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Res Judicata and Collateral Estoppel: The Preclusive Effect of Arbitration Awards in Subsequent Judicial Proceedings

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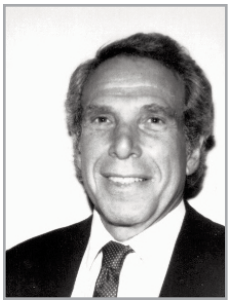

Eugene Wollan

editor's comments

(Belated) Happy New Year to one and all.

We lead off this issue with a particularly rewarding discussion of two different but at the same time quite similar juridical concepts: res judicata and collateral estoppel. These principles have at times stumped even hardened professionals, and it is certainly no wonder that non-lawyer arbitrators (and clients) sometimes find them difficult to grapple with. Mary Ann D'Amato and Benjamin Hincks have provided an analysis that is clear, interesting, and above all helpful.

Charles Moxley has dug into his personal treasure house of arbitration experience to give us a portrait of what he terms a "muscular arbitration" should be. As you will see, the article is really a series of bullet points. There was some discussion about whether it should be expanded into a more conventional narrative format, but I thought (yes, the buck stops here) that this approach was more consistent with his basic lean-and-mean concept. Visions of old Jack LaLanne TV commercials kept popping into my head, and he practically spoke in bullet points! You will note also that his hypothetical arbitrator is a "she," which is an excellent escape from the incorrect "they" and the cumbersome "he or she." One more small step.....

Ron Gass's semi-annual case notes continue to reflect the high quality of both his research and his mind. The best I can say for my piece is that it continues to reflect my obsession with linguistic precision; like a serial killer on a crime show, I just can't help myself.

For deadline reasons this thought didn't make it into the Fourth Quarter 2012 issue, but it's never too late to acknowledge something extraordinary: Special kudos to the ARIAS•U.S. Board for the way they responded to Sandy, including all the last-minute cancellations, re-scheduling, timetable juggling, full and partial refunds, and all the concomitant complications and aggravations. And an affectionate farewell to Elaine Caprio Brady as she conquers new fields.

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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

Res Judicata and Collateral Estoppel: The Preclusive Effect of Arbitration Awards in Subsequent Judicial Proceedings

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The doctrine of res judicata (or claim preclusion) "makes a valid final judgment conclusive on the parties . . . and prevents relitigation of all matters that were or could have been adjudicated in the [prior] action."

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DEFINITION AND REQUIREMENTS

Overview

The doctrines of res judicata and collateral estoppel are "closely related," as both aim to foreclose the possibility that a right, a question, or a fact distinctly put in issue and directly determined by a court of competent jurisdiction will be disputed again in a subsequent suit between the same parties or their privies. *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE§132.01(4)(a) (3d ed. 1997)

The term "res judicata" is sometimes used broadly to describe the general body of law governing the preclusive effect of prior actions, with "true res judicata" (or claim preclusion) and collateral estoppel (issue preclusion) resting as narrower doctrines underneath it. *See Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535-536 (5th Cir. 1978). For the purposes of this discussion, any reference to "res judicata" denotes the narrower understanding of the term (i.e., the doctrine of claim preclusion).

Res judicata (claim preclusion):

- The doctrine of res judicata (or claim preclusion) "makes a valid final judgment conclusive on the parties . . . and prevents relitigation of all matters that were or could have been adjudicated in the [prior] action." *Andrew Robinson Int'l, Inc. v. Hartford Fire Insurance Co.*, 547 F.3d 48, 52 (1st Cir. 2008). *See Cromwell v. Sac. County*, 94 U.S. 351, 352 (1876) (classic formulation of res judicata doctrine).
- The doctrine is sometimes known as "merger and bar" — "the re-asserted claim is deemed 'merged' into the prior judgment if the plaintiff had won or 'barred' by it if the plaintiff had lost.'" *AVX Corp. v. Cabot Corp.*, 424 F.3d 28, 30 (1st Cir. 2005).
- Generally, "[t]he operation of res judicata requires the presence of three elements:

  (1) the identity or privity of the parties to the present and prior actions,

  (2) identity of the cause of action, and

  (3) prior final judgment on the merits." *Andrew Robinson Int'l, Inc.*, 547 F.3d at 53 (citing Kobrin v. Bd. of Regist. in Med., 444 Mass. 837, 832 (2005).
- Some courts have added to this inquiry a fourth element: that the earlier decision be decided by a court of competent jurisdiction. See, e.g., In re Teltronics Services, Inc., 762 F.2d 185, 190 (2d Cir. 1985).

Collateral estoppel (issue preclusion)

- Whereas res judicata bars any claims that were or could have been adjudicated in a prior action, collateral estoppel (issue preclusion) "applies to prevent, or estop, relitigation of the same issues in subsequent cases." MOORE'S § 132.01(1).
- "For collateral estoppel to apply,

  (1) the issue sought to be precluded must be the same as that involved in the prior action,

  (2) the issue must have been actually litigated,

  3) the determination of the issue must have been essential to the final judgment, and

  (4) the party against whom estoppel is invoked must be fully represented in the prior action." *People Who Care v. Rockford Bd. Of Educ.*, 68 F.3d 172, 178 (7th Cir. 1995) (citing *Freeman United Coal Mining Co. v. Office of Workers' Comp. Program*, 20 F.3d 289, 293-294 (7th Cir. 1994)). *See Moron-Barradas v. Dep't of Ed. of the Commonwealth of Puerto Rico*, 488 F.3d 472, 479 (1st Cir.

2007) ("In order for collateral estoppel to apply here, [the parties] must have actually litigated the facts in question, and those facts must have been essential to a valid and final judgment in a prior action.").

- Traditionally, courts had required an identity of both parties to the prior and pending cases; that is, "unless both parties (or their privies) in a subsequent action would be bound by a judgment in a previous case, neither party (nor that party's privy) in the second action may use the prior judgment as determinative of an issue in the second action." MOORE'S§ 132.04 (2)(a). *See Blonder-Tongue Lab, Inc. v. University of Ill. Found.*, 402 U.S. 313, 320-322 (1971). The Supreme Court, however, abandoned this strict "mutuality" requirement, so that a stranger to the prior litigation now may benefit from issue preclusion in a subsequent action. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). (That said, issue preclusion, of course, only will bind a party to the prior litigation or his privy. MOORE'S 132.04(2)(a)).

Additional notes

- The party seeking the benefit of res judicata or collateral estoppel bears the burden of proving the requisite elements. *See, e.g., Thomas v. New York City*, 814 F. Supp. 1139, 1148 (E.D.N.Y. 1993).
- Barring a statutory provision prohibiting this power, courts may raise the issue sua sponte. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231, n.6 (1995).
- Even if the elements of res judicata or collateral estoppel are satisfied, courts will require that the party against whom the doctrine is applied had been given a full and fair opportunity to litigate the cause of action or claim in the prior proceeding. MOORE'S §§ 131.141(1) (res judicata) and 132.04(1)(a) (collateral estoppel).

JUDICIAL APPLICATION OF THE REQUIRED ELEMENTS

Privity

- A prior judgment bars subsequent action on the same claim only against the same parties or their privies: there is no "preclusion by association." *Casa Marie, Inc. v. Superior Court*, 988 F.2d 252, 264 (1st Cir. 1993). (As noted, the Supreme Court has lifted the requirement of mutuality for collateral estoppel, so that a stranger to the prior action may raise the doctrine against a party to the prior action or the party's privy.)
- The concept of privity lacks precise definition — it is "merely a word" used to say that the relationship between the party and nonparty is sufficiently close to support preclusion. *Bruzwesksi v. United States*, 181 F.2d 419, 423 (3d Cir. 1950) (Goodrich, J., concurring). Consequently, the privity inquiry is one of substance, rather than form. *See id.* at 1017.
- Although there is no bright-line rule governing the privity analysis, some common themes have emerged:
  - Courts have considered whether there is a "commonality of interests" between the parties to the prior and pending litigation. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003).
    - A mere interest in "the same question or in proving or disproving the same set of facts" is insufficient. *See Hartford Accident & Indem. Co. v. Columbia Cas. Co.*, 98 F. Supp. 2d 251, 256 (D. Conn. 2000) (quoting *Marziotti*, 695 A.2d at 1017)).
  - "It has been held that 'a key consideration for [the existence of privity] is the sharing of the same legal right by the parties allegedly in privity.'" Hartford Accident & Indem. Co., 98 F. Supp. 2d at 256 (quoting *Aetna Casualty & Surety Co. v. Jones*, 220 Conn. 285, 596 A.2d 414 (1991)).
- The Supreme Court also recently "identified six categories where nonparty preclusion may be appropriate." *Nationwide Mut. Fire Ins. Co., v. Hamilton*, 571 F.3d 299, 312 (3d Cir. 2009) (quoting *Taylor v. Sturgell*, 538 U.S. 880, 894-895 (2008)). They are:
  - "[T]he nonparty agrees to be bound by the determination of issues in an action between others;
  - [A] substantive legal relationship — i.e. traditional privity - exists that binds the nonparty;
  - The nonparty was 'adequately represented by someone with the same interests who [wa]s a party [in the prior action]';
  - The nonparty assumes control over the litigation in which the judgment is rendered;
  - The nonparty attempts to bring suit as the designated representative of someone who was a party in the prior litigation; and,
  - The nonparty falls under a special statutory scheme that expressly foreclose[es] successive litigation by nonlitigants.'" *Id.*
- With regard to the relationship between the party and nonparty:
  - "The kinds of legal relationships that create privity fall into three general categories:
    - (1) relationships based on transfer of property (e.g., successors in interest);
    - (2) contractual relationships (e.g., authorized legal representatives or agents); and
    - (3) status relationships (e.g., trustee and beneficiary)." MOORE' S §131.40(3)(a) (citations omitted).
  - The Supreme Court has recently employed the phrase "pre-existing substantive legal relationship" to describe the notion of traditional "privity." *Taylor v. Sturgell*, 538 U.S. 880, 894 (2008). Without providing an exhaustive list of such relationships, the Court noted that the realm of "[q]ualifying relationships include[s], but [is] not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor." *Id.*
- Turning to the relationship among corporations and their affiliates:

- Parent companies and wholly-owned subsidiaries may stand in privity with one another. *See Pickman v. Am. Express Co.*, 2012 U.S. Dist. Lexis 9662 (N.D. Cal. Jan. 27, 2012) (plaintiff had brought and dismissed two identical suits against defendant's subsidiaries; in third case brought against defendant and same subsidiaries, defendant parent deemed to be in privity with subsidiaries for purposes of res judicata).
- While some courts have found privity between such entities from the fact of their corporate relationship, *see id.* and *In re Teltronics Services, Inc.*, 762 F.2d 185, 191 (2d Cir. 1985), others have reasoned that "mere `independent corporate affiliation, by itself, does not create a master/servant or principal agent relationship'" for the purposes of privity. *Hartford Accident & Indem. Co.*, 98 F. Supp. 2d at 256 (rejecting argument that wholly-owned subsidiary was in privity with parent "based on the close functional relationship" between the two) (quoting *Usina Costa Pinto, S.A. v. Louis Dreyfus Sugar Co.*, 933 F. Supp. 1170 (S.D.N.Y. 1996)).
- Some factors that courts have considered, in addition to the corporate relationship, include:
  - An absence of a legally distinct basis for recovery against a corporate parent (in which case, final judgment against the subsidiary will result in claim preclusion). *See Pricaspian Dev. Corp. v. Royal Dutch Shell*, PLC, 382 Fed. Appx. 100, 2010 U.S. App. Lexis 13211 (2d Cir. June 29, 2010) (quoting *Strekal v. Espe*, 114 P.3d 67, 70 (Colo. Ct. App. 2000)).
  - Whether the subsidiary "sufficiently represents" the principal's interests (in which case, res judicata may attach). *See Wilson v. Limited Brands, Inc.*, 2009 U.S. Dist. Lexis 37576 (S.D.N.Y. April 17, 2009) (quoting *G&T Terminal Packaging Co. v. Consol. Rail Corp.*, 719 F. Supp. 153, 159 (S.D.N.Y. 1989).
- There is one case in which a federal district court has recognized, for the purposes of res judicata, privity between a reinsurer and another reinsurer with whom it had contracted. *See Guarantee Trust Life Ins. Co. v. First Student Progs., LLC*, 2009 U.S. Dist. Lexis 81136 (N.D. Ill. Sept. 8, 2009) (noting that both companies had identical positions in prior and pending matters, and that nonparty reinsurer was "actively involved" in prior arbitration). *But see Hartford Accident &Indem. Co.,* 98 F. Supp. 2d at 256-257 (concluding that two reinsurers were not in privity for purposes of collateral estoppel and declining to give preclusive effect to arbitration decision where one reinsurer was not a party to the arbitration and its contracts with the insured were not considered by the arbitration panel, even though the reinsurers were affiliated with each other, their contracts with the insured were similar, and they used the same counsel and coordinated their discovery efforts during litigation).

