ARIAS U.S.

QUARTERLY

# Roundtable: Arbitration of Life Reinsurance Disputes

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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.

Happy Summer. As we get ready for the Fall Conference and Annual Meeting in November, this issue of the Quarterly gives you a chance to relive and reminisce about the 2025 Spring Conference at The Biltmore in Coral Gables. Remember, next Spring we are in Nashville!

But before you get to the 2025 Spring Conference Recap, we have several excellent articles for you. First up is an article based on a group discussion between experienced life reinsurance professionals. Titled, "Roundtable: Arbitration of Life Reinsurance Disputes," Thomas Bush, from Smith Gambrell & Russell, LLP, moderates this engaging discussion about the development and challenges associated with life reinsurance disputes between Mark Gurevitz (MG Arbitrator and Mediator Services LLC), Susan Mack (Law Offices of Susan E. Mack, P.A.), David Raim (Alabama Life Reinsurance Company/ Raim Re, LLC) and Thomas Zurek (Arent Fox Schiff).

Next is an article with key insights about contract interpretation in the reinsurance context. In "Applying Principles of Contract Interpretation to Reinsurance Disputes," by Peter B. Steffen and Carly M. Allen from Smith Gambrell & Russell LLP, the authors explain how legal principles of contract interpretation are used in reinsurance disputes.

Ever hear of a Polycrisis? Neither did I. But industry visionary Pete Thomas from Cobblestone Consulting, LLC has, and he explains how insurance and

reinsurance losses and Polycrisis mix in his article "Polycrisis Notes: Why Navigating Multiple Risks is Essential."

Frank DeMento and Bryan McCarthy from Trans Re provide another important article about an emerging risk many companies are dealing with. In "Perfluoroalkyl and Polyfluoroalkyl (PFAS) Could Lead To Mass Litigation: The Case for Re/Insurance Exclusions," Frank and Bryan tell us why losses caused by PFAS may need to be excluded from insurance and reinsurance contracts.

The next article is a follow-up to a presentation made at the 2024 Spring Conference. Titled, "Is There an Arbitrator Role in Addressing Settlement or Mediation with the Parties?," David W. Ichel (X-Dispute LLC), Elaine A. Caprio (Caprio Consulting and Coaching LLC), Silvia E. Marroquin (Chaffetz Lindsey LLP) and Carlos A. Romero (Post & Romero) discuss the role arbitrators may have in encouraging settlement or mediation.

The last article is a short survey of case-law that ARIAS members may find very interesting. Originally prepared for an Ethics Committee presentation, Suman Chakraborty from Mintz, Levin, Cohn. Ferris, Glovsky & Popeo, P.C. has authored "The Use of the ARIAS·U.S. Code of Conduct in Case Law." Now we know the courts love ARIAS.

This issue also contains the first two Ethics Advisory Opinions issued by the Ethics Committee. Your submissions will result in future Ethics Advisory Opinions.

Finally, we have a new Certified Arbitrator to congratulate.

Please enjoy this issue of the Quarterly. Thank you to our many authors. Please keep your articles coming. The deadlines and requirements are on the ARIAS website under Publications. We welcome ARIAS 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 are on a panel at the Fall Conference, or have made a program proposal that was not accepted, please turn your presentation or proposal into an article. It is easy to leverage your thought leadership and publish an article in the Quarterly.

**Larry P. Schiffer**
Editor

# Roundtable: Arbitration of Life Reinsurance Disputes

**Moderator: Thomas F. Bush**
**Panel: Mark S. Gurevitz, Susan E. Mack, David Raim, Thomas M. Zurek**

**Bush:** Thank you all for participating in this roundtable. Until about twenty years ago, arbitrations in the life reinsurance area were actually quite rare. Since then, we have seen quite a number of them, most involving Yearly Renewable Term ("YRT") rate increases, but recently other types of disputes as well.

So, we thought it would be helpful to develop some background on these disputes for the ARIAS·U.S. Quarterly. We have invited four experienced arbitrators in life reinsurance cases: Susan Mack, David Raim, Tom Zurek, and Mark Gurevitz, to address some of these issues and to hopefully educate the ARIAS·U.S. readership about this new and important development.

So with that, let me just start with the first question, which is, why are we seeing more life reinsurance disputes today? Susan you want to take that one first?

**Mack:** I do. We're not only seeing more life reinsurance disputes today, but they're more likely to actually proceed to final hearing on the merits. First, that's because of the long-term nature of the reinsured policy, which can be in effect for the entire lifetime of the insured and second, because of regulatory constraints that prohibit a life reinsurer from terminating the reinsurance treaties for anything but the nonpayment of premium.

In short, life reinsurance treaties can remain in effect for a long, long time, and masses of long-term life policies can be ceded to those treaties. That means that the dollars get very big very quickly, and there is motivation to arbitrate to conclusion.

Now, for many years life insurance companies and their reinsurers were more collegial than their counterparts on the property/casualty side of the industry. But that seemed to stop in the late 1990s, with the advent of workers' compensation carve-out spiral issues and also universal life policies characterized by flexible premium payments. Because there was flexible premium, sometimes the owners of those policies sold them to investors, so we ended up with stranger-owned life insurance or investor-owned life insurance. Just enough was paid by the investors to keep the policies in place, leading to questions of insurable interest.

So, basically with that and with market consolidation and new reinsurer entries, we were off and running, and the gloves were off between life insurers and their reinsurers.

**Bush:** Can anyone add to that?

**Gurevitz:** I would add that I think we are seeing more disputes on the life side for the same reason we saw more disputes on the property casualty side. As Susan mentioned, the dollars are bigger now and the business is simply not as profitable due to the same factors that influence property/casualty.

But I would say, by way of background, I think that there was a lack of appreciation in underwriting these risks for the magnitude of the exposures that ultimately developed in a gross sense.

And secondly, despite all of the stochastic studies that were performed, there was a failure to appreciate all of the factors that could place strains on the business, not just longevity but other market factors, some of them include lapse, performance of the stock market, adequacy of investments and a host of others.

**Zurek:** I think also what started out with YRT rate increases ended up snowballing. I agree, obviously with what Mark and Susan have said, but I think what happened as the YRT rate increases came in, that companies got more used to the idea of arbitrating, and it just resulted in greater consideration of the ability to resolve disputes by arbitration rather than to just let them fester or take their lumps.

**Gurevitz:** And on that point—and I do agree with everything that has been said so far—we have to focus on another aspect of this and that is the nature of the reinsurance agreements on the life side.

The nature of the agreements is much more complicated because they were highly negotiated, and these highly negotiated terms, when you're looking at a life reinsurance agreement, they have the tendency to be very specific with regard to contractual terms. Both sides valued their interpretation of the language. Because they valued their interpretation of the language when a dispute arises, it becomes very personal to the people who have been involved. And I think that as a result, a lot of these cases that I have been involved in, really turn on the question of what is the language, what is the intent and are there embedded ambiguities in the contract.

**Bush:** One of the factors mentioned was industry consolidation. How has consolidation affected the development of life reinsurance disputes?

**Zurek:** By consolidation, I think we're talking about, both consolidation of companies on the ceding side and on the reinsurer side. As a result, there are fewer companies, and there are a lot of books and business that have been bought over the years.

And I have seen, gosh, a number of cases, where that is the core issue that we have to deal with.

The problem there is that you come to a realization that the people who were involved in making these deals, years and years and years ago, are not around anymore. So, what you end up with is the language of a complicated contract with no one to be able to provide any real insight into the dynamic or dimension of the agreements, and I think that the consolidation has encouraged then a need to do an examination of language with particularity.

**Mack:** What I have also seen is with the consolidation and the resulting changes—both as to the life ceding companies and their life reinsurers—records can be lost and the original understandings can therefore either be purposely jettisoned or just forgotten because the same people are not there.

So, for example, in a YRT rate increase dispute the original pricing file is often in issue. That becomes a real problem if the reinsurer cannot find its original pricing file.

**Gurevitz:** I agree with Tom. Consolidation has affected the number of disputes in the sense that when a company acquires either a book of business or an entire company, there are, lots of times, issues related to the composition of the book that was acquired, and there are issues of mischaracterization or misrepresentation. In other cases where lines of business in the context of consolidation are sold off or spun off, there may be issues where the seller ultimately retains some risk over a certain level and there may be disputes in those cases as to the administration of that book and whether it increased the risk of exposure to the level of business that was retained.

**Bush:** Do you expect that YRT arbitrations will continue, increase, or fall away?

**Mack:** In my opinion we're about 85 percent done with the YRT rate increase arbitrations. My own personal involvement as a panelist in YRT rate increase arbitrations started in 2010, and the bulk of the arbitrations took place from then to 2022. I think they're now starting to taper off. The treaties in issue seem to have been executed from the late 1980s to the early to mid-2000s. Basically the original language leading to the dispute was tightened up by about 2010. So that's where we are.

**Raim:** I would say though, that at some point—and we may not be there yet—we may well have a second round of YRT rate increase cases. If the reinsurers were allowed to raise the rates and those rates turned out still to result in losses or experience worse than expected, there is still the likelihood that reinsurers will push for another round of rate increases. And so we can see additional YRT rate arbitrations in the future, depending upon how the first round of rate increases fare.

**Gurevitz:** I totally agree with David on that. I think there is certainly a great likelihood of that to be expected, to the extent that the original business was not recaptured.

**Zurek:** I can't even at this point think of how many cases that I have had over the last ten years, but it's quite a few and I have had quite a few with the people on this panel.

And I just have been struggling to think whether any one of the cases that didn't result in a recapture had some finality to it that, that the panel or the parties would essentially acknowledge. I can't think of any. They all have the capacity to come back and when you're talking about the later stages of the tail on this business, the later stages are going to get really expensive and when they get really expensive, I believe that they're going to be coming back.

**Mack:** Let me jump in here, I don't know how well versed in life reinsurance all the ARIAS·U.S. Quarterly readers are, so let's talk about what recapture actually is.

When there is a disputed premium article or rate article in the YRT treaty that is the subject of a YRT rate dispute arbitration, there is usually a treaty provision stating that if the reinsurer succeeds in implementing a rate increase, the ceding company is able to take back the reinsured policies ceded under that treaty. That's what's called recapture.

So there's been a lot said about YRT rate disputes at ARIAS·U.S. conferences and at other venues, but typically we're talking about a very heated, principled dispute between the reinsurer and ceding company about the meaning of reinsurance contract language pertaining to rates. This argument harks back to what Tom said with reference to life reinsurance disputes being very personal. This is one of the most personal.

Ceding companies traditionally have maintained that they purchased yearly renewable term, YRT, reinsurance – in life terms, non-proportionable reinsurance – on the premise that rates would not be increased. Now, when I was SVP, General Counsel and Chief Treaty Officer at Transamerica Reinsurance from 1998-2006, if we had approached ceding companies to sell YRT reinsurance and represented that we had a future intent to raise rates on YRT treaties, we simply would not have sold any business during that time period. That's because there was a soft market at that time. There were a lot of life reinsurers circulating for premium dollars ceded by large life companies pursuant to reinsurance treaties. So it is arguable that to get into a ceding company's select pool of reinsurers, certain reinsurers priced too low during that period, and some of the later profitability problems were due to intentional pricing mishaps.

Now, on the other side, reinsurers will refute this by maintaining that the language of the treaties can be viewed as plainly allowing rate increases. Reinsurers will also shy away from the concept of pricing mishaps, saying that the desired rate increase is to compensate for deteriorating mortality trends.

But because this is such a personal issue, only a couple of reinsurers cur-

rently are arbitrating YRT rate disputes right now. What happens instead with life ceding companies and reinsurers with ongoing marketing relationships, is that they try to work it out amongst themselves on an entire portfolio basis. Now, as relationships deteriorate—and Tom and David are certainly correct that relationships can end—future disputes and arbitration will proliferate.

**Bush:** Going forward, what other types of disputes do you see developing other than YRT?

**Zurek:** Well, I think it's pretty clear that there is a large group of very expensive cases that are out there in the long-term care arena and these long-term care cases, when you think about the tail on that business and the expense in that business as the years go on, all of the sympathies that the companies had for this business when it was written, have disappeared. And now what they're doing is they're looking at it in terms of the fact that the long-term care exposure is extraordinary and since it's extraordinary, it will be dealt with, probably not by the parties being able to work out their dispute, but rather by having arbitration panels work out their dispute.

**Raim:** I also think generally underwriting disputes will continue to increase as Susan was talking about. There were a lot of pressures on a lot of different sides to write business during the prior decades, whether it was pressure on ceding companies from agents or competition for business, or whether there were pressures for reinsurers to lower rates. I don't think the underwriting guidelines are a hundred percent clear as to how business was supposed to be written, and I have seen these disputes and I think we will see more underwriting disputes in the future on stuff like business.

**Gurevitz:** I think that's right. I think there will always be rating issues concerning whether a risk was placed in proper tiers when written or subject to an exception. And these could be one off or they could apply to an entire book of business. I think those disputes are going to occur in the future as they have occurred in the past. But I think that one of the main areas of potential dispute for the future, in my view, is related to security as it applies to credit for reinsurance purposes.

The life industry is becoming even more capital intensive than it has been and those issues have appeared in many areas, annuities, and long-term care, as Tom was referring to, and I think the capital challenges presented by level term life and annuity guarantees are only part of the challenges that the industry faces today.

> “The life industry is becoming even more capital intensive than it has been…”

There's an increasing involvement of private equity firms and offshore reinsurers that has resulted in increased scrutiny from regulators right now. These issues include the nature of the assets securing their exposures, the level of assets needed to secure credit for reinsurance, how those exposures are calculated, and what standards are being applied by the regulators. I think as US and other regulators look more deeply into these issues, disputes are likely to arise as to whether the security provisions of these cross border reinsurance arrangements will be sufficiently robust and flexible to respond to demands for increased security under the enhanced capital adequacy testing, which I think we're likely to see.

**Mack:** There are other disputes that always seem to percolate. Again, from 1998-2006, I was the Chief Claims Officer of Transamerica Re, then a leading market reinsurer. Accordingly, I have always tended to see life reinsurance claim disputes. Basically the disputes have to do with whether the claims were appropriately handled under the reinsured life policies, whether reinsurance indemnification can properly be had under the respective treaty wordings, or whether there's any reinsured extra contractual exposure under the respective treaty.

