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QUARTERLY

Key Takeaways From Reinsurance Court Decisions of 2023 and Early 2024

ALSO IN THIS ISSUE

Revisiting Arbitrator
Disclosure Standards

Vacating Arbitration Awards
for Fraud

Spring Conference Recap

Obituaries

FEATURES



5 Key Takeaways From Reinsurance Court Decisions of 2023 and Early 2024

By: Mason D. Roberts, Foley & Lardner LLP

11 Revisiting Arbitrator Disclosure Standards

By: Teresa Snider and Joshua Dille

19 Vacating Arbitration Awards for Fraud

By: Robert M. Hall

ALSO IN THIS ISSUE

3 EDITOR'S LETTER

23 SPRING CONFERENCE RECAP

30 OBITUARIES

33 RECENTLY CERTIFIED

BACK COVER BOARD OF DIRECTORS

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



Exciting 30th Anniversary Year Offers Array of Opportunities

As you read this issue of the Quarterly, we are more than half way through our 30th Anniversary year and are getting ready for our Fall Conference.

The Fall Conference will feature an important presentation by several of the founding members of ARIAS as part of our 30th Anniversary celebration and a key Ethics panel on potential enforcement mechanisms that will be discussed in virtual the Town Hall meetings coming up this September.

Once again, we also want to acknowledge our generous 30th Anniversary Sponsors, who will continue to be recognized all year and at the Fall Conference.

Certified Arbitrators Can Now Update Their Arbitrator Profiles

A quick report on Certified Arbitrator profiles.

As you know, we now have the mechanism in place that allows Certified Arbitrators to update their membership profiles, which will in turn sync to their Arbitrator Profiles on the ARIAS website's online search engine. We are continuously working with our vendors to improve and smooth out this process.

We will have a breakout session at the Fall Conference that will cover how to update the profiles and there are instructions and a video available on the website for those who are having issues. If you are still having problems or have



any questions, please let us know at info@arias-us.org.

Enhanced Membership Benefits Program Offers Perks

Once again, we also want to remind you about the Enhanced Membership Benefits program for 2024.

The program provides Certified Arbitrators with a deep discount on all educational programs (other than the Spring and Fall Conference) and up to 10 employees of Corporate Members with free access to those same educational programs.

Certified Arbitrators and employees of Corporate Members should use the discount code when registering for a webinar, seminar or workshop. The discount code is the same for all educational events so if you have received the discount code, you can use it all year for all educational events. If you need the discount code, please contact me or

info@arias-us.org. Take advantage of this great member benefit.

Issue Filled With Useful, Informative Articles

This issue of the Quarterly features a very useful article summarizing key reinsurance cases from 2023 and early 2024.

In "Key Takeaways From Reinsurance Court Decisions of 2023 and Early 2024," Mason Roberts of Foley & Lardner provides an excellent digest of these important judicial decisions that will be of interest to practitioners and arbitrators alike.

Next, we have "Revisiting Arbitrator Disclosure Standards: To disclose or not to disclose, and the potential consequences of non-disclosure," authored by our Quarterly Editorial Committee Chair Teresa Snider and her colleague from Porter Wright, Joshua Dille. Arbitrator disclosures are a key point of the ARIAS Code of Ethics and are critical to selection of an arbitration panel. This article explores recent developments in the courts in this area and is a must-read for counsel and arbitrators.

Additionally, we have another article from our Editorial Committee member Robert Hall of Hall Arbitrations. This time, Bob discusses developments in the courts concerning vacating arbitration awards in "Vacating Arbitration Awards for Fraud." While vacatur based on fraud is rare, it does happen and counsel and arbitrators should be aware of these cases.

Finally, we have a Spring Conference Recap from our 2024 Spring Conference in Puerto Rico, with pictures. If you missed the Spring Conference, I hope this recap gives a sense of our experience in San Juan. Thanks to Conference Co-Chairs Jane Mandigo from Swiss Re and Neal Moglin from Foley & Lardner for pulling this recap together.

We hope you enjoy this issue of the Quarterly. We continue to need your contributions to future issues. The deadlines and requirements are on the ARIAS website under Publications. We welcome committee reports, letters to the editor, original articles and repurposed articles from ARIAS CLE programs. If you were on a panel at the Spring Conference or made a proposal for the Fall Conference that was not

accepted, please turn your presentation into an article. Leverage your thought leadership and publish an article in the Quarterly. Your thought leadership is worthy of publication.



Larry P. Schiffer
Editor



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Key Takeaways From Reinsurance Court Decisions of 2023 and Early 2024

By: Mason D. Roberts, Foley & Lardner LLP

While reinsurance disputes and their outcomes are often unavailable to the public because they are resolved through confidential arbitration, disputes in court can provide valuable takeaways from both an underwriting and claims perspective. Several court decisions from 2023 and early 2024 offer such lessons.

The first of these is *Utica Mutual Insurance Co. v. American Re-Insurance Co.*¹

This dispute stemmed from primary and umbrella policies Utica issued to the Burnham Corporation covering the period of 1977 to 1984. Utica obtained reinsurance for these umbrella policies from American Re (later merged into Munich Re). After Burnham was sued and the primary policy limits were allegedly exhausted, Utica paid defense costs for Burnham under the umbrella policies. Utica then sought—and Munich paid—approximately \$2 million

in reimbursement for those defense costs under the reinsurance contracts. Munich later concluded that defense costs were not covered by the underlying umbrella policies and refused to pay any further such costs. Utica sued Munich in New York state court for payment of further defense costs pursuant to the reinsurance agreement. Munich countersued for breach of contract, seeking to recoup the \$2 million it had already paid. Utica moved for

summary judgment on Munich's counterclaim, and the trial court granted the motion. The New York Appellate Division subsequently affirmed the trial court's ruling. It reasoned that, while a prior case between the parties did not bar Munich from recovering improperly paid defense costs under the doctrine of collateral estoppel, Utica was entitled to summary judgment and dismissal of Utica's counterclaim based on the voluntary payment doctrine.

The appeals court explained the voluntary payment doctrine "is a common-law principle that bars recovery for 'payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law.'"² The court further elucidated on the principle as follows: "The onus is on a party that receives what it perceives as an improper demand for

money to take its position at the time of the demand, and litigate the issue before, rather than after, payment is made."³ There is a "presumption that [reinsurance] payments are voluntary," and any protest to such payment must be made at the time of payment.⁴ The court noted that a "mistake of material fact or law" can be an exception to the voluntary payment doctrine.⁵ However, if payment is made based on a party's own lack of diligence, the voluntary payment doctrine will bar recovery for that party. Central to the appeals court's holding in *Utica* was that Munich made the prior defense cost reimbursement payments without any objection or apparent effort to learn the parties' respective legal obligations, such as by obtaining and reviewing the umbrella policies. The court factually distinguished other cases where the paying party had issued a reservation of rights. *Utica* provides

three key reminders. First, always issue a reservation of rights when paying out reinsurance claims. Second, investigate all parties' respective rights and obligations even where they seem straightforward. Third, pay under protest if needed, being sure to raise any dispute prior to payment.

Another notable decision came in *Alabama Municipal Insurance Corp. v. Munich Reinsurance America, Inc.*⁶ There, an Alabama federal court evaluated a dispute between Munich Re and AMIC, a non-profit insurance company wholly owned by Alabama municipalities. AMIC had issued a commercial general liability policy to the Waterworks and Sewer Board of Hanceville, Alabama, an entity responsible for the discharge of treated wastewater into a nearby creek. In 2008, a major flood in the town caused raw, untreated sewage to spill into the creek. Two residents living on that creek brought a lawsuit that ultimately settled in 2014. AMIC reported a loss of \$680,153.70 from the settlement and sought reimbursement under a reinsurance treaty with Munich covering the period of November 1, 2007 to November 1, 2008. Based on the allegations in the underlying lawsuit, AMIC and Munich disputed the timing of when the relevant "occurrences" and "losses" took place. Notably, the AMIC-Munich reinsurance treaty obligated Munich to reimburse for any Ultimate Net Loss paid by AMIC "under [AMIC's] Coverage Documents." AMIC's insurance policy with the Hanceville Waterworks and Sewer Board during 2007 period covered only "Bodily Injury or Property Damage occur[ing] during the policy period." Munich therefore asserted that because no occurrence or loss took place during the relevant policy period, it had no

“...the voluntary payment doctrine ‘is a common-law principle that bars recovery for “payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law.”’²”

reimbursement obligation under the reinsurance treaty. AMIC filed suit against Munich, and Munich moved for summary judgment based on its argument that no loss occurred during the underlying policy period.

The court denied Munich's motion, finding it could not definitively say on summary judgment whether the losses AMIC suffered occurred during the policy period or not. On one hand, AMIC contended that losses it suffered were the result of one occurrence: the January 2008 sewage flood. The court, however, found that AMIC had "not conclusively established" this to the level of an undisputed fact appropriate for consideration on summary judgment.⁷ On the other hand, Munich pointed to testimony from the Hanceville lawsuit plaintiffs stating that some property damage had occurred before 2008. The court similarly found that Munich had "fail[ed] to establish that the plaintiffs brought the... lawsuit in order to recover damages for these earlier occurrences" in addition to the 2008 sewage flood.⁸ In other words, disputed issues of fact that needed to be resolved by the trier of fact precluded an award of summary judgment for Munich.

