would not have written the risk at all, then the insurer may avoid the policy, but must return the premium. Avoidance is, therefore, still available where breach of the duty is neither deliberate nor reckless. It will only be permitted if the insurer demonstrates (on the balance of probabilities) that, if the insured had made a fair presentation of the risk, the participating underwriter would not have been willing to write it at all.

Varying the term of the contract: If the insurer would have written the risk but on different terms, the contract will be treated as if it had been written on those terms. This does not include terms relating to the premium. Effectively, this means that the courts will rewrite the contract on the basis of what the underwriter would have written if he/she had received a fair presentation of the risk.

Proportionate reduction of the claim: If the insurer would have written the risk but for a higher premium, then the insurer may proportionately reduce the claim. The reduction will be in the same proportion that the actual premium bears to the premium that would have been charged if a fair presentation had been made. This proportionate reduction may work alongside the "rewriting" of the contract described above, or may stand alone as a sole remedy.

Practical effects of the new range of remedies on the business of insurers: The central change brought about by the introduction of proportionate remedies is an increase in the importance and complexity of inducement. The actual underwriter will, in certain cases, have to prove that he was induced to a much finer degree—including specific terms he might have imposed, or premiums charged.

Warranties

Abolition of basis clauses: The new act abolishes "basis clauses" in business insurance contracts. This means that any representation made by the insured in connection with a "proposed" business insurance contract is no longer capable of being converted into a warranty by means of any term in either the policy or the proposal. For example, a term saying that the facts stated in the proposal form the basis of the contract will no longer be of any effect. The parties may not contract out of this provision.

Warranties become suspensory conditions: Under the old law, a breach of warranty in an insurance policy permanently discharges the insurer's liability from the moment of the breach, even if the breach of warranty is later remedied by the insured.

Insurance warranties are now treated as suspensory conditions. The insurer will not be liable for losses while the insured is in breach of warranty. If, however, the insured/reinsured remedies its breach of warranty, the insurer will be liable for subsequent losses, unless they were "attributable to something happening" before the breach was remedied. The insurer will also be liable for losses occurring or attributable to something happening before the breach of warranty.

Terms not relevant to the actual loss: The new act materially changes the law and now prevents an insurer from relying on breach of a term by the insured if that breach is entirely unconnected with the actual loss the insured has suffered (which was allowed under the old law). A classic example is the

insurer's reliance on breach of a burglar alarm warranty where the loss has been caused by fire—the breach of such a warranty may have had nothing at all to do with the actual loss suffered.

Although the new act converts warranties into suspensory conditions, it does not alter the law on conditions precedent. Therefore, failure to comply with a condition precedent under English law causes cover to cease, even though the insurer cannot prove any damages suffered by the breach.

Contracting out: In consumer contracts, any attempt to contract out of any part of the new act will be of no effect. In business contracts, the parties are free to contract out of any of the provisions in the new act, apart from those relating to basis clauses.

If the insurer contracts out, it "must take sufficient steps to draw the disadvantageous term to the insured's attention" before the contract (or variation) is concluded.

The disadvantageous term must also be "clear and unambiguous as to its effect." Therefore, it is the *effect* of the term that must be clear and unambiguous.

Damages for Late Payment of Claims

The Enterprise Act of 2016 introduces into the Insurance Act the concept of late payment damages. From 4 May 2017, the late payment provisions applying to insurance and reinsurance will do the following:

- Introduce into every insurance contract a requirement that the underwriter pay sums due within a reasonable time.
- Provide a non-exhaustive list of matters that may be taken into account when determining a "reasonable time" for payment in the particular circumstances of a case, and state that a reasonable time will always include time to investigate and assess the claim. The insurer will have a defense to a claim for breach of the implied term where it had reasonable grounds for disputing the validity or value of a claim.
- Allow contracting out for non-consumer insurance contracts, provided that the insurer satisfies the transparency requirements set out in the Insurance Act of 2015.

In terms of defining "reasonable time," the Enterprise Act provides that it will depend on the specific circumstances and provides a non-exhaustive list of the factors that will be taken into account:

- the type of insurance;
- the size and complexity of the claim;
- compliance with any relevant statutory or regulatory rules or guidance; and
- factors outside the insurer's control.

Under the old law, an insured can only recover what it is owed under the policy, plus interest. However, the Enterprise Act provides that damages will be payable by an insurer where a policyholder suffers additional loss because of the insurer's unreasonable delay in payment.

It is important to note that these provisions do not seek to impose bad faith or punitive damages on insurers. They imply, into every insurance/reinsurance contract, an obligation on the underwriter to pay promptly. However, failure to do so does not result in an automatic obligation to pay damages. The insured has to prove actual loss suffered by the delay.

Third Parties' Rights against Insurers

On 1 August 2016, the Third Parties (Rights against Insurers) Act of 2010 will come into force. This act will have significant implications where the insured is insolvent.