Now, two other issues that are percolating as fodder for disputes are the meanings of recapture terms and the jumbo limit terms, constituting unique features of life reinsurance treaties. As I

mentioned, recapture refers to the ability of the ceding company to take back reinsured risks. The related disputes arise because there's disagreement as to whether the circumstances specified in the treaty for recapture have occurred and how the recapture amount should be calculated.

Jumbo limit refers to a life reinsurance treaty feature, whereby the issued and the applied for life insurance for a given individual cannot exceed a stated amount. For jumbo limits, one needs to understand that in life underwriting, you have two components, namely medical underwriting and financial underwriting.

On the financial side, for example, more life insurance can be purchased by a CEO than a garage mechanic, and there are limits as to how much insurance overall can be in force for a reinsurer to accept that individual. Disputes occur concerning the definition of "applied for" coverage, when the "applied for" coverage should be calculated, and how the overall jumbo limit should be calculated.

**Bush:** Custom and usage evidence, what are your views on their role in life reinsurance arbitrations?

**Zurek:** Well, it is an area that I have been very concerned about because it seems to pop up in virtually every situation that I have been involved in in arbitrations. I work off a basic premise, and the basic premise is this: If in fact you have an agreement among the parties that the contract that's under examination is not ambiguous, and it's astounding to me that virtually every case I've had, everybody is very proud of their document, that they're defending either way, and that there's not any ambiguity in this contract. So, both sides assume that there is no ambiguity and then they proceed to attempt to utilize extrinsic evidence. I've always had a bit of a problem with that because going back to law school days and when I was trying a lot of cases, extrinsic evidence in contract cases would come in, if in fact there were issues of ambiguity. And so the panels have this tendency, then, to take an approach that suggests that because this is an honorable engagement, we'll take everything in. I have a bit of a problem with that because if in fact we have a straightforward contract that the parties agreed is not ambiguous, I have a hard time then suggesting that we can look at the full range of potential extrinsic evidence.

I think that we have to be mindful of the fact that these contracts were highly negotiated, well negotiated, and have been in place for a long time. So, I do have some questions as to utilization of custom and practice and other extrinsic evidence.

**Raim:** I think, Tom, as much as both parties may think that their contracts are unambiguous, the panel may not necessarily agree with that.

**Zurek:** I understand.

**Raim:** And so the panel may well be interested in custom and practice evidence to help fill the holes that neither party thinks exists.

**Gurevitz:** That's always true, and I think to some extent the issue that we're talking about depends on the timeframe in which the contract is written. I think, at least from my personal experience, that life reinsurance contracts more closely resembled property/casualty reinsurance treaties back in time.

I would say in about 2000 I saw that begin to change and reinsurance contracts were highly negotiated, as Tom said, and began to look more like, in my mind, securities offerings. They were much more complex and dealt much more with financial issues than they ever had before, and that created, in my mind, a question as to whether companies wanted to move away from the traditional reinsurance concept that we were talking about, custom and practice and historical views of the world, and view life reinsurance contracts more as a financial transaction that you would see in the securities arena.

**Mack:** I couldn't agree with Mark Gurevitz more, and I have an explanation as to why that happened.

Prior to the late 1990s, actuaries were responsible for writing the life reinsurance treaties. They didn't have legal training, so certain things that Mark and I would look to in drafting in either a property/casualty reinsurance contract or life/health reinsurance contract are simply missing.

For example, prior to the year 2000, only very infrequently is a definitions article included in a life reinsurance treaty. The actuaries who were the people who purchased and sold the treaty knew what it meant, but they didn't bother to memorialize put that for future generations. As attorneys were hired and the responsibility for drafting the treaty shifted to either a contract wording-specific or law-specific

department, the treaties became much easier to comprehend.

Now, I will say, Tom must be in different arbitrations than I am, because it's often that one party says, the wording is plain on its face, it's clear and unambiguous, it's completely integrated because there's an entire agreement clause. And the other party says, no, these are terms of art, we can introduce custom and practice to illuminate terms of art.

A great example of that in the YRT rate increase context is the term, "class of business." Now, to me as a life reinsurance professional from the direct or life insurance perspective, "class of business" means either permanent or term insurance. From the reinsurance perspective, "class of business" means either proportional reinsurance, which is coinsurance, or YRT, which is non-proportional reinsurance, but a creative lawyer can say just about anything about that term.

**Raim:** Susan, I agree with you that the reality of these cases is that the contracts are not as clear as anyone thinks they are, but I think there's a tendency amongst lawyers not to want to admit that the contracts have holes in them. And I think that where one side claims they're unambiguous, the other side doesn't want to admit that they are only relying on custom and practice, so they will argue that they are clear and unambiguous, too, but then the bulk of their case will end up as custom and practice.

**Bush:** What role do actuary experts play in life reinsurance arbitration and are they important?

**Zurek:** Yes, they are important because nobody is willing to take the chance of not using one.

**Mack:** In both the life sector and the property/casualty sector, expert actuaries are very important in resolving disputes. In the life sector, life reinsurance actuaries were very prominent and remain prominent in the sales and pricing functions.

So over time, life actuaries have maintained important perspectives on trends, such as mortality and persistency, also known as lapse. A key recuring example in life reinsurance, is the argument that older age mortality deviated from commonly used pricing tables, that there was a mortality deterioration which wasn't captured in pricing, and that life reinsurers should not be obliged to pay for that.

So, the actuaries' testimony in those cases is important in determining whether a treaty is unprofitable due to a real pricing mistake on the part of the pricing actuary originally, or whether there was just a deteriorating mortality trend.

**Gurevitz:** Yes, I think that's right. I think the pricing of the business on the life side was far more actuarially driven than it was in many lines in property/casualty business, and so actuarial experts were critical to an understanding of the case to an arbitration panel. That's true whether it's the actuaries who were in house and who were involved in placing and writing the business in the first place or whether it's an independent actuarial expert who is going to interpret what was done.

**Raim:** I agree with what's been said, but I think what Tom has said is also correct in that while actuaries are particularly helpful for the issues that are very specific to the given dispute before the panel, sometimes actuaries are just used as experts to discuss general industry trends and issues that experienced life arbitrators have heard many times before. In those cases, the panel can practically recite the actuary's testimony without their having to give it.

I think that actuarial testimony is particularly important when it's specific to the dispute at hand but not when it's just related to the general trends in the industry which experienced life arbitrators are usually quite aware of.

**Bush:** Let me ask about the process of picking the arbitrators and umpires. Do you see any particular issues with panel selection in the life area?

**Mack:** I will say that this is my pet peeve as an arbitrator. Often attorneys do the dispute resolution process a grave disservice when they appoint individuals who only barely qualify under the arbitration clause, which typically states that arbitrators must be "present or former officers of life insurance or life reinsurance companies." Attorneys may appoint prospective arbitrators who only qualify under such clauses because they were part of a conglomerate that included a life subsidiary. I have a marked preference for serving with arbitrators who have real, practical experience in the life insurance or life reinsurance business. Otherwise, it's like trying the case to a jury. A jury member has no industry context as to whether or not an expert witness's testimony actually comports with what is done in the life insurance or reinsurance business. Nei-

ther does a largely property casualty/arbitrator have sufficient context in a life reinsurance setting.

For a panel member who is not steeped in the life industry, it's all too common for a true advocate of an attorney to try to effectively write on a blank slate.

**Raim:** I think the key issue, particularly with umpires, though, is finding qualified people that have experience in doing life arbitrations but whose views on the issues, say on YRT rate increases, are not so well-known that you can predict how they're likely to vote beforehand. I have heard from the lawyers who handle these disputes regularly, they'll call up and say, do you know any experienced life people who we haven't tapped before, who have views that are, perhaps, open to being convinced one way or another that we can try because we're tired of going back to the same well of candidates. It's an ever decreasing number as people retire.

**Gurevitz:** I think you're right, the life company issues are unique, but they're also, in many ways, like other reinsurance disputes. It depends on how you think about your own case in deciding what type of an arbitrator you want. Because if you feel that you have a strong issue that any life person would understand exactly what you're saying, then you want someone who is pretty knowledgeable about the business.

If you feel that you're stretching an understanding or it's not obvious, then you may want someone that isn't as steeped in the background of the business, because you feel you may have a better opportunity to influence that person, as you would with a jury or a judge, that doesn't have information. So I think those are all substantial factors to consider.

**Mack:** There is a subset of arbitration clauses in life reinsurance treaties that causes arbitrator selection problems. Those clauses call for an active life insurance executive or life reinsurance executive as an arbitrator or umpire. Usually what I have seen happen in a majority of those cases, if attorneys for the petitioner and attorneys for the respondent are at all collaborative, is that they will agree to strike that clause or have some sort of compromise about that clause. The "active" qualification is a tough one because as we mentioned, there are relatively few ceding life companies and life reinsurers, causing active executives to have conflicts in serving as an arbitrator or umpire.

**Zurek:** On that point, there was a time before I left my company where I was being asked to participate in these matters because I was active, and back in those days I think that on ARIAS·U.S., there were between six and eight of us who were active and so we were always on the same cases and that created a problem, I think.

**Raim:** I am still active, but I would echo what Susan says. I don't frequently get cases just because I'm active. I think in general parties collaborate. You see a lot of the same firms doing life cases because they have the expertise, and with those firms, usually there is agreement to waive that requirement.

**Gurevitz:** The other point I would mention, something that Susan alluded earlier, and that is that some issues are just very technical and they really do involve very specific type of granular life company issues, and having someone who is steeped in and has lived those types of issues every day might be very helpful and more persuasive, but then there are a lot of more general issues where it may not be as necessary or critical.

**Bush:** Let's talk about lawyers. There are some lawyers who have a lot of background in life disputes and some long-standing reinsurance lawyers who are getting into the life YRT cases for the first time. Have you encountered that as a problem with any case?

**Mack:** I think whether it's a problem can best answered by saying, "it depends." Say you have a lawyer who's versed in property casualty reinsurance and wants to transition to try a life or long-term care case. If this lawyer is willing to learn quickly, and he or she depends on not only what their specific client says but looks to what trade industry custom and usage was and the expectations of different trading partners, such an accomplished arbitration lawyer can do very well.

**Zurek:** I do agree with what Susan just said. I have had matters where the lawyers involved have had numerous life cases. I've also had matters where they are kind of rookies. The rookies come in and they seem to take the position that they have to really, really, really learn this, and I've noticed that they prepare very well. And if they've got good fundamental skill sets, I don't think that there's a problem making the transition.

**Gurevitz:** Two points to that. One, if you do retain someone that doesn't have that background and knowledge already, it is a learning curve and a high

hurdle, in some cases, to educate yourself on those issues.

But the other thing I'd say is that in a lot of cases, having an experienced reinsurance law firm that has been involved in many arbitrations previously and has the skill and knowledge of how to present a case to an arbitration panel is a more important skill set than knowing the particulars of the life issue involved in that case.

**Raim:** All of that said, I still think that there are a fewer number of law firms that companies are going to for life reinsurance disputes than they are for property/casualty disputes. Whether others may be skilled lawyers, may be able to pick it up, I think companies are more often than not relying on firms that have a fair bit of expertise in the area and experience. And I do think the larger size of the life cases, as compared to a lot of the property/casualty cases, contributes to that. I don't think companies are as interested in using someone that doesn't have the experience in life cases when they've got a $100 million case.

**Gurevitz:** Right, added to that David is that so many of these issues involve, as we talked about earlier, very complex, intricate actuarial terms, and not having knowledge of those terms can be daunting if you bring in a firm that hasn't had exposure to them previously.

**Bush:** Okay, that covers the topics that we planned to cover. I wanted to thank Pamela Taylor of Veritext for volunteering to transcribe this discussion. And thank each one of you for your comments today. I think our readers are going to find this very informative.

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# Applying Principles of Contract Interpretation to Reinsurance Disputes

**By Peter B. Steffen and Carly M. Allen, Smith Gambrell & Russell LLP**

As surely every reader of this publication understands, reinsurance disputes are usually creatures of contract and often focus on issues of contract interpretation. Even though arbitration clauses typically refer to the application of industry custom and practice, the resolution of reinsurance disputes frequently turns on how arbitrators and judges apply specific treaty wording, often in the face of competing arguments made by the parties.

Over time, courts have developed certain canons of construction to resolve disputes about what particular contractual provisions mean. These canons provide ways to simplify the process of contract interpretation. This article explores how those canons have been – and may be – used in reinsurance disputes.

## The Basics of Contract Interpretation

On one level, interpreting contracts seems like an easy endeavor: apply the words as written. And, most of the time, that is true enough. Once there is a dispute, however, what once may have seemed simple suddenly can become quite contentious. *Couch on Insurance* has the following to say about interpreting reinsurance contracts:

> A contract of reinsurance is to be interpreted according to the general rules of construction as would be used in interpreting any contract of insurance. Among these general rules are: 1) making reasonable interpretations of the terms, 2) avoiding strained or absurd constructions, 3) interpreting the words according to their commonly accepted and ordinary meaning, and 4) making appropriate reference to custom and usage.[1]

Simple, right? Hardly. Each of those four instructions contains its own room for interpretation over which people can disagree in good faith. What is reasonable? Strained? Commonly accepted? Appropriate?

## When Is a Provision Ambiguous?

Usually, the first question in a dispute over the meaning or application of treaty language is whether the provision in question is ambiguous. It is easy to think that just because two opposing sides bring competing arguments as to what something means, the language in question must be ambiguous. But that is not so. The mere existence of a dispute does not mean both sides have a legitimate argument as to the meaning of a provision.

In *Munich Reinsurance America, Inc. v. American National. Insurance Co.*, a federal district court wrote that "a word or phrase is ambiguous when it is capable of more than a single meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[2] So, at a minimum, ambiguity can only exist if the agreement as whole – and the common understandings of the industry – do not already resolve the issue, at least to an objective and reasonably intelligent person!

"The mere existence of a dispute does not mean both sides have a legitimate argument as to the meaning of a provision."