The court also noted that fixing the date of loss is often difficult in hazardous waste claims. It said: "Some reinsurers have responded to difficulty presented in circumstances such as these by incorporating loss-settlement clauses into their treaties, clearly describing the obligations of both the insurer and the reinsurer in the face of prospective or negotiated settlements."⁹ The court explained that the parties could have included in the treaty either (1) a follow-the-settlements clause, or (2) an obligation for the ceding company to

make allocations based on evidence in the underlying lawsuit. However, the AMIC-Munich treaty contained no such clause. The court concluded it was "without discretion to fashion and incorporate into the parties' policies language that they, for whatever reason, omitted to include."¹⁰

ther side) and extend litigation all the way to trial.

A second decision in the same lawsuit between AMIC and Munich provides further insight into how courts construe settlement clauses.¹¹ AMIC issued a commercial automobile policy to the town of Woodland, Alabama, with a \$2

“The court concluded it was ‘without discretion to fashion and incorporate into the parties’ policies language that they, for whatever reason, omitted to include.’¹⁰”

The *AMIC* case highlights the importance of clearly defining in a reinsurance treaty how settlements must be handled. It also serves as a reminder that courts will not add follow-the-settlements clauses or similar language where they do not exist. Finally, while only Munich moved for summary judgment in this case, it is evident based on the court's opinion that neither side had presented undisputed evidence sufficient to allow the court to make a ruling either way at the summary judgment stage. *AMIC* shows how a treaty's lack of clear language or direction can preclude summary judgment (for ei-

million per occurrence limit. During a trip of the town's citizens to nearby Georgia that the town had organized, a Woodland employee caused an auto accident resulting in serious injuries to multiple people. The crash victims sued Woodland, which tendered defense to AMIC. That lawsuit resulted in a jury verdict of almost \$4 million for the crash victim plaintiffs. Subsequently, the same crash victims sued AMIC for failure to settle the original lawsuit. AMIC tendered defense of that lawsuit to its professional liability carrier, Scottsdale. In the second lawsuit, the crash victims eventually settled with AMIC

for the policy limit of \$2 million. The settlement agreement called for Scottsdale to pay \$900,000 of the settlement amount.

Scottsdale, however, reserved the right to sue AMIC in a separate action to recover that \$900,000 portion of the settlement. Pursuant to that reservation, it brought a declaratory judgment lawsuit against AMIC in Alabama federal court, seeking a declaration that it had no obligation to contribute the \$900,000 amount to the settlement. The court in that lawsuit ruled in Scottsdale's favor, and the Eleventh Circuit affirmed on appeal. The court in the Scottsdale-AMIC lawsuit also awarded Scottsdale its fees for pursuing the declaratory judgment action against AMIC, which amounted to approximately \$385,000. After that lawsuit concluded, AMIC sent final notice of the Woodland motor vehicle accident claim to Munich and, after deducting its \$350,000 retention, requested reimbursement of \$1.9 million, an amount which included the fees it had paid to Scottsdale.

When Munich declined to reimburse the \$385,000 in fees AMIC was ordered to pay to Scottsdale, AMIC brought a separate breach of contract count as part of the Hanceville claim lawsuit against Munich. AMIC admitted that the fees it was ordered to pay to Scottsdale were unrelated to the Woodland litigation, but still argued it was entitled to reimbursement under the AMIC-Munich reinsurance treaty. The court rejected AMIC's argument, granted Munich's motion for summary judgment on AMIC's claim, and held that the reinsurance treaty neither (1) created an obligation for AMIC to pursue recovery from Scottsdale, or (2) created an obli-

gation for Munich to reimburse AMIC for costs associated with that pursuit. The court started and ended its analysis with the plain terms of the treaty:

"The Reinsurer agrees to indemnify the Company, on an excess of loss basis, for Ultimate Net Loss paid by the Company as a result of losses occurring under the Company's Coverage Documents attaching during the term of this Agreement. . ."¹²

The court found this provision conclusively established that Munich's obligations were directly tied to AMIC's obligations to its insured: the town of Woodland. Because the legal dispute between AMIC and Scottsdale did not arise directly from AMIC's insurance obligations to the town of Woodland, the losses from the AMIC-Scottsdale dispute were not covered under the treaty.

This "part two" of the AMIC-Munich case provides two lessons. First, courts will follow the plain treaty language and not imply obligations—for either the ceding company or reinsurer—where not explicitly stated. Second, the construction of loss settlement clauses is critical and can shape the outcome of litigation in the event of a coverage dispute.

Another notable case was *Insurance Company of the State of Pennsylvania v. Equitas Insurance Ltd.*¹³ The Insurance Company of the State of Pennsylvania ("ICSOP") issued umbrella policies for a predecessor of the Dole Food Company spanning a policy period of October 1968 to October 1971. Equitas reinsured part of ICSOP's exposure on that risk for the same three-year period. In 2009, homeowners in Carson, Cali-

fornia sued Dole for polluting soil and groundwater over multiple decades. The lawsuit settled and \$20 million of the settlement was allocated to the ICSOP-Dole policy, even though plaintiffs' property damages and personal injuries continued to accrue well after the policy period expired. The settlement followed California's "all sums rule," rendering liable any insurer during any time period of continuing harm jointly and severally (up to policy limits) for all damage caused by the pollutant. ICSOP then sought reimbursement from Equitas for its portion of the risk. Equitas denied ICSOP's claim on the basis that English law governed the reinsurance policy, and English law would not have allocated ICSOP's settlement liability on an "all sums" basis.

ICSOP filed suit against Equitas in the New York federal court for breach of contract. The district court granted summary judgment in favor of ICSOP and rejected Equitas's basis for denying coverage. Equitas appealed to the Second Circuit Court of Appeals, which affirmed the trial court's ruling. The Second Circuit undertook an extensive examination of English law and how it would apply to the settlement and Equitas's reinsurance obligations. It ultimately framed the question not as whether English law would have applied "all sums" rule in determining ICSOP's liability in underlying lawsuit, but rather whether English law would interpret the reinsurance policy as providing co-extensive coverage. In other words, the court determined that English law did not apply to the underlying settlement itself—only to determination of Equitas's reimbursement obligations under the reinsurance contracts. In this context, the court noted that English law had a strong presumption

that facultative reinsurance provides back-to-back coverage, and that these facultative certificates also contained a provision that English law would likely view as a follow-the-settlements clause.

Equitas provides three important takeaways. First, it is critical to know the presumptions of the jurisdiction specified in any choice of law clause. Second,

methodology, and the matter was resolved through arbitration. Years later, another billing-related dispute arose concerning the same provisions in the reinsurance agreements at issue in the 2017 arbitration. National Casualty and Nationwide filed an action for declaratory relief and injunction in Illinois federal court, arguing that CNA was precluded from “re-arbitrating” the de-

one that must be arbitrated. It rejected National Casualty and Nationwide’s arguments that, because the court had judicially confirmed the 2017 arbitration, it had jurisdiction to decide substantive arguments of issue preclusion relating to that arbitration. Notably, the court stated that “[p]rocedural questions that grow out of the dispute and bear on its final disposition” are matters for an arbitrator.¹⁶ The court cited to well-established Seventh Circuit case law holding that the preclusive effect of a prior arbitration award is a defense subject to arbitration, not judicial determination.

“...it is critical to know the presumptions of the jurisdiction specified in any choice of law clause.”

the choice of law governing the reinsurance relationship will not govern the ceding company’s obligations in litigating or settling an underlying litigation absent explicit language to that effect in the reinsurance agreement. Third, choice of law provisions incorporating non-U.S. law can create scenarios where claims analysis becomes incredibly complex and may create a dispute between the parties.

National Casualty Co. v. Continental Insurance Co. contains an informative ruling on the arbitrability of reinsurance disputes under a reinsurance treaty’s arbitration clause.¹⁴ Here, CNA entered into three reinsurance agreements with National Casualty and Nationwide, each containing nearly identical arbitration clauses. In 2017, a dispute arose between the parties over CNA’s billing

cision from the 2017 arbitration. CNA moved to compel arbitration, arguing that the merits of plaintiffs’ issue preclusion arguments must be decided by an arbitrator, not the court.

The court agreed with CNA that the arbitration clauses precluded the court from infringing on the arbitrator’s jurisdiction to assess plaintiffs’ substantive arguments. It emphasized that the Federal Arbitration Act mandated the enforcement of valid, written arbitration agreements, and that no party disputed the arbitration agreement was valid.¹⁵ Thus, the court had no discretion in enforcing the arbitration clauses as written. The court ultimately held that the issue of whether the parties’ prior arbitration had any preclusive effect was an issue that not only fell within the arbitration clauses’ scope, but was

This case reaffirms two important facts. First, valid arbitration clauses can delegate almost everything to an arbitrator, and only the validity of an arbitration clause as a contractual agreement itself is subject to determination by a court (unless that dispute is also delegated to the arbitrators). Second, while arbitration clauses often increase the efficiency and privacy of litigation, they can sometimes lengthen proceedings that a court might dismiss early on in the case. Having an arbitrator dismiss a case on the same grounds as would a court simply takes longer due to the procedural steps involved.

A final recent case to note is *Gen. Re Life Corp. v. American General Life Insurance Co.*¹⁷ In *Gen Re*, the parties entered into six separate reinsurance agreements between 1991 and 2002. In April 2020, Gen Re increased the premiums for those agreements. American General refused to pay the increased rates. The dispute went to arbitration, where Gen Re prevailed and sought confirmation of the arbitration award in the New York federal court. During the arbitration, the parties stipulated to a confidentiality agreement prohibiting

disclosure of materials to third parties, except as necessary in court proceedings relating to confirming or vacating the arbitration award. In the confirmation proceedings, American General did not dispute the merits decision of the arbitration, but argued the court did not have jurisdiction to confirm the award based on American General's decision to recapture the business ceded under the reinsurance agreements. It asserted that this recapture brought the total "amount in dispute" below the \$75,000 requirement for diversity jurisdiction in federal court. In briefing this issue before the court, the parties attached the arbitration position statements and the arbitration panel's Final Award as exhibits. The parties sought to file those arbitration materials under seal pursuant to the confidentiality agreement.

