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A Working Guide to Dispel the Mysteries of Arbitration Proceedings

MURPHY'S LAW OF REINSURANCE ARBITRATIONS

Eugene Wollan

Eugene Wollan is a partner in the New York law firm, Mound, Cotton & Wollan.

The author departs from his usual insurance case law analysis in this column to give us an amusing inside look at what goes on in reinsurance arbitration proceedings. His nine "Rules" and their attendant corollaries are presented here somewhat whimsically; yet, they are intended to – and do—reveal the inner workings of the system for the benefit of those who may become parties to such arbitration.

Although reinsurance arbitrations seem to be proliferating these days at approximately the same rate as rock videos, the nature of these proceedings remains a mystery to most of the insurance and reinsurance community. The purpose of this article is to case some light on the more arcane aspects of the system and provide a sort of working guide, not only to potential parties but also to those toilers at the bar who may find themselves handling such cases. One caveat: this is written from the perspective of a working lawyer whose involvement in such matters goes back to the days when arbitration demands were dispatched by Pony Express; clients and potential clients be warned accordingly.

By their nature, reinsurance controversies tend to be far more complicated.

Genesis

Most reinsurance controversies simmer for months and years—indeed, sometimes even for decades—before erupting into full-fledged arbitrations. There are certain very clearly established rules of behavior that govern the relationship between client and counsel in these early stages. These rules are nowhere written down, but they are so firmly entrenched in the practice of the industry that they might as well be cast in stone.

Rule I: The client always consults counsel between 3 and 5 P.M. on a Friday afternoon.

The reason for this rule is perhaps self -evident. Reinsurance controversies are troublesome things, and the client spends a good deal of time and effort stewing about what to do. There is a natural reluctance to consult counsel, somewhat akin to avoidance of dental appointments and predicated on very similar fears: of both physical and fiscal distress. It therefore requires a substantial motivation to induce the client to take the plunge, and the strongest possible impetus is the urge to clear his desk before the

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Letter from the Editorial Board

Dear Members:

The ARIAS•US Quarterly Editorial Board invites you to send us articles on topics that are of interest to those involved in insurance and reinsurance arbitrations, as well as letters in response to previously published papers. Our goal is to provide a forum for highlighting and discussing significant arbitration issues, as we believe this will foster the objectives of the Society.

All such correspondence should be sent to the Editor, Stephen H. Acunto, Chase Communications, P.O. Box 9001, Mount Vernon, New York 10553. The Editorial Board reserves the right to decide what will be published and when publication will occur. Any substantive editing will be made only with the permission of the author.

If you have any questions or ideas on how to make the Quarterly more beneficial for the membership, please contact Bob Mangino or me. Thank you.

Sincerely,

Daniel E. Schmidt, IV

Chairman, Editorial Board

Collateral Estoppel and Arbitration

Michael A. Knoerzer

Editor's Note: Mr. Knoerzer is a partner in the law firm of Werner & Kennedy in New York City, where he concentrates his practice in the area of insurance and reinsurance coverage disputes. The opinions presented in this commentary are those of the author and should not be attributed to Werner & Kennedy or its clients. Portions of this Commentary were published in Mealey's Litigation Reports.

1. Introduction

The doctrine of res judicata precludes relitigation of claims that were, or could have been, decided in a prior proceeding.[1] The doctrine of collateral estoppel precludes relitigation of issues that were actually and necessarily decided in a prior proceeding.[2] These judicially created doctrines serve the purpose of bringing repose to disputes and preventing redundant and unnecessary litigation.

Courts have long held that these preclusive doctrines apply to arbitration. While application of res judicata to reinsurance arbitration is largely routine, application of collateral estoppel to reinsurance arbitration has not in practice been widely accepted. This commentary examines the doctrines of res judicata and collateral estoppel and discusses their application to the arbitration of reinsurance disputes.

II. Res Judicata (Claim Preclusion)

A. Definition of Res Judicata

The doctrine of res judicata, also known as claim preclusion, provides that a judgment on the merits in a prior proceeding bars a subsequent proceeding involving the same parties and the same cause of action. Application of res judicata to litigation or arbitration is just another way of saying that the decision of the court or the panel binds the parties and that, absent

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week-end. Recognition of the importance of motivation leads ineluctably to:

Corollary I to Rule I: That Friday afternoon will usually be the one just before the client leaves on vacation.

The result is that the client, having presented the matter to counsel as the direst of emergencies, then becomes immediately unavailable for consultation for at least several weeks, leaving counsel to muddle through as best he can in his effort to figure out what the case is all about. That is, of course, counsel's first task (after establishing the billing rate): to familiarize himself with the facts of the case. By their nature, reinsurance controversies tend to be far more complicated, and their facts to extend much further back into the recesses of history, than the typical lawsuit. It is not at all uncommon for a case to relate to contracts that were made or losses that were sustained many, many years earlier. The phenomenon gives rise directly to

Rule II: The client cannot locate his file.

This rule sometimes assumes a slightly different form.

Rule II: (alternate): No one can identify the applicable treaty.

Equally troublesome from counsel's point of view is

Rule III: No one who was involved in the original placement (or the original claim) is still employed by the client.

Whereupon counsel then instantly confronts

Corollary I to Rule III: All of the former employees have moved to Albania and cannot be located, much less interviewed.

Sooner or later, of course, despite these impediments, counsel will develop some sort of handle on the case. He has done his research (which is, naturally, of virtually no assistance because previous arbitration decisions are by definition unreported), and he proceeds to the next act of the drama.

The Panel

It has been observed by a great sage that in the reinsurance business you sooner or later meet yourself coming around the corner. Nowhere is the accuracy of this aphorism better demonstrated than in the process of designating the arbitrators and selecting an umpire. The statement is so universally valid that it provides

By their nature, reinsurance controversies tend to be far more complicated, and their facts to extend much further back into the recesses of history, than the typical lawsuit.

Rule IV: The first eight possibilities considered for the panel will turn out to have a conflict of interest.

There is a group of very knowledgeable, highly capable, thoroughly experienced reinsurance experts available to act as arbitrators and umpires. The problem seems to be that the demand is greater than the supply. This is not simply a matter of the potential panelist finding it physically impossible to be in two places at once (hardly an insuperable obstacle—after all. Concorde pilots and trial lawyers do it all the time). The greater difficulty is that the expert approached by counsel will almost always turn out to be already engaged in another arbitration involving one of the same parties. As a result, the search for qualified, competent and available panel members takes on something of the nature of Blondel's protracted quest for King Richard. From this fact flows

Rule V: The completion of the panel requires more time than all other phases of the case combined.

The key panel member is, of course, the umpire. His role is so critical that it warrants separate consideration. Experience has demonstrated conclusively that every umpire who has ever served on an arbitration panel falls precisely into one of the following categories:

1. CASPAR MILQUETOAST. This umpire feels totally out of his element and is diffident almost to the point of invisibility. He is so awed by Counsel (after all, they are professionals) that he permits them to get away with murder, which they do with regularity as soon as they realize he can be taken advantage of; that realization usually comes to them within the first ten minutes of the hearing. This species requires a massive injection of calcium to strengthen the spine.

2. TORQUEMADA. The exact antithesis of No. 1, this umpire puts even the Grand Inquisitor to shame. He becomes drunk with power, rides roughshod over Counsel and Panel alike, brooks no argument, and tolerates no discussion. He treats every witness like a retard or perjurer or both. His rulings,

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MURPHY'S LAWS ...

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made without consulting his colleagues on the Panel, are brusque and arbitrary. The prescription for this mental aberration is a large does of the milk of human kindness with a dollup of humility.

3. HENRY CLAY. Unlike his prototype, the Great Compromiser, every ruling this empire makes is a half-way measure that satisfies no one and solves nothing. His role model is King Solomon, but it escapes his notice that cutting the baby in half is seldom an appropriate solution. A liberal application of decisiveness is called for here.