The *Munich Reinsurance* case is an example of one where, despite the parties bringing two contradictory interpretations to the fore, the court concluded there was no ambiguity at all. The case involved a retention and limit clause that specifically referred to the retrocedent's ultimate net loss, as it stated that the retrocessionaire "shall not be liable for any loss hereunder until [retrocedent's] ultimate net loss … exceeds $500,000." Elsewhere in the treaty, "ultimate net loss" was defined as meaning "only such amounts as are actually paid or payable by [retrocedent] and [Cedent] … ."

In court, the retrocessionaire argued that the retrocedent must itself pay $500,000 before the retrocessionaire is obligated to pay under the retrocessional agreement. Its argument was based on the retention and limit clause. The retrocedent, though, relied on the definition of "ultimate net loss" to argue that, once the cedent and retrocedent collectively paid $500,000, the retrocessionaire was obligated to pay under the retrocessional agreement. [3]

The court sided with the retrocedent, writing that the retrocessionaire's interpretation "is not one that reflects an objectively reasonable interpretation of the parties' agreements" and that the retrocedent's interpretation was the only one "that harmonizes all relevant provisions."[4] So, even though the retention and limit clause could plausibly be read in a particular way, it did not make sense in light of other contractual provisions. And even though both sides went to court with different readings of the contract, that did not mean there was an ambiguity.

## Resolving Ambiguities

If an ambiguity does exist, though, how should it be resolved? Courts generally follow the canon that *extrinsic evi-*

*dence can be used to interpret ambiguous contracts.* As one court wrote in a reinsurance dispute, "if the court finds that the terms, or the inferences readily drawn from the terms, are ambiguous, then the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract."[5] There, however, the court found that there was no ambiguity, and one party's argument that the language in question was "so broad as to be impossible to interpret without resort to industry custom" was not sufficient to establish an ambiguity.[6]

Use of extrinsic evidence can sometimes seemingly conflict with a treaty's entire agreement clause, which typically states that the terms of the agreement, as written, comprise the entire agreement between the parties and may only be changed in writing. Where there is no ambiguity, there theoretically should be no issue, but where there is an ambiguity, in practice, arbitrators may choose to look to custom and practice – and, thus, extrinsic evidence. Even then, though, the timing of the extrinsic evidence should be kept in mind. Evidence of intent early on in treaty negotiations may not be as relevant as evidence closer in time to the actual agreement itself. After all, the parties' intentions may change over time, and it is the intent at the time an agreement is entered into that is most germane to the meaning of the parties' agreement.

Perhaps one of the most frequently cited reinsurance cases of all time, *Christiania General Insurance Corp. of New York v. Great American Insurance Co.*, was one where a court relied on extrinsic evidence to resolve an ambiguity, in that case, over the meaning of the words "prompt notice." There, the Second Circuit wrote "when the obligation to provide notice arose in this case cannot be determined on the face of the agreement without resort to extrinsic evidence … ."[7] While "prompt notice" is generally construed to require notice within a reasonable time after the duty to give notice has arisen, when the duty to provide such notice begins requires an objective evaluation of the facts known to the insured. And when you need facts, you need extrinsic evidence.

Even though the commonly accepted rule states that you only look to extrinsic evidence in the face of an ambiguity, courts are known to buttress their opinions by looking at extrinsic evidence even when they conclude that the language in question is unambiguous. *Munich Reinsurance* is one example, where the court cited testimony from an underwriter that both the cedent's and retrocedent's losses were to be included in the ultimate net loss calculation.[8] Another example is *Global Reinsurance Corp. of America v. Century Indemnity Co.*, where the Second Circuit cited not just what it felt was "unambiguous language" to resolve its dispute, but also "evidence of custom and usage."[9]

> "Once it has been determined that there is an ambiguity and extrinsic evidence is examined, that will not necessarily resolve the dispute."

## How Other Canons Have Been Used to Resolve Reinsurance Disputes

Once it has been determined that there is an ambiguity and extrinsic evidence is examined, that will not necessarily resolve the dispute. Courts and arbitration panels may look to other canons of contract interpretation to try to determine the meaning of the wording in question. In this section, we look at how other canons have been referenced in reinsurance disputes.

To begin with, a common canon of construction that is applied in all contexts is to *interpret the language according to its ordinary meaning.* This is an obvious point, but where a party seeks to advance an argument with a tortured

explanation of what a phrase means, it will need significant evidence to support its cause. As one court wrote in a reinsurance dispute, "[i]n construing a reinsurance treaty, the words used therein will be given their ordinary meaning, unless it plainly appears that a technical meaning was intended."[10]

Another frequently cited canon is that a *writing has to be interpreted as a whole and all writings forming part of the same transaction are interpreted together.* In other words, as the Second Circuit wrote, "if the document as a whole makes clear the parties' over-all intention, courts examining isolated provisions should then choose that construction which will carry out the plain purpose and object of the agreement."[11]

For example, in *Boston Insurance Co. v. Fawcett*, the court interpreted the phrase "each and every loss" as it appeared in the reinsurance treaty by looking to the endorsements. The court found that the "interrelation" between the various documents as to "subject matter, terminology, parties and time dictates that they be read together."[12]

A similar canon is to *read a contract to give all provisions meaning.* One example is the *Munich Reinsurance* case cited above. There, the court found that the retrocessionaire's interpretation would ignore the definition of "ultimate net loss" that appeared elsewhere in the treaty. Courts, though, seek to give meaning to all provisions of a contract. As the Third Circuit wrote in another reinsurance case, "all provisions in the agreement will be construed together and each will be given effect because a court 'will not interpret one provision … in a manner which results in another portion being annulled.'"[13]

Similarly, it should be assumed that each provision has a reason for being in the contract and should not be rendered superfluous.[14] In Latin, that is *verba cum effectu sunt accipienda.* Every word and every provision is to be given effect. For example, in a dispute over a service of suit clause, one party contended that a phrase involving agreement to submit to "a court of competent jurisdiction" encompassed both subject matter jurisdiction and personal jurisdiction. The court, however, wrote that such an agreement would be meaningless because "there is no need to agree to submit to a court already having personal jurisdiction." Thus, the phrase in question only applied to subject matter jurisdiction.[15]

But what if two provisions are in conflict? Well, then *specific terms are given greater weight than general language.*[16] For example, in *Global Reinsurance Corp. of America v. Century Indemnity Co.*, the Second Circuit gave the follow-form clause precedence over the treaty's preamble and Reinsurance Accepted provision. The court reasoned that the preamble provided general terms, but the follow-form clause designated the specific terms on which that reinsurance was offered.

Another canon that often appears in reinsurance disputes is that *a contract should not be interpreted to produce an absurd result.* One way to show that a particular interpretation will lead to absurd results is if it has no limiting principle. For example, in one case, the Second Circuit found a cedent's argument that it could bill reinsurers for defense costs originally paid under "other policies (or possibly no policy at all, if its reasoning is taken to its logical conclusion)" to lead to an absurd result precisely because there was no limiting principle.[17] Those are key words. If a party can successfully argue that its opponent's argument could result, if followed, to a something reasonable parties would never have intended (regardless of how plausible the argument is when applied only to the specific set of facts of the dispute), it will have gone a long way to undermining the acceptability of such an argument.

One canon that is disfavored in reinsurance cases is *contra proferentem.* When applied elsewhere in the law, that means that ambiguities are resolved against the party that drafted the agreement. In insurance, that means the ambiguity is resolved in favor of the insured who, after all, did not write the policy. Reinsurance, of course, is different. There, one is dealing with two sophisticated parties. Thus, the majority view is that this rule is inappropriate in the reinsurance context.[18] As one court wrote, "the rules of construction meant to protect individual purchasers of original insurance policies do not apply to reinsurance. … This canon of construction does not apply because reinsurance contracts are negotiated at arm's length by two sophisticated parties."[19]

## Other Canons of Contract Construction

Given the relative lack of reported case law on reinsurance disputes, there are only so many court opinions that cite canons of contract construction to resolve reinsurance disputes. There are, though, many other canons of contract interpretation in addition to those listed above – too many, in fact, to include in this article.

That said, it is worth noting other interpretative canons that could be used to resolve disputes over the meanings of reinsurance treaties. Consider the following, non-exhaustive list that may or may not be coming to a future reinsurance dispute near you:

- ***Expressio unius est exclusion alterius.*** The expression of one thing implies the exclusion of others.
- ***Presumption of consistent usage.*** A word or phrase is presumed to bear the same meaning throughout a text.
- ***Casus omissus pro omisso habendus est.*** Nothing is to be added to what the contract states or reasonably implies.
- ***Unintelligibility canon.*** An unintelligible term is inoperative.
- ***Presumption of "include" as non-exclusive.*** Where the verb "include" is used, it introduces examples, and not an exhaustive list.
- ***Noscitur a sociis.*** A word is known by the company it keeps – in other words, you look to the words with which something is associated in the contract to define the ambiguous word in question.
- ***Ejusdem generis.*** In Latin, that means "of the same kind, class, or nature," so when a general phrase follows a list of specific items, the general phrase is read to include only items similar in kind or class as the specifically listed items.
- ***Consistency.*** Using different words in different portions of the same text indicates the drafter intended different meanings.

Of course, application of all of these is context-dependent, but these and the other canons described above can be used to frame reinsurance disputes and resolve disagreements over the meaning of treaty wording. The use of so many Latin terms should not take away from the fact that all of the canons are basically rooted in common sense. That said, the first question remains whether an ambiguity exists. Parties may attempt to introduce all manners of evidence (and fancy sounding canons) to imply that a provision is ambiguous, but if it is not objectively susceptible to more than a single reasonable meaning, then the inquiry may end before anyone has to brush up on their Latin.

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2 893 F.Supp.2d 686, 709 (D.N.J. 2012), *aff'd* 601 F.App'x 122 (3d Cir. 2015).

3 The underlying reinsurance agreement was for $750,000 excess of $250,000. The retrocessional agreement provided coverage for $500,000 of ultimate net loss excess of $500,000 of ultimate net loss. Under the retrocessionaire's interpretation of the limit and retention clause, the retrocedent would only be able to recover $250,000 of the $500,000 limit.

4 *Id.* at 710.

5 *Brit. Int'l. Ins. Co. v. Seguros La Republica, S.A.*, 342 F.3d 78, 82 (2d Cir. 2003).

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7 979 F.2d 268, 278 (2d Cir. 1992).

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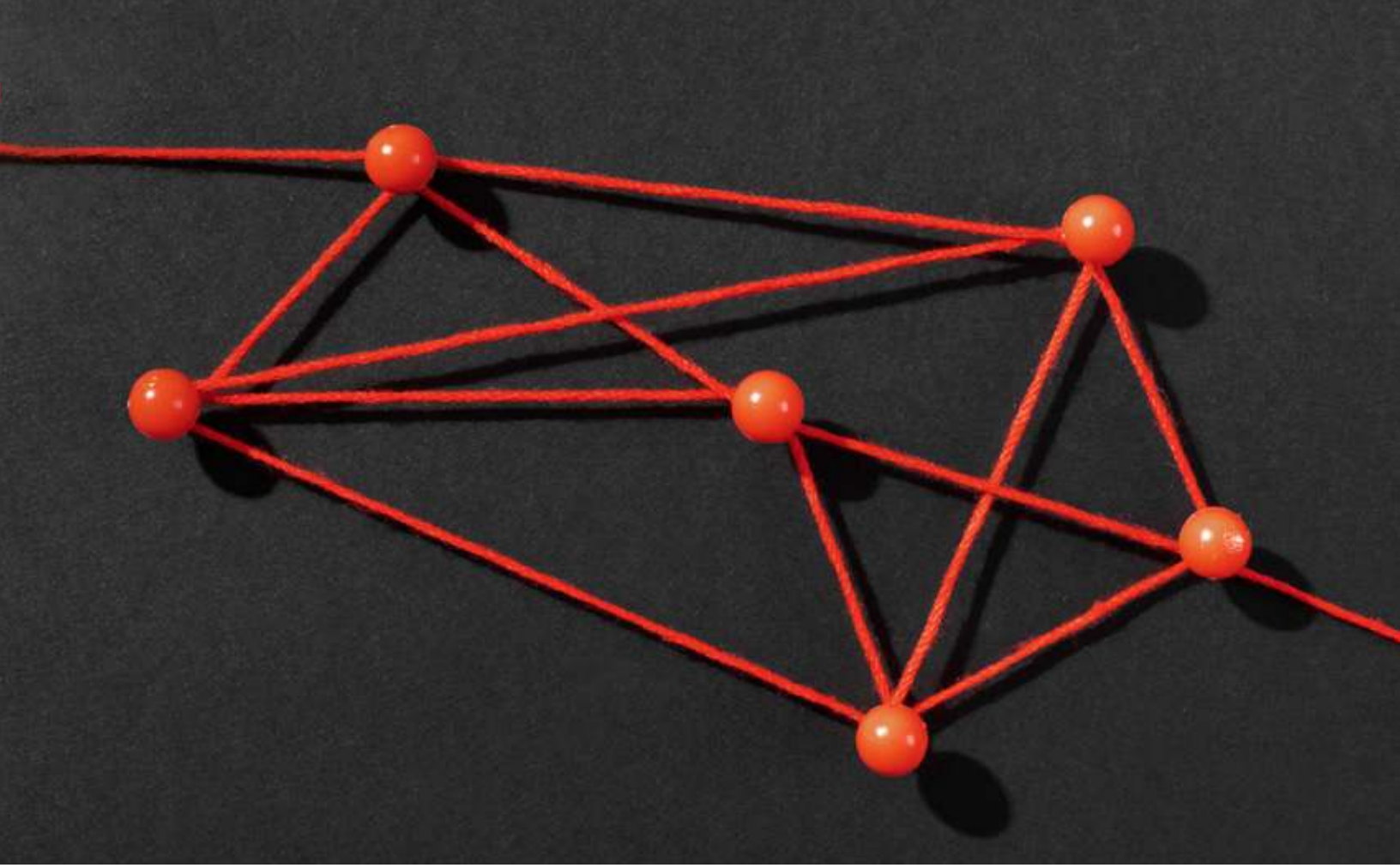

# Polycrisis Notes: Why Navigating Multiple Risks is Essential

**By Pete Thomas, Cobblestone Consulting, LLC**

## Change

Everything is changing. The world is more populated and wealthier. Increasingly, more people and businesses are residing and operating in areas vulnerable to disasters. The modern world, connected by information highways, transportation systems, and trade, is more networked, interconnected, and fragile. This connectivity has made the world smaller, but it has also exposed it to pandemics, financial contagion, new cybercrimes, disinformation, and the possibility of cyberwar.

