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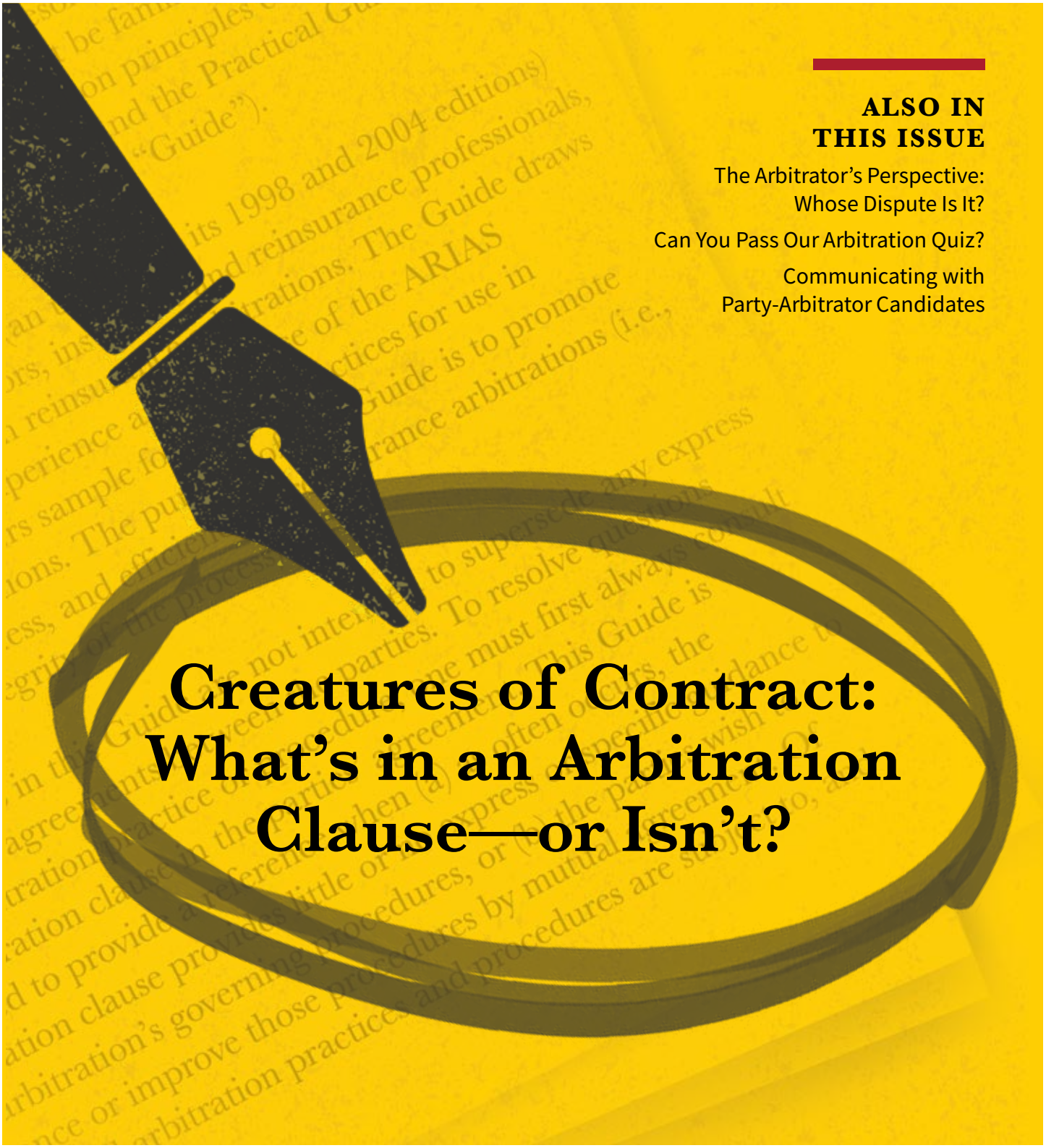

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BACK COVER

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

COVER ARTWORK: HALID OZGUR/GETTY IMAGES

Welcome to 2021, a year we all hope will be much better than 2020. Yet, as I write this, we are still in the midst of the pandemic. Remote working is now the norm, and the courts are once again closed. The light at the end of the tunnel, however, is getting closer as the vaccines are out and being administered. I received my first shot, and by the time you read this I will have had my second (I, for one, am not throwing away my shot). I hope that you, your families and your colleagues are all safe and well.

Meanwhile, insurance and reinsurance disputes continue, albeit mostly virtually. Many of us have been involved in virtual mediations, depositions, hearings and arbitrations. We are all learning that, yes, this can be done remotely. Hopefully, the guidance and ideas provided by some of the articles in the past few issues of the *Quarterly* have been helpful in navigating this new world.

This issue brings us several interesting articles, three of which are written from the arbitrator's perspective. First, David Thirkill of the Thirkill Group takes us on a tour of a traditional reinsurance contract arbitration clause in his article, "Creatures of Contract: What's in an Arbitration Clause—or Isn't?" David juxtaposes the words of the clause with the typical activities taken by party-appointed arbitrators in a traditional reinsurance arbitration. Unsurprisingly, David has some strong views on which of those activities are derived from the reinsurance contract and which are derived from the forms, guides, rules and codes established by ARIAS·U.S. Contrary views are welcomed.

Second, we present The Arbitrators' Corner, written by arbitrators Suzanne Fetter of Fetter Company and John Cole of Wiley Rein LLP. In "The Arbitrator's Perspective: Whose Dispute Is It?," Suzanne and John focus on the arbitrator's role when a party challenges various gateway issues like arbitrability. The article posits that it is not the arbitrator's job to stand aside just because of a jurisdictional challenge to the panel's authority. The Arbitrators' Corner will be a semi-regular feature of the *Quarterly*.

You will also find something new in this issue. Members of the Arbitration Committee—Carlos A. Romero, Jr. of Post & Romero, Fred Pinckney of Business Law and Arbitration Services, Inc. and Kim Hogrefe of Kim Dean Hogrefe, LLC—put together a clever quiz to test your knowledge about how to handle certain arbitration issues. Read the questions and answer them yourself (don't cheat!). The answers follow the questions. Let us know how you did.

Jonathan Sacher and Kelly Jones of Bryan Cave Leighton Paisner provide a follow-up to an earlier article with "The New U.K. Position on Arbitrator 'Bias.'" Arbitrator bias has been a topic of great interest in arbitration circles in both the U.K. and the U.S. The U.K. Supreme Court has now provided some much-needed guidance. How relevant is this case to U.S. arbitrations? Let's hear from you.

Finally, we have a fabulous ethics article, "Spotlight on Ethics: Communicating with Party-Arbitrator Candidates," authored by Teresa Snider of Porter Wright Morris & Arthur LLP. Teresa is chair of the *Quarterly* Editorial Board and a member of the Ethics Committee. The article navigates through the minefield of information that may be provided to party-appointed arbitrator candidates and discusses when those candidates must refuse to serve.

I hope you enjoy these articles. While you are enjoying them, consider submitting your own article for others to enjoy. Submissions are welcomed on all topics related to insurance and reinsurance arbitrations and mediations.

Larry P. Schiffer
Editor

Creatures of Contract: What's in an Arbitration Clause—or Isn't?

By David Thirkill

At many ARIAS meetings and in many arbitrations, I have heard the immortal words, "We are creatures of contract." Most reassuring, but wholly true? Most ARIAS·U.S. certified arbitrators participate in ad hoc industry (or non-neutral) arbitrations where the party arbitrators may be pre-disposed and where the parties have chosen their own procedures. These arbitrations are governed only by the arbitration clause in a contract and, ultimately, the Federal Arbitration Act (FAA). Most arbitration clauses in use today differ little from those first drafted many years ago.

A typical arbitration clause specifies the qualifications for the arbitrators, who usually must be "former or active officers or directors of insurance or reinsurance companies, or Underwriters at Lloyd's." Other clauses specify time frames for appointments and default mechanisms for umpire selection. These clauses sometimes state that the two party-arbitrators will select an umpire and, often, that if they fail to do so then each shall nominate three persons, strike two each and toss a coin for the decision. Usually a situs (e.g., the home city of the ceding company) is specified. That is it. No reference to anything else; no reference to any formalized procedure. Zip, zero, nada more.

In 1994, a group of industry persons formed ARIAS·U.S., whose stated aim was and still is to provide "initial training and continuing education skills necessary to serve effectively on an insurance/reinsurance arbitration panel."[1] Initially, ARIAS set forth guidelines for the ethical conduct of arbitrators. These were well thought out and practical; recently, they have morphed into a Code of Conduct. ARIAS also produced numerous forms—questionnaires for the umpire selection process, a sample agenda for

organizational meetings, and so on. While most of these forms are useful, many arbitrators are under the impression that the various ARIAS forms supplant or replace words in the arbitration clause of a contract. They do not.

This article intends to review what happens in real-life situations based on the words that appear in arbitration clauses, the Code of Conduct, sample forms for questionnaires, agendas for organizational meetings, and so on. The article will also question whether certain words or phrases are creatures of contract or creatures of ARIAS·U.S.

A Bit of History

Arbitrations today have changed from when arbitration clauses were first written. All original users of arbitration were entities engaged in the ongoing business of reinsurance. The terms "legacy" and "run-off" had not been coined. It was a world where the principle of *uberrimae fidei* ruled. Arbitrations were rare; if they were held, three people (mainly underwriters) would be asked to arbitrate the dispute. They would gather over coffee (or something stronger), perhaps receive a file, listen to an outline of the dispute from the protagonists, and make a decision. No lawyers, no appeals, no fuss, no publicity.

Asbestos and major catastrophes obliterated the old world. Many well-known companies and institutions like Lloyd's either disappeared or were re-formed. The continuing legacy liabilities now are managed by specialist run-off operators with little or no knowledge of the hopes and aspirations of the persons who placed or accepted the business. Ongoing relationships usually do not apply, and disputes have become more common, leading to an increase in the number of arbitrations and the growth of an army of arbitrators. And yet, any dispute arising out of those contracts, whether legacy or new, must be dealt with per the terms of those contracts. And, to repeat, most arbitration clauses in today's reinsurance contracts closely resemble the clauses that have been in use for decades.

One of the few changes is a requirement that the arbitrators be active, rather than active or retired. But what does "active" mean? Most active reinsurance entities do not allow their employees to be arbitrators. This is good news for active (pun intended) arbitrators, but the result is that very few of today's arbitrators know anything at all about modern underwriting customs and practices. And as far as historic custom and practices are concerned, my estimate is that way fewer than half of ARIAS·U.S. certified arbitrators ever underwrote anything or ever picked up a claim file. This does not mean, of course, that they cannot be good arbitrators. But it does mean that the business of reinsurance is not ingrained in them.

Let us look at some of the words or phrases that appear in (or are missing from) a typical arbitration clause and how they are applied today.

Interpret the Contract

An arbitration clause typically starts off with something like this: "In the event of a dispute arising between the parties as to the interpretation of this Agreement. . . ." In many arbitrations, a panel was formed to decide the meaning of (i.e., interpret) contractual terms even before a claim arose.

At one end of the arbitration spectrum are individuals who construe the word "interpretation" to mean that the only thing a panel can do is render an opinion as to how the agreement in question is meant to operate. These individuals insist that a panel does not have the authority to order monetary damages. They say that a party, armed with a satisfactory interpretation of the contract, must then apply to a court to enforce the contract. While I see some logic in that very narrow view, it does not make a great deal of sense to me to interpret a contract and then refuse to do more.

At the other end of the spectrum, the word "interpret" is often simply ignored. There are those who believe that the only dispute that can arise out of a reinsurance agreement is over unpaid claims, and absent a ripe dispute, a panel has nothing to do. Not so. Also, the word "interpret" has been expanded to apply to procedural disputes (including consolidation), the application of declaratory judgment expenses, and so on.

'The Two Shall Pick a Third'

It used to be the case—and still is the case in the U.K. and Bermuda—that the two arbitrators (with perhaps some consultation with counsel for the party appointing them) selected the umpire. Nowadays, it would be a brave party-appointed arbitrator who would even think of doing that. It is true that an arbitration clause does not specify exactly how the two arbitrators will select the umpire (thus, involving counsel and the parties arguably is not contravening the contract).

