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DECISION-MAKING IN REINSURANCE DISPUTES: Orders and Awards, Modification, Reconsideration, and Appeal

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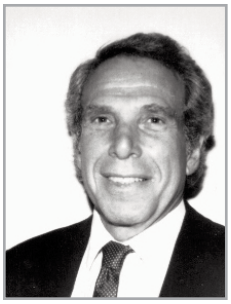

Eugene Wollan

editor's comments

The Courts are back in full swing after a summer lull, and so are we. We are very happy with the contents of this issue.

Mark Kreger and Melissa Weldon have given us an erudite, thoroughly researched, and fascinating analysis of the decision-making process in the context of reinsurance disputes. Our members will benefit from a careful reading.

Another contribution to the ongoing discussion of mediation is the article by the formidable quartet of Michael Pontrelli, Brian Keenan, Raenu Barod, and Gregory Eisenreich on the specific subject of judicially-mandated mediation. Many of us have encountered differences in both the atmosphere and the results of mediations, depending on whether they are entered into voluntarily by the parties or directed by a Court. We would welcome further discussion of this important subject.

Bob Hall offers us a very helpful analysis of awards of attorney's fees by arbitration panels. It would be interesting to see someone carry the subject further by contributing a discussion of the British loser-pays system.

Many of us have wondered whether "manifest disregard of the law" still constitutes a viable basis for attempting to overturn an arbitration award in the wake of the Hall Street decision. In his Case Note, Ron Gass explains why he considers the concept still alive, if perhaps on life support, in the Second Circuit.

When I first started submitting articles to the Quarterly with some regularity, Editor Dick Kennedy and I had a discussion about what the feature should be called. We settled on "Off the Cuff" because it sounded appropriate and relatively innocuous. The runner-up – a very close runner-up, I might add – was "Curmudgeon's Corner." I rather liked it, but I think Dick, ever the gentleman, felt that it was perhaps a bit too in-your-face. It would, however, undoubtedly be an appropriate title for my contribution to this issue. I would be happy to receive any comments, pro or con, on the curmudgeon persona.

See you in November at the Hilton!

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Editorial Policy

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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 also a brief biographical statement and a portrait-style photograph in electronic form.

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feature

Decision-Making in Reinsurance Disputes: Orders and Awards, Modification, Reconsideration, and Appeal

This article is based upon a paper presented at the ARIAS•U.S. 2012 Spring Conference.

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The final decision in a case can take a variety of forms, depending on the nature of the dispute and the procedure by which it is resolved.

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I. The Decision

A. Judicial Decision-Making

(1) An Overview

Decision-making in the courts often follows a very formal process, with specific procedural requirements and deadlines along the way. The parties are required to follow a prescribed format for the submission of issues, often with specific page limits and clear deadlines. Both parties know what is required and when submissions are due. Depending on the jurisdiction, the court may have time limits as well, requiring that its decisions be provided to the parties within a certain number of days.

A court need not issue a written ruling or interim rulings, but in certain instances can provide its ruling orally on the record. As for an ultimate ruling, the Federal Rules of Civil Procedure define a "judgment" to include a "decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a).

The final decision in a case can take a variety of forms, depending on the nature of the dispute and the procedure by which it is resolved. If the matter is submitted on a motion for summary judgment under Fed. R. Civ. P. 56, the court will typically issue a detailed opinion, setting forth its factual findings and legal conclusions. If the case proceeds to a bench trial, the parties are much more likely to get a complete written opinion from the court. A jury trial is less likely to result in any written opinion, with the jury's verdict form serving as the basis for any ruling.

(2) Written Decisions

Under the federal rules, a court is not required to issue findings of fact or conclusions of law when ruling on motions, including motions to dismiss or motions for summary judgment. Fed. R. Civ. P. 52(a)(3). In practice, detailed rulings are almost always provided for such motions. When a case is tried to a federal bench, either without a jury or with an advisory jury, the court is required to issue findings of fact and conclusions of law. Fed. R. Civ. P. 52(1). Those findings and conclusions can be made on the record or can be provided in a written decision. *Id.*

A "finding of fact" is defined as the "determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record." BLACK'S LAW DICTIONARY (9th ed. 2009). A "conclusion of law," on the other hand, is an "inference on a question of law, made as a result of a factual showing, no further evidence being required." *Id.* How detailed such findings and conclusions will be depends largely on the nature of the specific dispute and the court in which the parties find themselves.

(3) Modification and Reconsideration of Court Orders

In the courts, specific rules are provided that allow a party to request that the court modify or reconsider any of its orders.

A party can move for relief from any judgment or order on certain enumerated grounds including, among other things, mistake, newly discovered evidence, or fraud. Fed. R. Civ. P. 60. The court can unilaterally correct a judgment or order if it determines that there has been a clerical mistake, an oversight, or an omission. Id.

After trial, a party can bring a motion seeking a new trial. Fed. R. Civ. P. 59. Additionally, a court has the authority to act on its own and order that a new trial be had. Fed. R. Civ. P. 59(d). Following entry of judgment, a party can also file a motion requesting amended or additional findings. Fed. R. Civ. P. 52(b). As with

most motions, the rules provide for specific timelines within which a party must seek such relief.

As a practical matter, motions for reconsideration are rarely granted; the burden that a party must meet to gain such reconsideration is extremely high. The procedural rules provided by the courts, however, do provide a road map and specific grounds for seeking relief from a court judgment or order.

B. Arbitral Decision-Making

(1) Interim Rulings

Interim rulings that may be made by an arbitration panel fall into two basic categories: pre-award rulings that can be referred to loosely as procedural in nature, and interim or partial awards that address some aspect of the merits of the parties' dispute. With respect to rulings in the former category, most reinsurance agreements say very little about pre-hearing procedural matters. In the absence of express contractual provisions governing procedural matters, the arbitration panel itself is typically authorized to establish appropriate procedures that will govern the arbitration. Such procedures may include whether and under what circumstances the panel will entertain requests for interim relief or make rulings on purely procedural issues such as discovery disputes. Although the Federal Arbitration Act, 9 U.S.C. §1 *et. seq.* ("*FAA*"), which governs arbitrations in the United States, does not specify when an interim or partial award should be deemed "final," it seems clear that such procedural rulings do not rise to the level of a final award that can be confirmed or vacated by a U.S. District Court under Sections 9 and 10 of the FAA.

One of the most contentious pre-hearing issues an arbitration panel may be called upon to decide is whether a party -- most often the reinsurer -- will be required to post pre-hearing security. Such security usually takes the form of a Letter of Credit or trust account securing the amount at issue in the arbitration. The request for pre-hearing security is typically raised at or before the organizational meeting.

Because arbitration rulings are generally unavailable publicly, it is impossible to know precisely how frequently arbitration panels receive or grant requests for pre-hearing security. Such requests, however, have grown more common, as evidenced by the fact that ARIAS•U.S. has developed a form of order for security. See, *ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure* (Rev. Ed. 2004), available at www.arias-u.s.org. When a panel does award security, its order is likely to be enforced. Several Federal courts have upheld interim awards granting security to cedents. *See, e.g., Banco de Sequros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); *Yasuda Fire & Marine Ins. Co. of Europe Ltd. v. Continential Casualty Co.*, 37 F.3d 345 (7th Cir. 1994); *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991). They have held that arbitration panels have the power to grant such interim relief and that such awards will be confirmed under Section 9 of the FAA, except in the limited circumstances generally applicable to vacatur of arbitration awards.

With respect to interim and partial awards that arbitration panels issue in ruling on the merits of the parties' claims and defenses, the FAA does not offer any statutory guidance addressing the circumstances under which the courts may intervene during the pendency of the arbitration proceeding for the purpose of either confirming or vacating such awards. This circumstance has led to a body of case law in which the courts have decided discrete issues relating to the finality and enforceability of interim and partial awards that address the merits of the dispute. Even in the absence of a statutory provision specifically authorizing arbitral tribunals to issue interim or partial awards that are final in nature, federal courts have long recognized that arbitration panels have such authority. *See, e.g., Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984) (noting the 'rule that 'an "interim" award that finally and definitively disposes of a separate independent claim can be confirmed "notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration."'") It was no doubt partly for that reason that Congress recognized indirectly the arbitration panel's implicit authority to issue such awards when it amended the FAA in 1988. Section 16(a)(1)(D), which was added to the FAA in 1988, identifies when appeals may be taken from district court orders pertaining to arbitration issues, thus providing that "[a]n appeal may be taken from [a]n order. . .confirming or denying confirmation of an award or *partial award*" 9 U. S . C. §16(a)(1)(D) (emphasis added).

(2) Reasoned vs. Non-Reasoned Awards

While arbitration hearings are often quite similar to trials in court, arbitral awards generally bear little resemblance to judicial opinions. It remains the exception rather than the rule in the United States that an arbitration panel will issue a "reasoned award." Rather, arbitral awards generally state the relief that is being awarded, but do not set forth detailed "findings of fact" or "conclusions of law," and may offer little if any other explanation for the result.

There are several justifications for this practice. The *ARIAS•U.S., Practical Guide to Reinsurance Arbitration Procedure* offers a few:

> Common arguments against "reasoned" awards are (a) they could discourage compromise awards when otherwise appropriate; (b) arbitration awards accompanied by written decisions may be challenged more frequently by petition to a court; (c) experience shows that "reasoned" decisions are often tailored predominantly to avoid reversal or criticism; and (d) requirements for "reasoned" decisions will ultimately favor appointment of lawyers as arbitrators, whereas the essence of arbitration frequently is to obtain a business, rather than legalistic, resolution.

ARIAS•U.S., Practical Guide to Reinsurance Arbitration Procedure (Rev. Ed. 2004), §5.4, Comment C.

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Once an arbitration panel has issued its final award, its jurisdiction generally ends, under the traditional formulation of the doctrine of *functus officio* (from the Latin phrase for "having performed his office"). At that point, the panel is barred from modifying its award except in limited circumstances.

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This leads to a key difference between arbitral awards and judicial decisions: arbitral awards are often compromises designed to address circumstances that arise in the context of a business relationship. Reinsurance arbitration agreements typically contain "honorable engagement" clauses that allow arbitrators to disregard the rules of law that govern the resolution of disputes in the courts. Moreover, since party arbitrators in American reinsurance arbitrations are expected to be partisan, they may bargain with one another to craft a result that gives something to both sides, often referred to as a "split the baby" award.

A fine article appeared in a recent edition of the *ARIAS•U.S. Quarterly* that discussed the trend toward increased use of 'reasoned awards' in American arbitrations, and traced the emerging case law defining the standards by which courts will review the sufficiency of such awards. Derek T. Ho, The Standards for a Reasoned Award: Emerging Lessons from Case Law, 19 *ARIAS•U.S. Quarterly* 1, at 17-19. Without reiterating or critiquing the findings of that article, a few important principles are worth noting. First, it is fair to say that the criteria for determining what constitutes a "reasoned award" remain sparse and ill-defined. Second, there have been a handful of judicial decisions over the past decade in which a "reasoned award" has been defined as "something short of findings and conclusions but more than a simple result." *Arch Dev. Corp. v. Biomet, Inc.*, 2003 WL 21697742, at *4-5 (N.D. Ill., July 30, 2003). *See, Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011); *Sarofin v. Trust Co. of the West*, 440 F.3d 213, 214 n.1 (5th Cir. 2006). Finally, the case law indicates that courts are very reluctant to overturn arbitral awards for failure to provide sufficient reasons.

(3) The Doctrine of Functus *Officio*

Once an arbitration panel has issued its final award, its jurisdiction generally ends, under the traditional formulation of the doctrine of *functus officio* (from the Latin phrase for "having performed his office"). At that point, the panel is barred from modifying its award except in limited circumstances.

One court has explained the doctrine this way:

> As a general rule, once an arbitration panel renders a decision regarding the issues submitted, it become *functus officio* and lacks any power to reexamine that decision. . . . Despite certain distinctions between common law and statutory arbitrations,. . .the *functus officio* doctrine has been routinely applied in federal cases brought pursuant to the Federal Arbitration Act . . . (.) The policy underlying this general rule is an "unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to reexamine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion."

Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 331-332 (3d Cir. 1991).

Nevertheless, there are exceptions to this rule. The Third Circuit Court of Appeals has noted three instances in which an arbitration panel can act following the issuance of an award:

> (1) an arbitrator "can correct a mistake which is apparent on the face of his award" . . . ; (2) "where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination," . . . [and] (3) "where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify."

Id., at 332.

Moreover, even when the arbitrators are barred from changing their award, a reviewing court may remand an award to the panel for clarification in the event the award is ambiguous in some way. *Hyle v. Doctor's Associates, Inc.*, 198 F.3d 368, 370 (2d Cir. 1999).

In reinsurance arbitrations, the *functus officio* doctrine most often creates difficulty when arbitration panels attempt to correct a final award. For example, in *Colonial Penn Insurance Co. v. Omaha Indemnity Co.*, *supra*., the final award included an element of relief that was based upon an inaccurate assumption of fact by the panel. When it learned of its mistake, the panel attempted to

issue a new award. The Third Circuit, however, held that the doctrine of *functus officio* barred the panel from substituting the second award for the first. It explained that the "mistake on the face of the award" exception did not apply. That exception was intended to apply to "clerical mistakes or obvious errors in arithmetic computation." *Id*., at 332. The mistaken factual assumption upon which the panel issued its first award did not create an error that was apparent on the face of the award.

The Second Circuit, however, noted an important caveat to the *functus officio* doctrine in the more recent case of *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc*., 592 F.3d 329 (2d Cir. 2010). In *T. Co. Metals*, the court noted that the doctrine applies only "absent an agreement by the parties to the contrary." *T. Co. Metals, supra*., at 342, quoting *Hyle v. Doctor's Associates, Inc*., 198 F. 2d 368, 370 (2d Cir. 1999). Parties are therefore free to empower their arbitrators to reconsider an award. *See, Glass, Molders, Pottery, Plastics & Allied Workers Int'l. Union, Local 182B v. Excelsior Foundry Co*., 56 F. 3d 844, 848 (7th cir. 1998) (Posner, C.J.) ("*Functus Officio* is merely a default rule, operative if the parties fail to provide otherwise. There is no legal bar to authorizing arbitrators to reconsider their decision, and some rules for arbitrators. . .do authorize reconsideration.") The Second Circuit found that the arbitrator in *T. Co. Metals* was empowered by both parties to consider requests for revisions to be made in the arbitration award by virtue of the fact that they had previously agreed to conduct the arbitration pursuant to the AAA's International Dispute Resolution Procedures, which authorize reconsideration in certain circumstances. *T. Co. Metals, supra*., at 343.