Under the 1933 act, if a third party wishes to bring a claim against an insolvent insured (e.g., a contractor) in order to obtain compensation under the insured's insurance policy (a relatively common situation in professional indemnity claims), the third party must go through a cumbersome (and costly) procedure to first establish the liability of the insured. This has until now required the third party to apply to the courts to have the insured restored to the register of companies (if the company has been struck off).

Under the new act, restoration to the register will no longer be required. Instead, the third party will be permitted to issue proceedings directly against the insurer without involving the insolvent insured at all. As would be expected however, the third party will still have to establish the liability of the insured for the claim before any judgment can be enforced against the insurer.

In addition, certain defenses previously available to insurers (e.g., late notification by the insured) will be removed under this new act. Instead, the third party itself will be able to notify the relevant insurers of its claim against them.

The act also obliges the liquidator or person in possession of the property of the insolvent to disclose relevant insurance policies to the third party

CONCLUSION

So, for those of us used to practicing under the 100-plus-year-old English insurance and reinsurance law, the next few years will be very interesting as the English courts seek to interpret these new laws. •

Dos and Don'ts for New Umpires

By Jim Sporleder, Roger Moak, Stephen McCarthy, and Connie O'Mara

We compiled the following suggestions for serving as an umpire in an arbitration. Not all will agree with all of the suggestions (in fact, there was some disagreement among us), but novice umpires may find them useful. Reference should always be made to the ARIAS•U.S. Practical Guide.

Before the organizational meeting (OM), *do* the following:

- Make sure both parties have agreed to your fee schedule and to provide you and the panel with a hold harmless agreement (its execution at the OM is acceptable and typical).
- Direct counsel to identify jointly and provide copies to the panel of the contracts in dispute.
- Keep a record of each arbitration you are handling (see the *ARIAS Master Case List* form). Include the name of any TPA involved in handling.
- Keep a copy of your umpire questionnaire answers.
- Keep track of any agreements not to accept future party arbitrator or umpire appointments if you so agreed in the umpire questionnaire.
- Note how much time you spend working on the case and include task details so each party knows why it is being billed.
- Conduct a preliminary call with the panel for introductions; exchange phone numbers and e-mail and mailing addresses; and note particular circumstances as to communications among panel members (for instance, if one panel member is employed full-time outside his/her arbitration practice, consider the impact will that have on conference calls, phone numbers, e-mails, and so on). Discuss preferences as to using hard or electronic copies of documents.
- Facilitate a decision as to where the OM should be held.
- Prepare and distribute a pre-OM memorandum and agenda (see letter template as an example).
- Make sure one of the parties makes arrangements for a court reporter.
- Insist on an in-person OM unless the case is too small to justify the expense. If you're not already familiar with the cast of characters, the sooner you get acquainted, the better.
- Act as if you're in charge, because you are.
- Consider asking all panel members to make disclosures in advance of the OM. Any conflicts with parties, counsel, and witnesses should be disclosed as soon as known.
- Meet briefly with the panel to discuss (for example) when to suspend the organizational meeting for a panel ruling on objections by counsel and any other process issues.
- Attempt to agree on hearing dates and cutoff dates among panel members so you can motivate the parties to adhere to an appropriate schedule.

- Block out time on your schedule to read position statement and contracts.
- Agree with the parties or counsel whether first or last names will be used during the proceedings.
- Make a schedule of important dates. Advise the parties of dates that are blocked out for personal commitments (such as vacations).
- Advise the parties and panel whether "business casual" or formal attire is appropriate.
- Advise your panel colleagues of your preferred style of deliberations (e.g., arbitrators to agree or identify areas of dispute first before you provide input versus umpire providing for framed issue questions to each party arbitrator).

Don't take other arbitrations as a party arbitrator involving the parties until the case is resolved.

At the OM, *do* the following:

- Allow panel members to make any additional disclosures that are warranted.
- Ask the parties to accept the panel and execute the indemnification/hold harmless agreement before proceeding with the meeting agenda.
- Ask the parties to execute the confidentiality agreement (if one is being used).
- Ask the parties for their opinion on the cut-off of ex parte communications.
- When deposition testimony is to be used (rather than live witnesses), consider asking for entire transcripts so the panel can read any excerpts in context and get the background information on the witness(es).
- *Don't* give up control of the arbitration to an overactive or outspoken party arbitrator. Speak to the party arbitrator about this if you see a problem developing. Also, *don't* prohibit a party from being given the proper opportunity to discover facts about the case, but remember that you may need to control the amount and type of discovery, especially if you are faced with a motion to compel or a motion for a protective order.

Don't give up control of the arbitration to an overactive or outspoken party arbitrator. Speak to the party arbitrator about this if you see a problem developing.

