ARIAS•U.S. 2018 Fall Conference

November 7–9, 2018

New York Marriott at the Brooklyn Bridge

333 Adams St, Brooklyn, NY 11201

Conference Program & Session Materials

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Chaffetz Lindsey LLP

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General Information

Attire: The general dress code for the conference is "business casual." This means that while speakers and panel members may be in business professional attire with a tie or suit jacket, it is not a requirement for attendees. Usually at these conferences, attendees will dress up a bit more for the evening reception.

Badges: Conference badges will be issued to all attendees. Please wear your badge at all times to access all conference functions.

Session Materials: While most session materials are in the conference program, some materials may be published online due to length.

Breakout Session Room Assignments: Room assignments for the Thursday afternoon Breakout Sessions are included in the back of the program. Please refer to the list for your assigned session room. Be sure to attend your assigned session and fill in each seat to ensure that all attendees have a seat and sessions can begin on time.

Continuing Legal Education: Continuing legal education credits will be awarded for the State of New York and Illinois. Credits are pending for Pennsylvania and Minnesota. For other states, please reference the information that was communicated to all participants. Sign-in and sign-out sheets are for attorneys who wish to receive CLE Credit. Certificates of attendance will be based solely upon these sheets. You must sign in and out each day to receive credit for each day. There will be sign in and out sheets on tables outside the General Session, next to registration. The sign in and out sheets for the Thursday Breakout Sessions will be on tables near each room, and signage will be displayed clearly for each session. Make sure you sign in and out of the various sessions with the time you arrive and the time you leave in order to receive full credit. Certificates of attendance will be sent via email to everyone who has signed in and out.

This is required by the New York State CLE Board.

ARIAS•U.S. Certification: Anyone receiving credit for ARIAS•U.S. Certification does not have to sign in and out and will not be provided with a certificate of completion for the training. Participants however must be in the training session and not in the hallways. This is a directive from the ARIAS•U.S Board of Directors.

Obtaining Credit for the Conference: You will not receive full credit for a session if you are standing in the hallways or arrive late or leave early. The training is taking place in the session rooms; you must be inside. This is true both for CLE training and for ARIAS•U.S. Certification credit. To be clear, anyone who is attending for ARIAS•U.S. certification renewal or for initial certification and who is not in the session rooms will be considered as not completing the attendance requirement for certification/recertification.

Opinions and Comments: Opinions and comments expressed in the enclosed materials and during the conference sessions are not necessarily those of ARIAS•U.S., the firms or companies with which the speakers are associated, or even the speakers themselves. Some arguments are made in the context of fictitious disputes to illustrate methods of handling issues; others are individual opinions about the handling of an issue. Every dispute or matter presents its own circumstances that provide the context for decisions.

Finally, please note that this conference will be conducted in accordance with the ARIAS•U.S. Antitrust Policy, which is enclosed and is also available in the About ARIAS section of the website (www.arias-us.org).

We hope you enjoy the conference!

SECOND FLOOR

Wednesday, November 7

Pre-Conference Sessions

11:00 a.m. – 1:00 p.m. **WOMEN'S NETWORKING LUNCHEON**

Salon A

Sponsored by Chaffetz Lindsey LLP and Steptoe & Johnson LLP

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12:00 p.m. – 1:00 p.m. **ARBITRATOR & UMPIRE SEMINAR LUNCH**

Salon B

1:00 p.m. – 5:00 p.m. **ARBITRATOR & UMPIRE SEMINAR**

Salon C

Making Hard Decisions on the Road to a Fair and Efficient Arbitration

Arbitrators and umpires play different roles in the typical U.S. reinsurance arbitration. This year's seminar will focus on the difference in those roles as they impact key decision points on the road to a hearing. The faculty for this program are arbitrators who have extensive experience both in the role of a party-arbitrator and in the "middle chair" and will feature a lively discussion of how their role in a particular case impacts their approach to the hard decisions.

Thursday, November 8

7:00 a.m. – 9:00 a.m. **Registration**

Promenade

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7:30 a.m. – 8:30 a.m. **Breakfast**

Salon FGHI

8:30 a.m. – 8:40 a.m. **GENERAL SESSION:**
Welcome from the Conference Co-chairs

Salon DE

Scott Birrell, Travelers Companies, Inc.
Michael Carolan, Troutman Sanders LLP
Cynthia R. Koehler, AXA XL
Joseph K. Scully, Day Pitney LLP

8:40 a.m. – 9:20 a.m. **ARIAS•U.S. Organizational Update**
Salon DE

9:20 a.m. – 10:10 a.m. **GENERAL SESSION: Opening Keynote**
Salon DE

The Honorable Shira A. Scheindlin, Former United States District Judge

10:10 a.m. – 10:40 a.m. **MORNING REFRESHMENT BREAK**
Salon DE Foyer

10:40 a.m. – 11:30 a.m. **GENERAL SESSION: Expanding ARIAS•U.S. to Policyholder and Direct Insurer Disputes: Delivering the Best Arbitrators and Mediators for ALL Insurance Disputes**
Salon DE

Leading policyholder and insurer litigators as well as ARIAS•U.S.-certified arbitrators with backgrounds from both the policyholder and insurer sides will present (1) a report on the status of ongoing ARIAS•U.S. / Policyholder counsel efforts to bring policyholder-insurer disputes to ARIAS•U.S., (2) meeting the challenge to ARIAS•U.S. in expanding, training and promoting its pool of certified arbitrators and mediators for policyholder-insurer disputes that both sides can confidently accept, and (3) exploring the expansion of ARIAS•U.S. to direct insurer disputes. Envisioning an expanded ARIAS•U.S. that resolves all insurance disputes.

Moderator: *David W. Ichel, X-Dispute LLC*
Panel: *Steven Gilford, JAMS*
Kim D. Hogrefe, Kim Dean Hogrefe, LLC
Peter Halprin, Anderson Kill LLP
Deirdre Johnson, Squire Patton Boggs LLP
Lawrence Pollack, JAMS
Carlos Romero, Jr., Post & Romero LLP
Peter K. Rosen, Latham & Watkins LLP

11:30 a.m. – 12:20 p.m. **GENERAL SESSION: New Options for Legacy Run-off Business**
Salon DE

A number of states have enacted (or are considering) legislation similar to that found in the UK/Europe: a Part VII Transfer permitting a company with discontinued legacy business to transfer (by way of a novation) that business to a new entity, enabling the transferring company to remove the liabilities from its balance sheet.

Moderator: *Jonathan F. Bank, Locke Lord LLP*
Panel: *Marvin Mohn, Pro Insurance Solutions & CX Reinsurance Company Limited*
Robert Romano, Locke Lord LLP
David Scasbrook, Swiss Re
Jim Wrynn, FTI Consulting

12:20 p.m. – 12:25 p.m. **Announcements from the Executive Director**
Salon DE

12:30 p.m. – 2:00 p.m. **LUNCHEON**
Salon FGHI

1:00 p.m. – 2:00 p.m. **NETWORKING LOUNGE OPEN**

Salon DE Foyer

2:00 p.m. – 2:50 p.m. **BREAKOUT SESSIONS — ROUND 1**

Breakout Session 1: Efficient Data Security – The Use of "Deal Rooms" in Arbitration

Salon A

This program explores the why, when and how of using "deal rooms" in arbitration. It will include a live demonstration of deal rooms and tips on how they can be used efficiently to maintain data security.

Panel: *Michael Menapace, Wiggin and Dana LLP*
Sarah Arad, Intralinks
Barry L. Weissman, Carlton Fields Jorden Burt LLP

Breakout Session 2: Issuance & Enforcement of Arbitral Subpoenas

Greenpoint & Williamsburg

This session will explore the potential minefield of issues that face an arbitration panel in the issuance of third-party subpoenas, including: status of the law, subpoena issuance contrasted with enforcement, and the role of the panel – merely administrative or more?

Panel: *Debra J. Hall, Hall Arbitrations*
Daryn Rush, White and Williams LLP

Breakout Session 3: Emergency First Aid: How to Quickly Resolve Hearing "Burns"

Salon B

While counsel maintains the ability to later vacate an arbitration award in the event of bias or other arounds, all stakeholders need quick, pragmatic remedies should an event occur which threatens the integrity or effectiveness of the proceeding. Experienced arbitrators, lead counsel, and a party representative will describe extreme situational difficulties and how to cure them.

Panel: *David Loper, Protective Life Insurance Company*
Susan E. Mack, Adams and Reese LLP
Neal J. Moglin, Foley & Lardner LLP

Breakout Session 4: Cheaper? Faster? Really? Getting Arbitration Back on Track

Salon C

Arbitration is frustratingly expensive – while budget pressures are ever increasing. And...ARIAS wants to expand its market. We must deliver value to our user community. This interactive session focuses on specific issues and strategies to improve the cost-benefit equation. Attendees will play an active role in discussing and evaluating ideas.

Panel: *Leslie A. Davis, Troutman Sanders LLP*
Charles Ehrlich, ARIAS•U.S. Certified Arbitrator
David Thirkill, The Thirkill Group

3:00 p.m. – 3:50 p.m. **BREAKOUT SESSIONS — ROUND 2**

Breakout Session 1: Efficient Data Security – The Use of "Deal Rooms" in Arbitration

Salon A

Repeated session – see description and panel presenters on page 6.

Breakout Session 2: Issuance & Enforcement of Arbitral Subpoenas
Greenpoint & Williamsburg

Repeated session – see description and panel presenters on page 6.

Breakout Session 3: Third Party Litigation Funding and Its Impact on Insurers
Salon C

Third party litigation funding is a $5 billion industry. Hear how it is changing the risk profile for insurers and the legal, ethical, and financial issues it presents.

Panel: *Thomas D. Cunningham, Sidley Austin LLP*
William E. Lohnes, The Hartford

Breakout Session 4: When Preclusion Is in Play
Salon B

Don't wait to learn the rules until after the game has begun! Participants will learn the "how" and "when" of ruling on preclusion motions through interactive play, and leave with solid understanding of arbitration panel authority to issue preclusion rulings and clear guidance on assessing preclusion motions.

Speaker: *Catherine Isely, Butler, Rubin, Saltarelli & Boyd LLP*

3:50 p.m. – 4:15 p.m. **Afternoon Refreshment Break**
Salon DE Foyer

4:15 p.m. – 5:05 p.m. **BREAKOUT SESSIONS — ROUND 3**

Breakout Session 1: Third Party Litigation Funding and Its Impact on Insurers
Salon C

Repeated session – see description and panel presenters listed above.

Breakout Session 2: Emergency First Aid: How to Quickly Resolve Hearing "Burns"
Salon A

Repeated session – see description and panel presenters on page 6.

Breakout Session 3: Cheaper? Faster? Really? Getting Arbitration Back on Track
Greenpoint & Williamsburg

Repeated session – see description and panel presenters on page 6

Breakout Session 4: When Preclusion Is in Play
Salon B

Repeated session – see description and panel presenters listed above.

5:10 p.m. – 6:00 p.m. **Annual Meeting and Elections**
Salon C

6:00 p.m. – 7:30 p.m. **Evening Reception**
Salon FGHI

Friday, November 9

7:30 a.m. – 8:30 a.m. **Breakfast**
Salon FGHI

7:30 a.m. – 8:15 a.m. **Committee Meetings**
Law Committee (7:45 a.m. – 8:15 a.m.) — *Williamsburg*
Arbitrators Committee — *Salon A*
Membership Committee — *Salon B*
Ethics Committee — *Salon C*
International Committee — *Greenpoint*

8:20 a.m. – 9:20 a.m. **GENERAL SESSION: Emerging Risks/ Issues**
Salon DE

At the Spring Conference, last May we talked about "emerging risks" and their potential impact on the (re)insurance and arbitrator community. The things that were keeping our Underwriters awake at night last Spring have certainly not gone away, in fact, some have progressed at an alarming rate, while altogether new risks have moved on to the horizon. Whether "emerging" or "emerged" we have identified several topics worthy of your continued attention, and will provide a "quick hit" update on them in a modified "rapid-fire" format honed over our last few gatherings.
Topics include: Opioids, Concussions, Talc, Climate Change/ Extreme weather and #MeToo/ Sexual Harassment.

Moderator: Cynthia R. Koehler, AXA XL
Opioids: *Robert A. Kole, Choate Hall & Stewart LLP*
Concussions: *Richard J. Pratt, Troutman Sanders LLP*
Talc: *Heather Simpson, Kennedys CMK LLP*
Climate Change/Extreme Weather: *Laura Foggan, Crowell & Moring LLP*
#MeToo: *Joe Farrell, Latham & Watkins LLP*

9:20 a.m. – 10:10 a.m. **GENERAL SESSION: A Tale of Three Jurisdictions: Disclosures in The U.S., England & Bermuda**
Salon DE

Recent cases in the U.S., England and the Cayman Islands take varying approaches to arbitrator disclosure requirements, and the consequences of non-disclosure. A panel of experts will discuss the trends, and debate the merits of the varying approaches.

Moderator: *Jan Woloniecki, ASW Law Limited*
Panel: *Ian R.C. Kawaley, Judge of the Cayman Islands Grand Court (formerly Chief Justice of Bermuda)*
Steven C. Schwartz, Chaffetz Lindsey LLP

10:10 a.m. – 10:35 a.m. **Morning Refreshment Break**
Salon DE Foyer

10:35 a.m. – 11:25 a.m.

GENERAL SESSION: How the Political Wars are Affecting the Insurance Industry and What to Expect in the Years to Come

Salon DE

The daily Twitter Wars, whether disturbing or amusing to you, are changing the dynamics of both the federal and state governments. The Insurance/Reinsurance Industry is not a bystander, and is being affected in both small and large ways. This session will outline the current political environment, hypothesize on the likely future environment, and discuss the impact these events will have on insurance issues such as: NAIC, Marijuana, TRIA, National Flood Program, State Bad Faith Laws, State Budgetary Crises, Credit for Reinsurance & Capital Standards.

Moderator:	*Deana Lykins, Selective Insurance Company of America*
Panel:	*Jeff Beck, Selective Insurance Company of America*
	Deirdre Manna, Zurich North America
	John K. Tiene, Agency Network Exchange

11:25 a.m. – 12:15 p.m.

ETHICS SESSION: Vacating an Award: Lessons from the ICA v. Underwriters Decision

Salon DE

In ICA v. Underwriters, the Second Circuit issued a major decision on whether an arbitral award could be voided for evident partiality on the basis of improper arbitrator disclosure. Besides summarizing this important decision, we will provide "takeaways" for arbitrators, counsel, and clients. This segment is designed for ethics credit.

Moderator:	*Marc L. Abrams, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. LLP*
Panel:	*Andrea Giannetta, Enstar Group*
	Sarah Kutner, General Reinsurance Corporation
	Zhanna Plotkin, Esq., Allstate Insurance Company
	Larry Schiffer, Squire Patton Boggs (US) LLP

12:15 p.m. – 12:20 p.m.

Acknowledgements / Closing Remarks

Salon DE

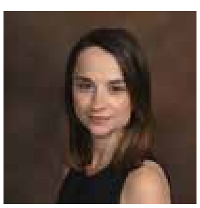
NY CLE CREDIT: Nine hours of Continuing Legal Education credits are available to those who attend this conference, which breaks down as follows: 1.0 CLE credits for Ethics and 8.0 CLE credits for Areas of Professional Practice. This program is structured for both newly admitted attorneys and experienced attorneys. Sign-in and sign-out sheets will verify attendance at all sessions and will be the basis upon which certificates of attendance will be prepared and sent, but certification of completed credit hours to CLE Boards is the responsibility of each attorney.

ARIAS•U.S. 2018 Fall Conference
FACULTY BIOGRAPHIES

Marc L. Abrams

Mintz Levin Cohn Ferris Glovsky and Popeo P.C.

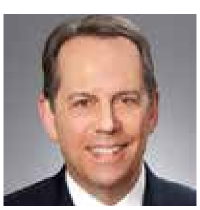
Marc Abrams has nearly 20 years of experience guiding clients through complex insurance and reinsurance dispute resolutions, both in U.S. courts and before U.S. and international arbitration panels. He represents U.S. and international insurers and has been involved in a variety of engagements for both insurers and reinsurers across various lines of insurance business. He has presented and tried many of the insurance and reinsurance industry's fundamental dispute issues, including allocation, aggregation, notice, follow the fortunes, security, payment of interest, set-offs, insolvency, captives, "cut-through" provisions, claims handling practices, claims control, special acceptances, rescission, and sunset clauses. He has been admitted as *pro hac vice* in various U.S. federal courts. On the reinsurance side, he has recently resolved several matters in court and in arbitration involving allocation and notice as well as a complex international reinsurance dispute involving a fronting company's "cut-through" rights. His practice also extends to litigating and arbitrating insurance coverage matters, broker, agency, and intermediary disputes, and other commercial disputes involving insurers, and he has recently resolved several EPLI and business interruption claims for a large U.S. insurer.



Sarah Arad

Intralinks

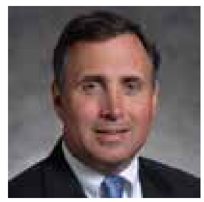
Sarah Arad is a senior account executive at Intralinks, a leading financial technology provider for the global banking, legal, deal making and capital markets communities. She focuses on relationships with law firms across the New York City tri-state area and provides tools and services to lawyers seeking a secure, online location to manage the exchange of documents for a wide range of transactions and projects.



Jonathan F. Bank

Locke Lord LLP

Jonathan Bank's practice focuses on reinsurance/insurance dispute resolution, insurance company restructuring, and regulatory-related matters (credit for reinsurance/collateral) for both the domestic and foreign/alien as well as captive insurance markets. He is well versed in matters involving reinsurance cut-through endorsements in both rehabilitations and liquidations, and he is actively involved in the run-off industry, most recently leading a firm team in licensing ProTucket Insurance Co. in Rhode Island under the state's Insurance Business Transfer Act (Reg.68). He was previously the senior vice president of Tawa Associates Ltd., as well as general counsel of CX Reinsurance Company. Prior to being one of the founding partners of Tawa, he was the insurance practice leader of PricewaterhouseCoopers' U.S. insurance/reinsurance regulatory and restructuring practice.



Jeff Beck

Selective Insurance Company Of America

Jeff Beck joined Selective in 2007 as vice president, government affairs. Prior to joining Selective, he was the head of state government relations for Aetna. He currently serves as chairman of the Future-One Committee of the Independent Insurance Agents & Brokers of America, Inc. and serves on the boards of directors of various state trade associations and groups within the American Insurance Association.

Scott P. Birrell

The Travelers Companies, Inc.

Scott Birrell is head of the Travelers Reinsurance Legal Group, Mr. Birrell has oversight of all ceded and assumed reinsurance litigation and arbitration for the Company as well as certain oversight responsibilities relative to commutation, regulatory, wording and transactional issues. Additionally, he oversees the Company's Legacy Assumed Reinsurance Claims Organization.

Prior to joining Travelers, Mr. Birrell was in private practice, specializing in the litigation and trial of general commercial and insurance-related matters. Mr. Birrell is President of the Board of Directors for ARIAS-US and is a past member of the Arbitrator and Umpire Certification Committee and past Co-Chair of the ARIAS Arbitration Task Force. He is certified as an arbitrator with ARIAS-US, and with The Association of Insurance & Reinsurance Run-Off Companies (AIRROC).

Mr. Birrell received his undergraduate degree from the University of Colorado, with honors, and his Juris Doctorate, cum laude, from the New England School of Law in Boston, Massachusetts, and is a past adjunct faculty member of the University of Connecticut School of Law. He resides in Simsbury, Connecticut, with his wife and daughter.

Michael Carolan

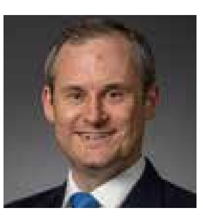
Troutman Sanders LLP

Michael concentrates his practice on litigating, arbitrating, and resolving domestic and international disputes involving reinsurance, complex insurance coverage, brokers' liability, and other commercial disputes, including. He also counsel's clients on regulatory issues, business and settlement strategy, insolvency and liquidation issues, and bad faith exposures.

Michael has represented company and intermediary clients across the life, health, and property/casualty markets in disputes regarding issues such as policy and contract interpretation, yearly renewable term reinsurance premiums, notice, aggregation of losses, underwriting practices and claims management, life settlements, reinsurance allocations, follow the fortunes and follow the settlements, rescission, fraud, misrepresentation, and sunset and commutation clauses. He has litigated and arbitrated in both state and federal courts and a variety of U.S. and foreign arbitral settings.

Michael also has significant experience representing domestic and offshore captive insurance companies and captive managers, providing counseling on reinsurance and fronting arrangements, policy drafting, claims management, regulatory issues, and commutation agreements.

Michael is a graduate of the University of Michigan and George Washington University Law School. He serves as the Co-Chair of the AIDA ARIAS-U.S. Law Committee and the Newsletter Co-Chair of the ABA TIPS Excess, Surplus Lines, & Reinsurance Subcommittee. Prior to entering the practice of law, Michael was a consultant on energy and environmental issues.



Thomas D. Cunningham

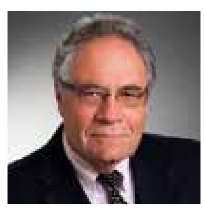
Sidley Austin LLP

Thomas Cunningham is a partner in the insurance, reinsurance, and privacy practice groups of Sidley Austin LLP. He has over 20 years of experience representing insurers and reinsurers in litigation, arbitration, regulatory investigations, and market conduct examinations. He has repeatedly been asked to replace prior counsel, in some instances after discovery has closed, to prepare high-stakes insurance or reinsurance cases for trial. He has handled disputes respecting asbestos, pollution, and health hazards, TPA/MGU matters, workers' compensation, fixed and variable annuities, life insurance, and finite risk. He also advises insurance companies and self-insured health plans on compliance matters, including HIPAA, GDPR, cybersecurity, and data breach laws. He is a member of the Technology Committee of ARIAS·U.S.

Leslie Davis

Troutman Sanders LLP

Leslie Davis handles complex litigation matters for clients in a variety of industries, including insurance and reinsurance, energy and commodities trading, biopharmaceuticals, entertainment and sports leagues. She has significant experience in handling insurance-related matters, with a focus on representing insurers in policyholders' mass tort bankruptcies, along with environmental, asbestos, concussion, and other mass-tort liabilities. She has litigated matters in federal and state courts throughout the United States, including leading trials and appeals. She also has significant experience arbitrating reinsurance and contractual indemnification disputes.



Chuck Ehrlich

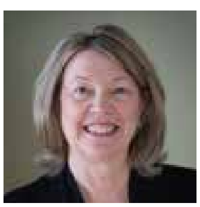
Independent Arbitrator

Chuck Ehrlich was a litigation partner in an AmLaw 100 firm when he joined the executive team organized to extricate Xerox Financial Services, Inc. from the property and casualty insurance business. He was responsible for resolving complex, volatile, high-dollar matters as the team completed its assignment for Xerox and ultimately became part of the Fairfax Financial Holdings Limited family. His corporate positions have included senior vice president and general counsel, senior vice president, claims, and senior vice president, worldwide special counsel, as well as directorships of domestic and foreign insurance companies. He was responsible for the resolution of billions of dollars in disputes and the administration of legal budgets in the tens of millions of dollars annually. His portfolio included mass tort liabilities, pollution, class actions, products liability, and complex commercial coverages. He is familiar with all aspects of the property and casualty industry and has served as an umpire and a party arbitrator.

Joe Farrell

Latham & Watkins, LLP

Joe Farrell is a partner in the Los Angeles office of Latham & Watkins. His litigation practice focuses on employment law litigation and counseling. He provides employment law advice to, and represents, employers in litigation in the following industries: automotive, biotech, finance, food services, garment, healthcare, retail, technology, telecommunications, and utilities. In addition, he also provides legal advice to not-for-profit organizations. He writes on a variety of employment law topics And is the contributing editor for the Rutter Group's California Practice Guide, Employment Litigation, Age Discrimination chapter. He is a co-author of "Age Discrimination, A Guide for California Employers" and "Age Discrimination Claims: A Growing Problem for Employers." He has also assisted in drafting chapters in "Sexual Harassment in Employment Law" (B. Lindemann & D. Kadue) and "Employment Discrimination Law" (P. Grossman and B. Lindemann) concerning responding to internal complaints of sexual harassment and class action employment discrimination litigation, respectively. He also teaches employment law as an adjunct professor at USC's Gould School of Law.



Laura Foggan

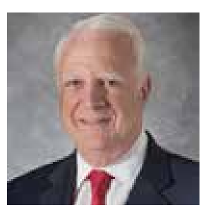
Crowell & Moring LLP

Laura Foggan chairs the Insurance/Reinsurance Group at Crowell & Moring LLP, where she represents insurers in complex, precedent-setting disputes nationwide. She is one of the industry's leading attorneys helping insurance and reinsurance companies address emerging issues and maximize opportunities in the digital age. She has been described by LawDragon 500 Magazine as "one of the most successful advocates for the insurance industry to ever practice" and named Washington, D.C., insurance "Lawyer of the Year" by Best Lawyers (2017). She litigates high-profile coverage disputes, product liability, and privacy claims in state and federal courts and has participated in more than 300 significant insurance appeals across the country, addressing coverage for environmental and toxic tort, asbestos, construction defect, product liability, privacy and cyber security, and many other claims. A Who's Who Legal (2018) Thought Leader for Insurance & Reinsurance, she has significant experience representing insurer trade groups on a wide variety of issues affecting the business of insurance, and advocates for insurers in legislative and regulatory matters. She counsels insurers on emerging issues such as autonomous vehicles and drones, privacy and cyber liability, global warming (climate change), the Internet-of-things (IoT), artificial intelligence (AI), and utilization of blockchain or distributed-ledger technology. She also assists in drafting insurance policy forms and endorsements, offering strategic suggestions and form language to meet product goals and regulatory requirements.

Andrea Giannetta

Enstar Group

Andrea Giannetta has over 20 years' experience in the insurance and reinsurance industry. She joined Enstar U.S. in 2007 and serves as senior vice president litigation legal counsel, where she is the head of the litigation team that provides litigation services, advice, and counsel to the Enstar Group Limited organization worldwide on a wide range of insurance claims, coverage and reinsurance matters pending in the U.S. and Canada. In this capacity, she has supervised numerous reinsurance disputes that have been tried before arbitration panels and courts. Prior to joining Enstar U.S., she was with RiverStone Claims Management, where she was an assistant vice president in the complex claims unit and then reinsurance counsel in the legal department. She also led the legislative team for Fairfax Financial Holdings in the endeavor to enact the FAIR Act for the benefit of the insurance industry. She began her career in private practice, representing insurance and reinsurance companies in insurance coverage and reinsurance disputes.



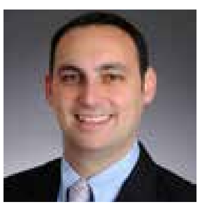
Steven Gilford

JAMS

After 40 years of legal practice, Steve Gilford recently joined JAMS to focus full-time on service as a mediator and arbitrator. He is certified as an arbitrator and mediator by ARIAS U.S. and the Circuit Court of Cook County, Illinois and has taught insurance at Duke Law School. While in private practice at Mayer Brown and then Proskauer, he spent much of his time on insurance and reinsurance. He has broad experience in trial and appellate litigation and domestic and international arbitration and has represented clients in all segments of the insurance industry, including policyholders, insurers, reinsurers, captives and brokers. His experience includes virtually every area of insurance coverage, including CGL, D&O, cyber, E&O, product recall, employment practices, first party property, and business interruption.

Debra J. Hall
Hall Arbitrations

Debra Hall is a reinsurance professional and former litigator who has held positions that include senior vice president/general counsel of the RAA; senior vice president/senior regulatory counsel at Swiss Re, senior vice president/general counsel of the Illinois receivers' office, and a lead government litigator in Illinois, where she tried major federal class-actions. She is a certified ARIAS - U.S. arbitrator and is also retained as an umpire and expert witness. She has extensive experience in reinsurance, regulation, and dispute resolution procedures, including the development of the RAA Manual for the Resolution of Reinsurance Disputes and the formation/facilitation of the Insurance and Reinsurance Industry Dispute Resolution Task Force. She is one of the founding members of ARIAS-U.S., has testified before many state legislatures and U.S. Congressional subcommittees, and has presented to hundreds of audiences in the U.S., Europe, Bermuda, Brazil and Asia. She has published numerous articles and written/supervised more than 50 amicus briefs and compendiums of nation-wide reinsurance case law, statues and regulations.

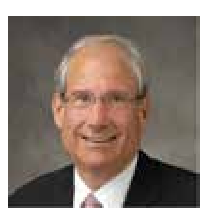


Peter A. Halprin
Anderson Kill LLP

Peter Halprin is an attorney in Anderson Kill's New York office. His practice concentrates in commercial litigation and insurance recovery, exclusively on behalf of policyholders. He acts as counsel for U.S. and foreign companies in domestic and international arbitrations, including both ad hoc (ARIAS, Bermuda Form, London) as well as institutional (AAA, ICC, ICDR, JAMS, LCIA) arbitration forums. He is a Fellow of the Chartered Institute of Arbitrators and received a Postgraduate Distance Learning Diploma in International Commercial Arbitration from the Queen Mary School of Law, University of London. He has successfully completed the Hong Kong International Arbitration Centre's (HKIAC) Tribunal Secretary Accreditation Programme and is on the Tribunal Secretaries Panel for the Australian Centre for International Commercial Arbitration (ACICA). He is also an adjunct professor of law and coach of the Benjamin N. Cardozo School of Law Willem C. Vis International Commercial Arbitration Moot Team. He is deputy co-chair of Anderson Kill's Cyber Insurance Recovery Group and a member of the firm's Financial Services Industry Group. Since 2013, he has been recognized by Super Lawyers as a New York Metro Rising Star for Insurance Coverage.

Kim D. Hogrefe
Kim Dean Hogrefe, LLC

Kim Hogrefe has formed an LLC to pursue opportunities as a mediator, arbitrator and consultant. His focus as a mediator is on insurance and reinsurance coverage disputes and high value civil cases worldwide. He is certified as a mediator by the Straus Institute of Dispute Resolution/Pepperdine School of Law and has mediated over 70 cases for a volunteer court program in the New Jersey. He is certified by ARIAS-U.S. as a reinsurance arbitrator. He recently completed a term as chair of the board of trustees of the National Judicial College, which provides educational programs and training for U.S. judges, and currently serves on the board's Executive, Nominations and Governance, and Audit Committees. He was a senior vice president of Chubb & Son and had responsibility for the dispute resolution process and management of claims under insurance and reinsurance policies in lines of business including cyber liability, directors and officers, errors and omissions, fidelity and surety, fiduciary liability, financial lines, and employment practices liability. He previously served as a trial attorney, supervisor and administrator in the Manhattan District Attorney's Office, where he investigated and prosecuted homicide and serious felony cases (including the murder of John Lennon) and tried over 30 cases to juries. He is an active member of the American Bar Association and ARIAS-U.S. He was elected as a member of the governing council and financial officer of the ABA Tort Trial and Insurance Practice Section (TIPS). A recipient of the TIPS Andrew Hecker Award, he currently serves on its Cybersecurity and Data Privacy Committee. He recently completed a term on the council of the ABA's Judicial Division. He serves on the Arbitrators' Committee of ARIAS-U.S. and chairs its sub-committee that is exploring the expansion of ARIAS-U.S. to the resolution of direct insurance disputes. He is a frequent speaker on the topics of cyber liability risks, mediation and arbitration strategies, and D&O liability claim resolution strategies.

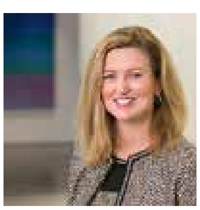


David W. Ichel
X-Dispute LLC

David Ichel is an arbitrator, mediator, and special master certified by ARIAS-U.S., CPR (the International Center for Conflict Prevention and Resolution), and FedArb (Federal Arbitration, Inc.) as well as an adjunct professor of Law at Duke University's and the University of Miami's Law Schools, where he teaches complex civil litigation. He retired as a longtime partner at Simpson Thacher & Bartlett LLP at the end of 2015 after 37 years at that firm, where he was one of the founding partners of its insurance practice and was a broad-gauged litigator for large scale insurance, insurance insolvency, financial services, securities, product liability and commercial disputes of nearly every variety. He was elected to the American Law Institute in 1993, serves on the board of visitors of Duke Law School (which he chaired in 2009-2015), and until recently served as a member of the Board of Mobilization for Justice (1996-February 2018; chair 2000-02).

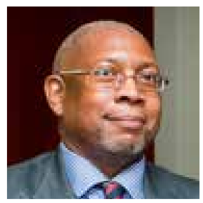
Catherine E. Isely
Butler Rubin Saltarelli & Boyd LLP

Catherine Isely is a trial attorney and Butler Rubin partner who has litigated and arbitrated complex commercial disputes for more than two decades. For the past ten years, Chambers USA has recognized her as a leading Illinois lawyer in reinsurance dispute resolution. She has extensive experience before courts and arbitration panels litigating the allocation of environmental and toxic tort settlements, as well as disputes related to claims handling, negligent underwriting, bad faith allegations, pool membership rights and obligations, retrospectively-rated business, commutations, retrocessional coverage, title reinsurance, direct access provisions, obligations to follow settlements, obligations to post security, and the interpretation and application of ultimate net loss, aggregate limit, definitive statement of loss, net retained lines, prompt notice, access to records, consent to settle, honorable engagement and arbitration clauses. She is a founding member and co-host of Butler Rubin's annual Women in Reinsurance Program.



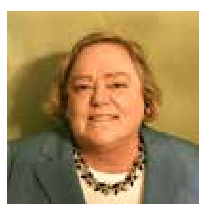
Deirdre G. Johnson
Squire Patton Boggs LLP

Deirdre Johnson represents insurers, reinsurers and captives in coverage disputes involving professional liability, life and health, variable annuity, general liability, surety, product liability, employment discrimination and environmental matters. She has handled dozens of arbitrations in both domestic and international proceedings, including many Bermuda and London arbitrations arising out of a broad range of claim types in both direct insurance and reinsurance matters. She represents insurers providing directors and officers/errors and omissions/fidelity coverage and has taken disputes arising out of such coverage through to arbitration award. Additionally, she represents companies in disputes under life reinsurance treaties on such matters as rate increases pursuant to yearly renewable term agreements. Chambers USA ranked her as a top attorney in insurance/reinsurance, and she is recognized as a leader in insurance/reinsurance by the Who's Who and Super Lawyers rankings. Her practice also includes the defense of public corporations in class actions, derivative lawsuits, mergers and acquisition litigation, and SEC enforcement actions.



Ian R.C. Kawaley
Judge of the Cayman Islands Grand Court (formerly Chief Justice of Bermuda)

Ian Kawaley served as chief justice of Bermuda and senior commercial judge between April 2012 and July 2018, when he retired from the Bermuda Bench. He was first appointed to the Supreme Court of Bermuda in July 2003 and was a founding member of Bermuda's Commercial Court when it was established in January 2006. He became an Overseas Master of the Bench (Middle Temple) in October 2017. His Bermuda arbitration law experience includes appearing as counsel before arbitrators while in practice, judicially enforcing arbitration agreements, and chairing an arbitration tribunal. He is currently a judge of the Financial Services Division of the Cayman Islands Grand Court and presides over a wide range of commercial and trust matters.



Cindy Koehler
AXA XL

Cindy Koehler is senior vice president, global practice leader, casualty claims at AXA XL, where she manages a team of highly experienced specialists overseeing claims in all lines of casualty business on a global basis. She is responsible for setting litigation/arbitration/settlement strategy for AXA XL's most complex casualty claims, identifying and understanding emerging risks and claims trends, and interacting with underwriters, actuaries and brokers on casualty claim results. Prior to joining XL Catlin in early 2016, she managed the Complex & Emerging Risks Legal Department at Liberty Mutual Insurance Company. She is a certified ARIAS-U.S. arbitrator and a member of the ARIAS U.S. Board of Directors.

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Rob Kole

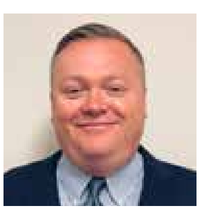
Choate, Hall & Stewart, LLP

Rob Kole is a partner in the Insurance & Reinsurance Group of Choate, Hall & Stewart. He has argued before the U.S. Court of Appeals for the First, Second, Fifth, Ninth and Eleventh Circuits, as well as various state appeals courts, in connection with insurance and reinsurance disputes. He has successfully litigated opioid coverage cases via trial, summary judgment and federal and state appellate review. His practice focuses on reinsurance arbitration, litigation and complex claim analysis on behalf of cedents and reinsurers, and insurance litigation, arbitration, alternative dispute resolution and coverage analyses on behalf of insurance companies, involving pharmaceutical products, asbestos, hazardous waste, toxic tort, workers compensation, catastrophe bonds, D&O, E&O, personal and advertising injury, property and hurricane-related losses. In 2017, he was elected a Fellow of the American College of Coverage and Extracontractual Counsel. He is listed as a leading lawyer for insurance in Chambers USA, is recognized in The Legal 500 as a leading lawyer for Insurance, and has been elected to the 2017 World's Leading Insurance and Reinsurance Lawyers by Who's Who's Legal.

Sarah Kutner

General Reinsurance Corporation

Sarah Kutner is an assistant general counsel at General Reinsurance, where she oversees various claims and litigation against the company as well as counseling internal clients on a variety of topics, including trade sanctions, data privacy, contract language and negotiation, employment law, information security law, conflicts of interest, and other compliance issues. Before joining Gen Re in 2014, she was an insurance and commercial litigator at DLA Piper.



William E. Lohnes

The Hartford

William E. Lohnes is assistant general counsel - reinsurance law at The Hartford Financial Services Group, Inc., in Hartford, Connecticut. Prior to joining the Reinsurance Law unit at The Hartford, he spent six years as a lawyer in The Hartford's complex claim group, providing coverage advice in connection with long-tail and other complex claims, and defending the company in coverage litigation associated with those claims. He was a commercial litigator for six years in private practice before joining The Hartford.

David M. Loper

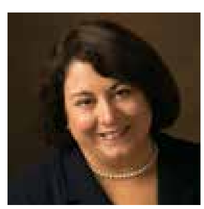
Protective Life Corporation

David M. Loper is senior vice president and senior counsel at Protective Life Corporation, where he advises the life insurance division and supervises litigation. He has an AV rating from Martindale Hubbell and was named outstanding corporate counsel by the Birmingham Business Journal. He currently serves as the chair of the Life Insurance Committee of the American Council of Life Insurers and previously chaired its Litigation Committee. He serves on the boards of directors for the Birmingham Zoo, REV Birmingham (which revitalizes commercial districts), and Birmingham AIDS Outreach. He has run five marathons, taught all his nieces and nephew how to water ski, and survived running with the bulls in Pamplona.

Deana Lykins

Selective Insurance Company Of America

Deana Lykins joined Selective in December 2016. Prior to that, she was president of the Insurance Council of New Jersey and assistant counsel to the New Jersey Senate majority. She serves on the boards of directors of a number of insurance entities, including AIPSO, the New Jersey and Delaware Guaranty Funds, the New Jersey Automobile Insurance Risk Exchange, and the New Jersey Compensation Rating & Inspection Bureau.



Susan E. Mack

Adams and Reese LLP

Susan Mack serves as special counsel in the Jacksonville, Florida, office of Adams and Reese LLP following a 25-year career as general counsel and chief compliance officer of both insurers and reinsurers in the life/health and property/casualty sectors of the insurance industry. She is a founding director of ARIAS-U.S., was the first woman to serve on the ARIAS-U.S. Board of Directors, is a members of the association's Ethics Committee, and holds ARIAS-U.S. certifications as an umpire and arbitrator and is also a qualified mediator. In addition to her current insurance regulatory practice, she accepts assignments as an arbitrator, mediator. and expert witness.

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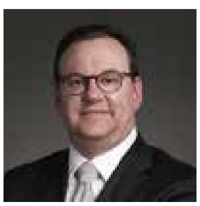
Deirdre Manna

Zurich North America

Deirdre Manna is senior vice president and head of Zurich North America Government & Industry Affairs. She has over 20 years of varied experience in developing and advancing state and federal public policy initiatives that impact the insurance industry. She came to Zurich from the Property Casualty Insurers Association of America (PCI), where she served as political engagement and regulatory affairs vice president, leading PCI's political engagement division and managing regulatory and industry affairs throughout the country for the association, including managing professionals in Washington, D.C. She is a former state insurance regulator, having served as acting director of the Illinois Division of Insurance. She also served as assistant vice president of the American Insurance Association and as a government relations professional for a prominent national law firm. She was named among the insurance industry's Elite Women of 2017 by Insurance Business of America.



Michael Menapace

Wiggin and Dana LLP

Michael Menapace represents insurers in court and arbitrations. He has litigated numerous disputes through final verdict, including disputes concerning bad faith, insurance coverage, reinsurance, premium calculations, and allocation among policies. Leading insurance industry trade groups have engaged him to represent them on matters of industry-wide importance before trial and appellate courts. He advises insurers on policy construction, coverage, compliance and regulatory issues and often represents stock, mutual, and captive insurers in their dealings with state regulators, including proceedings concerning rates, applications for acquisition of control, and market conduct exams. In addition, he advises companies on a variety of privacy and data protection issues and defends companies facing potential data breach liability. He also advises clients in connection with internal and government investigations and responses thereto, including cyber breaches. He lectures and publishes regularly: he teaches insurance law at the Quinnipiac University School of Law and is co-editor of *The Handbook on Additional Insureds*, published by the ABA (2012).

Neal Moglin

Foley & Lardner LLP

Neal Moglin is a partner and litigation attorney with Foley & Lardner LLP. He is an experienced litigator who regularly represents ceding companies and reinsurers in arbitrations involving life/accident and health and property/casualty contracts. He has also represented insurers and reinsurers in federal and state courts in New York, Illinois, Texas, Florida, and other jurisdictions. He is chair of the firm's Insurance & Reinsurance Litigation Practice and a member of the Insurance & Reinsurance Industry Team.

Marvin Mohn

Pro Insurance Solutions & CX Reinsurance Company Limited

Marvin Mohn is the group general counsel of Pro Insurance Solutions and general counsel of CX Reinsurance Company Limited. He was one of the founding shareholders of Tawa plc in 2001 and was appointed that company's general counsel in 2007 and a director in 2017 (the company is presently called ACHP plc). He previously served as the chief executive officer of Tawa's former subsidiaries, PXRE Reinsurance Company Limited, Lincoln General Insurance Company, and QX Reinsurance Company Limited, and he presently serves as a director of Island Capital Limited and Asta Managing Agency Limited. He is a member of the State Bar of California and a qualified English solicitor. Before joining Tawa, he was with the restructuring practice of Pricewaterhouse Coopers LLP and before that was a lawyer with Chadbourne & Parke LLP. In 2002, he assisted in drafting Chapter 25 of the Rhode Island statutes on Voluntary Restructuring of Insurers and assisted in drafting the recent amendments to that statute, strengthening its provisions on insurance business transfer plans.

Zhanna Plotkin

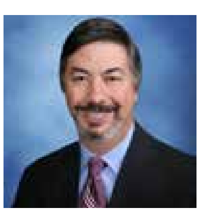
Allstate Insurance Company

Zhanna Plotkin is a senior attorney with the Reinsurance Law Team at Allstate Insurance Company. She provides legal counsel on all matters pertaining to reinsurance, including claims, underwriting, regulatory, compliance, operations, contract drafting, and program structuring. She also oversees and handles Allstate's reinsurance disputes, including arbitrations and litigations globally. She has broad experience across a variety of lines of business, including property, casualty, and professional liability (D&O, EPL, crime, fiduciary, architects and engineers, medical malpractice, legal malpractice, and agents' E&O). Prior to joining Allstate, she was a casualty claims expert at SCOR Reinsurance Company, Inc. and an associate at Tressler, LLP where she focused her practice on the counseling, arbitration and litigation of complex reinsurance and insurance disputes on behalf of cedents, reinsurers, and insurers.

Lawrence W. Pollack

JAMS

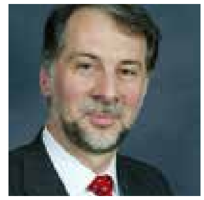
Lawrence Pollack serves as a neutral arbitrator, mediator, special master, and discovery master of complex business/commercial and insurance matters. He specializes in enabling, through negotiation or arbitral proceedings, the resolution of difficult disputes with significant claims among multiple parties with divergent interests. He has 30 years of experience that he employs at JAMS to address commercial disputes, business, partnership and joint venture dissolution actions, legal malpractice matters, product liability cases, aviation controversies, and sophisticated issues in all aspects of domestic and international insurance and reinsurance, including those relative to claims, subrogation, policy language, regulation, and business strategy. He is often the neutral selected by both policyholder and insurance counsel for dispute resolution services. He joined JAMS in 2010 after 28 years in private practice at Dewey & LeBoeuf LLP and its predecessor firms, where his practice often required travel to Europe for work on cases venued in the U.S. involving parties based overseas. By virtue of that experience, he is now a member of the JAMS International panel and serves as a neutral in matters with an international dimension. In 1999, he began a 10-year service as co-chairman of his firm's Litigation Department. He became a member of the firm's Executive Committee in 2003 and served on that committee until his retirement from the firm in 2009.



Richard Pratt

Troutman Sanders LLP

Richard Pratt has significant litigation and mediation experience in cases nationwide involving a myriad of procedural and substantive issues, with an emphasis on mass tort, environmental insurance coverage and other complex litigations. He counsels clients on a wide variety of issues, including insurance coverage, settlement, and policy drafting issues, and has represented clients in numerous state courts as well as federal district courts and federal courts of appeal.



Robert Romano

Locke Lord LLP

Robert Romano is a partner in Locke Lord's New York office, with more than 35 years of legal experience in international matters, having resided in both London and Brazil. He has assisted numerous clients from Brazil, the United Kingdom, Europe, Japan and China, as well as U.S. companies, in such areas as banking and insurance regulatory and corporate matters and energy development, as well as related cross-border litigation strategies. He assists clients in formulating strategies to enter into or restructure their operations, including legacy business, in the U.S. market – to obtain and maintain licenses domestically and to engage in activities in the U.S., to acquire energy assets from U.S. sources, and to maintain compliance with U.S. requirements for operations abroad and domestically, including the strictures of the U.S. Office of Foreign Asset Control and the U.S. Foreign Corrupt Practices Act.

Carlos Romero, Jr.

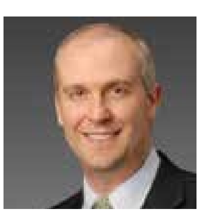
Post & Romero LLC

Carlos Romero has been an arbitrator since around 1995 and is on numerous panels; he has been a mediator since 2010. The panels, appointments, and licenses include the following: Florida Certified Circuit Mediator (2010); Certified Arbitrator by Tribunal General de Justicia for cases referred by the courts of the Commonwealth of Puerto Rico (November 2014); American Arbitration Association (1995); International Centre for Dispute Resolution (ICDR); International Institute for Conflict Prevention & Resolution; Distinguished Neutral of Panels for Insurance policyholder coverage; Certified Public Accountants, Miami ADR, Real estate, Cross-Border, and Taxation; The Chartered Institute of Arbitrators, Chartered Arbitrator, Presidential Panel of Arbitrators, and Fellow Member; and Certified Arbitrator of ARIAS-U.S., Inc. He is active as an advocate as well as an arbitrator in arbitrations. He prefers neutral arbitration to party-appointed panels and has served on both types of panels. His experience includes life, health, and casualty insurance, reinsurance, insurance pools, intermediary reinsurance managers, and general managing agents. He has represented the reinsurer, the reinsured, the insured, the insurance agents in various jurisdictions, sale of portfolios of lines of insurance, policy development for excess surplus line insurer, RICO claims against former officers of insurer, and investigations conducted by regulatory insurance agencies.

Peter K. Rosen

Latham & Watkins, LLP

Peter Rosen is a partner in the Los Angeles office of Latham & Watkins and is a member of the litigation department. From March 2013 until February 2018, he was the global chair of the Insurance Coverage Litigation practice. He represents insurance policyholders in matters involving commercial general liability policies, directors' and officers' liability insurance policies, transactional liability insurance policies, environmental insurance, fidelity insurance, professional liability policies, property disputes, and surety bonds. He was the lead lawyer for the retail leaseholder at the World Trade Center in the massive insurance coverage litigation arising out of the 9/11 attacks. His role in the World Trade Center insurance coverage litigation gained him worldwide recognition. His practice also includes counseling boards of directors and senior management on directors' and officers' litigation, corporate governance issues, insurance strategies, indemnification agreements and bylaws. He is recognized by Chambers USA as a leading insurance policyholder lawyer. Since 2007, he has taught insurance law as well as corporate governance at the USC Gould School of Law and taught insurance law at Pepperdine Law School during the Spring 2018 semester. He is as a Fellow of the Chartered Institute of Arbitrators (CIArb), a Fellow of the American College of Coverage and Extracontractual Counsel, a Master Member of the Pepperdine Straus American Inn of Court for Dispute Resolution, and a CEDR Accredited Mediator. He also is a panel mediator for the United States District Court for the Central District of California, a panel mediator for the California Court of Appeal, Second Appellate District, and a mediator and arbitrator for the Los Angeles County Attorney-Client Mediation and Arbitration Service.



Daryn Rush

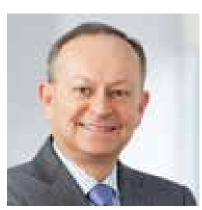
White and Williams LLP

Daryn Rush is a partner at White and Williams, where he is chair of the Reinsurance Group and leader of the Business of Insurance Team. He represents domestic and foreign insurers and reinsurers in arbitration, mediation and litigation and has tried dozens of reinsurance arbitrations and lawsuits to final award or verdict. He has worked extensively on insurance receiverships and represents insurers, reinsurers, managing general agents, policyholders, and other interested parties in domestic and foreign insolvencies. He advises companies on transactional matters, including assumption reinsurance and alternative risk transfer transactions, product development and regulatory issues, contract drafting and claim audits. He frequently speaks and writes on emergent insurance and reinsurance-related issues. He serves on the Public Interest Law Center's Board of Directors, volunteers at Senior Law Center clinics, and is a mentor in the Philadelphia Futures Sponsor-a-Scholar program.

David Scasbrook

Swiss Re

David Scasbrook is Swiss Re's lead for Non-Life Retrospective Products. He is chairman of Swiss Re Portfolio Partners, the European closed book acquirer, and CEO of Swiss Re Specialty Insurance UK Ltd. He has been with Swiss Re since 2004 via its acquisition of GE Insurance. He has global responsibilities for, and considerable experience of, the marketing of, structuring, costing, closing and post-close migration and operations of run-off and unexpired contracts. His insurance restructuring experience dates from the Equitas project in 1995, and he has remained in this sector since. He has led corporate and run-off restructuring projects in various jurisdictions, including the U.K., Australia, Hong Kong, Holland, Germany, Italy, and Canada, and is one of the insurance industry's leading practitioners of non-life regulatory and legal business transfers.



Larry P. Schiffer

Squire Patton Boggs (US) LLP

Larry Schiffer is a partner in the New York office of Squire Patton Boggs (US) LLP, where he practices complex commercial, insurance, and reinsurance litigation, arbitration, and mediation. He also advises on coverage, insurance insolvency, and contract wording issues for a variety of insurance and reinsurance relationships. He is chair of the ARIAS•U.S. Technology Committee and a member of the ARIAS•U.S. Ethics Discussion Committee; he also is a member of the ABA's Tort Trial & Insurance Practice Section, where he was chair of the Excess, Reinsurance & Surplus Lines Committee. He was also chair of the New York State Bar Association Committee on Association Insurance Programs for nine years. He has lectured about and been published on reinsurance and insurance topics for ARIAS•U.S., ABA, ACI, Mealey's, PLI, C-5, HarrisMartin, HB Litigation, Lloyd's Market Association, Reinsurance Magazine, Insurance Day, the Tort & Insurance Law Journal, Westlaw Journal – Insurance Coverage, and others. He serves as expert commentator on reinsurance for IRMI.com and co-authored the reinsurance chapter in the NYSBA's Insurance Law Practice treatise. He edits the Squire Patton Boggs Reinsurance Newsletter and the Insurance and Reinsurance Disputes Blog, InReDisputesBlog.com. He also is the moderator of the Reinsurance Disputes Group on LinkedIn. He has been recognized by Chambers USA, Euromoney Guide to the World's Leading Insurance and Reinsurance Lawyers, The International Who's Who of Insurance & Reinsurance Lawyers, The Legal 500, and Super Lawyers. He serves as a mediator for the U.S. District Court for the Southern District of New York and for the New York Supreme Court Commercial Division.

Steven C. Schwartz
Chaffetz Lindsey LLP

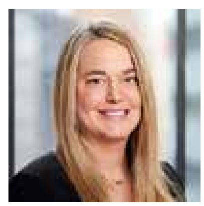
Steve Schwartz is a partner at Chaffetz Lindsey LLP. He has devoted most of his practice to reinsurance arbitration and litigation since the early 1990s. During that time, he has handled disputes relating to both property/casualty and life and health reinsurance, as well as finite risk reinsurance. He is the author of *Reinsurance Law: An Analytic Approach*, a comprehensive treatise first published in 2009 and updated semi-annually since then.

Joseph K. Scully
Partner, Insurance and Reinsurance Disputes, Day Pitney LLP

Joseph Scully is a litigator experienced in trying complex civil disputes. He has represented clients in courts throughout New England and other parts of the country including Delaware, Maryland, New York, Ohio, and Texas. Joseph has taken several matters to trial and has litigated numerous arbitrations through final hearings. He has handled appeals before a variety of courts including the First and Second Circuit Courts of Appeals and state appellate courts in Connecticut, Massachusetts, New York and Rhode Island.

Joseph's practice focuses primarily on the representation of insurance companies in insurance coverage actions and reinsurance disputes. He has litigated various types of coverage disputes, including disputes arising from asbestos and other product liability claims, environmental losses, fire and other property damage, construction defects, and equipment breakdown claims. Joseph also has handled and tried disputes involving reinsurance claims before arbitration panels and in various state and federal courts.

Joseph is a graduate of Fordham University and Harvard Law School. After law school, he clerked for The Honorable Edward F. Harrington, of the United States District Court for the District of Massachusetts.



Heather E. Simpson
Kennedys CMK LLP

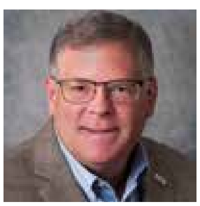
Heather Simpson is a partner in the Basking Ridge office and handles disputes throughout the United States, focusing on insurance coverage and commercial litigation matters. She has extensive experience in litigating and pursuing alternative dispute resolution of insurance coverage disputes involving professional liability, general liability, construction, environmental, product liability, and employment claims. In recent years, she has handled numerous insurance claims arising from class action and mass tort litigation asserted against various sports leagues by former professional and collegiate athletes alleging long-term brain injury. She also has experience handling appeals in both state and federal courts.

David A. Thirkill
The Thirkill Group

David Thirkill has spent over 45 years in insurance and reinsurance, concentrating in property and casualty and finite reinsurance underwriting in the London market, Bermuda, and the U.S. He began at Lloyds and then served in a London- and Gibraltar-based professional reinsurance office. In Bermuda, he managed and underwrote for captive organizations and was president and chief underwriter for a finite reinsurer. In the U.S., he had extensive involvement with workers' comp and property insurers before joining a leading run-off organization to handle significant reinsurance disputes and numerous large commutation transactions. In 2005, he became a full-time arbitrator, serving in over 250 matters as an umpire and a party-appointed arbitrator for ceding companies and reinsurers. He has acted as an expert witness, primarily regarding finite contracts, and as a mediator. His appointments have encompassed the U.S., U.K., and Bermuda and have extended beyond reinsurance into insurance and other fields.

He was recently named to the Executive Advisory Council of Vertafore, a leading provider of agency management systems, and he serves on Selective Insurance Company's New Jersey Regional Producer Advisory Council. He continues his role as a trusted advisor to leaders of the insurance industry, a role that began more than two decades ago.

Active in community and nonprofit organizations most of his adult life, he is a former chairman of the Board of Trustees of the Brain Injury Alliance of New Jersey, and served for years the BIANJ's Executive Committee and Board of Trustees.



John K. Tiene

Agency Network Exchange

John Tiene is the CEO and shareholder of Agency Network Exchange (ANE), which delivers hands-on support to agencies and their owners to increase retention and growth, improve agency operations, and increase contingent revenue by pooling premiums, while allowing agencies to maintain 100% ownership and control of their businesses. A recognized leader in the property/casualty insurance industry, he has held several challenging positions in his 30+ year career. Prior to joining ANE, he was director of personal lines sales and marketing for OneBeacon Insurance Group, Ltd., an independent agency company. During his time at OneBeacon, he conducted extensive research into building effective independent agency distribution systems. He represented OneBeacon on the advisory board of Trusted Choice®, the agency marketing organization of the Independent Insurance Agents and Brokers of America (IIABA) and the Insurance Council of New Jersey where he served as a member of the Executive Committee. For more than a decade, he was the chief lobbyist and spokesman for the Garden State's $12 billion property/casualty insurance industry. As president of the Insurance Council of New Jersey, he was directly involved in the development and passage of major legislative and regulatory reforms including the comprehensive legislative initiative to reform New Jersey's automobile regulatory system in 2003. He also served as chairman of the state-mandated commission that handled the politically sensitive issue of redrawing the geographic boundaries for automobile insurance rating for the first time in more than 60 years.

Barry L. Weissman

Carlton Fields

With a legal career spanning more than four decades, Barry Weissman brings significant experience in the insurance and reinsurance industries. He represents insurance and reinsurance companies in regulatory and transactional matters as well as in all forms of dispute resolution including arbitration, litigation, and mediation in state and federal courts on bad faith, complex litigation, and multidistrict matters. He also represents state departments of insurance in various matters including defending them in litigation and various regulatory matters such as Form A's. His practice also has an international component: he represents clients in Europe and Asia in a variety of complex reinsurance and commercial matters, many of which have involved cross-border issues such as mergers and acquisitions, dispute resolution, and insurance regulatory matters. He has served as outside general counsel to several insurance companies. For example, the California Department of Insurance asked him to serve as general counsel to one of its companies that was placed in receivership. He works closely with the senior management of various reinsurance and insurance companies advising on techniques concerning avoiding and handling dispute resolution, contract drafting, and regulatory issues. Appellate work has been a distinctive part of his practice. In addition to having a dozen published cases in both California state courts and the Ninth Circuit, he has been part of numerous teams that planned and strategized appeals. He works with clients before and during trial to help trial counsel protect the record for appeal, and handles appeals post-verdict. His appellate work has included representing insurance entities and insurance trade associations. He filed amicus briefs on behalf of the National Association of Insurance Commissioners in *Hill v. State Farm Mutual*, a landmark

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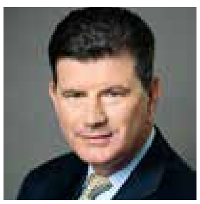
Jan Woloniecki is a member of the bars of England and Wales (1983) and Bermuda (1991) and is head of litigation at ASW Law Limited. He is the co-author of *The Law of Reinsurance in England and Bermuda*. His areas of specialization are insurance and reinsurance law, international commercial litigation and arbitration, private international law, trusts law, and insolvency law. He is a Fellow of the Chartered Institute of Arbitrators And has been appointed as an arbitrator in international arbitrations held in Bermuda, London, Hong Kong, and Singapore.



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Jim Wrynn is a senior managing director at FTI Consulting, Global Insurance Services, and leader of the Governance, Risk & Regulation practice. He is one of the leading experts in the world on insurance regulatory matters, based on his more than 30 years of professional experience as an executive, attorney, regulator and advisor. He has been involved in global insurance regulations, policies, and standards and in assisting clients in developing strategies and programs dealing with regulatory issues, capital management/optimization, identification of strategic partners and acquisitions, new product development, geographic expansion strategies, distribution solutions, risk financing and captive insurance formation, restructuring and operational performance, inquiries and investigations, enterprise risk management/own risk and solvency assessments, and a variety of other issues in the U.S. and globally. He is admitted to practice law in the federal and state courts of New York and New Jersey and the U.S. Supreme Court. He has earned a Martindale-Hubbard Peer Review rating of AV Preeminent and has been rated a top lawyer in insurance law by American Lawyer Media and Martindale-Hubbell, in insurance coverage by New York Metro Super Lawyers, and the 2017 listing of Who's Who Legal Consulting Expert Guide: Insurance and Reinsurance. He has earned an Associate in Captive Insurance (ACI) and Associate in Risk Management (ARM) designation. He has also served as a registered foreign lawyer in the United Kingdom and as an expert witness on matters involving his areas of concentration.

Thursday, November 8, 2018, 10:40 a.m. – 11:30 a.m.

GENERAL SESSION
Expanding ARIAS-US to Policyholder and Direct Insurer Disputes: Delivering the Best Arbitrators and Mediators for ALL Insurance Disputes

SESSION MATERIALS:

PRESENTED BY:
Moderator:
David W. Ichel, X-Dispute LLC
Panel:
Steven Gilford, JAMS
Kim D. Hogrefe, Kim Dean Hogrefe, LLC
Peter Halprin, Anderson Kill LLP
Deirdre Johnson, Squire Patton Boggs LLP
Lawrence Pollack, JAMS
Carlos Romero, Jr., Post & Romero LLP
Peter K. Rosen, Latham & Watkins LLP

EXPANDING ARIAS-US TO POLICYHOLDER AND DIRECT INSURANCE DISPUTES
DELIVERING THE BEST ARBITRATORS AND MEDIATORS FOR *ALL* INSURANCE DISPUTES

Panel:

David W. Ichel, Moderator
Steven Gilford
Peter A. Halprin
Kim D. Hogrefe
Deirdre Johnson
Lawrence W. Pollack
Carlos A. Romero
Peter K. Rosen

Table of Background Materials:

1. Peter K. Rosen, *Does ARIAS Have a Role To Play In Direct Insurance Arbitrations*, ARIAS-U.S. Quarterly (2d Q 2018)

2. Mark Miller, Blog, *Why Insurance Carriers Prefer Insurance Coverage Arbitration Over Litigation*, Aug. 2, 2018, http://millerfriel.com/blog/insurance-carriers-love-insurance-coverage-arbitration/.