But the developed practice today is that the arbitrator has become, in effect, only an advisor to a group (consisting of counsel and in-house representative) who will determine the candidates to be put up for consideration, with the final decision regarding nominees being the prerogative of the party itself.

Nowadays, arbitrators are often left out of the process altogether and only told at the end who has been selected. Also, instead of the "put up three names" process, parties increasingly prefer to put up multiple names, followed by an elaborate strike-and-rank process. What happens if one party says, "No, we want the arbitrators to decide without any further ado" (or, worse, the party arbitrators try to go it alone)? Apart from those brave (or foolhardy) arbitrators who may never get another appointment, the ultimate decision maker in that fight will most likely be a judge. And when presented with that question, courts have said, "Let the arbitrators do their job with no interference."

Which process is better for selecting an umpire, the two arbitrators or the parties? There are good arguments for both. Which process is faster and cheaper? No contest! Which is the creature of contract? No contest. Which is better? Depends on your viewpoint.

Umpire Questionnaires

Today's umpire selection process involves a questionnaire sent to nominated candidates. But hold on a second—no arbitration clause I have ever seen says anything about that. Of course, parties may alter the terms of any clause, including the arbitration clause, if they mutually agree so to do. And the easy answer about the need for questionnaires is that the parties can learn about the candidates. But most arbitrators are quite well known already. And if experienced party arbitrators are selected, they will probably know more about their brethren than counsel or parties.

So, why not send the questionnaire only to unknown people? Because, says counsel, we don't know the relationships between the candidates and the party arbitrators and the parties. So, why don't you just ask those questions? In other words, while the questionnaire process may be of some use, it is expensive, very tedious for the candidates, a drag on the whole process, and largely tells you little you don't already know. But, good or bad, is the questionnaire process a creature of contract? No. And is it, for example, better than leaving the choice to the two arbitrators? Depends on one's viewpoint.

The ARIAS Sample Umpire Questionnaire

Thanks to the ARIAS Forms Committee, some additions have been made to the umpire questionnaire. Two are particularly worthy of note.

The first is this question: Have you been contacted by anyone about this arbitration? There used to be seven deadly sins, but there are now eight—contacting an umpire candidate is the eighth. When I started arbitrating, it was commonplace to call a few people and ask them if they had conflicts. Might some persons have discussed the issues? Probably. Was that necessarily a bad thing? Depends on your viewpoint.

> "And when presented with that question, courts have said, 'Let the arbitrators do their job with no interference.'"

But that all came to a screeching halt when this question was added. Answering "yes," irrespective of what might have been said, may now automatically eliminate the individual from consideration and potentially damn the person who contacted the candidate to the eternal flames. Many

umpire candidates, however, can guess which side nominated them anyway. So, what is the point of this tick box?

The second question of note is this: Will you refuse to take any appointment as an expert or party-appointed arbitrator on behalf of either of the parties prior to the final disposition of the arbitration? Does everyone completing an umpire questionnaire and ticking the "yes" box realize they are entering a binding and legally enforceable contract? Do they understand that if the arbitration continues for some years, they potentially are curtailing their ability to accept assignments irrespective of the circumstances? (And if the party is a run-off organization, the list of affiliates may well grow.)

It is true that the rationale behind this question is appealing. Parties were getting worried that there was nothing stopping the other party from approaching (enticing?) the umpire about accepting a party-appointed position on a completely different matter, and that when this happened the non-offending party felt it may be prejudiced. But it is also true that most (though not all) experienced arbitrators can and do easily shift and distinguish between the roles of umpire and party-appointed arbitrator. Whatever the rationale, does the box ticking accord with the creature of contract theme, or is it a creature of ARIAS that adds a non-contractual qualification to those contained in the arbitration clause?

There are two relatively minor but very irritating pet peeves about the questionnaire, which are shared by every arbitrator I know. First, why distinguish between insurance and reinsurance? Would it not make more sense to ask how many arbitrations you have experienced and then, if appropriate, ask what percentage of the total were insurance, or MGA, or life-related? Second, why do we have to fill out that infernal box and then get asked for the same information in written form? This is a pain in the proverbial a**.

Disclosures

Canon IV of the ARIAS Code of Conduct sets out a whole smorgasbord of things an arbitrator should disclose. But despite what many in our community think, none of them have anything to do with an ad hoc industry arbitration. As mentioned, these arbitrations ultimately are subject to the FAA. And in relation to non-neutral arbitrators, which we usually are, consider the following quote:

One accepting the position of a party-appointed non-neutral arbitrator is subject to a duty of disclosure in order that the other party and the other arbitrators may have some insight and understanding into the non-neutral's involvement. The disclosure should be sufficient to provide such insight and understanding but need not be as detailed or specific as that of a neutral arbitrator. A party-appointed non-neutral arbitrator is not subject to disqualification by the other party based upon matter so disclosed.[2]

The AAA Commercial Rules state in E18(b), "The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence."

In other words, some reasonable disclosure is necessary, but (in my view) nowhere near to the degree suggested by ARIAS. I am not suggesting at all that the ARIAS Code of Conduct be ignored by ARIAS certified arbitrators; to the contrary. But the code has no contractual relevance in a non-neutral arbitration, to my knowledge, and ARIAS has no enforcement mechanism.

I do suggest that arbitrators think about what they disclose, and why. I believe disclosures do not have to contain a list of every single arbitration one has been involved in, stating in detail the dates and dispositions from the beginning of time—although, of course, if that is what is asked of umpires in questionnaires, they should respond. Nor do I think you need to list every cup of tea (or glass of wine) enjoyed with counsel or panel members. I often simply say, "I have had a significant number of appointments from party X" and/or "I have met socially with arbitrator Y numerous times if in New York," as those things are the rationale behind the questions. And I always make disclosures in writing in advance of an organizational meeting, so that all concerned may review and ask (reasonable) questions.

Organizational Meetings

There is nothing in arbitration clauses about an organizational meeting, and absolutely nothing about parties being allowed to accept (formally or otherwise) or reject a properly constituted panel. Organizational meetings can be useful things, but when the issues are

relatively simple and all involved know each other, they are an expensive luxury. (COVID-19, which has spawned much use of Zoom-type meetings, has demonstrated that.) Where the issues are complex and not everyone is familiar with all the players, an organizational meeting can be very useful. But an organizational meeting, conceptually, is simply not required by any contract I have ever seen.

Many arbitrators and counsel believe that a panel is not formed (properly constituted) until it has been formally accepted by the parties at an organizational meeting. This is simply not true. If it were, then every single reinsurance arbitration panel convened under similar language prior to the advent of ARIAS must have been improperly constituted. A panel is formed when the umpire accepts the appointment. No other conclusion could be drawn from arbitration clauses.

From that point on, a panel has authority, does not need to wait for an organizational meeting to act, and does not need to be formally accepted. Indeed, if (for example) urgent contractual security is required, a panel should act before the organizational meeting. And yet, on the ARIAS sample agenda for organizational meetings, we find item #2: Formal acceptance of panel or challenges. Why does the panel need to be accepted, and what possible basis is there for a challenge (at least at this stage)?

And what happens if a party does challenge and refuses to accept the panel? Should everyone just go home? And who would be challenged? A party cannot challenge the opposing party's arbitrator unless that arbitrator does not meet the qualifications in the arbitration clause. But that challenge could and should have been made at his/her appointment, not at the organizational meeting. Most organizational meeting challenges to party arbitrators in recent years have not been contractually based at all, but rather have been of the showboating type, designed to reduce an arbitrator's standing in the eyes of the umpire and oriented to the supposed duties of an arbitrator to an ARIAS oath. But that has no relevance in a non-neutral arbitration.

Challenges to party arbitrators or to umpires have not fared well in court. Recently, one challenge was to whether an umpire met an active contractual requirement. Despite some rather intemperate language on the part of counsel challenging the umpire, the judge rightly noted that the definition of "active" was rather broad and dismissed the complaint. So, why is this an item on the sample agenda? The basic fact is that the panel is properly constituted when the umpire accepts the role.

There is no contractual basis for the granting of a hold harmless stipulation (arbitrators have statutory and common law immunity), although it is a comforting thing for the arbitrators. It should be noted, of course, that the hold harmless stipulation, as drafted by ARIAS, was and is a generous gesture from the parties, as it provides greater relief to arbitrators (e.g., indemnification for costs) than does the statutory or common law immunity. It is unlikely that arbitrators today would proceed without this protection.
So, organizational meetings and the hold harmless stipulation have become commonplace and welcome parts of the arbitration process, and although they are creatures of ARIAS, they are welcome and helpful. Whether the formal acceptance of such is needed is another matter.

Confidentiality Agreements

Confidentiality agreements are not referenced at all in any arbitration clause I have ever seen. There are some parties who argue that they have no place in arbitration. I believe that one of the reasons parties arbitrate in the first place is that they have no desire at all to attract the publicity that a court hearing might generate, and that this was so well understood by all concerned that no one saw any reason to write it into a contract. And, as ARIAS used to say, "Confidentiality is a hallmark of the arbitration process." This concept had become so ingrained that if one party did not want confidentiality and the other did, panels defaulted to confidentiality.

But confidentiality has been viewed by some to mean that details of one arbitration cannot be presented to a future panel convened between those same two parties, not just to the outside world. This dichotomy led ARIAS to feel it necessary to create an exception, now routinely adopted, that information from one arbitration (if between the parties) may be used in a future proceeding between them. Two conditions are stated in the new sample form: (1) the same agreements are at issue, or (2) for good cause.

This change is appealing—savings in discovery costs loom large in that context. But the devil, as always, is in the details. The change does not

clearly specify what information may be shared (e.g., does it include awards?). Although the sharing of information may seem reasonable, precedent has no place in arbitration. Parties desiring arbitration wanted to move away from formal court decisions. They usually want arbitrators to view a reinsurance agreement as an honorable engagement. The concept of honorable engagement and the lack of any precedent means that one panel may reasonably interpret a contract differently from another panel, come to a different conclusion, and issue a differing award.

There are some in the community who want precedent to apply to arbitration. But if you lose the umpire selection toss and get a ridiculous award with no chance of an appeal, is that what the parties bargained for? If you want precedent to apply, then there must be an appeals process. Panel members may bring biases with them, and, yes, there are some (fortunately few) umpire candidates who have very definitive biases. But, bottom line, it is true that a confidentiality agreement, whether a hallmark or not, is not mentioned in arbitration clauses.

Ex Parte Communications

I will bet anything you like that if you went back in time and asked anyone who was an industry arbitrator prior to the advent of ARIAS to define *ex parte* communications, he or she would say, "I haven't got a clue." I misspoke earlier when I said there were now eight deadly sins. Wrong! There are nine. Engaging in *ex parte* communications when communications are outlawed is also a deadly sin.

> "The reality is that the concept of stopping certain *ex parte* communications may be admirable, but it has no relevance to non-neutral arbitrations and has no basis in contract."

The concept of a judge engaging in communications with one side alone is, quite rightly, anathema to the concept of fairness in a legal proceeding. In an all-neutral arbitration context, it also is not condoned. But when viewed through the prism of an ad hoc industry arbitration where, at least in the view of some federal courts, an arbitrator is expected to "vie for the vote of an umpire," it has no logical meaning. Not only is there nothing at all in reinsurance arbitration clauses about it (perhaps because the writers of reinsurance contracts had no idea what it is), ARIAS-style arbitrators must be schizophrenic. They are expected to have *ex parte* communications and talk about a case until X point in time (usually the filing of the pre-hearing brief), but then must immediately cease communications and become neutral. Put another way, at the very point in time where *ex parte* communications would make most sense and be most useful, they are, at least per ARIAS, banned.

In a similar vein, an arbitrator may (according to the ARIAS Code of Conduct) "provide his or her impressions as to how an issue might be viewed by the Panel . . . An arbitrator should not edit briefs . . . or preview demonstrative evidence to be used at the hearing."[3] Thus, an arbitrator, per ARIAS, may say all he or she likes about the best way to put any issue to the panel, but may not comment on the actual words to be used in a brief or the evidence to achieve that end. That makes absolutely no rational sense. The reality is that the concept of stopping certain *ex parte* communications may be admirable, but it has no relevance to non-neutral arbitrations and has no basis in contract.