4. JUDGE ROY BEAN. This umpire goes through the motions of a full and fair hearing, except that he starts out with his mind made up and is unwilling to be confused by the facts. The only remedy for this form of arrested intellectual development is a daily objectivity pill.

5. GOLDFINGER. To this umpire, "follow the fortunes" refers to his own bank account, perhaps in Switzerland. His primary concern is how long the hearing can be made to last and what fee schedule he can get the parties to accept. There is no known cure for the disease of greed, but it can usually be controlled by tactful cooperation of the parties.

6. WILLY LOMAN. This is the quintessential salesman. He wants to be everyone's friend because some day, somehow, somewhere he may have some business referred to him by one of the parties or witnesses, or perhaps even be asked again to serve on a panel. Isolation is the recommended course of treatment.

7. OLIVER WENDELL HOLMES. And then there is the umpire who is even-handed, fair minded, dedicated and conscientious, intelligent and perceptive in his analysis of the case, considerate and pleasant but also firm and decisive in dealing with Counsel and witnesses, objective and impartial but open to reason and persuasion—in brief, the paragon of umpires. There are those who, having been through the mill, will protest that if this prototype of umpire really exists, so too do Santa Claus and the Tooth Fairy. The question lies far beyond the scope of this discussion.

What a proceeding like a reinsurance arbitration does is create a highly concentrated environment in which those very human characteristics are highlighted more dramatically than usual.

The Hearing

The first order of business for the members of the panel is always—not generally, not ordinarily, not frequently, not commonly, but always—to get their hourly and daily rates and the methods of payment. That having been accomplished to their satisfaction (which, interestingly enough, coincides precisely with the first stirrings of second thoughts by the parties as to whether the whole exercise is such a good idea after all), they next promulgate the ground rules and, particularly, the timetable under which the arbitration is to proceed. This includes fixing a hearing date and establishing deadlines for the submission of written briefs and documentary materials. In doing so, the Panel will inevitably bring into play

Rule VI: Counsel always needs more time.

This requirement arises without fail out of one of the following circumstances:

1. Counsel has a conflicting engagement.

2. Counsel decides it would never do to admit he does not have a conflicting engagement.

3. Counsel needs time to try to figure out a viable theory of the case.

4. Sooner or later, however, the briefs have been written, the witnesses have been lined up, the parties and counsel have conferred, the Panel has convened, and the hearing proceeds. Thereupon, all concerned must forth with confront

Rule VII: The hearing always takes longer than everyone thought it would.

One consequence of the operation of this Rule is the utter chaos into which it throws counsel's schedule for the ensuing weeks. (There goes that trip to Disneyland again!) Of far greater moment, however, even to the most

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COLLATERAL ESTOPPEL...

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reversal or vacatur of the decision, the particular dispute resolved cannot be relitigated or rearbitrated by the parties.

To most people, the application of res judicata to court judgments and arbitration awards makes good sense. Unlike touch-football, the law cannot permit "do-overs" just because one party is unhappy with the result. The soundness of this doctrine is obvious: without res judicata, a well-heeled but unsuccessful litigant could litigate a claim over and over until either a favorable decision is achieved or the opponent is bankrupted.

An important aspect of res judicata is that its effect extends beyond merely those issues actually decided in a proceeding.[3] Res judicata prevents an unsuccessful party from relitigating a previously decided claim based upon new arguments the party could have, but did not, raise in the prior proceeding.

B. Res Judicata in Action

Consider the following example involving a dispute under a reinsurance treaty. Ceding Company commences an arbitration against Reinsurer seeking reimbursement of losses Ceding Company paid on a claim involving a hydrogen-filled dirigible named the Hindenburg. Reinsurer's sole defense is that Ceding Company fundamentally induced Reinsurer to accept a participation on the treaty which covered the Hindenburg risk. After a five-day hearing, during which Reinsurer was given a full opportunity to prove its defense, the panel directed Reinsurer to pay its entire share of the Hindenburg loss.

Reinsurer, after receiving the unfavorable award, notices that the Treaty expressly excludes coverage of hydrogen-filled dirigibles. Thus, Reinsurer commences a second arbitration regarding the Hindenburg claim, this time raising the treaty exclusion defense.

Although Reinsurer has asserted a new defense not raised in the first arbitration, it is clear that the second arbitration arises from the same cause of action as the first arbitration — both involve the Treaty and the Hindenburg claim. Under the doctrine of res judicata, Reinsurer's failure to raise the treaty exclusion defense in the first arbitration precludes it from raising that defense in the second arbitration.

Res judicata cuts both ways, however. Suppose that after the first arbitration, Ceding Company realizes that the Treaty provides for reimbursement of defense costs in addition to reimbursement of loss payments. The doctrine of res judicata also bars a subsequent arbitration by Ceding Company to collect those defense costs, because this claim should have been decided in the first arbitration.

C. Application of Res Judicata to Arbitration Awards

Federal law supports the application of res judicata to arbitration awards. Section 13 of the Federal Arbitration Act provides that a confirmed arbitration award has the same effect as a judgment rendered by a court. While there is respectable authority for the proposition that an unconfirmed arbitration award may also be accorded preclusive effect, [4] there is sufficient authority to the contrary to commend the practice of moving to confirm an award.[5]

Significantly, the doctrine of res judicata bars relitigation of a claim even when the losing party does not appear at the arbitration and the panel issues a default award.[6] If the arbitrators lacked the authority to hear and decide a particular claim, however, a court will not confirm the award and res judicata effect should not be granted.

III. Collateral Estoppel (Issue Preclusion)

A. Definition of Collateral Estoppel

In contrast to the ease in which res judicata has been applied to arbitration, application of collateral estoppel has proven much more difficult and controversial. Unlike res judicata, the doctrine of collateral estoppel (or issue preclusion) bars relitigation of individual issues, not entire claims.[7] Where an issue was necessarily and actually litigated and decided in a prior action, collateral estoppel may bar relitigation of the issue in a subsequent action, regardless of whether the second action involves the same claim as the first. Thus, the doctrine of collateral estoppel recognizes that although subsequent actions might not involve the same claim, they may involve identical issues which should not be relitigated.

B. An Example of Collateral Estoppel

Consider another example involving the same ceding company and reinsurer that arbitrated the Hindenburg claim. Assume that a second claim arises under the Treaty involving an insured named the Conflagration Oil Company which houses tanks of rocket fuel on the San Andreas fault. An earthquake destroys the tanks. Ceding Company pays the claim and seeks to recover from Reinsurer in an arbitration proceeding (the "Conflagration Oil Arbitration"). As in the Hindenburg Arbitration, Reinsurer defends by arguing that Ceding Company fraudulently induced Reinsurer into accepting a participation on Treaty.

Since the Conflagration Oil Arbitration does not involve the same claim as the Hindenburg Arbitration, the doctrine of res judicata does not bar this defense. The issue of Reinsurer's fraudulent inducement defense, however, is common to both arbitrations. Thus, Ceding Company may assert that the doctrine of collateral estoppel precludes Reinsurer from relitigating its fraudulent inducement defense in the Conflagration Oil Arbitration.

To successfully assert collateral estoppel in the Conflagration Oil Arbitration, Ceding Company would need to demonstrate the following facts:

1. The panel in the Hindenburg Arbitration actually and necessarily decided

Reinsurer's fraudulent inducement defense in order to settle that dispute.

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MIAMI, FLORIDA...

AIDA/U.S. – ARIAS/U.S. COLLOQUIUM, A SUCCESS

More than 130 insurance and legal professionals from South America, Australia, Europe and the United States gathered in Miami, Florida, April 2-5, 1997 for the first Joint International Colloquium of AIDA U.S. and ARIAS • U.S.

Attendees were treated to perfect weather, when outdoors, and by all accounts, an outstanding two-part program when together in the Omni Colonnade Hotel.