At the hearing, *do* the following:

- Consult with counsel as to how much time each side will need for argument and rebuttal, and plan accordingly. Panel questions could distort these parameters, and in most cases, counsel should be given as much speaking time as they feel necessary. This also applies to oral argument of motions.
- Allow everyone in the room to identify themselves for the record at the beginning of every hearing.
- Confirm that there are no additional disclosures by the party arbitrators or yourself.
- Allow your party arbitrators to ask questions before you do, unless you won't understand what will follow without getting clarification.
- Keep questions non-adversarial and try to ask questions of both parties.
- Watch the faces of counsel and witnesses (not your computer screen); such conduct shows respect for, and engagement with, the material presented.
- Keep in mind the dollar amounts involved in the dispute when making discovery decisions.
- Remember, that whereas you are a truth-finder, counsel are advocates and protectors of their clients. Do not take their assertions of the attorney-client and/work product-privileges at face value. Be sure that communications meet the test for the attorney-client or work-product privileges. For example, merely copying a lawyer on a document does not, by itself, establish privilege and documents cannot be privileged unless they are confidential. Generally, documents sent to a long list of addresses should not be considered confidential.
- Insist on detailed privilege logs that

Personal Tips for Umpires

Bring your business card to every meeting.

Take control of the case, but don't be overly aggressive.

Ask the panel if they would like to have dinner together before the OM or hearing.

Make sure food is ordered if the OM or hearing will go beyond lunch.

Have a system in place for making three-way or conference calls.

Try to learn and remember the names of all counsel and party representatives.

Take regular breaks every hour or two and tell the parties they can request breaks as needed.

If a joke is told or something is said that should not be on the record, tell the court reporter to go off the record.

Try to bill on a regular basis (monthly or quarterly depending on the length of the proceeding). Don't wait until the end of the case to send a bill.

Don't show favoritism to one party, panel member, or witness, and don't spend too much time with (or accept dinner invitations from) parties or counsel at industry functions.

Don't discuss your fees or those of anyone else, and don't ask party arbitrators for favors or assistance while the case is pending.

actually demonstrate the applicability of the privilege.

- Try to hold questions for a witness until the direct and cross examinations have been completed.
- Share your preliminary thoughts—based on counsel's written submissions—with your panel colleagues before an oral argument or hearing. It will enable and encourage them to ask counsel questions that address your issues.
- Consider the wording of the contract first and foremost. If the meaning or the wording is clear, you shouldn't need extrinsic evidence. If there is an ambiguity, then drafting history (from documents or drafters) is better than expert testimony.
- Consider whether an expert witness's (or a panel member's) espousal of "custom and practice" is truly relevant and instructive when the witness's experience has no relationship to the time of the contract and the parties involved.
- Ask the parties to prepare a proposed hearing award or other order so you have something to work from in your drafting process.
- Take the time to make your orders and awards complete and clear. In writing any decision—even one that doesn't have to be reasoned—assume that a judge may someday have to figure out what the panel considered (i.e., specifically identify counsels' various briefs and how much oral argument or hearing you allowed). Also, write with no ambiguity about what you mean and don't mean in resolving the dispute.
- Ask for a copy of the hearing transcript if it is ordered by the parties.

Don't do the following:

- Be intimidated by counsel's threats—veiled or overt—about the risk of a court challenge to an adverse ruling. There are relatively few challenges and even fewer successful ones.
- Hold panel questions until the end of an oral argument (but do try to hold questions during their examination of a witness—see above).
- Think that an honorable engagement provision in the arbitration clause or language releasing you from "strict adherence" to the law or the rules of evidence means that you can do whatever you want without giving applicable law and rules due consideration.
- Allow the parties to lose their temper or become unprofessional to each other. It is imperative to maintain a professional (and respectful to all) tone at the hearing.
- Do your own research on an issue. Rely on counsel to give you the facts, arguments, and authority for their arguments.
- Show favoritism to either party.
- Cross-examine witnesses. Allow the parties to cross-examine. At most, ask succinct, neutral questions.
- Lose your temper or show emotion.
- Speak about the parties of counsel or the facts of a case to third parties.

After the Hearing

Do keep final awards, indemnification/hold harmless, and confidentiality agreements permanently. They should not be destroyed, even after you discard copies of other materials from the arbitration.

Don't disclose opinions or positions of other panel members. Also, don't talk about the arbitration to friends and industry colleagues in any way that would identify the participants. •

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A Speed Dating Memoir

My heartburn is killing me.

By Chuck Ehrlich

My heartburn is killing me.

Is it the lunch of short ribs and mini-éclairs? (They were so small, surely it was OK to have a couple, along with the mini-cream puffs.)

Or is it the swiftly approaching ARIAS Speed Dating event, at which I'll have six minutes to sell my suitability to decide multimillion-dollar disputes (less time than a prospective hamburger flipper gets when interviewing at McDonalds)?

Twice the prescribed dose of meds seems to be cutting back on the burn.

The room is like a London pub in the early evening, but without the prospect of a good pint. (I know pubs because I'm returning from chairing a conference for GCs in London.) It's crowded and noisy, and nobody's quite sure what's happening.