Assuming an Advocacy Role

The ARIAS Code of Conduct, Article XII, Comment 5, states that arbitrators may question witnesses "during the hearing for explanation and clarification" but should "refrain from assuming an advocacy role." I understand what clarification means. I understand that advocacy, in this context, means a question aimed at influencing another panel member. But why on earth should I refrain from doing anything like, for example, questioning a witness if I think he is not telling the truth or I know that what he is saying is wrong?

For example, I was in a matter involving bodily injury to persons exposed to asbestos. The original policy was a typical CGL policy and contained a personal injury sublimit. The main witness for the opposite party testified that personal injury was, obviously, bodily injury such that the sublimit applied to personal (including bodily) injuries. This issue had been raised in the reply briefs, so the *ex parte* communication ban was in effect.

It was obvious that neither counsel for the party appointing me (one of the top counsel in our business, by the way) nor my co-panelists had any idea that personal injury, in this context, referred to torts such as libel, slander, and defamation of character, not bodily injury. It seemed to me perfectly reasonable to ask questions that were not simply for clarification. I considered it part of my job, and I think it should be the case whether the arbitration is neutral or non-neutral. And no arbitration clause I have ever seen puts any limitation on what questions an arbitrator may ask or how he or she should ask them. What on earth is the point of having industry-experienced arbitrators if they cannot use their experience to ask questions any way they like in an arbitration proceeding? This is a creature of ARIAS.

> "The best arbitrators fight hard for the party that appointed them, but if they cannot reconcile that duty with the facts and evidence, they vote their conscience."

Hearing the Issues within 90 Days

When these clauses were written, that was easy to say and do. Today, most parties throw the kitchen sink at any dispute, and many arbitrators do not have any room in their diary for months. So, should these words in the contract (of which we supposedly are creatures) prevail?

Relatively recently, I was told (quite patronizingly) by a junior counsel that of course the parties had meant "organizational meeting" when they wrote those words. "Really?" I said. "Organizational meetings did not exist when this contract was written!" Practicalities of life may result in the contract being ignored, but is this result a creature of contract?

Impartiality

The last sentence in the ARIAS Practical Guide (Comment B to Article 3.9) begins, "Since each panel member has a duty to hear the evidence and decide the case impartially. . . ." The theme of impartiality is repeated throughout the Code of Conduct. It provides the basis for many of the things I have discussed above. But, once again, no arbitration clause I have seen goes anywhere near saying that, and impartiality in non-neutral arbitrations is not expected.

What do parties want or expect? My experience is that most parties want their appointed arbitrator to fight hard for their case (be pre-disposed) but, ultimately, to vote their conscience. There are, however, some parties who clearly want to win at any cost and expect their appointed arbitrator to vote for them irrespective of the facts. Some arbitrators loudly protest they are always impartial, but do not exactly act like it in real life. To my mind, the best arbitrators fight hard for the party that appointed them, but if they cannot reconcile that duty with the facts and evidence, they vote their conscience.

The plain fact is that not every issue put to a panel is clear-cut. No one back in the day saw the asbestos crisis coming, which made event language a contentious subject. Was 9/11 one loss, or two? How did the hours clause in cat covers apply to the winter storms of 2005 (when numerous named storms arrived one after another)? How, if at all, can we accumulate the dreadful priestly abuses, and are they per perpetrator, per parish, or per diocese? Many decisions that panels must make can be subjective and often are determined by an arbitrator's or umpire's work background. Disagreement does automatically signal lack of partiality.

The point at the end of the day is that arbitration clauses are silent on the subject. I do not know whose creature impartiality in ARIAS arbitrations is, other than fairness and conscience with a goodly dollop of custom and practice thrown in. In my view, the concept of "pre-disposition but vote your conscience" is clearly a creature of the persons who formed ARIAS and is a unique feature of ARIAS arbitrations, with all other commercial arbitrations being either totally neutral or totally partisan (most industry non-neutral arbitrations, such as the NBA, NFL, and so on, fit into that camp).

Situs

Last but not least, we come to the site of the arbitration. Most reinsurance agreements contain a clause that names the hometown of the ceding company as the place where the arbitration should be held. A goodly number of the arbitrations today involve entities that no longer exist but have been subsumed within another live or run-off group.

Obviously, given the history of insurance growth in this country, larger insurance companies were in large cities: New York, Philadelphia, Chicago, Boston and, yes, Hartford. Most of those are safe to visit, easy to get to, and offer a choice of good hotels, good restaurants, and places to hold hearings.

But some just are not. For example, I was on a panel where the situs was a rather small state capital that is definitively not safe. It is hard to get to and is rather short on good hotels and restaurants (one is named "Rubicon," as in crossing the ___). And yet it was the named situs for the arbitration in the arbitration clause. As usually happens in these cases, the "we are creatures of contract, so we must go there" cry rang out from those who had blithely ignored the "two shall pick a third" and the "90 days for a hearing" parts of the contract. Fortunately, the party involved, recognizing that dragging a very reluctant panel to their city might not be the best idea, eventually agreed to hold the arbitration in a more reasonable city.

In recent days, many panels have had to deal with the tension between sites referenced in arbitration clauses (with an implication that a hearing must be held in person) and the concept of virtual hearings occasioned by the COVID-19 pandemic. Numerous panels have had to deal with this. Courts appear to recognize that practicality in these respects outweighs contractual terms. I had one virtual, four-day hearing (by mutual consent of the parties) and another later in January, as well as multiple organizational meetings, deliberations and the like. All other hearings have been punted in hopes the pandemic will disappear, as most participants want in-person hearings. But for good or evil, the situs of the arbitration is clearly a creature of contract.

NOTES

1. AIDA Reinsurance & Arbitration Society. "About ARIAS·U.S." Webpage at https://www.arias-us.org/about-arias-us/.

2. "What is an Arbitrator's Duty of Disclosure?" Findlaw (2016). Accessed at https://corporate.findlaw.com/litigation-disputes/what-is-an-arbitrator-s-duty-of-disclosure.html.

3. ARIAS·U.S. Code of Conduct, Canon 5, Comment 6(c).

David Thirkill spent over 45 years in the insurance and reinsurance business – concentrating in reinsurance markets underwriting in the London Market, Bermuda and the United States.

The Arbitrator's Perspective: Whose Dispute Is It?

By Suzanne Fetter and John Cole

You have just been "jointly" selected by the parties as umpire for what appears to be a complex and challenging reinsurance arbitration. You are looking forward to moving the arbitration ahead without delay (as well as working with two respected party-appointed arbitrators) when, almost immediately, you receive a formal notice from one of the parties. The respondent advises, in no uncertain terms, that it refuses to accept the jurisdiction of the panel, contending that the arbitration clause is inapplicable to the parties' dispute and unenforceable. Even more troubling, the respondent further advises that it will seek a binding judicial determination by the local state court denying the arbitration panel jurisdiction.

Not to be outdone, the petitioner—having received a courtesy copy of the respondent's state court complaint—replies immediately, contesting its opponent's jurisdictional position and advising it will either accept the panel's jurisdiction and/or remove the respondent's state court suit to federal court, arguing that the Federal Arbitration Act (FAA) applies.

On quick review of the complaint, you identify the potential for several preliminary disputed issues but feel somewhat overwhelmed by the threats to summarily abandon the panel and pre-empt what appears to be the panel's proper, contract-based authority to determine the parties' issue(s). The reinsurance contract (and the governing arbitration clause) specifies that "all questions" concerning the scope of issues that must be arbitrated under that clause are "reserved to the judgment of the Arbitration Panel."

This article addresses the panel's basic contractual-based authority (and, in certain cases, obligation) to understand the differing "arbitrability"

issues that may be raised by the parties. It also addresses the awareness that professional arbitrators should display in understanding and appreciating their indispensable role in enforcing the parties' written intent.

Whose Decision Is It?

In this hypothetical case, the respondent's state court suit seeks immediate judicial intervention to stay the arbitration. It raises several arguments regarding the premium charged and allocation of losses and indicates it will file a potentially dispositive motion asking the state court to accept jurisdiction, enjoin the arbitration, and decide the issues.

There are several legitimate "gateway issues" that may arise at the outset of an arbitration and/or at critical early stages following the initial notice of arbitration. As context to this discussion, it is important to note the well-accepted maxim that, first and foremost, "arbitration is a creature of contract." Said differently, the authority to demand arbitration as the proper dispute resolution tool is strictly a matter of prior mutual consent—no two parties can be forced to arbitrate a dispute absent clear and enforceable evidence that they have agreed to arbitrate.

This requirement of contractual consent is the *sine qua non* to establish a requirement that a disputed issue must be arbitrated. And, while the term "gateway issue" has been afforded somewhat differing definitions and implications (see brief discussion below), it is broadly accepted that a "gateway issue" is one that determines whether the parties have a binding agreement to arbitrate. Whether a gateway issue is present most frequently surfaces (as here) when one of the parties refuses at the outset to accept that it is required to arbitrate the matter(s) at issue. Most fundamentally, this may take the form of a flat denial by one of the parties that an enforceable arbitration agreement exists, essentially requiring that the opposing party bring a motion to compel the arbitration. In other instances, the existence of an arbitration agreement is effectively conceded, but it is claimed that the breadth of the contested matters placed at issue (usually by the petitioner) is outside the scope of the arbitration clause's terms.

While there are highly nuanced interpretations of what constitutes a "gateway issue" affecting the mandatory "arbitrability" of an issue (a complete discussion of which is beyond the intended scope of this article), gateway issues may arise from the following: (a) a statute of limitations interpretation; (b) a motion to consolidate two "related" arbitrations; (c) uncertainty as to whether the qualifications of one of the arbitrators satisfies the arbitration clause's "experiential" or other explicit requirements; (d) lack of subject matter jurisdiction or exclusive remedy rules; (e) concern that one of the arbitrators has exhibited "evident partiality" and should be disqualified; or (f) fraud.

Over the past two decades, the U.S. Supreme Court has repeatedly reinforced that arbitrators should, in instances where the parties clearly and unmistakably evidence an intent to submit arbitrability issues to the arbitrators, decide gateway issues of "arbitrability." The general presumption that gateway issues are for the courts continues to hold true for the threshold determination as to whether a valid and enforceable contract between the parties exists.

Consistent with strongly articulated public policy favoring arbitration, which is grounded in nearly a century of judicial interpretation of the FAA,[1] courts abstain from exercising jurisdiction in instances where the parties have "clearly and unmistakably" evidenced in their arbitration agreement that the issue in question be determined by the arbitrators. See *Henry Schein v. Archer & White Sales, Inc.*, 139 S. Ct. at 527 (2019). This determination is directly related to the governing precept that, under the FAA, ". . . courts must enforce arbitration agreements according to their terms." *Id.* (Emphasis supplied.)

Interestingly, the Supreme Court was particularly emphatic in *Schein* that "a court possesses no power to decide the [contractually reserved gateway issue] . . ." even if the court that is being asked to intervene thinks the argument that the arbitration agreement applies to a particular dispute is "wholly groundless." In so doing, it resolved a previous split in the federal circuit courts by rejecting this controversial court-created exception (the so-called "wholly groundless" principle had been embraced by the Fifth, Sixth and Federal Circuits but rejected by the Tenth and Eleventh Circuits).

The Supreme Court has determined that a contractual delegation of arbitrability determinations to the arbitrators must be strictly enforced, and the FAA allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. See *id.*; *Rent-A-Center West,*

Inc. v. Jackson, 561 U.S. 63, 68–70 (2010).

The thrust of the "wholly groundless" exception was said to arise in those instances where the parties' agreement clearly and unmistakably delegated arbitrability questions to the arbitrators, but a court determined that a given assertion that a matter was subject to arbitration was itself "wholly groundless." A unanimous Supreme Court held that any such exception, the effect of which would result in courts vesting authority in themselves rather than duly appointed arbitrators, was precluded by the plain text of the FAA itself as well as by prior Supreme Court decisions recognizing the parties' authority to expressly delegate "threshold arbitrability questions" to arbitrators where evidence of such intent was "clear and unmistakable." It further observed that arbitrators were equally capable of ruling as quickly as courts as to whether a given demand for arbitration was frivolous or not.