## The polycrisis model as a tool for policymakers

In January 2024, Cambridge University Press published a paper titled "Global Polycrisis: The Causal Mechanisms of Crisis Entanglement." This paper was a collaborative effort among the Cascade Institute, the Potsdam Institute for Climate Impact Research, and the Stockholm Resilience Center, collectively known as "Cascade." The importance of the ESIR's and Cascade's polycrisis definition and model is its utility in organizing policymakers' historically uncorrelated and independent systems and the emerging risks (and opportunities) arising from such complex and interconnected systems into valuable and actionable intelligence. The Polycrisis Policymaker Conceptual Model ("PPCM") is a global model that provides policymakers with insights into existential risks. The paper's authors suggest a global polycrisis arises when one of the more fast-moving trigger events combines with slow-moving stresses to push a global system out of an established equilibrium into a volatile and harmful state of disequilibri-

um.[1] The Stress-Trigger Crisis Model ("STC") is the core of Cascade's framework, which depicts crises as the result of slow-moving stresses interacting with fast-moving trigger events to push a global system out of its established equilibrium and into a state of disequilibrium or a systemic crisis, that causes human harm.[2] In this model, a polycrisis emerges from the interplay of multiple systems and the activation of causes and effects that lead to harm. The focus is not on the complexity of the risks themselves but on the complexity of the system in which the risk develops[3].

The PPCM's importance lies in its utility for organizing historically uncorrelated and independent systems, providing policymakers with valuable and actionable intelligence on the emerging risks and opportunities that arise from such complex and interconnected systems. The PPCM is a global model that provides policymakers with actionable intelligence on global catastrophic risks.

## The insurance and reinsurance industry's need for actionable intelligence

The PPCM is not intended for insurance or reinsurance risk managers or insurance or reinsurance product designers. However, insurers and reinsurers, on a different scale, deal with known, unknown, and emerging risks that arise out of the local, regional, national, and global complex, connected, and frequently mutually reinforcing systems every day. The risk ecosystems that insurers and reinsurers must understand constantly change. These changes are not an abstract academic exercise, as insurance and reinsurance buyers may have unexpected gaps in their protections. The obsolescence may also expose insurers and reinsurers to risks that are neither expected nor priced. Unfortunately, the history of the insurance and reinsurance business has had several intelligence failures where changes to the risk ecosystem were overlooked or ignored. There is an ongoing need for sound risk intelligence.

With insurers' and reinsurers' need for reasonable and actionable intelligence on emerging risks, emerging trends, complex and interconnected systems, and changes to the risk ecosystem, the PPCM is too valuable a tool not to adapt and use. *Captive International* reports that Pierre du Rostu, CEO of Axa's Digital Commercial Platform, described a polycrisis at the 2024 FERMA Forum, where "all risks are completely intertwined." Climate change, for example, may exacerbate geopolitical tensions, leading to cyberattacks that result in supply chain disruptions. The PPCM, with its focus on global catastrophes and existential risks, may be adapted to address such local and regional multiple-system crises that could coalesce into a substantial catastrophic event but not a global catastrophe. There also may be an opportunity to combine a modified polycrisis model with a model, such as those described by Charles Perrow, that focuses on individual risks or systems. This combination might provide an insurer or reinsurer with a more complete view of the risk ecosystem.

> "The PPCM is a global model that provides policymakers with actionable intelligence on global catastrophic risks."

## Individual systems or risks

The models, as described in Charles Perrow's (Perrow) books *Normal Accidents* and *The Next Catastrophe*, focus on single systems. Cascade and Perrow focus on system complexity; however, unlike the PPCM, Perrow's deterministic concept is based on individual systems or risks, as well as the concepts of specific system complexity and tight coupling. Perrow's focus was on the internal dynamics within particular systems. In *Normal Accidents*, Perrow provides several examples of complex systems that are tightly coupled, such as nuclear power plants[4], chemical processing plants[5], modern aircraft[6],

air traffic control, financial markets[7], health care organizations[8] and the national power grid.[9] Tightly coupled systems where small failures can unpredictably cascade into catastrophes.

## Innovation and change

Insurers and reinsurers rarely welcome surprises. Surprises are expensive, and they are intelligence failures that did not anticipate evolving risk ecosystems.

Guy Carpenter and Company Inc., in the 1960s, with the support of underwriters at Lloyd's of London, created the Global Slip Catastrophe Reinsurance (GSCR)[10]. The GSCR was a revolution in reinsurance catastrophe protection welcomed by both insurers and reinsurers. GSCR, like the earlier Carpenter Plan, was a brilliant innovation. GSCR provided extensive coverage grants with very few exclusions. GSCR was attractive to reinsurance buyers as it offered comprehensive coverage for multiple lines of business, including United States casualty insurance. The casualty coverage in the GSCR (initially) was a sweetener to stabilize property catastrophe pricing.

However, the underwriters decided to offer casualty coverage on a 1950s understanding of the United States casualty risk ecosystem. At that time, injured parties faced a significant challenge in perfecting liability claims in the United States. Tort law, from an underwriting perspective, operated in a narrow framework. In the 1950s, the compensation for pain and suffering was severely limited. Second, there was no strict liability for dangerous products, which imposed a much higher burden of proof on injured consumers. Third, injured parties faced challenges related to privity. The traditional rule required that there had to be a contractual relationship between the injured party and the defendant. In other words, the injured party could sue the seller but not the manufacturer unless they prove negligence. There was also limited recognition of emotional distress claims and non-physical injuries. In 2000 inflation-adjusted numbers[11], the average successful claim was $10,000 or less from 1930 to 1960. In the 1960s, the average successful claim was between $100,000 and $130,000. Underwriters trained and accustomed to this risk ecosystem would be comfortable providing casualty coverage as part of the GSCR.

Unfortunately, this comfort was illusionary and the product of a lack of good intelligence. Cascade's global polycrises model describes the impact of slow-moving stressors. The efforts of legal academics and plaintiff lawyers to modernize tort law in the United States are a classic example of a slow-moving stressor; it serves as a case study of how a risk ecosystem can evolve, resulting in substantial losses for insurers and reinsurers.

The incredibly influential *American Law Institute's* (ALI) 1965 Restatement of the Law, Second, Torts, Section 402A (the "Restatement") should not have come as a surprise.[12] This Restatement, although not law, serves as an instructive illustration of a slow-moving stressor that was part of a broader risk ecosystem that developed, expanded, and gained influence over time. This tort revolution took seventy-plus years, but eventually, there was a convergence of several independent slow-moving stressors, such as the emergence of a middle class, recognition of the uncompensated injury and damage resulting from industrial practices, dissatisfaction with the limitations of negligence and contract law, radical legal scholars, aggressive judiciary, and an increasingly sophisticated plaintiffs' bar. This convergence created the conditions and political will for revolution in tort law. This Restatement[13] eliminated privity requirements, advanced the doctrine of strict liability, and recognized an independent cause of action for intentional inflection of severe emotional distress. Even though this tort law revolution took almost a century to materialize, insurers, reinsurers, and brokers were surprised as they struggled with waves of litigation and worked to reengineer their insurance policies and reinsurance catastrophe treaties.[14]

It all came to a boil in 1984. The asbestos crisis exploded. European reinsurers withdrew from the American market. Insurers struggled to meet capital adequacy requirements due to a lack of reinsurance support, as well as unexpected and unanticipated losses. Reinsurance structures, such as the GSCR, were not renewed or were radically restructured. Insurers went insolvent. The remaining insurers had to reduce limits and coverage or withdraw from specific lines of business. The shrinking supply of available insurance drove premiums upward. People, communities, firms, and doctors could not find insurance coverage. It was a mess. The problem was even worse for reinsurers. Lloyd's of London underwriters lost billions of dollars[15]. These losses, in large part, stemmed from the United States casualty business, particularly asbestos-related losses. In 1995, Lloyd's of London established Equitas[16] to handle the runoff of syndicate liabilities from 1992

> "Collaboration is cheaper than being surprised."

and earlier years. This initiative was part of an effort to restructure Lloyd's and eliminate the unlimited liability of Lloyd's names, thereby facilitating the introduction of corporate capital into the Lloyd's market.

The 1980s Liability Crisis was a massive intelligence failure that demonstrated how a single component of a risk ecosystem, such as the law, can radically change over time and function as both a slow-moving stressor and a fast-moving multiple crisis trigger. It was a global polycrisis and a local, regional, and national crisis.

## Collaboration

In isolation and combination, new unforeseen systems and risk ecosystems emerge daily. Existing risk ecosystems may evolve and become increasingly complex and powerful. Risk ecosystems and their component systems may become obsolete, devolved, ineffective, or dangerous. The only constant is the need for vigilance and actionable intelligence. No single government, insurer, reinsurer, broker, actuary, modeler, researcher, legal scholar, university, or private corporation can manage this process alone, regardless of technological accomplishments. The intelligence work that supports ecosystem risk management on this scale is expensive, suggesting the need for collaboration. Collaboration is cheaper than being surprised.

## Conclusion

A modified version of Cascade's global polycrisis model incorporating a Perrow-like single-system model might help analyze slow-moving stressors and trigger crises on any scale. No one likes surprises.

## About Cobblestone Consulting LLC

Cobblestone Consulting LLC provides specialized services focused on enhancing insurer operational efficiency, reinsurance risk management, emerging risk mitigation, educational programs, and litigation support for law firms. We focus on cost-effective problem-solving and knowledge transfer. Our mission is to help clients improve.

https://cobblestone-consulting.com

*Pete Thomas is an acknowledged industry expert and thought leader with over 47 years of experience in insurance, reinsurance management, problem-solving, and product design. He provides actionable insights into emerging risks and advises organizations on risk management and operational efficiency. Thomas expertise, backed by his commitment to integrity and ethical practice, has significantly contributed to the success and growth of numerous companies.*

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# Perfluoroalkyls and Polyfluoroalkyls (PFAS) Could Lead To Mass Litigation

## *The Case for Reinsurance Exclusions*

**By Frank DeMento and Bryan McCarthy**

Per-and Poly-Fluoroalkyl substances ("PFAS") claims are now a mass tort with significant implications for the re/insurance industry. PFAS present distinct challenges due to their widespread use, persistent environmental presence, and emerging health risks. New studies continue to document the greater prevalence of these "forever chemicals" in water, food, and consumer products than previously understood. According to Verisk's analysis "modeling suggests ground up losses from PFAS litigation could range between $120B - $165B, depending on how certain trends evolve."[1] As it becomes clear that PFAS will likely be the "next asbestos," re/insurers should consider adapting their underwriting approach to include the use of comprehensive exclusions.

### Background

PFAS is the commonly used abbreviation for organic compounds which replace most or all carbon/hydrogen links with carbon/fluoride links. PFAS can be traced back to 1938. Two of the earliest and most popular uses of PFAS were DuPont's Teflon and 3M's Scotchgard. Today, PFAS are a class of over 15,000

synthetic compounds. For decades, PFAS have been used in a wide range of products, such as paper products, wire insulation, surface coatings, cleaning products, personal care products (like cosmetics, shampoos, and dental floss), among numerous others.

They are called "forever chemicals" because of their ability to repel oil and water, their stability and resistance to heat and fire, and their resistance to any methods designed to break apart the atoms within the chemicals. Unfortunately, the same physical characteristics that make PFAS useful in commercial applications also make them highly persistent and mobile in the environment and the human body. Given the ubiquity of these chemicals, the vast majority (97%) of Americans have PFAS chemicals in their blood.[2]

at its chemical plant in Parkersburg, WV, caused widespread water contamination and contributed to high rates of cancer and other health problems for the residents. An independent scientific panel (known now as the "C8 Panel") was tasked with observing and monitoring the health of residents as related to potential links between PFAS exposure and medical ailments. They conducted medical monitoring from 2005-2013 and ultimately found probable links between exposure to PFAS and kidney and testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension, and high cholesterol.

Following the panel's findings, litigation began. The first three cases went to verdict, and each found for the plaintiffs:

> "Given the ubiquity of these chemicals, the vast majority (97%) of Americans have PFAS chemicals in their blood.[2]"

The first PFAS case was a 2004 class action lawsuit captioned *Leach v. E.I. du Pont de Nemours & Co.*, No. 01-C-698 (Wood County W.Va. Cir. Ct). West Virginia and Ohio residents alleged that Dupont's PFAS manufacturing

(1) $1.6 million compensatory reward for a kidney cancer plaintiff,
(2) $5.1 million compensatory and $500,000 punitive award for a testicular cancer plaintiff; and
(3) $2.1 million compensatory and $10.5 million punitive award for a testicular cancer plaintiff.

Following the first three trials, DuPont agreed to settle 3,500 personal injury cases in the class for $670 million.

About 100 cases remained in the class against DuPont post-settlement. The first trial, involving a woman with kidney cancer, resulted in a mistrial and was scheduled to be retried. The second resulted in a $50 million verdict for a man who developed testicular cancer. Thereafter, DuPont agreed to resolve the remaining cases for $83 million. DuPont also agreed to establish an escrow account funded by $1 billion with a $4 billion aggregate cap for potential future PFAS liabilities.

Today, the largest pending litigation related to PFAS is a multi-district litigation ("MDL") related to a single product, aqueous film-forming foam ("AFFF"), a fire suppressant, and is venued in a South Carolina Federal District Court. The MDL consists of over 15,000 pending cases that are being litigated on a consolidated docket. New cases continue to be filed and incorporated into the MDL. The first bellwether trial was the *City of Stuart v. 3M Co.*. No.2:18-cv-03487 (D. S.C.). The City of Stuart was informed by the Florida EPA that its water contained PFAS chemicals above the accepted maximum safe levels for potable water. Testing of individual supply wells indicated that a potential source of the PFAS contamination may have been the City of Stuart Fire Rescue Station. The City of Stuart eventually concluded that the PFAS contamination in its water supply was caused by the use of AFFF during training exercises at the fire station. In

October 2018, the City of Stuart filed a lawsuit against a group of companies, including 3M, DuPont, Tyco, BASF, and Chemguard for the contamination of its water supply.