3. Excerpt from policyholder brief in opposition to a motion to appoint an ARIAS umpire in *In Re Nat. Union Fire Ins. Co. v. Beelman Truck Co.*, 17-cv-02946-VEC (S.D.N.Y. June 16, 2017).

4. David W. Ichel and Carlos A. Romero, *Comparing Policyholder Arbitrations to Reinsurance Arbitrations*, ARIAS U.S. Quarterly (d Q 2018).

Why Insurance Carriers Prefer Insurance Coverage Arbitration Over Litigation

Posted By Mark Miller on August 2, 2018 | permalink | trackbacks(2725)
http://millerfriel.com/blog/insurance-carriers-love-insurance-coverage-arbitration/

A question that corporate policyholders should ask before entering insurance coverage arbitration is whether arbitration is a viable way to resolve a complex corporate insurance dispute. In the not so recent past, arbitration provisions in insurance policies were rare. Now, they are common. And, language contained in many standard-form arbitration clauses has become even more onerous over time. The reason for this is that Insurance Carriers prefer Insurance Coverage Arbitration over litigation.

Are Insurance Coverage Arbitrations a Good Option for Corporate Policyholders?

We address here some of the issues that corporate policyholders should note when faced with an insurance coverage arbitration. We also draw some basic conclusions about insurance coverage arbitration based on our extensive experience in this area of insurance recovery law.

First, lets look at some of the reasons why insurers feel so strongly about arbitration.

1) Arbitrators May Not Follow Policyholder-Friendly Law

To prevail on claims, policyholders rely on powerful policyholder-friendly rules of construction. For example, there is a duty to defend whenever there is any potential of coverage. Courts and arbitrators should not look to the ultimate outcome of whether the claim is covered. Rather, if a claim has any possibility of being covered, a defense must be provided. Similarly, policy exclusions are construed against insurers and in favor of policyholders, and for an exclusion to apply, there must be no other reasonable interpretation of coverage other than the one offered by the insurer.

It goes without saying that both arbitrators and Courts should follow the law. If these and other common insurance rules of construction are applied, policyholders have a distinct advantage.

As a general rule, courts follow the law, and if the law is followed, policyholders are typically entitled to coverage. In litigation, if a Court does not follow the law correctly, an appeal may be taken.

Arbitration is a different animal. Review of arbitration awards is limited, and arbitrators are generally afforded more flexibility than courts in fashioning their rulings. In insurance coverage arbitration, arbitrators may be permitted to evaluate factors that have nothing to do with coverage. Arbitrators have been known to look at what a policyholder paid for coverage in relation to the value of the claim to determine what the insurer intended as far as coverage. They may also be improperly swayed by insurance industry custom and practice regarding what insurance companies think critical language means, rather than following the legal standard of interpreting insurance policy language. These factors that arbitrators may be interested in considering cannot be considered in court, as they are legally and factually irrelevant to coverage.

Finally, some arbitrators are reluctant to apply standard rules of construction because these rules of law are designed to render black and white coverage determinations in favor of coverage. Applying these rules to most contested corporate insurance claims can lead to a ruling that the claim is covered.

To cloud the issue, insurance carriers typically raise as many possible defenses to coverage as possible, and push for devaluation of a claim, irrespective of the validity of their so-called defenses. Hence, even if the applicable legal rules mandate coverage, arbitrators can, either intentionally or unintentionally, open the door to legally invalid insurer defenses. Although this does not necessarily lead to an incorrect decision, it unnecessarily complicates the process.

2) Arbitrators May Ignore Insurance Carrier Bad Faith

Another problem with arbitration is that some arbitrators have been conditioned to give insurance carriers a pass on bad faith conduct, whereas courts and juries may be conditioned in the opposite direction. Insurance carriers have a fiduciary duty not to place their interests above those of their corporate policyholders. This is an exceptionally hard standard for insurance companies to meet. Pursuant to their responsibilities to shareholders. Insurance companies are also obligated to maximize shareholder value. One way for insurance companies to increase net income is to limit expenses, which includes limiting payments on claims. These two competing burdens, one to shareholders, and another to policyholders, puts insurance companies in a uniquely difficult place. All too often, it is just too enticing to deny claims for financial reasons, which results in a breach of their duty of good faith and fair dealing to corporate policyholders. In the corporate insurance context, these damages can be immense.

Insurance carriers commit bad faith because it is difficult for them to reconcile pursuit of their interests with the idea that they are not permitted to place their interests ahead of corporate policyholders.

One reason why arbitrators in an insurance coverage arbitration may not be inclined to award bad faith damages may be purely economic. If such a ruling is issued, and the insurers are upset by that ruling, the arbitrator will not be proposed by the insurers to handle future insurance coverage arbitrations.

3) Some Arbitrators May Find it Difficult to Side With Corporate Policyholders

Insurance companies hire arbitrators as part of their business. They are repeat consumers of arbitration services. They keep track of how arbitrators handle their insurance disputes. They know who is good for them, and who is not, and they are not about to take any chances by proposing an arbitrator who does not pass their internal results-oriented tests.

For this reason, arbitrators that routinely handle insurance coverage arbitrations are generally not the best choice for corporate policyholders. Future work drives any service oriented business and arbitration is no exception. Corporate policyholders should assume that experienced Insurance coverage arbitrators know that insurers can drive their future business. Arbitrators need future work to remain employed, and insurers may not be inclined to agree to use an arbitrator again if that arbitrator finds against them in a high-dollar insurance coverage arbitration.

This is not to say that arbitrators cannot see their way through this morass and find for corporate policyholders. Rather, it is one of many important issues for corporate policyholders to consider when selecting an arbitrator for an insurance coverage arbitration.

4) Some Insurance Arbitration Organizations are Mere Extensions of Insurance Companies

Insurance carriers are always concerned about the possibility that an arbitrator who they have not vetted properly will be appointed for an insurance coverage arbitration. To protect against this, insurers have formed specific trade associations disguised as arbitration tribunals. The most infamous of these is ARIAS. ARIAS arbitrators have experience working for insurers, and they translate this knowledge into finding for insurers in arbitration. An arbitration before ARIAS is like an arbitration with the insurance company claims adjuster who denied the claim acting as arbitrator. Policyholders should never agree to an arbitration with an ARIAS arbitrator.

Conclusions

Insurance carriers favor insurance coverage arbitrations because insurance coverage arbitration is better at limiting insurer exposure than litigation. A number of important lessons can be learned from understanding this, including:

1) Policyholders should not agree to arbitration clauses in insurance policies;

2) Policyholders should resist insurance company efforts to arbitrate, unless adequate precautions have been taken to select a neutral arbitrator;

3) Arbitrators with extensive insurance coverage experience are likely not neutral; the fact that they have been repeatedly selected for insurance matters could mean that they have rendered numerous decisions favorable to insurers; and

4) Arbitrators with minimal insurance experience are more likely to provide policyholders with a fair arbitration.

A good friend who runs the arbitration group for a major multinational corporation once said to me, “if you get the wrong arbitrator, you lose your case upon selection of that arbitrator, but you will not know it until years later.” These are sound words to live by.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration between NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA, on behalf of Itself and each of the related insurers that provided Coverage to Respondents Petitioners, v. BEELMAN TRUCK COMPANY, et al. Respondents,	Civil Action No.: 1:17-cv-2946 VEC

<u>RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER'S PETITION FOR THE APPOINTMENT OF AN UMPIRE</u>

Respondents Beelman Truck Company, Beelman Logistics, LLC, Granite City Slag, LLC, Beelman River Terminals, Inc., Racehorse Investments, LLC, Transhold, LLC, Beelman Materials, LLC, Beelman Ag Service, LLC, and Transload Realty, LLC (hereinafter collectively referred to as "Beelman") respectfully submit this memorandum of law in opposition to Petitioner's Petition for the Appointment of an Umpire based on the following grounds: (1) Petitioner's repeated assertions that the arbitrators must be ARIAS certified is not based on the Payment Agreements between the parties; (2) Beelman's umpire candidates are qualified under the plain terms of the Payment Agreements; (3) the Payment Agreements do not require or suggest that arbitrators have prior arbitration experience, and (4) Petitioner's insistences that the arbitrators be certified through ARIAS, the histories of the proposed arbitrators and umpires by Petitioner, and the fact that all arbitrators proposed by Petitioner show ARIAS arbitrators have a pro-insurance bias and cannot be impartial as required by law.

As indicated above, since the beginning of the arbitration process in this case, Petitioner has repeatedly stressed that only an ARIAS arbitrator could serve as an umpire, appointed an ARIAS arbitrator as its party-nominated arbitrator, and sought to disqualify Beelman's own party-nominated arbitrator without providing a basis. All of Petitioner's candidates for umpire and its nominated arbitrator are former employees and executives of insurance companies or have businesses where they are inextricably linked to garnering favor with the insurance industry as either consultants or serving as professional arbitrators or mediators. See Exhibits H, R – T. These individuals are therefore dependent on insurance companies for their livelihood, and this dependency heightens the likelihood of a bias in favor of Petitioner and negating the neutrality an umpire must possess. "Under any model of alternative dispute resolution, it is axiomatic that the third party must be impartial so that its decisions 'will be based upon the merits of the dispute rather than the personal influence or identity of the disputants.'" In re: Travelers Indem. Co., 2004 WL 2297860, *3 (citing Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 Ohio St. J. on Disp. Resol. 37, 49 (1996)). Travelers adds that because an umpire in a tripartite arbitration occupies a position similar to a judge, that impartiality is necessary "in order for parties to feel that they are being treated fairly; it supports their confidence in the decision-making process." Id.

Also relevant to the issue of potential biases regarding Petitioner's umpire candidates lie with the eligibility requirements to become an ARIAS certified arbitrator, like Petitioner's party-nominated arbitrator. To be eligible, one must have at least ten years of experience in the insurance/reinsurance industry, and obtain three sponsor recommendations from individual ARIAS members that the candidate has known for at least five years. See https://www.arias-us.org/certification/certification-procedures/ (last visited on June 15, 2017). This, reasonably, leaves a small pool of potential candidates who are likely well-acquainted with one another through business dealings, prior arbitrations, and other contacts, which could lead to a situation where the "neutral" umpire would be tempted to be sympathetic to the insurance company. Since Beelman and Mr. Stock are not members of this "exclusive" club, it seems reasonable that an ARIAS arbitrator is not appropriate.

Here, we should recognize the tactics pursued by Petitioner for what they are, which is the real attempt to game the system by packing the arbitration panel in its favor. Beelman hereby asks this Court to not appoint any neutral arbitrator from ARIAS because any such arbitrator would come with biases which would impede the process.

CONCLUSION

For the aforementioned reasons, Beelman asks that this Court appoint one of its candidates as the third arbitrator to the panel because they meet the qualification as set forth in the Payment Agreement and they have sufficient experience to act as the neutral arbitrator, and for the Court to: (a) not place a special emphasis on ARIAS certification because it is not required under the Payment Agreements or law; and (b) not choose a neutral arbitrator from ARIAS because any such arbitrator would be tainted by their past and present ties to the industry.

Respectfully submitted,

/S/

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DIRECT INSURANCE ARBITRATIONS

Does ARIAS Have a Role to Play in Direct Insurance Arbitrations?

By Peter K. Rosen

Eight months ago, I joined two of my policyholder counsel colleagues, Mitchell Dolin of Covington and Paul Zevnik of Morgan Lewis, on a panel chaired by Deirdre Johnson, now of Squire Patton Boggs, to discuss ARIAS•U.S.'s potential foray into the arbitration of direct insurance coverage disputes. Perhaps to the surprise of many in our audience, we all said we were cautiously optimistic that ARIAS could develop an attractive arbitration product for direct insurance coverage disputes.

Why were we cautiously optimistic? First, as litigators and trial lawyers, we recognize that there is a greater emphasis on arbitration as a binding forum to resolve controversies. Many of our commercial clients see arbitration as an efficient, speedy, and confidential alternative to litigation to resolve controversies. Moreover, as I describe in more detail below, we are seeing more and more commercial insurance policies with arbitration as a method—sometimes a binding method—to resolve disputes about the policies.

Most of the policies we see, however, are form policies sold to our policyholder clients without much input from our clients or their brokers, especially concerning their alternative dispute resolution (ADR) provisions. As policyholder counsel, it behooves us to ensure that, if the only ADR method made available in our clients' policies is binding arbitration, the policies include a rules set that works with insurance coverage disputes. We also must be confident that the organization behind the development and implementation of this rules set is training and certifying arbitrators who are knowledgeable about direct insurance coverage disputes. As we discussed during our panel presentation, we see ARIAS (and its non-administered rules set) as a viable organization to provide this support.

Second, each of the arbitration and mediation organizations (e.g., the American Arbitration Association, JAMS, FedArb, the International Institute for Conflict Prevention & Resolution, and the International Chamber of Commerce) is encouraging its corporate members and their law firms to select it as the arbitration administrator (with its rules set) or as the provider of

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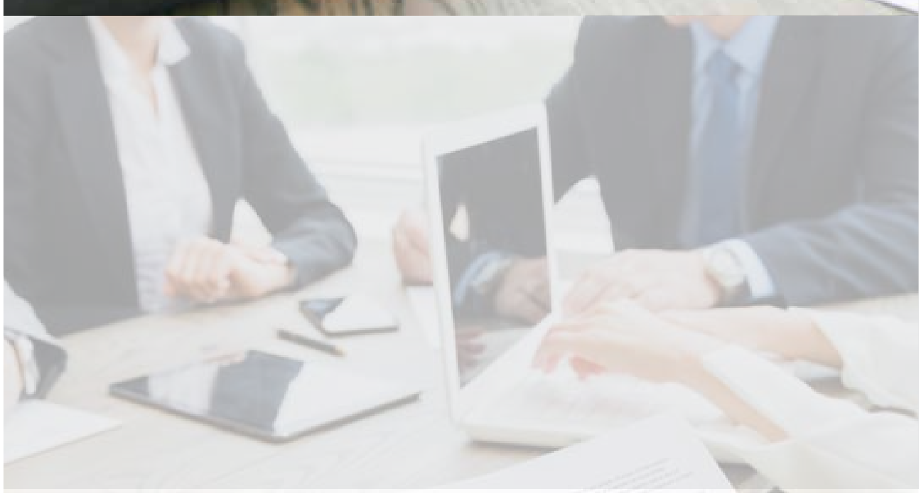

the non-administered rules set in the transactional agreements they sign and their law firms negotiate. For example, CPR, of which each of our firms is a member, has an online arbitration clause tool (available at https://www.cpradr.org/resource-center/model-clauses/clause-drafting/clause-selection-completion-tool) that its member clients and their law firms can use to draft arbitration clauses in their stock purchase agreements, merger agreements, and asset sales agreements. Similarly, JAMS provides that, if a rules set is not provided in an arbitration clause in which JAMS is designated as the arbitration administrator, the parties will default to JAMS' rules set (see https://www.jamsadr.com/rules-comprehensive-arbitration).

These organizations generally encourage the parties to match the rules set (and the administrator, if the arbitration is not self-administered) in all of the agreements governing a transaction or relationship, including the insurance policies that will be affected by the transactions. However, they don't yet provide the same level of training for, or the same degree of consistency among, insurance coverage dispute arbitrators and mediators that ARIAS can provide for direct insurance disputes arising out of these transactions (or, for that matter, any insurer-policyholder disputes). Similarly, while both JAMS and CPR have insurance coverage panels, both are largely self-selecting (with some level of scrutiny by the arbitration organization). Importantly, neither organization sponsors training for, or provides for certification of, mediators and arbitrators specializing in insurance disputes to an extent that is remotely similar to what ARIAS currently offers for reinsurance disputes (in Europe, the Chartered Institute of

Arbitrators offers training; see http://www.ciarb.org/). In the absence of training and certification, matching the rules set and, as appropriate, the administering arbitration organization set out in the underlying transactional documents may not make sense for the insurance policies that would come into play in the event there is an insurance coverage dispute arising under or out of the underlying transactional documents.

Coverage-in-Place Agreements

Third, aside from the policy-specific arbitration clauses discussed above, there are other areas of focus where ARIAS could provide meaningful arbitration products. Many coverage-in-place agreements provide for binding arbitration (during our panel discussion, we provided some examples). Following are three such agreements, one administered by the AAA, one administered by JAMS, and one utilizing CPR's non-administered arbitration rules.

Example #1

The Parties agree that they will attempt to resolve any dispute arising from this Settlement Agreement through good faith negotiations for a period of thirty (30) days after written notification regarding such dispute. Thereafter, if the dispute remains unresolved, the Parties agree to submit the dispute to mediation. The Parties will conduct the mediation in such a manner that it shall be completed within ninety (90) days after good faith negotiations have failed to resolve the dispute. Thereafter, if the dispute remains unresolved, the Parties agree to submit the dispute to binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect as of the Effective Date. Unless the Parties agree otherwise, mediation and/or arbitration shall take place in New York, New York.

Example #2

11.2. In the event the mediation fails to resolve such dispute within ninety (90) days of any Party's written request to mediate pursuant to Section 11.1, said dispute shall be submitted to and resolved by arbitration held through JAMS in New York, New York.

11.3. The dispute resolution procedures set forth in this Section 11 shall govern all disputes relating to, arising out or involving the construction or application of this Agreement, as well as any contention that a Party has failed to live up to is obligations under this Agreement.

Example #3

Binding Arbitration: If a mediated resolution to the dispute is not achieved within ninety (90) days of the selection of a mediator (or such additional time as the relevant Parties may agree in writing), any party may serve a written demand for arbitration of the unresolved dispute.

The unresolved dispute shall be submitted to binding arbitration . . . before a single arbitrator selected by the relevant Parties with substantial background in risk management or insurance coverage law. If the relevant Parties cannot agree on the arbitrator within (30) days of a written demand for arbitration, then a panel of three arbitrators shall be selected by the relevant Parties pursuant to the Center for Public Resources' Rules for Non-Administered Arbitration, subject to the relevant Parties' agreement that all three arbitrators shall have a substantial background in risk management or insurance coverage law. The costs of the arbitration shall be shared equally . . . Each party to the arbitration shall bear its own costs and fees, including attorneys' fees, in association with the arbitration.

Other coverage-in-place agreements provide for a multi-phase dispute resolution process—negotiation, mediation and arbitration—requiring the parties to select arbitrators with, as set out in Example #3 above, "substantial background in risk management or insurance coverage law." ARIAS clearly could provide a set of non-administered rules to govern coverage-in-place agreement arbitrations and supply certified arbitrators with the necessary background and experience.

Captive Insurance and Reinsurance

Captive insurance and reinsurance agreements are another opportunity for an ARIAS arbitration program. During our panel presentation, we highlighted the following provision in a captive insurance agreement:

XIX. GOVERNING LAW AND DISPUTE RESOLUTION

ARIAS clearly could provide a set of non-administered rules to govern coverage-in-place agreement arbitrations and supply certified arbitrators with the necessary background and experience.

Any dispute or claim arising out of or relating to this Agreement, including its formation and validity, shall be referred to arbitration. The arbitration shall be conducted in accordance with the ARIAS U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes.

Arbitration shall be initiated by the delivery, by mail, facsimile, or other reliable means, of a written demand for arbitration by one party to the other . . .

The parties agree to submit to binding arbitration. The arbitration proceedings shall take place before a single arbitrator appointed pursuant to the ARIAS·U.S. Umpire Selection Procedure. Such arbitrator shall be either a present or former executive officer of insurance or reinsurance companies in the United States of America and shall be certified by ARIAS·U.S. The arbitrator shall be disinterested, shall not be under the control of either party, and shall have no financial interest in the outcome of the arbitration.

In another example we provided during our panel presentation, we noted that the policy between the insured company and its captive insurer did not have an arbitration clause, but the reinsurance agreement between the captive and its reinsurers contained the following:

1. Any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, shall be settled by a panel of three arbitrators; [and]

4. The arbitration shall take place in New York City, N.Y., unless the arbitrators select another location. Insofar as the arbitration panel looks to substantive law, it shall consider the laws of New York.

We also pointed out that the provision in the captive reinsurance agreement between the captive insurer and the company's fronting insurer contained the following language:

Arbitration

a. As a condition precedent to any right of action hereunder, any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, shall be submitted for decision to a panel of three arbitrators . . .

d. All arbitrators shall have at least ten (10) years of insurance or reinsurance experience and be disinterested with knowledge about the lines of business at issue.

Specialty Insurance

As we note above, many of the specialty policies our clients purchase contain alternative dispute resolution clauses, all of which could benefit from an ARIAS-sponsored arbitration program. For example, AIG's public entity directors and officers liability insurance policy has contained an ADR clause for many years. Its current form provides as follows:

ADR Options: All disputes or differences which may arise under or in connection with this Coverage Section, whether arising before or after termination of this policy, including any determination of the amount of Loss, shall be submitted to an alternative dispute resolution (ADR) process as provided in this Clause. The Named Entity may elect the type of ADR process discussed below; provided, however, that absent a timely election, the Insurer may elect the type of ADR. In that case, the Named Entity shall have the right to reject the Insurer's choice of the type of ADR process at any time prior to its commencement, after which, the Insured's choice of ADR shall control.

ADR Rules: In considering the construction or interpretation of the provisions of this policy, the mediator or arbitrator(s) must give due consideration to the general principles of the law of the State of Formation of the Named Entity. Each party shall share equally the expenses of the process elected. At the election of the Named Entity, either choice of ADR process shall be commenced in New York, New York; Atlanta, Georgia; Chicago, Illinois; Denver, Colorado; or in the state reflected in the Named Entity Address. The Named Entity shall act on behalf of each and every Insured under this Alternative Dispute Resolution Clause. In all other respects, the Insurer and the Named Entity shall mutually agree to the procedural rules for the mediation or arbitration. In the absence of such an agreement, after reasonable diligence, the arbitrator(s) or mediator shall specify commercially reasonable rules.

Specialty policies sold by other insurers also provide that any arbitration shall be conducted under ARIAS (UK) or ARIAS·U.S. rules.

E7 Jurisdiction and Governing Law / Arbitration

This policy shall be governed by and construed in accordance with the laws of England and Wales. All matters in difference between the parties arising under, out of or in connection with this policy, including formation and validity, and whether arising during or after the period of this policy, shall be referred to an arbitration tribunal. The seat and place of arbitration shall be in London.

The arbitration shall be conducted in accordance with the latest UK ARIAS Rules published at the time that the arbitration is commenced by the claimant (the party requesting arbitration), unless the rules conflict with this clause, in which case this clause will prevail . . .

Some even provide that ARIAS shall appoint the second and third arbitrators in the event the counterparty fails to timely appoint the second arbitrator or the parties cannot agree on the third arbitrator (this is from a product recall policy):

Arbitration

Seat: New York

Appointer: ARIAS (US)

Further, many of the transactional liability policies (representations and warranties and tax liability policies) insurers are placing in the United States contain ADR clauses:

(a) ADR Options. All disputes or differences which may arise under or in connection with this Policy, whether arising before or after termination of this Policy, including any dispute regarding the determination of the amount of Loss, shall be submitted to an alternative dispute resolution ("ADR") process as provided in this Section 9(a). The Named Insured may elect the type of ADR process discussed below; provided, however, that absent a timely election, the Insurer may elect the type of ADR process. In that case, the Named Insured shall have the right to reject the Insurer's choice of the type of ADR process at any time prior to its commencement, after which, the Named Insured's choice of ADR process shall control. The parties shall only be entitled to pursue judicial proceedings in connection with this Policy (which judicial proceedings shall be in accordance with Section 11(a) hereof) (i) in connection with a dispute, if the parties have first elected and complied with the mediation ADR process provided below with respect to such dispute, or (ii) to enforce any arbitral award.

The arbitrator will interpret this Agreement as an honorable engagement and will not be obligated to follow the strict rules of law or evidence. In making the award, the arbitrator shall apply the custom and practice of the property and casualty insurance and reinsurance industry in the United States of American with a view to affecting the general purpose of the Agreement. To the extent that the arbitrator looks to any state or federal law, the arbitration tribunal will apply the laws of State of Delaware.

There certainly are many other insurance companies that sell commercial liability and first-party insurance policies to policyholders that contain binding arbitration provisions, all of which could benefit from ARIAS-certified and -trained arbitrators.

The Path Forward

What, then, are the next steps? As my colleagues and I noted during our presentation, policyholders and their counsel have generally viewed ARIAS with suspicion because it handles only insurance industry disputes. Our concern is that, as largely an industry group, ARIAS is not well suited to handle direct disputes.

This can change (as we discussed during our presentation) with the identification and selection of arbitrators whom both insurers and policyholders will embrace. This will require a revamping of ARIAS' certification process. Among the changes that likely will need to be made are the following:

- modify the "Industry Experience" to include 10 years of specialization in representing policyholders in insurance-related matters;
- add an Option D that permits a member to satisfy the eligibility requirements to be a certified arbitrator by participating as an arbitrator or umpire or as lead trial counsel in a certain number of direct dispute arbitrations; and
- update the ARIAS·U.S. Rules, Code of Conduct, Practical Guide, and Panel Selection Procedures and Forms to account for the addition of direct insurance disputes arbitrators and mediators.

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COMPARING ARBITRATIONS

Comparing Policyholder Arbitrations to Reinsurance Arbitrations

By David W. Ichel and Carlos A. Romero, Jr.

During the last 20 years, arbitration proceedings have been on the rise in disputes, not only between insurers and reinsurers and between reinsurers and retrocessionaires (reinsurance arbitrations) but also between direct policyholders and insurers (policy arbitrations). Although there are differences between the two categories of arbitrations, there are more similarities than differences.

In this article, the authors draw on their personal experiences to review key similarities and differences between both categories of arbitrations. Note: This article will consider only policies and reinsurance agreements that cover U.S.-based risks.

Arbitration Provisions

Policy arbitrations. In the United States, many states still do not permit arbitration provisions to be included in policies issued by admitted insurers, particularly for personal lines policies. Some states take a middle ground and permit arbitration only for limited purposes, such as determining the value of the loss of covered property in a property insurance policy.

Even though there is strong Supreme Court precedent requiring enforcement of arbitration provisions under the Federal Arbitration Act (FAA),[1] practitioners must be sensitive to other laws that could trump the FAA. For example, courts have held that when a state affirmatively prohibits or restricts arbitration provisions in insurance policies, the McCarran-Ferguson Act[2] not only grants a state primary regulatory authority to govern the business of insurance but also will "reverse preempt" the FAA, thus permitting the state prohibition or restriction.[3] On the other hand, courts have enforced arbitration clauses in insurance policies in the absence of any state regulation or statute specifically prohibiting or restricting the arbitration agreement.[4]

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Carlos Romero is a partner at Post & Romero and has been practicing in a broad array of insurance matters since the early 1980s. He has participated in insurance-related arbitrations as an advocate and arbitrator and enjoys handling complex insurance pool disputes coupled with substantial accounting disputes and discrepancies (along with claims of fraudulent billings and allocations). He has handled insurance disputes concerning many foreign jurisdictions, including Panama, Mexico, Venezuela, Colombia, Bermuda, and Argentina.

In contrast, it is not uncommon for excess and surplus lines policies issued to commercial entities to contain an arbitration clause. The permissiveness within the commercial risk context reflects a lower regulatory and public policy concern than in the personal lines arena. For example, in the standard Bermuda Form for excess insurance policies and in London market policies, an arbitration clause is common. Arbitration clauses are now found in many types of policies, such as directors and officers, errors and omissions, employment liability, and cyber liability.

Reinsurance arbitrations. Reinsurance arbitration clauses are used generally by most reinsurers. The authors, in their experience, have never seen a reinsurance agreement without an arbitration clause. The range of detail in arbitration provisions can vary, from the sparse (providing few provisions) to the comprehensive (addressing numerous topics).

Older arbitration clauses were quite sparse and at times consisted of a simple notation (like "Arbitration," without anything more) in the cover notes between the insurers. Indeed, arbitration clauses often did not select arbitration rules, were not administered by any organization, called for two party-appointed arbitrators and one umpire, and mandated experience requirements of all sorts (e.g., present or former executive or lawyer in the insurance industry for a requisite number of years). Arbitration clauses in some older agreements sometimes made reference to an arbitration organization (or its rules) that no longer existed or had changed its name.

The more recent arbitration clauses lean toward a more comprehensive provision. They may (or may not) adopt

The trend in more modern arbitration clauses shows a preference for maximizing not only the scope of arbitrable issues, but also the authority of the arbitrator.

arbitration rules, require particular experience of the arbitrators, specify administration by a particular arbitration organization, mandate choice of law, impose time frames to issue a final award, set forth rules for discovery, and define a broad scope of arbitrable issues. Even today, however, there are reinsurers using arbitration clauses that contain no arbitration rules for the panel to follow or provide for administration by an arbitration organization. In such "no rule" arbitrations, arbitrators must fashion their own procedures "on the fly," which often triggers resistance from counsel and presents challenges to obtaining desired party consent.

Arbitration Rules/ Organization/Arbitrator Selection

Policy arbitrations. Arbitration provisions differ significantly from one policy to the next. Bermuda Form policies provide for an "ad hoc" (i.e., non-administered) arbitration and allow policyholders the choice of applying New York, Bermuda, or English substantive law. (Most policyholders tend to choose New York law). Also, although most Bermuda Form policies provide for the procedural rules of the British Arbitration Act of 1996 (along with situs in London), others provide for the Bermuda Arbitration Act (with situs in Bermuda).[5] Various London market and other excess and surplus lines policies frequently provide for the application of New York law under the arbitration rules published by either the American Arbitration Association (AAA), International Institute for Conflict Prevention and Resolution (CPR), Federal Arbitration Inc. (FedArb), or JAMS (formerly known as Judicial Arbitration and Mediation Services).[6] Finally, policy arbitrations can be, at times, non-administered, although usage in the industry leans toward administered proceedings by organizations like the AAA, FedArb, and (recently) CPR.[7]

Certain policies and arbitration rules of more recent vintage now provide additional and optional procedures—if mutually acceptable to the parties—for mediation (it may be conducted by a mediator not on the panel of arbitrators) and for "one" appeal (it may be conducted by a different arbitrator or arbitrators not on the panel that conducted the trial).

Most policy arbitration clauses provide for a panel of three arbitrators, with each side to select an arbitrator and the two selected arbitrators then selecting the panel chair. In case of a deadlock when selecting a chair, Bermuda Form policies provide for selection by lots or by petition to the High Court of Justice of England & Wales.[8] Under AAA, CPR, or FedArb rules, the deadlock can be resolved by the arbitration organization through methods including appointment by the arbitration organization, circulation of a list of additional candidates, a drawing by lots, or other agreed method. Various state arbitration statutes and the Federal Arbitration Act allow deadlocked parties to petition the court for the appointment of arbitrators.[9]

Reinsurance arbitrations. Historically, the reinsurance industry resolved disputes with a gentleman's handshake. Older insurance agreements did contain arbitration clauses, but they were rarely invoked and were sparse in content. Oftentimes, the reinsurers and retrocessionaires, as well as the insurers and reinsurers, signed cover notes with no treaty or facultative agreement. The cover notes contained the general terms of the agreement—they would make reference to mandatory arbitration and the selected forum, but would omit inclusion of the arbitration clause (the intent being to formalize the agreement at a later date, which sometimes did not happen).

Over the last 20 years, however, two events have contributed to significant changes, ranging from one extreme (how to avoid arbitration entirely) to another (how to exploit drafting more comprehensive arbitration clauses). These two events are as follows: first, discontent has increased over perceived disadvantages, monetary expenditures, and procedural limitations encountered in arbitrations; second, our society has become more litigious, thus spurring (not surprisingly) more detailed arbitration clauses.

Older agreements tended not to define the scope of arbitrable issues. This omission inevitably triggered litigation as to whether specific issues in dispute were even arbitrable. As more recent arbitration clauses began to specifically provide for a broad, all-inclusive scope of authority and arbitrable issues, litigation over the scope of arbitrable issues has been waning. The trend in more modern arbitration clauses shows a preference for maximizing not only the scope of arbitrable issues, but also the authority of the arbitrator (which now includes jurisdiction to resolve not only whether any claim is arbitrable under the arbitration clause, but the jurisdiction of the panel, too).[10] Some arbitrators obtain, at an organization meeting or preliminary hearing, the mutual consent of the parties to reaffirm or expand the scope of arbitrable issues and the authority of the arbitrator to resolve additional issues.

To improve the effectiveness of arbitrations, reinsurers have taken steps to improve arbitration clauses (or to appease the never-ending drafting by corporate attorneys who never litigated). These steps include, among others, the following:

- specifying a time frame for issuing an award;
- specifying the arbitration rules that apply;
- requiring proceedings to be administered by arbitration organizations;
- relying on arbitration organizations to supply a list of qualified arbitrators;
- requiring all arbitrators to be neutral;
- mandating qualified arbitrators from a recognized arbitration organization; and
- expanding the scope of arbitrable issues (like fraud in the inducement, rescission, void or voidable, enforceability, attorney fee award, other agreements between the parties that either do not have arbitration clauses or provide for a different forum, and third parties related to the dispute).

More recently, some reinsurers have started to experiment with requiring mediation prior to an arbitration proceeding. The AAA now has a rule that requires mediation, but either party may opt out.[11] ARIAS also has a voluntary mediation program.

Today, reinsurance agreements sometimes contain comprehensive arbitration clauses that are longer than one page. These lengthy clauses cover a host of issues so as to be all-inclusive, but often this effort is not as productive as was intended. The drafter, facing a time or budgetary constraint, may neglect to read the designated organi-

Today, reinsurance agreements sometimes contain comprehensive arbitration clauses that are longer than one page so as to be all-inclusive, but often this effort is not as productive as was intended.

zation's rules, may draft rules that are either duplicative or confusing, and may (unwittingly) create expensive procedures. Other times, the rules are too restrictive—requiring arbitrators to issue an award within 60 days of the appointment of a three-member panel, mandating no depositions under any circumstances (which can help settle a case), and denying the use of expert witnesses or forensic accountants (thus complicating resolution). In fairness to the drafter, it is simply not possible to predict the nature and complexity of issues that can arise many years after signing a reinsurance agreement.

In an effort to reduce the cost of a panel of three arbitrators, the AAA recently adopted a new rule granting the parties full flexibility to agree to designate a single arbitrator (typically the chairperson) to be the sole decision maker for (a) part or parts of the proceeding, (b) the entire proceeding (and, if agreed by the parties, even the final hearing and issue of the final award), (c) all issues up to the final hearing (at which point the entire panel participates and issues the final award), (d) the issuance of one or more partial awards, or (e) all issues (including dispositive motions on the merit) up to the final hearing and issue of the final award.[12] This rule is sufficiently flexible to allow the parties to adopt this procedure mid-stream during the proceeding. Doing so basically eliminates the fees of two arbitrators and maximizes the flexibility and speed with which a single arbitrator (who is truly dedicated and responsive) can take action.

Arbitrator Neutrality

Policy arbitrations. The neutrality of arbitrators is a key ingredient in policy arbitrations. All of the Bermuda Form, AAA, CPR, JAMS, and FedArb rules require that all arbitrators (including party-appointed arbitrators) be neutral, impartial, and independent, unless the parties specifically agree otherwise. Ex parte communications with the arbitrators, excepting initial communications to select a party-appointed arbitrator, to discuss the availability or qualifications of a candidate, or to select the panel chair, generally are prohibited.

Reinsurance arbitrations. Traditionally, once a party provides the other with an arbitration notice, each side has a short window of about 30 days to appoint an arbitrator. The two arbitrators then select an umpire. Unless the parties agreed otherwise, the party-appointed arbitrators are not expected to be neutral; the selected umpire will be the sole neutral arbitrator.

Newer arbitration clauses are more comprehensive but still provide for two party-appointed arbitrators, who in turn appoint the umpire. The clauses generally provide no guidance on the extent to which ex parte communications with party-appointed arbitrators are permissible or prohibited. Restrictions and prohibitions can be imposed if (a) the governing arbitration rules contain restrictions and prohibitions, (b) the parties agree to require all arbitrators to be neutral from inception, or (c) the parties agree that the two party-appointed arbitrators must refrain from ex parte communications either before or even after the initial organization meeting or preliminary hearing.

For example, the AAA rules provide (unless agreed otherwise) that the party-appointed arbitrators shall not engage in communications with their appointing party and that the parties must communicate with the entire panel, with a copy to all parties. The ARIAS·U.S. rules allow for ex parte communications up to certain points in the proceeding or as established in or after the initial organization meeting.

Recently, ARIAS adopted neutral panel rules that require three neutral arbitrators and prohibit ex parte communications. Also, more members of ARIAS are suggesting that the practice of permitting ex parte communications with party-appointed arbitrators is creating friction and controversy in arbitrations that detract from the desire for a fair and unbiased award. The concern is that allowing a party-appointed arbitrator to campaign and watch out for the interests of the appointing party not only injects bias but also invites secret conferences between a party-appointed arbitrator (who has a vested financial interest in being selected for future panels) and the attorney representing the appointing party. (This almost suggests that counsel is unable to represent the client competently without discussing the "inside scoop.")

The Initial Organizational Conference, Scheduling, and Pre-Hearing Disputes

Policy arbitrations. In policy arbitrations, the arbitrators will hold an initial organizational conference with counsel for all parties to address the pre-hearing schedule, scope of discovery, pre-hearing briefing, exchange of exhibits intended to be used at the final hearing, witness statements, expert reports, witness list, rebuttal witness statements, expert and rebuttal expert reports, and (often) even the final hearing dates. The arbitrators, after typically maximizing agreement on all subjects with counsel, will issue a procedural order that should outline all agreed-upon subjects as well as matters that remain open for resolution. In

Bermuda Form arbitrations under the British Arbitration Act of 1996, the initial order is called the Directional Order No. 1. Under the AAA rules, it is often called Procedural Order No. 1 or Scheduling Order for Final Hearing.

Unless otherwise agreed by the parties, discovery is limited. In Bermuda Form arbitrations, discovery is generally limited to "standard disclosures" of documents to be relied upon or that adversely affect one's position. These documents can be supplemented by limited specific requests for categories of relevant documents. Depositions are generally not permitted.

Similarly, no depositions are permitted generally under AAA and ICDR Rules, although they are permitted under certain circumstances to preserve evidence. There has been a growing trend over the past 15 years to permit depositions on a limited basis upon insistence by counsel. FedArb and JAMS rules permit at least a limited number of depositions, unless otherwise agreed by the parties. This trend evidences the difficulties that counsel often face in handling litigation without the use of depositions.

Under the International Bar Association's (IBA) Rules on the Taking of Evidence in the International Commercial Arbitration, the parties must disclose all documents "relied upon" and are allowed to request specified additional categories of documents. Discovery disputes are often resolved using a Redfern schedule that requires a party to identify a sought document in one column of the schedule and justify its relevance in the next column, then allows the other party to state its objections in another column. The arbitrators then rule on the requests and objections and note their ruling in the final column of the schedule.[13]

In Bermuda Form arbitrations, prehearing submissions begin with the filing of original pleadings in the form of a Statement of Claim and a Statement of Response (often containing both defenses and counterclaims). Typically, at the preliminary or organizational hearing, the parties are allowed to amend their initial filings. Similar procedures are required under the arbitration rules of the other major organizations, although the names of the pleadings differ.

Disputes can be raised by motion of either party, at or after the initial organizational conference. Experienced arbitration panels will ask the parties to confer and attempt to agree on all prehearing disputes prior to seeking panel resolution of the issue.

Reinsurance arbitrations. The procedures governing reinsurance arbitrations are substantially similar to those governing policy arbitrations. The issues litigated in reinsurance disputes, if concerning a pool of risks, will entail a complex interaction of coverage, annual caps, and the year in which the loss is incurred. The complexity escalates as the number of reinsurers and retrocessionaires participating in the pool, the number of tiered excess loss coverages, the differing annual caps among the policies for different years, the allocations of loss payments among different years and different excess layers, and the years of coverage in question increase.

Manner of Proof

Policy arbitrations. It is the general practice in Bermuda Form and many AAA, CPR, and FedArb arbitrations for witness statements and expert reports to be submitted in advance of the

There is a new crop of reinsurance agreements that specifically disavow the application of the "follow the fortunes" doctrine that has existed for more than a century.

hearing. These statements and reports often are provided in lieu of direct testimony from any witness or expert. Typically, the arbitrators will allow the proffering party to elicit some live, direct testimony to introduce the witness before cross examination. Cross examination and re-direct will then follow. FedArb follows the Federal Rules of Evidence absent the parties agreeing otherwise. Bermuda Form arbitrations are conducted under either the British or Bermuda Arbitration Act, which often depends on whether London or Bermuda is the chosen situs. AAA, CPR, and JAMS arbitrations have some simple rules to follow, but they do not require the application of strict rules of evidence. International commercial arbitrations often are guided by the IBA Rules on the Taking of Evidence.

There are more similarities than differences between policy and reinsurance arbitrations. Nevertheless, differences do exist.

Reinsurance arbitrations. The procedures for reinsurance arbitrations are substantially similar to those applicable in policy arbitrations, where strict evidentiary rules are disregarded.

Rules of Policy Construction

Policy arbitrations. The Bermuda Form generally provides that policies shall be construed in an "even handed fashion" and precludes use of the *contra proferentem* (construction against the drafter) doctrine or "reasonable expectations" doctrine (what a policyholder should reasonably expect). It also prohibits "parol or other extrinsic" evidence for policy construction. AAA, CPR, FedArb, and JAMS do not provide any specific rules for policy construction. FedArb arbitrations simply follow the Federal Rules of Evidence unless the parties agree otherwise.

Reinsurance arbitrations. The "traditional" theme in reinsurance arbitrations leans toward informality and away from strict rules of law. Reinsurance arbitration clauses generally contain language that encourages custom and practice over the application of the law. For example, arbitration clauses containing the following text are quite common (but are being replaced by a new generation of corporate counsel that do not share the same traditional values):

This contract [or arbitration provision] is an honorable engagement, and the panel shall not be obligated to follow the strict rules of law or evidence. In deciding the award, the panel shall [or may] apply the custom and practice of the insurance and reinsurance business.

There is a new crop of reinsurance agreements that specifically disavow the application of the "follow the fortunes" doctrine. This doctrine is being replaced by a complicated host of rules that trigger noncoverage in the event of noncompliance by the reinsured entity. This change will significantly affect the traditional "follow the fortunes" analysis that has existed for more than a century.

Relief and Award

Policy arbitrations. The Bermuda Form allows for coverage of punitive damage awards against a policyholder, and its New York choice of law provision specifically excludes any prohibition on such coverage.[14] The arbitral panel is also empowered to award to the prevailing party recovery of all costs, including reasonable attorney fees, under English (or Bermuda) law applicable to Bermuda Form arbitration procedure, as well as under most arbitration organization rules for other policy arbitrations. Unless specifically agreed by the parties, there is no rule regarding punitive damages coverage in AAA, CPR, FedArb, or JAMS arbitration rules, but arbitrators acting under these rules are permitted to award attorney fees and costs among or between the parties. Parties in policy arbitrations can choose either a reasoned award, full award, or standard award. Reasoned awards tend to be the preferred choice.

Reinsurance arbitrations. Often, the reinsurance treaty or agreement relieves the reinsurer from any bad faith, punitive, or exemplary damages (extracontractual liability) that the insurer may have paid the insured in a judgment or settlement. The arbitration clause generally would not cover this issue; instead, the reinsurance agreement typically contains a separate clause that precludes indemnity by the reinsurer to the ceding insurer for such damages. The arbitration clause, however, may contain a provision that strips the arbitrator of authority to grant the insurer or the reinsurer any entitlement to bad faith, punitive, or exemplary damages either as between the reinsurer and the insurer or between the insured and the insurer. Such a provision would seem to ensure consistency between (a) the terms of the reinsurance agreement and (b) the scope of authority of the arbitrator and the scope of arbitrable issues. One might ask whether such limitations could be challenged when the arbitration clause contains language that permits the panel to interpret the agreement as a "gentleman's engagement" and to disregard strict rules of law or evidence (and follow industry custom and practice), where the conduct of a culpable party was egregious.

Confidentiality

Policy arbitrations. Arbitrations under the Bermuda Form will be confidential pursuant to the British Arbitration Act of 1996 and British common law (for London chosen situs) and the Bermuda Arbitration Act (for Bermuda chosen situs). Although the scope may differ as enforced in the United States, confidentiality is the general practice. In contrast, although confidentiality is not strictly mandatory under AAA, CPR, FedArb, and JAMS rules, the arbitrators have authority to order confidentiality for particular materials presented in the proceeding and generally conduct private proceedings that are not open to the public. Typically, the parties agree as to confidentiality in either the arbitration provision or in the initial procedural hearing. Although hearings are private, the parties often engage a court reporter and order transcripts when desired. Confidentiality as to any award often ends as a practical matter if the final award must be filed in court to seek its enforcement.

Reinsurance arbitrations. The rules on confidentiality will differ among the arbitration clauses adopted, and often the parties submit to the panel an agreed order for entry. The hearings are not open to the public, and in this sense all hearings are private. Confidentiality provisions are rarely seen in arbitration clauses in reinsurance agreements.

Conclusion

In summary, there are more similarities than differences between policy and reinsurance arbitrations. Nevertheless, differences do exist. Should ARIAS·U.S. seek to develop a policy arbitration procedure, it should consider state restrictions and limitations where permitted, be fair to the policyholder, promote the neutrality of the panel, and grant the panel maximum authority to resolve all issues that can arise.

NOTES

1. See, e.g., *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (enforcing arbitration provision that prohibited class actions in an antitrust dispute even though the pursuit of an individual claim would not be financially viable or justifiable for an attorney to pursue).
2. 15 U.S.C. §1012(b) (providing that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . .").
3. See, e.g., *Standard Security Life Insurance Co. v. West*, 267 F.3d 821 (8th Cir. 2001) (declining to enforce an arbitration clause in a sports injury policy that was prohibited by Missouri statute governing the business of insurance); *Continental Insurance Co. v. Equity Residential Properties Trust*, 565 S.E. 2d. 603 (Ga. App. 2002). See also Rhode Island General Laws §10-3-2 (1998) (providing that insurer has the option to arbitrate as follows: ". . . and provided further, that in all contracts of primary insurance, wherein the provision for arbitration is not placed immediately before the testimonium clause or the signature of the parties, the arbitration procedure may be enforced at the option of the insured, and in the event the insured exercises the option to arbitrate, then the provisions of this chapter shall apply and be the exclusive remedy available to the insured.")
4. See, e.g., *Monarch Consulting, Inc. v. National Union Fire Insurance Co.*, 26 N.Y. 3d 659, 47 N.E. 3d 463, 27 N.Y.S. 3d 97 (upholding enforcement of arbitration clause in workers compensation policy payment agreement, because the State of California did not prohibit the use of this clause).
5. For references on the Bermuda Form policies and arbitrations, see Richard Jacobs, Lorelie Masters and Paul Stanley, *Liability Insurance in International Arbitration: the Bermuda Form* (Second ed. 2011); Davd Scorey, Richard Geddes and Chris Harris, *The Bermuda Form: Interpretation and Dispute Resolution of Excess Liability Insurance* (Oxford University Press 2011); Leon B. Kellner and Vivek Chopra, "Bermuda Form Arbitration: A Policyholder Perspective" (Perkins Cole LLP, ARIAS·U.S. Fall 2017 Conference presentation); Mina Matin, "The Bermuda Form Arbitration Process: A Glimpse Through the Insurer's Spectacles" (Norton Rose Fulbright LLP, ARIAS·U.S. Fall 2017 Conference).
6. AAA rules can be found at adr.org, CPR rules can be found at cpradr.org, Federal Arbitration rules can be found at FedArb.com, and JAMS rules can be found at jamsadr.com.
7. The standard FedArb arbitration rules provide for the application of the Federal Rules of Civil Procedure, except as modified by agreement of the parties.
8. British Arbitration Act of 1996 §18.
9. Federal Arbitration Act, 9 U.S.C. §5.
10. See, e.g., Rule 7(a), AAA Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large and Complex Commercial Disputes), effective October 1, 2013, stating that the "Arbitrator shall have the power to rule on his or her own jurisdiction, including . . . the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."
11. Rule 9, AAA Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large and Complex Commercial Disputes), effective October 1, 2013, stating that, in disputes involving a claim or counterclaim in excess of $75,000, the parties must mediate during the proceeding, unless either party opts out. Any party has the right to opt out.
12. "Streamlined Three-Arbitrator Panel Option for Large Complex Cases" issued by the AAA, stating that this rule "allows parties to take advantage of this by utilizing a single arbitrator to manage the early stages of the case, decide issues related to the exchange of information and resolve other procedural matters without incurring the costs associated with the entire panel. The AAA has found that a three-arbitrator panel can actually cost five times as much as a single arbitrator. By maximizing the use of a single arbitrator, the parties will be able to capitalize on the cost savings provided by a single arbitrator while still preserving their right to have the case ultimately decided by a panel of three arbitrators."
13. IBA Rules on the Taking of Evidence in International Arbitrations at Art. 3 (Documents).
14. Bermuda Form Policy, Condition O.

Thursday, November 8, 2018, 11:30 a.m. – 12:20 p.m.

GENERAL SESSION
New Options for Legacy Run-off Business

SESSION MATERIALS:

PRESENTED BY:
Moderator:
Jonathan F. Bank, Locke Lord LLP
Panel:
Marvin Mohn, Pro Insurance Solutions & CX Reinsurance Company Limited
Robert Romano, Locke Lord LLP
David Scasbrook, Swiss Re
Jim Wrynn, FTI Consulting

UK Part VII Transfer
as a Guide to US Insurance Business Transfers

By Marvin D. Mohn[1]

1. Insurance business transfer plans of one form or another are well recognized in multiple jurisdictions outside the United States. In the European Union, a series of European Directives require EU members to have in place mechanisms for such transfers. Directive 2002/83/EC provides for the transfer of all or part of the part of the portfolio of life assurance business from one life assurer to another (see article 14), Directive 92/49/EC addresses the transfer of all or part of the portfolio of non-life insurance business (see article 12), and Directive 2005/68/EC addresses portfolios of reinsurance business (see article 18).

2. British law establishes a procedure to transfer insurance portfolios under Part VII, sections 103A to 117 of the Financial Services and Markets Act 2000 ("FSMA").[2] This legislation covers both insurance business transfers and banking business transfers and is fundamentally a restructuring statute. Although it satisfies the requirements of the various European Directives just identified, it predates those Directives and is itself an update of previous British legislation allowing for such transfers, specifically Schedule 2C to the Insurance Companies Act 1982 (now repealed).

3. As U.S. jurisdictions implement or consider implementing similar legislation allowing for corporate restructuring of insurance companies, many of the issues already addressed under the British legislation will undoubtedly arise again, making it useful to review British practices.

4. As with the US transfer mechanisms that have been implemented or are being considered, an insurance business transfer plan may be implemented with court approval after all interested parties (including regulators) are given an opportunity to object. No consent of interested parties is required,[3] with the court approval process

[1] General Counsel, Pro Global group of companies.
[2] In particular, see FSMA section 105(1) which defines the relevant transfer as being one that "results in the business transferred being carried on from an establishment of the transferee in an EEA State", comprises business by a UK insurer or carried on in the UK, and is not excluded by statute.
[3] In contrast, a majority of creditors needs to approve a scheme of arrangement, which is a voluntary restructuring of a UK company. The process involved is analogous to a Chapter 11 reorganization under the U.S. bankruptcy code, including requirements of approval by separate classes of creditors where interests among the creditors sufficiently diverge. UK Companies Act 2006, §§ 895-901. Although the scheme process is analogous to a U.S. bankruptcy reorganization, it is also used with solvent companies for other purposes such as mergers and demergers of companies and to effect the transfer of minority shareholders' interests where 75% of shareholders agree to sell a company. Because majority creditor approval is required, a scheme may prejudice creditors in ways that would not be deemed fair for the purpose of a Part VII transfer. The statute governing schemes actually allows for a "compromise or arrangement", *id.* § 895(1), and many insurance schemes involve compromises of liabilities in the form of commutations, which go well beyond what can be accomplished through a transfer of policies.

(including regulatory review and comment) serving to protect the interests of affected persons. Applicants for a transfer must take appropriate steps to give policyholders and other affected persons notice of the proposed transfer and an opportunity to object.

5. The core regulatory concern for insurers is solvency, and unsurprisingly the core issue addressed in court cases on business transfers is the degree of solvency required for a transferee insurer. The statute itself expresses little guidance on the point (or indeed on the requirements for transfers in general), indicating simply that the "court must consider that, in all the circumstances of the case, it is appropriate to sanction the" transfer.[4] The British courts have elaborated further on that test, determining:

> "Ultimately what the court is concerned with is whether the scheme is fair as between different classes of affected persons, and in arriving at a conclusion as to whether or not it is, among the most important material before the court is material which the Act requires to be before it, namely the report of an independent actuary as to his opinion on the scheme."[5]

6. This was elaborated further by the court in *Re Axa Equity & Law Life Assur. Soc. plc & Axa Sun Life plc* (applying the predecessor statute, the Insurance Companies Act 1982):

> "(1) The 1982 Act confers an absolute discretion on the court whether or not to sanction a scheme but this is a discretion which must be exercised by giving due recognition to the commercial judgment entrusted by the company's constitution to its directors.
>
> "(2) *The court is concerned whether a policyholder, employee or other interested person or any group of them will be adversely affected by the scheme*.
>
> "(3) *This is primarily a matter of actuarial judgment involving a comparison of the security and reasonable expectations of policyholders without the scheme with what would be the result if the scheme were implemented*. For the purpose of this comparison the 1982 Act assigns an important role to the independent actuary to whose report the court will give close attention.
>
> "(4) The FSA[6] by reason of its regulatory powers can also be expected to have the necessary material and expertise to express an informed opinion on

[4] FSMA § 111(3).
[5] *Re: Hill Samuel Life Assurance Limited* [1998] 3 All ER 176, at 177 (as quoted in *Re Pearl Assurance (Unit Linked Pensions) Ltd and others* - [2006] All ER (D) 72 (Sep), ¶ 6).
[6] The FSA, or Financial Services Authority, no longer exists. Its functions have been split between the Prudential Regulation Authority and the Financial Conduct Authority.

whether policyholders are likely to be adversely affected. Again the court will pay close attention to any views expressed by the FSA.

"(5) *That individual policyholders or groups of policyholders may be adversely affected does not mean that the scheme has to be rejected by the court. The fundamental question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected*.

"(6) It is not the function of the court to produce what, in its view, is the best possible scheme. As between different schemes, all of which the court may deem fair, it is the company's directors' choice which to pursue.

"(7) Under the same principle the details of the scheme are not a matter for the court provided that the scheme as a whole is found to be fair. Thus the court will not amend the scheme because it thinks that individual provisions could be improved upon.

"(8) It seems to me to follow from the above and in particular paras (2), (3) and (5) that the court, in arriving at its conclusion, *should first determine what the contractual rights and reasonable expectations of policyholders were before the scheme was promulgated and then compare those with the likely result on the rights and expectations of policyholders if the scheme is put into effect*." [7]

7. If policies are transferred from one company to another, what level of security in the new company is sufficient such that the transfer is considered fair? Put differently, what exactly must the independent actuary opine on? The British courts have determined that as long as the transferee company has sufficient assets to meet its *regulatory capital requirements*, the transaction is fair. A mere reduction in capital coverage does not give reason to refuse sanction to a transfer.[8] The court discussed this point in *Re Norwich Union and other companies*:[9]

"**[14]** With that in mind I shall deal first with the objections raised by Mr Butcher. Chief amongst them was a complaint as to changes effected by the Scheme as to the excess over the "required minimum margin" of solvency or "RMM" available to several classes of policyholders. It is a fact that by reason of different funds having, for example, different origins, different investment records, different administrative costs and by reason of their being open or closed, they have ended up with different amounts by which their assets exceed their liabilities and, in turn, different extents to which their RMM is

[7] [2001] 1 All ER (Comm) 1010, ¶ 6 (emphasis added). The principles quoted in the text are derived from a previous unpublished judgment under the Insurance Companies Act 1982, *Re London Life Association Ltd* (21 February 1989) (Hoffman J.). The principles have subsequently been applied under the FSMA. *See*, *e.g., Re Norwich Union*, [2004] EWHC 2802 (Ch), ¶¶ 13-14; *Re The Copenhagen Reins. Co. (UK) Ltd*, [2016] EWHC 944 (Ch), ¶ 17.
[8] *Re The Copenhagen Reins. Co. (UK) Ltd*, [2016] EWHC 944 (Ch), ¶ 21.
[9] [2004] EWHC 2802 (Ch).

covered. Under the Scheme in some cases the RMM is improved, in some diminished. Accordingly there is a double complaint; one part is that the Scheme is unfair as between policyholders, some having their position improved, some having it weakened, and, as to the other part of the complaint, it is that the Claimant companies and the shareholders standing behind them gain from the Scheme whereas, policyholders or at any rate those with diminished RMMs, only suffer from it.

"**[15]** As to the first part of that double complaint, firstly *as an insurance company is in general free in the course of its business to annihilate or diminish the excess over the RMM, to that extent there is no entitlement of a policyholder to cover beyond the RMM itself or to the maintenance of an existing RMM*. Secondly, the RMM, determined according to EU rules and based on calculations of assets and liabilities following FSA Regulations, is intended to represent a practical level of policyholder safety. One can thus reduce the excess over the RMM without materially endangering security. Thirdly, whether any particular reduction in an excess over RMM represents a material disadvantage to any policyholder is a matter for expert actuarial and accounting assessment. Here the Independent Expert whilst, as one might expect, using slightly different language as to different funds and as to guaranteed benefits or benefit expectations, has concluded that no-one sufferers by the Scheme to a material extent; there would be no discernible impact, he says, on security; there was no reason to believe that there would be any adverse affect." (Emphasis added.)

8. Notably, the requirements of regulatory capital for British companies have shifted over time. The current requirement is that companies meet the requirements of Solvency II. That requirement applies to any Part VII transfers that happen under current law, as indicated both in court precedent[10] and in the EU Directives cited above.[11]

9. Solvency margins for EU companies are calculated on a different basis than those of American companies. Under Solvency II, companies can either use a standard model or a customized model approved by the regulator better reflecting the risk profile of the company than the standard model. The standard model is deterministic, meaning that it determines capital requirements based upon a presumed risk profile without regard to the actual actuarial profile of the company involved. The model, however, is based upon certain actuarial assumptions. Specifically, the model determines, on

[10] *See*, *e.g.*, *Re Sompo Japan Ins. Inc*, [2011] EWHC 260 (Ch), ¶ 36.

[11] *E.g.*, Directive 2002/82/EC, art. 14 ("Under the conditions laid down by national law, each Member State shall authorise assurance undertakings with head offices within its territory to transfer all or part of their portfolios of contracts, concluded under either the right of establishment or the freedom to provide services, to an accepting office established within the Community, if the competent authorities of the home Member State of the accepting office certify that after taking the transfer into account, *the latter possesses the necessary solvency margin*." (Emphasis added.))

its assumptions, the amount of capital required for an insurance company to run off solvent in 99.5% of outcomes over a one-year time horizon. In other words, if the loss reserves of the company deteriorate, at the end of one year the company will still have sufficient capital to meet 99.5% of the modelling outcomes for the run off of that company.

10. Before implementation of Solvency II, the UK used a similar but different solvency determination known as an Individual Capital Assessment or ICA.[12] Under that test, the company had to have sufficient capital such that it could meet 97.5% of modelled outcomes at the end of five years.[13] For most long-tail books of business those two tests – 99.5% on a one-year time horizon and 97.5% on a five year time horizon – are effectively equivalent. For shorter tail books they may generate different outcomes.

11. The discussion thus far has focused on the standards applied by the court sanctioning the Part VII transfer. Some transfers falling within the definition of a "ring-fencing transfer scheme" require approval of the UK regulator.[14] Most schemes do not expressly require approval, but the UK's two insurance regulators, the Prudential Regulation Authority ("PRA") and the Financial Conduct Authority ("FCA"), have a statutory right to be heard in any proceeding to approve a transfer, and in practice the courts are unlikely to approve a transfer that the PRA or FCA determines is unfair to policyholders. In addition, the regulator has to approve the choice of independent expert to advise the court on the transfer and has to approve the form of the independent expert's report.[15] Both the PRA[16] and the FCA[17] have issued guidance papers on Part VII transfers.

12. The practice in the UK is for the independent experts – in practice always an actuary[18] – to evaluate the transfer from the perspective of three different groups: (i) the policyholders being transferred, (ii) the policyholders of the transferor not being transferred, and (iii) the pre-transfer policyholders of the transferee company.[19] In each case, the expert advises the court whether any of the three groups is being materially prejudiced by the transfer.

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[12] A related acronym is "ICAS" referring to individual capital adequacy standards, which was the framework under which a firm prepared its ICA before Solvency II became effective. *See* https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2013/pension-obligation-risk-treatment-under-the-individual-capital-adequacy-standards-for-insurers-5-13. Of course, the same letters can also refer to the plural of ICA, or "ICAs".
[13] *Re The Copenhagen Reins. Co. (UK) Ltd*, [2016] EWHC 944 (Ch), ¶ 20.
[14] FSMA § 106B, 107.
[15] FSMA § 109.
[16] https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2015/ps715 (pdf p.199)
[17] https://www.fca.org.uk/publication/finalised-guidance/fg18-04.pdf
[18] PRA Statement of Policy, *supra* note 16, ¶ 2.18.
[19] The affected classes of persons to be considered also includes shareholders. For a full list see *Re Sompo Japan Ins. Inc*, [2011] EWHC 260 (Ch), ¶ 6. The three point identified in the text are specifically enumerated in the PRA policy statement on the form of the expert opinion. PRA Statement of Policy, *supra* note 16, ¶ 2.30(11).

13. U.S. insurance companies also have a statutory calculation of regulatory capital, known as risk-based capital or RBC.[20] Similar to the standard model used for Solvency II, it is a deterministic model that does not rely upon an assessment of the individual actuarial profile of the specific book of business. However, the U.S. model is principally designed to identify when regulatory action is required, so how that translates to determining the capital adequacy of a transferee company is unknown.

14. Policyholders have also objected to business transfers on the ground that they did not offer an opt out to individual policyholders. That objection has been rejected, albeit with the qualification that if the "failure to provide an opt-out [went] to the basic question of fairness", then it would be appropriate for the court to consider.[21] However, courts have yet to find a transfer deficient for failure to provide an opt out.