Meetings of the AIDA U.S. Presidential Council and AIDA Worldwide Presidential Council were held: At Luncheon on Thursday, April 3, 1997, John Butler, President of AIDA offered a report on AIDA International Activities. A panel, Liability Spin-Offs: Should Insurer Restructurings Be Allowed? - included Robert Shapiro, partner, Law Offices of George K. Bernstein, Washington, D.C.; David J. Walsh - General Counsel, American International Group, New York; Robert Mackin, Mackin & Company, Albany, New York; Geoff Nicholas, Partner, Freshfields, London; Mark Herlihy, Levi, Perry, Simmons & Loots, PC, Washington, D.C. and David Nichols, Risk Enterprise Management, New York City; Moderator was Carol Campbell Cure of O'Connor, Cavanagh, Phoenix, Arizona. The featured Speaker that evening was Hon. William B. Hoeveler, U.S. District Court, District of Florida, who presided over the criminal case of former Panamanian dictator, Manuel Noriega. On Friday, April 4, 1997 - Privatization of Pensions: Opportunities and Challenges, a program of speakers included: Jan Carendi, Sr. EVP, Skandia Insurance Co., Sweden; Dr. Dimitri Vittas, Adviser, World Bank; Dr. Francisco Sequeira, Federacion Impresas, Chile; Dr. Olivia Mitchell, Prof., Wharton School of Business, University of Pennsylvania; Moderator was Dr. Harold Skipper, Georgia State University.

The ARIAS•U.S. Program featured a mock arbitration that highlighted many important issues in the field. Led by Ron Jacks and Dan Schmidt, the panel included several outstanding professionals. ▲

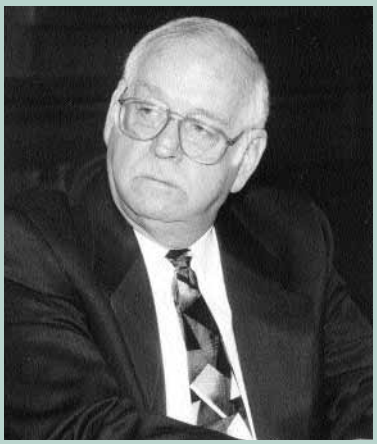
A likvely ARIAS/U.S. mock arbitration dealt with such issues as collateral estoppal, ex parte communications and confidentiality.

Mock Arbitration covered the Arbitration of International Disputes and featured...

Of Counsel...

James J. Rubin, Esq.
Butler, Rubin, Saltarelli & Boyd
Chicago

Arbitrator...



Frank J. Barrett, Esq.
Former Chairman, NAIC

Umpire...

Daniel E. Schmidt, IV, Esq.
EVP and Group General Counsel,
SOREMA N.A.

P A R T I C I P A N T S . . .

Left:
New ARIAS Members
Richard Feldman
and Gary Centola

Right:
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Dick Kennedy and
Judge and Mrs. Hoeveler

Jan Woloniecki,
Mark Herlihy

Paul Hawskworth,
Mary LoPatto,
Charles Havens

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Michael Isaacson

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John Riihiluoma,
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London

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P A R T I C I P A N T S . . .

Nan and Edmond Rondepierre

Richard Waterman, Vicki Gabay, Ann and Robert Mangino

Below: Mr. & Mrs. John Thornton, Anthony and Julie Lanzone

James Powers, Tom Allen, Dennis Gentry, Richard Waterman, Nasri Barakat

Below: Stephen Acunto, Vince Vitkowsky,Don Gabay, Edmond Rondepierre

Marvin Cashion, Jonathan Bank

Collateral Estoppel...

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2. Reinsurer had a full and fair opportunity to present its case in the Hindenburg Arbitration.

3. The dispute in the Conflagration Oil Arbitration is identical to the issue decided in the Hindenburg Arbitration.

4. The party against whom Ceding Company asserts collateral estoppel in the Conflagration Oil Arbitration, is the same reinsurer as in the Hindenburg Arbitration or is in privity with that reinsurer.[8]

In our simple example, Ceding Company's assertion that collateral estoppel precludes relitigation of Reinsurer's fraudulent inducement defense in the Conflagration Oil Arbitration should be successful. Since this was the only defense Reinsurer raised in the Hindenburg Arbitration, it seems certain that the panel necessarily considered and decided the issue. Reinsurer had ample opportunity to assert its position in the Hindenburg Arbitration. Although the Hindenburg and Conflagration Oil Arbitrations involve different claims, the issue in both disputes is the same: whether Ceding Company fraudulently induced Reinsurer into accepting a participation on the Treaty, Under these facts, the doctrine of collateral estoppel would likely prohibit relitigation of Reinsurer's fraudulent inducement defense.

C. Who Decides the Collateral Estoppel Issue

Recent decisions by the federal courts have delegated to arbitrators the obligation to consider the collateral estoppel effect of prior arbitration or court judgments. The arbitrators' dereliction of this obligation may result in vacatur of the award.

In National Union Fire Insurance Co. v. Belco Petroleum Corp. ("Belco"),[9] the Court of Appeals for the Second Circuit was presented with the question of whether a court or an arbitration panel should determine the collateral estoppel effect of a prior arbitration award. The arbitration clause at issue in Belco provided that "[a]ll disputes which may arise under or in connection with [contract in issue]" were subject to arbitration. The Belco Court characterized the collateral estoppel issue as merely a "legal defense" which "is itself a component of the disputes on the merits." The Belco Court reasoned that - absent a provision to the contrary in the arbitration clause - the Federal Arbitration Act ("FAA") required the collateral estoppel defense, like any other defense, to be decided by the arbitrator.

There are perhaps several reasons to be concerned about the courts' delegation to arbitrators of the responsibility to decide the collateral estoppel issue.

Subsequently, in United States Fire Insurance Co. v. National Gypsum Co.[10] the Second Circuit declared that an arbitration panel should also determine the preclusive effect of a prior court judgment. In National Gypsum, the arbitration clause provided that the parties "shall resolve through alternative dispute resolution...any disputed issue within the scope of the Agreement." Relying upon the "FANs strong presumption of arbitrability" the National Gypsum Court ruled: [I]ssue preclusion, like other defenses to arbitrability, is arbitrable, and, because issue preclusion can be arbitrated, it must be arbitrated.

Based upon this conclusion, the National Gypsum Court reversed a ruling of a district court judge on the collateral estoppel question and ordered instead that the collateral estoppel issue be decided by the arbitrators.

While the Second Circuit Court of Appeals appears to be at the vanguard on this issue, most other courts agree that the collateral estoppel issue is ordinarily to be decided by the arbitrators.[11] Given the FAA's strong presumption of arbitrability, and the Courts' natural tendency to let arbitrators have the first crack at difficult issues, it seems that the rulings in Belco and National Gypsum will become the law throughout the United States.

IV. The Consequences of Ignoring the Collateral Estoppel Issue

There are perhaps several reasons to be concerned about the courts' delegation to arbitrators of the responsibility to decide the collateral estoppel issue. Consideration of a collateral estoppel defense can involve highly complex and time-consuming questions such as what issue was necessarily decided in the prior matter and which parties may properly be bound by a prior award or judgment. It seems inconsistent with the FAA's announced goal of promoting a swift and speedy dispute resolution process to require arbitrators to evaluate two disputes: one previously resolved and another yet to be resolved.

Additionally, it appears that one party's right to assert a collateral estoppel defense may often conflict with another party's right to keep its prior arbitrations confidential.

Moreover, courts — although they sometimes must consider the preclusive effect of jury verdicts — generally have the benefit of considering the preclusive

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effect of detailed written decisions, which are supported by the record at trial and include findings of fact. On the other hand, arbitrators will likely be required to wrestle with delphic one-page arbitration awards which are often so lacking in detail that they would make Alan Greenspan blush. These purposefully vague awards are not easily susceptible to analysis of their collateral estoppel effect.