The court denied the parties' motions to seal, and rejected American General's argument that the court lacked

fect" the court's adjudication of a case.¹⁹ The court reasoned that the parties' arbitration position statements directly affected the court's determination of the jurisdictional issue because they described the amount in controversy. The court also emphasized that a confidentiality agreement between parties is insufficient on its own to overcome the interest in public disclosure and transparency; a stronger showing is needed.²⁰ On the merits of the jurisdictional issue, the court held that the \$75,000 amount-in-controversy requirement relates to the amount that is disputed, not the ultimate amount of any award or payment made. Thus, American General's recapture was not a basis to argue the \$75,000 threshold was not met.

The *Gen Re* decision highlights two points to bear in mind. First, parties cannot assume that everything about a confidential arbitration will always be confidential. This case provides a good

Gen Re and American General unsuccessfully asserted that impact as a basis for keeping the arbitration materials under seal.



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Litigation and Business Litigation and Dispute Resolution practice groups. Mr. Roberts' practice focuses on litigating a wide range of business disputes through trial and arbitration, and includes a significant number of reinsurance and insurance matters.

“...parties cannot assume that everything about a confidential arbitration will always be confidential.”

jurisdiction to confirm the arbitration award. On the motions to seal, the court noted there was a “strong presumption” in favor of access to judicial documents.¹⁸ That presumption is even stronger where documents “directly af-

illustration of how submissions in an underlying, private arbitration can be put at issue in public litigation. Second, courts are usually unsympathetic to the potential impact on future business negotiations from public disclosure. Both

Endnotes

- 1 218 A.D.3d 1283 (4th Dep't Jul. 28, 2023).
- 2 *Id.* at 1285 (citation omitted).
- 3 *Id.* (citation omitted)
- 4 *Id.*
- 5 *Id.*
- 6 670 F. Supp. 3d 1327 (M.D. Ala. 2023)
- 7 *Id.* at 1334.
- 8 *Id.* at 1333-34.
- 9 *Id.* at 1334.
- 10 *Id.*
- 11 *Ala. Mun. Ins. Corp. v. Munich Reinsurance Am., Inc.*, No. 2:20cv300-MHT, 2023 U.S. Dist. LEXIS 153148 (M.D. Ala. Aug. 30, 2023).
- 12 *Id.* at *13.
- 13 68 F.4th 774 (2d Cir. 2023).
- 14 No. 23-cv-3143, 2023 U.S. Dist. LEXIS 204528 (N.D. Ill. Nov. 15, 2023).
- 15 *Id.* at *4-5.
- 16 *Id.* at *7.
- 17 No. 23-cv-05219 (ALC), 2024 U.S. Dist. LEXIS 56443 (S.D.N.Y. Mar. 28, 2024).
- 18 *Id.* at *8.
- 19 *Id.*
- 20 *Id.* at *9.



Revisiting Arbitrator Disclosure Standards

To disclose or not to disclose, and the potential consequences of non-disclosure.

By: Teresa Snider and Joshua Dille

Ethical rules and guidelines for arbitrator disclosures increase the perceived integrity of arbitration proceedings. Disclosure can also remove or diminish potential grounds for vacating an award based on claimed arbitrator bias. Evident partiality is one of only a few grounds that exist for vacating an arbitration award under the Federal Arbitration Act.¹ A relationship or interest that may seem immaterial if disclosed at the outset of an arbitration proceed-

ing can take on outsized importance if discovered after an award has been issued.² A failure to disclose could result in the award being vacated for evident partiality and, even if the award is not vacated, litigation about the nondisclosure may be costly. This article discusses the disclosure guidelines for arbitrators promulgated by ARIAS-U.S., the American Arbitration Association, and the International Bar Association, and two recent decisions from the feder-

al appellate courts in which the courts refused to vacate arbitration awards for arbitrator non-disclosures.

The ARIAS-U.S. Code of Conduct

Under Canon IV of the ARIAS-U.S. Code of Conduct, “candidates for appointment as arbitrators should disclose any interest or relationship likely

to affect their judgment. Any doubts should be resolved in favor of disclosure.”³ This is a subjective standard, with the disclosure obligation based on the arbitrator’s own assessment of whether a particular interest or relationship is “likely to affect their judgment.” However, comment 1 to the Canon expands the scope of disclosure by adding an objective reasonableness standard. The comment directs that the arbitrator candidate should also disclose any “existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect [the candidate’s] judgment.”⁴

Canon IV and comment 1 thus provide a robust framework for disclosures by requiring disclosure be approached from two vantage points:

- Subjective: the arbitrator candidate’s view of what relationships or interests are “likely to affect their judgment,”⁵ and
- Objective: an analysis of what relationships “others could reasonably believe would be likely to affect their judgment.”⁶

In addition, the comments to Canon IV identify certain interests and relationship that should be disclosed, regardless of whether the candidate believes such items merit disclosure through either a subjective or objective lens. Comment 2 instructs arbitrator candidates that they should disclose:

- Relevant positions taken in published works or in expert testimony;
- The extent of previous appointments by either party, either party’s counsel or either party’s third party administrator or manager; and

- Any past or present involvement with the contracts or claims at issue.⁷

Comment 6 makes clear that an arbitrator’s disclosure obligation does not terminate once the candidate has been selected as arbitrator, but is “a continuing obligation” throughout the course of the arbitration.⁸ In making disclosures, arbitrator candidates and arbitrators also need to be mindful of prior commitments to maintain confidentiality.⁹

AAA Guidelines

Disclosure guidelines promulgated by the American Arbitration Association (“AAA”) also address disclosure under both subjective and objective standards.¹⁰ They address arbitrators’ subjective views on potential conflicts by directing them as follows: “You should not judge the significance of the potential conflict but rather you should make the disclosure and let the parties determine its significance. As

a guiding principle, *if a relationship or interest crosses your mind – disclose it.*”

¹¹The AAA Disclosure Guidelines also contain two objective measures for disclosure: arbitrators must disclose “[a]ny circumstance likely to give rise to justifiable doubt as to your impartiality or independence (per AAA rules¹²)” and “[a]ny interest or relationship that might create an appearance of partiality (per the Code of Ethics).”¹³ The AAA Disclosure Guidelines further specify certain mandatory disclosures: “As to any party, attorney, witness and other arbitrator involved in this case, [arbitrators] must disclose any: Financial interest that is direct (existing or past) or indirect (existing or past)” and “any relationships [the arbitrator has] with any party, attorney, witness and other arbitrator involved in this case.”¹⁴ The disclosure obligation extends to relationships that the arbitrator had with the families or household members, current employers, partners, and professional and/or business associates of any party, attorney, witness, and other arbitrator involved in the case.¹⁵

“You should not judge the significance of the potential conflict but rather you should make the disclosure and let the parties determine its significance.”

The AAA Disclosure Guidelines direct that the arbitrator should disclose the who, what, when, where, and how of the relationship, emphasizing that “[w]hen disclosing, specificity is extremely important.”¹⁶ The AAA International Centre for Dispute Resolution also has

- The contact event (e.g., business meetings; occupying space in the same building; consultation; legal professional representation; professional or trade association meeting or committee work; intimate social gathering; large

“The AAA Disclosure Guidelines direct that the arbitrator should disclose the who, what, when, where, and how of the relationship, emphasizing that ‘[w]hen disclosing, specificity is extremely important.’¹⁶”

issued guidance on what facts should be included in making a disclosure:

- Whether the relationship is in the past, present, or anticipated in the future; •
- The nature of the relationship; •
- The duration of relationship (from when to when); •
- Whether business is being conducted directly or indirectly; •
- Whether the disclosed relationship is professional, social or familial;
- The extent of contact—daily, weekly, monthly, yearly; •

- group social gathering; etc.);
- Will the relationship affect the arbitrator’s ability to act impartially?¹⁷

These types of facts would not appear to pose problems with prior confidentiality commitments, but arbitrators must still weigh disclosure in light of such commitments, and whether they should serve if they are unable to make complete disclosures regarding their relationships.

