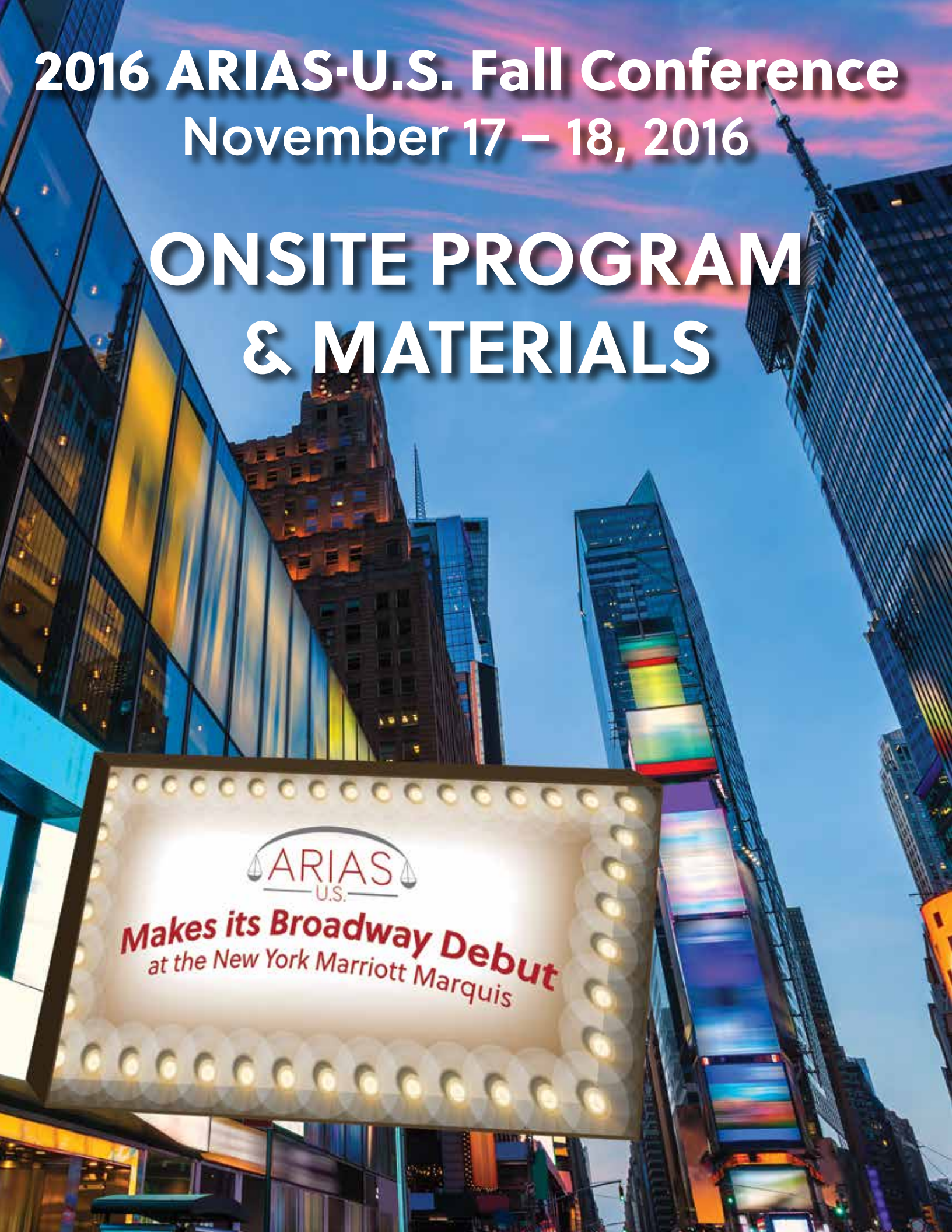
2016 ARIAS·U.S. Fall Conference

November 17 – 18, 2016

ONSITE PROGRAM & MATERIALS



ARIAS·U.S. 2016 Fall Conference & Annual Meeting

Dear Colleagues,

It is a great pleasure to welcome you to the 2016 ARIAS•U.S. Fall Conference & Annual Meeting hosted at the New York Marriott Marquis in Times Square!

We are delighted to open the meeting with an Organizational Update from Betty Mullins and Jim Rubin, which will highlight the accomplishments of the various committees over the last 12 months and their plans for the coming year. We follow the updates with six general sessions and six breakout sessions focusing on a variety of hot topics. And lastly, we look forward to hearing from our Keynote Speaker, Maria T. Vullo, Superintendent of the New York State Department of Financial Services.

We invite all conference attendees to attend Speed Dating 2.0: Conversation Starters and Sparklers, a networking session designed to spark interesting and meaningful connections. We hope that those rich conversations continue well into the evening cocktail reception and beyond.

This year, all program materials will be provided electronically in advance of the conference, and hard copies will be provided onsite when attendees check into the conference at the registration desk. No conference materials will be mailed out in advance.

This conference will be conducted in accordance with the ARIAS·U.S. Antitrust Policy, which is available in the *About ARIAS* section of the website at www.arias-us.org.

We are excited about this year's conference and welcome you to Broadway!

Program Co-Chairs:

Elizabeth A. Mullins
ARIAS·U.S. Chairwoman
Swiss Re Management (U.S.) Corporation

Patricia Taylor Fox
American International Group

Steven C. Schwartz
Chaffetz Lindsey LLP

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SCHEDULE

Thursday, November 17, 2016

7:00 a.m. – 8:30 a.m. **REGISTRATION**

South Pre-function Registration Booth (5th Floor)

Thank you to our lanyard sponsor FTI Consulting

7:30 a.m. – 8:30 a.m. **BREAKFAST**

North Pre-function Foyer Area (5th Floor)

8:30 a.m. – 8:40 a.m. **GENERAL SESSION — Welcome**

West Side Ballroom (5th Floor)

Presenters: *Patricia Taylor Fox, American International Group*
Steven C. Schwartz, Chaffetz Lindsey LLP

8:40 a.m. – 9:20 a.m **ARIAS·U.S. ORGANIZATIONAL UPDATE**

West Side Ballroom (5th Floor)

Presenters: *Elizabeth A. Mullins, ARIAS•U.S. Chairwoman*
Swiss Re Management (U.S.) Corporation
James I. Rubin, ARIAS•U.S. President
Butler Rubin Saltarelli & Boyd LLP

9:20 a.m. – 10:05 a.m. **GENERAL SESSION — If You Want Reliability, Should We All Just Get a Dog?**

West Side Ballroom (5th Floor)

This highly interactive session will encourage the audience to consider what it really means for an arbitration process to be "reliable." Reliable in what sense? Does it mean the ability to handicap the chances of winning or losing? Does it mean procedural reliability? Does it mean knowing what to expect from the parties and their counsel? Does it have to do with cost, time, and fundamental fairness? All of the above?

Presenters: *Mark A. Kreger, Kerns, Frost & Pearlman, LLC*
Robert Sweeney, CNA Corporate Litigation
Howard Denbin, HDDRe Strategic LLC
Deidre Derrig, Allstate Insurance Company

10:05 a.m. – 10:30 a.m. **REFRESHMENT BREAK**

North and South Pre-function Foyer (5th Floor)

10:30 a.m. – 11:15 a.m. **GENERAL SESSION — Improving the Arbitration Process through Better Contract Wording**

West Side Ballroom (5th Floor)

There remains a fair bit of debate in the industry these days as to whether the arbitration process in reinsurance disputes is working the way it is intended and the extent to which it continues to offer benefits over litigation. In this interactive panel, contract wording experts will take on some of the most debated features of current reinsurance arbitration practice, including the time to get to a hearing, the scope of discovery, motion practice and witness testimony. Drawing on their experience, as well as observations from a sampling of active arbitrators, the panel will provide their recommendations on improvements to the process that can be achieved through contract wording changes.

Presenters: *Julie Pollack, Swiss Re America*
Sean Maloney, American International Group
Marnie Hunt, Aon Benefield
Bryce Friedman, Simpson, Thatcher & Bartlett LLP

11:15 a.m. – 12:00 p.m. **GENERAL SESSION — Data Security in Arbitration: Practical Guidance for Protecting Company and Personal Information**

West Side Ballroom (5th Floor)

This session will discuss best practices and practical strategies for identifying and protecting private and regulated information in arbitration, with particular emphasis on tools and procedures to be used with and among arbitrators. Insurers reported data breaches in 2015 that affected a combined 101.4 million persons. With law firms and businesses under constant assault, arbitrators have an obligation to the parties before them to secure all sensitive information submitted.

Presenters: *Michael Menapace, Wiggin and Dana*
David Winters, Butler Rubin Saltarelli & Boyd LLP
Thomas D. Cunningham, Sidley Austin LLP
Dan Fitzmaurice, Day Pitney LLP
Aimee Hoben, The Hartford

—8th Floor—

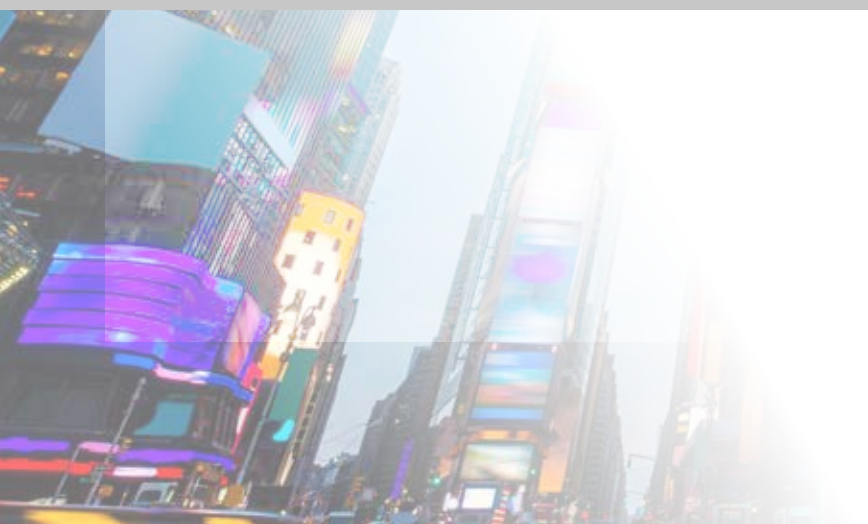
12:00 p.m. – 1:20 p.m. **LUNCHEON**

The Broadway Lounge / Manhattan Ballroom – (8th Floor)

LIFE/HEALTH GROUP LUNCHEON

The Broadway Lounge / Manhattan Ballroom – (8th Floor)

Separate tables will be designated.



1:30 p.m. – 2:20 p.m. **BREAKOUT SESSIONS — Data Security in Arbitration**

Salon Rooms (5th Floor)

This breakout session for arbitrators, company representatives and law firms will discuss and solicit feedback on the draft practical guidance ARIAS-U.S. has developed for the security of confidential information exchanged in the reinsurance arbitration process.

BREAKOUT 1: Discussion for Arbitrators: Data Security in Arbitration

Salon 4 (5th Floor)

Moderators: *Michael Menapace, Wiggin and Dana LLP*
Andrew Gifford, General Reinsurance Corporation
Ann Field, Field Law and Arbitrations

BREAKOUT 2: Discussion for Company Representatives: Data Security in Arbitration

Salon 3 (5th Floor)

Moderators: *Thomas D. Cunningham, Sidley Austin LLP*
Stacey Schwartz, Swiss Re America

BREAKOUT 3: Discussion for Law Firms: Data Security in Arbitration

Salon 2 (5th Floor)

Moderators: *David Winters, Butler Rubin Saltarelli & Boyd LLP*
Alysa Wakin, Odyssey Re
Jonathan Witte, Cigna

2:30 p.m. – 3:45 p.m. **SPEED DATING 2.0: Conversation Starters and Sparklers**

Room assignments will be provided at Registration.

Join us this year as we put a new twist on the classic speed dating format. This is one session you don't want to miss!

3:45 p.m. – 4:10 p.m. **REFRESHMENT BREAK**

North and South Pre-function Foyer Area (5th Floor)

4:10 p.m. – 5:00 p.m. **BREAKOUT SESSIONS**

Salon Rooms (5th Floor)

BREAKOUT 1: Takeaways from New Discovery Rules to Employ in Arbitrations: The Company, Arbitrator, and Counsel Perspectives

Salon 2 (5th Floor)

In response to the 2015 amendments to the Federal Rules, litigants, counsel, and federal courts have grappled with ways to control the ever-increasing scope of discovery in civil litigation. This session will provide an opportunity to explore the key takeaways from the recent amendments that can be utilized in arbitrations.

Presenters: *Syed S. Ahmad, Hunton & Williams LLP*
Andrew Maneval, Chesham Consulting LLC
Glenn A. Frankel, The Hartford
Royce F. Cohen, Tressler LLP

BREAKOUT 2: Ultimate Dodgeball: How to Avoid Delaying Tactics by Arbitration Participants

Salon 3 (5th Floor)

While many arbitrations are typified by courteous and efficient behaviors that move the process smoothly toward a final hearing, arbitrators and umpires with extensive experience have likely encountered delaying tactics from counsel or other members of the arbitration panel (typically not ARIAS-U.S. certified). This session will provide pragmatic tips on how to effectively maneuver around such tactics and get the proceeding back on track.

Presenters: *Susan E. Mack, Adams and Reese LLP*
Suman Chakraborty, Squire Patton Boggs (U.S.) LLP
Susan Grondine-Dauwer, SEG-D Consulting, LLC
Robert M. Hall, Hall Arbitrations

BREAKOUT 3: Leveraging Summary Adjudication: Cost-Conscious Justice in Reinsurance Arbitration

Salon 4 (5th Floor)

The panel will explore the evaluation of disputes amenable to summary process; the best way to position a dispute for full or partial summary disposition; discovery techniques most likely to contribute to a successful summary process; and the significance (and trending) of arbitrators' due process concerns.

Presenters: *David A. Attisani, Choate Hall & Stewart LLP*
Neal Moglin, Foley & Lardner LLP

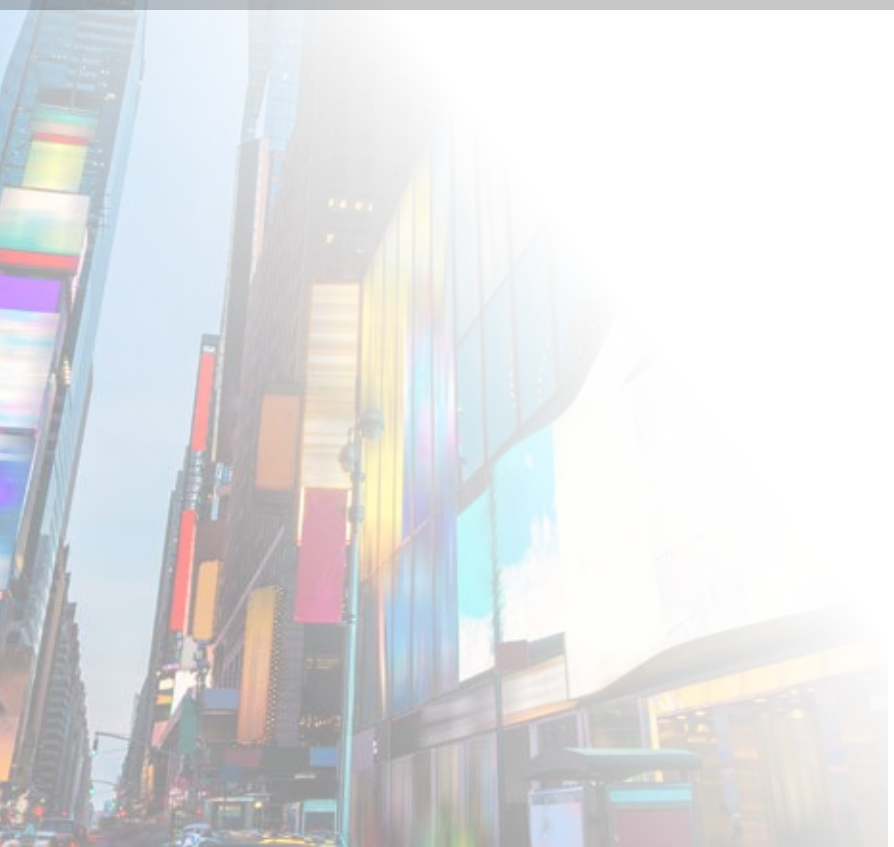
5:10 p.m. – 6:00 p.m. **ARIAS·U.S. Annual Meeting and Elections**

Salon 2 (5th Floor)

—7th Floor—

6:00 p.m. – 7:30 p.m. **COCKTAIL RECEPTION**

Astor Ballroom/Astor Pre-Function (7th Floor)



Friday, November 18, 2016

7:15 a.m. – 8:30 a.m. **BREAKFAST**
North Pre-function Foyer Area – (5th Floor)

7:30 a.m. – 8:30 a.m. **ARIAS•U.S. COMMITTEE MEETINGS**
Arbitrators Committee – *Carnegie/Lyceum (5th Floor)*
Forms Committee – *Belasco (5th Floor)*
Law Committee – *Broadhurst (5th Floor)*
Member Services Committee – *Imperial (5th Floor)*
Strategic Planning Committee – *Julliard (5th Floor)*
International Committee – *Edison (5th Floor)*

7:30 a.m. – 8:30 a.m. **WOMEN'S NETWORKING SESSION**
Alvin (5th Floor)

Engage with other conference attendees and participate in an informal meeting to help plan the women's networking event for the 2017 Spring Conference.

8:30 a.m. – 9:15 a.m. **GENERAL SESSION — Pursuing Arbitration that is Fair**
West Side Ballroom (5th Floor)

In the pursuit to streamline the arbitration process to be faster, cheaper, and more reliable, arbitration must also be perceived fair. Although fairness is an elusive term, probably as elusive as the term "reliable", we have identified four frequent process encounters that tend to influence procedural fairness as well as fair-minded arbitration decisions. The panel discussion will address best practice views to handle the identified situations to achieve the goal of fairness throughout the arbitration process.

Presenters: *Richard Waterman, Northwest Reinsurance Inc.*
Charles Ehrlich, ARIAS•U.S. Certified Arbitrator
Sylvia Kaminsky, Insurance/Reinsurance Consultant
Elizabeth M. Thompson, Arbitrator/Mediator

9:15 a.m. – 10:00 a.m. **KEYNOTE SPEAKER**

West Side Ballroom (5th Floor)

Keynote: *Maria T. Vullo, Superintendent, New York State Department of Financial Services*

Maria T. Vullo was confirmed by the New York State Senate as Superintendent of Financial Services on June 15, 2016. She was nominated for the position by Gov. Andrew Cuomo. As superintendent, she is responsible for protecting consumers and markets in New York from fraud and financial crises as well as reforming the regulation of financial services to keep pace with the industry's rapid evolution.

10:00 a.m. – 10:30 a.m. **REFRESHMENT BREAK**

North and South Pre-function Foyer (5th Floor)

10:30 a.m. – 11:15 a.m. **GENERAL SESSION — Is My Arbitration Final, or is it Groundhog Day?**

West Side Ballroom (5th Floor)

This panel will explore the evolving law on post-award challenges — including motions to vacate, collateral estoppel, and collateral attacks on arbitration awards — as well as attempts to publicize confidential awards through often-unnecessary motions to confirm.

Presenters:
Robert Lewin, Strook & Strook & Lavan LLP
Hon. Brian Cogan, U.S. District Judge for the Eastern District of New York
Brad Rosen, Berkshire Hathaway Group
Anthony Vidovich, XL Catlin

11:15 a.m. – 12:05 p.m. **GENERAL SESSION — Comparative Ethics: Lessons to be Learned from Other Arbitration Regimes**

West Side Ballroom (5th Floor)

The ARIAS•US Code of Conduct has parallels used in other arbitration regimes, including the American Arbitration Association's Code of Ethics and the ethical norms applicable to international arbitration. By focusing on a variety of real-world fact patterns, this session will explore the ways in which different sets of ethical rules address critical questions.

Presenters:
Cecilia F. Moss, Chaffetz Lindsey LLP
Larry P. Schiffer, Squire Patton Boggs (U.S.) LLP
Kelly Turner, American Arbitration Association
Mark Kantor, Independent Arbitrator

12:05 p.m. – 12:15 p.m. **ACKNOWLEDGEMENTS / CLOSING REMARKS**

West Side Ballroom (5th Floor)

Presenter: James I. Rubin, ARIAS•U.S. Chairman Butler Rubin Saltarelli & Boyd LLP

NYS CLE Credit:

Nine hours of Continuing Legal Education credits are available to those who attend this conference, which breaks down as follows: 1.0 CLE credits for Ethics, 6.5 CLE credits for Areas of Professional Practice, and 1.5 for Skills. This program is structured for both newly admitted attorneys and experienced attorneys. Sign-in and sign-out sheets will verify attendance at all sessions and will be the basis upon which certificates of attendance will be prepared and sent, but certification of completed credit hours to CLE boards is the responsibility of each attorney.

SAVE THE DATE

ARIAS•U.S. 2017 Spring Conference

May 3- 5, 2017

Ritz-Carlton Naples, Florida

In 2017, for the first time, ARIAS will meet in Naples, a beautiful area of Florida overlooking the Gulf of Mexico. It is accessible by air from Southwest Florida International Airport in nearby Ft. Myers.The Ritz-Carlton, Naples beachfront hotel was named to *Condé Nast Traveler's* 2013 "Gold List" and *Travel + Leisure* "World's Best List" 2013.

The beach resort's features include:

- Stunning views of the Gulf of Mexico
- 450 luxury guest rooms, including 35 suites and 70 Ritz-Carlton Club® Level rooms and suites, each with a view of the beach and Gulf of Mexico
- An exclusive world-class spa and a complimentary fitness center
- Seven innovative dining experiences
- Two heated outdoor pools including a family pool, relaxation pool, a whirlpool and a children's pool
- More than 42,000 square feet of indoor and outdoor meeting space
- Access to the Tiburon Golf Club, two 18-hole Greg Norman-designed golf courses

details at arias-us.org

Faculty Biographies & Headshots

speakers, moderators, panelists, presenters, leaders

Syed S. Ahmad
HUNTON & WILLIAMS LLP

A partner at Hunton & Williams LLP, Syed Ahmad's practice focuses on reinsurance and insurance matters. He counsels clients in a variety of disputes related to reinsurance claims under facultative and treaty contracts; he has also advised clients in connection with allocation disputes, notice obligations, the duty of utmost good faith, and rescission claims. Recent matters before him have involved all facets of the "follow the fortunes" and "follow the settlement" doctrines, including the scope of discovery permitted in those contexts. He has also dealt with matters involving the so-called "Bellefonte" defense and custom and practice discovery allowed to address that defense. Syed represents clients with direct insurance claims, including coverage under general liability, D&O, and E&O policies.

David A. Attisani
CHOATE HALL & STEWART LLP

David A. Attisani is one of *Who's Who's* 5 "Most Highly Regarded" U.S. re/insurance lawyers (2016) and is also co-chairman of Choate's re/insurance practice group, which was awarded first place in the *Reactions Legal Survey* for reinsurance and litigation (2012). He has more than 23 years of experience representing re/insurers and has handled confidential matters implicating Obamacare, variable annuities, 9/11 losses, "Superstorm Sandy," clergy abuse, the "Big Dig"/Central Artery tunnel collapse, engineering losses (Turkish oil pipeline), workers' compensation; and underwriting disputes. David graduated from Harvard Law School (honors) and Williams College (Phi Beta Kappa), and clerked in the Southern District of New York. He is consistently recognized in *Chambers USA* and *Best Lawyers in America*, and is one of only 12 reinsurance lawyers listed as a *Legal 500* elite "Leading Lawyer" (2016).

Suman Chakraborty
SQUIRE PATTON BOGGS (U.S.) LLP

Suman Chakraborty assists clients in the resolution of domestic and international commercial disputes, with an emphasis on reinsurance and complex insurance litigation. His practice encompasses state and federal court litigation as well as arbitration and other forms of alternative dispute resolution, and he advises clients on a wide range of insurance and reinsurance matters, including in the areas of insolvency, regulatory compliance, governmental investigations and disputes with managing agents. He is recognized as a Recommended Lawyer by *Legal 500* (2016) and as a Rising Star in both litigation and i nsurance by the *Expert Guides* (2015 and 2016). . Based in New York, and having practiced in both London and Tokyo, Suman brings an awareness of the needs of transnational companies as well as an understanding of his clients' commercial and industry challenges.

Hon. Brian M. Cogan
U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK

Brian M. Cogan was appointed by President George W. Bush and entered into service on June 12, 2006. Previously, he was an associate at Stroock & Stroock & Lavan LLP, becoming a partner in 1988 and general counsel to the firm in 2004. He had a commercial litigation practice concentrating on complex litigation, accountants' liability and securities fraud, insolvency, and cross-border litigation. He is the co-author of "Bankruptcy Code Impact on Civil Litigation in the Federal Courts," in *Business and Commercial Litigation in Federal Courts* (R. Haig ed., 2d ed. 2005), and the author of "Practice in the Commercial Division," in *Commercial Litigation in New York State Courts* (R. Haig ed., 2d ed. 2005). In his time on the bench, Judge Cogan has presided over several MDL cases, including antitrust, product liability, and consumer fraud cases. He is a "designated patent judge" in the Patent Pilot Program for the Eastern District of New York and chairman of the Committee on Grievances for the E.D.N.Y. He also has served as a "mentor judge" for the Federal Judicial Center's introductory program for newly appointed judges.

Royce F. Cohen
TRESSLER LLP

A partner in Tressler's New York office, Royce Cohen focuses her practice on insurance and reinsurance arbitration and litigation. She represents both cedents and reinsurers in a variety of matters, including comprehensive general liability, excess and umbrella liability, workers' compensation, asbestos, and environmental and property/casualty insurance. These matters include misrepresentations in connection with the placement of reinsurance, disputes as to the coverage provided by treaties and policies, standards of accountability of cedents as fronting companies, standards of conduct applicable to ceding companies in their dealings with reinsurers, and disputes involving program managers. Royce also has extensive experience with e-discovery issues and regularly helps clients address the costs and risks associated with managing electronically stored information, particularly in connection to litigation and regulatory compliance.

Thomas D. Cunningham
SIDLEY AUSTIN LLP

Tom Cunningham represents insurance companies in litigation, regulatory investigations, unclaimed property examinations, and compliance matters, including cybersecurity and data breach response. He regularly represents insurers and reinsurers in state and federal court or arbitration proceedings, including life reinsurance and health disputes, and is representing multiple life and health insurers in ongoing single and multi-state unclaimed property examinations. He has advised insurance and reinsurance companies on privacy, cybersecurity and data breach laws. Tom is a member of his firm's insurance and financial services group and its privacy, data security and information law group.

Howard Denbin
HDDRE STRATEGIC LLC

Howard Denbin is an ARIAS·U.S. Certified Arbitrator and an attorney with over 30 years of experience in the insurance and reinsurance industry. As outside counsel, in-house counsel, and an arbitrator, he has been involved in hundreds of reinsurance arbitrations involving the full range of legal issues and disputes. He began his reinsurance career at the boutique law firm of Lanzone and Kramer in

Faculty Biographies & Headshots

New York before moving in-house with CIGNA and the successor operations of ACE and Resolute Management, Mid-Atlantic Division. Most recently, Howard was associate general counsel and headed the Reinsurance Legal Team of Legion Insurance Company (In Liquidation). In that position, he directly arbitrated, litigated, and mediated reinsurance disputes as counsel of record as part of an in-house arbitration program he first implemented at CIGNA.

Deidre B. Derrig
ALLSTATE INSURANCE COMPANY

Deidre Derrig is corporate counsel with Allstate Insurance Company in Northbrook, Illinois. She joined Allstate in 1989 and provided legal services to the company's Reinsurance Division, which was sold in 1996 to SCOR Reinsurance Company. After serving as an assistant vice president and associate general counsel at SCOR, she returned to Allstate in 1999. Since 2006, Deidre has been involved with the negotiation, placement, and execution of Allstate's Catastrophe Reinsurance Program. In that role, she has gained experience in catastrophe reinsurance bonds, side-car arrangements, and fully collateralized catastrophe reinsurance placements. She is also involved with regulatory oversight of the program, including statutory reinsurance credit issues.

Charles G. Ehrlich
ARIAS•U.S. CERTIFIED ARBITRATOR

Charles Ehrlich was a litigation partner in an AmLaw 100 firm when he joined the insurance industry as a senior executive with the Resolution Group, a team organized to extricate Xerox Financial Services from the property and casualty insurance. For the next seventeen years, he was responsible for resolving complex, volatile, high-dollar direct and reinsurance matters as his run-off team completed its assignment for Xerox, was acquired by an investment group, and ultimately became part of the Fairfax Financial Holdings Limited family. He has held directorships in domestic and foreign insurance companies and affiliated service businesses, and he helped build a 150-person claims organization whose portfolio included mass tort liabilities, pollution, class actions, products liability, and complex commercial coverages. He has served both as an umpire and a party arbitrator and has been a speaker and instructor for ARIAS·U.S. programs and workshops.

Ann L. Field
FIELDLAW AND ARBITRATIONS

Ann Field is an ARIAS·U.S. Certified Arbitrator and a licensed attorney with over 22 years of significant experience in reinsurance and insurance coverage issues, arbitration, and litigation. She has served as an arbitrator or umpire in more than 30 insurance and reinsurance arbitrations and is also a Northwestern University-trained and -certified mediator. Prior to forming her own company, she worked at Zurich Insurance Group as the global head of reinsurance recoveries, claims and asset management, where she directed over 125 reinsurance arbitrations handled by external and in-house counsel and was responsible for Zurich's $20 billion global reinsurance asset, including all assumed and ceded global reinsurance claims across all lines of property and casualty business. Ann has a diverse and extensive background in all lines of property and casualty business involving treaty and facultative reinsurance contracts dating from 1945 through 2016. She is a vice president of ARIAS·U.S. and a co-chair of the its Strategic Planning Committee. In 2015 and 2016, *Intelligent Insurer* honored her as one of the "Top 100 Women In Reinsurance."

Dan Fitzmaurice
DAY PITNEY LLP

A longstanding partner at Day Pitney LLP, Dan Fitzmaurice represents clients in trials, arbitrations, and appeals of complex commercial disputes, with an emphasis on insurance, reinsurance, and financial matters. He has been the lead counsel in over thirty evidentiary proceedings to completion, most of which involved disputes over multiple millions of dollars. He actively participates in ARIAS·U.S. and is currently on the Strategic Planning Committee and Membership Committee. Previously, he was a member and chair of the Board of Directors and was a co-chair of the ARIAS·U.S. Industry Task Force on improving arbitration. He speaks nationally on issues relating to insurance, reinsurance, trial practice, and arbitration and has published numerous articles on these topics. He has represented clients in appellate proceedings in the U.S. Supreme Court, the U.S. Courts of Appeals for the Second, Third, Ninth, and District of Columbia Circuits, and the Connecticut Supreme Court. Dan is recognized in several reference guides, including *Chambers USA*, the *Euromoney Guide to the World's Leading Insurance and Reinsurance Lawyers*, and *Super Lawyers* (Connecticut and New England).

Patricia Taylor Fox
AMERICAN INTERNATIONAL GROUP

Patricia Taylor Fox has almost 20 years experience in the insurance and reinsurance industry. She currently serves as Deputy General Counsel in the Reinsurance Legal Division of American International Group, Inc., where she is the head of the Dispute Resolution Unit. Ms. Fox began her career in reinsurance as an associate attorney at Werner & Kennedy. Before joining AIG's legal department, she was an associate with the law firm of Simpson Thacher & Bartlett LLP, where she concentrated her practice on the resolution of reinsurance litigations and arbitrations.

Ms. Fox has co-authored articles on evidence in arbitrations, attorney-client privilege, the common-interest privilege and developments in reinsurance law, and is a frequent speaker on issues relating to the arbitration of reinsurance disputes.

Glenn A. Frankel
THE HARTFORD

An ARIAS·U.S. Certified Arbitrator, Glenn Frankel is vice president of claims with The Hartford and currently leads the Strategic Claim Management group, which is responsible for (1) direct asbestos and toxic tort (sexual molestation, lead paint, chemical exposures, sports-related head injuries, etc.) claims, and (2) assumed reinsurance. He also has responsibility for all operations of Hartford Financial Products, Inc. and Downlands Liability Management, The Hartford's U.K. operations based in Worthing, England. In addition, he sits on the board of directors for the First State Insurance Group companies. Prior to joining The Hartford, Glenn was a managing counsel with Travelers Property & Casualty and an associate with the law firm of Day, Berry & Howard (now Day Pitney) in Hartford, Connecticut.

Faculty Biographies & Headshots

Bryce L. Friedman
SIMPSON, THATCHER & BARTLETT LLP

Bryce L. Friedman is a Partner in the Firm's Litigation Department. He concentrates on representing clients in complex commercial disputes and in responding to allegations of fraud.

Bryce has particular experience in the insurance and reinsurance business. He has represented insurers in a variety of commercial, coverage, reinsurance and trade practice disputes. He has litigated and arbitrated disputes to conclusion in state and federal courts and arbitral forums across the United States. He is recognized by *Chambers* as a notable practitioner, and described by market commentators as having a "flourishing practice representing insurers in coverage disputes as well as in high profile cases revolving around alleged False Claim Act violations. He receives high praise for his "top-notch strategic thinking." He is also recognized as a national "Litigation Star" for insurance by *Euromoney's Benchmark Litigation* and was named a "Rising Star" by *Law360*.

Bryce is co-chair of the Firm's Legal Personnel Committee. In addition, he is involved in substantial pro bono work including supervising Simpson Thacher's ongoing legal clinic at the Bushwick Campus Schools in Brooklyn and serves on the Board of Volunteers of Legal Services, Inc. He was also a New York State-certified emergency medical technician and a volunteer EMS provider in New York City for over 20 years.

Andrew Gifford
GENERAL REINSURANCE CORPORATION

Andrew Gifford is senior vice president, general counsel and secretary at General Reinsurance Corporation, a Berkshire Hathaway company. In his role as global general counsel, Andrew is responsible for a broad range of issues, including transactional analysis and advice, contract drafting, litigation, compliance, employment law, and regulatory policy. Prior to joining Gen Re, he was a litigation partner in the Chicago office of DLA Piper LLP, where he represented clients in a variety of international businesses, including insurance and reinsurance, auditing and consulting services, banking, mortgage lending, and real estate. Andrew has significant experience as lead trial counsel and is a member of the United States District Court for the Northern District of Illinois' Trial Bar.

Susan Grondine-Dauwer
SEG-D CONSULTING, LLC

Susan Grondine-Dauwer has 30 years of professional and executive experience within the insurance and reinsurance industry, including roles as general counsel, chief claims officer, board member, officer, treasurer, and corporate secretary. She has been responsible for a wide range of high-level assignments involving expertise in strategic planning, mergers and acquisitions, operational management, regulatory compliance, reinsurance asset management, claims reengineering, and run-off structuring. She has technical expertise in property/casualty primary and excess/excess and surplus lines complex claims, direct and assumed claims administration, drafting and reviewing insurance and reinsurance agreements, reinsurance collections, commutations, and various types of MGA/MGU operations. Susan is a member of ARIAS·U.S. and is an ARIAS·U.S. Certified Arbitrator. She serves on the ARIAS Arbitrators Committee and the Publications Committee. She is co-chair of the newly formed Claims and Litigation Management Alliance's Reinsurance and Run-Off Advisory Board and has lectured at domestic and international conferences and academic meetings concerning insurance, reinsurance, arbitration and litigation, and run-off management issues.

Robert M. Hall
HALL ARBITRATIONS

Robert Hall is an attorney with 20 years of in-house insurance company experience, most recently as general counsel and senior vice president of Munich Reinsurance America. He has been a partner in the insurance and reinsurance practice group of DLA Piper and for the past sixteen years has had a solo practice as an arbitrator, mediator, consultant and expert witness. He is certified by ARIAS·U.S. as an arbitrator and umpire, has formal training in mediation, and has participated in over 175 arbitrations. He has been very active in regulatory matters at the state, federal, and NAIC levels and has testified in Congress and in state legislatures. He has worked on various NAIC "interested persons groups" dealing with various insurance, reinsurance, and receivership issues. In addition, Robert has published over 100 articles on insurance, reinsurance, receiverships and alternative dispute resolution. These articles may be viewed at his website, robertmhall.com.

Aimee L. Hoben
THE HARTFORD

Aimee Hoban is vice president and assistant general counsel, director of reinsurance and claims law at The Hartford. She leads a team of eight lawyers responsible for all legal issues relating to reinsurance as well as for providing regulatory and claim practices support to The Hartford's claim organization. Her team is responsible for all ceded and assumed reinsurance coverage disputes; legal advice on commutations and relations with insolvent counterparties; review of ceded contract wording and placement; strategic projects and transactions involving reinsurance; and general regulatory and business issues relating to the company's run-off entities (both domestic and international). She counsels The Hartford's property and casualty business and provides reinsurance counsel to Talcott Resolutions, which manages the company's run-off life and annuity issues. She led a multidisciplinary team in the successful Part VII court restructuring of The Hartford's U.K. run-off businesses, which was completed in October 2015. Prior to joining The Hartford, Aimee was in private practice at Murtha Cullina LLP in Hartford, with a focus on insurance coverage, environmental law, and land conservation.

Marnie Hunt
AON BENEFIELD

Marnie Hunt is the senior managing director for contracts for Aon Benfield. She has more than 20 years of experience in the insurance and reinsurance industry, having first worked at a primary insurance company for two years. She is also a member of the Contracts Committee at BRMA and the joint Law and Broker Committee at the RAA. Marnie is licensed to practice law in Minnesota. She also holds a CPCU designation, an ARe designation, and an AIAF designation, and has been a speaker at numerous industry seminars.

Faculty Biographies & Headshots

Sylvia Kaminsky
INSURANCE/REINSURANCE CONSULTANT

Sylvia Kaminsky is a certified ARIAS·U.S. arbitrator and umpire and an independent insurance/reinsurance industry consultant. For the first 15 years of her career, she was in private legal practice, focusing on coverage, defense, insurance, and reinsurance arbitration and litigation matters. She then joined Constitution Reinsurance Corporation as senior vice president, general counsel, and corporate secretary and served on the board of directors. She also served in the same capacity for Sirius Reinsurance Corporation (later Sirius America Insurance Company). Sylvia has served as a consultant and arbitrator, having participated in well over 175 arbitrations involving insurance, reinsurance, and security matters. She is the co-chair of the ARIAS Arbitrators Committee and a member of the ARIAS Law Committee. She is also on the Panel of Commercial Arbitrators and the Complex Coverage Neutral Evaluation Panel of the American Arbitration Association; the arbitration panel of FINRA; and the panel of the International Institute for Conflict Prevention.

Mark Kantor
INDEPENDENT ARBITRATOR

Until he retired from Milbank, Tweed, Hadley & McCloy, Mark Kantor was a partner in the Corporate and Project Finance Groups of the firm. He currently serves as an arbitrator and mediator, teaches at the Georgetown University Law Center (where he received the Fahy Award for Outstanding Adjunct Professor), and is editor-in-chief of the online journal, *Transnational Dispute Management*. He is a member of the Council of the American Arbitration Association, former chair and vice chair of the D.C. Bar International Dispute Resolution Committee, and a chartered arbitrator of the Chartered Institute of Arbitrators. Mark is also a member of the editorial board of *Global Arbitration Review*, the board of editors of the *Journal of World Energy Law and Business*, the board of editors of the *Journal of Damages in International Arbitration*, the editorial board of the *Journal of Technology in International Arbitration*, and the ADR Advisory Board of the International Law Institute. Among other publications, he is the author of Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence (Kluwer 2008), and "A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?" 26 Arbitration International 323 (2010).

Mark A. Kreger
KERNS FROST & PEARLMAN LLC

For over 30 years, Mark Kreger's practice has been concentrated in the fields of insurance and reinsurance transactions, claims, and disputes. He joined Kerns Frost & Pearlman as head of the firm's reinsurance practice in January 2009 after serving for many years as a senior partner in the insurance and reinsurance practice of a large Chicago-based international law firm. He has counseled insurers in the fields of professional liability, general and products liability, bad faith, and various toxic torts, including asbestos and environmental claims; he has counseled reinsurers in all lines of property, casualty, surety, A & H, and life reinsurance. Mark has also drafted and negotiated contract documents, supervised claim reviews, managed liability claims programs, and acted as lead trial counsel in numerous litigations, arbitrations, and appeals in jurisdictions throughout the U.S.

Robert Lewin
STROOK & STROOK & LAVAN LLP

Robert Lewin is chair of the firm's insurance and reinsurance litigation/arbitration practice. He has represented numerous clients in various insurance and reinsurance coverage disputes involving comprehensive general liability, directors and officers, errors and omissions, excess and umbrella liability, workers' compensation, and financial guarantee and performance bonds. In the reinsurance area, he has represented cedents, reinsurers, retrocessionaires, pool members, intermediaries, and liquidators. Over the past 30 years, he has been responsible for several complex litigations and arbitrations at both the trial and appellate level, in a variety of domestic and foreign jurisdictions. He recently successfully arbitrated a dispute that resulted in a nine-figure award. Robert is active in various professional organizations and has served as a speaker at insurance/reinsurance conferences.

Susan E. Mack
ADAMS AND REESE LLP

Susan Mack serves as special counsel with the Jacksonville office of Adams and Reese LLP, following a 25-year career as general counsel of both insurers and reinsurers in the life/health and property/casualty sectors. Although she is engaged in the practice of insurance regulatory law, she still accepts appointments as an arbitrator, umpire, mediator, and expert witness. A founding director of ARIAS·U.S. and the first woman to serve on the organization's board of directors, she currently holds ARIAS·U.S. certifications as an umpire and arbitrator and is also a qualified mediator. Susan has had the privilege of working as chief treaties officer, chief claims officer, and chief compliance officer of her organizations and has drawn on that expertise to deliver more than 50 presentations on issues ranging from reinsurance occurrence and allocation to life insurance securitization. She serves on the *Journal of Reinsurance's* Industry Advisory Board.