Identity of Cause of Action or Issue

Res judicata and cause of action

- The doctrine of res judicata requires an "identity of the cause of action." *Andrew Robinson Int'l, Inc.*, 547 F.3d at 53. The phrase "cause of action" is interchangeable with the phrase "claim to relief" and the word "claim." MOORE'S §131.10(3)(a). For the purposes of res judicata, it encompasses:
  - Matters addressed by the prior judgment
  - Matters that could have been raised in the prior action
  - Defenses that could have been asserted in the prior action. *Id.*
- Although there is no uniform test to discern whether an identity of claims exists, most federal court have adopted the "same transactions" or "transactional" approach.
  - As explained in §24 of the Restatement (Second) of Judgments, this approach holds that: "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (i.e., res judicata) . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *See Northeast Data Systems, Inc. v. Genesis Computer Corp.*, 1992 U.S. Dist. Lexis 3552 at *14 (D. Mass. March 23, 1992).
  - "A cause of action is defined as a set of facts which can be characterized as a single transaction or a series of related transactions. The cause of action, therefore, is a transaction that is identified by a common nucleus of operative facts." *Apparel Art Int'l, Inc. v. Amertex Enters., Ltd.*, 48 F.3d 576, 583 (1st Cir. 1995) (citations omitted).
- The Seventh Circuit has refined the transactional approach, holding that "two claims are one for the purposes of res judicata if they are based on the same, or nearly the same, factual allegations." *Anderson v. Chrysler Corp.*, 99 F.3d 846, 852 (7th Cir. 1996) (citing *Herrmann v. Cencom Cable Assocs.*, 999 F.2d 223, 226 (7th Cir. 1993).

Collateral estoppel and identity of issues

- The doctrine of collateral estoppel requires that "the issue sought to be precluded [is] the same as that involved in the prior action, [and that] the issue must have been actually litigated." *People Who Care*, 68 F.3d at 178.
- With regard to the identity of the issues:
  - The focus of the inquiry is on the issues in the prior and pending actions — there is no requirement under this doctrine that the causes of action are the same. *See, e.g., Leather v. Eyck*, 180 F.3d 420, 425 (2d Cir. 1999).
  - The issue raised in the subsequent case must be "precise and identical" to that raised in the first; "[s]imiliarity does not

suffice." *Boim v. Holy Land Found. For Relief & Dev.*, 511 F.3d 707, 727 (7th Cir. 2007).

- For the doctrine to apply, the issue at hand must have been actually litigated and actually decided.
    - o This element requires "the issue to have been raised, contested by the parties, submitted for determination by the court, and determined." MOORE'S § 132.03(2)(A).
    - o "An issue may be 'actually decided even if it is not explicitly decided, for it may have constituted logically or practically, a necessary component of the decision reached in the prior litigation.'" *Stoehr v. Mohamed Bin Abdul Rahman Al Saud*, 244 F.3d 206, 208 (1st Cir. 2001) (quoting *Palmacci v. Umpierrez*, 125 F.3d 781, 786 (1st Cir. 1997)).
        - Ambiguity as to whether an issue has been litigated and decided is resolved in favor of finding no preclusion. *Mitchell v. Humana Hosp.-Shoals*, 942 F.2d 1581, 1583-1584 (11th Cir. 1991).
- The issue also must have been necessary to support the judgment entered in the first action. *Bobby v. Bies*, 556 U.S. 825, 826 (2009). *See Whitey v Seibel*, 676 E 2d 245, 248 (7th Cir. 1982).
    - o This factor may pose additional trouble for litigants raising the preclusive effect of an *unreasoned* arbitration award (i.e., an award with no factual findings or written or oral explanations). *See In Re Lambert*, 233 Fed. Appx. 589, 599 n. 1, 2007 U.S. Dist. Lexis 7258 (9th Cir. 2007)("Because the judgment [in arbitration] generallyawards damages for all three causes of action, we cannot say that any one cause of action was necessary to support the award").
    - o In these circumstances, however, courts have adopted the standard for assessing whether an issue was necessarily determined by a general verdict: "in that instance, the inquiry must be 'whether a rational [fact-finder] could have reached a conclusion based on an issue other than that which the party asserting collateral estoppel wishes to foreclose from consideration." *Dacotah Marketing and Research, LLC. v. Versatility, Inc.*, 21 F. Supp. 2d 570, 580-581 (E.D. Va. 1998) (citing *Ashe v. Swenson*, 397 U.S.436, 444 (1970)). *See Wellons v. T.E. Ibberson Co.*, 869 F.2d 1166, 1170 (8th Cir. 1989).

Finality of the Arbitration Award

- Courts have recognized the preclusive effect of arbitration awards under the doctrines of res judicata and collateral estoppel in a subsequent judicial proceeding that necessarily requires a finding that the arbitration award is a final disposition of the claim or issue in dispute. However, the "rules" for claim/issue preclusion with respect to the "finality" of an arbitration award are not uniform across jurisdictions.
    - o With respect to claim preclusion (res judicata), "...it seems safe to infer that most agreements to submit disputes to arbitration contemplate that the award will merge or bar all of the claims and defenses involved in the submission, whether the agreement is made before or after the dispute has arisen. If any party dissatisfied with the award were left free to pursue independent judicial proceedings on the same claim or defenses, arbitration would be substantially worthless." (Wright, Miller & Cooper 18B Fed. Prac. & Proc. Juris. § 4475.1).
    - o With respect to issue preclusion, "Decisions of an arbitral panel normally provide the type of finality sought by courts to be protected by collateral estoppel." Hammad v. Lewis, 638 F. Supp. 2d 70, 74 (D.C. Cir. 2009).
    - o Courts have accepted an arbitration award as the predicate for issue preclusion notwithstanding arguments that because an arbitration is a private rather than a judicial process, the application of doctrines of preclusion does not serve the same interests in judicial economy and avoidance of piecemeal litigation. "We do not believe, however, that parties to an arbitration agreement could reasonably intend to allow the losing party to have a second chance to win in court on the very issue that he lost in arbitration. Such a result would undermine the legitimacy of the arbitration award itself, and of the arbitration process." *B-S Steel of Kan.,*

Courts have recognized the preclusive effect of arbitration awards under the doctrines of res judicata and collateral estoppel in a subsequent judicial proceeding that necessarily requires a finding that the arbitration award is a final disposition of the claim or issue in dispute. However, the "rules" for claim/issue preclusion with respect to the "finality" of an arbitration award are not uniform across jurisdictions.

Inc. v. Tex. Indus., Inc., 439 F.3d 653, 666 (10t Cir. 2006).

- Claim and issue preclusion are viewed to be in the discretion of the courts, (Miller § 4475.1)

- Courts differ as to whether satisfaction of the "finality" requisite requires judicial confirmation of an arbitration award in order to give the award preclusive effect in a subsequent judicial action.

- The federal circuits are split on whether an award must be confirmed for purposes of preclusion. A number of courts have expressed concern that because arbitral findings typically lack the supervisory scrutiny of authoritative review, "...courts must be cautious of procedural variances between arbitral proceedings and judicial proceedings when deciding whether to give preclusive effect to the former." See *Gruntal v. Steinberg*, 854 F. Supp. 324, 337 (D.N.J. 1994).

  - In *Gruntal*, relying on both Maryland law and guidance from the Second and Third Circuits, a New Jersey Court held that "absent judicial confirmation, an arbitration award will not result in a 'final judgment' and cannot, therefore, have preclusive effect on subsequent litigation." *Gruntal*, at 337-38.

  - In *Leddy v. Standard Drywall*, 875 F.2d 383, 385 (2d Cir. 1989), after noting that arbitration proceedings can, but do not necessarily, have preclusive effect on subsequent federal court proceedings, the Second Circuit rejected the preclusive effect of a prior arbitration award because the award was never confirmed and entered as a judgment pursuant to New York's civil practice rules. The Court held that "'under New York law, it is the *judgment* entered on an arbitration award that is given preclusive effect in subsequent litigation.'" *Id.* (quoting *Springs Cotton Mills v. Buster Boy Suit Co.*, 275 A.D. 196, 88 N.Y.S.2d 295, 298 (1st Dept), affd, 300 N.Y. 586, 89 N.E.2d 877 (1949). The Second Circuit then concluded that an arbitration award that is not filed and confirmed in an appropriate court is without effect and denied the application of collateral estoppel based on the award. Leddy at 385, (citing *Flora Fashions Inc. v. Commerce Realty Corp.*, 80 N.Y.S.2d 384, 386 (Sup. Ct. 1948).

  - Eight years later, however, in *Jacobson v. Fireman's Fund Insurance Co.*, 111 F.3d 261 (2d Cir. 1997), the Second Circuit held that the lack of confirmation of an arbitration award did not vitiate the finality of the award for purposes of res judicata. The *Jacobson* court, also looking to New York law, acknowledged the holding in *Leddy* but predicted that the New York Court of Appeals (New York's highest court) would now hold that an arbitral award will be given preclusive effect even if the award had not been confirmed. *Id.* at 267. "We therefore hold, in keeping with the courts of the First and Second Departments, (New York intermediate appellate courts) that res judicata and collateral estoppel apply to issues resolved by arbitration 'where there has been a final determination on the merits, notwithstanding a lack of confirmation of the award.'" Jacobson at 268, (quoting *Hilowitz v. Hilowitz*, 85 A.D.2d 621, 444 N.Y.S. 2d 948, 949 (2d Dept 1981)). *Hilowitz* held that the "contention that only a judicially confirmed arbitration award may form the basis for the defenses of res judicata and collateral estoppel is without merit. . . . [These] doctrines are applicable to issues resolved by arbitration where there has been a final determination on the merits, notwithstanding a lack of confirmation of the award." *Hilowitz v. Hilowitz*, 85 A.D.2d 621, 444 N.Y.S.2d 948, 949 (2d Dep't 1981).