Courts will likely not be greatly moved by these criticisms. Indeed, concerning the issue of vague awards, one court has issued the decisive, but utterly unhelpful, declaration that "[t]he absence of explicit findings and a statement of reasons does not render the arbitrator's award ambiguous or undermine its preclusive effect."[12] Thus, unless the parties' arbitration agreement expressly declares that the arbitrators are not to decide this issue, or the parties subsequently stipulate to that point, it is squarely the arbitrators' responsibility to consider and decide the preclusive effect, of prior arbitration awards and court judgments. And as the cases make clear, neither the parties nor the arbitrators can afford to ignore this obligation once the issue has been properly raised.

A startling example of the grave consequences that can result if an arbitrator fails to consider the preclusive effect of a prior award or judgment is exemplified by Aircraft Braking Systems Corp. v. Local 856.[13] In Aircraft Braking, a federal district court ruled that an agreement to arbitrate existed between Aircraft Braking and Local Union 856. Arbitration went forward before a single arbitrator, who courageously declared that the district court's ruling was "not binding" upon him and that no agreement to arbitrate existed.

The district court, obviously somewhat miffed, not only refused to confirm the award issued by the arbitrator, but ordered the arbitrator to be disqualified for his failure to abide by the Court's prior ruling that an agreement to arbitrate exists. On appeal, the Sixth Circuit Court of Appeals affirmed, declaring:

Here, the district court did not abuse its discretion. The arbitrator obviously did not believe himself bound by prior judicial resolution of the same issue in a lawsuit involving the same parties, noR did the arbitrator even discuss collateral estoppel in coming to a conclusion in direct conflict with a prior federal court holding. On these facts, the district court's decision to remand the case to a new arbitrator was correct.

This was the harshest penalty delivered by any court. Nevertheless, other courts have readily vacated awards where the arbitrators have improperly failed to consider or properly apply the collateral estoppel issue.[14]

V. Proposals for Considering the Collateral Estoppel Effect of a Prior Award or Judgment

A. When to Consider the Collateral Estoppel Issue

Since one of the purposes of collateral estoppel is to avoid redundant litigation, it seems appropriate to consider the collateral estoppel issue at the earliest possible juncture in order to best narrow further discovery or argument. With adequate notice and adroit preparation by counsel, the collateral estoppel issue should be decided shortly after the organizational meeting. If, however, counsel requires significant discovery to present a claim of collateral estoppel, then the time-saving feature of collateral estoppel would be lost and the collateral estoppel issue could be decided at the hearing with the other issues before the Panel.

Because courts have declared the collateral estoppel issue to be a defense like other legal defenses, it is submitted that similar rules should apply to the assertion of the collateral estoppel issue. Thus, arbitrators can require that the claim be timely raised and adequately proven. The party raising the collateral estoppel issue should have the opportunity to conduct reasonable discovery in support of its claim.[15]

B. How to Decide the Collateral Issue in Arbitration

The following guidelines are proposed as a framework for consideration. They will not resolve every collateral estoppel issue that an arbitrator may face.

1. Identify and Evaluate the Prior Judgment or Award

A. Is the prior judgment or award facially valid? (i.e., signed by the Judge or by the requisite number of arbitrator(s), not reversed or vacated, etc.);

B. Is the prior judgment or award subject to a pending appeal or motion to vacate? (Absent a stay, judgments and awards generally remain enforceable even though an appeal or motion to vacate is pending. However, the arbitrators may in their discretion conclude that it is better that all appeals or motions be exhausted before considering the collateral effect of a judgment or award).

2. Identify the Party(ies) Affected

Collateral estoppel only applies against parties who were given a full and fair opportunity to present their case in the prior arbitration. Two important points are necessary to keep in mind with respect to this rule, however:

A. The party seeking to use collateral estoppel to its favor need not have been a party to the first arbitration — only the party against whom collateral estoppel is sought to be asserted.[16]

B. A party's agent or alter-ego can lose an issue in a prior arbitration or litigation and it may be binding against the party in a subsequent matter. For example, at least one court has ruled that a reinsurance intermediary cannot relitigate an issue against a reinsurer which the ceding company had previously litigated and lost.[17]

3. Identify the Particular Issue(s) Upon Which Collateral Estoppel is Sought

A. Was the Issue Actually and Necessarily Decided?

Collateral estoppel applies only to those factual issues that were "actually

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Partiality Among Arbitration Panelists

Robert M. Hall and Paige D. Waters

Reinsurance contracts often call for the resolution of disputes before an arbitration panel consisting of three individuals who are or have been officers of insurance or reinsurance companies. This represents a clear choice in favor of arbitrators with significant experience with insurance and reinsurance matters and, necessarily, the insurance companies and individuals involved in such matters.

This choice has a number of beneficial aspects, such as a high degree of technical expertise with respect to the subject matter, quick grasp of the issues and creativity in fashioning remedies. Use of arbitrators with insurance industry experience also carries with it the possibility of partiality in favor of or against certain individuals, companies or positions. The purpose of this paper is to examine the law pertaining to arbitrator partiality as well as some potential remedies.

I. VACATING AN AWARD UNDER THE FAA

Arbitration awards may be vacated under federal statutory grounds of arbitrator partiality. As arbitrations became more common as a means of resolving disputes, in July 1947, Congress enacted the Federal Arbitration Act ("FAA") addressing the more frequently litigated arbitration issues. The FAA created statutory grounds for vacating an award on, among other things, the basis of arbitrator partiality. Section 10 of the FAA, provides, inter alia, that:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

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and necessarily decided" in order for the decision-makers to reach their decision. Questions of law, even if actually and necessarily decided, are not subject to collateral estoppel effect.[18] Likewise, non-essential findings or other remarks (what courts call dicta) are not subject to collateral estoppel effect.

This does not mean that the Court or arbitration panel must expressly declare each finding for it to be accorded collateral estoppel effect. Some findings may properly be presumed. For example, in BBS Norwalk One, Inc. v. Raccolta, Inc.,[19] a court was called upon to consider the collateral estoppel effect of the following award:

With respect to all claims and counterclaims submitted to arbitration by...CLAIMANT...and [respondents], same are hereby denied in their entirety.

In a subsequent litigation, the respondents argued that because "the arbitrator's award does not include any findings of fact and does not state explicitly its reasons for denying [respondents'] claims" they could not be collaterally estopped from relitigating their argument that the claimant had breached his fiduciary duty. The Court rejected this argument, ruling that since ail claims were denied in their entirety by the prior award, the respondents were collaterally estopped from resurrecting their breach of fiduciary duty claim, even though that claim was not expressly referred to by the arbitrator.

B. Is the Issue Previously Decided Identical to the Issue to be Precluded from Further Litigation?

This promises to be the most challenging issue confronting arbitrators faced with a collateral estoppel defense. As discussed above, collateral estoppel is available only where the issue now presented is identical to, or at least substantially the same as, an issue previously decided.

Little would be gained by setting forth examples of court's efforts at dealing with what has been characterized as this "murky area."[20] However, guidelines have been declared to assist in determining whether the issue in a successive proceeding is identical to an issue previously litigated:

(1) is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advance in the first?

(2) does the new evidence or argument involve the application of the same

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Section 10(a)(1) of the FAA provides a statutory provision pursuant to which a party may challenge "active partiality". Section 10(a)(2) allows a party to vacate an award for "evident partiality." The purpose of this paper is to provide a detailed discussion of arbitrator partiality.

II. ACTUAL PARTIALITY

There are few reported cases of active partiality. Courts generally are reluctant to infer active partiality just from the size of an award. To set aside a common law arbitration award based upon active partiality, the party "must show by clear, precise and indubitable evidence that he was denied a hearing, or that there was fraud, misconduct, corruption or some other irregularity of this nature on the part of the arbitrator which caused him to render an unjust, inequitable or unconscionable award, the arbitrator being the final judge of both law and fact, his award not being subject to disturbance for a mistake of either." Bole v. Nationwide Ins. Co., 352 A.2d 472, 473 (Pa. Super. 1975) (quoting Allstate Ins. Co. v. Fiorevanti., 299 A.2d 585, 589 (Pa. 1973)).