The court also made an important additional finding that may provide a further opening for parties seeking to avoid application of the doctrine of *functus officio* in order to seek reconsideration or modification of an arbitral award. In response to arguments by one of the parties as to the narrow scope of the reconsideration authority afforded under the AAA's procedures, the court held that, by directly petitioning the arbitrator to amend his original award, both parties had expressed a mutual intention that issues regarding the scope of the AAA procedures should be decided by the arbitrator himself. *Id*., at 344. Accordingly because the court concluded that the arbitrator did not exceed his powers by revising his original award, in a way consistent with his interpretation of his reconsideration authority, the Second Circuit reversed the decision of the district court to vacate the amended award and remanded the case to the district court with instructions to confirm the amended award. *Id*., at 347.

II. Appellate Rights

A. In the Courts

(1) An Overview

In a case that has been decided by a trial-level court, be it federal or state, the losing party has an automatic right to appeal from the final judgment to an intermediate appellate court. In the federal system, those courts are the United States Circuit Courts of Appeals. Such courts may affirm, modify, vacate, set aside, or reverse any judgment, decree or order of a trial court that is lawfully brought before them for review. An appellate court may remand the case to the trial court and direct the entry of any appropriate judgment, decree, or order, or require such further proceedings as may be just under the circumstances.

Appellate courts can avoid deciding a difficult question, which has not been fully argued by the parties to an appeal, if it can afford the appellant full relief without reaching that question. Instead, it will generally defer a decision on the issue until another case is presented in which the resolution of the issue will affect the outcome of the appeal. *Hodge v Seiler*, 558 F.2d 284 (5th Cir. 1977).

The highest court of the state (usually the state Supreme Court; in New York, the New York Court of Appeals) is considered to be the final authority on state law matters. In determining a matter of state law, federal courts are required to follow the decision of the highest court of the state. *Huddleston v. Duyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944). A federal court is also required to follow a rule announced as *dictum* in an opinion by the highest court of the state, when the rule is authoritative and relied upon by lower courts in the state. *Neuburgh Land & Dock Company v. Texas Company*, 227 F.2d 732 (2d Civ. 1955). A Federal court will always ascertain and apply the applicable

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In response to arguments by one of the parties as to the narrow scope of the reconsideration authority afforded under the AAA's procedures, the court held that, by directly petitioning the arbitrator to amend his original award, both parties had expressed a mutual intention that issues regarding the scope of the AAA procedures should be decided by the arbitrator himself.

Whereas the parties are entitled to judicial review of a trial court's final judgment by an intermediate appellate court, appeals to the U.S. Supreme Court or to the highest court of a state are usually discretionary, meaning that litigants must request that the higher rank court accept the case for further review. In practice, only a very few cases are accepted for review by the U.S. Supreme Court or by the highest courts in larger states.

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state law, even if it must rely on an opinion of an intermediate state court in determining what the law is. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed. 109 (1940). A Federal court, however, is not bound to follow a state court's interpretation of Federal law.

Whereas the parties are entitled to judicial review of a trial court's final judgment by an intermediate appellate court, appeals to the U.S. Supreme Court or to the highest court of a state are usually discretionary, meaning that litigants must request that the higher rank court accept the case for further review. In practice, only a very few cases are accepted for review by the U.S. Supreme Court or by the highest courts in larger states.

(2) Interlocutory Appeals

An interlocutory appeal is an appeal of a ruling by a trial court that is made before a final judgment in the case has been entered. Most jurisdictions generally prohibit such appeals, requiring parties to wait until the entry of a final judgment before permitting challenges to any of the trial judge's pre-trial or trial rulings. Many jurisdictions, however, make exceptions for decisions of trial courts that are especially prejudicial to the rights of one of the parties. For example, if a party is asserting some sort of immunity from suit or is claiming that the court lacks personal jurisdiction over the party, it is recognized that being forced to wait for the conclusion of the trial would violate the party's right not to be subjected to a trial at all. In the federal courts, the U.S. Supreme Court has created a test for the availability of interlocutory appeals, which are authorized by 28 U.S.C. §1292. This test, called the collateral order doctrine, allows for such appeals only if:

1. The outcome of the case would be conclusively determined by the issue;
2. The matter appealed was collateral to the merits of the case; and
3. The matter would be effectively unreviewable if immediate appeal were not allowed. *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989).

In addition, several statutes directly confer the right to interlocutory appeals, including appeals from court orders denying arbitration under the FAA. 9 U.S.C. §16. There is currently a split of authority as to whether a stay of proceedings should issue in the district court while an interlocutory appeal on the arbitrability of a dispute is decided. *Compare, Bradford-Scott Data Corp., Inc. v. Phuysician Computer Network*, 128 F.3d 507 (7th Cir. 1993) *and Britby v. Co-op Banking Corp.*, 916 F.2d 1405 (9th Cir. 1990). An interlocutory appeal under the collateral order doctrine usually warrants a stay of proceedings.

(3) Standards of Review

Appellate courts, including the Federal circuit courts of appeals as well as state appellate tribunals, review the decisions of lower courts under various standards of review, depending on the nature of the lower court ruling. Unless a review is "*de novo*," the reviewing court will determine whether the lower court's decision was "clearly erroneous" or an "abuse of discretion." Traveling down the funnel (from widest to narrowest) of the series of appellate review standards, the broadest scope of review is *de novo* (from the Latin meaning "from the beginning," "afresh" or "anew"), which is normally applied to questions of law, then "abuse of discretion," normally applied to procedural issues, and finally "clearly erroneous," normally applied to factual findings of a trial court.

As examples of the application of these standards in an arbitration context, the issue of whether the parties are contractually bound to arbitrate their disputes will be reviewed under the *de novo* standard, and the admissibility in evidence of a handwriting expert's testimony regarding a forged arbitration document will also be reviewed under the de novo standard. The lower court's decision to admit or exclude such expert's testimony will be reviewed under the abuse of discretion standard, and its factual findings with regard to the question of whether or not the document was a forgery will be reviewed under the clearly erroneous standard.

B. In Arbitration

Arbitral awards are not self-enforcing. Accordingly, the FAA provides a mechanism for court enforcement of such awards. The prevailing party may take the arbitration panel's award to a court of competent jurisdiction and obtain a judgment, entitling that party to enforce the award against the losing party in the same

manner as if the judgment had been entered by a court of law in the first place. Congress, however, did not leave the losing party without any recourse, or compel courts to automatically approve every arbitral award regardless of the fairness or legitimacy of the underlying arbitration proceeding. To the contrary, the FAA provides several specific but highly limited grounds upon which a reviewing court can vacate, modify, or correct an arbitral award. 9 U.S.C. §10. Congress also specified the arbitration-related district court orders from which parties can seek further appellate review, including orders confirming, denying, modifying, correcting, or vacating an award. 9 U.S.C. §16.

In addition to the statutory grounds for review, courts have created narrowly defined common law grounds for vacating an arbitration award. Recent case law, however, has cast substantial doubt on the continued vitality of such common law grounds for attacking arbitral awards.

(1) Statutory Grounds for Vacating, Modification or Correction of an Arbitral Award

Section 9 of the FAA provides for judicial confirmation of arbitral awards. Specifically, the statute provides in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. §9. Given this language, issues arising from a proceeding to confirm an arbitral award turn on whether there are any grounds for vacating or modifying an award. The grounds for vacating or modifying an arbitral award are extremely narrow, and are set forth in Section 10 of the FAA.

Under Section 10(a), a reviewing court may vacate an arbitral award, upon the application of any party to the arbitration, in these circumstances:

> 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.

9 U.S.C. §10.

The first three grounds set forth in Section 10 involve a review of the actions of the parties and the arbitrators in order to determine if the proceeding was fair, and have nothing to do with the merits of the arbitrators' decision. And while the fourth ground seems to provide for some substantive review of the award, the U.S. Supreme Court has interpreted it to bar reviewing courts from considering whether the arbitrators correctly decided the merits of the case. *United Paperworkers Int'l. Union v. Misco, Inc.*, 484 U.S. 29 & 37-38 (1987). As one court put it, in reviewing arbitral awards a district or appellate court is limited to determining "whether the arbitrators did the job they were told to do — not whether they did it well, or correctly, or reasonably, but simply whether they did it." *Remmey v. PaineWebber, Inc.,* 32 F.3d 143, 146 (4th cir. 1994) (quoting *Richmond, Fredricksburg & Potomac R.R. v. Transp. Comm'n Int'l. Union*, 973 F.2d 276, 281 (4th Cir. 1992).

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As one court put it, in reviewing arbitral awards a district or appellate court is limited to determining "whether the arbitrators did the job they were told to do — not whether they did it well, or correctly, or reasonably, but simply whether they did it."

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Despite the narrow grounds for vacating arbitral awards, attempts to vacate awards remain relatively common. We therefore analyze each of the grounds for vacating separately:

[a] Corruption, Fraud or Undue Means

The first statutory grounds for vacating an award — that the award be "procured by corruption, fraud, or undue means," -- is rarely used. Fortunately, egregious conduct, such as corruption and fraud, is extremely rare.

The term "undue means" is not much broader than the words "corruption" and "fraud." Courts have held that undue means "must be read in conjunction" with those two words, *National Casualty Co. v. First State Ins. Co.*, 430 F.3d 492 (1st Cir. 2005), and "clearly connotes behavior that is immoral if not illegal. *A. G. Edwards & Sons, Inc. v. McCullough*, 967 F.2d 1401, 1403 (9th Cir. 1992). Accordingly, vacating an award on the basis of "undue means" has been held to require "proof of intentional misconduct," in addition to a "causal relation between the undue means and the arbitration award." *Painewebber Group., Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988, 991-994 (8th Cir. 1999).

Courts have rejected arguments that "undue means" extends to parties' withholding documents from discovery in reliance on reasonable assertions of privilege, id. at 994, to parties' submission of legally objectionable evidence, *American Postal Workers Union v. United States Postal Service*, 52 F.3d 359 (D.C. Cir. 1995), or to parties' assertion of frivolous defenses. *A.G. Edwards, supra*.

[b] Evident Partiality

The second statutory ground for vacating an award, "evident partiality" of an arbitrator, is a more commonly used ground than the first. Courts have held, however, that "evident partiality" means more than the mere appearance of bias. *See, e.g., Applied Industrial Materials Corp. v. Ovaler Makine Ve Sayayi, a.S.*, 492 F.3d (2d Cir. 2007). Such a low standard for vacating awards would be inconsistent with the language of the FAA and would likely frustrate the purpose of arbitration. *International Produce, Inc. v. A/S Rossharet*, 638 F.2d 548, 552 (2d Cir. 1981).

At the same time, however, some courts have indicated that the "evident partiality" standard may not require a showing of actual bias. For example, the Seventh Circuit has concluded that "evident partiality within the meaning of Section 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party in the arbitration." *Ment Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983). Other courts have shown an inclination to find "evident partiality" if an arbitrator fails to disclose a potential conflict. *See, e.g., Applied Industrial Materials Corp., supra* at 138.

Vacating an award for evident partiality is particularly difficult when the arbitrator in question is party-appointed. Where a party-appointed arbitrator is expected to be partial, some courts have found that the evident partiality standard may not apply at all. *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002).

Courts have upheld arbitration awards against a variety of challenges based on "evident partiality." For example, courts have declined to find "evident partiality" where arbitrators were alleged to have close personal or professional relationships with a party or another panel member, *Transit Casualty Co. v. Trenwick Reinsurance Co.*, 659 F.Supp. 1346 (S.D.N.Y. 1987), where the umpire was slated to be a witness in another case involving the same law firms that represented the parties in the first arbitration, *International Produce, Inc., supra*, where an arbitrator engaged in *ex parte* communications with the party that appointed her, *Nationwide Mutual Ins. Co., supra*, where two of the arbitrators had failed to disclose that they had been involved in an ethics controversy when they were state judges many years earlier. *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F. 634, 646 (9th Cir. 2010).

[c] Misconduct

Under the third ground for vacatur set forth in Section 10 of the FAA, a court may vacate an arbitration award if 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." This provision focuses on the arbitrators' conduct of the arbitration proceeding.

As with the other grounds for vacating an award, however, this ground is also quite narrow. Arbitrators have broad discretion to conduct the arbitration in the manner they see fit. As one court has stated, "The misconduct must amount to a denial of fundamental fairness of the arbitration proceeding in order to warrant vacating the award" for misconduct under Section 10(3). *Transit Casualty Co., supra*.

Given the deference afforded to the arbitrators in procedural matters, courts have upheld awards when the panel refused to hear oral argument, *British Ins. Co. of Cayman v. Water Street Ins. Co., Ltd.*, 93 F. Supp. 506 (S.D.N.Y. 2000), refused discovery requests, *One Beacon America America Ins. Co. v. Odyssey America Reinsurance Corp.*, 2009 WL 4509183 (S.D.N.Y. Nov. 18, 2009), refused a submission offered by a party, *Transit Casualty Co., supra*, excluded evidence, *One Beacon America Ins. Co. v. Swiss Reinsurance America Corp.*, 2010 WL 5395069 (D. Mass. Dec. 23, 2010), and conducted *ex parte* interviews with panel-retained experts. *United States Life Ins. Co. v. Superior National Ins. Co.*, 591 F.3d 1167 (9th Cir. 2010). It is particularly difficult to vacate an award on the basis of misconduct where the contract includes an "honorable engagement" clause, as most contracts do. The honorable engagement clause provides in substance that the arbitrators need not follow the strict rules of law or observe judicial formalities in making their decision. As the First Circuit Court of Appeals observed:

> Here, the relevant contract provisions not only relieved the arbitrators of any obligation to follow "the strict rules of law," but also released the arbitrators from "all judicial formalities." In

> the face of a clause that broad, which makes no mention of the production obligations of the parties or of the discovery procedures to be followed, and which so fully signs over to the arbitrators the power to run the dispute resolution process unrestrained by the strict bounds of law or of judicial process, a party will have great difficulty indeed making the showing, requisite to vacatur, that their rights were prejudiced.