Shouting over the cacophony, a volunteer explains that the buyers will sit on one side of long tables, the sellers on the other. They'll have until the next shouted instructions to get to know each other. Then, sellers move to the right. Buyers stay put. Repeat several times.

I've printed up packets with my résumé, a one-page blurb on my approach to arbitration, and a copy of my ARIAS article, *The View from the Middle Seat*. The last is, of course, unnecessary, because surely everyone present has read it several times. (Actually, at least two people have read it. One was my wife.)

Across from me, at my first stop, are three gentlemen. OMG (as the kids say)—did I print enough packets? I had assumed one or two interviewers per stop. I exercise my decision-making skills by giving a packet to the most senior-looking fellow; maybe he'll see that as a sign of respect.

We actually have an interesting discussion; perhaps I think it's interesting because it's mainly me talking? They seem to be very nice fellows, and I know their company is highly thought of. So, I'm glad of the encounter and feeling a bit looser as the order to move along is shouted out.

Next stop, only one gentleman, so no tough packet allocation decisions to be made. Again, an interesting discussion. I'm starting to enjoy this, and getting more eloquent in explaining my arbitration philosophy.

"Arbitration philosophy." Isn't that a trifle over-serious, you ask? After all, we're talking about a business exercise, not an inquiry into the life well led. So, let's say "approach." Essentially, it's this: (1) we're supposed to decide disputes, not babysit endless process; (2) we've been too silent because, abetted by the threats of the lawyers, we've worried too much about being second-guessed by courts; (3) companies don't like not knowing the basis for

decisions; (4) the discipline of writing decisions can lead to better thinking; and (5) courts are, in fact, significantly more likely to respect panel decisions supported by lucid reasoning than those rendered as one-liners.

It doesn't take six minutes to say this, and suddenly I'm in a pairing in which those few minutes seem to extend into hours. I've had my say, and it's now "do you have any kids?" Of course, this is why the real speed dating was invented—a bad date can be a short date without hurting anyone's feelings. More shouting from the herder, and I'm liberated.

My last station is across the room. When I get there, an elderly gentleman seller is in deep conversation with his buyer. I don't want to be impolite, but, after all, it is my turn. So I hover at a polite distance, close enough to be noted but not so close as to invade personal space. Either this seller is fantastic or the buyer is simply too polite to nudge him along.

Shortly, the shouting fellow shouts his last and it's all over. I've missed the last buyer. He's still chatting with the older fellow, but I think I recognize him and I'll e-mail him the packet.

Once we got going, the heartburn went away, so maybe it was the short ribs and dessert(s). Speed dating was actually fun. I met people who were completely new to me and interested in what I had to say. It's an exercise worth doing. Too bad it hadn't been invented when I was in college. •

Ethics Committee Responds to Member Survey Questions

In 2015, the ARIAS•U.S. Ethics Committee conducted a survey. Certain questions emerged from the survey results.

The committee's responses to these questions are grounded in the ARIAS•U.S. Code of Conduct (the code) and are focused on the ethical responsibilities of party-appointed arbitrators and umpires and not the specific facts and circumstances that might arise in a dispute. Note, however, that the "Purpose" section of the code states the following:

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

These responses are intended to assist members with gaining a better understanding of the code as drafted and are not meant to be relied upon, cited, or otherwise used by parties in any disputes or by courts in construing disputes. Below are the questions, followed by the committee's responses.

What happens when an opponent nominates three umpire candidates, but two of these candidates have been talked to by the opponent, forcing the coin flip to the third and favorite candidate?

In this instance, the umpire candidates who have been "talked to" by the "opponent" (whether counsel or the party he or she represents) about the matter for which the candidate is nominated as umpire must decline to serve as the umpire in the proceeding. This answer is made clear by Canon I, titled *Integrity,* which specifies that "Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently."

Comment 3 to Canon I provides as follows:

The parties' confidence in the arbitrator's ability to render a just decision is influenced by many factors, which arbitrators must consider prior to their service.

There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve . . . (e) where the candidate is nominated for the role of umpire and the candidate was contacted prior to nomination by a party, its counsel or the party's appointed arbitrator with respect to the matter for which the candidate is nominated as umpire.

If the umpire candidates do not voluntarily comply with this clear mandate, the party other than the one denominated as the "opponent" may request that the candidates withdraw and that the "opponent" nominate two other candidates (of course, copying the "opponent" on all correspondence). Nothing in this response affects either party's rights under the Federal Arbitration Act.

To the extent the conduct of the "opponent" was intentional—that is, the "opponent" deliberately disqualified two of its umpire candidates to get a 50% chance that its third candidate will be selected—it is a violation of the

"Purpose" section of the code quoted above. Such conduct, if engaged in by counsel, may be subject to state attorney disciplinary proceedings.