15. Other issues of prejudice to policyholders have arisen as well. For example, reinsureds may have collateral from the reinsurer to ensure that they receive balance-sheet credit for the reinsurance asset. In most cases the reinsured will have a contractual right to the collateral, and thus will not be prejudiced since the transferee of the book will be legally obligated to provide replacement collateral.[22]

16. An additional objection sometimes raised is that a counterparty will lose set-off rights. For instance, assume Company A is both a cedant and a reinsurer of Company B. Company A will in some cases have the contractual right to set off amounts owed to Company B as a reinsurer against amounts by Company B. Even if there is no contractual right, as a practical matter there would be a commercial ability to assert set-off in the form of a counter-claim (although that can be complicated by different arbitration clauses and other matters) and there would also likely be a set-off right in the event Company B became insolvent. If the inwards or the outwards book is transferred, Company A loses its set off rights. It may of course gain set-off rights against the transferee company, but that will depend upon who is the transferee. In any case, in practice where someone raises concerns about set off, they are typically dealt with commercially to eliminate any objections.

17. A key aspect of Part VII transfers is the transfer of outwards reinsurance that attaches to the inwards book of business being transferred. Section 112(2)(a) of the FSMA permits the transfer order to "transfer property or liabilities whether or not the

[20] *See, e.g.,* R.I. Gen. Laws §§ 27-4.6-1 to -13; Okla. Stat. §§ 36-1521 to -1530; N.Y. Ins. Law § 1324.
[21] *Re Norwich Union & other cos.*, [2004] EWHC 2802 (Ch), ¶ 26 ("In any event, one can readily see the massive disadvantages which would arise were any given company to be required to continue with some of its business (where an opt-out had been exercised) as it had been before the Scheme and some of it (where there was no such exercise) as it should be after the Scheme had received sanction. So far from simplifying the structures in the companies, they would be made even worse.").
[22] *See Re Names at Lloyd's for the 1992 and Prior Years of Account, Represented by Equitas Ltd*., [2009] EWHC 1595 (Ch) ¶¶ 26-28 (concluding that U.S. policyholders were not prejudiced by the transfer because substitute collateral was provided).

authorised person concerned otherwise has the capacity to effect the transfer in question". The UK courts have held that this provision authorizes the courts to order the transfer of reinsurance assets without reinsurer consent.[23] Indeed, the reinsurance can be transferred "even in cases where those properties or liabilities might otherwise be non-transferable, for example by reason of express contractual provision."[24] They have also permitted modification of guarantees of the business being transferred so that transferred policyholders continue to benefit from the guarantee.[25]

18. Other objections depend upon the details of the book of business being transferred and the treatment of the book by the transferee. For example, with respect to the transfer of a life insurance book, policyholders in *Re HSBC Life Ltd.* raised a number of concerns:

> "At present, HLUK policyholders can access information concerning their policy, make fund switches and make additional contributions online, at the same time as dealing with their HSBC bank accounts. Although it will be possible for ReAssure [the transferee] policyholders to access unit prices on the ReAssure website, so as to calculate the value of their fund, and ReAssure will continue to accept regular payments electronically, ReAssure is not intending to offer the same online facility in relation to switching and the making of additional contributions. As a matter of policy, such changes will have to be made in written correspondence or following a telephone call to a call centre, which is to be open during business hours on week days."[26]

19. These concerns were evaluated by the regulator (in this case the FCA rather than the PRA), the independent expert, and the court. The independent expert opined, and the court agreed:

> "Although policyholders may be less familiar with ReAssure as a brand compared to HSBC, I do not consider this, in itself, to be a reason for the Scheme not to proceed. In particular, holding a product with a well-known or familiar brand does not provide any guarantee about the standards to which the policies will be administered. Indeed, in this instance, I believe it is important to note that HLUK no longer sells pension business and that the Scheme represents a stage in HLUK's strategic decision to exit this market. In contrast, ReAssure has a substantial existing pension book and the Scheme represents an expansion of its presence in this market. While impossible to quantify, I consider that there is a benefit to policyholders in being in a

[23] *WASA Int'l (UK) Ins. Co Ltd v WASA Int'l Ins. Co Ltd*, [2003] 1 All ER (Comm) 696, ¶¶ 17-21.
[24] *Re Cater Allen Ltd* [2002] EWHC 3147 (Ch) (as quoted with approval in *WASA Int'l (UK) Ins. Co Ltd* at ¶ 20); *see also* *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538 (applying the same principle to non-insurance transfers under the Industrial and Provident Societies Act).
[25] *Re The Copenhagen Reins. Co. (UK) Ltd*, [2016] EWHC 944 (Ch), ¶¶ 28-49 (the court relied upon § 112(1)(d) as authority to do so).
[26] [2015] EWHC 2664 (Ch), ¶ 21.

> company with an ongoing commitment to a particular market, as it is more likely that they will invest to reflect emerging market developments in the future …
>
> "I appreciate that HLUK may inspire confidence in policyholders as a result of being part of HSBC, an established and recognisable brand. However, this brand recognition comes primarily from its retail banking services rather than its presence in the UK life insurance industry - a sector in which it has limited presence, which would be reduced further by the approval of the Scheme. ReAssure is a part of Swiss Re, which is also a large global business with its own established brand, and one of the market leaders in the financial services industry. It already manages a large block of pensions business, and has an ongoing commitment to expanding its presence in the UK life insurance industry. As a result, I do not believe that objections on the basis of brand loyalty, in itself, is a reason for the Scheme not to proceed."[27]

20. In addition, the PRA Policy Statement on insurance business transfers highlights some issues that could raise potential issues of prejudice in its requirements as to the form of the expert opinion required for the transfer, indicating that the opinion should evaluate, *inter alia*:

> "(a) the effect of the scheme on the security of policyholders' contractual rights, including the likelihood and potential effects of the insolvency of the insurer;
>
> "(b) the likely effects of the scheme on matters such as investment management, new business strategy, administration, claims handling, expense levels and valuation bases in relation to how they may affect:
>
>> "(i) the security of policyholders' contractual rights;
>>
>> "(ii) levels of service provided to policyholders; or
>>
>> "(iii) for long-term insurance business, the reasonable expectations of policyholders; and
>
> "(c) the cost and tax effects of the scheme, in relation to how they may affect the security of policyholders' contractual rights, or for long-term insurance business, their reasonable expectations."[28]

21. How the factors identified by the PRA will affect an individual transfer will of course depend upon the particular facts of a case. As the *Re HSBC Life Ltd.* decision quoted above indicates, the mere fact that a transfer will involve changes to how the policyholder interfaces with its insurer will not prevent British courts from sanctioning an insurance business transfer. To prevent the sanctioning of a transfer,

[27] Id. ¶ 55.
[28] PRA Policy Statement, supra note 16, ¶ 2.33.

the changes must be materially prejudicial such that sanctioning the scheme would not be deemed fair.

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ARTICLE: Rhode Island's Voluntary Restructuring of Solvent Insurers Law and Similar Efforts in Other States

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Text

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Introduction

This Article discusses a small, but unique, area of insurance law - voluntary restructuring - in the smallest state, Rhode Island. This Article begins with the initiative that led Rhode Island to address this topic, and then looks at the two methods of voluntary restructuring currently available in Rhode Island, as well as the two methods' influences. Next, this Article goes on to describe the Rhode Island process and the single time the courts have addressed this law. Finally, this Article will discuss activity in other states to adopt alternative voluntary restructuring laws.

Before diving in, some nomenclature may be helpful. Insurers write contracts and sell them to policyholders. The contracts [1] delineate when and how much the insurer must pay in the case of a fortuitous event, and how much the policyholder must pay in **[*471]** premium in exchange for the coverage. [2] There are times that insurers or policyholders seek to change their

[1] Most insurance contracts are traditionally contracts of adhesion. See John Aloysius Cogan, Jr., Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies, 15 Roger Williams U. L. Rev. 93, 98 (2010).

[2] For example, if Company A guaranteed to pay $ 1 to Policyholder B on January 1, 2020, without any other restrictions or provisos, that is not an insurance contract. For a contract of insurance to exist, there must be certain indicia, including a risk transferred between the parties. For example, if Company A agreed to pay Policyholder B $ 10 if Policyholder B was not able to dance on January 1, 2020, that would likely be considered insurance. See id. at 113-14.

contracts, and if both parties agree, the contract can be novated. There could also be a reason that the insurer and policyholder would agree to end the coverage. In such an instance, the parties could agree to commute the policy. [3] Insurers sometimes seek protection of their own policies from "reinsurers," where the reinsurer assumes a portion of the risk written by the insurer. A "run-off company" is an insurer that is no longer writing new business. Insurance is a highly regulated area, and the decision to cease new offerings could be voluntary (such as a decision to focus on other areas) or involuntary (as part of a regulator's plan to turn around a troubled company, the regulator might order the company to stop writing new business). [4] Whatever the reason for the run-off status, many insurers have considerable assets in a run-off business, [5] to the point that there is now plenty of competition among insurance groups that specialize in managing run-off books of business for other companies. [6] In the context of voluntary restructuring, "unlocking capital" is often referenced and refers to **[*472]** the capital that insurers must hold to pay possible future claims. [7] Insurers invest the premiums they receive and hope to earn money on their investments before claims must be paid. [8]

In the United States, statutory accounting principles issued by the National Association of Insurance Commissioners (NAIC) provide guidance to insurers about the quantity and quality of capital the company should maintain to support its operations. [9] Insurers must hold capital to reserve against possible claims, sometimes for decades, tying up resources that could be used elsewhere, such as reinvesting in the company. [10] Many of these cases are related to environmental or asbestos policies that were written with occurrence-based triggers that can seemingly last forever. [11] In addition, long-term care insurance has been a developing area where insurers recently have been in regular need of additional reserves with the expectation of paying claims for decades on business written upwards of thirty years ago. For example, General Electric, the former lightbulb and consumer appliance giant that now focuses on jet

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[3] See Bill Goddard, The New World Order: Financial Guaranty Company Restructuring and Traditional Insurance Insolvency Principles, 6 Brook. J. Corp. Fin. & Com. L. 137, 145-47 (2011) (providing an example of a fascinating situation where insurance commutations were well employed in helping the troubled mortgage insurer, Ambac, through its unique rehabilitation).

[4] See Nat'l Ass'n of Ins. Comm'rs Restructuring Mechanisms for Troubled Companies Subgroup of the Fin. Condition (E) Committee, Alternative Mechanisms for Troubled Companies 5 (2010), http://www.naic.org/store/free/AMT-OP.pdf [hereinafter NAIC White Paper 2010] (discussing considerations for a troubled insurer where they are put into "regulatory run-off").

[5] See PWC, Global Insurance Run-off Survey 3-4 (2018), https://www.pwc.com/gx/en/insurance/assets/pdf/global-insurance-run-off-survey-2018.pdf (indicating $ 350 billion in North American run-off assets and $ 380 billion more in the rest of the world).

[6] Id. at 11 (citing Berkshire Hathaway as well as five "run-off specialists": Armour Re, Catalina, Enstar, R&Q, and RiverStone).

[7] John Winter, Unlocking Capital, Insider Q., Winter 2013-14, at 68.

[8] The NAIC issues and revises its Statements of Statutory Accounting Principles (SSAP) regularly and methodically. Recently, the NAIC issued a revision to SSAP No. 26R-Bonds, which amended several phrases in the seventeen-page description of insurance accounting rules that identify what securities should be considered bonds for insurance company investing purposes, because bonds are considered to be more secure for capital requirement purposes. See Nat'l Ass'n of Ins. Comm'rs, Exposure Draft SSAP No. 26R-Bonds 4-5 (2017), http://www.naic.org/documents/cmte_e_app_sapwg_exposure_13_36_ssap26r.docx.

[9] See id. at 5, 10.

[10] GE reignites breakup talk after $ 11 billion insurance, tax hit, Bus. Ins. (Jan. 17, 2018, 8:25am), http://www.businessinsurance.com/article/20180117/NEWS06/912318551/GE-reignites-breakup-talk-after-$ 11-billion-insurance,-tax-hit.

[11] See James A. Johnson, Long-Tail Liability Claims, 96 Mich. B.J. 28, 28-29 (2017).

engines and wind turbines, announced in January 2018 that it was planning to add fifteen billion dollars more in reserves to one of its insurance run-off subsidiaries for previously underpriced long-term care obligations. [12]

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I. Rhode Island Has A Unique Law That Allows Solvent Insurers To Restructure Their Businesses

A. How the Unique Rhode Island Laws Were Created

In 1995, Governor Lincoln Almond issued an Executive Order that created the Rhode Island Insurance Development Task Force (the Task Force). [13] The Governor's order also appointed the first nine members and assigned them to identify how Rhode Island could become a center of insurance excellence and recommend statutory or regulatory changes to effectuate that plan. [14] The Task Force was to issue a report that the legislature could act upon, and by 2002, the Rhode Island General Assembly enacted legislation that provided for the voluntary restructuring of solvent insurers. [15] The bill that became what is now codified as Rhode Island General Laws Chapter 27-14.5 was sponsored by Senator William Irons, who was also one of Governor Almond's initial nine appointees to the Task Force, filling the seat reserved for a member of the State's General Assembly. [16]

B. The Legislature Created a Legal Structure to Permit Voluntary Restructuring

In 2002, the Legislature passed the law to allow voluntary restructuring, and Governor Almond signed the law in his last full year in office. [17] However, the public law as enacted would only take effect once the Rhode Island Department of Business Regulation's Division of Insurance (the Division) promulgated rules and regulations to effectuate the law, [18] and once the Commissioner of Insurance certified that certain other preconditions had been met (regarding staffing in the Division). [19] The Division proposed a new regulation entitled Regulation 68 - Commutation Plans on June 21, 2004, which took effect on **[*474]** September 5, 2004. [20] The regulation detailed the costs to an insurer that wished to commute business from a solvent

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[12] Gen. Elec. Co., Current Report (Form 8-K) (Jan. 15, 2018) (noting General Electric's plan to allocate $ 8.9 billion to future policy benefit reserves, incurring a $ 6.2 billion charge under GAAP accounting, and continued contributions of $ 2 billion a year for 6 years).

[13] R.I. Exec. Order No. 95-21, § I (Aug. 22, 1995), https://almond.apps.uri.edu/execord/95-21.html.

[14] Id. § II.

[15] 2002 R.I. Pub. Laws ch. 381.

[16] Id.

[17] Id.

[18] 27 R.I. Gen. Laws § 27-14.5-6 (2017).

[19] 2002 R.I. Pub. Laws ch. 381, § 3.

[20] R.I. Dep't of Business Regulation, Division of Insurance, Regulation 68, effective Sept. 5, 2004. In the past year, Insurance Regulation 68 has been recodified at 230 RICR 20-45-6 (LexisNexis 2018), but throughout this paper it will be referred to as Regulation 68 or 68 R.I. Ins. Reg. for consistency.

insurer, [21] the items that the Division required in a plan, and the mechanical steps that an insurer would follow. [22] Subsequent versions of the regulation added clarity to the process [23] by implementing the best practices after the first commutation plan was enacted and addressed by the Rhode Island Superior Court, [24] and broadened the scope of the regulation to allow insurance business transfers (IBTs). [25]

The Rhode Island law and regulation now allow two unique functions that had not been previously available to insurers in the United States: commutations of solvent insurers and insurance business transfers. The commutation portion of the law and regulation allow that "a solvent insurance or reinsurance company in run-off may propose a commutation plan extinguishing its liabilities for past and future claims of its creditors and then terminate its business." [26] The more recently allowed IBT portion of the regulation allows that a mature and closed book of business may be transferred into a Rhode Island domestic insurer, and the contracts be novated by order of the Superior Court. [27] Each of these mechanisms is somewhat unique in the United States, but both are based on well-established insurance systems in England, **[*475]** other Commonwealth countries such as Bermuda, [28] the European Union, and is not unheard of in courts in the United States because of the international nature of modern insurance and bankruptcy law. [29]

C. Commutation Plans in Rhode Island

Commutation plans represent one way that an insurer in run-off status might quickly wind down its affairs. A run-off company can exist for years beyond its useful life span, and indeed, there are many companies in regulator-mandated run-off that are required to pay claims, collect premiums, and wind down their businesses over years or decades. [30] One of the problems with

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[21] 68 R.I. Ins. Reg. § 5(a) (Sept. 5, 2004) (recodified at 230 RICR 20-45-6 (LexisNexis 2018)) (setting the amount as "$ 125,000 or such lesser amount as the Commissioner shall deem adequate," in addition to costs associated to the Division's review of the Plan).

[22] Id. § 4.

[23] In 2009, the Division added a definition and gave itself authority to modify or waive any of the requirements for "good cause shown" after a written application is made by the applicant. 68 R.I. Ins. Reg.§§3(B), 10(A) (Dec. 31, 2009) (recodified at 230 RICR 20-45-6 (LexisNexis 2018)).

[24] In 2014, the Division added several procedural steps and broke Section 4-Plan Procedure into five discrete steps. 68 R.I. Ins. Reg. §§3(B), 10(A) (Jun. 21, 2014) (recodified at 230 RICR 20-45-6 (LexisNexis 2018)).

[25] 230 RICR 20-45-6.3(A)(11), -6.4 (LexisNexis 2018).

[26] In re GTE Reinsurance Co., No. PB 10-3777, 2011 WL 7144917, at 5-6 (R.I. Super. Ct. Apr. 25, 2011).

[27] 230 RICR 20-45-6 (LexisNexis 2018).

[28] See Conyers Dill & Pearman, Schemes of Arrangement for Insurance Companies in Bermuda (2017) (presenting a summary of the solvent scheme available in Bermuda based on Bermuda's Companies Act of 1981).

[29] See In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd., 238 B.R. 25, 35-37 (Bankr. S.D.N.Y. 1999) (discussing the options available to distressed and solvent companies in Bermuda under their solvent schemes statute, finding many similarities to various aspects of United States' bankruptcy law, including Chapter 11 for Bermuda's solvent scheme).

[30] See James Veach et al, The New "Three Rs": Regulators, Run-Off, and "Restructuring Mechanisms," AIIROC Matters, Spring 2009, at 11-12, for an anecdote about a regulatory run-off company that went insolvent in the 1980's, was ordered rehabilitated in 1985, and deferred in 2007 - twenty-two years later - when the New York court was asked to close the

long-lasting run-off companies is that every year, companies incur legal, accounting, regulatory, and other administrative costs. These costs take money away from the company's stockpile of assets that it uses to pay future claims, and if done over a long enough time period, could eliminate an insurer's ability to satisfy its creditors or pay the claims that it promised to pay. Instead of existing for decades and paying claims as they arise out of the dwindling investment proceeds, commutation plans allow an insurer to make an offer to the policyholder to extinguish the coverage. To do this, all parties usually rely on actuaries to determine the likelihood of a claim being filed and the likely severity of the claim to boil it down to a present value figure. This payment could come as a lump sum paid to each insured to **[*476]** extinguish the remaining insurance coverage, in essence reimbursing the insured for lack of continued insurance coverage.

When regular (non-insurance) companies become insolvent, they usually turn to federal bankruptcy courts; however, insurance is state-regulated, and most states have laws that govern the conservation, rehabilitation, or liquidation of insurance companies. [31] New York's insurance regulators have used commutation plans in their rehabilitation of impaired or insolvent insurers since 1989, when the insurance commissioner sought that specific authority to commute reinsurance agreements in order to better carry out his duties. [32] However, the New York commutation plans are only available to impaired or insolvent companies, and the New York legislature specifically said, "a commutation of a reinsurance agreement … shall not be voidable as a preference," [33] which both mean that it is not a corollary to the United Kingdom or Rhode Island commutation plans. [34]

There are a number of mechanical steps that the statute, regulation, and courts require in order to entertain and ultimately approve such a plan. The Legislature created certain steps to ensure fairness in the commutation plans for policyholders by requiring that insurers convince a substantial number of their insureds that the commutation plan makes sense for all parties. This was ensured by requiring a vote of the creditors for (or against) the plan, in addition to giving unsatisfied parties an opportunity to object to the plan in court. [35] The Division must also approve the plan, which requires either adherence to the numerous requirements of Regulation 68 or a waiver for a specific subsection. [36] Additionally, the statute requires that after the **[*477]** Division approves the plan, the applicant must petition the superior court to issue an

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liquidation. See also New York Liquidation Bureau, Union Indemnity Insurance Company of New York (Feb. 19, 2018), http://www.nylb.org/UnionIndem.htm (providing additional information on the Union Indemnity liquidation).

[31] Nat'l Ass'n of Ins. Comm'rs, Receiver's Handbook for Insurance Company Insolvencies 5 (2016).

[32] N.Y. Comp. Codes R. & Regs. tit. 11, §§128.0-128.6 (2018); see also Sheik H. Mohamed, N.Y. Ins. Dep't, Report on Examination of the Constellation Reinsurance Company as of December 31, 2009, at 7 (2010) (offering a brief recap on the company's net impairment that was eliminated after the commutation plan, whereas it had been negative $ 12,432,161 immediately prior to the plan).

[33] N.Y. Ins. Law § 7425(d) (McKinney 2016).

[34] NAIC White Paper 2010, supra note 4, at 16-18.

[35] 27 R.I. Gen. Laws § 27-14.5-4(b)(3)-(4) (2017).

[36] 230 RICR 20-45-6.7 (LexisNexis 2018) (providing for the modification or waiver of other regulatory requirements upon "good cause shown" by the requestor).

order and make certain findings in approving the plan. [37] The court must find that "implementation of the commutation plan would not materially adversely affect either the interests of the objecting creditors or the interests of the assumption policyholders." [38] One piece of evidence the court could look to for that finding is the requirement mentioned above that at least fifty percent of each class of creditors and the holders of seventy-five percent in value of the liabilities owed to each class of creditors vote for the plan. [39] One might call the Rhode Island process a forced commutation whereby the court's order can force insureds who did not approve the plan to surrender their coverage in exchange for money. An alternative approach could have been to let insurers simply negotiate with their policyholders to come to agreement over the amount to be paid, [40] but any insurer and insured could reach such an agreement at any time without need for a court to approve it. And the efficiencies derived from the commutation and business transfer processes include that they may both proceed over the objection of some small number of parties. [41]

This method of forced commutation is not without critics. [42] **[*478]** In the only instance where a commutation plan was considered by the Rhode Island courts, two of the insured parties objected and filed suit to oppose the court's approval. In 2010, GTE re-submitted a commutation plan for approval under Rhode Island General Laws section 27-14.5 and Insurance Regulation 68. [43] The plan was reviewed and eventually approved by the Division after an independent actuary had reviewed the proposal, and a petition was filed with the Rhode Island Superior Court. [44] At an initial hearing, the court ruled that there would only be a single class of creditors [45] for purposes of meeting and sufficiently approving the proposed plan both on the basis of a favorable vote by the majority of the members and of seventy-five percent of the value of

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[37] 27 R.I. Gen. Laws § 27-14.5-4(b)(1).

[38] Id. § 27-14.5-4(c)(1).

[39] Id. § 27-14.5-4(b)(4).

[40] Unfortunately, this creates a situation akin to a reverse Prisoner's Dilemma. Because of the advantages to the insurer to eliminate their policyholders, the insurers might be willing to pay a premium in order to incentivize the last few holdouts to agree. But that might incentivize others to not accept an early payout in hope or fear that later payouts would be higher. Where the traditional Prisoner's Dilemma always leads to better outcomes for the prisoners for cooperating with the authorities, in these cases, policyholders seem to always benefit from withholding their cooperation with their insurer who wants to commute their business.

[41] See In re GTE Reinsurance Co., No. PB 10-3777, 2011 WL 7144917, at 20 (R.I. Super. Ct. Apr. 25, 2011). At issue in this case was the first commutation plan submitted and approved in Rhode Island, where five cedents (likely companies) had objected to the proposed plan at the meeting of the creditors. Id. The five cedents represented 2.13% of GTE RE's total composite reserve, and the court approved the commutation plan in spite of the objectors. Id.

[42] See Susan Power Johnston, Why U.S. Courts Should Deny or Severely Condition Recognition to Schemes of Arrangement For Solvent Insurance Companies, 16 Norton J. of Bankr. L. & Prac. 953 (2007) (citing concerns with the amounts that policyholders end up receiving on claims, deficiencies in the notice that is given to insured, and other problems); see also Susan Power Johnston & Martin Beeler, Solvent Insurance Schemes Should Not Be Recognized [Reprised], 17 Norton J. of Bankr. L. & Prac. 6 (2008) (reaffirming stance on solvent insurance schemes). But see Howard Seife & Francisco Vazquez, U.S. Courts Should Continue to Grant Recognition to Schemes of Arrangement of Solvent Insurance Companies, 17 Norton J. of Bankr. L. & Prac. 571, 571 (2008) (critiquing Johnston, Why U.S. Courts Should Deny or Severely Condition Recognition to Schemes of Arrangement For Solvent Insurance Companies, supra).

[43] In re GTE Reinsurance Co., 2011 WL 7144917, at 16.

[44] Id. at 18.

liabilities owed to the single class of creditors. [46] After the creditors met and voted on the proposed plan, the court held a fairness hearing to consider whether to ultimately approve the plan over the objection of several creditors. [47] One of the five objecting creditors raised legal arguments with the court at the fairness hearing, including challenges to the constitutionality of the restructuring statute under several theories, including the contract clause and due process. [48] In a well-written opinion, Judge Silverstein addressed these concerns and found that the contract clause was not violated, in part because Bermuda has similar commutation-like laws; additionally, the court held that the Rhode Island Legislature had a significant and legitimate public purpose, and the Restructuring Act represented a **[*479]** "reasonable and necessary means by which to address a legitimate public purpose." [49]

The decision of In re GTE Reinsurance Co. has been well received by the Rhode Island legal community [50] and beyond. [51] However, the Rhode Island Supreme Court did not have an opportunity to review the constitutional matters or the commutation law itself because of the subsequent partial vocateur that allowed the settlement of two of the objectors, presumably at higher values of commutation than had previously been offered. [52]

D. Insurance Business Transfers in Rhode Island

The regulation issued pursuant to Rhode Island General Laws section 27-14.5 was amended in 2015 to allow for a second type of voluntary restructuring - the insurance business transfer. [53] The United Kingdom had, for several decades, allowed insurance companies to transfer insurance policies from one solvent insurer to another, through a court sanctioned process that had since 2000 been called a Part VII transfer. By the time Rhode Island amended its regulation, the United Kingdom had experienced fourteen years of evidence that Part VII transfers could work and help insurers without causing major harm on policyholders. Based on the statute's rulemaking authority, [54] the Division promulgated an addition to Regulation 68 that allowed insurers the ability to transfer business from another solvent insurer company into a

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[45] Id. at 18-19. Creditors are more commonly known as policyholders or cedents, and, as GTE RE was a reinsurer, the policies it wrote had ceded GTE RE risks.

[46] Id. at 19-20. This procedure is required by 27 R.I. Gen. Laws § 27-14.5-4(b)(4).

[47] In re GTE Reinsurance Co., 2011 WL 7144917, at 20.

[48] Id. at 1.

[49] Id. at 52, 59, 65.

[50] See John J. Partridge, Rhode Island's Commutation Statute: Constitutional Issues Remain Open, 23 FORC J. 19 (2012). But see J.H. Oliverio, Note, The Great Instrument of Chicanery: An Appeal for Greater Judicial Scrutiny of Solvent Insurers' Schemes of Arrangement, 17 Roger Williams U. L. Rev. 439 (2012). One reason the decision was well received could be the fact that Rhode Island has a business calendar with a judge that is able to devote his full attention to business matters. See Administrative Order No. 2011-10 (R.I. Super. Ct. 2011).

[51] See Thomas F. Bush, Solvent Schemes Come To America, Law 360 (June 8, 2011, 1:01 PM), https://www.law360.com/articles/248309/solvent-schemes-come-to-america.

[52] In re GTE Reinsurance Co., No. PB 10-3777, 2012 R.I. Super. LEXIS 4, at 3 (Super. Ct. Jan. 12, 2012).

[53] 27 R.I. Gen. Laws § 27-14.5-4(e)(ii) (2017).

[54] Id. § 27-14.5-6.

Rhode Island domestic insurer, known as an **[*480]** Insurance Business Transfer (IBT). [55] For policy reasons and to ensure that Rhode Island was setting a high bar with regards to this new kind of transfer in the United States, the transferring business was limited to commercial run-off business sold more than sixty months prior that had been part of a "closed book of business or a reasonably specified set of policies." [56] These restrictions together ensure that business being actively marketed is not immediately available to be commuted and operate as a minimum set of standards. To some, this signaled the opportunity to use both forms of voluntary restructuring together (commutation and IBT), to first transfer business into Rhode Island, and then commute the business once it was within the State. [57]

II. Rhode Island's Law is Based on Concepts That Have Long Existed Outside the United States

A. Solvent Schemes of Arrangement in the United Kingdom

A scheme of arrangement (or commutation plan) is a court sanctioned U.K. process through which insurers take policies and exchange them with their policyholders for money, unwinding the insurance arrangement, or as the NAIC wrote "[a] scheme of arrangement is essentially a statutory compromise between a company and its creditors." [58] In 2006, the United Kingdom updated a 1985 law that specifically allowed judicially approved solvent schemes of arrangement. [59] The 2006 update left the **[*481]** statute quite succinct, which continued to leave much of the process to the courts' discretion. U.K. courts have established a history of cases exercising the power to commute business when presented with a reasonable plan that had the support of a majority of their insureds representing a supermajority of the value protected.

Insurers can receive numerous benefits in using a commutation plan instead of continuing to service the insurance. [60] One benefit is the efficiency through which the process can be undertaken. Another is that a U.K. commutation plan can be approved without the full cooperation of all policyholders, and thus, could be approved even over the objection of a small number of policyholders. If there are objectors that disagree with the value to be paid to the policyholders under the plan, the court will give the matter greater scrutiny. However, the court,

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[55] 230 RICR 20-45-6.2 (LexisNexis 2018).

[56] Id. pt. 6.4(A)(1).

[57] Andrew Rothseid, Cas. Actuarial Soc'y, U.S. Options for Accelerated Closure of Legacy Liabilities 42 (Sept. 10, 2015), https://www.casact.org/education/CLRS/2015/presentations/R-5.pdf.

[58] NAIC White Paper 2010, supra note 4, at 14. Also, note that the broad concept of "schemes of arrangement" or even "schemes" are viewed with some skepticism in the United States. But in the United Kingdom and other Commonwealth nations, several have similar insurance commutation plans available without any apparent negative connection to the term "schemes." I will often replace scheme of arrangement for commutation because of the negative connotation in the United States.

[59] Companies Act, 2006, c. 46,§§895-901 (Eng.); see Dominic McCahill, English Schemes of Arrangement Expand to Continental Europe and Beyond, Skadden Insights (Jan. 16, 2014), https://www.skadden.com/insights/publications/2014/01/english-schemes-of-arrangement-expand-to-continent (providing general information on U. K. schemes).

[60] Rothseid, supra note 57, at 23.

ultimately, has the authority to move forward and approve the transaction regardless of such opposition, assuming the court concludes that the proposed plan is fair to the class members. [61]

In those thirty years of U.K. law, a line of cases has established some helpful guidelines for the similar but distinct process. Under the 2006 U.K. Companies Act (and its similar 1985 predecessor), the process begins when a plan is submitted to the court. Unlike the Rhode Island commutation and Part VII transfers, there is no regulatory approval required for a U.K. commutation, and the plan is filed directly with the court. [62] Next, **[*482]** the court reviews the plan for compliance with the statute, and then reviews the proposed classes of policyholders. If satisfied, the court can allow the plan's proponents to proceed to host policyholder meetings, which requires notices and statements to be sent out and advertised. [63] The law then requires that in each class a majority of the creditors present, in addition to seventy-five percent of the value to be commuted, must approve the plan as a condition to the court's approval. [64] U.K. courts can scrutinize these plans for reasons other than those raised by objectors, as they have considerable discretion in approving plans and responsibility to review other aspects of plans before issuing approval. [65] Also as time has passed, more insureds have become aware of the risks that they would be taking on in the face of a commutation of their policy, leading to more policyholders raising better and more effective objections to these plans, and seeming to help ensure that all policyholders are treated appropriately. [66]

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[61] One standard articulated by the courts in turning down commutation plans has been the Buckley test, as identified in the In re The British Aviation Ins. Co. decision. [2005] EWHC 1621 (Ch.) [74] (Eng.). There, the court's primary ruling was that the creditor meeting was insufficient, but it also opined that the Buckley test would have applied had the creditor meeting been sufficient, and that the plan would not have been approved for lacking fairness. Id. paras. 142-44. The Buckley test seems to derive from Buckley on the Companies Act, a longstanding treatise on U.K. corporate law dating to the 1872. Id. para. 74. One passage articulating the standard for approval of schemes in British Aviation citing Buckley is "that the court should normally sanction a scheme if: "the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.'" Id. para. 74.

[62] See Companies Act, 2006, c. 46,§§896-7 (Eng.). Some believe a "no objection" letter from the Financial Services Authority regarding an insurer that they regulate has some influence in the court approval process. Michelle Kierce et al., Schemes of Arrangement and their Ongoing Currency 14 (2010), PLC Cross-Border Insurance and Reinsurance Handbook, reprinted in Sidley Austin LLP, https://www.sidley.com/~/media/files/publications/2010/01/schemes-of-arrangement-and-their-ongoing-currency/files/view-article/fileattachment/schemes-of-arrangement-and-their-ongoing-currenc__.pdf (last visited Mar. 23, 2018).

[63] Companies Act, 2006, c. 46, § 897 (Eng.).

[64] Id. § 899(1).

[65] See, e.g., In re Hawk Ins. Co., [2001] EWCA (Civ) 241. There, the lower court had previously denied a scheme of arrangement plan based upon her own judgment and absent objectors, including whether there should have been multiple classes of shareholders, and specifically, whether IBNR shareholders should be in the same group as more recognized claimants. Id. para. 7. On appeal, Justices Pill, Chadwick and Wright overturned that decision and allowed the scheme to continue, in part because there had not been any objectors to the plan before the lower court. Id. para. 6. Their decision was based on the 1985 law, and that law had required 3 steps for approval. Id. para. 11. The appeals court found that the trial court had initially approved the proposed plan in the first approval stage, allowed notices to be distributed to the impacted policyholders, and then denied approval in the third stage without any policyholders objecting. Id. para. 21.

[66] One such well-argued objection to a proposed commutation plan was the proposed scheme in the In re British Aviation decision. [2005] EWHC 1621 (Ch.) (Eng.). There, the justice dismissed certain objections to the scheme, but determined that the class meeting had not been properly provided because he determined that there should have been two classes of creditors: those with current claims, and those with Incurred but Not Reported (IBNR) claims. Id. paras. 91-92, 97; see Kierce et al., supra

B. Transfers of Insurance Business in the United Kingdom

Part VII transfers have been a part of U.K. law since 2000, when the Financial Services and Markets Act of 2000 modernized insurance business transfers in England in its seventh part, titled Part VII - Control of Business Transfers. [67] Part VII transfers have established a growing utility in the United Kingdom, in part likely influenced by their flexibility, and the fact that no Part VII transferor has encountered financial difficulties. [68]

Once a company has decided to conduct a Part VII transfer, the transferee must prepare a plan that would identify the liabilities and assets being transferred from one company to another, identify the notice that they intend to circulate to insureds, identify the opportunity to object to the plan, among other requirements. [69] This plan is referred to in England as the Scheme Document, and it requires the approval of the U.K regulators before it can be submitted to the court. [70] In the United Kingdom, there are two regulators with authority over these transfers, the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA), both taking roles in the process and review of Part VII plans. [71] Then, a Part VII transfer **[*484]** requires several approvals during its process, including ultimately the approval of the High Court, which issues the order novating the contracts. Their reviews can take several months to conclude, including actuarial review, to ensure that sufficient ability to pay the transferred claims exists. [72] Once the regulators are satisfied and notice is disseminated, there is another required waiting period to ensure that insureds have both received the notice and had sufficient time to review it. [73] After the notice process is approved and notice is disseminated, a time period is allowed for any policyholders to object to the transfer. If policyholders object, the court is more likely to scrutinize

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note 62, at 14. Current claims have already occurred, and the parties are aware of them, but IBNR claims are less certain to lead to a claim because they have not been reported yet by definition and are more difficult to quantify. To resolve this, actuaries could offer opinions as to how likely such an event is, and thus can assign a future value to such events.), and thus two meetings and two separate votes.

[67] Financial Services and Markets Act 2000, c. 8,§§104-117. Previously this Act had been codified in the United Kingdom Insurance Companies Act of 1982. Insurance Companies Act, 1982, c. 50,§§49-52 (Eng.).

[68] See also Luann M. Petrellis, Welcome to the New World of Run-off, 11 AIRROC Matters 6, 7 (2015) (stating several uses for Part VII transfers for U.K. insurers in addition to extolling the virtues of insurance business transfers in general for insurers, and for the transferring and assuming of companies).

[69] See infra note 71.

[70] Id.

[71] The English Prudential Regulation Authority (PRA) and their Financial Conduct Authority (FCA) both have oversight over Part VII transfers. See Financial Services and Markets Act 2000, c. 8 § 108(1) (authorizing that "the Treasury may impose by regulation impose requirements under Section 107"). The FCA leads the review, but the PRA has published guidance on the topic. See Fin. Conduct Auth., Proposed guidance on our approach to the review of Part VII insurance business transfers 11 (2017), https://www.fca.org.uk/publication/guidance-consultation/gc17-05.pdf.

[72] See Fin. Conduct Auth., supra note 71, at 15. English actuaries rely on a 99.5% confidence level that the transferred business will be able to pay claims for the first year after the transfer. This standard is not unique for Part VII transfers. It is the U.K. general standard for insurance regulatory capital and is based on the FSA's adoption of Solvency II capital standards. See Fin. Services Auth., Insurance Sector Briefing: Risk and capital management update (2008), http://www.fsa.gov.uk/pubs/other/isb_risk_update.pdf.

[73] See Insurance Business Transfers, Milliam Briefing (Milliam, Inc., U.K.), Aug. 2017, at 1, http://careers.milliman.com/uploadedFiles/Solutions/email-marketing/Insurance-Business-Transfers.pdf.

the transfer. [74] One of the final pieces of the Part VII process is the court order, which applies to all members of the class, regardless of objecting status.

C. Cases in the United States Acknowledging Solvent Schemes and Part VII Transfers

Although there has been limited experience in the U.S. courts in approving commutations and insurance business transfers, some U.S. courts have had opportunities to review these issues because European, U.K., and American insurers have been involved with U.K.-based commutations or transfers. Since the 2000 and 2005 revisions to U.K. laws, solvent schemes and Part VII Transfers have been employed much more frequently in the **[*485]** United Kingdom. [75] This has led to more frequent reviews by U.S. courts of the underlying U.K. transactions due to financial markets becoming more interconnected. Some of the impact on the United States is felt in bankruptcy courts, which often are implicated because U.S. policyholders obtain coverage from U.K.-based insurers on such a regular basis, while others involve non-bankruptcy situations, such as when a policyholder wants to submit a claim for payment, but no longer has coverage. [76]

There are several interesting cases that provide guidance to Rhode Island courts. One such case, Narragansett Electric Co. v. American Home Assurance Co., involved damage dating back over sixty years. [77] In Narragansett Electric Co., the court reviewed claims by London-based insurer, Equitas, that the plaintiff had sued the wrong insurer. [78] Equitas argued that it had not assumed the obligations at issue. [79] As the court summarized, "Equitas's motion to dismiss raises the question whether this [Part VII] transfer of insurance obligations from Lloyd's to Equitas is effective and enforceable under U.S. law." [80] First, the court decided that it was sitting in diversity jurisdiction and that **[*486]** the appropriate substantive law to apply was English. [81] Next, the court discussed a prior District Court case where another Part VII transfer

[74] See In re Hawk Ins. Co., [2001] EWCA (Civ) 241. There, a U.K. appeals court overturned the lower court's denial that raised issues on its own without objections to the proposed commutation scheme. Id. para. 21. As of this writing, the author is unaware of another Part VII case with a similar denial for lack of objectors with a subsequent overturn on appeal, but the Hawk decision might guide any such future cases.

[75] See Sidley Austin LLP, Part VII Transfers Effectuated Pursuant to the UK Financial Services and Markets Act 2000 (2017), https://www.sidley.com/-/media/publications/part-vii-transfers.pdf.

[76] See Jennifer D. Morton, Note, Recognition of Cross-Border Insolvency Proceedings: An Evaluation of Solvent Schemes of Arrangement and Part VII Transfers under U.S. Chapter 15, 29 Fordham Int'l L.J. 1312, 1314-15 (2006).

[77] See No. 11 Civ. 8299(PKC), 2012 WL 4075171 (S.D.N.Y. Sept. 12, 2012). Oddly enough, this was a Rhode Island utility and involved a claim originating in Pawtucket, Rhode Island, but with waste disposed near Attleboro, Massachusetts (the next town over, but across the state line). Id. at 1-2. In subsequent decisions in related matters, the Massachusetts Appeals Court found that Massachusetts law would govern whether the pollution was discharged in sudden and accidental ways. OneBeacon America Ins. Co. v. Narragansett Elec. Co., 57 N.E.3d 18, 24 (Mass. App. Ct. 2016).

[78] Narragansett Elec. Co., 2012 WL 4075171, at 2; see Steven E. Sigalow & Richard E. Stewart, How Lloyd's Saved Itself, 37 The Ins. Forum (2010), reprinted in Jones Day, http://www.jonesday.com/files/Publication/dae28676-d6c8-4de6-9cbb-c05aee419d4b/Presentation/PublicationAttachment/533860ba-d4f1-4056-85d9-78b84dc71af5/How%20Lloyd's%20Saved%20Itself.pdf (last visited Mar. 23, 2018).

[79] Narragansett Elec. Co., 2012 WL 4075171, at 2.

[80] Id.

[81] Id. at 8.

was discussed at length and not recognized as a foreign bankruptcy proceeding. [82] In reaching a conclusion to not dismiss the claims against the Equitas defendants, the court relied on a letter sent by Equitas to American policyholders notifying them that Equitas was assuming the obligations of the original insurer. [83] The court found that regardless of whether the Part VII had any effect, the letter sent to American policyholders raised sufficient basis to let the suit continue. [84] Equitas attempted to argue that the Part VII transfer did not state that it would become effective in the United States, rather that it was only effective in certain countries of Europe. [85] Nevertheless, the utility company alleged that it had not relied on the English High Court Order executing the Part VII transfer, but rather relied on the notice letter it received as the evidence of obligation by the new named insurer. [86]

Another case, Air & Liquid System Corp. v. Allianz Insurance Co., dealt with an interesting discovery dispute as to whether a policyholder impacted by a Part VII transaction could later have access to the information that went into a U.K.'s independent expert's report. [87] Ultimately, the special master in the District Court allowed discovery to proceed with a not-inconvenient deposition of the expert. [88] Allianz Insurance Co. is an example of one way that Part VII transfers can be used to add complication to an insurance coverage dispute, embroiling all involved in later litigation. Allianz Insurance Co. also shows how the approval of such a transfer, even though well vetted originally, can later come under scrutiny in unintended or unforeseen locations.

Allainz Insurance Co. concerned General Star, which wrote policies for excess coverage outside the United States for only three years, 1998-2000, and then was put into runoff and ceased **[*487]** writing new policies. [89] By 2010, it had substantially wound down its business and decided to transfer its policies to a new insurer via a Part VII transfer. [90] Both General Star (the transferor) and the transferee taking over the policies shared an ultimate parent company - Berkshire Hathaway. [91] At issue here was whether the expert who opined on the Part VII transfer had properly included one particular U.S.-based insured, Howden North America, and all three policies it had purchased from General Star. [92] That insurance contract had been for excess coverage, and Howden had informed General Star of 13,500 potential asbestos related claims that were likely to exceed the initial layers of insurance, making it likely that the General

[82] Id. at 9.

[83] Id. at 10.

[84] Id.

[85] Id.

[86] See id.

[87] Air & Liquid Sys. Corp. v. Allianz Ins. Co., No. 2:11-CV-00247-JFC, 2012 U.S. Dist. LEXIS 121553 (W.D.P.A. 2012).

[88] Id. at 59.

[89] Id. at 10.

[90] Id. at 11-12.

[91] Id. at 12. This interrelated nature is not unusual and is referred to as an intra-company transaction.

[92] See id. at 8-10.

Star excess policy would be required to pay out claims. [93] The real issue at play in Allianz Insurance Co. seemed to be that the post-Part VII insurer was put into voluntary liquidation days after the Part VII transfer concluded, leading to questions about whether and how the independent expert had valued Howden's potential asbestos claims. [94]

In the In re Board of Directors of Hopewell International Insurance Ltd. decision, a New York bankruptcy judge analyzed a scheme of arrangement that occurred in Bermuda, and applied Bermuda law, rather than the requested Minnesota law. [95] The court further determined that, given the location of the petitioner's assets, respondents had failed to object to the scheme as proposed when they had been provided notice, and that petitioner had been subjected to a foreign proceeding, it had jurisdiction. As such, the court enjoined the respondent from taking action against petitioner based on the underlying action. [96] **[*488]** The court in Hopewell also recognized the Bermuda scheme as one qualifying as a foreign proceeding under U.S. Bankruptcy Code. [97]

III. Vermont was an Early State to Allow for Insurance Business Transfers in the United States

In 2013, Vermont adopted a law that would allow companies to transfer closed blocks of certain insurance coverage into Vermont-based companies through a regulatory approval process. [98] The Legacy Insurance Management Act (LIMA) lays out mechanisms akin to those existing in the United Kingdom and other traditional locations for insurance business transfers. [99] However, there are a few key differences in LIMA that companies might have noted, which could be

[93] See id. at 9, 15-16.

[94] See id. at 15-16.

[95] In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd., 238 B.R. 25, 31-32 (Bankr. S.D.N.Y. 1999).

[96] See id. Written by then the chief United States bankruptcy judge in the Southern District of New York Tina Brozman, this decision detailed relevant history behind the Bermuda schemes of arrangement, including the different methods available to companies. Id. at 35. One arrangement involves a cut-off scheme, developed in 1995, in which companies have no more than five years to submit additional claims prior to a bar date. Id. at 35-36. This scheme had its advantages in that it greatly reduced the time for a run-off to wind down its business. See id.

[97] Id. at 48 (citing to 11 U.S.C. § 101(23) (2012)). The court applied a standard that "a foreign proceeding is a foreign judicial or administrative process whose end is to liquidate the foreign estate, adjust its debts or effectuate its reorganization." Id. at 49 (internal quotations omitted).

[98] See Legacy Insurance Management Act, 2014 Vt. Acts & Resolves 93 (codified as amended at Vt. Stat. Ann. tit. 8, §§7111-7121 (West 2017)).

[99] See Anna Petropoulos, Vermont's new law enables smooth transfer of legacy insurance portfolios, Apetrop USA (Apr. 8, 2014), http://apetropusa.com/2014/04/08/vermonts-new-law-enables-smooth-transfer-of-legacy-insurance-portfolios/; see alsoVt. Stat. Ann. tit. 8, § 7112(b)(1)-(21). This section identifies what is required in the plan submitted to the Commissioner for approval, including: identify what is to be transferred; identify the insureds; a no-objection letter from the domicile regulator; audited financials and annual statements; actuarial opinion that "quantifies the liabilities to be transferred"; three years of pro-forma financial statements showing the assuming company to be solvent; sign-off from the assuming company's officers; copy of the notice to be given to policyholders; statement about pending disputes; and, business plan, investment policies, etc. Vt. Stat. Ann. tit. 8, § 7112(b)(1)-(21). This section also lays out the other requirements of the Act, such as subsection (d)'s requirement

keeping the act from being utilized as frequently as the U.K. version. [100] Additionally, it appears that, at least through early 2018, the mechanisms created in LIMA have not been utilized by any insurers.

[*489] One major limitation of LIMA could be its scope, which may have been set as intentionally smaller than the U.K. predecessor. Several things limit the scope of LIMA, including the types of insurance eligible, the ability of policyholders to exclude themselves, and the exclusion of policies that prohibit such transfers. In LIMA's findings and purpose, the statute identifies that its goal is to target non-admitted insurance and reinsurance, [101] and its definition of "closed block" operates to restrict LIMA transfers to only non-admitted or reinsurance business. [102] LIMA allows objecting policyholders to essentially opt out of the plan (i.e., not be transferred) by simply identifying their policy and an objection to the plan. [103] The fact that policyholders can withdraw themselves from the plan means that any insurer considering such a transfer might need to affirmatively court each policyholder to ensure that the desired goals are accomplished. Additionally, the process is specifically limited to exclude policies that would violate a provision of the underlying insurance or reinsurance contract. [104]

Another concern with the statute is that the final sign-off approving the transfer is provided on a regulatory - and not a judicial - basis. [105] Having a regulatory and not a statutory approval process could limit the ability of the transferor to shield itself from future suits in other jurisdictions. Parties dissatisfied with the Commissioner's final order or the regulatory process are not without options, as they can go to the Vermont Supreme Court **[*490]** to appeal the Commissioner's order. [106] Nonetheless, since the LIMA action concludes with a regulatory action, a question could arise on appeal of what level of judicial scrutiny would apply on appeal. One might argue that the Administrative Procedures Act of Vermont would apply, and that the court should defer to the agency approving the proposed transfer. Moreover, a Vermont Supreme Court decision, State Department of Taxes v. Tri-State Industrial Laundries, certainly implies that the review of the administrative case here would receive deferential review, in that "the actions of agencies are correct, valid and reasonable, absent a clear and convincing

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for the Commissioner to let the applicant know if their application is complete within 10 days of filing, and subsections (h)'s timing requirement. Id. §§7112(d), 7112(h).

[100] See Andrew Rothseid, Cutting on the Gordian Knot on Run Off Insurance, 1 Int'l Corp. Rescue, 373, 376-77 (2016) (summarizing differences between the Rhode Island and Vermont LIMA business transfer processes and identifying similar concerns).

[101] 2013 Vt. Acts & Resolves 93.

[102] Vt. Stat. Ann. tit. 8, § 7111(2).

[103] See id. § 7112(j) (stating that in response to a timely objection "the assuming company shall, not later than 15 days after the end of the comment period, submit to the Commissioner either (1) an amended list of policies … excluding such policyholder … or (2) an express written notice from such policyholder … accepting the plan and consenting to the transfer having the full force and effect of a statutory novation … and withdrawing and rescinding its prior notice of objection"). Basically, under LIMA, the objector must either be satisfied or be cut out of the plan altogether.

[104] Id. § 7112(l) explicitly limits the process if the contract or reinsurance agreement to be transferred has a provision prohibiting the transfer without the consent of the policyholder. While United Kingdom and Rhode Island regulators or courts might well intend to exclude such policies, they do so implicitly, rather than explicitly.

[105] Id. § 7114(a).

[106] Id. § 7115(b) (requiring that aggrieved parties appeal to the Vermont Supreme Court).

showing to the contrary." [107] Although, another concern arising from the regulatory order is how the courts of other states would treat such an administrative order. It is uncertain if a non-Vermont court would grant a similar level of deference, and further, if such a court might consider whether this level of decision could benefit from the full faith and credit of other states, or if it would be accepted by other states under the doctrine of comity. [108] Many courts and commenters have touched on **[*491]** whether administrative decisions are sufficient to satisfy the Full Faith and Credit or Comity clauses of the Constitution, [109] and it might be that the more akin to a court proceeding the Vermont process is, the more likely it is to be upheld. [110] It is possible that the state-based regulatory scheme in which insurers operate demand more cooperation and deference to other states' laws and regulatory orders, such as when insurance companies are no longer able to pay their claims and state insurance departments need to take action to rehabilitate or liquidate the companies. [111]

A method of voluntary restructuring in Rhode Island or elsewhere would not be very effective if it was not also recognized by the other states in the United States and beyond. [112] The notion that the courts of one state respect those of other states is deeply engrained in American culture. Court judgments and decisions receive such respect due to the inclusion of two similar clauses in Article IV of the U.S. Constitution: the Full Faith and Credit Clause [113] and the Privileges and Immunities Clause. [114] The United States Supreme Court has said "no law has any **[*492]** effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." [115] Thus, the Privileges and Immunities Clause or the Full Faith and Credit Clause are two

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[107] State Dep't of Taxes v. Tri-State Indus. Laundries, 415 A.2d 216, 218 (1980). But see In re Agency of Admin., State Bldgs. Div., 444 A.2d 1349, 1350-51 (1982) (overturning a state agency decision as lacking sufficient basis, even as it articulated administrative case would receive deference on the factual matters and would only be overturned if they were to go beyond their enabling legislation or were clearly erroneous). Nevertheless, a dissenting Justice wrote that the court should follow the "construction of a statute by those charged with its execution … unless there are compelling indications that it is wrong." Id. at 1362 (Billings, J., dissenting).

[108] In insurance transactions, there exists an underlying contract between two parties, where the issuer agreed to pay certain amounts if a specified or fortuitous event occurs. If a contract was novated pursuant to the LIMA process, would such a novation be respected by courts in other states? An example might help. Let us assume that an insured had moved and never received notice under the plan and submitted a claim the following year to the transferring company, well after the Final Order issued and appeal rights were extinguished. Presumably, the transferring insurer would deny the claim and point to the LIMA final administrative order, as they had believed their obligations under that contract were novated by the action. But a court in another state might add additional scrutiny later and might not rely on the Vermont administrative order, and it might not be as clear to the other court that the bargained for insurance had truly ceased. In what might be a closer call, look at the same example but assume that the administrative order had been challenged to the Vermont Superior Court, which upheld the administrative order, but did grant deference to the agency during its review. Would that then receive the full respect during the other court's review?

[109] See, e.g., Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); see also William Daniel Benton, Application of Res Judicata and Collateral Estoppel to EPA Overfiling, 16 B.C. Envtl. Aff. L. Rev. 199, 244 (1988). But see New York Life Ins. Co. v. Head, 234 U.S. 149 (1914) (rejecting Missouri's application of Missouri law in its interpretation of its life insurance contract's loan agreement that was negotiated in New York between a New York insurer and a resident of New Mexico). The Head decision has been favorably cited for this limitation on extraterritorial application of state laws. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571 n.16 (1996).

[110] See Utah Constr. & Mining Co., 384 U.S. at 421-22.

[111] See Ambassador Ins. Co. v. Allied Programs Corp., 564 N.Y.S. 2d 54, 55 (A.D. 1 Dept. 1990) (upholding a lower court's granting of full faith and credit to the administrative order of the Vermont insurance department). The court noted the granting of full faith and credit previously in New Jersey and that there was a model law created to provide a uniform system for the orderly and equitable administration of assets and liabilities of defunct multi-state insurers mandates such recognition. Id.

methods emanating from the U.S. Constitution that courts use to recognize court orders in other states.

The Privileges and Immunities Clause, also referred to as the Doctrine of Comity, is based on mutual recognition of foreign proceedings. [116] More than one hundred years ago, in a matter regarding a New York merchant's operations in Paris that led to a suit brought by a French consumer, the United States Supreme Court refused to grant comity to the judgement of a French court because the French court would not have recognized a U.S. judgement under similar circumstances. [117]

On the other hand, the Full Faith and Credit Clause is a means to prohibit multiple states from exercising jurisdiction over the same matter, case, or controversy with divergent results. [118] The Supreme Court has explained that

ours is a union of States, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue. [119]

The clause really is a method of applying res judicata and collateral estoppel to cases from other jurisdictions. In order for the Full Faith and Credit Clause to apply and for a decision be respected later by other jurisdictions, courts look to whether the initial court had jurisdiction over the matter. [120]

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IV. Connecticut Adoped a Law Allowing the Division or Merger of Insurance Companies, Adapting the More Expansive Pennslyvania and Arizona Laws for Insurance

In 2017, Connecticut adopted a new law that would allow domestic insurance companies to divide or merge through a regulatory process. [121] Effective October 1, 2017, the Connecticut law authorized the Connecticut Division of Insurance to approve either the division of an insurer

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112 See Harold S. Horwich, State of Conn. Ins. Dep't., Final Report of the Special Task Force on Insurance Company Run-Off and Reorganization 11 (2006), http://www.ct.gov/cid/lib/cid/rptrunoff.pdf.

113 U.S. Const. art. IV, § 1.

114 U.S. Const. art. IV, § 2, cl. 1.

115 Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

116 See id. (""Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another.").

117 Id. at 228-29.

118 Id. at 185.

119 Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 703-04 (1982).

120 Id. at 704.

121 H.B. 7025, 2017 Leg., Reg. Sess. (Conn. 2017).

or the combination of an insurer with a newly formed company. [122] This law allows domestic insurers to divide into two or more insurers pursuant to a plan of division that meets the requirements of nine sections of the law and gains the insurance commissioner's approval. [123]

Connecticut's law appears to be very similar to recent laws adopted in Pennsylvania [124] and Arizona [125] that allow for divisions of corporations. [126] The Pennsylvania and Arizona laws are broader and not only limited to insurance companies, as they **[*494]** appear to allow the division of any corporate entity and are not codified under the insurance laws in either state. Connecticut's law creates a series of terms using the word "organic," [127] in an attempt to clarify which rules the entity must follow and their derivation. [128] The terms seem intended to identify that the insurers operate across many states and are subject to state based regulation which could lead to multiple sets of rules for a book of business. They also reflect that many insurance company documents are proprietary and not subject to public scrutiny, even though the companies are regulated by a public entity who has access to such documents. [129] The use of such definitions may in fact help an entity going through a division in a public process to maintain confidentiality of such documents.

V. Oklahoma is Considering Adopting a Law to Allow Part VII Transfers

Oklahoma had proposed legislation in 2017 that would have created a commutation process within the Insurance Department. [130] The bill eventually was held, and a Joint Legislative Committee was created to consider the concept and possibly recommend a proposal. [131] On January 17, 2018, the Oklahoma Senate proposed a bill that would instead create an insurance

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[122] Alexander R. Cochran et al., Connecticut Adopts Act Authorizing Domestic Insurers to Divide, Debevoise & Plimpton (May 11, 2017), https://www.debevoise.com/insights/publications/2017/05/connecticut-adopts-act.

[123] On December 4, 2017, The Hartford announced the sale of a subsidiary in run-off, Talcott Resolution, to a group of outside investors. See The Hartford Announces Agreement to Sell Talcott Resolution, The Hartford Newsroom (Dec. 4, 2017), https://newsroom.thehartford.com/press-release/hartford-announces-agreement-sell-talcott-resolution. It is unclear that this sale involved Connecticut's newly authorized division statute or would subsequently involve a merger of certain business into a separate company not be to be sold off with the rest of Talcott. But one could imagine insurers reorganizing certain assets under this law to prepare for a sale of a non-core legacy business and unlock capital by selling the assets off, as this sale did. See An Act Authorizing Domestic Insurers to Divide: Hearing on CT H.B. 7025 (NS) Before the Comm. on Ins. & Real Estate, Jan. Sess., 2017 No. 3549 (Conn. 2017) (statement of Cliff Leach, Vice President, Government Affairs of the Hartford). In that testimony, Leach identified roadblocks that insurance managers have in exiting insurance markets, such as Hartford's 2012 exit of certain life insurance markets. Id.

[124] 15 Pa. Cons. Stat.§§361-368 (2017).

[125] S.B. 353, 51st Leg., Reg. Sess. (Ariz. 2013) amended many sections of law, including Ariz. Rev. Stat. Ann. § 10-22 (2017) and Ariz. Rev. Stat. Ann.§§29-2101 through 2703.

[126] William D. Goddard, Connecticut offers more options for insurers exiting lines of business, Bus. Ins., (Oct. 2, 2017, 12:00 AM), http://www.businessinsurance.com/article/20171002/ISSUE0401/912316228/Business-Insurance-Perspectives-Connecticut-options-insurers-exit-lines.

[127] "Organic rule," "organic law," and "public organic document." See H.B. 7025, 2017 Leg., Reg. Sess.§§(13), (14), (17) (Conn. 2017).

[128] Id. § (1). This section appears to be copied from § 102 and § 312 of the Corporations and Unincorporated Associations Section of the Pennsylvania General Laws. Compare id. with 15 Pa. Cons. Stat.§§102, 312.

[129] Compare the definition of public organic document to the internal entity controls that are not always known to the public - private organic rules. See Conn. H.B. 7025 §§(15), (17).

business transfer process. [132] That bill proposes to **[*495]** create a legal process that would first involve the Oklahoma Insurance Department and their courts. [133]

The current proposed bill seems to have many of the advantages of Rhode Island's Insurance Business Transfers. It has a section that gives jurisdiction to the District Court in Oklahoma County to carry out provisions of the Act, including approval of the proposed insurance transfer. [134] The bill also proposes that the applicant provide notice to the appropriate regulators, guarantee associations, reinsurers, and known policyholders. [135] Section 6 of the proposal includes the submission of the business transfer plan to the Oklahoma Insurance Department for initial approval of the plan, the use of an independent expert to opine on the impact of the plan, including its impact on policyholders. [136] And section 6C gives the court the authority to receive comments and then, after a determination that the plan would not materially adversely affect the policyholders, the court has the authority to approve the transfer of the business, novating the original contracts. [137]

One of the only distinctions between the Rhode Island IBT process and Oklahoma's 2018 proposal is that the Rhode Island process is limited to mature blocks of certain kinds of business to be transferred, while Oklahoma's process is not so limited. The Oklahoma proposal has similar restrictions on the kinds of business that are limited, but does not have a maturation requirement in its current proposal. In theory, this could mean that a 2017 insurance policy could be transferred from the carrier that sold it to a new carrier, over the objection of the policyholder. [138]

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Conclusion and Summary Charts

Insurance companies have identified a need to unlock capital that is held in reserve from decades-old policies. Various jurisdictions have developed methods to help insurers unlock that

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[130] S.B. 606, 56th Leg., 1st Sess. (Okla. 2017) was proposed and had considerable support, passing the senate on three occasions, and seemingly passing a majority house vote as well. See Bill Information for SB 606, Okla. State Legislature, http://www.oklegislature.gov/BillInfo.aspx?Bill=SB606&Session=1700 (last visited Mar. 24, 2018).

[131] The Joint Interim Study of Insurance Business Transfer Plans had its first and only meeting on October 26, 2017 to receive testimony, in person or via Skype, from a number individuals and groups, including the author of this Article.

[132] S.B. 1101, 56th Leg., 2d Sess. (Okla. 2018). The new Oklahoma bill appears to have adopted many of the better aspects of the U.K. Part VII transfer and the Rhode Island Reg. 68, whereas the 2017 bill had "looked like the love child of the laws introduced by Vermont and Rhode Island." See Dan Ascher, The Rhode Ahead, Insider Q., Summer 2017, https://www.insiderquarterly.com/the-rhode-ahead.