Sean Maloney
AMERICAN INTERNATIONAL GROUP

Sean Maloney is deputy general counsel of AIG's Reinsurance Legal Group, leading AIG's global transactional, contract wording, and regulatory reinsurance practices. He has been with AIG since June 2012; previously, he was an associate in the Insurance & Financial Services practice at Sidley Austin LLP. He graduated from Harvard Law School in 2004.

Andrew Maneval
CHESHAM CONSULTING, LLC

As president of Chesham Consulting, Andrew Maneval serves as an arbitrator and mediator in the insurance/reinsurance and financial services industries and provides consulting and expert witness services in these fields. He is accredited as an umpire and arbitrator by ARIAS·U.S., FINRA, and AIRROC and is authorized as a mediator in New Hampshire state courts. He has trained various industry groups on arbitration, reinsurance, and negotiations, has frequently lectured on these topics, and has been involved in hundreds of arbitrations. Andrew worked as an attorney for thirteen years before becoming an executive with various insurance and reinsurance companies in The Hartford Financial Services Group, Inc. Andrew was with The Hartford for sixteen years; prior to that, he was a partner in the New York firm of Mound, Cotton,

Faculty Biographies & Headshots

Wollan & Greengrass, specializing in insurance and reinsurance matters. He was a co-founder of AIRROC and served as its first chairman. He has also served as a charter member of the Insurance/Reinsurance Industry Dispute Resolution Task Force and helped draft AIRROC's Arbitration Procedures.

Michael Menapace
WIGGIN AND DANA LLP

Michael Menapace represents insurers in court cases and arbitrations and has litigated numerous disputes through final verdict, including disputes concerning bad faith, insurance coverage, reinsurance, premium calculations, and allocation among policies. Leading insurance industry trade groups have engaged Michael to represent them on matters of industry-wide importance before trial and appellate courts; he has also advised insurers on policy construction, coverage, compliance, and regulatory issues and often represents stock, mutual, and captive insurers on their dealings with state regulators, including proceedings concerning rates, applications for acquisition of control, and market conduct exams. In addition, he advises companies on a variety of privacy and data protection issues, defends companies facing potential data breach liability, and advises clients in connection with internal and government investigations and responses thereto, including cyber breaches. Michael teaches insurance law at the Quinnipiac University School of Law and is co-editor of *The Handbook on Additional Insureds*, published by the ABA (2012).

Neal J. Moglin
FOLEY & LARDNER

Neal Moglin is a partner and litigation attorney with Foley & Lardner LLP and vice chair of the firm's Insurance & Reinsurance Litigation. An experienced litigator who regularly represents ceding companies and reinsurers in arbitrations involving life/accident & health and property/casualty contracts, he has also represented insurers and reinsurers in federal and state courts in New York, Illinois, Texas, Florida, and other jurisdictions. Neal also advises clients on regulatory compliance and risk management issues and assists them in the development of new products and the acquisition and disposition of books of business. He is regularly ranked in both *Chambers USA* and *Legal 500 USA*.

Cecilia Froelich Moss
CHAFFETZ LINDSEY LLP

A founding partner of Chaffetz Lindsey LLP, Cia Moss has litigated and arbitrated complex commercial and financial disputes, primarily in the insurance and reinsurance field, for the past 20 years. She has handled disputes arising out of property/casualty, life/health, workers' compensation carve out, finite risk, and aviation reinsurance, and her cases have covered the major areas of controversy in insurance and reinsurance, including issues of contract interpretation, number of occurrences, allocation and late notice, and claims for rescission based on fraud or fraudulent inducement. She also has substantial experience with issues arising out of the Federal Arbitration Act, including questions about the enforceability of arbitration agreements, the propriety of consolidation of arbitrations, and issues relating to enforcement of arbitral awards. Cia is an active member of the ARIAS·U.S. Law Committee and is admitted to practice in state and federal courts in New York and in the Second Circuit.

Elizabeth A. Mullins
SWISS RE MANAGEMENT (U.S.) CORPORATION

Elizabeth Mullins is a managing director of Swiss Re Management (US) Corporation. She is head of the global Dispute Resolution & Litigation team and leads a team of lawyers based in the U.S. and U.K. Prior to joining Swiss Re, Elizabeth was president and chief executive officer of a New York medical professional liability carrier. Before that, she was a litigation partner with Stroock & Stroock & Lavan LLP, in New York City, practicing before both state and federal courts and regulatory tribunals, and handling a range of insurance and reinsurance matters and other civil litigation. In 1991, Elizabeth was seconded to a London firm of solicitors, Cameron Markby Hewitt (now known as CMS Cameron McKenna), and worked on matters involving syndicates at Lloyd's and London Market companies.

Julie Pollack
SWISS RE AMERICA

Julie Pollack is a senior vice president and head of Americas P&C Reinsurance Contracts for Swiss Reinsurance America, leading a team of lawyers and other contracts professionals delivering advisory oversight for reinsurance contract wording in Canada, Latin America, and the United States. She is also a member of Swiss Re's Global Contracts leadership team. Julie joined Swiss Re in 2001 as an associate general counsel and has focused on the contracts function since 2006. Before joining Swiss Re, she practiced with law firms in New York and Philadelphia, concentrating in insurance coverage litigation and reinsurance arbitration.

Brad Rosen
BERKSHIRE HATHAWAY GROUP

Brad Rosen is a vice president and counsel with the Berkshire Hathaway Reinsurance Division, where he serves as a legal resource on a variety of matters. Previously, he was an associate at Quinn, Emanuel, Urquhart & Sullivan LLP in New York. Brad also serves as an adjunct lecturer for the Yale College Computer Science Department in New Haven. He received a master's of science and bachelors of science from Yale University in 2004 and his juris doctor from Harvard Law School in 2008.

James I. Rubin
BUTLER RUBIN SALTARELLI & BOYD LLP

James Rubin is a trial lawyer and co-head of the reinsurance litigation and arbitration practice at Butler Rubin Saltarelli & Boyd LLP. He is a founding partner of the firm and has extensive experience representing insurance and reinsurance companies and brokers in hundreds of disputes. James has repeatedly been named as a national leader in insurance and reinsurance law in publications including *Chambers USA*, *The Legal 500*, *The Best Lawyers in America* and *Super Lawyers*. He is a member of the board of directors of ARIAS·U.S and chair of the ARIAS Ethics and Publications committees; he also co-authored ARIAS' original *Guidelines for Arbitrator Conduct*.

Faculty Biographies & Headshots

Larry P. Schiffer
SQUIRE PATTON BOGGS (U.S.) LLP

Larry Schiffer is a partner in the New York office of Squire Patton Boggs (U.S.) LLP, where he practices complex commercial, insurance, and reinsurance litigation, arbitration, and mediation. He also advises on coverage, insurance insolvency, and contract wording issues for a variety of insurance and reinsurance relationships. He is chair of the ARIAS•U.S. Technology Committee and a member of the ARIAS•U.S. Ethics Discussion Committee; he is also a member of the ABA's Tort Trial & Insurance Practice Section, where he was chair of the Excess, Reinsurance & Surplus Lines Committee. He was chair of the New York State Bar Association Committee on Association Insurance Programs for nine years and has lectured and has been published on reinsurance and insurance topics for ARIAS•U.S., ABA, ACI, Mealey's, PLI, C-5, HarrisMartin, HB Litigation, Lloyd's Market Association, *Reinsurance* Magazine, *Insurance Day*, the *Tort & Insurance Law Journal*, *Westlaw Journal – Insurance Coverage*, and others. Larry edits the Squire Patton Boggs Reinsurance Newsletter and the Insurance and Reinsurance Disputes Blog, InReDisputesBlog.com. He also is the moderator of the Reinsurance Disputes Group on LinkedIn. He has been recognized by *Chambers USA*, *Euromoney Guide to the World's Leading Insurance and Reinsurance Lawyers*, *The International Who's Who of Insurance & Reinsurance Lawyers*, *The Legal 500*, and *Super Lawyers.* He serves as a mediator for the United States District Court for the Southern District of New York and the New York Supreme Court Commercial Division.

Stacey Schwartz
SWISS RE MANAGEMENT (U.S.) CORPORATION

Stacey Schwartz is a senior vice president and senior counsel with Swiss Re Management (U.S.) Corporation. Stacey is a member of the Dispute Resolution and Litigation group, where she is responsible for counselling clients in connection with the personal accident/workers' compensation carve-out, property and casualty, and traditional life lines of business, and the strategic management of arbitrations.

Prior to joining Swiss Re, Stacey was with the Lumbermens Mutual Casualty Company where she counseled the ceded reinsurance group on all aspects of complex asbestos, environmental, mass tort and clash reinsurance loss presentations, as well as reinsurance arbitration and dispute resolution. She also had responsibility for managing the reinsurance contract wording unit, and developing standardized wording for use in Lumbermens' reinsurance agreements.

Steven C. Schwartz
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Steve Schwartz is a partner at Chaffetz Lindsey LLP. He has devoted most of his practice to reinsurance arbitration and litigation since the early 1990s. During that time, Steve has handled disputes relating to both property/casualty and life and health reinsurance, as well as finite risk reinsurance. Steve is the author of *Reinsurance Law: An Analytic Approach*, a comprehensive treatise first published in 2009 and updated semi-annually since then.

Robert E. Sweeney, Jr.
CNA INSURANCE

Robert Sweeney is a senior litigation attorney in the CNA Law Department in Chicago, Illinois. He joined CNA in 2011 after spending many years with the firm of Lord, Bissell & Brook (now known as Locke Lord). He specializes in reinsurance dispute resolution, has handled numerous arbitrations, and has represented various domestic and alien insurers and reinsurers in a wide varsity of complex matters during his career. He has likewise assisted with contract drafting and has provided counseling services and opinion letters to cedents and reinsurers in connection with diverse issues arising from their treaties and facultative certificates. His experience includes contract formation and interpretation, underwriting issues, contractual compliance, resolving allegations of bad faith, coverage issues, and allocation questions. While in private practice, he represented parties involved in various lines of business, including life and health, surety, professional liability, automobile workers' compensation, property, product liability, and general liability. Since arriving at CNA, he has taken a lead role in resolving both ceded and assumed reinsurance claims.

Elizabeth M. Thompson
After a successful career as a trial attorney, Elizabeth Thompson became vice president – special litigation of Electric Mutual Liability Insurance and subsequently chief legal officer/general counsel/chief claims officer of Electric Insurance. At various times with both companies, she had operational responsibility for the commercial and personal lines' litigation and claims departments for general, products liability, toxic, environmental, fidelity, property, latent disease workers' compensation, commercial and private passenger automobile, personal excess liability, and homeowner's coverages. She was responsible for reinsurance relationships and recoveries and was extensively involved in coverage issues, particularly related to latent disease and environmental exposures. She developed and implemented a mediation process and mediation training program for all claim/litigation departments. Elizabeth has served as an arbitrator, umpire, or mediator in 100 insurance and reinsurance disputes involving a myriad of issues. She is an ARIAS•U.S. Certified Arbitrator, Certified Umpire, and Qualified Mediator and has been a frequent ARIAS conference speaker and arbitrator/umpire training faculty member.

Kelly Turner
AMERICAN ARBITRATION ASSOCIATION

Kelly Turner is a vice president with the American Arbitration Association (AAA) and leads the AAA's Chicago Regional Office, focusing on the AAA's Commercial Division. In that role, she interacts with AAA clients who file commercial cases and the neutrals who serve as arbitrators and mediators in those cases across nine states. She also is involved in arbitration-related training in the region. Before joining the AAA, Kelly spent more than 19 years at Locke Lord LLP, where she handled complex commercial litigation and was involved in a wide variety of cases, including class actions and cases alleging consumer fraud, insurance coverage, breach of contract, business torts, antitrust, and other commercial disputes. She has represented clients in state, federal, and bankruptcy courts across the country and has had substantial involvement with the financial services and related industries, including insurance companies, mortgage loan servicing companies, and a payment card industry client.

Faculty Biographies & Headshots

Anthony Vidovich
XL GROUP PLC

Anthony Vidovich is senior vice president and general counsel for global insurance claims for the XL Group PLC family of companies. At XL, he manages a team of experienced lawyers to support the international insurance dispute resolution, coverage advice, monitoring counsel, and attendant claims-related legal needs of the company's diverse insurance businesses, including property, casualty, D&O, E&O, EPL, cyber, marine, aviation, product recall, and attendant specialty, manuscript, and global program-based programs and products. Prior to joining XL, Anthony was senior vice president, associate general counsel, and director of commercial markets law for The Hartford, where he led a team of experienced lawyers and legal professionals supporting the Commercial Property & Casualty, Group Life and Disability, and Corporate Claims businesses of The Hartford. Before assuming the director of commercial markets law position, Anthony was the director of reinsurance law for the insurance and reinsurance operations of The Hartford. He is an ARIAS•U.S. Certified Arbitrator, former voting member of the ARIAS•U.S. Arbitration Task Force, and a frequent speaker at industry conferences.

Maria T. Vullo - Keynote
Maria T. Vullo was confirmed by the New York State Senate as superintendent of financial services on June 15, 2016. In this position, she is responsible for protecting consumers and markets in the state of New York from fraud and financial crises, as well as reforming the regulation of financial services to keep pace with the industry's rapid evolution. Prior to joining DFS, she was a litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, where she led civil, criminal, and regulatory investigations before courts and governmental authorities across the country. She has also served as executive deputy attorney general for economic justice in the Office of the New York State Attorney General, where she oversaw the Bureaus of Investor Protection, Antitrust, Real Estate Finance, Consumer Frauds and the Internet, leading investigations across New York to protect investors and consumers from fraud. Over the course of her career, she has been involved in litigations and investigations involving the financial services sectors and fraud, real estate, health care, insurance, tax, consumer protection, bankruptcy, antitrust, and constitutional law. An accomplished trial lawyer, Maria has argued before the U.S. Supreme Court, the U.S. Courts of Appeals for the Second, Ninth, and Tenth Circuits, and the New York State Appellate Division. She has been named a "New York Super Lawyer" by *Super Lawyers* Magazine and has been included in numerous leading lawyer lists published by the *National Law Journal* and other leading publications.

Alysa Wakin
ODYSSEY RE

Alysa Wakin is vice president and claims counsel for Odyssey Reinsurance Company where she manages the litigation and arbitration of disputes on behalf of that company and its subsidiaries. Prior to joining Odyssey Re, Alysa was a litigator with the firm of Wiley Rein & Fielding where she represented insurers and reinsurers in complex litigation and arbitration matters and provided advice and counsel on a wide range of insurance and reinsurance topics. Alysa first entered the world of reinsurance arbitrations in 1995 as an associate with the firm of Werner & Kennedy.

Alysa previously served on the ARIAS·U.S. Education Committee and currently serves on the Strategic Planning Committee.

Richard Waterman
NORTHWEST REINSURANCE INC.

Richard Waterman is a charter member of ARIAS·U.S. and has been a Certified Arbitrator since 1998. In addition to his substantial arbitration experience, Richard has accumulated extensive industry knowledge as an underwriter, senior executive, chief executive officer, and board member of several prominent insurance companies and through his consulting assignments with more than 80 domestic and international insurance and reinsurance companies. Richard draws on his considerable industry experience and knowledge of industry custom and practice for every arbitration and mediation appointment.

David Winters
BUTLER RUBIN SALTARELLI & BOYD LLP

David Winters is a trial lawyer who concentrates on reinsurance and complex business litigation. He has had significant litigation experience, both as lead counsel and second chair, representing clients in disputes before arbitration panels and state and federal courts. He has also handled numerous reinsurance arbitrations, including life reinsurance disputes, and participated in health care litigation and managed care disputes. As a result, he has had considerable experience handling regulated and sensitive information in the context of reinsurance arbitrations and litigation generally. In 2016, David received the CIPP/US designation from the International Association of Privacy Professionals (IAPP), indicating that he is a certified information privacy professional for the U.S. private sector. He is a member of Butler Rubin's HIPAA Compliance and Privacy Committee.

Jonathan Witte
CIGNA

Jonathan Witte is associate chief counsel with Cigna, a global health services company. Jonathan manages the commercial contracting area within the legal department, counsels information technology, works with the information protection and privacy areas and advises on records retention. He has also managed commercial litigation and class actions, and domestic and international reinsurance disputes.

Participate in the Career Gear & Dress for Success Annual Suit Drive!

Do you have extra business attire to share with someone just starting their career?

ARIAS•U.S. will be hosting a suit drive to benefit Career Gear & Dress for Success at the 2016 Fall Conference on Thursday, November 17, 2016.

If your donations are appropriate to wear to work and you would be comfortable wearing your donated item to an interview, we'll take it! Donations can be dropped off as you arrive at the ARIAS•U.S. Registration desk in the South Pre-function Registration Booth on the fifth floor. All donations are 100% tax-deductible. We will be collecting new or gently-worn men's and women's professional clothing and accessories including the following:

FOR WOMEN

Items such as suits, blouses, dresses, dress pants, closed-toe shoes, accessories, hand bags, and attaché bags are appropriate.

FOR MEN

Items such as business suits, dress shirts, ties, and blazers, over coats, dress pants, dress shoes, belts, brief cases, and portfolios, watches, tie clips, and cufflinks are appropriate.

No Clothes to Donate?

Career Gear and Dress for Success accept monetary donations to provide employment retention services to its clients. This ongoing support enables men and women to successfully transition into the workforce, build thriving careers, and succeed both professionally and personally.

All contributions are tax-deductible. Please make your check payable to Career Gear or Dress for Success Worldwide; Donations can be dropped off as you arrive at the ARIAS•U.S. Registration desk in the South Pre-function Registration Booth on the fifth floor. A receipt will be mailed to you.

If you would like more information about Career Gear or Dress for Success, please visit www.careergear.org or www.dressforsuccess.org.

Thank you for your support!

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About Career Gear

Career Gear is a national non-profit organization that promotes the economic independence of disadvantaged men by providing not only a suit, but also a network of support and the necessary career development tools to help men continue their upward path to becoming successful, self-sufficient fathers and leaders among their communities. Since 1999, Career Gear has provided professional attire, mentoring, and job-retention and advancement coaching to more than 30,000 men.

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Dress for Success is an international not-for-profit organization that promotes the economic independence of disadvantaged women by providing professional attire, a network of support, and the career development tools to help women thrive in work and in life. Dress for Success has provided clothing, confidence and career boosts to more than 600,000 women since 1997.

— GENERAL SESSION —
If You Want Reliability Should We All Just Get a Dog?

Thursday, November 17, 2016, 9:20 a.m. – 10:05 a.m.

Materials:

THE ISSUE OF "RELIABILITY" IN REINSURANCE ARBITRATIONS

Presented by:
Mark A. Kreger, Kerns, Frost & Pearlman, LLC
Robert Sweeney, CNA Corporate Litigation
Howard Denbin, HDDRe Strategic LLC
Deidre Derrig, Allstate Insurance Company

THE ISSUE OF "RELIABILITY" IN REINSURANCE ARBITRATIONS

Deidre Derrig, Allstate Insurance Company

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Mark A. Kreger, Kerns, Frost & Pearlman, LLC

Robert Sweeney, CNA Corporate Litigation

*** This paper is intended to provoke thought and discussion during the 2016 ARIAS Fall Conference. It has been jointly submitted, but it does not necessarily reflect the views of each contributor or their company, law firm, or clients.

INTRODUCTION

Parties who opt to include an arbitration clause in their reinsurance contracts typically give up the safeguards provided by the well-established procedural and evidentiary rules used in courtrooms, as well as the binding effect of precedent concerning the substantive legal points that may be pertinent to disputes that could eventually arise between the parties. Similarly, if an arbitration clause governs dispute-resolution between two parties: 1) there is no opportunity to have factual differences resolved by as many as twelve disinterested people; and 2) there is very little chance for the losing party to obtain any sort of appellate relief.

Since an entity agreeing to arbitrate is evidently relinquishing some very valuable rights, it would be reasonable to wonder why a sophisticated commercial entity would agree to have its disputes resolved by merely 1-3 people who are given vast leeway in how they perform their functions; and are given the power to make important decisions in private amongst themselves; and who further enjoy the absence of any significant concern that their decisions will be overturned. The generally accepted answer to that question is that arbitration allows commercial disputants to resolve their differences in a non-public forum using experienced industry professionals who understand the subject matter and can appreciate and apply "industry custom and practice" to reach a fair resolution. Using a small number of knowledgeable people as the decision-maker(s) should also theoretically lead to a quicker and less-expensive disposition of the parties' disagreement.

Since many reinsurance contracts (both historically and currently) include arbitration clauses, it seems apparent that most participants in the reinsurance industry remain generally willing to cede broad dispute-resolution authority to arbitration panels - notwithstanding the reality that important safeguards may be lost. Yet, it is probably fair to say that the system remains imperfect and some of the participants are less than fully satisfied. In fact, one reason for the existence of ARIAS•U.S. is to continually work toward establishing a consensus on how best to make improvements.

One of the oft-repeated areas of concern relates to a perception that reinsurance arbitrations are not sufficiently "reliable". The procedures used by panels can vary widely, and the substantive results are far less predictable than they would be in a courtroom litigation. Consequently, the issue of "reliability" may be a fertile ground for ongoing inquiry and improvement by the participants in ARIAS-U.S.

Positive Steps By ARIAS•U.S.

It should be noted, of course, that ARIAS•U.S. over the years has developed a number of initiatives that may tend to increase reliability. For example:

Code of Conduct

ARIAS•U.S. published on its website a revised Code of Conduct that became effective on November 13, 2015. The purpose is to provide guidance to arbitrators and to encourage high standards of ethical conduct amongst panel members.

Practical Guide

In 2004 ARIAS•U.S. made available on its website a revised Practical Guide to Reinsurance Arbitration Procedure.

This is a useful tool that encourages some consensus regarding the general way in which reinsurance arbitrations should normally be conducted.

Umpire Questionnaires

The method in which parties select the umpire in an arbitration is usually considered to be extremely important. In an attempt to facilitate full disclosure and fairness in the selection process, ARIAS•U.S. publishes on its website a model form - and the form is periodically revised in order to accommodate improvements sought by the members.

ARIAS•U.S. Rules

Within the past couple of years ARIAS•U.S. also developed a set of Rules for the Resolution of U.S. Insurance and Reinsurance Disputes. It is noteworthy that these were proposed as rules rather than mere guidelines, but they are not binding and enforceable unless the parties engaged in the dispute have either placed them into their arbitration clause or have otherwise agreed to jointly abide by them.

Neutral Panel Rules

In an attempt to deal with the "reliability" problems related to the use of party-appointed arbitrators, and the perception that sometimes arbitrations in the U.S. may be too partisan, ARIAS•U.S. offers on its website a set of procedural rules for parties who may wish to have an all-neutral panel preside over the parties' dispute.

The Issue

Ultimately, arbitration is a private contractual undertaking between two parties. Rules, guidelines, and forms can be suggested by ARIAS•U.S. but they are technically unenforceable unless the parties have adopted them in their contract or have subsequently agreed to be bound. This sometimes leads to inconsistencies, and situations in which a participant (a company, an outside counsel, or even a panel member) is left with a feeling that the arbitration process is insufficiently reliable.

A COMPANY REPRESENTATIVE'S VIEW

When agreeing to arbitrate disputes, the reinsurance industry likely envisioned a confidential, cost effective and efficient adjudicatory proceeding before experienced industry representatives well able to assess contracting parties' intent based, in part, on the industry's custom and practice. Unfortunately, reality does not always meet vision; this is true for the reinsurance arbitration process where, increasingly, companies are finding the process' costs savings and efficiencies to be overstated.

The confidential nature of most reinsurance arbitrations prohibits an empirical analysis of how often the arbitration process "breaks down" thus requiring parties to seek judicial intervention. As detailed below, however, a Lexis search of reported federal and state reinsurance cases[1] indicates an increase in the number of cases involving reinsurance arbitrations.

1995-1999	2000-2004	2005-2009	2010-2014	2015-2016
133	259	299	324	118

Arbitration Provisions in Newly-Placed Contracts

Despite its drawbacks, a company's desire to protect proprietary and confidential information, modeling data, and claims analyses may argue in favor of utilizing the reinsurance arbitration process. As such, arbitration provisions in newly-placed contracts should be drafted with an aim toward improving the procedural reliability of the arbitration process. This can be accomplished by including provisions:

- allowing potential consolidation of an arbitration across contracts in the same program and with reinsurers on these contracts as long as the arbitration involves the same dispute
- clarifying that the panel must follow the provisions of any confidentiality requirements, as well as award late pay-

1 Using the term "reinsurance" within the same sentence as the search term "arbitrat!"

ments penalties if such an article is invoked

- allowing a cedent to forego arbitration and instead bring an action in court against a "Runoff Subscribing Reinsurer" (as defined is appended Exhibit A)

ARIAS Scheduling Order

Absent its counterparty's consent to adjudicate a matter in court, a company with legacy business must utilize the reinsurance arbitration process. Arbitration proceedings governed by sparse arbitration provisions often found in legacy reinsurance contracts may benefit from a more comprehensive scheduling order based on the ARIAS recommended scheduling order. Scheduling orders can address the following potential issues, which may aid in the procedural reliability of the process:

- require parties to submit more detailed Preliminary Statements in order to frame and define the dispute and provide some guidance as to needed discovery
- limit the number of depositions and hearing witnesses
- specify when an *ex parte* prohibition incepts and terminates
- require the parties to include their proposed awards with pre-hearing arbitration briefs, and limit the relief to be granted by the panel to that which is requested in the parties' proposed awards
- if the contract is silent, specify whether state or federal arbitration statutes govern the proceeding and whether rules of evidence govern the proceeding

Why Reliability in the Reinsurance Arbitration Process Matters

The inability to predict the procedural aspects of the arbitration process hinders a company's ability to budget external and internal resources. Adherence by the parties to agreed-upon arbitration procedures – including confidentiality – assists in managing and budgeting costs and resources by obviating the need for panel and/or judicial intervention with its attendant and unexpected costs. As the costs of arbitration proceedings increase and become more difficult to predict, a company may find the judicial process, with its rules of procedure, rules of evidence, and an appellate review process, more predictive and thus, preferable. Further, as courts increasingly adjudicate reinsurance contract disputes, a company may become more accustomed to the litigation process.

The lack of any precedential value to arbitration decisions results in a company's counsel often predicting outcomes based on a paucity of legal cases decided by strangers to the insurance and reinsurance industry. Further, it is difficult to analogize case law decisions, which are often dependent on contract wording, with an arbitration panel's potential award, which is more likely dependent on the custom and practice of the reinsurance industry. This inability hinders a company's ability to estimate the probable loss for certain reinsured claims.

The confidential nature of arbitration proceedings means a party is aware of its own "wins and losses" and, for the most part, not those of its colleagues with similar claims, wording, and disputes. This lack of data limits a predictive analysis of the chances of succeeding in an arbitration proceeding. As the business community increasingly depends on the collection, organization, and analysis of large sets of data to predict outcomes, it may find that confidentiality agreements, depending on their scope, hinder "big data" analytics.

Finally, increased participation by alternative market mechanisms in the reinsurance industry means a cedent's reinsurance partner may be a capital provider as opposed to a reinsurance underwriter. Capital providers likely have little, if any, experience in reinsurance arbitrations and may prefer to have their disputes decided by a court as opposed to reinsurance industry experts. The increasing costs and putative lack of procedural reliability attendant with the reinsurance arbitration process may therefore cause these capital providers to insist on court adjudication of contractual disputes.

AN OUTSIDE COUNSEL'S VIEW

Outside counsel routinely advise their clients that they "don't guarantee outcomes" in dispute resolution proceedings, a piece of advice that automatically imparts a sense of unreliability. It is advice that applies as much in the context of litigation as it does to arbitration proceedings. Counsel, however, are quite familiar with their clients' need for estimates of the likelihood of success in the cases assigned to them, whether they be litigations or arbitrations. Such estimates are based, first and foremost, upon counsel's evaluation of the intrinsic strengths and weaknesses of their cases based upon

the facts of the cases as counsel understand them. Nevertheless, when counsel thinks of "reliability" in the context of arbitration proceedings they are not thinking as much about handicapping the chances of achieving successful outcomes as they are about the procedural aspects of the process. From counsel's perspective, the concept of "reliability" in arbitration relates more to the procedures that will be used to reach the result than to a prediction of the eventual outcome. What are some of the procedural elements of typical ARIAS-style reinsurance arbitrations that differentiate them from what counsel encounter in the litigation process, and which contribute to a greater or lesser degree of "reliability"? The following are examples of procedural aspects of the process that both supporters and critics have identified as contributing to or detracting from reliability.

I. Form of the proceeding

A) Consolidated proceedings – who decides?

In litigated matters, both state and Federal rules of civil procedure govern the joinder of multiple parties and claims in a single proceeding. See, e.g., N.Y.CPLR-Article 10; 735 ILCS 5/2-404-407, 614; F.R.C.P. 10, 18-21. There are well-established principles of law governing the disposition of motions addressed to the pleadings in litigation, including motions relating to improper joinder of parties and claims under the applicable procedural rules. The rules also typically allow for severance of claims or counterclaims for trial, in instances where it would be inconvenient for the court to try all of the claims, counterclaims or cross-claims in a single proceeding. See, e.g., F.R.C.P. 42.

Since reinsurance arbitrations are creatures of contract, rules regarding consolidated arbitration proceedings involving multiple parties, claims and counterclaims do not exist, except to the extent provided in the contracts themselves. With respect to the parties, except in unusual circumstances, only those who have agreed to submit their contract disputes to arbitration may be joined as parties to the proceeding. *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79,83, 123 S. Ct. 588,154 L. Ed. 2d 491 (2002) . However, issues regarding consolidation of disputes involving multiple parties, claims, counterclaims or cross-claims in a single arbitration proceeding often arise in cases where one party seeks consolidation in the absence of an express agreement to do so.

Consolidation issues were traditionally decided by the courts, but the trend in more recent cases has been to hold that such issues should instead be decided by the arbitrators. See, e.g., *Munich Reinsurance America Inc. v. National Casualty Co*., 2011 WL 1561067 S.D.N Y. April 26, 2011); *Employees Insurance Co. of Wausau v. Century Indemnity Co*., 443 F. 3d 573 (7th Cir. 2006). Saying that consolidation issues are for arbitrators rather than courts to decide adds an element of unpredictability into the process. Without legal experience or precedent to guide them, arbitration panels may be faced with a number of difficult decisions regarding which arbitrators are authorized to decide complex questions of consolidation involving multiple parties or multiple panels. Courts have differed in their approaches to these issues. Compare, *Markel International Ins. Co. v. Westchester Fire Ins. Co*., 442 F. Supp. 2d 200 (D.N.J. 2006) with *Employees Ins. Co. of Wausau v. Century Indemnity Co.*, 2005 WL 2100977 (W.D. Wis. July 19, 2005) *aff'd* 443 F. 3d 573 (7th Cir. 2006).

B) Reasoned awards and the form of relief that may be granted.

In those litigations where the issues will be decided by a judge rather than a jury, the court will typically author either an opinion, or findings of fact and conclusions of law, that will provide the parties with an explanation of the court's reasoning for the result it reached. This practice promotes reliability to the extent it provides a check against an arbitrary or capricious result, or one based upon mistakes in the law or misunderstanding of the facts.

In reinsurance arbitrations, reasoned awards in which the arbitration panel provides the parties with the rationale for its decision are the exception rather than the rule, at least in cases where the contracts are silent on the issue and one party or the other objects to such an award.

With respect to the nature of the relief that may be ordered by an arbitration panel, there are very little checks on the panel's authority to devise a form of award that may involve declaratory relief rather than or in addition to the typical monetary award, and that might or might not have been requested by one of the parties at the outset of the proceeding or at any time prior to the entry of the final award. See, e.g*., Star Ins. Co. v. National Union Fire Ins. Co.*, No. 15-1403, 2016 BL 267734 (6th Cir. Aug. 16, 2016) (vacating arbitration panel's final award and noting that panel majority had awarded a form of relief that resulted in losing party being liable "for millions more than it had anticipated when the arbitration

commenced"). The inability to define or predict the limits of the relief that may be granted by an arbitration panel, as distinguished from the forms of relief that are available to a court in a litigated matter, may add a significant element of unpredictability to the dispute resolution process in certain cases.

II. Identifying the decision makers

Judges in state and federal courts across the United States differ dramatically in their familiarity with the business of reinsurance, their understanding of the terminology and contractual forms employed in the industry, and their experience in the resolution of reinsurance disputes. For example, while justices of the commercial division of the New York Supreme Court in Manhattan certainly have experience with reinsurance cases, as do some Federal courts in major commercial centers, most state courts have little experience in such matters, even those sitting in some of the major commercial jurisdictions. Looking at it in one way, there is a certain unpredictability that flows from a process in which the decision makers are unfamiliar with the business, terminology, contracts, customs and practices of the reinsurance industry, and have little or no experience or track record in resolving disputes in the industry. Obviously, the parties have little or no control over the identity of the judge who will decide their dispute if the matter is in litigation. Viewed another way, however, judges have been trained to apply rules of law and contract construction to the resolution of contractual disputes, regardless of the industry in which they arise, and predictability might be said to result simply from the application of those well-established rules.

In the case of reinsurance arbitrations, the contracts typically specify how many arbitrators will decide the case, what their qualifications will be, and the manner by which they will be appointed. The contracts often specify that arbitrators must be current or retired officers or directors of insurance or reinsurance companies. Other contracts may require that arbitrators have certain credentials, such as having been certified by ARIAS•U.S. These contractual provisions lend predictability to the process by specifying the universe of individuals eligible to serve, and establishing the process by which the arbitrators will be selected, as opposed to the relative randomness of the assignment of judges in U.S. courts.

It is beyond the scope of this paper to recite the pros and cons of a procedure which employs party-appointed advocate arbitrators, as opposed to one which employs all neutral arbitrators. For this purpose, it may be said that either system can be supportive of the goal of reliability simply because the process by which the decision makers are chosen is expressly set forth in the reinsurance contract.

Where randomness and unreliability enter more often is in the selection of the neutral third arbitrator or umpire by two party-appointed arbitrators. Typically, reinsurance agreements provide that if the party-appointed arbitrators cannot agree on the appointment of an umpire, which in practice they usually do not, then some form of random procedure is employed to select the umpire. The process of random selection often involves the two sides proposing separate slates of candidates, followed by a procedure by which each side strikes candidates from the other side's slate and then draws lots. Another somewhat less random process involves each side ranking the candidates on both slates, with the candidate achieving the highest total rank being selected automatically to serve as the umpire. It is often said that using a random process of umpire selection may determine the ultimate outcome of the arbitration, because the candidates slated by the opposing parties are often believed to have certain predispositions by reason of their backgrounds or their reputations in prior cases.

While the fairness of such a process has been questioned, "reliability" should not be doubted. Experienced counsel and their clients will reliably vet and select those party-appointed arbitrators best-suited to the needs of their cases. Experienced arbitrators will reliably recommend umpire candidates with whom they have had good working relationships, and who they believe are likely to be sympathetic to their party's cases.

III. Confidentiality

It was once thought that confidentiality was one reliable advantage of arbitration over litigation. It is certainly accurate to state that arbitration is inherently *more* confidential than litigation, because public access to arbitration proceedings is not allowed, and no public record of the proceedings is made. Moreover, most parties to arbitration proceedings enter into confidentiality agreements in order to limit public disclosures. Such agreements, however, do not always assure that information about the arbitration actually remains confidential. Post-arbitration judicial proceedings may be filed to confirm or vacate an arbitration award, requiring that, at a minimum, some form of public record be made of the existence of the arbitration and the fact that an award has been entered. Even if the actual award is filed under seal, courts do not always agree to keep

the parties' arbitration information confidential. Courts have sometimes held that the constitutional right of public access to court proceedings trumps the parties' confidentiality agreement. See, e.g. *Amerisure Mutual Ins. Co. v. Everest Reinsurance Co*., 2014 WL 5481107 (E. D. Mich. Oct 29, 2014); *Eagle Star Ins. Co. v. Provincial Indemnity Co*., 2013 WL 5322573 (S.D.N.Y) Sept. 23, 2013); *Aioi Nissay Dowa Ins. Co., v. Prosight Specialty Management Co*., *Inc*. 2012 WL 3583176 (S.D.N.Y. Aug. 21, 2012). Parties therefore cannot rely on their "dirty laundry" not being exposed to public scrutiny.

IV. Discovery

C) Fact

Fact discovery in modern reinsurance arbitration is common. Parties typically exchange documents and take depositions of fact witnesses in much the same way as they would in litigation. Most arbitration agreements, however, are silent on discovery, and the Federal Arbitration Act ("FAA") does not expressly address discovery.[2] Accordingly, arbitration panels, who have wide latitude to control the procedural aspects of the case, have broad discretion to regulate discovery to meet the needs of the individual proceeding. This discretion means that the scope of discovery that will be allowed in any given case might not be as reliable as it is in litigation, where rules governing permissible discovery are intentionally broad. See e.g., F.R.C.P. 26(b)(1); N.Y. CPLR § 3101; Ill. Sup. Ct. Rule 201 (b)(1).

Perhaps the area of fact discovery in arbitration which involves the greatest unreliability is third-party discovery. Third-parties obviously are not signatories to the arbitration agreement and therefore have not consented to the jurisdiction of the arbitration panel. The FAA does not expressly authorize third-party discovery, but does grant authority to the arbitrators to "summon in writing any person to attend before them," and this authority applies to both witnesses and documents. 9 U.S.C § 7. There is a split of authority as to whether the applicable provisions of the FAA allow only trial subpoenas, or permit discovery subpoenas as well. The Second, Third and Fourth Circuit Courts of Appeal have held that Section 7 does not confer authority on arbitrators to issue discovery subpoenas. The Eight and Sixth Circuits, however, have taken a broader view of Section 7, holding that the authority to issue discovery subpoenas may be inferred from the authority to issue trial subpoenas. To avoid this problem, some panels have convened "mini-hearings" before one or more of the arbitrators in order to allow parties to obtain discovery from third parties. Such proceedings can be cumbersome, and are fraught with their own issues of reliability.

D) Expert

Another area where discovery in arbitration can differ from litigation involves expert testimony. In litigation, parties are generally free to designate expert witnesses, subject to subsequent motion practice which may restrict a party's use of the experts' testimony at trial. It is not uncommon in arbitration proceedings for one party or another to argue that expert testimony is neither appropriate nor required. Typically a party asking an arbitration panel to resolve the dispute by applying the strict wording of the contract may argue that expert testimony is inappropriate. Moreover, parties seeking to limit evidence of custom and practice with respect to particular types of transactions or lines of business may argue that "the arbitrators are the experts" and that, as such, additional expert testimony would be cumulative and unnecessary. Panels often restrict and at times may refuse expert witness designation and discovery based on these arguments. Parties who had anticipated constructing their cases around relevant expert testimony may find they are foreclosed from doing so by pre-discovery rulings of the panel. This may add considerable unreliability and uncertainty to the arbitration process, especially compared to litigation where parties are typically allowed to designate and take discovery of expert witnesses, subject to a *subsequent* motion to limit the use of such testimony at trial.

V. Evidence

Reinsurance contracts typically contain an "honorable engagement" clause, an example of which is found in the ARIAS•U.S. guide to arbitration procedure:

> The arbitrators and the Umpire shall interpret this Agreement as an honorable engagement, and shall not be obligated to follow the strict rules of law or evidence. In making their award, they shall apply the custom and practice of the insurance and reinsurance industry, with a view to effecting the general

2 The reader should note that the Uniform Arbitration Act, adopted in some form by many states, expressly addresses both the production of documents as well as depositions for discovery purposes.

purpose of the Agreement.

In litigation, reliability is promoted by the rules of evidence that govern the way in which evidence is offered and received by a judge or jury. Arbitration panels, on the other hand, are free to accept or reject the rules of evidence, or to apply them selectively. This means that panel members have discretion to ignore counsel's objections to the introduction of evidence based upon the following:

- Relevancy;
- Prejudice or confusion;
- Character and reputation evidence;
- Compromise and offers of compromise;
- Existence of retrocessional reinsurance for losses;
- Lack of personal knowledge;
- Writings used to refresh recollection;
- Opinion testimony by lay witnesses;
- Qualification of experts and bases of expert opinions;
- Hearsay and exceptions to hearsay;
- Authentication of original documents and duplicates;
- Admissions; and
- Leading questions on direct examination.

VI. Appeal

Arbitration agreements in reinsurance contracts typically provide that an award of the arbitration panel will be "final and binding" on the parties. This expresses the parties' contractual intent that a decision by an arbitration panel will not be appealable either to the panel itself or to a court. Section 9 of the FAA provides for judicial confirmation of final arbitral awards, and limits appeals in arbitration cases to the question of whether there are statutory grounds for vacating or modifying the award. The statutory grounds are exceedingly narrow, and thus appellate review of arbitration awards is far more limited than appellate review of judicial decisions. 9 U.S.C. 10 and 11. Viewed in one way, the absence of appellate review of arbitral awards adds an element of procedural reliability to the process because the parties know in advance that the decision of the panel will likely be final and non-appealable. On the other hand, however, critics argue that the absence of meaningful appellate review actually adds considerable unreliability to the arbitration process insofar as there is no mechanism in the process to correct errors made by arbitration panels.