The importance of *Schein* to professional arbitrators' practical understanding of the scope of their roles is pivotal. It is both common and understandable that arbitrators, particularly those who have never previously faced the special questions presented by preliminary "gateway issues," may naturally presume both state and federal courts to possess superior authority to decide any issue that a party may wish to place before a court. This instinct to defer may be more of a factor when faced with complex issues of arbitrability. It is important—particularly in light of instructive cases such as *Schein*—that arbitrators involved in cases governed by the FAA understand and appreciate that the issue is not one of reflexive deference to courts, but an understanding and appreciation of an arbitrator's affirmative responsibilities under the FAA. The FAA and its case law progeny unambiguously reinforce the majority of cases enforcing arbitration clauses that require arbitrators, not the courts, to decide issues.

Arbitrators must understand the principles that govern the basic scope of their role as arbitrators and be cognizant of their responsibilities to determine certain of these "gateway" arbitrability issues, whether a court challenge is mounted by a party or not. This means that well-trained professional arbitrators should appreciate that not only are they are permitted to make "gateway" decisions but that, in the majority of instances, they are *required* to do so.

To be sure, there are certain instances where the FAA has been construed narrowly. These typically include instances of evident partiality/conflicting financial interests or an arbitrator exceeding his or her authority or maintaining a close relationship with one of the parties. These types of cases are taken up for review in the courts, but they tend to be brought (or resolved) only after the arbitration is concluded.

Practical Considerations

To understand the significance of the gateway issues and the reasoning behind the relevant public policy provisions of the FAA, there are important practical considerations for the parties and the panel. Among these are the following:

Enforcement of the parties' agreement. Parties who have intentionally bargained for arbitration expect and deserve to have their bargain enforced as written. Except in the relatively few instances where preliminary decisions are reserved to the courts, the Supreme Court has made clear that parties cannot bargain for a greater scope of judicial review than is specified under the FAA and that enforcement is the arbitration panel's responsibility.[2] The FAA is generally applicable to any contract involving interstate commerce, broadly interpreted to include the full exercise of the power under the Commerce Clause.[3]

Clearly articulated elections to arbitrate generally will be enforced. It is well understood, for example, that a substantial majority of reinsurance contracts historically have included arbitration provisions. This in large part is attributed to the parties' preference for employing knowledgeable industry arbitrators versus judges with little or no understanding of reinsurance norms. Where the intent to arbitrate is clear, including the scope of disputes that the parties intended to be subject to arbitration, both the rules of contract interpretation and well-established public policy considerations require that arbitration provisions be enforced.

Preemption of state law. The Supreme Court has clarified repeatedly that the provisions of the FAA preempt contrary provisions of state law. It has now been more than a decade since the Supreme Court announced, in *Hall Street Associates, LLC v. Mattel, Inc.*, that a federal district court cannot vacate an arbitral award even if the panel

arguably misunderstood the law or made unsupported findings of fact. In other words, even where a panel has not applied the law to the facts or determines facts not in evidence, the panel is still vested with the authority to decide the issues without fear of judicial second-guessing. The FAA cannot be selectively ignored by parties seeking a more expansive judicial review than the FAA permits.[4] Moreover, the role of a federal district court may not be modified by contract.

Arbitration clause provisions may validly authorize a panel to refrain from strict adherence to case law or purely legal principles. Parties in industries (such as reinsurance) whose accepted commercial practices may be based on longstanding industry traditions or sui generis industry understandings often may prefer to avoid the strict application of generic case law or legal principles that may have no accepted relevance in that industry. For example, we know that a sizable percentage of reinsurance contracts contain so-called "Honorable Engagement" provisions. In general, these provisions expressly authorize panels to "dispense with all judicial formalities, including the strict rules of evidence" and afford the arbitrators the right to render decisions without reference to, or strict reliance on, "controlling" case law or other purely legalistic standards in deciding disputes.

An honorable engagement provision, as applied by arbitrators, also permits the parties to avoid the risk of a court applying or adopting strictly legalistic principles that may be at odds with (1) generally accepted reinsurance standards of fair dealing and/or (2) accepted commercial practices relevant to the issue in question. In those cases, the parties expect the panel (selected based upon their deep industry experience) to apply that industry knowledge in deciding the issues before it—something a court, lacking that experience and often bound by applicable "precedent," would likely be reluctant to do. As important, panels in those cases are clearly afforded greater latitude to mete out "rough justice" or prescribe equitable outcomes that are reasonable in terms of generally accepted industry standards.

> "The key issues are: Do the parties have an enforceable contract? Is the specific dispute in question within its scope?"

Arbitrators are responsible for applying the arbitration clause "as written." Part of the calculus considered by experienced arbitration counsel is whether their party's position is more likely to be successful if judged under strict legal principles or by a more commercially oriented arbitration panel. Accordingly, arbitrators must be mindful that there may be instances where the jurisdiction of the arbitrators or sufficiency of an arbitration clause with respect to the required arbitrability of a given dispute will be contested. The key issues are: Do the parties have an enforceable contract? Is the specific dispute in question within its scope?

It should be recognized that, as a practical matter, the party having initiated the arbitration can be expected to advocate in support of the arbitrators' jurisdiction. The possibility exists that an arbitration panel may have to act to evaluate and enforce the parties' intent independent of, and at times in advance of, a collateral legal challenge before a court. For this reason, arbitrators should be knowledgeable regarding common gateway issues that may arise. Because there is no obligation that arbitrators blindly defer to a court (nor should a court intervene without having carefully assessed its proper and limited role under the applicable legal standards),[5] a panel should make an equally careful assessment and act consistent with its determination of its

contractual role under the terms of the arbitration provision at issue.

A reasonable reaction might be to expect that litigation in federal court will undermine the flexibility and confidentiality of arbitration proceedings. When arbitrators are faced with a party's efforts to invoke the jurisdiction of a state or federal court under the FAA, a panel's role (pending a decision on jurisdiction by a state or federal court) is to assert authority to decide the matters presented, despite the concern that the panel may not be the last word on the disputed issues. Because the Supreme Court has endorsed a growing trend of allowing arbitrators greater discretion in deciding the gateway procedural issues identified above, especially where the issue to be addressed is silent in the arbitration contract, arbitrators should feel confident in addressing these issues even where court challenges are mounted. See *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758 (2010).[6]

Courts have uniformly found that arbitration clauses control the underlying reinsurance contracts at issue. The question of whether the underlying demands for payment are covered by the applicable treaties is one of contract interpretation. When a contract calls for the resolution of certain disputed issues by a panel of arbitrators or even a single arbitrator, the matter should be decided in the arbitration forum. Moreover, impartial arbitrators should feel confident that they have the authority to decide the disputed contractual, jurisdictional, procedural, financial, and equitable issues presented by the parties.

Our message to new (and not so new) arbitrators is straightforward. Both the FAA and decades of U.S. Supreme Court guidance have made two things clear: (1) both the FAA and related public policy dictates strongly encourage and enforce the authority of duly authorized arbitration panels to decide, with few exceptions, preliminary challenges to the arbitrators and arbitrability of disputes; and (2) a duly constituted panel not only has the option to refrain from deferring to a court—it is often the panel's obligation to do so.

NOTES

1 See, e.g., *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002); *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Henry Schein v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019).

2 See *Henry Schein v. Archer & White Sales, Inc.*, 139 S. Ct. at 527.

3 A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2.

4 Reinsurance Practice and the Law, § 50.43 (Barlow, Lyde & Gilbert).

5 In *TIG v. American Home Assurance Co.*, the reinsurance agreements provided that disputes between the parties would be arbitrated before two arbitrators, "one to be chosen by each party and in the event of the arbitrators failing to agree, to the decision of an umpire to be chosen by the arbitrators." After each party appointed an arbitrator per the terms of the agreements, TIG objected to arbitration on the ground that Granite State (a subsidiary of the cedent) was not a party to the agreements. To support its refusal to pay the asbestos-related claims, TIG filed an action in New York federal court to determine who should decide the threshold question of arbitrability. *TIG Ins. Co. v. Am. Home Assur. Co.*, No. 18-CV-10183 (S.D.N.Y. Feb. 7, 2020). The issue presented to the court was whether the cedent's demands for payment fell within the scope of the agreements. TIG argued that the arbitrability issue was for the court to decide, as opposed to an arbitration panel. The court found that the FAA "provides that an arbitration provision in a 'contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" 9 U.S.C. Section 2. *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011).

6 A federal court is likely to defer to an arbitration panel, though there are several exceptions to this rule. For example, courts have also found that panels may not decide issues concerning attorney disqualification. See *Munich Re v. ACE*, 500 F. Supp. 2d 272 (S.D.N.Y 2007). Further, evident partiality, especially as it relates to financial influence between parties and panelists, may be left for a court to decide. See FAA § 10. "Procedural questions that grow out of the dispute and bear on its final disposition," however, are for an arbitrator to decide. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002).

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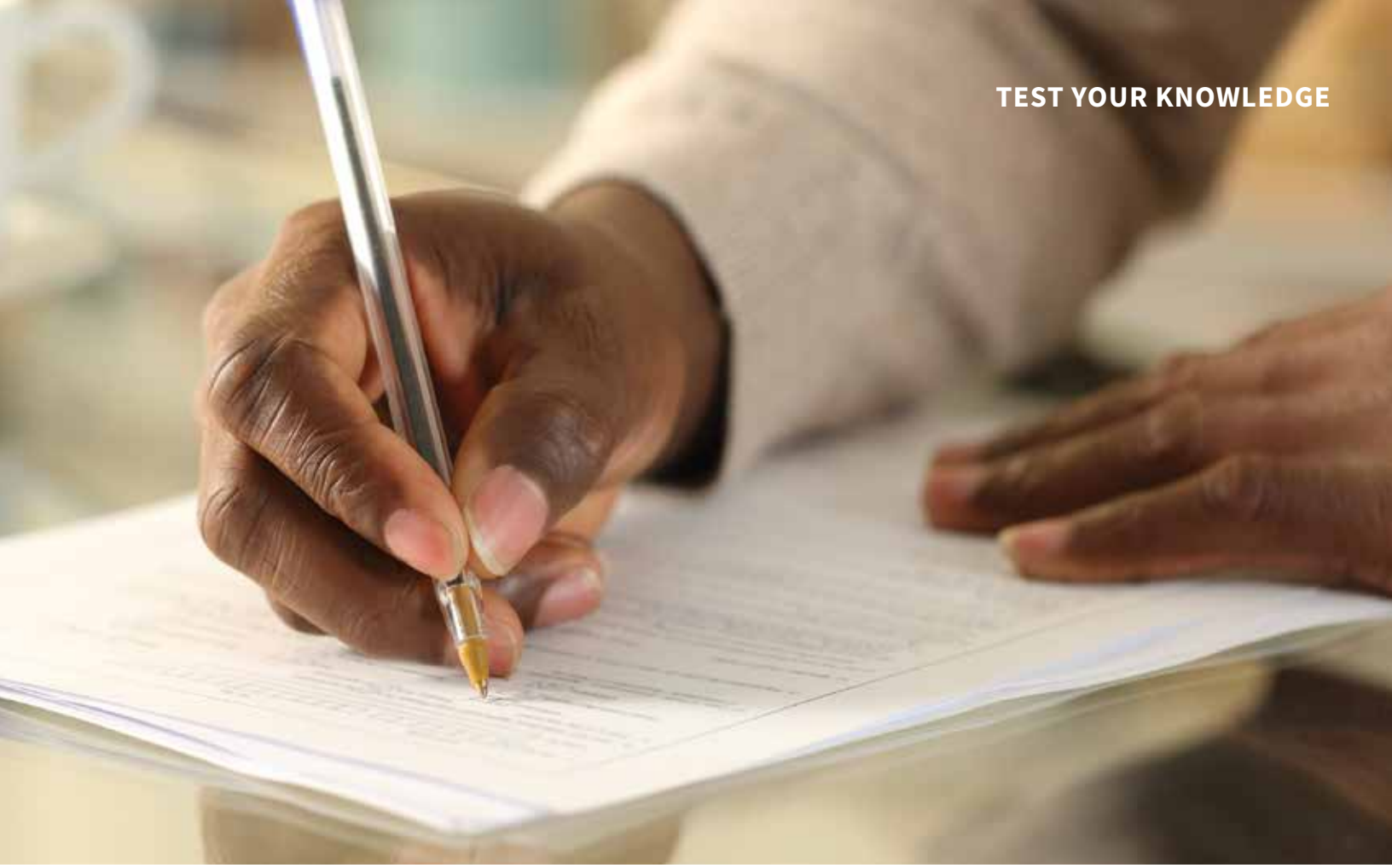

Can You Pass Our Arbitration Quiz?