National Casualty Co., supra at 497-498.

There have been cases, however, where the courts have held that an arbitration panel's refusal to hear key evidence constituted sufficient grounds to vacate an award under Section 10(a)(3). For example, the Second Circuit held that a panel's refusal to hear evidence of an important witness amounted to misconduct, justifying vacatur. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d. Cir. 1997). The court said that "there was no reasonable basis for the arbitration panel to determine that [the witness's] omitted testimony would be cumulative . . ." Thus, the court concluded, "the Panel excluded evidence plainly 'pertinent and material to the controversy'," sufficient to warrant vacatur. *Id.*

[d] Exceeding Powers

The final statutory ground for vacating an arbitration award is "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. §10(a)(4).

This ground for vacating an award is a necessary outgrowth of the fundamental principle that arbitration is a creature of contract. Thus an award can be vacated if an arbitration panel ignores a contractual limitation on its authority. In one case, the Ninth Circuit Court of Appeals vacated an arbitration award where an arbitrator ignored a contractual forum provision. *Polimaster Ltd. v. RAE Systems, Inc.*, 623 F.3d 832 (9th Cir. 2010).

Nevertheless, where an arbitration provision is broad, courts are reluctant to hold that a panel has exceeded its powers. The Second Circuit has explained that Section 10(a)(4) does not authorize the courts to correct an erroneous decision. The court stated:

> We have "consistently accorded the narrowest of readings" to the FAA's authorization to vacate awards pursuant to § 10(a)(4). . . . Our inquiry "focuses on whether the arbitrators had the power based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue."

Banco de Seguros del Estado, supra.

Moreover, arbitration panels are typically found to have discretion to order remedies they deem appropriate, as long as they do not exceed the power granted to them in the contract. The Seventh Circuit has expressly recognized that arbitration panels have the implied power to order remedies that are not specifically expressed in the contract. *Yasuda Fire & Marine Ins. Co. of Europe, Ltd., supra*. The court has said:

> Although parties to arbitration agreements may not always articulate specific remedies, that does not mean remedies are not available. If an enumeration of remedies were necessary, in many cases "the arbitrator would be powerless to impose any remedy, and that would not be correct. Since the arbitrator 'derives all his powers from the agreement, the agreement must implicitly grant him remedial powers when there is no explicit grant.'"

Yasuda Fire & Marine Ins. Co., supra at 351.

For example, it is well-established that arbitrators have the power to award pre-hearing security, even where the contract is silent on the issue. *Banco de Seguros del Estado, supra*. This approach has also been used to confirm awards of sanctions made by arbitration panels. *Reliastar Life Ins. Co. of New York v. EMC National Life Co.*, 564 F.3d 81 (2d Cir. 2009).

Finally, under Section 10(a)(4), an award can be vacated if it is "completely irrational." *Avio v. Underwriting Members of Syndicate 53 at Lloyd's*, 618 F.3d 277 (3d Cir. 2010). It is very difficult to persuade a court that an arbitrator's award was *completely* irrational. It is not enough that the court might disagree with the award. There must be "absolutely no support at all in the record justifying the arbitrators' determinations for a court to deny enforcement of an award." *Id.*

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Moreover, arbitration panels are typically found to have discretion to order remedies they deem appropriate, as long as they do not exceed the power granted to them in the contract. The Seventh Circuit has expressly recognized that arbitration panels have the implied power to order remedies that are not specifically expressed in the contract.

In addition to these statutory grounds for vacatur, courts have traditionally enjoyed the power under common law principles to vacate arbitration awards. The common law doctrines of vacatur that courts have used are that the award was "arbitrary and capricious," "completely irrational," a violation of "public policy," and that the award was made in "manifest disregard of the law."

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Section 11 of the FAA provides equally narrow grounds for modifying or correcting an award, allowing the court to do so, upon application of either party to the arbitration:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. §11.

Like Section 10, courts interpreting Section 11 have insisted that these provisions not be misused as a pretext for correcting arbitrators' decisions or the merits. *See, e.g., Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980). Courts have limited the application of Section 11 to the correction of obvious mathematical or clerical errors, See e,g, Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188, 194 (4th Cir. 1998), or to the striking of "all or a portion of an award pertaining to an issue not at all subject to arbitration," *See, e.g., Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 997-98 (9th Cir. 2003).

(2) Common Law Grounds for Vacating an Arbitration Award: The "Manifest Disregard" Doctrine

In addition to these statutory grounds for vacatur, courts have traditionally enjoyed the power under common law principles to vacate arbitration awards. The common law doctrines of vacatur that courts have used are that the award was "arbitrary and capricious," "completely irrational," a violation of "public policy," and that the award was made in "manifest disregard of the law." The origin of the doctrine of "manifest disregard" was a seemingly innocuous piece of *dictum* in the 1953 U.S. Supreme Court case *Wilko v Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). In *Wilko*, the Court held that an arbitration clause in a margin agreement between a broker firm and its customer was void pursuant to Section 14 of the Securities Act. *Id.* at 438. The Court considered whether "a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would 'constitute grounds for vacating the [arbitral] award pursuant to Section 10 of the [FAA].'" *Id.* at 436. The Court stated that the "failure would need to be made clearly to appear. In unrestricted submissions. . .the interpretation of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* at 436. This statement became the basis for the modern doctrine of manifest disregard, as interpreted by the circuit courts of appeal after this decision.

The Second Circuit Court of Appeals has defined "manifest disregard of the law":

> An arbitral award may be vacated for manifest disregard of the law "only if 'a reviewing court . . . finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" . . . We have emphasized that an arbitral panel's refusal or neglect to apply a governing legal principle 'clearly means more than error or misunderstanding with respect to the law.'"

Wallace v. Buttar, 378 F.3d 182 (2d Cir. 2004).

Other circuits have followed a similar approach. As the Eighth Circuit has explained:

> Manifest disregard requires something more than a mere error of law. If an arbitrator, for example, stated the law, acknowledged that he was rendering a decision contrary to law, and said that he was doing so because he thought the law unfair, that would be an instance of 'manifest disregard.' To require anything less would threaten to subvert the arbitral process.

Lincoln National Life Ins. Co. v. Payne, 374 F.3d 672, 675 (8th Cir. 2004).

Although the doctrine of manifest disregard traditionally has been available in every circuit as a basis of judicial relief from arbitration awards, parties have been rarely successful in using it. This is because all the circuits set a high subjective standard for vacatur on this ground. Application of the

doctrine to reinsurance arbitration may be more limited than in other fields of commerce. This is because of the presence in reinsurance agreements of "honorable engagement" clauses. Presumably, if the parties have already *agreed* that the arbitration panel may disregard otherwise applicable legal principles, it is unclear how the "manifest disregard of the law" doctrine would apply. Despite its low success rate, manifest disregard remains one of the most popular claims for a losing party to make in an attempt to gain relief from an adverse arbitral award.

(3) Can the Parties Expand Appellate Rights?

Notwithstanding the fairly well-established doctrine of "manifest disregard," the U.S. Supreme Court, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 396, 170 L.Ed. 2d 254 (2008), ruled that the FAA provides the exclusive grounds for vacatur of arbitral awards. This ruling created uncertainty over whether the common law doctrine of manifest disregard remains a valid ground for vacatur. In *Hall Street*, the plaintiff, Hall Street Associates, L.L.C. leased a manufacturing site to the defendant, Mattel, Inc. As part of the lease, Mattel agreed to indemnify Hall Street for any costs that resulted from its failure, or its predecessor's failure, to follow environmental laws while using the site. *Id*. at 579. In 1998, tests showed that Mattel's predecessors had left high levels of trichloroethylene ("TCE") in the property's well in violation of a state environmental law, which forced Mattel to cease its use of the well. Id. In 2001, Mattel gave High Street notice of its intent to terminate the lease, and Hall Street later filed suit claiming that Mattel had to indemnify Hall Street for the cost of cleaning up the TCE under the terms of the lease. *Id*.

Following a bench trial in the district court, the parties drew up an arbitration agreement to deal with the indemnification claim. The agreement stated that the district court "shall vacate, modify or correct any award: (i) where the arbitrators' findings of facts are not supported by substantial evidence or (ii) where the arbitrators' conclusions of law are erroneous." Id. The arbitrator decided for Mattel, holding that "no indemnification was due, because the lease. . .did not require compliance with the testing requirements of the Oregon Drinking Water Quality Act." *Id*. at 580.

Hall Street filed a motion to vacate the arbitration decision, arguing that the arbitrator committed a legal error by finding that the Oregon Act did not apply to the terms of the Lease. *Id*. The district court agreed and vacated the award on the basis of the terms set out in the arbitration agreement, and remanded the case for further consideration by the arbitrator. *Id*. On remand, the arbitrator applied the Oregon Act and therefore decided for Hall Street.

This case eventually made its way to the Supreme Court, where the court was confronted with the issue of whether Sections 10 and 11 of the FAA were the exclusive grounds for vacatur and modification of an arbitral award, or whether the FAA allowed parties to supplement the statutory grounds for vacatur by contract. *Id*. at 581. Hall Street attempted to argue that Sections 10 and 11 were not exclusive grounds in light of the court's prior decision in the *Wilko* case.

The Court determined that the phrase in *Wilko* that had given birth to the modern doctrine of "manifest disregard of the law" was too vague to support Hall Street's argument, and thus *Wilko* had no relevance to the case at hand. Instead, the court ultimately decided that Sections 10 and 11 of the FAA were intended to be the exclusive grounds for vacatur and modification of an arbitral award, and emphasized the point throughout its opinion. *Id*. at 585- 586. The court reasoned that the text of Section 9 of the FAA, which states that court "must grant" an order "unless" it can vacate an award "as prescribed" by Sections 10 and 11, "carried no hint of flexibility" with its language. *Id*. at 587. The Court felt that the language of Section 9 "unequivocally" stated that the courts "must grant" confirmation of an arbitral award in all cases, except for the "prescribed" exceptions. *Id*. Any other reading of this section would "open the door to the full-bore legal and evidentiary appeals that can `rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Id*. at 588.

(4) The Future of "Manifest Disregard" after *Hall Street v. Mattell*

The Supreme Court's decision in *Hall Street* has led lower courts to question whether the doctrine of "manifest disregard of the law" is still a valid ground for vacating an arbitral award. Several circuit courts of appeal have considered the issue. At least three circuits have concluded that *Hall Street* eliminated manifest disregard as a ground for vacatur. The Fifth and Eleventh Circuits have conclusively held that manifest disregard is no longer valid. *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010). The First Circuit, however, has made this statement only in *dictum*. *Ramos-Santiago v. UPS*, 524 F.3d 120, 124 n.3 (1st Cir. 2008).

The circuits holding that *Hall Street* did not eliminate manifest disregard as a ground for vacatur have reached this conclusion in different ways. The Sixth Circuit dealt with the issue by simply holding that the court in *Hall Street* did not expressly consider the doctrine of manifest disregard. *Coffee Beanery Ltd. v. WW L. L.C.*, 501 F.Supp. 2d 255 (W.D. Mich. 2007) *rev 'd,* 300 F. App'x (6th Cir. 2008). The Second and Ninth Circuits have read Hall Street less narrowly than the Sixth Circuit and have held that the *Hall Street* decision reached, but did not eliminate, the doctrine. The Second Circuit, in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 548 F.3d 85 (2d Cir. 2008), held that after *Hall Street* courts would now reinterpret manifest disregard as "shorthand" for Sections 10(a)(3) or 10(a)(4) of the FAA, dealing with arbitrator "misconduct" and arbitrators "exceed[ing] their powers." *Id*. at 94. The court based this framework for harmonizing the manifest disregard doctrine and the FAA on the Seventh Circuit's decision in *Wise v Wachovia Securities, LLC*, 450 F.3d 265 (7th Cir. 2006), in which the Seventh Circuit had

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previously held that its definition of "manifest disregard" was "so narrow that it fits comfortably under [Section 10(a)(4) of the F.A.A.]." *Id*. at 268.

The Ninth Circuit has taken a similar approach to the Second Circuit's holding in *StoltNielsen. In Comedy Club, Inc. v. Improv W. Assocs*., 553 F.3d 1277 (9th Cir. 2009), the Ninth Circuit acknowledged that *Hall Street* made the FAA grounds the exclusive ones for vacatur. The court stated, however, that it had "already determined. . .the manifest disregard ground for vacating [was] shorthand for a statutory ground under the F.A.A., specifically 9 U.S.C. §10(a)(4)." *Id*. at 1290. This is essentially the same conclusion that the Second Circuit, borrowing from the Seventh Circuit's decision in *Wise*, had reached. The Ninth Circuit, however, argued that it was unnecessary to "reconceptualize" manifest disregard because it found evidence in its own prior decisions that manifest disregard was the equivalent of a statutory ground for vacatur. *Id*. The Court held that the "exceeding their powers" language in Section 10(a)(4) and its own definition of "manifest disregard" were equivalent.

In sum, the future of the doctrine of "manifest disregard" remains somewhat unclear because of the varying approaches adopted by the Circuit Courts of Appeal in the wake of the Supreme Court's decision in *Hall Street*. It appears, however, that the doctrine, at least to the extent it varies from the statutory grounds for vacatur set forth in FAA, is moribund, if not altogether extinct.

III. The Impact of Rulings on Future Conduct and Claims

A. Legal Principles of Estoppel

Well-established principles of estoppel can serve to prevent parties from relitigating the same issues and the same claims in the courts. Ideally, these principles serve to reduce the need for multiple litigations and create judicial efficiency.