  - To date, the New York Court of Appeals has not ruled on the issue. However, New York trial and intermediate appellate courts have adhered to the position that an arbitration award, even one never confirmed, can serve as the basis for the defense of collateral estoppel in a subsequent action. *See Williamson v. Stallone*, 905 N.Y.S.2d 740, 754-55 (N.Y. Sup.Ct. 2010).

- A cautionary note with respect to the timing of reliance on arbitration awards for res judicata or issue preclusion purposes. The Colorado Court of Appeals, in a matter of first impression in that state, held that an arbitration award is not final until all appellate remedies applicable to an order confirming the award have been exhausted, including writs of certiorari to the Colorado Supreme Court and the U.S. Supreme Court. *Barnett v. Elite Props. Of Am., Inc.*, 252 P.3d 14, 22-23 (Colo. App. 2010). "Where arbitrator's award was open to direct attack by appeal or otherwise, it was not final for issue preclusion purposes." *Id.* at 23 (citing *National Union Fire Ins. Co. v. Stites Profl Law Corp.*, 235 Cal. App. 3d 1718, 1 Cal. Rptr. 2d 570, 574 (Cal. Ct. App. 1991). The Colorado court's ruling regarding the finality of a judgment entered confirming an award is consistent with rulings in various other states concerning the finality of judgments for purposes of collateral estoppel.

  - Logically, an award cannot be used for preclusion effects until the time to seek to vacate the award has expired, and a confirmed award cannot be used until all direct appellate remedies regarding the judgment entered on confirmation have been exhausted burden. *Id.*

Choice of Law Considerations

- For matters pending in federal courts, the applicable law determining the preclusive effect of an arbitration award depends on the basis of the federal court's jurisdiction. State law determines the applicability of the doctrine of collateral estoppel in a diversity action, while federal law determines the preclusive effect to be given in federal question cases. *Weizmann Inst. Of Science v. Neschis*, 421 F. Supp. 2d 654, 675 n.21 (S.D.N.Y. 2005) (internal citations omitted).

- Where a state court judgment is entered confirming an award, state law controls the preclusive effect of that judgment. "[A] federal court must

give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 84, 81, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984); *See Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994).

- Where an award is not confirmed, and thus no judgment entered, the law of the state in which the award was rendered will control absent contrary contractual provisions or federal question jurisdiction.
    - The court in *Jacobson v. Fireman's Fund* held that because the umpire's awards against Jacobson were rendered in of a New York arbitration "the preclusive effect in federal court of [those] state-court judgments is determined by [New York] law." 111 F.3d at 265 (quoting *Migra*, 465 U.S. at 81).
- Insurance and reinsurance disputes in arbitration are usually subject to the Federal Arbitration Act. With one notable exception, the FAA does not confer federal subject matter jurisdiction so that jurisdiction in the District Court is usually diversity-based. *See F. Hoffman-La Roche, Ltd. V. Qiagen Gaithersburg, Inc.*, 730 F. Supp. 2d 318, 324 (S.D.N.Y 2010); *Hall Street Assoc. v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008). Consequently, the federal courts will look to the law of the state in which the award was rendered in determining preclusion issues.
    - However, matters within the Convention on the Recognition and Enforcement of Foreign Arbitral awards ("NY Convention") are deemed to arise under the laws and treaties of the United States. In these circumstances, one would expect federal courts to rely on federal law for resolving preclusion issues.

Limitations on Preclusive Application of Arbitration Awards

- There is a lingering concern that because of the differences between arbitrations and litigation in terms of procedure, decision-making, and post-decision review, application of res judicata or collateral estoppel is inappropriate or unfair, even where there is identity of parties and identity of claims or issues, the issues were actually decided, and the award is final. To accord preclusive effect to an arbitration award, the court in a subsequent proceeding must consider whether the party against whom the award is asserted had a "full and fair opportunity" to litigate the issue in the prior proceeding. *Greenblatt v. Drexel Burnham Lambert Inc.*, 763 F.2d 1352, 1359 (11th Cir. 1985).
- The courts' concerns with the use of arbitration awards for res judicata or collateral estoppel relating to the differences in procedure are illustrated in the Restatement of Law (Second) Judgments § 84. The Restatement provides that an arbitration should have the same effects under the rules of res judicata as a judgment of a court, unless "[a]ccording preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision..." or "[t]he procedure leading to the award lacked the elements of adjudicatory procedure" such as those set forth in § 83(2).
    - The factors set forth in § 83(2) are:
        - (a) Adequate notice to persons who are to be bound by the adjudication ...;
        - (b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;
        - (c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series of them;
        - (d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
        - (e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

There is a lingering concern that because of the differences between arbitrations and litigation in terms of procedure, decision-making, and post-decision review, application of res judicata or collateral estoppel is inappropriate or unfair, even where there is identity of parties and identity of claims or issues, the issues were actually decided, and the award is final.

Courts have expressed reservations in granting preclusive effect to arbitrators' awards where matters of public policy are involved. Basically, courts believe that they should be the decision makers, at a judicial level, where resolution involves public policy. Arbitrations are private proceedings born of the parties' agreement; the arbitrators are private individuals, usually selected by the parties.

- Arbitrations may involve procedures agreed upon by the parties that might nullify the preclusive effect of an award on later litigation.
    - For instance, the parties' arbitration agreement might not allow for certain discovery, or, for purposes of efficiency or to save time, the parties might voluntarily agree to truncate the discovery process during the arbitration.
    - Arbitration panels are generally more limited than courts with respect to certain subpoena powers, especially with respect to entities that are not parties to the arbitration itself. Accordingly, procedures that can result in limited discovery might strike against the application of res judicata or collateral estoppel in a subsequent litigation of the same issues. *See, e.g., FleetBoston Financial Corp. v. Alt*, 638 F.3d 70, 80 (1st Cir. 2011) (acknowledging that differences between arbitration and litigation make it "particularly difficult" in "applying res judicata to arbitral awards.")
- The evidence presented to a Panel, not subject to judicial "rules of evidence", may be of sufficient significance to discourage the preclusive effect of an award.
    - Typically, arbitrators are not bound by rules of evidence that preclude admission of hearsay evidence, privileged information, etc.
    - Arbitrators are often directed to decide issues on the basis of industry custom and practice; such evidence is not necessarily admissible in a contract dispute.
- Courts have expressed reservations in granting preclusive effect to arbitrators' awards where matters of public policy are involved. Basically, courts believe that they should be the decision makers, at a judicial level, where resolution involves public policy. Arbitrations are private proceedings born of the parties' agreement; the arbitrators are private individuals, usually selected by the parties. While the parties have agreed to be bound by the arbitrators' determinations within the confines of the arbitration, a question arises as to whether matters of public policy outside the confines of an arbitration should be determined by the arbitrators' prior ruling.
    - For instance, the Eighth Circuit refused to apply the doctrine of issue preclusion, where the arbitration award raised a question of public policy. *Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC*, 638 F.3d 572 (8th Cir. 2011). There, an airline pilot filed a grievance with his labor organization, Air Line Pilots Association International ("ALPA"), to recover lost wages and benefits. ALPA demanded arbitration against the airline, Trans States Airlines ("TSA"), for reimbursement. TSA lost at arbitration, and was ordered to reinstate the pilot and pay his lost wages and benefits. ALPA moved to confirm the award in district court, and TSA moved to vacate the award on the ground that the award was contrary to public policy. ALPA argued that a prior award between ALPA and TSA concerning the improper discharge of a different airline pilot should be given preclusive effect. That prior arbitration resulted in a finding that the payment of lost wages and benefits to a union employee for his wrongful dismissal did not constitute an illegal loan, and therefore did not violate public policy. The parties to that arbitration settled before the award could be confirmed or vacated by a district court. Although the requisite elements of collateral estoppel were all present, the Eighth Circuit nevertheless refused to apply the doctrine. The court explained, "where, as here, a challenge to an arbitration award raises a question of public policy, we do not give a prior award, specifically one which has not been subject to judicial review, any preclusive effect on a matter of public policy." *Id*. at 579. The court continued, "...the question of public policy is ultimately one for resolution by the courts." *Id*.
- The United States Supreme Court has also stated that an arbitration award might not have a preclusive effect on subsequent litigation if the arbitration involved certain federal rights that are best resolved by the courts. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 223 (1985) (explaining that "arbitration cannot provide an adequate substitute for a judicial proceeding in protecting federal statutory and constitutional rights..."); *See McDonald v. City of West Branch*, 466 U.S. 284 (1984).

CONFIDENTIALITY AGREEMENTS

- Reliance on a prior arbitration award to preclude relitigation of a claim or issue in a later case may prove particularly challenging where the parties executed a confidentiality agreement for the arbitration. *See* John M. Nonna, Larry P. Schiffer & Lisa A. Joedecke, *Res Judicata and Collateral Estoppel*, ARIAS•U.S. QUARTERLY, Third Quarter 2003 (discussing difficulties of investing confidential arbitration awards with preclusive effect). *See also Hans Smit, Breach of Confidentiality as a Ground for Avoidance of the Arbitration Award*, 11 AM. REV. INT'L. ARB. 567 (2000) (positing that, "if a party could not plead that an earlier arbitral award had *res judicata* effect . . ., a party agreeing to arbitration would forego a substantial right that also serves the public interests of forestalling repetitive litigation. It is not readily to be assumed that confidentiality can be invoked to produce an effect so adverse to the important social considerations that underlie the doctrine of *res judicata*").
- The standard ARIAS confidentiality agreement contains this exception: "Disclosure of Arbitration Information may be made: ... (b) in connection with court proceedings relating to any aspect of the arbitration, including but not limited to motions to confirm, modify or vacate an arbitration award."

A party seeking to invoke res judicata or collateral estoppel on the basis of on an arbitration award that is subject to the standard ARIAS confidentiality provision could argue that the quoted exception permits disclosure of the confidential arbitration award.

  - o The list of exceptions to confidentiality is not exhaustive ("including but not limited to ...").
  - o Just as a motion to confirm is an action "relating to any aspect of the award," so too is a motion seeking to invest the arbitration award with preclusive effect.
  - o Note, however, that the exception permits disclosure only in connection with "court proceedings." This exception may not authorize disclosure to another arbitration panel.

- A party seeking to oppose the application of res judicata or collateral estoppel in reliance on an arbitration award that is subject to the standard ARIAS confidentiality provision could argue that the quoted exception permits disclosure of confidential arbitration information only in connection with subsequent proceedings relating to the arbitration itself, not in connection with an unrelated proceeding in which res judicata or collateral estoppel is invoked.

  - o The listed exceptions ("motions to confirm, modify or vacate an arbitration award"), while admittedly not exhaustive, all address the integrity of the arbitration itself, whether to enable the prevailing party to judicially enforce the arbitration award or to permit the losing party to obtain judicial correction of a defective award. Nothing in the list of exceptions suggests that disclosure is permitted to advance the interests of a party in a subsequent proceeding that is unrelated to the arbitration itself.
  - o An interpretation of exception (b) to the standard ARIAS confidentiality agreement that permits disclosure of confidential arbitration information to invoke res judicata or collateral estoppel would swallow the rule. Under this pro-disclosure logic, a party could *always* disclose confidential arbitration information to a court because, simply by doing so, the disclosing party could argue that the court proceedings now "relat[es]" to the arbitration, which would make the disclosure permitted under exception (b). This logic is circular and has no limitation.
  - o Disclosing confidential arbitration information to obtain the benefits of res judicata or collateral estoppel destroys the protections of confidentiality that both parties agreed to at the outset of the arbitration and that is one of the principle reasons why parties choose arbitration in the first instance.
  - o Unlike court proceedings, arbitration awards were never intended to have precedential, let alone preclusive, effect upon subsequent disputes. The unique characteristics of arbitration, including relaxed procedural and evidentiary standards, truncated discovery, and

A party seeking to oppose the application of res judicata or collateral estoppel in reliance on an arbitration award that is subject to the standard ARIAS confidentiality provision could argue that the quoted exception permits disclosure of confidential arbitration information only in connection with subsequent proceedings relating to the arbitration itself, not in connection with an unrelated proceeding in which res judicata or collateral estoppel is invoked.

decision-makers who are typically not bound by law and who are permitted to arrive at their decisions by compromise, render arbitration awards particularly unsuitable bases for res judicata or collateral estoppel.