The Bole court remanded the case for further factual findings regarding the prior legal representation rendered to the insurer by its chosen arbitrator (e.g., what the legal issues were, when or how often or how regularly they arose, and the extent of the arbitrator's representation.) However, on the appeal of Bole, the Pennsylvania Supreme Court adopted a per se rule that the award should be vacated and the matter remanded for the appointment of a new panel of arbitrators where: (i) the disputed contract requires a "disinterested arbitrator"; and (ii) a party objects to the prior legal representation of a party by an arbitrator.

At least one court has interpreted Bole:

Our reading of Bole leads us to conclude that a showing of a direct relationship between a party to an arbitration proceeding and a designated arbitrator must be shown, such as the existence of a prior employer-employee or attorney-client relationship, before the requisite partiality of that arbitrator is established . . . . We will not extend such allegations of partiality to an alleged "indirect connection" with a party to an arbitration. To do so would invite any dissatisfied claimant to allege partiality on the part of the opposing party's arbitrator and thus require court supervision of arbitration. This is contrary to the purpose of arbitration.

Land v. State Farm Mutual Ins., 600 A.2d 605, 607 (Pa. 1991). The Land court held that a party to an arbitration may seek only limited discovery to determine whether an arbitrator had been employed by the other party to the dispute prior to the Court's dismissal of the party's petition to set aside the arbitration award. As a practical matter, such formal discovery attempts to seek too little too late.

Because active partiality is extremely difficult to prove, there are few reported cases vacating an award on such basis. There are, however, many cases where the award was upheld notwithstanding an allegation of active partiality. For example, in Fort Hill Builders, Inc. v. Nat'l Grange Mut. Ins. Co., 866 F.2d 11 (1st Cir. 1989), the defendant challenged the opposing party's arbitrator as biased in the plaintiff's favor because the arbitrator strenuously advocated the plaintiff's position. Moreover, during the defendant's presentation, the arbitrator "adopted an air of blatant indifference, frequently closing his eyes, appearing to be asleep, and just generally ignoring the proceedings. When he did (infrequently) speak, his comments were most often directed criticisms of [defendants'] position, or indications that he already had made up his mind how he would rule, regardless of [defendants'] testimony." In Hill, these charges were not substantiated, but the court indicated that if proved, such facts would have established active partiality. See, e.g., Metropolitan Prop. & Cas. Co. v. J.C. Penney Cas. Co., 780 F. Supp. 885, 887-888 (D.R.I. 1991) (potential arbitrator's extensive ex parte communications with party and evaluation of evidence prior to appointment constituted active partiality); but see, Tri-City Jewish Center v. Blass Riddick Chilcote, 440, 512 N.E.2d 363, 366 (Ill. Ct. App. 1978), appeal denied, 520 N.E.2d 393 (Ill. 1988) ("too little or excessive damages in itself is insufficient to raise a presumption of fraud, corruption or undue means on the part of the arbitrators").
See supra note 3.

III. EVIDENT PARTIALITY

A. Standards of "Evident Partiality"

"Evident partiality" does not rise to the level of active bias and is inferred from the relationship between an arbitrator and a party involved in the arbitration. The courts have articulated several standards of "evident partiality". One of the earlier tests for "evident partiality" addressed the following factors: (1) the arbitrator's financial interest in the arbitration proceeding; (2) the directness of the alleged relationship between the arbitrator and the party to the dispute; and (3) the timing of the relationship. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968). In Commonwealth Coatings, the United States Supreme Court vacated an arbitration award for "evident partiality" even though there was no evidence of active bias. The Court determined that although the arbitrator did not have a financial interest in the arbitration, the arbitrator had a substantial undisclosed business relationship with one of the parties (i.e., the arbitrator performed services for the party involving significant fees over a period of four to five years, and even performed services related to the dispute being arbitrated).

Another court developed a "reasonable person" standard which is similar to that which is set forth in Commonwealth Coatings, but requires that a reasonable person "would have to conclude that an arbitrator was partial to one party to the arbitration". Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1985). The Morelite court found evident partiality existed based upon a father-son relationship (i.e., an arbitrator was the son of an officer of an international union whose local union was a party in this arbitration).

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Evident partiality also may be found where the circumstances are "powerfully suggestive" of bias. Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983), cert. denied, 464 U.S. 1009 (1983), modified, 728 F.2d 943 (7th Cir. 1984). The Merit court refused to vacate an award where one of the arbitrators failed to disclose that he worked for the president of one of the parties fourteen years earlier at a different corporation; these facts were not "powerfully suggestive" of arbitrator bias.

B. Vacation of Award for "Evident Partiality"

An arbitrator's failure to disclose a financial interest in the arbitration, a direct relationship with one of the parties, or other facts creating the appearance of partiality may result in the vacation of an award. "The interest or bias must be direct, definite and capable of demonstration rather than remote, uncertain or speculative." Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196, 1200 (7th Cir.), cert. denied, 449 U.S. 873 (1980) (citations omitted) (quoting United States Wrestling Federation v. Wrestling Division of the AAU, Inc., 605 F.2d 313, 318 (7th Cir. 1979)).

Reported cases offer insight into the sufficiency of evidence offered to establish evident partiality. In DeBaker v. Shah, N.W.2d 464 (Wis. Ct. App. 1994), rev'd, 533 N.W.2d 464 (Wis. 1995), the court vacated an award under § 10(a)(2) of the FAA where an arbitrator failed to disclose that he had received, during the arbitration proceedings, campaign contributions from several members of a firm representing one of the parties. In Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994), the court vacated an award where the arbitrator failed to disclose a thirty-five year relationship between his law firm and the parent corporation of the defendant in the arbitration. Although the legal representation had ceased almost two years before the arbitration and there was no proof that the arbitrator was aware of his firm's prior legal representation, the court determined that the arbitrator had a duty to investigate and inform the parties to the arbitration of any potential conflict. The arbitrator's failure to do so resulted in "a reasonable impression of impartiality" justifying vacation of the award. Id., 20 F.3d at 1049. See also Neaman v. Kaiser Found. Hosp., 11 Cal. Rptr. 2d 879 (Cal. Ct. App. 1992) (award vacated where neutral arbitrator failed to disclose that he had served as a party-arbitrator for one of the parties); Gulf Coast Industrial Workers Union v. Exxon Co., 70 F.3d 847 (5th Cir. 1995) (arbitrator engaged in misconduct when he misled party to believe certain evidence was admitted and then later refused to consider that evidence); Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141 (2d Cir. 1992) (award vacated where panel advised party not to submit certain evidence because other documentation was acceptable and panel rejected party's claim for lack of proof).

The court stated that the ex parte communications did not warrant vacation of the award for "evident partiality"

C. Disclosure and Waiver

The appearance of partiality may be rebutted by disclosing the facts or relationship prior to the arbitration hearing. If the other party is notified and fails to object, then that party has waived its right to object after the award. An arbitrator should disclose any and all potential conflicts or relationships prior to the arbitrator's appointment; however, failure to do so will not automatically result in vacation of the award. Sun Refining & Marketing Co. v. Statheros Shipping Corp., 761 F.Supp. 293 (S.D.N.Y. 1991), aff'd without opinion, 948 F.2d 1277 (2d Cir. 1991). "Full and early disclosure increases the probability that successful attacks on the award for "evident partiality" can be avoided." The duty to disclose continues until the award. Once a party consents to the choice of an arbitrator knowing the relevant facts and circumstances, that party may not later object to an award based upon "evident partiality". Astoria Med. Group v. Health Ins. Plan of Greater N.Y., 182 N.E.2d 85, 89 (N.Y. 1962).