(1) *Res Judicata*: Claim Preclusion

Res judicata, or claim preclusion, refers to an "issue that has been definitively settled by judicial decision." BLACK'S LAW DICTIONARY (9th ed. 2009). It prevents the relitigation of the very same cause in a second proceeding between the same parties or parties who are in privity with each other. *Paramount Farms, Inc. v. Ventilex*, 735 F. Supp. 2d 1189, 1201-02 (E.D. Cal. 2010). Three elements must be satisfied for *res judicata* to apply:

- The claim must be identical to the one already litigated;
- There must have been a final judgment on the merits; and
- The party against whom *res judicata* is being asserted must be the same party from the prior proceeding or be in privity with the prior party.

Paramount Farms, supra., at 1201-02. When these elements are met, the losing party is prevented from litigating the very same claim again in the hope of getting a different result. Conversely, the winning party should not be required to litigate the same issue again, having already achieved a favorable result.

(2) Collateral Estoppel: Issue Preclusion

Under collateral estoppel, sometimes called issue preclusion, the determination of an issue by judicial decision will be conclusive between the parties for any issue that was actually litigated and determined if that determination was essential to the final judgment. RESTATEMENT (SECOND) OF JUDGMENTS § 17 (2011). Collateral estoppel, then, will prevent the relitigation of an issue already decided if specific elements are met:

- The issue must be identical to one raised in a prior proceeding;
- The issue must have been actually litigated and decided;
- The resolution of the issue must have been necessary to support a final and valid judgment on the merits; and
- The party against whom the doctrine is being asserted must have been a party to the earlier proceeding, with a full and fair opportunity to litigate the issue, or have been in privity with the party in the prior proceeding.

Bouriez v. Carnegie Mellon Univ., 430 F. App'x 182, 186 (3rd Cir. 2011); Par*amount Farms*, 735 F.Supp. 2d at 1202; *Hoffmann-LaRoche Ltd. v. Quiagen Gaithersburg*, Inc., 730 F. Supp. 2d 318, 327 (S.D.N.Y. 2010); *Stonewall Ins. Co. v. Argonaut Ins. Co*., 75 F. Supp. 2d 893, 901 (N.D. Ill. 1999).

(3) Special Considerations in the Application of Res Judicata and Collateral Estoppel

Both collateral estoppel and *res judicata* require that the parties be identical or that the current party be in privity with the party from the prior proceeding. Whether or not the party is considered in privity with the prior party requires the application of a flexible doctrine; in any event, privity will only apply when the actual party fully and fairly represented the current party's interests. *Commonwealth Ins. Co. v. Thomas A. Greene & Co., Inc*., 709 F. Supp. 86, 88- 89 (S.D.N.Y. 1989). In determining whether the parties are in privity, the tribunal asks whether the parties shared the same legal right. *Hartford Accident & Indem. Co. v. Columbia Cas. Co*., 98 F. Supp. 2d 251, 256 (D. Conn. 2000).

Additional issues arise if there are multiple, inconsistent rulings. As a general rule, if there are two inconsistent judgments, the latter one will be given conclusive effect in a third or other subsequent proceeding. RESTATEMENT (SECOND) OF JUDGMENTS § 15 (2011).

Finally, consideration should be given to the burden of proof for establishing that estoppel principles should apply. The proponent of estoppel has the burden of establishing that the earlier issues were identical and decisive. *AXA Corp. Solutions v. Underwriters Reins. Co*., No. 02 C 3016, 2004 U.S. Dist. LEXIS 22609, at *29-30 (N.D. Ill. Nov. 9, 2004). The opponent has the burden of establishing that it did not have a full and fair opportunity to litigate the issue in the prior proceeding. *Id*.

(4) Judicial Estoppel

A third form of estoppel is judicial estoppel, preventing a party from taking a position in a judicial proceeding that is inconsistent with one previously taken.

Under judicial estoppel, a party is prevented "from asserting a claim or right that contradicts what one has said or done before." BLACK'S LAW DICTIONARY (9th ed. 2009).

In determining whether to apply judicial estoppel, the tribunal will ask three questions:

- Is the present position being taken irrevocably inconsistent with the prior position?
- Has the party changed its position in bad faith?
- Can the use of judicial estoppel be tailored to address any affront to the court's authority?

Untracht v. Fikri, 454 F. Supp. 2d 289, 306 (W.D. Pa. 2006). If the elements are satisfied, the party will be prevented from taking inconsistent positions on an issue in a judicial proceeding.

B. Law of the Case and *Stare Decisis*

Two additional legal doctrines prevent the same issue from being relitigated over and over again. The law of the case doctrine prevents an issue from being relitigated within the same proceeding between the same parties, while *stare decisis* prevents a decided rule of law from being relitigated in future proceedings between any parties.

The law of the case is a "doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal." BLACK'S LAW DICTIONARY (9th ed. 2009). Under this doctrine, an issue previously decided will not be relitigated unless there is an intervening change in controlling law or new facts come to light. *City of Pontiac Gen. Emps.' Retirement System*, 637 F.3d 169, 173 (2nd Cir. 2011).

Stare decisis refers to the "doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY (9th ed. 2009). While *stare decisis* provides parties with certainty about established rules of law, it depends on public and widely available decisions that all parties can access. Thus the doctrine has little application to arbitration proceedings, since arbitration awards are seldom "reasoned" and even less often available to panels that may be considering similar issues.

C. Application to Arbitration Proceedings

The courts have broad discretion to determine whether or not estoppel principles should apply to arbitration rulings. *Universal Am. Barge Corp. v. J-Chem, Inc.* 946 F.2d 1131, 1137 (5th Cir. 1992). As a general rule, however, such principles will be applied only to a final arbitration award. *Hartford*, 98 F. Supp. 2d at 255; *Commonwealth*, 709 F. Supp. at 88.

The federal courts might not apply principles of estoppel if it is determined that other federal interests are at stake. *Dean Witter Reynolds, Inc. v. Byrdi*, 470 U.S. 213, 223 (1985). For example, civil rights or federal securities laws will generally trump the application of estoppel principles to an arbitration award. *Id*.

When it comes to arbitration, the courts have indicated that it will be up to the arbitrator to determine whether or not to follow a previous award. *N. River Ins. Co. v. Allstate Ins. Co.*, 866 F. Supp. 123, 128 (S.D.N.Y. 1994). As a creature of contract, however, parties to arbitration can themselves reach an agreement regarding the estoppel effect of any arbitration rulings--interim or final. *See, e.g., Consolidation Coal Co. v. United Mine Workers of Am.*, 213 F.3d 404, 407 (7th Cir. 2000) ("[Any preclusive effect], like most features of arbitration, is indeed a matter of contract rather than a matter of law.").

In agreeing to the estoppel impact of an arbitration ruling, the parties should make sure that the desired impact is addressed in their arbitration agreement and in any confidentiality order.

The confidentiality agreement or order should be carefully drafted to ensure that it will not adversely affect the preclusive effect of a ruling that the parties desire by preventing either side from sharing the results of a final award. If the parties agree that the arbitrator's award should have estoppel effect, they will need to ensure that the confidentiality agreement makes clear that the order can be released to a future panel or court.

The arbitration agreement can include a provision that specifically outlines the preclusive effect of any award as well, clarifying to whom the award will apply and the specific effect the parties wish it to have. Because arbitration is always a matter of agreement between the parties, such agreements, when properly drafted, should serve to provide the parties with the estoppel effect that they desire.▼

The views expressed in these materials do not necessarily reflect the views of Kerns, Frost & Pearlman, LLC; Larson King, LLP; their attorneys, or any of their clients.

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news and notices

Eric Smith to Give Keynote Address at Fall Conference

ARIAS•U.S. is honored to announce that **J. Eric Smith**, President and CEO of Swiss Re Americas, will provide the keynote address for this year's Fall Conference at the Hilton New York. He will speak to the conference on Friday morning.

A 30-year insurance veteran, Mr. Smith joined Swiss Re from USAA Life Insurance Co. in July of 2011. Prior to USAA, Mr. Smith was President of Allstate Financial Services. He also spent over 20 years with Country Financial.

Throughout his career, Mr. Smith has been an advocate of technology as a way to create not only business value and competitiveness, but also accessibility to insurance products.

Mr. Smith serves on the Executive Committee of the American Council of Life Insurers, a trade association that represents the country's largest life insurers and reinsurers.▼

Fall Conference to Support Career Gear and Dress for Success

This year, for the first time, ARIAS will ask attendees at the 2012 Fall Conference to bring along some extra clothing when they come to the Hilton.

ARIAS will be collecting men's and women's suits and accessories that are in good condition for distribution to Career Gear (men) and Dress for Success (women). These are national non-profit organizations that promote the economic independence of disadvantaged men and women by providing not only a suit, but also a network of support and the necessary career development tools to help them become successful, self-sufficient members of their communities.

Complete details will be sent to all ARIAS members in September.▼

ARIAS•U.S. Announces New Members of Ethics Discussion Committee

The ARIAS•U.S. Board of Directors has appointed three new members to the Ethics Discussion Committee. The new appointees are **Edward P. Krugman** of Cahill Gordon & Reindel LLP, **Mark T. Megaw** of ACE Group Holdings, and Larry P. Schiffer of Patton Boggs LLP. They join Chairman **Eric S. Kobrick**, **Mark S. Gurevitz**, **James I. Rubin**, and **Daniel E. Schmidt, IV** in focusing ARIAS•U.S. members' attention on the critical ethics issues in insurance and reinsurance arbitration.▼

Dassenko, Moak, and Thompson Are September Workshop Faculty

The Education Committee has announced that the experienced arbitrators who will instruct at the September 19 Intensive Arbitrator Training Workshop are **Paul Dassenko**, **Roger Moak**, and **Elizabeth Thompson**. These three veterans of reinsurance arbitration have a combined total of 328 arbitrations as arbitrator or umpire; their advice comes with a deep understanding of the process.

The workshop is being held at the New York offices of DLA Piper LLP (US), 1251 Avenue of the Americas in New York City. The program will run from 8:30 a.m. until 4:30 p.m.

This is the only Intensive Arbitrator Training Workshop that ARIAS•U.S. will offer during 2012. The deadline for registration was August 29.

The intensive workshop is not considered an "educational seminar" for purposes of arbitrator certification *renewal*.

Complete details are on the website Calendar.▼

Fall Educational Seminars Will Feature Simultaneous Tracks

The Education Committee has begun development of the next seminars. As in the previous two years, this October 31 event will consist of two simultaneous seminars, one covering key aspects of the arbitration process, the other tackling some of its most difficult issues. The latter seminar is for very experienced arbitrators only.

Each "Educational Seminar" qualifies as one of the three requirements for renewal of ARIAS arbitrator certification.

Co-chairs for the basic course are **Patricia Fox** and **Ronie Schmelz**. Experienced arbitrator course co-chairs are **Leslie Davis** and **John Nonna**.

The two concurrent seminars will take place on October 31, the afternoon before the 2012 Fall Conference. They will be located at the Hilton New York hotel. Complete details were sent to all members and were posted on the website calendar in late August. Registration opens on the website on September 12, with a deadline of October 12.▼

Board Approves Barry Stinson as Certified Arbitrator

At its meeting on June 6, the ARIAS Board of Directors approved **Barry W. Stinson** as a Certified Arbitrator. His sponsors were Sylvia Kaminsky, Robert Redpath, and David Fox.

Kevin T. Riley

Kevin T. Riley, a long-time member and ARIAS Certified Arbitrator, died of a heart attack on Martha's Vineyard on Saturday June 9. A memorial service was held on Friday, June 15, at 12:00 p.m. at St. Patrick's Church, 169 Blackrock Turnpike, Redding, Connecticut.

From the 6/13 NY Times: Kevin T. Riley, 69 of Redding, CT and Edgartown, MA, passed away on June 9th. Kevin was born in Newark, New Jersey, May 9th, 1943 and graduated Seton Hall University in 1965. He worked for more than 40 years in the insurance and reinsurance industries and was a member of the Union League Club of New York.▼

feature

Why Parties Mediate: The Scope of Judicial Decisions Mandating Mediation

This article is based upon a paper presented at the ARIAS•U.S. 2012 Spring Conference.

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While largely untried as a means of resolving reinsurance disputes, mediation has become a staple of the decades-old movement toward alternative dispute resolution ("ADR"). Along with other ADR mechanisms, mediation promised to reduce the delays and burgeoning expense that came to be associated with litigation. Mediation clauses (which only recently have begun to appear in reinsurance contracts) became commonplace in commercial agreements. Such clauses provide for mediation as a precursor to suit. Absent a mediation clause, commercial parties often agree to mediate once a dispute arises or litigation is underway. While the actual success rate of mediation is debatable, broad agreement exists that many commercial disputes are resolved in this fashion, including some of the largest and most complex ones.

Another category of commercial cases involving mediation is far less typical. These are cases in which courts have ordered litigating parties to mediate before allowing a civil action to proceed. Over the past several decades, many court systems have established mandatory ADR programs, which include court-ordered mediation. The efficacy of these programs varies, as parties can usually comply without engaging in the kind of intensive mediation needed to resolve thornier disputes.

Cases in which individual judges require mediation stand on a different footing from garden-variety judicial ADR programs. Courts traditionally try cases; it is the exceptional case in which an individual judge is prepared to exercise his or her inherent authority to bring the parties in a particular case to the mediation table. In major cases, court-ordered mediation can then entail significant costs for the parties. If mediation fails, the same judge who has ordered the parties to mediate could continue to preside over the case, with uncertain repercussions from the unsuccessful mediation. Against this backdrop, only judges who have formed a strong view in favor of mediation—whether to push entrenched parties toward settlement, to manage the court's own docket, or for some other reason—will issue an order requiring mediation. Consequently, such cases offer a window into the thinking of judges about what types of cases seriously warrant mediation.

An arbitration panel differs from a court, of course, especially in terms of the scope of the panel's inherent authority. Arbitration is a creature of contract, meaning that the parties presumably have bargained for an arbitration award from their panel, rather than a mandate to mediate. As a practical matter, moreover, arbitrators quite understandably do not conceive of their role in terms of having the parties before them mediate rather than arbitrate.

With these considerations in mind, this article first surveys the decisions in which courts have ordered mediation, and then discusses pertinent decisions concerning the scope of arbitral authority.