OFFENSIVE AND DEFENSIVE USE OF RES JUDICATA AND COLLATERAL ESTOPPEL

- "The Sword": Offensive Collateral Estoppel: a prior finding against the defendant is used to preclude the defendant from relitigating the issue in a subsequent judicial proceeding. In such an instance, the Plaintiff would, in the subsequent action, attempt to strike the relevant defense (s) or obtain summary adjudication in its favor by virtue of collateral estoppel.
    - o Plaintiff in the subsequent action does not necessarily have to have been a party to the prior arbitration .
    - o Defendant must have been a party to the prior proceeding, or in privity with the party in the prior proceeding.
- "The Shield": Defensive Collateral Estoppel: a prior finding against the plaintiff is used to preclude the plaintiff from relitigating the issue in a subsequent judicial proceeding. In such an instance, the defendant uses collateral estoppel as a defense and/or grounds for dismissal.
    - o Plaintiff, or someone in privity with Plaintiff must have been a party to prior action.
    - o Defendant does not necessarily have to have been a party to the prior proceeding
- Courts might apply greater scrutiny in applying res judicata or collateral estoppel in an offensive, as opposed to a defensive, manner. *See* Westerlind, James, "The Preclusive Effect of Arbitration Awards", Mealey's Litigation Report: Reinsurance, Vol. 21, No. 8, August 20, 2010 (explaining that the courts allow both offensive and defensive uses of collateral estoppel).
- Courts have allowed the offensive use of res judicata and collateral estoppel. *See, e.g.*, the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and the New York Court of Appeals in *B.R. DeWitt, Inc. v. Hall*, 19 N.Y. 2d 141 (1967) (explaining, "While it is true that most of the relevant cases in this area in New York have arisen under circumstances wherein the defendant sought to use the prior adjudication against the plaintiff, there seems to be no reason in policy or precedent to prevent the 'offensive' use of a prior judgment.").
- However, courts also have explained that the application of collateral estoppel is controlled by "principles of equity", so the offensive application of the doctrine should only be allowed where its application would be "fair" to the parties involved.
    - o *See, e.g., Jack Faucett Associates, Inc. v. American Tel. & Tel. Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984) ("Where offensive estoppel is involved, the element of 'fairness' gains special importance.").
    - o Collateral estoppel is an equitable doctrine. Offensive collateral estoppel is even a cut above that in the scale of equitable values. It is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it. The discretion vested in trial courts to determine when it should be applied is broad. (Citing Parklane Hosiery, supra, at 331). Its application is controlled by the principles of equity. "This court has previously admonished that fairness to both parties must be considered when it is applied." Nations v. Sun Oil Co., 705 F.2d 742, 745-46 (5th Cir. 1983).
    - o To determine whether it would be "fair" to invoke the application of offensive res judicata or collateral estoppel, courts have exercised their "broad discretion" and have looked to the four non-exclusive factors set forth by the US Supreme Court in *Parklane Hosiery*:
        - (1) whether the party asserting the doctrine could easily have joined in the action upon which reliance is placed;
        - (2) whether the party against whom the doctrine is to be applied had any incentive to vigorously defend the first action;
        - (3) whether the second action offers procedural opportunities unavailable in the first action; and
        - (4) where the prior judgment relied on is inconsistent with other decisions. Id. at 332.▼

DID YOU KNOW...?

THAT THE BEST WAY TO FAMILIARIZE YOURSELF WITH THE RECENTLY REDESIGNED ARIAS•U.S. WEBSITE IS TO ROLL YOUR POINTER HORIZONTALLY ACROSS THE MENU HEADINGS AT THE TOP OF THE PAGE AND SCAN THE ITEMS IN EACH DROPDOWN LIST.

news and notices

CEO of Zurich General Insurance Business Is Keynote for Spring Conference

Michael G. Kerner, CEO of the general insurance arm of Zurich Insurance Group (Zurich), will provide the keynote address to open the ARIAS 2013 Spring Conference at The Breakers in Palm Beach, Florida. Mr. Kerner, was named to this new role last August, after previously serving as CEO for Zurich's Global Corporate business in North America. He has held various executive positions with Zurich since 1992, including the Head of Group Reinsurance.

Mr. Kerner is a graduate of the State University of New York at Binghamton, having earned a Bachelor of Science degree in Mathematics and Economics. He is a Fellow of the Casualty Actuarial Society and a Member of the American Academy of Actuaries.

Elaine Caprio Brady in New Position at Liberty Mutual

Elaine Caprio Brady, who retired as Chairman of ARIAS•U.S. in December, changed roles at Liberty Mutual Insurance recently. She is now Vice President and Manager of Corporate Procurement for Liberty Mutual Insurance. ARIAS•U.S. wishes her the best of success in this significant undertaking.▼

Breakers Reservations Are Open

The Breakers reservation system is now open for those who wish to reserve their rooms for the ARIAS 2013 Spring Conference. The yellow button near the top of the ARIAS Home page links to the "Welcome ARIAS" page of the hotel's online system. Rooms are available at $315 for a Deluxe Room, $385 for a Premium Room, and $470 for an Oceanfront Room, the last room type is on an "if available" basis.

The conference runs from Wednesday noon until Friday noon, May 8-10. Registration opened on the website in the middle of February.▼

Foss Is Recipient of ARIAS Award

At the 2012 Annual Meeting on December 17th at the Hilton New York, new Chairman **Mary Kay Vyskocil** presented **The ARIAS Award** to **Charles M. Foss**.

Charlie Foss was a founding member who took on a number of key initiatives before he was Chairman during 2003 and 2004. In 2000, he created the ARIAS•U.S. Umpire Selection Procedure that provided a system for randomly selecting names from among ARIAS•U.S. Certified Arbitrators or Umpires and bringing them down to a single selection. In 2001, he conceived of the Intensive Arbitrator Training Workshop, created the scenario that has been used for the mock sessions ever since, and led the workshop for three years. In 2002, he drafted and submitted for Board approval a resolution that established that Board members could serve only two three-year terms before retiring. In 2004, he created the ARIAS•U.S. Award and recommended that it be presented to Founding Chairman **T. Richard Kennedy**.

Upon mandatory retirement from the ARIAS•U.S. Board in 2004, Charlie served on the Editorial Board of the *ARIAS•U.S. Quarterly* from 2005 through 2008.▼

Karnell and Vidovich Approved as Certified Arbitrators

At its meeting on December 17, the ARIAS•U.S. Board of Directors approved **G. Kathleen Karnell** and **Anthony Vidovich** as Certified Arbitrators, bringing the number of arbitrators to 241. Their biographies are on page 30 of this issue.▼

Richard Marrs Named Certified Umpire

At the same meeting, the Board of Directors approved **Richard E. Marrs** as a Certified Umpire, bringing the number of umpires to 54.▼

ARIAS Certification Requirement Extensions Revised

At its meeting on December 17, the ARIAS-U.S. Board of Directors revised the extension of certification for those who had registered for one of the two October 31 seminars, which were canceled because of Hurricane Sandy. Any arbitrator who was due to be renewed on January 1, 2013 on the basis of that attendance will have his/her certification extended until next November 1 to allow attendance at one of the seminars scheduled for October 30, 2013. Seminar credit could also have been achieved through attendance at the recent December 17 event or one of the seminars (two tracks) on March 14 in New York.

This extension is similar to the extension granted to those whose certifications expired at the end of 2012 and had planned to attend the Fall Conference for conference credit; they have been extended until November 2013 so that the 2013 Fall Conference can apply retroactively toward their renewal on January 1, 2013.

The Board felt that those arbitrators who had planned to meet the two requirements (conference and seminar) with a single trip to New York last month would be subjected to an unfair additional financial burden by having to attend a stand-alone seminar.

In both cases, the date for the next expiration does not change; it remains at December 2014. If these attendances are to be applied in reverse toward the renewal date of January 2013, they cannot also support renewal in January 2015. Therefore, those taking advantage of these extensions must attend seminars and/or conferences during 2014, as well.▼

feature

Some Tips for Conducting Muscular Arbitration Hearings

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

Charles J. Moxley, Jr.

Charles J. Moxley, Jr.

Here are some tips that have occurred to me in presiding over many arbitrations, as to how arbitrators might begin to become the vaunted "Muscular Arbitrator"...

An ARIAS Certified Arbitrator and the principal in MoxleyADR LLC, Mr. Moxley has presided over more than 250 commercial arbitrations, many of them in the insurance area, over the past 30+ years. An Adjunct Professor at Fordham Law School teaching arbitration law, Mr. Moxley is the Distinguished ADR Practitioner in Residence at Cardozo Law School, a Fellow of the College of Commercial Arbitrators and a Fellow of the Chartered Institute of Arbitrators.

The Overriding Imperative That We Become "Muscular Arbitrators" and Choose "Muscular Arbitrators" for Our Cases

We have all known for some time that we need to up our games as arbitrators and advocates if arbitration is to achieve its fundamental objective of providing a better alternative to litigation, delivering a process that is more flexible, quicker, and less expensive than litigation while providing the same fairness of process and result.

Here are some tips that have occurred to me in presiding over many arbitrations, as to how arbitrators might begin to become the vaunted "Muscular Arbitrator" and as to how litigators in arbitration can improve the prospects of their receiving a "Muscular Arbitration."

The Muscular Arbitrator

- The Muscular Arbitrator will proactively manage the hearing from the beginning.
- The Message: Both sides will get a full and fair opportunity to present their case/defense, but we will move it along.
- Limit opening statements where appropriate and enforce the limits.
- Give guidance to counsel, at the first provocation, not to engage in repetitive or cumulative testimony or argumentative behavior and advise that redirect and recross will be limited.

Opening Statements: Tip to Counsel

- A colorful and engaging PowerPoint can add wonders to an opening statement—and, with a good one, the arbitrators may refer to it throughout the hearing.

All the Exhibits Are In

- Arbitrators should be very clear (unless there is a reason to do it differently in a particular case) that all previously marked exhibits, except ones that have been objected to, are fully in evidence as of the beginning of the hearing.
- And further — that objections to objected-to documents will be heard when the documents are offered.
- This should be in the context of making the parties understand that, generally speaking, all exhibits come in, subject to issues as to authenticity, privilege, extreme irrelevance/prejudice, or prior failure to designate the documents in advance.

Study the Witness Statements and Experts' Reports in a Timely Way

- The Muscular Arbitrator will study the Witness Statements/Expert Reports and related exhibits in advance — and will review them closely the night before, in order to be as familiar with them as she would have been had their substance been presented by live testimony.
- The Muscular Arbitrator will tell the parties at the opening of the hearing that she will be doing this and that they can count on it.
- The same applies to reviewing the Key Exhibits in advance.
- Tips to Counsel:
  - Remember that Arbitrators do not have a staff or junior attorneys and paralegals working with them on the arbitration.
  - Facilitate the arbitrators' access to Witness Statements, Expert Reports for

upcoming witnesses, and the like, and keep them advised of changes in the order of witnesses.