Disclosure Doesn’t Cure All Conflicts

However, disclosure is not a cure-all for every interest or relationship. The ARIAS-U.S. Code of Conduct requires that arbitrators “serve only in those matters in which they can render a just decision,” and “uphold the integrity of the arbitration process.”¹⁸ Ethical guidelines and codes recognize that the biases or perceived biases inherent in some types of interests and relationships cannot be overcome through mere disclosure. For example, the ARIAS-U.S. Code of Conduct instructs that a candidate must refuse to serve as an arbitrator where the candidate:

- Has a material financial interest in a party that could be substantially affected by the outcome of the proceeding;
- Currently serves as a lawyer for one of the parties;
- Is currently at a law firm that serves as a lawyer for one of the parties (unless the candidate does not derive any income from the representation and there is an ethical wall established between the candidate and the firm’s work for the party)
- Is nominated for the role of umpire and is currently a consultant or expert for one of the parties; or
- Is nominated for the role of umpire and was contacted prior to nomination by a party, its counsel, or party-appointed arbitrator with respect to the matter where the candidate is nominated as umpire;
- Is nominated for the role of umpire in one matter and is solicited to serve as a party-appointed arbitrator or expert in a new matter by a party to the matter where the

candidate is nominated as umpire.¹⁹

The IBA Guidelines and Recognition of Industry-Specific Norms

In February 2024, the International Bar Association issued updated “Guidelines on Conflicts of Interest in International Arbitration.”²⁰ According to its introduction, the IBA Guidelines “embody the understanding of the IBA Arbitration Committee as to the best current international practice.” Like the ARIAS-U.S. Code of Conduct and the AAA Disclosure Guidelines, the IBA Guidelines contain disclosure requirements and identify circumstances in which the arbitrator must refuse to serve. Under the IBA Guidelines, arbitrators are required to “be impartial and independent of the parties” at the time of appointment and throughout the proceedings.²¹ Accordingly, the IBA Guidelines contain a subjective test that requires an arbitrator to decline appointment “if the arbitrator has any doubt as to the arbitrator’s ability to be impartial or independent.”²² Also adopting an objective standard, the IBA Guidelines frame the issues of disclosure and conflicts of interest by reference to “justifiable doubts as to the arbitrator’s ability to be impartial and independent.”²³

To assist parties and arbitrators in assessing whether arbitrators are impartial and independent, IBA Guidelines include three lists of situations, which are color-coded based on the perceived risk of bias:

- Red List: specific situations that, depending on the facts of a given case, may, in the eyes of the parties

ties give rise to justifiable doubts as to the arbitrator’s impartiality or independence;²⁴

- Orange List: specific situations that, depending on the facts of a given case, may in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence;
- Green List: specific situations where no appearance and no actual conflict of interest can exist under the subjective or objective standard. Thus, the arbitrator has no duty to disclose situations falling within the Green List.²⁵

The Red List has two components: a “non-waivable” list of situations where the arbitrator cannot serve and a “waivable” list of situations where the parties can waive the conflict of interest. Thus, for example, if the arbitrator has a “significant financial or personal interest in one of the parties,” the arbitrator cannot serve and the conflict cannot be waived. But the parties can waive the conflict and the arbitrator can serve where the arbitrator has a close family member who “has a significant financial or personal interest in one of the parties.”²⁶ Due to the seriousness of the situations on the “Waivable Red List,” waiver of the conflict of interest must be express.²⁷

The situations included in the Orange List are not as serious as the Red List situations and therefore are deemed to be waived if a timely objection is not made after disclosure.²⁸ Examples of items in the Orange List include the following:

- The arbitrator has, within the past three years, been appointed as arbitrator on two or more oc-

casions by one of the parties or party affiliate;

- The arbitrator currently serves, or has served within the past three years,
 - as arbitrator in another arbitration on a related issue or matter involving the parties, or party affiliate; or
 - as an expert for one of the parties, or a party affiliate in an unrelated matter.

As those familiar with reinsurance arbitrations recognize, these disclosure/waiver guidelines in the Orange List would have a significant impact on current norms in appointing ARIAS-U.S. certified arbitrators if the guidelines were applicable. It is common in reinsurance arbitrations for party-appointed arbitrators to have been appointed more than once by the same party in the past three years, and for the same party-arbitrator to be appointed in related matters. The IBA Guidelines recognize that, “[i]n certain types of arbitrations . . . arbitrator may be drawn from a specialized pool of individuals . . .” and that “[p]arties active in those fields may be aware of a custom or practice for appointing parties frequently to appoint the same arbitrator in different cases.”²⁹ Accordingly, [w]hile disclosure of multiple appointments may still be desirable . . . , the scope of disclosure and consequences of repeat appointments may differ from those set forth in these Guidelines.³⁰ In other words, where repeat appointments are customary in a particular industry, the fact of such appointments may not give rise to a justifiable doubt as to the arbitrator’s impartiality and independence, and therefore it may be inappropriate for the candidate to be disqualified even if an objection is raised.

Industries possessing their own peculiar arbitral practices is not a novel concept. More than twenty years ago, the Seventh Circuit Court of Appeals observed:

Industry arbitration, the modern law merchant, often uses panels composed of industry insiders, the better to understand the trade's norms of doing business and the consequences of proposed lines of decision. The more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties. Yet all participants may think the expertise-impartiality tradeoff worthwhile; the [Federal] Arbitration Act does not fasten on every industry the model of the disinterested generalist judge.³¹

Recent Case Law

Recent case law in the U.S. continues to recognize that arbitrators' relationships with other arbitrators, the parties, and counsel typically do not equate to evident partiality. In 2023, the Second Circuit and the Eleventh Circuit Courts of Appeal issued decisions addressing the standard for when non-disclosure of such relationships will amount to evident partiality under the Federal Arbitration Act. Both courts reviewed arbitrator partiality and disclosures from an objective viewpoint, applying a "reasonable person" standard.

The Second Circuit case, *Andes Petroleum Ecuador Ltd. v. Occidental Exploration & Production Co.*,³² involved the AAA Commercial Arbitration Rules. Those Rules required the arbitrator can-

didates to be "wholly independent and impartial" and to disclose "any circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence."³³ Smit, the party-appointed arbitrator for OEPC, disclosed at the outset of the OEPC-Andes arbitration that "he had a professional connection to one of Andes' counsel, Laurence Shore, from an unrelated prior arbitration and arbitration con-

the panel had not been properly constituted in accordance with the agreement between the parties.³⁸ The district court denied the motion to vacate, and confirmed the award.

OEPC appealed to the Second Circuit. The court held that an "an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, would have to conclude the ar-

“Recent case law in the U.S. continues to recognize that arbitrators’ relationships with other arbitrators, the parties, and counsel typically do not equate to evident partiality.”

ferences.”³⁴ While the OEPC-Andes arbitration was ongoing, Smit and Shore were appointed as arbitrators on the same tribunal in a separate arbitration proceeding.³⁵ Neither disclosed his appointment in the Andes- OEPC arbitration, but the fact of the appointments was publically listed online.³⁶ The OEPC-Andes arbitration resulted in a \$391.9 million award in favor of Andes, plus interest.³⁷ OEPC moved to vacate the award, arguing that Smit was partial and that the non-disclosure meant that

arbitrator was partial to one side.”³⁹ Speculation that Andes' counsel Shore would have had behind-the-scenes access to OEPC's party-appointed arbitrator Smit as a result of their service as co-arbitrators did not establish evident partiality.⁴⁰ The court therefore declined to vacate the award based on Smit's failure to disclose his appointment to a different arbitral tribunal alongside Andes' counsel, finding that "the non-disclosure did not pass the 'high hurdle' for vacating arbitration decisions under 9

U.S.C. § 10(a)(4) because Smit did not ‘effectively dispense[] his own brand of industrial justice’ and ‘make public policy.’”⁴¹ The court also rejected OEPC’s contention that the panel was not properly constituted, finding there was no evidence that the non-disclosure interfered with the composition of the arbitration pane.⁴²

OEPC filed a petition for certiorari after losing in the Court of Appeals. In its petition, OEPC argued that there was a circuit split regarding whether proving evident partiality requires a showing of actual bias by the arbitrator or merely the “appearance of bias.”⁴³ Andes denied the existence of a circuit split; it argued that the Second Circuit had correctly analyzed whether the arbitrator had a “material relationship” with a party from which “a reasonable person could reasonably infer . . . the possibility of bias.”⁴⁴ The Supreme Court did not address the supposed circuit split, instead dismissing the petition for certiorari at the parties’ request.

The Eleventh Circuit case, *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, also involved the losing party in an arbitration moving to vacate an arbitration award for evident partiality on the basis of arbitrator non-disclosures.⁴⁵ Grupo Unidos and Autoridad del Canal arbitrated their dispute under the Rules of Arbitration of the International Chamber of Commerce. Three arbitrators were appointed, Gaitskell (who was nominated by Autoridad del Canal), von Wobeser (nominated by Grupo Unidos), and Gunter (who served as president of the tribunal).⁴⁶ Collectively, the arbitrators had been involved in more than 500 arbitrations over the course of their careers.⁴⁷ Under the ICC Rules,

each arbitrator was required “to submit ‘a statement of acceptance, availability, impartiality and independence’ including ‘any facts or circumstances which might be of such a nature to call into question the arbitrator’s independence in the eyes of the parties’ or could give rise to reasonable doubts as the arbitrator’s impartiality.”⁴⁸ All three arbitrators submitted the required statement.

After Grupo Unidos was ordered to pay Autoridad del Canal more than \$265 million in a Partial Award, Grupo Unidos asked for additional information from the arbitrators regarding their relationships with each other, counsel, and the parties. It learned that, while the arbitration was pending, (1) Gaitskell had nominated Gunter as president of the tribunal in an unrelated arbitration, and served with him on the tribunal, and (2) in another unrelated arbitration, Von Wobeser served as a co-arbitrator with one of Autoridad del Canal’s attorneys.⁴⁹ It also learned that, several years before the present arbitration, Gaitskell served as an arbitrator where another of Autoridad del Canal’s attorneys was a co-arbitrator.⁵⁰ And, finally, Gaitskell was serving as an arbitrator in an unrelated arbitration where one of the parties was represented by another of Autoridad del Canal’s attorneys.⁵¹ Grupo Unidos asked the ICC to remove all three of the arbitrators, arguing that they had withheld “important connections.”⁵² The ICC refused, observing that some of the connections should have been disclosed, but that none of the facts affected the arbitrators’ independence or impartiality.⁵³ The arbitrators subsequently issued a Final Award that increased the amount awarded to Autoridad del Canal to \$285 million, as a result of costs and some merits claims

that had been unresolved in the Partial Award.⁵⁴

Grupo Unidos moved first to vacate the Partial Award, and then moved to vacate the Final Award after it was issued. The district court consolidated the actions, and denied the motions to vacate. The Eleventh Circuit Court of Appeals affirmed, holding that the “evident partiality” standard justifies *vacatur* only if “either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.”⁵⁵ The court further stated that “[t]he alleged partiality must be ‘direct, definite and capable of demonstration rather than remote, uncertain and speculative.’”⁵⁶ The court then analyzed each of the late-disclosed relationships to determine if that standard was met, and concluded that arbitrators’ appointments of co-arbitrators and work on tribunals with the same co-arbitrators and/or counsel amounted to “mere indications of professional familiarity.”⁵⁷ “Familiarity ‘does not indicate bias.’”⁵⁸ The court noted that “[i]t is little wonder and, of little concern, that elite members of the small international arbitration community cross paths in their work.”⁵⁹ Accordingly, to demonstrate evident partiality, the court found that there must be more than “professional familiarity,” though it also indicated that undisclosed business relationships and dealings may warrant suspicion.⁶⁰ Thus, both federal appellate courts faced with arbitrator non-disclosures were skeptical of evident partiality allegations where the undisclosed relationships consisted of concurrent service in other arbitration proceedings.