1. The Power of Courts to Order Mediation

Courts recognize that "policy of the law has always been to promote and sustain the compromise and settlement of claims"[1] and therefore they "wish to encourage mediation as a means of dispute resolution."[2] In jurisdictions that have not imposed local rules permitting courts to order mediation, appellate courts have held that trial courts have the inherent authority to order parties

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In the federal courts, the First Circuit offered the most detailed analysis of a court's right to order mediation, holding that even where no rule authorizing mediation exists, "a court nonetheless may order mandatory mediation through the use of its inherent powers as long as the case is an appropriate one and the order contains adequate safeguards."

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to mediate, even over the objection of one of the parties, by virtue of trial courts' "substantial inherent authority to manage and control their calendars."[3]

In the federal courts, the First Circuit offered the most detailed analysis of a court's right to order mediation, holding that even where no rule authorizing mediation exists, "a court nonetheless may order mandatory mediation through the use of its inherent powers as long as the case is an appropriate one and the order contains adequate safeguards."[4] The case was a complex litigation in Puerto Rico federal district court involving the construction of an aqueduct (and a related insurance coverage case had been filed in the local Puerto Rico courts). The First Circuit described the litigation as containing a "googol of claims, counter-claims, cross-claims, and third party complaints."[5] One of the numerous defendants, Atlantic Pipe Corporation, moved to dismiss the federal action. While that motion was pending, one of the other parties moved the court for an order requiring mediation. Over Atlantic Pipe's objection, the district court "pronounced mediation likely to conserve judicial resources; directed all parties to undertake mediation in good faith; stayed discovery pending completion of the mediation; and declared that participation in the mediation would not prejudice the parties' positions vis-a-vis the pending motion or the litigation as a whole."[6] Atlantic Pipe sought a writ of mandamus from the First Circuit to reverse the district court's mediation decision.

The First Circuit denied the writ, holding that the district court had the authority to order mediation. The court began by examining the four possible sources for judicial authority to order mediation: (1) the court's local rules; (2) an applicable statute; (2) the Federal Rules of Civil Procedure; and (4) the district court's inherent powers. The court held that the first three sources did not provide a basis for the mediation order, but the district court's inherent powers gave it the ability to order mediation.

The court held that there may be "specific cases in which such a protocol is likely to conserve judicial resources without significantly burdening the objectors' rights to a full, fair, and speedy trial."[7] Although it may be inefficient to force parties to mediate, the court thought the case before it was one of the instances when a mediation could still yield benefits because "a party may resist mediation simply out of unfamiliarity with the process or out of fear that a willingness to submit would be perceived as a lack of confidence in her legal position."[8] A mediation, particularly in a complex case with numerous parties (there were twelve in *Atlantic Pipe*), offers the opportunity for "creative solutions--solutions that simply are not available in the binary framework of traditional adversarial litigation."[9] In order to prevent mediation from being taken "hostage to the parties' ability to agree on the concomitant financial arrangements" the court held that the trial court "is empowered to order the sharing of reasonable costs and expenses" of the mediation.[10]

While the First Circuit accepted the district court's power to order mediation, it provided guidance for trial courts in ordering mediation by addressing several problems with the specific order entered in the case. The court noted that "any such order must be crafted in a manner that preserves procedural fairness and shields objecting parties from undue burdens."[11] Therefore, a district court should set a limit on the number of hours for the mediation and/or a cap on the mediator's fees. In addition, because "justice delayed is justice denied," the court should set a definite time frame for the mediation.[12] Further, while the court held that there was no prohibition on appointing the mediator suggested by one of the parties, in an "ideal world" the court should "solicit the names of potential nominees from all parties and ... provide an opportunity for the parties to comment upon each others' proposed nominees."[13] Lastly, the court should make clear that "participation in the mediation will not be taken as a waiver of any litigation position."[14]

State courts take the same position as well. The Kentucky Supreme Court held that a trial court that had ordered parties to mediation "was well within its jurisdiction to do what it deemed reasonably necessary to 'aid in the disposition of the action' and to order the parties to mediation."[15] The case was a consolidated action of two complaints stemming from the same car accident, in which two of the drivers filed suit against the other drivers and their insurers. Early in the case, the trial court ordered that "the parties and an adjustor of their insurers with full authority to settle shall attend a

mediation conference," that the parties were to "use their best efforts to resolve all issues," and imposing sanctions such as attorneys' fees and costs on any party that failed to appear at the mediation.[16] If the case was settled after the mediation, the trial court sought to impose "additional costs, fines and penalties" to account for "disruption to the courts" because of the alleged "failure to give timely or adequate work and consideration to this aspect of the case." [17] Three parties objected to the order, arguing that the trial court had no authority to order mediation and had improperly attempted to impose sanctions. After the trial court denied those motions, one of the insurers sought writs of prohibition and mandamus from the Kentucky Court of Appeals, which were denied. The insurer then appealed to the Kentucky Supreme Court.

The Kentucky Supreme Court held that the trial court had the authority to order mediation but had overstepped its authority when imposing sanctions for a settlement reached after mediation. The court began by recognizing that trial courts "have inherent power to prescribe rules to regulate their proceedings and to facilitate the administration of justice."[18] For this reason, the court held, "the trial court was well within its jurisdiction to do what it deemed reasonably necessary to 'aid in the disposition of the action' and to order the parties to mediation."[19]

The court did rein in the trial court, finding that one error in the order was sufficient to justify the grant of a writ of prohibition. The court struck the provision imposing penalties if the matter settled after the mediation because it improperly coerced parties to settle. Along the same lines, the court refused to interpret the trial court's requirement that the parties have "full authority to settle" as a requirement that the parties must actually settle. Instead, it interpreted the phrase to require "the appearance of parties with 'full authority to settle' to prevent the pernicious practice of negotiations by 'an agent without authority."[20] In order to make mediation useful, there "must be participation by persons possessed of immediate decision making authority" because "the process is irreparably harmed if final settlement authority rests elsewhere." [21]

The Georgia Supreme Court reached the same result in a case involving the Georgia Department of Transportation's condemnation of land for the construction of a parkway. The trial court had enjoined the Department from condemning certain land until the merits of the case could be tried and also ordered the parties "to participate in the process of mediation and engage in discussions in good faith."[22] The Department appealed that order, arguing that the trial court had no authority to order the parties to mediation. The Georgia Supreme Court disagreed.

The Georgia Supreme Court began by encouraging "the use of mediation as a means of dispute resolution."[23] While mediation was ordinarily voluntary, the court (with reasoning similar to the First Circuit's in *Atlantic Pipe*) noted that even a forced mediation could be productive because parties may have "reached a standstill in settlement negotiations such that for either party to suggest mediation is to perhaps admit a weakness or at least suggest he is willing to yield further" or the parties may just not be familiar with mediation.[24] The court cautioned that the trial court "may not order them to resolve their differences in mediation nor to yield on any matter they choose not to yield."[25] For these reasons, the court rejected an interpretation of the mediation order that would "require the parties to mediate their dispute on penalty of contempt if they fail," instead holding that a trial court "should simply make the referral and leave it to the parties from that point."[26]

The opinion that courts can force parties to mediation, however, is not universal. The California Court of Appeal has held that "a case management conference order requiring that parties in complex cases attend and pay for mediation" was not authorized by California's statutory scheme regarding mediation and was "contrary to the voluntary nature of mediation."[27] In a complex construction defect case involving multiple parties, the trial court ordered all parties to appear at a mediation with settlement authority and that each party would be responsible for a pro rata share of the mediator's fees. Jeld-Wen, one of the many defendants, objected to the mediation provisions and did not attend the first mediation session. The trial court then granted a motion for sanctions against Jeld-Wen and ordered it to appear at the next

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The courts have not yet addressed directly whether arbitrators possess any power to require mediation, perhaps for the reasons mentioned above. Be that as it may, the case law sheds some light on arbitrators' inherent authority.

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mediation. Jeld-Wen sought a writ of mandate from the California Court of Appeal.

The Court of Appeal granted the writ of mandate, holding that the trial court did not have the authority to order parties to mediation. The court noted that "case law and the statutory scheme ... emphasize the voluntary nature of mediation."[28] While the court noted the inherent authorities of courts, an "order requiring the parties in complex cases attend and pay for mediation is not authorized by the statutory scheme [in California] and is contrary to the voluntary nature of mediation." [29] The court also focused on the practical effect on the objecting party, holding that "it serves no purpose to force Jeld-Wen, an uninsured litigant and minor player in this complex action, to attend mediation where the combined costs of the mediator and attorneys fees expended to attend multiple mediation sessions could exceed the amount of the claim against it." [30] The court spoke positively of mediation, but did not believe courts should force parties to mediate against their will. The court noted the usefulness of mediation and that "in a large majority of complex cases most parties will agree to private mediation; as such [sic] we foresee no apocalyptic consequences from this decision."[31] The court noted that trial courts can "try to cajole the parties in complex actions into stipulating to private mediation," but held that forcing parties to do so "is antithetical to the entire concept of mediation."[32]

2. The Scope of Arbitral Authority

The courts have not yet addressed directly whether arbitrators possess any power to require mediation, perhaps for the reasons mentioned above. Be that as it may, the case law sheds some light on arbitrators' inherent authority. Some cases recognize that broad arbitration clauses give arbitrators a variety of ancillary power, which might encompass the power to compel mediation. Other cases have held specifically that arbitrators do not have all the inherent powers of a court. Such cases cut against arbitrators' authority to order mediation. In sum, the ultimate question is whether a broad arbitration clause implicitly grants arbitrators the power to manage the arbitration, including the power to mandate mediation, or whether the contractual agreement to arbitrate must explicitly grant such powers because the parties have chosen to arbitrate, effectively ruling out mandatory mediation.

Some courts have held that a broad arbitration clause, like those usually included in reinsurance agreements, grants arbitrators "inherent authority" similar to that possessed by courts.[33] The Second Circuit has recognized that when "an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate."[34] In effect, these courts interpret broad arbitration clauses as giving the arbitrators broad discretion over the procedure of the arbitration, including the ability to award sanctions, even if such powers are not explicitly mentioned in the arbitration agreement. For example, courts have upheld arbitrators' authority to sanction parties with attorneys' fees and arbitrators' fees[35] and to require pre-hearing security.[36]

In addition, courts often defer to the arbitrators' decisions on "procedural" issues. In reviewing an order to arbitrate issued by a court, the Illinois Appellate Court held that a "mediation order is ministerial or administrative in nature ... because it is regulating the procedural details of the litigation, rather than affecting the rights of the parties."[37] Applying this reasoning to mediation during an arbitration, the mediation would be a "procedural" ruling subject to deferential review by the courts.[38] This deference may be more pronounced when the order being reviewed follows the courts' own policy of promoting "the compromise and settlement of claims."

To the contrary, other cases have identified limits to the inherent authority of arbitrators. In *Interchem Asia 2000 PTE Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340 (S.D.N.Y. 2005), the United States District Court for the Southern District of New York held that arbitrators did not have the authority to sanction an attorney with the payment of attorneys' fees.[39] While the court upheld an award of attorneys' fees against one of the parties because both parties had requested attorneys' fees as relief, it held that arbitrators did not have inherent authority to impose sanctions beyond those requested by the parties. The court ruled that the parties could have explicitly granted the arbitrator the power to award sanctions in the agreement and that "[g]ranting the Arbitrator authority beyond that granted to

him by the parties conflicts with the most basic principles underlying the arbitration process."[40]

Similarly, in *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926 (N.D. Cal. 2003), the United States District Court for the Northern District of California held that a court did not have the inherent authority to impose a $10,000 per day sanction for failing to comply with the arbitrators' order to post pre-hearing security (which the court had held was valid).[41] The court held that arbitrators do not have the same inherent contempt power that courts possess to enforce their orders and that the FAA's policy of judicial review of arbitral awards prevented arbitrators from awarding sanctions that would impinge on a party's right to obtain review of the award, unless such a power was clearly evident from the contract.[42]

Following these cases, a court could distinguish the inherent authority to regulate the arbitration procedure by awarding fees or security from an order that forces parties out of arbitration into a form of ADR to which the parties have not agreed in their contract.

3. Conclusion

All of this being said, of course, arbitrators who are understandably disinclined to require mediation could suggest it to the parties in appropriate cases. If a case seems susceptible to settlement, an arbitral suggestion to mediate may give the parties "cover" to engage (or re-engage) in settlement discussions. As the Georgia Supreme Court noted, the parties sometimes reach "a standstill in settlement negotiations such that for either party to suggest mediation is to perhaps admit a weakness or at least suggest he is willing to yield further."[43]▼

FootNotes

1 *First Wisconsin Nat l Bank of Rice Lake v. Klapmeier*, 526 F.2d 77, 80 n.6 (8th Cir. 1975).
2 *Dep't of Transp. v. City of Atlanta*, 380 S.E.2d 265, 267 (Ga. 1989).
3 *In re Atlantic Pipe Corp.*, 304 F.3d 135, 143 (1st Cir. 2002). *See also Short Brothers Constr., Inc. v. Korte & Luitjohan Contractors, Inc.*, 828 N.E.2d 754, 756 (Ill. App. Ct. 2005) (recognizing that a "mediation order is clearly related to the circuit court's inherent authority to control its own docket").
4 *Atlantic Pipe*, 304 F.3d at 138.
5 *Id* at 139.
6 *Id*.
7 *Id*. at 144.
9 *Id*. at 145.
10 *Id*. at 146-47.
11 *Id*. at 143.
12 *Id*. at 147.
13 *Id*. at 146 n.7.
14 *Id* at 147.
15 *Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455, 458-59 (Ken. 2004).
16 *Id*. at 457.
17 *Id*.
18 *Id* at 458.
19 *Id*. at 458-59.
20 Id at 459.
21 *Id*.
22 *Dep't of Transp. v. City of Atlanta*, 380 S.E.2d 265, 267 (Ga. 1989)
23 *Id*.
24 *Id*.
25 *Id*.
26 *Id*.
27 *Jeld-Wen, Inc. v. Superior Court*, 53 Cal. Rptr. 3d 115, 119 (Cal. Ct. App. 2007).
28 *Id*. at 118.
29 *Id*. at 119.
30 *Id*.
31 *Id*. at 120.
32 *Id*.
33 *E.g., Reliastar Life Ins. Co. of New York v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009) ("a broad arbitration clause ... confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that such a sanction may include an award of attorney's or arbitrator's fees").
34 *Id*.
35 *Id*. at 86-87.
36 *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 261-62 (2d Cir. 2003) (holding that arbitration panel may order pre-hearing security); *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991) (same).
37 *Short Brothers*, 828 N.E.2d at 756.
38 *E.g., Central West Virginia Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 276 (4th Cir. 2011) (holding that judicial review of "a procedural issue that an arbitrator had authority to decide is exceedingly narrow"); *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 631 F.3d 869, 874 (7th Cir. 2011) ("Arbitrators are entitled to decide for themselves those procedural questions that arise on the way to a final disposition.")
39 373 F. Supp. 2d at 358. 40 Id. at 358-59.
41 264 F. Supp. 2d at 944.
42 *Id*.
43 *Dep't of Transp.*, 380 S.E.2d at 267. *See also Atlantic Pipe*, 304 F.3d at 144 ("a party may resist mediation ... out of fear that a willingness to submit would be perceived as a lack of confidence in her legal position").

