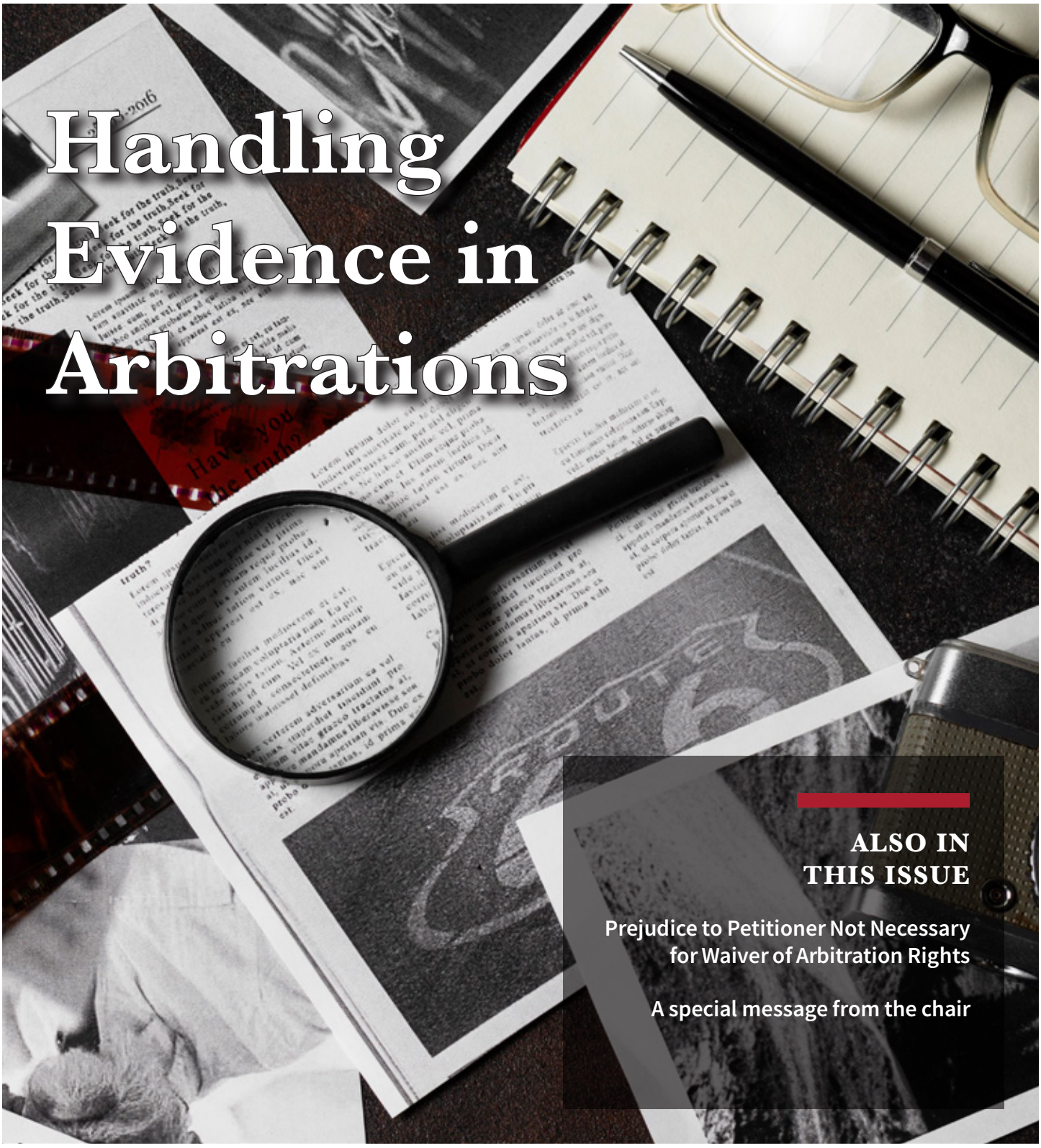
ARIAS U.S.

QUARTERLY

# Handling Evidence in Arbitrations



## ALSO IN THIS ISSUE



Q3 • 2022

TABLE OF CONTENTS

# FEATURES


## 4 Handling Evidence in Arbitrations
By James E. Fitzgerald



## ALSO IN THIS ISSUE




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: freepik

Dear ARIAS Membership,

Welcome back from Summer! As we all gradually start turning our attention back to the day-to-day, the ARIAS Board wants to bring you up to date on some important developments for our organization.