VII. Res judicata/collateral estoppel

When a litigation is ended, a judgment is typically entered by the court which will likely have precedential or preclusive effect in subsequent cases. *Stare decisis* is the legal doctrine upon which the English and American systems of common law are built. The *stare decisis* doctrine provides that when principles of law are decided and applied to a certain set of facts, those principles will be applied in the same way to substantially the same facts in future cases. There is no such doctrine applicable to arbitration awards. Arbitration agreements in reinsurance contracts typically provide that the arbitrators are not bound by strict rules of law in making their decisions, and thus principles decided by an arbitration panel in one case need not be followed by subsequent panels in future cases. This cannot help but diminish the reliability of arbitration awards compared to judgments in litigation.

The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) bar the re-litigation of the same claims and issues in subsequent court cases. Do arbitral awards have the same preclusive effects? Some courts have answered this question in the affirmative, finding that arbitration awards may be given preclusive effect in subsequent litigation. See, e.g., *Lobaito v. Chase Bank*, 529 Fed. Appx. 100 (2d Cir. 2013); *Witkowski v. Welch*, 173 F. 3d 192 (3d Cir. 1999); *Universal American Barge Corp v. J-Chem, Inc.* 946 F. 2d 1131 (5th Cir. 1991). However, even those courts that recognize the preclusive effect of arbitration awards in subsequent litigation might find it difficult to do in a given case for the simple reason that arbitrators are not typically required to explain the reasons for their awards. *Postlewaite v. McGraw-Hill, Inc*.,

333 F. 3d 42, 48-49 (2d Cir. 2003).

When the proceeding in which a prior arbitral award may be given preclusive effect is another arbitration rather than a litigation, courts have held that whether the prior award will be given such effect is for the subsequent arbitration panel rather than a court to decide. See e.g., *Citigroup, Inc. v. Abu Dhabi Investment Authority*, 776 F. 3d 126 (2d Cir. 2015); *Consolidation Coal Co v. United Mine Workers of America*, 213 F. 3d 404 (7th Cir. 2000). As such, arbitration panels are free to ignore the doctrines of *res judicata* and collateral estoppel. In theory, two panels in separate cases between the same parties, considering the same issues under identical or substantially the same contract wording, are free to decide the cases in opposite ways. This is another example of the relative unreliability of arbitration procedures as distinguished from those applicable in a litigation context.

AN ARBITRATION PANEL MEMBER'S VIEW

To the extent "reliability" of the arbitration process is considered, it is typically from the perspective of the parties. After all, they are the stakeholders that drive the "process"; with the endgame being the Panel's decision (hopefully in their favor). Panel Members on the other hand, whether serving as a party-appointed arbitrator or "neutral" umpire, recognize that they are in service of the process and the needs of the parties. Yet, Panel Members undoubtedly understand the perspective of the parties and share many of the same concerns. However, for Panel Members (and for counsel as well) there is an additional element of "reliability" that has to do with the "the business of the business". So, what does "reliability" look like from the Panel Members perspective: what should they be able to rely upon from the parties and counsel in moving through the process?

At its most basic, "reliability" means knowing what's going on, or in other words, being kept "in the loop". Panel Members should be able to assess their inventory of arbitrations and where they stand. They need to know which arbitrations are "real" and which are not, i.e., which arbitrations are moving forward (and when), which arbitrations are "stalled" and which arbitrations are likely to go away. As all participants in the process understand, Panel Members need to know the status of their arbitrations for disclosures in other matters, both as a potential umpire making disclosures in an umpire questionnaire, or as a party-appointed arbitrator initially advising of potential "conflicts" and later making detailed disclosures in conjunction with an Organizational Meeting. Panel Members – like anyone else – need to be able to plan or project their schedules moving forward, as well as monitor the state of their business.

The first point of engagement with the process for a Panel Member often has to do with the appointment itself. "Reliability" in the appointment phase simply means letting the Panel member know whether or not they got the appointment. For a prospective umpire that means being updated on the status of umpire selection (which can extend over the course of a year or more), and ultimately being timely advised if the process resulted in another candidate being selected as umpire. For a prospective or actual arbitrator that similarly means being advised if another candidate got the appointment or if there are any delays in either making the appointment or moving forward with the arbitration itself.

Other examples of being kept "in the loop" can be expressed with the following questions:

> Is the arbitration moving forward, or is it "stalled" or "on hold" for umpire selection, audits, mediation, negotiations, consolidation matters, etc.? I would imagine that every arbitrator has amongst their inventory of arbitrations, some or many that are technically "open" (or presumed closed through passage of time), though they either never moved forward following appointment or at some later phase. I also suspect that many arbitrators have first heard from opposing arbitrators or umpires that an arbitration which was lying dormant for ages is suddenly moving forward.
>
> Did the other side appoint?
>
> Has a slate of potential umpires been vetted? Has a protocol for selection of the umpire been agreed? Has the umpire questionnaire been agreed or sent out? Has an umpire been appointed?
>
> What's going on with the audit(s), negotiations, mediation, document production, third-party discovery, dispositive motions?
>
> How is the agreed schedule holding up? Any potentially meaningful slippage? Should the Panel "hold" the scheduled Hearing date(s), or look for other dates at an early opportunity?

Has the case settled? (I would imagine many Panels or Panelists have sought to find out what happened to the overdue pre-hearing briefs only to find out that the arbitration has already settled.)

Another issue of "reliability" from the Panel Member's perspective is keeping the arbitration on track. Continual adjournments of Hearing dates while settlement negotiations are ongoing do not support "reliability". On the other hand, holding to the scheduled hearing date and pursuing "parallel tracks" can focus the parties' attention and both facilitate settlement if there is going to be one and enhance "reliability" with all participants knowing the endgame (and the timing).

For any Panel Member, reliability" means being paid promptly for their services. After all, this is a business, like any other. Most Panel Members are not doing this simply for their health - the wonders of The Breakers notwithstanding. Similarly, most Panel Members are not doing this as an extension of their *pro bono* commitment as lawyers. With some notable and highly public exceptions, most business people believe that they should pay their service providers promptly and in full. In the arbitration business, however, that doesn't always translate into actual practice.

Finally, why don't you just tell us what you want as an industry? We certainly recognize that "Reliability" may not necessarily be advantageous to all in a particular arbitration. And as Panel Members, it's all good! (We're here to serve… if not protect) We're happy to remain entirely flexible, but that does not make the process "reliable" or predictable and can be dis-economic. And, these aspects of "process" impact the reliability of results as well. For example, do you want broad discovery akin to the federal rules, or narrow discovery limited to core documents? At this point, you can have polar extremes regarding document discovery and depositions, with everything in between, from proceeding to proceeding… either as a function of the Panel Members' backgrounds (lawyers and non-lawyers) and beliefs and/or the parties' or counsel's strategy. Another example, is the use of experts on "reinsurance" issues as opposed to scientific or technical issues. The point is, if it is reliability you want, this is something to consider from the Panel Member's perspective.

CONCLUSION

It seems apparent that significant concerns about "reliability" continue to exist in various segments of the ARIAS-US community. It is remarkable, though, that the grounds for concern are markedly different depending on whether the person is a company representative, outside counsel, or arbitrator.

EXHIBIT A

A "Run-off Subscribing Reinsurer" is defined as:

1. A State Insurance Department or other legal authority has ordered the Subscribing Reinsurer to cease writing business; or
2. The Subscribing Reinsurer has become insolvent or has been placed into liquidation, receivership, supervision or administration (whether voluntary or involuntary), or proceedings have been instituted against the Subscribing Reinsurer for the appointment of a receiver, liquidator, rehabilitator, supervisor, administrator, conservator or trustee in bankruptcy, or other agent known by whatever name, to take possession of its assets or control of its operations; or
3. The Subscribing Reinsurer has become involved in a scheme of arrangement or similar proceeding (whether voluntary or involuntary) which enables the Subscribing Reinsurer to settle its claims liabilities, including but not limited to any estimated or undetermined claims liabilities under this Contract, on an accelerated basis; or
4. The Subscribing Reinsurer has reinsured its entire liability under this Contract with an unaffiliated entity or entities without the Company's prior written consent; or
5. The Subscribing Reinsurer has ceased assuming new or renewal property or casualty treaty reinsurance business; or
6. The Subscribing Reinsurer has transferred or delegated its claims-paying authority, as respects business subject to this Contract, to an unaffiliated entity

— GENERAL SESSION —
Improving the Arbitration Process through Better Contract Wording

Thursday, November 17, 2016, 10:30 a.m. – 11:15 a.m.

Materials:

EXAMPLES OF HISTORICAL TYPE WORDINGS

SAMPLE CLAUSES FROM MORE RECENT WORDINGS

ARBITRATION: THE "NEW LITIGATION"

— Available in online materials only —

ARIAS•U.S. Neutral Panel Rules For the Resolution of U.S. Insurance and Reinsurance Disputes

ARIAS • U.S. Streamlined Rules for Small Claim Disputes

Arbitration and Choice: Taking Charge of the "New Litigation"

Presented by:
Julie Pollack, Swiss Re America
Sean Maloney, American International Group
Marnie Hunt, Aon Benefield
Bryce Friedman, Simpson, Thatcher & Bartlett LLP

Examples of Historcal Type Wordings

BRMA 6 E
ARBITRATION

As a precedent to any right of action hereunder, if any differences shall arise between the contracting parties with reference to the interpretation of this Contract or their rights with respect to any transaction involved, whether arising before or after termination of this Contract, such differences shall be submitted to arbitration upon the written request of one of the contracting parties.

Each party shall appoint an arbitrator within thirty (30) days of being requested to do so, and the two named shall select a third arbitrator before entering upon the arbitration. If either party refuses or neglects to appoint an arbitrator within the time specified, the other party may appoint the second arbitrator. If the two arbitrators fail to agree on a third arbitrator within thirty (30) days of their appointment, each of them shall name three individuals, of whom the other shall decline two, and the choice shall be made by drawing lots. All arbitrators shall be active or retired disinterested officers of insurance or reinsurance companies or Underwriters at Lloyd's London, not under the control of either party to this Contract.

Each party shall submit its case to its arbitrator within thirty (30) days of the appointment of the third arbitrator or within such period as may be agreed by the arbitrators. All arbitrators shall interpret this Contract as an honorable engagement rather than as merely a legal obligation. They are relieved of all judicial formalities and may abstain from following the strict rules of law. They shall make their award with a view to effecting the general purpose of this Contract in a reasonable manner rather than in accordance with a literal interpretation of the language.

The decision in writing of any two arbitrators, when filed with the contracting parties, shall be final and binding on both parties. Judgment upon the award rendered may be entered in any court having jurisdiction thereof. Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the third arbitrator and of the arbitration. In the event that two arbitrators are chosen by one party as above provided, the expense of the arbitrators and the arbitration shall be equally divided between the two parties. Any arbitration shall take place in the city in which the Company's Head Office is located unless some other place is mutually agreed upon by the contracting parties.

Sample Clauses from More Recent Wordings

Provisions limiting the amount of discovery and/or witnesses

- Within __ days after the appointment of all arbitrators, the panel must meet with the parties. Prior to such meeting, the panel may require the parties to, respectively, submit a writing detailing the nature of the dispute, the issues and the resolution sought. At the meeting, the panel shall determine, among other items, the scope of and time frame for submitting briefs, beginning and ending dates for discovery (including the scope of discovery) and schedule for hearings. In making such determinations, the panel shall be mindful that time is of the essence under this Article and shall take into consideration the costs associated with an elongated discovery and hearing timeframe, and may make any orders in relation to shortening the number of witnesses, the number of depositions and the outside timeframe for the hearing, as it deems to be in the best interests of the arbitration and in effecting the purposes of this Article.

- Within __ days of being selected, the Arbitrator will convene an organizational meeting and set a schedule that allows for a final resolution within ___ days of his or her appointment. Discovery will be limited to exchanging only those documents directly relating to the issue in dispute, subject to a limit of two discovery depositions from each party, unless otherwise authorized by the Arbitrator upon a showing of good cause and provided that such additional discovery depositions can be concluded within a period of time such that final resolution of the dispute still occurs within ___ days of the arbitrator's appointment. It is the expectation of each party participating in the Arbitration that all requests for production of witnesses or documents will be in good faith and relevant to the issues before the Arbitrator and not intended to delay, overburden or harass. The Arbitrator will use his/her best efforts to limit the scope of document production in the manner described above as well as the duration of a final hearing and may promulgate a schedule that requires solely written submissions in lieu of an in-person hearing.

- Unless the arbitration panel issues an order to the contrary for good cause shown, (i) all requests for documents and other discovery shall be served no later than __ days following the date of the organizational meeting; (ii) all responses to discovery requests shall be due 30 days from the date the request is received by the responding party; and (iii) each party shall take no more than three depositions.

Panel authority to issue sanctions

- The panel shall have the power to impose sanctions for failure to comply with an interim ruling by the panel or for discovery-related abuse.

Reasoned award

- The panel shall provide the parties with a reasoned award no later than __ days following the termination of the hearing, which shall set forth: (1) the resolution of the disputed issues; (2) the amount of the award, and such other relief granted by the panel, if any, and (3) the panel's reasons for reaching its decision. Judgment upon the award may be entered in any court having jurisdiction thereof.

- The award shall be in writing and shall state the factual findings that served as the basis for the award.

By Written Submission at parties' option

- Notwithstanding the foregoing, the parties may forego arbitration proceedings set forth above and select arbitration by written submission. Within ___ days of selection of the arbiters in accordance with paragraph ___ above, both parties shall simultaneously present their respective written submissions to the arbiters. Written submissions shall be no longer than 25 pages in length. The arbiters, at their discretion, may request additional information in the form of supplemental reply briefs. The arbiters shall issue their award within ___ days after the written submissions have been filed and supplemental reply briefs have been provided.

ARBITRATION: THE "NEW LITIGATION"

*Thomas J. Stipanowich**

Provisions for binding arbitration of disputes are now employed in virtually all kinds of contracts, making arbitration a wide-ranging surrogate for civil litigation. This has also subjected arbitration to unprecedented strains and unparalleled criticism. Once promoted as a means of avoiding the contention, cost, and expense of court trial, binding arbitration is now described in similar terms—"judicialized," formal, costly, time-consuming, and subject to hardball advocacy. Though "court-like" arbitration has alienated many business users, others strive to make arbitration even more like court trial, as through agreements for expanded judicial review of arbitration awards. Meanwhile, the emergence of mediation and other "thin-slicing" methods for resolving disputes more quickly and effectively has raised serious questions about the value of arbitration and its continuing role in the conflict resolution marketplace.

Additionally, broad judicial enforcement of arbitration provisions in standardized adhesion contracts governing employees and consumers has fueled impassioned debate over the need for regulation of arbitration agreements. The real concerns of reform advocates, lawmakers, legal commentators, and educators have produced strong responses that "spill over" into the realm of arm's-length business-to-business agreements—often imposing new transaction costs without commensurate benefits.

These developments point to a critical need for more effective exercise of choice by users of arbitration and others whose decisions affect the arbitration experience. The most important difference between arbitration and litigation—and the fundamental value of arbi-

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tration—is the ability of users to tailor processes to serve particular needs. In order to make the most of the promise of arbitration, contract planners and drafters must move beyond a monolithic one-size-fits-all view of arbitration and make deliberate process choices based on client goals and priorities. The need for a more nuanced approach also requires planners to strategically assess arbitration's particular value in a world of expanding process choices. Similarly, those who make or propose laws affecting arbitration and those who prepare tomorrow's lawyers must look "beyond the monolith" to understand that regulation that is essential in one transactional setting may be detrimental in another.

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The moon waxes only to wane, and water surges only to overflow.
—Ancient Chinese Proverb[1]

INTRODUCTION

The latest edition of the American Institute of Architects (AIA) construction forms, the nation's most widely used template for building contracts, eliminates the default binding arbitration provision, long a *sine qua non* of construction contracts; parties must henceforth affirmatively elect arbitration or go to court.[2] A new, much-heralded rival set of standard construction contract documents also relegates arbitration to an option rather than a default procedure.[3] Along with a drumbeat of headlines heralding arbitration's ebb tide,[4] such developments provoke discussion and introspection among commercial arbitration[5] practition-

1. 100 PEARLS OF CHINESE WISDOM 189 (Sinolingua 1999).

2. AM. INST. OF ARCHITECTS, AIA DOCUMENT A201-2007, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION art. 15 [hereinafter AIA DOCUMENT A201-2007]; AM. INST. OF ARCHITECTS, AIA DOCUMENT B101-2007, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT art. 8 (Projects 2007); *see also* Am. Inst. of Architects, Contract Documents, http://www.aia.org/contractdocs/AIAS076659#P8_1567 (last visited Nov. 25, 2009) (comparing current and previous versions).

3. CONSENSUSDOCS LLC, CONSENSUS DOCS 240: STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT/ENGINEER art. 9.5, at 19 (2007).

4. *See, e.g.*, ROBERT GAITSKELL, SOC'Y OF CONSTR. LAW, TRENDS IN CONSTRUCTION DISPUTE RESOLUTION (2005), http://www.scl.org.uk/files/129-gaitskell.pdf; Editorial, 17 CONSTR. L.J. 1, 1–2 (2001); Leslie A. Gordon, *Clause for Alarm*, A.B.A. J., Nov. 2006, at 19; Sylvia Hsieh, *Arbitration Falling out of Vogue*, LAWYERSUSA, Mar. 10, 2008, at 1; *Knocking Heads Together*, ECONOMIST, Feb. 3, 2000, at 62 (noting that arbitration is no "cheaper, fairer or even quicker" than trial); Mary Swanton, *System Slowdown: Can Arbitration Be Fixed?*, INSIDECOUNSEL, May 2007, at 51; Lou Whiteman, *Arbitration's Fall from Grace*, LAW.COM, July 13, 2006, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005457792.

5. Throughout this Article, "commercial arbitration" is used in its stricter, more straightforward sense—arbitration between commercial entities. The term is sometimes used more broadly to encompass many forms of binding arbitration outside the collective bargaining sphere. *See* Thomas J. Stipanowich, *The Evolving Standards and Persistent Challenges of Employment Arbitration*, *in* RESOURCE BOOK FOR MANAGING EMPLOYMENT DISPUTES (CPR Inst. for Dispute Resolution, Inc. ed., 2004). It

ers, advocates, and critics, raising questions about arbitration's future in the increasingly crowded and diverse marketplace of conflict resolution.

An ABA Symposium on "The Vanishing Trial" spotlighted an eighty-four percent decrease in the percentage of federal civil cases resolved by trial between 1962 and 2002, as well as significant parallel declines in state courts.[6] This dramatic decrease in the trial rate may be attributed, at least in part, to business and public concerns about the high costs and delays associated with full-blown litigation, its attendant risks and uncertainties, and its impact on business and personal relationships.[7]

The concerns that contributed to the waning of civil litigation would seem to offer opportunities for the growth of private adjudication through binding arbitration.[8] Conventional wisdom suggests that businesses choose binding arbitration mainly because it is perceived to be different from litigation.[9] Parties look for some or all of the following: cost savings, shorter resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.[10] It is not

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should also be distinguished from "commercialized" arbitration, a term some have employed in reference to the recent evolution of arbitration and dispute resolution as a business. *See, e.g.*, Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 459 (2004) (observing that arbitration "has changed significantly . . . from the traditional model involving voluntary arbitration between parties of relatively equal bargaining power, to . . . become a profession and a commercialized industry that is imposed upon consumers and employees").

6. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, [illegible]–63 (2004).

7. *See* VALERIE P. HANS, BUSINESS ON TRIAL 50–78 (2000) (describing public's apprehension regarding litigation); Stephen Daniels & Joanne Martin, *"The Impact It Has Had Is Between People's Ears": Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 454 (2000) (noting businesses' fear of litigation); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 26 (1998) (stating that ninety-four percent of surveyed executives believed there had been a "litigation explosion").

8. As one experienced commercial dispute resolution lawyer explains, "Nature abhors a vacuum, and a vacuum has been created with the decreased frequency of bench and jury trials. This portends good things for alternative dispute resolution processes." Telephone Interview with David McLean, Managing Partner, New Jersey Office, Latham & Watkins LLP (Oct. 7, 2008) [hereinafter McLean Interview].

9. COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 7 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST]; *see also* William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 532 (2000); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1340–41 (1996).

Some recent data suggests, however, that the choice often favors litigation. A survey of international contracts in Form 8-K filings by reporting corporations over a six-month period in 2002 reflected that only about eleven percent of contracts included binding arbitration clauses, which led the authors to the conclusion that arbitration might not always be perceived as value-enhancing compared with litigation. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 335–36 (2007).

10. *See* DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 17 tbl.15 (1998) (detailing reasons why companies use mediation and arbitration), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=icrpubs; Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Percep-*

surprising, therefore, that today arbitration provisions are utilized in all kinds of contracts, making arbitration a wide-ranging surrogate for civil trial.[11]

Yet for a variety of reasons arbitration often falls short of popular expectations. Despite repeated evidence that business lawyers tend to view arbitration more favorably than litigation in key categories (fairness, speed to resolution, and cost),[12] the literature frequently focuses on various perceived shortcomings, including unqualified arbitrators, uneven administration, difficulties with arbitrator compromise, and limited appeal.[13] There are, moreover, frequent complaints regarding delay and high cost.[14] In spite of efforts by national institutions to enhance arbitrator quality[15] and provide guidance for improved practice,[16] it appears that discontent with commercial arbitration has never been more palpable if not more widespread.[17]

It would be irresponsible to suggest that arbitration, which in recent years experienced unprecedented growth,[18] is facing imminent extinction

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tions of Attorneys and Business People, 30 INT'L BUS. LAW. 203, 203–04 (2002) (performing a simple forced-rank analysis of factors important to attorneys and clients in AAA international arbitration cases).

11. *See* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 839–44.

12. *See* FULBRIGHT & JAWORSKI L.L.P., U.S. CORPORATE COUNSEL LITIGATION TRENDS SURVEY FINDINGS 10 (2004), http://www.fulbright.com/images/publications/15122612_1.PDF [hereinafter FULBRIGHT 2004 SURVEY]; Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?*, CORP. LEGAL TIMES, Feb. 2004, at 44, 44–45 (2004); John H. Henn, *Where Should You Litigate Your Business Dispute?*, DISP. RESOL. J., Aug.–Oct. 2004, at 34, 36–38; *see also infra* text accompanying notes 35–36.

13. *See, e.g.*, Charles E. Buffon & Joshua D. Wolson, *Antitrust Arbitration Counseling*, ANTITRUST, Fall 2004, at 31, 32–34; Paul J. Masinter et al., *Arbitration: Be Careful What You Ask For*, 7 COMM. & BUS. LITIG. 5, 5 (2006); Robert Shapiro, *Advance Sheet*, 28 LITIGATION 59, 61 (2001). Such concerns are also raised, along with others, in connection with arbitration conducted pursuant to standardized provisions in adhesion contracts. *See, e.g.*, JACKSON WILLIAMS, PUB. CITIZEN, THE COSTS OF ARBITRATION 4–5 (2002); *see also infra* Part III.

14. *See supra* note 4; *see also* Michael M. Marick et al., *Excess, Surplus Lines and Reinsurance: Recent Developments*, 26 TORT & INS. L.J. 231, 232 (1991); Barry Richard, *Corporate Litigation: Arbitration Clause Risks*, NAT'L L.J., June 14, 2004, at 13, 13; Benjamin J.C. Wolf, *On-line but Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306–07 (2006) (describing the disadvantages of arbitration, include costs similar to litigation and lengthy discovery process and hearings). Recent surveys of corporate counsel in the United States and United Kingdom suggest that with respect to the resolution of international cases, lawyers are increasingly likely to see arbitration as just as costly and lengthy as litigation. *See infra* text accompanying notes 151–53.

15. *See, e.g.*, Am. Arbitration Ass'n, Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, http://www.adr.org/si.asp?id=4223 (last visited Nov. 25, 2009).

16. *See* CPR-GEORGETOWN COMM'N ON ETHICS & STANDARDS IN ADR, MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL (2002), http://cpr-prod.ibelongnetworks.com/Portals/0/CPRGeorge-ModelRule.pdf [hereinafter LAWYER AS THIRD-PARTY NEUTRAL]; THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2005), *available at* http://cpr-prod.ibelongnetworks.com/ClausesRules/ArbitrationEthics/tabid/80/Default.aspx.

17. *See supra* notes 4, 13–14; *infra* notes 37–38.

18. *See* Stipanowich, *supra* note 11, at 831, 841–44. For additional background material, see Joseph M. Matthews, *Consumer Arbitration: Is It Working Now and Will It Work in the Future?*, FLA. B.J., Apr. 2005, at 22, 22 ("During the past 30 years, use of arbitration has expanded both as to the quantity and the nature of the disputes subjected to it.").

or even extreme marginalization in the manner of court trial, at least for now. Indeed, a close reading of some of the articles with "alarmist" headlines reveals a more moderate though highly variegated view of arbitration and lawyer perceptions.[19] The business arbitration caseload of the American Arbitration Association (AAA), the largest and longest-standing national provider of business arbitration services, has remained relatively stable.[20] Moreover, new opportunities for arbitration continue to appear,[21] at least on the international scene.[22]

In the United States, however, three significant developments are subjecting business arbitration processes to unprecedented stress and strain, and subjecting arbitration to swelling criticism. First, it appears that as arbitration has been called upon to assume the burden of resolving virtually every kind of civil dispute, it has taken on more and more features of a court trial. Today, for example, proceedings under standard arbitration rules are likely to include prehearing motion practice and extensive discovery.[23] Hearings may go on for extended periods of time in order to avoid charges of procedural injustice,[24] and there is evidence that the much-vaunted finality of arbitral awards is eroding.[25] The higher costs associated with these developments is a leading cause for complaint

19. *See, e.g.*, Gordon, *supra* note 4; Curtis E. von Kann, *Not So Quick, Not So Cheap*, LEGAL TIMES, Sept. 20, 2004, at 43; Whiteman, *supra* note 4; *see also* Henn, *supra* note 12 (expressing a more moderate opinion regarding the drawbacks of arbitration).

20. Over the last decade, the Association's commercial caseload has increased from 15,232 cases in 1998 to 20,711 in 2007. *See* E-mail from Ryan P. Boyle, Vice President, Statistics & In-House Research, Am. Arbitration Ass'n (May 21, 2008) [hereinafter *AAA Commercial Caseload Statistics*] (on file with author). Although reliable figures are elusive, data on a dozen of the leading international commercial arbitration institutions compiled by the Hong Kong International Arbitration Centre (HKIAC) provide a rough touchstone. The data indicate that the volume of cases at most institutions is stable or increasing. *See* Hong Kong International Arbitration Centre, About the HKIAC, http://www.hkiac.org/show_content.php?article_id=9 (last visited Nov. 25, 2009).

21. *See, e.g.*, DONALD C. WINTER, SEC'Y OF THE NAVY, SECNAV INSTRUCTION 5800.15: USE OF BINDING ARBITRATION FOR CONTRACT CONTROVERSIES (Mar. 5, 2007), http:www.usdoj.gov/adr/secnavinst5800-15.pdf (establishing "a comprehensive Department of the Navy (DON) policy for the use of binding arbitration for contract issues in controversy under the [Federal Acquisition Regulations Part 33.2] and [DoD Instruction 4105.71, Nonappropriated Fund (NAF) Procurement Policy]"). The practical impact of this regulation remains to be seen.

22. For example, under the new Organisation for Economic Co-operation and Development (OECD) model tax convention, multinationals in the middle of cross-border tax disputes may seek binding arbitration with government authorities. OECD COMM. ON FISCAL AFFAIRS, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 25(5), at 37–38 (2008), http://www.oecd.org/dataoecd/14/32/41147804.pdf.

A 2006 survey of international corporate counsel conducted by Queen Mary College and PricewaterhouseCoopers suggests that the vast majority of companies expect to continue using arbitration as a preferred method of international dispute resolution, and that the expansion of international trade will produce a commensurate increase in the volume of arbitration. QUEEN MARY, UNIV. OF LONDON, SCH. OF INT'L ARBITRATION & PRICEWATERHOUSECOOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 22 (2006), http://www.pwc.com/en_BE/be/publications/ia-study-pwc-06.pdf [hereinafter QUEEN MARY 2006 SURVEY].

23. *See infra* Part I.B.1–2.

24. *See infra* Part I.B.3.

25. *See infra* Part I.B.4.

about arbitration among business users.[26] At the same time, paradoxically, it appears that an increasing number of lawyers are seeking ways of eliminating the remaining differences between arbitration and court trial, most notably through contractual provisions for expanded judicial review of arbitration awards.[27]

A second, concurrent phenomenon is the explosion of mediation and other competing dispute resolution alternatives to "extended adjudication."[28] Just as alternative dispute resolution (ADR) has played a prominent role in changing the landscape of civil litigation, the use of mediation and other "thin-slicing" approaches is dramatically altering the environment of private dispute resolution. Such approaches are generally perceived as doing a better job of accomplishing many of the benefits traditionally associated with arbitration, and they often better serve and resonate with various business goals.[29] As a result, if changes to recent standard contracts are any indication, arbitration usage may be diminishing in some commercial arenas such as construction;[30] some suggest that we have passed the zenith of commercial arbitration in America—at least in anything similar to its present form.[31] Whether and to what extent arbitration continues to play a primary role in the resolution of commercial conflict, or is marginalized in favor of mediation and other ADR mechanisms on the one hand and court litigation on the other, remains to be seen.

A third momentous trend is the broad enforcement of binding arbitration provisions in standardized adhesion contracts that govern employment relationships and consumer transactions.[32] This evolution has fueled a continuing debate over the need for regulation of arbitration agreements—regulation that sometimes "spills over" into the business-to-business arena in ways that increase related costs without enhancing the value of the process.[33] It has also contributed to a generally negative image of arbitration, as evidenced in first-year contracts casebooks.[34]

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26. *See supra* notes 4, 13, 14; *infra* notes 37, 38.
27. *See infra* text accompanying notes 96–110.
28. *See infra* Part II.
29. *See infra* Part II.C (discussing relatively favorable perceptions of mediation).
30. It is too early to gauge the impact of the removal of the default arbitration provision from the AIA documents and the absence of such a provision in other documents. *See supra* text accompanying notes 2–3. The American Arbitration Association, undoubtedly the largest institutional provider of arbitration services for U.S. construction projects, reported 4677 construction cases in 2000, but reported successively lower numbers in each of the next five years (bottoming out at only 3809 cases in 2005). *See AAA Commercial Caseload Statistics*, *supra* note 20. However, the Association caseload increased in the last two years, with 4085 reported cases in 2006 and 4199 cases in 2007. *Id.* It is impossible to determine the overall volume of construction arbitration from the AAA caseload, because reduced volume at that institution may reflect increased business at other institutions or more reliance on ad hoc procedures.
31. *See, e.g.*, Matthews, *supra* note 18, at 22, 24–27 (discussing the current state of arbitration and its feasibility and viability in the future).
32. *See infra* Part III.
33. *See infra* Part III.B–C.
34. *See infra* text accompanying notes 359–61.

An appreciation of these developments and their implications for users of arbitration is critical for those who counsel business clients on the planning and drafting of dispute resolution agreements, for those who purport to provide administrative or dispute resolution services, and for advocates, lawmakers, and legal educators. Part I of this Article chronicles the developments surrounding arbitration's evolution as the "new litigation" and the oft-perceived dissonance between user experiences and user goals and needs. Part II explores concurrent trends in the use of mediation and other "thin-slicing" approaches in the resolution of contract-related disputes and their potential impact on perceptions and use of arbitration. Part III examines concerns about predispute arbitration provisions in adhesion contracts, the resultant regulation and other responses, and the "spillover" of the latter into the realm of commercial (business-to-business) arbitration. Part IV responds to these three trends with three general proposals, each of which requires those involved with arbitration to fulfill the "promise" of arbitration by embracing a more nuanced view of arbitration processes and by making or promoting more appropriate process choices.

I. ARBITRATION BECOMES THE NEW LITIGATION

Early in the twentieth century, the dawn of the modern era of American arbitration was heralded by the passage of a federal statute underpinning the enforcement of contractual agreements to arbitrate future disputes; advocates championed arbitration as a means of avoiding the "needless contention that [is] incidental to the atmosphere of trials in court."[35] Arbitration was popularly touted as a more efficient, less costly, and more final method for resolving disputes; there was little or no discovery, motion practice, judicial review, or other trappings of litigation.[36] By the beginning of the twenty-first century, however, it was common to speak of U.S. business arbitration in terms similar to civil litigation—"judicialized," formal, costly, time-consuming,[37] and subject to hardball advocacy.[38]

35. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 614 n.44 (1928); *see also* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 429 (1988) (noting that "observers frequently depict arbitration as a speedy and economical process").

36. *See* Stipanowich, *supra* note 35, at 429; *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985) ("[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies."); von Kann, *supra* note 19 (describing the "rough justice" of traditional commercial arbitration).

37. *See* Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 35–36 (2003) (discussing perceptions of the American influence on international arbitration); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 434–35 (2000) (observing that international arbitration is no longer quicker than adjudication and suggesting that the "American law model" is a cause); John Wilkinson, *The Future of Arbitration: Striking a Balance Be-*

Contractual provisions for the resolution of disputes by arbitrators are now featured in many kinds of commercial contracts.[39] These practices, coupled with plenary judicial enforcement of broadly tailored arbitration provisions, have made arbitration a wide-ranging surrogate for trial in a public courtroom. As a consequence, the arbitration experience has become increasingly similar to civil litigation, and arbitration procedures have become increasingly like the civil procedures they were designed to supplant, including prehearing discovery and motion practice.[40] Not surprisingly, clients and counsel often complain about the costliness and length of arbitration—yet at the same time, ironically, they or their peers bemoan the non-appealability of awards and other features that still distinguish arbitration from litigation. Consider the double-edged lament of one corporate general counsel: "[W]e found arbitration generally is as expensive [as litigation] . . . less predictable, and not appealable. Arbitration is often unsatisfactory because litigators . . . run it exactly like a piece of litigation."[41]

A. The Expansion of Arbitration

In the twentieth century, pre-dispute (or "executory") arbitration agreements evolved from disfavored status[42] to judicially denominated "super-clauses."[43] Once categorized as separable from the remainder of

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tween Quick Justice and Fair Resolution of Complex Claims, 8 Expert Evidence Rep. (BNA), at 189 (Apr. 21, 2008); Wolf, *supra* note 14, at 281 (describing the disadvantages of arbitration to include costs similar to litigation and lengthy discovery process and hearings).

38. In some cases these include "hardball" tactics, which in the international sphere have been described as "unbridled and ungentlemanly aggressivity and excess in arbitration." Nicolas C. Ulmer, *A Comment on "The 'Americanization' of International Arbitration?,"* 16 MEALEY'S INT'L ARB. REP., June 2001, at 24, 24; *see also* Shalakany, *supra* note 37, at 435.

39. von Kann, *supra* note 19, at 43 (commenting on the widespread, and potentially creative, use of arbitration provisions in commercial contracts).

40. *See* Helmer, *supra* note 37, at 35–36; von Kann, *supra* note 19, at 43.

41. Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 895 (2004) (quoting Jeffrey Carr, Vice President & Gen. Counsel, FMC Tech., The Torch Is Passed, Corporate Counsel Panel, Remarks at the Annual Meeting of the CPR Institute for Dispute Resolution (Jan. 29–30, 2004)).

42. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 432–35 (1953) (deciding arbitration was inappropriate for making findings to resolve claims of fraud based on violations of federal securities acts); Am. Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 828 (2d Cir. 1968) (holding "the antitrust claims raised [were] inappropriate for arbitration" because arbitrators were thought to have limited capabilities).

43. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) ("We hold, therefore, that in passing upon a [FAA] § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) (holding that challenges to the legality of a contract as a whole must be argued before the arbitrator rather than a court because "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance").

the contract in order to be stricken,[44] broad arbitration clauses may now be fully enforceable despite defenses to the contract in which they are contained, including fraud[45] or illegality.[46]

U.S. courts once tended to look with suspicion upon the capabilities and partialities of private arbitrators.[47] Now, led by favorable Supreme Court precedent expanding the rubric of the Federal Arbitration Act (FAA) and reflecting very different presumptions regarding arbitrators and arbitration,[48] courts vouchsafe to arbitrators the responsibility not just for garden variety contract matters, but also the vindication of rights under civil statutory schemes including antitrust laws,[49] the Racketeer Influenced and Corrupt Organizations Act (RICO),[50] and, as discussed below, laws designed to protect employees and consumers.[51] Arbitrators routinely handle statute-based claims,[52] as well as claims for punitive or

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44. *See Buckeye Check Cashing, Inc.*, 546 U.S. at 444–45; *Prima Paint Corp.*, 388 U.S. at 402–04.

45. *See Prima Paint Corp.*, 388 U.S. at 398, 404.

46. *See Buckeye Check Cashing, Inc.*, 546 U.S. at 443, 448–49.

47. In his dissent in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, Justice Stevens had occasion to repeat a quotation used by Justice Black in his dissent in *Prima Paint Corp.*; the passage is from an article written shortly after the passage of the FAA:

> Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 646 n.11 (1985) (Stevens, J., dissenting) (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)); *see, e.g.*, *Am. Safety Equip. Corp.*, 391 F.2d at 824–25; Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 795–96 (N.Y. 1976) (stating that power to award punitive damages is reserved for the courts because arbitrators lack the capability to decide such matters and may be subject to manipulation).

48. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27–28 (1991) ("It is true that arbitration focuses on specific disputes between the parties involved. . . . [But arbitration, like litigation] can further broader social purposes."); *Mitsubishi Motors Corp.*, 473 U.S. at 628 (declaring that the FAA created a broad national policy favoring arbitration upon parties' choice; stating that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum" and absent proof, there is no basis for assuming the arbitration forum is inadequate for the task); Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 776 F.2d 269, 270 (11th Cir. 1985) (stating that the strong federal policies favoring arbitrability of issues and remedial flexibility of arbitrators will govern). In *Mitsubishi Motors Corp.*, the Court also stated, "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." 473 U.S. at 634.

49. *Mitsubishi Motors Corp.*, 473 U.S. at 630–31 (holding that a defendant's antitrust claims were arbitrable because the antitrust claims did not invalidate the forum selection or arbitration clauses, arbitration provided competent arbitrators, and issues were resolved using the national law where the claim arose; furthermore, there was also a strong presumption favoring arbitration in international commerce).

50. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 220–21 (1987) (holding that claims under RICO and the Securities and Exchange Act of 1934 are subject to arbitration).

51. *See, e.g.*, *Gilmer*, 500 U.S. at 27–28 (affirming that a claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (2006), could be subjected to compulsory arbitration pursuant to an arbitration agreement); *Shearson/Am. Express, Inc.*, 482 U.S. at 238, 242.

52. *See supra* notes 49–51.

exemplary damages;[53] in the absence of a contrary agreement, arbitrators might even be called on to certify and supervise "class arbitration."[54]

B. Changes in Arbitration Procedure and Practice

Since arbitration processes took over the territory historically reserved for litigation in the public forum, the character of arbitration has changed. In order to grapple more effectively with a wide range of business disputes, including many large, complex cases, arbitration procedures have tended to become longer and more detailed, and lawyers bring to bear the same tools of zealous advocacy they employ in litigation.

1. Jurisdictional Issues

Like judges, arbitrators routinely make determinations regarding their own jurisdiction. Current federal arbitration law requires courts to enforce agreements that "clearly and unmistakably" empower arbitrators to address and rule on key front-end questions such as the enforceability of the arbitration agreement or the scope of arbitrable issues.[55] Such "empowering" agreements may be found in virtually any situation where the parties' contract incorporates any number of leading arbitration procedures.[56] Arbitrators' power to render summary judgments[57] or to sanc-

53. *See, e.g.*, *Willoughby Roofing*, 776 F.2d at 270.

54. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453–54 (2003) (concluding that, in the absence of a contrary agreement, the question of whether arbitration provisions forbade class arbitration should have been resolved in arbitration).

The dramatic expansion of arbitral jurisdiction under the aegis of the FAA provides a curious analogue to the vast growth of judicial remedy-making power under federal legislation addressing employment discrimination, housing discrimination, discrimination in public employment, and other statutes. *See* Leon Silverman, *Are We a Litigious Society? The So-Called Litigation Explosion*, 58 RECORD 296, 298 (2003).

55. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (holding that absent contrary intent, the court is responsible for deciding arbitrability); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) (enforcing a provision authorizing arbitrators to address arbitrability issues).

56. The following organizational provisions empower arbitrators to interpret, decide, and apply rules regarding jurisdictional challenges: AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R. 7 (2009), *available at* http://www.adr.org/sp.asp?id=22440#R7; INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, NON-ADMINISTERED ARBITRATION RULES, R. 8 (2007), http://www.cpradr.org/Portals/0/2007 Arbitration Rules SlimJim.pdf; JUDICIAL ARBITRATION & MEDIATION SERVS., COMPREHENSIVE ARBITRATION RULES AND PROCEDURE, R. 11 (2009), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule11.

57. *See, e.g.*, Schlessinger v. Rosenfeld, Meyer & Susman, 47 Cal. Rptr. 2d 650, 659–60 (Cal. Ct. App. 1995) (concluding the arbitrator had implicit authority to rule on summary adjudication motions and that plaintiff was not substantially prejudiced by summary proceeding).

tion parties for failing to comply with arbitral orders[58] has also been recognized.

2. *Prehearing Discovery*

a. The Expansion of Discovery

Arbitration hearings are now often preceded by extensive discovery, including depositions.[59] Because discovery has traditionally accounted for the bulk of litigation-related costs,[60] the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery,[61] it is not unusual for legal advocates to agree to trial-like procedures for discovery, even to the extent of employing standard civil procedural rules.[62] This should not be surprising as there is a tendency to use the tools with which one is most familiar, and lawyers schooled in trial may predictably rely on their knowledge and experience in the private analog of the process. Trial practice, with its heavy emphasis on prehearing motion practice and intensive discovery, is reinforced by ethical rules enshrining the model of zealous advocacy.[63] For lawyers accustomed to full-fledged discovery, anything less may seem tantamount to inviting claims of malpractice. As one seasoned arbitration practitioner recently observed, "Most lawyers are reluctant to go ahead and try the case. Many times I have tried to shorten the time [frame] and have the hearing soon-

58. *See* Superadio Ltd. P'ship v. Winstar Radio Prods., L.L.C., 844 N.E.2d 246, 252–54 (Mass. 2006) (upholding arbitral sanction against defendant for violating discovery orders during the course of arbitration).