In 2021, Tyco was the first company to settle. It signaled the next significant step in the evolution of PFAS litigation. The $750M settlement was the first settlement that had taken place for a PFAS personal injury lawsuit with a company that used PFAS as a component of its consumer product. The settlement indicated that companies are sufficiently concerned about PFAS product liability lawsuits that they are willing to resolve the cases without going to trial. Ultimately, the top defendants settled with approximately 300 water providers. DuPont settled for $1.185B, 3M settled for $12.5B, and BASF settled for $316.5M.

As a result, litigation has now expanded to include all sorts of consumer product retailers—including cosmetics and personal care product companies like L'Oréal, general product retailers like Target, and fast-food restaurants like Chick-Fil-A. Plaintiff attorneys have also expanded liability theories, as they seek to broaden the range of PFAS defendants beyond just traditional manufacturers and distributors. We have seen strict product liability theories brought against consumer product retailers, alleging that they failed to disclose/warn of the presence of PFAS within the products they sell. We have even seen this theory utilized in a lawsuit against a public water agency. In the matter of *Hoffnagle v. Connecticut Water Co.*, No. 3:2023-cv-01489 (Ct. Dist. 2023), plaintiffs allege that the municipal water itself, as a product, was defective as it contained elevated levels of PFAS. Causes of action include alleged strict product liability, failure to warn, and negligent design and manufacture.

Phase two trials within the MDL will feature municipal water cases against non-settling defendants and bodily injury cases. The phase two bodily injury plaintiffs allege they suffered ulcerative colitis, thyroid disease, kidney cancer, and testicular cancer as a result of AFFF PFAS exposure.[3] It is anticipated these bellwethers will take place in October of 2025.[4]

We note that the AFFF MDL is limited to a single PFAS-related product yet has already resulted in billions of dollars of settlement money. We anticipate that there will be many more MDL litigations dealing with an endless variety of PFAS products. This is why some experts believe that PFAS implications for insurers may ultimately rival claims from asbestos.[5]

## PFAS Regulations

Over the last several years, the United States Environmental Protection Agency ("EPA") has regulated PFAS more strictly in ground and drinking water.

"Over the last several years, the United States Environmental Protection Agency ("EPA") has regulated PFAS more strictly in ground and drinking water."

On April 10, 2024, the EPA finalized the first National Primary Drinking Water Regulation for PFAS.[6] Under the regulation, the limit for PFAS compounds found in public drinking water is four parts per trillion (the equivalent of one drop of water in five Olympic-sized swimming pools). This is lower than any current state limit. The final rule also requires that public water systems implement solutions to reduce certain PFAS to the required limit by 2029. This regulation was hailed as the "first-ever national, legally enforceable drinking

water standard to protect communities from PFAS." The EPA noted that "Exposure to PFAS has been linked to deadly cancers, impacts to the liver and heart, and immune and developmental damage to infants and children." The EPA believes that this rule will reduce PFAS exposure for approximately 100 million people, prevent thousands of deaths, and reduce tens of thousands of serious illnesses. Dr. Tracey Woodruff, Professor & Director, Program on Reproductive Health & the Environment (PRHE)/Environmental Research and Translation for Health at the University of California, San Francisco stated, "The science is clear that PFAS chemicals are linked to a wide range of health harms including cancer, damage to cardiovascular and immune systems, poor pregnancy outcomes, and effects on the developing child."[7]

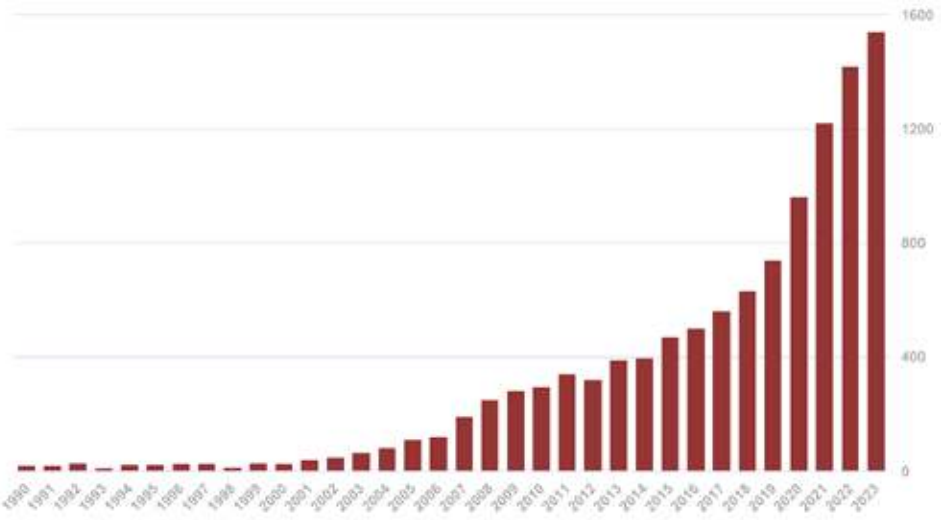
## What about Causation?

The fate of the first casualty cases that went to trial hinged entirely on causation. That mere question of fact allowed each case to get past summary judgment and to trial. At trial, defendants did not dispute whether PFAS are harmful or whether a water supply was contaminated. The central question for expert opinion testimony was whether the products made by defendants could be specifically linked to the PFAS contamination and plaintiffs' injuries. The defense experts argued that there was no way to definitively prove that contamination came from defendants' products. Plaintiffs' experts took the opposite position. To date, plaintiffs have never lost at trial. Since those first cases in West Virginia, defendants (unwilling to risk nuclear verdicts) have settled every case before trial. Plaintiff attorneys have expanded their targets well beyond the traditional manufacturers and distributors of PFAS to downstream companies that utilize PFAS as components of their products and product retailers. The overall trends of PFAS litigation filings and damage estimates are rapidly increasing. Further, the science linking PFAS to specific injuries continues to improve dramatically, making causation even more difficult for defendants to rebut.

There has been a surge in research coinciding with the realization that PFAS is now present throughout the world in water, soil, animals, and humans and with the realization that PFAS are likely having a profound impact on the normal functioning of the endocrine system. There have been multiple independent studies directly linking PFAS to adverse health effects and the science continues to develop in a way that concludes that PFAS is the cause of multiple diseases and injuries. To date, direct links have been found between exposure to PFAS and kidney and testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension, and high cholesterol[8]. A March 2024 paper published by researchers from the Cancer Center at Illinois ("CCIL") concluded that there is a link between PFAS exposure and the growth of testicular germ cell tumors.[9] This study is consistent with a July 2023 study by the Division of Cancer Epidemiology & Genetics at the National Cancer Institute which linked PFAS exposure to increased risk of testicular cancer.[10] Further, the International Agency for Research on Cancer (IARC) which is part of the World Health Organization (WHO), has classified PFOA as "carcinogenic to humans."[11]

The ongoing commercial use of these individual PFAS, however, continues to attract the attention of the scientific community. This strongly suggests that scientific support linking PFAS to specific injuries will continue its upward trend. The chart below demonstrates the rapid increase in scientific articles investigating PFAS:

**Scientific Articles Investigating PFAS**



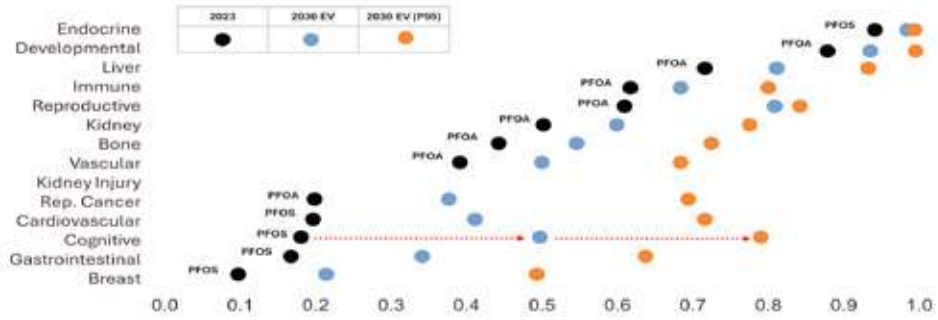

*Source: PubMed, National Library of Medicine*

We can summarize the peer-reviewed literature on PFAS and human health with the help of the General Causation (GC) risk score, an algorithm developed by Praedicat, Inc. that measures scientific support for hypotheses of the causes of bodily injury.

GC risk scores range from -1.0 to +1.0, where -1.0 indicates the scientific community overwhelmingly rejects a given hypothesis and +1.0 indicates it overwhelmingly accepts a given hypothesis. to asbestos causes mesothelioma has a GC risk score of 1.0.

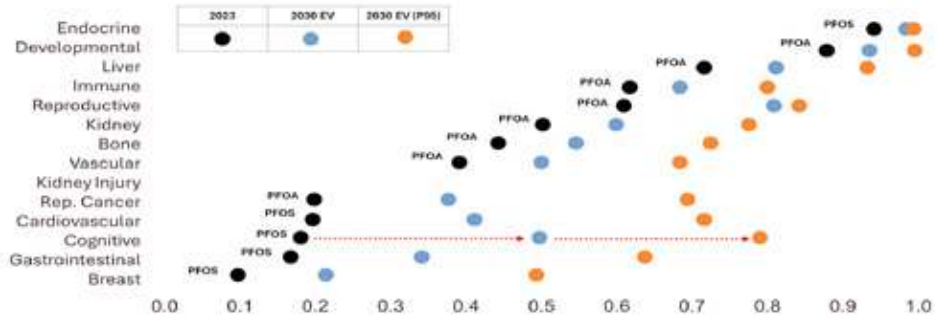
The charts below is derived from a statistical model of the likelihood that new studies will appear in scientific literature that support a given hypothesis. It shows the current (2023) GC risk score, the expected value in 2030 and the 95th percentile value in 2030. As an example, the hypothesis that PFOA/PFAS exposure causes endocrine system injury is already above +0.9.[12]

**General Causation (GC) Risk Score By Bodily Injury Type PFOA & PFOA, 2023 & 2030**




*Source: Praedicat general causation risk model*

**General Causation (GC) Risk Score By Individual PFAS 2023 & 2030**




*Source: Praedicat general causation risk model*

The score increases with the number of studies, strength of measured associations, and the quality and diversity of evidence across study designs. As an example, the hypothesis that exposure

## Scientific Advances Detect Specific PFAS Chemical Composition

Along with advances in scientific studies linking PFAS to various bodily injuries, the science of PFAS chemical composition detection is also improving. The ability to identify PFAS chemical composition is a tool that can be utilized by plaintiffs going forward. The Battelle Memorial Institute, an American private nonprofit applied science and technology development company, has recently created a PFAS Signature Advanced Analytics Tool. This tool can identify the source of PFAS in areas of co-mingled sources.[13] This will make it easier for plaintiff attorneys to identify the source of PFAS and therefore more accurately identify the future defendants for their lawsuits.

## Are PFAS Covered by General Liability Policies?

To date we have seen larger corporate defendants choose to fund settlements themselves and reserve rights against their insurers. They then seek to recover the settlement proceeds from their carriers, filing coverage litigation if needed. We anticipate that PFAS coverage litigation will continue on for years. However, there have been some confidential coverage settlements reached between carriers and their insureds related to PFAS claims.[14] PFAS coverage litigation has been filed in ten states so far. The cases involve almost every conceivable coverage issue that can be litigated in the mass tort context. Issues include the losses qualifying as occurrences, whether there is a duty to defend, trigger and allocation across multiple policy periods and within complex coverage towers, as well as the potential applicability of various exclusions—including various iterations of pollution exclusions.

The threshold coverage questions at issue under general liability policies include a determination whether the allegations against a particular insured allege an "occurrence" as defined by the relevant insurance policy. The answer is likely yes.

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Further, the duty to defend is broader than the duty to indemnify and allegations must be accepted as plead.

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damage.

Next, it is important to determine if the allegations against a particular insured assert actionable "bodily injury" under the policy in question. For most defendants, injury from PFAS was likely not expected or intended and will not trigger the following exclusion.

This insurance does not apply to: Expected or Intended Injury

> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured.

## What About the Pollution Exclusion?

To date, several key judicial decisions have been issued regarding the applicability of various types of pollution exclusions in the PFAS context and give us insight as to whether pollution exclusions will bar coverage.

> "To date, known casualty PFAS settlements exceed $16 billion."

In *Tonoga Inc. v. New Hampshire Insurance Co.*, No. 532546, 2022 N.Y. App. Div. LEXIS 105 (App. Div. 3rd Dep't Jan. 6, 2022), the court supported the application of the pollution exclusion in the PFAS context where the claims arose from traditional environmental pollution at a manufacturing facility.

In *Wolverine Worldwide v. American Insurance Co.*, 1:19-CV-10, 2021 WL 4841167 (W.D. Mich. Oct. 18,2021), the court found that in the PFAS context, the carrier's denial based upon their pollution exclusion was not appropriate as the sudden and accidental exception (used pre-1986) to the pollution exclusion precluded a denial of coverage.

In *Colony Insurance Co. v. Buckeye Fire Equipment Co.*, No. 3:19-cv-00534-FDW-DSC, 2020 U.S. Dist. LEXIS 194709 (W.D.N.C. Oct. 20, 2020), the court held that the pollution exclusion applied only to traditional environmental pollution, which did not include bodily injury from direct contact with a pollutant. The Court therefore reasoned that the exclusion did not apply to the underlying claims in the PFAS AFFF litigation.

The pollution exclusion may be applicable in traditional environmental exposures. However, where bodily injury is caused by individualized exposure to PFAS or an alleged product failure, courts are reluctant to uphold pollution exclusions. Many PFAS claims are now being framed as product liability claims rather than traditional pollution claims, potentially circumventing pollution exclusions. As litigation expands to include retailers and product manufacturers who used PFAS in their products, this distinction becomes increasingly relevant. At the end of the day, we have seen that courts are reluctant to uphold pollution exclusions to bar coverage for PFAS claims that are not in the traditional context of environmental pollution.