First and foremost, as I mentioned at our Spring Conference, the ARIAS Board made the difficult decision last Spring to move on from our current association manager, MCI. After a long and thorough search and vetting process, we are very pleased to announce that we have signed a contract with DPS AMC effective Aug. 1, 2022. By way of this letter, I'd like to formally introduce our new ARIAS Managing Director, Tracy Schorle. Tracy has more than 20 years of experience as an association management professional. As Senior Director of Client Services, she has served DRI for 11 years. Before DRI, she spent 10 years at SmithBucklin, the world's largest association management company. Throughout her career Tracy has focused on creating communication, marketing, and sales programs to grow associations of all sizes and industries, and we are confident that she will be an outstanding addition for ARIAS.

Tracy also brings with her a highly talented support team — Crystal Lindell, who will serve as the Staff Editor of the ARIAS Quarterly publication; Lydia Calder, who will serve as our Continuing Education Coordinator; Angela Smith Ford, our new Manager of Meetings and Events; and Jamil Rawls, who will serve as ARIAS Marketing Coordinator.

Tracy and the DPS Team have already been hard at work transitioning management responsibilities, systems and documentation for a few months now, and they are quickly getting up to speed on the organization — both our short-term imperatives and our longer-term vision as an organization. The Board is very excited to work with Tracy and her team as they help ARIAS achieve its objectives to grow, and at the same time enhance the benefits and value of your membership.

Tracy and her team also are currently working at updating and ensuring technical support for our Arbitrator Database. For those who have tried making changes or updates in the last year or so, this will be welcome news! As Tracy and her Team are in the process of helping the Board land on the best support and upgrade solution, please expect additional information on how you can access, update and improve your profiles in the immediate future.

As we look to the future, we know that social media has become a vital means of communication within the industry. In an effort to better serve our members we are bringing new life and energy to our LinkedIn page, and we'd love for you to check it out! You'll find all the latest information about upcoming events as well as professional tips to help you better navigate the site. Please note: the LinkedIn page will supplement, not replace, our ARIAS website, but we still hope you will take a moment to follow us at linkedin.com/company/arias-u.s./ next time you are on LinkedIn.

We are particularly pleased to report that we had expectation-breaking attendance at our Spring Conference in Amelia Island, Florida in May, with one of the largest groups of attendees in memory! After almost two full years of Covid, it was evident that folks were more than willing and interested in traveling to see friends and acquaintances and to attend the programming in sunny Florida. As you know our conferences are essentially ARIAS' financial "life blood" and in addition to a near record number of first-time attendees, the conference reviews made clear that the location, programming and networking opportunities were spot on. Thank you again to our Spring Conference Co-Chairs: Scott Birrell, Steve Schwartz, Randi Elias and Joy Langford.

Not to be outdone by the sunshine and palm trees, our 2022 Fall conference will be held November 3-4 at the New York Hilton, in Midtown, New York. The event will be held in-person, and there will not be a two-way virtual option, though we hope to be able to stream it for those who want to watch. We highly encourage members who are comfortable to attend in-person in order to take full advantage of the educational sessions, in addition to networking and reconnecting with old friends and colleagues. Conference Co-Chairs Seema A. Misra, Sarah Gordon, Amy

Kallal and Patricia Taylor Fox are planning a stellar program, the agenda for which will be available shortly, along with the registration materials that will allow you to reserve your spot and a room at the Hilton, if needed.

her Board service. The terms for Sarah Gordon (law firm representative) and Josh Schwartz (cedent company representative) are also expiring, however both Josh and Sarah have expressed their interest and willingness to continue as a member of the Board. Peter

> "We are particularly pleased to report that we had expectation-breaking attendance at our Spring Conference in Amelia Island, Florida in May, with one of the largest groups of attendees in memory!"

As a reminder, the Annual Business Meeting and Board Elections will be held in conjunction with the Fall Conference, on Thursday, Nov. 3. You should all have received the "Call for Nominations" that came out on August 25. This year there are three seats on the Board with expiring terms. After serving two terms, Beth Levene (reinsurance company representative), will be stepping down from the Board. On behalf of the entire organization, we are grateful to Beth for her contributions to ARIAS·U.S. both prior to and during

Gentile, Treasurer and Arbitrator, has also expressed his willingness to continue as a member of the Board. The Nominating Committee will be accepting nominations for the open reinsurer seat. The Committee will also consider other candidates in addition to Josh, Sarah and Peter for the remaining seats. We welcome all nominations, whether on your own behalf or for a friend, acquaintance or colleague. **Please submit the names of potential nominees along with the information outlined above to the ARIAS·U.S. Managing Director, Tracy Schorle, (Tschorle@arias-us.org), via e-mail, as soon as possible but in all events no later than 5 p.m. EST on Sept. 30, 2021.**

As a Board, we worked very hard the last two years to navigate Covid, and to make decisions in the best long-term interest of ARIAS-US. We purposely kept annual dues level for all members during this time to minimize the impact of Covid on our membership. However, as all are aware, inflation is taking a toll, and prices for both food and AV equipment/access have increased exponentially since the lockdown ended. Accordingly, like most other associations of our size, we expect to increase annual dues for all members, as well as Fall and Spring Conference fees. We have worked hard to ensure that these increases are fair, reasonable, and in line with other associations of similar size and aspirations. The Board expects to vote on what we believe are relatively modest, but necessary, increases at our September Board Meeting.