59. *See* von Kann, *supra* note 19, at 43; W. Alexander Moseley, *What Do You Mean I Can't Get That? Discovery in Arbitration Proceedings*, 26 CONSTRUCTION LAW., Fall 2006, at 18, 24.

60. According to a 1999 study, document discovery alone accounts for fifty percent of litigation costs in the average case and ninety percent in active discovery cases. *Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls*, THIRD BRANCH (Admin. Office of the U.S. Courts), Oct. 1999, http://www.uscourts.gov/ttb/oct99ttb/october1999.html. American lawyers devote more time to document discovery than to nearly any other activity, including client counseling, legal research, and negotiations. *See* JAMES S. KAKALIK ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA xxi, 24 (1998); Salvatore Joseph Bauccio, *E-Discovery: Why and How E-mail Is Changing the Way Trials Are Won and Lost*, 45 DUQ. L. REV. 269, 270 n.7 (2007); John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 506 (2000); Wayne D. Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450, 454 (1981).

61. *See, e.g.*, AM. ARBITRATION ASS'N, *supra* note 56, R. 30; INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION *supra* note 56, R. 11 ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate . . . taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective."); JUDICIAL ARBITRATION & MEDIATION SERVS., *supra* note 56, R. 22.

62. As an arbitrator, the author has in past cases been confronted by situations in which counsel for arbitrating parties made a prior agreement to utilize the discovery provisions of the Federal Rules of Civil Procedure in arbitration. It is often possible to persuade the parties to forego requests for admission and interrogatories, to strictly limit the number of depositions, and also to closely supervise the discovery process to avoid unnecessary delays.

63. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980).

er, . . . [but] in many instances the lawyers want more time to get prepared."[64]

It is not hard for American lawyers to justify intensive discovery to themselves and their clients. Legitimizing a legal position often requires painstaking reconstruction of past events, a highly labor- and time-intensive activity that requires conscientiously sifting through vast amounts of information, most of which is of little or no relevancy. The expectation—or hope—is that the "mining" effort will ultimately produce a picture that supports the position.[65] Alternatively, it might at least forestall an undesired resolution for months or years.[66]

Business clients—especially those with significant interests or assets at stake—are often ill-disposed to challenge this effort to mine information. Clients may be relying on the advocate's preliminary counsel that the mining operation will yield productive results,[67] or they may have strategic reasons for using discovery to increase the cost of or delay the final resolution of the dispute.[68]

Arbitrators, intent upon striking a balance between fundamental fairness and efficiency, may be reluctant to push parties to limit such practices or to keep to schedule.[69] Arbitrators' concerns about having their award subjected to a motion to vacate likely reinforce these tendencies, especially among arbitrators who lack the confidence of long experience. The reluctance to limit discovery may also reflect an arbitrator's desire to avoid offending anyone in the hope of securing future appointments.[70]

For all of these reasons, discovery under standard arbitration procedures has tended to become more like its civil court counterpart. As one corporate general counsel explains, "[I]f you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation . . . ."[71]

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64. John Hinchey, Remarks at the Annual Meeting of the American College of Construction Lawyers: Adjudication: Coming to America (Feb. 22, 2008) (notes on file with author).

65. *See* Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 221–22 (2000) (discussing the advent of the "discovery lawyer"); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?,"* 46 HASTINGS L.J. 679, 697–714 (1995) (noting that overly broad discovery allows parties to go on "fishing expeditions").

66. *See* BENJAMIN SELLS, THE SOUL OF THE LAW 83 (1994).

67. *See* Carr & Jencks, *supra* note 65, at 240.

68. *See* Sorenson, *supra* note 65, at 699–700.

69. *See id.* at 700 (explaining how discovery has been used as a tactical weapon to impose excessive costs on the opposing party).

70. *See* Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 717 (2004) (arguing that arbitrators may be less restrictive with discovery than judges because of their concern over obtaining future appointment as an arbitrator).

71. Stipanowich, *supra* note 41, at 895 n.202 (2004) (quoting James Bender, Gen. Counsel, Williams Cos., The Torch Is Passed, Corporate Counsel Panel, Remarks at the Annual Meeting of the CPR Institute for Dispute Resolution (Jan. 29–30, 2004)).

b. Third-Party Discovery

The desire to obtain information prior to trial has also led to frustration with another limitation of arbitration—the difficulty of obtaining discovery from third parties who are not bound by the arbitration agreement. The strictures on nonparty witnesses are amply illustrated by *Matria Healthcare, LLC v. Duthie*,[72] in which a federal district court in Illinois held that § 7 of the FAA does not authorize arbitrators to compel the attendance of a nonparty witness at a deposition.[73] In response to concerns raised by the FAA language, the drafters of the Revised Uniform Arbitration Act (RUAA) specifically authorized arbitrators to issue deposition subpoenas.[74]

c. E-Discovery

Even as the courts have begun to grapple with the immense and unprecedented challenges associated with the discovery of electronic data,[75] "e-discovery" looms as the ultimate test for arbitration as an alternative to court.[76] Today, the great bulk of information that organizations produce or receive is created electronically.[77] E-mail messages, word processing or spreadsheet documents, databases, web pages, and other data proliferate in multiple forms, including in backup or archive form—sometimes without human knowledge or direct action.[78] These data are dynamic, metamorphosing as a result of human modification or through the automatic operation of computers. It is becoming less and less likely

72. 584 F. Supp. 2d 1078 (N.D. Ill. 2008).

73. *Id.* at 1083. The decision followed *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004), a decision by then Judge Samuel Alito strictly construing the FAA language empowering arbitrators to "summon . . . any person to attend before them . . . as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material." *Id.* at 407 (quoting 9 U.S.C. § 7 (2000) (internal quotations and emphasis omitted)). Alito concluded that the FAA "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator [in other words, at the arbitration hearing]." *Id.*; *accord* COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999).

74. The Act provides that "upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing." UNIF. ARBITRATION ACT § 17(b) (2000), 7 U.L.A. 61 (2009).

75. For the text of various recent amendments to the Federal Rules of Civil Procedure, see AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf. *See also* SEDONA CONFERENCE WORKING GROUP, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 1–2 (2005) [hereinafter SEDONA GUIDELINES].

76. *See* John B. Tieder, Jr., *Electronic Discovery and Its Implications for International Arbitration*, *in* INTERNATIONAL ARBITRATION AND MEDIATION—FROM THE PROFESSIONAL'S PERSPECTIVE (Anita Alibekova & Robert Carrow eds., 2007); Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, DISP. RESOL. J., Nov. 2006–Jan. 2007, at 9.

77. *See* SEDONA GUIDELINES, *supra* note 75, at vi (citing PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? (2003), *available at* http://www.sims.berkeley.edu/research/projects/how-much-info-2003/).

78. Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 1, 3–4 (2007).

that a thoroughgoing dispute resolution process will fail to deal with electronic information.[79] The magnitude and cost of e-discovery and the possibility of sanctions for spoliation are becoming primary determinants of the momentum, pace, and cost of adjudication, as well as the scope of trial issues and the timing and terms of settlement.[80]

3. The Hearing Stage

At the hearing stage, "docketing" problems are a primary concern in large or complex cases.[81] The problem of finding mutually acceptable dates is exacerbated by the use of a three-member tribunal, common in commercial arbitration. Such realities may be readily exploited by parties hoping to benefit from delay.[82] Clients' agendas will also come into play. As in litigation, a defendant "sitting on cash" may seek opportunities for delay for tactical reasons; resourceful advocates are adept at advancing plausible bases for time extensions.[83]

Hearings are also likely to be prolonged by the tendency of arbitrators to proceed cautiously in order to avoid even colorable grounds for vacatur of award; these motivations may cause arbitrators to avoid dispositive rulings, to accept the estimates of counsel regarding hearing schedules, and to be very liberal in the admission of evidence. As a result, arbitration may be no less costly or lengthy than litigation. In the words of one experienced advocate,

> Arbitration may or may not produce shorter resolution times, but arbitrations are more likely than litigation to "go the distance." Moreover, arbitrators tend to be reluctant to refuse admittance to evidence, and are less likely than federal judges to dramatically shorten presentation times. Arbitrators tend to go along so no one can say that justice has not been served—and so the award will be rendered more bullet-proof.[84]

4. Post-Hearing Process

The "judicialization" of arbitration is also observable at the post-hearing stage. Here, the focus is on one of the longstanding verities of

79. *See, e.g.*, FULBRIGHT & JAWORSKI L.L.P., FOURTH ANNUAL LITIGATION TRENDS SURVEY FINDINGS 22–23 (2007), http://www.fulbright.com/images/publications/FourthAnnual LitTrends.pdf [hereinafter FULBRIGHT 2007 SURVEY] (indicating trend among corporate legal departments toward retaining e-discovery vendors and law firms with special technical expertise in e-discovery issues).

80. *See* Mazza et al., *supra* note 78, at 2–5; Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 792–95, 796 (1991).

81. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 226.

82. *See id.* at 194.

83. *See id.* at 195.

84. McLean Interview, *supra* note 8; *see also* von Kann, *supra* note 19, at 43, 45 (noting that arbitrators will "probably resolve close calls in favor of more extensive evidence-gathering and presentation").

arbitration—finality of award. Under the FAA,[85] the RUAA,[86] and other state arbitration statutes,[87] judicial review of arbitration awards is limited to fundamental procedural deficiencies, such as procurement of the award "by corruption, fraud, or undue means,"[88] "evident partiality or corruption in the arbitrators,"[89] prejudicial arbitrator misconduct like a failure to hear material and relevant evidence,[90] a decision beyond the scope of the arbitrators' contractual authority, or a decision "so imperfectly executed . . . that a . . . final[] and definite award upon the subject matter submitted was not made."[91] These limited grounds for review, generally adhered to by courts reviewing commercial arbitration awards, have long been viewed as rendering arbitration awards much more impervious to reversal than court judgments.[92] But consider the results of a survey of published federal and state court decisions on motions to vacate arbitration awards during a ten-month period in 2004: although far from conclusive, the data suggest that the much-vaunted "finality" of arbitration awards varies considerably among jurisdictions.[93] In particular, it appears that reversal or vacatur may be much more likely in the courts of key commercial states. Federal courts granted only six of sixty-one motions to vacate during the survey period, whereas the courts of California, New York, and Connecticut collectively vacated awards in nineteen of sixty-four cases—nearly one-third of all requests.[94] Although, again, one must take care in drawing final conclusions from such a small sample, the numbers suggest that, at least in some states, arbitration awards challenged in court may be as vulnerable to reversal as trial court judgments.[95]

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85. 9 U.S.C. § 10(a) (2006).

86. UNIF. ARBITRATION ACT § 23 (2000), 7 U.L.A. 77–78 (2009).

87. *See, e.g.*, CAL. CIV. PROC. CODE § 1286.2 (West 2007); N.Y. C.P.L.R. 7511 (McKinney 1998).

88. 9 U.S.C. § 10(a)(1). "[Courts] have uniformly construed the term undue means as requiring proof of intentional misconduct." Spiska Eng'g, Inc. v. SPM Thermo-Shield, Inc., 678 N.W.2d 804, 806 (S.D. 2004).

89. 9 U.S.C. § 10(a)(2).

90. *Id.* § 10(a)(3).

91. *Id.* § 10(a)(4).

92. *E.g.*, Durkin v. Cigna Prop. & Cas. Corp., 986 F. Supp. 1356, 1358 (D. Kan. 1997) ("Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited." (quoting ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995))); *see also* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 444–45 (1998); Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 401–05 (1995). Some courts have occasionally entertained motions for vacatur on grounds such as "manifest disregard of the evidence," but these grounds are rarely successful. Wallace v. Buttar, 378 F.3d 182, 193 (2d Cir. 2004).

93. Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23, 25 fig.5.

94. *Id.*

95. *See, e.g.*, THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2005, 4 tbl.5 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/agctlc05.pdf (finding, in contract cases in state courts, a reversal rate of 16.7 percent where a plaintiff filed a notice of appeal, and a reversal rate of 22.5 percent where

The greater readiness of some courts to scrutinize awards is paralleled by another emergent phenomenon of recent years—the contractual agreement for expanded judicial review of awards.[96] Such provisions, which appear to be driven by concerns about excessive damages or irrational results in high-stakes cases,[97] attempt to augment the limited statutory grounds upon which courts may vacate awards with provisions permitting judicial inquiry into the merits of arbitrator decisions.[98] Such provisions have received mixed judicial response[99] and have resulted in considerable post-arbitration litigation.[100]

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a defendant filed a notice of appeal). In drawing comparisons, of course, we are missing at least one other critical factor—the percentage of arbitration awards that are not submitted to court for confirmation or vacatur.

96. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 285–98; Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, DISP. RESOL. J., Nov. 2006–Jan. 2007, at 16, 17 (examining the tension between the limited grounds for review under the FAA, common law grounds for review, and arbitration provisions negotiated by the parties themselves); Joshua K. Norton, Note, *Having Your Cake and Eating It Too?: Contractually Expanding Judicial Review of Arbitration Decisions:* Schoch v. InfoUSA, Inc., *341 F.3d 785 (8th Cir. 2003)*, 86 NEB. L. REV. 183, 185 (2007) (addressing the circuit split regarding expanded review).

97. *See* Margaret Moses, *Can Parties Tell Courts What to Do?: Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 429 (2004) ("[P]arties sometimes harbor fears that a maverick arbitrator will render an egregious award . . . .").

98. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 285–98.

99. Five circuit courts came down in favor of enforcement. Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 710–12 (6th Cir. 2005); P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 30–31 (1st Cir. 2005) (dicta); Rodway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) (dicta); Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 WL 452245, at *6–7 (4th Cir. Aug. 11, 1997); Gateway Tech., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996–97 (5th Cir. 1995). Four circuits reached a contrary conclusion. Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003), *overruling* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 935–37 (10th Cir. 2001); UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 997–98 (8th Cir. 1998) (dicta); Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (dicta); *see generally* Norton, *supra* note 96.

State courts are similarly divided on the issue. Decisions favoring enforcement include *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 608 (Cal. 2008), and *NAB Construction Corp. v. Metropolitan Transportation Authority*, 579 N.Y.S.2d 375, 375 (N.Y. App. Div. 1992) (enforcing contractual provision permitting judicial review of an arbitration award "limited to the question of whether or not the [designated decision maker's] determination is arbitrary, capricious or so grossly erroneous to evidence bad faith" (internal quotations omitted)). Other state courts have found no room under arbitration statutes for expanded review. Chi. SouthShore & S. Bend R.R. v. N. Ind. Commuter Transp. Dist., 682 N.E.2d 156, 158–59 (Ill. App. Ct. 1997), *rev'd on other grounds*, 703 N.E.2d 7 (Ill. 1998) (denying effect to a contract term permitting a party to claim an "'arbitrator's decision is based upon an error of law . . . [to] institute an action at law . . . to determine such legal issue'" and concluding that "[t]he subject matter jurisdiction of the trial court to review an arbitration award is limited and circumscribed by statute"); Dick v. Dick, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995) (finding that a contractual opt-in provision permitting appeal to the courts of "substantive issues" relating to the award attempted to create "a hybrid form of arbitration" that did not "comport with the requirements of the [Michigan] arbitration statute").

New Jersey has addressed the issue by statute under the New Jersey Alternative Dispute Resolution Act, providing for parties to arbitration agreements to "opt in" to a heightened standard of review established by the statute. N.J. STAT. ANN. § 2A:23A-12 (West 2009). The RUAA drafters considered and rejected such an approach, declining to establish any explicit basis for expanded review under that uniform act. *See* UNIF. ARBITRATION ACT § 23 (2000), 7 U.L.A. 79–83 cmt. B (2009).

100. For a thorough discussion on this topic, see Thomas S. Meriwether, Comment, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739 (2007).

The Supreme Court's pronouncement in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[101] that such relief could not be obtained under the FAA,[102] far from putting the matter to bed, has opened up a whole new realm of questions regarding the ability of parties to contract for judicial appeal under some other body of law.[103] The majority concluded that agreements for expanded review were inconsistent with the specific language of FAA §§ 10 and 11,[104] which "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[105] But the Court proceeded to invite consideration of other avenues to the same ends,[106] as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."[107] Although it may be some time before the full import of this invitation is clarified, it is likely that state statutes or controlling judicial decisions promoting contractually expanded review will become "safe harbors" for such activity. New Jersey is perhaps the sole example of a statutory template for parties that wish to "opt in" to the legislative framework for elevated scrutiny of awards;[108] in *Cable Connection, Inc. v. DIRECTV, Inc.*, California's highest court recognized a more general "safe harbor" for contractually expanded judicial review under that state's law.[109]

Although *Cable Connection* appears to be a rational interpretation of arbitration law, this may be a situation in which having the legal authority to engage in an activity is an invitation to misadventure.[110] Effective judicial review requires implementing a variety of steps, including the creation of a record[111] and the preparation of a rationale to accompany the award.[112] As reflected in leading commercial procedures, such

101. 128 S. Ct. 1396 (2008). *See* Russ Bleemer, *The Calm and the Storm: Arbitration Experts Speak Out on* Hall Street Associates, 26 ALTERNATIVES TO HIGH COST LITIG. 104, 104–05 (2008).

102. *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1396; *see also* 9 U.S.C. §§ 1–16 (2006).

103. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 285–98.

104. *See Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1399.

105. *Id.* at 1405 ("Any other reading [would] open[] the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . . .'" (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003))).

106. In a highly unusual move, the Court requested additional briefing on these issues after the initial arguments. Its March decision concluded that the supplemental arguments raised new points which required a remand for the development of the issues. *See Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1407–08. The Ninth Circuit subsequently issued a remand order to the district court, concluding that the High Court decision "preserved the issue of sources of authority, other than the Federal Arbitration Act, through which a court may enforce an arbitration award." Hall St. Assocs., L.L.C. v. Mattel Inc., 531 F.3d 1019, 1019–20 (9th Cir. 2008).

107. *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1406.

108. *See* N.J. STAT. ANN. § 2A:23A-12 (West 2009).

109. 190 P.3d 586, 599 (Cal. 2008).

110. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 285–98 (describing the pitfalls and concerns associated with expanded review).

111. *Id.* at 289.

112. *Id.* at 279–81.

elements are more common in current arbitration practice.[113] In addition, a number of arbitration institutions have established processes that are private counterparts for appellate courts.[114]

5. Unauthorized Practice of Law; Conflict of Interest

The growing similarity of arbitration to litigation (as well as the growing use of trial tactics in arbitration) is also reflected in the increased emphasis on the unauthorized practice of law. In recent years, a number of state tribunals or other bodies have considered motions to remove party representatives[115] or vacate an award[116] under this rubric. Several state rulemaking bodies have announced limitations on lawyers from other states representing clients in arbitration.[117]

Relatively few issues in arbitration have generated more legal activity than concerns about arbitrator conflict of interest.[118] A host of legal

113. *See, e.g.*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, *supra* note 56, R. 15.2 ("All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise."); JUDICIAL ARBITRATION & MEDIATION SERVS., *supra* note 56, R. 24(h) ("Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award."). *But see* AM. ARBITRATION ASS'N, *supra* note 56, R. 42(b) ("The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.").

114. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 298–313.

115. *See, e.g.*, Disciplinary Counsel v. Alexicole, Inc., 822 N.E.2d 348, 349–50 (Ohio 2004) (finding that a nonlawyer who regularly "prepares statements of claims, prepare[s] discovery, participate[s] in prehearing conferences, participate[s] in settlements, and attend[s] mediation and/or arbitration hearings" on behalf of clients in securities cases engages in unauthorized practice of law).

116. *See, e.g.*, Superadio Ltd. P'ship v. Winstar Radio Prods., L.L.C., 844 N.E.2d 246, 252 (Mass. 2006) (declining a motion to vacate an award on the basis that opposing party's attorney was not licensed to practice law in the seat of arbitration). Allegations of unauthorized practice have also underpinned efforts to deny counsel payment for legal services, resulting in some of the leading precedents in this area. *See, e.g.*, Prudential Equity Group, LLC v. Ajamie, 538 F. Supp. 2d 605, 610–11 (S.D.N.Y 2008) (considering and rejecting an argument that a fee-sharing agreement could not be enforced because the lawyer engaged in unauthorized practice of law by participating in arbitration in New York although not admitted to the New York bar); Donald J. Williamson, P.A. v. John D. Quinn Constr. Corp., 537 F. Supp. 613, 615–16 (S.D.N.Y 1982) (finding a New Jersey law firm was entitled to compensation for legal services and disbursements rendered with respect to arbitration in New York even though the attorney who performed most of the services was not admitted to practice in New York); Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 10 (Cal. 1998) (holding that a New York law firm could not recover for representation of a California client in dispute, including making preliminary arbitration arrangements and negotiating settlement, because attorneys providing services were not members of the California bar).

117. *See* CAL. CIV. PROC. CODE § 1282.4 (West 2007) (providing an arbitration exception to rules governing the unauthorized practice of law and requiring *pro hac vice* registration); Paul M. Lurie, *Court Committee Opinion Limiting ADR Representation Raises Constitutional Issues, as well as Problems Rooted in Protectionism*, 25 ALTERNATIVES TO HIGH COST LITIG. 72, 74 (2007) (discussing the New Jersey Court Unauthorized Practice of Law committee's opinion of January 4, 2007 and approaches in other states); D. Ryan Nayar, *Unauthorized Practice of Law in Private Arbitral Proceedings: A Jurisdictional Survey*, 6 J. AM. ARB. 1, 5–12 (2007).

118. *See* Bethany L. Appleby, *Arbitrators Must Investigate or Disclose, 2nd Circuit Says*, DISP. RESOL. J., Oct. 2007, at 5, 5, 15 (discussing the court's decision to impose a duty on an arbitrator to either investigate conflicts of interest of which they become aware, or inform the parties that no investigation was undertaken); Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28

decisions have considered motions to vacate based on an arbitrator's failure to disclose a connection to the case or participants.[119] These concerns have also been among the stimuli for reform of standards governing arbitration, including statutes.[120]

C. *The Impact of Statutory Reform*

When the RUAA,[121] whose predecessor was the model for arbitration statutes in thirty-five states,[122] was published in 2000, it incorporated many new elements that reflect the "legalization" of arbitration. These include sections establishing judicial and arbitral authority to order provisional remedies;[123] authorizing courts to consolidate arbitration hearings in appropriate cases;[124] expressly requiring disclosures by arbitrators;[125] authorizing summary dispositions by arbitrators;[126] setting requirements for notice of hearings;[127] permitting all parties to have a lawyer;[128] authorizing arbitrator subpoenas, deposition orders, and arbitrator-supervised discovery;[129] and permitting a wide range of arbitral remedies, including punitive damages and attorney fees if authorized by law.[130] In many cases, the substance and detail of these provisions, and in some cases their mandatory character, reflect the need to address concerns associated with consumers and employees brought into arbitration under standardized contracts, a subject addressed below.[131] Just as the scope and structure of the RUAA was influenced by the "legalized" practice of its time, it will undoubtedly reinforce these trends. Recent discussions among commercial arbitrators and practitioners suggest, for example, that colleagues are viewing the RUAA's procedural due

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FORDHAM URB. L.J. 915, 920–28 (2001) (describing elements that create an arbitrator conflict of interest).

119. *Compare* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150–51 (1968) (White, J., concurring) (distinguishing important nondisclosures from insignificant ones in order to determine whether there is evident partiality under the FAA), Uhl v. Komatsu Forklift Co., 512 F.3d 294, 307–08 (6th Cir. 2008) (working on an unrelated case did not provide enough evidence that arbitrator had improper motives in issuing award), *and* Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007) (holding the arbitrator is disqualified under the "evident partiality" standard of the FAA only when a reasonable person, considering all the circumstances, would conclude the arbitrator was partial), *with* Rebecca Callahan, *California's New Ethics Standards: A Hot Bed of Controversy and Conflicting Decisions*, 5 J. AM. ARB. 295, 329–38 (2006) (discussing the move away from a reasonableness standard to new standards in determining arbitrator conflict of interest).

120. *See infra* text accompanying notes 125, 134–35, and 292–310.

121. UNIF. ARBITRATION ACT §§ 1–33 (2000), 7 U.L.A. 11–98 (2009).

122. *See id.* prefatory note 1.

123. *Id.* § 8, 7 U.L.A. 33–34.

124. *Id.* § 10, 7 U.L.A. 40.

125. *Id.* § 12, 7 U.L.A. 46.

126. *Id.* § 15(b), 7 U.L.A. 56.

127. *Id.* § 15(c), 7 U.L.A. 57.

128. *Id.* § 16, 7 U.L.A. 60.

129. *Id.* § 17, 7 U.L.A. 60–61.

130. *Id.* § 21, 7 U.L.A. 72–73.

131. *See infra* Part III.

process "enhancements" as a mandate for more discovery in commercial arbitration.[132]

The RUAA and state legislative enactments represent only one of several layers of regulation currently governing arbitration. Arbitrators and practitioners are best advised to engage in the process with an eye not only to applicable institutional arbitration procedures, but also to federal and state laws fleshed out by case law,[133] as well as ethical standards governing arbitrators[134] and lawyers.[135]

D. Evolution of the Arbitration Bar; Perceptions of Counsel and Arbitrators

Like the litigators of earlier generations, attorneys with practices emphasizing arbitration have organized themselves at regional and national levels in groups such as the Public Investors Arbitration Bar Association (PIABA) and arbitration committees of different ABA Sections.[136] At the same time, tort reform and other developments leading to the contraction of litigation have forced some long-time litigators into arbitration practice in the United States or internationally.[137] Listservs sponsored by bar groups and other professional organizations feed a growing appetite for discussion and analysis of court decisions and other developments affecting arbitration.

Recent canvasses of business lawyers reveal decidedly mixed experiences with commercial arbitration and perspectives on the current state of arbitration. Results from a 2004 survey of 300 corporate counsel conducted by Fulbright & Jaworski, which looked at attitudes toward domestic arbitration, reflect a tendency to view arbitration more positively than litigation but also portray a division of perspectives among corporate counsel.[138] In the Fulbright survey, in-house attorneys were asked whether they believed that arbitration offered cost savings over litiga-

132. Ironically, the Reporter's Comment makes it clear that "extensive discovery . . . eliminates the main advantages of arbitration in terms of cost, speed and efficiency." UNIF. ARBITRATION ACT § 17 cmt. 2, 7 U.L.A. 59. Moreover, continues the commentary, "it should be clear that in many arbitrations discovery is unnecessary" and "parties can decide to eliminate or limit discovery as best suits their needs." *Id.* cmt. 3, 7 U.L.A. 59.

133. *See generally* IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT (1995) [hereinafter FEDERAL ARBITRATION LAW].

134. *See, e.g.*, AM. ARBITRATION ASS'N & AM. BAR ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977) (revised 2003), www.abanet.org/dispute/commercial_disputes.pdf. Representatives of the CPR Institute for Dispute Resolution were also heavily involved in the revisions to the Code, but for political reasons CPR's name did not appear on the finished revision. The author was involved in the deliberations as Chair of the ABA Committee that began the reforms to the Code and later as President and CEO of the CPR Institute.

135. *See, e.g.*, LAWYER AS THIRD-PARTY NEUTRAL, *supra* note 16.

136. Other organizations, such as the American College of Construction Lawyers, consistently place heavy emphasis on arbitration law and practice in meetings and publications.

137. Interview with Mark Baker, Partner, Fulbright & Jaworski (Oct. 27, 2007).

138. FULBRIGHT 2004 SURVEY, *supra* note 12, at 10.

tion. Not quite half of those responding answered affirmatively. A *Corporate Legal Times* survey sought a similar comparison, with most respondents (fifty-nine percent) concluding that arbitration generally was less costly.[139] In the latter survey, almost four-fifths (seventy-eight percent) of those responding thought arbitration tended to produce quicker results than litigation.[140] Moreover, most counsel perceived arbitration results as just as fair or fairer than litigation, but responses to another question indicate that there remains an abiding perception that arbitrators tend to "split the baby" in their awards.[141]

For some attorneys, arbitration tends to be too much like going to court. In a 2002 survey of experienced commercial arbitrators, three-quarters of respondents expressed the belief that "arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and cost-efficient means of resolving commercial disputes."[142] For others, however, even "legalized" forms of arbitration are an unsatisfactory substitute for court trial; critics cite, among other things, the reluctance of arbitrators to grant summary judgments or dispositive relief;[143] the limitations on multiparty practice that result in inefficiencies and potentially incompatible results;[144] the fact that decision makers must be paid by the parties, unlike public judges;[145] the bifurcation of the authority to render and to execute decrees;[146] and the limits on

139. Burr, *supra* note 12, at 45. A more recent Fulbright survey of corporate counsel in the United States and United Kingdom, however, suggests that when it comes to international disputes, perceptions about the cost benefits of arbitration over litigation are changing, with fewer and fewer attorneys perceiving arbitration as less expensive. FULBRIGHT 2007 SURVEY, *supra* note 79, at 30. Another recent study of perspectives of corporate counsel found expense and time as the leading *disadvantages* of international arbitration. QUEEN MARY 2006 SURVEY, *supra* note 22, at 7.

140. Burr, *supra* note 12, at 45. However, the 2007 Fulbright survey of corporate counsel in the United States and United Kingdom suggests that with respect to the resolution of international disputes, there is a decided trend toward seeing arbitration as taking just as long as litigation. FULBRIGHT 2007 SURVEY, *supra* note 79, at 30–31.

141. Burr, *supra* note 12, at 45. The latter conclusion is fueled by suspicions that some who rely on work as an arbitrator or mediator for their livelihood are reluctant to disappoint anyone in the hopes of obtaining future business. *See* Summers, *supra* note 70, at 717.

142. Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, DISP. RESOL. J., Feb.–Apr. 2003, at 37, 38 (noting that arbitration has become a legalistic method of adjudication).

143. *See* Gordon, *supra* note 4, at 19.

144. Bernard Hanotiau, *Problems Raised By Complex Arbitrations Involving Multiple Contracts—Parties—Issues: An Analysis*, 18 J. INT'L ARB. 251, 253–55 (2001) (discussing the limitations on multiparty practice in complex arbitrations as compared to the ability to join parties in traditional litigation); *see also* Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 476 (1987) (discussing the difficulties associated with bringing about multiparty arbitration through consolidation or joinder in the absence of clear agreement); JOHN UFF, ARE WE ALL IN THE WRONG JOB?: REFLECTIONS ON CONSTRUCTION DISPUTE RESOLUTION 12 (2001), http://www.scl.org.uk/files/094-uff.pdf (addressing the "multiparty problem" under English arbitration law).

145. *See* Gordon, *supra* note 4, at 19.

146. *See* 1 FEDERAL ARBITRATION LAW, *supra* note 133, § 36.5.5 (noting the division of authority between arbitrators and courts regarding specific performance).

review.[147] The perspectives of counsel reflect the variety of goals and needs that business parties bring to arbitration and suggest that different process options are desired.

E. Trends in International Arbitration

Although our focus is on business arbitration in the United States, there is no question that the "legalized" American arbitration model has reverberated in the international sector, if only because of the dominant role played by large Anglo-American law practices.[148] The U.S. influence has been ameliorated by countervailing forces,[149] producing efforts at harmonization such as the *IBA Rules on the Taking of Evidence in International Commercial Arbitration.*[150] That influence, however, is regularly blamed for imbuing international arbitration with what Lord Mustill memorably termed as "all the elephantine laboriousness of an action in court, without the saving grace of the exacerbated judge's power to bang together the heads of recalcitrant parties."[151] Whatever the cause, it appears that international arbitration proceedings "increasingly simulat[e] court proceedings in the length of time it takes to complete a[] . . . case,"[152] and arbitration is generally perceived as tending to be as expensive as litigation.[153]

147. Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999) (commenting that "in exchange for reduced costs and speedier resolution, arbitrating parties agree to limit their right to appeal").

148. *E.g.*, YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE 51–57 (1996); Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 80–88 (2003); Arthur Marriott, *The Arbitrator's Responsibilities for the Proper Conduct of Proceedings*, *in* INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY 80, 81 (Albert Jan van den Berg ed., 2001); *see also* GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE 13–18 (2002) (describing the exportation of U.S. law and the convergence of legal rules).

149. *See* Susan L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5, 34 (2003); Lucy Reed & Jonathan Sutcliffe, *The 'Americanization' of International Arbitration?*, 16 MEALEY'S INT'L ARB. REP., Apr. 2001, at 37, 37 (stating that international practices are "homogenized" and American influences are balanced with civil law and other practices); *cf.* Tieder, *supra* note 76 (noting that American-style discovery tends to repel many parties and counsel from abroad).

150. *See* Helmer, *supra* note 37, at 50–56.

151. Michael John Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43, 56 (1989); *see also* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 96 (2000) ("Procedurally, international commercial arbitration is becoming more and more like public court litigation, particularly public court litigation as practiced in the United States."); Marriott, *supra* note 148, at 81 (arguing that "US litigation techniques . . . are leading to dramatic increases in the cost of settling disputes" and urging resistance to such influences in international arbitration processes); Shalakany, *supra* note 37, at 434–36 (stating that "[t]he highly successful introduction of the American law firm model into the European market for legal services has led to a more aggressive and confrontational model of litigation" and describing how arbitration tends to be lengthier, more formal, and more costly); Ulmer, *supra* note 38, at 24 (noting that American influence has generally been positive, but acknowledging occasional instances of "unreconstructed 'hardball'" tactics by American lawyers in international cases).

152. QUEEN MARY 2006 SURVEY, *supra* note 22, at 7.

153. *See id.*; *see also* FULBRIGHT 2007 SURVEY, *supra* note 79, at 17.

Despite these concerns, corporate counsel still tend to favor binding arbitration for international dispute resolution[154]—perhaps because, in the international sphere, it is the clearly superior alternative for adjudication.[155] But today arbitration provisions in international business contracts are increasingly relegated to a secondary or tertiary role in a multi-step dispute resolution agreement.[156]

II. THE REVOLUTION IN THE DISPUTE RESOLUTION MARKETPLACE; THE APPEAL OF "THIN-SLICING"

Arbitration's emergence as a surrogate for litigation, and its growing similarity to litigation, has a number of implications for arbitration's role in the landscape of conflict management. It also affects user perceptions of binding arbitration vis-à-vis mediation and other approaches aimed at informal, party-driven consensual resolution.

A. The Search for Reduced Cost and Risk, Greater Value in Dispute Resolution

The corporate retreat from litigation was fueled by concerns about cost: the cost of judgments, the cost of settlements in the shadow of litigation, and the legal and other dispute resolution costs that are often much greater than the cost of settlement before litigation.[157] Coupled with the risks of unpredictable jury verdicts[158] and the drain on internal resources that might have been better employed managing or pursuing business,[159] these factors help explain the attraction of arbitration with its conventional perceived benefits of lower cycle time, lower cost, and expert decision making. They also explain the present frustration of business persons whose expectations of arbitration have been disappointed by an increasingly legalized process. Arbitration too often involves the same sustained, customized, and labor-intensive approach as litigation; demands the commitment of significant in-house resources; and entails un-

154. *See* QUEEN MARY 2006 SURVEY, *supra* note 22, at 22 (describing how a vast majority of corporate counsel plan to continue to use arbitration despite concerns about cost and other issues).

155. Charles N. Brower, *Introduction* to INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? ix, ix–x (Richard B. Lillich & Charles N. Brower eds., 1994) (observing that the desire to avoid an opposing party's court system is a paramount advantage of arbitration); Alan Redfern, *Having Confidence in International Arbitration*, DISP. RESOL. J., Nov. 2002–Jan. 2003, at 60, 60–61.

156. *See* QUEEN MARY 2006 SURVEY, *supra* note 22, at 5 (stating that "[i]n most cases, international arbitration is not used in isolation; its use in combination with ADR mechanisms is the most common option"); *see also* Helmer, *supra* note 37, at 47–48 (noting an increasing use of ADR in international commercial disputes to redress some of the concerns associated with increasingly formal and costly arbitration).

157. *See* Lande, *supra* note 7, at 51; David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Stipanowich, *supra* note 41, at 843.

158. *See* Lande, *supra* note 7, at 32–35.

159. *See id.* at 35–38.

acceptable risks.[160] It is no wonder that corporate counsel appear to be increasingly drawn away from arbitration toward mediation and other approaches that tend to be more successful in achieving business' goals.[161]

B. Embracing ADR

Businesses as well as courts, agencies, and communities have all played a role in the revolutionary trends toward mediation and other nonbinding approaches for third-party conflict intervention in the United States, the United Kingdom, and other common law jurisdictions.[162] Mediation, early neutral evaluation, dispute review boards, and other strategies aimed at negotiated conflict resolution have become an accepted feature of court and administrative processes.[163] They have also assumed a key role in private resolution of business, employment, and consumer disputes,[164] often at the direct expense of arbitration.[165]

In a recent bestseller, Malcolm Gladwell explores many examples of "thin-slicing"—the ability of the human subconscious to identify patterns in situations and to make responses based on very quick or short "slices of experience."[166] The brain develops these shortcuts as a means of enabling us to make the myriad decisions necessary to conduct everyday life, but the concept of thin-slicing has significant implications for the analysis and resolution of conflict. Gladwell's summaries of psychological studies demonstrate, among other things, that too much information may actually cloud judgment and undermine the accuracy of conclusions.[167] His point is that, by developing a facility to make relatively quick judgments based on selective key data, one may avoid considerable, unnecessary effort.[168] The emergence of mediation and other infor-

160. *See generally* Phillips, *supra* note 142.

161. *See infra* Part II.C. Such approaches may resonate with counsel such as Mark Chandler, the General Counsel of Cisco Systems, Inc., who warns of a "fundamental misalignment of interests" between business clients seeking to manage expenses and law firms driven by hourly billing. He describes his own legal department as being "as metrics-driven as manufacturing, HR or sales," and driving constantly to improve productivity and reduce expense—a goal which he views as diametrically opposed to the highly customized, highly leveraged, labor-intensive, and expensive method by which legal services are currently provided. Mark Chandler, Gen. Counsel, Cisco Sys., Inc., Address at the Northwestern School of Law's 34th Annual Securities Regulation Institute: State of Technology in the Law (Jan. 25, 2007) (transcript available at http://blogs.cisco.com/news/comments/cisco_general_counsel_on_state_of_technology_in_the_law/).

162. *See generally* NANCY NELSON ET AL., COMMERCIAL MEDIATION IN EUROPE 3 (2004).

163. Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 549 (2008) ("[D]isputes are increasingly being transferred from court dockets to mediation, arbitration, or some other alternative dispute resolution[] procedure that is 'court-connected,' or required or advised by the court."); *see also* JEFFREY M. SENGER, FEDERAL DISPUTE RESOLUTION 2–3 (2004).

164. *See* Stipanowich, *supra* note 11, at 849–51 (discussing the expanding use of mediation).

165. *Knocking Heads Together*, *supra* note 4, at 62 (noting trend away from arbitration and toward mediation).

166. MALCOLM GLADWELL, BLINK 22–23 (2005).

167. *See id.* at 125–45.

168. *Id.* at 52.

mal approaches for the efficient, effective resolution of conflict represents an application of "thin-slicing" that has revolutionized public and private dispute resolution, as well as challenged the primacy of litigation and arbitration with their emphasis on full information exchange, full exposition, and extensive due process. Today, increasingly more disputants and counsel are recognizing that less is often more.

C. The Phenomenon of Mediation

It is now commonplace to hear or read about corporate counsel drawing unfavorable comparisons between binding arbitration and mediated negotiation.[169] When one general counsel was asked why her company had virtually supplanted arbitration with mediation, she immediately responded with three words: "Speed, cost and control."[170] She explained further, "I almost never arbitrate any more except when mandated by contract or where we are dealing with foreign nationals that expect arbitration. In arbitration you can have a very bad outcome."[171]

Various potential benefits of mediation tend to be well understood by lawyers in litigation or dispute resolution departments.[172] These benefits include a high degree of control by parties and counsel over process and product,[173] with the assurance that a binding result will only occur in the event the parties reach agreement.[174] Control permits considerable customization,[175] including "layers" of protection to ensure the secrecy of

169. *See infra* notes 174, 182–85.

170. Telephone Interview with Nancy Vanderlip, Vice President & Gen. Counsel, ITT Indus. (Jan. 2007) [hereinafter Vanderlip Interview]. Professor Steve Ware appropriately stresses the notion that "mediation and arbitration are incomparable: mediation requires a post-dispute agreement to resolve the matter, while arbitration doesn't." E-mail from Stephen J. Ware, Professor, Univ. of Kan., to Author (Nov. 13, 2008). For additional discussion, see STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 1.7(d) (2d ed. 2007). I wholeheartedly concur, but as discussed below in the text accompanying notes 204–09, it appears some businesses that regularly utilize mediation may more readily accept litigation rather than arbitration as an adjudicatory "backdrop."

171. Vanderlip Interview, *supra* note 170.

172. *See* LIPSKY & SEEBER, *supra* note 10, at 17 tbl.15 (detailing reasons why companies use mediation and arbitration); *U.S. Corporations Now Widely Use Alternative Dispute Resolution over Litigation to Solve Disputes, National Survey Shows*, CORNELL U. BUS. NEWS, May 21, 1997, http://www.news.cornell.edu/releases/May97/ADRstudy.html.