All of this being said, of course, arbitrators who are understandably disinclined to require mediation could suggest it to the parties in appropriate cases. If a case seems susceptible to settlement, an arbitral suggestion to mediate may give the parties "cover" to engage (or re-engage) in settlement discussions.

members on the move

In each issue of the Quarterly, this column lists employment changes, re-locations, and address changes, both postal and email that have come in during the last quarter, so that members can adjust their address directories.

Although we will continue to highlight changes and moves, remember that the ARIAS•U.S. Membership Directory on the website is updated frequently; you can always find there the most current information that we have on file. If you see any errors in that directory, please notify us at director@arias-us.org.

Do not forget to notify us when *your* address changes. Also, **if we missed your change below, please let us know**, so that it can be included in the next Quarterly.

Recent Moves and Announcements

After a 41-year actuarial career, **Denis W. Loring** has retired from RGA Re. However, he continues as a Senior Vice President of RGA Worldwide Reinsurance Company, Ltd. and continues to be eligible for assignments that require an active officer of an insurance or reinsurance company. He can be contacted at 119 Grand Palm Way, Palm Beach Gardens, FL 33418-4630, phone 561-351-8585, fax: 561-625-9707, email denis.loring@att.net .

Dr. Detlef A. Huber has returned from his sabbatical in South America and is now Managing Partner at re-/insurance consultancy AURIGON Advisors AG, located at Alte Steinhauserstr. 1, CH – 6330 Cham/Zug, Switzerland. Contact numbers are phone +41 41 561 3818, fax +41 41 561 3819, cell +41 792 789 567, email d.huber@aurigon.ch.

Henry McGrier and **Bill Littel** have relocated to Northbrook. Their new address is Allstate Insurance Company, 3075 Sanders Road, Suite H1W, Northbrook, Il 60062. Phone numbers are: McGrier 847-402-0661, Littel 847-402-1072, Fax 847-402-2921.▼

feature

Grant of Attorney's Fees by an Arbitration Panel: Is a Demand for Such Fees Necessary?

Robert M. Hall

Robert M. Hall

I. Introduction

Considerable attention has been devoted lately to the match between the issues submitted to reinsurance arbitration panels and the remedies the panel provides. The concern articulated most often is that the panel lacks the authority to go beyond the tasks assigned to it and cannot re-write the contact(s) or dispense the panel's own brand of justice. Due process concerns may also be in the background, *i.e.,* the ability of the parties to argue for and against certain remedies.

One, but only one, context in which this arises is that of attorneys' fees. Absent a flat prohibition in the arbitration clause against a panel granting attorneys' fees, what authority does a panel have or must be given to grant such fees? The purpose of this article is to examine selected case law demonstrating a significant split in authority on point.

II. Cases Holding That There Must Be a Specific Demand for Attorneys' Fees

This line of cases is exemplified by the recent decision of *White Springs Agricultural Chemicals, Inc. v. Glawson Investments, Corp.*, 660 F.3d 1277 (11th Cir. 2011), in which White Springs sought to vacate an award of attorneys' fees against it. The arbitration in question was in two phases with the first phase addressing specified issues (not attorneys' fees) and the second phase all other issues. Once the first phase was complete, Glawson identified attorneys' fees as an issue for the second phase and the panel received briefs and heard argument on point before granting such fees. Under these circumstances, the court rejected White Spring's claim that the issue of attorneys' fees had not been submitted properly to the panel before its ruling on point.

Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995), was an appeal of an order affirming the ruling of a securities arbitration panel that each party should pay its own attorneys' fees. The petitioner did not claim attorneys' fees and neither party briefed or argued the issue to the arbitration panel. Apparently, there was a state law that might have been a basis for the petitioner to recover attorneys' fees. The court reversed the lower court on its confirmation of the ruling on attorneys' fees, holding that a demand for "costs" and certain ambiguous submissions to the panel did not amount to the necessary request for a ruling on attorneys' fees.

See also Interchem *Asia v. Oceana Petrochemicals AG*, 373 F.Supp. 2d 340 (S.D.N.Y. 2005), which involved a late shipment of petrochemicals. There was a broad arbitration clause in the contract at issue and the parties demanded attorneys' fees. The arbitrator found for Interchem and ordered that attorneys' fees be paid by Oceana and its counsel. The court upheld the award of attorneys' fees against Oceana but declined to confirm the award against Oceana's counsel individually. Although AAA Commercial Rule 43 allowed the arbitrator to grant remedies that were equitable and within the scope of the agreement, it held it "implausible to construe" this as justifying an award against the attorney.' While acknowledging that a court has the power to sanction attorneys personally as part of its "inherent power to police itself," the court found no such authority for an arbitration panel to act in similar fashion:

> [F]inding that the Arbitrator had inherent authority to sanction [the attorney] would directly contradict the principle that an arbitrator's authority is circumscribed by the agreement of the parties. That principle flows from the basic understanding that arbitration is a

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Absent a flat prohibition in the arbitration clause against a panel granting attorneys' fees, what authority does a panel have or must be given to grant such fees?

Mr. Hall is a former law firm partner, a former insurance and reinsurance company executive, and acts as a reinsurance and insurance consultant and expert witness, as well as an arbitrator and mediator of insurance and reinsurance disputes.

Case law on panel award of attorneys' fee represents a remarkable range of holdings, from: (a) attorneys' fees must be demanded, briefed and argued; to (b) attorneys' fees may be granted without demand, briefing, or argument, absent a strict prohibition by the contract at issue.

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> consensual arrangement meant to reflect a mutual agreement to resolve disputes outside the courtroom. Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration.[2]

III. Cases Holding That There Need Not be a Specific Demand for Attorneys' Fees

Certainly the leading case in this category is *ReliaStar Life Ins. Co. v. EMC National Life Co.*, 564 F.3d 81 (2nd Cir. 2009). The arbitration clause in the relevant contract was broad in that it included any dispute with reference to any transaction relating in any way to the treaty. It called for the panel to consider custom and practice in the life or health business. Most significantly, it provided in § 10.3:

> Each party shall bear the expense of its own arbitrator ... and related outside attorneys' fees, and shall jointly and equally bear with the other party the expenses of the third arbitrator.[3]

At the conclusion of an arbitrated dispute under this contract, the panel awarded the cedent nearly $4 million in attorneys' and arbitrators' fees and costs on the basis that the panel viewed the conduct of the reinsurer in the arbitration as "lacking in good faith."[4] The district court declined to confirm the award of attorneys' fees because it violated § 10.3 of the treaty and thus exceeded the panel's authority.[5]

On appeal, the court characterized the issue as "whether, in light of the parties' agreement to arbitrate, the arbitrators were authorized to sanction bad faith conduct by awarding attorney's fees and arbitrator fees."[6] The court acknowledged that a party cannot be required to arbitrate a dispute that it has not agreed to submit to panel and that the authority of the panel depends on the intention of the parties as described in the arbitration clause.[7]

As a baseline for its ruling, the court made a broad general statement on the power of arbitration panels:

> [W]e here clarify that a broad arbitration clause, such as the one in this case, ... confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that sanction may include an award of attorney's or arbitrator's fees.[8]

The court took its direction on the facts of this case from the reason for arbitration as a dispute resolution technique:

> Indeed, the underlying purpose of arbitration i.e. efficient and swift resolution of disputes without protracted litigation, could not be achieved but for good faith arbitration by the parties. Consequently, sanctions, including attorney's fees, are appropriately viewed as a remedy within an arbitrator's authority to affect the goals of arbitration.[9]

Given the broad scope of the arbitration clause, the court reasoned that §10.3 was merely a statement of the American Rule on attorney's fees that is to apply to arbitrations conducted in good faith. Absent a more specific contractual limitation on the power of the panel to grant remedies in a bad faith context, the court declined to apply this section to such a context:

> Precisely because the agreement in this case conferred broad authority on the arbitrators, because inherent in such authority is the power to sanction bad faith conduct, and because bad faith is a recognized exception to the American Rule for attorney's fees, we conclude that the simple statement of that Rule in section 10.3 is insufficient by itself to swallow the exception.[10]

ReliaStar was followed by two subsequent cases in the southern district of New York. *In re Arbitration between General Security National Ins. Co. and Aequipcap Program Administrators*, 785 F. Supp. 2nd 411 (S.D.N.Y. 2011); *National Union Ins. Co. of Pittsburgh v. Odyssey America Reins. Corp.*, 2009 U.S. Dist. Lexis 108318 (S.D.N.Y.). There are, however, a number of decisions that pre-date *ReliaStar*, some in other circuits, which use somewhat similar reasoning.

Marshall & Co., Inc. v. Duke, 114 F.3d 188 (11th Cir. 1997) *cert. denied* 522 U.S. 1112 (1998), involved a securities dealer arbitration. The panel denied the claims of the securities investors and awarded the securities brokers

substantial attorneys' fees and costs. The Uniform Submission Agreement used for securities disputes did not address such fees and costs.[11] On a motion to confirm, the district court held that the panel was within its authority to award these costs and fees on the bases: (a) the investors agreed to the panel hearing this issue; and (b) "[E]very judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the 'American Rule.'"[12] The court of appeals affirmed and as to point (b) ruled: "[T]he arbitrators have the power to award attorneys' fees pursuant to the 'bad faith' exception to the American Rule that each party bears its own attorney's fees."[13]

An arbitration concerning ship refitting under the rules of the AAA provided the factual backdrop for *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991). From the opinion, it is evident that the relevant contract contained a broad arbitration clause but did not specifically address punitive damages or attorneys' fees. It is not evident from the opinion whether one or both of the parties demanded punitive damages and/or attorneys' fees. The panel denied the claims of the ship owner and granted the shipyard compensatory damages, punitive damages, attorneys' fees, and costs. The panel's stated rationale for the punitive damages was that the ship owner was guilty of bad faith, deceptive practices, and knowingly false representations. The rationale for attorneys' fees was bad faith during the course of the arbitration that caused it to be extended unnecessarily. The ship owner argued that the panel acted in excess of its authority under law in granting punitive damages and attorneys' fees.

The district court confirmed the award and the court of appeals affirmed. As to punitive damages, the court noted that the arbitration was held pursuant to the AAA rules and that Rule 43 allowed the arbitrators to grant any remedy they deem equitable and within the scope of the agreement (but it did not specifically address costs, attorney's fees, or punitive damages).[14] The court of appeals stated:

> We hold that the expansive view that has been taken of the power of arbitrators to decide disputes, coupled with the incorporation of AAA Commercial Arbitration Rule 43 by the parties, provided the arbitration panel here with the authority to make the punitive damage award.[15]

Likewise with respect to attorneys' fees, the court ruled:

> Federal law takes an expansive view of arbitrator authority to decide disputes and fashion remedies, particularly when a dispute arises between parties to a commercial contract with an arbitration clause that incorporates AAA Commercial Rule 43, and which applies to every dispute arising under the agreement. In light of the broad power of arbitrators to fashion appropriate remedies and the accepted "bad faith conduct" exception to the American Rule, we hold that it was within the power of the arbitration panel in this case to award the attorneys' fees.[16]

In *Synergy Gas Co. v. Sasso*, 853 F.2d 59 (2nd Cir. 1988), the arbitrator in a labor dispute granted attorneys' fees because the employer discharged an employee without just cause, failed to comply with a prior order to reinstate, and acted in bad faith in violating its contractual obligations and in bringing a spurious claim of arbitrator misconduct. The relevant collective bargaining agreement contained a broad arbitration clause, but apparently did not specifically address attorney's fees, costs or punitive damages. While there was no formal demand for attorneys' fees, the court interpreted certain "other claims" language during the hearing as inclusive of attorneys' fees. The employer challenged the attorneys' fee award as violating New York public policy barring punitive damages in labor disputes. The court of appeals upheld the award as within the power of the panel and found that it was not punitive but compensatory in order to reimburse the employee for expenses he would not have incurred had he been reinstated as ordered in the initial arbitration.

IV. Commentary

Case law on panel award of attorneys' fee represents a remarkable range of holdings, from: (a) attorneys' fees must be demanded, briefed and argued; to (b) attorneys' fees may be granted without demand, briefing, or argument, absent a strict prohibition by the contract at issue. The latter rulings might be explained as a means of allowing a panel to control the arbitration proceeding by sanctioning outlandish behavior by counsel, absent a right to hold counsel in contempt, but this reasoning does not reach the much more likely target of the sanction — outlandish behavior of a party. More significantly, *ReliaStar* seems to place few limitations to the ability of a panel to devise remedies, if not rule on issues, that have not been identified, briefed, or argued by counsel.

Perhaps the most useful comment in the context of attorneys' fees is a practice tip for counsel to demand, brief, and argue for attorneys' fees whenever it seems remotely likely that a panel would grant such fees. This will serve counsel in good stead in whatever court such an award might be challenged.