[133] See Okla. S.B. 1101 § 6, which proposes an approval process for the Department, followed by an approval process for their courts.

[134] See id. § 4.

[135] See id. § 5.

[136] See id. § 6.

[137] See id. § 6C.

[138] But only if the Insurance Division had first approved the transaction, and the court later approves the proposal as well. See id. § 6.

value while also creating protections for policyholders in their processes. The United Kingdom has the longest history with Part VII transfers to move policies from one company to another and solvent schemes of arrangement to facilitate a faster winding down of an insurer's business. Modeled after those two laws, Rhode Island has created two methods of voluntary restructuring that achieve many of the goals that insurers seek. Several other states have adopted, or are proposing, laws authorizing something similar to the U.K.'s Part VII law, but currently only Rhode Island has a substantially similar law to the U.K. Part VII transfer.

One trend that appears on the rise is more aware and better represented policyholders who are able to articulate the reasons that the proposed voluntary restructuring may not be the best situation for themselves. Thus, the more and the better that policyholders are able to represent themselves in both the administrative and judicial processes, the better the system will have to become. Furthermore, several cases have pointed to a developing trend that not all future claims should be treated equally. Specifically, in In re GTE Reinsurance, the court approved a single class of creditors, and there, it was likely the most appropriate choice. [139] But future courts should look to cases from England, such as In re Hawk Insurance or In re British Aviation, for thoughtful guidance on whether to consider IBNR claims as a part of a combined creditor class or whether to treat them as a separate class of claims. [140]

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Summary of Various Voluntary Restructuring Options: Business Transfers

	Court Approval	Binding on Objectors	Independent Expert Opinion Required	Notice Required to Policyholders	Approval/ Non-Objection from Transferor Regulator	Policies Subject to Transfer
U.K. Part VII Transfers	Yes	Yes	Yes	Yes	No	Most allowed (Part VII, Sec. 105 has some exclusions)
RI Insurance Business Transfers	Yes	Yes	Yes	Yes	Yes	Mature (60 mo.+), closed book, no life, W.C. or personal lines

[139] In re GTE Reinsurance Co., No. PB 10-3777, 2011 WL 7144917 (R.I. Super. Ct. Apr. 25, 2011).

[140] In re British Aviation Ins. Co., [2005] EWHC 1621 (Ch.) [140]-[141] (Eng.); In re Hawk Ins. Co., [2001] EWCA (Civ) 241 [11]-[12], [15]-[17].

Vermont	No, regulatory	No	Yes	Yes	Yes	Closed block (60 mo.+) surplus lines or reinsurance
Connecticut	No, regulatory	Yes, but Sec. 8 gives right to appraisal	Not required, but available	Yes, and likely a public hearing too	N/A. To divide, must be domestic CT insurer	Seemingly any line or type
Oklahoma 2018 SB 1101	Yes, as proposed	Yes, as proposed	Yes, as proposed	Yes, as proposed	Yes, as proposed	No proposed restrictions

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Summary of Various Voluntary Restructuring Options: Commutations

	Initial Regulator Approval	Creditor Vote	Notice Required	Binding on Objectors	Court Approval	Limitations on Policies
U.K. Solvent Schemes of Arrangement	No	Yes, more than 50% of creditors representing >75% of value	Yes	Yes	Yes	No
RI Reg. 68 Commutations	Yes	Yes, more than 50% of creditors representing >75% of value	Yes	Yes	Yes	Mature (60 mo.+), closed book, no life, W.C. or personal lines
Oklahoma 2017 SB 606 (no longer proposed)	N/A (only regulatory approval)	Yes, more than 50% of creditors representing >75% of value	Yes	Yes	No	No Life, W.C. or personal lines

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Thursday, November 8, 2018, 2:00 p.m. – 2:50 p.m. & 3:00 p.m. – 3:50 p.m.

BREAKOUT SESSION
Efficient Data Security – The Use of "Deal Rooms" in Arbitration

SESSION MATERIALS:

PRESENTED BY:

Panel:
Michael Menapace, Wiggin and Dana LLP
Sarah Arad, Intralinks
Barry L. Weissman, Carlton Fields Jorden Burt LLP

ARIAS•U.S. Practical Guide for Information Security in Arbitration

Introduction

This Practical Guide, and the accompanying checklist, is provided by ARIAS•U.S. to help participants in insurance and reinsurance arbitrations address issues of data privacy and cybersecurity. Most companies and law firms have IT and privacy professionals to help them maintain the security of confidential information. The statutory, regulatory, and common law obligations that companies and law firms have to protect confidential information are beyond the scope of what ARIAS•U.S. can address. This Practical Guide is drafted primarily to provide guidance to arbitrators and to outline how companies and law firms can help arbitrators comply with the responsibility to secure and protect confidential information in the arbitration process.

Arbitrations often involve the exchange of regulated forms of information, such as "personally identifiable information" and "protected health information," or other information that is sensitive from a business operations standpoint. Moreover, as stated in the ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure, most parties to arbitration prefer that the proceedings remain confidential. Indeed, it is generally agreed throughout the industry that reinsurance arbitrations are and should be confidential in most circumstances, even absent the parties' complete agreement. Accordingly, the ARIAS•U.S. standard confidentiality form broadly classifies *all* information exchanged in an arbitration as confidential "Arbitration Information."

Personally Identifiable Information ("PII") – Under United States law, in general, personally identifiable information is information that can be used on its own or with other information to identify, contact, or locate a single person, or to identify an individual in context. This information is regulated currently by the data breach notification statutes of 48 states, plus Puerto Rico, and by a host of industry specific regulations and guidance documents.

Protected (or Personal) Health Information ("PHI") – The HIPAA Privacy Rule protects all "individually identifiable health information" that is, with some exceptions, (i) transmitted by electronic media; (ii) maintained in electronic media; or (iii) transmitted or maintained in any other form or medium. Individually identifiable health information is information, including demographic data, that relates to (a) the individual's past, present or future physical or mental health or condition, (b) the provision of health care to the individual, or (c) the past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.

Arbitration Information ("AI") – This is generally defined as all briefs, deposition and hearing transcripts generated in the course of an arbitration, including documents created for the arbitration or produced in the arbitration proceedings by opposing parties or third-parties, final award and any interim decisions, correspondence, oral discussions, and information exchanged in connection with a confidential arbitration proceeding.

The handling of sensitive business and personally identifiable information requires care, thoughtful processes, and deliberate action. Companies, counsel, and arbitrators are encouraged to consider and discuss these issues early and throughout the arbitration process. Even though all information exchanged in the typical reinsurance arbitration is usually considered to be confidential, not all information is equally sensitive. Accordingly, different procedures can and should be implemented for specific circumstances. Therefore, keeping in mind the proviso that arbitrations involving PII or PHI may require additional precautions beyond those listed below, all participants should consider applying, at a minimum, the practices described below to *all* information relating to confidential arbitrations.

The practices described below are not intended to be onerous. Indeed, most companies, law firms, and arbitrators are likely already employing many of these security measures. In the end, one trade-off of enjoying technological advances is the obligation to protect against the risks that accompany those advances.

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I. Organizational Meeting

At the organizational meeting, the parties and panel should discuss:

- Whether the parties are likely to exchange PII, PHI or other types of regulated or sensitive information.
- If the parties anticipate that these types of information or documents will be exchanged, they should ask whether that exchange is truly required and necessary. If there is no reason why this information must be exchanged, consider steps to avoid the exchange. For example, consider whether a column of a spreadsheet may easily be removed or documents be redacted.

The parties and panel should also discuss:

- Whether the parties are likely to file/submit to the panel, PII, PHI or other types of regulated or sensitive information.
- If the parties anticipate that they will file/submit this information, ask whether the filing/submission is truly required and necessary. If there is no reason to file/submit PII or PHI, consider steps to avoid the filing/submission of this information.

<u>Document the treatment of Confidential Information</u>. The parties and panel should address the requirements of exchanging and submitting AI, PII and PHI. Companies may be statutorily or otherwise required to vouch for the security measures implemented by their vendors, including law firms and arbitrators. For example, the companies and arbitrators may consider incorporating these issues within the Confidentiality Agreement signed as part of the arbitration, Scheduling Order, arbitrator engagement letters, and/or arbitrator hold harmless agreements, *e.g.* the company will hold the arbitrators harmless for claims associated with the disclosure of Confidential Information provided they follow certain practices, such as those outlined in this Practical Guide. Ultimately, it is the companies that must be comfortable with the form of assurance they get from law firms and arbitrators to employ sufficient security measures.

<u>Discuss a mode of transmission</u>. If Confidential Information is to be exchanged and submitted to the Panel, the parties should agree on a transmission mode for Confidential Information. See the discussion below for transmission options.

<u>Exchange passwords in person</u>. At the organizational meeting, the parties should consider exchanging passwords in person for encrypted files – the password should never travel with the encrypted files.

<u>Cross-border transmission</u>. Sending PII or PHI across national borders can trigger special obligations. If the cross-border transfer of PII or PHI is necessary, the parties should speak with each company's information security officer and the parties should discuss with the arbitrators any special processes that will be required by any of the applicable jurisdictions.

II. Confidential Information at Rest

The goal is to ensure that all Confidential Information "at rest" is kept secure. "At rest" means information maintained in some form of persistent storage, for example hard copy paper, laptop computer disc, or a portable electronic storage device.

In general, there are two ways that Confidential Information can be stored "at rest": electronically and in hard copies (generally, paper). Care should be taken to ensure that both are secure.

A. Hard Copy Confidential Information

The guidance provided below for storing hard copy confidential information can be neatly summarized as putting into place, and maintaining, a "clean desk" policy for your workspace. Indeed, many companies have a "Clean Desk Rule" for their employees.

1. Equipment Necessary

To implement this policy, arbitrators need a few items of basic equipment that most likely already possess. Every arbitrator working on a matter involving Confidential Information should have a drawer, desk, or safe that locks. Arbitrators should also have an office shredder.

2. Practical Guidance

Once you have the basic equipment, follow the following policies:

- If possible, use a single dedicated space for your workspace when you have to access or review Confidential Information, such as an office. Where practicable, restrict access to that workstation, and secure your workstation when you leave to prevent unauthorized access.
- Follow a "Clean Desk" rule – remove Confidential Information from the top of your desk and lock it in a drawer when the desk is unoccupied and at the end of your work day. In the alternative, a locked door on your office is acceptable to secure hard copy information.
- Close and lock file cabinets containing Confidential Information when not in use or when not attended.
- Do not leave the keys used for access to Confidential Information at an unattended desk.
- Immediately remove from the printer or fax machine documents containing Confidential Information.
- Erase whiteboards containing Confidential Information.
- Treat mass storage devices such as CD-ROMS, DVDs, or USB drives (sometimes called "flash drives" or "thumb drives") as sensitive and secure them in a locked drawer.

B. Electronic Confidential Information

Managing electronic Confidential Information is slightly more challenging than securing hard copy documents, but nevertheless can be done with some basic principles.

1. Equipment Necessary

You should absolutely invest in a computer (laptop or desktop) with **full disk encryption** or software for full disk encryption. Full disk encryption is described more fully below with example products that can be used.

Use and update regularly **anti-virus software**. Most anti-virus software or third-party providers include an option that prompts you to install updates. Take advantage of these options.

We recommend that you invest in a surge protector or battery power backup for your computer, as well as a cable lock or locking desk drawer for laptop storage.

2. Practical Guidance

- Use a dedicated computer for your arbitration work. Do not allow friends or family to use that dedicated computer.
- Any computer that contains Confidential Information should employ "whole disk encryption," and the whole disk encryption should be deployed. In shorthand, whole disk encryption means that the computer user must input a password (or supply prove his/her identity via a fingerprint or some other way) to access any data stored on the computer.
    - Technically, whole disk encryption is a process by which data is transformed on the computer's hard drive into a format that renders it unreadable without access to the encryption key and knowledge of the process used.
    - Whole disk encryption comes standard with many newer Apple computers ("FileVault") and PCs using Windows 10. It is also available using certain commercially available software, including McAfee Complete Data Protection, Symantec Endpoint Encryption, Sophos Safeguard, Microsoft BitLocker, Dell Data Protection/Encryption, Apple FileVault 2, and Trend Micro Endpoint Encryption.
- Use commercially available, standard, supported anti-virus software. Download and run the current version; download and install anti-virus software updates as they become available.
- **Important:** We cannot overemphasize the importance of a strong password. Your passwords should meet or exceed the attached "Password Guidelines." *See below*.
- Enable a password-protected screen saver with a short timeout period to ensure that workstations that were left unsecured will be protected. The password should comply with the Password Policy.
- Never leave passwords on post-it notes attached on or under a computer, nor should they be written down in an accessible location.
- Logoff of your computer when you are not using it.
- Turn off your computer when you are done working or at the end of the day.

- Exit running applications and close open documents when your work is complete.
- Ensure that your workstation computer is protected with a surge protector (not just a power strip) or a UPS (battery backup).
- Recommended: Secure laptops using a cable lock or lock the laptop in a drawer or cabinet.
- We do not recommend using portable electronic storage devices such as thumb drives, CD-ROMs, or DVDs, to store Confidential Information. However, if you do use these devices to store electronic information, the Confidential Information must be encrypted.
    - There is commercially available encryption software that permits encryption of portable electronic storage devices, including McAfee Complete Data Protection, Symantec Endpoint Encryption, Sophos Safeguard, Microsoft BitLocker, Dell Data Protection/Encryption, Apple FileVault 2, and Trend Micro Endpoint Encryption.
- NEVER open any files or click on links attached to an email from an unknown, suspicious, or untrustworthy source. One of the most common ways that bad actors can gain access to data on your computer is through "phishing." The bad actor sends an email (sometimes very official looking) with a file or link. Once you click on the link or open the file, malicious files can be automatically downloaded and the bad actor has access to your computer, often times without your knowledge. Delete these emails and attachments immediately, then "double delete" them by emptying your Trash. If you are unsure if this is a legitimate file or link, call the person who it appears sent you the email to confirm they are known to you and the file is safe.
- Delete spam, chain, and other junk email without forwarding.
- Regularly empty your Trash folder.
- WiFi Routers - All home or business wireless infrastructure devices, a/k/a routers, should adhere to the following standards (usually printed on the box):
    - Enable the requirement that users of your router input a password. You can look for technical specifications - WiFi Protected Access Pre-shared Key (WPA-PSK), EAP-FAST, PEAP, or EAP-TLS .
    - When enabling WPA-PSK, configure a complex shared secret key (at least 20 characters) on the wireless client and the wireless access point – many devices have a randomly generated password already configured for that router.
    - Disable broadcast of SSID.
    - Once operational, consider changing the default SSID name.
    - Regularly change the device password – quarterly or twice yearly.
- Smartphones: If you send or receive Confidential Information using a smartphone, you should have the smartphone password protected and have it set up so that the screen locks if not used within a relatively short time period (i.e., one minute).

- Avoid using public WiFi when possible. If necessary, however, the use of public WiFi connections is acceptable if you are otherwise following the practical guidance outlined above.
- Do not access Confidential Information using a public computer.
- If you are printing documents containing Confidential Information in a public or office environment, do not leave confidential documents at the printer. Also note that many printers have secure printing options that allow you to send your confidential print jobs and hold them in the print queue until the user comes to the printer.

Laws, regulations, guidance documents, and technology change all the time. Particularly if your arbitration will involve the submission of PHI, a full discussion of the most up-to-date requirements under HIPAA (or its state-based equivalents) should take place with the parties so that you understand any additional practices that must be followed.

III. Confidential Information in Motion

Confidential Information "in motion" includes data being transmitting over public, untrusted networks such as the internet or data being transmitted within private, trusted networks, and includes hard copy information or electronically stored information (often referred to as ESI) being physically transported by mail or other delivery service.

A. Electronic Transmission of Confidential Information

The following provides guidance for handling Confidential Information "in motion."

1. Equipment Needed

Use a secure email service provider. Gmail, Hotmail, AOL and other commonly used "free" email services tell you in their terms of service that they are essentially reading your emails. Some examples of secure email services are Proton Mail and Tutanota, both of which have free versions that are secure.

If you are using an email service provider that is not fully encrypted, such as those described above, use one of the commercially available services that allow for the secure transmission of attachments (*e.g.*, HighTail, Citrix Sharefile) and consider upgrading to the pay versions of Gmail, Hotmail, etc. These pay versions are not as secure as the secure email services listed above, but they are significantly better than the free email services.

2. Practical Guidance

- Consider using an encrypted email service.
  - It is a good idea to use one of high-security secure email options available. Some of these options are free, others have a small fee. For example, instead of a Gmail account, you can use Google Apps for Work or G Suite for individual email accounts.
  - Among the free services are the following high-security options: Proton Mail and Tutanota.

    Important: Some email products do not use encryption "out of the box" as a default setting; you have to take steps to enable the encryption. The commercially available services have "Help Desks" that can help you make sure your email is encrypted.

    - **Note:** We recognize that many arbitrators currently use free email services like Gmail, Yahoo, AOL and Hotmail. Many of these services now advertise that emails are encrypted, however, there have been reports of breaches in these services. Moreover, these services' Terms of Service all warn that the companies may scan the content of your emails. We do not, therefore, recommend those services as a first-line choice for confidential arbitrations. If you must use one of these services, all Arbitration Information should be attached to emails using password-encrypted attachments. Documents that are compressed using "Winzip" can be password encrypted. Moreover, most versions of Microsoft Excel, Microsoft Word, and Adobe Acrobat permit password encryption of individual files.

- Consider enabling "two-step authentication," also called "two-step verification" or "cell-phone confirmation," to secure your email account. The secure email services above provide for this.

  Two-step authentication uses a password for your account and some additional method of confirming your identity. For example, you can set up a trusted mobile device on which you will receive a verification code. With two-step authentication, someone can try to gain access to your email with your password from their own computer (or any computer that is not yours), but they will be unable to access your account unless they also have your cellphone. When you log into your email, an authentication code will be sent to your mobile phone, usually as a text message. Before you can complete the sign-on process for your email, you will have to supply the code that was sent to you. *This does <u>not</u> require the user to input two passwords every time you log onto your email. It requires the password and the authentication code when you log into your email from a new computer. Once you log in from that computer, the authentication code is not required for subsequent log-ins from that computer.*
- Set up a dedicated email account for your work as an arbitrator and, to the extent possible, use that account only for business.
- Whenever possible, no Confidential Information should be contained within the body of the email, but within a secure, encrypted attachment.
- Create a strong password using the "Password Guidelines."
- Highly sensitive information should be transferred or access given by a secure method. For example, a File Transfer Protocol (FTP) transfer can be used to download information directly to your encrypted computer. Most law firms will have dedicated FTP transfer capabilities and counsel can assist with how to upload and download documents. In the alternative to transferring information, law firms and companies can set up virtual data room a/k/a "Deal Rooms" where information can be securely accessed by only those given access. The "Deal Room" can be set up such that information cannot be copied, downloaded, or otherwise removed from the deal room, making the issue of deleting files inapplicable, but obviously creating some challenges, e.g. not being able to print and mark-up documents.

B. Physical Transport of Confidential Information

You may have to travel or physically transport Confidential Information. When that is the case, follow these tips.

1. Equipment Necessary

- If you use your laptop on planes or in public places, invest in a physical laptop privacy screen, which are very inexpensive. These screens keep people from seeing your screen unless they are directly facing it.
- For your mobile device or your laptop that contains Confidential Information, you might consider a laptop security product that allows you to remotely locate/disable/wipe clean a laptop that has been lost or stolen. For these to work, the device needs to be connected to the internet, so it is important that the computer or mobile device have full disk encryption as described above. Also, these features or products must be configured before the device is lost/stolen, so plan ahead. Apple has the "Find My" services available for its devices. Android has a built in Device Manager feature that you can enable. For laptops, there are many third-party apps and software that you can use for remote tracking and wiping of the computer.

2. Practical Guidance

- Avoid traveling with Confidential Information.
- Avoid traveling with portable electronic storage devices (e.g., thumb drives). They are small and can easily be lost or misplaced. If you travel with one of these devices, encrypt it. And, you must not keep the encryption key with the device. A better option is to transfer the data to a secure computer (i.e., encrypted) and return or destroy the device.
- Avoid sending PII or PHI via hard copy if possible. Insist that counsel redact unnecessary PII or PHI that will be transmitted in hard copy.
- Avoid using your laptop to work on Confidential Information in public spaces – but if you do, consider investing in a laptop privacy screen.
- Do not check bags with Confidential Information and do not check your laptop.

IV. Disposal of Confidential Information

The lifecycle of Confidential Information ends with disposal. When disposing of Confidential Information, follow these practices:

A. Hardcopy Confidential Information

1. Equipment Necessary

- Shredder (cross-cut or diamond, preferable)

2. Practical Guidance

- Review any confidentiality agreement or other agreements that discuss obligations for disposal of Confidential Information and follow them.
- Shred Confidential Information or return it to the party that filed it.

B. Electronic Confidential Information

Simply deleting a file on your laptop generally removes only the reference to the file, not the file itself. Special steps need to be taken to securely delete electronic files. Keep in mind that, even if you do not save Confidential Information on your computer, care should still be taken. For example, if you open a file sent to you, but do not save a copy of that document on your computer, your computer may very well store a version of that document as a temporary or other file.

Information on external hardware (a disk or drive) can be destroyed by destroying the hardware itself, i.e. the hammer or shredding method. The following deals primarily with disposing of files stored on your computer.

1. Equipment Necessary

- Computer with secure file deletion capabilities
  - Recommendation: Update your computer software and operating system regularly. Use software that employs the most up to date standards. Currently, appropriate software will disclose that it is compliant with the U.S. Department of Defense 5220.22-M standard (3 pass or 7 pass) or Guttman method (overwriting 35 times).

2. Practical Guidance

- Windows
  - Download and use a file deletion program. For example, you may consider:
    - Fileshredder: www.fileshredder.org
    - Eraser: www.eraser.heidi.ie
    - Secure Eraser: www.secure-eraser.com

- Entire hard drive deletion. Use only if wiping an entire hard drive. ***Be very careful with this program***, as it could wipe the wrong drive if you are not careful.
  - Darik's Boot and Nuke: www.dban.org

- Apple
  - Single file deletion: Drag item into Trash, then choose Finder > Secure Empty Trash (OS X Yosemite and prior).
  - For operating systems OS 10.11 or later, you can download the product Permanent Eraser.
  - To erase the entire hard drive, you can use the Disk Utility, secure erase option.
  - Apple SSD drives: Enable whole drive encryption (FileVault 2)

- Portable Electronic Devices
  - Secure deletion using a minimum of 3 pass deletion
  - Destruction: Some shredders permit destruction of CD-ROMs and thumb drives. Physical destruction works nicely for thumb drives.

V. Incident Response – "*Break the Glass*"

- Things happen.
- You are obligated to report potential compromises of Confidential Information because, among other reasons, the companies and law firms should be able to assist you in determining the extent of any issue and help mitigate the issues. In addition, companies and law firms may have reporting requirements imposed by statute or regulation when they or one of their vendors has a potential incident.
- There are various scenarios that can trigger your reporting requirement to the parties, including times when you are not even certain that Confidential Information has been compromised. Some of these scenarios are obvious, for example, you leave a pile of paper in your hotel room after checkout or on the seat of a taxi. Or, you receive a "ransomware" note from a bad actor who has locked down all of your data.
- Examples of potential incidents that should be reported are: a package of papers arrives to you and had been opened already or a thumb drive (even encrypted) was in your suitcase that the airline lost.
- When something happens:
    - Stop. If you are dealing with a potential breach by a third-party, do not proceed on your own.
    - Report to everyone – parties and firms.
    - Today, not tomorrow.

Strong Password Tips

Strong passwords have the following characteristics:

- Contain at least 12 alphanumeric characters.
- Contain both upper and lower case letters.
- Contain at least one number (for example, 0-9).
- Contain at least one special character (for example,!$%^&*()_+|~-=\`{}[]:";'<>?,/).

Poor, or weak, passwords have the following characteristics:

- Contain less than eight characters.
- Can be found in a dictionary, including foreign language, or exist in a language slang, dialect, or jargon.
- Contain personal information such as birthdates, addresses, phone numbers, or names of family members, pets, friends, and fantasy characters.
- Contain work-related information such as building names, system commands, sites, companies, hardware, or software.
- Contain number patterns such as aaabbb, qwerty, zyxwvuts, or 123321.
- Contain common words spelled backward, or preceded or followed by a number (for example, terces, secret1 or 1secret).
- Are some version of "Welcome123" "Password123" "Changeme123"

Avoid writing down passwords. Instead, try to create passwords that you can remember easily. One way to do this is create a password based on a song title, affirmation, or other phrase. For example, the phrase, "This May Be One Way To Remember" could become the password TmB1w2R! or another variation.

- (NOTE: Do not use either of these examples as passwords!)
- Considering using a passphrase. A passphrase is similar to a password in use; however, it is relatively long and constructed of multiple words, which provides greater security against dictionary attacks. Strong passphrases should follow the general password construction guidelines to include upper and lowercase letters, numbers, and special characters (for example, TheTrafficOnThe101Was*&!$ThisMorning!).

Change your password periodically. Changing passwords on a quarterly or bi-annual basis is ideal.

Practical Guide for Information Security in Arbitration

Checklist

This checklist is intended to be used with the Practical Guide and is not a substitute for the full document.

I. Organizational Meeting

Discuss whether the parties are likely to exchange PII or PHI and whether they must.

Discuss whether the parties will be submitting/filing PII or PHI to the Panel. If not required, try to avoid submission.

Address the requirements of exchanging and submitting Confidential Information through the Confidentiality Agreement, Scheduling Order, arbitrator engagement letters, and/or in arbitrator hold harmless agreements.

Agree on a transmission mode and consider exchanging passwords for encrypted files.

II. Storage at Rest

Clean Desk rule for paper documents.

Use password protected computer with encryption.

Keep anti-virus software up-to-date.

Never download files or click on links from unknown or suspicious sources.

Password protect your smart phone and use the timed screen lock feature.

Avoid using public WiFi when possible.

III. Storage in Motion

Use an encrypted email service dedicated for your work activity or take other precautions described in the Practical Guide.

Transfer Confidential Information via an encrypted attachment, not in the body of the email.

Create a strong password.

Highly sensitive information should be transferred or access given by a secure method, e.g. FTP or a Deal Room.

IV. Disposal

Shred paper documents to return them to the party that filed them.

Use the most up to date deletion standards for electronic files.

Use entire hard drive deletion if you want to wipe everything on your computer.

For Portable Electronic Devices (CDs or thumb drives), delete using a minimum of 3 pass deletion or physically destroy.

V. Incident Response – "*Break the Glass*"

Stop.

Report to everyone – parties and firms.

Today, not tomorrow.

USE OF DATA ROOMS
November 8, 2018

I. Introduction
- a. Data Security in Arbitration – data rooms are one tool
- b. What is a data room?
- c. Why use a data room?
  - i. Advantages (assuming at least 100,000 pages)
    1. Costs
    a. Reduction in production costs (no photocopying or shipping)
    2. Ease of access to documents
    3. Everyone has access to same document which results in avoiding copying issues (e.g. poor copying, out of order, docs mixed up)
    4. Can limit access to documents as long as coded properly
    5. E.g. panel can see agreed documents
    6. Privileged documents cannot be seen by opposing party
       - a. Use of data room vs use of cloud type storage such as OneDrive, Drop Box, etc.

II. Disadvantages
- a. Set up costs
  - i. Can be expensive but likely less than photocopying and shipping
- b. Familiarity with program and use of computers

III. Setting up a Data Room
- a. How to set it up
  - i. Outside vendors
  - ii. Firms IT staff
- b. Agreed protocols between parties
  - i. What documents are in data room
  - ii. Basically discovery production
- c. Ability to search all documents at once rather than looking at each individual document
- d. Parties agree upon folder types for documents (although if can search all at once not necessarily crucial step)
- e. Download documents

IV. Use of Data Room

a. Can be done from any location (including a hearing room) – only need good monitor(s) and fast internet connection
b. Practical Tips – using the data room effectively

Presenters:

Barry L. Weissman, Carlton Fields

Michael Menapace, Wiggin and Dana

Sarah Arad

Thursday, November 8, 2018, 2:00 p.m. – 2:50 p.m. & 3:00 p.m. – 3:50 p.m.

BREAKOUT SESSION
Issuance & Enforcement of Arbitral Subpoenas

SESSION MATERIALS:

PRESENTED BY:

Panel:
Debra J. Hall, Hall Arbitrations
Daryn Rush, White and Williams LLP

White and Williams LLP

Attorneys

Gregory Capps

Daryn Rush

Ciaran Way

Practice Areas

Commercial Arbitration

Kaepernick Case Raises Arbitrator Subpoena Power Questions

Sports Law360 | June 20, 2018

By: Gregory Capps, Daryn Rush and Ciaran Way

It has been widely reported that lawyers representing Colin Kaepernick in collective bargaining arbitration proceedings with the NFL are considering asking the arbitrator to issue a subpoena to compel President Trump to appear for deposition. Aside from obvious issues as to whether a sitting president can be subpoenaed to sit for deposition, the case also presents interesting issues about the power of an arbitrator to compel testimony of a non-party under the Federal Arbitration Act (FAA), and the territorial limitations on that power as prescribed by Fed.R.Civ.P. 45.

Arbitrator's Power to Subpoena a Non-Party for Deposition

An arbitrator's power to compel non-parties to produce documents or testify is derived from Section 7 of the FAA, which grants arbitrators the authority to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case."[1] Section 7 also provides that the "summons shall issue in the name of the arbitrators…shall be signed by the arbitrators…." and shall be enforced by "petition to the United States district court for the district in which such arbitrators, or a majority of them, are sitting…."

Notably, Section 7 does not expressly provide that arbitrators may compel pre-hearing discovery or deposition testimony from a non-party. Although there is a lack of consensus among the federal circuit courts as to whether an arbitrator has the authority to compel pre-hearing discovery from a non-party, there appears to be an "emerging rule" that "the arbitrator's subpoena authority under [Section 7] does not include the authority to subpoena non-parties or third parties for prehearing discovery [including depositions and document production] even if a special need or hardship is shown."[2] The Second, Third and Ninth Circuits follow this approach without exception.[3] The Fourth Circuit suggested a limited exception noting that "a party might, under unusual circumstances petition the district court to compel pre-arbitration discovery [from a non-party] upon a showing of special need."[4]

On the other hand, the Eighth Circuit has reached the opposite conclusion, holding "implicit in an arbitration panel's power to subpoena relevant documents for production at the arbitration hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[5] But, this holding is limited to pre-hearing document productions and does not encompass subpoenas for non-party depositions. Indeed, district courts in the Eighth Circuit have distinguished between pre-hearing document production and depositions, enforcing arbitral subpoenas for the former but not the latter, and observing that producing documents "is less onerous and imposes a lesser burden than does a witness deposition."[6]

In addition to the federal court decisions, there is one recent New York state trial court case worth noting. [7] Recognizing the lack of "unanimity" among the federal courts or a decision on point from the New York Court of Appeals, the court in *Matter of Roche Molecular Sys. Inc.,* declined to follow the Second Circuit's decision in *Life Receivables Trust, supra,* and instead relied on

*Imclone Systems, Inc. v. Waksal.****[8]*** In *Imclone*, a New York appellate court interpreted the FAA to give arbitrators the authority to issue non-party deposition subpoenas, where the "information sought would plainly be unavailable from other sources" and was focused on a "crucial" issue in the case.[9] Following *Imclone*, the *Roche Molecular* court also enforced an arbitration panel's subpoena directing the deposition of a non-party witness where the testimony sought was not available from another source and was "sufficiently focused on the topics at issue in the arbitration."[10]

Although no federal circuit court has enforced an arbitral subpoena commanding a non-party's deposition, courts have recognized that Section 7 of the FAA does not prevent arbitrators from holding preliminary hearings, in advance of a final hearing on the merits, to hear testimony from non-parties.[11] "[T]he language of Section 7 is broad, limited only by the requirement that the witness be summoned to appear 'before [the arbitrators] or any of them' and that any evidence requested be material to the case."[12] In *Stolt-Nielsen*, the petitioner first sought to enforce subpoenas for the depositions of non-parties, and the district court refused. Therefore, the petitioner went back to the panel seeking the issuance of subpoenas for testimony at a preliminary hearing. These subpoenas directed the non-parties to "appear and testify in an arbitration proceeding."[13] The district court enforced the subpoenas, finding the dispositive difference was that the instant subpoenas "call[ed] for the non-parties to appear before the arbitrators themselves."[14] The non-parties appealed. Both the district court and Second Circuit denied the motions for stay pending appeal. Therefore, the arbitrators and the parties convened the preliminary hearing and heard the non-parties' testimony prior to the Second Circuit ruling on the appeal. Agreeing with the district court, the Second Circuit rejected the non-parties' argument that the subpoenas "were thinly disguised attempts to obtain pre-hearing discovery,"[15] and set forth several factors that distinguished the preliminary hearing from a deposition (*i.e.* the preliminary hearing was before the arbitrators, the arbitrators ruled on evidentiary issues such as admissibility and privilege during the hearing, and the testimony became a part of the arbitration record used by the arbitrators in their final determination of the dispute).[16]

Although it does not appear that Mr. Kaepernick can compel the deposition of a non-party under the FAA, following the guidelines set forth in *Stolt-Nielsen*, it is possible to call a non-party to appear for a preliminary hearing. However, the preliminary proceeding must resemble an evidentiary hearing rather than a deposition. The most important factor is the presence of the arbitrator. Although arbitrators and courts should take steps to minimize the burden on non-party witnesses, there is no blanket prohibition against re-calling a non-party witness at a later hearing.[17]

Territorial Limitations of Rule 45

Section 7 mandates that subpoenas issued by an arbitrator must be served "in the same manner as subpoenas to appear and testify before the court."[18] Fed.R.Civ.P. 45 applies to subpoenas and provides that a subpoena summoning a person to attend a hearing or trial must be issued "from the court where the action is pending."[19] Rule 45(c)(1)(A) and (B) contain territorial restrictions which limit a district court's power to compel a non-party's appearance to attend a hearing taking place within the state where the non-party resides, is employed or regularly transacts business, or is within 100 miles of where the non-party resides, is employed or regularly transacts business.

At least one court concluded that the territorial limitations of the Rule 45(c)(1) apply to an arbitrator's subpoena commanding documents and testimony.[20] Additionally, where there is no independent basis for personal jurisdiction over a non-party who is outside the court's normal geographic jurisdiction, courts have refused to enforce a subpoena commanding appearance by phone or video.[21] In other words, a party cannot circumvent the territorial limitations of Rule 45 by requesting video testimony.

If Mr. Kaepernick seeks to compel a non-party to appear at a hearing or produce documents, he will have to consider these territorial limitations. To avoid these issues, one alternative is to convince the arbitrator to convene a preliminary hearing in a location within the non-party's territorial limitations. This alternative was recognized by the court in *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co. (In re Arbitration).* Although the *Legion* court refused to enforce the subpoena because of territorial limitations, it suggested that if the testimony and the documents "sought by the subpoena are of sufficient importance, and if all else fails, attendance could presumably be compelled at an arbitration hearing [where the non-party is located]." [22] This alternative is by no means guaranteed as it requires the arbitrator's, and possibly adverse parties', agreement.

Conclusion

Obtaining prehearing discovery from non-parties in an arbitration can often be difficult, but there are workarounds to consider. Under Section 7 of the FAA, federal courts have generally concluded that an arbitrator is not authorized to subpoena the deposition of a non-party. However, an arbitrator still has broad powers under Section 7 to convene multiple hearings to accommodate non-party testimony even in advance of a final hearing on the merits. Moreover, an arbitrator arguably has the power to move the situs of the hearing to circumvent the territorial limitations of Rule 45.

If you have questions or would like more information, please contact Gregory Capps (cappsg@whiteandwilliams.com; 215.864.7182), Daryn Rush (rushd@whiteandwilliams.com;

215.864.6360) or Ciaran Way (wayc@whiteandwilliams.com; 215-864.6815).

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[1] 9 USC § 7.

[2] *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008) quoting H. Oehmke, 3 Commercial Arbitration § 91:5 (2008) (noting this emerging rule was triggered by *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004)).

[3] *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008) (*adopting Hay Grp*.); *CVS Health Corp. v. Vividus*, LLC, 878 F.3d 703, 706 (9th Cir. 2017) (an arbitrator has "no freestanding power to order third parties… other than in the context of a hearing.").

[4] *Comsat Corp. v National Sci. Found.*, 190 F3d 269, 275-276 (4th Cir 1999) (did not define "special need," but stated the party moving to compel must at least show that "the information it seeks is otherwise unavailable").

[5] *See In re Security Life Ins. Co.*, 228 F.3d at 870-71 (8th Cir. 2000); *see also Am. Fed'n of Tel. & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999) (looking to the FAA for guidance in a labor employment case and following decisions from district courts finding that Section 7 implicitly allows pre-hearing document discovery from third parties).

[6] *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. 02-4304 (PAM/JSM), 2004 U.S. Dist. LEXIS 389, at *7 (D. Minn. Jan. 9, 2004) (enforcing the subpoena for pre-hearing production of

document and refusing to enforce the subpoena for a pre-hearing deposition of a non-party witness).

[7] *Matter of Roche Molecular Sys. Inc. (Gutry)*, 2018 N.Y. Misc. LEXIS 1455 (N.Y. Sup. Ct. April 24, 2018).

[8] *Id.* relying on *Imclone Systems, Inc. v. Waksal*, 22 AD3d 387 (N.Y. App. Div., 1st Dept 2005).

[9] *Imclone Systems, Inc.,* 22 AD3d. at 388.

[10] *Matter of Roche Molecular Sys. Inc. (Gutry)*, 2018 N.Y. Misc. LEXIS 1455, at *14-15.

[11] *Stolt-Nielsen Transp. Grp., Inc. v. Celanese AG*, 430 F.3d 567, 578 (2d Cir. 2005); *All. Healthcare Servs. v. Argonaut Private Equity*, LLC, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011) ("permitting an arbitrator to hold a preliminary hearing that is not a hearing on the merits 'does not transform [the preliminary hearing] into a [prohibited] discovery device.'").

[12] *Stolt-Nielsen Transp. Grp., Inc.*, 430 F.3d at 578-79.

[13] *Id.* at 570.

[14] *Id.* at 571.

[15] *Id.* at 571.

[16] *Id.* at 578.

[17] *Id*. at 580.

[18] 9 USC § 7.

[19] Fed.R.Civ.P. 45(a)(2) (2013).

[20] *See, e.g., Lin v. Horan Capital Mgmt.*, LLC, 2014 U.S. Dist. LEXIS 114631, at *3-4 (S.D.N.Y. Aug. 13, 2014).

[21] *Id. citing Roundtree v. Chase Bank USA, N.A.*, 2014 U.S. Dist. LEXIS 76255, at *5 (W.D.Wash. June 3, 2014).

[22] *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co. (In re Arbitration)*, MISC. NO. 01-162, 2001 U.S. Dist. LEXIS 15911, at *5 (E.D. Pa. Sep. 5, 2001).

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and legal questions.

Issuance & Enforcement of Arbitral Subpoenas

Including Authority of Panels to Conduct Third-Party Pre-Hearing Discovery

By

Debra J. Hall and Robert M. Hall

Ms. Hall is an attorney, former reinsurance senior executive and is currently an active insurance/reinsurance umpire, arbitrator and expert witness. She was a litigator for more than a decade with extensive trial experience. Ms. Hall is an ARIAS-U.S. certified arbitrator. For more detail visit her website at hallarbitrations.com or debrahalladr.com. Mr. Hall is an attorney, a former law firm partner, and a former insurance and reinsurance senior executive. He is currently an insurance consultant, insurance/reinsurance umpire, arbitrator and expert witness. Mr. Hall is an ARIAS-U.S. certified umpire and arbitrator. For more detail visit his website at robertmhalladr.com.

I. Introduction

This article examines an arbitration panels' authority to pursue third party pre-hearing discovery. Although the judicial trend is to deny enforcement,[1] some courts have recognized the express authority of panels to convene preliminary hearings for the purpose of taking witness testimony along with the production of documents. However, therein lies a potential minefield of issues for the arbitration panel, including the use of inconsistent language within and among the relevant statutes and conflicting institutional arbitration rules.

Significantly, we highlight the contrast between the authority of an arbitration panel to *issue* a subpoena with its authority to *enforce* a witness' compliance. This distinction raises a policy question for an arbitration panel—does the panel perceive their role with respect to the issuance of subpoenas as merely an administrative one, issuing the form and substance of the summons[2] as requested? Or should the panel examine any draft subpoena and its issuance, with an eye toward its ultimate enforcement?

II. Circuit Court Split on Pre-Hearing Discovery of Non-Parties

Any analysis of an arbitration panel's authority to issue subpoenas must start with the Federal Arbitration Act ("FAA").[3]

Section 7 entitled "Witnesses before arbitrators; fees; compelling attendance" provides:

> The arbitrators . . . or a majority of them, may summon in writing, any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case . . . . Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or

> neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Federal Circuits are split on whether this language permits an arbitration panel to issue a documents-only subpoena to a non-party in the course of discovery. The Second,[4] Third,[5] Fourth[6] and Ninth[7] Circuits have interpreted §7 to require the appearance of a testifying witness before one or more members of the panel, thus not permitting a pre-hearing documents-only subpoena.

These restrictive interpretations of FAA §7 stand in contrast to the more liberal view of the Eight Circuit[8] that the authority granted by §7 to subpoena relevant documents for production at a hearing includes the "implicit power" to subpoena relevant documents prior to the hearing. The Sixth Circuit, while declining to apply the FAA to the labor matter before it, expressly relied on a similar view of §7.[9]

While the Fourth Circuit adopted the interpretation that §7 precludes discovery subpoenas as a general matter and in the specific case that was before them, the Court noted in *dicta* that pre-hearing document subpoenas might be enforced upon a showing of special need or hardship, though the Court did not define the parameters of this exception except to observe that the information must, at a minimum, be otherwise unavailable. [10]

A joint committee report of the New York Bar is an excellent resource on arbitration subpoena issues, including a list of federal district court cases in other circuits following the restrictive interpretation of §7.[11]

There has also emerged a divergence of view between the Second Circuit and the New York state courts. Some of the state courts have taken a view similar to that of the Fourth Circuit. [12] For a discussion of the implications of this federal/state court split, *see* the *New York Bar Report*.[13]

III. Obtaining Non-Party Compliance in the Face of the Circuit Court Rulings

The Stolt-Nielsen Alternative

Learning its lesson from a prior attempt, the arbitration panel in *Stolt-Nielsen Trans. Group, Inc. v. Celanese AG, ("Stolt-Nielsen")*[14] issued subpoenas to Stolt-Nielsen directing its custodian of records to appear and testify at an arbitration proceeding and to bring certain documents with him. The district court enforced these subpoenas and the custodian appeared before the entire panel bringing documents and providing testimony on evidentiary issues and objecting to certain questions on the grounds of privilege.

Stolt-Nielsen appealed the district court order arguing that Section 7 does not empower arbitrators to summon non-parties to testify and produce documents in advance of a "merits hearing" characterizing it as a "thinly disguised effort to obtain pre-hearing discovery." The Second Circuit rejected this argument, upholding the preliminary nature of the hearing citing three factors: (a) the custodian was not summoned to a deposition designed to elicit information in preparation for a hearing; (b) the custodian gave testimony directly to the arbitration panel and the panel ruled on certain issues and reserved others for later; and (c) the testimony of the custodian became part of the record to be used by the arbitrators to resolve the dispute. The court commented that the fact that the custodian's testimony was in advance of the final hearing on the merits was irrelevant since there may be preliminary matters to be determined and hearings are often continued for extended periods. The Second Circuit also made it clear that they were not suggesting that all three factors had to be present in other cases.[15]

The concurring opinion of Judge Chertoff in the Third Circuit's *Hay Group* decision discussed a similar procedure, whereby a single arbitrator may compel a third-party to appear with documents and then adjourn the proceedings.[16] The Second Circuit cited both the procedure outlined by Judge Chertoff's concurrence and its decision in Stolt-Nielsen as examples of how arbitration panels are not powerless to compel third party discovery under FAA §7**.**[17]

Arbitration panels should be aware that institutional arbitration rules have failed to keep abreast of developments in this area. For example, AAA Commercial Rules at R-34 (d) provide "An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." Although the majority of Circuits have ruled that arbitrators cannot issue subpoenas for documents alone, this provision may be operative in the Eighth and Sixth Circuits as well as arbitrations conducted under some state statutes. Likewise, insurance/reinsurance arbitration rules permit panels to issue subpoenas for the production of documents in contravention of the rulings in the majority of Circuits.[18]

This brings us to the next questions regarding who and how to issue the subpoenas, how many arbitrators must attend a hearing, where the hearing can be held, and what other traps to avoid in the enforcement (as opposed to the issuance) of the summons.

IV. Issuance of Subpoenas—Process & Procedure

A. Only Arbitrators Can Issue Summons

Section 7 provides that "the arbitrators, or a majority of them" may summon any person to attend before them, as a witness and to bring documents. Unlike certain state statutes (*e.g.,* New York Civil Practice Law and Rules ("C.P.L.R.") §7505 that permits an arbitrator or any attorney of record the power to issue subpoenas), only the arbitrators can issue summons in an arbitration to which the FAA applies.

B. Opposing Party Objection to Issuance

Typically, the requesting party presents the subpoena to the arbitration panel for its approval and signature.[19] Sometimes the opposing party raises objections to the issuance of subpoenas generally, the authority or jurisdiction of the panel, or to the scope of the requested summons. The arbitration panel should carefully consider any authority or jurisdiction issues as the issuance of subpoenas not within the panel's authority or jurisdiction undermines the integrity of the process and the panel itself. However, issues of scope are generally beyond the ability of the opposing party to raise. Rather, the subpoenaed witness more properly brings such issues before the appropriate Federal district court by way of a motion to quash or to modify the subpoena.[20] A party does not have standing to assert any rights of the nonparty, absent a personal right or privilege.[21]

C. Nationwide Service of Process

FAA §7 provides that witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." Rule 45 of the Federal Rules of Civil Procedure ("FRCP") provides for nationwide service of judicial subpoenas.[22] By extension, an arbitral subpoena can be served anywhere in the United States.

Two questions remain: Can an arbitral summons require the witness to appear at the location where the arbitration is pending even if it is far from the witness' domicile? And if the witness fails to appear, how and by whom is the subpoena enforced?

D. Location of Third Party Witness Compliance

While an arbitral subpoena can be served anywhere in the United States, it can command compliance only within 100 miles of the witness, unless other conditions exist as noted below. FRCP Rule 45(c)(1) sets forth the territorial limits for complying with a subpoena, providing in relevant part:

> A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense.

Thus, the subpoena should command the witness to appear and testify and bring the requested documents to a place within the geographical limit applicable to the witness, regardless of where the arbitration proceedings are otherwise pending.

E. Motions to Quash

Courts have held that witness objections to relevancy, materiality, privilege and confidentiality should first be brought before the arbitration panel as the proper entity to determine evidentiary issues in the arbitration.[23] However, witness motions to quash based on the limitations imposed by FAA §7 (*e.g.*, the panel exceeded its authority) may also be properly brought before the court with jurisdiction to enforce the subpoena as discussed below.[24] Insurance/reinsurance industry procedures authorize panels to rule on the objections of either a party or a subpoenaed person without specifying the type of objection.[25]

The *New York Bar Report* offers a "Model Federal Arbitration Summons" ("Model Summons") that addresses this and other arbitration subpoena issues with helpful annotations. For example, the text of the Model Summons specifies the type of objections that should be made to the arbitration panel as opposed to the court. The Drafting Committees' purpose for including this language was to overcome any assumption that all objections are to be addressed to the court and thereby avoid the delay caused by unnecessary judicial intervention in the arbitration process.[26]

The Fourth Circuit has noted that the recipient of an arbitrator-issued subpoena is under no obligation to move to quash the subpoena and that by failing to do so, the recipient does not waive the right to challenge the subpoena on the merits. The FAA imposes no requirement on the subpoenaed party, the only remedy being a motion to compel compliance.[27]

V. Enforcement of Arbitral Subpoenas

A. Court Enforcement at Place of Compliance

An arbitration panel's authority to issue a non-party summons does not include the authority to enforce the subpoena—only a court can compel compliance under the FAA.

FAA §7 provides that

> . . . upon petition the United States district *court for the district in which such arbitrators, or a majority of them, are sitting* may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in *the same manner provided by law* for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." (emphasis added)

Additionally, Rule 45 makes it clear that the federal district court *at the place of compliance* with a judicial subpoena is the court in which enforcement should be sought as long as the district court has subject matter jurisdiction.[28] In the absence of jurisdiction, enforcement would be proper in the state court at the place of compliance.[29]

In the event that an arbitration panel opts to hold a Stolt-Nielsen preliminary hearing with non-party testimony and production of documents, the proper court for enforcement of the subpoena would be the district court (or state court) within the 100-mile radius of the witness specified in FRCP Rule 45.

B. Relocating the Panel to Another Jurisdiction

At least one court has upheld a subpoena requiring a non-party to appear and testify before a panel relocated for that purpose.[30]

Additionally, institutional arbitration rules permit panels to conduct hearings at locations other than where the arbitration is pending. For example, AAA International Dispute Resolution

Procedures Article 17 Rule 2 states that a "panel may meet at any place it deems appropriate for any purpose" including conducting hearings. The AAA Commercial Arbitration Rules at R-11 authorizes the arbitrator, in his/her sole discretion, to "conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process." By contrast, insurance/reinsurance industry procedures require that the location of "all proceedings" shall be as agreed by the parties with the ability of the panel to change the location only in the absence of agreement.[31]

Panels should be aware of any restrictions in the arbitration agreement and the applicable institutional arbitration rules, if any, that might require consent of all parties to change the location of a hearing. A recalcitrant party could use this provision to preclude court enforcement of a subpoena.[32] Depending on the wording of the arbitration agreement, the panel might be able to relocate for purposes of a preliminary hearing, interpreting the location provision in the parties' agreement as referring only to the merits hearing. Alternatively, the panel may be able to apply an adverse inference against the party refusing to agree to the panel's attempt to relocate for purposes of hearing testimony and obtaining documentary evidence.[33]

Additionally, serious consideration should be given to changing industry insurance/reinsurance arbitration rules so that they no longer impose an impediment to parties and panels attempting to relocate proceedings for the purpose of obtaining non-party documents.

C. How Many Arbitrators Is Enough?

FAA §7 provides that the arbitrators "may summon in writing, any person to attend before them *or any of them* as a witness." (emphasis added) Courts have cited the ability of a single arbitrator to hear testimony of a witness.[34] By contrast, when it comes to enforcement of a subpoena, §7 provides for enforcement in the district of compliance upon petition to the district court "in which such arbitrators, or a majority of them, are sitting." Thus, while §7 seems to permit the taking of testimony by a single arbitrator, the same section seems to suggest that enforcement is available only where a majority of them are sitting.

The taking of testimony by less than the entire panel of arbitrators could also raise questions under the parties' arbitration agreement that may require that evidence be heard by the entire panel. Additionally, some arbitration rules require that all arbitrators be present for the taking of evidence. For example, AAA Commercial Arbitration Rules at R-34 (a) provide in relevant part: "All evidence shall be taken in the presence of all the arbitrators and all the parties . . ." Some state statutes may have similar impediments. For example, N.Y. C.P.L.R. §7506 (e) provides: "The hearing shall be conducted by all the arbitrators, but a majority may determine any questions and render an award."

The International Commercial Disputes Committee of the Association of the Bar of the City of New York recommended:

> . . .while Section 7 provides that non-party evidence may be taken 'before [the arbitrator] or any of them,' the Committee believes that all arbitrators should be present when a non-party provides testimony in an international arbitration. This is recommended both to ensure that arbitrators carefully weigh whether the non-party's testimony is 'really needed' (to borrow Judge Chertoff's words), and to protect the enforceability of the arbitrators' eventual award from any challenges under the FAA or the New York Convention.[35]

In our view, best practice is to hear testimony before at least a majority of arbitrators and to ensure that the parties agree, on the record, to testimony being taken by less than the entire panel for this purpose. By requiring the presence of a majority, the enforceability provision of FAA §7, which is not subject to waiver by the parties, is clearly met and the parties are thereby precluded from attacking the ultimate award on this basis.

D. Testimony by Electronic Means

Some commentators have suggested, and institutional arbitration rules permit the taking of testimony by electronic means instead of requiring physical presence. For example, AAA Commercial Rules at R-32 (c) permit video conference, internet communication, telephonic conference and other such means as long as the parties are afforded the opportunity to present evidence and cross examine witnesses. Similarly, insurance/reinsurance arbitration rules expressly authorize this practice.[36]

However, the *New York Bar Report* cautions panels that providing for other than physical presence of the arbitrators could provide a recalcitrant witness the opportunity to argue that the panel is not "sitting" in the federal district where the witness is located. Noting that the "touchstone of Section 7" is the *adjudicative* presence of the arbitrator, not the physical presence, the joint committees believe it is "prudent to avoid controversy on this point." [37]

VI. Conclusion

In summary:

- The majority of courts hold that FAA §7 requires that non-party documents be produced by a testifying witness;
- The arbitration panel may convene a preliminary hearing for the purpose of taking testimony and receiving documents as §7 does not limit a panel's authority to a merits hearing;
- Although an arbitration panel has the ability to issue a summons anywhere in the United States, it can command compliance, in accordance with FRCP Rule 45, only within a 100 mile radius of the non-party witness' location;
- Parties have no standing to object to the scope of the subpoena, only the subpoenaed witness has such standing, absent a personal right or privilege;
- Motions to quash based on irrelevancy, materiality, privilege, and confidentiality should be brought before the arbitration panel though challenges to the panel's authority/jurisdiction may be brought before the court ultimately responsible for enforcement of the subpoena;

- The appropriate court to seek compliance with a non-cooperative witness is the district (or state) court where compliance is sought;
- The panel may temporarily relocate for the purpose of taking testimony and receiving documents, except beware of arbitration agreement wording as well as insurance/reinsurance industry procedures that might impose impediments; and
- FAA §7 is internally inconsistent permitting a single arbitrator to hear testimony but providing for subpoena enforcement only where a majority of the panel is "sitting." Testimony before less than a full panel may violate requirements of certain institutional arbitration rules and raise questions of enforceability under the FAA and the New York Convention (in the case of international arbitrations). The best practice is to hear testimony before at least a majority of arbitrators and to ensure that the parties agree, on the record, to testimony being taken by less than the entire panel for this purpose.

As noted in the Introduction, some panels perceive their role with respect to subpoena issuance as administrative, leaving questions about the conformity of the subpoena with FAA Section 7 and the requirements of FRCP 45 to be decided by a judge. Commentators have suggested that the preferred approach is for arbitration panels to:

> . . . consider carefully the enforceability of proposed subpoenas as a condition of issuance . . . by making well-conceived decisions based on clearly applicable case law, so that the tribunal rules at the point of issuance of a subpoena as it would rule if it were a judge deciding a motion to compel compliance."[38]

ENDNOTES

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[1] *See Life Receivables, infra*, Note 4. *Hay Group* signaled what one commentator has called an "emerging rule . . . This growing consensus is evidenced by the wide array of district court decisions – including those within this Circuit – that have adopted *Hay Group's* holding." *Life Receivables* at 215.

[2] The Federal Arbitration Act, 9 U.S. Code §§ 1 – 16 refers at §7 to the issuance and enforcement of arbitral "summons." This article uses the terms "summons" and "subpoena" interchangeably as both refer to "an arbitrator's compulsory process to a non-party witness." *See* New York Bar Report, *infra*, Note 11, at Annotation A.

[3] *Id.*

[4] *Life Receivables Trust v. Syndicate 102 at Lloyd's of London,* 549 F. 3d 210 (2d Cir. 2008) ("Life Receivables").

[5] *Hay Group, Inc. v. E.B.S. Acquisition Corp*., 360 F. 3d 404 (3d Cir. 2004) ("Hay Group"). The opinion of the Court was issued by then Circuit Judge Samuel Alito (before his appointment to the U.S. Supreme Court).

[6] COMSAT Corp. v. National Science Found., 190 F. 3d 269 (4th Cir. 1999) ("COMSAT").

[7] *CVS Health Corp. v. Vividus,* LLC 2017 U.S. App. LEXIS 26236 (9th Cir.) ("CVS Health").

[8] *In Re Sec. Life Insurance of America*,228 F. 3d 865 (8th Cir. 2000)("Security Life").
[9] *American Federation of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F. 3d 1004 (6th Cir. 1999).
[10] *COMSAT*, 190 F.3d *at* 276. The Third Circuit rejected this exception, *Hay Group,* 360 F.3d at 410.
[11] Report of the International Commercial Disputes Committee and the Arbitration Committee of the Association of the Bar of the City of New York, 26 Am. Rev. Int'l Arb. 157 (May 2015) ("New York Bar Report").
[12] In *ImClone Sys. Inc. v. Waskal*, 22 A.D. 3d 387, 388 (1st Dep't 2005), predating the Second Circuit decision in *Life Receivables*, the Appellate Division of New York Supreme Court, First Department, held that in a case governed by the FAA, it would apply §7 to permit discovery depositions of non-parties upon a showing of special need or hardship. The court in *Connectu v. Quinn Emanuel Urquhart Oliver & Hodges*, No. 602082/08, slip op. at 10 (Sup. Ct. N.Y. Cnty. March 11, 2010) followed *ImClone* after and notwithstanding the Second Circuit's decision in *Life Receivables.*
[13] *New York Bar Report* at Annotation E.
[14] 430 F.3d 567 (2nd Cir. 2005).
[15] *Stolt-Nielsen* at 578 (". . . although we hasten to add that we do not suggest that all these factors need be present in every case in order to justify the arbitration subpoenas under Section 7.").
[16] *Hay Group*, 360 F.3d at 413. To the extent that Judge Chertoff's concurrence could be interpreted as compelling the witness to appear with documents, and not taking testimony, it would be contrary to the majority trend that requires the witness to appear for the purpose of taking testimony. See *Life Receivables* at 218 (". . .those relying on Section 7 of the FAA must do so according to its plain text, which requires that documents be produced by a testifying witness.")
[17] *Life Receivables*, 549 F.3d at 218.
[18] Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 1999) at 14.5 ("1999 TF Procedures"); Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 2009) at 14.5 ("2009 TF Procedures"); ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (2014) ("ARIAS U.S. Rules") at 14.5.
[19] FAA §7 requires that a summons issue in the name of and be signed by a majority of the arbitrators. Does this require the panel to circulate the subpoena for signature by multiple panel members? It is difficult to believe that in today's electronic environment that one panel member cannot sign on behalf of the panel. Common practice suggests that a single arbitrator may sign the subpoena, listing the arbitrators by name under the signature line and clearly noting that the signature is "on behalf of a majority of," or if applicable, "on behalf of a unanimous panel."
[20] 9 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE, par. 45.50 at 3. (3d ed. 2000).
[21] *Id.* at Note 10.
[22] FRCP 45(b)(2) was amended effective December 1, 2013 providing for nationwide service. *See* New York Bar Report at Annotation F (noting that the FRCP 45(b)(2) amendments remove at least one procedural hurdle to arbitral subpoena enforcement raised by cases like *Dynegy Midstream Servs., LP v. Trammochem*, 451 F. 3d 89 (2d Cir. 2006) and *Legion Ins. Co. v. John Hancock Mutual Life Ins. Co.*, 33 Fed. Appx. 26 (3d Cir. April 11, 2002)).
[23] *See New York Bar Report* at Annotation I citing *Security Life*, 228 F.3d at 871 (Section 7's requirement that information sought by arbitral subpoena be "material as evidence" does not entitle the witness to judicial assessment of materiality, as such a requirement would be "antithetical to the well-recognized policy favoring arbitration, and compromise the panel's presumed expertise in the matter at hand").
[24] *See New York Bar Report* at Annotation I citing *Ware v. Peacock, Inc*. 2010 WL 1856021 at 3 (N.D. Ill. May 7, 2010) (granting motion to quash arbitration-issued deposition subpoena based on *Hay Group*

and *Life Receivables*); *In re Proshares Trust Sec. Litig*., 210 WL 4967988, at 1 (S.D.N.Y. Dec. 1, 2010) (granting motion to quash document discovery subpoena based on *Life Receivables*).

[25] *1999* TF Procedures at 14.5; 2009 TF Procedures at 14.5; *ARIAS U.S. Rules* at 14.5.

[26] New York Bar Report at Annotation I.

[27] COMSAT, 190 F.3d at 276.

[28] New York Bar Report at Annotation F.

[29] Subject matter jurisdiction is beyond the scope of this article. For a discussion of the topic, see New York Bar Report at Annotation H.

[30] *In re National Financial Partners Corp*., 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. April 21, 2009).

[31] 1999 TF Procedures at 9.1; 2009 TF Procedures at 9.1; ARIAS U.S. Rules at 9.1.

[32] Teresa Snyder, "The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act", 34 TORT & INS. L.J. 101, (1998).

[33] "Adverse Inferences in International Arbitral Practice", ICC International Court of Arbitration Bulletin Vol 22/November 2 – 2011 at 44 ("An arbitral tribunal's power to draw adverse inferences is well established as a matter of international arbitration practice."). Likewise, the International Dispute Resolution Procedures provide that "In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs." International Centre for Dispute Resolution and American Arbitration Association. Article 21.9.

[34] *Hay Group*, 360 F.3d at 413.

[35] *Obtaining Evidence From Non-Parties in International Arbitration in the United States,* The International Commercial Disputes Committee of the Association of the Bar of the City of New York at II. C.. Reference to Judge Chertoff is to the concurrence opinion in *Hay Group*.

[36] *1999* TF Procedures at 14.6; 2009 TF Procedures at 14.6; *ARIAS U.S. Rules* at 14.6.

[37] *New York Bar Report* at Annotation F. While not determinative, in the concurring opinion in *Hay Group,* Judge Chertoff noted that obtaining non-party documents through witness testimony requires the arbitrators to decide if they too, are prepared to suffer some inconvenience in order to mandate what is in reality, an advance production of documents. *Hay Group*, 360 F.3d at 413. Obviously Judge Chertoff contemplated physical presence of the arbitrator(s). *See also,* the Second Circuit in *Stolt-Nielsen*, 430 F.3d at 580 ("Nor should we assume lightly that that arbitrators will subpoena third-party witnesses gratuitously, since the arbitrators themselves must attend any hearing at which such subpoenas are returnable.")