By Carlos A. Romero, Jr., Fred Pinckney, and Kim Hogrefe

This quiz has been designed to achieve two goals: provide a fun experience for readers and share some recent decisions affecting arbitration.

Question #1

Construction industry

This question arises under Texas law. X buys a home from builder B. The X-B sales agreement has a covenant to arbitrate disputes, and the assignment of any contract rights requires the consent of B. X then sells the residence to Y, and Y sells it to Z. The consent of B is never sought or obtained.

The residence develops mold, caused by moisture build-up attributable to a construction defect. Z sues B in court, and B files a motion to compel arbitration under two theories: equitable estoppel and implied assumption of the A-B sales agreement. Z alleges violations of the deceptive trade practices act, breach of implied warranty of habitability, breach of implied warranty of good workmanship, and negligent construction.

Should the court grant or deny the motion to compel arbitration?

Question #2

Full disclosure by arbitrators and their duties to be impartial

This question arises under English law. There are two arbitration proceedings against Chubb seeking coverage under its Bermuda Form policy. The claims in both proceedings relate to the Deepwater Horizon incident. There are two insureds, Halliburton and Transocean; both are insured by Chubb. Halliburton initiates arbitration against Chubb, as does Transocean.

In the Halliburton proceeding, the

court appoints R (over objections by Halliburton) to chair the arbitral panel. R disclosed to Halliburton prior appointments as arbitrator in which Chubb was a party and in which Chubb appointed him as arbitrator. Subsequently, the first Transocean arbitration proceeding is initiated, and R is appointed to the arbitral panel. Thereafter, in a second Transocean arbitration proceeding (where Chubb was a second excess liability insurer), R is appointed as arbitrator.

R discloses to Transocean his arbitrator appointments in the Halliburton proceedings. In contrast, however, R does not update his disclosures to Halliburton to announce his arbitrator appointments in the Transocean proceedings.

Did R have a duty in the Halliburton proceeding to disclose the two subsequent Transocean appointments? If yes, should he have been removed for failing to do so?

Question #3
28 USC section 1782 and discovery

Federal law states that a person may petition a U.S. district court to obtain evidence for use in a "foreign or international tribunal." 28 U.S. C. §1782. Can a party in an arbitration proceeding seated outside the United States invoke this statute and the aid of U.S. federal courts?

Question #4
Governing law clause

This question arises under English law. The question involves determining the governing law of the arbitration clause, when the clause does not specify the governing law that applies. Asked differently, when does the law of the seat of the arbitration govern, and when does it not govern?

Question #5
Enforcement of an arbitration agreement in the terms of the agreement governing the downloading of an app

X has a U.S. patent. Y makes mobile applications, including the "Scruff" app. X claims that Y's app infringed X's patent. Y sues X in federal court seeking a declaratory judgment that Y did not infringe the patent.

Mr. A is the lawyer for X. Mr. A downloads the Scruff app to see what it is about. When accessing the Scruff app, Mr. A uses his personal cell phone, his personal email, and his photograph. When downloading the app, Mr. A agrees to the terms governing the app, which include an agreement to arbitrate.

When he downloaded the Scruff app, did the conduct of Mr. A bind his client, X, to the arbitration agreement?

Question #6
Enforcement of an arbitration clause against a non-party

Husband H enters into a retail installment purchase agreement with dealer D and buys a car. D assigns the agreement to lender L. The retail installment agreement contains an arbitration clause that reads as follows:

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract, or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by court action. This Arbitration Clause shall survive any termination, payoff or transfer of this contract.

When H falls behind on payments, L contacts H's wife, W. L contacts W more than 125 times on her cellphone attempting to reach H and collect payments in arrears due by H. W sues L for violations under the Telephone Consumer Protection Act (among others). L files a motion to compel arbitration against a non-party, W.

Is the arbitration clause enforceable against W?

Answer #1. The motion to compel arbitration was denied—there was no basis to invoke application of the arbitration covenant against Z. There are generally six bases to invoke the application of the arbitration covenant to a person who is not the original contracting party: incorporation by reference, assumption, third-party beneficiary, equitable estoppel, alter ego, or agency. B argued that either assumption or equitable estoppel applied. The court disagreed because there was no assignment of the original contract, and the underlying suit was not based upon the original contract. *Taylor Morrison of Tex., Inc. v. Kohlmeyer*, No. 01-19-00519-CV (Tex. App. Dec. 8, 2020).

Answer #2. The court concluded that R had a legal duty in the Halliburton proceeding to disclose his appointment in the Transocean proceeding. R was a panelist in two arbitration proceedings involving a common party, Chubb. Under English law, in the context of a Bermuda Form arbitration, "the obligation to disclose can arise in circumstances in which the objective observer, informed of the facts at the date when the decision whether to disclose is or should have been made, might reasonably conclude that there was a real possibility of bias."

Even though R had a duty to disclose, the court concluded that a second litmus test applied for determining his disqualification. "The fair-minded and informed observer assesses whether there is a real possibility that an arbitrator is biased by reference to the facts and circumstances known at the date of the hearing to remove the arbitrator." The court, after conducting an exhaustive review of the facts and legal analysis, concluded that there was no real possibility that bias existed at the date of the hearing. *Halliburton Company v. Chubb Bermuda Insurance Ltd.*, [2020] UKSC 48.

Answer #3. The federal courts are split. If you file a section 1782 petition in the Second, Fifth and Seventh Circuits, the federal courts will rule against you; if you file this petition in the Fourth and Sixth Circuits, the federal courts will rule in your favor. And if you file this petition in the Third and Ninth Circuits, there are cases pending on appeal that may resolve the position in those circuits.

On December 7, 2020, a petition for a writ of certiorari was filed in the U.S. Supreme Court asking it to decide whether a commercial arbitration proceeding seated outside the U.S. is a foreign or international tribunal under section 1782 so as to permit a party to the proceeding to seek aid from a U.S. district court to obtain evidence. *Servotronics, Inc. v. Rolls-Royce PLC*, No. 19–1847, 2020 WL 5640466 (7th Cir. Sept. 22, 2020), cert. pending.

Answer #4. An express or implied choice of governing law in the contract will apply to the arbitration clause. This rule applies, even if the seat of the arbitration proceeding is different from the governing law set forth in the contract. By contrast, if there is no express or implied governing law in the contract, then the law of the seat of the arbitration proceeding applies. *Enka Insaat Ve Sanayi AS v. Insurance Company Chubb*, [2020] UKSC 38.

Answer #5. The court rejected the agency theory. Mr. A's actions did not bind X—he did not sign up for the app with intent or authority to bind X to any arbitration agreement. Mr. A testified that he downloaded and used the Scruff app of his own accord (and not on behalf of his client X) and in his professional capacity to meet his obligations under Rule 11. Rule 11 of the Federal Rules of Civil Procedure can trigger sanctions against an attorney who does not meet his "affirmative duty to conduct a reasonable inquiry into the facts and the law before filing." *Perry Street Software, Inc. v. Jedi Techs, Inc.*, No. 20-CV-4539 (S.D.N.Y. Dec. 15, 2020).

Answer #6. The court denied the motion to compel. First, the arbitration clause "only covers claims and disputes by or against" H. Second, the TCPA claims are unrelated to the retail installment purchase agreement. Although one would have thought that the calls by L to W were related to the balance due under the retail agreement, the court rejected this argument, because W was not a party to the retail installment agreement. *Johnson v Westlake Portfolio Management, LLC*, No. 8:20-cv-749-T-24 AEP (M.D. Fl. Sep. 15, 2020).

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The New U.K. Position on Arbitrator 'Bias'

By Jonathan Sacher and Kelly Jones

The U.K. Supreme Court's recent much-anticipated decision in the Deepwater Horizon case between Halliburton and Chubb provided clarity on the standards governing the removal of arbitrators under the Arbitration Act. The Court's decision addressed (1) the arbitrator's duty of impartiality, (2) the duty to give disclosure of other appointments, and (3) the extent to which an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party, without giving rise to the appearance of bias.

The case involved claims under a Bermuda Form insurance policy, which provided for arbitration on an ad hoc basis in London. The party-nominated arbitrators were unable to agree on the chairman of the tribunal, and the court appointed Ken Rokison, who had been Chubb's preferred candidate. Before appointment, Rokison disclosed that he had previously acted as arbitrator in a number of arbitrations in which Chubb was a party (including arbitrations in which he had been appointed by Chubb) and was currently appointed in two references in which Chubb was involved.

After appointment, Rokison accepted appointment as arbitrator in two further references involving claims against insurers also connected with Deepwater Horizon. The appointments were not disclosed to Halliburton. When Halliburton discovered Rokison's other Deepwater claim appointments, it applied to the court under section 24(1)(a) of the Arbitration

Act to remove him as arbitrator.

The court dismissed the application, and Halliburton appealed that decision to the Court of Appeal. At the heart of the appeal was a contention that the judge failed to give proper regard to the unfairness that may arise when an arbitrator accepts repeat appointments in overlapping references with only one common party. The essence of that unfairness is the information and knowledge that the common party acquires that is unknown to the other party.

The Court of Appeal agreed that disclosure of the appointments should have been made to Halliburton, and in doing so the court developed English law on arbitrator disclosure obligations. The court did not, however, accept that the non-disclosure would have led a fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased. Halliburton's appeal was dismissed, so it submitted a further appeal, to the Supreme Court.

A 'Gold Standard' of Disclosure?

In the Supreme Court, Halliburton argued that, to protect the reputation of London arbitration, English law should apply a "gold standard" to the disclosure given by arbitrators. Halliburton argued in favor of a presumption that an arbitrator should never accept appointments in multiple references involving overlapping issues and only one common party, without giving disclosure.

Intervenor submissions from the LCIA and ICC (whose arbitration rules require arbitrators to give "gold standard" disclosure) supported the imposition of more robust disclosure in English law. They referred to an "international pro-disclosure consensus" and reflected the concerns of the international arbitration community that the approach of the English courts to arbitrator impartiality is insufficiently strict. Various trade associations also intervened regarding the practice in their sector, and ARIAS U.K. submitted a paper explaining the position in English reinsurance arbitrations.

Chubb, in defending the earlier court judgments, argued that the power to remove an arbitrator under section 24(1)(a) of the Arbitration Act applies if there are justifiable doubts as to impartiality, but noted that it does not refer to independence. This is deliberate and recognizes that in specialty fields such as insurance (and, in this instance, Bermuda Form arbitrations), parties may choose to appoint arbitrators with specific expertise, which may have an impact on the links between a party and an arbitrator. It is common in insurance disputes for arbitrators to sit in multiple arbitrations—repeat appointments are regarded as a positive, and parties may consequently have different expectations of disclosure. This, Chubb argued, runs contrary to the suggestion that there should be a presumption that concurrent appointments in related arbitrations are not allowed without disclosure.

The Supreme Court unanimously dismissed Halliburton's appeal. It held that an arbitrator is under a legal duty to disclose such appointments, and the main opinion from Lord Hodge—which sets out a detailed analysis of the disclosure obligations expected of arbitrators sitting in England—confirms the Court of Appeal's view that there are high expectations on disclosure. The Supreme Court also held, with respect to Bermuda Form arbitrations, that an arbitrator must disclose appointments involving common parties in the absence of agreement to the contrary. The Court further held that the existence of an arbitration and the identity of a common party may be disclosed without the express consent of the parties to that arbitration, as consent can be inferred from the party's action in seeking to nominate/appoint the arbitrator.