ENDNOTES

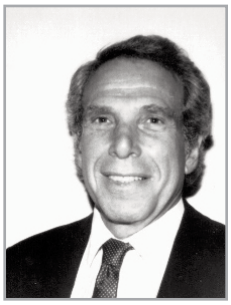
1 373 F.Supp. 2d 340 at 357.
2 Id. at 53-4 (internal citations and quotation marks omitted).
3 864 F.3d at 84.
4 *Id.* at 85.
5 473 F.Supp.2d 607.
6 864 F.3d at 85.
7 *Id.*
8 *Id.* at 86.
9 *Id.* 87.
10 *Id.**88-9.
11 But an Arbitrator's Manual used for guidance stated that fees might be awarded in exceptional cases. 941 F.Supp. 1207 at 1214.
12 114 F.3d 188 at 189-90.
13 *Id.* at 190.
14 943 F.2d 1056 at 1063. See cases cited by the court that interpret this rule as allowing the arbitrators to grant punitive damages.
15 *Id.*
16 *Id.* at 1064.

off the cuff

This column appears periodically in the Quarterly. It offers thoughts and observations about reinsurance and arbitration that are outside the normal run of professional articles, often looking at the unconventional side of the business.

Exactly What Is a Slomin? …and Other Unanswerable Questions

Eugene Wollan



Eugene Wollan

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In today's world of advanced technology, there are very few questions that can't be answered by a quick trip to Wikipedia or Google or some similar website. Every so often, however, I encounter one that doesn't lend itself to an easy answer. When that happens, I tend to lie awake at night and stew about it. It occurs to me that I might find these situations less frustrating if I were to share some of them with my faithful readers (all four of them); who knows – one of them might even suggest a solution to a question that has hitherto struck me as insoluble.

- There's an alarm security company that advertises a lot on T.V., calling itself "The Slomin's Shield." Their service may or not be as good as they say, but my problem with it is that I haven't a clue what the name means. Is "Slomin" a person, a thing, or a title?
  - If the company name is intended to reflect the name (first or last) of an individual, as in "Schindler's List" or "Hobson's Choice," then the "The" is completely out of place.
  - If, on the other hand, the company name is intended to reflect a family name, then it's the apostrophe that's completely out of place, and the name should be constructed like "The Obamas' daughters" or "The Medicis' Legacy."
  - If, on the third hand, "Slomin" is a title rather than a name, the existing form makes sense, as in "The Emperor's New Clothes" or "The Terminator's Revenge." But is "Slomin" really a title rather than just a name? It certainly doesn't sound like one.
  - I found these questions so bewildering that I went searching for an answer. According to Wikipedia, the company was founded about a century ago by a man named Jacob Slomin, so presumably the idea sought to be conveyed by the name is that a guy or a family named Slomin offers protection that will assure the user security and peace of mind.
  - If it's a guy, deep-six the "the." If it's the whole family, move the apostrophe. If it's neither – rename the company!
- An underwriter issues a named perils policy of property insurance. Flood is not one of the named, and therefore insured, perils. Nevertheless, he then throws in an endorsement that specifically excludes flood from the coverages. What was he thinking?
  - Did he believe he was just being appropriately cautious, as if wearing both a belt and suspenders?
  - Was he trying to highlight the absence of flood coverage, just to make certain the insured was aware of it and had no "reasonable expectation" of being insured against the next tsunami?
  - Did he not realize that he could be opening the proverbial can of worms, this time in the form of a debate over whether the burden of proof lies with the insured (to bring itself within the basic coverage grant) or the insurer (to establish the applicability of the exclusion.)
  - Did he never encounter the old

There's an alarm security company that advertises a lot on T.V., calling itself "The Slomin's Shield." Their service may or not be as good as they say, but my problem with it is that I haven't a clue what the name means. Is "Slomin" a person, a thing, or a title?

Eugene Wollan, Editor of the Quarterly, is a former senior partner, now Senior Counsel, of Mound Cotton Wollan & Greengrass. He is resident in the New York Office.

adage about leaving well enough alone?

- New York City's Metropolitan Transit Authority has introduced on some routes "Select Service" buses. The special gimmick is that before boarding you purchase a receipt from a machine at the bus stop, and passengers can them embark or disembark through any of the three sets of doors. (It's not completely an honor system; there are periodic random checks by MTA police, and if you can't produce a current receipt the fine is $115.) A major advantage of the system supposedly is that it eliminates congestion at the front doors from boarding passengers waiting in line to swipe their metrocards, one by one, through the machine next to the driver. Nevertheless, every time someone pushes a button to signal for the next stop, a recorded voice booms out "Please exit through the rear door." Why?
  - Doesn't that contradict one of the basic objectives of the new system? (Of course, most New Yorkers don't pay attention to this and use the front door anyhow if it's closer, even on the older buses where the announcement makes sense, but let's not go there.)
  - Did someone at the MTA automatically include it in the specifications for the new buses just because it's always been there?
  - Is this just one more example of someone operating unthinkingly on automatic pilot?
- If you read almost any manuscript policy of insurance, usually a broker's form, you will almost certainly find an occasional provision, scattered here and there apparently at random, that leads off with the phrase "It is hereby understood and agreed . . ." (Let's ignore for present purposes the superfluous and pretentious "hereby.") What did the draftsman have in mind?
  - Why were these words used to introduce this paragraph and not the one before or after it?
  - Isn't it a fact that every provision in the policy is "understood and agreed" to precisely the same extent, because that's what a contract is, and an insurance policy is, after all, a contract?
  - Did he consider that any oddity in the policy wording, even one as innocuous as this, could give rise to an "ambiguity" that would gladden the heart of an insured's lawyer?
- There has recently been a plague of T.V. commercials for a new cable series called "Common Law" in which one of the lead characters is heard saying to the other, "Neither of those words are adjectives."
  - Strunk and White nailed this one (as usual) in their Rule 9: "The number of the subject determines the number of the verb."
  - Every time I am subjected to this egregious solecism I ask myself: Who is it who is illiterate, the character uttering these words, or the script writer who gave him the words to utter?
- There are three or four major insurance companies that spend enormous amounts of money on television advertising. They focus primarily on auto insurance, and more specifically on what they claim to be the lower premiums they charge than their competitors for what purports to be identical or comparable coverage. Each one claims to charge hundreds of dollars less per year than others. Will someone please explain to me how this can possibly be?
  - If A charges less than B, and B charges less than C, and C charges less than A, does that transport us to some kind of alternate universe where negative numbers rule?
  - Is there a parallel here to the legendary bird that flies in ever-diminishing concentric circles until it disappears down its own throat?
- Many courts have now embraced the concept that an important consideration in defining the coverage afforded by an insurance policy is the "reasonable expectation" of the ordinary businessman/insured.
  - Why is this criterion restricted to insurance policies and no other kind of contract?
  - If the policy is not a true contract of adhesion, but has actually been the subject of negotiation (or, even more likely, been drafted by the broker on behalf of the insured), why

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There are three or four major insurance companies that spend enormous amounts of money on television advertising. They focus primarily on auto insurance, and more specifically on what they claim to be the lower premiums they charge than their competitors for what purports to be identical or comparable coverage. Each one claims to charge hundreds of dollars less per year than others. Will someone please explain to me how this can possibly be?

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on earth should the insured's "expectations" receive special consideration?

- What about the reasonable expectations of the underwriter?

- Aren't the reasonable expectations of both parties to any contract implicit in the wording they have adopted?

• Most war risk exclusions in first-party policies contain what is known as a reverse burden of proof clause. This was devised by some clever UK underwriters, and says in effect that when the insurer invokes the exclusion and can make even a minimal prima facie showing in support of it, the burden of proof shifts to the insured to establish that the exclusion does not apply. This provision has been upheld by the courts.

- Why, then, hasn't some equally clever underwriter, either here or in the UK, tried to apply this concept to other exclusions?

- Is a war risk exclusion so very different from, say, a latent defect exclusion or a surface water exclusion?

- Is the difference that most exclusions, like these examples, can readily be established or negated by expert testimony, whereas the different categories of "war risks" are much more nebulous and more difficult to pin down?

- Or is this one more illustration of Newton's law of inertia?

• One of the oddities of our language is the juxtaposition of singular and plural pronouns. "Everyone has to do his or her own job" is correct and relatively painless, but after a while the phrase begins to sound awkward and tiresome. Most folks, including many who should know better, cut the Gordian Knot with "Everyone should do their job," which is clear enough but overlooks the fact that "their" is plural whereas "everyone" is singular.

- Is there no sensible, grammatically acceptable way of stating this transition?

- Can no one devise a unisex pronoun that could bridge the gap?

• This is akin to the "his/her" problem. How often have you heard a T.V. commercial that begins something like this: "If you or someone you know suffers from chronic heartburn - - -? Now, obviously you wouldn't say "If you suffers from chronic heartburn." Technically, the dulcet-voiced announcer should be saying "If you suffer, or someone you know suffers, from chronic heartburn - - -" but this is so stilted and ungainly that no one would think of using it. What we do instead is resort to the shorthand version that is technically bad grammar but conveys the thought clearly and precisely.

- Is there some new pronoun out there that could span this gap?

- Can no one devise a one-verb-fits-all way of saying this without stumbling through a grammatical minefield?

• Why are three auxiliary police stationed at each busy Manhattan intersection during rush hour, with the apparent mission of screwing traffic up beyond hope?

- Medieval theologians speculated on how many angels could dance on the head of a pin. Jokesters in recent years have flourished asking how many [you fill in the ethnic blank] it takes to change a light bulb. Semanticists may quibble over how many protesters are needed to constitute a "mob". My question remains: why three traffic directors?

- Is the theory that if three act at cross – purposes, they will cancel each other and traffic will flow unimpededly?

- Is this part of a Machiavellian plot to make traffic so unendurable that New Yorkers will give up driving in the City and resort to two-wheeled transportation using those bicycle lanes that are springing up everywhere and making their own major contribution to the traffic mess?

- Or is this just a commendable effort to reduce the unemployment rate while providing these folks with an opportunity for healthy aerobic activity in the great outdoors?

And then there is what is probably, for us in ARIAS, the ultimate unanswerable question: will it ever be possible to reconcile the tension between the fairness of the process and the desire to win?

- There has been a lot of discussion over the years about the advantages of truly "neutral" arbitration panels – their use would, it is said, lead to more consistently equitable results, reduce the time and cost expended, and encourage a universal perception of the process as essentially fair.

- At odds with this, however, is the basic nature of the arbitration process as an adversarial one; the parties and counsel focus on winning the case, not on being perceived as fair, and they are understandably reluctant to surrender whatever opportunity they see to tilt the playing field in their direction, particularly in the selection of their party arbitrators (and ultimately the umpire).

- There is a reason why the idea of all-neutral panels receives plenty of lip service but just about zero actual use (at least in the U.S.).

Will there ever be a solution to the conflict between wanting the process to be seen as completely fair and wanting to win the case?

I am reminded of the lawyer who, responding to a question about the outcome of a case, said, "Justice prevailed ... and we're appealing." Does that describe in capsule form what lies in our future?▼

"Manifest Disregard" Not Quite Dead Yet — New York Federal Court Declines To Vacate Arbitration Tribunal's Award

case notes corner

Ronald S. Gass

Ronald S. Gass

Although several federal circuit courts have significantly curtailed the application of the "manifest disregard of the law" doctrine to vacate arbitration awards (*see* Louis J. Aurichio & Joseph P. Noonan III, *What's Left of "Manifest Disregard of the Law" as a Basis for Vacatur of Arbitration Awards after* Hall Street?, 17 ARIAS•U.S. Quarterly 17 (1st Quarter 2010)), it lives on in the Second Circuit. As a recent New York federal district court case demonstrates, however, winning vacatur on the basis of this doctrine remains an uphill battle.

In this case, the cedent allegedly sustained a $411 million loss under first party insurance covering a DuPont manufacturing facility in Texas that was substantially damaged by Hurricane Ike in 2008. DuPont sought coverage for both its property damage and business interruption losses under its $500 million policy with the cedent. The cedent retained the first $200 million in losses, and the remaining $300 million was apparently reinsured with numerous facultative reinsurers. When the parties to these reinsurance agreements were unable to resolve their differences over the cedent's valuation of the DuPont losses, the cedent demanded arbitration in early 2011.

In an unusual move (probably because the facultative certificates did not contain arbitration clauses), the parties negotiated and executed a post-loss "Arbitration Agreement," that provided, *inter alia*, that the tribunal would "not be bound by any final rules of evidence," "have the power to fix procedural rules relating to the conduct of the Arbitration," and "issue a reasoned, written explanation of its award." The reinsurers, in what was described by the parties as a "leap of faith," also made a $50 million claim payment to the cedent in reliance on its representation that the DuPont losses would exceed $250 million.

By agreement, discovery was conducted on an expedited basis with a limited number of depositions, and the tribunal subsequently held an eight-day hearing. In its unanimous November 2011 written award, the tribunal held that the cedent failed to sustain its burden of proving that its Hurricane Ike losses exceeded $250 million, and likewise the reinsurers had failed to sustain their burden of proving that the losses were less than $250 million, thereby apparently denying the reinsurers' counterclaim for the return of their $50 million "leap of faith" claim payment. Following a cedent motion for clarification and/or reconsideration, the tribunal issued a second unanimous decision in December 2011 stating that it was now *functus officio* and that the cedent had received all the compensation to which it was entitled until such time as it could establish that its DuPont Hurricane Ike losses actually exceeded $250 million, i.e., the $200 million retention plus the $50 million good faith payment advanced by the reinsurers.

The reinsurers petitioned the New York federal district court to confirm the tribunal's award, and the cedent cross-petitioned to vacate it. The cedent attacked the decision on four grounds: that it violated § 10(a)(3) and (4) of the Federal Arbitration Act ("FAA"), and was made in manifest disregard of the law and in manifest disregard of the parties' Arbitration Agreement.

Section 10(a)(3) provides in pertinent part that a court may vacate an arbitration award if "the arbitrators were guilty of misconduct . . . 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." The cedent argued that the tribunal improperly refused to hear certain course of dealing evidence concerning

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The cedent attacked the decision on four grounds: that it violated § 10(a)(3) and (4) of the Federal Arbitration Act ("FAA"), and was made in manifest disregard of the law and in manifest disregard of the parties' Arbitration Agreement.