“Familiarity ‘does not indicate bias.’ The court noted that ‘[i]t is little wonder and, of little concern, that elite members of the small international arbitration community cross paths in their work.’”

Conclusion

The ARIAS-U.S. Code of Conduct, the AAA Disclosure Guidelines, and the IBA Guidelines all require that arbitrators, when considering appointment and continued service on a panel, consider subjectively whether they have any bias or relationship that would impact their decision, or if they have any doubt as to their ability to render a just decision. If they do, they must decline or terminate the appointment. The same ethical standards and guidelines also direct that arbitrators consider whether a reasonable person would believe that the arbitrator was biased or that their judgment might be affected by their prior and current relationships with the parties, other arbitrators, and counsel. Depending on the facts and circumstances, the arbitrator must at the very least make disclosure, and in

some instances, decline the appointment. Fulsome disclosures consistent with applicable ethical codes and guidelines not only enhance the integrity of the arbitration process, they also diminish the likelihood of later challenges to an award based on alleged evident partiality. Even though courts rarely vacate awards based on non-disclosures, the time and expenses of litigating such challenges may be avoided if arbitrators understand the applicable standards and make complete disclosures.



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Endnotes

- 1 9 U.S.C. § 10(a)(2).
- 2 “[D]isclosure at the outset often avoids later controversies.” *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 622 (7th Cir. 2002).
- 3 ARIAS-U.S. Code of Conduct, Canon IV, available at <https://www.arias-us.org/wp-content/uploads/2019/07/ARIAS-Code-of-Conduct-2019.pdf>.
- 4 *Id.* at Canon IV, comment 1.
- 5 *Id.* at Canon IV.
- 6 *Id.* at Canon IV, comment 1.
- 7 *Id.* at Canon IV, comment 2.
- 8 *Id.* at Canon IV, comment 6.
- 9 *Id.* at Canon IV, comments 3 and 4.
- 10 Disclosure Guidelines for serving on American Arbitration Association Cases (September 2019) (“AAA Disclosure Guidelines”) at https://www.adr.org/sites/default/files/document_repository/Arbitrator_Disclosure_Guidelines.pdf.
- 11 *Id.*
- 12 Rule 17(a) of the AAA Commercial Arbitration Rules and Mediation Procedures states “Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the

- arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration." The Rules are available at <https://adr.org/sites/default/files/Commercial%20Rules.pdf>.
- 13 Canon II of the AAA Code of Ethics for Arbitrators in Commercial Disputes states "An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality." The AAA Code of Ethics is available at https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf). The Code "requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality." AAA Codes of Ethics, Note on Neutrality.
 - 14 AAA Disclosure Guidelines.
 - 15 *Id.*
 - 16 *Id.*
 - 17 https://www.adr.org/sites/default/files/document_repository/Disclosure_and_Challenge_of_an_Arbitrator-Fact_Sheet.pdf.
 - 18 ARIAS-U.S. Code of Conduct, Canons I and II.
 - 19 *Id.* at Canon I, comment 3.
 - 20 The IBA Guidelines are available at <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024>.
 - 21 IBA Guidelines, at (1) General Principles. The 2004 version of the IBA Guidelines stated that the Guidelines do not apply to non-neutral arbitrators, who are not required to be independent and impartial. This explicit reference to non-neutral arbitrators is not included in the 2024 Guidelines.
 - 22 IBA Guidelines at Part I, (2)(a).
 - 23 See, e.g., *id.* at Part I, (2)(b)-(d).
 - 24 This is the standard applied in many jurisdictions. *Id.* at Introduction. Indeed, legislation proposed in the UK as part of the Arbitration Act 2024 would codify the common law duty for the arbitrator to disclose any "circumstances that might reasonably give rise to justifiable doubts as to the individual's impartiality in relation to the proceedings or potential proceedings." HL Bill 59, available at <https://bills.parliament.uk/publications/54937/documents/4640>. Under the Arbitration Act 2024, arbitrators must disclose circumstances that they actually know and what they ought reasonably to know. *Id.* Due to the general election scheduled for July 4, 2024, the Arbitration Act 2024 will need to be reintroduced in order to move forward.
 - 25 IBA Guidelines, at Part II.
 - 26 Compare IBA Guidelines at part II, (1) Non-Waivable Red List, ¶ 1.3 with part II, (2) Waivable Red List, ¶ 2.3.8.
 - 27 *Id.* at Part II, Practical Application of General Standards, ¶ 2.
 - 28 *Id.* at ¶ 3.
 - 29 *Id.* at n.3.
 - 30 *Id.*
 - 31 *Sphere Drake v. All Am.*, 307 F.3d at 620 (citations omitted).
 - 32 *Andes v. OEPC*, 2023 LEXIS 14861 (2d Cir. June 15, 2023).
 - 33 *Id.* at *3.
 - 34 *Id.*
 - 35 *Id.*
 - 36 *Id.*
 - 37 *Id.*
 - 38 *Id.*
 - 39 *Id.* at *5 (quoting *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012) (quotation marks omitted)).
 - 40 *Id.*
 - 41 *Id.* at *6 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-72 (2010)).
 - 42 *Id.* at *7.
 - 43 OEPC's Nov. 9, 2023 Petition for Writ of Certiorari, at 17-26.
 - 44 Andes' Feb. 2, 2024 Brief in Opposition to Petition for Writ of Certiorari, at 2.
 - 45 78 F.4th 1252 (11th Cir. 2023).
 - 46 *Id.* at 1257.
 - 47 *Id.* at 1257-58.
 - 48 *Id.*
 - 49 *Id.* at 1259.
 - 50 *Id.*
 - 51 *Id.*
 - 52 *Id.* at 1260.
 - 53 *Id.*
 - 54 *Id.*
 - 55 *Id.* at 1262 (quoting *Univ. Commons-Urbana, Ltd. v. Universal Constructor, Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002) (quotation marks omitted)).
 - 56 *Id.* (citations omitted).
 - 57 *Id.* at 1262-64.
 - 58 *Id.* at 1264.
 - 59 *Id.*
 - 60 *Id.* at 1263.



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Vacating Arbitration Awards for Fraud

By: Robert M. Hall

I. Introduction

Section 10(a)(1) of the Federal Arbitration Act (“FAA”) allows a court to vacate an arbitration award that was “procured by corruption, fraud, or undue means.” There is a surprising (to the author at least) amount of caselaw dealing with efforts to vacate awards for fraud. It appears that the standards for such a vacatur are black letter law:

First, the movant must establish the fraud by clear and convincing evidence. . . . Second, the fraud must not have been discoverable

upon the exercise of due diligence prior to or during the arbitration. . . . Third, the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration. . . . The last element does not require the movant to establish that the result would have been different had the fraud not occurred.¹

The purpose of the article is to explore the facts of selected cases in which these standards have been applied in order to better elucidate their meaning.

II. Fraud by Clear and Convincing Evidence

A lack of clear and convincing evidence was found in the recent case of *Metropolitan Municipality of Lima v. Rutas De Lima S.A.C.*, No. 1:20-cv-02155 (ACR), 2024 U.S. Dist. LEXIS 42891 (D.C. Mar. 12, 2024). Rutas was retained by Lima to build a superhighway and was to be compensated by tolls on the highway. However, residents protested the tolls on the superhighway, and it was shut down without completing payments to Rutas. Rutas brought and won two ar-

bitrations on separate parts of the contract before well-qualified, international arbitration panels. A third arbitration panel enjoined Lima from terminating the contract and Lima filed a criminal complaint against the entire panel for invoicing their standard fees. When Lima's arbitrator resigned, Lima appointed a replacement and then challenged that arbitrator for bias. Lima sought to have the first two arbitration awards vacated under the FAA, alleging bribery by Rutas, fraud for denying it before the arbitration panels and new evidence supporting the bribery.

The *Rutas* court declined to make inquiry into corruption involved in the first two arbitrations because the arbitration panels had found insufficient evidence of corruption under a lower

preponderance of the evidence standard.² Likewise, the court found Lima's new evidence not probative and certainly not "clear and convincing."³

France v. Bernstein, 43 F.4th 367 (3rd Cir. 2022), involved the arbitration of a dispute between sports agents. (For a fuller description of the facts of this case, see the next section.) The court found that France (one of the agents) lied under oath and knowingly concealed critical evidence. The court ruled: "Perhaps the easiest conclusion in this case, even under a clear-and-convincing evidence standard, is that France committed fraud."⁴ See also *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293 (9th Cir. 1982), in which the court stated that fraud is a ground for vacating arbitral

award and that obtaining an award by perjured testimony constitutes fraud.