[38] *Id.* at Annotation K.

Thursday, November 8, 2018, 2:00 p.m. – 2:50 p.m. & 4:15 p.m. – 5:05 p.m.

BREAKOUT SESSION
Cheaper? Faster? Really? Getting Arbitration Back on Track

SESSION MATERIALS:

PRESENTED BY:

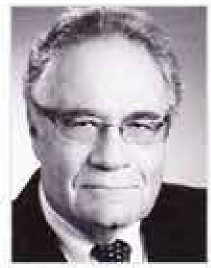
Panel:
Leslie A. Davis, Troutman Sanders LLP
Charles Ehrlich, ARIAS•U.S. Certified Arbitrator
David Thirkill, The Thirkill Group

The View from the Middle Seat

article

By Charles G. Ehrlich

Charles G. Ehrlich



There's a saying that "if you're not lead dog, the view never changes."

In contrast, when you're a reinsurance arbitration umpire, the view changes constantly; it's a continual adventure.

There may have been, perhaps, a time of peace and kindness, when party appointed arbitrators got together over a pint or five and solved disputes, maybe bringing in the umpire to smooth out any last gentlemanly differences of opinion. That time is no more.

Today's arbitration looks like litigation without the courtroom. I've been hearing this reality bemoaned at ARIAS since the Bill Clinton administration, but nothing has changed – which suggests that significant change in the foreseeable future isn't all that likely despite earnest efforts at reform.

These days, our custom of "pre-disposed" party-appointed arbitrators is somewhat unique in the commercial world. The American Arbitration Association detests the concept. (See AAA Canons of Ethics IX and X.) In Europe, party-appointed arbitrators are expected to be neutral. Our system seems well entrenched, however, so rather than suggesting changes I'm offering some thoughts and impressions on how to get the most bang for your arbitral buck if you're a client or lawyer, and how to get to an award you like if you're a party arbitrator. Let's focus on three critical issues: credibility, common sense, and a good story.

Now, dear reader, you're probably thinking that these points are so obvious that you needn't read further. Indulge me, though. Let's just pretend that a little reflection can be worthwhile. If you're willing to indulge that suspension of disbelief, you could well find the following observations interesting.

Let's start with credibility – a concept that has numerous faces, including credibility of your position(s), credibility of your witnesses, credibility of your party-appointed, and credibility of your counsel.

As a ceding or assuming company, building the credibility of your position begins well before there is a dispute to be arbitrated. If your assumed re team has doubts about a cession, you'll want to show any eventual arbitration panel that your concerns were valid and in good faith – and not, as the cedent will argue, ginned up to evade a legitimate claim. So, from the very beginning your team should be making a record that demonstrates timely, clear and focused inquiries addressing the issue(s) of concern – not boilerplate demands for umpteen categories of information that have little if anything to do with the problem at hand but are the easiest way to push back on a cession. Then, if the cedent responds to your focused inquiry, you are well advised to actually address the merits of what they say – which will benefit you in two ways. First, a focused and thoughtful dialogue might actually solve the problem. Second, if you end up in arbitration, your demonstrated seriousness and good faith effort can weigh significantly with the panel. In contrast, the easy response of a boilerplate list of demanded information – particularly information a panel will know that you'd never actually look at – cuts heavily against your eventual credibility.

By the way, if rightly or wrongly, you suffer the industry reputation of being "slow pay – no pay," you can't ignore that elephant in the room. It would be a good idea to devote extra attention to building a strong, supportable case that will convince the panel of your bona fides.

In addition to creating a good record, it is never too early to start thinking about arbitration witnesses if you see a dispute coming down the pike. In arbitration you'll want witnesses who come across as thoughtful, reasonable and sincere. But what if the fellow handling the file is going to (un) impress a Panel as a disagreeable twit? He may be a fine professional who will, nevertheless, make a rotten impression

As a ceding or assuming company, building the credibility of your position begins well before there is a dispute to be arbitrated.

Charles D. Ehrlich

Always fascinated by the process of decision making, Chuck Ehrlich is a former General Counsel, SVP of Claims, and reinsurance lawyer who is now an ARIAS arbitrator and expert witness.

There may have been, perhaps, a time of peace and kindness, when party appointed arbitrators got together over a pint or five and solved disputes, maybe bringing in the umpire to smooth out any last gentlemanly differences of opinion. That time is no more.

when testifying. Plan ahead: assign the file to someone who can support your position reasonably and credibly. Line management will probably object – "this has been Freddy's file for years and you'll insult him by moving it" – but biting that bullet can buttress your chances of winning.

The challenge of maintaining credibility continues into the conduct of the arbitration itself. The lawyer is the face of the client, and if the lawyer's credibility erodes away, that can't help the client. Moreover, when a lawyer takes questionable positions, he puts his party-appointed arbitrator in a tough spot.

Maintaining credibility is a particular challenge for a lawyer in love with case law. A one of a kind reinsurance decision by a judge in Kansas will likely carry little weight with a panel of industry experts, no matter how much you pound the table. And, you doubly trip yourself if you give the panel the impression that you don't know this. Or let's assume you want to take the deposition of the cedent's CEO in a $2,000,000 dispute. The cedent is a multi-billion dollar company and the CEO submits a declaration that she has never heard of the matter. Yet you continue to push. Yes, you will lose credibility with the Panel. But even worse, you're putting your party-appointed arbitrator in a terrible position. If she supports you, the Umpire must now suspect her judgment, i.e., her credibility. That's not good. And, if she doesn't support you, you've started to cleave her away from The Cause (envision the White Cliffs of Dover with chunks falling into the sea) and, once begun, that process of cleaving may continue into more important issues. In other words, you don't want to force your party arbitrator into becoming comfortable with voting against you; it may become a habit.

Speaking of your party-appointed . . . if you haven't agreed to a neutral panel let's confess (at least between ourselves) that you want your party appointed to be a tireless advocate for your position. But she can't be a mere mouthpiece (or the less polite term often used) because then her influence with me, the Umpire, is at risk. So pick someone who is forceful but willing to bite the bullet if you have the lesser side of a position. Also, pick someone who is hard working. I've found it very helpful, perhaps even persuasive on an issue, when a party appointed is fully conversant with everything relevant in the record over the entire course of the arbitration and can support her argument with facts as well as conviction. A very smart party-appointed is also a good idea. An Umpire takes everything with a grain of salt; so intelligent reasoning helps conquer innate skepticism.

Credibility's cousin is common sense.

A classic abandonment of common sense is to endlessly complain that your opposition is committing the most awful blatant horribleness since the Spanish Inquisition. This is a world in which really terrible things happen to millions of people on a daily basis. So, the fact that your opponent was disagreeable at a deposition or served a pile of silly interrogatories may well call for a remedy from the panel but it isn't an atrocity; don't treat it as one.

Common sense is also often a fatality in the wonderland that is discovery. (This calls for a war story.) Years ago I was in front of a federal judge in Los Angeles, a nasty fellow but very bright. Ahead of me was a status conference in which two very prominent lawyers started telling His Honor about their plans for a document depository, a special discovery master, and related mush. His Honor cut them off after about two minutes. "Here's the deal," he said, "plaintiff brought this case and I trust has two or three good reasons to support it. Defendant likewise has two or three good reasons to oppose it. That's what discovery is going to be about. And, if you have any disputes, forget about a master – you'll bring them to me and the loser will probably be sanctioned."

Most reinsurance disputes likewise feature but a handful of real issues. If you want to impress the panel and also save time, money, and effort, draft your discovery requests with a laser focus on what's truly important and necessary. Don't ask for every document that "records, reflects or memorializes" every triviality you (or the assigned associate) can think of. Also, consider reasonable alternatives to discovery. If you need to know how the reinsurer's filing system is organized try for an agreed informal tour of the file room -- perhaps opposing counsel also wants to embrace common sense. That tour could be much more informative, and certainly far less expensive, than deposing a custodian of records.

What seemed like a common sense idea, the "meet and confer," has run amuck.

When a panel asks counsel to "meet and confer," it's looking for the parties to solve a problem that should within their grasp. The panel isn't – I promise – hoping for what it far too often gets, i.e., a series of increasingly strident letters and emails that will eventually be attached to a motion and opposition.

So, I offer a couple of suggestions to make the "meet and confer" possibly useful rather than wasteful. If both lawyers are in the same town, then really meet – get together for coffee (a D.C. lawyer I know uses ice cream very effectively) and actually work at solving the problem rather than making a record for the panel. If you're at a distance, talk on the telephone -- don't resort to e-mail (aka "the anger escalator"). Second, rather than passing the job downhill, have the senior lawyers talk to each other. With some (much?) luck, they'll have less ego invested, see the bigger picture, and be less focused on accumulating small but meaningless triumphs of argument.

Common sense plays a big role in brief writing as well.

An effective brief doesn't bloviate; it straightforwardly educates the panel about your position and why it should prevail. The sooner you get to substance, the better because that's what I want to read. I'm greatly helped if you set out at the beginning precisely what you want me to take away, e.g., "this brief supports X proposition by showing Y and Z."

And, don't be afraid to be, well, brief. There is a sense that if a brief isn't unbrief, the panel won't think you're serious about your position. Quite the opposite is often true; an excellent short brief can make your conclusions appear self-evident. If there's an important court decision involved, give the panel a copy. But since arbitrators aren't judges, it's usually more persuasive to have an argument that fits their concepts of common sense and industry standards than to ask a case to do the heavy lifting.

The dissonance between common sense and hyperbole we've already touched upon. The vast majority of folks in our business are decent human beings just trying to do their jobs well. They aren't war criminals. So let's kill the inflamed rhetoric. (I've been tempted more than once to order that no adjectives or adverbs may be used.) Hark back to President Lincoln: when really angry he would pen a very nasty letter but then he'd put it away in a drawer never to see the light of day.

A final common sense suggestion: pay attention to an arbitrator's questions and answer them carefully. If this seems obvious, my experience proves otherwise. A panel question can be a soft pitch or a vicious curveball. If a panel member asks, "is it significant that this treaty refers to widgets while the other treaty refers to piglets," that person most likely: (a) is genuinely puzzled, or (b) sees the distinction as meaningful, or (c) wants to be reassured that it isn't, or (d) wants support on a point that the panel is considering. In any of these cases, your answer may well influence the ultimate decision. So, don't shoot from the hip. Just because you haven't thought about the point doesn't mean it's not important – at least to someone who is, in turn, important to you. And, it's ok to say, "I'd like to give that some thought and get back to it."

My last suggestion is that you tell a good story, and tell it well.

In a world of chaos, we yearn for logic and order. We want events to make sense. So, show the panel the business narrative underlying the contested contract – and why that narrative favors your position. What were the parties aiming to accomplish when they put this business arrangement together – and how does the result you want fit their plan like a glove? Admittedly, this is a huge challenge when the deal was done decades ago and/or we're facing a fact situation that, in truth, the parties never contemplated in their wildest nightmares. If, however, you can demonstrate that your solution meshes with the business framework, you've added strong support to your case.

A good story is only as good as its presentation. If the panel can't follow you, you're getting nowhere – as well as frustrating your audience. Clarity is a particular challenge on cross-examination. You're buzzing through the witness like a chainsaw through butter – but the panel has no conception of what you're proving. Let us know what you're getting at. Yes, you help the witness a bit if you preview where you're going, e.g., "Mr. Witness, let's talk now about the efforts you made to understand the cession," but that's a small price compared to leaving the panel lost in the dust.

And pay attention to organizing documents. What good does it do you to carve up the witness on point X if the Panel is ten minutes behind, still trying to figure out which document you were talking about on point Q? Prepare for examination by agreeing with your opponent to use differing sets of exhibit numbers or simply one set of continuous numbers; then the panel won't get lost because you're using respondent's exhibit 1091 and we're looking at petitioner's exhibit 1091. If you have an exhibit put together from non-consecutive "Bates" numbers then do the panel a gigantic favor – renumber each page within the exhibit consecutively. Even a Perry Mason cross-examination would fail before a panel that's fumbling around trying to locate the document that's being talked about. And, it's ten times worse if you're fumbling because then you look (are?) lost. May I suggest that there could even be a few arbitrators who will stop trying to follow where you're going if it becomes too frustrating?

One of the pleasures of serving as an ARIAS arbitrator is the exceptionally high quality of the reinsurance bar. This niche legal practice attracts smart lawyers who think well, write well and present well. It's with great respect that I offer my suggestions and thoughts from the middle seat. ▼

Friday, November 9, 2018, 8:20 a.m. – 9:20 a.m.

GENERAL SESSION
Emerging Risks/ Issues

SESSION MATERIALS:

PRESENTED BY:

Moderator:
Cynthia R. Koehler, AXA XL
Panel:
Robert A. Kole, Partner, Choate Hall & Stewart, LLP
Richard J. Pratt, Partner, Troutman Sanders, LLP
Heather Simpson, Kennedys CMK, LLP
Laura Foggan, Partner, Crowell & Moring LLP
Joe Farrell, Latham & Watkins, LLP

Supreme Court of Virginia Holds That CGL Policy Does Not Cover Climate Change Suit

September 16, 2011
By Laura A. Foggan and Gregory J. Langlois

The Supreme Court of Virginia has ruled that an underlying lawsuit filed against an energy company policyholder alleging losses caused by the policyholder's contributions to global climate change are not potentially covered by a CGL policy, precluding an insurer's duty to defend, because the suit failed to allege an "occurrence." As the first coverage suit addressing claims for such damage, the Virginia high court's decision in The AES Corporation v. Steadfast Insurance Company, Record No. 100764 (Va. Sept. 16, 2011), likely will play a prominent role in future determinations by other courts as to whether insurance coverage for such claims is available. The Supreme Court of Virginia's ruling in AES provides insurers with a viable argument that the threshold "occurrence" requirement is not satisfied by allegations of damage caused by policyholders' intentional operations that contribute to global climate change.

Climate Change Suit, Coverage Litigation and Appeal

In AES, the policyholder, a Virginia-based energy company, sought coverage under CGL policies issued by the insurer for an underlying suit filed against it and numerous other companies by the governing bodies of an Inupiat village located on a barrier island in northwest Alaska. In the underlying suit, Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir. 2010), the plaintiffs alleged that the companies' energy-generating operations are responsible for substantial greenhouse gases that have been emitted into the atmosphere. The Kivalina plaintiffs alleged that these gases trap atmospheric heat and cause global warming, which, in turn, caused Arctic sea ice that protects their village's shoreline from winter storms to form later or melt earlier each year. As a result, they alleged, the village suffered extensive damage, forcing the community of approximately 400 people to relocate. The Kivalina complaint alleged that the policyholder and the other defendants intentionally emitted large amounts of carbon dioxide and other greenhouse gases into the atmosphere while knowing that their emissions would contribute to global warming and injure communities such as the plaintiffs'. The complaint also contained allegations, however, that the defendants knew "or should have known" that the impact of their emissions would contribute to global warming and harm the plaintiffs' property, that the defendants had intentionally "or negligently" caused a public nuisance, and that the defendants committed "negligent acts or omissions" and engaged in "negligent" conduct.

The policyholder sought coverage under CGL policies issued by the insurer providing coverage for an "occurrence," defined in the policies as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." The policies also contained a pollution exclusion barring coverage for "[a]ny injury or damage which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." The policy defined "pollutants" as "any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The insurer agreed to provide a defense under a reservation of rights and subsequently filed a declaratory judgment coverage action in Virginia state court. The policymaker counterclaimed. The insurer first moved for summary judgment, arguing that it had no duty to defend based on, inter alia, the "occurrence" and pollution exclusion provisions of the policies. In light of the parties' citing to evidence extrinsic to the "eight corners" of the underlying complaint and the insurer's policies, the trial court held that questions of fact existed and denied the motion. The policyholder subsequently moved for summary judgment on its counterclaim, arguing that the insurer owed a duty to defend. With the focus this time only on the "eight corners," the trial court granted summary judgment in favor of the insurer, holding that it did not owe a duty to defend because the underlying complaint did not allege an "occurrence" within the meaning of the policies. The court did not address whether the pollution exclusion also barred coverage.

Virginia Supreme Court: Lack of Occurrence Precludes Coverage

On appeal, the Supreme Court of Virginia affirmed. The court explained that, under Virginia's "eight corners" rule, courts examine only the allegations contained in the underlying complaint and the provisions of the insurance policy in determining whether an insurer owes a policyholder a defense duty. The court noted that, under Virginia law, an insurer's duty to defend is broader than its duty to indemnify, but the court also explained that neither duty arises "if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations." As to "occurrence"- based policies, the court explained, the terms "occurrence" and "accident" are synonymous and refer to an incident that was unexpected from the policyholder's viewpoint. According to Virginia case law, the court noted, an accidental injury is one that happens by chance, unexpectedly and fortuitously. Noting that the underlying complaint alleged that the policyholder intentionally released greenhouse gases into the atmosphere as part of its electricity-generating operations, the court explained that Virginia law does not recognize intentional acts as covered "occurrences" or "accidents." However, the court continued, if the alleged injury results from an unforeseen cause and is not a reasonably anticipated consequence of the policyholder's intentional act, coverage is available. Thus, whether the policyholder was entitled to coverage turned on whether the village's alleged injuries resulted from "unforeseen consequences that a reasonable person would not have expected to result from [the policyholder]'s deliberate act of emitting carbon dioxide and greenhouse gases," according to the court.

The court rejected the policyholder's argument that, because the village's complaint alleged that the policyholder "[i]ntentionally or negligently" engaged in tortious acts, it was entitled to coverage under Parker v. Hartford Fire Insurance Co., 278 S.E.2d 803 (Va. 1981), which the policyholder argued holds that a policyholder is entitled to coverage when negligence is alleged. The court also rejected the policyholder's argument that, because the underlying complaint asserted that the policyholder "knew or should know" that its electricity-generating activities would result in environmental harm to the village, the injuries alleged by the village were accidental from its viewpoint and, therefore, an unintentional "occurrence." The court distinguished Parker, explaining that, unlike the policy involved in that case, the insurer's policies "do not provide coverage for all damage resulting from [the policyholder]'s negligent acts" but, instead, only impose a defense duty for claims alleging injury "caused by an occurrence or accident." According to the court, because the underlying complaint plainly alleged that the policyholder intentionally released carbon dioxide into the atmosphere as a regular part of its operations and that a scientific consensus exists that such emissions result in global warming and damages of the type that the village suffered, no coverage was available under the policy.

Regarding the underlying complaint's references to negligence and related "should have known" standards, the court explained that "[w]hether or not [the policyholder]'s intentional act constitutes negligence, the natural and probable consequence of that intentional act is not an accident under Virginia law." Moreover, "allegations of negligence are not synonymous with allegations of an accident, and, in this instance, the allegations of negligence do not support a claim of accident," the court held. Even if the policyholder was negligent and did not intend to cause the village's damage, the court explained, "the gravamen of [the village]'s … claim is that the damages it sustained were the natural and probable consequences of [the policyholder]'s intentional emissions." Citing leading insurance treatises, the court explained that, when a policyholder "knows or should have known of the consequences of [its] actions, there is no occurrence and therefore no coverage." Because the underlying complaint alleged that the policyholder should have anticipated the damage resulting from its emissions, such alleged damage was "the natural and probable consequence of [the policyholder]'s intentional actions," the court held. Therefore, it held, the complaint did not allege damage resulting from a fortuitous event or accident, precluding coverage under the policy.

Implications

As the first decision of a state high court to address liability coverage for global warming claims, AES could serve as a bellwether for future coverage litigation over such claims. Insurers can take heart not only in the bottom-line no-coverage determination reached by the Supreme Court of Virginia, but also by the court's arrival at that determination based on the lack of an "occurrence." In future coverage litigation, insurers will be able to invoke AES to argue that the threshold "occurrence" requirement is not satisfied by allegations of damage caused by policyholders' intentional operations that contribute to global climate change. Typically, insurers find it difficult to succeed on arguments that no "occurrence" has taken place, given that courts typically require only that the alleged loss-and not the policyholder's acts-be unintended in order for coverage obligations to arise. To the extent that underlying allegations in other climate change cases subject to future coverage litigation are similar to those asserted by the village here, AES provides insurers with a viable argument that no coverage is available for lack of an "occurrence." Even if an "occurrence" is alleged, insurers in many cases will be able to rely on other policy provisions, such as the pollution exclusion appearing in more recent policies. Here, the Supreme Court of Virginia did not need to address the applicability of the pollution exclusion in light of its no-"occurrence" holding.

Along with the favorable AES result, insurers may be encouraged by the U.S. Supreme Court's decision in American Electric Power Co. v. Connecticut, 132 S. Ct. 2527 (2011), which potentially could decrease insurers' exposure to coverage for climate change suits by limiting the theories upon which such suits may rely. Although the Court in AEP did not reach consensus on whether plaintiffs in such suits lack standing, the Court did hold that Congress, in passing the Clean Air Act, displaced federal common law regulation of greenhouse gas emissions. Therefore, the Court held, underlying plaintiffs could not assert claims seeking abatement of greenhouse gas emissions based on a nuisance theory under federal common law. This aspect of the AEP decision at least limits one avenue by which underlying plaintiffs such as the village in AES might impose liability upon policyholders for climate change-related damages. The Court, however, did not address whether the Clean Air Act displaces state law, leaving the viability of such claims under state nuisance law open for consideration in the future. Thus, climate change litigation is likely to continue, and insurers are likely to be faced with coverage claims for such suits in the foreseeable future. The Virginia high court's AES decision, however, provides favorable early precedent for insurers facing future climate change coverage claims

NATURAL DISASTERS

DEALING WITH THE NEW NORMAL

"IT'S A MATTER OF GLOBAL IMPORTANCE. THE ISSUE IS WHAT TO DO ABOUT IT."

—RICHARD LEHFELDT

More than 50 inches of rain in five days in Houston. The first mass evacuation of the Florida Keys in decades. Puerto Rico's electric grid essentially destroyed, with at least a year until full power will be restored. With millions of people affected and hundreds of lives lost, the full damage is still being tallied, and the financial cost is now estimated in the hundreds of billions of dollars.

The devastating hurricanes in 2017—Harvey, Irma, and Maria—on top of the deluge of other major storms in recent years, have raised new questions about whether the U.S. electrical grid is up to the task, given the "new normal" of severe weather.

"It's a matter of global importance," says Richard Lehfeldt, a partner in Crowell & Moring's Energy Group. "The issue is what to do about it. It's not as if it arose out of nowhere."

The severity of the threat is daunting. A U.S. Government Accountability Office study found that Superstorm Sandy-like events that once took place every 500 years in 1800 are now occurring every 25 years. Worse yet, by 2045, those superstorms could come once every five years.

That growing hazard prompted the U.S. Department of Energy last year to direct the U.S. Federal Energy Regulatory Commission to examine, among other things, whether the U.S. electrical grid is reliable and resilient enough to address these severe and recurrent stresses to the system, and what resources are needed to strengthen resiliency and respond rapidly to major weather events. While that rulemaking ended early this year, the commission reiterated its commitment to ensuring that the national grid is able "to withstand or recover from disruptive events."

Several entities share responsibility for monitoring and ensuring the safety and reliability of the grid. The North American Electric Reliability Corporation is designated by FERC to ensure the grid's reliability. The Department of Homeland Security and the Department of Defense each look at the grid from the perspective of national security. The key questions: What are vital resources and critical energy infrastructure? Which facilities must be capable of operating in a severe weather event, no matter what? And how do we restore resources after an incident?

A LOCAL MATTER

Government policymakers can require resilience planning, seek to formally price reliability and resiliency, and offer subsidies to promote preferred behaviors in order to make the grid more reliable. Federal and state regulators can issue specific regulations compelling risk management in the design and management of electrical generation and transmission facilities. But part of the problem is that while safety and reliability are of national importance, the federal government doesn't have direct control over maintenance of the grid. Currently, most key resources' choice decisions about what to build and what kind of power generation to have are made by state regulators, through contested regulatory hearings, and not the typical authorization and appropriations process used for most public works projects.

"All of those state-level decisions are then somehow supposed to be integrated and harmonized at the federal level, which doesn't always happen," says Lehfeldt. "The questions that are now increasingly being asked by regulators and legislators, at both the state and federal level, pertain to security, reliability, and now the new word 'resiliency.' The issue is: What resources do we need now that these extreme weather conditions are becoming the new normal?"

THINKING OUTSIDE THE GRID

One way being considered to protect the grid from severe weather is the establishment of so-called microgrids—full-fledged, miniature utility systems, capable of "islanding" their operations and continuing to function even in the event of a long-term, regional power outage. These can be expensive systems, but cities and states now see an increasing need for microgrids to prepare for outages that can last weeks or even months. The city of Princeton, New Jersey, for example, has one, as does the New York University Manhattan campus. The Princeton microgrid maintained service through the worst of Superstorm Sandy.

Another tactic under consideration rests on the question of whether some retail customers might settle for a reduced level of service, essentially paying less in exchange for agreeing to suffer service interruptions during severe weather disruptions. Such multi-tiered service already exists during power restoration, when utilities triage service calls to ensure that essential customers (hospitals, fire and police departments, food suppliers) return first to full service.

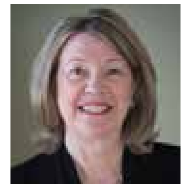
IS INSURANCE A SOLUTION?

Of course, one of the biggest issues is who should bear the financial burden. "How are we going to pay for the added security or reliability that is necessary because we are no longer talking about a 100-year storm, but about something that occurs more frequently?" asks Laura Foggan, a Crowell & Moring partner and a member of the firm's Insurance/Reinsurance Group. "Insurance is an important part of the solution. Of course, the higher number of weather events means there are greater losses and increased costs for insurers as well, but insurers can help minimize or prevent loss, as well as spread the financial burden of losses from climate change."

The insurance industry can play a role in helping prepare for future severe weather because the companies have a tremendous amount of data and knowledge about loss avoidance and prevention, Foggan says. "One of the things insurers can do is partner with government regulators both at the state and federal level to identify and articulate loss-prevention strategies that will benefit society as well as insurers," she says. Loss prevention or mitigation of physical damage to key infrastructure—such as electrical grids—saves costs of repair, as well as the important downstream costs to private industry and society that result from loss of infrastructure function.

Policymakers must also consider whether government help in financing recovery may promote repetitive losses. Currently, the federal government is the last line of defense for many victims of hurricanes and floods through the National Flood Insurance Program, which provides coverage for about 5 million homes and businesses.

As the costs of hurricanes increase, so do the questions about whether this subsidized insurance is the best solution, because it costs all U.S. taxpayers yet benefits so few homeowners. And Foggan says questions continue to be raised as to whether such pricey, subsidized insurance products in fact incentivize real estate development in geographic areas that are just too high risk to sustain such projects.



"HOW ARE WE GOING TO PAY FOR THE ADDED SECURITY OR RELIABILITY THAT IS NECESSARY BECAUSE WE ARE NO LONGER TALKING ABOUT A 100-YEAR STORM, BUT ABOUT SOMETHING THAT OCCURS MORE FREQUENTLY?"

—LAURA FOGGAN

WHO PAYS FOR DISASTER?

If a home or business is built in a known floodplain, should the government have to help pay for the damage when a flood occurs? What role should private insurance companies play?

Those are questions that the U.S. Congress is debating as it restructures the National Flood Insurance Program. The NFIP provides subsidized insurance to homes in at-risk flood areas that might not otherwise be able to get coverage.

Many countries are struggling with how to handle flood coverage. The U.K. has a new approach to addressing the availability and affordability of private homeowners' flood coverage through Flood Re, a not-for-profit levy and pool system that is designed to provide affordable insurance to up to a half-million households in high-risk flood areas.

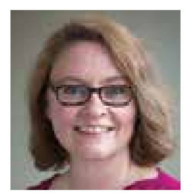
The closest thing the U.S. has to this is in Florida, where a law allows private flood insurance.

Michelle Linderman, a London-based partner at Crowell & Moring and a member of the firm's International Trade Group, says that as forward-looking as Flood Re is, it does have its faults.

The first is that despite the program's goal to provide affordable insurance, critics say its policies are still too expensive. Moreover, it is only available to homeowners and not for commercial properties.

Finally, it does not provide any means to encourage actions that might reduce future risk from flooding.

However, Linderman notes, "despite its shortcomings, Flood Re is a good example of how government can work with the private sector to bring about change that benefits hundreds of thousands of households."



"FLOOD RE IS A GOOD EXAMPLE OF HOW GOVERNMENT CAN WORK WITH THE PRIVATE SECTOR TO BRING ABOUT CHANGE THAT BENEFITS HUNDREDS OF THOUSANDS OF HOUSEHOLDS."

—MICHELLE LINDERMAN

Friday, November 9, 2018, 9:20 a.m. – 10:10 a.m.

GENERAL SESSION
A Tale of Three Jurisdictions: Disclosures in The U.S., England and Bermuda

SESSION MATERIALS:

PRESENTED BY:

Moderator:
Jan Woloniecki, ASW Law Limited
Panel:
Ian R.C. Kawaley, Judge of the Cayman Islands Grand Court (formerly Chief Justice of Bermuda)
Steven C. Schwartz, Chaffetz Lindsey LLP

ARIAS US 2018 Fall Conference

November 7-9, 2018

DISCLOSURE OBLIGATIONS OF ARBITRATORS AND GROUNDS FOR REMOVAL

A REVIEW OF RECENT JUDICIAL DECISIONS IN ENGLAND AND A COMPARISON WITH BERMUDA, THE CAYMAN ISLANDS AND THE UNITED STATES

I. England (Jan Woloniecki, Head of Litigation, ASW Law Limited, Bermuda, and international arbitrator, Brick Court Chambers, London)

Summary of two decisions of the English Courts:

Halliburton Company v Chubb Insurance [2018] EWCA Civ 817

Guidant LLC v Swiss Re International LLC [2016] EWHC 1201

II. Bermuda and the Cayman Islands: A view from the offshore bench (Dr Ian R.C. Kawaley, retired Chief Justice of Bermuda, Justice of the Grand Court of the Cayman Islands, Financial Services Division)

Summary of decision of the Privy Council (on appeal from the Court of Appeal for the Cayman Islands):

Almazeedi v Penner [2018] UKPC 3

III. Comparison with the United States (Steve Schwartz, Partner, Chaffetz Lindsey, New York)

Summary of key statutory and case authority:

Federal Arbitration Act, 9 U.S.C. § 1 et seq.

Cases regarding evident partiality and disclosure.

IV. Criticisms of *Halliburton v Chubb* and Questions: Panel Discussion

(1) Will *Halliburton v Chubb* have a negative impact on London as a seat for international arbitration?

(2) Is the pragmatic (American) approach that chairpersons should be held to a higher standard of disclosure and impartiality to be preferred to the Anglo-Bermudian mantra that all arbitrators are impartial?

(3) What approach should be followed in offshore jurisdictions?

I. England

This first section discusses four questions regarding the duty of disclosure and disqualification of arbitrators under English law:

1. What is the scope of the duty of disclosure by a potential arbitrator?

2. What are the consequences of a failure by an arbitrator to disclose; in particular, does it automatically lead to disqualification?

3. What are the grounds for removal of an arbitrator following disclosure?

4. Whether and to what extent an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party and whether there is a duty of disclosure?

Question 1

What is the scope of the duty of disclosure by a potential arbitrator under English law?

Two important points should be noted at the outset of any discuss of English arbitration law.

First, there is no such thing as "UK law" or "British law". The United Kingdom of Great Britain and Northern Ireland consists of three separate jurisdictions: England and Wales (together comprising "English law"); Scotland; and, Northern Ireland. English arbitration law is contained in the Arbitration Act 1996 ("the 1996 Act"), which applies to England and Wales, and to Northern Ireland. Scotland has a separate arbitration statute, the Arbitration (Scotland) Act 2010.

Second, although the 1996 Act is comprehensive and sets out in detail the respective powers of arbitral tribunals and the courts, it is not a complete code of English arbitration law. Certain important matters are governed by common law as stated in decisions of the English courts.

For example, there is no statutory duty of disclosure imposed upon arbitrators under the 1996 Act , "but many institutional rules governing arbitration include provisions requiring disclosure to be made of facts or circumstances which may give rise to justifiable doubts as to an arbitrator's impartiality."[1] In *Halliburton Company v Chubb Bermuda Insurance Ltd*[2] the Court of Appeal noted that "under the common law, judges should disclose facts which would or might provide the basis for a reasonable apprehension of lack of impartiality."[3] The Court of Appeal[4] held that the same principle applies to arbitral tribunals.

> "In summary, we consider the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality. Under English law this means facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased."[5]

The common law test for what must be disclosed ("circumstances which would, <u>or might</u>, give rise to an arbitrator's impartiality") is therefore wider than the statutory test for disqualification of an arbitrator ("circumstances exist that give rise to justifiable doubts as to his impartiality"). The Court of Appeal emphasised that the common law test for disclosure was to be applied <u>objectively</u>, looking at the matter from the point of view of a hypothetical "fair-minded and informed observer", as opposed to the "eyes of the parties", which is the test under the IBA Guidelines and the ICC Rules.[6] Similarly, the LCIA Rules require disclosure of "circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence."[7]

<u>Question 2</u>

What are the consequences of a failure to disclose on the part of the arbitrator?

The Court of Appeal emphasised that two distinct questions arise when an allegation of non-disclosure is made. First, the court had to consider whether the disclosure ought to have been made. Second, if the court finds that there ought to have been disclosure, it must then consider the significance of that non-disclosure in the context of an application to remove an arbitrator.

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[1] *Halliburton Company v Chubb Insurance Ltd* [2018] EWCA Civ 817, [55].

[2] *Halliburton Company v Chubb Insurance Ltd* [2018] EWCA Civ 817.

[3] [2018] EWCA Civ 817, [56].

[4] Sir Geoffrey Voss V-C, Simon and Hamblen LJJ.

[5] [2018] EWCA Civ 817, [71].

[6] See: [2018] EWCA Civ 817, [67].

[7] Article 5.4 (emphasis added), quoted *ibid*.

The Court of Appeal stated, as a general proposition, that, "[n]on disclosure is … a factor to be taken into account in considering the issue of apparent bias. An inappropriate response to the suggestion that there should be or should have been disclosure may further colour the thinking of the observer and may fortify or even lead to an overall conclusion of apparent bias …"[8] However, the Court of Appeal immediately went on to say, "[n]on-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, give rise to justifiable doubts as to the arbitrator's impartiality, cannot, however, in and of itself justify an inference of apparent bias. Something more is required …"[9]

The facts of *Halliburton v Chubb* are discussed in the next section (under Question 3). Although the Court of Appeal disagreed with the judge[10], who had held the matters in question did not have to be disclosed, they nonetheless concluded that the matters which should have been disclosed did not give rise to apparent bias and rejected the application to remove the arbitrator.

<u>Question 3</u>

What are the grounds for removal of an arbitrator following disclosure?

Section 24(1)(a) of the 1996 Act provides that a party may apply to the court to remove an arbitrator if, "circumstances exist that give rise to justifiable doubts as to his impartiality." The English courts have adopted the common law test applicable to the recusal of judges, namely "apparent bias", to the disqualification of arbitrators. The practical difficulties of applying the test of apparent bias in the context of international arbitration are illustrated by the recent decision of the Court of Appeal in *Halliburton v Chubb*[11].

The facts of *Halliburton v Chubb* were as follows. "M", a "well-known and highly respected international arbitrator"[12], had been appointed by the High Court as the chairman of an arbitral tribunal in a Bermuda form arbitration with a London seat. The dispute concerned insurance

8 [2018] EWCA Civ 817, [75].

9 [2018] EWCA Civ 817, [76].

10 Popplewell J, [2017] EWHC 317 (Comm).

11 *Halliburton Company v Chubb Insurance Ltd* [2018] EWCA Civ 817; reported at first instance as *H v L & Ors* [2017] EWHC 317 Comm.

12 [2017] EWHC 317 Comm, [9], per Popplewell J.

coverage for Halliburton's liabilities arising out of the Deepwater Horizon disaster. M had disclosed to the High Court that he had previously sat in a number of arbitrations in which Chubb (formerly known as ACE) was a party, including appointments on behalf of Chubb/ACE; and that he was currently appointed as arbitrator in two arbitrations in which Chubb was a party, neither of which related to the Deepwater Horizon. About six months after his appointment as chairman by the High Court, M was appointed by Chubb as an arbitrator in a second insurance coverage arbitration, arising out of Deepwater Horizon, in which Transocean, an affiliated company of Halliburton, was party. He subsequently accepted a third appointment on behalf of another insurer in an arbitration involving Transocean which was also an insurance coverage dispute arising out of Deepwater Horizon. M did not disclose these two subsequent appointments to Halliburton, who learned of them about eighteen months into the reference, at which point Halliburton's counsel wrote to M and raised an objection to his continuing to sit as chairman. M maintained that the subsequent appointments did not affect his impartiality or independence, and denied that he was under any obligation to disclose them; although, he accepted that, with the benefit of hindsight, it would have been prudent to do so. M offered to resign, provided Chubb consented to his resignation.[13] Chubb declined to so, and Halliburton applied to the Court to remove M on the grounds of apparent bias.

The Court of Appeal formulated the question as follows: "whether, at the time of the hearing to remove, the non-disclosure taken together with any other relevant factors would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility of bias."[14] The Court of Appeal continued:

> "In answering this question we would in particular take the following factors into account from the perspective of the fair-minded and informed observer: (1) the non-disclosed circumstance does not in itself justify an inference of apparent bias; (2) disclosure ought to have been made,

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13 M's letter to the parties (quoted by the Court of Appeal: [2018] EWCA Civ 817, [19]) stated, in part, as follows: "Mr Payton wishes me to remain as chairman and for the hearing to go ahead. But if I were to decline Mr Brisic's invitation to resign, I have little doubt that an application would be made to the court to remove me which may well take some time to resolve … were the decision left to me in accordance with my own self-interests, I would resign. I have no wish to continue to serve as chairman in a tribunal in a case in which one of the parties, through its legal team, has expressed serious doubts as to my impartiality. Furthermore, as you may know, I plan to retire later this year and would not wish that my long career as an international commercial arbitrator which has spanned over three decades should end with my being the subject of a debate in the Commercial Court as to whether I have behaved improperly. However, as I have already indicated, I have duties to both parties: by accepting the Court's appointment as chairman, I undertook to continue to serve in that capacity until I had completed the task, unless prevented by circumstances beyond my control and I would, I think, be in breach of those duties were I simply to resign in the face of strong opposition from one party."

14 [2016] EWCA Civ 817, [95].

> but the omission was accidental rather than deliberate; (3) the very limited degree of overlap means that this is not a case where overlapping issues should give rise to any significant concerns; (4) the fair-minded and informed observer would not consider that mere oversight in such circumstances would give rise to justifiable doubts as to impartiality; and (5) there is no substance in Halliburton's criticisms of M's conduct after the non-disclosure was challenged or in the other heads of complaint raised by them."[15]

The Court of Appeal agreed with the judge that there was no such possibility.

<u>Question 4</u>

Whether and to what extent an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party and whether there is a duty of disclosure?

In *Halliburton v Chubb* the Court of Appeal addressed the question whether, and to what extent, an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias. This is a situation which arises, typically, in Bermuda form arbitrations. The Court of Appeal cited, with approval, the following passage from a leading work on the Bermuda form:

> "14.32 Commencing a Bermuda Form Arbitration
>
> The decision in *Locabail*, and the foregoing discussion, is also relevant in the fairly common situation where a loss, whether from boom or batch, gives rise to a number of arbitrations against different insurers who have subscribed to the same programme. A number of arbitrations may be commenced at around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. Another possibility is that there are successive arbitrations, for example because the policyholder wishes to see the outcome of an arbitration on the first layer before embarking on further proceedings. A policyholder, who has been successful before one tribunal, may then be tempted to appoint one of its members (not necessarily its original appointee, but possibly the chairman or even the insurer's original appointee) as arbitrator in a subsequent arbitration. Similarly, if insurer A has been successful in the first arbitration, insurer B may in practice learn of this success and the identity of the arbitrators who have upheld insurer A's arguments. It follows from *Locabail* and *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 All ER 723 that an objection to the appointment of a member of a previous panel would not be sustained simply on the basis that the arbitrator had previously decided a particular issue in favour of one or other party. It equally follows that an arbitrator can properly be appointed at the outset in respect of a number of layers of coverage, even though he may then decide the dispute under one layer before hearing the case on another layer."[16]

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[15] [2016] EWCA Civ 817, [96].

[16] Richard Jacobs, Lorelie Masters and Paul Stanley, *Liability Insurance in International Arbitration* (2nd ed., 2011 at 14.32), cited [2018] EWCA Civ 817, [52].

The Court of Appeal considered and approved the decision of Leggatt J (as he then was) in *Guidant LLC v Swiss Re International SE*[17]. In that case, which was also an insurance coverage dispute under the Bermuda form, three separate arbitrations had been commenced by the policyholder, Guidant, against Markel, and two Swiss Re entities respectively. Guidant had appointed the same arbitrator in all three references; each of the three insurers had appointed a different arbitrator. The two party-appointed arbitrators in the Markel arbitration had agreed upon a third arbitrator. Guidant applied to have the same third arbitrator appointed in the two Swiss Re arbitrations. The Court of Appeal agreed with Leggatt J (as he then was) that, "the appointment of a common arbitrator does not justify an inference of apparent bias. The fact that the same person has been appointed by Guidant as its arbitrator in the Markel arbitration is not, therefore, a ground on which an application could be made to seek to disqualify him from acting in the Swiss Re arbitrations."[18] However, Leggatt J declined to appoint the same third arbitrator in the Swiss Re arbitrations:

> "If the same person were to be appointed, there would be a legitimate concern that that person would be influenced in deciding the Swiss Re arbitrations by arguments and evidence in the Markel arbitration … Swiss Re is not a party to the Markel arbitration and will have no opportunity to be heard in that arbitration or to influence its outcome. Indeed, without a waiver of confidentiality, they will not be privy to the evidence adduced or the submissions made in the Markel arbitration. If the Markel arbitration were to be heard first, the members of the tribunal in that arbitration would form views, without any input or opportunity for input from Swiss Re, from which they may afterwards be slow to resile."[19]

The Court of Appeal noted that Leggatt J drew a distinction between the concern which Swiss Re "were entitled to feel" and concern which would justify an inference of apparent bias.[20] However, if Swiss Re had a legitimate concern about the appointment of the same individual as third arbitrator and chairman in all three arbitrations, then it was surely also legitimate for Halliburton to feel the same concern about the position M. If M had been appointed as an arbitrator in the other two Deepwater Horizon arbitrations <u>before</u> the application to the High Court was made to appoint him in the arbitration against Halliburton, then, following the approach of Leggatt J in *Guidant v Swiss Re*, M ought not to have been appointed by the Court as chairman, even though

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17 [2016] EWHC 1201.

18 [2016] EWHC 1201, [10], per Leggatt J; cited by the Court of Appeal [2018] EWCA Civ 817, [45]. There was no application to disqualify Guidant's party-appointed arbitrator. *Guidant v Swiss Re* was concerned with the appointment of a third arbitrator.

19 [2016] EWHC 1201, [19], per Leggatt J; cited by the Court of Appeal [2018] EWCA Civ 817, [44].

20 [2016] EWCA Civ 817, [46].

there was no apparent bias. The problem is not one of partiality or impartiality. It is about basic fairness. The hearing is not fair because one arbitrator is receiving information from the other two Deepwater Horizon arbitrations which the other two arbitrators in Halliburton v. Chubb do not have; indeed, he is under a duty to keep whatever learns in the other arbitrations confidential from his co-arbitrators in the third arbitration. However, he cannot put out of his mind what he knows from the other two arbitrations and may decide the matter on the basis of facts and arguments which are not before the tribunal in the third arbitration.

II. Bermuda and the Cayman Islands

Bermuda

Bermuda has two statutory regimes for arbitration: the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act"), which gives legal effect in Bermuda to the UNCITRAL Model Law and applies to any international commercial arbitration the seat of which is Bermuda; the Arbitration Act 1986 (which applies to domestic arbitrations and to international arbitrations where the parties have opted out of the 1993 Act). In contrast to the position in England there is a specific statutory duty of disclosure in Bermuda under the Model Law. Article 12(1)[1] provides:

> "When a person is approached in connection with his possible appointment as arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."

The obligation to disclose continues throughout the course of the arbitral proceedings.[21] Article 12(2) provides:

> "An arbitrator may be challenged only if circumstances exist that give rise to his impartiality or independence, or he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

The challenge procedure is set out in art. 12(3). The parties are free to agree upon a procedure. In the absence of an agreed procedure the challenge must be made to the arbitral tribunal within 15 days of the challenging party becoming aware of the grounds for challenge. If the challenge is not successful the challenging party may apply to the Supreme Court of Bermuda[22] within 30 days of

21 Model Law art. 12(1)[2].

22 That is to say the court of first instance in Bermuda.

the decision rejecting the challenge. The decision of the Supreme Court of Bermuda is not subject to appeal. There is no Bermudian authority as yet on art. 12.[23]

Cayman Islands

The Caymanian Arbitration Law 2012 is derived in part from the UNCITRAL Model Law (2006 revision – Bermuda has the original 1985 version, which it has not amended) and in part from the English Arbitration Act 1996. Sections 18 and 19 of the Arbitration Law 2012 are derived from art. 12 of the Model Law. Under section 18 of the Arbitration Law, prospective arbitrators must disclose any matters likely to be relevant to their impartiality or independence and appointed arbitrators are under similar continuing disclosure duties. For practical purposes therefore the law of the Cayman Islands and that of Bermuda appear to be identical. There is no Caymanian authority on disclosure and challenge to arbitrators under the Arbitration Law 2012. However, a recent decision of the Privy Council on an appeal from the Court of Appeal of the Cayman Islands, concern apparent bias and the disclosure obligations of judges, is of great importance. As a decision of the Privy Council it is also binding on the Bermudian courts.

In *Almazeedi v Penner*[24], the Judicial Committee of the Privy Council found itself, "in the invidious position of having to decide whether the fair-minded and informed observer, would see a real possibility that the judgment in the Cayman court of an experienced judge near the end of his career would be influenced, albeit sub-consciously, by his concurrent appointment to a Qatari court which was at the outset still awaiting its completion by swearing in."[25] The judge in question, Sir Peter Cresswell, sitting in the Financial Services Division of the Grand Court of the Cayman Islands, had determined certain applications in winding-up proceedings which were challenged by Mr Almazeedi. The judge had failed to disclose the fact of his appointment to the Civil and Commercial Court of the Qatar Financial Centre ("QICDRC"). The gravamen of Mr Almazeedi' s complaint was that the Qatari Minister of Finance, a Mr Al-Emadi, who effectively controlled the appointment of judges of the QICDRC, and who was involved in a bitter commercial dispute

[23] For an unsuccessful challenge to an arbitrator appointed the 1986 Act, in which the Supreme Court of Bermuda applied the English authorities on apparent bias, see: *Raydon Underwriting Management Co Ltd v Stockholm Re (Bermuda) Ltd (In Liquidation)* [1998] Bda L.R. 73 (discussed in O'Neill & Woloniecki, The Law of Reinsurance, 4th ed. at para 14-059).

[24] [2018] UKPC 3.

[25] [2018] UKPC 3, [32].

with Mr. Almazeedi, was in a position to influence Sir Peter Cresswell. The majority of the Judicial Committee[26] held as follows:

> "33. The key to the resolution of this appeal is not simply that the proceedings in which the judge sat concerned issues arising between investors belonging or close to the Qatari state and the appellant. It is, in the Board's view, that the disputes involved in such proceedings concerned two personalities, Mr Al-Emadi and Mr Kamal [Mr Al-Emadi's father-in-law] who were so closely connected with each other as to make it readily appear unrealistic to distinguish their respective attitudes; that the disputes in which the appellant was engaged up to the date of the winding-up order took place against a background of personal threats, one of which … associated the appellant's resistance to the winding-up order with a challenge to the state of Qatar itself; and that first Mr Kamal and then from 26 June 2013 Mr Al-Emadi, was closely concerned, to an extent which remains opaque, in at least some aspects of the arrangements by or under which the judge was in the process of becoming a new part-time judge of the relatively new Qatar Civil and Commercial Court.
>
> 34. In the result, the Board, with some reluctance, has come to the conclusion that the Court of Appeal was right to regard it as inappropriate for the judge to sit without disclosure of his position in Qatar as regards the period after 26 June 2013 and that this represented a flaw in his apparent independence, but has also come to the conclusion that that the Court of Appeal was wrong to treat the prior period differently. The judge not only ought to have disclosed his involvement with Qatar before determining the winding-up petition. In the Board's view, and at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised. An alternative to disclosure might have been to ask the Chief Justice to deploy another member of the Grand Court, to which there would, so far as appears, have been no obstacle."[27]

The application by the majority in *Almazeedi* of the test of apparent bias appears at first blush to be inconsistent with the approach of the Court of Appeal in *Halliburton v Chubb*.[28] We note the dissenting opinion of Lord Sumption:

> "The common law rightly imposes high standards of independence on judges at every level. The present dispute, however, is not about the legal test, but about its application to the facts, and for my part I would have held that the test was not satisfied. In the ordinary course, I would not have thought it right to dissent on such a question. But applications based on apparent bias are open to abuse, and the particular problem which arises in this case is not uncommon. Retired judges from Commonwealth jurisdictions commonly sit on an occasional basis in other Commonwealth jurisdictions and in tribunals of international civil jurisdiction. The law is exacting in this area, but it is also realistic. The notional fair-minded and informed observer whose presumed reaction is

26 Lords Mance, Hughes, Wilson and Lloyd-Jones, Lord Sumption dissenting.

27 [2018] UKPC 3.

28 The decision of the Privy Council in *Almazeedi v Penner* was handed down after the Court of Appeal had heard oral argument in *Halliburton v Chubb*, and the parties were given the opportunity to make further written submissions. The Court of Appeal noted that "the decision in *Almazeedi* supports the importance of disclosure" [2018] EWCA Civ 817 [65], but did not comment on the majority's application of the "fair minded observer" test on the facts of that case.

the benchmark for apparent bias, has only to be satisfied that there is a real risk of bias. But where he reaches this conclusion, he does so with care, after ensuring that he has informed himself of all the relevant facts. He is not satisfied with a look-sniff impression. He is not credulous or naïve. But neither is he hyper-suspicious or apt to envisage the worst possible outcome. The many decisions in this field are generally characterised by robust common sense … Sir Peter Cresswell is not alleged to have done anything which could raise doubts about his independence. The case against him rests entirely on the notion that he might be influenced, possibly unconsciously, by the hypothetical possibility of action being taken against him in Qatar as a result of any decision in the Cayman Islands which was contrary to the Qatari Government's interests. Hypothetical possibilities may of course found a case of apparent bias, but since there are few limits to the possibilities that can be hypothetically envisaged, there must be some substance to them. There is no suggestion that Mr Al-Emadi was in a position to influence the assignment of work to judges within the QICDRC. Instead, the suggestion is that the notional fair-minded and informed observer would anticipate a real risk of bias because Sir Peter Cresswell might be influenced by the thought that if he made decisions adverse to the interests of the influential persons in Qatar, in particular Mr Al-Emadi, his appointment might not be renewed after his first five-year term or his terms of service might be adversely affected by a decision of the Council of Ministers on the proposal of Mr Al-Emadi. That really is all that it amounts to. In my opinion, this suggestion lies at the outer extreme of implausibility. I am prepared to assume that Mr Almazeedi, who appears to be possessed by a sense of persecution, takes it seriously. But the notional fair-minded and informed observer would not regard it as amounting even to a serious working hypothesis."[29]

III. United States

A. The Federal Arbitration Act

The "evident partiality" standard:

The court may vacate the award "where there was evident partiality or corruption in the arbitrators …." 9 U.SC. § 10(a)(2)

B. What Is Evident Partiality?

"If the standard of 'appearance of bias' is too low for the invocation of Sectionf 10, and 'proof of actual bias' too high, with what are we left? … we hold that 'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."

[29] [2018] UKPC 3, [36], [43]. It should be noted that dissenting opinions are very unusual in the Privy Council. A video of oral arguments is available at: https://www.jcpc.uk/cases/jscpc-2016-0054.html (accessed 24 September 2018).

Morelite Consruction Corp. v. N.Y.C. Dist. Council of Carpenter Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

C. The Interplay Between Disclosure and Evident Partiality.

"The nondisclosure does not by itself constitute evident partiality. The question is whether the *facts* that were not disclosed suggest a material conflict of interest."

Scandinavian Re Co. Ltd. v. St. Paul Fire and Marine Ins. Co., 668 F.3d 60, 77 (2d Cir. 2012).

D. Is Disclosure Enough?

No. In one extreme case, a party to an arbitration "began showering [the neutral arbitrators's] law firm with new business." The court vacated the award, holding:

"It is no answer to assert … that [the neutral] fully disclosed these arrangement to the parties. Five years into an arbitration, those disclosures were little better than no disclosure at all."

Thomas Kinkade Co. v. White, 711 F.3d 719 (6th Cir. 2012).

E. What About Party Arbitrators?

"Expecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution.

"That said, a party-appointed arbitrator is still subject to some baseline limits to partiality. We decline to catalogue all 'material relationship[s]' that may bear upon the service of a party-appointed arbitrator. … But it can be said that an undisclosed relationship is material if it violates the arbitration agreement."

Certain Underwriting Members of Lloyds of London v. Florida, Department of Financial Services, 892 F.3d 501, 510 (2d Cir. 2018) (citation omitted).

IV. Criticism of *Halliburton v Chubb*

Paul Stanley QC has described the decision in *Halliburton v Chubb* as "confused, and likely to satisfy nobody".[30] In our view *Halliburton v Chubb* is a classic example of the maxim that "hard cases make bad law". Whilst we share the very high regard of Popplewell J and the Court of Appeal for M, and agree that on a narrow application of the objective test of a hypothetical "impartial and informed observer", there was, strictly speaking, no case of apparent bias as a matter of English law; we also think that the concerns expressed by Halliburton's US counsel regarding the appearance of impartiality of M were legitimate and not fanciful. It would, in our view, have been preferable for the Court of Appeal to have held that where, in the exceptional circumstances of that case, legitimate concerns have arisen as to the impartiality of a court-appointed chairman by reason of his accepting additional and undisclosed appointments in related arbitrations after his appointment by the Court, and the chairman had himself expressed a willingness to resign provided both parties agreed, it was appropriate to appoint a new chairman. We think that, as a matter of principle, the chairman of an international arbitral tribunal, ought to be held to a higher standard of impartiality than a party-appointed arbitrator.[31] If, as Leggatt J held in *Guidant v Swiss Re*, the Court should not appoint a chairman, notwithstanding the absence of apparent bias, where one party has good reason to question his impartiality, the Court should also be prepared to remove a chairman if circumstances arise after his appointment which might reasonably suggest to one party a lack of impartiality. Moreover, the Court should have had regard to the fact that M had been Chubb's preferred candidate for chairman, and that Chubb had refused to consent to his offer to resign. As Mr Stanley QC observes:

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30 Case Note: "Halliburton Company v Chubb Bermuda Insurance Ltd" p. 2 (http://essexcourt.com/publication/halliburton-v-chubb-2018-ewca-civ-817/ accessed 2 July 2018).

31 Mr Stanley QC quotes Jan Paulsson (*The Idea of Arbitration*, p. 155), "citing a case note by [a] distinguished French jurist … who wrote of 'degrees of impartiality', contrasting the 'sufficient' neutrality of the party-appointee with need for presiding arbitrators to be 'particularly neutral'!" Although Mr Stanley may find the notion of degrees of impartiality troubling, hence his exclamation mark, in our view the remarks which Jan Paulsson quotes reflect commercial reality in many cases, and is the legal position in the United States. Mr Stanley goes on to quote a further observation by Jan Paulsson (*The Idea of Arbitration*, p. 160): "Many persons serving as arbitrator seem to have no compunction about quietly assisting 'their party'; they apparently view the modern international consensus that all arbitrators own a duty to maintain an equal distance to both sides as little more than pretty words." Perhaps there is something to be said for the American system, where party-appointed arbitrators are expected to be advocates for their side, and only the chairman, who is referred to as "the neutral", is supposed to be impartial.

> "An English lawyer, even one who does not know who M was, may accept assurances that he is a person known to have the highest integrity. A corporation in Texas may be less sanguine. To be told that an English judge has appointed the preferred candidate of one's adversary, who has soon afterwards secretly added a further reference relating to the same matter, might invite scepticism. It was one of the purposes of the Arbitration Act 1996 to reassure those unfamiliar with English ways that London is an arbitration centre that can be trusted. One might think that it is important to be sensitive to appearances, and to bear in mind that arbitration users may come from backgrounds where, as in some US domestic arbitration, the line between party-appointed arbitrator and advocate is often difficult to see. In bias cases the common law itself has never allowed confidence, no matter how strong and widespread, in the individual integrity of a decision-maker to count for much. Nobody would doubt the integrity of Lord Hoffmann[32], or Sir Peter Cresswell[33]. But part of the function of rules guaranteeing impartiality is to reassure outsiders. That matters all the more in arbitration."[34]

The Court of Appeal also addressed the issue of multiple appointments of the same arbitrator by one party in unrelated arbitrations. Counsel for Chubb had conceded, "that 10 appointments for one party might objectively give rise to justifiable doubts as to the impartiality of the arbitrator."[35] This was not the case in relation to M, who had, in any event, disclosed his previous appointments as a party-appointed arbitrator on behalf of Chubb/ACE. The problem of "frequent flyers" – to use Mr Stanley's term – is that the same individuals tend to be appointed, repeatedly, in Bermuda form arbitrations on behalf of insurers, by a handful of law firms.[36] The practice of perpetuating a small pool of arbitrators in the London market, in particular in the narrow field of Bermuda form arbitrations, was not discussed by the Court of Appeal in *Halliburton v Chubb*. However, it was expressly approved by Popplewell J at first instance, for whom it was not merely to be tolerated as a common practice that is, perhaps, inevitable in a specialised market, but was said to be "desirable".[37] At a time when international arbitral institutions and leading law firms are seeking

32 See: *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 2)* [2001] AC 119.

33 See: *Almazeedi v Penner* [2018] UKPC 3, discussed above.

34 Case Note: "Halliburton Company v Chubb Bermuda Insurance Ltd" p. 18 (http://essexcourt.com/publication/halliburton-v-chubb-2018-ewca-civ-817/ accessed 2 July 2018) Mr Stanley QC is one to the co-authors of *Liability Insurance in International Arbitration* (which as we have noted above was cited by the Court of Appeal). Mr Stanley's critique of the present state of the law on disclosure and disqualification of arbitrators is written from the perspective of an advocate who represents policyholders in Bermuda form disputes. Nonetheless, in the view of the authors (one of whom has experience as both counsel and as a party-appointed arbitrator on behalf of policyholders and insurers in Bermuda form arbitrations) some of the points he makes regarding lack of transparency in the arbitral process, and the perception "outsiders" have of London arbitrations are fair and reasonable.

35 [2018] EWCA Civ 871, [90].

36 In the case of policyholders in Bermuda form arbitrations, party-appointed arbitrators are typically selected from among US lawyers whose practise involves acting exclusively for policyholders, or from a small number of English QCs, who do not regard insurance policies as ingenious linguistic puzzles which an insured must solve in order to obtain coverage.

37 [2017] EWHC 317 (Comm), [22].

to promote diversity in arbitral appointments[38], some international observers of the English arbitral scene, who by definition would not be regarded by Popplewell J as either "objective" or "fair-minded", may well find the learned judge's approach undesirable. Moreover, while English judges take an Olympian view of what they consider to be objective and fair, as Mr Stanley QC points out:

> "From a US vantage point, lawyers and brokers, facing what they see as an un-level playing field, will increasingly advise policyholders to avoid, where possible, insurance policies which require binding arbitration generally, and London arbitration in particular. The lack of transparency, a perception of complacency in the world of London arbitration, and weak policing of disclosure, all risk undermining the confidence that the Arbitration Act 1996 was intended to instil."

APPENDIX

SUMMARY OF ENGLIGH LAW ON DISCLOURE OBLIGATIONS AND DISQUALIFICATION OF ARBITRATORS

The current state of English law relating to disclosure and disqualification of arbitrators may be summarised as follows.[39]

(1) Section 33 of the1996 Act requires the tribunal to act fairly and impartially between the parties. It is presumed that all arbitrators, including party-appointed arbitrators, will be strictly impartial in compliance with their statutory duties. The presumption is said to be the objective conclusion which any fair-minded and informed observer would reach having read section 33. *H v L & Ors* [2017] EWHC 317 (Comm), [16]. Moreover, the presumption of impartiality is not easily rebutted. At the risk of stating the obvious, it appears that the more eminent the reputation of the arbitrator being challenged the less likely it is that a challenge founded on "apparent bias" will succeed.

(2) At common law an arbitrator is under a duty to disclose circumstances known to him which "would or might" lead a fair-minded and informed observer to conclude there is a real possibility that the arbitrator is biased. *Halliburton v Chubb* [2018] EWCA Civ 817 [70] The

[38] See: www.arbitrationpledge.com.

[39] This summary, which is taken from the 5th edition of O'Neill & Woloniecki, The Law of Reinsurance (due to be published in early 2019) is derived, in part, from the first instance judgment of Popplewell J in *Halliburton v Chubb*, *H v L & Ors* [2017] EWHC 317 (Comm), [16].

category of circumstances which should be disclosed at common law is therefore broader than those which entitle a party to disqualify an arbitrator pursuant to section 24 of the 1996 Act.

(3) An arbitrator may be removed under section 24 of the 1996 Act if, and only if, there are "justifiable doubts as to his impartiality". *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451 at [17], *A v B* [2011] 2 Lloyd's Rep. 591 at [22], *Sierra Fishing Co v Farran* [2015] EWHC 140 at [51]. There does not appear to be separate legal basis upon which an arbitrator can be removed for lack of "independence" if it does not amount to "justifiable doubts as to his impartiality".

(4) The test to be applied is the same as the common law test of apparent bias: would a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. *Porter v Magill* [2002] AC 357 per Lord Hope at [51]; *R v Gough* [1993] AC 646 per Lord Goff at 670.