As for bias, the Supreme Court held that the test for apparent bias is to ask whether, "at the time of the hearing to remove," the circumstances would have led a fair-minded and informed observer to conclude that there was in fact a real possibility of bias. In looking at this case, the Supreme Court held that, regarding the circumstances known at the time of the application to remove the arbitrator, it could not be said that a fair-minded and informed observer would infer from the failure to make disclosure that there was a real possibility of bias. A failure to disclose, while a relevant factor, is not sufficient on its own to remove an arbitrator, especially in circumstances in which the non-disclosure was inadvertent.

Different Expectations

In reaching its decision, the Supreme Court recognized that the fair-minded and informed observer will take account of the fact that in certain subject matter fields of arbitration, there are different expectations as to the degree of independence of an arbitrator and the benefits to be gained by having an arbitrator who is involved in multiple related arbitrations. The objective observer will consider whether, in the

circumstances of the arbitration in question, it would be reasonable to expect the arbitrator not to have the knowledge or connection with the common party that the multiple references would give him or her. The objective observer will also appreciate that there are differences between—

- on the one hand, arbitrations in which there is an established expectation that a person, before accepting an offer of appointment in a reference, will disclose earlier relevant appointments to the parties and is expected similarly to disclose subsequent appointments occurring in the course of a reference; and
- on the other hand, arbitrations in which, as a result of relevant custom and practice in an industry, those expectations would not normally arise.

The Supreme Court recognized that there are often "sound reasons" for parties to make repeat appointments. This was acknowledged to be particularly so in Bermuda Form arbitrations, given that the Bermuda Form policy contains unique provisions and there is an interest in obtaining consistency in their interpretation. The Supreme Court also recognized that it is common in insurance and reinsurance arbitrations for multiple arbitrations arising from the same incident, involving claims against a number of insurers, to commence at around the same time, and for the same arbitrator to be appointed for all claims.

The Court found that, under English law, multiple appointments must be disclosed in the context of Bermuda Form arbitrations unless the parties to whom disclosure would otherwise be made have agreed otherwise. Moreover, it has not been shown that there is an established custom or practice in Bermuda Form arbitrations in which parties have accepted that arbitrators may take on multiple appointments without disclosure to the other parties. This is contrary to the position in other industries such as GAFTA (Grain and Feed Trade Association) and LMAA (London Maritime Arbitrators Association), where it was found that there is an accepted practice that arbitrators may accept multiple appointments without the consent of parties to existing arbitrations, together with a provision in the GAFTA rules that does not require disclosure of multiple appointments. The Supreme Court acknowledged, based on a report submitted by ARIAS U.K. on treaty reinsurance arbitrations, that "there is evidence of a similar practice in reinsurance arbitrations."

The Court's decision rejects the universal application of a "gold standard" approach to disclosure in favor of a more nuanced approach that reflects differing practices in different fields of arbitration. It identifies Bermuda Form arbitrations as a field where arbitrators should disclose multiple appointments involving a common party, with a suggestion (although the position was not made entirely clear by the Supreme Court) that such disclosure may not be required in reinsurance arbitrations (or at least those related to treaty reinsurance).

The decision has prompted considerable debate in the U.K. and beyond, and greater attention undoubtedly will now be paid to the obligation to disclose other appointments, which may not have been as common in reinsurance arbitrations. It would surely be a brave arbitrator who fails to make a complete disclosure when appointed in an English reinsurance arbitration in the future.

Jonathan Sacher is co-leader of the Insurance Practice of Bryan Cave Leighton Paisner. He co-chairs the ARIAS•U.S. International Committee and is an Arbitration Panel member of ARIAS U.K.

Kelly Jones has worked at Bryan Cave Leighton Paisner in the Insurance Litigation team for 14 years.

Communicating with Party-Arbitrator Candidates

By Teresa Snider

The ability to submit reinsurance disputes for adjudication to individuals who are familiar with the customs, practices, and sometimes esoteric subject matter of the reinsurance industry is often cited as the rationale for resolving reinsurance disputes through private arbitration. However, this benefit alone likely would not sustain the industry's willingness to arbitrate; rather, the system has arguably endured for so long because the industry has faith in the integrity of the process.

That said, private arbitration creates an ethical minefield that parties and potential arbitrators must navigate immediately at the outset of a formal dispute by defining the nature and extent of permissible communications between a party and its candidates for party-arbitrator. Parties and arbitrators who disregard the ethical considerations during this initial phase of a dispute can disrupt the level playing field upon which the participants rely, thereby jeopardizing the integrity of the process. Therefore, both the parties and potential party-appointed arbitrators must understand the ethical rules applicable to their communications.

The ARIAS·U.S. Code of Conduct provides guidance on the information that can be provided to a candidate for a party-arbitrator in an insurance or reinsurance dispute. The arbitration agreement may also limit the communications that are allowed. Before communicating with an arbitrator candidate, the party (or counsel, where involved) should determine whether the arbitration clause or any applicable arbitration rules place any restrictions on communications with arbitrators. *See* Code of Conduct, Purpose (stating that Canons are "not intended to override the agreement between the parties in respect to

arbitration"); *see also* Comment 1 to Canon V ("If an agreement between the parties or applicable arbitration rules establish the manner or content of communications among arbitrators and the parties, those procedures should be followed.").

Another key issue to confirm before any communication with a party-arbitrator candidate is whether the arbitration clause calls for neutral arbitrators. A requirement that the arbitrators be "disinterested" does not mean that the arbitrators must be "neutral"; rather, "disinterested" means that the arbitrator cannot have a financial interest in the outcome of the arbitration and cannot be under the control of a party. *See, e.g., Certain Underwriting Members of Lloyd's of London v. State of Florida,* 892 F.3d 501 (2d Cir. 2018) (finding that the contract qualification of "disinterested" "would be breached if the party-appointed arbitrator had a personal or financial stake in the outcome of the arbitration."); *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 631 F.3d 869, 872–73 (7th Cir. 2011) (determining that "disinterested," as used in arbitration agreement, "means lacking a financial or other personal stake in the outcome"); *see also* ARIAS·U.S. Practical Guide to Reinsurance Arbitration Procedure, ¶ 2.3 (rev. ed. 2018) ("The parties and the panel should interpret arbitration clauses requiring 'disinterested' arbitrators to mean that arbitrators may have no financial interest in the arbitration outcome and are not under any party's control."). The ethical rules governing communications with potential disinterested arbitrators differ from those governing communications with potential neutral arbitrators, with the latter being more restricted.

Following are topics that can (and, in some instances, must) be discussed with party-appointed arbitrator candidates, with limitations noted where applicable for communications with candidates for neutral party-appointed arbitrator.

The candidate's qualifications. A party is permitted to communicate with a candidate about the arbitrator qualifications in the contract and the candidate's work history to ensure that the candidate meets those qualifications. *See* Comment 1 to Canon III ("Candidates should provide up-to-date information regarding their relevant training, education, and experience to the appointing party . . . to ensure that their qualifications satisfy the reasonable expectation of the party.").

The identity of the parties, their counsel, the other party-appointed arbitrator, and key witnesses. An arbitrator candidate should be informed of the identity of the parties to the arbitration, of counsel, and of any third-party manager or related entity managing the parties' reinsurance disputes, as well as of the identity of any key fact or expert witnesses. Arbitrator candidates must obtain this information to determine whether they can fulfill their obligations of integrity and fairness and satisfy their disclosure obligations. *See* Canons I, II, and IV.

An arbitrator candidate is obliged to assess whether they may accept the assignment in the first instance. This assessment includes determining whether there are prior or current relationships with the parties or with counsel that would affect the integrity or fairness of the proceeding. *See* Comments 3, 4, and 5 to Canon I and Comment 1 to Canon II.

For example, under Comment 3 to Canon I, a candidate "**must** refuse to serve (a) where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings; . . . [or] (c) where the candidate currently serves as a lawyer for one of the parties." (emphasis added). Under Comment 4 to Canon I, a candidate should review whether any of the identified factors (such as prior consultant or expert service for a party or significant relationship with a party, lawyer, or witness) exist and "would likely affect their judgment." The candidate also needs to know the identity of the parties and counsel so that the candidate can identify the extent of previous appointments involving those parties or attorney. Comment 4 to Canon I. Under Comment 1 to Canon II, "**[b]efore accepting an appointment**, a person contacted to serve as arbitrator should consider whether the identity of the parties and their counsel . . . would impact the arbitrator's ability to render a just decision in the matter." (emphasis added) In such instances, the arbitrator candidate should decline the appointment. Canon II (Arbitrators "shall serve only in those matters where they can render a just decision."); *see also* Comment 4 to Canon I.

Comment 1 to Canon IV (Disclosure) states, "**Before accepting an appointment**, candidates for appointment should make a diligent effort to identify and disclose any direct or indirect financial interest in the outcome of the proceeding or any existing or past financial, business, professional or

social relationships that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be arbitrators or potential witnesses." (emphasis added)

The subject matter of the arbitration. According to Comment 1 to Canon II, "[b]efore accepting an appointment, a person contacted to serve as arbitrator should consider whether . . . factual issues anticipated to be implicated in the matter . . . would impact the arbitrator's ability to render a just decision in the matter." Communication of the subject matter of the arbitration does not, and should not, include a discussion of the merits of the case with a candidate for a neutral arbitrator appointment, as further explained below.

The candidate's availability. The arbitrator candidate may also communicate their availability. For example, if an arbitrator were unable to schedule a hearing for the next two years, the party seeking to appoint would likely want to know that prior to any appointment. *See* Canon VII and Comment 2 ("Individuals should only accept arbitrator appointments if they are prepared to commit the time necessary to conduct the arbitration process promptly.").

The candidate's fees. Under Canon X, "[a]rbitrators shall fully disclose and explain the basis of compensation, fees and charges to the appointing party or to both parties if chosen to serve as the umpire." According to Comment 1 to Canon X, "information about fees should be addressed when an appointment is being considered."

The merits of the case. As noted above, the ethical canons restrict communications with potential neutral party-arbitrators to a greater extent than communications with other potential party-arbitrators. The principal difference between the two relates to discussion of the merits of the case. Comment 2 to Canon V makes clear that if the arbitrators must be neutral, the lawyer or party cannot discuss the merits of the case with the arbitrator candidate. If the arbitrators need not be neutral, the merits of the case can be discussed prior to the appointment and until the time that *ex parte* communication is cut off. Even if the party and the arbitrator candidate are permitted to discuss the merits, however, the candidate cannot offer assurances as to how she will vote, nor can she offer a commitment to dissent. (Comments 2 and 3 to Canon II)

Documents. Any documents that the party-appointed arbitrator candidate examines should be disclosed to the parties and the other members of the panel once all the members of the panel have been accepted. (Comment 3 to Canon V) This means that a party should not provide the arbitrator with any documents that the party is not willing to produce to the other side. It is typical to provide the arbitrator with a copy of the contract at the time the appointment is being discussed.

Potential Umpire Candidates

Under the Code of Conduct, the arbitrator candidate can discuss with their party the acceptability of persons under consideration for appointment as umpire; however, neither the arbitrator candidate nor the party should unilaterally reach out to umpire candidates. All communications to potential umpire candidates should be made either jointly by counsel for both parties or jointly by both party-arbitrators. If the umpire candidate has been 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, the umpire candidate must refuse to serve. (Canon I, Comment 3(e))

Knowing and following the ethical canons governing communications with candidates for party arbitrator will enhance confidence in the integrity and fairness of arbitrators and arbitration.

Teresa Snider is an ARIAS·U.S. Ethics Committee member, partner at Porter Wright Morris & Arthur LLP, and co-chair of the firm's Reinsurance Litigation and Arbitration Practice Group.

The Preclusive Effect of an Arbitration Award is a Question for Arbitrators

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

Case: *Certain Underwriters at Lloyd's London v. Century Indemnity Company,* Civil Action No. 18-CV-11056 (U.S.D.C., D. Massachusetts)

Court: United States District Court, District of Massachusetts

Date decided: March 6, 2020

Issue decided: Preclusive effect of an arbitration award is for arbitrators to decide; consolidation of arbitrations is an issue for arbitrators to decide

Submitted by: Sylvia Kaminsky

Certain Underwriters at Lloyd's London provided reinsurance to Century Indemnity Company in effect between 1963 and 1970 under general casualty blanket and excess of loss reinsurance agreements. Century issued insurance policies to the Boys Scouts of America (BSA) from the 1960s to the 1990s.