III. Not Discoverable by Due Diligence

Kaiser was a corporation that wanted to bid out construction work and Erwin was a former employee who participated in a bid-rigging scheme in *Lafarge Concrets et Etudes v. Kaiser Cement*, 791 F.2d 1334 (9th Cir. 1986). Kaiser lost an arbitration with the low bidder on the project and later tried to vacate the award based on the subsequent statements of Erwin concerning the bid-rigging. The court declined to vacate the award:

Kaiser stated that during the arbitration, it suspected that Erwin had falsified documents. Neglecting to subpoena Erwin, under these circumstances vitiates its claim that the alleged fraud was not discoverable by due diligence. For the same reason, Erwin's statements do not constitute newly discovered evidence. Newly discovered evidence does not justify vacation of an award. (Citation omitted). But even if newly discovered evidence did justify vacation of the award, Kaiser's failure to exercise due diligence and subpoena Erwin bars it from claiming this evidence to be new.⁵

Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988), involved embezzlement by an account executive. The investors brought an arbitration against the employer, Dean Witter, and the branch manager who challenged an award of punitive damages. One of the experts for the investors grossly misrepresented his credentials to the

“The *Rutas* court declined to make inquiry into corruption involved in the first two arbitrations because the arbitration panels had found insufficient evidence of corruption under a lower preponderance of the evidence standard.²”

arbitration panel and the defendants sought to have the punitive damage ruling vacated for fraud. The court vacated the award ruling that the witness' misrepresentations could not have been discovered before the hearing because the AAA rules did not provide for the exchange of a prehearing list of witness.⁶

A National Football League player who wished to move from one agent (Bernstein) to another (France) provided the backdrop to *France v. Bernstein*, 43 F.4th 367 (3d Cir. 2022). The NFL Players Association rules prohibit one agent from taking certain actions to poach the client of another agent. Bernstein alleged that France had broken these rules but France repeatedly denied this in a pre-arbitration deposition and refused to comply with document subpoenas. Lacking evidence on point, the arbitrator denied the grievance but discovery in later litigation revealed evidence of poaching. The district court declined to vacate due to lack of due diligence in failure to seek judicial enforcement of the subpoena. Noting the elaborate process necessary to enforce document subpoenas under the FAA,⁷ and the lack of time before the arbitration to do so, the court reversed and vacated the order:

Reasonable diligence does not require parties to assume the other side is lying. It piles one unfairness on another to say that Bernstein had to seek enforcement of the subpoenas shortly before an arbitration hearing, just to double-check whether France was being truthful in representing that he did not possess pertinent documents and that he was not involved in organizing (the poaching events).⁸

“Reasonable diligence does not require parties to assume the other side is lying.”

IV. Materiality of the Fraud

The court in *Bonar v Dean Witter Reynolds, Inc.*, *supra*, found the relevant witness' testimony to be material to the fraud because he argued strongly on the only issue before the panel; *i.e.* granting punitive damages against Dean Witter and the branch manager.

A fired bond trader arbitrated a variety of claims against his former employer in *Odcon Capital Group LLC v. Ackerman*, 864 F.3d 191 (2017), however, the arbitration panel awarded only his claim for unpaid wages. After the arbitration, the employer discovered that the bond trader had testified inaccurately concerning earlier FINRA investigations and sought to vacate for fraud the arbitration award of unpaid wages. The court found that the inaccurate testimony was not material to the award of unpaid wages as there was no nexus between such testimony and the award: “A holding that any untruth could serve as the basis for vacating an award regardless of its materiality is wholly inconsistent with the language of the FAA, which allows vacatur only where the award was “procured by . . . fraud.”⁹

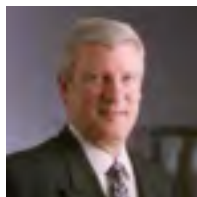
Midamerican Energy v. International Brotherhood of Electricians, 345 F.3d 616 (8th Cir. 2003), involved the em-

ployee of a liquid natural gas facility who was the only employee on duty at night and against rules, left his post for a number of hours. His story was that his wife had called and told him that his son was missing and was injured in gang activity. He was fired but sought to reverse this in an arbitration. Citing a previously unblemished record, the arbitrator ruled that the employee be reinstated but to lesser position with more supervision and that no back pay be granted. Thereafter, the employer received evidence that the employee's absence from the plant was the result of a romantic assignation rather than any danger to his son. The court ruled that this evidence was material to show fraud in light of arbitrator's comments in the order about the employee's willingness to take full responsibility for his absence from the plant:

Given these statements regarding how crucial the arbitrator felt that honesty and truthfulness were and given the fact that, if fraud is proven, the entirety of Turner's [the employee's] involvement in the arbitration process would be shown to be a sham, we conclude that the alleged fraud is material to the case at hand.¹⁰

Commentary

While § 10(a)(1) of the FAA authorizes the courts to vacate arbitration awards, the courts are reluctant to do so except under compelling circumstances. The first of such circumstances is that there be clear and convincing evidence of fraud, such as perjury. The second is to promote finality of arbitration awards, that fraud must not have been reasonably discoverable prior the arbitration award. Finally, the fraud must have a nexus to the award but need not be a “but for” nexus.



Robert Hall is an attorney, a former law firm partner, a former insurance and reinsurance executive and acts as an arbitrator of insurance and reinsurance disputes and as an expert witness. He is a veteran of over 200 arbitration panels and is certified as an arbitrator and umpire by ARIAS-US. The views expressed in this article are those of the author and do not reflect the views of his clients. Copyright by the author 2024. Hall has authored more than 100 articles and they may be viewed at his website: robertmhalladr.com.

Endnotes

- 1 Bonar v. Dean Whitter Reynolds, Inc., 35 F.2d 1378 1383 (11th Cir. 1988).
- 2 Slip op. at 26.
- 3 Slip op. at 29 – 30.
- 4 43 F.4th 367 at 378.
- 5 791 F.2d 1334 at 1339.
- 6 835 F.2d 1378 at 1384.
- 7 Debra and Robert Hall, *Issuance and Enforcement of Arbitral Subpoenas*, ARIAS-US Quarterly, Vol. 25, No. 2 at 20 (2018).
- 8 43 F.4th 367 at 380.
- 9 864 F.3d 191 at 197 (quoting 9 U.S.C. § 10(a)(1)).
- 10 345 F.3d 616 at 623.

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Enhancing Expertise and Building Connections

Highlights from the 2024 ARIAS-U.S. Spring Conference in Puerto Rico

By: Jane Mandigo and Neal Moglin

The 2024 ARIAS-U.S. Spring Conference was held at the venerable (if, at times, “under powered”) Fairmont El San Juan Hotel in Puerto Rico. Built by Pan American World Airways during its heyday, the hotel has an incredible history and retro-glam vibe that, according to the post conference surveys, attendees enjoyed.

While each day blew in a little rainstorm, there was plenty of sun for pool and beach time and the rain provided cover for anyone who wanted to hide out in the hotel’s bars or gym. Even though folks had to travel a little fur-

ther than usual to attend this year’s conference, headcount was strong with 198 delegates participating in what our “Survey Says” was a standout event.

Executive Director Larry Schiffer Kicks Off Dynamic Conference

The program kicked off (as ever) with a warm welcome from our Executive Director, Larry Schiffer. Larry’s steadfast devotion to the organization and, particularly, the quality of our educational programming was evident in this year’s

agenda. Larry pushed the committee to create an agenda that took past member feedback, and particularly requests for more dynamic and varied content to heart.

Once the program started, Larry shifted into his more visible (and often thankless) role of “cat herder in chief”—ensuring that everyone got where they needed to be, when they needed to be there and that nobody forgot the CLE sign in rules. Anyone who failed to get your CLE credits...that’s on you. Larry warned you!



Board Member Sarah Gordon with Keynote Speaker Former Governor of Puerto Rico Luis G. Fortuño

Former Governor of Puerto Rico Shares Unique Insights

Co-chair Cia Moss provided an expanded welcome to thank attendees for their support and enthusiasm for the Puerto Rico location and to highlight the thematic elements of the Conference: Global Currents-Expanding Arbitration Expertise, Knowledge and Connections!

The Puerto Rico location inspired fresh takes and a more global approach to industry problems, consistent with this year's ARIAS theme: Enhancing the Core, Expanding the Reach.

As an homage to the beautiful Puerto Rico location and its people, the Conference began with a special Keynote Speaker, former Governor of Puerto Rico and US Representative, Luis G. Fortuno/Reed Smith. Following some brief and insightful remarks regarding the regulatory and business environ-

ment in Puerto Rico, Governor Fortuno sat down for a "fireside chat" with his friend and former partner, Sarah Gordon/Stephoe.

Governor Fortuno answered a wide range of questions about his experiences on and off the island, as a Governor,

Congressperson and outside lawyer. Governor Fortuno's charismatic style and pride in the island provided a great opening energy to the conference.

Panel Discussion Addresses What Arbitrators Want

Immediately after Governor Fortuno's fireside chat, we moved into our first plenary session of the conference: A Panel discussion dealing with a question of great importance to most delegates: "What Arbitrators Want."

As with many of this year's conference presentations, this Panel was developed in response to feedback detailing the sorts of topics members want us to address.

Elizabeth Mazzocco/ Foley & Lardner moderated the lively and informative discussion between the panelists: Andrew Maneval/ Chesham Consulting, Ann Field/AON and Eric Kobrick/AIG.