(5) The fair-minded observer is gender neutral, is not unduly sensitive or suspicious, reserves judgment on every point until he or she has fully understood both sides of the argument, is not complacent and is aware that judges and other tribunals have their weaknesses. The "informed" observer is informed on all matters which are relevant to put the matter into its overall social, political or geographical context. These include the local legal framework, including the law and practice governing the arbitral process and the practices of those involved as parties, lawyers and arbitrators. See *Helow v Secretary of State for the Home Department* [2008] 1 W.L.R. 2416 at [1]-[3]; *A v B* at [28]-[29]. *H v L & Ors* [2017] EWHC 317 (Comm), [16]. See also: *Almazeedi v Penner* [2018] UKPC 3 per Lord Sumption (dissenting) at [36].

(6) The test is an objective one. The fair-minded observer is not to be confused with the person who has brought the complaint, and the test ensures that there is a measure of detachment. The litigant lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business and most litigants are likely to oppose anything which they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded: see *Helow v Home Secretary* per Lord Hope at [2]; *Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2016] EWCA Civ 556 per Lord Dyson MR at [69]. *H v L & Ors* [2017] EWHC 317 (Comm), [16].

(7) One aspect of the objective test is that it is not dependent on the characteristics of the parties, for example their nationality: see *A v B* per Flaux J at [23]-[24]. The test is the same whether or not foreign nationals are involved, and the test is not informed by the actual or stereotypical attitudes towards the arbitral process which may be held by a party who is, or is managed by, foreign nationals. *H v L & Ors* [2017] EWHC 317 (Comm), [16].

(8) As a matter of principle, an arbitrator can accept appointments in more than one reference with the same or overlapping subject-matter without giving rise to the appearance of bias: *Guidant LLC v Swiss Re International* [2016] EWHC 1201 (Comm); *Halliburton v Chubb* [2018] EWCA Civ 817. An arbitrator may be trusted to decide a case solely on the evidence or other material before him in the reference in question. Objectively this is not affected by the fact that there is a common party. *Halliburton v Chubb* [2018] EWCA Civ 817 [51]. However, a significant number of appointments of one arbitrator by the same party may allow an inference of apparent bias to be drawn. *Halliburton v Chubb* [2018] EWCA Civ 817 [90]. What constitutes a "significant number" has yet to be judicially determined; it was conceded by counsel in *Halliburton v Chubb* that 10 appointments on behalf of the same party was sufficient for there to be a reasonable inference of apparent bias.

(9) Inadvertent non-disclosure by an arbitrator of a circumstance which should have been disclosed, but does not as a matter of English law give rise to justifiable doubts as to the arbitrator's impartiality, cannot, in and of itself justify an inference of apparent bias. Something more is required – see, for example Lord Mance in *Helow v Secretary of State for the Home Department* [2008] 1 W.L.R. 2416 at [58]. *Halliburton v Chubb* [2018] EWCA Civ 817 [76]

(10) All factors which are said to give rise to the possibility of apparent bias not merely individually but cumulatively. See: *Cofley Limited v Anthony Bingham* [2016] EWHC 240 (Comm) at [115]. *H v L & Ors* [2017] EWHC 317 (Comm), [16].

(11) Non-disclosure is therefore a factor to be taken into account in considering the issue of apparent bias. Non-disclosure of a circumstance which "might" give rise to justifiable doubts may tip the balance, effectively deepening the objective observer's doubts to the point that something that would normally be taken as just the right side of the line is regarded as just the wrong side: to fortify or even lead to an overall conclusion of apparent bias – see, for example,

Paice v Harding [2015] EWHC 661, and *Cofley Ltd v Anthony Bingham* [2016] EWHC 240 (Comm). *Halliburton v Chubb* [2018] EWCA Civ 817 [75].

(12) The International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 edition ("The IBA Guidelines"), which reflect best practice in international arbitration, may provide some assistance to the Court with respect to what may constitute an unacceptable conflict of interests and what matters may require disclosure. However, they are not legal principles, and if there is no apparent bias applying the English law test, whether there has been compliance with the IBA Guidelines is irrelevant. *Cofley Ltd v Anthony Bingham* [2016] EWHC 240 (Comm) at [109]; *A v B* at [73]; *Sierra v Farran* at [58]. *H v L & Ors* [2017] EWHC 317 (Comm),

Friday, November 9, 2018, 10:35 a.m. – 11:25 a.m.

GENERAL SESSION
How the Political Wars are Affecting the Insurance Industry and What to Expect in the Years to Come

SESSION MATERIALS:

PRESENTED BY:

Moderator:
Deana Lykins, Selective Insurance Company of America
Panel:
Jeff Beck, Selective Insurance Company of America
Deirdre Manna, Zurich North America
John K. Tiene, Agency Network Exchange

The Midterm Elections and Beyond

With 60 days until the midterm elections, the post-Labor Day election forecasting has begun in earnest. While several variables can still influence the ultimate trajectory of the election, a national climate where President Trump's approval rating is mired in the high 30s/low 40s and the average Democratic lead on the generic ballot is 8.4 points continues to point to a base case where Democrats win control of the House and Republicans retain control of the Senate. However, Republicans retaining a small majority in the House is still a possible outcome, and the Democrats have a path to a Senate majority if they run the table of toss-up elections.

The midterm elections are a critical opportunity for voters to express their views on the current performance of Congress and the Trump administration, with the outcome playing a defining role in how Congress and the administration move forward for the next two years. A blue wave that brings the Democrats into the House majority will empower the anti-Trump and GOP critics to push back on the previous two years of governing. **Despite any legislative prerogatives coming from Democratic leadership, the likelihood that any meaningful legislation that is not considered "must pass" is enacted and signed into law in the next two years remains remote.**

House Democrats and Senate Republicans are unlikely to agree on controversial issues like drug pricing reform and pay-fors for infrastructure spending, as policy messaging will quickly turn to the 2020 presidential elections. **As such, a divided Congress will mean greater legislative gridlock and ramping up of executive actions on items like trade and drug pricing when possible from the Trump administration. Without needing support from Republicans, Democrats will seek to focus on the administration and conduct investigations into Trump as the progressive base seeks accountability rather than compromise with the president and GOP.** How far-reaching and theatrical these investigations go will be determined in large part by the makeup of Democratic leadership and committee chairmanships as well as any final report from the Mueller investigation.

While all eyes are on the midterm elections, behind the scenes planning is ramping up among congressional leadership to stake out a possible legislative agenda for 2019 and 2020, with *Axios* earlier this week detailing what a potential Democratic majority in the House would focus on should they take over in November. Such internal planning will continue among Democrats and Republicans, along with intra-party debates and positioning for leadership posts. Meanwhile, staff departures, like that of White House Counsel Don McGahn, will likely accelerate after the midterm elections, creating another iteration of staff turnover that could leave the White House ill-prepared for the challenges of dealing with an opposition party in control of at least one chamber of Congress unless the administration can bolster its legal staff by year's end

The Post-Labor Day Campaign Push

House

According to FiveThirtyEight's recently launched House forecast, Democrats have a 77 percent chance of picking up the 23 seats necessary to become the majority party. *Politico*'s new race ratings predicts the "House leans in favor of the Democrats." Meanwhile, individual race forecasters like the Cook Political Report show Democrats starting with a base of 182 solid seats and Republicans with 150 solid seats. From there, Democrats are defending 13 competitive seats and Republicans are defending 90 competitive seats (38 of which are rated as a toss-up or worse). Political analysts have noted that such a high number of competitive Republican seats denotes that the House GOP is facing the highest relative seats-at-risk-to-margin ratio (152 percent) compared to midterm elections in 1994, 2006, and 2010 when the House majority changed parties. This means Democrats have a higher margin of error than in past efforts in converting competitive seats into wins for them to take the majority.

A wide path for the Democratic quest for 23 seats is through open and vacant seats left by Republicans. A record 38 Republican House incumbents chose not to seek reelection this year, with several more leaving vacant seats due to scandal. While most of those seats are in reliably red congressional districts, the Cook Political Report has 13 of these seats as rated toss-up or worse for the GOP and only nine rated as Lean/Likely for the GOP. Without the incumbency advantage, Democratic candidates for many of these seats stand a good chance of winning.

And while there are several strong Republican incumbents in swing congressional districts that Democrats face an uphill climb of ousting, there are good number of Republican incumbents who are struggling to organize against formidable Democratic challengers. According to *Politico*, Democrats in 56 House districts surpassed Republican incumbents in Q2 fundraising this year, with 16 of these challenges having more cash-on-hand too.

Senate

As challenging as the national climate is for Republicans, Democrats will not only need a blue wave, but a blue *tidal* wave to overtake the high ground Senate Republicans have in 2018. Republicans now hold a razor-thin 51-49 edge over Democrats in the Senate – a net of just two seats will give Democrats control of the upper chamber in November. But of the 35 Senate seats up for election this year, 26 are held by Democrats and Independents aligned with Democrats, while only nine are held by Republicans. Many of these seats, like in Indiana, Missouri, Montana, North Dakota, Tennessee, and West Virginia are in the heart of Trump country, where the Republican challengers are actually seeking to nationalize the race and make it a referendum on supporting the Trump agenda. These Republicans will also receive the bulk of the resources and attention from Trump himself, as he ubiquitously campaigns in person and via Twitter over the coming weeks.

Taking the latest election ratings from Cook Political Report, Sabato's Crystal Ball, Inside Elections, and RealClearPolitics (RCP) polling averages, eleven of those Senate seats held by Democrats, and just four of those Senate seats held by Republicans, will be competitive to varying degrees in November, something we laid out in detail in a Spotlight Report last month. As opposed to the House, this gives the Senate GOP the best seats-at-risk-to-margin ratio compared to previous midterm elections. *Politico*'s Senate race ratings predicts the "Senate will likely go to the Republicans."

The Base Case: Democratic House/Republican Senate

Come November, the most likely outcome of the midterm elections is Democrats winning the House and Republicans retaining control of the Senate. This base case would also mean a Congress led by Senate Majority Leader Mitch McConnell (R-KY) and a presumed House Speaker Nancy Pelosi (D-CA).

While McConnell's claim to leadership is under no doubt, there has been a whirlwind of chatter about Pelosi's ability to garner the 218 votes necessary to win back the speakership that she relinquished in 2010. A palpable frustration among the House Democratic rank-and-file came to a low boil after the disappointing 2016 elections towards Pelosi and the leadership team -- who have been around longer than most Democratic members have actually been in Congress. Sixty-three Democrats -- nearly one-third of the conference -- voted against her bid to become minority leader after the 2016 election, a margin of victory she could not afford if running for speaker. According to a Gallup poll in June, Pelosi had a dismal 29 percent approval rating, with only 55 percent of Democrats having a favorable view of her. The problem for Pelosi is a generational challenge and a desire for a new face of Democratic leadership, since 78-year-old Pelosi has been leading the caucus since 2003. According to NBC News, at least 42 of the party's nominees for House seats have declared they will not back Pelosi and nine incumbent Democratic lawmakers are on the record opposing her, bringing the total to 51.

Even with this generational concern coming from Democratic candidates and several incumbents, Pelosi remains the odds-on favorite to continue leading House Democrats. The main reason for her relatively strong positioning is not just her fundraising prowess and proven ability to lead a diverse caucus, but the lack of any clear alternative to her leadership post. The one person who was seen as her biggest threat to leadership, Democratic Caucus Chair Joe Crowley (D-NY), will not be in Congress come 2019, as he lost his primary to upstart Democratic Socialist Alexandria Ocasio-Cortez. Without Crowley, Pelosi can credibly claim that she can lead the Democrats for the upcoming two years and transition out of her position in 2020, passing on the mantle then to a new leader.

Pelosi is not waiting for the leadership race to occur to begin planning a potential Democratic agenda in the new Congress. Pelosi on Tuesday wrote a "Dear Colleague" letter to the Democratic rank-and-file that noted, "As we approach the end of this Congress, we must Be Ready for the prospect that we will be in the Majority in January." To that end, Pelosi mentioned three areas where legislation is already being developed: "Lowering health care costs and prescription drug prices; increasing pay through strong economic growth by rebuilding America; Cleaning up corruption to make Washington work for the American people." Part of the Democrats' A Better Deal agenda, these proposals seek to set the legislative agenda for the upcoming two years.

While no detailed plans have come forth about lowering healthcare costs, the Democrats do have a blueprint on tackling drug costs. It includes three focus areas: new enforcement of drug price gouging, allowing Medicare Part D to negotiate drug prices directly, and transparency of excessive drug price increases. In addition, the progressive wing of the Democratic Party will seek to push for "Medicare for All" legislation, which has received the support of the majority of the conference this past year. Though unable to pass the Senate or receive the support of President Trump, the future House leadership will need to find the balance in placating the progressive base while also ensuring that moderates have a voice at the table and are not completely sidelined.

Democrats also have a $1 trillion infrastructure plan that would "rebuild our crumbling infrastructure and create more than 16 million American jobs." The plan from A Better Deal does not specify sources of funding the $1 trillion in spending, though the plan says it will be "stabilizing the Highway Trust Fund" without a specific mention to raising the federal gas tax. A Senate Democratic infrastructure plan from March would offset infrastructure costs through modifying parts of the Republican tax cut law, including raising the corporate tax rate to 25 percent, restoring the alternative minimum tax, and increasing the top individual tax rate to 39.6 percent. It's noteworthy that Pelosi is reportedly "committed to reviving the pay-go (or pay as you go) rule she had during her previous run as speaker," meaning that new spending will need to be offset in the budget, something the Republicans partially waived in their tax cuts.

Pelosi's commitment to fiscal responsibility leaves any sort of compromise with McConnell on something like a major infrastructure package largely in doubt. There was a brief top-down push this year by the Trump administration to pass an infrastructure bill, but even among Republicans, coming up with the necessary pay-fors was a bridge too far. Unlike with tax cuts, where there was a strong impetus from the donor base for Republicans to act, there is little urgency for Pelosi and McConnell to make politically difficult funding decisions (e.g., increasing the gas tax) in order to reach a deal on infrastructure. As such, the one area of common ground that could unite Congress on major legislation has a slim chance of success.

Instead of any serious legislative efforts, a Democratic majority in the House will have the most energy and passion when focusing on Trump. As of now, Democratic leadership is none too keen to support a push for impeachment, at least until the Mueller investigation concludes. In the meantime, if the Democrats take control of the House, they will immediately begin several probes and investigations into the Trump administration, seeking to highlight any perception of corruption within the administration. In talking about future investigations, Pelosi in an interview with NPR this week said, "You will see us use every arrow in our quiver to find the truth about what's happening in public policy, what they're doing to the environment. We see this as a culture of corruption, cronyism and incompetence." According to *Axios*, such investigations will run the gamut from Trump's personal finances and business relationships to policy actions like the Muslim travel ban and family separation at the border.

These investigations will take place largely in the House Judiciary Committee, the Oversight Committee, and the Intelligence Committee. House Intelligence Committee Ranking Member Adam Schiff (D-CA) described the importance of investigations while also making sure it's done in a reasonable manner, saying this week that, "We need to attack the problem of corruption we see in the administration and do our oversight. But Democrats are mindful of the fact that if we want to stay in the majority, we have to show that we are responsibly governing." The challenge for Pelosi, Schiff, House Oversight Committee Ranking Member Elijah Cummings (D-MD), and House Judiciary Committee Ranking Member Jerry Nadler (D-NY) is to preside over an investigation that shines the light on potential corruption of the Trump administration without creating such a spectacle that gives ammunition for Republicans to promote the "witch hunt" narrative that the president has been advocating.

The Other Midterm Outcomes

While a divided Congress is the most likely outcome this November, there is a nontrivial chance that Republicans retain control of both chambers of Congress or, less likely, Democrats take control of the Senate along with the House.

Republican House/Republican Senate

If Republicans are able to hold the House, they will view it as a strong and important endorsement of the Republican agenda and President Trump's first two years in office. In this case, reconciliation will be back on the table as an option for getting around the 60-vote threshold in the Senate. As Vice President Pence recently mentioned, there would be another attempt at repeal-and-replace of the Affordable Care Act (ACA), something the Republicans failed at, albeit by just a single vote in the Senate. A second iteration of tax cuts, namely, extending the tax cuts on the individual side for a few more years while making some fixes to the first round of tax cuts could also be an option for reconciliation with the potential for some drug pricing reforms to be included as pay-fors. Finally, Republicans would also take a close look at tackling welfare reform, something that retiring House Speaker Paul Ryan (R-WI) has always wanted to accomplish, but did not have the bandwidth to achieve this year in a meaningful way.

In terms of the makeup of the Republican caucus, Senate Republicans who were critical of the president, including Senators Bob Corker (R-TN), Jeff Flake (R-AZ), and the late-Senator John McCain (R-AZ) will no longer be in office. In their place would be candidates who were elected (Mitt Romney being the exception) in large part thanks to the campaigning and support of the president. A more pro-Trump Republican makeup will be even more evident in the House. Speaker Ryan has a working relationship with the president, but it's clear that the speaker has several issues with the style of the president. But Ryan, along with several moderate Republicans critical of the president, are retiring at the end of this year or are facing tough reelections, leaving the future House leadership in more Trump-friendly hands. The two leading contenders to replace Ryan, House Majority Leader Kevin McCarthy (R-CA) and House Majority Whip Steve Scalise (R-LA) are effusive in their praise of and relationship with the president. Additionally, Rep. Jim Jordan (R-OH), one of Trump's biggest supporters from the House Freedom Caucus, is running for speaker. Jordan's chances of actually becoming speaker are slim, but he could parlay any support he garners into a leadership post, bringing one of the biggest Trump allies into a position of power. All of this would mean even less scrutiny of the Trump administration, leaving the president even more inclined to ridicule the Mueller investigation without fear of congressional repercussions. All the while, House Republicans would continue the investigations against perceived injustices done to Trump and conservatives.

Democratic House/Democratic Senate

A blue wave in the midterm elections that gives the Democrats both the House and Senate would be seen as a major rebuke of Trump from all corners of the country. Democrats would have the power of reconciliation to advance several of their agenda items, though they would not have the votes necessary to override a veto. Democrats would be emboldened to investigate Trump, block several of his nominees in the Senate, and seek tough negotiating positions in spending talks. This includes a major fight around Trump's border wall and action around protections for Deferred Action for Childhood Arrivals (DACA) recipients. All of this would lead to a greater showdown between Trump and Congress, leading to an increased risk of a lasting shutdown.

The Trump White House Post-Midterm Elections

A post-midterm election scenario where Democrats have control of the House is not a scenario for which the Trump administration has prepared. The dynamics and organization of the White House has always been one of chaos and lacking adequate staffing, but this may only be magnified if Democrats win the House. According to a report by *the Washington Post* last week, "President Trump's advisers and allies are increasingly worried that he has neither the staff nor the strategy to protect himself from a possible Democratic takeover of the House, which would empower the opposition party to shower the administration with subpoenas or even pursue impeachment charges." A similar report was done by the *Associated Press* last week as well. In particular, Trump's legal team is already understaffed, with White House Counsel Don McGahn leaving in the fall. An understaffed and unprepared legal staff will create immense headaches for the White House as investigations from a Democratic House ramp up and potential impeachment talks develop.

But it's not just McGahn and members of the White House legal team that are seeking an exit after the midterm elections. People like Press Secretary Sarah Sanders and Chief of Staff John Kelly are unlikely to stay on into the New Year. Cabinet secretaries like Defense Secretary Jim Mattis and Attorney General Jeff Sessions could also step down or get fired. The continuing record turnover of White House personnel leaves Trump with a shrinking orbit of staff that he will trust less and less. Any replacements are unlikely to hold the same caliber of the prior Trump appointments, creating an environment where the president is even more unshackled by the burdens of process and bureaucracy. In terms of policy, this will likely necessitate greater use of executive actions to accomplish the president's policy priorities, as he has already demonstrated a penchant for pursuing with respect to trade and drug pricing policies.

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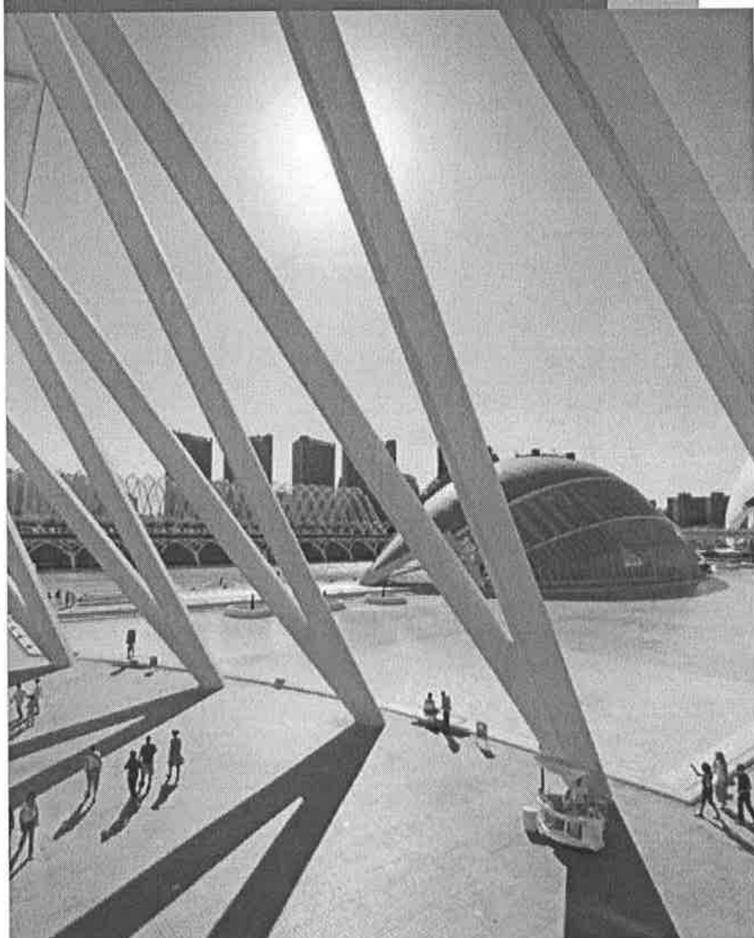
Insurance 2020: Turning change into opportunity

Insurers who anticipate and plan for change can create their own future

January 2012



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Contents

Introduction

The future may be hard to predict, but need not be hard to prepare for. Insurers are grappling with the tough new business, investment and regulatory environments that are emerging from the financial crisis.

The industry, however, also faces far broader challenges. Demographic shifts, the rise in power of the emerging markets and changing customer behaviour will all help shape the sector's longer term future.

Insurers who can anticipate and plan for change can create their own future. Others who are 'fast followers' will need to be agile enough to recognise the leaders and adopt similar strategies. The 'survivors' are likely to be focused on short-term performance. ***Which one are you?***

In this report we take a two-stage approach (see Figure 1) to help you address this key question and to develop a strategy to exploit the opportunities the future holds:

1. **Analysis of the key market drivers.** We have conducted extensive research to develop a set of future scenarios. We have based our research on an 'outside-in' scenario planning analysis that takes into account the impact of global social, technological, environmental, economic and political factors (STEEP) across three major insurance industry sectors – personal, commercial and life, annuity and retirement. We take into consideration more than 30 different drivers that could potentially impact insurance, globally. (We describe in this document the drivers, but due to space limitations do not cover each one in depth.)

2. **Implications for insurers' business models.** Our second stage is an 'inside-out' business design analysis, which evaluates the impact of these different scenarios on developed and emerging market insurers' strategies. We also consider the changes you could make to your business design to avoid risks and maximise opportunities. The business design framework can help you to exploit the data and insights in this study, and tailor them to your specific strategic direction and unique capabilities.

Figure 1: Scenario planning based business design

Factors & Drivers	Mega trends	Sectors	Scenarios	Industry impacts	Strategies	Design levers
What **Social, Technological, Environmental, Economic, and Political (STEEP) factors** and its component drivers impact the future?	What **mega trends** can be inferred from the STEEP factors and drivers?	How do these factors, drivers, and mega trends change by the three **insurance sectors** – personal lines, commercial lines, individual life, annuities and retirement?	What are the primary dimensions and **macro-scenarios** that can be mapped from the 'outside-in' analysis?	What are the key **industry impacts** that arise out of the three sectors of insurance?	Given their strategic intent and core capabilities, what **strategies** can develop and emerging market insurance players adopt to prepare for the future?	What **design levers** should companies use to execute their strategies to exploit the uncertain and fast changing future?

"Outside-in" Scenario Planning Analysis

"Inside-out" 3D Business Design Analysis

Source: PwC analysis

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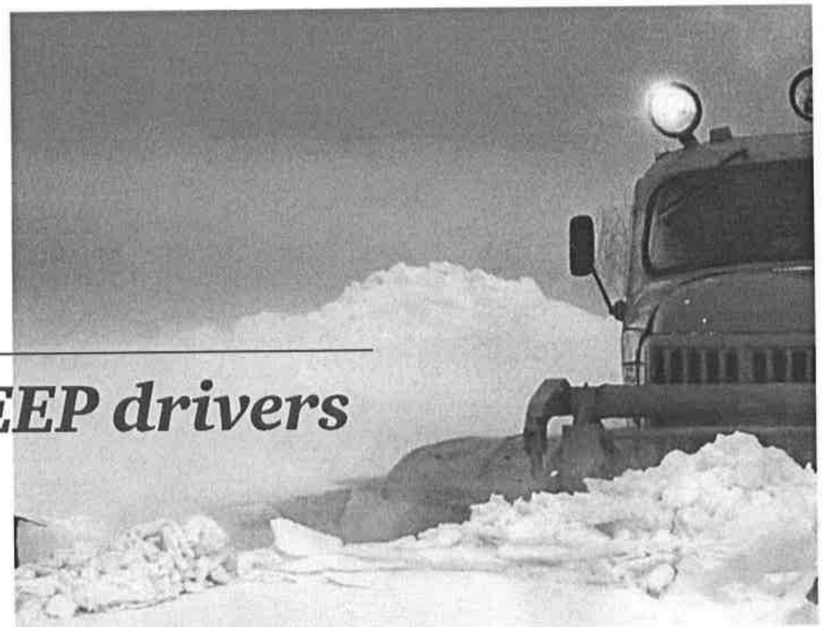
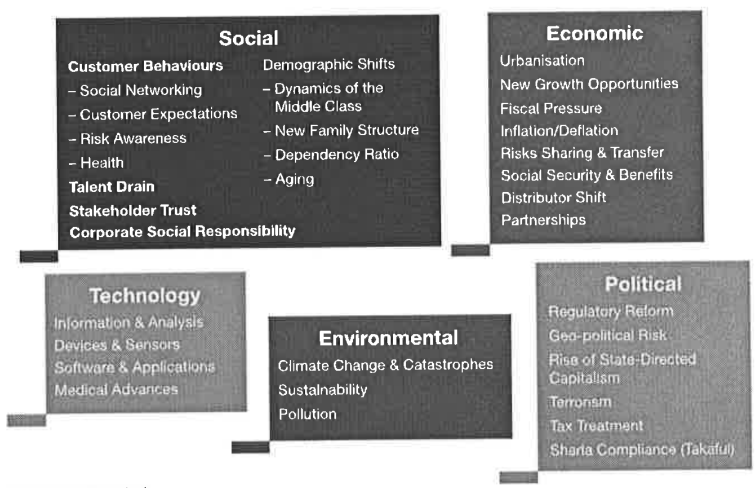


The key STEEP drivers

We have explored the five STEEP drivers to identify 32 factors that we believe will have an impact on the insurance industry (see Figure 2). STEEP factors have an impact on all sectors of insurance – personal, commercial and individual life, annuities and retirement – but not all changes will affect insurers positively. Economic growth, for example, in the short to medium term will be stronger in emerging economies. Forward-looking insurers in developed countries, however, can still grow in their local markets by exploiting socio-demographic and technological trends, while at the same time targeting emerging markets for growth. Similarly, insurers from emerging economies have an opportunity to reshape insurance products for their local markets while expanding on the global stage to build their technical expertise.

Although no one can predict exactly what STEEP changes will occur in the next decade, we believe five key mega-trends will influence the insurance sector. There are many more to consider (review the scenarios described in Figure 3) and with our research in place we are happy to walk you through them, but in this publication we will focus on:

Figure 2: STEEP drivers and factors



Source: PwC analysis

- **Social:** The balance of power is shifting towards customers.
- **Technological:** Advances in software and hardware that transform 'big data' into actionable insights.
- **Environmental:** The rise of more sophisticated risk models and risk transfer to address the increasing severity and frequency of catastrophic events.
- **Economic:** The rise of economic and political power in emerging markets.
- **Political:** Harmonisation, standardisation and globalisation of the insurance market.

2 PwC Insurance 2020: Turning change into opportunity, January 2012

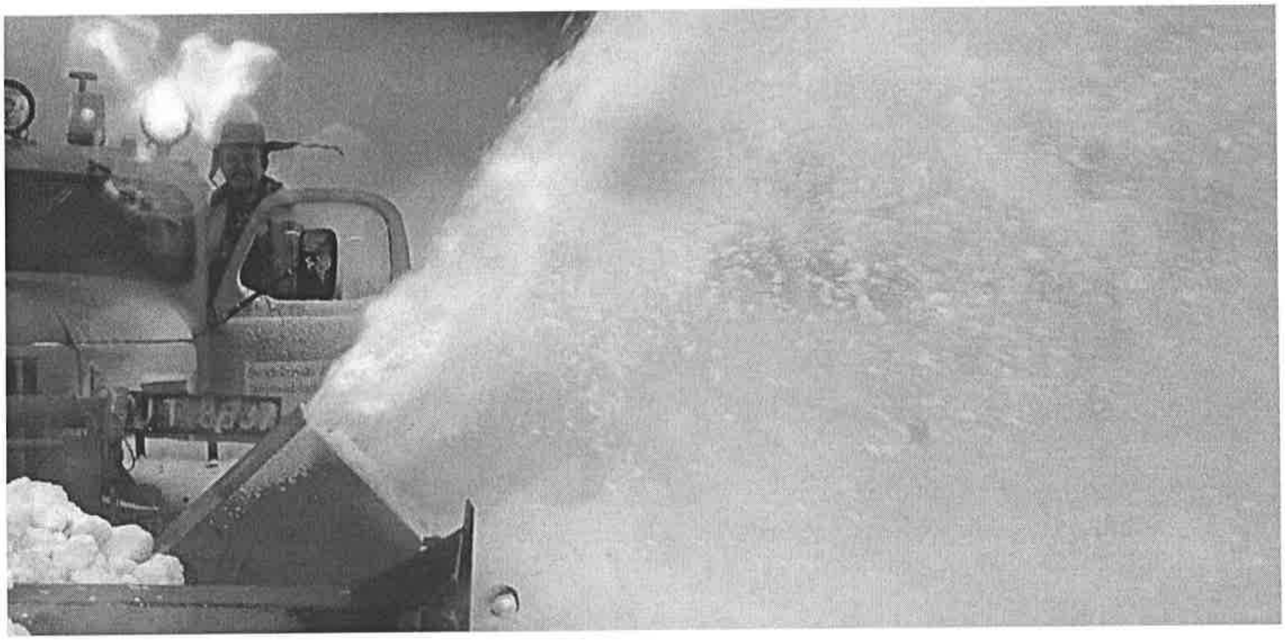


Figure 3: STEEP Drivers: The range of possible scenarios you face

Our detailed analysis of over 30 key STEEP drivers has enabled us to determine a range of possible macro-scenarios that the insurance industry faces. These macro-scenarios underpin the implications we have drawn for the future shape of the insurance sector.

	Regressive	Combination of factors			Progressive
	1	2	3	4	5
Social	Customers predominantly seeking face-to-face interactions with intermediaries.	Distribution disruption in which multiple channels compete for customer interaction.	Distribution disruption where integrated multi-channel interaction is the norm.	Distribution destruction, where customers buy directly from carriers.	Distribution destruction, where self-forming groups of customers negotiate bulk purchases from carriers.
Technological	Insurers face increased data overload, quality and privacy issues, and cyber threats, resulting in a regression to 'gut-driven' decision-making.	Insurers continue to manage information overload and ever-increasing sophistication of analytical techniques that require ongoing investment to keep pace with competitors.	Sophisticated information analytics becomes the key determinant of competitive differentiation, which underwriting talent magnifies.	Sophisticated information analytics, new sources of information (from mobile sensors), and underwriting talent become the key determinant of competitive differentiation.	Sophisticated information analytics progresses to a point where no more useful information can be extracted and all key decision-making has been automated; competition shifts to prevention and productivity gains.
Environmental	With catastrophic events on the rise and insufficient data to accurately predict them, insurers will exit unprofitable areas.	Insurers will continue to rely on catastrophe models, but regulatory restrictions will prevent them from restructuring innovative risk transfer/ sharing deals.	**Insurers will continue to rely on catastrophe models and sell innovative catastrophe insurance products through securitisation and reinsurance.**	Catastrophe modelling gets more sophisticated and uses advanced, early warning technologies to underwrite in specific, catastrophe-prone areas.	Advanced early warning technologies and new risk transfer/sharing mechanisms with public and private enterprises reduce human and property loss from catastrophic events.
Economic	The world moves from globalisation to regionalisation and insurers operate in and create products specific to narrow boundaries.	**Emerging market insurers grow in scale and importance, and limit opportunities for developed market insurers.**	As developed market insurers enter emerging markets, margins in these markets decline.	New emerging market insurers move into developed markets and become global businesses.	Truly global markets with products that are able to integrate multiple parts of the value chain, regardless of location.
Political	Governments in both developed and emerging markets enforce equally burdensome regulations on insurers decreasing their profitability.	Emerging markets erect more onerous regulations than developed markets' decreasing profitability and limiting control of developed market insurers.	Majority of regulations focused on banks, and insurers in developed and emerging markets are able to get away with minimal regulatory changes to pricing, coverage, rates and reserves.	Emerging markets and developed markets enact less burdensome regulations and emerging markets relax their regulations to ease the entry and control of developed market insurers into emerging markets.	The regulatory climate improves with greater harmonisation across countries (and within states in large countries). Regulatory harmonisation leads to standardisation across products and practices.

Source: PwC analysis

Social: The balance of power is shifting towards customers

New and ongoing social trends will shake up traditional business patterns in the insurance industry, resulting in an increase in consumer power:

Customer expectations: Customers (consumers and businesses) are increasingly demanding simplicity, transparency and speed in their transactions with businesses, including insurance agents/advisers and carriers. The relentless march of online and mobile technology is continuing to fuel this change in customer expectations.

In a recent survey of US consumers, more than 32% of all respondents – and 50% of those aged 18 to 25 – said they prefer to work directly with insurance carriers.[1] This 'push' towards direct interaction will continue across both personal lines and individual life insurance sectors. In addition, the online world is also becoming increasingly mobile as smartphone and tablet use increases and fuels the demand for localised information, available anytime, anywhere. By 2014, for example, the number of mobile internet users is expected to overtake desktop internet users.[2]

These changes will substantially impact the insurance sector:

- More and more insurance will be 'bought' by customers as opposed to being 'sold' by agents destroying the age old wisdom of 'Insurance is sold and not bought'. This fundamental shift will force insurers and agents to re-examine their roles in the insurance value chain and become more relevant to the end-customer (consumer or business).
- Customer expectations of simplicity and transparency will foster innovations in product/service design and delivery. Leading insurers will get better at targeting customers and customising product and service attributes to meet their specific needs, amassing greater customer surplus.
- Mobility and speed of service demanded by customers will translate into investments in mobile and interactive technologies for multimedia content creation and distribution as well as transactional capabilities across multiple digital platforms.

Social networks: The rapid adoption and fast evolution of social networks will continue to empower both consumers and businesses to communicate more transparently and to harness the buying power of virtual communities. The growth of social networking – one of the fastest ever global adoptions – will help shift the balance of power towards customers. In just six years since its launch, for example, Facebook has attracted over 800 million users.[3] As consumers become even more comfortable with social networks several scenarios are likely to develop:

- People exchange more personal information and start building networks of trusted friends, family and acquaintances, shifting the balance of trust from insurance agents and advisers to online communities.
- Online social networks wielding substantial purchasing power become new group insurance channels, benefiting from information-driven online intermediaries.
- Eventually, online social networks become pooling mechanisms for self-insurance, changing the role of insurers at a primary level from product manufacturers to administration service providers.

1 Source: Coverhound: Car Insurance shoppers still prefer to deal with local agents over direct carriers, January 2011
2 Source: mashable.com: mobile by the numbers (infographic), March 2011
3 Source: Facebook statistics, November 2011

From distribution dominance to distribution destruction

Historically, the insurance sector has been dominated by intermediaries who have played the role of understanding consumer and business needs, and then matching and tailoring insurance products and solutions to their needs. Internet, mobility and social networking have changed the game over the past decade and have created a new generation of customers who demand simplicity, speed and convenience in their interactions. These trends will accelerate, leading to a situation where customers will be more willing to buy 'direct' using their online and offline 'trust' network of friends and family to guide their choice. This will result in a fundamental redefinition of the role of advice and the disappearance of distributors as a sales channel.

- 45% expect 'distribution destruction' where customers buy direct and even form groups to negotiate bulk purchases direct.

Source: PwC Research from more than 150 C-suite executives polled at a presentation of the Future of Insurance to the International Insurance Society (IIS), June 2011.

Technological: Advances in software and hardware are transforming 'big data' into actionable insights

As the insurance industry reaps productivity gains from the most recent wave of automation, new technologies are significantly enhancing operational efficiencies, increasing revenue opportunities and improving the customer experience. The important new technological developments for the insurance industry are:

- The growth in smartphones and tablets, coupled with cloud computing, which provide constant access to the internet.
- The explosion of computing power and storage, enabling the accumulation and analysis of extremely large amounts of data.
- The growth in active sensors and devices connected to the internet.

Big data: The growth of internet connected devices and sensors, which are projected to reach 50 billion by 2020,[4] will have a significant impact on the availability of real-time information – a trend often referred to as 'big data'. Insurers who can exploit this information for better pricing, underwriting and loss control will have a distinct competitive advantage over their peers.

To harness the 'big data' trend, global investment in advanced analytical techniques is increasing in order to develop the capabilities to process large volumes of unstructured and multimedia data, such as continuous real-time video, life blogging and social chatter. These advances will lead to software – and eventually hardware – that can translate 'big data' into actionable insights.

Advances in Artificial Intelligence techniques, such as machine learning, natural language understanding and intelligent decision-making will allow insurers to advance from using technology for transaction processing to decision-making. Today, analytical techniques are used for making ad hoc decisions using structured data.

By 2020, the use of unstructured data (e.g. social media, devices, video and audio) will complement structured data, allowing insurers to make strategic forward-looking decisions.

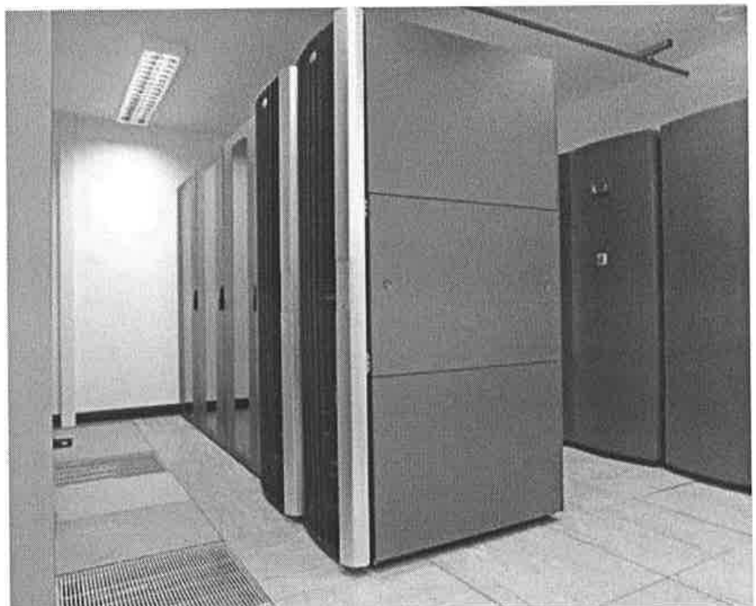
From a reactive to a preventative business model: Commercial insurers are already using connected devices and sensors to develop risk and loss management and improve productivity, but we also envision life and health insurers using them as well.

By 2020, a number of biotechnologies will be available at the nanoscale, providing the ability to embed devices and sensors unobtrusively within the human body. The nanotechnology drug delivery market is expected to grow at a CAGR of 21.7% between 2009 and 2014, and reach almost $16bn by 2014.[5] Such nanotechnologies have the potential to dramatically improve health outcomes through enhanced monitoring and preventive control of chronic disease.

4 Source: CISCO, The internet of things: How the next evolution of the internet is changing everything, April 2011
5 Source: Companies and Markets, Nanotechnology in Healthcare: Market outlook for applications, tools and materials, January 2010

The medical service and treatment model is evolving towards the customisation of healthcare; the resultant decrease in morbidity and mortality will have a profound impact on life and health insurers. Consumers will eventually use personalised medicine to create highly customised healthcare solutions that actively change the body's biochemistry in response to risks and conditions that are unique to each person. We anticipate that these medical advances will flatten the cost curve as mortality and morbidity rates dramatically improve. Some of these advances can also reduce litigation costs as medical product manufacturers can provide detailed evidence on the efficacy of their drugs.

Commercial insurers have always focused on loss control and risk management, but that trend will deepen and expand into other lines of insurance. Personal and life carriers will be able to move from passively identifying and pricing risk and reactively paying claims to proactively using 'big data' and actionable insights to reduce losses and better manage risk. For life and health insurers as well as annuity and retirement income providers, monitoring devices could significantly extend life expectancies and increase the number of years of active retirement life.



From a structured data/tactical decision-making/reactive business model to an unstructured data/strategic decision-making/preventive model

Historically, the insurance sector has used, primarily, internal data in a structured format to make tactical and operational decisions around which customers to target, how to price the risk, how to estimate the losses, etc. However, in the next decade the industry will increasingly use large amounts of real-time sensor data, unstructured data from social networks, and multimedia data such as text, voice and video. As sophisticated artificial intelligence techniques evolve, insurers will start using this unstructured data for forward-looking strategic decisions such as, which product or solution is most suited for a client given their current and future situation, which emerging countries to enter as well as when and how proactively to manage customer experience to enhance retention of the most profitable customers. Insurers who are able to use real-time 'big data' and advanced forward-looking simulation techniques will establish a significant competitive advantage.

- In a recent survey, 49% expect new sources and techniques in the use of data analytics to be the key competitive differentiator.

Source: PwC Research from more than 150 C-suite executives polled at a presentation of the Future of Insurance to the International Insurance Society (IIS), June 2011.

Environmental: The severity and frequency of catastrophic events is increasing

The severity and frequency of catastrophic events, both natural and man-made, have been increasing over the past 20 years. Between 1990 and 2009, hurricanes and tropical storms accounted for 45.2% of total catastrophe losses,[6] and the rate and intensity of these storms is predicted to increase with global climate change. A large portion of claims' payouts result from business interruption coverage losses – in the Chilean earthquake, for example, over 50% of claims were filed for business interruptions and extra expenses.[7]

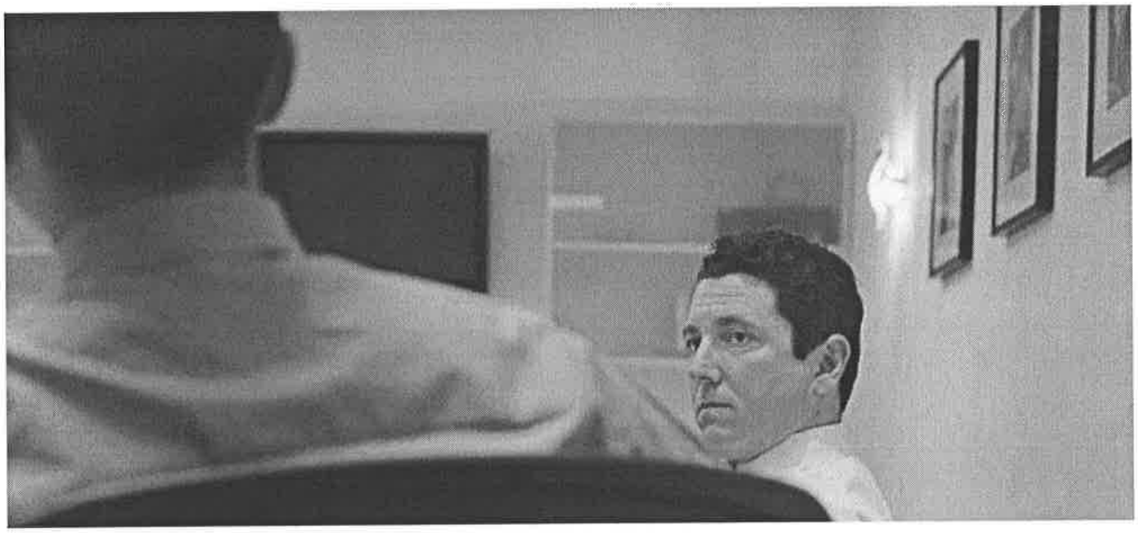
In addition to catastrophic events, insurers must also consider man-made degradation of the environment. Increasing energy consumption and associated atmospheric pollution will directly impact carriers' risk exposure. The US Energy Information Administration, for example, predicts world energy consumption will grow by 49% between 2007 and 2035.[8] With continued fossil fuel use, pollution will remain a significant health issue, threatening the well-being of populations in both developed and developing countries. Life and health insurers will need to closely monitor trends in atmospheric pollution in order to acurately assess risk in different regions.

Environmental measures will help mitigate the most serious consequences. Renewable energy sources are projected to account for 23% of electricity by 2035.[9] Increased consumer investment in sustainable solutions (e.g. solar panels) will gradually create new modelling and pricing risks for Property & Casualty (P&C) insurers.

Managing these types of risks will require insurers to be more sophisticated in their risk modelling and innovative in structuring risk-sharing and risk transfer deals. Catastrophe modelling will become more sophisticated and use advanced, early warning technologies to underwrite in specific, catastrophe-prone areas. Insurers who fail to keep pace with this increasing sophistication might be forced to exit markets in certain coverage areas, such as those prone to flooding or forest fire.

Increased severity and frequency of catastrophic events overwhelming insurers vs technology and risk transfer easing the pain

Historically, the insurance sector has been good at developing catastrophic models that capture known high severity/low frequency events (e.g. earthquakes, tsunamis, etc). However, most of these models perform poorly when it comes to unknown 'Black Swan' events. Over the next decade the insurance sector could be overwhelmed with uncorrelated catastrophic events reducing capacity and raising prices. Alternatively, new sensing and monitoring technology, together with risk transfer mechanisms, could cushion insurers and reinsurers against abnormal losses.



6 Source: Insurance Matters: Information for policymakers, Catastrophes: Insurance Issues, June 2011
7 Source: Insuring Florida, Catastrophes: Insurance Issues, October 2011
8 Source: US Energy Information Administration, World energy use projected to grow 49 percent between 2007 and 2035; Rapid growth projected for renewables, but fossil fuels continue to provide most of the world's energy under current policies, Press Release May 2010
9 Source: US Energy Information Administration, International Energy Outlook, September 2011

Economic: The rise of emerging market economic and political power

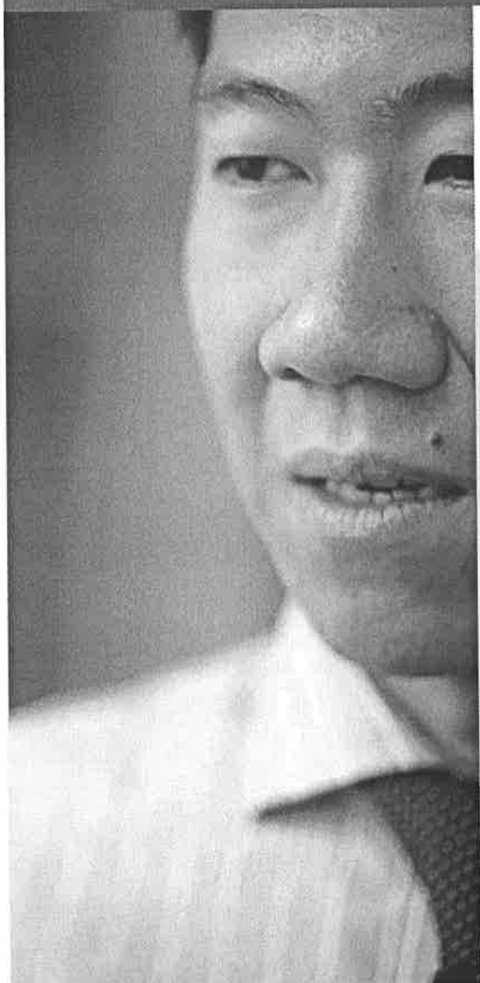
The increasing attractiveness of the emerging markets, combined with uncertain growth in the developed world and stricter regulatory guidelines will make carriers re-evaluate their strategic goals towards developing countries.

The E6 countries' (China, India, Brazil, Russia, Indonesia and Mexico) proportion of global GDP has been increasing over the past 20 years, and the liquidity and debt crunch precipitated by the financial crisis of 2008 continues to affect developed economies far more than emerging ones. It is estimated that the E6 will contribute 47% of Global GDP growth between 2006 and 2020, while the G6 will contribute less than 24% during the same period (Figure 4).[10]

A number of factors are contributing to the ongoing shift from a world dominated by developed markets to a world in which the majority of growth is in emerging markets:

- In the developed world, the old outnumber the young. In emerging markets (except China) the working age population will continue to outnumber the dependent population, and thereby result in more productive growth.
- The rise of the middle class in emerging markets is fuelling increased consumption, which is leading to impressive small business growth.
- Government infrastructure investment, population growth, new businesses and wealth creation are driving growth in construction, land development, energy and transportation sectors, all of which are creating a greater need for insurance.

10 Source: Economic Intelligence Unit, Foresight 2020



The rise of economic influence and power of emerging market countries and emerging market insurers

Over the past couple of decades the world's economies have become more interdependent and this trend is likely to continue. However, the power and influence of the US, Europe and other OECD nations will wane as the emerging markets continue to grow as well as become the engine for global growth. As consumption in these countries increases, the insurance market will grow, resulting in big opportunities for emerging market insurers. The developed market slowdown, due to the financial crisis, will accelerate this shift in power towards emerging market economies and emerging market insurers. In a recent survey conducted by PwC:

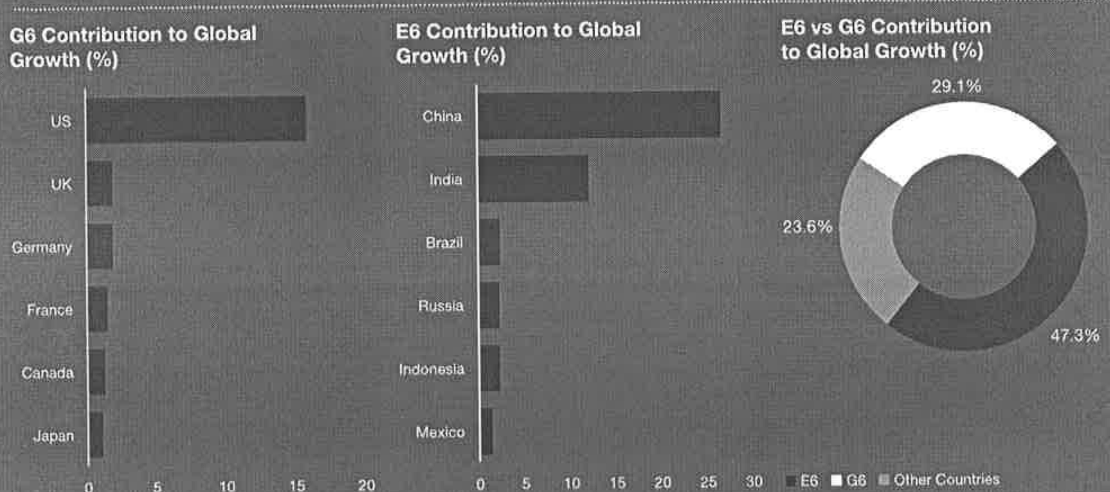
- 30% believe new emerging market insurers will move into the developed world to become global insurers.
- 28% foresee truly global markets.

Source: PwC Research from more than 150 C-suite executives polled at a presentation of the Future of Insurance to the International Insurance Society (IIS), June 2011.

The uneven distribution of economic growth between the developed and emerging markets creates different scenarios for insurance industry competitive dynamics:

- The insurance industry as a whole could become more globalised as countries harmonise regulations, standardise practices and distribute products across borders (see 'Political' on page 10). This could lead to greater market share for global insurers, as well as economies of scale and scope that drive the globalisation of the insurance value chain.
- Conversely, twin-track growth and the loss of the developed world's authority in the wake of the financial crisis could result in greater protectionism by countries or regions.
- In-between these two extremes, developed market insurers could increase their attempts to find growth in emerging markets, and or emerging market players could expand into developed markets for know-how and talent.

Figure 4: E6 vs. G6 Contribution to global growth (2006–2020)



Source: Economic Intelligence Unit, Foresight 2020

PwC Insurance 2020: Turning change into opportunity, January 2012 9

The developed market slowdown, due to the financial crisis, will accelerate this shift in power towards emerging market economies and emerging market insurers.

Political: Harmonisation, standardisation and globalisation of the insurance market

We see a range of potential outcomes from a regulatory perspective. The financial crisis has enhanced communication and dialogue between and among the US, EU and emerging market regulators:

- If regulators are successful at negotiating and harmonising global insurance regulations, this could lead to greater standardisation of products and policies, and promote more globalisation of the insurance value chain.
- On the other hand, regulators could continue to develop new but different (and potentially onerous) regulations in each market.
- In-between these two extremes, it is possible that emerging markets will prevent developed market players from entering their markets or put limits on their activities. (An alternative intermediate scenario is that emerging markets encourage developed market entry by removing restrictions and easing regulatory burdens.)

Outside the regulatory arena there are several additional political trends for insurers to consider:

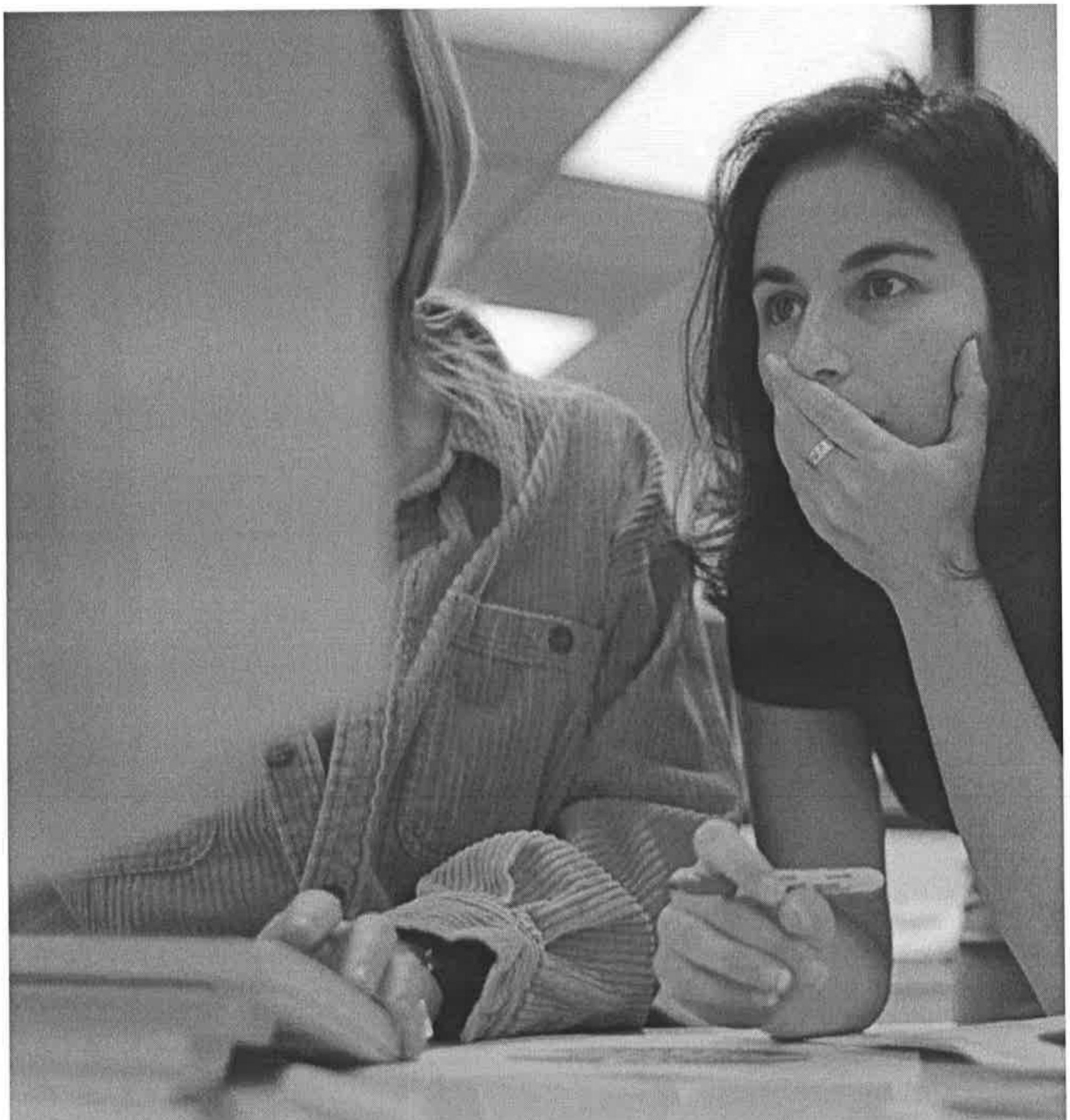
Pressure on the solvency of social security and welfare programmes throughout the world will increase because of rising dependency ratios. Dependency ratios (defined as the ratio of the number of persons aged under 18 or over 64 to the number of persons between these ages) are expected to increase by an average of 14% in the G6 between 2000 and 2025.[11] Using current projections, the US Social Security Trust Fund will be depleted in 2037 and Social Security will be able to pay only 78 cents in the dollar.[12]

Consumers lacking faith in the solvency of social security programmes will begin to focus on providing their own savings for retirement, as governments pare back benefits. This will create new opportunities for life and annuity insurers, although governments under financial pressure are likely to seek ways to reduce spending while increasing tax revenue. The preferential tax treatment of life, annuity and retirement policies may be viewed as an easy target for revenue generation. Insurers will need to adapt nimbly in order to weather these changes.

Terrorism. Over the past 30 years, there has been an increase in terrorist attacks around the world. Terrorists currently attack global supply chains once every four days on average.[13] Carriers will have increased exposure as the frequency of major attacks increases. In addition, terrorist attacks often impact multiple product lines (e.g. commercial property, business interruption, workers compensation, life and benefits), which are often modelled independently. As a consequence, the potential losses from so-called 'uncorrelated' risk factors could be large, requiring substantial industrywide or state-provided capital to insure losses beyond a certain level. Further detailed modelling is required to understand the capacity requirements for terrorism coverage.

Geopolitical instability. Resource scarcity around the world is magnifying the risks of geopolitical instability, as evidenced by the current political upheaval in the oil-producing nations of the Middle East and North Africa, or the 'Arab Spring'. This has caused resource-consuming nations to reassess their energy policies. We anticipate that the potential for fewer despotic regimes in the Middle East and technological solutions to resource scarcity will lower geopolitical risk over the next ten years.

11 Source: Alliance for Health & the Future, The Dependency Ratio, Issue Brief Vol 2, Number 1
12 Source: Centre for Retirement Research at Boston College, The Social Security Fix-it Book
13 Source: Terrorists attack global supply chains every four days. SupplyChain Digital, April 2011



Harmonisation and standardisation of insurance regulation, products and practices

Over the past couple of decades the world's economies have become more interdependent and this trend is likely to continue. However, the power and influence of the US, Europe and other OECD nations will wane as the emerging markets continue to grow as well as become the engine for global growth. As consumption in these countries increases, the insurance market will grow, resulting in big opportunities for emerging market insurers. The developed market slowdown, due to the financial crisis, will accelerate this shift in power towards emerging market economies and emerging market insurers. In a recent survey conducted by PwC:

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Implications for the future of your business

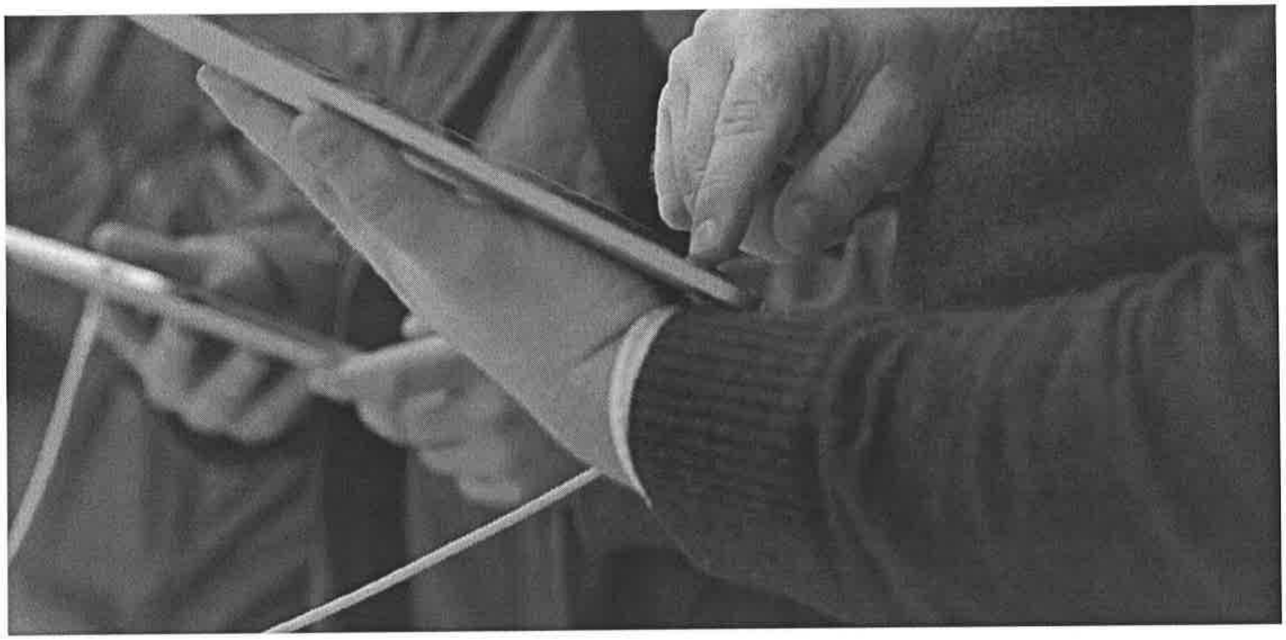
We have analysed the STEEP factors and drivers for each of the three insurance industry sectors. While some drivers, such as direct purchase, are common, their impact could be greater in one sector (e.g. personal lines) than in others (e.g. commercial lines). Also, some sectors will have additional drivers, such as health advances and their impact on life and disability insurance.