173. In litigation and in arbitration, the process is often dominated by the lawyer; the agent becomes the principal. *See* SELLS, *supra* note 66, at 88. Indeed, it has been said that because of the control exerted by lawyers over the adjudicative process, lawyers and the state may be said to expropriate the client's "property" interest. *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 648 (1980–81). In mediation, however, there is usually much greater emphasis on a client's active engagement in the process.

174. *See* Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation & Arbitration*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167, 1170 (1993) (noting that disputants may prefer mediation to arbitration because they value the opportunity to control, negotiate and develop the outcome).

175. *E.g.*, Gerald S. Clay & James K. Hoenig, *The Complete Guide to Creative Mediation*, *in* AAA HANDBOOK ON MEDIATION 115, 118–21 (Thomas E. Carbonneau ed., 2006) (stressing the flexibility of process and problem-solving in mediation); *see also* KIMBERLEE K. KOVACH, MEDIATION IN A NUTSHELL 36 (2003) (stressing the self-determination of parties engaging in mediation).

information and communications made during the mediation process.[176] The scope of discussion may embrace commercial and personal interests as well as legally or factually founded controversies, and in some cases relational considerations.[177] The results are not limited to the typical forms of adjudicated relief, but may even extend to overcoming communication and cultural barriers, and adjusting or transforming personal or institutional relationships.[178] Mediation also holds out a realistic promise of a reduction in dispute cycle time and related costs,[179] coupled with more creative, durable solutions[180] and relatively minor risks.[181] In short, mediation is the most popular and successful form of "thin-slicing" in conflict resolution. In the current "toolbox" of approaches to conflict, mediation is the equivalent of a multifunctional Swiss Army knife.

It is not surprising that in head-to-head comparisons with arbitration, mediation is usually perceived more positively by business persons and their counsel on several grounds.[182] Indeed, some of the starkest contrasts between mediation and arbitration point out the ways in which mediation may be more effective in serving the ends traditionally associated with arbitration, and more. Mediation is generally viewed more favorably with respect to cost savings,[183] speed of resolution,[184] and general satisfaction.[185] It typically entails significantly less preparation than adjudication on the merits and may help to minimize or forego substantial information exchange and discovery.[186] Parties may scale down their

176. *See* KOVACH, *supra* note 175, at 193–98 (discussing a range of options parties have to ensure confidentiality in mediation).

177. *See id.* at 37–38 (stating that mediation provides an opportunity for acknowledging and preserving relationships).

178. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 12 (rev. ed. 2004); Johnnie Scott, Jr., *Addressing Race and Cultural Conflict in Employment Mediation*, *in* AAA HANDBOOK ON MEDIATION, *supra* note 175, at 307, 307–11 (discussing how mediation can overcome cultural barriers to agreement).

179. KOVACH, *supra* note 175, at 35 (describing how mediation can take place in a matter of days or hours, thus sparing the expenses of litigation).

180. *See* Howard J. Aibel, *Mediation Works: Opting for Interest-Based Solutions to a Range of Business Needs*, *in* AAA HANDBOOK ON MEDIATION, *supra* note 175, at 49, 49 (stating that an agreement is more likely to be adhered to faithfully when it is not imposed by a third party); Clay & Hoenig, *supra* note 175, at 116–18 (stressing the creativity of mediation).

181. Clay & Hoenig, *supra* note 175, at 116 (noting the great benefits and relatively minor costs and risks of mediation).

182. *See* Aibel, *supra* note 180, at 49 ("Mediation is fast becoming a preferred method for resolving business disputes as corporate counsel and business executives increasingly recognize the benefits of the process."); Lisa Brennan, *What Lawyers Like: Mediation*, NAT'L L.J., Nov. 15, 1999, at A1.

183. *See* FULBRIGHT 2004 SURVEY, *supra* note 12, at 11; *see also* RHYS CLIFT, INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION: A COMPARISON BETWEEN ARBITRATION AND MEDIATION 7–10 (2006), http://civilmediation.org/library-page.php?lib=3 (follow "Comparison Between Mediation and Arbitration" hyperlink).

184. CLIFT, *supra* note 183, at 7–9.

185. *See id.*; *see also* Stephen B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences Between Mediation and Arbitration*, 6 NEGOTIATION J. 249, 250 (1990) (finding that groups historically utilizing arbitration processes unanimously preferred mediation).

186. *See* KOVACH, *supra* note 175, at 116–18 (describing how preparation for mediation is flexible and enhances the process).

presentations to address only essential elements of proof or interests.[187] Privacy and confidentiality tend to be protected more fully,[188] and the risks are typically significantly lower.[189] As in arbitration, parties may have the advantage of third-party substantive expertise. And, although arbitration affords the signal benefit of a binding result, private mediation is very likely to resolve disputes in a mutually satisfactory way[190] and holds out the possibility of a much wider variety of potential outcomes, as noted above.[191]

Finally, mediation tends to be a much better approach for preserving, maintaining, and even improving commercial relationships.[192] It is flexible, informal, and private; most significantly, it allows disputing parties to take control of their destiny by stepping back from legal claims to explore underlying issues and significant personal and institutional interests. These attributes may all contribute to parties finding creative and mutually acceptable solutions to get a venture or a partnership back on track. Mediation can also be conducted at a tempo that reflects the needs and rhythm of the relationship.

Similar to litigation, modern "legalized" arbitration tends to work against ongoing relationships.[193] They are both formalized adversary processes aimed at adjudicating rights and obligations, and thus are narrowly and backward focused.[194] Legal counsel, not the parties themselves, drive the process.[195] The question is not whether arbitration will improve an underlying commercial relationship, but how much harm it will do. Unresolved conflict takes time and energy from other pursuits and often results in a spiral of conflict in which parties engage in heavier and increasingly contentious tactics.[196] Arbitration, if not the culmination of these tendencies, will usually tend to exacerbate them. Unless they are carefully streamlined, expedited proceedings, arbitration processes will tend to divert resources away from mutually beneficial efforts and commit them to mutual combat.[197]

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187. *See* CLIFT, *supra* note 183, para. 4.31, at 10.

188. *See id.* paras. 4.18–22, at 8.

189. *See id.* para. 4.34, at 10.

190. Clay & Hoenig, *supra* note 175, at 115 ("Mediation . . . [gives parties] the power to determine their own outcome by reaching a mutually acceptable resolution of their dispute.").

191. *See supra* text accompanying notes 172–80.

192. CLIFT, *supra* note 183, paras. 7.13–.14, at 14.

193. *See* Kent B. Scott & Cody W. Wilson, *Questions Clients Have About Whether (and How) to Mediate and How Counsel Should Answer Them*, DISP. RESOL. J., May–July 2008, at 26, 29.

194. Carmen Collar Fernandez & Jerry Spolter, *International Intellectual Property Dispute Resolution: Is Mediation a Sleeping Giant?*, DISP. RESOL. J., Aug. 1998, at 62, 65.

195. *See supra* text accompanying notes 173–74.

196. *See* DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT 11–13 (3d ed. 2004).

197. Some forms of expedited arbitration may be a notable exception. *See infra* note 367 (referencing Abbott Labs arbitration program for distributorship contracts). *See generally* Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS. & COM. L.J. 383 (2009).

Mediation is increasingly visible across the commercial landscape,[198] and its vitality and utility will likely be enhanced by increasing reliance on information technology to transact business and resolve disputes quickly and efficiently over vast distances. For example, the online dispute resolution (ODR) program for eBay buyers and sellers resulted in the successful resolution of tens of thousands of disputes.[199] The Internal Revenue Service created an online resolution program to address taxpayer disputes.[200]

Just as students of federal and state court-connected ADR programs have observed a trend away from arbitration processes and toward mediation initiatives,[201] there is a growing tendency to turn to mediation *at least initially* instead of arbitration. Some years ago, the CPR Institute for Dispute Resolution (now the International Institute for Conflict Prevention & Resolution) issued a set of guidelines for business parties that designated arbitration as the final step in a recommended three-step approach for the resolution of business disputes consisting of (1) negotiation, (2) mediation, and (3) binding arbitration.[202] Such "filtering systems" for the resolution of disputes acknowledge the logic of relying initially on approaches that tend to be less formal, more flexible, more efficient, and less costly than binding adjudication, and only turning to arbitration as a final step if all else fails. Similar multistep dispute resolution provisions are now becoming ubiquitous in commercial contracts and related court decisions.[203]

198. Mediation now appears alongside arbitration in some dispute resolution statutes. *See, e.g.*, California International Arbitration and Conciliation Act, CAL. CIV. PROC. CODE § 1297.11 (West 2007).

199. Due to eBay's change to its feedback system in May 2008, SquareTrade decided to discontinue its ODR program, which had handled hundreds of thousands of disputes for eBay. SquareTrade, ODR Is No Longer Offered by SquareTrade, http://www.squaretrade.com/pages/odr-discontinued (last visited Nov. 25, 2009). If a dispute should arise, eBay now encourages users to communicate directly to their trading partner and report problems through an in-house dispute console. eBay.com, Resolving Transaction Problems in Our Resolution Center, http://pages.ebay.com/help/tp/using-dispute-console.html (last visited Nov. 25, 2009). For a discussion of other ODR programs, see Jim Keane & Debi Miller-Moore, *Linking Information Technology and Dispute Resolution*, DISP. RESOL. J., Feb.–Apr. 2004, at 58, 58–59 (discussing Cybersettle, an ODR provider that has assisted the insurance industry with over 70,000 settlements).

200. *See IRS Launches Pilot Programs in ADR*, DISP. RESOL. J., Nov. 2000–Jan. 2001, at 6 (describing the IRS's implementation of the Fast-Track Mediation Program and the Comprehensive Case Resolution Pilot Program); David Parsly, Note, *The Internal Revenue Service and Alternative Dispute Resolution: Moving from Infancy to Legitimacy*, 8 CARDOZO J. CONFLICT RESOL. 677, 677 (2007).

201. Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 201 (2002) ("[S]tate and federal courts have turned away from nonbinding arbitration and towards mediation." (quoting Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 77)).

202. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 5–30.

203. The reported cases are replete with examples of multistep dispute resolution provisions, many of which include mediation followed, if necessary, by arbitration. One assumes that private dispute resolution agreements that are referenced in court documents are merely the tip of the iceberg. *E.g.*, Tittle v. Enron Corp., 463 F.3d 410, 413–14 (5th Cir. 2006) (liability insurance policy); Image Software, Inc. v. Reynolds & Reynolds Co., 459 F.3d 1044, 1047 (10th Cir. 2006) (license agreement dispute); Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 85–86 (4th Cir. 2005) (stepped em-

In tiered dispute resolution systems, arbitration or some other form of binding adjudication must play a residual role, as mediation cannot guarantee a resolution of disputes. The potential need for a binding decision is theoretically arbitration's trump card. There is, however, the possibility that some parties, contractually availing themselves of a highly flexible and often successful private ADR process in mediation, will prefer for court trial to be the final step if the benefits of binding arbitration are not seen to clearly outweigh its costs and limitations compared to litigation. Thus, many stepped dispute resolution agreements culminate not in binding arbitration, but in court.[204] The most striking example of such an election is the decision of the committee drafting the 2007 edition of the AIA contracts regime to delete the default arbitration provision in the standard stepped dispute resolution clause, but to retain mediation as a precondition to going to court.[205] This occurred after a decade of experience with a stepped process, including mediation and arbitration,[206] and with support from various industry sectors. As the president of a leading organization of surety companies recently explained in support of the AIA document changes, "Sureties feel that arbitration has turned into essentially litigation, with all the expense of litigation, and without the court."[207] The speaker was among those supporting development of another new set of construction contract documents that eschew arbitration as a default choice, instead emphasizing mediation and other processes.[208] The American experience with mediation is paralleled by that of other common law countries, notably England,[209] Australia,[210] and

ployment system); Prescott v. Northlake Christian Sch., 141 F. App'x 263, 265–68 (5th Cir. 2005) (employment contract between principal and Christian school); Parsons Energy & Chem. Group, Inc. v. Williams Union Boiler, 128 F. App'x 920, 921–24 (3d Cir. 2005) (construction contract); DSMC Inc. v. Convera Corp., 349 F.3d 679, 681–82 (D.C. Cir. 2003) (digital storage services contract); Hawkins v. Aid Ass'n for Lutherans, 338 F.3d 801, 803–05 (7th Cir. 2003) (fraternal benefit society contract); Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1288–90 (11th Cir. 2002) (distributorship contract); Sec. Watch, Inc. v. Sentinel Sys., Inc., 176 F.3d 369, 370–71 (6th Cir. 1999) (contract for security services); Accuride Corp. v. Forgitron, L.L.C., No. 1:07-CV-833, 2007 WL 2381952, at *1–2 (N.D. Ohio Aug. 17, 2007) (service agreement); SI V, L.L.C. v. FMC Corp., 223 F. Supp. 2d 1059, 1060–61 (N.D. Cal. 2002) (contract for purchase and sale of land); *see also* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 123–27 (2006); Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Expanding Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 457 n.242 (2007) (listing published cases).

204. AIA DOCUMENT A201-2007, *supra* note 2, art. 15.3.1.

205. *Id.*

206. *See* Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 364–78 (1998) (discussing the evolution of stepped processes including mediation under the AIA documents).

207. Lynn Schubert, President, Surety & Fid. Ass'n of Am., Remarks at the American College of Construction Law Princeton Symposium: Delivering the Future: Technology, Risk and Reward (Nov. 3, 2006), *in* J. AM. C. CONSTRUCTION L., May 2007, at 129, 146 [hereinafter ACCL Princeton Symposium Proceedings]. Ms. Schubert further explained that her industry was supportive of mediation and was working with other industry groups to create new contract forms that would provide for a "standing mediator" on construction projects. *Id.* at 145–46.

208. *See* CONSENSUSDOCS LLC, *supra* note 3, art. 9.5.

209. GAITSKELL, *supra* note 4, at 7–9; *see also* ROBERT M. NELSON, NELSON ON ADR 310–12 (2003).

Canada.[211] First introduced to England around 1990,[212] U.S.-style mediation experienced steady but unspectacular growth until a decade later, when the active encouragement of courts dramatically increased mediation use.[213] Today, mediation is widely used in all forms of commercial disputes.[214] It has contributed to a precipitous drop in major litigation, including an almost eighty percent reduction in cases in the Technology and Construction Court[215] and a two-thirds reduction in just three years in appeals arising from Queen's Bench, a reflection of the reduction of trials in those courts.[216] Mediation is also one of the reasons for a substantial decrease in the volume of commercial arbitration in the United Kingdom, informally estimated at more than thirty percent.[217]

Anglo-American mediation models have yet to proliferate in commercial dispute resolution outside the common law countries.[218] In the EU, mediation confronts numerous barriers. These include the belief that mediation is a creature of the U.S./U.K. litigation crisis, inapplicable in other European systems; a lack of understanding about the nature of mediation and its potential value; a lack of awareness of mediation resources; and limited encouragement by courts and agencies.[219]

But the landscape appears to be shifting. Although a 2002 CPR Institute survey of corporate counsel in the EU indicated that most respondents had little if any experience with mediation and other forms of ADR, a 2005 marketing survey conducted by DLA Piper Rudnick of corporate lawyers in five different regions of the EU suggested that they tended to view mediation and ADR more favorably than arbitration.[220] Perhaps the most telling harbinger of the future is a 2006 survey of corporate counsel regarding international arbitration by Queen Mary Col-

210. *See* HILARY ASTOR & CHRISTINE CHINKIN, DISPUTE RESOLUTION IN AUSTRALIA 3–22 (2d ed. 2002); NELSON, *supra* note 209, at 291–95.

211. *See* NELSON, *supra* note 209, at 7, 55; *Mediation and ADR in Canada*, 8 WORLD ARB. & MEDIATION REP. 212, 212 (1997).

212. GAITSKELL, *supra* note 4, at 8.

213. Miryana Nesic, *Mediation—On the Rise in the United Kingdom?*, 13 BOND L. REV. 20 (2001), *available at* http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1214&context=blr (noting the gradual take-up of mediation and the impact of court reform).

214. *Knocking Heads Together*, *supra* note 4, at 62 (providing the oldest and biggest of U.K.-based mediation providers, London-based Center for Effective Dispute Resolution (CEDR), and its U.S. partner, JAMS, with priceless press).

215. GAITSKELL, *supra* note 4, at 3.

216. *Id.* at 5.

217. *Id.*

218. NELSON ET AL., *supra* note 162, app. 1 (providing European Corporate Survey data reflecting little usage of mediation by European corporations).

219. Despite the fact that international commercial conciliation is still in its infancy, relatively speaking, there is already a United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation. G.A. Res. 57/17, U.N. Doc. A/RES/57/17 (Jan. 21, 2003), http://daccessdds.un.org/doc/UNDOC/GEN/N02/538/92/PDF/N0253892.pdf [hereinafter UNCITRAL MODEL LAW].

220. DLA PIPER RUDNICK GRAY CARY, EUROPEAN DISPUTE RESOLUTION SURVEY 14 (2005–06).

lege and PricewaterhouseCoopers.[221] According to that study, more than half of those surveyed indicated that their preferred mechanism for the resolution of cross-border disputes was mediation or another ADR process (not including arbitration) or a multitiered approach in which arbitration would normally be preceded by (and perhaps rendered unnecessary by) negotiation, mediation, or other ADR mechanisms.[222]

D. Other Thin-Slicing Processes

Mediation is not the only nonbinding intervention strategy currently challenging arbitration for a share of the commercial market. For example, the global construction industry has gained considerable experience with other forms of thin-slicing based on nonbinding expert decisions made early in the life of a conflict. These other processes include the dispute review board (DRB),[223] and "statutory adjudication."[224] Delay in resolving conflict on the construction site can lead to escalating conflict, diverting attention from the project, and further delaying or disrupting the job.[225] DRBs are intended to address disputes at the earliest practicable time by having an authoritative third party make a preliminary decision that may be nonbinding but that motivates the parties to resolve their dispute, avoiding prolonged conflict and obviating the need for traditional binding arbitration or litigation.[226] There are indications that DRBs have been highly successful in settling disputes without further arbitration or litigation;[227] many believe that the very presence of a DRB on a project dampens controversy and discourages claims.[228]

In developing dispute resolution programs for the nation's largest construction project, the Boston Central Artery/Tunnel Project, authorities believed DRBs were clearly more suitable than binding arbitration. Anticipating a vast number of large and complex claims, project planners

221. *Compare* NELSON ET AL., *supra* note 162, app.1, *with* QUEEN MARY 2006 SURVEY, *supra* note 22, at 5.

222. Sixteen percent of respondents favored mediation or other ADR processes without arbitration; forty-four percent favored arbitration in the context of a tiered dispute resolution process. QUEEN MARY 2006 SURVEY, *supra* note 22, at 5.

223. Daniel D. McMillan & Robert A. Rubin, *Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements*, 25 CONSTRUCTION LAW., Spring 2005, at 14, 14. Much relevant information may be found on the website of The Dispute Resolution Board Foundation, *available at* http://www.drb.org (last visited Nov. 25, 2009).

224. Peter Kennedy, & Janey Milligan, *Mission Drift in Statutory Adjudication* (Sept. 6, 2007), http://www.rics.org/site/download_feed.aspx?fileID=3402&fileExtension=PDF.

225. Kathleen M. J. Harmon, *Construction Conflicts and Dispute Review Boards: Attitudes and Opinions of Construction Industry Members*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 66, 69–70.

226. *Id.* at 68.

227. According to the Dispute Resolution Board Foundation (DRBF), the leading advocacy group for the process, DRBs have achieved an extraordinary level of success, with as many as ninety-eight percent of cases resulting in settlement, avoiding arbitration or litigation. DISPUTE RESOLUTION BD. FOUND., PRACTICES AND PROCEDURES § 1.3 (2007), *available at* http://www.drb.org/manual_access.htm (follow "Quick Print—Section 1" hyperlink).

228. Harmon, *supra* note 225, at 73.

were concerned that arbitration was too lengthy and cumbersome.[229] They chose instead to establish standing DRB panels for all projects over $20 million.[230] Appointed at the beginning of the project, each panel made regular visits to the project site to conduct periodic reviews of potential problems, claims, or disputes, and to check the status of outstanding claims.[231] As of 2009, DRBs had been employed on over twelve hundred completed projects, including many major infrastructure projects in North America.[232] DRBs have been used on many major international projects; the World Bank now requires DRBs on projects exceeding ten million dollars.[233] The International Chamber of Commerce recently announced its own Dispute Review Board documents.[234]

The potential impact of an abbreviated, preliminary expert decision-making process on the use of litigation or arbitration is revealed in the extraordinary evolution of "statutory adjudication" in England.[235] The procedure, which evolved with the stroke of a pen as a result of the Housing Grants, Construction and Regeneration Act of 1996,[236] has revolutionized the management of construction disputes in Britain. Its emphasis on a very short review and decision-making process—statutorily set at twenty-eight days[237]—significantly changed the administration of English construction projects, as well as the roles of contractors, engineers, architects, and lawyers.[238] Given the temporal limitations, adjudication is necessarily "rough" justice—as one English Queen's Counsel put it, it may be "little more than a gut reaction" to the dispute.[239]

Although under the law the adjudicator's determination is only preliminary and may be overturned in binding arbitration or litigation, the "vast majority" of adjudication decisions are accepted by the losing par-

229. Kurt L. Dettman & Martin J. Harty, The Use of Alternative Dispute Resolution Techniques to Resolve Mega Project Claim: Lessons from Boston's "Big Dig" 2 (unpublished manuscript, on file with author).

230. *Id.* at 7.

231. *Id.* at 5.

232. The Dispute Resolution Board Foundation, DRB Frequently Asked Questions, http://www.drb.org/FAQ.htm (last visited Nov. 25, 2009).

233. *See* INT'L FED'N OF CONSULTING ENG'RS, CONDITIONS OF CONTRACT FOR CONSTRUCTION FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER §§ 20.2–.4 (Multilateral Dev. Bank Harmonised ed., Mar. 2006); WORLD BANK, PROCUREMENT OF WORKS 1 (2000), http://siteresources.worldbank.org/PROCUREMENT/Resources/works-ev6.pdf.

234. *See* NICHOLAS GOULD, SOC'Y OF CONSTR. LAW, ESTABLISHING DISPUTE BOARDS—SELECTING, NOMINATING AND APPOINTING BOARD MEMBERS 4–8 (Dec. 2006) (discussing ICC and other institutional dispute board procedures).

235. *See* GAITSKELL, *supra* note 4, at 1, 5, 10–13.

236. Housing Grants, Construction and Regeneration Act, 1996, c. 53, §§ 1–151 (Eng.), *available at* http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960053_en_1.

237. *Id.* § 108.

238. *See* UFF, *supra* note 144, at 3–7 (discussing the impact of adjudication and the evolution of dispute resolution processes).

239. JOHN TACKABERRY, SOC'Y OF CONSTR. LAW, FLEXING THE KNOTTED OAK: ENGLISH ARBITRATION'S TASK AND OPPORTUNITY IN THE FIRST DECADE OF THE NEW CENTURY 3 (2002).

ties.[240] A knowledgeable Queen's Counsel reports that "well over 80 [percent] of the adjudication decisions are simply accepted, with the losing party content that it has had a fair chance to put its case to an independent tribunal."[241] Explains one judge,

> The clear message appears to be that in broad terms the industry is content with adjudication. If that is so, it is worth analysing why. First, adjudication is of course a comparatively quick process. Secondly, the cost can be lower than the cost of litigation or arbitration. . . . Finally . . . . [it] enables the parties to identify what is really in issue and to test the strengths and weaknesses of their case. . . . A director in a major construction company commented that he preferred to have a wrong but cheap adjudication decision than a wrong but expensive arbitration award. And after all, the scope for correcting a wrong arbitration award is narrow whereas there is always the entitlement to take the adjudicated dispute on to the next stage, whether arbitration or litigation.[242]

Statutory adjudication is reported to be among the primary reasons for the dramatic reduction in construction litigation and arbitration in the United Kingdom.[243] What began as a "'quick, enforceable, interim decision which lasted until practical completion when, if not acceptable, it would be the subject of arbitration or litigation'" became "a mainstream post-contractual method of dispute resolution."[244] Its success has led the British government to find ways to make improvements in the process and encourage even greater use of the process, further reducing the amount of arbitration and litigation.[245] Though a strong argument can still be made for binding arbitration in cases involving greater stakes or complexity,[246] the British experience reflects the pull of the new "thin-slicing" processes.

E. Moving Upstream: Systemic Conflict Management and Cultural Change

The growing experience with mediation and other ADR mechanisms has encouraged many thinking persons to change the way they ap-

240. GAITSKELL, *supra* note 4, at 11 ("Figures given anecdotally are that there have been about 15,000 adjudications thus far . . . . Of this enormous number only about 300 have reached the courts, and of these about 200 reported decisions have resulted.").

241. *Id.*

242. FRANCES KIRKHAM, SOC'Y OF CONSTR. LAW, THE FUTURE OF ADJUDICATION 1–2 (2004).

243. GAITSKELL, *supra* note 4, at 11–12.

244. KIRKHAM, *supra* note 242, at 2 (quoting Lord Ackner debating the Housing Grants, Construction and Regeneration Act).

245. GAITSKELL, *supra* note 4, at 12; *see also* TACKABERRY, *supra* note 239, at 1. Predictably, those who serve as adjudicators tend to believe the breadth of their mandate could and should be expanded, at least within the construction realm. *See* Nicholas Gould & Malte Abel, *The Results of the Latham Review Questionnaire*, 20 CONSTRUCTION L.J. 417, 417–18 (2004).

246. *See* Vivian A. Ramsey, Justice, High Court of England & Wales, Queen's Bench Div., *in* ACCL Princeton Symposium Proceedings, *supra* note 207, at 164–69 (discussing possible avenues for conflict management, and the benefits of arbitration in some cases).

proach conflict. This may result in greater reliance on negotiation as a strategy[247] or more systematic approaches to managing conflict.[248] Although there is evidence that relatively few companies have proactively developed specific policies and procedures for the management of business disputes,[249] this may be gradually changing. The Queen Mary survey suggests what may be a growing emphasis on the importance of corporate policies governing the resolution of disputes.[250] In addition, parties to long-term contractual relationships (e.g., construction contracts or supply contracts) have found great value in contractual structures that promote alignment of objectives and active collaboration; for example, "alliancing" is a project organization method involving collective responsibility for meeting performance goals, as well as profit and risk sharing.[251] Such frameworks contemplate the avoidance and active management of conflict well short of adjudication, including binding arbitration.

III. "CONSUMERIZED" OR "MASS" ARBITRATION AND THE "SPILLOVER" EFFECT

A third dimension of arbitration's evolution into an all-purpose surrogate for civil litigation is its widespread use in standardized contracts affecting consumers and employees. This phenomenon has touched off an ongoing debate about fairness concerns and the need for regulating arbitration agreements—provoking responses that sometimes "spill over" into the broad realm of business-to-business arbitration.

247. Experience may in some cases encourage more direct negotiation. One experienced investor attorney suggests that many of his peers are convinced that their clients are better served by negotiation without the help of a mediator. Telephone Interview with Robert A. Uhl, Partner, Aidikoff, Uhl & Bakhtiari (Feb. 1, 2007).

248. *See* DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 150–52 (2003); Stipanowich, *supra* note 41, at 888–94 (summarizing empirical studies regarding the management of conflict by companies).

249. *See* Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 15 (1998); Stipanowich, *supra* note 41, at 888–94 (summarizing studies reflecting the relatively limited use of systemic approaches to conflict by companies).

250. QUEEN MARY 2006 SURVEY, *supra* note 22, at 22.

251. The concept, which has proven particularly suitable in long-term initiatives with many unknowns, avoids the typical distributive win/lose mentality underlying most commercial ventures by aligning all parties' interests in the same measurements of success. Alliancing approaches have met with extraordinary success in major public sector construction projects in Australia and New Zealand. The international information technology industry has embraced similar models for long-term ventures to develop hard or soft technology. Under typical alliancing agreements, all parties undertake to avoid conflict in favor of affirmative collaboration and to share the profits or losses on the basis of an agreed allocation. On many projects, performance targets include not only cost targets but also environmental, safety, community, quality, and time targets. Disputes are resolved by the integrated alliance leadership team, a governance structure representing all participants that is designed to produce unanimous decisions. *See* Michael A. Wilke, Chief Operating Officer of the Ams., Parsons Brinckerhoff, Inc., *in* ACCL Princeton Symposium Proceedings, *supra* note 207, at 147–54 (discussing Australian alliancing applications).

A. The Evolution of Arbitration in Adhesion Settings

The autonomy of contracting parties has always been conceptually intertwined with arbitration law and practice.[252] The enforcement of arbitration agreements, and of resulting awards, is founded on the principle that courts should honor expressions of assent to private adjudication.[253] The concept of party autonomy was emphatically strengthened and expanded by modern arbitration statutes such as the FAA, the UAA, and other state acts, which underpinned the specific enforcement of executory arbitration agreements[254] and encouraged greater use of arbitration in contracts between business parties.[255] In the mid-1980s, the Supreme Court's pronouncement of the existence of a unique, preemptive "substantive law of arbitrability" under the FAA,[256] and its subsequent extension to rights of action under federal and state securities laws,[257] employment discrimination statutes,[258] and other consumer claims,[259] ignited a firestorm of public debate and unleashed a sustained tide of litigation.[260]

Alternatives to the courtroom may appear very attractive, especially when one considers that litigation often falls short of the ideal.[261] As a response to the costs and risks of litigation, corporations began using

252. *See* FEDERAL ARBITRATION LAW, *supra* note 133, § 3.2.1 ("Because arbitration depends upon and is defined by private agreement, some commentators laud it as a principle of 'social autonomy' or a manifestation of the 'natural right of self-regulation' .... This position raises a number of questions.").

253. *Id.* § 2.1.3.6.

254. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court announced that, under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." 460 U.S. 1, 24–25 (1983).

255. *See* Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 322 n.9 (2007) (mentioning in a discussion of arbitration's expansion into employment and consumer contracts that the FAA "was originally intended to encourage arbitration between businesses" (quoting Hassam M. Fahmy, *Arbitration: Wiping Out Consumer Rights?*, 64 TEX. B.J. 917, 918 (2001))).

256. *See* Southland Corp. v. Keating, 465 U.S. 1, 15–17 (1984) (holding California franchise investment statute interpreted to make contractual arbitration provisions unenforceable against franchisees violative of preemptive pro-arbitration policy of FAA); *see also* Allied Bruce-Terminix Cos. v. Dobson, 513 U.S. 265, 271–72 (1995).

257. *See, e.g.*, FEDERAL ARBITRATION LAW, *supra* note 133, § 13.1.2.

258. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

259. *See Allied Bruce-Terminix*, 513 U.S. at 281.

260. *See, e.g.*, Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 632 (2008) (discussing the "rising tide of litigation and skepticism toward consumer arbitration"); David S. Schwartz, *If You Love Arbitration, Set It Free: How "Mandatory" Undermines "Arbitration,"* 8 NEV. L.J. 400, 422 (2007) (arguing that the virtues of arbitration would be enhanced if Congress amended the FAA to overrule the Supreme Court's decisions in *Moses H. Cone*, *Southland Corp.*, and *Mitsubishi*, and removed consumer and employee contracts from the purview of the statute); Jeff W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 258–59, 263–68 (2007) (concluding that, rather than resist the enforcement of arbitration clauses, consumer advocates and arbitration skeptics should focus on arbitral impartiality and adherence to substantive law); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 351 (1996).

261. *See* DEBORAH L. RHODE & GEOFFREY C. HAZARD, PROFESSIONAL RESPONSIBILITY AND REGULATION 76 (2002).

standardized arbitration agreements in consumer and employment contracts.[262] For individuals, the promise of an opportunity to vindicate one's claims in the public forum often falls far short of a promise of vindication; it is a fact of life that disparities in money, information, and other sources of power mean that a system that depends upon zealous representation of opposing interests often presents a far from level playing field.[263] The time and cost associated with getting a result may be overwhelming. There are other hurdles as well. It is relatively difficult for the average employee to get claims before a jury,[264] and there is evidence that it is much easier for employees with a discrimination claim to reach trial on the merits in arbitration.[265]

Nevertheless, the expansion of arbitration into the realm of standardized consumer and employment contracts has provoked responses on many levels, including judicial decisions ranging from unmitigated enforcement of arbitration clauses in standardized consumer and employment contracts to the recognition of process limits under the rubric of standard contract defenses such as unconscionability[266] or fraud.[267] Other responses include: "community due process standards" such as the Due Process Protocols developed by ADR provider groups and other national organizations,[268] the modification of leading consumer and employment arbitration rules,[269] government regulation in the securities arena,[270] and statutory reform.[271] All of these developments reflect concerns about the lack of choice many consumers and employees face and the potential for overreaching by parties in a position of superior influence.[272]

A little more than two decades ago, employees and consumers might have encountered arbitration, but in settings with built-in safeguards against overreaching. Employment arbitration, not yet a feature of standardized individual contracts, was a mainstay of dispute resolution

262. A reduction in the number of workers covered by collective bargaining agreements coincided with greater judicial involvement in protection of employee rights. A study of cases filed in federal district court between 1971 and 1991 showed that employment litigation increased by 430 percent. SIEDEL, *supra* note 148, at 58 (citing U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FACT FINDING REPORT 134 (1994)). A Rand Corporation study indicated that indirect corporate costs in attempting to avoid litigation, including retaining poor performers and offering severance, far exceeded actual litigation costs. JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY xi–xiv (1992).

263. *See* DEBORAH L. RHODE, ETHICS IN PRACTICE 8 (2000).

264. Randall Samborn, *At-Will Doctrine Under Fire*, NAT' L.J., Oct. 14, 1991, at 1, 40.

265. Stipanowich, *supra* note 41, at 904 (discussing empirical data).

266. Stipanowich, *supra* note 11, at 910.

267. *Id.*

268. *Id.* at 913, 916–17.

269. *See, e.g.*, American Arbitration Association, AAA Mediation Procedures: Summary of Changes, http://www.adr.org/sp.asp?id=32895 (last visited Nov. 25, 2009); American Arbitration Association, Summary of Changes: Employment Arbitration Rules and Mediation Procedures, http://www.adr.org/sp.asp?id=28461 (last visited Nov. 25, 2009).

270. Stipanowich, *supra* note 41, at 906–07.

271. Stipanowich, *supra* note 11, at 844, 858–60.

272. *See, e.g.*, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) (finding terms in shrink-wrap contract to be unconscionable).

under collective bargaining agreements.[273] In that context, of course, the agreement to arbitrate and the terms and conditions under which arbitration would be conducted were negotiated at arm's length by management and labor representatives functioning as a collective bargaining unit.[274] Consumer arbitration also existed under the rubric of state lemon laws[275] and under regulations implementing the Magnuson-Moss Warranty Act;[276] but critically, these adjudicatory procedures did not involve an automatic waiver of the right to trial. Consumers retained the ability to go to court if they were unhappy with the results of the private process.[277]

When, as a result of judicial enforcement, arbitration provisions became more widely utilized in consumer settings, the first major incursion was in the realm of agreements between investors and securities brokers.[278] An important element of the argument put forth by proponents of binding arbitration was that broker-dealer arbitration would be conducted under the auspices of securities regulatory organizations but would also be supervised and regulated by the Securities and Exchange Commission.[279]

The eventual further expansion of binding arbitration into the everyday lives of individual Americans undoubtedly provoked such a profound response because it is perceived to challenge the peculiarly American values of individualism, egalitarianism, and the vindication of rights that de Tocqueville observed in the early years of our country.[280] Americans share an "emphasis on fair procedure, having one's day in court, and broad acceptance of the myths and rituals associated with the legal and political process."[281] In particular, Americans exalt the jury system to a level unparalleled anywhere else in the world; the right to a trial by jury has been described as a "historic and iconic" evocation of the egalitarian and populist American ethos.[282] And although there is no question that this and other incidents of trial, such as discovery, may be manipulated by parties with overwhelming economic resources, the key perceptual is-

273. Stipanowich, *supra* note 11, at 843.

274. *Id.* at 843–44; *see also* STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION 350 (1995).

275. Stipanowich, *supra* note 11, at 844.

276. 15 U.S.C. §§ 2301–2312 (2006).

277. For an informative guide on the workings of lemon laws, see RICHARD L. KAYE, LEMON AID: EXERCISING YOUR RIGHTS UNDER THE CONSUMER LEMON LAW (1991). Under the Magnuson-Moss Warranty Act, most statutes require or permit the consumer to participate in an informal dispute resolution procedure established before filing an action in court. *See, e.g.*, MD. CODE ANN., COM. LAW § 14-1502(i) (LexisNexis 2005). For a discussion of how the Act operates, see Sarah T. Lepak, Comment, *Federal Jurisdiction Under the Magnuson-Moss Warranty Act*, 52 U. KAN. L. REV. 1041, 1045–53 (2004).

278. *See* Stipanowich, *supra* note 11, at 900.

279. *See generally* Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483, 535–38 (1996) (discussing the foundations of securities arbitration).

280. OSCAR G. CHASE, LAW, CULTURE, AND RITUAL 50 (2005).

281. Lawrence Rosen, *Individualism, Community and the Law: A Review Essay*, 55 U. CHI. L. REV. 571, 581 (1988).

282. CHASE, *supra* note 280, at 55–58.

sue for many seems to be the "formal equality of opportunity" to present one's case in court.[283] Indeed, there is substantial evidence to support the conclusion that the "opportunity to be heard under a procedurally fair process is more important than the outcome of that process."[284] Against the measuring stick of court trial, some forms of binding arbitration may be found suspect by employees or consumers from various perspectives: systemically, procedurally, and in terms of outcomes.[285]

Considerable scholarship has expounded upon the special dynamics and concerns associated with arbitration provisions in mass consumer and employment contracts.[286] Scholars have critically analyzed the extension of principles applying traditional contract theory, enhanced by policies supporting liberal enforcement of arbitration agreements, to such provisions.[287] Appropriately, scholars have tended to draw strong contrasts between settings involving adhesion concerns and traditional arm's-length business-to-business arbitration,[288] and have aimed particular criticism at efforts to treat the former precisely like the latter.[289] In many cases, these distinctions have been observed in the responses of lawmakers, practitioners, and institutional leaders.[290]

283. *Id.* at 61.

284. RHODE & HAZARD, *supra* note 261, at 52.

285. *See generally* Stipanowich, *supra* note 11, at 888–916 (discussing various indicia of perceived fairness in arbitration processes under standardized contracts affecting employees and consumers).

286. *See, e.g.*, David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33.

287. Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37, 47–57 (2007) (discussing the effect of court deference to form arbitration provisions based on contract formalism and the need for regulation in the realm of consumer arbitration provisions); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 821–22 (2004) (criticizing the effect of formalism and classical contract theory on consumer arbitration contracts).

288. *See, e.g.*, Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 (2008). The study found that three-quarters of consumer agreements provided for mandatory arbitration, while less than ten percent of the same firms' nonconsumer, nonemployment contracts included arbitration clauses. *Id.* at 876. The authors argue this suggests that the frequent use of arbitration clauses in consumer and employment contracts may be an effort to preclude aggregate action rather than to promote fair and efficient dispute resolution. *Id.* at 895.

289. *See, e.g.*, Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Arbitration*, 52 U. KAN. L. REV. 583, 587 (2004) (arguing for separate regulations for consumer arbitration); Donna M. Bates, Note, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 FORDHAM INT'L. L.J. 823, 885 (2004) ("Just because arbitration may be a better choice than litigation in those situations, however, does not mean that arbitration is appropriate for consumers involved in cross-border transactions. Arbitration is not an appropriate form of dispute resolution for consumers in domestic cases. In its binding pre-dispute form and with the conflicting national policies on its use, reliance on arbitration to resolve consumer disputes in cross-border transactions is even more dubious."); *see also* Stipanowich, *supra* note 41, at 875–81; Thomas J. Stipanowich, *Future Lies Down a Number of Divergent Paths*, DISP. RESOL. MAG., Spring 2000, at 16, 16 ("One-size-fits-all approaches [to arbitration] are outmoded and intrinsically problematic.").

290. Stipanowich, *supra* note 11, at 903–17.

B. The "Spillover" Effect: Legal Enactments

Commercial arbitration law and practice has also been affected by statutes aimed primarily at arbitration agreements in mass employment and consumer contracts. In another of the ironic twists that permeate the history of modern arbitration, pro-arbitration policy and classic contract theory combined to bring standardized employment and consumer agreements alongside commercial agreements for enforcement purposes, provoking responses that sometimes carry over into the commercial realm.

1. State Statutes

Efforts by state legislatures to limit enforcement of arbitration provisions in employment and consumer contracts have often fallen victim to the preemptive effect of the FAA within the broad bounds of interstate commerce.[291] The specter of preemption, however, has helped to shape new regulatory regimes that do not specifically deny enforcement of arbitration agreements, but instead focus on arbitration procedures. Although the impetus for these regulations is provided wholly or partially by concerns with adhesion scenarios, the regulations sometimes extend beyond these settings to commercial arbitration. For example, modifications to the California Arbitration Act, stimulated by and aimed primarily at consumer and employment arbitration, also established stringent requirements for disclosure of potential conflicts of interest by arbitrators in commercial cases.[292] Among other things, arbitrators are required to "disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial."[293] The statute permits parties to disqualify the arbitrators based on such disclosures within fifteen days after receiving the disclosure statement.[294]

The statute has dramatically altered the landscape of commercial arbitration in California. In some ways the impact has been positive. A view expressed by some active arbitrators is that they appreciate being reminded of the obligation of professional disclosure and understanding

291. *See e.g.*, Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 386–87 (1992); Drew M. Gulley, Note, *The Enhanced Arbitration Appeal Amendment: A Proposal to Save American Jurisprudence from Arbitration, Modeled on the English Arbitration Act of 1996*, 36 HOFSTRA L. REV. 1095, 1123 (2008) ("Even state laws that attempt to increase the awareness of arbitration clauses by consumers are suspect.").