Christine Gurevitz, Mark Gurevitz and Board Member Seema Misra

The panelists agreed that the most important thing they want to see from the counsel, client representatives and

Finally, the arbitrators stressed the importance of submitting clear, non-personalized/even-handed briefs for even

Jack Baughman Gives Presentation on... Presentations

After a short break, Jack Baughman/Baughman Kroup Bossee, captivated the audience with a rapid-fire tour de force presentation about...delivering captivating presentations.

Jack's "one man" session entitled "The Art of Persuasion" drew upon psychological research and analysis into how people make decisions. In the process Jack "busted" a number of myths and traditional assumptions about how what we say and how we say it impacts audiences—sometimes in very unintended ways. Jack deconstructed the why and how of storytelling and discussed common biases that affect decision-making, including the impact of "anchoring."

Jack was a dynamic and compelling speaker with valuable lessons to share.



Board Members Alysa Wakin, Patrica Fox, Neal Moglin and Marc Abrams

witnesses who appear before them is impeccable knowledge of the cases they are presenting. The panel was unanimous in noting that this is the key to establishing credibility.

The panel was likewise in agreement that while they did not have strong preferences for in person (vs. remote or even written) witness testimony, they did want to see evidence presented in an efficient and well organized way that explained how events relevant to a dispute unfolded.

The arbitrators agreed that they were always happy when one (or both) parties provided them early on with a chronologically organized compendium of key documents that they could use to build their understanding of the relevant facts—noting that they will often build upon these chronologies as the case develops and use them as reference points.

the most contentious topics and motions, noting that what they want most of all are submissions that enhance their ability to assess disputed issues and, ultimately, the merits of the case.



President and Conference Co-Chair Joshua Schwartz and Jim Fitzgerald

We were all 'persuaded' by Jack's astute and entertaining program.

Skits Highlight U.S. and U.K. relationship

Not to be outdone, the final general session of the first day, gave us a glimpse into a few untapped theatrical careers.

The Session "Two Nations Separated by a Common Language-Arbitration is No Exception" was structured as a series of boundary pushing "skits" designed to highlight the differences between how arbitration Panels are formed under U.S. and U.K. procedural rules and guidelines.

The session was 'directed by' Susie Wakefield/Shoosmiths and showcased the litigation and acting talents of: Jonathan Sacher/ Bryan Cave, Christine Russell/Chubb Bermuda, Diedre Johnson/Mintz, Howard Denbin (US Arbitrator) and Mark Chudleigh/Kennedys (UK Arbitrator).

Award for best "fake phone/staying committed to a bit" goes to Howard Denbin; and award for best ad lib goes to Jonathan Sacher. While light in presentation, this session was heavy in content and provided some very clear points of contrast between how U.S. and U.K. practitioners approach the business of resolving reinsurance disputes.

30th Anniversary Gala Showcases ARIAS culture

Day 1 ended with the much anticipated 30th Anniversary Celebration Gala.



Chair Marc Abrams at the 30th Anniversary Gala

While we (and more specifically Josh Schwartz/Chubb) had planned this to be a poolside event complete with a pig roast, the weather forced a last minute "change of venue" to the hotel's ballroom where everyone enjoyed the food, music and camaraderie.

A strong element of the ARIAS culture is the membership's willingness to welcome new attendees and the event provided a perfect chance to spend time with old friends and get to know new people.

Guests Share Unfiltered View of Puerto Rico's Government and Business Landscape

Day 2 began with another homage to the beautiful Puerto Rico location.

Jonathan Hacker/O'Melveny & Myers hosted a discussion panel with offerings on law, economics, and risk in Puerto Rico. Guests included Antonio Ramirez/McConnell Valdez, Ruben N.

Gely/International Insurers Consulting Group, and Melba Acosta/ McConnell Valdes.

Antonio Ramirez has worked extensively in international insurance and reinsurance relations and is a board member of the Puerto Rico International Insurers Association.

Ruben Gely formerly held numerous government posts affiliated with the Commissioner of Insurance and other insurance-related roles and Melba Acosta is, among other things, the former President of the Government Development Bank of Puerto Rico.

All three of these guests gave their unfiltered view of how the governmental and business communities have dealt with the natural catastrophes, economic disruptions and political challenges that have impacted Puerto Rico over the past several decades and how, despite these challenges, Puerto Rico has evolved into an attractive hub for international insurers.



Breakout Session

Breakout Sessions, Chosen Activities offer Chances for Authentic Conversations

Following this session attendees “broke out” for a series of smaller, content driven sessions featuring a variety of topics including:

- Harnessing Data and Analytical Tools for Large Complex Economic Damages with Simon Oddy/ BakerTilly, Brendan Gray/ BakerTilly and Eileen Sorabella/ Arch Re;
- Hot Off the Presses: Recent COVID UK, Life and Voluntary Payments Doctrine Cases with Bruce Friedman/Gallo Vitucci Klar, Sherminah Jones/Troutman Pepper and Daryn Rush/ O’Melveny & Myers;
- Hot Spots and Hot Policies: Political Risk Insurance in Today’s Volatile World with James Hosking/Chaffetz Lindsey and Carolyn Thomas/ AON; and

- How Should Arbitrator’s Address Potential For Settlement With the Parties with David W. Ichel/X-Dispute, Elaine A. Caprio/Caprio Consulting, Carlos A. Romero/Post & Romero and Silvia Marroquin/Chaffetz Lindsey.

Of course, the Member Services Committee held its breakout session Networking Event led by Michael Robles/ Husch Black and Leslie Davis/Troutman Pepper.

Following the breakouts, conference participants headed off to their chosen activities.

Some competed in the Enstar sponsored Pickleball tournament; some joined the Old San Juan tour; some joined the rainforest “hike”/bus ride; and some took advantage of the break in the weather to swim, sun or work in the shade of the hotel’s beautiful landscaping (complete with a towering 300-year-old Banyan tree).

Panel Discusses Complex Claims in Latin America

The final day of the conference was, as ever, jam packed. We began with a Panel Discussion on Handling Complex Claims in Latin America.



Daryn Rush, Bruce Friedman and Sherminah Jones

The panelists, Emmanuel Munoz/Chubb, Francisco Colon/Colon Ramirez and Lorena Avila/Kennedys, discussed the unique features of the Puerto Rican legal system. They also spoke about how hot button issues like the interpretation of exclusions, challenging adjuster reports, and the issuance of reservation of rights letters can impact the handling of large commercial claims in Puerto Rico and the Lat-Am region generally.

Session Addresses Evolution of Public Nuisance

The next session featured a call to education and action: "What a Nuisance!"

This session provided critical information on the history and evolution of Public Nuisance as a casualty cause of action.

The session was moderated by Jane Mandigo/Swiss Re for panelists: Troy Schuman/Enstar, Robin Dusek/Cohn Baughman and Adam Fleischer/Bates Carey.

The program stressed the need to understand adverse implications and explained that this tort has been pled in a wide variety of diverse areas ranging from tobacco to opioids. The panel explained the growing importance of this issue to the industry and the need for us all to understand the possible implications of the further expansion of this tort theory.

Final Session Deals with Ethics

The final session of the day and conference dealt with ethics and, more point-



Pickleball Sponsored by Enstar

edly, whether ARIAS can and should consider the adoption of an enforcement mechanism for ethical violations committed by members (arbitrators, company representatives or lawyers).

The session began with Neal Moglin/Foley & Lardner walking attendees through the results of the ARIAS Ethics Survey and specifically including the fact that an overwhelming majority of respondents believe ARIAS should, at least consider, establishing a formal ethical grievance and sanctioning body and procedure. From there we moved onto a roundtable discussion chaired by Alysa Wakin/Odyssey and featuring Suman Chakraborty/Mintz, Susan Mack/Arbitrator and Larry Greengrass/Arbitrator as panelists.

The roundtable highlighted a number of the more disturbing observations made by participants to the survey regarding unethical behavior they had seen from ARIAS members and discussed some

of the more common themes present in respondents' comments.

Given respondents' focus on bias and the competing concern about the increasing weaponization of the disqualification process, Larry Greengrass walked attendees through a proposal he had developed which would set objective ground rules for when an arbitrator or umpire must decline to take an assignment or resign from service on a Panel.

The session ended with a lively audience comment session and the promise to continue the discussion via a series of Town Hall meetings to be led by the ethics committee.

Everyone Who Made Conference Possible Deserves Thanks

As Co-Chairs we thank the sponsors, presenters, administrators, and

members who attended the Spring 2024 Conference.

We especially appreciate the investment of time to produce valuable content. A tremendous amount of effort goes into presenting an ARIAS session and that work shows when you are LIVE at the conference. We also appreciate the enthusiasm reflected in the broad group of RFP's that were offered for the Spring program. We rely heavily on member suggestions in developing the agenda. This time, we had so many suggestions, we had to decline a number that we hope are re-proposed for future conferences. What a great problem to have!

We also want to thank Angela Ford Smith, Jamil Rawls, and Fawn O'Brien of DPS for helping to organize the entire event from start to finish and for reminding us of deadlines and to-dos.



Pickleball Sponsored by Enstar

They are the energy that keeps the planning machine, and the organization as a whole moving forward.

Don't forget the Fall Conference coming up November 14-15, 2024 at the New York Hilton Midtown in New York City. We'll see you there!

Calling All Authors

The *Quarterly* is seeking article submissions for upcoming issues. Don't let your thought leadership languish. Leverage your blogs, client alerts and internal memos into an article for the *Quarterly*. ARIAS Committee articles and updates are needed as well. Don't delay. See your name in print in 2024.

Visit www.arias-us.org/publications/ to find information on submitting for the 2024 issues.