Personal lines

We believe personal lines insurance will change in four fundamental ways:

- **Greater commoditisation.** Price transparency, dis-intermediated direct purchase and virtual social community-led bulk purchase will all lead to greater commoditisation of personal lines insurance. In the immediate term, insurers in some emerging and underdeveloped markets will be able to generate good margins. As personal lines insurance becomes more global over time, however, these margins will vanish in a price-based, competitive world.
- **Decreasing profitability.** The increased number of megacities being built in areas prone to natural disaster could result in catastrophic losses. With no opportunities for diversification, this could result in highly volatile earnings and decreasing profitability for insurers.
- **Automated underwriting.** As personal lines insurers expand globally, ageing underwriting resources in the developed world and lack of underwriting skills in emerging markets will lead to severe talent shortage. However, insurers who are able to recruit or retain top underwriters and use their knowledge to build sophisticated predictive modelling should be able to gain greater market share. Automated underwriting, more standard in the developed world, will be increasingly adopted in the emerging markets as the globalisation of the personal lines sector continues.
- **Greater loss control.** In the immediate term, insurers will use advances in telematics primarily to price mileage-based insurance. But, in the medium term, they will use telematics to proactively control losses and manage risk, which should substantially enhance operating profitability. Over time, this competitive advantage will disappear as automotive safety features and advanced analytics become commonplace.

Projecting future scenarios on a global scale with countries growing at different rates, insurance sectors at different stages of maturity, and insurance carriers with different strategies and capabilities is a challenging task. Rather than detail all different combinations of scenarios coming out of the 32 drivers, we highlight here some key scenarios from the perspective of illustrative insurance carriers and their strategies. Scenario A highlights the story of a hypothetical personal lines insurer and how it 'Creates its own future' by expanding globally.



Scenario A

In March 2012, the CEO of PL Insurer came out of a three-day strategy session determined to shape the company's future. PL Insurer, operating in more than 25 countries across the globe, was struggling to cope with tectonic social changes in consumer attitudes and behaviours. An increasing number of customers were migrating online, while use of mobile technology and social networks (including in the emerging market countries) was increasing rapidly. The agency-based distribution model that the company employed in 18 out of the 25 countries was being challenged by the adoption of innovative usage-based business models and telematics by the competition, as well as by increased capital requirements and regulatory oversight across the world. The CEO was determined to reinvigorate his global growth and innovation strategy, redefine the experience that consumers and agents shared with PL Insurer, and to build an insight-driven business model that would revolutionise decision-making across the organisation.

On 3 April 2020, as the CEO of PL Insurer is flying back to New York from Shanghai, he reflects on the past eight years since the pivotal historic meeting with his senior management in 2012. In that intervening period PL Insurer has become the largest global P&C insurer, now operating in 150 countries, with a combined ratio that is the envy of the industry. Over the past five years, profitability has been steadily climbing and the company has a war chest of cash to acquire companies. The regional distribution and operational model adopted by PL Insurer to serve its six global regions acts as a hub to share best practices, increase efficiency where possible through automation and centralisation as well as enhance effectiveness by devolving decision-making to the regional or country level. The SocInsurance global subsidiary is the fastest growing subsidiary of PL Insurer, offering personal insurance to social networking affinity groups. The advanced analytical and underwriting capability that SocInsurance has built allows it to select targeted segments and tailor its products, based on their social affinity. The patented interpretive underwriting engine offers PL Insurer a distinct competitive advantage over its competition, which will continue for at least three more years. The CEO is pleased that the steps he took to 'Create the Future' in 2012 have paid off so handsomely.

Commercial lines

We expect commercial lines to experience the following significant changes over the next decade:

- **Virtual business affinity groups.** Social networking among small business owners will create virtual business affinity groups that pool their risks and retain greater predictable layers of risk. Greater availability of information and increased price transparency will facilitate this trend.
- **Automated underwriting.** Current trends in automation of quoting and underwriting functions for commercial insurance will continue as insurers try to match underwriting capacity with the complexity of application inflow. The talent premium, especially underwriting talent, will have a much greater impact on commercial insurance than on personal insurance.
- **Business model transformation.** Real-time data from sensors and devices will continue to transform the commercial insurance business model. Commercial insurance will increasingly focus on providing standardised products and value-added services that involve working with the clients to proactively avoid or reduce losses and manage risks. In addition, risks are becoming more complex, offering the opportunity to harness improved data analytics to develop new risk transfer markets.

Similar to the scenario we discussed earlier, the following Scenario B highlights the story of a hypothetical regional commercial lines insurer and its success in adopting a 'Fast Follower', 'niche player' strategy.

Scenario B

RegCo Insurer, is a regional commercial insurer, focused on commercial lines insurance. In 2012, large global commercial insurers, capable of serving clients globally as well as regionally, were challenging RegCo's business. These competitors were operating at a combined ratio that was hard for a regional player like RegCo to match. RegCo can offer more customised risk management solutions to its commercial clients, but at a cost that adversely impacts its combined ratio, making it less profitable. As RegCo started planning for its future, it decided to reinvent itself by following other regional commercial insurers and move from being a product manufacturer to a risk management solution provider.

By 2020, RegCo is flourishing and has become one of the top 20 risk management solution providers. Starting in 2012, RegCo progressively withdrew from the product manufacturing business and instead partnered with brokers, reinsurance carriers and commercial lines carriers, to transfer its customers' risks. RegCo built a leading risk management solution that utilised embedded sensors and devices to monitor commercial risks in real-time and thereby control losses. Adopting a fee-based solution and value-share business model, RegCo was able to demonstrate the huge reductions in losses its solutions could provide and took a share of those savings. Its 'fast follower' strategy adopted in 2012 allowed it to flourish in the risk management space while some of its competitors were acquired, or went bankrupt.

Individual life, annuities and retirement

Environmental factors, urbanisation and changing customer behaviours will all greatly affect the life, annuities and retirement sectors. These sectors will also experience significant changes in response to global demographic shifts over the next decade:

- **New products for seniors.** An ageing population in most developed countries will result in new growth opportunities in drawdown or retirement income products, long-term care products and longevity insurance. While the growth opportunities for managing retirement portfolios before and after retirement is huge, insurers will face intense competition from other financial service providers, including banks, wealth managers and asset managers.
- **Insurers step onto government turf.** The increasing dependency ratio in most developed countries (and China) will increasingly strain government support for the elderly and sick, leading to prolonged employment and/or a reduction in the standard of living. This could open up the opportunity for insurers to form public and/or private partnerships to offer value-added solutions in response to a political challenge.
- **Better risk management.** Greater availability of medical and behavioural data, along with personalised medicine, will continue to drive greater sophistication in, and automation of, underwriting and provide the opportunity to better manage risk and to expand the boundaries of insurability.
- **Tailored products.** For group benefits, the responsibility for protection and retirement savings will continue to shift towards the individual. This will result in increasing voluntary coverage, as well as worksite marketing.

Current trends in automation of quoting and underwriting functions for commercial insurance will continue as insurers try to match underwriting capacity with the complexity of application inflow.

Scenario C

LifeCo is a global life, annuities and retirement (LAR) carrier operating in the US, Europe and Australia. In 2012, the low interest rate environment had decreased profitability and LifeCo's legacy technology made it difficult to adapt to the changing needs of its customers. LifeCo's executive team was faced with customers' ongoing desire for simplicity, transparency and speed as well as solutions to help them lead healthier lifestyles. Other challenges included data aggregation and value extraction, staying ahead of medical advances and developing products to accommodate longer lifespans and working years. Gaining approval from the Board, LifeCo's CEO embarked on a strategy to provide an industry-leading customer experience, develop an organisation focused on business intelligence and create products and partnerships to reinvigorate LifeCo's growth across the globe.

Preparing for 2020's first board meeting, LifeCo's CEO is proud of what his executive team has accomplished. The strategy he implemented has made LifeCo profitable again, with one of the lowest operating expense ratios in the industry for the past three years. By developing a personalised customer portal while providing binding quotes in a matter of minutes, LifeCo has become the first choice among agents and consumers. Hiring an experienced business intelligence (BI) leader was one of the best decisions the CEO made. Reporting directly to the CEO, the BI leader enabled the consistent flow of insightful, fact-based information, helping the executive team make the right decisions, faster. Utilising this information and partnering with a medical device company providing biotechnology to monitor health, LifeCo developed low-priced, consumer-specific, localised products offering discounts in later years for consumers living healthy lifestyles. LifeCo developed novel long-term care products for the increasing elderly population and also entered the Takaful market as it expanded into the Middle East. As LifeCo's product breadth grew, the company expanded its distribution channels by working with local carriers and brokers in other countries to expand its global footprint. As the CEO adds the finishing touches to his board presentation, he realises that LifeCo has become a true innovator in the industry and he looks forward to conveying that story to the board.

Some changes affect everyone

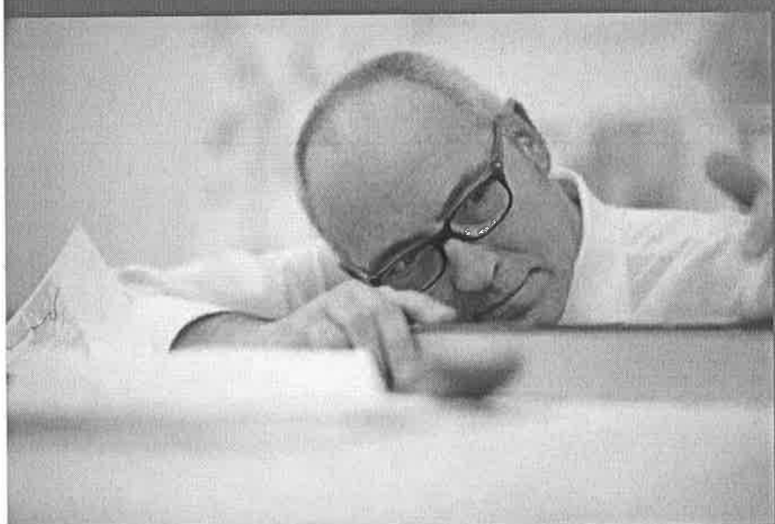
In addition to these sector specific factors, all insurers will be effected by the shift towards a global interconnected model, automated and assisted decision-making, based on data and insights and changes in the industry cost structure:

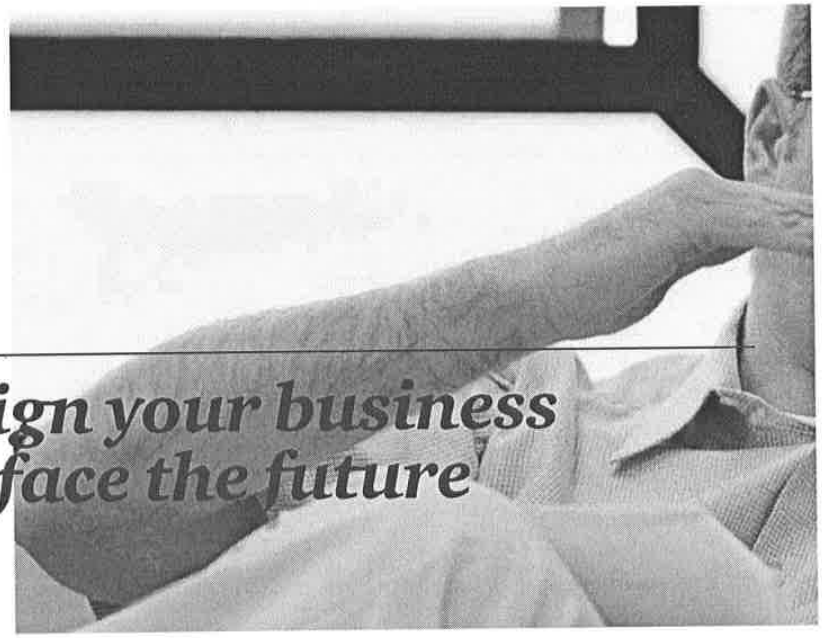
Globalisation and interconnectivity of risks. Apart from reinsurers and some commercial line insurers, most others have typically operated at the local or national level, and have been primarily involved in measuring risk exposures and determining the premium that they need to charge customers to insure their risk. However, given the scale of change implied by the STEEP trends, we believe that more insurers will be forced to think globally. In the future, insurers will be more involved in deciding which geographies, products, customer segments and channels will offer their desired level of growth, profitability and risk appetite.

Automated and assisted decision-making. Following the automation of transactional systems and the automation of interactions with customers, we are entering a new era of automating decision-making. Extensive internal and external data, as well as new artificial intelligence-based techniques will expand the scope of assisted and automated decision-making of insurers across a variety of functions. These include identification of markets/segments to enter or grow, customer segmentation, risk selection, advice engines that assist agents/advisers or end-consumers, claims triaging, and proactive preventive loss prevention and management.

Changing cost structures. Insurers who fully exploit the potential offered by the internet to transform their cost structures will be able to scale themselves exponentially and leverage their people, operations and technology infrastructure globally:

- Insurance distribution has traditionally relied on a commission-based variable cost model for sales; the route to increased sales was to 'put more feet on the street'. With increasing investment in direct online channels, cost structures are moving towards a larger upfront fixed cost, but a lower ongoing variable cost (provided you achieve the desired scale).
- Over the past two decades, insurers have invested heavily in operations and technology, incurring largely fixed costs to build IT infrastructures capable of dealing with their estimated customer base. Now, as more and more applications migrate to the 'cloud', information is available anywhere, anytime and at very little cost. If you have more standardised and streamlined processes you can use the cloud to move to a low variable transaction cost model that scales exponentially.
- With the right talent and proper use of information and analytics in underwriting, a greater number of transactions can be automated. This will allow the application of superior underwriting insight to a greater number of your transactions, helping overcome the looming talent gap as the current generation of underwriters approach retirement age.





How to design your business strategy to face the future

There is no prescriptive solution about how you should prepare your business for the future scenarios we have described.

While STEEP drivers impact all insurers globally, they have different levels of impact within each region and country.

In addition, the actions that insurers choose to take will depend not only on their national or regional markets, but also on their strategic intent, core capabilities, availability of talent, capital and organisational culture.

We have, however, identified four broad strategic directions that developed market and emerging market insurers could take, based on their specific situations:

Create your future: Innovators

Insurers who want to reshape the future through innovation. Whether these innovators are in emerging or developed markets, their focus will be on R&D, new product innovation and analytical decision-making techniques. (See Figure 5 for an Innovator's primary areas of focus.) In light of the limited growth opportunities in developed countries for traditional insurance products, developed market insurers will focus on creating value-added loss control and risk management services.

Figure 5: Create your future - innovators and expansionists

This diagram shows the areas of primary focus for an innovator and an expansionist. As both look to reshape their business, much emphasis is placed on front-office activity to disaggregate and re-engineer the value chain. Leaders in these areas will need to be cognisant of the drivers of change and their implications; they'll need to understand the potential impact on the business and also how the business is likely to respond. As change will impact functional teams simultaneously, strong communication, coordination and alignment of thinking will be required to succeed.

Front-office		Middle-office	Back-office	
Growth strategy	Innovation	Operations	UW & Risk Management	Claims/Benefits
Marketing	Sales & Distribution	Technology	Finance	Capital Management
Channels	Products & Services	Information	Asset & Liability	Human Resources

■ Primary areas of focus

Source: PwC analysis

Information-based services will be the key innovation in developed markets, using new sources of unstructured real-time information to draw operational and strategic insights. Insurers can use these insights to underwrite and price risk, as well as reduce losses and manage risk. In emerging markets, traditional insurance products will need to be adapted to suit local needs (e.g. micro-insurance or alternative distribution channels).

Create your future: Expansionists

Carriers who want to reshape the future through expansion. They will be growth seekers and not necessarily innovators of new products and services. These carriers will focus on leveraging their capabilities (e.g. customer understanding, product portfolio, capital, diverse talent, Takaful) into adjacent and similar markets around the globe. (See Figure 5 for primary areas of focus.) Expansion can come from moving into new geographies, targeting new customer segments for existing products, and/or introducing new distribution channels to reach customer segments.

Create your future: Fast followers

Carriers who do not want to be the first, but are adept at following the leaders and establishing a strong presence. Fast followers focus on scaling capabilities across a broad market. They are good at sensing new innovations and market opportunities, and are agile enough organisationally to follow and establish a lasting presence.

As Figure 6 shows, the primary focus of activity for fast followers lies away from the front office, demanding agility in operations, technology, information and the back office to respond to new business models and create operational excellence.

Figure 6: Create your future - fast followers and survivors

Front-office		Middle-office	Back-office	
Growth strategy	Innovation	Operations	UW & Risk Management	Claims/Benefits
Marketing	Sales & Distribution	Technology	Finance	Capital Management
Channels	Products & Services	Information	Asset & Liability	Human Resources

■ Primary areas of focus

Source: PwC analysis

Create your future: Survivors

Carriers who are focused on short-term performance and survival. These carriers wait for a majority of the industry to adopt new ideas and practices before adopting them. They tend to be organisationally hierarchical and slow to respond, but can be operationally resilient and efficient.

What do you want to be?

Each of the above strategies is not necessarily superior or inferior to the others. In a conservative industry like insurance, there will be more survivors and fewer fast followers, expansionists and innovators. However, having a clear strategic direction about 'what you want to be' will be critical in determining how you design your business to manage the risks and exploit the opportunities that come your way.

What's on your mind?

Figures 5 and 6 show the functions engaged in implementing and embedding a new business strategy. Your perspective on change will be shaped by where you sit in the business. Here we've highlighted just a few considerations for the executive team when formulating a new strategy:

CEO	Who do you task with shaping the response to all this change? Who will drive innovation to anticipate and respond to a changing market? How do you decide which markets, countries and customer segments to target? How do you prioritise your investments, and build the capabilities to survive and exploit the changing market?
CRO	How well is risk management embedded in your organisation and will you be comfortable with the risk assessments on new products, services and distribution channels? How can you be better prepared to anticipate and prepare for extreme 'Black Swan' events?
CFO	What will be the impact on your message to the market? How can you manage the capital and balance sheet structure of your company under changing regulatory, market and rating agency expectations?
CMO	How do you transform your organisation into a customer-centric organisation that is capable of marketing and tailoring products to your consumers' changing attitudes and behaviours?
CTO	How do you ensure the organisation is not only aware of the emerging technology trends, but is also actively involved in experimenting with new technologies as they come to market?
CIO	How do you ensure that you build an information advantage enabled by rich, insightful data, fully supported by a cost-effective technology platform?
Head of Actuarial	How are you ensuring that you can select and price risk appropriately, based on your risk appetite?
Head of Underwriting	Can you exploit new sources of information to improve better risk selection and pricing?
Head of Claims	Can you transform your organisation from paying claims to actively managing the losses based on real-time data and loss management techniques?
Head of HR	How do you ensure that you continuously attract and retain the right talent within the organisation – especially when the talent has to be culturally aware, multidisciplinary and global?

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Whether you are a personal, commercial, individual life and annuities, group benefits, or retirement provider, you will see fundamental changes to your business models, value chain and how you acquire, retain and train your highly skilled talent over the next decade.

Irrespective of whether you are a developed market, emerging market, or global insurer, you need to anticipate these changes and prepare for growth.

PwC has developed and facilitated three types of workshops to help clients plan for the future:

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Fiercest Competitor is a rich, fast-paced experience that challenges leadership teams to imagine what could significantly disrupt their sectors, and then think about how they can drive that disruption to elevate their businesses to a higher level of competitiveness. We will help you create your worst competitor nightmare, so you can identify your organisation's weaknesses and where you need to modify its approach. This session helps you explore what plans you need to put in place to future proof your business and identify who is best placed to deliver.

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- **Prepare:** Determine 'no regret' moves to be completed in the near-term.
- **Act:** Start those activities that have a longer lead time.
- **Monitor:** Identify future signposts to act at a later time.

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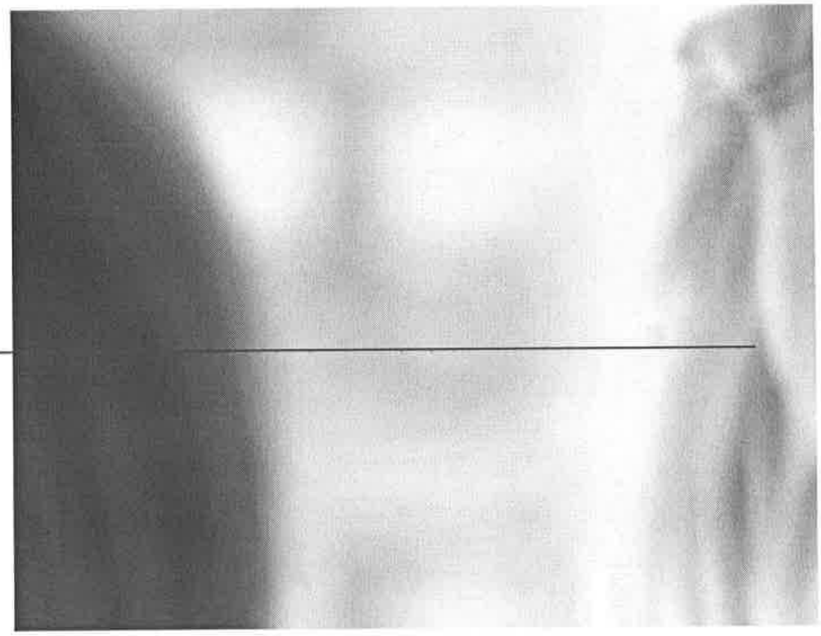
This paper covers only a little of the picture and there is much more to share and discuss. To find out how PwC can help you understand what's beneath the surface and support you in the creation of your future, please contact the team listed on the next page.



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INVITED ARTICLE

The Politics of Insurance Regulation

Kenneth J. Meier

Even though insurance is the largest state-regulated industry in the United States, it has received almost no scholarly attention in the political science literature. Until the publication of *The Political Economy of Regulation: The Case of Insurance*, only one political science book examined the politics of public policies affecting insurance and that covered only the regulation of life insurance investments in a single state (Orren, 1974). The purpose of this essay is to outline a political theory of insurance regulation and apply political science theories of public policy to the politics of insurance regulation. The essay assumes that insurance regulation is similar to other forms of regulation, that it is inherently a political process whereby political actors seek to allocate the powers of the state for their own benefit. Accordingly, the goals of insurance regulation must be viewed as multiple and political rather than just in terms of correcting market failures.

Based on studies of other industries, elaborate theories of regulatory policy exist in the literature (Wilson, 1980; Meier, 1985; Noll and Owen, 1983; Reagan, 1987). Regulatory policy, in these theories, is viewed as resulting from the interaction of "political institutions" within an environment that influences the abilities of these institutions to use their political resources effectively. Four major political institutions or political actors (or sets of actors) have been identified: the regulatory agency (i.e., the insurance commission), the regulated industry (in this case the insurance industries), non-industry interests (primarily though not exclusively in this case consumer interest groups), and political elites (legislators, chief executives, federal officials, et al.). Regulatory issues take place in an environment that varies in both complexity and salience. This environmental variance systematically advantages and disadvantages each of the political actors depending on how salient or how complex the policy issue under consideration is. This essay will link each of the four major actors in insurance regulation to broader theories

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This is an invited article based on the author's book entitled *The Political Economy of Regulation: The Case of Insurance* (New York: St. Martin's Press, 1988). The book won the 1990 Clarence Arthur Kulp Award given by the American Risk and Insurance Association.

of regulatory politics, and then tie the actors together with a discussion of the policy environment.

The Regulatory Agency

All 50 states regulate the insurance industry with a regulatory agency normally called the insurance commission.[1] Economic theories of regulation, as well as pluralist political theories, treat regulators as passive, neutral arbiters (Stigler, 1971; Posner, 1974; Peltzman, 1976; Truman, 1950; Noll and Owen, 1983). Policy, according to this view, is determined by the competition of private interest groups with the regulator merely ratifying the results of the interest group process. While this view has spawned a great deal of research, it is clearly not a valid description of how insurance or any other industry is regulated in the United States. Recent political theories of regulation treat regulators as political actors in their own right. As such they have their own policy goals that they wish to achieve and the autonomy necessary to make policy decisions (Sabatier, 1988; Meier, 1988, p. 27). In normal regulatory times such decisions take place in interaction with the industry but with little outside input from political elites.

Regulatory Goals

Insurance regulation is characterized by multiple goals: solvency, fairness, access, stability, local protectionism, and social objectives (Miles and Bhambri, 1983). Differences between the goals held by insurance regulators and the goals of the insurance industry generate the politics of insurance regulation. Regulators, because they are subject to a wide variety of political pressures, frequently stress different goals from those preferred by the industry. Regulators can be viewed as politicians seeking to gain political support for their agency (either for use in budget battles or to generate greater autonomy for the organization in the policy process; see Rourke, 1984).

Solvency: The major economic goal for insurance regulation is solvency. Because insurance is an industry that collects payments today to cover potential losses at some future time period, the insurer must remain solvent for an insurance contract to have any value. Solvency is quite likely the prime regulatory goal of the industry; solvency was used in the 1940s to justify the need for price regulation to protect the industry from the destructive effects of competition (Joskow, 1973, p. 392). It remains a major justification today for industry opposition to restrictions on rates or the calculation of rates (e.g., prohibition of rates based on residence, see Ream 1989). All regulators accept the solvency of insurers as a regulatory goal. The difference between

[1] Political scientists normally think of a commission as a multimember board since this is the pattern adopted by federal regulatory commissions and most other state regulatory commissions. A commission with a single commissioner is somewhat unusual as is the use of a board to set rates (as some states do) with administrative power vested in a single insurance commissioner.

regulators and the industry is that regulators generally have several other goals in addition to solvency.[2]

Fairness: The insurance market is generally characterized by information asymmetry, that is, the insurer has a great deal more knowledge than the consumer (Formisano, 1982, p. 23). The objective of fairness regulation is to prevent this information asymmetry from distorting the market to the disadvantage of the consumer. A variety of regulatory policies have fairness as a goal: the establishment of specific policy language, limits on the types of insurance contracts, information presented on prices and claims service, and concerns about low loss ratios. Fairness is not just a consumer issue; the industry has recently raised a wide variety of fairness concerns. Recent changes in tort law and product liability have led to arguments that insurers need to know specifically what the extent of their liability will be and how the laws will be interpreted (Wasilewski, 1986, p. 14). Claims made policies, efforts to limit punitive damages, and several other tort reform issues can be interpreted as fairness issues. Insurance regulators vary greatly in their support of fairness goals for either consumers or industry.

Access: Market systems use price to compensate for high risks. Market prices, however, limit access to insurance to those who can afford the market price. While insurers are likely to support some access goals when accompanied by government subsidies (e.g., flood insurance), regulators are much more likely to be advocates of greater access. Doing so usually requires some cross-subsidization whether it be via an assigned risk pool or a ban on using certain classifications that are correlated with risk (e.g., urban residence, AIDs). Increasing access, as a result, usually challenges the actuarial base of the insurer (thus generating opposition) while increasing the potential political support of the regulator.

Stability: Although price stability is not frequently discussed as a regulatory goal, Simons (1989) argues that it should be. Consumers react negatively to large rate increases after several years of constant rates. Simons suggests that stability should be a high priority for industry interests. Instability, he argues, activates consumer groups and political elites which in turn has political ramifications for the industry.

Local Protectionism: As political actors, the support of domestic companies is more valuable to the regulator than support from foreign insurers. The value of this support can quite easily be translated into an effort to protect local companies. Although the extreme measures used in the past (banning foreign companies and discriminatory premium taxes) are no longer legal, local protectionism may have become more subtle. The author hypothesizes that local companies are more likely to be consulted on policy questions and their complaints about regulation are more likely to be heard.

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[2] The claim that regulators all have solvency as a goal is a broad one, but the author has yet to interview either a regulatory commissioner or a member of the regulatory agency who did not hold this view. They might disagree with industry representatives about the best way to attain solvency or how serious various threats to solvency are, but they accept the goal.

Social Objectives: Because they need to generate their own political support, regulators often seek social objectives (as distinguished from economic objectives) in insurance regulation. Perhaps the most obvious are requirements for the investment of assets or tax incentives to invest capital in ways that insurers would not normally do (Orren, 1974). Social objectives are most common in regard to investments, but they also frequently occur in other issues such as the prohibition of redlining neighborhoods and using gender as a risk classification.

Regulatory Resources

Differences in regulatory goals explain the differences in objectives between regulators and insurers. The ability of regulators to impose these objectives on the insurance industry is a function of regulatory resources. The insurance industry is highly complex, and regulation in many areas is a technical process. As a result, regulators need to develop some expertise or run the risk that the policies they propose will be shown to be inadequate or will fail in implementation. Students of bureaucratic expertise have concluded that the minimum necessary conditions for developing bureaucratic expertise are a large number of employees (so that specialization is possible) and adequate financial resources to attract talented employees to the organization (Rourke, 1984; Berry, 1979; 1984; Benveniste, 1972).

The striking fact about state insurance commissions is their variance on these measures. The commissions range in size from a few dozen employees to several hundred employees; resources range from totally inadequate to sufficiently ample to compete with other state agencies for qualified personnel. A large number of state insurance commissions quite frankly lack the regulatory resources to be an effective regulator of the insurance industry even with help from the National Association of Insurance Commissioners' staff. U.S. Representative John Dingell (D-MI) recently concluded that lack of regulatory capacity was a major reason for the rise in insurer insolvencies in the late 1980s. Lacking a regulatory agency with the capacity to regulate means that the insurance industry is quite likely to dominate the agency (since the commission must rely on the industry for the bulk of its information). In such a policy system, regulatory issues are more often decided in the legislative process since legislators cannot rely on the expertise of the regulatory agency to resolve insurance issues. The insurance industry can also be harmed in such a situation. Without an effective insurance commission, salient issues will be settled by political institutions using political criteria. An effective regulatory agency can often limit political decisions because it brings an objective form of analysis to the policy debates.

Despite the variation in insurance commission resources, insurance regulatory agencies can generally be characterized as fairly weak. In comparison to other agencies or even other state regulatory agencies, they are generally small (exceeding in size only those agencies that regulate professions—see Meier, 1985), they do not have a great deal of political support from sources other than the industry, and many have developed little expertise. Such regulatory agencies should in theory be dominated by the industry that it regulates.[3] In practice, however, many of these regulatory agencies are not controlled by the industry. The explanations for this relationship can be found in the structure of the regulated industry.

The Regulated Industry

Theories of public policy generally associate the success of an industry in achieving its regulatory objectives with its economic resources. In terms of economic resources, insurance is one of the largest industries in the United States. With nearly two million employees and hundreds of billions in assets, the insurance industry has economic resources that are the envy of virtually all other industries. Economic resources, however, do not translate into political resources. Two factors in particular, mobilization and cohesion, limit the impact of insurance resources in the policy process.

Business organizations, in general, only mobilize a small portion of their economic assets for political purposes (Greenwald 1977). Among business interests, however, insurers have mobilized less than the norm. Insurance industry efforts in support of tort reform, for example, were eventually stalemated at the state level and cannot seem to make the institutional agenda at the federal level. This example suggests that trial attorneys and their allies, although much smaller in terms of economic size, appear to be much more skilled politically than insurers. Similarly, the life and health insurance and the property-liability insurance segments of the industry lost two expensive battles over taxation in the early 1980s when their opposition appeared to be a single member of Congress (see Meier 1988, pp. 127-31). In what has become a guerrilla war in the courts and federal regulatory agencies, banks appear to be winning their battle to enter the insurance industry (see Crenshaw 1991). Perhaps one reason for the insurance industry's relative lack of political skills is that it came relatively late to the modern pressure group process. Since insurance is state regulated, the major consumer/business battles of the 1960s and 1970s at the federal level which caused business organizations to mobilize greater political resources (Vogel, 1989) touched the insurance industry only at the margin. State-level interest group processes in the 1960s and 1970s were far less developed and were not nearly as good a training ground to develop interest group skills as was the federal level.[4]

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[3] The best example is the agencies that regulate the professions (e.g., medicine, law, barbering, dry cleaning, etc.). These agencies are small, often staffed only with part-time help. Although some of these agencies are able to achieve some independence from the industries that they regulate, for the most part the regulated industry completely dominates these agencies (see Meier 1985, chapter 7; Rottenbergh, 1980; Blair and Rubin, 1980).

[4] The need to mobilize resources is especially the case when interest groups want to get something rather than prevent something. Interest group studies generally argue that interests seeking to prevent some action have an advantage over those who seek to establish a new policy because the policy process has numerous veto points and defensive interest groups need only win at one of these veto points (see Anderson 1990).

A far more crucial variable affecting the insurance sector, however, is cohesion. Interest group theories generally associate cohesive industries and coalitions with successful policy efforts. Studies of airline deregulation and banking deregulation both credit, among other things, the lack of cohesion in the industry for its inability to retain protective regulation (Derthick and Quirk, 1985; Brown, 1987; Meier, 1985, chapter 3). Cohesion in the insurance industry is a problem because the industry is highly segmented with little serious effort to build coalitions across segments.

Although insurance is often perceived by outsiders as a single industry, it is really several separate industries that provide differentiated products. The industry itself divides insurance into two industries, the life-health insurance industry and the property-liability insurance industry. Each industry has separate histories, separate professional organizations, separate regulatory agendas, and separate political goals. Were insurance only two industries, however, its political problems would be substantially less.

Politically and perhaps economically, it is more accurate to perceive the insurance field as several industries rather than just two. Separate lines of insurance are concerned with different policy issues and have different policy agendas. While there is some overlap, recent policy issues reveal the lack of common political interests among the different lines of insurance. During the 1985-1986 product liability crisis and the effort to adopt tort reforms, the bulk of the political work was done by the commercial liability industry and their organizations. Absent from the debates were not only the life-health industry but also for the most part firms representing the personal lines of insurance. Recent efforts to restrain the costs of automobile insurance have reversed the tables; the large automobile insurers are at the point with little help from others. Similarly, recent efforts to limit medicare and medicaid reimbursement as part of the federal budget process see the health insurers battling alone.

Lines of insurance are not the only cleavage limiting cohesion. Companies that are direct writers have different political interests from those who operate through agents. A representative of a major automobile insurer recently noted that he did not particularly care if states followed California's lead and adopted mandated rate reductions; as the low cost provider of auto insurance, they would flourish at the expense of the nondirect writers.[5] Agents have interests different from the companies they represent. Mutual companies have different interests from stock companies as demonstrated by the federal taxation fights of the 1980s (Meier, 1988, p., 128).

The result of this fragmentation is an industry that can be thought of as lacking sufficient cohesion to prevail in the political process. Coalitions with business and other interests outside the industry are often easier to make than coalitions within the industry. Medical malpractice insurers have more in common with physicians than they do with companies that write homeowners insurance.

[5] Personal interveiw with the author.

This assessment should not be taken to imply that the insurance industry always loses or is the weakest industry politically. Rather it is a relative argument. The insurance industry is a economic power; in contrast it is a political wimp. Given its resources, the insurance industry should have the same influence on the regulatory process as the automobile industry. The insurance industry often has great difficulty in defeating interests that are far weaker than it is, and sometimes loses politically to coalitions that it should easily defeat. A lack of mobilized resources and cohesion is only part of the explanation for this (tactics, see below are another), but they are a significant explanation.

Consumer Interests

Consumer interests will be used as a generic term to cover all noninsurance interests that are concerned with insurance regulation. These interests vary greatly from issue to issue and include at various times businesses and individuals who purchase insurance, trial attorneys, environmental groups, women's organizations, labor unions, and consumer organizations such as the Consumer Federation of America, etc. Those consumer organizations and their leaders that routinely receive the media attention such as Robert Hunter of the National Insurance Consumers Organization, Joan Claybrook of Public Citizen, or Ralph Nader are only one small part of the realm of consumer interests.

If political victories went automatically to the coalition of interest groups with the greatest economic resources or the greatest mobilized political resources, the insurance industry coalition would rarely lose. Only on major federal issues such as permitting banks to sell insurance or eliminating gender as a rating category does the noninsurance coalition come even remotely close to the resources of the insurance coalition (Bykerk, 1989). In most cases the noninsurance coalition is at a distinct advantage. Two factors contribute to the victories by noninsurance coalitions.

First, political skills quite clearly matter. Although Ralph Nader and Robert Hunter are minor players in insurance policy especially at the state level, they are masters at attracting media attention to their cause. An examination of a variety of insurance issues would reveal numerous cases where smaller noninsurance interests have been able to use their greater political skills to influence policy (tort reform in large states, auto insurance prices in California).

Second, all interest groups face what Gamson (1968) has called a mobilization of bias which can be described as how favorable or unfavorable policymakers perceive an interest. Insurers face a mobilization of bias that is distinctly unfavorable. The industry's own image that they are responsive companies that quickly assist policyholders to overcome temporary or major set backs (e.g., the response of insurers to major disasters, or even the processing of day-to-day claims) appears to count for little in the eyes of policymakers. The general perception of the insurance industry is that it is a highly profitable industry that offers a product that is relatively expensive.[6] Schweig and Gasper (1989, 22) attribute the industry's poor reputation to how consumers are treated by insurance companies.

Consumer groups, on the other hand, generally face a mobilization of bias that is favorable to them especially in liberal policy environments. Consumers are the little person, the David combatting with Goliath even when the consumers are represented by a wealthy trial attorney. The result is a general preference of the political system to support consumer group positions.

Evidence presented by consumer groups is often given equal credibility to that presented by insurers even though consumer groups generally lack the expertise possessed by the industry. Although this relative credibility reflects the general mobilization of bias of policy systems in favor of consumers, part of it is the fault of the industry. Reflecting the nature of the industry (accepting payments now to cover risks incurred in the future), the industry is conservative and highly risk averse. Any change in law happening today can have major ramifications for insurer pay outs in the future on policies sold in the past. Insurance industry lobbyists reflect the industry's risk averse nature and tend to emphasize the worst that can happen. In the process they have gained somewhat of a "Chicken Little" reputation among policymakers. Industry contentions especially when accompanied by extreme anecdotes that are outside the experience of most individuals are discounted if other interests are present to challenge them.

Political Elites

Political elites at the state level include the legislature and the governor. At the federal level, the President and his appointees and members of Congress are considered political elites. Political elites play two roles in the policy process. First, they serve as an appeals board for decisions made by the insurance commission. Insurance commissions report to the legislature and the governor who are hierarchically superior to the commission. They have the authority to reverse commission decisions by legislation or executive order. Second, political elites also have policy preferences that they seek to impose on the policy process absent any appeals from a regulatory system. For the most part, very few of the policy preferences of political elites involve insurance so the regulatory system is generally left alone. On issues with the right

[6] This is a perception that may or may not be accurate depending on the situation. The expensive product perception is almost universally held by policymakers that have been interviewed by the author. Expensive is a term used relative to individual payments not the return to the individual or any attempt to balance the books of the industry. It is a general perception which may or may not have any empirical support. I suspect this occurs because literally thousands of persons can be found who have paid insurance payments for many years and never had a claim. During the property and liability crisis of 1985–86, testimony from small businesses who could not get insurance despite long histories of no claims were common. Empirical evidence on the profitability of the industry tends to be published in sources read by insurance industry leaders and insurance academics rather than being widely distributed among the general public.

characteristics, however, political elites are quite willing to intervene in the regulatory process.

Although insurance regulation is not generally a partisan issue, when political elites become involved, partisanship is often related to the goals that are sought. Democratic politicians, particularly liberal Democrats, are more likely to pursue goals of access, fairness, and social responsibility than are Republicans, particularly conservative Republicans. In theory, Republican politicians should also be more supportive of solvency goals and a general preference to let the market system rather than the insurance commission regulate the behavior of insurers.

The likelihood of insurance issues reaching the political agenda is related to the competitiveness of the political system within a state. Similar to other areas of regulation, when a single political party dominates the politics of a state with little threat of replacement by the other party, industry preferences receive more weight (Meier, 1988, chapter 7). Absent any electoral consequences, the natural economic advantages of insurers mean that political elites are more likely to cultivate the insurance industries. When the parties are in competitive balance, the modest resources of consumer groups become more important especially if responding to these groups can be used in the politician's election campaign.

Even within a competitive political system, insurance issues only rarely become major legislative issues. Insurance is a highly complex industry; many politicians are unwilling to invest their own personal resources to learn the nuances of insurance regulation. Although there are ways to reduce such information costs (see below), the politician has a variety of issues to chose from and, as a result, issues other than insurance are likely to be more attractive to most politicians.

Despite these barriers to political elites on insurance issues, numerous politicians have made insurance a keystone of their political agenda. The Florida state legislature responded to the tort reform movement by imposing a series of restrictions on the industry in 1986. Governor James Florio of New Jersey made insurance costs a key part of his campaign for office and part of his legislative program in 1990. In 1990 Governor-Elect Anne Richards of Texas included insurance costs as part of her agenda in her victory speech on election night.

The Policy Environment

The policy environment structures how the various policy actors interact and influences how much each actor's policy goals are reflected in public policy. The policy environment does this by creating an environment that systematically favors the political resources of one policy actor rather than another. The policy environment does not determine winners or losers but rather alters the odds of winning or losing. The theoretical work of Gormley (1986) argues that the two key characteristics of the policy environment are issue salience and issue complexity. A salient policy issue is one where a large number of persons feels that the issue affects them and that the political system is a way to address the issue. Environment protection, war in Iraq, and the Savings and Loan crisis are salient issues at the present time. Regulation of accounting practices, setting utility rates, and determining policy forms are generally not salient issues; they simply lack the scope (number of persons interested) that is generally associated with a salient issue.

A complex issue is one where specialized knowledge is required to understand the policy question. Complex issues might include policies on global warming, medical research issues, and methods of financing government debt. Issues with little complexity might be pornography, a bottle-deposit law, and the imposition of a sales tax.

Issue complexity affects which actors can effectively participate in policy discussions because a lack of knowledge limits the contribution that an actor can make. In short, issue complexity increases the costs of participation in the policy process by requiring that political actors learn the intricacies of the public policy under consideration. Issue salience affects the rewards of the policy process; the greater the salience of a public issue, the greater the potential political benefits that can accrue to a policy actor who influences public policy.

Combining both issue salience and issue complexity generates a set of conditions that Gormley feels benefits certain actors over others. When issues are complex yet not salient, the major participants will be the regulated industry and the regulatory agency. The regulated industry must participate in all cases (complex or not, salient or not) because regulation has a major economic impact on the industry. Similarly the regulatory agency must participate whether or not issues are salient or complex. Whether the industry or the commission has the capacity to participate effectively, however, is an empirical question.

Issues that are salient, whether or not they are complex, are issues that are likely to bring the participation of nonindustry groups and political elites. Salience increases the rewards for participation. As it increases to a high enough level, political elites will perceive the rewards for intervening in the policy process outweigh the costs. A complex issue will have to be more salient than a noncomplex issue to attract the participation of political elites since complexity affects the costs of participation. Complex but salient issues rarely have effective nonindustry participation (unless these "consumers" are also highly sophisticated industries themselves). For general consumer groups, the issue must be noncomplex as well as salient.

Gormley's theory of policy environments makes several predictions. In complex but nonsalient policy environments, policy will reflect the relative resources of the regulated industry and the regulator; consumer groups and political elites will have little impact. In noncomplex but not salient issues, regulatory policy will reflect the relative resources of the regulatory agency, the industry, and the nonindustry interests; political elites are unlikely to participate. In complex but salient issue areas, regulatory policy will be determined by the relative resources of the regulatory agency, the regulated industry, and political elites. Finally, in noncomplex but salient issue areas regulatory policy will reflect the resources and goals of all four policy actors.

Insurance regulation in general is complex but not salient. Much regulation focuses on technical issues that are only of remote concern to most consumers (e.g., policy forms, accounting standards, reporting requirements). Overall insurance policy should generally reflect the interaction between the industry and the regulatory commission with only modest input from political elites and consumers. Given the relative lack of resources assigned to regulatory agencies, such an environment would generally suggest that regulation would reflect the interests of the insurance industry, especially if the industry were relatively united in its policy goals.

The important aspect of policy environments, however, is that insurance issues vary in both salience and complexity. The price of automobile insurance has become a salient issue in a variety of states; an insurance company insolvency (or more likely several) will greatly increase the salience of solvency issues, the use of gender as a rating category is salient in Montana, Pennsylvania, and a few other states. Insurance issues also can be made less complex even if they are not in practice. Rather than deal with the technicalities of prior approval rate regulation, proposition 103 in California attempted to simplify this complex issue by presenting a direct 20 percent reduction in premiums. The proponents of this ballot initiative were successful in simplifying the issue and thus inviting the participation of persons who rarely think of insurance.[7] Representative Pete Stark dramatically simplified the issue of insurance industry taxation in 1982 and 1986 by proposing fairly blunt taxes and forcing the industry to solve the complexity problem for him by providing alternatives capable of producing the same revenues (Meier, 1988, p. 131).[8]

In competition between industry and nonindustry groups for insurance policies, the ability to manipulate salience and possibly complexity suggests different tactics. Nonindustry groups will rarely win in nonsalient complex situations (unless the regulatory agency has values that generally favor the consumers). It is in the best interest of nonindustry groups, therefore, to make issues as salient as possible and attract support as a result from political elites who would not normally be concerned with insurance policy. It is also in the best political interests of consumer groups to simplify issues as much as possible so that they can appeal to a greater number of consumers.

The insurance industry will rationally adopt the opposite strategy. Increased salience will bring additional actors to the policy process and weaken the industry's relative control over the process. The industry in such a situation

[7] Whether or not the simplification results in an accurate presentation is a different question. Simplification invites greater participation, it may or may not be meaningful participation as the rest of the policy process then deals with the policy issue. In the case, of proposition 103, the courts also intervened to reintroduce the complexity of the issue by establishing the satndards for automobile insurance rates.

[8] The process of simplifying an insurance issue does not always result in success for nonindustry groups. The 1990 defeat of propostition 201 in Arizona is an example.

should not increase the salience of an issue unless it feels it will clearly lose at the regulatory agency level. Similarly, the industry has little interest in simplifying issues; this lowers the costs of participation to nonindustry groups and weakens the relative resources of the industry.

This logic suggests a major tactical error by the insurance industries in recent regulatory policy issues. In several cases, the liability crisis of the mid-1980s, the automobile price debates of 1988 through 1990, the taxation of life insurers, etc., the insurance industry has engaged in a process of what is termed "grass roots lobbying." Grass roots lobbying is essentially using public relations techniques to communicate the issue to the general consumer public. A variety of interest groups, probably the most successful is the National Rifle Association, have used grass roots lobbying effectively in policy disputes. Such a tactic, however, is ill-informed when used by the insurance industries since it increases issue salience and generally decreases complexity. Both results are more likely to benefit nonindustry groups, especially consumer groups, and also likely to attract the interest of political elites who may well have policy interests hostile to the industry.

Conclusion

This essay has applied a political theory of public policy to insurance regulation. *The Political Economy of Regulation: The Case of Insurance* uses this theory to trace the historical development of insurance regulation, to discuss contemporary federal issues of insurance policy, to assess the liability insurance crisis of the mid-1980s, and to guide a quantitative analysis of insurance regulation in the 50 states. The striking aspect of this study is the mixed political fortunes of the insurance industries. By all normal political criteria, insurers companies should dominate the regulatory process. In reality they do not. The industries' lack of cohesion and poor choice of political tactics permits weaker coalitions to stalemate and at times defeat the interests of the insurance industries.

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Friday, November 9, 2018, 11:25 a.m. – 12:15 p.m.

GENERAL SESSION
ETHICS SESSION: Vacating an Award: Lessons from the ICA v. Underwriters Decision

SESSION MATERIALS:

PRESENTED BY:

Moderator:
Marc L. Abrams, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. LLP
Panel:
Andrea Giannetta, Enstar Group
Sarah Kutner, General Reinsurance Corporation
Zhanna Plotkin, Esq., Allstate Insurance Company
Larry Schiffer, Squire Patton Boggs (US) LLP

SQUIRE PATTON BOGGS

Vacating an Arbitration Award for Evident Partiality Just Got Harder

Vacating an arbitration award has always been tough. The Federal Arbitration Act only has limited bases to seek vacatur. One of those bases is when there is "evident partiality" by the arbitrator. 9 U.S.C. § 10(a)(2). In "traditional" reinsurance arbitrations, the arbitration panel includes two party-appointed arbitrators, each of whom may be predisposed toward the position of the party that appointed them, and a third arbitrator or umpire, who is neutral. Where there is a challenge to an arbitration award rendered by an arbitration panel that includes party-appointed arbitrators that are not required to be neutral, what does the challenging party need to show to obtain vacatur based on evident partiality? In other words, what is the standard or burden of proof? Is it based on the standard governing neutral arbitrators, or should there be a higher standard of proof needed when there are party -appointed arbitrators? The Second Circuit Court of Appeals has now answered that question.

In *Certain Underwriting Members of Lloyd's of London v. State of Florida, Department of Financial Services*, No. 17-1137, 2018 U.S. App. LEXIS 15377 (2d Cir. Jun. 7, 2018), the district court had vacated a reinsurance arbitration award in the cedent's favor based on evident partiality of the cedent's party-appointed arbitrator for failure to disclose close relationships with parties associated with the cedent. The district court found that the arbitrator's pre-existing and concurrent relationships with the cedent's representatives were considerably more extensive than what the arbitrator disclosed. The district court held that the failure to disclose those relationships were significant enough to demonstrate evident partiality.

In reversing and remanding the case for reconsideration by the district court, the circuit court found that the district court weighed the arbitrator's conduct under the standard governing neutral arbitrators. the Second Circuit held that "a party seeking to vacate an award under Section 10(a)(2) must sustain a higher burden to prove evident partiality on the part of an arbitrator who is appointed by a party and who is expected to espouse the view or perspective of the appointed party."

The court noted that while evident partiality will be found where a reasonable person would have to conclude that an arbitrator was partial to one party in the arbitration, the challenging party must prove the existence of evident partiality by clear and convincing evidence. The court distinguished between what must be shown in a neutral arbitration setting from a party-appointed setting. In determining that there will now be a distinction in the Second Circuit between party-appointed and neutral arbitrators in considering evident partiality challenges, the court stated that "[e]xpecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution. " In other words, because reinsurance parties continue to seek out arbitral panels with expertise by using party-appointed arbitrators who are expected to serve as *de facto* advocates, the degree of partiality tolerated is set in part by the parties' contractual bargain.

The distinction, held the court, "is salient in the reinsurance industry, where an arbitrator's professional acuity is valued over stringent impartiality." But, said the court, "a party-appointed arbitrator is still subject to some baseline limits to partiality." For example, an undisclosed relationship is material if it violates the arbitration agreement. If, in this case, the party-appointed arbitrator had a personal or financial stake in the outcome, it would violate the "disinterested" qualification in the arbitration clause. Also, if the undisclosed fact results in a prejudicial effect on the award, it is material and warrants vacatur. But in "the absence of a clear showing that an undisclosed relationship (or the non-disclosure itself) influenced the arbitral proceedings or infected an otherwise-valid award, that award should not be set aside even if a reasonable person (or court) could speculate or infer bias."

On remand, the district court is charged with determining whether the reinsurers have shown by clear and convincing evidence that the failure to disclose by the cedent's part-appointed arbitrator either violates the qualification of disinterestedness or had a prejudicial impact on the award. This might require further proceedings.

Notably, the same "expertise" that the Second Circuit discusses that comes with using party-appointed arbitrators in reinsurance disputes is still available to the parties by using the ARIAS• U.S. Neutral Panel Rules, but without the heightened scrutiny now required when challenging an award for evident partiality where the arbitrator is party-appointed and non-neutral.

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17-1137-cv
Certain Underwriting Members of Lloyds of London v. Insurance Company of the Americas

United States Court of Appeals for the Second Circuit

AUGUST TERM 2017
No. 17-1137-cv

CERTAIN UNDERWRITING MEMBERS OF LLOYDS OF LONDON, CERTAIN UNDERWRITING MEMBERS OF LLOYDS, LONDON SUBSCRIBING TO TREATY NO. 0272/04,

Petitioners-Appellees,

v.

STATE OF FLORIDA, DEPARTMENT OF FINANCIAL SERVICES, AS RECEIVER FOR INSURANCE COMPANY OF THE AMERICAS,*

Respondent-Appellant.

ARGUED: JANUARY 8, 2018
DECIDED: JUNE 7, 2018

Before: JACOBS, RAGGI, and HALL, *Circuit Judges*:

Insurance Company of the Americas ("ICA") appeals the order vacating the arbitral award (the "Award") issued in a reinsurance dispute between ICA and Certain Underwriting Members of Lloyds of London including those

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* The Clerk of the Court is directed to amend the official caption to read as shown above.

members subscribing to Treaty No. 02072/04 (the "Underwriters"). The issue on appeal is whether the Award is void for evident partiality under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(2), by reason of the failure by ICA's party-appointed arbitrator to disclose close relationships with former and current directors and employees of ICA. The district court concluded under our reasonable person standard that the ICA-appointed arbitrator was impermissibly partial to ICA. We hold that a party seeking to vacate an award under Section 10(a)(2) must sustain a higher burden to prove evident partiality on the part of an arbitrator who is appointed by a party and who is expected to espouse the view or perspective of the appointing party. See Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine Ins. Co., 668 F.3d 60, 76 n.21 (2d Cir. 2012).

The district court weighed the conduct of ICA's party-appointed arbitrator under the standard governing neutral arbitrators. We therefore vacate and remand for the district court to reconsider under the proper standard. An undisclosed relationship between a party and its party-appointed arbitrator constitutes evident partiality, such that vacatur of the award is appropriate if: (1) the relationship violates the contractual requirement of disinterestedness (see Sphere Drake Ins. v. All American Life Ins., 307 F.3d 617, 620 (7th Cir. 2002)); or (2) it prejudicially affects the award (see Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815, 821-22 (8th Cir. 2001)).

PHILIP J. LOREE JR., Loree & Loree, New York, New York, *for Respondent-Appellant.*

TIMOTHY W. STALKER, Weber Gallagher Simpson Stapleton Fires & Newby, LLP, Philadelphia, PA, *for Petitioners-Appellees Certain Underwriting Members Lloyds of London.*

JOSHUA P. BROUDY, Rosenthal Lurie & Broudie LLC, Philadelphia, PA, *for Petitioners-Appellees Certain Underwriting*

Members of Lloyds, London Subscribing to Treaty No. 0272/04.

DENNIS JACOBS, *Circuit Judge*:

Insurance Company of the Americas ("ICA")[1] appeals the order vacating the arbitral award (the "Award") issued in a reinsurance dispute between ICA and Certain Underwriting Members of Lloyds of London including those members subscribing to Treaty No. 02072/04 (the "Underwriters"). The issue on appeal is whether the Award is void for evident partiality under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(2), by reason of the failure by ICA's party-appointed arbitrator to disclose close relationships with former and current directors and employees of ICA. The district court concluded under our reasonable person standard that the ICA-appointed arbitrator was impermissibly partial to ICA. We hold that a party seeking to vacate an award under Section 10(a)(2) must sustain a higher burden to prove evident partiality on the part of an arbitrator who is appointed by a party and who is expected to espouse the view or perspective of the appointing party. See Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine Ins. Co., 668 F.3d 60, 76 n.21 (2d Cir. 2012).

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[1]Following oral argument, on January 24, 2018, the Circuit Court of Florida, Leon County, declared ICA insolvent and placed the company in liquidation, appointing Florida's Department of Financial Services as receiver. We nonetheless continue to refer to appellant as ICA throughout this opinion.

BACKGROUND

ICA insures workers compensation claims in the construction industry. The Underwriters in turn provide ICA with second and third layer reinsurance under a series of treaties, each of which contains an arbitration clause requiring that disputes be adjudicated by an arbitration panel consisting of three members: one party-appointed arbitrator for each party, and the neutral umpire. The only contractual qualification is that the arbitrators "be active or retired disinterested executive officers of insurance or reinsurance companies or Lloyd's London Underwriters." J. App'x at 593. Each party bears the expense of its own arbitrator and is permitted to engage in *ex parte* discussion with its party-appointed arbitrators during discovery.

ICA requested coverage from the Underwriters under the treaties for claims arising out of multiple construction site injuries exceeding in total $12.5 million. The Underwriters declined the claim, citing language in the treaties that (according to the Underwriters) restricts coverage to a single "loss occurrence" involving more than one insured. Id. at 576-77. In December 2014, ICA demanded arbitration pursuant to the treaty. ICA appointed Alex Campos as its arbitrator, and the two party-appointed arbitrators selected Ben Hernandez as neutral umpire.

At the May 11, 2015 organizational meeting, each arbitrator was called upon to disclose pre-existing or concurrent relationships with a party. ICA was represented at the disclosure meeting by Gary Hirst, Chairman and Chief Investment Officer, and arbitration counsel. Campos disclaimed any appreciable link to ICA:

> I don't know anyone here except for Mr. [Gary Hirst, Chairman of ICA]. I had some potential business dealings with him about ten years ago that never really materialized. He had an associate that I was trying to do a deal with but it never went anywhere and other than that contact I don't have any other related contacts with Mr. Hirst.

Id. at 521. Between the organizational meeting and the conclusion of the arbitration, Campos let pass several opportunities to come forward with additional disclosures.

As the district court found, Campos's pre-existing and concurrent relationships with ICA's representatives were considerably more extensive than Campos disclosed. The court emphasized undisclosed dealings between ICA and a human resources firm named Vensure Employee Services ("Vensure") of which Campos was President and CEO. Specifically, the court found that: ICA and Vensure operate out of the same suite in a business park in Mesa, Arizona; John Iorillo, a former director of ICA, was CFO of a firm that provided consulting services to Vensure; and Ricardo Rios, a Director of ICA, was hired as the CFO of Vensure in the summer of 2015. Rios testified as a witness at the arbitration, and Iorillo's name was mentioned repeatedly.

The panel favored ICA's interpretation of the treaty language, and the Award granted ICA net damages of over $1.5 million. The Underwriters moved to vacate the Award on several grounds, including "evident partiality" on the part of Alex Campos, manifest disregard of the law, and prejudicial procedural misconduct. ICA cross-moved to confirm.

The district court granted the motion to vacate the award and denied the cross-motion to confirm. <u>Certain Underwriting Members v. Ins. Co. of Am.</u>, 16-CV-323(VSB), 2017 WL 5508781, at *11 (S.D.N.Y. Mar. 31, 2017). Campos's "undisclosed relationships" with ICA representatives were found to be "significant enough to demonstrate evident partiality." <u>Id</u>. at *11. The district court "note[d] that the relationships here are far more significant, more numerous, and involve more financial entanglements than are present in" other cases from this Circuit. <u>Id</u>. (citing the "number and variety" of relationships with former ICA employees, which were "longstanding" and "ongoing at the time of the arbitration"). Additionally, the court was "troubl[ed]" by the apparent willfulness of the non-disclosures, in particular Campos's silence during the testimony of Ricardo Rios. <u>Id</u>. The court did not take issue with the substance of the Award, did not connect Campos's conduct to the panel's decision, and made no finding that Campos had a personal or financial interest in the outcome of the arbitration.

Discussion

I

"When reviewing a district court's decision to vacate an arbitration award, we review findings of fact for clear error and questions of law *de novo*." Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 136 (2d Cir. 2007). Our review of an arbitration award is "severely limited" in view of the strong deference courts afford to the arbitral process. ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co., 564 F.3d 81, 85 (2d Cir. 2009) (quoting Amicizia Societa Navegatione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960)); see also Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133, 138 (2d Cir. 2007). A "stringent standard for vacating awards is a necessary corollary to the federal policy favoring arbitration." Barry R. Ostrager and Mary Kay Vyskocil, MODERN REINSURANCE LAW AND PRACTICE, p. 598 (2014 ed.).

"Under the FAA, the validity of an award is subject to attack only on those grounds listed in [Section] 10, and the policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist." Wall Street Assocs. L.P. v. Becker Paribas, Inc., 27 F.3d 845, 849 (2d Cir. 1994). We may vacate under Section 10 "where there was evident partiality ... in the arbitrator." Morelite Const. Corp. v. New York City Dist. Council Carpenters Ben. Funds, 748 F.2d 79, 82 (2d Cir. 1984) ("Morelite") (internal quotation marks omitted); see 9 U.S.C. § 10(a)(2). "[E]vident partiality within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Id. at 84. The party challenging the award must prove the existence of evident partiality by clear and convincing evidence. See Nat'l Football League Mgm't Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016); accord Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671 (2010) (The party challenging an award on the basis of evident partiality "must clear a high hurdle.").

The Supreme Court established in Commonwealth Coatings that "an arbitrator's failure to disclose a material relationship with one of the parties can constitute 'evident partiality' requiring vacatur of the award." Lucent Techs. Inc. v. Tatung Co., 379 F.3d 24, 28 (2d Cir. 2004) (citing Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968)). But "Commonwealth Coatings does not establish a *per se* rule requiring vacatur of an award whenever an undisclosed relationship is discovered." Id. at 30. It is "the materiality of the undisclosed conflict [that] drives a finding of evident partiality, not the failure to disclose or investigate *per se*."[2] National Indemnity Co. v. IRB Brasil Resseguros S.A., 164 F. Supp. 3d 457, 476, 478 (S.D.N.Y. 2016) (citing Scandinavian Reinsurance, 668 F.3d at 77 ("The nondisclosure does not by itself constitute evident partiality. The question is whether the facts that were not disclosed suggest a material conflict of interest.") (emphasis in original)); see also Applied Indus. Materials, 492 F.3d at 137.

A neutral arbitrator's relationship with a party is material if it goes "so far as to include the rendering of services on the very projects involved in th[e] lawsuit," Commonwealth Coatings, 393 U.S. at 146, or contemporaneous investments that create a vested financial stake in that party. See Applied

[2] We acknowledge the value of disclosure, transparency, and ethical conduct on the part of all arbitrators. See Ostrager, supra, at 535 (noting disclosure "enables the parties to identify potential problems at the outset and[] to avoid later claims of prejudice by losing parties"). Mainstream arbitral guidelines such as ARIAS and the American Arbitration Association require comprehensive disclosure. See id. at 535-36 (citing the Code of Ethics for Arbitrators in Commercial Disputes); ARIAS-U.S. Practical Guide to Reinsurance Arbitration Procedure, ¶ 3.6. It would appear that Alex Campos violated these ethical codes; and future parties may well be wary of his participation on panels. However, it is well-established that such ethical violations do not compel vacatur of an otherwise-valid arbitration award. See Ostrager, supra, at 536 (citing Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th Cir. 1983)). An arbitrator's "failure to make a full disclosure may sully his reputation for candor but does not demonstrate evident partiality." Sphere Drake Ins. v. All American Life Ins., 307 F.3d 617, 622-23 (7th Cir. 2002).