A party must raise the issue of arbitrator partiality when the party becomes aware of the facts or circumstances which may give rise to the arbitrator's bias. In Hartford Steam Boiler Inspection & Ins. Co. v. Industrial Risk Insurers, 1997 WL 94089 (Conn. Super Ct. 1997); a party to the arbitration challenged the opposing party's arbitrator as biased for engaging in ex parte communications and failing to disclose them. The challenging party discovered such communications shortly after they had taken place but failed to raise the issue prior to or during the arbitration hearing. The Hartford court, citing Clisham v. Bd. of Police Commissioners, stated that, "a claim of bias must be raised in a timely manner. . .[t]he failure to raise a claim of disqualification with reasonable promptness after learning the ground for such a claim ordinarily constitute waiver thereof . . ." The court stated that the ex parte communications did not warrant vacation of the award for "evident partiality" because they did not involve "facts, issues or evidence relevant to the subject of the arbitration proceedings". The court held that the challenging party was not entitled to discovery to substantiate its claims because it had waived its right to raise the issue of partiality.

If counsel becomes aware of a basis for a challenge to an arbitration based on arbitrator partiality before the hearing, he or she faces a difficult choice. An objection must be lodged at that point in the proceedings or it is waived. The objection is likely to offend the arbitrator in

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question and may create a negative tone for the entire panel. In addition, relatively few pre-hearing challenges are successful. As a result, counsel has a significant disincentive to a pre-hearing challenge but likely waives a post-hearing challenge by not objecting earlier.

IV. PHILOSOPHICAL PARTIALITY

In addition to the actual and evident partiality bases addressed in the FAA, some observers of reinsurance arbitrations are concerned about the appointment of "hired guns" who can be counted upon to take a particular position regardless of the actual law or facts applicable. Since such individuals may take their positions for reasons other than active or evident partiality, we have coined the term "philosophical partiality" for such a situation. Although such partiality probably occurs less often than some might imagine, it nonetheless merits examination.

A. Role of Party's Outside Counsel

Some might attribute the presence of philosophical partiality to the efforts of a party's outside counsel in seeking a sympathetic panel. However, it is the duty of outside counsel to zealously represent the interests of his or her client. Such representation includes an effort to control variables, to the extent practical and ethical, which may impact on the outcome of the arbitration. Clearly, one such variable is the composition of the arbitration panel.

In a trial setting, counsel give considerable thought to venue and court in which to try a case. To the extent possible, trial counsel seek a trier of fact who will be open to the position of counsel's client. In a jury trial, this is shaped through voir dire. In addition, some courts allow a limited form of judge shopping.

Within the arbitration context, it is hardly unexpected that a party's outside counsel would be highly focused on the composition of the arbitration panel. All counsel seek panelists who have sufficient knowledge, time and intellectual curiosity to deal with the controversy. Most counsel prefer a party arbitrator and umpire who may be sympathetic with their position. A few merely seek hired guns. None of this should be surprising, however, in light of the relatively unstructured fashion in which panels are composed. Outside counsel often spend considerable time and thought in selecting an appropriate party arbitrator. Even more time may be spent on umpire selection. Months may be devoted to the process and in some cases it is necessary to seek impasse resolution from an outside third party or a court.

Blaming outside counsel for the time spent completing a panel misses the point, however. Usually, an impasse in panel completion results from a poorly drafted arbitration clause. Outside counsel act at the direction of their client and would not be zealously representing their client if they did not seek a sympathetic panel. Providing more structure to the panel selection process may allow outside counsel to play their proper role while avoiding some of the more protracted battles over panel selection.

It is unrealistic, if not undesirable, to expect such individuals to be complete philosophical neutrals.

B. Posing the Problem

Requiring arbitrators to be experienced insurance industry executives carries with it the potential for philosophical partiality. A prospective panelist often has experience in the area of the insurance or reinsurance business in which the dispute arises. In addition, such individuals may have experience with the nature of the dispute in question. Clearly, both situations are viewed as an advantage given the qualification requirements for most panelists.

It is unrealistic, if not undesirable, to expect such individuals to be complete philosophical neutrals. With some individuals and some issues, however, there may be a point at which experience becomes prejudice in favor of a particular result regardless of the facts or contractual language involved in individual disputes. For instance, a request for an award of declaratory judgement expenses sometimes generates a very strong reaction in arbitration panelists which often correlates to an individual's employment background and experience with this issue. It may be argued that individuals who have developed such strong, generalized conclusions about certain issues are philosophically partial with respect to a dispute involving such issues.

When such a person is selected as a party arbitrator, the opposing party faces a significant problem. Absent the active or evident partiality noted above, there is no apparent remedy for philosophical partiality in the FAA. Efforts to convince such an arbitrator to recuse himself may worsen the problem and affect other panelists. The problem becomes worse still if the individual who is philosophically partial becomes umpire. This could occur if one party fails to appoint an arbitrator within the designated time period and the other party selects both arbitrators who select the umpire. It also could occur if one party nominates only philosophically partial umpire candidates and prevails in the selection by lot. If such situations come to pass, the cynic's observation might be true that the arbitration dispute effectively may be decided when the umpire is selected.

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It has been the authors' experience that the situation is not nearly as dire as that which might be theorized. The vast majority of arbitrators go to great lengths to examine all the arguments of counsel, remain objective to the parties and do justice to the dispute. However, the relatively unstructured manner in which arbitrators and umpires are selected, combined with the natural tendency of outside counsel to seek a sympathetic panel, can result in some panels which are more philosophically partial than one might desire.

C. An Alternative for Panel Selection

While the current structures for panel selection work relatively well, the selection process may be modified to decrease the ability to achieve a partial panel. For example, it may be feasible for an organization to develop a database of arbitrators and umpire candidates who wish to be part of that database. Candidates would supply the data, including, e.g.:

- Education;
- Employment history;
- Professional background;
- Areas of expertise;
- Published articles; and
- Experience (as counsel, party arbitrator and umpire) and training in arbitrations.

Parties in dispute could agree to use the database to select an umpire or an entire panel based on a matching of characteristics which the parties choose for prospective candidates. Software could be programmed to produce a random pattern of candidates with characteristics the parties select. To avoid true conflict or a philosophical interest in the outcome, a surplusage of candidates could be supplied to the parties who could use strikes or ranking to select the panel or the umpire.

Such an approach distinctly improves the fairness of the arbitration process by focusing on the qualifications of panel candidates rather than their view of the particular issue involved. This would produce a pool of candidates less likely to be partial than those the parties or their counsel propose. It also preserves the right to strike certain candidates who, due to interest or conflict, are not desirable participants in a particular arbitration.

It remains to be seen whether any organization in the United States would be interested in building and making available such a database. Doing so, however, would help: (1) reduce the considerable time and effort currently devoted to the selection of arbitration panels in the United States; and (2) avoid those occasional panels which are tinged by partiality.

While the current structures for panel selection work relatively well, the selection process may be modifed to decrease the ability to achieve a partial panel.

V. CONCLUSION

The FAA allows an aggrieved party to vacate an arbitration award procured by corruption, fraud, or undue means (active partiality) or where a panelist's connection with a party which is strongly suggestive of partiality (evident partiality). If such partiality is revealed to or becomes evident to the aggrieved party prior to the arbitration hearing, the aggrieved party must raise an objection or risk a waiver of the claim to vacate the award under the FAA. This places a heavy burden on the aggrieved party (who already must meet a high standard of partiality proof) to succeed in demonstrating partiality or fail and risk alienating the accused panelist if not the entire panel.

Philosophical partiality can also have a negative impact on the arbitration process but does not appear to be subject to a specific FAA remedy. Absent such a remedy, the reinsurance arbitration process would benefit from a more structured mechanism for panel or umpire selection, facilitated by an independent third party, which would help mitigate those situations in which partiality plays a role in the arbitration process.