292. *See* CAL. CIV. PROC. CODE §§ 1281.85, 1281.9 (West 2007); Ethics Standards for Neutral Arbitrators in Contractual Arbitration, CAL. CIV. PROC. CODE Standard 7 (West 2006); Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 120–22 (2003) (critically appraising the statutory "ethics standards").

293. CAL. CIV. PROC. CODE § 1281.9(a).

294. *Id.* § 1281.91.

its precise contours.[295] It may be that rigorous disclosure standards have caused arbitrators to devote more careful attention to their obligations to make disclosures, particularly with respect to non-obvious potential conflicts, such as relationships of close relatives with parties or counsel. The requirements may have enhanced the professionalism of active practitioners, although it is likely that some of those who do not regularly perform arbitral duties still rely primarily on memory as opposed to systematic record-keeping.[296]

From the standpoint of commercial arbitration, however, the California Ethics Standards also have a distinct downside. Though the scope of disclosures arbitrators are required to make are not in themselves inappropriately onerous, the Standards are unique in making any and all disclosures, including disclosures that might not be considered material to a finding of evident partiality under traditional arbitration law,[297] grounds for disqualification of the disclosing arbitrator upon the motion of any party.[298] These expansive rules set California apart from any other

295. *But see* Glick, *supra* note 292, at 125–30.

296. In the case of arbitration involving a consumer, employment, or health care contract, the arbitrator is also required to disclose information about relationships between the arbitration-provider organization and any party, lawyer, or law firm in the arbitration. *See* Ethics Standards for Neutral Arbitrators in Contractual Arbitration, CAL. CIV. PROC. CODE Standard 8. These requirements may or may not have produced clear positive benefits. The requirements for larger provider organizations may produce such voluminous disclosure documents for consumer cases that the effective result may be obfuscation rather than clarity. One active arbitrator with a leading provider organization says that he routinely supplements his own multipage disclosure form with eighty to a hundred pages of disclosures from other neutrals in his organization. Unless one is very diligent and focused, he insists, it is hard to parse the really important data from the mass of material.

297. Motions to vacate usually arise in the context of nondisclosure of facts or relationships by an arbitrator, and the prevailing standards tend to require the party seeking vacatur to offer a quantum of proof that would be well above the standard set out in Section 1281.9 for automatic disqualification. *See, e.g.*, Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983), *modified*, 728 F.2d 943 (7th Cir. 1984) (requiring that, to warrant vacatur for evident partiality under the FAA, the [undisclosed] circumstances must be "powerfully suggestive of bias"); *see also* Borst v. Allstate Ins. Co., 717 N.W.2d 42, 45 (Wis. 2006) (vacating an award based on substantial, continuing attorney-client relationship between an arbitrator and a party and finding vacatur appropriate "when a reasonable person would have serious doubts about the impartiality of the arbitrator"); 1 FEDERAL ARBITRATION LAW, *supra* note 133, § 28 (discussing case law on partiality and disclosure under the FAA).

298. *See* CAL. CIV. PROC. CODE § 1281.9 ("[T]he proposed neutral arbitrator shall disclose all matters that *could* cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial . . . ." (emphasis added)). The statutory commentary states:

> The arbitrator's overarching duty under this standard, which mirrors the duty set forth in Code of Civil Procedure section 1281.9, is to inform parties about matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial. While the remaining subparagraphs of (d) require the disclosure of specific interests, relationships, or affiliations, these are only examples of common matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The absence of particular interests, relationships, or affiliations listed in the subparagraphs does not necessarily mean that there is no matter that could reasonably raise a question about the arbitrator's ability to be impartial and that therefore must be disclosed. An arbitrator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under paragraph (d).

state in the Union and also depart significantly from longstanding decisional law under the FAA.[299] They create the potential for cynical manipulation of the arbitration process and dramatically increase the risk that a process will be derailed midstream, with potentially significant transaction costs. By way of illustration, consider the situation in which, months or years into the arbitration of a complex commercial case, a party who fears it will be on the losing end of the arbitrator's award hires new counsel or identifies a witness having some relationship to the arbitrator for the purpose of creating a requirement for the arbitrator to make a supplemental disclosure under the statute. An arbitrator who elects to make a disclosure of the relationship gives the parties an automatic right to have the disclosing arbitrator disqualified no matter how insignificant the relationship.[300] If the arbitrator fails to make the disclosure and the "aggrieved" party learns of the undisclosed relationship, the arbitration award may be vacated if the nondisclosure is found to be "a ground for disqualification of which the arbitrator was then aware."[301]

To many business clients the statute's disclosure requirements and automatic disqualification approach may seem superfluous in light of longstanding administrative mechanisms for handling arbitrator disclosures and challenges.[302] Moreover, given the potential risks and higher transaction costs described above, at least some commercial parties would seek to incorporate contract terms waiving the statute and its "protections" in commercial cases. This may not be possible, however. A recent court decision interpreted the California statute as requiring commercial parties to comply with the disclosure requirements of the statute; in the court's view, the statute effectively trumped the institutional disclosure and challenge procedures incorporated in the arbitration provision of the parties' contract.[303] A California arbitrator, in a proceeding under the AAA Construction Arbitration Rules, made disclosures to the effect that he had served as a neutral arbitrator on other cases in which a party was represented by counsel appearing for a party in the present arbitration, that seventeen years before he had been employed by a company that at the time also employed that lawyer, and that the law firm where he was "of counsel" listed a party to the arbitration as potentially

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Ethics Standards for Neutral Arbitrators in Contractual Arbitration, CAL. CIV. PROC. CODE Standard 7 cmt.

299. *See supra* note 297.

300. *See* Ethics Standards for Neutral Arbitrators in Contractual Arbitration, CAL. CIV. PROC. CODE Standard 7 cmt.

301. CAL. CIV. PROC. CODE § 1286.2(a)(6) (providing for vacatur on the basis of an arbitrator's failure to disclose in accordance with § 1281.91).

302. *See, e.g.*, AM. ARBITRATION ASS'N, *supra* note 56, R. 16, 17 (2007) (setting forth disclosure requirements for arbitrators and providing an administrative procedure to address motions for disqualification).

303. *See* Azteca Constr., Inc. v. ADR Consulting, Inc., 18 Cal. Rptr. 3d 142, 149–51 (Cal. Ct. App. 2004).

adverse to one of its clients on another unrelated case.[304] When a party challenged the arbitrator based on these disclosures, the AAA handled the matter administratively under its Construction Rules and determined that the grounds for objection were not substantial enough to warrant removal of the arbitrator.[305] The arbitration proceeded to award and the same party that had raised the earlier objection sought to vacate the award on the basis that the arbitrator should have been removed on the basis of the disclosure.[306] On appeal, this argument prevailed. The appellate court concluded that the objecting party had not waived its right to have the arbitrator removed on the basis of the statutory disclosures by agreeing to arbitrate under the AAA Construction Arbitration Rules, even though these included an administrative challenge procedure, and directed the trial court to enter a new order vacating the award.[307] This result increases the risk of delays and greater transaction costs in commercial arbitration without clear commensurate benefits for commercial parties.[308]

Thus, the California Ethics Standards have made California a less hospitable place to arbitrate commercial cases. A party may sink substantial money into a case and suddenly realize it must either lose a neutral arbiter or risk vacatur of award. Though these increased risks may be justified in consumer or employment cases, the same may not be said of business cases. The Standards illustrate the dangers of lumping together very different kinds of arbitration under a single standard.

Both federal and state courts have acknowledged that the California Ethics Standards are preempted by the disclosure and challenge requirements of securities arbitration rules under the SEC-supervised regulatory scheme for investor-broker arbitration.[309] Although it is possible

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304. *Id.* at 144–45.

305. *Id.* at 145.

306. *Id.*

307. The court explained the draconian effect of the statute as follows:

> This subdivision confers on both parties the unqualified right to remove a proposed arbitrator based on any disclosure required by law which could affect his or her neutrality. There is no good faith or good cause requirement for the exercise of this right, nor is there a limit on the number of proposed neutrals who may be disqualified in this manner. As long as the objection is based on a required disclosure, a party's right to remove the proposed neutral by giving timely notice is absolute.
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> ....
>
> ... [The party exercising the right has] no independent burden to demonstrate that a reasonable person would doubt [the arbitrator's] capacity to be impartial .... [D]isqualification is automatic, [and] the disqualified [arbitrator] loses jurisdiction over the case and any subsequent orders or judgments made by him or her are void.

Id. at 146, 151–52 (citations omitted).

308. Ruth V. Glick, *Should California's Ethics Rules Be Adopted Nationwide?*, 9 DISP. RESOL. MAG., Fall 2002, at 13, 14.

309. Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1132 (9th Cir. 2005) (California Ethics Standards are preempted by National Association of Securities Dealers arbitration rules); Mayo v. Dean Witter Reynolds, Inc., 258 F. Supp. 2d 1097, 1114 (N.D. Cal. 2003) ("Application of the California standards would impose inconsistent and conflicting procedural rules upon those specifically agreed upon by the parties. ... [S]uch a result is impermissible under § 2 of the FAA ...."); *accord* Jevne v. Superior Court, 111 P.3d 954, 958 (Cal. 2005).

that at least some of the provisions of the California Ethics Standards, such as the ability of parties to vacate awards based on nonmaterial nondisclosures, may ultimately be deemed to run afoul of and be preempted by broader pro-arbitration policies under the FAA, as well as the decisional law that has developed under the Supreme Court decision in *Commonwealth Coatings v. Continental Casualty Co.*[310] with its less draconian standards for judicial action,[311] such a possibility is yet to be determined.

A subtler but potentially more influential example of regulatory "spillover" is the RUAA,[312] published by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000 and enacted into law in at least twelve states.[313] The NCCUSL drafting committee was warned against any categorical treatment of consumer and employee contracts that might run afoul of the preemptive effect of the FAA;[314] they therefore made do with a commentary addressing the role of unconscionability and other means of policing overreaching in adhesive arbitration agreements.[315] Concerns about mass arbitration involving consumer and employee "outsiders," however, formed a subtext for other substantive elements of the RUAA.[316] Like its close federal counterpart, the FAA,[317] the original UAA[318] was carefully tailored to provide a "barebones" legal framework. It aimed to facilitate very limited judicial intervention to specifically enforce arbitration agreements and awards,[319] including a limited statute of frauds,[320] key default provisions (including authority for judicial appointment of arbitrators where the stipulated method failed),[321] and severely restrained

310. 393 U.S. 145, 147–50 (1968).

311. *See supra* note 297.

312. UNIF. ARBITRATION ACT §§ 1–33 (2000), 7 U.L.A. 10–98 (2009).

313. THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 89 (4th ed. 2007) (stating that RUAA has been adopted in twelve states and is pending passage in fourteen states).

314. For example, see Fred H. Miller, *Update on Uniform Laws Affecting Consumer Credit*, 60 CONSUMER FIN. L.Q. REP. 238, 240 (2006), which tellingly observes:

> The 2000 Uniform Arbitration Act continues to authorize agreements to arbitrate disputes before they arise. However, the procedural side of arbitration is greatly augmented to meet modern needs. The 2000 Uniform Arbitration Act was drafted against the significant and preemptive presence of the Federal Arbitration Act. . . . [A]ny state law that limits the availability of arbitration or differentiates among types of provisions risks failure as a matter of federal preemption.
>
> Although there is not complete agreement about the relationship between federal and state law on certain specific issues, the 2000 Uniform Arbitration Act is drafted to avoid preemption. For that reason, it does not differentiate between arbitration provisions in commercial and consumer contracts even though many advocate the necessity of differentiation.

315. UNIF. ARBITRATION ACT § 6 cmts. (2000), 7 U.L.A. 25–30.

316. The author was an Academic Advisor to the NCCUSL drafting committee and was present for most of the meetings of the committee. He was not a voting member of the committee, however.

317. Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006).

318. UNIF. ARBITRATION ACT §§ 1–25 (1956), 7 U.L.A. 99–796.

319. *See supra* note 318.

320. UNIF. ARBITRATION ACT § 2 (1956), 7 U.L.A. 248.

321. *Id.* § 3, at 343.

judicial review of challenges to awards.[322] The RUAA, on the other hand, is a much more expansive document that incorporates many more procedural default rules and, more importantly, a number of mandatory (required and nonwaivable) procedural elements.[323] These elements represent an effort to channel arbitration agreements and restrict the party autonomy that is a traditional hallmark of arbitration in favor of certain perceived requirements of due process.[324] Arguably superfluous in a statute aimed at traditional business-to-business arbitration agreements incorporating detailed and varied arbitration procedures,[325] these provisions appear to be intended primarily, if not entirely, to protect adhering parties from overreaching. Their application, however, is coterminous with the scope of the statute and, therefore, applicable to commercial arbitration.

For example, RUAA section 16 states, "A party to an arbitration proceeding may be represented by a lawyer."[326] The right to legal representation cannot be waived by a pre-dispute agreement under RUAA section 4(b).[327] Legal representation is taken for granted in most commercial arbitration processes,[328] while in some traditional industry or trade settings lawyers are actually excluded from hearings by the rules.[329] Section 16 works little if any benefit in the former scenarios and may entail undesirable transaction costs if raised in the latter context. The concern of section 16 must center on the special concerns of individual employees or consumers who find themselves in arbitration. Indeed, the accompanying commentary acknowledges that the right of representation is "especially [important] in the context of an arbitration agreement between parties of unequal bargaining power."[330]

Also nonwaivable by executory agreement are sections 17 (a) and (b) regarding the authority of arbitrators to issue subpoenas and to "permit a deposition of any witness to be taken for use as evidence at the hearing."[331] To say that parties cannot by pre-dispute agreement limit the ability of arbitrators to order prehearing depositions is a significant turnabout on traditional "no discovery" arbitration and justifiable primarily on the basis of concerns about employees, consumers, and other

322. *Id.* §§ 11–13, at 488–716.

323. UNIF. ARBITRATION ACT § 4 (2000), 7 U.L.A. 19 (detailing the nonwaivable elements of the RUAA, it did not exist in the original UAA).

324. *See id.* cmt. 1.

325. *E.g.*, *id.* § 16, at 60.

326. *Id.*

327. *Id.* § 4(b)(4), at 19.

328. *See* SELLS, *supra* note 66, at 84–86.

329. *See* UNIF. ARBITRATION ACT § 16 (2000), 7 U.L.A. 60.

330. *Id.* § 4 cmt. 4.c, at 20. Note, an exception to the nonwaivability of the right to representation is made for "an employer or a labor organization . . . in a labor arbitration." *Id.* § 4(b)(4), at 19. The Comment observes that this exception reflects "long standing practice" and also recognizes that "the parties are of relatively equal bargaining power." *Id.* § 4 cmt. 4.c, at 20.

331. *Id.* § 17(a)-(b), at 60–61.

adhering parties having access to information and witnesses.[332] One critique describes the RUAA's approach as a

> complicated arrangement . . . to balance, on the one hand, providing certain non-waivable protection to consumers, employees, and others who may be 'forced' into arbitration through pre-dispute agreements and, on the other hand, providing flexibility to sophisticated commercial entities and other repeat players who wish to shape the arbitration process in ways they like. Neither group is likely to be entirely happy with the balance struck.[333]

Finally, section 21 provides that "arbitrator[s] may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim . . . ."[334] Although the provision is waivable under the RUAA, the commentary clarifies that limits on or waivers of certain remedies may run afoul of judicial decisions requiring that employees and other parties "[have] the right to obtain the same relief in arbitration as is available in court."[335] Though punitive damages are by no means unknown in the commercial arena, it is not uncommon for business parties to limit their arbitration agreement to exclude punitive damages from the arbitral arsenal of remedies, especially in international agreements.[336] Again, this provision is motivated primarily by the concerns of parties in adhesion contract scenarios, a reality reflected in the cases and standards cited in the commentary.[337]

Although each of these statutory elements is likely to be brought to bear most directly in adhesion settings involving consumers or employees, they will undoubtedly have an impact on the law and practice of commercial arbitration. As noted previously, the expansive discovery provisions of the RUAA are already being cited to arbitrators as a standard for practice.[338]

2. *Proposed Revisions to the FAA*

It is very likely that Congress will seriously consider significant modifications to the FAA in the coming term. Although such efforts,

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332. The Comment to § 17 provides that the provisions are nonwaivable "because they go to the inherent power of an arbitrator to provide a fair hearing by insuring that witnesses and records will be *available at* an arbitration proceeding." *Id.* § 17 cmt. 1, at 61–62 (emphasis added).

333. Jim Carr et al., *Colorado's Revised Uniform Arbitration Act*, 33 COLO. LAW., Sept. 2004, at 11, 17–18.

334. UNIF. ARBITRATION ACT § 21(a) (2000), 7 U.L.A. 72.

335. *Id.* § 21 cmt. 2, at 73–74 (citing, among other cases, *Cole v. Burns International Security Service*, 105 F.3d 1465 (D.C. Cir. 1997), which held that an employee with a Title VII discrimination claim is entitled to the same relief in arbitration as in court).

336. *E.g.*, Raytheon Co. v. Automated Bus. Sys., Inc., 882 F.2d 6, 12 (1st Cir. 1989) ("Parties that do wish arbitration provisions to exclude punitive damages claims are free to draft agreements to do so explicitly."); Mark J. Astarita, Punishing the Industry, SEC Law.com, http://www.seclaw.com/docs/197.htm (last visited Nov. 25, 2009).

337. UNIF. ARBITRATION ACT § 21 cmt. 2 (2000), 7 U.L.A. 73–74.

338. The author was part of an exchange among members of the College of Commercial Arbitrators to this effect.

driven primarily by concerns about the role of arbitration in adhesion contracts involving consumers and employees, have been regularly mounted in the past with little effect,[339] changes in the political landscape make passage of such legislation more probable. Two current bills each include elements that would produce potentially significant "spillover" effects on commercial arbitration.

The proposed Arbitration Fairness Act of 2007 was intended to amend § 2 of the FAA to provide that

> (b) No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of—
>
> (1) an employment, consumer, or franchise dispute; or
>
> (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.
>
> (c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.[340]

Speaking of this draconian proposal's potential impact on international commercial arbitration, Professor Emmanuel Gaillard states that the act "pos[es] a serious threat to the promotion of efficient international dispute resolution and of the United States as a friendly place to arbitrate."[341] The same may be said of its effect on business-to-business arbitration generally. This results in part from the vagueness of the proposed statute's scope, particularly with respect to nonenforceability of disputes under "any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power."[342] The failure to provide more specific definition for the classes of affected statutes or the concept of "unequal bargaining power" creates a vast grey area of nonenforceability within which parties seeking to avoid or to delay the commencement of arbitration may roam at will, potentially undermining conventional expectations regarding arbitration's efficiency and economy of process.

This effect is dramatically compounded by a clause providing that "the validity or enforceability of an agreement to arbitrate shall be de-

339. The sole exception is federal legislation exempting pre-dispute arbitration provisions in contracts between auto manufacturers and dealers from the enforceability provisions of the FAA. *See* Motor Vehicle Franchise Contract Arbitration Fairness Act of 2000, 15 U.S.C. § 1226 (2006).

340. Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4 (2007) (internal quotation marks omitted).

341. Emmanuel Gaillard, *International Arbitration Law*, N.Y.L.J., April 22, 2008, at 3, 3.

342. H.R. 3010, § 4.

termined by the court, rather than the arbitrator . . . ."[343] This provision applies to any kind of arbitration agreement, without regard to the parties' sophistication or the way in which the parties struck an agreement to arbitrate. The practical result is to deny enforcement to provisions, now ubiquitous in domestic and international commercial arbitration procedures, that promote efficiency by vouchsafing enforcement and "jurisdictional" questions to arbitrators.[344] The impact of this provision is rendered far greater by a materially ambiguous provision that gives courts initial authority to address not only "challenges [of] the arbitration agreement specifically," but also challenges to the arbitration provision "in conjunction with other terms of the contract containing such agreement."[345] This provision might be interpreted to overturn, within the purview of the proposed statute, the principle first enunciated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[346] and recently reiterated in *Buckeye Check Cashing Co. v. Cardegna*,[347] to the effect that predispute arbitration agreements are separable from the contracts of which they are a part for the purposes of assessing their enforceability under the terms of the FAA.[348] Although the Arbitration Fairness Act was modified to delete the ambiguous language regarding statutes "regulat[ing] contracts or transactions between parties of unequal bargaining power," it remains in other respects the same, and is still pending as of the time of this writing.[349]

A second bill, the Fair Arbitration Act of 2007,[350] took a different approach. Rather than outlawing any category of pre-dispute arbitration agreements, it set out proposed due process standards for all arbitration agreements in a manner similar to the RUAA. It did, however, go significantly further than the RUAA in regulating the form and substance of arbitration, imposing significant restrictions on choice and enhancing transaction costs in commercial arbitration. Among other things, the bill established a required format for arbitration clauses, including mandatory disclosures and conspicuousness requirements; prohibited ad hoc arbitration and required administration by "an independent, neutral alternative dispute resolution organization"; prohibited list selection of arbitrators and required the use of a tripartite panel in which each party selects an arbitrator; required arbitrators to make broad disclosures and to comply with the Code of Ethics for Arbitrators in Commercial Dis-

343. *Id.*

344. *See, e.g.*, AM. ARBITRATION ASS'N, *supra* note 56, R.7.

345. H.R. 3010, § 4.

346. 388 U.S. 395, 402–04 (1967).

347. 546 U.S. 440, 449 (2006).

348. This legislation has been criticized in the *Washington Post*, *see* Editorial, *A Good Arbiter*, WASH. POST, Apr. 12, 2008, at A14, and the *Wall Street Journal*, *see* Editorial, *No Lawyers, Please*, WALL ST. J., Apr. 5, 2008, at A8 (reporting poll that found eighty-two percent of respondents preferred arbitration to court for resolution of disputes with companies).

349. *See* Arbitration Fairness Act, H.R. 1020, 111th Cong. (2009).

350. Fair Arbitration Act, S. 1135, 110th Cong. (2007).

putes; required that, in the absence of contrary agreement, the arbitrator be a member of the bar of the court in which the hearing is conducted; required application of the substantive law of the state in which the non-drafting party resides; required "relevant and necessary prehearing depositions" to be granted by the arbitrator; and set outside dates for answers, hearings, and awards.[351] Many commercial clients and practitioners shook their heads at this litany of limitations on their ability to choose the arbitration procedure most suitable to their transaction. The Fair Arbitration Act has not been reintroduced in this Session.

It remains to be seen what form arbitration reform legislation will take. It is, however, very likely that new laws will affect day-to-day commercial arbitration practice in unhelpful ways.

C. The "Spillover" Effect: Scholarship and Teaching

As previously noted, concerns with arbitration agreements in adhesion contracts have stimulated much of the scholarship addressing American arbitration subjects in recent years.[352] In some cases, such concerns have provoked strong academic criticism of legal doctrines that many in the commercial arbitration world might have considered more or less settled. An illustration is provided by Professor Maureen Weston's thoughtful, robust challenge to the broad immunity accorded arbitrators and arbitral institutions by case law and statute.[353] Although her argument for qualified immunity is not wholly contingent on concerns with consumer arbitration, the latter provides most of its force.[354] She argues that in the present environment where powerful companies force many consumers and employees toward mandatory arbitration and the use of provider institutions, blanket immunity undermines public confidence.[355] She describes the "frustration, if not horror, and distrust" voiced by some arbitrating parties in a process "shielded from public and judicial scrutiny," and insists that an appropriate "response is necessary if consumer arbitration is to retain legitimacy in the eyes of the public."[356] She concludes that "people who find themselves bound to arbitration, whether voluntarily or as a result of adhesive mandatory arbitration contracts, must have assurance that the players in the process are not above the law."[357] Although her eventual proposed solution is a minor amendment to the law of arbitration, she

351. *Id.*
352. *See supra* note 260.
353. *See generally* Weston, *supra* note 5.
354. For example, Professor Weston points out that arbitration "provider institutions" are able to avoid liability for a range of ministerial tasks that would not be similarly protected in a courthouse setting. *Id.* at 492. She also points to the "increasingly commercialized nature" of the provision of arbitration services. *Id.* at 496.
355. *Id.* at 510.
356. *Id.* at 511.
357. *Id.*

also discusses the possibility of subjecting arbitrators to professional licensing or credentialing, including "reporting or grievance mechanisms."[358] Whatever the ultimate consequences of this line of inquiry, it is doubtful that the inquiry would have begun without the strong stimulus of consumer concerns.

The "spillover" effect of concerns regarding arbitration in adhesion contracts is also evident in some first-year contracts texts. In light of the fact that arbitration agreements in standardized contracts imposed on employees and consumers have given new life to the concept of "unconscionability,"[359] it makes sense for contracts casebooks to include decisions on the subject. Similarly, an author might legitimately include a case on arbitration in a "shrink-wrap" contract.[360] When, however, a casebook, even impliedly, portrays arbitration clauses as nothing more than a mechanism for imposing unfair procedures on unsuspecting parties, students are ill-served. Without a nuanced discussion which includes a treatment of the important and beneficial role often played by arbitration in domestic and international business transactions and other settings,[361] students are likely to go forward with an incomplete, unsophisticated, and overly negative concept of arbitration.

IV. ADDRESSING THE "NEW LITIGATION": LOOKING BEYOND THE MONOLITH

Our exploration of the realities behind current discontent with arbitration reveals a spectrum of processes under stress and strain. Arbitration's evolution as a private surrogate for court trial and its subsequent "legalization," the growing popularity of mediation and other "thin-slicing" alternatives, and fairness concerns stemming from the use of binding arbitration in standardized contracts with individual consumers and employees, all contribute to present dissatisfaction with arbitration and raise questions about its future. All three trends, however, point out the need to understand and embrace the primary value of arbitration and its primary advantage over litigation—choice. This Part briefly presents three propositions, all founded on the concept of choice in arbitration, that are intended to address current concerns and promote enhanced satisfaction with commercial arbitration.[362]

358. *Id.* at 512–13.

359. Brafford, *supra* note 260, at 351–52.

360. *See, e.g.*, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) (finding terms in a shrink-wrap contract to be unconscionable).

361. *See, e.g.*, STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW 255–66 (3d ed. 1995) (featuring two cases involving adhesion contracts and unconscionability under the heading of "The Justice Principle: Standard Form Contracts"); JAMES F. HOGG ET AL., CONTRACTS: CASES AND THEORY OF CONTRACTUAL OBLIGATION 426 (2008) (focusing on issues confronting Internet consumers with respect to arbitration clauses, including two cases involving adhesion contracts).

362. These proposals are extensively explored in Stipanowich, *supra* note 197.

A. Contract Planners and Drafters Need to Make Affirmative, Appropriate Choices Regarding Arbitration

There is no recipe to ensure arbitration will produce general satisfaction among business users. Much energy and ingenuity has been devoted to improving the general quality of commercial arbitrators through heightened experiential and training requirements. There have been serious efforts to address concerns about cost and time management, including published guidelines[363] and extended discourse among arbitrators and advocates. The fact remains, however, that many lawyers have the general view that arbitration is "too much like litigation"; some wish it included additional litigation features, particularly judicial review and some harbor both perspectives.[364] Moreover, it is reasonable to assume that perspectives and expectations vary with the client and the circumstances.

1. Choice as the Central Value of Arbitration

Because users seek different things from arbitration and because business goals and needs vary by company, by transaction, and by dispute, no one form of arbitration is always appropriate. For this reason, the central and primary value of arbitration is not speed, or economy, or privacy, or neutral expertise, but rather the ability of users to make key process choices to suit their particular needs. In an extensive set of recommendations entitled *Commercial Arbitration at Its Best*, the CPR Commission on the Future of Arbitration observed that "many business users regard *control over the process*—the flexibility to make arbitration what you want it to be—as the single most important advantage of binding arbitration . . . ."[365]

Choice is what sets arbitration apart from litigation. If parties truly desire an expedited procedure in which speed and economy are the preeminent goals, it is possible to structure and implement a "lean program" to achieve those ends at the cost of various procedural bells and

363. *See, e.g.*, AM. ARBITRATION ASS'N, NAT'L CONSTR. DISPUTE RESOLUTION COMM., THE AAA GUIDE FOR CONSTRUCTION CONTRACTS (2007) [hereinafter AAA GUIDE] (guidance for users of AAA procedures, including those who seek to customize procedures); THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION (Curtis E. von Kann et al. eds., 2006) (guidelines aimed primarily at arbitrators); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9 (extensive set of guidelines on commercial arbitration for business clients and counsel).

364. *See supra* text accompanying notes 138–47 (discussing how arbitration is too expensive and too much like litigation, and that there is also no appeal).

365. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at xxiii. The conclusion of the Commission is strongly reaffirmed by the findings of a 2006 survey of corporate counsel by Queen Mary College and PricewaterhouseCoopers regarding international arbitration. In the words of the report, "*Flexibility of procedure* was the most widely recognised advantage. The active participation of the parties in determining and shaping the procedure inspires confidence in the process." QUEEN MARY 2006 SURVEY, *supra* note 22, at 6 (emphasis added); *see also* von Kann, *supra* note 19, at 43.

whistles.[366] Expedited arbitration may also be utilized to strike a balance between the need for final adjudication and the maintenance of an ongoing commercial relationship.[367] If, on the other hand, cost-savings and a quick result are much less important than controlled "quasi-litigation"—extensive legal due process with a tribunal comprised of three grand old ships-of-the-line that results in a highly "authoritative" decision—that too, is an option. The key is fitting the process to the problem(s)—from the choice of decision maker and forum to the time and location of hearings to all elements of procedure.

In recent years, much emphasis has been placed on the importance of carefully tailoring conflict management systems to organizational goals and priorities—a process that begins with thoughtful consideration of what the organization hopes to accomplish.[368] Such approaches have proven extremely beneficial in the development of corporate employment programs.[369] Unfortunately, this is not the normal procedure for contract planners and drafters who incorporate arbitration and dispute resolution provisions in commercial contracts; the usual approach in these contracts is to drop in standard boilerplate without much reflection or discussion.[370] Although effective arbitrators and thoughtful advocates may function effectively within this kind of framework and even overcome deficiencies in arbitration procedures, there are no guarantees. All too often, arbitration under standard one-size-fits-all procedures is likely to take on many of the trappings of litigation, with commensurate costs and delays; the result will be frustration and disappointment for those coming to arbitration with conventional expectations. Indeed, in the present environment of "legalized" arbitration, it is unrealistic to expect that traditional process attributes like economy, efficiency, and finality will be achieved without purposeful effort on the front end. It is for parties to establish definite priorities for arbitration and to translate those priorities into action through their arbitration agreement and subsequent decisions. In order to fulfill the promise of arbitration, parties must be more deliberate in taking advantage of the spectrum of available choices.

366. *See, e.g.*, Stipanowich, *supra* note 197, at 403–05 (discussing Abbott Labs' customized expedited dispute resolution program for distributorship disputes); *see also* JUDICIAL ARBITRATION & MEDIATION SERVS., STREAMLINED COMMERCIAL ARBITRATION RULES AND PROCEDURES (2009), *available at* http://www.jamsadr.com/rules-streamlined-arbitration/.

367. *See, e.g.*, Stipanowich, *supra* note 197, at 404.

368. *See, e.g.*, CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 168–71 (1996).

369. *See id.*

370. *See* Stipanowich, *supra* note 197, at 388–92 (discussing the reasons why lawyers tend to rely on boilerplate for arbitration); *see also* LIPSKY & SEEBER, *supra* note 10, at 9–14 (presenting data indicating that businesses do not often take a proactive approach to the management of conflict).

2. The Role of Clients and Counsel

Business clients, guided by competent counsel, are in the best position to determine how and when arbitration will be brought to bear on commercial disputes, and what kind of arbitration processes will be employed. If business parties really want arbitration to be a truly expeditious and efficient alternative to court, they must assume control of processes and not abdicate the responsibility to outside counsel—in other words, principals, and not agents, must act as principals.[371] Ideally this includes not only choice making at the time of contracting, but a strategic approach to conflict management in which arbitration is considered among a variety of tools and approaches.[372]

In order to "take charge" and make effective choices regarding commercial arbitration, the first step is to identify the goals and priorities to be served by the mechanism for conflict resolution. These will undoubtedly include one or more of the following: (1) flexibility; (2) low cost or cost efficiencies; (3) a speedy outcome and avoidance of undue delay; (4) "fairness" and "justice"; (5) legal due process; (6) results comporting with commercial, technical, or professional standards; (7) predictability and consistency in result; (8) a final and binding resolution; (9) privacy and confidentiality; and (10) the preservation of a relationship and continuing performance.[373] The goals and priorities identified become touchstones for process selection.

Unfortunately, there are several daunting obstacles in the way of identifying goals and making commensurate process choices. It is often difficult to anticipate what kinds of disputes will arise under a contract and what the stakes will be.[374] Moreover, dispute resolution provisions tend to be accorded low priority in contract negotiations, at least partly because raising the specter of conflict seems inappropriate when the emphasis is on coming together.[375] Perhaps, too, some transactional lawyers are reluctant to make arbitration a negotiating point, fearful of trading off more "substantive" elements.

There is also the problem of lack of sophistication on the part of contract planners and drafters. In the effort to define client goals and translate them into meaningful process choices, legal counsel, the "gatekeeper to legal institutions and facilitator of . . . transactions,"[376] must play a critical role. But transactional lawyers seldom have direct experience with resolving conflict; without adequate external support they

371. *Cf.* SELLS, *supra* note 66, at 88 (explaining that clients use counsel as a way to avoid "the messiness of personal involvement" in litigation).

372. *See generally* SIEDEL, *supra* note 148, at 135–72.

373. *See generally* Stipanowich, *supra* note 197.

374. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 6–8.

375. *See id.* at 6.

376. Felstiner et al., *supra* note 173, at 645.

may fall back on inadequate boilerplate language or falter in the minefield of customized drafting.[377]

That said, significant business, legal, and ethical imperatives make it necessary to exercise care in selecting and tailoring arbitration and dispute resolution clauses.[378] The published cases and literature are filled with examples of parties whose expectations of arbitration were derailed by issues such as lack of precision in describing the process; failure to clarify the consequences of noncompliance with specified pre-arbitration steps or procedures; the inability to join or to obtain discovery from third parties; a party-appointed arbitrator who functions inconsistently with expectations; failure to adequately protect trade secrets; and inability to enforce and implement a provision for expanded judicial review of award.[379] There is also the growing specter of discovery, which is above all the most significant determinant of cost and cycle time in arbitration, and which demands direct attention and treatment.[380]

Those charged with preparing business dispute resolution provisions must take a much more considerate approach to the selection of arbitration procedures—preferably after discussing key goals with the client. If customized provisions seem appropriate, special caution is required in the crafting.[381] Choice regarding arbitration is too important to be left until the eleventh hour of negotiation; process options should be considered and developed ahead of time.[382] It is no longer ethically sufficient to tick off basic options ("mediation," "arbitration") and throw in convenient boilerplate language without reflection; lawyer-counselors must have or gain access to the knowledge and sophisticated tools necessary to address key process choices and issues.[383] In this regard, provider institutions need to play a more affirmative role.

3. *The Role of Provider Institutions and the Need for Templates*

One of the biggest obstacles to effective exercise of choice and to matching procedures with parties' goals is the relative absence of alternative process templates among procedures published by leading providers of arbitration services.[384] Although much effort has been expended in the development of standard arbitration provisions, the training of arbi-

377. *See* John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, DISP. RESOL. J., Feb.–Apr. 2003, at 28, 30.

378. *See* Stipanowich, *supra* note 197, at 394–99.

379. *See id.* at 395–96.

380. *See supra* Part I.B.2.

381. One famous nightmare scenario of one-off drafting involved a contractual provision for expanded judicial review of arbitration awards. *See* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003), *overruling* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997).

382. *See* Stipanowich, *supra* note 197, at 398–99.

383. *Id.*

384. *Id.* at 390–92.

trators, and other quality control initiatives, no single provider offers direct guidance regarding process tools to serve each of the ten sets of goals described above.[385] Some major providers have also tended to promote a single set of general-purpose commercial procedures, which leave considerable discretion to arbitrators and advocates with respect to key elements like discovery.[386] Moreover, the similarities among major procedural templates for commercial arbitration far outweigh the differences. Some major providers have only recently developed streamlined rules and other templates as alternatives to their standard rules.[387] There are now also competing initiatives to address concerns and provide options for the handling of discovery[388] and alternatives to expanded review in the form of appellate arbitration processes.[389] Busy lawyers need easily accessible templates that offer clear choices, as well as concise and comprehensive roadmaps that address all these options in addition to other drafting issues. Providers can do much more to fill this void.

4. *The Role of Advocates and Arbitrators*

There are two other key "choice points" for users of arbitration—the selection of legal counsel to represent one's interests in the resolution of disputes and the selection of arbitrators to resolve those disputes. In both cases, the choices parties make are just as critical as process choices, if not more so. Indeed, effective advocates and arbitrators may overcome the deficiencies of inadequate procedures; ineffective advocates and arbitrators may undermine the best-crafted procedural program.

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385. For example, the CPR "Suitability Screen," one of the tools designed for counsel advising clients regarding arbitration, is useful in identifying some basic distinctions between arbitration and litigation, and may be a starting point for discussion with a client who is unfamiliar with arbitration. *See* JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 460–61 (2005) (featuring slightly modified version of the Suitability Screen). It is, however, overly simplistic and conceivably misleading when it comes to some subjects such as discovery. Moreover, it provides no guidance respecting decisions about the arbitration process itself.

The primary guidance afforded by leading dispute resolution organizations is in the form of arbitration rules. Generally speaking, however, these are not accompanied by user guides that explain specifically how various party goals and priorities may be served by different options. One of the better efforts to provide a template for drafters and users is the AAA GUIDE, *supra* note 363. A report of the CPR Commission on the Future of Arbitration, which is organized in a question and answer format, is among the most straightforward general resources on choices regarding commercial arbitration for clients and counsel. *See generally* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9.

386. *See, e.g.*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, *supra* note 56; JUDICIAL ARBITRATION & MEDIATION SERVS., *supra* note 56. Both organizations, however, have begun to develop and promote other options. *See infra* note 387.

387. *See, e.g.*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, EXPEDITED ARBITRATION OF CONSTRUCTION DISPUTES (2006); JUDICIAL ARBITRATION & MEDIATION SERVS., *supra* note 366.

388. Stipanowich, *supra* note 197, at 414–42 (discussing current CPR, ICDR, and IBA initiatives).

389. *See* INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, ARBITRATION APPEAL PROCEDURE (amended 2007), *available at* http://www.cpradr.org/ClausesRules/ArbitrationAppealProcedure/tabid/79/Default.aspx; JUDICIAL ARB. & MEDIATION SERVS., JAMS OPTIONAL ARB. APPEAL PROC. (rev. 2003), http://www.jamsadr.com/files/Uploads/Documents/optional_arbitration_appeal-2003.pdf.

Thoughtful and sophisticated lawyers may navigate through the arbitration process in a way that most effectively promotes client goals and may find it possible to collaborate with opposing counsel in order to develop integrative process solutions that promote mutual benefits.[390] Similarly, well-equipped arbitrators may make effective use of their discretion to strike an appropriate balance between efficiency and fairness—or, as necessary, to address other user needs such as confidentiality.[391]

Given the right set of circumstances, including a good working relationship between counsel and a very effective neutral that the parties trust, it might be possible to creatively address the need for flexibility in managing conflict in long-term contractual relationships by setting up dynamic programs for tailoring processes to disputes *at the time conflict arises*.[392] Such an approach would obviate the need for a detailed predispute template for conflict management and avoid negotiations over procedural details at contract time; it would permit a process to be specifically formulated for the dispute at hand. If a facilitated negotiation failed to produce agreement on procedures to be employed, the third party neutral might even have the authority to formulate procedures. There are precedents for such an approach, including a contract-based conflict management program centered on the person of a "Dispute Resolution Advisor" that was successfully employed on several construction projects in Hong Kong.[393] Such innovations have not, however, attracted discernable attention in the United States, perhaps because they afford a neutral considerable discretion and leave commensurately less control in the hands of client and counsel respecting the ultimate process choice.

B. Arbitration Should Be Considered in the Context of an Array of Conflict Management Tools

In seeking to fulfill client goals and priorities through effective conflict management, arbitration should not be considered in isolation.

390. *See generally* Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO HIGH COST LITIG. 186, 187 (describing possibilities for collaborative process design).

391. *See generally* Wilkinson, *supra* note 37 (discussing ways arbitrators may bring tools to bear).

392. Walter Gans, former General Counsel of Siemens and an experienced advocate and arbitrator, suggests that,

> in the absence of an advance agreement, [the parties] empower an arbitrator/lawyer nominated or selected by the chosen provider for his/her industrial, business & process expertise, *to mandate the rules to be applied to the conduct of the arbitration* with a view to effecting a fair outcome reached in the most cost and time efficient manner, keeping in mind the agreement of the parties.

E-mail from Walter Gans to author (Sept. 10, 2008, 08:58 EST) (on file with author) (emphasis added).

A decade ago, the author explored the possibility of enhancing flexibility in the management of conflict by employing a third party to attempt to facilitate discussions about processes for resolving conflict and, if necessary, to direct the use of specific options. *See* Stipanowich, *supra* note 206, at 386–403.

393. *See* Stipanowich, *supra* note 206, at 310–23.

Binding arbitration is often a favorable alternative to the litigation process, but it is ill-suited to be the primary process option for serving the day-to-day needs of businesses.[394] Rather, the logical, normal first step is negotiation, followed in many commercial dispute resolution procedures by mediation.[395] Though opinions may vary regarding the desirability of a contractual provision for mediation, the option should always be considered.