Finally, to say the very least, the Board is excited to move past the Covid-era, and this association management transition, and get back to the business of growing our organization and finding new ways to offer value and benefits to you, our members. We look forward to tapping into your ideas and energy and to seeing all of you in New York in early November!

Sincerely,

**Cindy Koehler**
Chairperson, ARIAS-US

As many of you know, ARIAS has gone through a professional management transition from MCI to our new managers, DPS AMC, led by our new Executive Director, Tracy Schorle. Please turn to ARIAS Chair Cindy Koehler's introductory note for more information. Welcome DPS AMC and Tracy and her team. A special welcome to Crystal Lindell, who will be the staff editor for the *Quarterly*.

As summer ends and fall begins, we turn to the Fall Conference on November 3-4, 2022, which will be upon us before you know it. Planning for the Fall Conference gives our thought leaders a great opportunity to plan a program and an article for the *Quarterly*. We hope you'll consider leveraging your work on the Fall Conference and write an article for the *Quarterly.*

This issue of the Quarterly is a bit late because of the management transition, but we are working to get back on track. Nevertheless, we have two excellent articles for your enjoyment. First, we

have "Handling Evidence in Arbitrations," written by James E. Fitzgerald of Fitzgerald Legal Consult, P.C. Jim takes us through the often complicated and winding road of evidentiary rules and applies them to the arbitration context. This is a good review for arbitrators who may not have to adhere to the strict rules of evidence, but may find a discussion of evidentiary concepts helpful in reaching evidentiary decisions in arbitrations.

Next, we have another article from Robert M. Hall, a member of our *Quarterly* Editorial Committee and of Hall Arbitrations. In "Prejudice to Petitioner Not Necessary for Waiver of Arbitration Rights," Bob explores the ways courts protect the right to arbitration and the circumstances under which the right to arbitrate might be waived.

We hope you enjoy this issue of the *Quarterly.* We need many more of you to contribute to future issues. The deadlines and requirements are on the ARIAS website. We welcome committee reports, original articles, and repurposed articles from ARIAS CLE programs or from company or firm publications. We encourage you to leverage your thought leadership and publish an article in the Quarterly!

**Larry P. Schiffer**
Editor


# Handling Evidence in Arbitrations

**By James E. Fitzgerald[1]**

An arbitration is a private resolution procedure in which an arbitrator is appointed to decide the merits of a dispute and render an award based on the evidence and arguments presented by the parties to the dispute.

The arbitrator is charged with giving each side the opportunity to present evidence and argument supporting its position and then making a fair and just award. In discharging those duties, it is the arbitrator's paramount responsibility to make sure that the arbitration process is fundamentally fair to the parties. It is the job of counsel representing the parties to present truthful and accurate evidence supporting the claims and/or defenses to be decided by the arbitrator.

It is reasonable for the parties going to arbitration to expect that their arbitration will be conducted in concert with the parties' written arbitration agreement, the governing tribunal rules, applicable federal and state laws governing arbitrations, and fundamental fairness. An arbitrator's role includes overseeing the arbitration in a manner that hopefully meets those reasonable expectations – so that arbitration will continue to be the valuable tool it is for private dispute resolution.

The arbitration process gives arbitrators wide discretion in the consideration of evidence submitted by the parties. How, and if, evidence is admitted, and the weight, if any, it is given is left to the discretion of the arbitrator. But, that discretion must always be exercised in a manner that does not violate a party's right to receive a fundamentally fair hearing and determination of an award.[2] Let us examine some of the evidentiary issues and concerns arbitrators and parties face in arbitration.