What is the scope of permissible ex parte communications? When and how can one communicate with party-appointed arbitrators? Before/after interim awards? During deliberations? How does one respond when a party-appointed arbitrator clearly has engaged in those discussions?

In most instances, counsel will agree to the timing of the ex parte communication cut-off and will disclose this agreement at the organizational meeting. If not, the panel should take care to clearly provide a firm date for ex parte communications cut-off. Other circumstances may arise when ex parte communications are cut off, including during motion practice or other submissions to the panel. Also, ex parte communications may reopen following issuance of the final award, so long as the panel's deliberations are not disclosed.

These questions underscore how important it is to be precise in addressing the timing of ex parte cut-off early in the arbitration proceeding. For example, if counsel and/or the parties want to resume ex parte contact following an award, they should so specify. The same is true for ex parte contact before motions are submitted, either in supporting or opposing interim awards or in presenting other issues.

Generally speaking, the umpire may have no ex parte communications with the parties or their counsel or the party-appointed arbitrators at any time during the proceeding. The only times during which an umpire may discuss the case with a single arbitrator, party, or party's counsel, in the absence of other counsel, are set forth in Comment 8 to Canon V, titled *Communications*. These occasions are: (a) discussions about ministerial matters (such as the time of a hearing), provided that the umpire then promptly informs the other arbitrator, party, or party's counsel of the discussion and allows expression of views before any final decision is made; or (b) if all parties so request or consent to the contact. Also, if a party fails to be present at hearing after having been given due notice, the entire panel may discuss the case with any party or its counsel who is present, and the arbitration may proceed.

Within specified parameters, each party-appointed arbitrator may speak to the party who appointed him or her up to the time of the deadline for ex parte communications. Again, these circumstances are specified in the comments to Canon V. These are as follows:

Party-appointed arbitrators may communicate with the party who is considering appointing them about their fees and, excepting those who by contract are required to be "neutral" or the equivalent, may also communicate about the merits of the case prior to acceptance of the appointment until the date determined for the cessation of ex parte communications. (Comment 2)

Except as provided above, party-appointed arbitrators may only communicate with a party concerning the dispute provided all parties agree to such communications or the Panel approves such communications, and then only to the extent and for the time period that is specifically agreed upon or ordered. (Comment 4)

When party-appointed arbitrators communicate in writing with a party concerning any matter as to which communication is permitted, they are not required to send copies of any such written communication to any other party or arbitrator. (Comment 5)

Although there has been discussion and debate about whether ARIAS•U.S. should establish a formal ethical grievance and sanctioning body and procedure, no such body or procedure exists.

Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and (c) provide his or her impressions as to how an issue might be viewed by the Panel, but may not disclose the content or substance of communications or deliberations among the Panel members. An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing. (Comment 6)

It is the arbitrator himself or herself who must weigh whether repeated appointments by the same party will affect his or her ability to rule fairly or would affect confidence in the process.

Is it appropriate for a law firm to select an individual as a party-appointed arbitrator for a client one week before a hearing where that individual is serving as an umpire in a case in which the same law firm is counsel for another client?

The timing of the offered party appointment is not the issue. The issue is whether an umpire may accept a party appointment involving a law firm currently appearing before the umpire in a different matter. If the new matter involves parties appearing before an umpire in a pending matter, the umpire must decline the proffered party appointment as indicated in Canon I, Comment 3(f). If the new matter involves different parties, the code does not prohibit the umpire from accepting the appointment, but leaves it to his/her discretion.

In deciding whether to take the new appointment, the umpire should consider whether the new appointment would hinder the umpire's ability to render a just decision in either the existing matter or the new matter. The decision should be made after consideration is given to the factors indicated in Canon I, Comment 4.

What can ARIAS•U.S. do to police and deal with those who violate our Code of Ethics?

Although there has been discussion and debate about whether ARIAS•U.S. should establish a formal ethical grievance and sanctioning body and procedure, no such body or procedure exists. Article II, Section 5 of the By-Laws provides the following:

A member may be suspended for a period, or expelled, for cause such as violation of any of the by-laws or rules of The Society or for conduct prejudicial to the best interests of The Society. Suspension or expulsion shall be by a two-thirds vote of the membership of the Board of Directors, provided that a statement of the reasons for the contemplated action shall have been mailed by registered mail to the affected member at the address last given to The Society by the member at least thirty (30) days before final action is taken thereon; this statement shall be accompanied by a notice of the time when and place where the Board of Directors is to take action in the premises. The member shall be given an opportunity to present a statement at the time and place mentioned in such notice.

What if the parties disagree as to the application of the ethical rules?

If the parties disagree about the application of the code in a particular arbitration and a workable compromise cannot be reached, they should raise the issues with the panel for resolution and, if necessary, preserve any objections for judicial intervention if appropriate.

Should we be concerned about multiple appointments of party appointed arbitrators by the same party?