- It is generally a good idea for counsel to provide the arbitrators with *dramatis personae*, summaries, copies of earlier papers — whatever counsel would like the arbitrators to be looking at or thinking about at any given time.

Having the Necessary Papers

- The Muscular Arbitrator will have copies of the pleadings and other important papers at ready access.

Paper Exhibits

- It is a very nice touch when the exhibits are in binders that are small enough to be opened and closed without it being a back-breaking job.
- Two-sided copies save a lot of trees and are easy on arbitrators' backs.
- It also can be a wonderful if the documents are organized in some sensible way, whether by chronology or by topic or the like.
- Another very handy device is for counsel to Bates stamp the individual pages of all the exhibits consecutively before having the copies made, so that any page of any exhibit can be located by its unique page number.
- Further Tip to Counsel: Some arbitrators aren't in firms and have no real support staff. Helping the arbitrators with the set-up of the Exhibits and the shipping and/or storage of them between hearing days, when there are gaps, can be a nice touch.

The Electronic Hearing

- The Muscular Arbitrator will increasingly be ready for the fully electronic hearing.
- Tips for Counsel:
  - Providing a thumb drive or the like containing all of the pleadings, Witness Statements, Expert Reports, briefs, transcripts (if any), exhibits, copies of cases, *etc.* can be very helpful to arbitrators in evaluating the case and writing the award. Particularly helpful are briefs that are hyperlinked to the exhibits and authorities cited.
  - It can also be helpful, with the permission of the arbitrators, to mark up the important parts of exhibits and cases, etc.

Some Nice Touches with Respect to Individual Witnesses

- In a long case, it can be a nice touch for counsel to provide photos of individual witnesses.
- It is often a good idea to provide a CV of each witness, where applicable, in advance of the testimony, and to hand a copy of the CV to the arbitrators as the witness starts to testify, thereby making it possible to save time on foundations.
- Tip to Counsel: It's not unreasonable for counsel in such circumstances to make a nice summary statement of what the CV shows.

Organizational Charts as to the Positions and Responsibility of Witnesses and other Such Guides Can Be Helpful

- Tips to Counsel:
  - Basic chronologies can be helpful.
  - A *dramatis personae* can be helpful where there are many witnesses.
  - Again, counsel are well advised to recall that the arbitrators do not have a team of junior lawyers and paralegals to assist them in organizing materials for the arbitration.
  - In addition, arbitrators don't necessarily live with the case during the breaks, so it can be helpful to provide copies of materials like these to the arbitrators when the hearings resume to bring the arbitrators back into the picture (though the Muscular Arbitrator will obviously have done this on her own).
  - Accordingly, it is always a good idea for counsel to make available to the arbitrators whatever they would like the arbitrators to be looking at or thinking about at the time.

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Argumentative Counsel

- It not infrequently happens that counsel are inclined to engage in heavy and sometimes vituperative colloquy among themselves.
- While parties have a right to make any objections they want and to be heard with respect to objections, there is no room for vituperation (not to mention that it is counter-productive), nor is extended colloquy helpful.
- These practices must be squelched when they first appear.
- Approaches:
    - Direct counsel, when they are too disputatious with each other, to direct everything to the arbitrators; and
    - Don't be afraid to limit argument once the point has been made.

Reviewing Upcoming Witnesses and Areas of Testimony at the End of the Day

- The Muscular Arbitrator will review upcoming witnesses and their anticipated areas of testimony with counsel at the end of each day.
- Particularly after the matter has gone on for a while and the arbitrator has heard enough testimony to have a sense of the matter, she will advise counsel as the case proceeds as to what witnesses and which areas of testimony seem potentially helpful, and which do not.
- The Muscular Arbitrator will provide for extended days when necessary to get the job done on time —- and will remember that the court reporter (if there is one) has to be on board for extended days to be an option.

Limiting Direct Testimony When the Witness's Direct Testimony

- Has Been Presented by Witness Statement, Expert Report or the Like

A lot of time can be saved by avoiding extensive repetition of direct testimony when that testimony has already been provided by a Witness Statement, Expert Report, or the like.

Offers of Proof and Unnecessary Testimony

- The situation will arise where a party is going to put a witness on to testify to something that the party needs to establish but that the other side is not really going to be in a position to dispute anyhow, although they would not necessarily stipulate to it.
- In this situation, a quick compromise can be to have an Offer of Proof put on the record by offering counsel — and have that offer be stipulated to as testimony, i. e. , not that the matter is true, but that this is what the witness would have testified to.

Hearing Expert Witnesses on a Particular Topic at the Same Time

- It can save time to have expert witnesses on a particular topic testify at the same time, with all such witnesses being present when each testifies.

Arbitrator's Stream of Consciousness Notes at the End of Each Day

- A practice that some arbitrators follow — and that can be quite helpful in terms of assisting the arbitrator to understand a case and organize her thoughts on it, and also to get back into it promptly again after a break — is to dictate a stream of consciousness memorandum at the end of each day's hearing, setting forth in some detail the arbitrator's impressions and tentative conclusions based on the day's testimony and her overall analysis of the issues in the case, as they appear in the hearing to date, along with any questions the arbitrator has going forward.
- These dictated notes can be much more helpful than the notes arbitrators take on yellow pads or laptops during the hearing, since they typically provide more of an overview and analysis.
- Arbitrators who follow this practice find that it increases their understanding of the case and their sense of what will be most helpful in the case going forward.

Form of Award

- Reasoned awards are expensive and time-consuming.
- The Muscular Arbitrator will challenge the parties, as with discovery and motion practice, as to why they want a reasoned award, and will point out that, given the limited scope of review, in many instances a standard award may be sufficient.
- Where the parties want a reasoned award, the question becomes what level of reasoning they want.
- Different arbitrators and counsel have markedly different views of what is meant by a "reasoned award."
- This should be a matter of explicit discussion: The Muscular Arbitrator will discuss with counsel what level of reasoning they want, conducting this discussion with reference to the potential costs of different levels of reasoned awards.
- The Muscular Arbitrator will also remember that at times, when counsel advise that they want a standard, non-reasoned award, this means not only that they do not want to incur the expense of a reasoned award, but also that they affirmatively want to avoid having a reasoned award. When this is the case, obviously the arbitrator will want to respect this.

Avoiding Post-Hearing Briefs When It Makes Sense/The Closing Statement Alternative

- Post-hearing briefing adds a considerable level of expense to arbitrations and results not only in substantial delay, but also in the arbitrators' not addressing the matter and writing their awards until weeks, or more typically months, after the close of the hearing.
- Often — although counsel may have a hard time letting go — the arbitrators will know the case as well as counsel by the end of the hearing, so that post-hearing argument and briefing will not really be all that helpful to the arbitrators. This is worth discussing with counsel. Nonetheless, if, as often happens, counsel nonetheless want to

brief the matter and/or have closing statements a week or two subsequent to the closing statements, that should generally be permitted.

- Closing statements can be an efficient alternative to post-hearing memoranda when counsel are satisfied with them.
- Where the parties and counsel are local, it is often convenient for them to come back a week or two after the hearing to provide their closing statements, in some instances after the transcripts (if any) are received.
- While this takes some time, it is generally more efficient and quicker than post-hearing briefs and, in many cases, may be more helpful to arbitrators because of the dialogue the closing statements make possible.
- Tips to Counsel:
  - A good closing PowerPoint presentation, annotated to the record, can be helpful in an appropriate case (if counsel don't then just read it).
  - Also quite helpful and handy is a small binder of the key documents from the hearing, marked up to highlight the points counsel like (it can be particularly handy if the documents are somewhat reduced in size and two-sided).

Attorneys' Fees and Costs

- In cases in which the arbitrators will be awarding attorneys' fees and costs, it becomes very important how this process is administered.
- Many arbitrators believe that the best practice is to ask both sides to submit their statement of their fees with their final briefs and to agree that the arbitrators may decide attorneys' fees on the basis of those submissions.
- If this approach is adopted, substantial potential delay in the future can be avoided. However, in the unusual case where either side objects and reserves the right to have a hearing as to fees, allowance will have to be made at a later time for such a hearing, since factual questions will presumably be presented.
- While this approach results in the winning party's having had to submit its fees as well, this should not be a significant burden because lawyers in most cases will have recorded their time on a regular basis anyhow. Moreover, having the two submissions to review can be helpful as to reasonableness.
- The alternative — the submission of fees applications after the award — can take up much more time, as the losing party may, by that time, be quite uncooperative.

Dealing with Those Last Minute Troublesome Issues That Come Up

- It often happens that issues come up late — sometimes quite late in the arbitration — that are really a nuisance.
- The Muscular Arbitrator, to protect the record of the case and avoid the risk of issuing an award that is unclear or in some way subject to challenge, will give fair consideration to such matters and, as appropriate, create a record as to that consideration, rather than simply brushing such matters aside.

Important Words to Add at the Very End

- Nothing can more derail the efficiency and economy of arbitration than to have the award be subject to challenge in court.
- Running a good hearing is obviously a way to decrease the likelihood that any such court challenge will have merit.
- One important stopgap is to very carefully and comprehensively inquire of counsel at the end of the hearing questions along these lines: Have you had an opportunity to offer whatever proof you feel you're entitled to offer and to say whatever you feel you need to say? Do you feel you've had a full and fair hearing? Is there anything further you need in order to feel that you have a full and fair hearing?
- While this may seem like looking for trouble, it can save a lot of time in the long run.▼

One important stopgap is to very carefully and comprehensively inquire of counsel at the end of the hearing questions along these lines: Have you had an opportunity to offer whatever proof you feel you're entitled to offer and to say whatever you feel you need to say? Do you feel you've had a full and fair hearing? Is there anything further you need in order to feel that you have a full and fair hearing?

Replacement Conference Draws 210

Jeffrey M. Rubin

Michael A. Frantz

As Hurricane Sandy was bearing down on the New York and New Jersey coastlines on October 29, ARIAS•U.S. chose to scrap six months of preparation before everyone's power went out, rather than risk having people attempt to get to New York only to find that the conference could not be done. As it turned out, the decision was a good one. On November 1, the opening day of the conference, with the subways still shut down, the hotel had few employees, and flooded-out refugees were standing in line in the Lobby, hoping to get rooms. Power was out for the bulk of the area surrounding New York and for some large parts of Manhattan, as well.

With the 2012 Fall Conference gone, ARIAS•U.S. worked with the Hilton to find a date when at least part of the agenda could be staged. As a result, a smaller event was scheduled for December 17 that included the 2012 Annual Meeting, three of the general session panels, a luncheon, and a reception. The conference was still entitled "ARIAS•U.S. Moving Forward," but was informally called the "December Conference" to distinguish it from the original event. The turnout was impressive. When all were accounted for, the number of attendees reached 210, versus the 409 who had registered for the Fall Conference.

In the opening general session, members of the Arbitration Task Force, **Jeffrey M. Rubin**, **Michael A. Frantz**, and **Anthony Vidovich**, discussed the progress of several initiatives to explore improvements to the arbitration process, including utilizing neutral panels, adopting an appeal process, recapturing best practices of the past, and using mediation during arbitration. Many specific ideas had been raised in the Task Force

Anthony Vidovich

ANNUAL MEETING

William Yankus, Elaine Caprio Brady, and Mary Kay Vyskocil address the 2012 Annual Meeting.