## "Fundamental Fairness" and the Evidentiary Process

The Federal Arbitration Act ("FAA"), state arbitration laws and the rules/codes of private dispute resolution organizations, require that the arbitration process be "fundamentally fair" to each party. If it is not, the award may be subject to vacatur.[3] A court may vacate an arbitration award if the arbitrator engaged in misconduct by refusing to hear evidence pertinent and material to the controversy.[4] This does not mean that an arbitrator is required to hear all evidence offered by the parties. But, it does mean that the arbitrator "must give each of the parties to the dispute an adequate opportunity to present its evidence and argument."[5]

In practice, what is fundamentally fair depends on the particular circumstances of the case. For example, an arbitrator should not refuse to postpone a hearing, upon reasonable request and sufficient cause shown, where the consequence of doing so would preclude one side from having the opportunity to present evidence that is pertinent and material to the dispute.[6] By the same token, "arbitrators are to be accorded a degree of discretion in exercising their judgment with respect to a requested postponement. Therefore, assuming there exists a reasonable basis for the arbitrator's considered decision not to grant a postponement, the Court will be reluctant to interfere with the award on these grounds."[7] Courts asked to consider whether a denial of a postponement resulted in fundamental unfairness requiring vacatur, have decided the issue based on the particular facts of the case. Other than a violation of the strictures of the FAA or a state court statute, the discretion of the arbitrator in deciding that issue will rarely be the basis for granting vacatur.[8]

> "In practice, what is fundamentally fair depends on the particular circumstances of the case."

An arbitrator's refusal to hear and consider a particular piece of evidence could create grounds for vacatur. In the first instance, a party's proffered evidence and argument that has been precluded by the arbitrator must be shown to have been relevant and material to the issues in dispute. This means that the evidence must go to the determination of an issue that is of consequence in determining the award.[9] Consideration of whether (and/or how) it is relevant ***and*** material is ultimately left to the discretion of the arbitrator. If precluding the evidence and refusing to consider it violates fundamental fairness, the resulting award may be subject to vacatur. Thus, an arbitrator's safest course of action is usually to hear the evidence and later judge whether it has any significance to the issues to be decided, thereby ensuring that the process for submission of evidence has been fundamentally fair to the parties.

## How Evidentiary Objections Play in Arbitration

The success and failure of evidentiary objections is derivative of the form and content of the evidence being adduced. How a question is framed is critical. Questions that are well-organized, brief and to the point are typically less objectionable. On the other hand, questions that present unfocused, unclear, irrelevant or collateral evidence will draw objections from opposing counsel – and, possibly the arbitrator — and likely muddy the facts critical to an issue for determination. It is the job of attorneys to focus the witness and arbitrator on the critical issues and demonstrate how the evidence being presented goes to proving or disproving a particular issue in dispute. To achieve this, an often-used approach is for the questioner to organize questions by subject area (chronologically or substantively) and then "headline" that subject area before beginning the questions under that subject. This method demonstrates organization in the examination, and focuses the witness and arbitrator on the issue, and mitigates the likelihood (and validity) of objections to the questions. Framing questions to avoid obvious objections serves to save time and avoid unnecessary delay in the proceedings.

Should you object? What is the purpose or goal, if any, in making the objection? Is there a risk in making the objection — one that makes the objection not

worth making? Answer these questions first, while bearing in mind that formal rules of evidence do not apply in arbitrations. An objection may validly be designed to prevent evidence from being heard, or show that the evidence to be provided is unreliable or lacks credibility. But, if the evidence is likely to come in regardless, there may be little or no value in making the objection — at least at that point. That is a difficult judgment call that typically needs to be made in the moment. In making that judgment call, remember that if a question is meant to evoke a response that is likely to provide evidence relevant and material to the subject at issue, or evidence that is neutral or even favorable to you, an objection may be unwarranted. Moreover, while a question may be objectionable as to its form (e.g., leading), but likely to be allowed anyway, objecting may only serve to slow down the proceeding, and annoy the arbitrator. Unlike trial jurors, arbitrators are more sensitive to the evidentiary process and generally have the ability to distinguish improper/unreliable evidence from credible/trustworthy evidence. Finally, keep in mind that objecting to evidence that might be unfavorable often has the effect of unnecessarily highlighting it, which may end up doing more harm than good.

> “In the end, whether to object to evidence requires a strategic analysis of whether the proffered evidence has any real import to the ultimate issues for decision, whether the objection unnecessarily highlights evidence, and whether the objection is likely to be sustained or allowed.”

When an objection is overruled, some attorneys see this as a personal defeat and an indication that the arbitrator is either biased against them, or biased in favor of the questioner. It usually is neither. Rather, the arbitrator is typically exercising prudence in hearing the evidence and expects the attorneys to understand that the arbitrator has the skill set to weigh the evidence being offered and evaluate its quality and applicability (if any) without entertaining objections. In the end, an arbitrator's evidentiary ruling usually follows “substance over form.” In addition, the arbitrator's overruling of an objection may be intended to protect the record against a later vacatur petition based on failure to allow evidence to be heard. Thus, sometimes the best call for the objecting attorney is to be silent.