To date, known casualty PFAS settlements exceed $16 billion. As coverage issues regarding PFAS claims develop and litigation expands (beyond traditional manufacturers to downstream product users), re/insurers should consider adapting their underwriting approach to include comprehensive exclusion wording, enhanced risk assessment, and strategic portfolio management. Insurance carriers already regularly exclude PFAS for manufacturing, food packaging, and other risks with clear PFAS risk or exposure.

The Insurance Services Office ("ISO") has facilitated this by approving and making PFAS exclusion endorsements available for general liability, umbrella, business owners, and auto dealers' coverage forms.[15] Brokers and insureds expect to have PFAS-related conversa-

tions. Re/insurers are starting to drive discussions on PFAS. Where carriers have both admitted and non-admitted offerings, they seem to be using the same PFAS exclusion on both.

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# Is There an Arbitrator Role in Addressing Settlement or Mediation with the Parties?

**By David W. Ichel, Elaine A. Caprio, Silvia E. Marroquin and Carlos A. Romero**

Arbitrations are a form of private judging available to contracting parties to resolve disputes, which provides the dispute parties with the ability to participate in choosing their own adjudicative panel based on knowledge of their expertise and background. Yet we know that most commercial disputes, whether arbitrated or litigated in the courts, are ultimately settled by the parties on a compromise basis. We also know that courts encourage settlement in litigations, often under rules providing for mandatory mediation or other alternative dispute resolution procedures. So too, the major arbitral institutions are encouraging parties to consider settlement as an arbitration unfolds. The arbitration rules of the American Arbitration Association ("AAA"), International Center for Dispute Resolution ("ICDR"), International Chamber of Commerce ("ICC"), The International Institute for Conflict Prevention & Resolution ("CPR"), JAMS and ARIAS·U.S. all provide, in one way or another, for raising the subject of mediation or settlement with the parties given the arbitration costs and outcome risks facing dispute parties. We participated in a panel at the ARIAS·U.S. 2024 Spring Conference on the opportunities, limits and tools for arbitrator involvement in facilitating mediation or settlement, and had very vibrant discussions with the participants on the topic. This arti-

> “…the major arbitral institutions are encouraging parties to consider settlement as an arbitration unfolds.”

cle summarizes some of the issues we discussed.

## Fundamental Constraints to Arbitrator Involvement

We begin by observing that as arbitrators, we must above all protect the integrity of the arbitration process by adhering to the basic duties to:

- Protect the enforceability of the award. The arbitral process and the parties depend on awards being enforceable and not being vulnerable to challenge due to arbitrator actions. We should avoid conduct that could expose the award to being set aside.
- Decide the case before us solely based on the merits. Arbitrators should be completely neutral and unbiased in the case of neutral panels as well as umpires/chairs in arbitrations such as many insurance arbitrations in which party-appointed arbitrators need not be without predisposition at the outset of the arbitration.
- Respect the principle of “party autonomy” of the contractual arbitration process. This means that arbitrators cannot and should not pressure the parties to settle their dispute.

With these thoughts in mind, there is a tool box of options available to parties and arbitrators in an arbitration to address potential settlement without arbitrator pressure.

## The Mediation Window

At the outset of the arbitration proceeding, all of the ARIAS·U.S.[1], AAA[2], ICDR[3], ICC[4], CPR[5] and JAMS[6] rules, among others, provide for raising the prospect of settlement or mediation. This makes sense because often neither party wishes to be the first to raise the topic for fear of looking less than confident in its case, and the arbitrators can remove this block by simply asking the parties whether they wish to build a mediation window into an appropriate point in the case schedule in which the parties will retain a mediator to help them see if they can reach a business compromise resolution. A mediator, unlike an arbitrator, can help the parties focus on ways to resolve the dispute that go outside the confines of simply considering the relative merits of each party’s positions such as:

(1) discussing the costs, risks and business interruptions of going forward with arbitration through an Award,
(2) developing agreed new operating rules or approaches among the entities who will continue dealing with one another (e.g., appointing a neutral accountant or claim adjuster who issues a binding report),
(3) establishing a schedule of structured payments,
(4) agreeing on “baseball arbitration,” and
(4) other business considerations that go beyond pure monetary considerations.

Curiously, we found through our polling at the ARIAS·U.S. Spring 2024 Conference that not all ARIAS·U.S. arbitrators or members were aware that the ARIAS·U.S. Rules specifically provide in Rule 10 (g)(x) that:

> “unless there is an explicit reason for not including it, the agenda for the organizational meeting should include the topic of mediation.” [7]

ARIAS·U.S. Rule 12.2 also explicitly states that the Panel should consider “raising the possibility of mediation” at other “key junctures of the proceeding, including but not limited to (a) [a]t the close of discovery; (b) when pre-hearing briefs are exchanged; upon a motion for summary judgment.”[8]

The AAA Commercial Arbitration Rules and the ICDR International Dispute Resolution Rules also provide for mediation of disputes with an independent mediator who is not one of the arbitrators, with the timing of the mediation and the choice of a mediator to be agreed by the parties, but allow a

party to opt out of the mediation process entirely.[9] The AAA form template for the initial scheduling order that is given to parties at the outset of a commercial arbitration provides for the arbitrators to determine with the parties whether there is a point in the case for a "mediation window" to be inserted into the initial scheduling order. The parties and arbitrator can determine whether or not to provide for a "pause" in the schedule for the mediation process or simply allow the mediation to go forward at a sensible point in the ongoing schedule.

The arbitration clauses in a number of insurance and other commercial contracts provide for various dispute resolution steps that include mandatory or optional mediation, often as a precursor to arbitration.

## Timing of Mediation

As recognized in the ARIAS·U.S. Rules, there are a number of important junctures when mediation could take place, and the choice at each stage has its own advantages and disadvantages, and these will differ as every case presents its own unique factual and legal issues and other business timing needs. In general, early mediations that are successful will save the most arbitration costs, which can run into the millions of dollars. However, the parties may not feel that they have had sufficient discovery or perhaps the parties have not yet felt sufficient risk from the arbitration in its early stages. At the later stages, the parties will have more information, and may have a better sense of the risks, but will have already expended many of the costs that they could have saved in an earlier settlement. All of these stages are places where many cases have been settled in mediation:

- Before the commencement of arbitration
- Shortly after the initial Organizational Meeting / Preliminary Hearing
- After the discovery cut-off
- After submission of expert reports
- After briefing, argument or a partial decision on identified specific issues
- Even after the final hearing or post-Liability Award

## Other Ways Arbitrators Can Help Parties Settle

We have found that there are other ways to help the parties think about settlement without pressuring them.

> "...there are a number of important junctures when mediation could take place..."

**Asking the Parties to Brief or Argue an Issue or Issues**

One of us recently had a hunch that one of the principal damages claims was not collectible under the subject contract and convinced the other panel arbitrators to ask for briefing on the issue. It turned out that both parties agreed that that this category of damages was not provided for under the contract or applicable state law. Within a week after the briefing was completed, the parties reported that they had settled the case. The argument or decision on a preliminary motion for protective injunctive relief or security can also provide impetus toward mediation or settlement of the entire case.

Some of us have been on panels that decided to present questions to the parties for dispositive motion briefing that focused both sides on their risks on key issues.

**Bifurcating the Case Between Liability and Quantum In the Initial Procedural Order**

Many, if not most, cases will settle once there is an award as to liability. Post-liability settlement discussions are late in the process, but simple bifurcation between liability and quantum of damages can provide an opportunity for settlement while avoiding the costs of proving damages through expert witnesses and other expensive proof.

**Briefly Postponing the Issuance of the Award at the End of the Hearing**

The parties can request or be told by the arbitrator or panel that the award will not be issued until after a particular announced date so as to give the parties time to mediate or otherwise negotiate a settlement following the hearing. By that time, the parties and their counsel

will have seen the entire proceeding unfold before them and may be in a good position to negotiate a resolution.

**"Arb-Med" and "Med Arb" Procedures**
Arb-Med and Med-Arb are processes to which parties can agree in their business contract or during the arbitration proceeding. The Arb-Med procedure takes place after the final hearing. It involves the arbitrator writing and sealing a completed award, but holding it while the parties undertake a mediation, either before a mediator or the arbitrator. If the mediation leads to settlement, the award is never issued. If the mediation does not result in a settlement by a certain date, the award is then simply issued. The advantage to the process is that both sides have seen the other's case and arguments, but the disadvantage is that almost no costs are saved as the arbitration is already at its end.

Med-Arb, on the other hand, begins with a mediation, which if not successful, would have the mediator then serve as the arbitrator to decide the dispute. The advantage here—or with any mediation before a separate mediator before beginning an arbitration—is potentially saving almost all of the significant costs of an arbitration. The disadvantage of using the mediator as the arbitrator is the risk of biasing her/him with the *ex parte* communications by the parties in the mediation process that precedes the arbitration if the case does not settle. Some arbitrators have expressed an aversion to the Med-Arb process because of this. On the other hand, if the mediator is trusted by the parties to base any arbitration decision solely on the evidence presented in the arbitration should the mediation fail, the parties will save the costs of educating a new arbitrator. The med-arb agreement itself would need to provide that the arbitrator's rulings will be based solely on the evidence presented in the arbitration and will disregard all *ex parte* communications exchanged during the mediation process.

**Wing Arbitrators Work With Both Sides as Mediators**
There have been occasions when the Chair/Umpire on a tripartite non-neutral panel has suggested that the two party-appointed wing arbitrators together, with the agreement of the parties, attempt to mediate the dispute. If they cannot, the Chair/Umpire with the two wings can still decide the dispute in the arbitration based solely on the evidence in the arbitration. The Chair/Umpire will have not participated in the mediation.

**International Arbitration Approaches**
In the international arbitration arena, similar and even more active approaches toward encouraging settlement are being discussed or pursued.

The ICC Commission on Arbitration and ADR issued a well-researched 2023 report entitled *Facilitating Settlement in International Arbitration* that discusses some of the procedures outlined above, and suggests that settlement or mediation can be discussed with party consent at the initial Case Management Conference and later "mid-stream" conferences. The report also notes approaches, if the parties agree, such as an arbitration panel discussing non-binding preliminary views or concerns with the parties, which apparently is common in German-speaking countries as part of their judicial proceedings, or the arbitration panel chairing settle-

> "…arbitrators should be open to letting the parties know that there are tools they can use, should they wish, to pursue a negotiated resolution when, as and if the time is right for them."

ment conferences among the parties. [10] We believe that arbitrators should read the report to be current with different approaches being taken by different arbitral institutions on this topic.

The Prague Rules on the Efficient Conduct of Proceedings in International Proceedings, which can be agreed to by the parties before or during an arbitration, provide that arbitrators may announce non-binding preliminary views on disputed issues.[11] The Prague Rules also allow for an arbitrator on an arbitration panel, with prior written consent of the parties, to assist the parties with settlement or even act as a mediator, but provide that if an arbitrator acts as a mediator, further consent to continue as arbitrator is required at the close of an unsuccessful mediation. [12]

CPR has a Concurrent Mediation-Arbitration Clause and Protocol.[13]

## Concluding Thoughts

It is not unusual for the parties to any arbitration to be thinking about how best to address the possibility of settlement. We do not believe that it is the place of arbitrators to "push" parties toward settlement. However, we do believe that arbitrators should be open to letting the parties know that there are tools they can use, should they wish, to pursue a negotiated resolution when, as and if the time is right for them.

By introducing the topics of mediation and settlement, the arbitrators can lift off the shoulders of lawyers and their clients the burden of not wanting to be the first to suggest the topic.

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*Elaine A. Caprio is an ARIAS·U.S. certified arbitrator, mediator, attorney and insurance company executive and officer with 35 years of experience forging resolutions to U.S. and international business disputes. Through Caprio Consulting, which Caprio founded in 2014, she has served as an arbitrator or umpire in over 60 matters involving contract, consumer, banking, insurance and reinsurance disputes. Caprio is currently the Chief Reinsurance Officer for R&Q Re (in Liquidation), where she is responsible for managing the valuation of proofs of claim, as well as recovering outwards reinsurance.*

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*Carlos A. Romero, Jr., a partner of Post & Romero, has been practicing in a broad array of insurance matters since early 1980s (starting with captive insurance companies and IRS challenge of tax deductibility of premiums).*

**Endnotes**

1 ARIAS·U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes Rule 10 (g)(x)

2 AAA Commercial Arbitration Rules (Eff. Sept 1, 2022) at Rule 10.

3 ICDR International Dispute Resolution Procedures (Eff. Mar. 1, 2021) at Article 6.

4 ICC 2021 Arbitration Rules, Appendix IV-Case Management Techniques at (h) (i) and (ii).

5 CPR Dispute Resolution Administered Arbitration Rules (2019) at Rule 21.

6 JAMS Comprehensive Arbitration Rules & Procedures (Eff. June 1, 2021) at Rule 28.

7 ARIAS·U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes Rule 10 (g)(x).

8 *Id.* at Rule 12.2.

9 AAA Commercial Arbitration Rules (Eff. Sept 1, 2022) at Rule 10; ICDR International Dispute Resolution Procedures (Eff. Mar. 1, 2021) at Article 6.

10 ICC, Facilitating Settlement in International Arbitration (2023) at ¶¶ 51-66.

11 Prague Rules on the Efficient Conduct of Proceedings in International Proceedings at Article 2 (e).

12 *Id.* at Article 9.

13 CPR Dispute Resolution, Concurrent Mediation-Arbitration Clause and Protocol (Eff. July 1, 2020).

# The Use of the ARIAS·U.S. Code of Conduct in Case Law

**By Suman Chakraborty, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.**

The ARIAS·U.S. Code of Conduct ("Code") was developed to provide arbitrators and attorneys with guidance on ethical rules for reinsurance arbitrations. And while it is the ARIAS community that most frequently consults the Code, federal courts have also referred to it when addressing matters ranging from panel formation to arbitrator disqualification. Below are some of the leading cases that have relied in part on the Code to resolve ethical issues.