Elaine Caprio Brady reviews her year as Chairman.

New Chairman Mary Kay Vyskocil presents "The ARIAS Award" to Charles M. Foss (see News and Notices on Page 11).

Chairman Vyskocil presents Meritorious Service Award to Outgoing Chairman Brady.

Former Chairman Susan Stone with Meritorious Service Award.

Executive Director Bill Yankus summarizes 2012 financial results and 2013 budget.

deliberations, but none has yet been recommended to the Board. All are still in the analysis and consideration stage. The slides from this presentation are available on the website under the About ARIAS•U.S. menu at the bottom of the Arbitration Task Force page.

After lunch, the **Annual Meeting** elected three new Board members, **Michael A. Frantz**, **Mark T. Megaw**, and **James I. Rubin**. New Chairman **Mary Kay Vyskocil** presented awards to retiring members, **Elaine Caprio Brady, Susan A. Stone**, and **Damon Vocke** (in absentia). She also presented **The ARIAS Award to Charles M. Foss**, one of the founders of ARIAS•U.S., who had pioneered many of the programs of the Society. This was only the third time that the award had been presented, since it was created (by Charlie Foss) in 2004. Finally, the ARIAS•U.S. financial results through the end of the last fiscal year (June 30) were presented **by Bill Yankus**, in Treasurer Peter Gentile's absence. The slides from this presentation are available in the Members Area of the website, accessed through the Membership menu. In an update to that presentation, he pointed out that the cancelation of the Fall Conference had seriously affected the current year results for ARIAS•U.S., estimating a net loss

DIRECT DISPUTES

Panel explains procedural and substantive issues in direct disputes.

Moderator Daniel J. Neppl

John D. Cole

Howard D. Denbin

Joseph R. Profaizer

for the year of roughly $60,000, instead of a net gain of $132,000.

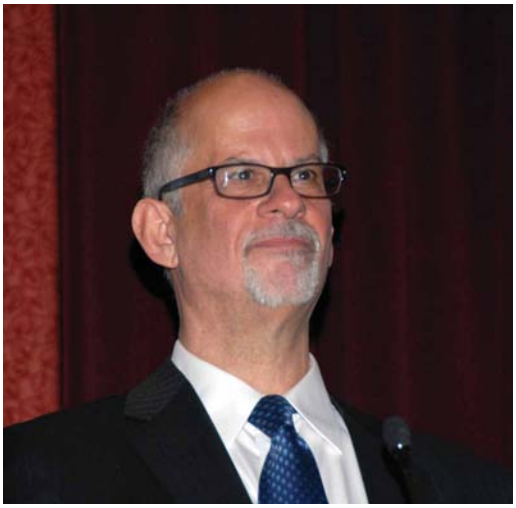
The other two panels that were carried over from the Fall Conference focused on **Direct Disputes** and **Use of Evidence**.

The first session explained how ARIAS arbitrators can become involved in direct insurance disputes. It also surveyed procedural issues that arise in direct disputes but are not typical in reinsurance disputes and outlined the types of substantive issues that frequently arise in direct disputes. Seeking new opportunities for ARIAS•U.S. arbitrators in other areas of insurance, beyond reinsurance, is a major initiative being examined by the Strategic Planning Committee. The panelists addressing this subject were **John Cole**, **Howard Denbin**, and **Joseph Profaizer**. **Daniel Neppl** moderated the discussion.

The second panel addressed a range of key evidence-related questions. What is the difference between "fact" and "expert" evidence, and when is "expert" evidence useful in an arbitration (and when is it not)? What exactly is custom & practice evidence, what is its relevance, and can it substitute for a lack of direct evidence? What is the value of "course of

USE OF EVIDENCE

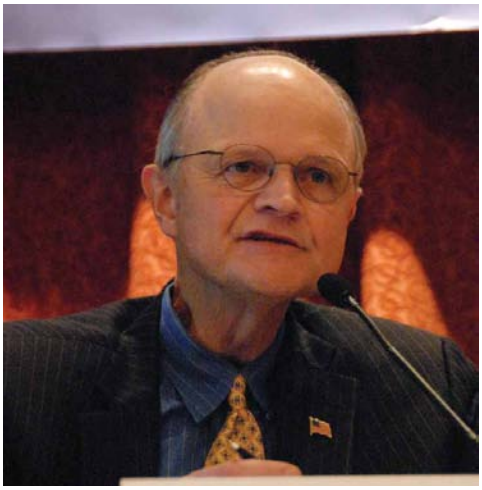
Panel details characteristics and value of various types of evidence.



Moderator Lawrence S. Greengrass

Patricia Taylor Fox

Charles J. Moxley, Jr.



Peter A. Scarpato

performance" evidence, and what issues are inherent in its use? The panel explored these and related questions, both from a procedural and a substantive context. The panelists were **Patricia Taylor Fox**, **Charles Moxley**, and **Peter Scarpato**. **Lawrence Greengrass** moderated the discussion.

In all, this modified conference gave attendees some valuable training that, while significantly shortened, was worthwhile in refreshing, updating, and expanding member understanding of key knowledge areas. It also afforded useful opportunities for renewing relationships with associates and meeting new participants in the field.

The clothing drive for disadvantaged job seekers, originally planned for the November Conference was carried over to the December event. Volunteers from Mound Cotton Wollan and Greengrass staffed the collection station. A significant number of contributions were made by attendees. Nine large boxes of clothing were sent to Dress for Success (women) and CareerGear (men).▼

RECEPTION

Miguel Roure, Mina Matin, Andrew Lewner, and Tom Perry

Michael Collins, Denis Loring, and Larry Greengrass

Paul Dassenko and David Thirkill

Joe Carney and Larry Magnant

Amy Kline and Lydia Kam Lyew

feature

Mary Kay Vyskocil and Jeffrey Rubin Chosen as Chairman and President

Kobrick elected Vice President (President Elect); Mullins is Vice President; Michael Frantz, Mark Megaw, and James Rubin are New Board Members


Mary Kay Vyskocil


Jeffrey M. Rubin


Eric S. Kobrick


Elizabeth A. Mullins


Michael A. Frantz


Mark. T. Megaw


James I. Rubin

Mary Kay Vyskocil, a Litigation Partner at Simpson Thacher & Bartlett LLP, was elected Chairman of ARIAS•U.S. at its 2012 Annual Conference in New York City. She succeeds **Elaine Caprio Brady**, Vice President at Liberty Mutual Group, who has retired from the Board. **Jeffrey M. Rubin**, Senior Vice President, Director Global Claims of Odyssey Reinsurance Company, was elected President succeeding Ms. Vyskocil.

Also at the conference, **Eric S. Kobrick**, Deputy General Counsel and Chief Reinsurance Legal Officer at American International Group, Inc., was elected Vice President (President Elect). **Elizabeth A. Mullins**, Managing Director and head of Global Dispute Resolution & Litigation of Swiss Re America Holding Corporation, was elected Vice President.

In addition, ARIAS•U.S. members elected three new Board members. They were **Michael A. Frantz**, Senior Vice President and Claim Department Manager of Munich Reinsurance America, Inc., **Mark T. Megaw**, Director of Reinsurance Litigation for ACE Group Holdings, and **James I. Rubin**, head of the reinsurance litigation and arbitration practice at Butler Rubin Saltarelli & Boyd LLP. They replaced **Elaine Caprio Brady**, **Susan A. Stone**, and **Damon N. Vocke**, who retired from the Board.

As a Litigation Partner at Simpson Thacher & Bartlett LLP, Mary Kay Vyskocil handles general commercial litigation. Her practice is concentrated in insurance and reinsurance coverage litigation and cases involving the financial services industry.

Ms. Vyskocil has represented major domestic and foreign insurers in complex coverage litigations (including numerous jury trials and appellate arguments) throughout the U.S. in a wide variety of contexts, including environmental, asbestos, breast implants and other mass tort claims. She is also active in reinsurance litigations and arbitrations in the U.S., Great Britain and Bermuda. At ARIAS•U.S., she has chaired the Education and International Committees.

Outside the insurance area, Ms. Vyskocil currently represents UBS in connection with major litigations involving residential mortgage backed securities and former officers of Washington Mutual Bank in litigation with the FDIC. She has also served as outside counsel to the Archdiocese of New York.

Ms. Vyskocil is co-author of the leading treatise, *Modern Reinsurance Law & Practice*, 2d ed. (Glasser LegalWorks 2000) and is a frequent lecturer and author on insurance and reinsurance coverage issues and on litigation and trial skills.

As Senior Vice President, Director Global Claims of Odyssey Reinsurance Company, Jeffrey Rubin is responsible for oversight of group-wide claims. At ARIAS•U.S., he is Co-Chair of the Finance Committee.

Prior to working on the business side of the reinsurance industry, Mr. Rubin practiced law in Chicago for 16 years where he was a partner at Phelan, Pope & John, Ltd. He is a graduate of Cornell University Law School and State University of New York, Oneonta College.▼

members on the move

In each issue of the *Quarterly*, this column lists employment changes, relocations, 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

Mitchell L. Lathrop can now be reached at Law Office of Mitchell L. Lathrop, 3580 Carmel Mountain Road, Suite 300, San Diego, CA 92130-6768, phone 619-985-8262, fax 619-226-2762, email mllathrop@earthlink.net. He has a website at www.LathropADR.com.

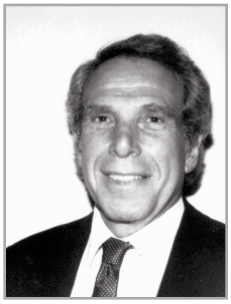
Susan Claflin's address is now Claflin Consulting Services LLC, c/o Alea Group, 55 Capital Boulevard, Rocky Hill CT 06067, phone 860-258-6550, cell 203-907-9141, emails susan.claflin@aleagroup.com and claflin.arbs@gmail.com.▼

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.

The Blighter Strikes Back

Eugene Wollan



"How about ending a sentence with a preposition?" [Answer: Winston Churchill, on being accused of committing this solecism, is said to have responded, "Your arrant snobbishness concerning the English language is something up with which I will not put."]

In *My Fair Lady*, Eliza Doolittle at one point protests (if memory serves) "I get words all day through, first from him then from you; is that all you blighters can do?" I can identify with her complaint because there seem to be a number of people out there who believe that "words" is just about all this particular blighter can do.

I am often approached at industry and professional gatherings by folks who have read one or two of my pieces dealing with language or writing, and who generally have new insights to offer, along the line of "Why didn't you list splitting infinitives as a cardinal sin?" [Answer: because sometimes it's perfectly ok.] Or "How about ending a sentence with a preposition?" [Answer: Winston Churchill, on being accused of committing this solecism, is said to have responded, "Your arrant snobbishness concerning the English language is something up with which I will not put."]

The folks who offer these comments are always pleasant and well-meaning, and I'm delighted to chat with them. What rankles deep down inside, however, is that they seem to think that I'm a Johnny-One-Note, whose only role in life is as a sort of language monitor, a bush-league William Safire, if you will. No one approaches me at these gatherings to compliment me on my lawyering or advocacy skills, or to discuss any of my cases, or to debate a position I've taken in one of my writings on legal or insurance issues. As Eliza said, it's all about "Words, words, words."

Now that I have groused about being known only as a linguistic pedant, I will proceed to reinforce the stereotype by offering another article on the same subject.