In the end, whether to object to evidence requires a strategic analysis of whether the proffered evidence has any real import to the ultimate issues for decision, whether the objection unnecessarily highlights evidence, and whether the objection is likely to be sustained or allowed. After such consideration, if the attorney thinks an objection is worthwhile, it should respectfully be made, the basis for it explained — thereby alerting the arbitrator to the question-

able value of the evidence — and then respectfully accept the arbitrator's ruling. Remember too that while the evidence may have come in, its value and significance, if any, can be argued later.

## Handling Specific Evidentiary Objections

All objections are not the same, and certain objections are more likely to be sustained than others. For example, one of the easiest objections to have sustained in practice is one based on foundation. This is because arbitrators can sustain it (or not), and then allow the questioner to try and cure the foundation problem by having the witness provide additional facts that will give a sufficient basis to hear the answer to the original question. On the other hand, if the question asks the witness for information the witness has no foundation to answer, objecting on foundation grounds may signal to the arbitrator that the answer to be elicited would not be credible because the witness lacks personal knowledge. Moreover, especially in the early stages of a hearing, an arbitrator may not know enough about the facts to evaluate if, and/or how, the proffered evidence might later turn out to be material to an issue. In that instance, the arbitrator may permit the questioner to attempt to elicit more foundational facts to allow the question to be answered and the evidence considered. Ironically, foundation objections often provide the questioner with an opportunity to ask better questions (and provide a better record) that provide a more reliable basis for presenting the evidence, and explaining its context and application to the issues. This is why arbitrators usually will hear the evidence and later evaluate its credibility, reliability and worth to the issues that are the subjects for determination.

Objections that are of a more technical nature may raise special problems with an arbitrator. The first problem is determining which rules of evidence (Federal rules vs. state rules), if any, might be applied, while, again, keeping in mind that formal rules of evidence are normally not applied in arbitrations. Second, more technical issues typically require more of a deep dive into the meaning and application of those rules of evidence in the particular case. This is particularly true of determining which "facts" qualify as hearsay, or trigger an exception to it, and whether, on balance, the evidence should be allowed at all. An arbitrator may handle the objection by simply hearing the proffered evidence, while noting that it is being received with the understanding that the challenge to its value and ultimate use is reserved. For the attorney objecting to questions on technical issues, it may be advisable to explain to the arbitrator, if permitted, why the evidence should not be admitted, or considered on the merits, by explaining ***why*** the evidence is not reliable or untrustworthy rather than getting slogging in the technicality of the legal objection. In this instance, emphasis on substance over form will again likely yield a better result.

Evidentiary objections are often better dealt with in preparation for the hearing. Experienced counsel plan for evidentiary issues that might arise, and may alert the arbitrator to a likely evidentiary issue through a motion(s) in limine (i.e., an advance request to preclude certain evidence). Raising an evidentiary issue before the hearing highlights it as an important issue that would be helpful to resolve in advance of the hearing. Resolving evidentiary issues through a stipulation as to facts, or by obtaining an advance ruling from the arbitrator, helps streamline the parties' preparation for the hearing, which will always be appreciated by the arbitrator. Nevertheless, some attorneys wait to raise an evidentiary issue until the hearing believing the element of surprise has special value to their case. In practice, preference for transparency, and a risk of a claim of waiver, may be preferred to creating surprise. It is also important to remember that motions in limine, even though denied at the beginning of a hearing, may be requested to be reconsidered after the arbitrator has gained a better understanding of the facts and has had more time to reflect on the evidentiary significance of the evidence being considered.

In sum, attorneys should present evidence in a way that supports their theme and theory of the case, their view of the facts and the effect that the evidence has on the issues for determination. Making sure that the arbitrator has heard that evidence with those considerations in mind is the key.