Beginning in the 1990s, BSA submitted multiple claims to Century arising out of allegations of sexual molestation committed by individuals associated with the organization. Century defended and indemnified BSA for those claims and entered into a settlement agreement whereby each molestation claim would be allocated under the Century policy that was in effect on the date when the first alleged act of molestation occurred. Defense and indemnity payments for that claim would be paid under the policy.

In billing its reinsurers, Century accumulated the payment allocated to each policy period and billed it as a single loss occurrence under the reinsurance contract in effect at that time. Underwriters disputed the allocation, claiming that it was "counterfactual," that the settlement was not the product of a reasonable and businesslike investigation, and that the accumulation into a single loss occurrence was improper. After a four-day hearing before an arbitration panel, a unanimous panel ruled that Century had not demonstrated that the settlement agreement was a product of a reasonable and businesslike investigation and, accordingly, Underwriters were not bound to follow the settlement agreement.

The final award held that the submitted Century billing was not covered under the reinsurance contracts. Thereafter, Century submitted new reinsurance billings allocating the payments across each of the Century policies in effect during the entire period into a single loss occurrence. Underwriters sought clarification from the panel precluding Century from re-billing the claims. In its clarification award, the panel accepted Underwriters' challenge to the settlement agreement, finding that the billing was based upon "two inter-dependent theories": the accumulation of claims as a single occurrence, and the allocation to the first date of alleged abuse. Finding that the failure of either prong of Century's claim would result in failure of the billing in its entirety, the panel found in favor of Underwriters

Underwriters sought to confirm the final award, which Century did not challenge. An order was entered by the court on November 16, 2018. On November 9, 2018, Century had served an arbitration demand seeking payment under a revised billing submitted to Underwriters in August 2018. After Underwriters refused to pay, Century moved the court for an order compelling arbitration with

respect to its revised billing.

Underwriters sought to enforce the final award (which was reduced to a judgment) and to dismiss Century's motion, claiming, among other issues, that the action was duplicative of the original arbitration action, that it is barred by the doctrine of res judicata, and that the second arbitration demand is an impermissible collateral attack on the first award. Century responded that the new demand was not challenging the validity of the prior award, but that it did not address the manner of the second billing. Further, Century argued that it was improper to ask the court to determine the preclusive effect of the prior award.

Holding. The court found Underwriters' reliance on cases regarding impermissible collateral attacks on arbitration awards distinguishable in that the subsequent action in those matters in effect challenged the arbitration proceeding. Here, the court found that the issue is not whether Century is seeking to attack the proceedings that resulted in the award, but whether that award precludes the arbitration of the second billing. The court held that the preclusive effect of an arbitration award is an arbitrable issue that is not for the court to resolve, but a question for the arbitrators.

The court found no indication that the award was intended to have a prospective effect on future billings and, therefore, there was no basis to order compliance with the award rather than require the parties to proceed anew through arbitration. While the billing involved the same claims and the same contracts, the court did not find that the award foreclosed Century from resubmitting the billing in a different format.

In addressing Underwriters' additional arguments, the court found that Century was an aggrieved party despite Underwriters claiming otherwise, since they had named arbitrators with respect to the new demand. While Underwriters named four arbitrators in response to Century's one demand (in which Underwriters claimed that the separate contracts required separate arbitrations), the court found that Underwriters have refused to proceed with arbitration in accordance with Century's demand and, therefore, Century was aggrieved. It also found Century's petition was not moot, as there was an ongoing dispute between the parties regarding the appointment of arbitrators. In addressing the issue of consolidation of the proceedings, the court held that this issue is one for the arbitrators to decide.

Sylvia Kaminsky is an attorney and a certified ARIAS arbitrator and umpire. She is a member of the ARIAS·U.S. Board of Directors and is the co-chair of the ARIAS Law Committee and the Arbitrators Committee.

Does Reinsurance Qualify as Insurance?

Washington Cities Insurance Authority (WCIA), an association of Washington public entities, is an entity authorized by statute to self-insure risks and purchase reinsurance. Ironshore Indemnity reinsured WCIA up to $10 million per occurrence for losses that exceeded WCIA's $4 million self-insured layer (the "reinsurance agreement"). The reinsurance agreement provided for arbitration of "[a]ny and all disputes or differences arising out of this Agreement ...." The agreement also included a New York choice of law provision.

WCIA filed suit after Ironshore denied a reinsurance claim in 2018. Ironshore moved to compel arbitration under the Federal Arbitration Act (FAA). WCIA moved to strike the arbitration clause and choice of law provisions as void under Washington law.

The district court granted WCIA's motion. Washington law provides that choice of law and arbitration provisions in an insurance contract are void. The court acknowledged that Washington law normally would be pre-empted by the FAA, which requires courts to "direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed ...." However, the court found that Washington law was not

pre-empted by virtue of the McCarran-Ferguson Act. The court explained that McCarron-Ferguson effectively reverse preempts the FAA with regard to state laws that regulate the business of insurance.

With this background, the court addressed the following two questions: first, does reinsurance qualify as insurance, and second, does Washington's prohibition apply to a reinsurance agreement purchased by a joint self-insurance program? The court answered yes to both.

In answering the first question, the court found that the statutory definition of insurance ("a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies") unquestionably encompassed the reinsurance agreement. The court also relied on the fact that the text of the statute did not expressly exclude reinsurance but did specifically exempt other types of insurance, such as ocean marine and foreign trade.

In answering the second question, the court addressed Ironshore's argument that a separate section of the Washington code authorizing joint self-insurance programs to purchase reinsurance permitted the use of arbitration and choice of law provisions. Specifically, Ironshore relied on a section of the law that allowed a joint self-insurance program to "purchase ... reinsurance coverage in such form ... as the program's participants agree by contract." The court declined Ironshore's invitation to read this section of the statute as carving out an exception to the statutory prohibition on arbitration and choice of law provisions. The court reasoned that had the legislature intended to exclude specific types of insurance (including reinsurance) from the statute, it would have done so in clear and unmistakable terms.

Case: *Washington Cities Insurance Authority v. Ironshore Indemnity Inc.,* No. 19-54 (W.D. Wash. March 6, 2020)

Court: U.S. District Court for the Western District of Washington

Date decided: March 6, 2020

Issue decided: Whether an arbitration and choice of law provision in a reinsurance agreement violate the state of Washington's statutory prohibition on enforcement of arbitration clauses in insurance contracts

Submitted by: Michael R. Kuehn

Michael Kuehn is reinsurance counsel at the Riverstone Group in Manchester, New Hampshire.

Functus Officio and Interim Versus Final Awards

Amerisure Mutual Insurance Company issued primary and umbrella insurance policies to F.B. Wright Company between 1976 and 1979 and Armstrong Machine Works/Armstrong Video Productions between 1979–1981 and again from 1982–1983. Allstate Insurance Company reinsured the umbrella policies issued to both companies pursuant to six facultative certificates.

Both F.B. Wright and Armstrong later became the subject of numerous lawsuits arising from injuries allegedly caused by asbestos exposure. Amerisure initially defended and indemnified both companies pursuant to its primary policies and, once those policies were exhausted, pursuant to its umbrella policies. When Amerisure's expense and indemnity payments reached the level at which Allstate's facultative certificates would respond, Amerisure notified Allstate and began to submit reinsurance billings. Those billings showed that Amerisure was paying expenses outside of its umbrella policy limits and was seeking reimbursement from Allstate on that basis.

Believing this was contrary to the terms of the umbrella policies, Allstate demanded arbitration and sought a determination that it was not required to reimburse expenses in addition to the

umbrella policies' limits. The parties then proceeded with arbitration. In its pre-hearing brief, Allstate sought an "interim award" that would (a) require Amerisure to provide information as to why it was paying defense costs outside of its umbrella policy limits (as well as what expenses those costs defrayed), and (b) declare Allstate had no obligation to reimburse Amerisure for defense costs in excess of the pre-1982 umbrella policies' limits.

Following a hearing, the arbitration panel issued an "interim final award" that found Amerisure was not required to pay defense costs outside of its pre-1982 umbrella policies' limits. As a result, the arbitration panel found that Amerisure was not entitled to reimbursement from Allstate for expenses paid outside of those policies' limits. The arbitration panel then established an "expense payment protocol" through which the parties were directed to work together to resolve questions regarding the specific billed expenses and, if agreement could not be reached, raise any disputes for resolution by the arbitration panel.

The parties were unable to reach resolution under this protocol, primarily due to differing interpretations of the interim final award. Allstate believed that under this award it was not obligated to reimburse any defense costs paid by Amerisure under its pre-1982 umbrella policies. Amerisure believed that under the award, Allstate was still obligated to reimburse expenses paid within the pre-1982 umbrella policies' limits.

In response to the parties' disagreement, Allstate filed a motion in the Northern District of Illinois to confirm the interim final award and sought a judgment denying Amerisure the right to reimbursement for any defense costs paid under the pre-1982 umbrella policies. The parties also filed post-hearing briefs with the arbitration panel. Consistent with its court petition, Allstate argued that the arbitration panel should only issue a final award as to its obligations in connection with the 1982–83 umbrella policy. For its part, Amerisure sought an award of defense costs under all of its umbrella policies and Allstate's associated facultative certificates, with the caveat that it only sought reimbursement for expenses paid within the policy limits of its pre-1982 umbrella policies.

The arbitration panel then issued a final award that provided Amerisure the right to reimbursement of expenses paid within the limits of its pre-1982 umbrella policies and outside the limits of its 1982–83 umbrella policy. Amerisure then moved to confirm this final award before the same court in which Allstate's petition to confirm the interim final award was pending.

Before the court, Allstate argued the interim final award should be confirmed because it resolved all issues under the pre-1982 umbrella policies and facultative certificates (the "pre-1982 contracts"). Accordingly, Allstate argued this award constituted a final arbitration award and rendered the panel *functus officio* as to issues regarding the pre-1982 contracts after its issuance. In response, Amerisure argued that the interim final award did not resolve the parties' entire dispute under the pre-1982 contracts and was therefore not a final arbitration award—rendering it ineligible for confirmation. Amerisure further argued that the final award did constitute a final arbitration award and should therefore be confirmed.

Case: *Allstate Ins. Co. v. Amerisure Mut. Ins. Co.*, Nos. 19 C 4241 / 19 C 7080, 2020 U.S. Dist. LEXIS 53923 (N.D. Ill. Mar. 25, 2020)

Court: United States District Court for the Northern District of Illinois, Eastern Division

Date decided: March 25, 2020

Issue decided: Whether an arbitration panel's interim final award and/or only its subsequent final award were subject to confirmation

Submitted by: Nicholas H. Rosinia

Holding. The court agreed with Amerisure. It found that the interim final award did not dispose of all issues relating to the pre-1982 contracts because it "denied Amerisure's claims under the pre-1982 contracts only to the extent that Amerisure sought defense costs in addition to limits." 2020 U.S. Dist. LEXIS 53923 at *13. While the interim final award had provided that "Amerisure's claims for recovery of expenses billed under [the pre-1982 contracts] are denied," the court found that in the context of the order and the arbitration as a whole, this passage "referred only to Amerisure's claims as to defense costs in addition to limits." *Id.* at *13–14.

This was largely because, the court explained, Allstate's pre-hearing brief had sought an interim award specifically directed at Amerisure's

request for reimbursement of expenses outside of its umbrella policy limits rather than its request for reimbursement of expenses at all. As a result, the court concluded that the issue of whether Amerisure was entitled to reimbursement for expenses at all under its pre-1982 umbrella policies "had not yet been put before the panel" at the time of the interim final award—such that this award could not be deemed a final arbitration award on the issue. *Id.* at *16.

The court noted that its conclusion was supported by the fact that the arbitration panel had issued the later final award, which included resolution of issues regarding the pre-1982 contracts. This, to the court, indicated the arbitration panel itself did not consider its interim final award to have disposed of all issues regarding the pre-1982 contracts. The court further explained that the interim final award could not constitute a final arbitration award because "the panel did not decide . . . whether and in what amounts Allstate was liable to pay any defense costs within limits." *Id.* at 22.