## *In Re Travelers* (D. Conn.)

In *In Re Travelers Indemnity Co.*, No. 3:04 MC 196(TPS), 2004 U.S. Dist. LEXIS 30074 (D. Conn. Oct. 8, 2004), the parties were unable to mutually agree on an umpire. The arbitration clause provided that in the event of such an impasse, "the third arbitrator shall be selected from a list of six individuals (three named by each arbitrator) by a judge of the federal district court" having jurisdiction over the situs of the arbitration. *Id.* at *5-6. The court was therefore faced with having to decide who of the six submitted candidates would be selected to serve as umpire.

The court initially noted that there was sparse case law as to "the qualities and characteristics desirable in an umpire for this type of reinsurance arbitration." *Id.* at *6. It further noted that cases that considered arbitrator qualification in the context of a motion to vacate were helpful, although the procedural posture of overturning an already completed arbitration was different than the task of appointing an umpire in the first place. The court further noted that the

arbitration clause required arbitrators to be "disinterested" active or former officers of insurance or reinsurance companies "without past employment or directorial relationships to either party." *Id.* at *8.

Beyond the need for impartiality and subject matter expertise required by the clause, the court also noted that the umpire would need to "manage the arbitration process in an organized, efficient, and fair manner" *Id.* at *9. The court then looked to the Code, recognizing that according to Canon III "[i]ndividuals who serve on arbitration panels have a responsibility to be familiar with the practices and procedures customarily used in arbitration that promote confidence in the fairness and efficiency of the process as an accessible forum to resolve industry disputes." *Id.* quoting Code at Canon III.

With this Canon in mind, the court rejected all three of the reinsurer's candidates. One was rejected because he had served as an expert witness for the reinsurer's counsel which "calls his neutrality into question" and because he had served as a party-appointed arbitrator for the reinsurer before. The facts "gives rise to business relationship that especially concerns the court." *Id.*at *12. The other two reinsurer candidates had never served as arbitrators before and the court did not believe the pending matter was the right vehicle for their first appointment.

The court accepted that all three candidates nominated by the cedent were qualified and that all three were "certified by ARIAS. *Id.* at *14. The court picked the most experienced of the three, who had served an umpire in approximately 90 disputes.

## *National Indemnity Co. v. IRB Brasil Resseguros S.A.* (S.D.N.Y.)

*National Indemnity Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457 (S.D.N.Y. 2016), was the result of a long-standing set of disputes related to panel formation that ended up in front of the court several times. In this chapter of the dispute, the candidate who had emerged from the selection process accurately filled out his disclosures early in the parties' multi-year panel formation dispute. Upon notification that he had been selected, the candidate updated his disclosures (which were now more than two years old). Those disclosures showed appointments by counsel for both parties, as well as additional appointments with one of the party appointed arbitrations. The reinsurer objected, claiming that one of those additional appointments disqualified the candidate. The arbitration proceeded anyway and the reinsurer filed a motion to vacate based in part on the umpire's prior service as a party-appointed for an affiliate of the cedent.

The court found that the reinsurer "has not presented, and the Court has not found, any case in which a court has found an arbitrator's past service as an arbitrator to be a basis to vacate an arbitration award." *Id.* at 481. In a footnote, the court noted that the parties had each cited to the Code in support of their positions, but found most instructive the Practical Guide to Reinsurance Arbitration Procedure promulgated by ARIAS. Specifically, "the Guide exempts payment as arbitrator or umpire from the type of remuneration that would render an arbitrator under the control" of a party." *Id.* at fn 27, citing ARIAS·U.S., Practical Guide to Reinsurance Arbitration Procedure, Chapter II ¶ 2.3, cmt.

The court in the end found that none of the reinsurer's complaints merited vacatur, and confirmed the arbitration award.

## *Northwestern National Ins. Co. v. Insco, Ltd.* (S.D.N.Y.)

*Northwestern National Insurance Co. v. Insco, Ltd.*, 866 F.Supp.2d 214 (2011), addressed the ethical considerations of the disclosure of panel e-mails by one party appointed arbitrator to counsel for the party that appointed him. The cedent had challenged the conduct of the reinsurer's party appointed arbitrator, claiming that her multiple appointments in prior cases had rendered her too dependent on the reinsurer's counsel. During the course of the proceedings, the cedent had sent multiple e-mails seeking the arbitrator's resignation, and eventually also sought the full panel's resignation. The matter came before the court based on the reinsurer's efforts to disqualify the cedent's counsel for having sought and received panel communication.

While recognizing that the Code was not binding upon the parties, the court noted that:

> Comment Three to the ARIAS Code of Conduct, Canon VI, states that "[i]t is not proper at any time for arbitrators to . . . inform anyone concerning the contents of the deliberations of the arbitrators." The ARIAS Ethics Guidelines further state that "[a]n arbitrator should not reveal the deliberations of the Panel. To the extent an arbitrator predicts or speculates as to how an

issue might be viewed by the Panel, the arbitrator should at no time repeat statements made by any member of the Panel in deliberations, even his or her own.

Even though the reinsurer took the position that the arbitration was not governed by ARIAS rules, the court noted that this was at odds with the reinsurer's conduct throughout the proceedings, where ARIAS guidelines were repeatedly discussed.

The court found the disclosures of the panel communication to be improper and disqualified counsel for the cedent who had received the Panel's emails.

## Concluding Thoughts

There are a few lessons to be taken from these cases.

*First*, all of the courts who looked to the Code understood that the ethical rules were not binding in a judicial setting. Despite that, the courts certainly appear to find them instructive, particularly when both parties point to ARIAS rules and guidelines during the arbitral process and in briefing, or when all panel members are ARIAS·U.S. certified. *See, e.g., Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 66 (2d Cir. 2012) (citing to and quoting Canon IV of the Code "which instructs arbitrators to 'disclose any interest or relationship likely to affect their judgment' and to resolve any doubt about whether to disclose 'in favor of disclosure'").

*Second*, the decision in *In Re Travelers* is noteworthy because it recognized that the ethical concerns when selecting an umpire are different than those considered on a motion to vacate. The Federal Arbitration Act sets a high bar for establishing arbitrator bias or partiality, a standard that the court recognized may not be applicable when determining an umpire before the merits phase. This of course creates a conundrum for parties who believe an arbitrator is not qualified to serve or has a disqualifying bias – case law makes clear that those challenges are properly brought after an award is issued on a motion to vacate, but that procedural posture makes it less likely that a challenge will be successful.

*Suman Chakraborty is a nationally recognized first-chair litigator with Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. He has more than two decades of experience advocating for major insurers and reinsurers in high value arbitrations, and in state and federal court litigation across the country.*

# Ethics Advisory Opinions

"The purpose of the [ARIAS·U.S. Code of Conduct (the "Code")] is to provide guidance to arbitrators in the conduct of insurance and reinsurance arbitrations in the United States, whether conducted by a single arbitrator or a panel of arbitrators, whether or not certified by ARIAS·U.S. and regardless of how appointed."

In April 2024, the ARIAS·U.S. Ethics Committee conducted a survey of the members prior to the 2024 Spring Conference to identify ethical issues facing the organization. The survey results showed the membership viewed these as the main issues:

- Panel qualifications/conflicts
- Exclusion of party arbitrator from deliberations/communications
- Breaches of *ex parte* communication bans
- Breaches of confidentiality
- Breaches of decorum/name calling

The Ethics Committee reported in detail on the results of the survey at the 2024 Spring Conference and solicited ideas for addressing these concerns. Members made various suggestions, including creating an enforcement mechanism for the Code, revising the Code, and issuing advisory opinions.

In September 2024, the Ethics Committee held town hall meetings with the ARIAS·U.S constituencies: arbitrators, company representatives, and outside attorneys. The attendees were invited to share their ideas for addressing the perceived ethical issues, as well as any concerns they might have with respect to the ideas raised. At the 2024 Fall Conference, the Ethics Committee held separate break-out sessions with the three constituencies to discuss the feedback received during the town halls. The leaders of the breakout sessions discussed the various suggestions that had been put forth by town hall participants and solicited additional input from the attendees. The majority of attendees of all three constituent groups supported having ARIAS·U.S. issue advisory opinions to further educate members about their ethical obligations under the Code.

The Ethics Committee researched the use of advisory opinions by other professional organizations, reviewed the insurance purchased by ARIAS·U.S., and prepared a proposal to the Board of Directors outlining the Ethics Committee's proposal for issuing Ethics Advisory Opinions ("EAOs"). As part of the proposal, the Ethics Committee prepared two hypothetical ethics questions and exemplar EAOs responding to the questions. The exemplar EAOs (reproduced below) address fact patterns derived from the hypothetical questions. The ARIAS·U.S. Board of Directors considered the proposal and authorized the Ethics Committee to issue EAOs.

Consistent with the approved proposal, the Ethics Committee will issue EAOs in response to questions submitted on Ethics Advisory Opinion request forms (which will be available on the website) and to questions formulated by the Committee. EAOs are intended to assist members with a better understanding of the Code. EAOs are not intended to supplant or contradict the Canons and Comments comprising the Code. Rather, EAOs focus on the ethical responsibilities of party-appointed arbitrators, neutral arbitrators, and umpires under the Canons and Comments, in the context of particular hypothetical facts or circumstances that may be of concern. Note also, however, that the Purpose section of the Code states:

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

"Members will be able to submit questions anonymously to the Ethics Committee using the request form on the ARIAS·U.S website."

Members will be able to submit questions anonymously to the Ethics Committee using the request form on the ARIAS·U.S website. When filling out the form, members are cautioned not to disclose any identifying information or information subject to a confidentiality order, protective order, or similar strictures. Not every submitted question will be addressed. Member questions may be re-stated or genericized, and the Ethics Committee may formulate its own questions to elucidate the Code.

The Ethics Committee will not opine on questions of law, nor does it intend to provide EAOs on matters that are currently in litigation or arbitration. In determining whether to issue an EAO, the Ethics Committee will review each question to determine whether the answer helps elucidate the Code and will be useful to members. In issuing EAOs, the Ethics Committee will distinguish between matters where the answer is provided by the Canons and Comments, and those that are matters of discretion to be guided by the principles underlying the Code. The Ethics Committee will not opine on purely "discretionary" matters, but it will outline the considerations provided in the Code that should guide the exercise of discretion.

ARIAS·U.S will post the EAOs on the ARIAS·U.S website, making them available to all members, as well as to the public.

The EAOs are not attributable to individual Ethics Committee members or their employers. EAOs may be issued on the basis of a determination by a super-majority of the members of the Ethics Committee to do so. EAOs are not meant to be relied upon, cited, or otherwise used by parties in any disputes or by courts in construing ethical obligations under the Code. We invite members to submit to the Committee any comments or suggestions they may have regarding this process generally.

Next are the first two EAOs.

# Navigating Disqualification Procedures

Facts Presented:
*An arbitrator received a call from Lawyer X who has regularly been on the other side of the parties who have appointed the arbitrator. Lawyer X stated that he was generally reaching out to see whether the arbitrator would be interested in serving as party arbitrator in new cases and asked generally about conflicts with Company A but Lawyer X did not identify a specific arbitration or the facts of any case.*

*Several months later the arbitrator received a questionnaire to serve as umpire in a case involving Lawyer X and Company A.*

*Does the arbitrator need to disqualify themself from service under the facts laid out above?*

Topic Areas: Disqualification, Canon I, Canon IV

Opinion:

1. Based on these facts, the arbitrator does not have to disqualify themself as an umpire candidate.

2. The Comments to Canon I of the ARIAS·U.S. Code of Conduct ("Code") set forth certain circumstances where a candidate for appointment "must" refuse to serve (Comment 3) and other circumstances where the candidate "should" decline the appointment (Comment 4). As Canon I itself states, arbitrators should uphold the integrity of the arbitration process. The fundamental question for an arbitrator to assess is whether they believe they could serve as an Umpire in a fair, diligent, and objective manner.

3. Comment 3 to Canon I states that an arbitrator "must refuse to serve":

   > *e) where the candidate is nominated for the role of umpire and the candidate was contacted prior to nomination by a party, its counsel or the party's appointed arbitrator* ***with respect to the matter*** *for which the candidate is nominated as umpire . . . (emphasis added)*

   Accordingly, the arbitrator should consider the nature and substance of the contact in deciding whether potentially accepting the appointment would be contrary to Comment 3.

4. Lawyer X made an unsolicited phone call and did not discuss any particular matter. Rather, the Lawyer made a general inquiry as to whether the arbitrator had any conflicts with Company A. This discussion between counsel and the arbitrator was not "with respect to the matter" and is therefore not a reason for an umpire candidate to withdraw from consideration.

5. The answer could be different depending on the level or nature of information disclosed in the call. We note that this is not in any way intended to condone attorney behavior designed to preemptively disqualify an umpire candidate, which should never take place. Regardless, an arbitrator must remember their fundamental duty under Canon I to uphold the integrity of the arbitration process and promote fairness and should confirm their ability to do, considering the contents of the call.