## The Arbitrator Has Ultimate Discretion In Consideration Of The Evidence.

Arbitrators are given fairly wide latitude in considering if, and to what extent, to receive evidence, subject to certain boundaries. For example, the parties in their arbitration agreement may provide specific rules for the handling of evidence. An arbitrator's failure to follow those rules may provide valid grounds for vacatur of a subsequent award.[10] Some leading arbitration tribunal rules provide that the rules of evidence need

not be followed[11], although evidentiary rules regarding attorney-client privilege and the work-product doctrine are to be followed.[12]

Handling evidence in arbitration can sometimes create a paradox. On one hand, tribunal rules state that evidence may be offered by the parties "as is relevant and material to the dispute," and that once the evidence is offered "the arbitrator shall determine the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant."[13] Moreover, the procedural rules for some arbitration tribunals state that the arbitrator is "obligated to follow the strict rules of law, unless otherwise agreed."[14] On the other hand, some arbitration rules provide that "conformity to legal rules of evidence shall not be necessary."[15] Indeed, courts have held that parties are not denied "fundamental fairness" simply because an arbitrator has consistently failed to follow court rules of evidence.[16] Yet, the AAA, ARIAS and JAMS tribunal rules all provide for the rendering of a final award only after each of the parties is given a fair opportunity to present evidence (both documentary and testimonial).

> "Handling evidence in arbitration can sometimes create a paradox."

## Conclusion

In practice, conduct at arbitration typically defaults to a process for the submission and consideration of evidence that loosely tracks basic courtroom procedural rules and state and/or federal rules of evidence, albeit in a less formal manner. Thus, the blanket statement that arbitrators do not have to follow the rules of evidence appears, in practice, and according to relevant statutes and most tribunal rules, an oversimplification. If parties enter into arbitration agreements with the expectation that they will be conducted in accordance with procedural rules (often dictated by the tribunals and/or arbitration agreements) and the law, does an arbitrator who does not follow the law, or evidentiary rules undermine the parties' reasonable expectations? In the end, the arbitrator has the obligation to somehow reconcile these concerns, while exercising discretion within the realm of fundamental fairness.

### NOTES

1 The author wishes to thank Mitchell Lathrop for his astute review and comments that assisted the editing of this article.

2 *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997); *Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F. 3d 1010, 1013 (10th Cir. 1994).

3 9 U.S.C. Section 10 (a).

4 9 U.S.C. Section 10 (a)(3).

5 *Hoteles Condado Beach v. Union de Tronquistas Local 901*, 763 F. 2d 34,39 (1st Cir. 1985)

6 *Tempo Shain Corp. v. Bertek, Inc.*, Id. at 19-20.

7 *Fairchild & Co., Inc. v. Richmond, F & P.R. Co.*, 516 F. Supp. 1305, 1313-1314 (D.C. D.C. 1981)

8 *Storey v. Searle Blatt, Ltd.*, 685 F. Supp 80, 82 (S.D.N.Y. 1988); *Catz American Co., Inc. v. Pearl Grange Fruit Exchange, Inc.*, 292 F. Supp. 549, 553 (S.D.N.Y. 1968)

9 *See*, Federal Rule of Evidence 401.

10 *See, Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F. 3d 1010, 1013 (10th Cir. 1994).

11 *See*, AAA Commercial Arbitration Rules and Mediation Procedures, Rule R-34(a); JAMS Comprehensive Arbitration Rules & Procedures, Rule 22(d); California Code of Civil Procedure §1282.2(d); ARIAS' U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, Rule 14.3.

12 *See, for example*, JAMS Rule 22(d); AAA Commercial Arbitration Rules and Mediation Procedures, Rule R-34(c).

13 AAA Commercial Arbitration Rules and Mediation Procedures, Rule R-34(b)

14 See, for example, Rule 14.3 of the ARIAS U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes.

15 AAA Commercial Arbitration Rules and Mediation Procedures, Rule R-34(a)

16 *Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co., Inc., supra*, 22 F. 3d at 1013.

***James E. Fitzgerald*** *is an ARIAS certified arbitrator and mediator, and the Principal of Fitzgerald Legal Consult, P.C. in Los Angeles, California. He is also a Panelist on the American Arbitration Association National Roster of Arbitrators, and a former partner of Drinker Biddle & Reath, Akin Gump Strauss Hauer & Feld, and Stroock & Stroock & Lavan.*

# Prejudice to Petitioner Not Necessary for Waiver of Arbitration Rights

**By Robert M. Hall[1]**

## Introduction

Today, many commercial and consumer contracts contain an arbitration clause. Sometimes an aggrieved party to such a contact seeks a remedy in court rather than before an arbitrator. Sometimes the respondent proceeds with the litigation for a time but eventually decides to assert its arbitration rights. Then the issue becomes whether the respondent has waived its arbitration rights. The courts have devised various tests for determining waiver, but there has been a split in the circuit courts as to whether prejudice to the petitioner is a necessary element to proving waiver. The purpose of the article is to examine a selection of case law that split the circuit courts, as well as a recent decision of the United States Supreme Court that resolved this split.