It is the arbitrator himself or herself who must weigh whether repeated appointments by the same party will affect his or her ability to rule fairly or would affect confidence in the process. Parties may choose to appoint the same arbitrators repeatedly, whether because of favorable perceptions about their industry expertise or their ability to work effectively with other arbitrators. The candidate who receives repeated appointments from the same party must consider Canon I, Comment 4 (g), which states that, in determining whether he or she can render an impartial decision, an arbitrator should consider whether a "significant percentage" of his or her appointments for the past five years come from the party in question. Should the arbitrator determine that repeated ap-

pointments by the same party would likely affect his or her judgment, the appointment should be declined.

Is it a breach of ethics for an arbitrator or umpire to handle an arbitration for one party while also handling a different arbitration for the opposing party or attorney?

Party-appointed arbitrators are not prohibited from accepting an appointment by one party in a particular arbitration proceeding after having accepted an appointment from the opposing party in that proceeding. However, Comment 3(f) of Canon I makes clear that, because of his or her neutral role, the umpire in a proceeding may not accept a subsequent appointment as a party-appointed arbitrator from one of the parties in that proceeding.

When asked, are arbitrators required to disclose the percentage of income derived from appointments by same party/law firm/ third party/administrator or manager?

While Canon IV encourages complete disclosure on the part of arbitrators, Comment 2 (b) focuses on the number of appointments by the same party/law firm/ third party administrator or manager, rather than the percentage of income generated by those appointments. There are two primary reasons for this focus. First, participants in the arbitral process should strive to obtain necessary information about fairness and impartiality of an arbitrator without causing an undue invasion of his or her privacy. Second, while numbers of appointments are simply and objectively verifiable, it is less likely that the percentage of income generated by the same party/law firm/ third party administrator/manager may be so verified.

Should we educate umpires not to voice their opinions to arbitrators before testimony is given, especially when the two party-appointed arbitrators are serving on other panels to connected arbitrations that have been bifurcated or trifurcated?

In order to preserve the parties' confidence in the fairness and objectivity of the arbitral process, all arbitrators, including the umpire, should refrain from reaching a judgment, including on individual issues, until the parties have had an opportunity to present all the evidence related to those issues and the panel has fully deliberated. (See Comment 2 to Canon II.)

Are there any circumstances in which an arbitrator is permitted to disclose panel communications or deliberations?

Arbitrators may disclose certain communications if so agreed by the parties or if otherwise required or allowed by law as set forth in Canon VI, Comment 2. Although this should be a very infrequent occurrence, Canon VI, Comment 3 also makes an allowance for an arbitrator to place panel deliberations or communications on the record or in a communication to all parties and panel members in the event of the need to expose serious wrongdoing on the part of one or more of the other panel members.

What is an umpire's duty to disclose, in an umpire questionnaire, prior involvement at his or her prior company(ies) with the substantive issues involved in a dispute?

While Canon IV specifies that arbitrators should disclose any interest or relationship likely to affect their judgment and that all doubts should be resolved in favor of disclosure, it is true that certain issues are endemic to our industry. For example, given the number of disputes that involved number of occurrences under a treaty, it is not necessary for an umpire candidate to disclose his or her involvement with these generic issues. However, if the precise issue involves an account, policyholder, or contract with which the umpire had experience while employed at his or her former company, that involvement should be disclosed. (See Comment 1 to Canon IV.)

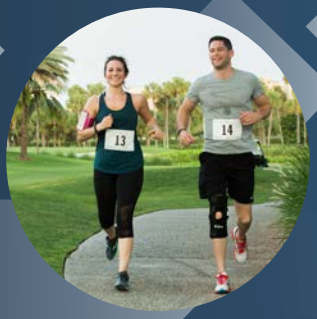
The members of the Ethics Committee thank you for your thoughtful questions and continuing interest. •

continued from page 18...