# Arbitrator Faces Call to Disqualify Themselves

Facts Presented:

*A reinsurer appointed a retired underwriter to serve as its party arbitrator in an arbitration brought by a ceding company to collect balances under a contract that was in force more than 20 years ago. Aggregation of claims was one of the issues in dispute.*

*After acceptance of the Panel, cedent's counsel asked the arbitrator to resign from the Panel because the arbitrator's former employer was another reinsurer on the same contract and the arbitrator was the underwriter. Documents produced during discovery, and supplied to the Panel by cedent's counsel, revealed that, while the contract was in force, the arbitrator was personally involved in responding in writing to an aggregation issue similar to the issue in dispute in the arbitration.*

*The arbitrator responded that, given the passage of time, the arbitrator (a) had not recalled their direct involvement in the contract or the aggregation-related issue, and (b) felt they could be fair and impartial in the arbitration. In these circumstances, does the ARIAS·U.S. Code of Conduct require the arbitrator to resign from serving as party-arbitrator?*

Topic Areas: Integrity/Fairness/Disqualification, Canon I, Canon II, Canon IV

Opinion:

1. Based on these facts, the arbitrator should resign as a party arbitrator.
2. Canon I of the ARIAS·U.S. Code of Conduct ("Code"), titled "Integrity," specifies that "Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently." Comment 4 to Canon I provides:

   > Consistent with the arbitrator's obligation to render a just decision, before accepting an appointment as an arbitrator the candidate should consider whether any of the following factors would likely affect their judgment and, if so, should decline the appointment:
   > * * *
   > d) whether the candidate has involvement in the contracts or claims at issue such that the candidate could reasonably be called as a fact witness

   Comment 5 to Canon I refers to an important general principle inherent in Canon I, namely, "in upholding the integrity of the arbitration process arbitrators will avoid the perception of bias."
3. Due to the timing of the request that the arbitrator resign, the arbitrator should also consider their obligations under Canon IV ("Disclosure"). Comment 5 to Canon IV provides:

   > After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw . . . In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when one or more of the following circumstances exist.
   > * * *
   > b) if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly.
4. Under Comment 4 to Canon I, it is the arbitrator themself who must weigh their prior involvement with the contract and assess whether it will likely affect their judgment. Under Comment 5 to Canon IV, the arbitrator must also consider whether the reason for the challenge is substantial and impedes their ability to decide the case fairly. Although the arbitrator did not recall their involvement with the contract when appointed (and therefore did not disclose it), they should consider the possibility that further documents and testimony may refresh their recollection. See Comment 6 to Canon IV

(stating that the duty to disclose is continuing and, if a previously undisclosed interest or relationship is recalled during the course of the arbitration, it must be disclosed). If the arbitrator's ability to render a just decision in a fair manner would be impeded by their prior involvement with the contract, the arbitrator must withdraw. See Canon II ("Fairness") and Comment 1 to Canon II.

5. Even if the arbitrator believes that the parties would not call the arbitrator as a fact witness, the arbitrator would (a) effectively be serving as a fact witness in light of the arbitrator's prior writings regarding aggregation under the very contract at issue in the arbitration and (b) not be subject to cross-examination by the parties.

6. The arbitrator has an obligation under Canon I to avoid the perception of bias. This requires that the arbitrator consider how a reasonable person would view the arbitrator's ability to render a just decision in light of the arbitrator's prior personal involvement with the contract on an issue analogous to the one in dispute. The arbitrator's subjective belief that they can be fair and the fact that only one side has asked the arbitrator to withdraw do not override the arbitrator's ethical obligation to step down from the panel due to the reasonable perception of bias under these facts.

# UPCOMING EVENTS

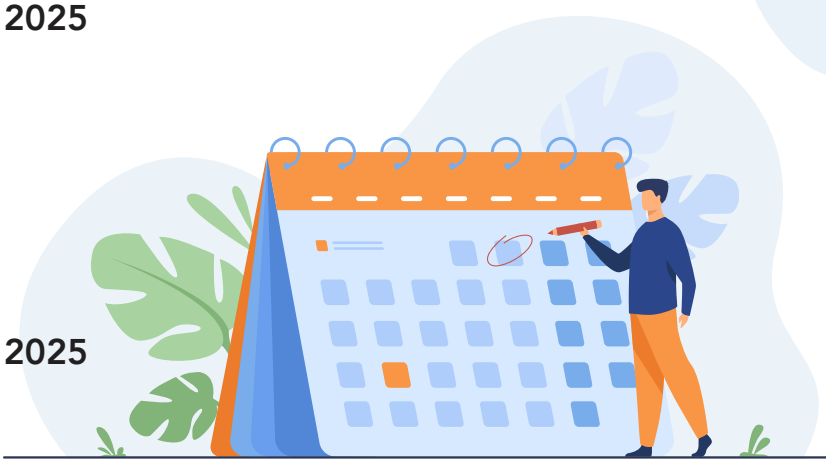
## Future Leaders Committee Chicago Area Kick-off Reception
**September 11, 2025**
**5:30 pm**
Troutman Pepper Locke
111 South Wacker Drive Suite 4100
Chicago, IL 60606

## Umpire Masterclass Workshop
**November 12, 2025**
**12:30 pm – 5:00 pm**
Marriott Marquis, New York

## 2025 Fall Conference
**November 13, 2025 - November 14, 2025**
Marriott Marquis, New York City

## 2026 Spring Conference
**April 29, 2026 - May 01, 2026**
J.W. Marriott, Nashville, TN

## 2025 Fall Conference
**November 12, 2025 - November 13, 2025**
Marriott Marquis, New York City



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# 2025 Spring Conference Recap

***April 30 to May 2, 2025***

**By ARIAS·US Staff**

On April 30 to May 2, 2025, the members of ARIAS descended upon Coral Gables, Florida for the 2025 Spring Conference.

Held over the course of three days, attendees were in high spirits, with an abundance of in-depth substantive content and networking opportunities, not to mention good food and warm weather.

The Women's Resource Committee kicked off the conference with a networking event on Wednesday morning, April 30, in which they prepared care boxes for LGBTQIA+ youth and victims of domestic violence.

After the opening lunch, which included the Member Services Committee Ambassador program lunch and the Future Leaders Committee lunch, we were treated to a fireside chat between our Keynote Speaker, The Honorable Federico A. Moreno, United States District Court Judge, Southern District of Florida; and ARIAS·U.S. Chair, Joshua Schwartz.

Judge Moreno drew upon his years on the bench to share insights on effective advocacy, his advice for young lawyers and testifying witnesses, and his experience presiding over many criminal and civil matters.

The fireside chat with Judge Moreno was followed immediately by the first general session of the conference, "California Wildfires Insurance and Reinsurance Issues" – a very hot and current topic. The session featured arbitrator Jeff Rubin as moderator; Teresa Snider of Porter Wright Morris & Arthur LLP; Spencer Kook of Hinshaw; and Elliott Feldman of Cozen O'Connor.

They discussed their experience with respect to past California wildfires and the Santa Ana winds to examine the insurance and reinsurance coverage issues that may arise, as well as the applicable legal authorities for the various situations.

The panel also addressed issues implicated by potential transfers of subrogation claims (such as claims against utility companies) from insurers to hedge funds. They also touched on the impact of the most recent California wildfires on the California market, including the residual market/FAIR Plan, and resulting implications for the insurance and reinsurance industry.

The next general session was a discussion on "The Science of Settlement: Psychology and Mediation" with Katherine Koener of Kelley Kronenberg; mediator and arbitrator Anne Kevlin; Nora Deveau, of Arch Insurance Group; and Daniel Hargraves, of AmTrust Financial Services.

The panel discussed some leading mediation and negotiation texts, e.g. Holding the Calm, The Art of Persuasion, Getting to Yes, and Never Split the Difference.

They also explored how emotions often derail settlement negotiations and the causes of those emotions, as well as how certain psychology concepts can help "lower the temperature" to optimize mediation results.

Next, the third general session of the first day explored the topic of preparing and presenting a case in arbitration versus litigation, and the differences and similarities with a panel moderated by Tom Cunningham of Sidley Austin.

Panelists Sarah Gordon of Steptoe as well as arbitrators Jonathan Rosen and Frank Papalia discussed how whether disputes are resolved by arbitration or litigation holds evidentiary, strategic, and tactical implications for resolution of complex reinsurance disputes.

The panel explored evidentiary rules that all arbitrators should know. It also discussed principles for parties and counsel to bear in mind in preparing and presenting witness testimony and documentary evidence, conducting cross-examinations, and making openings and closings to arbitrators on the one hand and judges and juries on the other.

Following the day's educational program, all attendees were invited to an outdoor cocktail hour.

On Thursday, May 1, we began with the fourth general session, moderated by Liz Kniffen of Zelle, which focused on insured's direct claims against reinsurers, and how they could involve "intentional, unintentional and surprise direct liability."

The panel included: arbitrators Jonathan Bank and Keith Kaplan; Ellen Kennedy of United Educators; and John Glowacki of Riverstone.

They explored reinsurance clauses that may or may not expose a reinsurer to direct liability, including cut through clauses, claims control clauses, and cooperation clauses, as well as what actions on the part of a ceding company and reinsurer may open the door to direct claims by insureds.

They also discussed how, although sometimes intentional, as in the case of cut through provisions, other involvement by reinsurers may also create a path for direct claims by an insured – leading to "surprise" direct liability.

The attendees then split up for a series of dynamic and diverse break-out sessions.

First, Andy Rothseid of Gallagher Re acted as moderator for a panel that included Paul Brockman of Enstar; Adrianna Cotter of Norton Rose Fulbright; and Michael Halsband of McDermott, Will & Emery.

They discussed retrospective reinsurance agreements, commonly referred to as "legacy deals", and the market interest, execution and industry implications of such agreements.

The panel delved into how these agreements were once a novel solution for companies experiencing adverse loss development, but now they are used more frequently as a capital relief tool affecting company rating and shareholder value.

They also explored the development of the market for these agreements and how the issues involving these transactions affect many touch points, including diligence requirements, non-disclosure agreements, contract negotiation and drafting, and disputes relating to the level and adequacy of disclosure.

There was also a break-out session about emerging risks. The panel was made up of Jack Vales of Dentons; Jim Dolan of Enstar; Frank DeMento of Transatlantic Re; and Lisa Simon of Swiss Re.

They discussed emerging claims stemming from alcohol, highly processed foods, microplastics, climate-related legislation, psychedelics, and PFAS.

They also explored the potential legal grounds for such claims, the extent to which such claims are likely to gain traction in the current climate, and insurance and reinsurance considerations related to such claims.

Next, Marie Hunt of Aon and Elizabeth Mazzocco of Foley & Lardner discussed war and terrorism, how the world has witnessed civil unrest and war in Chile, Ukraine, France, the US and other countries over the last five years, and how the "civil unrest and war" categorization may actually be a combination of war, civil war, riot, terrorism, and/or cyber events, which cannot neatly fit into one definition.

They also explored the various events and potentially relevant treaty language.

The fourth breakout was an informative discussion on how to proactively avoid TPA or MGA-related disputes.

The panel included Peter Steffen of Smith Gambrell Russell; Joe Loggia of Buxbaum Loggia; and David Bradford of Zurich.

They explained how relationships between insurance and reinsurance companies and TPAs/MGAs/MGUs can be a profitable win-win business tool or, if not managed properly, end with potential disputes.

They noted that MGA relationships have been cited as a cause behind certain insurance company insolvencies.

The panel also gave the participants guidance as to how to best manage these relationships and prevent the issues that sometimes arise when the insurance company authorizes a TPA, MGA, or MGU to act on its behalf.

The final breakout was a Member Services Committee networking event, which gave ARIAS' newest members an opportunity to network and build and diversify their contacts and network by engaging in a fun and relaxed format

On Friday, May 2, after some early morning committee meetings, attendees reconvened for the fifth general session of the conference, which was a discussion on the alternatives to the advocate arbitration system.

The panel consisted of Joshua Schwartz of Premia; Cia Moss of Chaffetz Lindsey; Mark Chudleigh of Kennedys; Tim Curley of Allianz; and Jennifer Cavill of Chubb.

They discussed how we arrived at our current arbitration system, where the arbitrators advocate and ex parte communication is the norm. They also talked about how while the ARIAS community has considered neutral arbitration as an

alternative to the advocate system, the ARIAS neutral rules have not taken off.

The panel explained that the ARIAS Board has established a Task Force to evaluate these issues and provide generate recommendations.

In this session, the panel also analyzed the current state of play in ARIAS arbitrations and the possibility of considering non-advocate options for ARIAS arbitration tribunals.

It explored the utility of arbitrator advocacy and ex parte communications, along with ethical considerations that the system presents. They also considered the potential benefits of non-advocate tribunals and whether ARIAS should provide a non-advocate offering.

The session used a polling system to give the ARIAS community an opportunity to share their experiences and ask questions as the Task Force considers these important questions.

Next, the sixth general session presented by the ARIAS Law Committee on key cases gave newer members a chance to present.

Michael Carolan of Troutman Pepper Locke moderated the session, and the panel was made up of Tricia Duffy of Saul Ewing; Gabby Siskind of Zelle; Maggie Burnside of Troutman Pepper Locke; Josh Shettle of Enstar; and Stephen Turner of Dentons.

Each panelist discussed one recent key insurance or reinsurance case, and made the case why their case is the most important, with conference attendees voting on which case they believed was the most significant for the industry.

Finally, certain members of the Ethics Committee – including Stacey Schwartz of Swiss Re; Joy Langford of Partner Re; Neil Moglin of Foley & Lardner; and Alysa Wakin of Odyssey Re – provided an update on the topic of whether an enforcement mechanism is the best way to ensure a fair arbitral process.

The topic was first introduced at the 2024 Spring Conference and it was a subject of discussion at the Ethics Town Halls in August 2024, and at the 2024 Fall Conference.

Based upon these discussions, and after considering various options, the panel reported that it had concluded advisory opinions were the first step, which the Board approved.

The panel then discussed the mechanics of the advisory opinion process, which led to audience questions and suggestions for the committee, which the Ethics Committee has taken under advisement.

After closing remarks from ARIAS·U.S. Chair, Joshua Schwartz, the conference concluded.

All in all, the Spring Conference was a great success.

We look forward to seeing you for the 2025 Fall Spring Conference on November 14-15, 2025 at the Marriott Marquis in New York City.

# Newly Certified Arbitrator

**Seema A. Misra**

Seema A. Misra is Senior Vice President, Deputy General Counsel and the Chief Litigation Officer of Arch Insurance Group, Inc. Her areas of responsibility include counseling the ceded reinsurance business unit of AIGI.

Prior to joining AIGI, Misra was with AIG's Reinsurance Legal group where she provided advice and counsel on a wide range of current and legacy reinsurance matters.

From 2001-2015, Misra was an associate and then a partner at Stroock & Stroock & Lavan in New York City, where she focused on insurance and reinsurance dispute resolution.

Misra is a member of the ARIAS Women's Resource Group and the ARIAS Education Committee. She is a graduate of Princeton University, *cum laude*, and the Boston University School of Law.

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




**AIDA Reinsurance & Insurance Arbitration Society**
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Chicago, IL 60606
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