## Circuits That Required Prejudice

The Eleventh Circuit articulated the test for prejudice as follows:

In determining whether a party

has waived its rights to arbitrate, we have established a two-part test. First, we must decide if, "under the totality of circumstances," a party "has acted inconsistently with the arbitration right," and we look to see whether, by doing so, that party "has in some way prejudiced the other party."[2]

> "In determining whether a party has waived its rights to arbitrate, we have established a two-part test."

While the Third Circuit agrees that prejudice to the opposing party is the "touchstone for determining whether a right to arbitration has been waived," five additional factors are to be considered:

> (1)the degree to which the party seeking to compel arbitration has contested the merits of its opponent's clams; (2) whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceeding; (3) the extent of the non-merits motion practice; (4) its assent to the district court's pre-trial orders; and (5) the extent to which both parties have engaged in discovery.[3]

The Tenth Circuit adopted an even more complicated test for waiver:

> (1)whether the party's actions are inconsistent with the right to arbitrate; (2) whether the "litigation machinery has been substantially invoked" and the parties are "well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay of proceeding; (5) "whether important intervening steps [*e.g.* taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "prejudiced" the opposing party.[4]

## Circuits That Did Not Require Prejudice

In *National Foundation for Cancer v. A.G. Edwards Sons,* 821 F. 2d 772 (D.C. Cir. 1987), the court found a waiver based on the party's "delay in seeking arbitration, its extensive involvement in pretrial discovery, its invocation of summary judgment procedures, and resulting prejudice to" the other party.[5] However:

> This circuit has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration. We decline to adopt such a rule today. Of course, a court may consider prejudice to the objecting party as a relevant factor among the circumstances that the court examines in deciding whether the moving party has taken action inconsistent with the agreement to arbitrate. But waiver may be found absent a showing of prejudice.[6]

Similarly, the Seventh Circuit, in *St. Mary's Medical Center v. Disco Aluminum Products,* 969 F.2d 585 (7th Cir. 1992), ruled that prejudice was just one of a number of factors to be considered with respect to waiver of arbitration rights:

> While none of our cases has stated explicitly that a court may find waiver absent prejudice, that principle is implicit in our repeated emphasis that waiver depends on all the circumstances in a particular case rather than on any rigid rules and that prejudice is but one relevant circumstance to consider in determining whether a party has waived its rights to arbitrate.[7]

## Supreme Court Resolution of the Prejudice Requirement

*Morgan v. Sundance,* Inc., No. 21-328 ____U.S.____(2022), involved an hourly employee at a Taco Bell franchise who agreed to confidential, binding arbitration to resolve any employment dispute. She brought a nationwide collective action against the franchisee

for violation of the Fair Labor Standards Act for not paying overtime. The franchisee defended itself against the suit and moved for dismissal on the basis that the suit was duplicative of existing suits. The petitioner declined to join other suits and the court declined to dismiss the suit. The franchisee then mediated with the petitioner in this matter and in other suits and settled with the latter but not the former. Then, eight months after the petitioner filed her suit, the franchisee moved to stay the litigation in favor or arbitration pursuant to the Federal Arbitration Act ("FAA").

> "The Supreme Court granted certiorari to determine whether prejudice was a necessary element of waiver of arbitration rights under the FAA."

The petitioner argued that the franchisee had waived its right to arbitration. The Eight Circuit used as its standard for waiver whether the party knew of its right to arbitration, acted inconsistently with that right and the other party was prejudiced as a result. The Supreme Court granted certiorari to determine whether prejudice was a necessary element of waiver of arbitration rights under the FAA.

The Court observed that outside the arbitration context, federal courts assessing waiver do not consider prejudice. So in requiring prejudice for a waiver of arbitration rights, the Eighth Circuit was applying a bespoke rule of waiver for arbitrations.

The Court further observed that the articulated justification for this treatment was a federal policy favoring arbitration. A unanimous Court ruled that this did not justify a requirement of prejudice for a waiver of arbitration rights:

> But the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. . . . The policy is to make "arbitration agreements as enforceable as other contracts but not more so". . . . Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation.[8]

## Commentary

The federal circuits continue to articulate the standards for arbitration waiver differently. However, it is now evident that prejudice to the party opposing arbitration can no longer be a requirement for waiver.

### NOTES

1 *Mr. Hall is an attorney, a former law firm partner, a former insurance and reinsurance executive and acts as an insurance consultant as well as an arbitrator of insurance and reinsurance disputes and as an expert witness. He is a veteran of over 200 arbitration panels and is certified as an arbitrator and umpire by ARIAS – US and is member of the publications editorial board of the ARIAS Quarterly. The views expressed in this article are those of the author and do not reflect the views of his clients. Copyright by the author 2022. Mr. Hall has authored over 100 articles and they may be viewed at his website: robertmhalladr.com*

2 *Ivax Corporation v. B. Brawn of America, Inc.,* 286 F.3d 1309, 1315-16 (11th Cir. 2002) (internal citations omitted).