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With regard to the cedent's "manifest disregard of the law" contentions, the court reiterated well-settled Second Circuit precedent that application of this doctrine requires that the challenging party satisfy a two-prong test: (1) that the "governing law" was "well defined, explicit, and clearly applicable," and (2) that the arbitrator knew about "the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it"...

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how some (but not all) of the reinsurers had previously agreed to calculate the amount of depreciation in determining the actual cash value ("ACV") of property damage losses similar to DuPont's but in the context of an unrelated Hurricane Katrina loss settlement arising under identical ACV policy language. The reinsurers opposed the introduction of this course of dealing evidence because that information was subject to a confidentiality provision included in the Hurricane Katrina-related settlement agreement. The tribunal twice ruled against the cedent's attempt to introduce this evidence — once during discovery and again during the hearing, despite the cedent's contention that the reinsurers had "opened the door" concerning the parties' prior course of dealing. Citing Second Circuit precedent, the court examined whether the tribunal's proceeding was "fundamentally fair," which requires that "an arbitrator 'give each of the parties to the dispute an adequate opportunity to present its evidence and argument,' but does not require that an arbitrator 'hear all the evidence proffered by a party.'" The court concluded that the tribunal did give the cedent an adequate opportunity to argue why the Hurricane Katrina-related course of dealing evidence should be admitted and gave appropriate weight to the reinsurers' breach of confidentiality concerns, which provided "more than a colorable justification for the outcome reached by the Tribunal."

Regarding the alleged violation of FAA § 10(a)(4), which provides in pertinent part for vacatur if "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," the cedent argued that the tribunal had imperfectly executed its powers by applying an unspecified and improper burden of proof standard without citing any legal precedent or discussing how the damages evidence submitted failed to meet that standard. Observing that this subsection of the FAA is "'accorded the narrowest readings' and 'focuses on whether the arbitrators had the power . . . to reach a certain issue,'" the court ruled against the cedent because (1) the scope of the Arbitration Agreement was broad and empowered the tribunal to resolve the parties' reinsurance dispute, and (2) the cedent was not arguing that the tribunal lacked the power under the parties' Arbitration Agreement to decide which party bore the burden of proof or that it exceeded its power by not choosing to apply a specific burden of proof standard. Because the tribunal was arguably acting within the scope of its authority, the award could not be vacated under § 10(a)(4).

With regard to the cedent's "manifest disregard of the law" contentions, the court reiterated well-settled Second Circuit precedent that application of this doctrine requires that the challenging party satisfy a two-prong test: (1) that the "governing law" was "well defined, explicit, and clearly applicable," and (2) that the arbitrator knew about "the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it" (quoting *Schwartz v. Merrill Lynch & Co., Inc.*, 665 F.3d 444, 452 (2d Cir. 2011)). Emphasizing that this doctrine was "severely limited," extremely deferential to arbitrators, and a "doctrine of last resort" whose use is limited to those "exceedingly rare instances" where some egregious impropriety on the part of the arbitrators is apparent but where none of the provisions of the FAA apply, the court held that it was inapplicable to the facts of this case.

The cedent presented two "manifest disregard of the law" arguments. First, it contended that the tribunal manifestly disregarded what the cedent claimed was the applicable contract principle of *contra proferentem, i.e.*, that a contract's ambiguities should be construed against the drafters. The tribunal found that the cedent actually participated in drafting the disputed contract language and that the final wording was, in fact, proposed by the cedent; hence, *contra proferentem* was inapplicable. The cedent did not meet the first prong of the "manifest disregard" standard because it failed to show that the tribunal was *obligated* to apply the *contra proferentem* doctrine or any other "governing law." That the tribunal disagreed with the doctrine's proposed application in this instance was "plainly insufficient" to support vacatur of the award.

Second, the cedent unsuccessfully argued that the tribunal "manifestly disregarded" the relevant case law it provided during the arbitration in support of its position that lost business income needed to be proved only by a "reasonable degree of certainty" as opposed to being proved with "absolute certainty" or "scientific rigor." It claimed that the tribunal never discussed this burden of

proof case law or specified what burden of proof standard it applied in reaching its decision that the cedent failed to sustain its burden. The court ruled that the cedent (1) again failed to show that the tribunal was bound by any "governing law" regarding proof of damages, and (2) even if it were so bound, the fact that the tribunal did not explain why the cedent failed to meet its burden of proof did not "clearly demonstrate" the doctrine's second prong, that the tribunal "intentionally defied" those cases.

Lastly, the court ruled against imposing an unusual variation of the "manifest disregard" argument, that an award could be vacated where it is in manifest disregard of the terms of the parties' relevant agreement. The cedent contended that the tribunal "manifestly disregarded" the parties' Arbitration Agreement in ruling on the disputed business interruption claims. Again citing Second Circuit precedent holding that courts can apply "'a notion of manifest disregard to the terms of the agreement analogous to that employed in the context of manifest disregard of the law'" (quoting *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 25 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998)), the district court rejected as unprecedented the application of this doctrine *to the parties' Arbitration Agreement*, as opposed to their underlying reinsurance contract, noting that the tribunal was not charged with interpreting the terms of the Arbitration Agreement. Furthermore, that document clearly provided that the tribunal was *not* bound by any formal rules of evidence and had the power to fix procedural rules relating to the conduct of the arbitration. Thus, the cedent's complaints about (1) the tribunal rejecting live testimony from two of its witnesses, and instead relying on their depositions, and (2) its not providing a "reasoned basis for rejecting" one element of the cedent's tendered business interruption losses, did not adequately demonstrate that the tribunal "intentionally defied" a binding provision of the parties' Arbitration Agreement.

This case aptly demonstrates the difficulties inherent in seeking vacatur of an arbitration award in general, and invoking § 10(a)(3) and (4) of the FAA and "manifest disregard of the law," in particular. It also underscores the point that, even in a jurisdiction in which the "manifest disregard" doctrine appears to be alive and well notwithstanding the United States Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), it will only be applied sparingly.

Ace American Insurance Co. v. Christiana Insurance, LLC, No. 11 Civ. 8862 (ALC), 2012 U.S. Dist. LEXIS 51863 (S.D.N.Y. April 12, 2012).▼

Lastly, the court ruled against imposing an unusual variation of the "manifest disregard" argument, that an award could be vacated where it is in manifest disregard of the terms of the parties' relevant agreement.

ARIAS•U.S. Website Redesigned

On August 15, ARIAS•U.S. opened up a new structure and graphical treatment of its website.

The ARIAS•U.S. website graphics had been in place since the website opened ten years ago. The new look and organization, among other things, is more contemporary, with drop down menus for categories of links, rather than a single column of grey navigation buttons down the left side of the page.

The new design also has a more modern style that includes a large space in the center to feature announcements and postings of upcoming events.

Web designers at Mountain Media, the long-time host of the ARIAS•U.S. website, have been at work on the redesign project for several months. The basic functionality of the site and its interaction with ARIAS•U.S. databases remain unchanged.

in focus

Recently Certified Arbitrators

Detlef A. Huber

Detlef A. Huber

Detlef Huber is a German attorney with more than twelve years of practical experience in the reinsurance sector. He is Managing Partner of the Swiss-based re-/insurance consultancy AURIGON Advisors AG, providing challenge & litigation management, inspection, and other services to the industry.

Prior to setting up AURIGON he acted as a board member and managing director of Alea Services AG in Switzerland and as Group Head of Reinsurance Claims of the Alea Group. In this function, Mr. Huber was responsible for claims departments in Switzerland, Bermuda, the USA, as well as London. He also managed various litigations and arbitrations in Germany, France, Italy, the UK, and the USA. In addition, he was heavily involved in downsizing the Alea group of companies by way of restructuring, outsourcing, company sale, and finally in redomiciling the Swiss reinsurance entity to Bermuda, which was the first transaction of that kind out of Switzerland.

Mr. Huber started his career in reinsurance as a consultant at Chiltington International in Hamburg, where he specialized in exit strategies, inspections of records and management of long-tail claims. Parts of his legal trainee programme (so-called "Referendariat") were spent at a law firm in Hamburg, the German consulate in Rio de Janeiro, and at Hannover Re in Hannover.

He became a Certified Arbitrator of ARIAS•U.S. and ARIAS Europe in 2011, is a member of the German Institute for Arbitration (DIS), the AIDA Swiss Chapter, and of the Swiss Institute for Liability and Insurance Law (SGHVR).

Mr. Huber studied in Freiburg and Hamburg, holds two German State Exams in legal studies, a Spanish master degree in European Law, and a Dr. iur in insurance law of the University of Hamburg.

He is fluent in German, English, and Spanish and has a good knowledge of Portuguese.▼

Profiles of all certified arbitrators are on the website at www.arias-us.org

BRING AN EXTRA SUIT TO THE 2012 FALL CONFERENCE!

This year, take a look in your closet before the Fall Conference. See if there isn't a suit or two in there that are in fine condition, but that you haven't worn for a year because you have moved on to newer ones. There are people who could use those suits, and any accessories that you aren't using, to help them land jobs and change their lives.

At the Fall Conference, ARIAS•U.S. will be collecting men's and women's suits and accessories that are in very good condition for distribution to Career Gear (men) and Dress for Success (women). These are national non-profit organizations that promote the economic independence of disadvantaged men and women by providing not only a suit, but also a network of support and the necessary career development tools to help them become successful, self-sufficient members of their communities.

Full details will be sent to members in late September.

ARIAS U.S.

Do you know someone who is interested in learning more about ARIAS•U.S.?

If so, pass on this letter of invitation and membership application.

An Invitation…

The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of August 2012, ARIAS•U.S. was comprised of 334 individual members and 115 corporate memberships, totaling 950 individual members and designated corporate representatives, of which 243 are certified as arbitrators.

The Society offers its *Umpire Appointment Procedure,* based on a unique software program created specifically for ARIAS, that randomly generates the names of umpire candidates from the list of ARIAS•U.S. Certified Umpires. The procedure is free to members and non-members. It is described in detail in the *Selecting an Umpire* section of the website.

Similarly, a random, neutral selection of all three panel members from a list of ARIAS Certified Arbitrators is offered at no cost. Details of the procedure are available on the website under Neutral Selection Procedure.

The website offers the "Arbitrator, Umpire, and Mediator Search" feature that searches the extensive background data of our Certified Arbitrators who have completed their enhanced biographical profiles. The search results list is linked to those profiles, containing details about their work experience and current contact information.

Over the years, ARIAS•U.S. has held conferences and workshops in Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Washington, Boston, Miami, New York, Puerto Rico, Palm Beach, Boca Raton, Las Vegas, Marina del Rey, Amelia Island, and Bermuda. The Society has brought together many of the leading professionals in the field to support its educational and training objectives.

For many years, the Society published the *ARIAS•U.S. Membership Directory*, which was provided to members. In 2009, it was brought online, where it is available for members only. ARIAS also publishes the ARIAS•U.S. *Practical Guide to Reinsurance Arbitration Procedure* and *Guidelines for Arbitrator Conduct*. These publications, as well as the *ARIAS•U.S. Quarterly* journal, special member rates for conferences, and access to educational seminars and intensive arbitrator training workshops, are among the benefits of membership in ARIAS.

If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the Membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Bill Yankus, Executive Director, at director@arias-us.org or 914-966-3180, ext. 116.

Join us and become an active part of ARIAS•U.S., the leading trade association for the insurance and reinsurance arbitration industry.

Sincerely,

Elaine Caprio Brady
Chairman

Mary Kay Vyskocil
President

ARIAS U.S. Membership Application

AIDA Reinsurance
& Insurance
Arbitration Society
PO BOX 9001
MOUNT VERNON, NY 10552

Complete information about ARIAS•U.S. is available at www.arias-us.org. Included are current biographies of all certified arbitrators, a current calendar of upcoming events, online membership application, and online registration for meetings.

914-966-3180, ext. 116

Fax: 914-966-3264

Email: info@arias-us.org

Online membership application is available with a credit card through "Membership" at www.arias-us.org.

NAME & POSITION _____

COMPANY or FIRM _____

STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____ CELL _____

FAX _____ E-MAIL _____

Fees and Annual Dues: Effective 10/1/12

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$415	$1,200
FIRST-YEAR DUES AS OF APRIL 1	$277	$800 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$138	$400 (JOINING JULY 1 - SEPT. 30)
TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

** Member joining and paying the full annual dues after October 1 is considered paid through the following calendar year.*

*** As a benefit of membership, you will receive the ARIAS·U.S. Quarterly, published 4 times a year. Approximately $40 of your dues payment will be allocated to this benefit.*

NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $415 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

Payment by check: Enclosed is my check in the amount of $_____
Please make checks payable to
ARIAS·U.S. (Fed. I.D. No. 13-3804860) and mail with
registration form to: ARIAS·U.S.
Dept. CH 16808, Palatine, Il. 60055-6808

Payment by credit card: Fax to 914-966-3264 or mail to ARIAS·U.S., P.O. Box 9001, Mt. Vernon, NY 10552.
Please charge my credit card: (*NOTE: Credit card charges will have 3% added to cover the processing fee.)*

☐ AmEx ☐ Visa ☐ MasterCard in the amount of $_____

Account no. _____

Exp. _____/_____/_____ Security Code _____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

By signing below, I agree that I have read the By-Laws of ARIAS•U.S., and agree to abide and be bound by the By-Laws of ARIAS•U.S. The By-Laws are available at www.arias-us.org in the About ARIAS section.

_____

Signature of Individual or Corporate Member Applicant

THE BREAKERS
PALM BEACH, FLORIDA
www.thebreakers.com

Back to the Breakers!





Two Years in a Row!

In the past, ARIAS•U.S. has interspersed visits to other venues. We have never before returned for a second consecutive year. However, the record of good experiences there is reason enough to stay settled for a second year. Block out the dates May 8-10, 2013 to avoid planning anything else. Many members have said we should always have ARIAS•U.S. Spring Conferences at The Breakers. Let's see how we like it two years in a row.

Save *the* Date...

May 8-10, 2013

ARIAS U.S.
P.O. Box 9001
Mt. Vernon, NY 10552

ARIAS U.S. Board of Directors

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