Richard "Rich" Dodge, Jr., passes away at 54

G. Richard "Rich" Dodge, Jr., storyteller, writer and attorney, passed away at home on April 4, 2024 from complications due to Amyotrophic Lateral Sclerosis (ALS). He was 54.

Rich was born on June 6, 1969 in Portland, OR, the eldest of three children. His rural upbringing in Portland; Saginaw, MI; Adams, NY; Cincinnatus, NY; and Hampden, ME provided him with a childhood full of outdoor adventures and later, days of hunting and fishing. He attended church regularly with his family and was a member of the Whitetail Lodge in Willet, NY.

Early on, Rich developed an interest in other cultures. While attending Drew University, he studied anthropology and played soccer. It was at Drew where he would make lifelong friends and meet his eventual wife, Athena Robles.

In 1990, Rich spent a semester abroad at The School for International Training in Harare, Zimbabwe. This experience and the tragic loss of his brother ignited his deep commitment to equality and the importance of seeking out experiences and relationships outside of his comfort zone. He was known for his sometimes incredulous stories and his penchant for storytelling often brought people together.

After completing law school at Georgetown University Law Center, he began a successful career as a litigator, working with compassion and a strong drive to help others. Sonia R. Martin, CEO of Dentons US, where Rich was a partner, described him as a "special soul" and a top practitioner in the national insurance bar, who was best known for his extensive work on behalf of clients in the defense of high-profile and complex cases including class actions and securities fraud matters.

Rich was an avid fan of the New York Jets, the Mets and Manchester City, as well as live music. He would pass on his passion for soccer and sports to his son, proudly wearing the mantle of soccer dad. He is survived by his wife, Athena Robles, and son, George Lucky Ramon Dodge; his sister, Christy (Scott Matthew Hargash) Michelle Dodge, Ph.D., and nephew, Scott Daniel Dodge Hargash; and his parents, Lois Jean Rathbone Dodge and George Richard Dodge. He is predeceased by a brother, Ramon Daniel Dodge, in 1991 and his beloved canine companion, Shea.

The family is grateful to the medical teams and caregivers who worked around the clock to provide Rich with comfort and treatment, especially in his final days, and to the relatives, friends, and neighbors who gave us their time, prayers and support. Memorial contributions can be made in his honor to the ALS Association.



Charles W. Havens III

"Charley" passes away at 88

Charles W. Havens III "Charley" passed away peacefully on April 12, 2024 in Vero Beach, Florida. He was 88 years old.

Charley was born in Baltimore to Charles W. Havens II and Jesse Mae (Money) Havens. He is survived by his wife of 67 years, Lucille (Bowman) Havens; son Charles W. Havens IV (Marilyn), and daughter Jessica Madalin Havens; and brother Richard G. Havens (Anne).

After a stellar football career at Westminster Maryland High School, Charley arrived at Franklin & Marshall College in Lancaster, PA and played three seasons for the Diplomats. As testament to his athletic abilities, he was inducted into the F&M Hall of Fame in 2018.

Charley received his law degree from the University of Virginia in 1961. He was a member of the Law Review and graduated at the top of his class. He began his legal career at Covington & Burling. In 1966, Charley became the Special Assistant to the General Counsel of the Department of Defense, working tirelessly for the Families of Vietnam POW/MIA.

In 1970, Charley became General Counsel and later President of the Reinsurance Association of America, thus starting his impressive career in insurance and reinsurance. He joined the international law firm of LeBoeuf Lamb Greene & MacRae in 1981 and served several years on the Executive Committee and as Vice Chairman. He was a beloved Managing Partner of the Washington, DC office. He was a demanding task master with high work standards, but with a twinkle in his eye and a wicked sense of humor, he both inspired and delighted his colleagues and launched the careers of many young lawyers.

Charley was a founding member of the AIDA Reinsurance and Insurance Arbitration Society (ARIAS) and a longtime member of the Federation of Insurance Defense and Corporate Counsel. He was a member of Kenwood Country Club, the Metropolitan Club, the National United Methodist Church (Washington, DC) and Christ by the Sea United Methodist Church (Vero Beach).

Donations in Charley's memory can be made to the Franklin & Marshall College Diplomat Athletic Club at <https://go.fandm.edu/give>.



Herbert Palmberger passes away at 78

Dr. Herbert Palmberger, former ARIAS-US member and certified arbitrator, died May 28, 2024. He was 78.

Born May 29 1945, Palmberger had a long career, first at a number of renowned companies, then in law firms. His specialties were industrial insurance and reinsurance. Palmberger leaves behind his wife, four daughters and five grandchildren.



2025 SPRING CONFERENCE

April 30 - May 2, 2025

The Biltmore, Coral Gables, FL

Newly Certified Arbitrators



Mike DeKoning

Mike DeKoning is an actuary with more than 35 years of experience in the Life and A&H Reinsurance and insurance business. He has managed many arbitration proceedings from the business side and acted as a fact witness in a Life Reinsurance arbitration.

DeKoning has deep experience in individual and group life; disability; long-term care; and annuity lines of business; from both an insurer and reinsurer perspective, across multiple geographies, regulatory and capital management frameworks.

DeKoning's experience covers pricing, underwriting, treaty, administrative and operational management aspects of Life and A&H reinsurance from both the ceding company and reinsurer perspective.



John F. Finston

John Finston is currently the principal member of Finston Strategic Consulting LLC focusing on insurance regulatory and transactional issues and expert witness and mediation and arbitration assignments. Finston is also a vice president, legal strategy, for CSAA Insurance Group, advising the CEO and Chief Legal Officer.

Finston career spans over 45 years in both private practice and public service. He began his career at LeBoeuf, Lamb, Greene & MacRae, focusing on insurance and reinsurance transactions, reinsurance disputes and insurance insolvency, regulatory and ratemaking matters. He transitioned to Dentons US, where he had a similar practice and was chair of the firm's Insurance Transaction and Regulatory Practice Group. John was also a Partner with Drinker Biddle & Reath and senior counsel with McDermott Will & Emery.

In addition to practicing law, Finston has had three positions in the public sector. His first position was with the California Department of Insurance where he served as Deputy Commissioner and General Counsel. John was active with the NAIC, as well, where he served as chair of the Reinsurance Task Force and chair of the Receivership Task Force. He was on the negotiation team for the US/EU covered agreement, as the designated reinsurance expert for the state regulatory team.

Finston also served as the Executive Deputy Superintendent for Insurance at the New York Department of Financial Services from October 2022 through December 2023. In addition, he has served on the Board of Directors of the Federal Crop Insurance Corporation from 2013 to 2021, where he was the designated reinsurance and regulatory expert on the board.

**Thomas Freitas**

Thomas Freitas is a retired CEO of Tindall Associates Inc, better known as TAI, which provides software and services to manage Life Reinsurance for direct writers and reinsurers. TAI's client base includes the largest North American insurers, reinsurers as well as several international insurers. Freitas focus at TAI was managing the financials, developing growth strategies, and creating a strategic framework to evolve the technology supporting the TAI business. During his tenure as CEO, Freitas was able to grow revenue by 50 percent. At the time of his retirement in 2022, TAI was wholly owned by RGA.

After serving in the US Army, Freitas earned a B.S. degree from Boston College and an MBA from Fordham University, where he was selected for the Senator Sam Nunn Award in Business Ethics.

Freitas' earlier reinsurance career focused on operations and information technology at Transamerica Reinsurance and later SCOR. As a senior officer in both organizations, his responsibilities included creating systems and processes that would streamline reinsurance processing and adhere to contractual obligations. This spanned the entire reinsurance deal lifecycle from treaty negotiation, data exchange, IT systems, risk management, inforce management and operational processing. A large focus of Freitas' time was resolving operational disputes both from the direct clients and the retrocessionaires.

Freitas is looking forward to providing arbitration services for the industry.

**Michael Harwood**

After more than 40 years as an executive in the life insurance industry, Michael Harwood, FSA, MAAA, now runs Harwood Actuarial, LLC focusing on Actuarial Consulting, Board Representation, and Arbitrations.

Previously, Harwood was senior vice-president and chief actuary for MetLife (10 years) and Corebridge (8 years), responsible for policyholder reserves, experience studies, liability projections, policyholder dividends, and reinsurance. Harwood has served on the Boards of multiple life insurance subsidiaries in the US and Bermuda.

Harwood has held roles as illustration actuary, closed block actuary, and individual life product development actuary (including being responsible for policyholder contracts and sales illustrations). Harwood led the actuarial phases of MetLife's demutualization in 2000.

For decades, Harwood acted regularly as a company representative, fact witness, or expert in litigation involving reinsurance, closed blocks, demutualization, life insurance pricing and product development, COIs, policyholder discrimination, and sales practices.



Mark Spevacek

Mark Spevacek retired after a lengthy career as a life insurance actuary. Early in his career he had experience pricing UL and annuities. He worked for a reinsurer both assuming and retroceding individual life business. Spevacek spent the last 31 years working for Primerica Financial Services with responsibilities which included crucial aspects (including pricing, treaty negotiation and interpretation) of managing very large blocks of ceded reinsurance. His experience includes both US and Canadian business reinsured with US and Canadian reinsurers as well as to international overseas companies.

Spevacek has in-depth knowledge of generating experience reports (mortality & persistency) for level premium term insurance during both the ILP and PLT periods and the impact on direct and reinsurance premiums.

Spevacek also has an extensive background working in US GAAP, Statutory & Tax valuation and financial reporting as well as experience with Canadian valuation and financial reporting. He is a Fellow in the Society of Actuaries and a Member of the American Academy of Actuaries.

Mike currently resides in Houston, Texas.



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November 14-15

New York Hilton Midtown

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