The proliferation of contractual tools for conflict management has also given rise to customized provisions that skirt the borderline between arbitration and mediation, often producing undesirable consequences, such as a result that cannot be enforced in court.[396] Once again, the byword is caution.

C. The Legal Framework for Arbitration Should Be Tailored to Reflect the Very Different Realities of Different Transactional Settings

Planners and drafters of commercial dispute resolution agreements must move beyond a monolithic conception of arbitration and consider process options in light of contextual needs and goals. Similarly, an understanding of key contextual differences between commercial arbitration in an arm's-length transaction and consumer or employment arbitration under the terms of an adhesion contract must inform the activities of lawyers, lawmakers, and legal educators.[397]

Although there is evidence that binding arbitration under adhesion contracts may produce advantages for all concerned if due process is accorded to all participants,[398] self-dealing, ignorance, or negligence on the part of corporate contract drafters may result in injustice against consumers or employees.[399] Drafters must appreciate that legal, ethical, and practice imperatives mandate adherence to fundamental due process—limiting unilateral choice and restricting options for businesses seeking to avoid litigation through binding arbitration.[400]

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394. *See supra* Part II.

395. *See supra* text accompanying notes 195–201. *See generally* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 9, at 1–62 (discussing general strategies for conflict management and drafting considerations).

396. These things seem to happen especially often in California! *See, e.g.*, Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 850 (Cal. Ct. App. 2006); Saeta v. Superior Court, 11 Cal. Rptr. 3d 610, 613–15 (Cal. Ct. App. 2004) (finding that an administrative proceeding was neither arbitration nor mediation, and privileges applicable to those proceedings did not apply); Elliott & Ten Eyck P'ship v. City of Long Beach, 67 Cal. Rptr. 2d 140, 145 (Cal. Ct. App. 1997) (finding that a procedure by which parties selected a judge to resolve their dispute with finality and without appellate review was not arbitration); Cheng-Canindin v. Renaissance Hotel Assocs., 57 Cal. Rptr. 2d 867, 874 (Cal. Ct. App. 1996) (denying a motion to compel arbitration pursuant to a contractual provision for resolution by employer review committee on the basis that the procedure was not arbitration).

397. *See supra* Part III.

398. *See* Stipanowich, *supra* note 41, at 904–05 (summarizing empirical studies on results in employment arbitration).

399. *See* Stipanowich, *supra* note 197, 389–93.

400. *See id.* at 394–99.

At the same time, those engaged in proposing or enacting laws motivated by concerns over consumer and employee welfare must proceed with care to avoid imposing unnecessary "spillover" transaction costs in arm's-length commercial settings.[401] Just because a rule makes sense in adhesion contexts does not mean it makes sense across the whole spectrum of arbitration.

Similarly, though it is understandable that legal educators will discuss arbitration in the context of unconscionability,[402] they need not leave law students with the notion that arbitration is an inherently bad choice. Rather, they might offer examples of how arbitration may be employed effectively in the proper setting and procedural framework.

CONCLUSION

As courts and contracting parties have thrust arbitration into a primary adjudicative role across the broad spectrum of civil disputes, arbitration has taken on increasingly more characteristics of litigation. Although this evolution is understandable, it has led to the frustration of many users who find their arbitration experience wanting when measured in terms of its conventional attributes such as speed and economy of process. At the same time, the impetus to make arbitration even more like trial is evident in customized contractual provisions for enhanced judicial review. These provisions also exemplify the dangers of one-off drafting, which all too often goes awry when performed by unsophisticated parties.

At a time when many legal departments are in a cost-cutting mode, "legalized" arbitration, like litigation, is of much narrower utility than mediation and other emerging "thin-slicing" approaches. The growing emphasis on mediation and other alternatives that serve business' underlying interests—including the preservation of relationships—reinforces the inadequacies of arbitration in these respects and is causing some, such as the drafters of leading construction contracts, to question the need to include arbitration as an end step.

As a surrogate for litigation in consumer and employment contracts, arbitration has attracted a great deal of controversy. This, in turn, has sparked a variety of efforts to regulate and restrict choice in order to protect the due process rights of consumers and employees—efforts that often "spill over" into the arena of arm's-length business transactions, imposing new transaction costs without commensurate benefits.

All of these developments highlight the need to understand and address arbitration in a more nuanced and sophisticated way, moving beyond the "monolithic" approaches that tend to dominate drafting and debate. More than ever, "arbitration" must be understood not as a uni-

401. *See supra* Part III.B.
402. *See supra* text accompanying notes 358–61.

tary concept, but as a spectrum of possibilities and a realm of choice that demands more active participation by those who use, regulate, and comment on arbitration processes. The promise of arbitration is choice, and in order to fulfill that promise, choice must be deliberatively and effectively exercised.

— GENERAL SESSION —
Data Security in Arbitration: Practical Guidance for Protecting Company and Personal Information

Thursday, November 17, 2016, 11:15 a.m. – 12:00 p.m.

Materials:

PRACTICAL GUIDE FOR INFORMATION SECURITY IN ARBITRATION

Presented by:
Michael Menapace, Wiggin and Dana
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ARIAS•U.S. Practical Guide for Information Security in Arbitration

DRAFT

Introduction

This Practical Guide, and the accompanying checklist, is provided by ARIAS•U.S. to help participants in insurance and reinsurance arbitrations address issues of data privacy and cybersecurity. Most companies and law firms have IT and privacy professionals to help them maintain the security of confidential information. This Practical Guide is drafted primarily to provide guidance to arbitrators and to outline how companies and law firms can help arbitrators comply with the responsibility to secure and protect confidential information. Arbitrations often involve the exchange of regulated forms of information, such as "personally identifiable information" and "protected health information," or other information that is sensitive from a business operations standpoint. Moreover, as stated in the ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure, most parties to arbitration prefer that the proceedings remain confidential. Indeed, it is generally agreed throughout the industry that reinsurance arbitrations are and should be confidential in most circumstances, even absent the parties' complete agreement. Accordingly, the ARIAS•U.S. standard confidentiality form broadly classifies *all* information exchanged in an arbitration as confidential "Arbitration Information."

Personally Identifiable Information ("PII") – Under United States law, in general, personally identifiable information is information that can be used on its own or with other information to identify, contact, or locate a single person, or to identify an individual in context. This information is regulated currently by the data breach notification statutes of 47 states, plus Puerto Rico, and by a host of industry specific regulations and guidance documents.

Protected (or Personal) Health Information ("PHI") – The HIPAA Privacy Rule protects all "individually identifiable health information" that is, with some exceptions, (i) transmitted by electronic media; (ii) maintained in electronic media; or (iii) transmitted or maintained in any other form or medium. Individually identifiable health information is information, including demographic data, that relates to (a) the individual's past, present or future physical or mental health or condition, (b) the provision of health care to the individual, or (c) the past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.

Arbitration Information ("AI") – Generally defined as all briefs, depositions and hearing transcripts generated in the course of an arbitration, including documents created for the arbitration or produced in the arbitration proceedings by opposing parties or third-parties, final award and any interim decisions, correspondence, oral discussions and information exchanged in connection with a confidential arbitration proceeding.

The handling of sensitive business and personally identifiable information requires care, thoughtful processes, and deliberate action. Companies, counsel, and arbitrators are encouraged to consider and discuss these issues early and throughout the arbitration process. Even though all information exchanged in the typical reinsurance arbitration is usually considered to be confidential, not all information is equally sensitive and therefore, different procedures can and should be implemented for specific circumstances. Therefore, keeping in mind the proviso that arbitrations involving PII or PHI may require additional precautions beyond those listed below, it is a sound practice for all participants to consider applying, at a minimum, the practices described below to *all* information relating to confidential arbitrations.

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I. Organizational Meeting

At the organizational meeting, the parties and panel should discuss:

- Whether the parties are likely to exchange PII, PHI or other types of regulated or sensitive information.
- If the parties anticipate that these types of information or documents will be exchanged, they should ask whether that exchange is truly required and necessary. If there is no reason why this information must be exchanged, consider steps to avoid the exchange. For example, ask whether a column of a spreadsheet may easily be removed or documents be redacted.

The parties and panel should also discuss:

- Whether the parties are likely to file/submit to the panel, PII, PHI or other types of regulated or sensitive information.
- If the parties anticipate that they will file/submit this information, ask whether the filing/submission is truly required and necessary. If there is no reason to file/submit PII or PHI, consider steps to avoid the filing/submission of this information.

Document the treatment of Confidential Information. The parties and panel should address the requirements of exchanging and submitting AI, PII and PHI. For example, they may consider incorporating these issues within the Confidentiality Agreement signed as part of the arbitration, the Scheduling Order, in arbitrator engagement letters, and/or in arbitrator hold harmless agreements, *e.g.* the company will hold the arbitrators harmless for claims associated with the disclosure of Confidential Information provided they follow certain practices, such as those outlined in this Practical Guide.

Discuss mode of transmission. If Confidential Information is to be exchanged and submitted to the Panel, the parties should agree on a transmission mode for Confidential Information. See the discussion below for transmission options.

Exchange passwords in person. At the organizational meeting, the parties should consider exchanging passwords in person for encrypted files – the password should never travel with the encrypted files.

Cross-border transmission. Sending PII or PHI across national borders can trigger special obligations. If the cross-border transfer of PII or PHI is necessary, the parties should speak with each company's privacy officer and the parties should discuss with the arbitrators any special processes that will be required by any of the applicable jurisdictions.

II. Confidential Information at Rest

The goal is to ensure that all Confidential Information "at rest" is kept secure. "At rest" means information maintained in some form of persistent storage, for example hard copy paper, laptop computer disc, or a portable electronic storage device.

In general, there are two ways that Confidential Information can be stored "at rest": electronically and in hard copies (generally, paper). Care should be taken to ensure that both are secure.

A. Hard Copy Confidential Information

The guidance provided below for storing hard copy confidential information can be neatly summarized as putting into place, and maintaining, a "clean desk" policy for your workspace. Indeed, many companies have a "Clean Desk Rule" for their employees.

1. Equipment Necessary

To implement this policy, arbitrators need a few items of basic equipment that most likely already possess. Every arbitrator working on a matter involving Confidential Information should have a drawer, desk, or safe that locks. Arbitrators should also have an office shredder.

2. Practical Guidance

Once you have the basic equipment, follow the following policies:

- If possible, use a single dedicated space for your workspace when you have to access or review Confidential Information, such as an office. Where practicable, restrict access to that workstation, and secure your workstation when you leave to prevent unauthorized access.
- Follow a "Clean Desk" rule – remove Confidential Information from the top of your desk and lock it in a drawer when the desk is unoccupied and at the end of your work day.
- Close and lock file cabinets containing Confidential Information when not in use or when not attended.
- Do not leave the keys used for access to Confidential Information at an unattended desk.
- Immediately remove from the printer or fax machine documents containing Confidential Information.
- Erase whiteboards containing Confidential Information.
- Treat mass storage devices such as CD-ROMS, DVDs, or USB drives (sometimes called "flash drives" or "thumb drives") as sensitive and secure them in a locked drawer.

B. Electronic Confidential Information

Managing electronic Confidential Information is slightly more challenging than securing hard copy documents, but nevertheless can be done with some basic principles.

1. Equipment Necessary

You should absolutely invest in a computer (laptop or desktop) with **full disk encryption** or software for full disk encryption. Full disk encryption is described more fully below with example products that can be used.

Use and update regularly **anti-virus software**. Most anti-virus software or third-party providers include an option that prompts you to install updates. Take advantage of these options.

We recommend that you invest in a surge protector or battery power backup for your computer, as well as a cable lock or locking desk drawer for laptop storage.

2. Practical Guidance

- Use a dedicated computer for your arbitration work. Do not allow friends or family to use that dedicated computer.
- Any computer that contains Confidential Information should employ "whole disk encryption," and the whole disk encryption should be deployed.
    - Encryption is a process by which data is transformed into a format that renders it unreadable without access to the encryption key and knowledge of the process used.
    - Whole disk encryption comes standard with many newer Apple computers ("FileVault") and PCs using Windows 10. It is also available using certain commercially available software, including McAfee Complete Data Protection, Symantec Endpoint Encryption, Sophos Safeguard, Microsoft BitLocker, Dell Data Protection/Encryption, Apple FileVault 2, and Trend Micro Endpoint Encryption.
- Use commercially available, standard, supported anti-virus software. Download and run the current version; download and install anti-virus software updates as they become available.
- **Important:** We cannot overemphasize the importance of a strong password. Your passwords should meet or exceed the attached "Password Guidelines." *See below*.
- Enable a password-protected screen saver with a short timeout period to ensure that workstations that were left unsecured will be protected. The password should comply with the Password Policy.
- Never leave passwords on post-it notes attached on or under a computer, nor should they be written down in an accessible location.
- Logoff of your computer when you are not using it.
- Turn off your computer when you are done working or at the end of the day.
- Exit running applications and close open documents when your work is complete.
- Ensure that your workstation computer is protected with a surge protector (not just a power strip) or a UPS (battery backup).
- Recommended: Secure laptops using a cable lock or lock the laptop in a drawer or cabinet.

- We do not recommend using portable electronic storage devices such as thumb drives, CD-ROMs, or DVDs, to store Confidential Information. However, if you do use these devices to store electronic devices, the Confidential Information must be encrypted.
    - There is commercially available encryption software that permits encryption of portable electronic storage devices, including McAfee Complete Data Protection, Symantec Endpoint Encryption, Sophos Safeguard, Microsoft BitLocker, Dell Data Protection/Encryption, Apple FileVault 2, and Trend Micro Endpoint Encryption.
- NEVER open any files or macros attached to an email from an unknown, suspicious or untrustworthy source. Delete these attachments immediately, then "double delete" them by emptying your Trash.
- Delete spam, chain, and other junk email without forwarding.
- Regularly empty your Trash folder.
- Never download files from unknown or suspicious sources.
- WiFi Routers - All home or business wireless infrastructure devices should adhere to the following standards:
    - Enable WiFi Protected Access Pre-shared Key (WPA-PSK), EAP-FAST, PEAP, or EAP-TLS – this information should be printed on the box or in the instructions that come with the device.
    - When enabling WPA-PSK, configure a complex shared secret key (at least 20 characters) on the wireless client and the wireless access point – many devices have a randomly generated password already configured for that router.
    - Disable broadcast of SSID.
    - Once operational, consider changing the default SSID name.
    - Regularly change the device password – quarterly or twice yearly.
- Smartphones: If you send or receive Confidential Information using a smartphone, you should have the smartphone password protected and have it set up so that the screen locks if not used within a relatively short time period (i.e., one minute).
- Avoid using public WiFi when possible. If necessary, however, the use of public WiFi connections is acceptable if you are otherwise following the practical guidance outlined above.
- Do not access Confidential Information using a public computer.
- If you are printing documents containing Confidential Information in a public or office environment, do not leave confidential documents at the printer. Also note that many printers have secure printing options that allow you to send your confidential print jobs and hold them in the print queue until the user comes to the printer.

The law, regulations, guidance documents, and technology changes. Particularly if your arbitration will involve the submission of PHI, a full discussion of the most up-to-date requirements under HIPAA (or its state-based equivalents) should take place with the parties so that you understand any additional practices that must be followed.

III. Confidential Information in Motion

Confidential Information "in motion" includes data being transmitting over public, untrusted networks such as the internet or data being transmitted within private, trusted networks, and includes hard copy information or electronically stored information (often referred to as ESI) being physically transported by mail or other delivery service.

A. Electronic Transmission of Confidential Information

The following provides guidance for handling Confidential Information "in motion."

1. Equipment Needed

Use a secure email service provider. Gmail, Hotmail and other commonly used "free" email services tell you in their terms of service that they are essentially reading your emails. Some examples of secure email services are Proton Mail, Tutanota, and Lavaboom, all of which have free versions that are secure.

If you are using an email service provider that is not fully encrypted, such as those described above, use one of the commercially available services that allow for the secure transmission of attachments (*e.g.*, HighTail, Citrix Sharefile).

2. Practical Guidance

- Consider using an encrypted email service.
    - You can invest in a commercial email account. There are numerous high-security options available for a small fee. For example, instead of a Gmail account, you can use Google Apps for Work.
    - You may also use a free service, including the following high-security options - Proton Mail, Tutanota, and Lavaboom.

      Important: For many email products, you don't just get encryption "out of the box"; you have to take steps to enable the encryption, but the commercially available services have "Help Desks" that can help you make sure your email is encrypted.

        - **Note:** We recognize that many arbitrators currently use free email services like Gmail, Yahoo, and Hotmail. Many of these services now advertise that emails are encrypted; however, there have been reports of breaches in these services. Moreover, these services' Terms of Service all warn that the companies may scan the content of your emails. We do not, therefore, recommend those services as a first-line choice for confidential arbitrations. If you must use one of these services, all Arbitration Information should be attached to emails using password-encrypted attachments. Documents that are compressed using "Winzip" can be password encrypted. Moreover, most versions of Microsoft Excel, Microsoft Word, and Adobe Acrobat permit password encryption of individual files.

- Consider enabling "two-step authentication," also called "two-step verification" or "cell-phone confirmation," to secure your email account. The secure email services above provide for this. Two-step authentication uses a password for your account and some other method of confirming your identity. For example, you can set up a trusted mobile device on which you will receive a verification code. With two-step authentication, someone can try to gain access to your email with your password, but cannot do so unless they also have your cellphone. *This does not require the user to input two passwords every time you log onto your email. It requires the password and the authentication code when you log into your email from a new computer. Once you log in from that computer, the authentication code is not required for subsequent log-ins from that computer.*
- Set up a dedicated email account for your work as an arbitrator and, to the extent possible, use that account only for business.
- Whenever possible, no Confidential Information should be contained within the body of the email, but within a secure, encrypted attachment.
- Create a strong password using the "Password Guidelines."
- Highly sensitive information should be transferred or access given by a secure method. For example, a File Transfer Protocol (FTP) transfer can be used to downloaded information directly to your encrypted computer. Most law firms will have dedicated FTP transfer capabilities and counsel can assist with how to upload and download documents. In the alternative to transferring information, firms and companies can set up virtual data room a/k/a "Deal Rooms" where information can be securely accessed by only those given access. The "Deal Room" can be set up such that information cannot be copied, downloaded or otherwise removed from the deal room, making the issue of deleting files inapplicable.

B. Physical Transport of Confidential Information

You may have to travel or physically transport Confidential Information. When that is the case, follow these tips.

1. Equipment Necessary

- If you use your laptop on planes or in public places, invest in a physical laptop privacy screen, which are very inexpensive. These screens keep people from seeing your screen unless they are directly facing it.
- For your mobile device or your laptop that contains Confidential Information, you might consider a laptop security product that allows you to remotely locate/disable/wipe clean a laptop that has been lost or stolen. For these to work, the device needs to be connected to the internet, so it is important that the computer or mobile device have full disk encryption as described above. Also, these features or products must be configured before the device is lost/stolen, so plan ahead. Apple has the "Find My" services available for its devices. Android has a built in Device Manager feature that you can enable. For laptops, there are many third-party apps and pieces of software that you can use for remote tracking and wiping of the computer.

2. Practical Guidance

- Avoid traveling with Confidential Information.
- Avoid traveling with portable electronic storage devices (e.g., thumb drives). They are small and can easily be lost or misplaced. If you travel with one of these devices, encrypt it. And, you must not keep the encryption key with the device. A better option is to transfer the data to a secure computer (i.e., encrypted) and return or destroy the device.
- Avoid sending PII or PHI via hard copy if possible. Insist that counsel redact unnecessary PII or PHI that will be transmitted in hard copy.
- Avoid using your laptop to work on Confidential Information in public spaces – but if you do, consider investing in a laptop privacy screen.
- Do not check bags with Confidential Information and do not check your laptop.

IV. Disposal of Confidential Information

The lifecycle of Confidential Information ends with disposal. When disposing of Confidential Information, follow these practices:

A. Hardcopy Confidential Information

1. Equipment Necessary

- Shredder (cross-cut or diamond, preferable)

2. Practical Guidance

- Review any confidentiality agreement or other agreements that discuss obligations for disposal of Confidential Information and follow them.
- Shred Confidential Information or send back to the party that filed it.

B. Electronic Confidential Information

Simply deleting a file on your laptop generally removes only the reference to the file, not the file itself. Special steps need to be taken to securely delete electronic files. Keep in mind that, even if you do not save Confidential Information on your computer, care should still be taken. For example, if you open a file sent to you, but do not save a copy of that document on your computer, your computer may very well store a version of that document as a temporary or other file.

Information on external hardware (a disk or drive) can be destroyed by destroying the hardware itself, i.e. the hammer or shredding method. The following deals primarily with disposing of files stored on your computer.

1. Equipment Necessary

- Computer with secure file deletion capabilities
  - Recommendation: Update your computer software and operating system regularly. Use software that employs the most up to date standards. Currently, appropriate software will disclose that it is compliant with the U.S. Department of Defense 5220.22-M standard (3 pass or 7 pass) or Guttman method (overwriting 35 times).

2. Practical Guidance

- Windows
  - Download and use a file deletion program. For example, you may consider:
    - Fileshredder: www.fileshredder.org
    - Eraser: www.eraser.heidi.ie
    - Secure Eraser: www.secure-eraser.com

- Entire hard drive deletion. Use only if wiping an entire hard drive. ***Be very careful with this program***, as it could wipe the wrong drive if you are not careful.
    - Darik's Boot and Nuke: www.dban.org

- Apple
    - Single file deletion: Drag item into Trash, then choose Finder > Secure Empty Trash (OS X Yosemite and prior).
    - For operating systems OS 10.11 or later, you can download the product Permanent Eraser.
    - To erase the entire hard drive, you can use the Disk Utility, secure erase option.
    - Apple SSD drives: Enable whole drive encryption (FileVault 2)

- Portable Electronic Devices
    - Secure deletion using a minimum of 3 pass deletion
    - Destruction: Some shredders permit destruction of CD-ROMs and thumb drives. Physical destruction works nicely for thumb drives.

V. Incident Response – "*Break the Glass*"

- Things happen.
- You are obligated to report potential compromises of confidential information because, among other reasons, the companies and law firms should be able to assist you in determining the extent of any issue and help mitigate the issues. In addition, companies and firms may have reporting requirements when they or one of their vendors has a potential incident.
- There are various scenarios that can trigger your reporting requirement to the parties, including times when you are not even certain that Confidential Information has been compromised. Some of these scenarios are obvious, for example, you leave a pile of paper in your hotel room after checkout or on the seat of a taxi. Or, you receive a "ransomware" note from a bad actor who has locked down all of your data.
- Examples of potential incidents that should be reported are: a package of papers arrives to you and had been opened already or a thumb drive (even encrypted) was in your suitcase that the airline lost.
- When something happens:
    - Stop. If you are dealing with a potential breach by a third-party, do not proceed on your own.
    - Report to everyone – parties and firms.
    - Today, not tomorrow.

Strong Password Tips

Strong passwords have the following characteristics:

- Contain at least 12 alphanumeric characters.
- Contain both upper and lower case letters.
- Contain at least one number (for example, 0-9).
- Contain at least one special character (for example,!$%^&*()_+|~-=\`{}[]:";'<>?,/).

Poor, or weak, passwords have the following characteristics:

- Contain less than eight characters.
- Can be found in a dictionary, including foreign language, or exist in a language slang, dialect, or jargon.
- Contain personal information such as birthdates, addresses, phone numbers, or names of family members, pets, friends, and fantasy characters.
- Contain work-related information such as building names, system commands, sites, companies, hardware, or software.
- Contain number patterns such as aaabbb, qwerty, zyxwvuts, or 123321.
- Contain common words spelled backward, or preceded or followed by a number (for example, terces, secret1 or 1secret).
- Are some version of "Welcome123" "Password123" "Changeme123"

Avoid writing down passwords. Instead, try to create passwords that you can remember easily. One way to do this is create a password based on a song title, affirmation, or other phrase. For example, the phrase, "This May Be One Way To Remember" could become the password TmB1w2R! or another variation.

- (NOTE: Do not use either of these examples as passwords!)
- Considering using a passphrase. A passphrase is similar to a password in use; however, it is relatively long and constructed of multiple words, which provides greater security against dictionary attacks. Strong passphrases should follow the general password construction guidelines to include upper and lowercase letters, numbers, and special characters (for example, TheTrafficOnThe101Was*&!$ThisMorning!).

Change your password periodically. Changing passwords on a quarterly or bi-annual basis is ideal.

Practical Guide for Information Security in Arbitration

Checklist

This checklist is intended to be used with the Practical Guide and is not a substitute for the full document.

I. Organizational Meeting

Discuss whether the parties are likely to exchange PII or PHI and whether they must.

Discuss whether the parties will be submitting/filing PII or PHI to the Panel. If not required, try to avoid submission.

Address the requirements of exchanging and submitting Confidential Information through the Confidentiality Agreement, Scheduling Order, arbitrator engagement letters and/or in arbitrator hold harmless agreements.

Agree on a transmission mode and consider exchanging passwords for encrypted files.

II. Storage at Rest

Clean Desk rule for paper documents.

Use password protected computer with encryption.

Keep anti-virus software up-to-date.

Never download files or click on links from unknown or suspicious sources.

Password protect your smart phone and use the timed screen lock feature.

Avoid using public WiFi when possible.

III. Storage in Motion

Use an encrypted email service dedicated for your work activity or take other precautions described in the Practical Guide.

Transfer Confidential Information via an encrypted attachment, not in the body of the email.

Create a strong password.

Highly sensitive information should be transferred or access given by a secure method, e.g. FTP or a Deal Room.

IV. Disposal

Shred paper documents to return them to the party that filed them.

Use the most up to date deletion standards for electronic files.

Use entire hard drive deletion if you want to wipe everything on your computer.

For Portable Electronic Devices (CDs or thumb drives), delete using a minimum of 3 pass deletion or physically destroy.

V. Incident Response – "*Break the Glass*"

Stop.

Report to everyone – parties and firms.

Today, not tomorrow.

— SPEED DATING 2.0 —
Conversation Starters and Sparklers

Thursday, November 17, 2016, 2:30 p.m. – 3:45 p.m.

Materials:

HOW TO LISTEN AND BUILD DEEPER CONNECTIONS WITH PEOPLE — THE ART OF CHARM

The Keys to Knowing Exactly What to Say Every Single Time


theartofcharm.com/networking/how-to-listen-and-build-deeper-connections-with-people/

View all posts by AJ Harbinger → 12/4/2015

We've never had more excuses to not listen. As technology advances and content explodes, we continue to spread our attention across multiple screens, problems, and people — often all at once. As a result, attention has become one of the scarcest resources — and one of the most valuable. People who can truly listen have a unique edge in a world fragmented by distraction. They deal not just with stimulus but with engagement, not just with interaction but with connection. As Simone Weil writes, "Attention is the rarest and purest form of generosity."

By listening, of course, we're not talking about "hearing" people or even tracking what they mean. Listening goes beyond comprehension. To listen is to be fully present to what someone else is saying, to process their words without distraction, and to seek to understand them before trying to be understood ourselves. Listening is the currency of rapport, and the window into trust, connection, and mutual engagement. The quality of our conversations, our relationships, and our reputations all hinge on how well we can do this one simple activity.

So here's our handy guide on how to listen.

1. Practice active listening.

"Are you even listening to me?"

The question catches you off guard. Of course you were listening, you say. Yet the other person felt the need to ask the question.

People can tell whether you're listening by your verbal responses and your body language. When you make eye contact and nod as they're speaking, you send a different message than if you were staring into space.

The words you use and your body language are part of a larger skillset called active listening, a process in which the listener responds to the speaker by actively processing, re-stating and responding to what they've heard. Active listening is crucial to communication and relationships. In order to get someone interested in you, you have to be interested in them.

The most obvious form of active listening is responding. For example, you already know you have to acknowledge someone's thoughts to indicate you've been listening. But one word responses, like "yeah," "cool," "interesting," or "totally," only telegraph that you're probably not listening. They're not substantive statements. People catch on quickly. Think back to your last conversation like this, and you know the effect these perfunctory words have on a relationship.

The formula for a great conversation driven by active listening is simple, and it revolves around listening:

1. Ask an open-ended question.
2. Listen to the response.
3. Follow up with a statement (ideally an open-ended statement — but not another question).

It's totally fine if your questions sound random. Think back to the basics: Who? What? When? Where? Why? How? These are all great ways to start conversations. For example, if you're talking about travel and there's a lull in the conversation, you might just ask a random question. That might seem weird or unnatural, but you'll be surprised at how ordinary it actually is. Conversations are hardly ever linear. (This isn't a lecture!)

2. Connect on an emotional level.

A lot of people listen on a logical level (men, especially). Look, that's the most straightforward way to guide a conversation, and it's frequently the safest. So it's not unnatural.

However, if you want to really connect with someone, you'll have to listen to them on an emotional level. Go beyond connecting concepts and ideas, and delve into the feelings behind those concepts and ideas. For example, if your friend is an entrepreneur telling you about the time she pitched her company to investors and you've never started a company before, you can think back to a time you felt a similar level of pressure and anxiety in a high-stakes situation.

This is crucial in developing meaningful relationships. When you listen to someone emotionally, you show empathy. When you empathize, you recognize that someone else is as real as you. Empathy is one of the most endearing and resonating emotional connections you can have with someone else. Yet from a young age, many people are explicitly taught, or inadvertently learn, to avoid or hide their emotions.

Throughout the years (or decades), a lot of men lose touch with their emotions. Men pay less attention to their own emotions, and so they naturally pay less attention to other people's emotions as well. They find it difficult to empathize. Their relationships have no depth or closeness because they don't have emotional connections.

That's okay. It doesn't have to be like that. Here's how you get back in touch with your emotions and empathize with the other people:

Behind everything someone says to you, whether they're facts or opinions, there's an emotion tied to it. Logical connections are about finding commonalities and interests. Emotional connections are not. And that's great, because the one ultimate thing that connects all of us is emotions. Each of us may have gone through different things, but we've all felt the same emotions.

In order to build an emotional connection, share moments in your life where you've felt the same emotions. Learn about people's personal narratives: their past (e.g., embarrassing moments or lessons learned), present (e.g., beliefs), and future (e.g., hopes, dreams, or fears).

Because personal narratives are so meaningful, most people don't willingly open up about them to everyone. You might have to make the first move.

It'll be uncomfortable. If you don't talk about your past, present, or future much, you probably realize that the people in your life aren't willing to share this stuff either. It's challenging to build relationships and emotional connections without first being a bit vulnerable and sharing your personal narrative first. Show your emotions, elicit their emotions, and then connect the two.

When AJ does a boot camp, he will tell the stories of his father passing away and his girlfriend breaking up with him. The worst part: both these things happened within eight months of each other. After that, he asks the guys he's coaching to pick one emotion from his story that resonated with them and share a story of their own based on that emotion. Half of the guys start off with, "My relationship with my dad…" or something related to, "My dad…"

See what happened there?

The men went straight for the logical connection point about fathers. It wasn't necessarily an emotional one, though. What about sadness, grief, loss? Perhaps gratitude, or regret, or guilt? It's important to tap into the emotions coming through.

Tapping into your feelings and relating emotionally with other people takes a bit of practice. Don't worry if you struggle at first, because it will come with time. Best of all, you'll notice your friendships and relationships going deeper and becoming richer.

3. Focus on the other person with questions.

“What do I say now?”

Maybe one of you just accidently touched on a sore subject, or the conversation just dried up. Maybe the other person just went to the bathroom and came back. Or maybe you feel the need to impress this person, because you realize they’re becoming more important to you. Either way, lulls in conversations can make you trip over your own two feet. Here’s how you can avoid that:

When you worry about the “right” thing to say, you’re not listening. If you were, your brain would be focused on what the other person was saying. So every time you start worrying about what to say next, that’s a helpful reminder to reinvest in the conversation.

If you’ve ever been on the receiving end of that in a conversation, you’ll realize how irritating — and obvious — it is. When you catch yourself doing that, just ask yourself questions instead.

For example, you can ask yourself:

- What is this person saying?
- How does this person feel about what they’re talking about?
- What have I done that’s similar to what they’re talking about?
- When did I feel like this?

Asking questions will prevent a common mistake, which is focusing on yourself instead of other people. It sets the stage for you to form an emotional connection with someone (more on this in a sec).

Remember always, their story should take greater priority over your story. Questions prevent you from talking about yourself. It might sound simple and straightforward, but the next time you catch yourself worrying about a lull or making a good first impression, ask yourself questions so you prompt yourself to listen. Think about, and feel, what the other person said.

4. Pay attention to how they’re saying it.

You might have already seen stats showing that the majority of our communication is done without words (estimates vary from 60% to 90%).

Since this is the case, listening means paying attention to how someone says something. You listen to their pauses, their tone, their diction, and you look at their body language and how it shifts. This whole pictures will give you insight to their emotions and what they really mean. That’s why email and instant messages can be so confusing, and why you need to be fully present when you’re listening to someone.

Develop your sensitivity to changes in their speech and body language. Look into how they express themselves:

- Is the other person’s voice getting higher pitched? Maybe the topic makes them nervous or brings up an unpleasant memory.
- Are they speaking faster, or stuttering more? You might have stumbled on something they’re passionate about, and so much to say their mouth can’t keep up.
- Are they avoiding eye contact? You might have broached an uncomfortable topic.

If you naturally tend to mirror the other person, how does your body language make you feel? It won’t be easy at first, but as you pay more attention and get feedback on whether you were accurate or not, you’ll be able to more accurately pinpoint how exactly someone feels when they’re talking.

You can also use quiet moments and pauses to get more clues into how someone is feeling. If they're interested in continuing a conversation with you, their natural reaction will be to ask a question and get to know you better. If they're not, well, the quiet might last longer than you'd be comfortable with.

5. Use humor sparingly.

We've all seen the rom coms or heard social or dating advice where it's best to make someone else laugh. There's no denying it: laughter is reassuring, and making someone else laugh feels great.

The hard truth is: humor doesn't make you memorable. Humor is just seasoning. It shouldn't be a main ingredient in the recipe of your conversation.

A lot of people try too hard to be funny. They force humor when it's not there. Yet humor breaks the emotional tension that's building. Although you might find tension awkward and uncomfortable, it can be equally powerful if you use it correctly. As our podcast guest Oren Klaff says, "Tension is what holds people's attention." When you break tension, you make deeper, emotional conversations more difficult.

For example, you might be humorous when the other person is trying to talk about something that means a lot to them. They'll feel like you're not taking them seriously or being real with them. You didn't mean to communicate that, but that's what it makes them feel like. Sometimes, it's a defense mechanism on your end, to avoid the emotional connection and to avoid getting hurt.

In the more serious or tense moments of a conversation, resist the impulse to constantly joke around. Listen. Don't try to cheer them up or break the tension, which can be uncomfortable. Instead, listen to the words and tonality, and remember how you've felt the way they felt.

AJ's a pretty funny guy. But if you asked AJ's current girlfriend, she wouldn't be able to remember the funny parts of the first time they met of their first date. She'll remember the emotions she felt around him. It's never the lines or words people remember, it's the way that you made them feel.

Closing Thoughts

Dig beyond listening comprehension and logical connections. Build an emotional connection so you can empathize with the other person and get an idea of how they're feeling.

Don't drive yourself nuts about what you're going to say. Instead, bring your mind back to the moment that's unfolding in front of you with questions. Pay attention to their, and your, body language. Pay attention and let the serious, tense, or awkward moments in a conversation happen. Sometimes, the uncomfortable or intense parts of a conversation can be the most beautiful.

You might not quite get it the first or second time you listen. Keep at it. You'll get the hang of it. And you'll realize how rewarding it can be.

— BREAKOUT SESSION 1— Takeaways from New Discovery Rules to Employ in Arbitrations: The Company, Arbitrator, and Counsel Perspectives

Thursday, November 17, 2016, 4:10 p.m. – 5:00 p.m.

Materials:

OVERVIEW FRCP AMENDMENTS
AIA COMMENTS ON PROPOSED FRCP AMENDMENTS
ALLSTATE FRCP COMMENT

— Available in online materials only —

Letter from Companies in Support of the Proposed Amendments to the FRCP

State Farm FRCP Comments

ARMA FRCP Amendments Comments

Presented by:
Syed S. Ahmad, Hunton & Williams LLP
Andrew Maneval, Chesham Consulting LLC
Glenn A. Frankel, The Hartford
Royce F. Cohen, Tressler LLP

Takeaways from New Discovery Rules to Employ in Arbitrations: The Company, Arbitrator, and Counsel Perspectives

Syed Ahmad
Royce Cohen
Andrew Maneval
Glenn Frankel

I. INTRODUCTION

- The 2015 amendments to the Federal Rules of Civil Procedure are part of an ongoing effort to rein in excessive discovery.

- Chief Justice Roberts described the recent changes as "the product of five years of intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes."

    - See Chief Justice John Roberts, "2015 Year-End Report on the Federal Judiciary."

- In 2010, the Advisory Committee on Civil Rules convened a symposium to address the problem of civil litigation becoming too expensive, time-consuming, and contentious, inhibiting effective access to the courts.

- The symposium identified the need for procedural reforms that would:

    - encourage greater cooperation;

    - focus discovery on what is truly needed to resolve cases;

    - engage judges in early and active case management; and

    - address serious problems associated with vast amounts of electronically stored information.

        - See id.

- The amendment process took several years. The Committee received over 2,000 written comments, held hearings in multiple cities, and heard from over 100 witnesses. Chief Justice Roberts described the final product as marking significant change for both lawyers and judges, in the future conduct of civil trials.

- Numerous insurance companies signed letters supporting the rule amendments on the grounds that federal litigation has become inefficient, too expensive, and fraught with too many uncertainties that have little or nothing to do with the merits of particular cases.

        - See Letter from Companies in support of the Proposed Amendments to the FCRP, February 14, 2014 (signatures included: Allstate Ins. Co.; AIG; CNA; Hanover Ins.; The Hartford; Liberty Mutual; Progressive; Property Casualty Insurers Association of America; State Farm; and Travelers).

- See Letter from American Insurance Association, February 18, 2014 ("AIA strongly supports the proposed amendments to the Federal Rules of Civil Procedure as a thoughtful and targeted approach to streamlining many cumbersome and expensive aspects of the litigation process.").

- The amendment to Rule 26, perhaps the most significant change, is designed to place a collective responsibility on the parties and the court to consider the proportionality of all discovery and in resolving discovery disputes.

  - See Adv. Committee Note (2015)

- One court commented that, since the amendments went into effect, "proportionality has become the new black in discovery litigation."

  - See Vaigasi v. Solow Mgmt. Corp., No. 11CIV5088RMBHBP, 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) (noting that parties have invoked proportionality concerns "with increasing frequency" since the amendments).

- The aim of the recent changes to Rule 26 is not to create a number of new obligations. Rather, the goal is to change the "mindset" of the parties and the court and to renew their focus on the existing requirements in the rules to make litigation more efficient and inexpensive.

  - See Gilead Scis., Inc. v. Merck & Co, Inc., No. 5:13-CV-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) (noting that an aim of amendments to federal rules is to change the "mindset" of the court and parties).

- Federal courts have acknowledged that "[n]o longer is it good enough to hope that information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone."

  - See id.

- Further, as Chief Justice Roberts' comments highlight, a party is **not** entitled to receive every piece of relevant information.

  - In re Takata Airbag Prods. Liab. Litig., 2016 U.S. Dist. LEXIS 46206, at *143-44 (S.D. Fla. 2016).

    - **Note** – Hunton & Williams LLP attorney John Delionado was appointed as Special Master for discovery in this case.

- While the amendments to Rule 26 are designed to limit discovery, parties seeking to *avoid* discovery have increased obligations as well. The amendment to Rule 34(b)(2)(C) indicates that boilerplate objections are no longer acceptable in federal court. The new

requirement that parties identify whether documents are being withheld based on an objection furthers the goals of cooperation and avoidance of obstructionist tactics.

- See Daniel M. Braude, "Methods for Asserting Objections Under Amended Rule 34" Law 360 (March 2, 2016).

- The 2015 Amendments encourage early discussion of preservation obligations.

- See "Applying Amended Rule 37(e)", Thomas Y. Allman August 9, 2016

- The renewed focus on efficiency and collaboration is also reflected in the amendment to Rule 1. The thrust of the amendment to Rule 1 is to mandate a collective responsibility that obligates not just judges, but the lawyers and parties themselves, to work to control the expense and time demands of litigation.

- In the arbitration context, the ARIAS rules work in concepts from the Federal Rules relating to proportionality, organizational meetings, initial disclosures, relevance, and other discovery issues. The arbitration process could further benefit from continued influence by the Federal Rules.

- See Daniel FitzMaurice and Matthew Shiroma, "Improving Arbitration by Borrowing from Recent Amendments to Rules of Litigation"

II. FEDERAL RULE CIVIL PROCEDURE 26(b)(1)

A. Rule Text and Standard

Fed. R. Civ. P. 26 (b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).".~~

- Courts do not place greater value on any one factor over any other as a blanket rule. Therefore, the analysis requires a review of all six factors that are weighed based upon the facts of any given case.

- See Litigation News – "Federal Court Clarifies Discovery Rights Under Revised Rule 26" Caitlin Haney. ("The 'court's willingness to engage in a six-factor balancing test demonstrates the increased emphasis on proportionality in discovery,' suggests Levasseur. It does not appear that 'any factor is any more important than another, so courts will have to look at all six factors depending on the facts of the case' predicts Levasseur.").

- A party seeking to resist discovery must make a specific objection and show that the discovery fails the proportionality calculation.

  - See Carr v. State Farm Mut. Auto. Ins., Co., 312 F.R.D. 459, 468 (N.D. Tex. 2015).

- While the text of the rule has been updated, courts have been obligated to consider proportionality in addressing discovery issues for the last 33 years.

  - See Schultz v. Sentinel Ins. Co., Ltd, No. 4:15-CV-04160-LLP, 2016 WL 3149686, at *5 (D.S.D. June 3, 2016) (describing proportionality requirement as "hardly new" and having first appeared in the rule in 1983).