5. *Id.*
6. *See Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 462, 477 (S.D.N.Y. 2010). *See also Safra Bank of New York v. Penfold Inv. Trading, Ltd.*, 2011 WL 1672467 at *5 (S.D.N.Y. Apr. 20, 2011) (holding that class arbitration and consolidation are "distinct procedural issues"); *Medicine Shoppe Intern, Inc. v. Bill's Pills, Inc.*, 2012 WL 1660958 at *2 (E.D. Mo. May 11, 2012) (same).
7. *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 222 (3d Cir. 2012), *aff'd* 133 S. Ct. 2064 (2013).
8. *Id.* at 222-223.
9. In 2003, the Supreme Court held, in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), that arbitrators, not a court, should decide whether class arbitration is permitted. In the wake of *Bazzle*, federal courts have arrived at a general consensus that consolidation is also a "threshold" issue for the arbitrators. *Connecticut General Life* predates the decision in *Bazzle*, and the appellate court, noting that "[n]one of the parties contends that the issue . . . is for the arbitrators rather than the court to decide," undertook to interpret the parties' agreement and determine whether consolidation was permitted and appropriate. *Connecticut General Life Ins. Co.*, 210 F.3d at 773. Today, this is a decision that would be made by the arbitrators.
10. *Id.* at 775.
11. *Id.* at 774.
12. *See id.* at 776.
13. *Id.*
14. *AAA Handbook on Arbitration Practice*, Chapter 11, "Consolidation, Joinder and Class Actions: What Arbitrators and Courts May or May Not Do," at 139.
15. *See Rolls-Royce Indus. Power Inc. v. Zurn EPC Services, Inc.*, 2001 WL 1397881, at *4 (N.D. Ill. Nov. 7, 2001) ("[A] court may not order arbitral consolidation simply on grounds that the *court* believes it would be more efficient to do so. However, a court may consider [practical] aspects indirectly based on the rationale that it is reasonable to assume that the *parties* would have wanted to arbitrate their dispute in a 'sensible' or practical way.") (emphasis in original).
16. *Id.* at *6.
17. *Id.* The courts in *Government of the U.K. v. The Boeing Co.*, 98 F.2d at 69 and *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d at 637, similarly declined to order consolidation of disputes arising under separate arbitration agreements involving different parties.
18. *See, e.g., Anwar*, 728 F. Supp. 2d 462 (refusing to enjoin panel from consolidating claims of thirty-eight plaintiffs involving at least thirty-seven distinct agreements); *Aegis Sec. Ins. Co. v. Philadelphia Contributionship*, 416 F. Supp. 2d 303 (M.D. Pa. 2005) (holding that panel in first-filed arbitration should determine whether to consolidate with arbitration subsequently demanded by reinsurer not party to first arbitration); *Markel Intern. Ins. Co. v. Westchester Fire Ins. Co.*, 442 F. Supp. 2d 200 (D.N.J. 2006) (holding that single panel should determine whether disputes between insurer and reinsurer concerning different reinsurance contracts should be consolidated or arbitrated separately).
19. 2008 WL 192270 (E.D. Mich. Jan. 23, 2008).
20. *See, e.g., Rice Co. v. Precious Flowers, Ltd.*, No. 12 Civ. 0497, 2012 WL 2006149 at *4 (S.D.N.Y. June 5, 2012) ("[C]ourts have uniformly held that, absent a clear agreement to the contrary, the question of whether arbitration proceedings should (or should not) be consolidated is a procedural matter to be decided by the arbitrators, not by a court."); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 577 (7th Cir 2006) ("[T]he question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve."); *Clearwater v. Granite State Ins. Co.*, No. C 06-4472, 2006 WL 2827872, at *3 (N.D. Cal. Oct. 2, 2006) ("The issue of whether, when, and how to consolidate these arbitrations is for the arbitration panels to decide.").
21. AAA Construction Industry Rules, Rule R-7(a).
22. *See Independent Ass'n of Mailbox Center Owners, Inc. v. Superior Court*, 133 Cal. App. 4th 396, 410 (Cal. Ct. App. 2005) (holding that trial court erred in allowing AAA administrator to decline to decide or issue any ruling on group arbitration request without referring the matter to an arbitrator).
23. *See, e.g., Gov't of the U.K. v. Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993) ("The AAA informed the United Kingdom that it would not order consolidation of arbitration proceedings without the consent of the parties."); *Hyundai America Inc. v. Meissner & Wurst GmbH & Co.*, 26 F. Supp. 2d 1217, 1218 (N.D. Cal. 1998) (stating that the AAA claimed that it had "no authority to consolidate the proceedings in light of M+W's objection and the absence of a specific contractual provision calling for such action."); *Specialty Bakeries, Inc. v. Robhal, Inc.*, 1997 WL 379184, at *1 (E.D. Pa. June 4, 1997) ("AAA explained that '[a]bsent the agreement of all parties, applicable contractual provisions authorizing joint arbitration, or a court order, the Association cannot consolidate the parties' disputed claims.'"); *Cohen v. S.A.C. Capital Advisors*, 2006 WL 399766, at *2 ("AAA refused to consolidate absent the parties' consent or a court order.").
24. *See, e.g., Markel Intern. Ins. Co. v. Westchester Fire Ins. Co.*, 442 F. Supp. 2d 200, 204 (D.N.J. 2006) ("[P]rinciples of efficiency strongly favor a single arbitration panel's determination of whether consolidation is appropriate under the parties' agreements ... Requiring multiple panels to decide the question of consolidated arbitration would likely result in strategic behavior that would only serve to frustrate a resolution of the parties' dispute."); *Argonaut Ins. Co. v. Century Indem. Co.*, 2007 WL 2668889, at *6 (E.D. Pa. Sept. 6, 2007) (recognizing that principles of efficiency strongly favor a single panel deciding consolidation); *Dorinco Reinsurance Co. v. Ace American Ins. Co.*, No. 07-12622, 2008 WL 192270, at *10 (E.D. Mich. Jan. 23, 2008) ("[I]f more than a single panel of arbitrators per occurrence is appointed and any one panel decides that separate panels are warranted, a consolidated panel is necessarily precluded. The principle at stake is not just one of efficiency, but one of preserving the arbitrators' ability to actually decide the question.").
25. *Markel*, 442 F. Supp. 2d at 204.
26. *Id. See also Arrowood Indem. Co. v. Harper Ins. Co.*, Nos. 3:12-cv-2, 3:12-cv-3, 2012 WL 161667, at *2 (W.D.N.C. Jan. 19, 2012) (the job of resolving the choice between competing understandings and interpreting the parties' contract "is solely one for an arbitrator to decide").
27. No. 05-5355, 2007 WL 2668889, at *1-2 (E.D. Pa. Sept. 6, 2007).
28. *Id.* at *2.
29. *Id.* at *1.
30. *Id.* at *3.
31. *Id.* at *6.
32. *Id.*
33. Nos. C 06-4472 SI, C 06-4500 SI, C 06-4501 SI, C 06-4502 SI, 2006 WL 2827872, at *1 (N.D. Cal. Oct. 2, 2006).
34. *Id.* at *3.
35. Nos. 3:12-cv-2, 3:12-cv-3, 2012 WL 161667, at *1 (W.D.N.C. Jan. 19, 2012).
36. *Id.*
37. *Id.* at *2.
38. 416 F. Supp. 2d 303, 310-11 (M.D. Pa. 2005).
39. *Id.* at 305.
40. *Id.* at 305-6.
41. *Id.* at 306.
42. *Id.* at 310.
43. *Id.* at 311.
44. 442 F. Supp. 2d at 201-2.
45. *Id.* at 205-6.
46. *Id.* at 204. *See also Certain Underwriters at Lloyd's, London v. Cravens Dargan & Co.*, No. CV 05-4. 226, 2005 WL 3682013 (C.D. Cal. Jun. 27, 2005); No. CV 05-4226, 2005 WL 3682012 (C.D. Cal. Aug. 11, 2005) (cedent demanded a single consolidated arbitration of disputes under separate reinsurance contracts, and reinsurers petitioned the court to compel separate arbitrations; court denied reinsurers' petition and ordered them to participate in appointing a panel that would then decide the consolidation issue); *Dorinco Reinsurance Co. v. Ace American Ins. Co.*, 2008 WL 192270, at *9-10 (ordering the parties to submit the question of consolidation to the panels in two reinsurance arbitrations that were demanded in a consolidated fashion, one for each occurrence leading to an insured loss, reasoning that allowing more than one panel to address the issue for each occurrence could negatively impact "the arbitrators' ability to actually decide the question").
47. No. 11 Civ. 1956, 2011 WL 4686517, at *1 (S.D.N.Y. Oct. 6, 2011).
48. *Id.*
49. *See also Avon Products, Inc. v. International Union, United Auto Workers of Am., AFL-CIO, Local 710*, 386 F.2d 651, 658(8th Cir. 1967) (holding that the first arbitrator selected in demanded arbitrations should "determine whether the grievances are to be resolved in a single or in multiple proceedings.").