As a result, the court ruled that the interim final award did not constitute a final arbitration award, and the arbitration panel was not *functus officio* as to issues relating to the pre-1982 contracts after issuance of the interim final award. The court further found that the arbitration panel's final award constituted the final arbitration award. The court therefore rejected Allstate's petition to confirm the interim final award and granted Amerisure's petition to confirm the final award.

Nicholas H. Rosinia is senior counsel in the Insurance & Reinsurance Litigation Group at Foley & Larder LLP.

Does a Per-Occurrence Liability Cap Limit the Reinsurer's Total Liability?

Between 1962 and 1981, Century issued insurance policies to the Caterpillar Tractor Company that obligated Century to pay for third-party liability claims up to each policy's stated liability limit. The policies contained a separate "supplementary payments" provision that required Century to pay defense costs in addition to the limit for indemnity.

Between 1971 and 1980, Global sold Century facultative reinsurance for the policies. The declarations of the certificates contained a dollar limit. After it paid losses under the Caterpillar policies, Century billed Global for both its indemnity and expense payments. Global refused to pay more than the limit stated in the certificates' declarations. It sought a declaratory judgment that the limit capped its total liability.

Century contended that the limit capped Global's indemnity liability, but not that for defense costs. The District Court for the Southern District of New York granted Global's motion for summary judgment, *Global Reinsurance Corp. of America v. Century Indemnity Co.*, No. 13 Civ. 6577, 2014 WL 4054260 (S.D.N.Y. Aug 15. 2014), primarily relying on the Second Circuit's decision in *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*, 903 F.2d 910 (2d Cir. 1990).

On appeal, the Second Circuit certified a question to the New York Court of Appeals asking whether New York law imposed either a rule of construction or a strong presumption that a per-occurrence liability cap in a reinsurance contract capped the total of the reinsurer's liability. *Global Reinsurance Corp. of America v. Century Indemnity Co.*, 843 F.3d 120, 122 (2d Cir. 2016). The court of appeals answered that there was no such presumption; instead, it stated that New York law requires that a court interpreting a policy must look at its language and apply the

> “The court found that the reinsurance agreement between the parties was unambiguous.”

Case: *Global Reinsurance Corporation of America v. Century Indemnity Company,* 13 Civ. 6577 (United States District Court, S.D.N.Y.)

Court: U.S. District Court, Southern District Of New York

Date decided: March 2, 2020

Issue decided: Under New York law, whether declaratory judgment expenses and costs were within, or in addition to, the dollar limit stated in the declarations of the parties’ facultative reinsurance certificates

Submitted by: Tom Stillman

principles governing contracts generally. *Global Reinsurance Corp. of America v. Century Indemnity Co.*, 30 N.Y. 3d 508 (2017). The Second Circuit remanded the case to the district court with directions “to construe each reinsurance policy solely in light of its language and, to the extent helpful, specific context”. *Global Reinsurance Corp. of America v. Century Indemnity Co.*, 890 F.3d 74, 77 (2d. Cir. 2018).

Holding. The plain and unambiguous meaning of the reinsurance contracts is that the dollar amount stated on the facultative certificates caps indemnity payments and also caps expense payments when there are no losses, but does not cap expense payments when there are losses.

As directed by the Second Circuit on remand, the district court held an evidentiary hearing to determine whether the reinsurance agreement was ambiguous and whether and how industry-specific context might help to interpret it. The parties presented a joint statement of facts, declarations and expert testimony.

The court found that the reinsurance agreement between the parties was unambiguous. Applying New York’s rules of contract construction, the court concluded that the certificates incorporated the underlying insurance policies so that they were integral to, and part of, the reinsurance agreement. Rather than give precedence to the dollar limit contained in the declarations of the certificates, as Global advocated, the court relied on language in both the certificates and the policies to support its holding.

The court concluded that its textual interpretation was confirmed by the credible testimony from Century’s expert as to industry custom and practice at the time the agreement was drafted. On the basis of such testimony, the court found that the parties would have considered whether the reinsurance and insurance were concurrent and would have presumed that they were in fact concurrent in absence of an explicit statement of non-concurrency. Non-concurrency was expressly stated as to expenses when there are no losses, but no such express statement was made as to expenses when there are losses.

Finally, the court rejected reliance on prior decisions in conflict with the Second Circuit’s direction on remand to “‘construe each reinsurance policy solely in light of its language and, to the extent helpful, specific context.’”

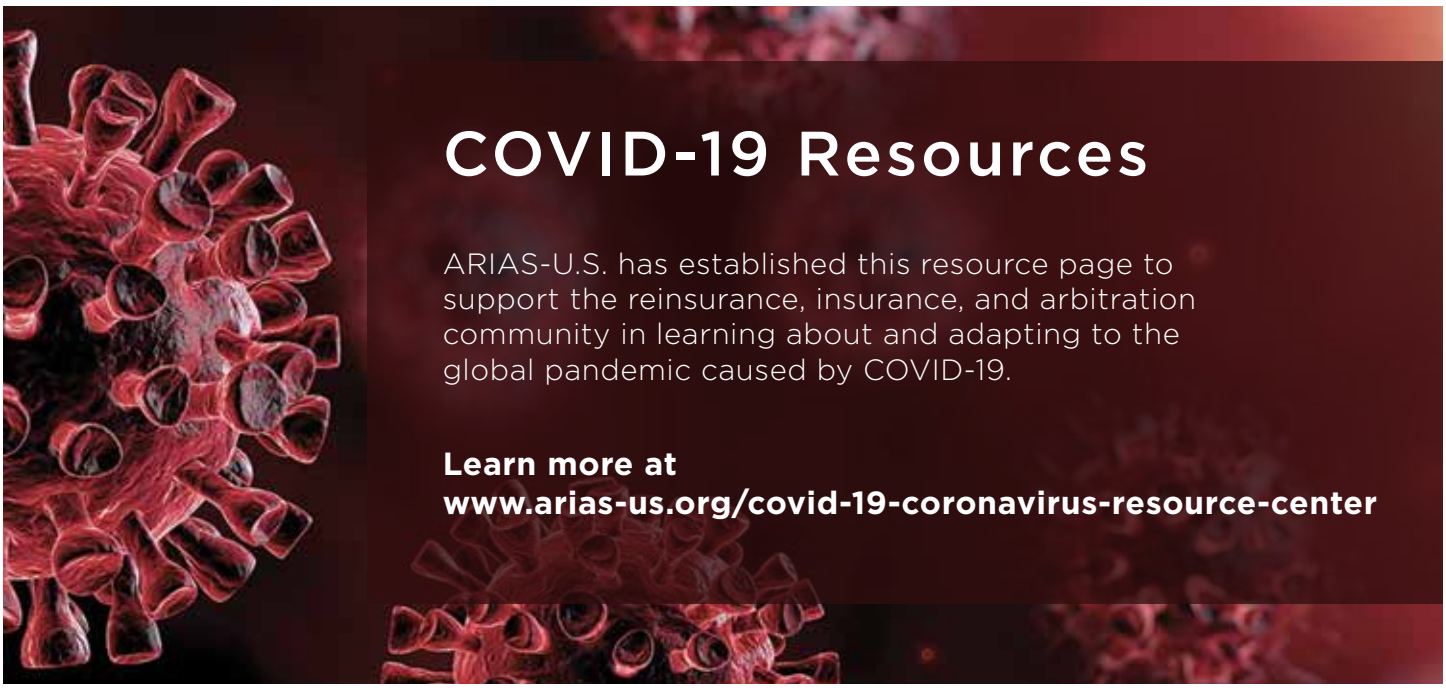
Tom Stillman, formerly senior vice president and deputy general counsel at CNA Insurance, became an ARIAS·U.S. Certified arbitrator after a nearly quarter century career at the company.

Newly Certified Arbitrators

Tom Conroy has over 30 years' experience in life Insurance and reinsurance with ING Security Life in various financial roles and as president of ING Re from 1993 to 2001. As CFO of Security Life in the 1980s, he oversaw all accounting, tax, valuation and investment activities. He was instrumental in developing the "Mod-co 820" structured concept and cross-border structured arrangements, as well as COLI and other business life insurance products. He consulted in the industry from 2001 to 2012, principally in the BOLI/COLI area. With Somerset Reinsurance (which he helped found), he held various C-Suite offices through 2019 until retiring.

Philip M. Howe is a civil litigator with lengthy experience in defending complex medical and financial issues in the areas of life, disability, health, automobile, homeowners, property and casualty insurance, including claims of bad faith. He has additional experience in condominium, construction, medical malpractice, personal injury and real estate litigation. Phil has also managed litigation nationwide as house counsel for an insurer that issued individual and group life, health and disability insurance. He has presented at the Eastern Claims and International Claims Associations (among others) and is in private practice in Boston.

Edward K. Lenci is a partner at Hinshaw & Culbertson LLP in New York. He focuses on litigating and arbitrating business disputes and defending businesses sued in class action lawsuits. He chairs the Reinsurance Section of his firm's Global Insurance Services Practice Group, is co-chair of the ARIAS•U.S. International Committee, and co-authored the ARIAS•U.S. International Arbitration Form. He has considerable appellate experience, including appeals concerning the arbitration of reinsurance disputes, and has spoken and written about the arbitration of reinsurance disputes. He will serve as chair of the International Section of the New York State Bar Association beginning in June.



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In Memorium

Jan Woloniecki, an ARIAS·U.S. member and frequent speaker who served as director of litigation for ASW Limited, a Bermuda law firm he co-founded, died of a heart attack at 61.

Jan gained international recognition during his career and participated as counsel and arbitrator in arbitrations in London, Singapore, Hong Kong, and the United States in addition to Bermuda. He also acted as an expert witness on Bermudian and English law in cases before U.S. courts and arbitration tribunals.

He was highly knowledgeable not only in law but many other subjects, including opera, for which he had a passion. He also authored several novels. He co-wrote the well-known text *Law of Reinsurance in England and Bermuda* with Terry O'Neill.

Jan played an important role in the development of Bermuda as a center for the hearing of reinsurance disputes. In 1999, he was the only lawyer in Bermuda to appear in the Euromoney Guide to Legal Experts' "Best of the Best," where he was listed as one of the world's leading insurance and reinsurance lawyers.

John Law Jacobus of Washington, D.C., died on January 2 at the age of 57 after a battle with cancer.

After receiving his Juris Doctor from Harvard Law School, John clerked for the Hon. Maryanne T. Barry at the U.S. District Court for the District of New Jersey. Following his clerkship, John served as a trial attorney at the Justice Department, then went into private practice. He briefly joined a large national law firm, but left to serve as general counsel in a family-owned business, the Jacobus Pharmaceutical Company. Following that service, John returned to firm practice, joining Steptoe & Johnson, LLP, in Washington, D.C., where he remained for the rest of his career.

Elected partner at Steptoe in 2001, John specialized in commercial litigation and arbitrations, often with a focus on insurance and reinsurance/risk trading. He served as chair of the Insurance and Reinsurance Practice Section of Lex Mundi, the world's largest assembly of private law firms. While at Steptoe, John also devoted a significant amount of time to pro bono work, often with a focus on helping immigrants reach the safety of the United States following persecution or torture abroad. His representation of the underprivileged also included serving as lead counsel in proceedings before the Court of Appeals of the District of Columbia Circuit in litigation on behalf of developmentally delayed children, in a case challenging their stewardship by the government of the District of Columbia.

UPCOMING EVENTS

VIRTUAL EDUCATION SEMINAR

Increasing Mediation Opportunities: Exploring ARIAS' New Mediation Initiative

Wednesday, March 31, 2021

2:30pm - 5:00pm EST / 1:30pm - 4:00pm CT

Registration Now Available!

SPRING CONFERENCE

Save the Date

May 6-7, 2021

Online Everywhere!

LIVE WEBINAR

***Functus Officio*: Exploring Exceptions to the Finality of Arbitral Awards**

Wednesday, May 12, 2021

1:00 pm – 2:15 pm ET / 12:00 pm – 1:15 pm CT

Registration Now Available!

ONDEMAND WEBINAR

The Powers of Arbitrators in the Virtual Age and Beyond

Tuesday, March 16, 2021

1:00 pm – 2:15 pm ET / 12:00 pm – 1:15 pm CT

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The ARIAS•U.S. Quarterly (ISSN 7132-698X) is published 4 times a year by ARIAS•U.S.

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