3 *Hoxworth v. Blinder,* 980 F.2d 912, 925 (3rd Cir. 1992).

4 *Peterson v. Shearson/American Express, Inc.,* 849 F.2d 464, 467-8 (10th Cir 1988) (internal citations omitted).

5 821 F. 2d 772, 778 (D.C. Cir. 1987).

6 *Id.* at 777.

7 969 F. 2d 585, 590 (7th Cir. 1992).

8 *Slip Opinion* at 6 (internal citations omitted).

# New Hire

**Anthony Del Guercio joins Saiber's Insurance and Reinsurance Practice**

Saiber LLC has added Anthony Del Guercio as it's Counsel in the Firm's Insurance & Reinsurance practice group.

Anthony has more than 20 years of litigation experience as both inside and outside counsel.

"We are excited to add another seasoned litigator to our Firm," said Joseph Schiavone, a senior member of Saiber's Insurance & Reinsurance practice group. "Anthony's unique experience serving in-house for a highly-regarded reinsurance company for over a decade, as well as serving as outside counsel to insurance and reinsurance companies, will make him an invaluable asset to our practice."

Anthony joins Saiber from Everest Re, where he served as V.P., associate general counsel.

While at Everest, Anthony was responsible for supporting and providing legal advice to all US reinsurance operations, including all reinsurance coverage issues, disputes, and claims. He also was jointly responsible for supporting international operations and coverage issues; disputes and claims; as well as reporting to senior management.

In addition, Anthony worked directly with outside counsel on insurance and reinsurance arbitrations and litigation on a variety of unique and complex coverage issues, including: cannabis, as well as claims involving: Covid-19, wildfires, asbestos, environmental, property and casualty coverages.

Prior to joining Everest, Anthony practiced at the law firm of Parker Ibrahim & Berg, where he first-chaired trials and briefed and argued motions and appeals for a variety of the Firm's clients.

"I am excited to join this talented team of litigators, at a firm that has such an outstanding reputation," said Anthony Del Guercio. "I look forward to growing my practice here for many years to come."

Prior to entering private practice, Anthony clerked for the Hon. Ann G. McCormick in the Superior Court of New Jersey. He received his B.A. from Rutgers University in 1997 and his J.D. from Seton Hall University School of Law in 2000.

Saiber LLC is a full service business counseling and litigation law firm headquartered in Florham Park. To learn more about Saiber, visit www.saiber.com.

# UPCOMING EVENTS

## Fall Conference

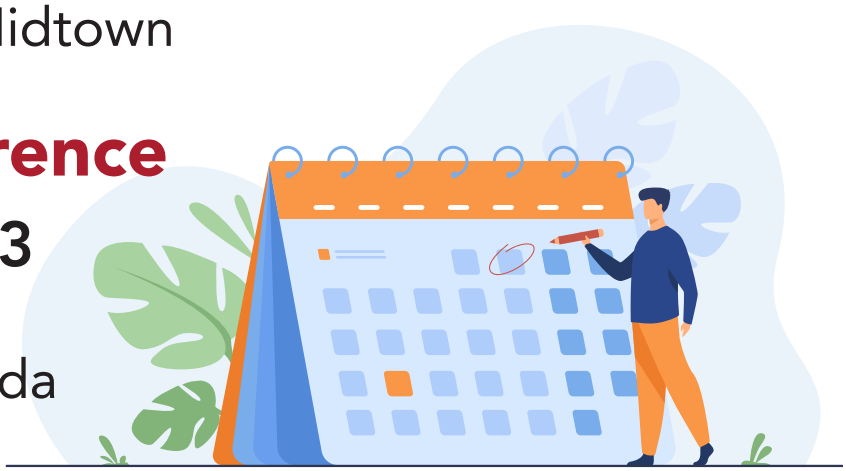
**November 3-4, 2022**

New York Hilton, Midtown

## Spring Conference

**May 17-19, 2023**

Ritz-Carlton on
Amelia Island, Florida



## Calling All Authors

The *Quarterly* is seeking article submissions for upcoming issues. Don't let your thought leadership languish. Leverage your blogs, client alerts and internal memos into an article for the *Quarterly*. ARIAS Committee articles and updates are needed as well. Don't delay. See your name in print in 2022 and 2023.

**Visit www.arias-us.org/publications/ to find information on submitting for the 2023 issues.**

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