2016 ARIAS·U.S. SPRING CONFERENCE RECAP

Conference Co-Chairs **Deirdre Johnson, Ann Field** and **Dennis Kerrigan** put together a fantastic agenda for the 2016 Spring Conference around the theme of staying relevant in a changing world. Drones, self-driving cars and cyber liability were just a few of the highlights that made this conference so engaging. Lively ethics breakout discussions, the use of a live polling app in the general session, and the commanding officer from the Army Cyber Command as the keynote speaker rounded out the conference experience and had the attendees looking forward to reconvening in the fall in New York. The sun was out the entire week as attendees ate, drank, golfed, played tennis, sat on the beach or ran a few miles during the inaugural fun run. More fun, sun and networking are in store when we gather again next spring at the Ritz Carlton in Naples, Florida!



STAYING RELEVANT IN A CHANGING WORLD

AN INVITATION

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The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process.

The Society offers its ***Umpire Appointment Procedure***, based on a unique software program created specifically for ARIAS, that randomly generates the names of umpire candidates from the list of ARIAS•U.S. Certified Umpires. The procedure is free to members and non-members. It is described in detail in the ***Selecting an Umpire*** section of the website.

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For many years, the Society published the ***ARIAS•U.S. Membership Directory***, which was provided to members. In 2009, it was brought online, where it is available for members only. ARIAS also publishes the ***ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure, The ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes***, and the ***ARIAS•U.S. Code of Conduct***. These online publications ... as well as the ***ARIAS•U.S. Quarterly*** journal, special member rates for conferences, and access to educational seminars and intensive arbitrator training workshops, are among the benefits of membership in ARIAS.

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Sincerely,

Elizabeth A. Mullins
Chairwoman

James I. Rubin
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