Over the years I have made it a practice to collect and retain examples of bad or ungrammatical writing that have jumped out at me from various law-related writings I have encountered – briefs, memoranda, letters, opinions, whatever. Some have been internally generated in my office, some have come from outside sources, but the one quality they all have in common is that they make my teeth hurt. Rather than suffer my dental discomfort alone, I now propose to share some of the mere egregious examples with my devoted readers.

- "The court found that the policy covered this loss." Courts "find" facts. Their legal rulings are "holdings."
- "This is to bring you up-to-date"]
- "The rule is well-settled"]

  The hyphens in both quotes above are wrong. They should be used only when the entire phrase is used as a modifier. ("It is well-settled law.") Otherwise, no. Would you hyphenate "The steak was well done"?

- "Immediately following the explosion, we understand that emergencies services responded promptly." The introductory phrase is misplaced. Whatever emergency services did, we understand it now, not right after the explosion.
- "I would have liked to have been there when the witness recanted." One "have" too many. Is the writer saying he/she would like now to have been there then, or would have liked at that time to be there?
- "We have not and will not agree to those terms." Would the writer say "we have not agree"? Inserting "agreed" after "have not" solves the problem.
- "The Fine Arts Floater covered prints by Durer, Holbein and Currier and Ives." The writer was a victim of being taught not to use the serial comma before the last item in a series. (The New York Times omits the comma regularly; E. B. White and the New Yorker use it.) This quotation illustrates the kind of confusion that can ensue from omitting it. If you didn't know that Currier and Ives were a pair, you wouldn't have a clue which name goes with which.
- "The decision was reversed. As such, a new trial will be held." As what? What does the modifier "such" refer back to? An example of correct use might be: "The Court's

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

statement was dictum; as such, it is not binding precedent," where "such" clearly refers back to "dictum." "As such" is not a synonym of "therefore." This is an unfortunately common error, usually perpetrated by writers guilty of the cardinal sin of trying to be fancy when keeping it simple will do just fine.

- "The witness indicated that he actually saw the accident." Another example of the same sin of trying to sound elegant. "Indicate" means "suggest" or "point to." It is not a synonym for the simpler "say".
- "The data is incontrovertible"]
- "The Court's statement was dicta"]
- "The media is very interested in this case"]

The nouns in all three of these quotes above are plural. The singulars are, respectively, "datum," "dictum, " and "medium." (Yes, Latin was my best subject in High School.) For example, television is a medium; combined with the press, radio, film, etc., it is a component of "the media."

- "The exhibits were pre-marked by counsel." This one is really among my favorites. The prefix "pre" means "before." What were the exhibits before they were marked? "The exhibits were marked as part of the pre-trial discovery" works. Calling them "pre-marked" doesn't. [And don't get me started on "pre-owned automobiles" or "pre-boarding" of airplanes.]
- "A review of the depositions reveal many contradictions." The subject of the verb is "review", not "depositions." Just because it's closer to the verb, that doesn't necessarily make it the subject.
- We served the answer on counsel, whom we thought was authorized to receive it." Would the writer say "we thought him was authorized —-"? The pronoun is the subject of "was authorized," not the object of "thought." Sad to say, I've noticed this mistake several times recently in the revered *New York Times*.
- "The two adjusters frequently confer with one another." This is another example of trying to sound a little fancy. "One another" is used for more than two people; when it's only two, the phrase is "each other."
- "Based on all the evidence, the court ruled for the plaintiff." This is a classic dangling participle. "The court" is not "based on" anything — except perhaps the foundation of its building. "The ruling was based on all the evidence" works because "based on" refers back to "ruling."
- "The evidence was both verbal and written." "Verbal" means "in words". The last time I checked, speech also used words. What the writer was groping for before he/she succumbed to the fancy virus was "oral."
- "Please let us have your document requests promptly, so we may decide which ones we will object to." "May" is not a more elegant way of saying "can." The writer here is talking about having the ability to decide, not getting permission to decide, so the right word would be "can."
- "The insurer issued its Policy # 12345 ("the Policy")." Is the parenthesis really necessary? If the purpose is to distinguish this policy from another one, sure. But if this is the only policy on the table, the writer seems to be suggesting that the reader is too dim -witted to understand which policy is referred to without this helpful parenthetical hint.
- "Both witnesses testified to the same effect. (Jones affidavit, p.3)." The usual function of a parenthesis is to identify something that can be excised without damaging the structure of the sentence. If we delete the parenthesis here, we are left with that poor little period dangling forlornly in mid-air. Either move it into the parenthesis or just leave it out.
- "The hearing was adjourned due to the illness of counsel." "Due" is an adjective, and should modify a noun ("The plane is due to arrive at noon.") If you mean "because of," resist the temptation to get fancy, and just say "because of."
- "The policy was mailed, however it was never received." This one really gets to my molars. It is a classic run-on sentence, and it's quite remarkable how often it is perpetrated by otherwise intelligent people. There are two conjunctions in the English language that can be used to connect the parts of a compound sentence - "and" and "but." "However" is not just a fancier way of saying "but."
- "None of the parties are corporation." "None" means "no one." You wouldn't say "one of the parties are a corporation." (Or would you?) The verb should be singular.

"The policy was mailed, however it was never received." This one really gets to my molars. It is a classic run-on sentence, and it's quite remarkable how often it is perpetrated by otherwise intelligent people. There are two conjunctions in the English language that can be used to connect the parts of a compound sentence - "and" and "but." "However" is not just a fancier way of saying "but."

- "The witness' statement was not sworn." The possessive of a singular noun is formed by adding " 's," even if the noun ends in an "s." (If the noun is plural, just add the apostrophe.) So the correct word would be "witness's." If that strikes you as awkward, re-cast the sentence ("The statement of the witness.").
- "If the defendant were negligent, he is liable." The writer has confused the subjunctive with the conditional. The subjunctive is used for a statement contrary to fact ("If I were king —-"). The conditional is used for something that may or may not be so ("If you come to my party, I'll be glad to see you.") Never the twain should meet.
- "He summarized the case to you and I." There is a remarkable number of folks who think "me" is a duty word. It's one thing to eschew a common (though technically ungrammatical) colloquialism like "It's me," but quite another to abandon the word completely. Presumably the writer would not say "He gave the book to I," and this is no different.

Sometimes it's not easy to draw the line between specific grammatical mistakes and purely bad writing. What I find particularly irksome in the latter category is the effort — usually but not exclusively by young lawyers — to sound "lawyerly" instead of writing simple, direct English. Here is a wonderful, if perhaps somewhat extreme, example of this syndrome:

> In connection with the above-referenced proceeding, please find annexed hereto copies of those documents which are currently in the possession of the defendant that are responsive to the plaintiff's notice for discovery and inspection dated _____, as modified by the stipulation which was entered into by our office and your office dated ____. Kindly advise me if there are any additional outstanding discovery demands which have been served by your office, and not responded to by our office in connection with this matter.

If you have any questions or comments with respect to the above, please feel free to contact the undersigned. Thank you for your attention to this matter.

(I am pleased to report that this communication was received by my office, not internally generated. I have nevertheless deleted identifying characteristics such as dates out of mercy to the sinner.)

Let's examine this masterpiece a little more closely:

> In connection with the above-referenced [why not "this"?] proceeding [what other proceeding could possibly be referred to?], please find annexed [why not just "annexed is"? — will the reader really have to search for it?] hereto [what else could it possibly to annexed to?] copies of those documents which are [two superfluous words] currently [as distinguished from last year?] in the possession of the defendant that are responsive to the plaintiff's notice for discovery and inspection dated _____, as modified by the stipulation which was entered into [four superfluous words] by our office and your office dated _____. [It's the stipulation that's dated, not the office; and — to the best of my knowledge and belief — stipulations are entered into by people, not offices.] Kindly advise me if there are any additional outstanding discovery demands which [should be "that" — restrictive clause] have been served by your office [by whom else could they have been served?], and not responded to by our office [as distinguished from some other law firm?] in connection with this matter [as distinguished from some entirely unrelated matter?].
>
> If you have any questions or comments with respect to the above [above what?], please feel free to contact [how - by séance?] the undersigned [what's wrong with "me"?]. Thank you for your attention to this matter [if the recipient does not give it attention, will the writer withdraw the thanks retroactively?].

Wouldn't it have been easier simply to write:

> "I enclose copies of the defendant's documents responsive to plaintiff's notice for discovery and inspection dated ____, as modified by our stipulation dated _____. Please let me know whether you believe there are any remaining discovery demands to which we have not responded."

Of course it would have been easier, but then the writer wouldn't be able to be proud of having written a legal-sounding letter!

Elsewhere in *My Fair Lady*, Professor Higgins laments "Why can't the English learn to speak?" My own plaint (pace, ghost of Rex Harrison) is "Why can't the lawyers learn to write?"▼

"He summarized the case to you and I." There is a remarkable number of folks who think "me" is a duty word.

case notes corner

Federal Court Denies Second Bite at the Evidentiary Apple

Ronald S. Gass

One oft-cited provision of the Federal Arbitration Act ("FAA") invoked by parties seeking to vacate unfavorable arbitration awards is that the arbitrators were guilty of misconduct "in refusing to hear evidence pertinent and material to the controversy." FAA § 10(a)(3). These challenges typically arise in the context of overturning final awards when evidence a party sought to offer during the hearing on the merits was rejected for some reason by the panel. In an unusual scenario, however, a New York federal district court recently ruled on a vacatur motion seeking to overturn a panel's post-hearing interim award on the ground that certain pertinent and material documents and testimony not introduced during the evidentiary hearing should have been heard by the panel before issuing its final award. The district court rejected this party's attempt to obtain a second bite at the evidentiary apple on §10(a)(3) and other grounds.

In this case, disputes arose between a Canadian insurer and its Belgian reinsurer involving several different reinsurance contracts as well as insurance business written pursuant to a managing general agent ("MGA") agreement in which the Belgian reinsurer, through the Canadian insurer's MGA affiliate, issued primary policies reinsured on a quota-share basis by that insurer. Each party claimed that monies were due to it after applying offsets across all of these contracts. A key contract interpretation issue arbitrated was the basis on which the parties' quota share reinsurance treaty had terminated, i.e., on either a cut-off or run-off basis.

Shortly before the hearing and pursuant to a panel order, the parties designated additional potential hearing exhibits, with the reinsurer identifying 450 documents versus 81 marked by the insurer. When questioned about why such a large number of new exhibits was being marked so close to the hearing, the reinsurer's counsel acknowledged that it was unlikely all those documents would be used at the hearing but felt that the panel's order required him to mark them now or risk his client being precluded from introducing them later during their case in chief. During the nine-day arbitration hearing, eleven witnesses testified and hundreds of documents were introduced as exhibits. On the final hearing day, the umpire twice stated that it was the panel's understanding that the parties had completed their evidentiary submissions, and neither party objected to that understanding, stated it wished to submit any additional evidence, or argued that it had not been afforded an opportunity to present any additional evidence.

After the evidentiary hearing, the panel issued two interim awards, both of which noted that the panel had conducted "a final hearing on the merits." In the second one, the majority held that the quota share treaty terminated on a cut-off basis, ruling in favor of the insurer's interpretation. It retained jurisdiction for a minimum of nine months to resolve any disputes that might arise between the parties in complying with the interim award or agreeing on an expedited and efficient alternative dispute resolution procedure to resolve future disputes governed by the interim award. The panel also scheduled a one-day hearing to consider whether any modifications to the award, including the protocols set forth in it, were necessary and whether there was any need for the panel to retain jurisdiction for an additional period of time and to hear any additional requests for relief from the parties. The panel expressly reserved the right to modify its interim award and to issue future interlocutory awards or a final award as justice and equity might require regarding any of the matters addressed in the interim awards.