ENDNOTES

1. 9 U.S.C.A. § 10.
2. The Arbitrator and Administering Institutions, § 28.1.3.2, Active Partiality, 28:7.
3. Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) (Undisclosed business relationships).
4. Id.
5. 352 A.2d at 475.
6. Bole v. Nationwide Ins. Co. 379 A.2d 1346 (1977).
7. 600 A.2d at 608.
8. The Arbitrator and Administering Institutions, § 28.1.3.2, Active Partiality, 28:7-8.
9. The Arbitrator and Administering Institutions, § 28.2.3.6, A Proposal, 28:28.
10. Merit, 714 F.2d 673.
11. 223 Conn. 354 (1992).
12. Hartford, 1997 WL 94089, (Conn. Super.) 12.
13. See generally R. Douglas Bond and Testa Snider, Pre-Hearing Disqualification of Arbitrators, Mealey's Lit. Rep. Reinsurance, Vol. 7, Iss. 8 (Aug. 28, 1996) at 20.
14. See Robert Hall, When The Other Side Will Not Arbitrate: Judicial Appointment of Umpires and Arbitrators, Mealey's Lit. Rep.: Reinsurance Vol. 6, Iss. 24 (April 25, 1996). The better arbitration clauses will: (1) allow one party to appoint both arbitrators if the other does

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rule of law as that involved in the prior proceeding?

(3) could pretrial preparation and discovery related to the matter presented in the first action reasonably expected to have embraced the matter sought to be presented in the second?

(4) how closely related are the claims involved in the two proceedings?[21]

As these questions make clear, absolute identity of issues does not seem required. Rather, the touchstone of the identity issue seems to be whether a party against whom collateral estoppel is to be asserted had a fair chance to litigate previously the issue now presented.

CONCLUSION

That parties have agreed to arbitrate a dispute does not mean that they have agreed to rearbitrate the same dispute over and over. The doctrines of res judicata and collateral estoppel apply to arbitration and ensure that previously resolved disputes are not wastefully relitigated. The benefits of repose are party neutral and accrue to both ceding companies and reinsurers.

Recent decisions have delegated to arbitrators the obligation to consider the collateral estoppel defense. Future arbitrations may prove that collateral estoppel is a judicial construct which may not be altogether suited to the arbitration process. Nevertheless, harsh sanctions are threatened by the courts should arbitrators fail to properly apply these constructs. Unless both parties agree in writing that the collateral estoppel issue cannot be decided by the arbitrator, this issue likely must be decided by the arbitrator.

Whether recent decisions have caused harm to the arbitration process remains to be seen. What is known now is that arbitrators' jobs will become significantly more difficult and time-consuming when the collateral estoppel issue is raised.

1. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

2. See id.

3. See Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466-67 n.6 (1982) ("[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

4. See Behrens v. Skelly, 173 F.2d 715, 720 (3d Cir.), cert. denied, 338 U.S. 821 (1949); Associated Constr. Co. v. Camp, Dresser & McKee, 646 F. Supp. 1574, 1578 (D. Conn. 1986) ("An arbitration award, whether or not sustained by a court judgment, constitutes finality for res judicata."); aff'd 771 F.2d 1495 (11th Cir. 1985), County of Rockland v. Aetna, 129 A.D,2d 606; 514 N.Y.S.2d 102 (1987).

5. See Leddy v. Standard Drywall, 875 F.2d 383, 385 (2d Cir. 1989) (Under New York law, "[a]n arbitration award that is not filed and confirmed in an appropriate court is without [preclusive] effect.").

6. See Rudell v. Comprehensive Accounting Corp., 802 F.2d 926, 927, 929 (7th Cir. 1986), cert. denied, 480 U.S. 907 (1987); Shell supra note 8, at 648 ("The entry of a default judgment triggers the full consequences of res judicata...").

7. See Metromedia Co. v. Fugazy, 983 F.2d 350, 365 (2d Cir. 1992) ("The doctrine of collateral estoppel, or issue preclusion, bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding...and the decision of the issue was necessary to support a valid and final judgment on the merits."), cert. denied, 113 S. Ct. 2445 (1993).

8. See Commonwealth Ins. Co. v. Thomas A. Green & Co., 709 F. Supp. 86, 88 (S.D.N.Y 1989) (finding that reinsurance intermediary was in privity with ceding company for purposes of collateral estoppel).

9. National Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129 (2d Cir. 1996).

10. United States Fire Ins. Co. v. National Gypsum Co., No. 95-7806, 1996 U.S. App. LEXIS 29159 (November 4, 1996).

11. See Chicago Typographical Union No. 16 v. Chicago Sun-Times, 860 F.2d 1420, 1424 (7th Cir. 1988); Transit Mix Concrete Corp. v Local Union No. 282, Int'l Bhd. of Teamsters, 809 F2d 963, 969 (2d Cir. 1987); Local Union No. 370, Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co., 786 F.2d 1356, 1358 (9th Cir. 1986); Little Six Corp. v. United Mine Workers, 701 F.2d 26, 29 (4th Cir. 1983) ("[T]he preclusive effect of a prior arbitral award is itself a question for arbitration."), but see HudsonBerlind Corp. v. Local 807, Int'l Bhd. of Teamsters, 597 F. Supp. 1282, 1285 (E.D.N.Y 1984) (ruling that courts should rule upon the preclusive doctrines because of the belief that arbitrators are less likely to strictly apply preclusion doctrines than courts, thus undermining the force of the Full Faith and Credit Act).

12. BBS Norwalk One, Inc. v. Raccolta, Inc. 95 Civ. 4138 (MGC) 1996 U.S. Dist. LEXIS 14314 (Sept. 27, 1996).

13. Aircraft Braking Sys. Corp. v. Local 856, 97 F.3d 155 (6th Cir. 1996).

14. See, e.g., John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 562-63 (8th Cir. 1990) (vacating arbitration award involving an interpretation of a no-strike clause in the parties' agreement contrary to a previous jury determination of the same issue in litigation between the same parties on the ground that consideration of the issue was barred by collateral estoppel principles); Telephone Workers Union of New Jersey Local 827, Int'l Bhd. of Elec. Workers v. New Jersey Bell Tel. Co., 584 F.2d 31, 33 (3d Cir. 1978) (refusing to confirm an arbitration award on res judicata and collateral estoppel grounds where arbitrator's determination on the arbitrability of an issue was contrary to a previous judicial decision on the same issue); Smithkline Beecham Biologicals, S.A. v. Biogen, No. 95 Civ. 4988 (JGK) 1996 U.S. Dist. LEXIS 5836 (April 27, 1996) (considering whether failure to consider collateral estoppel defense constitutes manifest disregard of the law).

15. It is unclear whether a party's right to conduct discovery on a collateral estoppel claim and an arbitrator's obligation to consider that claim vitiates the confidentiality of a prior arbitration.

16. Ray v. Continental W. Ins. Co., 920 F Supp. 1094, 1097 (D. Nev. 1996); Usina Costa Pinto, S.A. Acucar E. Alcool v. Louis Dreyfus Sugar Co., 933 F. Supp. 1170, 1176 (S.D.N.Y 1996); but see Prudential Securities 96 Civ. 4039 (LMM), 1996 U.S. Dist. LEXIS 13586 (S.D.N.Y) Sept. 12, 1996).

17. See Commonwealth Ins. Co. v. Thomas A. Green & Co., 709 F. Supp. 86, 88 (S.D.N.Y 1989) (finding that reinsurance intermediary was in privity with ceding company for purposes of collateral estoppel).

18. Prudential Securities, Inc. v. Woodrell, 96 Civ. 4039 (LMM) 1996 U.S. Dist. LEXIS 13586 (S.D.N.Y Sept. 12, 1996) ("where the issue to be decided is a question of law, it is stare decisis, not collateral estoppel, that applies").

19. 95 Civ. 4138 (MGC), 1996 U.S. Dist. LEXIS 14314 (Sept. 27, 1996).

20, Kamilche Co. v. United States, 53 F.3d 1059, 1062 (9th Cir. 1995), mod., 75 F.3d 1391(1996).

21. See id. ▲

Murphy's Laws...

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vacation-minded counsel, is the substantive content of the hearing, at which there will sooner or later come into play

Rule VIII: At least one witness will double-cross you.