Indus. Materials, 492 F.3d at 137-39. A reasonable person could also conclude that the arbitrator is unduly partial to the side of a close family relation. See Morelite, 748 F.2d at 84.

But even with respect to neutral arbitrators, "we have not been quick to set aside the results of an arbitration because of an arbitrator's alleged failure to disclose information." Andros Compania Maritima, S.A. v. Marc Rich & Co., 579 F.2d 691, 700 (2d Cir. 1978). "[W]e have declined to vacate awards because of undisclosed relationships where the complaining party should have known of the relationship, or could have learned of the relationship 'just as easily before or during the arbitration rather than after it lost its case.'" Lucent Techs., 379 F.3d at 28 (internal quotation marks and citation omitted); see Cook Indus., Inc. v. Itoh & Co., 449 F.2d 106, 107-108 (2d Cir. 1971). "We have concluded in various factual settings that the evident-partiality standard was not satisfied because the undisclosed relationship at issue was 'too insubstantial to warrant vacating the award.'" Scandinavian Reinsurance, 668 F.3d at 72 (citing Lucent Techs., 379 F.3d at 30).

For example, past contacts do not amount to material bias. When an arbitrator's "relationship with [a party] materially end[s] before [the party] appointed him as an arbitrator," one "cannot say that a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Lucent Techs. 379 F.3d at 31; see also Merck & Co., Inc. v. Pericor Therapeutics, Inc., No. 16-CV-22 (RA), 2016 WL 4491441, at *11 (S.D.N.Y. Aug. 24, 2016) (concluding that disclosure of a joint venture between a party and the arbitrator's prior law firm was not compelled because the venture ended years before the arbitration). Thus an arbitrator is not disqualified from selection as the neutral umpire by having received compensation from one of the parties for past service as a party-appointed arbitrator. Nat'l Indemnity Co., 164 F. Supp. 3d at 480 (ruling that "payment as an arbitrator in a past matter is ... insufficient to produce a conflict in a later matter"); see also Scandinavian Reinsurance, 668 F.3d at 73-74 (undisclosed prior role as party-appointed arbitrator distinguishable from material relationships "such as a family connection or ongoing business arrangement with a party or its law firm—circumstances in which a reasonable person could reasonably infer a connection between the undisclosed outside relationship and the possibility of bias for or against a particular arbitrating party.").

In broader strokes, the FAA does not proscribe all personal or business relationships between arbitrators and the parties. See Lucent Techs., 379 F.3d at 30 (co-ownership of an airplane by arbitrator and party's representative did not indicate evident partiality); Andros, 579 F.2d at 701 (professional relationship between arbitrator and party's representative arising from prior arbitration service together did not indicate evident partiality); see, e.g., Merck & Co., 2016 WL 4491441, at *8 (The FAA "does not prohibit arbitrators from having any personal and professional relationships with individuals who work in the industries in which they have expertise."). "[T]he balance of case law in the Second Circuit supports the proposition that when a purported financial interest or financial relationship between an arbitrator and a party to arbitration is indirect, general[,] or tangential, courts should not vacate arbitration awards." Merck & Co., 2016 WL 4491441, at *9 (internal citation and quotation marks omitted).

We therefore "requir[e] a showing of something more than the mere 'appearance of bias' to vacate an arbitration award," Morelite, 748 F.2d at 83, and will not vacate arbitration awards for evident partiality when the party opposing the award "identifies no direct connection between [the arbitrator] and the outcome of the arbitration." Merck & Co., 2016 WL 4491141 at *9; see also Scandinavian Reinsurance, 668 F.3d at 78 ("possibilities" that arbitrators could be influenced by each other's thinking on concurrent panels "do not establish bias").

Judicial tolerance of relationships between arbitrators and party representatives reflects competing goals in partiality decisions. Complete candor and transparency help root out bias and fraud. But reinsurers and ceding insurers affirmatively seek arbitral panels with expertise. "[T]he best informed and most capable potential arbitrators" are repeat players with deep industry connections, Commonwealth Coatings, 393 U.S. at 150 (White, J., concurring), who will "understand the trade's norms of doing business and the consequences of proposed lines of decision," Sphere Drake Ins. v. All American Life Ins., 307 F.3d 617, 620 (7th Cir. 2002); accord Nat'l Indemnity Co., 164 F. Supp. 3d at 480

("[S]pecialized arbitrators are likely to know one another, and repeated or overlapping service by the same arbitrators in different arbitrations is bound to occur."). "Familiarity with a discipline often comes at the expense of complete impartiality," and "specific areas tend to breed tightly knit professional communities." Morelite, 748 F.2d at 83. "[T]o disqualify any arbitrator who had professional dealings with one of the parties (to say nothing of a social acquaintanceship) would make it impossible, in some circumstances, to find a qualified arbitrator at all." Id.; see also Nat'l Indemnity Co., 164 F. Supp. 3d at 479-80 (if any personal or financial relationship constituted disqualifying partiality, "the entire commercial arbitration system ... would be undermined").

II

The principles and circumstances that counsel tolerance of certain undisclosed relationships between arbitrator and litigant are even more indulgent of party-appointed arbitrators, who are expected to serve as *de facto* advocates. "[I]n the main party-appointed arbitrators are supposed to be advocates." Sphere Drake, 307 F.3d at 620; see generally Ostrager, supra at 538-39.[3] The ethos of neutrality that informs the selection of a neutral arbitrator to a tripartite panel does not animate the selection and qualification of arbitrators appointed by the parties. See Instituto de Resseguros do Brasil v. First State Ins. Co., 577 N.Y.S.2d 287 (1st Dept. 1991) (a party-appointed arbitrator is "not expected to be neutral in the same sense as a judge or arbitral umpire"); Astoria Medical Grp. v. Health Ins. Plan of Greater N.Y., 227 N.Y.S.2d 401, 404 (1962) ("[T]here has grown a common acceptance of the fact that the party-designated

[3] In Floradsynth, Inc. v. Pickholz, 750 F.2d 171 (2d Cir. 1984), we were confronted with another tripartite arbitration panel and observed that the "two [party-appointed arbitrators] were not to act merely as partisan advocates directing argument to a third [arbitrator] who would act as umpire" and that the arrangement instead suggested "the three arbitrators were intended to serve and act as one board." Id. at 173. However, that observation was *dictum* only, see id. at 174-74; see also Scandinavian Reinsurance, 668 F.3d at 76 n.21 (noting that Florasynth only "suggest[ed]" party-appointed arbitrators not act as advocates), and we therefore are not bound by that language today.

arbitrators are not and cannot be 'neutral,' at least in the sense that the third arbitrator or a judge is.").

Of equal importance, arbitration is a creature of contract, and courts must hold parties to their bargain. ICA and the Underwriters have chosen a tripartite panel with party-appointed arbitrators who are "relieved of all judicial formalities and may abstain from following the strict rules of law." J. App'x at 593. "[P]arties are free to choose for themselves to what lengths they will go in quest of impartiality," including the various degrees of partiality that inhere in the party-appointment feature. Sphere Drake, 307 F.3d at 622 (noting that the impartiality protections of Section 10(a)(2) may be altered or waived by mutual consent); see also Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478-79 (1989) (emphasizing how "parties are generally free to structure their arbitration agreements as they see fit," including "specify[ing] by contract the rules under which the arbitration will be conducted"); Nat'l Football League Mgm't Council, 820 F.3d at 548 ("parties to [] arbitration can ask for no more impartiality than inheres in the method they have chosen").

Many of our sister circuits have therefore held that the disclosure requirements for neutral arbitrators "do[] not extend to party-appointed arbitrators." Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 552 (8th Cir. 2007); accord Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 645 (6th Cir. 2005) (alleged business and social contacts between arbitrator and party counsel did not warrant a finding of evident partiality, "particularly where, as here, the complaint of evident partiality concerns a party appointed, as opposed to neutral, arbitrator"); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 759 (11th Cir. 1993) (distinguishing between party-appointed and neutral arbitrators); Lozano v. Maryland Cas. Co., 850 F.2d 1470, 1472 (11th Cir. 1988) (same). Some courts have gone so far as to suggest that when parties contract to allow selection of their own arbitrators, the FAA's evident partiality rules do not apply. Sphere Drake, 307 F.3d at 622 ("To the extent that an agreement entitles parties to select interested (even beholden) arbitrators, [Section] 10(a)(2) has no role to play.").

The Second Circuit has not had occasion to decide the standard for a Section 10(a)(2) evident partiality challenge to a party-appointed arbitrator. In Scandinavian Reinsurance, we acknowledged that the issue remained unresolved; but we reserved decision on "whether the FAA imposes a heightened burden of proving evident partiality in cases in which the allegedly biased arbitrator was party-appointed" because the arbitrator in that case had made sufficient disclosures even under the more relaxed standard for neutrals. 668 F.3d at 76 n.21. Here the question is squarely and unavoidably presented because the district court's sound findings on Campos's improprieties are substantial under the traditional Morelite test.[4] Moreover, the district court expressly declined ICA's invitation to apply a heightened burden for the Underwriters' evident partiality challenge in view of Campos's role as a party-appointed arbitrator, and ruled that "Campos's conduct must be considered under the same evident partiality standard as is required in all arbitrations." Certain Underwriting Members v. Ins. Co. of the Am., 2017 WL 5508781, at *11.

We respectfully part ways with the district court, and instead join the circuits that distinguish between party-appointed and neutral arbitrators in considering evident partiality. This distinction is salient in the reinsurance industry, where an arbitrator's professional acuity is valued over stringent impartiality. It also meshes with our case law and takes into account the FAA,

[4] The district court was disturbed by Campos's lack of candor, but also by the length and number of his connections. Not all of them are significant. Even holding Campos to the standard of a neutral arbitrator, the relationships between his company, Vensure, and John Iorillo, Robert Morely, and Benton Morely are likely too remote, indirect, and removed in time from the arbitration to be material. See Lucent Techs., 379 F.3d at 31; Scandinavian Reinsurance, 668 F.3d at 72, 74. And the presence of two insurance agencies within the same Arizona business park does not reach the level of clear partiality. See Merck, 2016 WL 4491141, at *10. Campos's on-going relationship with Ricardo Rios is more direct, intimate, and more closely proximate to the arbitration; Rios also offered testimony before the panel. Rios's credibility (in which Campos may have been invested) could have been material to the Award.

which restricts "*evident* partiality" as opposed to "partiality" or "appearance of bias." 9 U.S.C. § 10(a)(2); Morelite, 748 F.2d at 83-84 (requiring "something more than the mere 'appearance of bias' to vacate an arbitration award"); Sphere Drake, 307 F.3d at 621 ("only *evident* partiality, not appearances or risks, spoils an award"). Expecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution.

That said, a party-appointed arbitrator is still subject to some baseline limits to partiality. We decline to catalogue all "material relationship[s]" that may bear upon the service of a party-appointed arbitrator. Lucent Techs., 379 F.3d at 28.[5] But it can be said that an undisclosed relationship is material if it violates the arbitration agreement. See Sphere Drake, 307 F.3d at 622. In this case, the qualification in the contract is "disinterested," which would be breached if the party-appointed arbitrator had a personal or financial stake in the outcome of the arbitration. See, e.g., Trustmark Ins. Co. v. John Hancock Life Ins. Co., 631 F.3d 869, 872-73 (7th Cir. 2011) (determining "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. 2004) ("[A]rbitration clauses requiring 'disinterested'

[5] Several tests have been proposed for neutrals. See Sanford Home for Adults v. Local 6, IFHP, 665 F. Supp. 312, 320 (S.D.N.Y. 1987) (proposing a three-part test for evaluating the partiality of an arbitrator: "(1) the financial interest the arbitrator has in the proceeding; (2) the directness of the alleged relationship between the arbitrator and a party to the arbitration proceeding; and (3) the timing of the relationship with respect to the arbitration proceeding"); see also Scandinavian Reinsurance Co., 668 F.3d at 74 (citing with approval a four-factor test from ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500 (4th Cir. 1999)). However, these tests are designed to evaluate the partiality of a neutral. See ANR Coal Co., 173 F.3d at 497 (ANR alleged that the neutral arbitrator selected as umpire was partial to Cogentrix); Vigorito v. UBS PaineWebber, Inc., 477 F. Supp. 2d 481, 486-87 (D. Conn. 2007) (applying the Sanford Home factors to an arbitrator appointed through the random assignment "list selection" method). So we are not relying upon them as exhaustive or outcome-definitive here.

arbitrators ... mean that arbitrators may have no financial interest in the arbitration outcome and are not under any party's control.").

An undisclosed fact is also material, and therefore warrants vacatur, if the party opposing the award can show that the party-appointed arbitrator's partiality had a prejudicial effect on the award. See Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 821 (8th Cir. 2001) ("[W]here the parties have expressly agreed to select partial party arbitrators, the award should be confirmed unless the objecting party proves that the arbitrator's partiality prejudicially affected the award."); Nationwide Mut. Ins. Co., 429 F.3d at 649 (instructing that undisclosed social or business contacts must be related "to the subject matter of the litigation before the arbitrator" to be material); see also Commonwealth Coatings, 393 U.S. at 146 ("the relationship even went so far as to include the rendering of services on the very projects involved in th[e] lawsuit."). In the absence of a clear showing that an undisclosed relationship (or the non-disclosure itself) influenced the arbitral proceedings or infected an otherwise-valid award, that award should not be set aside even if a reasonable person (or court) could speculate or infer bias. See Merck & Co., 2016 WL 4491141 at *9 (party opposing the award must "identif[y] [a] direct connection between [the arbitrator] and the outcome of the arbitration"); accord Scandinavian Reinsurance, 668 F.3d at 78 ("possibilities" that arbitrators could be influenced by each other's thinking on concurrent panels "do not establish bias").

We vacate and remand for the district court to determine whether the Underwriters have shown by clear and convincing evidence that the failure to disclose by party-appointed arbitrator Campos either violates the qualification of disinterestedness or had a prejudicial impact on the award. At the district court's discretion, this undertaking may necessitate additional proceedings. Cf. Sanko S.S. Co. v. Cook Indus., 495 F.2d 1260, 1265 (2d Cir. 1973) (remanding for the district court to give full consideration to further evidence bearing upon an arbitrator's undisclosed business relationships). The district court did not consider the Underwriters' challenges as to manifest disregard of the law and prejudicial procedural misconduct; nor do we.

CONCLUSION

For the foregoing reasons, we hereby **VACATE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CERTAIN UNDERWRITING MEMBERS AT LLOYD'S OF LONDON,

Petitioner,

-v-

INSURANCE COMPANY OF THE AMERICAS,

Respondent.

16-CV-323 (VSB)

CERTAIN UNDERWRITING MEMBERS AT LLOYD'S, LONDON SUBSCRIBING TO TREATY NO. 0272/04,

Petitioner,

-v-

INSURANCE COMPANY OF THE AMERICAS,

Respondent.

16-CV-374 (VSB)

MEMORANDUM & ORDER

Appearances:

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New York, New York
Counsel for Respondent Insurance Company of the Americas

VERNON S. BRODERICK, United States District Judge:

Currently pending before me are (1) the motion of Petitioner Certain Underwriting Members at Lloyd's of London ("Underwriters I") to vacate the arbitration award, (16-cv-323, Doc. 7),[1] (2) the motion of Petitioner Certain Underwriting Members of Lloyds, London Subscribing to Treaty No. 0272/04 ("Underwriters II") to vacate or modify the arbitration award, (16-cv-374, Doc. 5), (3) the cross-motions of Respondent Insurance Company of the Americas ("ICA") to confirm the arbitration award, (16-cv-323, Doc. 21; 16-cv-374, Doc. 21), and (5) the joint motion of the parties for oral argument on the pending motions, (Doc. 46).

Because I do not believe oral argument would be beneficial to my rendering a decision on the pending motions, the joint motion of the parties for oral argument, (Doc. 46), is DENIED. Further, because I find that the undisclosed relationships of the party arbitrator for ICA are significant enough to demonstrate evident partiality, Underwriters I's motion to vacate the arbitration award, (16-cv-323, Docs. 6), is GRANTED, and ICA's cross-motion to confirm the arbitration award against Underwriters I, (16-cv-323, Doc. 21), is DENIED. Because Underwriters II joined in the arguments of Underwriters I for vacatur, Underwriters II's motion to vacate the arbitration award, (16-cv-374, Doc. 5), is GRANTED, and ICA's cross-motion to confirm the arbitration award against Underwriters II, (16-cv-374, Doc. 21), is DENIED. To the

[1] I consolidated 16-cv-323 and 16-cv-374 on February 25, 2016 upon agreement of the parties that the matters warranted consolidation, and directed that all future filings in the consolidated matter use the number of the first-filed case, 16-cv-323. (16-cv-323, Doc. 19.) Accordingly, my references to the docket for documents filed prior to February 25, 2016 indicate to which docket they refer, i.e. "16-cv-323, Doc. X." For all documents filed subsequent to February 25, 2016, I use simply "Doc. X," which refers to the docket in 16-cv-323.

extent Underwriters II sought to modify the arbitration award, its motion, (16-cv-374, Doc. 5), is DENIED as moot.

I. **Background**

The basic facts underlying the arbitration here do not appear to be in dispute. ICA is an insurance company licensed in the state of Florida which is primarily involved in providing workers' compensation insurance for professional employment organizations. (2/19 Hirst Cert. ¶ 2.)[2] Beginning in December 31, 2004, ICA purchased from certain Lloyd's underwriters two reinsurance treaties—Treaty 0274/04 and Treaty 0272/04 (the "Treaties")—collectively containing three layers of reinsurance coverage providing excess-of-loss reinsurance for ICA's workers compensation policies. (16-cv-374, Vacate Pet. ¶ 19; 2/19 Hirst Cert. ¶¶ 6-10.) Treaty 0274/04 reinsured losses falling within the first and second layers of coverage: Part A reinsured the first Layer and Part B reinsured the second Layer. (2/19 Hirst Cert. ¶ 7.) Part A of this Treaty provided reinsurance in the amount $1.5 million per occurrence in excess of $1 million per occurrence ("First Layer"), while Part B of this Treaty provided reinsurance in the amount of $2.5 million per occurrence in excess of $2.5 million per occurrence ("Second Layer"). (*Id.* ¶ 8.) Treaty 0272/04 reinsured losses falling within the Third Layer, and provided reinsurance in a maximum amount of $5 million per occurrence in excess of $5 million per occurrence. (*Id.* ¶¶ 9-10.)

The dispute giving rise to this arbitration involved two workers' compensation claims, each of which arose under a workers' compensation policy issued by ICA and reinsured by the Treaties. (*Id.* ¶ 11.) One of the claims was brought by Alan Kringel, who suffered significant

[2] "16-cv-374 Vacate Pet." refers to the Petition to Vacate or Modify Arbitration Award. (16-cv-374, Doc. 1.) "2/19 Hirst Cert." refers to the February 19, 2016 Certification of Gary T. Hirst. (16-cv-374, Doc. 17.)

injuries from a diving accident in 2005 at age 16 for which he now requires around the clock care, seven days a week, and he will require such care for the rest of his life. (*Id.* ¶ 12.) ICA states that it had paid approximately $4 million for Kringel's care as of the date of the arbitration, and that it estimates it will have to pay $7.5 million more. (*Id.* ¶ 14.) The second claim was brought by Leon Arnold. (*Id.* ¶ 15.) Arnold was severely injured in 2005 when a stack of drywall collapsed on him. ICA has paid $1,007,842.57 for Arnold's treatment. Unlike Kringel's, Arnold's claim is now closed and should not require significant additional payments. (*Id.*)

In March 2011, ICA informed Underwriters I, but not Underwriters II, of these claims. (Underwriters II Br. at 4; 2/19 Hirst Cert. Ex. N, at 41.)[3] ICA did not actively pursue reimbursement for these claims until November 2013, again only from Underwriters I. (2/19 Hirst Cert. Ex. N, at 41-42.) Underwriters I declined coverage in January 2014. (*Id.*) By letter dated December 23, 2014, ICA demanded arbitration against Underwriters I and Underwriters II. (*Id.* at 44.) Pursuant to Article 24 of Treaty 0274/04, ICA also appointed Alex Campos ("Campos" or "Arbitrator Campos") as its designated arbitrator in this letter, and requested that Underwriters I designate its appointed arbitrator within thirty days. (*Id.*) This letter was sent by Federal Express to Clive Harris of Atrium Underwriters Ltd., Ted Davey of Alternative Reinsurance Products, and Gresham Insurance Brokers Ltd. (*Id.*) Underwriters I subsequently designated Trevor Clegg as its arbitrator ("Clegg" or "Arbitrator Clegg") and, when the parties could not agree on an umpire, Ben Hernandez ("Hernandez" or "Umpire Hernandez") was selected. (*See* Underwriters I Br. at 13; ICA Br. at 7.)[4]

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[3] "Underwriters II Br." refers to the April 1, 2016 Memorandum of Law of Petitioners Certain Underwriting Members at Lloyd's, London Subscribing to Treaty No. 0272/04 in Opposition to Respondent's Cross-Motion to Confirm the Arbitration Award. (Doc. 44.)

[4] "Underwriters I Br." refers to the Petitioner's Motion to Vacate Arbitration Award Pursuant filed on January 21,

Circumstances surrounding the initiation of the arbitration and their significance are, at least in part, in dispute here. First is the issue of notice of the arbitration demand to Underwriters II. As stated above, ICA never provided notice of the claims to Underwriters II prior to the notice of arbitration, and the December 23, 2014 notice of arbitration—which ICA contends requested arbitration from both Underwriters I and Underwriters II[5]—was sent to Clive Harris, Ted Davey, and Gresham Insurance Brokers Ltd. ("Gresham"). (2/19 Hirst Cert. Ex. N, at 44.) Atrium is the lead underwriter for Treaty 0274/04, and Davey is purportedly "the individual contact at Gresham who had negotiated the treaties," whom ICA served "at his then-current employer's address." (2/19 Hirst Cert. Ex. N, at 3.) Pursuant to the terms of Treaty 0272/04, Gresham was listed as the "Intermediary negotiating this Agreement for all business hereunder," meaning that "[a]ll communications (including but not limited to notices . . .) relating [to Treaty 0272/04] shall be transmitted to the Reinsured or the Reinsurers through Gresham." (2/19 Hirst Cert. Ex. B, at 22.) However, by the time the notice of arbitration was sent, Gresham was defunct. (2/19 Hirst Cert. Ex. N, at 3.)

Certain provisions of the Treaties and their interpretation were disputed during the arbitration. For example, a principal area of disagreement and argument during the arbitration concerned Article 1 of Treaty 0274/04 and related passages (Treaty 0272/04 contains the same passages). In Treaty 0274/04, Article 1, Section A reads "This Agreement is only to pay the

2016. (16-cv-323, Doc. 7.) "ICA Br." refers to the February 26, 2016 Insurance Company of the America's Memorandum of Law in Opposition to Petitioner's Motion to Vacate Award in ICA I (Consolidated Case No. 16-cv-323 (VSB)). (Doc. 20.)

[5] Underwriters II notes that, beyond the issue of whether it truly received the December 23, 2014 notice, the notice on its face is unclear that it involves a claim against Underwriters II. The title of the letter is "Re: Demand for Arbitration Agreement Number 02724/04 and other Reinsurance Agreements," which specifically references only the Treaty involving the First and Second Layers of coverage. (2/19 Hirst Cert. Ex. N, at 44.) Further, the only mention of the Treaty involving Underwriters II in the text of the letter itself is in a parenthetical that appears after the demand for arbitration with the reinsurers for the First and Second Layers—"(as well as a third layer treaty contained in Agreement Number 0272/04, should the Claim rise to that level)." (*Id.*)

excess of an Ultimate Net Loss to the Reinsured of USD 1,000,000 each loss occurrence with a limit of liability to the Reinsurers of USD 1,500,000 ultimate net loss each loss occurrence." (2/19 Hirst Cert. Ex. A, at 2.) Similarly, Article 1, Section B reads "This Agreement is only to pay the excess of an Ultimate Net Loss to the Reinsured of USD 2,500,000 each loss occurrence with a limit of liability to the Reinsurers of USD 2,500,000 ultimate net loss each loss occurrence." (*Id.*) These provisions implicate or are related to a portion of Article 5, which states "It is warranted that: 1) No loss or losses are recoverable under this Agreement unless there are two or more lives, with a minimum each life value of USD 750,000. 2) The maximum claim any one person shall not exceed USD 2,500,000 (including costs) or so deemed." (*Id.* at 3.) Also relevant to these provisions is Article 7 which defines a "Loss Occurrence" as "any one disaster or casualty or accident or loss or series of disasters or casualties or accidents or losses arising out of or caused by one event." (*Id.* at 4.)

Certain provisions of Treaty 0274/04 related to the arbitration process itself are also relevant to the arguments made by the parties. Article 24 of Treaty 0274/04 provides that "One Arbiter shall be chosen by the Reinsured, the other by the Reinsurer, and an Umpire shall be chosen by the two Arbiters before they enter upon arbitration, all of whom shall be active or retired disinterested executive officers of insurance or reinsurance companies or Lloyd's London Underwriters." (*Id.* at 13.) This Article also provided that "If more than one Reinsurer is involved in the same dispute, all such Reinsurers shall constitute and act as one party for the purposes of this Article and communications shall be made by the Reinsured to each of the Reinsurers constituting one party." (*Id.*)

On May 11, 2015, the arbitration panel—party arbitrators Campos and Clegg and Umpire Hernandez—held an organizational meeting. (2/19 Hirst Cert. ¶ 18.) The arbitration hearing began on October 5, 2015, and lasted through October 8, 2015. (*Id.*) The parties have identified certain events that occurred during the hearing and organizational meeting that they believe are relevant to my consideration of the pending motions. First, during the May 11, 2015 organizational meeting each member of the panel made affirmative disclosures regarding their previous relationships with the parties and individuals involved in the arbitration. Clegg went first and stated:

> MR. CLEGG: Okay. I am not yet aware of the identity of the London underwriters but I suspect that one - or there is the potential that one of the underwriters involved in this would be a gentleman by the name of Andrew Winyard. If Andrew is involved in this I have known him professionally for many years as an underwriter in the marketplace. I do not have a personal relationship with him. I have not actually seen him for an in excess of ten years but I have met him prior to that time at industry functions. I believe Mr. Clive Harris of Atrium is the claims manager handling this matter for Lloyd's underwriters as the lead underwriter. Similar to Mr. Winyard I have known Mr. Harris - I have met him from time to time at industry functions. I don't have a personal relationship with him and I notice from the papers provided to the panel that the broker in this matter is Mr. Ted Davey. I have -- I am aware of Ted Davey. To the best of my recollection I have not transacted any business with him in the past but I know who he is and I know that he is a Lloyd's broker. Those are my disclosures.
>
> MR. MAGLIERY: I have a few questions. Would you like to all make disclosures first or should I address you, Mr. Clegg?
>
> MR. CLEGG: By all means. Go ahead.
>
> MR. MAGLIERY: Have you served as an umpire or arbitrator -- obviously we have the benefit of the Umpire's questionnaire but not the party arbitrators. Have you served as an umpire or arbitrator for the Underwriters in this case or are you aware of the arbitrators in this case?
>
> MR. CLEGG: I am aware that the lead underwriter is Atrium Syndicate.
>
> MR. MAGLIERY: Have you served as umpire or appeared for Atrium before?
>
> MR. CLEGG: Not to the best of my knowledge. I will make the caveat that as I am sure you are aware in the London market it is common to have a subscription slip. I can't say with 100 percent confidence that I have never been an arbitrator on a slip where Atrium had participated but I have never been appointed as an arbitrator where they have been the lead underwriter or where I was aware that they

were a participant.

MR. MAGLIERY: Okay. Obviously we are aware that this is a party arbitration but nevertheless all the arbitrators and the Umpire are required to be disinterested. I take it that you are disinterested in Atrium as that term is used in the ARIAS rules. You have no pecuniary interest or other relationship other than knowing Clive Harris?

MR. CLEGG: No.

(5/11 Tr. 5:19-8:25).[6] Umpire Hernandez went next.

THE UMPIRE: Okay. Up to an hour ago I could have by -- my summation would have been very short meaning I didn't know anybody here however I do know Mr. Gary Hirst. Mr. Hirst and I worked together starting probably about three years ago. I was asked to join a company that is licensed in Arizona that wanted to obtain a New Mexico insurance company license. And so I assisted them with the form A and Mr. Hirst --

MR. HIRST: I was counsel.

THE UMPIRE: As counsel. So he and I collaborated together on that form A. It did not go anywhere other than exchanging the monies for my services rendered. There were no other monetary value.

MR. HIRST: Which was not from me.

THE UMPIRE: And it wasn't from him. It was from the insurance company. So we were both more consultant type people to this company.

MR. STALKER: What is the – can you give the identity of the insurance company?

THE UMPIRE: The insurance company was going to be Santa Fe Insurance Company which again was not licensed at all.

MR. STALKER: Was it going to be a company related to any of the companies that is the subject of this arbitration?

THE UMPIRE: Not to my knowledge.

MR. STALKER: Were any of the principals either past or current of ICA or ORISKA or the reinsurance company, I think abbreviated as RCA, the three companies, were any of the principals involved in the licensing issue that you were

[6] "5/11 Tr." refers to the Transcript of the May 11, 2015 organizational meeting held in this arbitration. A copy of the entirety of this transcript was provided to my chambers on a compact disc.

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THE UMPIRE: No. None of the principals nor none of the companies named or listed in these documents were involved in that Santa Fe operation. Again, to my knowledge.

MR. STALKER: Can you describe what Mr. Hirst's role was in the licensing project?

THE UMPIRE: His role was as general counsel so he provided the legal matters so in a form A as you know it is for the licensing and so you have a lot of legalese in there, you have a lot of financial information in there. My role was to provide projections since it was a brand new company so I provided projections for that and he provided the legal part of that. So if there was any overlapping it was where, you know, paragraphs had both wording and numbers attached.

(*Id.* 8:5-12:3.) Finally, Campos provided his disclosure.

MR. CAMPOS: My name is Alex Campos. I don't know anyone here except for Mr. Hirst. I had some potential business dealings with him about ten years ago that never really materialized. He had an associate that I was trying to do a deal with but it never went anywhere and other than that contact I don't have any other related contacts with Mr. Hirst.

MR. STALKER: Did you have any business relationships with ICA?

MR. CAMPOS: No.

MR. STALKER: ORISKA or I will use the initials RCA?

MR. CAMPOS: No.

MR. STALKER: All right. Did you do any work for any of the former principals of RCA or ORISKA?

MR. CAMPOS: No.

MR. STALKER: Can you just explain a little bit in detail what the - I will just call it the project you had with Mr. Hirst.

MR. CAMPOS: There was going to be an investment by someone that I think Gary Hirst knew. I don't remember the name of the person at the time but we, you know, looked at some due diligence and it just never materialized. There was never -- I don't even think it got to contracts but it just never closed.

MR. STALKER: That was about ten years ago?

MR. CAMPOS: Roughly, yes.

MR. STALKER: Nothing since then?

MR. CAMPOS: Nothing since then.

(*Id.* 12:6-13:23).

Second, James Kernan—a former officer, director and principal of ICA—testified regarding certain communications he had about the Treaties' coverage with Ted Davey, the broker who placed the reinsurance treaty for ICA. (Arb. Tr. 268-69.)[7] At this point in the proceeding Underwriters I asked the arbitration panel to adjourn the arbitation to allow for the production of documents regarding these communications, but the panel refused because they believed ICA's responses in discovery gave Underwriters I ample notice of these documents and Underwriters I therefore could have subpoenaed the documents:

> THE UMPIRE: Mr. Stalker, the panel has conferred and come to the consensus that we are going to deny your objection based upon the letter from Mr. Magliery dated August 5th, where he specifically, under general objections number 1, they objected to the discovery request to the extent it may seek information from companies other than ICA. Therefore, we feel that they gave you ample time to respond in some manner to Mr. Magliery's letter and, if you didn't agree, you could have subpoenaed Mr. Kernan and/or his records and/or Oriska's records. So, we feel that you had the time to do that.
>
> MR. STALKER: I thank the panel for the consideration, and just for the record, I just note my exception, but we thank you for the consideration.

(*Id.* at 603:7-25.)

On October 19, 2015, the arbitration panel issued its award (the "Award"). (2/19 Hirst Cert. Ex. E.) The panel granted ICA's claim in its entirety, stating that there was no condition of coverage in the Treaties requiring that two or more persons be injured in the same loss

[7] "Arb. Tr." refers to the full transcript of the arbitration held in this matter from October 5, 2015 through October 8, 2015. While portions of this transcript are attached as various exhibits to the parties' papers, a full copy of this transcript was provided to my chambers on a compact disc.

occurrence, that each of the workers' compensation claims constituted a loss occurrence under the Treaties, and that the Treaties provided coverage for the workers' compensation claims. (*Id.* at 2.) In addition, the award provided that—in the event the Kringel claim exceeded $5,000,000—Underwriters II would be liable pursuant to Treaty 0272/04. (*Id.*)

II. <u>Procedural History</u>

On January 14, 2016, Underwriters I filed a petition to vacate the arbitration award. (16-cv-323, Doc. 1.)[8] Underwriters I also filed a motion to vacate the arbitration award on January 15, 2016. (*Id.* Doc. 4.)[9] Underwriters II filed a petition to vacate or modify the arbitration award on January 18, 2016, (16-cv-374, Doc. 1), along with a motion to vacate or modify the arbitration award, (*id.* Doc. 5), memorandum of law in support of the motion, (*id.* Doc. 6), and a declaration of Joshua Brody with exhibits in support of the motion, (*id.* Doc. 7).

On February 19, 2016, ICA filed in 16-cv-374 its cross-motion to confirm the arbitration award against Underwriters II, (16-cv-374, Doc. 19),[10] memorandum of law in support of the motion, (*id.* Doc. 20),[11] memorandum of law in opposition to Underwriters II's motion to vacate or modify the arbitration award, (16-cv-374, Doc. 18), and a declaration of Gary Hirst with exhibits in support of the motion, (*id.* Doc. 17).

On February 25, 2016, at the parties' request, (16-cv-323, Doc. 18), I ordered that the cases be consolidated, (*id.* Doc. 19).

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[8] Due to a filing error, the petition was not successfully filed on the docket until January 15, 2016. (16-cv-323, Doc. 2.)

[9] Due to a filing error, the motion was not successfully filed on the docket until January 21, 2016. (16-cv-323, Docs. 6, 7.)

[10] Due to a filing error, the cross-motion was not successfully filed on the docket until February 22, 2016. (16-cv-374, Doc. 21.)

[11] Due to a filing error, the cross-motion was not successfully filed on the docket until February 22, 2016. (16-cv-374, Doc. 22.)

On February 26, 2016, ICA filed a memorandum of law in opposition to Underwriters I's motion to vacate the arbitration award, (Doc. 20), and a cross-motion to confirm the arbitration award, (Doc. 21). On February 27, 2016, ICA filed a memorandum of law in support of its cross-motion, (Doc. 22), and a declaration of Phillip Loree with exhibits in opposition to Underwriters I's motion to vacate the arbitration award, (Doc. 23). On February 29, 2016, ICA also filed a declaration of Gary Hirst in opposition to the motion to vacate the arbitration award, (Doc. 24). ICA subsequently filed an amended declaration of Gary Hirst with exhibits on March 3, 2016. (Doc. 28.)

On March 18, 2016, Underwriters I submitted a memorandum of law in support of its motion to vacate the award, (Doc. 33), along with a declaration of Timothy Stalker with an exhibit in support of the motion, (Doc. 35). Underwriter II also submitted a memorandum of law in support of its motion to vacate the arbitration award. (Doc. 37.) On April 1, 2016, Underwriters I filed a motion in opposition to Defendants' cross-motions to confirm. (Doc. 41.) Underwriters II also filed a motion in opposition to Defendants' cross-motions to confirm, (Doc. 44), along with a declaration of Joshua Broudy with exhibits in support of its motion, (Doc. 45).

On April 7, 2016, Underwriters I filed a motion on behalf of all parties seeking oral argument on the pending motions, (Doc. 46), which I took under advisement on April 8, 2016, (Doc. 47). On April 25, 2016, ICA filed reply memorandums in support of its cross-motions to confirm the arbitration award against Underwriters I, (Doc. 52), and Underwriters II, (Doc. 53), as well as affidavits of Alex Campos, (Doc. 50), and Ricardo Rios, (Doc. 51), in support of these motions.

On July 22, 2016, an entity named IPA Acquisitions, Inc. ("IPA") filed a motion to intervene in this matter pursuant to Federal Rule of Civil Procedure 24(a)(2). (Doc. 56.) I held a telephone conference to discuss IPA's proposed intervention on August 3, 2016 (ECF Dkt. Entry August 3, 2016), and received post-conference submissions from the parties, (Docs. 68-77). On August 31, 2016 I held a conference at which—for the reasons stated on the record, (*see* Doc. 84) —I denied IPA's motion to intervene, (Doc. 81).

III. Legal Standard

The Federal Arbitration Act ("FAA") provides for judicial confirmation of arbitration awards if the parties have consented to such confirmation in their agreement to arbitrate. *See* 9 U.S.C. § 9. Regardless of whether the parties have consented to confirmation in their agreement to arbitrate, either party to an arbitration falling within the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") may also obtain judicial confirmation of an arbitral award. *See id.* § 207; *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433, 436 (2d Cir. 2004).

"The value of arbitration lies in its efficiency and cost-effectiveness as a process for resolving disputes outside the courts, and its tendency to foster a less acrimonious process. To encourage and support the use of arbitration by consenting parties, [the Second Circuit], therefore, uses an extremely deferential standard of review for arbitral awards." *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007) (internal citations omitted). "Normally, confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court . . . ." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (internal quotation marks omitted).

A court with jurisdiction "must grant" judgment confirming an award "unless the award is vacated, modified, or corrected." *Id.* (quoting 9 U.S.C. § 9). Under the FAA, a court may vacate an arbitration award upon an application of any party to the arbitration:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). The FAA also provides that a court may modify an award upon an application of any party to the arbitration:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Id. § 11.

A court can only vacate an arbitration award for evident partiality "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 64 (2d Cir. 2012) (quoting *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007)). The party seeking vacatur must prove evident partiality by "clear and convincing evidence." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 106 (2d Cir. 2013). Further, "arbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen." *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016).

The "Supreme Court [has] held that an arbitrator's failure to disclose a material relationship with one of the parties can constitute 'evident partiality' requiring vacatur," but "d[id] not establish a per se rule requiring vacatur of an award whenever an undisclosed relationship is discovered." *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 28, 30 (2d Cir. 2004) (discussing *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147-48 (1968)). This is because "some 'undisclosed relationships . . . are too insubstantial to warrant vacating the award.'" *Id.* at 30 (quoting *Commonwealth Coatings*, 393 U.S. at 152 (White, *J.*, concurring). Further, vacatur of an arbitration award may be unwarranted "where the complaining party should have known of the relationship, or could have learned of the relationship just as easily before or during the arbitration rather than after it lost its cause." *Id.* at 28 (internal citation and quotation marks omitted); *see also CRC Inc. v. Comput. Scis. Corp.*, No. 10 CV 4981(HB), 2010 WL 4058152, at *3 (S.D.N.Y. Oct. 14, 2010). However, where "[a]n arbitrator . . . knows of a material relationship with a party" but fails to disclose it, "[a] reasonable person would have to conclude that [the] arbitrator who failed to disclose under such circumstances was partial to one side." *Applied Indus. Materials*, 492 F.3d at 137.

In addition to these grounds, an award may also be vacated if it exhibits "manifest disregard of the law." *Porzig*, 497 F.3d at 139 (quoting *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002)). An arbitral award may be vacated for manifest disregard of the law only if "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (quoting *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003)). "A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." *Id.* "Only 'a barely colorable justification for the outcome reached' by the arbitrators is necessary to confirm the award." *D.H. Blair & Co.*, 462 F.3d at 110 (quoting *Landy Michaels Realty Corp. v. Local 32B-32J*, 954 F.2d 794, 797 (2d Cir. 1992)). "[R]eview under the doctrine of manifest disregard of the law is highly deferential and such relief is appropriately rare." *Porzig*, 497 F.3d at 139.

IV. Discussion

Here, Underwriters I makes three principal arguments in support of vacatur: (1) the award should be vacated because of arbitrator Campos's failure to disclose his extensive business relationships with ICA and individuals associated with ICA as well as his questionable background in the financial services industry; (2) the arbitration violated fundamental fairness to Underwriters I because the arbitration panel failed to adjourn the arbitration to allow for production of material information; and (3) the arbitration award must be vacated because it demonstrates a manifest disregard of the law. (Underwriters I Br. at 14-42). Underwriters II joins in these arguments, and also separately contends that—even if upheld—the award should be modified because Underwriters II did not receive proper notice of either the claims themselves or the arbitration, and its interests were therefore not represented before the arbitration panel. (Underwriters II 1/19 Mem. at 9-15.)[12] Similarly, Underwriters II also argues that the award should be vacated because the arbitration panel issued a ruling regarding a matter—Underwriters II's liability—not properly brought before it. Because I find that Arbitrator Campos's significant, undisclosed relationships with principals of ICA compel vacatur of the arbitration award, I need not and do not consider the additional arguments raised by

[12] "Underwriters II 1/19 Mem." refers to the Petition to Vacate or Modify Arbitration Award filed on January 19, 2016. (16-cv-374, Doc. 6.)

Underwriters I for vacatur or Underwriters II for modification.

Underwriters I argues that the award must be vacated because of Arbitrator Campos's significant, undisclosed business relationships with numerous ICA executives demonstrates "evident partiality" sufficient to warrant vacatur of the arbitration award. (Underwriters I Br. at 18-29.) Underwriters I provided evidentiary support for the following facts, which are largely undisputed:

- Arbitrator Campos is the President and CEO of Vensure Employee Services ("Vensure"), and or/the Vensure group of companies, among many other companies. (Stalker Decl. Ex. 11; Campos Cert. ¶ 2.)[13] Vensure and ICA operated out the same suite at the same address: 4140 E. Baseline Road, Suite 201, Mesa, Arizona. (Stalker Decl. Ex. 14, 17; *see also* 3/3 Hirst Cert. ¶ 29.)[14]

- Ricardo Rios, the Treasurer, Secretary, and Director of ICA, (Stalker Decl. Ex. 14), was also the Chief Financial Officer of Vensure, Campos's company, (*id.* Ex. 17). After Underwriters I filed its petition seeking to vacate the arbitration award, Campos and Rios each filed certifications in which they admitted the relationship. (Docs. 50, 51.) As he now admits, Campos "first met Ricardo Rios on or about 2008." (Campos Cert. ¶ 11.) According to Campos, in July 2015 he was looking for a replacement for the position of Chief Financial Officer at Vensure, and he "thought of Mr. Rios, . . . who had impressed [him] and was clearly qualified." (*Id.* ¶ 12.) Campos offered Rios "a temporary, part-time independent contractor consulting position at Vensure and [Rios] accepted." (*Id.* ¶ 12.) Rios continued to work at Vensure until at least the date that Campos signed his certification—April 23, 2016. (*Id.* ¶ 13.) Although Campos now attempts to characterize Rios's position with Vensure as "a temporary, part-time independent contractor consulting position," (*id.* at ¶ 12), Rios was listed on the Vensure website as its Chief Financial Officer, (Stalker Decl. Ex. 17).

- John Iorillo, the President and Director of ICA until March 2014, was listed on the Vensure website as "MGA [Managing General Agent]: Accelerated, LLC." (Stalker Decl. Ex. 14; *see also* Campos Cert ¶ 20 (admitting that Iorillo is the principal of a consulting company that, until March 2014, provided consulting services to both ICA and Vensure).) Iorillo was also the Chief Financial Officer of Infinet, a company connected to another Campos company, PC General Agency. For instance, Campos was involved in and gave testimony during certain

[13] "Stalker Decl." refers to the Declaration of Timothy W. Stalker in Support of Certain Underwriting Members at Lloyds of London Motion to Vacate Arbitration Award. (Doc. 12.) "Campos Cert." refers to the Certification of Arbitrator Alex J. Campos filed on April 25, 2016. (Doc. 50.)

[14] "3/3 Hirst Cert." refers to the March 3, 2016 Certification of Gary T. Hirst. (Doc. 28.)

lawsuits filed in 2007 against PC General Agency and Infinet's subsidiary, Human Dynamic Captive Management. (Stalker Decl. Exs. 22, 23.) Campos testified about meetings with Infinet and a potential merger between Infinet (Iorillo's company) and PC General Agency (Campos's company). (*Id.* at Ex. 23 at 23.) Campos claims to have never had a financial relationship with Iorillo. (Campos Cert ¶ 20.)

- Benton Morley, ICA's National Claims Manager, was also the National Claims Manager for Vensure. (Stalker Decl. Ex. 21; *see also* 3/3 Hirst Cert. ¶ 30.) Campos claims to have never met Morley. (Campos Cert. ¶ 18.)

- Robert Morley, Vensure's counsel, was Director of ICA until 2012. (Campos Cert. ¶ 19.) Morley's law firm rents space in the Baseline Center—the same complex that houses ICA and Vensure. (*Id.*) Morley provided legal services to ICA prior to 2014, and he "also provides legal services for Vensure." (*Id.*)

- Underwriters I also asserts that internet searches from public websites reveal connections between Campos and ICA, Iorillo, Rios, Benton Morley and others. (*See* Stalker Decl. Ex. 18.)

As discussed above, Article 24 of Treaty 0274/04 required that all of the arbitrators be active or retired disinterested executive officers of insurance or reinsurance companies. (2/19 Hirst Cert. Ex. A, at 13.) During the arbitration panel organizational meeting held on May 11, 2015, the arbitrators each took turns making disclosures concerning their contacts with the parties and/or individuals associated with or connected to the parties. (5/11 Tr. 5:19-13:23). As quoted above, Campos's only disclosures during the organizational meeting were that he had some business dealings that never came to fruition with Gary Hirst roughly ten years before the arbitration. (5/11 Tr. 12:6-13:23.) Campos did not discuss or disclose any relationships he had with Rios, Iorillo, or Morley, or any additional business interactions with Hirst. He claimed to have no business relationships with ICA. (*Id.* at 12:18-20) Again, at the Arbitration Hearing, in recognition of the continuing duty on the part of the arbitrators to disclose relationships that might impact their ability to be disinterested arbitrators, Umpire Hernandez asked whether there would be any additional disclosures. (Arb. Tr. 4:14-16.) In response to that inquiry, Arbitrator

Campos made no disclosures. (*See id.* at 4:14-5:12.) This was in spite of the fact that, between the time of the Organizational Meeting in May 2015 and the Arbitration Hearing in October 2015, Campos hired an ICA principal—Arbitrator Rios—as the CFO of his own company.

Nor did Campos make any subsequent disclosures throughout the arbitration hearing, despite the fact that: (1) the arbitration panel was presented with a witness list on September 11, 2015 that included Rios's name, (Stalker Decl. Ex. 20); (2) Rios sat at ICA's table during the entire 3-day arbitration and was described to the arbitrators as the former controller and current Treasurer of ICA, (Arb. Tr. 43:13-16; 327:14-18); (3) Campos—with Rios sitting at ICA's table—was asked during the first day of the arbitration whether he had any additional disclosures, (*id.* at 4:14-16); (4) Rios was sworn in as a witness on the second day of the arbitration and testified before the arbitrators, (*id.* at 326:15-22), and (5) the names of Rios, Iorillo, and Morley were repeatedly mentioned throughout the arbitration hearing, (*see* Underwriters I Br. at 22-23 (counting number of times each name was mentioned during hearing)).

ICA contends that the only arbitrator qualification for Arbitrator Campos is that he be disinterested, which it contends means solely that lack a financial or other personal stake in the outcome. (ICA Br. at 19.) It contends that other Circuits have found that evident partiality standards either do not apply or are even more relaxed in the case of party appointed arbitrators in tripartite industry arbitrations, and that the Second Circuit has not yet considered the matter. (*Id.* at 20.) Here, ICA argues that the parties' decision to permit ex parte contacts through the discovery time period demonstrates that the parties did not intend the arbitrators to be impartial, (*id.*), and that an arbitrator's failure to follow ethical rules or guidelines concerning disclosure does not demonstrate evident partiality, (*id.* (citing *Scandinavian Reinsurance Co.*, 668 F.3d at

77)). ICA argues that, to the contrary, Campos did not have a personal or financial interest in the outcome of the litigation, (3/3 Hirst Cert. ¶ 16),[15] which is enough to fulfill the only requirement for Campos, that he be disinterested, (ICA Br. at 21).

Here, I agree that the nondisclosure does not—taken alone—demonstrate evident impartiality, and therefore the citations to arbitration codes of ethics provided by Underwriters I are not dispositive. (*See* Underwriters I Br. at 16-17.) However, those citations certainly support the notions that disclosures are routinely made in arbitrations and that the best practice for an arbitrator is to err on the side of disclosure. The question here is "whether the *facts* that were not disclosed suggest a material conflict of interest," such that "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Scandinavian Reinsurance Co.*, 668 F.3d at 77, 72. Here, those facts include clear, unrebutted evidence that a party-appointed arbitrator failed to disclose material relationships with principals of ICA, one of the parties before the arbitration panel, and his relationship with ICA itself. Of particular relevance is the undisclosed relationship with Ricardo Rios, the Treasurer, Secretary, and Director of ICA, who Campos hired just months prior to the Arbitration Hearing as his company's Chief Financial Officer. The undisclosed fact that Campos's company shares with ICA not only an address, but the same suite within that address, also suggests a material conflict of interest. (*See* Stalker Decl. Exs. 14, 16, 17.)

I believe these undisclosed relationships are significant enough to demonstrate evident partiality, and therefore vacatur is appropriate. The Second Circuit has advocated a "case-by-case approach in preference to dogmatic rigidity" in assessing evident partiality, *Lucent Techs. Inc.*, 379 F.3d at 28, and therefore any guideposts provided by previous decisions are not

[15] "3/3 Hirst Cert." refers to the March 3, 2016 Certification of Gary T. Hirst. (16-cv-323 Doc. 28.)

dispositive. However, the Circuit has also not hesitated in finding evident impartiality where the undisclosed financial relationship would lead a reasonable person to conclude that the arbitrator was partial to one side. *See Applied Indus. Materials*, 492 F.3d at 135 (arbitrator knew of potential business relationship between a branch of his corporation and an arbitrating party). And I note that the relationships here are far more significant, more numerous, and involve more financial entanglements than are present in cases where the Circuit has found undisclosed relationships too insubstantial to warrant vacating arbitration awards. *Cf Scandinavian Reinsurance Co.*, 668 F.3d at 74 (finding two arbitrators serving together in two similar arbitrations simultaneously not sufficient enough to vacate award); *Lucent Techs. Inc.*, 379 F.3d at 28-31 (finding no evident partiality where arbitrator failed to disclose both his past work as an expert witness for one of the parties and his past co-ownership of an airplane with another arbitrator); *Andros Compania Maritima*, 579 F.2d at 696, 701-02 (finding no evident partiality where umpire failed to disclose past joint service on nineteen arbitral panels with president of firm that acted as one party's agent).

Although the Second Circuit has not mandated the use of any test to determine evident partiality, the court has described the Fourth Circuit's evident impartiality test as "helpful." *Scandinavian Reinsurance Co.*, 668 F.3d at 74. This test has four prongs:

> (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding.

Id. (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007)). Here, viewing the facts Campos failed to disclose with these four factors in mind demonstrates that the facts Campos failed to disclose were significant. Campos had close business relationships with numerous principals of ICA, a party to the arbitration, and the number and variety of these relationships suggest he was personally acquainted with some of these individuals over a number of years. In addition, Campos's business operated out of the same office space as ICA, and the relationships which he failed to disclose throughout the arbitration were longstanding and ongoing at the time of the arbitration. Where "[a]n arbitrator . . . knows of a material relationship with a party" but fails to disclose it, "[a] reasonable person would have to conclude that [the] arbitrator who failed to disclose under such circumstances was partial to one side." *Applied Indus. Materials*, 492 F.3d at 137.

Although I do not rely on the following observation in reaching my decisions, I find it troubling that neither Arbitrator Campos nor Ricardo Rios acknowledged that they knew one another throughout the three-day arbitration. This apparent willful avoidance suggests that they were intentionally hiding their relationship from the other arbitrators and the representatives of Underwriters I.

I also find ICA's arguments to the contrary unavailing. In particular, the gravamen of ICA's argument is that evident partiality standards should apply with reduced force, or not at all, in matters such as the one here: party appointed arbitrators in tripartite industry arbitrations. (ICA Br. at 20.) ICA is simply misreading the law. ICA argues that the Second Circuit has not considered this situation, but the matter before the court in *Scandinavian Reinsurance* involved precisely this situation. *See Scandinavian Reinsurance*, 668 F.3d at 64-65. Indeed, the agreement at issue in *Scandinavian Reinsurance* laid out almost precisely the same standards for arbitrators and composition of the arbitration panel as the Treaties here. *Compare id.* at 65 (noting that the agreement at issue "required that such disputes be 'submitted for decision to a panel of three arbitrators'—two party-appointed arbitrators and an umpire—all of whom would be 'disinterested active or former executive officers of insurance or reinsurance companies or Underwriters at Lloyd's, London'"), *with* 2/19 Hirst Cert. Ex. A, at 13 ("One Arbiter shall be chosen by the Reinsured, the other by the Reinsurer, and an Umpire shall be chosen by the two Arbiters before they enter upon arbitration, all of whom shall be active or retired disinterested executive officers of insurance or reinsurance companies or Lloyd's London Underwriters."). In *Scandinavian Reinsurance*, the Second Circuit considered and analyzed the arbitrator's contacts and relationships using the Second Circuit's traditional evident partiality standards, *see* 668 F.3d at 72-73, and never suggested that the nature of the case—involving party-appointed arbitrators in tripartite industry arbitrations—would or should somehow result in a lesser standard. Arbitrator Campos's conduct must be considered under the same evident partiality standard as is required in all arbitrations. As noted above, I believe that standard compels a finding of evident partiality here.

V. Conclusion

Arbitrator Campos's failure to disclose his significant relationships with principals of ICA, and with ICA itself, requires vacatur of the arbitration award. Underwriters I's motion to vacate the arbitration award, (16-cv-323, Doc. 6), is GRANTED, and ICA's cross-motion to confirm the arbitration award against Underwriters I, (16-cv-323, Doc. 21), is DENIED. Moreover, because—in addition to its arguments for modifying the award—Underwriters II also joined in Underwriters I's arguments in support of vacatur, Underwriters II's motion to vacate the arbitration award, (16-cv-374, Doc. 5), is GRANTED, and ICA's cross-motion to confirm the arbitration award against Underwriters II, (16-cv-374, Doc. 21), is DENIED. To the extent Underwriters II sought to modify the arbitration award, its motion, (16-cv-374, Doc. 5), is DENIED as moot. Finally, the pending motion for oral argument, (Doc. 46), is DENIED.

The Clerk of Court is respectfully directed to close all pending motions, and to close this case.

SO ORDERED.

Dated: March 31, 2017
New York, New York

Vernon Broderick

Vernon S. Broderick
United States District Judge

THE ARIAS•U.S. 2018 FALL CONFERENCE WILL BE CONDUCTED UNDER THE ARIAS•U.S. ANTITRUST POLICY

ARIAS•U.S. POLICY STATEMENT AND GUIDELINES CONCERNING ANTITRUST COMPLIANCE

ARIAS•U.S. is a not-for-profit corporation that promotes improvement of the insurance and reinsurance arbitration process for the international and domestic markets. ARIAS•U.S. provides initial training, continuing in-depth conferences and workshops in the skills necessary to serve effectively on an insurance/reinsurance arbitration panel. In addition, ARIAS•U.S. certifies a pool of qualified arbitrators and serves as a resource for parties involved in a dispute to find the appropriate persons to resolve the matter in a professional, knowledgeable and cost-effective manner.

ARIAS•U.S. members include representatives of insurance companies, reinsurance companies, law firms and independent contractors with experience in the field. Some of the participants in ARIAS•U.S. meetings may be in competition with one another. For this reason, ARIAS•U.S. wishes to state unequivocal support for the policy of competition served by the antitrust laws.

The Policy of ARIAS•U.S. Requires Full Compliance with the Antitrust Laws

ARIAS•U.S. is firmly committed to free competition. In particular, ARIAS•U.S. stresses that members have and retain full and exclusive authority for making their own decisions in arbitrations or litigations in which they are involved, as well as in all of their business activities. ARIAS•U.S. does not in any way serve to facilitate agreements among competitors to coordinate their activities with respect to billing practices, collections, underwriting, or any other competitively sensitive activity of insurers or reinsurers. Rather, ARIAS•U.S. exists solely in order to provide educational and informational assistance in connection with the dispute-resolution process of arbitration or litigation.

Although the activities of ARIAS•U.S. are not intended to restrain competition in any manner, it is always possible that meetings involving competitors could be seen by some as an opportunity to engage in anti-competitive conduct. Good business judgment requires making substantial efforts to safeguard against any appearance of an antitrust violation -- both because ARIAS•U.S. has a firm commitment to the principle of free competition, and because the penalties for antitrust violations are severe. Certain violations of the Sherman Act, such as price fixing, are felony crimes for which individuals may be imprisoned or fined. In recent years, corporations have paid hundreds of millions of dollars in fines for these antitrust offenses. In addition, class actions and other treble damage claims by private parties are very expensive to litigate and can result in large judgments. Penalties might be imposed upon ARIAS•U.S., its individual and corporate members, and their individual representatives if they were adjudged to have violated the antitrust laws in connection with their ARIAS•U.S. activities. Members should not count on an antitrust immunity simply because insurance is a highly regulated industry.

It is the responsibility of every member of ARIAS•U.S. fully to comply with the antitrust laws in all ARIAS•U.S. activities. In order to assist members in recognizing situations that may raise the appearance of an antitrust problem, the meeting chair shall furnish at each meeting a copy of this Policy Statement and the following Guidelines.

Guidelines to Ensure Antitrust Compliance

Many ARIAS•U.S. members are skilled in the legal process and may be expected to understand their responsibility under the antitrust laws. Nonetheless, it is useful to state, as a reminder, some basic guidelines that will minimize potential antitrust risk.

1. ARIAS•U.S. members may freely discuss matters that are not competitively sensitive, such as legal developments, ethical principles, procedures, laws that affect the industry, ways to make proceedings more efficient, and technical problems involved in arbitration or litigation. It is permissible, for example, to draft sample arbitration clauses that parties may select on a voluntary basis.

2. ARIAS•U.S. meetings and activities shall not be used as an occasion to reach or attempt to reach any understanding or agreement among competitors -- whether written or oral, formal or informal, express or implied -- to coordinate their activities with regard to billing, collections, premiums, terms or conditions of contracts, territories or customers. Thus, for example, competing cedents (or competing reinsurers) should not agree with one another that they will require use of a particular arbitration clause, and especially should not agree that they will boycott parties that reject the clause.

3. The best way to guard against the appearance of such an agreement is to avoid any discussion of subjects that might raise concern as a restraint on competition. Accordingly, ARIAS•U.S. meetings and activities shall not be used as the occasion for competitors to exchange information on any competitively sensitive subjects, including the following:

(a) ARIAS•U.S. activities and communications shall not include discussion among competitors to coordinate their activities with respect to billing practices, collection activities, premium setting, reserves, costs, or allocation of territories or customers.

(b) ARIAS•U.S. members shall not use the occasion of any ARIAS•U.S. activities to discuss coordinated actions involving other competitors, suppliers or customers. Such discussions could be misconstrued as an agreement to boycott third-parties. For example, if a member decides it will decline to pay certain types of billings from a customer, the member should not discuss this decision with a competitor, because a common plan on such a subject could be considered an unlawful conspiracy or boycott. Accordingly, ARIAS•U.S. members should not discuss any proposal: to coordinate policies or practices in, billings or collections; to prevent any person or business entity from gaining access to any market or customer; to prevent any business entity from obtaining insurance or reinsurance services or legal or consulting services freely in the market; or to influence the availability, terms, provisions, premiums or other aspects of any reinsurance policy or line of insurance.

4. A written agenda shall be prepared in advance for every formal ARIAS•U.S. meeting. Where practical, the agenda shall be reviewed in advance by counsel. The written agenda shall be followed throughout the meeting. Where minutes are kept, the minutes of all meetings shall be reviewed by counsel (if possible) and, after such review, shall be distributed to all members of the body holding the meeting. Approval of the minutes shall be obtained after review at the next meeting.

5. Members are expected to observe the standards of conduct stated above in all informal discussions that take place at the site of ARIAS•U.S. meetings, and in all communications concerning ARIAS•U.S. business.

6. If a member suspects that any unlawful agreements are being discussed, the member should leave the discussion immediately and should consult counsel.

7. Questions concerning these Guidelines may be directed to the Chairman of the Law Committee of ARIAS•U.S.

Marc	Abrams	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.	New York	NY
Steven	Agosta	AXA XL, a division of AXA	Stamford	CT
Steve	Allison	Troutman Sanders LLP	Irvine	CA
Sarah	Arad	Intralinks	New York	NY
Christopher	Ash	Sanitas Law Group LLC	Boulder	CO
David	Attisani	Choate, Hall & Stewart LLP	Boston	MA
Jonathan	Bank	Locke Lord LLP	Los Angeles	CA
Nasri	Barakat	II&RCS, Inc.	New York	NY
Karen	Baswell	Chaffetz Lindsey LLP	New York	NY
Bob	Bates	BatesCarey LLP	Glencoe	IL
Jeff	Beck	Selective Reinsurance Company of America	North Chesterfield	VA
David	Beebe	Munich RE	Princeton	NJ
Alan	Bialeck	Alan R Bialeck LLC	New York	NY
Katherine	Billingham	Scottish Re	Charlotte	NC
Scott	Birrell	Travelers	Hartford	CT
Christian	Blocher	R+V Versicherung AG	Wiesbaden	Hessen
James	Boland	Freeborn & Peters LLP	Chicago	IL
Tim	Bolden	American Fidelity	Edmond	OK
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