About five months after the second interim award was issued, new arbitration counsel for

Ronald S. Gass

One oft-cited provision of the Federal Arbitration Act ("FAA") invoked by parties seeking to vacate unfavorable arbitration awards is that the arbitrators were guilty of misconduct "in refusing to hear evidence pertinent and material to the controversy.

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The dissenting arbitrator argued that the evidence sought to be presented by the reinsurer was pertinent and material, that the panel had retained jurisdiction and the discretion to modify its interim award, and that, in denying the reinsurer's petition to modify, the panel had refused to hear this evidence.

the reinsurer filed a petition to modify it arguing, *inter alia*, that the quota share cut-off ruling should be reversed because documentary evidence and testimony from a witness not presented during the evidentiary hearing demonstrated that the parties intended the quota share liabilities to be run off, not cut off. Following briefing by the parties on the discrete issue of whether grounds existed warranting the reopening of the arbitration (akin to whether there were grounds for a new trial in a judicial context), the panel issued its final award. The majority ruled that the reinsurer had failed to provide a valid excuse for not introducing the documents and testimony during the hearing on the merits and that the panel's retention of jurisdiction was not intended to leave the evidentiary record open or to permit the rehearing of any substantive issues previously considered. The dissenting arbitrator argued that the evidence sought to be presented by the reinsurer was pertinent and material, that the panel had retained jurisdiction and the discretion to modify its interim award, and that, in denying the reinsurer's petition to modify, the panel had refused to hear this evidence.

The insurer sought to confirm the panel's final award in New York federal district court, and the reinsurer cross-moved to vacate it on several grounds, including violation of FAA § 10(a)(3) and (4). Noting at the outset that arbitration awards are subject to "very limited review" and that arbitrators "enjoy broad discretion" to decide whether to hear certain evidence and "do not need to allow parties to present every piece of relevant evidence," the court examined the factual circumstances surrounding the reinsurer's petition to offer additional post hearing evidence. The central principle cited by the district court in analyzing this vacatur motion was whether the procedure afforded by the panel was "fundamentally unfair." Finding that the reinsurer was granted a full and fair opportunity to present its case at the hearing, the court focused on these key facts:

- The panel's scheduling order made it clear that each party was expected to put on its "full case" at the evidentiary hearing.
- In identifying 450 additional documents shortly before the hearing, the reinsurer's counsel acknowledged that if he did not designate them, the reinsurer would have been precluded from introducing them at the hearing.
- The reinsurer had the opportunity to present its case as it wished by engaging in extensive discovery and pre-hearing briefing, calling seven witnesses and cross-examining the insurer's four witnesses, submitting evidence, making opening and closing arguments, and submitting a proposed final award.
- The reinsurer possessed or had access to the contested additional evidence, which was previously produced during discovery, and it was well aware of the additional witness's role in the quota-share transaction but chose not to call her.
- The umpire had announced at the beginning and end of the last hearing day that the panel considered the evidentiary record to be closed at the conclusion of the hearing and there was no objection made by the reinsurer's counsel.

In denying the reinsurer's cross-motion to vacate, the district court held that it was afforded a full and fair opportunity to present its case and that the panel did not disregard any evidence properly presented. "The fact that [the reinsurer] declined to call certain witnesses or present certain evidence within the time allotted — or, more to the point, the fact that, with the benefit of hindsight, it regretted its handling of the hearing — does not constitute fundamental unfairness."

Notably, the court acknowledged the panel's right to modify its interim award "as long as doing so did not create fundamental unfairness." While the doctrine of *functus officio* ordinarily bars arbitrators from revisiting final awards subject to judicial review, "'if an arbitrator is not functus officio as to an interim award, then the interim award is not subject to judicial review' and is therefore logically subject to revisitation" (quoting *SH Tankers Ltd. v. Koch Shipping Inc.*, 12 Civ. 00375 (AJN), 2012 U.S. Dist. LEXIS, at *14 (S.D.N.Y. June 19, 2012)). In this case, however, the court concluded that the panel's retention of jurisdiction was limited to ensuring that the reinsurer complied with the payment protocols in the second interim award and not to permit the submission of additional evidence or the reopening of the evidentiary record.

The court also held that the panel did not

exceed its authority so that FAA § 10(a)(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") was inapplicable to vacate the final award for three reasons. First, the reinsurer argued that the panel had "rewritten" the parties' contract in finding that it was terminated on a cut-off, instead of run-off, basis. The court observed that this was a "hotly contested" issue with both parties presenting competing interpretations. The fact that the panel largely agreed with the insurer did not mean that it failed to reach a decision drawn from the "essence" of the agreement to arbitrate or failed to provide a "barely colorable justification for the outcome reached." Second, the reinsurer contended that the panel exceeded its powers by violating its own award when it refused to consider the petition to modify or conduct a one-day hearing as provided for in its second interim award. The court rejected this argument because the panel made it clear that its continued jurisdiction was for the purpose of overseeing any disputes that might emerge over compliance with the award and not to reopen the record for the presentation of evidence that the reinsurer had no excuse for failing to present the first time around. Third, the reinsurer complained that the panel exceeded its authority by imposing a "punitive sanction" in the form of attorney's fees. The court ruled that broad arbitration clauses such as the ones in this matter gave the arbitrators discretion to order remedies they determine are appropriate, including attorney's fees for bad faith conduct, even absent a specific authorization to do so and even where there was a specific contractual provision stating that each party would bear its own attorney's fees. More importantly, the reinsurer itself sought the award of attorney's fees, thereby waiving any argument that such an award was beyond the panel's authority.

Another interesting aspect of this decision was the district court's ruling not to seal portions of the court record notwithstanding the fact that the arbitration proceedings were subject to a confidentiality agreement and both parties had filed motions to seal the record. Briefly, the court observed that the mere existence of the parties' confidentiality agreement did not demonstrate that sealing was necessary, did not bind the court, and had no effect on the well-established common law right of access to these "judicial documents." While the public interest in the relationship between an insurer and its reinsurer is relatively low, the weight to be given the presumption of access here was reasonably high at least as to some of the documents at issue. "'In circumstances where an arbitration award is confirmed, the public in the usual case has a right to know what the Court has done." (quoting *Global Reinsurance Corp. — U.S. Branch v. Argonaut Ins. Co.*, Nos. 07 Civ. 8196 (PKC), 07 Civ. 8350 (PKC), 2008 U.S. Dist. LEXIS 32419, at *5 (S.D.N.Y. Apr. 18, 2008)). The pleadings and challenged arbitration decisions, according to the district court, directly affected its adjudication of this matter, and therefore should not be sealed.

One important lesson here is that *all* pertinent and material evidence must be presented by the parties during the arbitration hearing on the merits as there will unlikely be a "second bite" at the evidentiary apple even though the panel may have issued an interim, rather than a final, award and even if it expressly retained jurisdiction to modify that interim award (which this court acknowledged arbitration panels have the inherent authority to do). It also highlights the importance of formally closing the evidentiary hearing. In this case, the umpire twice announced on the last hearing day that it was the panel's understanding that the parties had completed their evidentiary submissions. In the absence of any objections or a request by a party to submit additional evidence, it will be nearly impossible to argue later on appeal that the panel refused to hear any pertinent and material evidence. From a practice standpoint, formally announcing the close of the hearing record should be routine procedure. For example, the American Arbitration Association's Commercial Arbitration Rule 35 entitled "Closing of Hearing" provides in pertinent part: "The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed." Making such an on-the-record inquiry of the parties at the conclusion of the evidentiary hearing is a worthwhile addition to every arbitrator's hearing playbook.▼

Century Indemnity Co. v. AXA Belgium, 11 Civ. 7263 (JMF), 2012 U.S. Dist. LEXIS 136472 (S.D.N.Y. Sept. 24, 2012).

It also highlights the importance of formally closing the evidentiary hearing. In this case, the umpire twice announced on the last hearing day that it was the panel's understanding that the parties had completed their evidentiary submissions.

in focus

Recently Certified Arbitrators

G. Kathleen Karnel

Anthony Vidovich

G. Kathleen Karnell

Kathleen Karnell is an attorney and claim professional with 27 years in the insurance and reinsurance industry. She currently is President of Silvermine Resolutions LLC, a company that provides insurance and reinsurance claims management and dispute resolution services. Ms. Karnell serves as an arbitrator and consultant and provides outside auditing services.

Before forming Silvermine Resolutions, Ms. Karnell was Vice President of Claims at Tokio Millennium Re (TMR) in Bermuda, where she was responsible for the management of all multi-line claims arising out of the company's US reinsurance portfolio. Lines of business included Property, Commercial Auto, General Liability, Commercial Umbrella and Excess, Workers' Compensation, Miscellaneous Professional Liability, and Medical Malpractice. Ms. Karnell also managed all coverage disputes and arbitrations filed against the company.

Prior to TMR, Ms. Karnell was employed at General Re for twenty years, her last position as Vice President, Claim Attorney. As Claim Attorney, she managed coverage disputes and arbitrations, as well as Declaratory Judgment Actions filed against the company, particularly on claims involving environmental and asbestos losses. She began her career at General Re as a Claim Executive managing a multi-line claim portfolio which included operational, prospective and active claim reviews. As part of Best Practices, she provided training to external and internal clients, and authored white papers on various topics, including New York Labor Law.

Ms. Karnell began her insurance career with Travelers Insurance as an outside claim adjuster in New York in 1986, handling all casualty lines of business. She was promoted to the position of Home Office Examiner where she supervised, trained, and provided claim authority to five field offices.

Ms. Karnell is admitted to practice law in New York and California, and has obtained her CPCU and ARe designations. She received her JD from Golden Gate University, School of Law in 1984, and her undergraduate degree from Mills College in 1981.▼

Anthony Vidovich

Anthony Vidovich is Vice President, Assistant General Counsel and Director of Reinsurance Law for the insurance and reinsurance businesses of The Hartford Financial Services Group, Inc. Mr. Vidovich, with his team of lawyers and legal professionals, is responsible for (1) the management and resolution of all legal issues related to the placement of reinsurance for The Hartford's Commercial and Consumer Markets (P&C) and Wealth Management (Life) businesses: (2) the resolution of all reinsurance collection matters through negotiation, commutation, arbitration or litigation; (3) advice, counseling, and dispute resolution for The Hartford's assumed reinsurance businesses; and (4) both strategic and general business advice and counseling for The Hartford's domestic and international run-off operations.

Mr. Vidovich is a frequent speaker at insurance and reinsurance industry conferences and seminars, primarily in the areas of runoff and the reinsurance dispute resolution process. He is a member of the Reinsurance Committee of the American Council of Life Insurers and active in a number of P&C industry organizations.

Prior to joining The Hartford's Law Department, Mr. Vidovich was with the law firm of Blank Rome LLP in Philadelphia, where his practice primarily centered on the representation of financial institutions, with a particular focus on insurance and reinsurance companies, policyholders, regulators and receivers.▼

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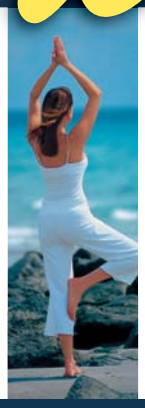

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Complete information about ARIAS•U.S. is available at www.arias-us.org. Included are current biographies of all certified arbitrators, a current calendar of upcoming events, online membership application, and online registration for meetings.

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