It is easy enough for the bystander to observe casually that this sort of thing happens in all legal proceedings, but it is quite another thing to be the victim of it. There must be few experiences in life quite as exquisitely painful as the breathless instant when a lawyer hears his witness say exactly the opposite of what he expected, and he sees his case (and perhaps that trip to Disneyland as well) floating gracefully out the window. The parallel comes to mind of a sharp blow to the solar plexus.

The saving grace from counsel's point of view is that ordinarily this sort of thing happens at least once to each side. The net effect on the final outcome may therefore be minimal. The impact on counsel's life expectancy is something else again.

The Decision

But with it all, the parties and their lawyers usually manage to survive the experience, and eventually the Panel issues its determination. This generally produces jubilation on one side and anguish on the other, although there are instances where the Panel has done its job so effectively that both sides are equally unhappy with the outcome. One specific emotional response to the final stages of the case is, however, so thoroughly predictable that it becomes enshrined as:

Rule IX: Both parties will be unhappy with counsel's bill. On that subject, enough said.

L'envoi

Most of the behavior patterns, personality types, and sequences of events described are surely not unique to reinsurance arbitrations. They stem from special attributes of the human animal that manifest themselves in every sphere of life. What a proceeding like a reinsurance arbitration does is create a highly concentrated environment in which those very human characteristics are highlighted more dramatically than usual.

After all, without those idiosyncrasies, what would there be to distinguish us from the other primates? ▲

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not appoint an arbitrator within a certain number of days after the arbitration demand; and (2) require a selection by lots if there is an impasse over the umpire.

15. In a widely quoted concurring opinion in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), Mr. Justice White stated:

The court does not decide today that arbitrators are to be held to the standards of judicial decorum.... It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function.

Id. at 150. ▲

ARIAS•U.S. Certification Procedures

At its first Annual Meeting, the Membership of ARIAS•U.S. approved proposed Certification of Arbitrators procedures.

We present them in full:

ARIAS•U.S. Objectives

The following are the objectives of ARIAS • U.S.

1. To promote the integrity of the arbitration process in insurance and reinsurance disputes.
2. To promote just awards in accordance with industry practices and procedures.
3. To certify objectively qualified and experienced individuals to serve as arbitrators.
4. To provide required training sessions for those persons certified as arbitrators.
5. To propose model rules of arbitration proceedings and mode arbitration clauses.
6. To foster the development of arbitration law and practice as a means of resolving national and international insurance and reinsurance disputes in an efficient, economical and just manner.

ARIAS•U.S.
CERTIFICATION OF ARBITRATORS

1. **GENERAL STATEMENT**
ARIAS•U.S. seeks to certify for its members' use knowledgeable and reputable professionals for service as panel members in industry arbitrations.

2. **CRITERIA FOR CERTIFICATION**
As a minimum of consideration, each candidate should:
   a. **Industry experience** – have at least ten years of significant specialization in the insurance/reinsurance industry. This specialized experience can be obtained with insurance and reinsurance companies and brokers or with accounting, actuarial, consulting, law, loss adjusting firms or government service, or any combination thereof.
   b. **Arbitration experience** – have completed at least one ARIAS•U.S. seminar or workshop and two other seminars/workshops and/or insurance/reinsurance arbitrations as arbitrator or umpire for a total of at least three seminars/workshops or arbitrations within two years preceding the date the completed application is received by ARIAS•U.S. Attendance at a foreign ARIAS seminar or workshop (U.K., France, etc.) would be acceptable for these purposes.
   c. **Membership in ARIAS•U.S.** – be an individual member of ARIAS•U.S.
   d. **Sponsors** – be sponsored in writing by a person who satisfies the foregoing criteria for certification. Either the sponsor or the candidate for certification can initiate the certification process by requesting a pre-application letter from the Board of Directors. Besides issuing the sponsoring letter, the sponsor should also arrange for two seconding letters from persons who satisfy the same criteria. Upon receipt of satisfactory sponsor and seconding letter, ARIAS•U.S. will mail an application to the candidate. ARIAS•U.S. certification is available to all candidates regardless of geographic location.

3. **CERTIFICATION DETERMINATION**
   a. After receiving completed applications together with sponsor and seconding letter from the Administrator of ARIAS•U.S., and any other information deemed appropriate by the Board of Directors, the Board, in its sole judgment and absolute discretion, will evaluate each application and determine certification in light of the above criteria. Any dispute with respect to such determination shall be resolved by binding arbitration in accordance with the By-laws of ARIAS•U.S.
   b. Certification of a candidate requires the affirmative vote of at least two-thirds of the full membership of the Board of Directors.
   c. A copyrighted list of certified arbitrators will be maintained by ARIAS•U.S. for use by its members and shall not be published or distributed outside of the membership.

Certification Programs

4. **APPLICATION FOR CERTIFICATION**

The application for certification must be on forms provided by ARIAS•U.S. and will contain the following information:
   a. name, address, telephone and fax, home and office.
   b. present and prior business affiliations.
   c. number of **completed** insurance/reinsurance arbitrations as arbitrator or umpire and related information including, with respect to the three most recently completed arbitrations, the names of the other arbitrators and the date of completion.
   d. number of **completed** insurance/reinsurance arbitrations as outside counsel and related information including, with respect to the three most recently completed arbitrations, the names of the arbitrators and the date of completion.
   e. areas of specialty.
   f. number of years of industry experience as defined in 2.a., above.
   g. education – college and graduate.
   h. work and military history.
   i. licenses, professional associations.
   j. ARIAS seminars and workshops attended.
   k. criminal convictions/disciplinary rulings.
   l. statement by applicant that he/she will agree to abide by the By-laws of ARIAS•U.S., including the provisions covering arbitration of disputes; that the information provided is subject to verification; and that the applicant agrees that the information is accurate to the best of his/her knowledge, information and belief.
   m. other information as determined by the Board of Directors.

5. **MAINTENANCE OF CERTIFICATION**

In order to maintain certification, an individual must:

   a. have attended or participated in at least one ARIAS seminar or workshop within the two years immediately preceding recertification.
   b. maintain membership in ARIAS•U.S.
   c. apply bi-annually for certification on forms provided by ARIAS•U.S.

To Join ARIAS•U.S.: Use the form provided on page 19

AIDA Reinsurance & Insurance Arbitration Society

Box 9001 • Mt. Vernon, NY 10552-9001
Tel: 800-951-2020 • Fax: 914-699-2025

Membership Application

ARIAS•U.S. is a not-for-profit corporation organized principally as an educational society dedicated to improving reinsurance and arbitration panels and procedures. The Society provides education for arbitrators, attorneys, insurers and reinsurers in practices and procedures which will improve the arbitration of commercial disputes. The Society, through seminars and publications, seeks to make the arbitration process meet the needs of today's insurance/reinsurance marketplace by:

- Training and certifying individuals qualified to serve as arbitrators and/or umpires by virtue of their experience, good character and participation at ARIAS•U.S. sponsored training sessions;
- Empowering its members to access certified arbitrators/umpires and to provide input into developing efficient economical and just methods of arbitration; and
- Providing model arbitration clauses and rules of arbitration.

Membership is open to law firms, corporations and individuals interested in helping to achieve the goals of the Society.

Name & Position: _____

Company or Firm: _____

Street Address: _____

City, State, Zip: _____

Phone, Fax: _____

Fees and Annual Dues:

	Individual	Corporation & Law Firm
Initiation Fee:	$500.00	$1,500.00
Annual Dues:	$250.00	$750.00
Total	$750.00 ☐	$2,250.00 ☐

Amount Enclosed: $_____

Return this application with check for Initial Fee and Annual Dues to:

ARIAS•U.S. Membership Committee
Stephen H. Acunto
Chase Communications
P.O. Box 9001 Mount Vernon, NY 10552

A N N O U N C I N G

ARIAS/U.S. Fall Seminar

November 7 - 8, 1997
Holiday Inn Crowne Plaza, New York

Watch for your invitation!

AIDA REINSURANCE & INSURANCE ARBITRATION SOCIETY

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