- The proportionality requirement was first codified in 1983 and was part of the scope of discovery described in part (b)(1), as it is now. However, in 1993, the proportionality requirement was shuffled to part (b)(2)(C) of the Rule dealing with the court's power to limit discovery. Thus, the 2015 amendment simply restores the provision to part (b)(1) of the rule, where it first appeared.

  - See id.

- In the arbitration context, discovery was for a long time very limited and virtually non-existent. In many cases, reinsurers were only able to obtain documents under the access to records clauses in reinsurance contracts.

  - See ARIAS Symposium – "How Much Process is Due? Procedural Issues in Arbitrations" (Paul C. Thomson describing lack of discovery in arbitration panels upon which he served in the 1980s and 1990s).

- Eventually, arbitration panels had to confront mushrooming discovery that detracted from the efficiency of the process. For several years now, the ARIAS Practical Guide has called for a similar exercise of arbitrator discretion in reining in discovery. Chapter 4, Comment E, directs arbitrators to "exercise the discretion to strike an appropriate balance between the relevant discovery necessary to the respective cases and protecting the streamlined, cost-effective intent of the arbitration process."

  - See ARIAS Symposium – "How Much Process is Due? Procedural Issues in Arbitrations" (Jamie Scrimgoeour comparing Rule 26 amendments with existing arbitrator responsibilities).

- While the ARIAS rules embody some concepts from the Federal Rules, further amendments to the ARIAS rules would be beneficial. For example, the ARIAS rules address proportionality in the context of depositions and other discovery but do not explicitly require proportionality for document requests. Further, the ARIAS rules could expressly apply the six factors in amended Rule 26 in the arbitration context.
    - See Daniel FitzMaurice and Matthew Shiroma, "Improving Arbitration by Borrowing from Recent Amendments to Rules of Litigation"

- Arbitration panels and courts have worked for years to strike a balance between giving parties their "day in court" and maintaining efficiency. Walking this line has been a particular focus of arbitrators who tout their dispute resolution forum as one that is often more streamlined than traditional litigation.
    - See ARIAS Symposium – "How Much Process is Due? Procedural Issues in Arbitrations" (Paul C. Thomson describing the efforts of panels and parties to agree to limit depositions and to promote efficiency by meeting and conferring to address this issue, and others).

- Even though both courts and arbitrators alike have been directed to exercise discretion for years, the recent amendments should serve to change the mindset of judges, arbitrators, and the parties, and inspire a renewed focus on efficiency.
    - See Gilead Sciences, Inc., 2016 WL 146574 at *1 ("Proportionality in discovery under the Federal Rules is nothing new . . . . What will change – hopefully – is mindset.").

- As shown by the examples below, there are a number of solutions that can be employed to balance efficiency with fair dispute resolution.

B. Amended Rule 26(b)(1) in Practice – Limiting Discovery

Below are some examples of the actions that courts have taken to limit discovery when considering the proportionality requirement in amended Rule 26(b)(1).

- **Permitting Physical Inspection of Records In Lieu of Requiring Production of Voluminous Records – Incremental Approach**.
    - See Design Basics, LLC, et. al. v. Ahmann Design, Inc., No. C16-0015, 2016 WL 4251076 (N.D. Iowa Aug. 10, 2016) (copyright infringement involving building plans). The court held that, where a claim was supported by only one ambiguous email, a request for production of documents relating to 10,000 house plans going back 20 years was not proportional. Instead, the court held that an incremental approach was appropriate. The plaintiff was permitted to inspect the physical records for a single day, from 9:00 a.m. until 4:00 p.m.

Whether any additional inspection would be permitted would depend on what evidence was discovered in the first inspection.

- **Limiting Production To Documents Necessary To Accomplish Purpose of Request**. Courts limit discovery to only what is necessary to establish the issue to which the discovery relates.

    - See Family Wireless #1, LLC v. Auto. Techs., Inc., No. 3:15CV01310(JCH), 2016 WL 3911870, at *2 (D. Conn. July 15, 2016) (franchisee action against franchisor). The defendants' request for production sought numerous categories of documents to establish the net worth of plaintiffs. The court held that a summary statement of net worth including basic information regarding assets and liabilities was sufficient. The court found that requiring production of many supporting documents did not achieve the goal of proportionality.

- **Ordering Production of Documents in Phases.** Courts have, on their own initiative, facilitated cooperation among the parties by determining whether discovery that is otherwise permissible could be completed in phases.

    - See Siriano v. Goodman Mfg. Co., L.P., No. 14-cv-1131, 2015 WL 8259548, at *1 (S.D. Ohio Dec. 9, 2015) (consumer protection class action). The court considered the proportionality factors and concluded that a products liability defendant was obligated to respond to requests for production of voluminous records relating to copper coils. The court, nevertheless, proposed that plaintiffs agree to discovery in phases, *e.g.* first production of warranty complaints; second, documents relating to investigations, etc.

- **Limiting Time Frame of Interrogatories.** Courts will limit the time frame of discovery to address proportionality concerns.

    - See Willis v. GEICO Ins. Co., 13-cv-0280, 2016 WL 1749665 (D.N.M. Mar. 29, 2010) (limiting scope of interrogatory requesting GEICO identify all insurance policies sold in New Mexico from 2006 to 2012, to require identification of only those policy in which a claim was made between 2010 and December 2011, among other restrictions, in consideration of proportionality factors).

    - See Roberts v. Clark County Sch. Dist., 312 F.R.D. 594 (D. Nev. 2016) (limiting interrogatory requesting all personal email addresses and social networking websites to only those sites on which plaintiff had an account after 2011).

- **Refusing Further Discovery Where Sufficient Support for Claim Has Already Been Provided.** When assessing whether discovery is proportional to the "needs of the case" courts look at what is truly necessary to a claim or defense and whether that information has been provided already.

    - See Vaigasi v. Solow Mgmt. Corp., No. 11CIV5088RMBHBP, 2016 WL 616386, at *14 (S.D.N.Y. Feb. 16, 2016) (employment discrimination) (disallowing further document requests where plaintiff employee had already received entire personnel files and other documents supporting claim and that the job itself was not ordinarily expected to generate a substantial volume of documentation).

    - See Turner v. Chrysler Group LLC, No. 14-cv-1747, 2016 WL 323748 (M.D. Tenn. Jan. 27, 2016) (products liability suit – lane departure warning system) (refusing to order responses to document requests of voluminous records concerning lane departure warning system where party could gain information from depositions and where party's own expert did not appear to be hampered by lack of access to requested discovery).

    - See Roberts v. Clark Cty. Sch. Dist., 312 F.R.D. 594 (D. Nev. 2016) (discrimination claim brought by transgender employee against school district) (holding that request for production of documents relating to expansive medical records was "grossly out of proportion" to what a party "legitimately needs to know to defend itself" against employment discrimination claims).

- **Finding that Privacy Concerns Tipped the Scale of Proportionality Against Production.**

    - See Williams v. Am. Int'l Grp., Inc., No. 15-CV-554-JDW-GMB, 2016 WL 3156066, at *1 (M.D. Ala. June 3, 2016). The court refused to order a workers compensation insurer to produce documents relating to plaintiffs' co-workers' workplace injuries. The court held that the privacy concerns of third-party health information "tip[ed] the scales of proportionality against disclosure." This was particularly true where plaintiff had an opportunity to gain information about the defendants' business practices in a deposition.

- **Refusing to Order Limited Production Where Plaintiff Made No Effort to Tailor His Requests to the Needs of the Case.**

    - See Mickail Myles v. County of San Diego, et al., No. 15CV1985-BEN (BLM), 2016 WL 4366543, at *8 (S.D. Cal. Aug. 15, 2016) (police brutality case). The court refused to order a police department to respond to requests for production that would result in $325,000 in costs. The court also refused to pare the requests down or order a

limited production where the plaintiff did not even attempt to tailor the requests appropriately.

- **Refusing to Order Discovery Where Cost and Burden Outweigh the Value of a Claim or Benefit to Requesting Party.**

  - See Rickaby v. Hartford Life & Accident Ins. Co., No. 15-CV-00813-WYD-NYW, 2016 WL 1597589, at *1 (D. Colo. Apr. 21, 2016) (ERISA case seeking reinstatement of benefits) (cost of compiling information to respond to interrogatories would involve over $25,000 in labor charges and was of only "limited value" to the specific conflict of interest claim to which it related)

  - See Marsden v. Nationwide Biweekly Administration, Inc., No. 14-cv-00399, 2016 WL 471364 (S.D. Ohio Feb. 8, 2016) (sexual harassment employment suit)(denying motion to compel responses to interrogatory and request for production because, "[a]lthough Plaintiff does not have access to all the requested information, the other proportionality factors – mainly Defendants' resources and the burden and expense of production – outweigh the production's likely benefit to Plaintiff.")

C. Amended Rule 26(b)(1) in Practice – Ordering Discovery

Below are examples where courts have found that the proportionality calculation supports the requested discovery.

- **Ordering Production of Insurer's Claim File In Bad Faith Dispute Because Insurer Had "Sole Access" To Relevant Information.**

  - See AMA Disc., Inc. v. Seneca Specialty Ins. Co., No. CV 15-2845, 2016 WL 3186493, at *1 (E.D. La. June 8, 2016) (ordering that insurer comply with request for production of claim file in bad faith insurance dispute because it had "sole access to relevant information in its file" and the production was proportional to the needs of the instant case).

- **Ordering Production of Documents After Considering Size of Defendant and High Amount in Controversy.**

  - See Bell v. Reading Hosp., No. CV 13-5927, 2016 WL 162991, at *1 (E.D. Pa. Jan. 14, 2016) (FLSA action). The court ordered production of documents relating to wage and hour claims where the defendant was a large company and cost of discovery would "certainly not exceed the amount of controversy."

- **Ordering Production of Documents and Responses to Interrogatories As Part of Public Policy Consideration.** Advisory Committee notes stress that public policy concerns must be considered as part of proportionality analysis.
    - See Schultz v. Sentinel Ins. Co., Ltd, No. 4:15-CV-04160-LLP, 2016 WL 3149686, at *5 (D.S.D. June 3, 2016) (action against homeowner insurer). The court ordered responses to document requests and interrogatories, in part, because the "value" of the case was not limited to $17,000 in claimed damages. Instead, the value included public policy ramifications of plaintiff succeeding on a claim that the insurer had engaged in a pattern of bad faith practices.

III. FEDERAL RULE OF CIVIL PROCEDURE 34(b)(2)(C)

A. Rule Text and Standard

Fed. R. Civ. P. 34(b)(2)(C) Objections.

An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

- The amendment is designed to end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.
    - See Adv. Committee Note (2015)
- A party is not required to provide a detailed description of any documents withheld, but it needs to alert the other parties to the fact that documents have been withheld and facilitate and informed discussion of the objection.
    - Id.
- This requirement will prevent time wasted addressing the veracity of objections that have not actually deprived a party of any discovery.
- Further, this requirement continues efforts by courts under the prior version of the rule to prevent gamesmanship by parties who do not reveal whether any documents are being withheld by virtue of an objection.
    - See Haeger v. Goodyear Tire and Rubber Co., 906 F. Supp. 2d 938 (D. Ariz. 2012) (stating that "litigation is not a game" and sanctioning party that "combine[d] its objections with a partial response, without any indication that the response was, in fact, partial").

- See Pro Fit Management v. Lady of America Franchise Corp., No. 08-cv-2662, 2011 WL 939226 (D. Kan. Feb. 25, 2011) (finding that production of documents was improper where made "subject to" certain objections because it left the other party "wondering whether all documents [had] been produced, or if some documents [were] still being withheld").

- See Rodriguez v. Simmons, No. 09-cv-02195, 2011 WL 1322003 (E.D. Cal. Apr. 4, 2011) (requiring party to "clearly state that responsive documents do not exist, have already been produced, or exist *but* are being withheld" based on an objection).

- The courts and the parties in these cases, and many others, may not have been side-tracked by expensive additional litigation had the rules required, as they do now, what the court ordered after-the-fact.

B. Amended Rule 34(b)(2)(C) in Practice

Below are examples where courts have confronted a party's failure to identify whether it withheld documents based on an objection, as required in the amended Rule 34.

- **Ordering Discovery Because Boilerplate Objections Do Not Support Withholding of Documents Under Amended Rule.**

  - See Orchestratehr, Inc. v. Trombetta, No. 3:13-CV-2110-P, 2016 WL 1555784, at *26 (N.D. Tex. Apr. 18, 2016) (former employer action regarding non-compete agreement). The court held that general objections that the requests for production are overly broad and unduly burdensome are not valid as codified in amended Rule 34(b)(2). The court granted a motion to compel where the party had failed to properly support its objections.

- **Holding that Amended Rule 34(b)(2)(C) Applies to Any Basis Asserted for Withholding Documents.**

  - See Jiang v. Porter, No. 4:15-CV-1008 (CEJ), 2016 WL 3015163, at *2 (E.D. Mo. May 26, 2016). A party claimed that it should not need to specify whether it withheld documents based on relevance grounds. The court held that, regardless of whether an objection was on privilege grounds, relevance, or any other basis, the party must state whether any responsive materials are being withheld. The court ordered the party to revise its discovery responses and affirmatively state whether it was withholding responsive materials.

- **Prohibiting Reliance on "Laundry List" of General Objections**

  - See City Furniture, Inc. v. Chappelle, No. 2:15-CV-748-FTM-99CM, 2016 WL 4262228, at *3 (M.D. Fla. Aug. 12, 2016). The court held that responses to requests for production made subject to a party's sixteen general objections did not comply with rule. The court prohibited the parties from relying on a "laundry list" of objections going forward.

IV. FEDERAL RULE CIVIL PROCEDURE 1

A. Rule Text and Standard

Fed. R. Civ. P. 1 – Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

- The amendment to Rule 1 makes clear that the parties share the responsibility to achieve Rule 1's goal. The advisory committee, in crafting this amendment, sought to emphasize that effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.

  - See Adv. Committee Note (2015)

- In the arbitration context, the ARIAS U.S. Rules could be changed to clarify that the parties, and not just the arbitrators, are responsible to administer the rules to achieve a speedy and inexpensive resolution to a dispute.

  - See Daniel FitzMaurice and Matthew Shiroma, "Improving Arbitration by Borrowing from Recent Amendments to Rules of Litigation"

B. Amended Rule 1 in Practice

Below are examples of how the amendment to Rule 1 has been recognized by the courts.

- **Finding that Rule 1 Contemplates "Active Judicial Case Management" and Ordering Cooperative Dialogue Among the Court and Parties**

  - See Siriano v. Goodman Mfg. Co., L.P., 2015 WL 8259548, at *1 (S.D. Ohio 2015) (consumer protection class action). Where defendant had not proposed any lesser degree of production or limitation, the court acknowledged that the amended rules contemplated "active judicial case management." The court, in furtherance of the goals embodied in amended Rule 1, proposed a compromise, and ordered a cooperative dialogue among the parties on how to limit document requests.

- **Ordering Parties to Stipulate to Matters Not Disputed and on Evidentiary Foundations that Clearly Could Be Laid.**

    - See Wichansky v. Zowine, 2016 U.S. Dist. LEXIS 37065 (D. Ariz. Mar. 22, 2016). The court recognized that "the parties share the responsibility to achieve Rule 1's goal" of a just, speedy, an inexpensive resolution of disputes. The court ordered the parties to stipulate to undisputed matters and evidentiary foundations to avoid wasting time in front of the jury.

V. FEDERAL RULE OF CIVIL PROCEDURE 37(e)

A. Rule Text and Standard

Fed. R. Civ. P. 37 Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(e) ***Failure to Preserve Electronically Stored Information.*** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

- FRCP 37 addresses discovery failures and subpart (e) was added in 2006 to deal with the failure to disclose electronically stored information ("ESI").

- The 2006 Amendments to the FRCP were the first amendments to address ESI. Unfortunately, there were several unintended consequences. The 2015 amendments revise the 2006 version of Rule 37(e) and address those deficiencies.

    - See Business Law Today – "New Amendments to the Federal Rules of Civil Procedure Litigation News: What's the Big Idea?" Joseph F. Marinelli (The previous version of Rule 37(e) included the following deficiencies: "(1) failing to harmonize inconsistencies among jurisdictions when dealing with lost ESI; (2) stating only what courts could not do in the event of lost ESI without providing any guidance on what measures the court could take; and

(3) being ambiguous as to when a court could impose more punitive sanctions rather than less serious curative measures for lost ESI.").

- The general intent of amended Rule 37(e) was to address the excessive effort and money being spent on ESI preservation as a result of the continued exponential growth in the volume of ESI, along with the uncertainty caused by significantly differing standards among the federal circuits for imposing sanctions or curative measures on parties who failed to preserve ESI.
    - See Marten Transport v. Platform Advertising, No. 14-cv-02464-JWL-TJJ, 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016).
- For Rule 37(e) to apply, the ESI at issue must have been lost after the duty to preserve attached and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve.
    - See Adv. Committee Note (2015)
- A duty to preserve may also arise from statutory requirements, administrative regulations, an Order in another case or a party's own retention requirements.
    - See "Applying Amended Rule 37(e)", Thomas Y. Allman August 9, 2016
- Due to the ever-increasing volume of ESI and the multitude of devices that generate such information, perfection in preserving all relevant ESI is often impossible. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. Courts should take into account the party's sophistication with regard to litigation in evaluating preservation efforts. Rule 37(e) is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve.
    - See Adv. Committee Note (2015)
- Proportionality also plays a role when evaluating reasonableness of preservation efforts. Courts should take into account a party's resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data – including social media – to address these issues.
    - See id.
- When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial

focus should be on whether the lost information can be restored or replaced through additional discovery. If the information is restored or replaced, no further measures should be taken.

- See id.

- Seven months into the implementation of the Amended Rule, some authorities have found that it "clearly resolved the circuit split on culpability for harsh measures by imposing a more uniform approach to lost ESI."

  - See "Applying Amended Rule 37(e)", Thomas Y. Allman August 9, 2016

- It has also been noted that there are a number of courts that have ignored Rule 37(e) entirely and have found this "troubling" and "problematic".

  - See id.

B. Amended Rule 37(e) in Practice

Below are some examples of how the courts have recognized Rule 37(e).

- **Scope of the Rule** – Rule 37(e) only applies to the loss of ESI, not the loss of other forms of discoverable information.

  - See Best Payphones v. City of New York, No. 1-CV-3924 (JG) (VMS), 1-CV-8506 (JG) (VMS), 3-CV-0192 (JG) (VMS) 2016 WL 792396, at *4 and *13-14 (S.D.N.Y., Feb. 26, 2016). In an action seeking spoliation measures for failure to retain and produce document and emails, the court applied separate legal analyses based on Circuit law for the tangible evidence and Rule 37(e) for the electronic evidence. The court found that, as to tangible items, the party acted with negligence but the availability of the evidence from other sources negated any prejudice. The court also found that the loss of the emails resulted in no prejudice under Rule 37(e)(1), and, given that "preservation standards and practices for email retention" were in flux at the time, the party had not "acted unreasonably as is required" under Rule 37(e).

- **Duty to Preserve** – Rule 37(e) only applies if the duty to preserve has attached.

  - Marten Transport v. Platform Advertising, No. 14-cv-02464-JWL-TJJ, 2016 WL 492743 (D. Kan. Feb. 8, 2016) (the court held that there was no breach of the duty to preserve because the ESI had already been overwritten under routine, good faith procedures in effect at the time the duty attached).

- **Reasonable Steps** – Rule 37(e) only applies if the party took "reasonable steps" to preserve the data. Courts, however, appear to be split over the degree of imperfection that still qualifies as having undertaken "reasonable steps".

- Marten Transport v. Platform Advertising, No. 14-cv-02464-JWL-TJJ, 2016 WL 492743, at *9 (D. Kan. Feb. 8, 2016) (the court found that conduct was reasonable when it involved routine, good faith operation of an electronic information system).

- Living Color v. New Era Aquaculture, No. 14–cv–62216–MARRA / MATTHEWMAN, 2016 WL 1105297, at *5 (S.D. Fla. March 22, 2016) (the court found that the failure to disable an auto-delete function was sufficient to find a failure to take "reasonable steps").

- Matthew Enterprise v. Chrysler, No. 13-cv-04236-BLF, 2016 WL 2957133, at *4 (N.D. Cal. May 23, 2016) (the court found that Plaintiff's "lackadaisical attitude towards document preservation" did not qualify as "reasonable steps").

- **Additional Discovery and Prejudice** – Rule 37(e) does not apply if additional discovery would mitigate the prejudice of the lost ESI. Rule 37(e) does not assign which party has the burden of proof.

  - Fiteq. v. Venture Corp., No. 13-cv-01946-BLF, 2016 WL 1701794, at *3 (N.D. Cal. April 28, 2016) (the court found that the moving party had "failed to provide that other responsive documents ever existed").

  - GN Netcom v. Plantronics, No. 12-1318-LPS, 2016 WL 3792833, at *10 (D. Del. July 12, 2016) (the court found that the nonmoving party was required to show that additional discovery mitigated the loss. While the additional discovery included 21 additional custodians and back-up tapes, less than 5% of the deleted emails were secured).

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February 18, 2014

Submitted electronically via Regulations.gov

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Members of the Committee on Rules of Practice and Procedure:

These comments are submitted on behalf of the American Insurance Association (AIA), which represents approximately 300 major U.S. insurance companies that provide all lines of property-casualty insurance to consumers and businesses in the United States and around the world. Given their frequent and extensive involvement in litigation, both as direct parties and on behalf of their policyholders, AIA members have a strong interest in the adoption of fair and efficient rules governing civil procedure.

AIA strongly supports the proposed amendments to the Federal Rules of Civil Procedure as a thoughtful and targeted approach to streamlining many cumbersome and expensive aspects of the litigation process. Our comments will address the proposed amendments as they have been grouped in the 5/8/13 memorandum accompanying the rules package.

I. Cooperation

AIA believes that the proposed amendment of Rule 1 sets the proper tone for the amendments that follow. Creating an explicit expectation that the parties (and not just the court) should construe and administer the rules to secure the "just, speedy, and inexpensive" determination of every action and proceeding highlights the significance of those goals, and serves notice that the proposal will address serious concerns about inefficient and expensive procedures that have been exacerbated over time.

II. Proportionality: Discovery Proposals

AIA agrees with the observation in the 5/8/13 memorandum that "excessive discovery occurs in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior." Accordingly, we support the general admonition in Rule 26(b)(1) that discovery must be "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." We also support the many specific amendments that implement this charge by reducing the presumptive number (and, where applicable, length) of depositions, interrogatories, production requests, and requests to admit. We believe all of the proposed limits are adequate because a court would be required to grant leave to exceed them where appropriate.

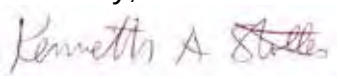
Given the complexities, burdens, and expenses of preserving vast quantities of information (which frequently results in innocent mistakes), AIA strongly supports amending Rule 37 to require a finding of willfulness or bad faith in order to impose sanctions or an adverse jury instruction for failure to preserve information subject to a discovery request. We agree with the observation in the 5/8/13 memorandum that "potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts."

III. Case Management Proposals

AIA supports the proposed amendments to Rules 4 and 16, which would increase the effectiveness of judicial case management by (i) reducing the time to serve the summons and complaint; (ii) requiring judges to issue scheduling orders sooner; (iii) requiring counsel for the parties to meet in person to discuss significant issues; and (iv) permitting a court to order the parties to request a conference to discuss discovery issues prior to the filing of a discovery motion. As with the other aspects of the rules package, these amendments should reduce both cost and delay without abridging any substantive rights.

AIA appreciates the Committee's consideration of our comments. Should you have any questions, please contact me at (202) 828-7167 or kstoller@aiadc.org.

Sincerely,



Kenneth A. Stoller
Assistant General Counsel

Edward T. Collins
Vice President &
Assistant General Counsel
Law & Regulation

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: *Public Comment of Allstate Insurance Company on Proposed Amendments to the Federal Rules of Civil Procedure*

Dear Members of the Committee:

Allstate Insurance Company ("Allstate") respectfully submits these comments on the discovery-related amendments to the Federal Rules of Civil Procedure proposed by the Federal Advisory Committee on Civil Rules (the Amendments). Allstate would like to thank the Committee for its hard work in developing the proposed changes and its commitment to soliciting and considering the diversity of views expressed in the comments. Allstate believes the Amendments represent a significant step toward reducing needless burdens and unproductive costs associated with discovery. Allstate agrees with, and supports, the comments submitted by the Lawyers for Civil Justice ("LCJ")[1] and appreciates the opportunity to provide additional comments in support of the proposed Amendments.

BACKGROUND REGARDING ALLSTATE

Founded in 1931, Allstate is the largest publicly held personal lines property and casualty insurer in America. It provides a range of insurance products to approximately 16 million households, including home, auto, life and retirement products. Allstate engages approximately 70,000 professionals made up of employees, agency owners and staff across all of North America. There are over 9,300 local small business owners who operate Allstate exclusive agencies in cities and towns across the country.

Like many other large companies, Allstate is frequently involved in a variety of civil disputes in state and federal courts. Some cases involve a plaintiff, individually or on behalf of a class, who challenges the application of a company policy or procedure. Other cases involve the types of litigation faced by other U.S. businesses, including contract disputes and employment litigation. Allstate is also a

[1] Lawyers for Civil Justice Public Comment to the Advisory Committee on Civil Rules (Aug. 30, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267 ("LCJ Comment"); Lawyers for Civil Justice Supplementary Public Comment to the Advisory Committee on Civil Rules (Feb. 6, 2014), available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0540 ("LCJ Supplementary Comment").

plaintiff in litigation and consequently has evaluated the Amendments from both a plaintiff's and a defendant's perspective.

Litigation in which Allstate is a party varies in size, ranging from large multistate and single-state class actions with significant monetary amounts at issue to smaller cases brought by individual policy holders, third-party claimants, or others. In the substantial majority of Allstate's cases, we face asymmetry in the allocation of discovery obligations in that most of the discovery burden is on Allstate. The expense and the drain on company resources to meet these discovery challenges are considerable. Over the past five years, Allstate has spent over $17 million in out-of-pocket costs for electronic discovery alone, plus many individual hours of in-house legal, paralegal and support staff time.

THE NEED FOR CHANGE IS ACUTE

We welcome the Committee's efforts to provide clarity and consistency in the administration of justice. Specifically, we support the intent of the Amendments to:

- minimize unnecessary over-preservation and provide efficiencies to the judicial system;
- allow litigants to look to the allegations of the complaint, rather than speculate what ancillary information must be preserved; and
- provide much-needed guidance on the meaning of "the just, speedy, and inexpensive determination of every action and proceeding."

The current Rules create manifest uncertainty regarding the scope of discovery and the risk of serious sanctions that can befall a litigant who in hindsight is found not to have met these ill-defined discovery and document-preservation obligations. This combination of uncertainty and expansive risk has led companies like Allstate to err on the side of caution in terms of preservation and discovery that, in the end, produce no tangible benefit for the litigation process. For example, Allstate currently stores over 65 TB of ESI specifically in connection with electronic discovery. Even this amount is only a portion of Allstate's electronic discovery-related storage burden because this amount does not include the storage of data held by individual custodians or within large non-custodial data stores. Nor does this number capture the cost of retaining vast amounts of paper documents throughout the organization. Of course, only a small fraction of these amounts is subject to production, and an even smaller subset is seen by a court or a jury. Such over-preservation is caused by the continued misinterpretation of Rule 26(b)(1) by opposing parties and courts, which creates uncertainty surrounding the scope of discovery, coupled with the risk of being wrong about preservation created by current sanctions provisions under Rule 37 and the inherent powers of the court.

The over-breadth of the discovery that can be ordered under the current version of Rule 26(b)(1) can, as described by Ford Corporation in its case study on the Stokes case, lead to significant costs with no advancement of any goal of justice. (In Stokes, not a single document from the plaintiff's extensive "other lawsuit" discovery ended up being used at trial, although the production cost the company an estimated $2 million in outside legal fees alone).[2] Unfortunately, in Allstate's experience, discovery like that involved in the Stokes case is not unique. Equally consistent is the report by Microsoft Corporation

[2] Letter from Doug Lampe, Counsel, Office of the General Counsel, Ford Motor Company to Advisory Committee on Civil Rules at 6-7 (Nov. 22, 2013) (Re: Ford Motor Company Comment to Report of the Advisory Committee Civil Rules), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0343.

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that, in 2011, the amount of ESI data it preserved was vastly out of proportion (by a ratio of 340,000 to 1) to the amount of information that was ever used in litigation (that ratio has since widened), and the report by Bayer Corporation that in its cases of "moderate size," on average just 0.1% of the pages produced in discovery were used as trial exhibits.[3] Survey data submitted to the 2010 Conference on Civil Litigation (the "Duke Conference") indicates that the metrics reported by Ford, Microsoft and Bayer are representative of the wider condition.[4]

Allstate believes the Amendments represent considerable progress toward curtailing wasteful discovery, easing the burden associated with discovery, and refocusing litigation on the merits of the dispute. As the General Electric Company noted in its comment on the proposed rules changes, money currently spent on discovery (including the significant costs associated with over-preservation) could be redirected to far more productive purposes, including business development or returns to shareholders.[5]

In addition, the Committee can expect that benefits extending from the Amendments if adopted will reach far beyond the federal system to our state courts because some states adopt all or part of the Federal Rules of Civil Procedure, and accord deference and respect to the federal courts' leadership in this area. As of February 2012, approximately 30 states modeled their e-discovery rules in whole or in part on the Federal Rules. For example, in 2008, Indiana amended its Rules of Trial Procedure in a manner that largely tracked the 2006 Amendments to the Federal Rules. Michigan, Minnesota, and North Dakota similarly adopted rules based on the 2006 Amendments. Even where states have not formally adopted the Federal Rules, many state courts look to the Federal Rules for guidance and are influenced by changes to those rules.[6] As of 2012, at least six states had made rule changes that addressed the expanding realm of e-discovery in some way. Thus, the Amendments' reforms will likely reach beyond the federal forum to help foster a more uniform and efficient judicial system throughout the United States.

COMMENTS ON SPECIFIC RULES

Rule 26

The proposed Amendment's emphasis that "relevant" information is that which is "relevant to any party's claim or defense," is a welcome and much-needed clarification. When determining what needs to be preserved, litigants need to be able to look to the allegations of the complaint rather than speculating about what ancillary information may need to be preserved for future unforeseen and unanticipated requests. Allstate also supports the LCJ proposal that a materiality standard should be added to support "relevan[ce]" -- that the rule should define discoverable material as "any non-privileged matter that is

[3] LCJ Comment at 3 n.10; Comment of Bayer Corporation ("Bayer Comment"), October 25, 2013 at 2; other reports helpfully summarized in LCJ Supplementary Public Comment at 2-3)

[4] Litigation Cost Survey of Major Companies (May, 2010) at 3 ("The ratio of pages discovered to pages entered as exhibits is as high as 1000/1.") *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

[5] Letter from Bradford A. Berenson, Vice President and Senior Counsel, Litigation and Public Policy, to Committee on Rules of Practice and Procedure, at 6 (Feb. 7, 2014) (Re: Response by the General Electric Company to the Request to Bench, Bar and Public for Comments on Proposed Rules), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0599 (in case in which 340,000 unique documents/over 6 million pages were produced, 194 documents marked at trial as exhibits).

[6] See Allman, T., *E-Discovery Standards in Federal and State Courts,* at 4*, available at* http://www.law.uc.edu/sites/default/files/2012FedStateEDiscoveryRules(Jan22).pdf .

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relevant and material to any party's claim or defense . . ." -- to further "signal[] the end to expansive interpretations of scope and relevance" and support proportionality.[7]

Another example of how the Amendments deliver needed clarity can be found in the discussion of the phrase "reasonably calculated to lead to discovery of admissible evidence." The Advisory Committee on Civil Rules has previously stated that this language was never intended to expand the scope of discoverable information but instead was intended to address discoverable but inadmissible information like hearsay. Specifically, "the purpose of the [current] amendment is to carry through the purpose underlying the 2000 amendment with the hope that this further change will at last overcome the inertia that has thwarted its purpose."[8]

The Advisory Committee's emphasis on proportionality is very much needed to curb unnecessary and wasteful discovery that, as discussed above, is imposing significant burden without corresponding social benefit. In Allstate's experience, issues relating to the scope of discovery become untethered from the merits of the case, and the current rules are interpreted -- incorrectly -- to allow "free looks"[9] into issues that go well beyond what is relevant or necessary to the claims and defenses alleged in a case. The proportionality standards incorporated into proposed Rule 26(b)(1) will not only provide much-needed guidance, they are also practical means of giving substance to the mandate of existing (as well as proposed revised) Rule 1, that the rules are directed at "the just, speedy, and inexpensive determination of every action and proceeding." In short, the proposed Amendments to Rule 26(b)(1) are needed to check unnecessary and inefficient costs and burdens to the parties and the system that results when discovery is allowed to extend beyond a case's claims and defenses.

For the same reasons, Allstate supports the proposed amendment to Rule 26(c)(1)(B) permitting the entry of a protective order providing for the "allocation of expenses" of discovery. Particularly where ESI is involved, the ability to allocate expenses of overbroad discovery requests to the requesting party would advance the goal of creating incentives to limit discovery to matters truly at stake in the litigation and create disincentives to wasteful discovery tactics.

Rule 37

Last month's decision in *In re: Actos (Pioglitazone) Products Liability Litig.*, 2014 U.S. Dist. LEXIS (W.D. La. Jan. 27, 2014) provides a further illustration of the need for clarity that the Amendments will provide to litigants. In *Actos*, faced with uncertainty as to whether the current Rules apply to pre-litigation conduct, the Court concluded it had to resort to its "inherent power" instead of relying upon Rule 37 to decide whether to impose what was in effect a request for a significant discovery sanction. The Amendments expressly eliminate the need to resort to inherent powers, and thereby in turn eliminate the risk of judicially-created inconsistent standards for discovery sanctions.

THE RULES AMENDMENTS ADDRESS REAL-WORLD PROBLEMS

Some who have commented in opposition to the Amendments attack the reliability of numerous studies showing that litigation costs have spiraled out of control as a result, in particular, of ESI

[7] LCJ Comments at 19.
[8] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Aug. 15, 2013) ("Preliminary Draft") at 272.
[9] The looks are, of course, "free" only to the requesting party; the producing party bears the majority of the burden and expense.

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discovery,[10] but the findings of these studies are completely consistent with Allstate's experience. The exponential increase in the number of e-discovery and document review companies also supports the findings of the studies.[11] Even some lawyers who primarily represent plaintiffs and oppose the Amendments candidly admit that the costs of ESI discovery are "significant," that "receiving and hosting electronic discovery . . . costs significant money," and that reviewing such documents "requires significant time."[12] Moreover, the current rules all too often lend themselves to strategic gamesmanship, where some litigants -- be they plaintiffs or defendants -- pursue expensive and wasteful discovery not for legitimate and reasonable litigation purposes, but rather in the hopes of catching their adversary in a misstep.

Comments in opposition to the proposed Amendments have also expressed concern about an inability to determine "relevance" under the amended rule.[13] Such concerns ignore hundreds of years of experience applying a common sense concept. Worries that changing the definition of discoverable information will limit access to information necessary to meet the burden of proof[14] are similarly misplaced. If information is needed by either a plaintiff or a defendant to meet a particular proof burden in the case, it is difficult to see how any rational court would find that the information is not "relevant to [its] claim or defense." Further, Allstate respectfully disagrees with comments that have criticized the Amendments because they might disable a plaintiff from finding additional claims beyond those contained in its pleadings.[15] As the Eleventh Circuit recently observed, this is not an entitlement under the Rule even as it currently exists.[16]

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[10] Comment of the American Association for Justice ("AAJ Comment"), December 19, 2013, at 27-30, available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372 .

[11] See, e.g. Comments of Tom Olofson, Chmn & CEO and Betsy Braham, Exec. V.P. & CFO of EPIQ Systems Inc. at Needham Growth Conf. (Jan. 16, 2014), Westlaw, INVESTEXT-CURRENT 23201535 (estimating market for e-discovery services at $2 billion to $3 billion and projecting double-digit annual growth).

[12] Letter from R. Joseph Barton, Partner, Cohen Milstein Sellers & Toll PLLC (March 1, 2013) available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0204 .

[13] AAJ Comment at 6.

[14] *Id*.

[15] Letter from/Joint Comments by Professors Helen Herskoff, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro, and Adam N. Steinman on Proposed Amendments to Federal Rules of Civil Procedure to Committee on Rules of Practice and Procedure at 6-7 (Feb. 5, 2014), available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0622 .

[16] *Liese v. Indian River County Hospital Dist.*, 701 F.3d 334, 355 (11th Cir. 2012).

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Conclusion

The Amendments will improve the efficiency, delivery and administration of justice both in the federal system and beyond by providing litigants with concrete guidance and meaningful discovery limitations. Without improvements and reasonable limitations such as those contained in the Amendments, some litigants will continue to abuse discovery, and particularly e-discovery, as a tactic that imposes excessive cost and burden on other litigants. Modernizing the federal discovery rules and improving the discovery process will help improve the nation's judicial system and ultimately benefit consumers and the entire economy.

Respectfully submitted,

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— BREAKOUT SESSION 2 —
Ultimate Dodgeball: How to Avoid Delaying Tactics by Arbitration Participants

Thursday, November 17, 2016, 4:10 p.m. – 5:00 p.m.

Materials:

OUTSIDE REINSURANCE: MANAGING OTHER CATEGORIES OF DISPUTES

OUTSIDE REINSURANCE: PRAGMATIC TIPS TO MANAGING ARBITRATIONS WITHOUT ACKNOWLEDGED RULES

CAN I DO THAT? THE PANEL'S AUTHORITY TO ENFORCE PROCEDURAL RULES AND PREVENT DELAYS

DISCOVERY

HOW REINSURANCE ARBITRATIONS CAN BE FASTER, CHEAPER AND BETTER (REVISTED)

PRELIMINARY MATTERS - BEGINNING THE PROCESS WITH EFFICIENCY

— Available in online materials only —

Century Indem V AXA Belgium (SDNY 2012)

Commercial Risk V Security Ins 526_F_Supp_2d_424 (SDNY 2007)

Presented by:
Susan E. Mack, Adams and Reese LLP
Suman Chakraborty, Squire Patton Boggs (U.S.) LLP;
Susan Grondine-Dauwer, SEG-D Consulting, LLC
Robert M. Hall, Hall Arbitrations

ARIAS PRESENTATION – NOVEMBER 2016

ULTIMATE DODGEBALL: HOW TO AVOID DELAYING TACTICS

BY ARBITRATION PARTICIPANTS:

Outside Reinsurance: Managing Other Categories of Disputes

By: Susan E. Mack

I. When Can a "Deadball" Occur Outside Reinsurance?

- Insurer vs. Managing General Agent
- Insurer vs. Commercial Insured
- Consumers v. Banks/Collection Agencies
- Consumers vs. Service Purveyors
- Investors vs. Brokers (FINRA)

II. **"The Honor System Officiating" – Does It Matter if the Cause of Delay is Benign or Malignant?**

- And how does another arbitration participant tell?

A. Applicable Rules

- ARIAS Canon I – General Duty to Act with Diligence
- ARIAS Canon VII – Advancing the Arbitral Process: Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications

> Comment 2. Individuals <u>should</u> only accept arbitration appointments if they are prepared to commit the time necessary to conduct arbitration process promptly.
>
> Comment 3. Arbitrators <u>should</u> make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

- ARIAS Canon VIII – Arbitrators <u>should</u> make decisions justly, exercising independent judgment and should not permit outside pressure to affect decisions.

B. Self-Monitoring Ethical Guidelines as opposed to an Umpire / Panel's Disciplinary Exertions

1. Pre-panel formation

2. Post-panel formation

III. Causes of Delay – Manuscript Arbitration Clauses

A. What Set of Rules Govern?

1. Obvious Conflict

- ARIAS–US Traditional Model
    - Two Party-Appointed Arbitrators Plus One Neutral

vs.

- AAA Traditional Model: The Code of Ethics for Arbitration in Commercial Disputes (Canon IX)
    - All Three Arbitrators Presumed to be Neutral

B. What Qualifications Shall the Arbitrators / Umpire Have?

- Sourced from particular organization or society?

- Contacts with firm or parties permissible?

C. What Time Frames – if any – Apply?

D. Have the Preliminary Requirements Been Met?

- Negotiation by corporate executives?

E. The Ultimate "Out of Bounds" Play – Is Litigation an Initial or Ongoing Recourse?

1. Is there a subset of issues that is not:

- ✓ implicated by the arbitration demand?
- ✓ covered by a "narrow" arbitration clause?
- ✓ ripe for any form of adjudication?

IV. Causes of Delay: The Intransigent Arbitrator

A. Various Excuses Leading to Impermissible "Holding"

1. "Out of the country"

2. Hectic schedule

3. Counsel unavailability

4. Counsel's difficulty in contacting party

5. "Let's wait until settlement talks concluded"

V. Causes of Delay: Umpire Appointment

A. Questionnaire

B. Breaking an Umpire Selection Deadlock

VI. Causes of Delay: Demand and Answer

A. Initial Pleading Unclear or Does Not Follow Arbitration Clause Rules

B. Subsequent Pleading Results in Joining New Issues

VII. Causes of Delay: Discovery and Hearing

A. Moving the Hearing Date / Rescheduling

VIII. Pragmatic Tips for Avoiding "Deadballs"

A. Prior to Umpire Selection

1. Establish firm deadlines with agreed consequences up front

2. Document all agreements as to deadlines and consequences

3. Enlist counsel's involvement

4. Employ tools provided by arbitration clause, if any

5. Run to the next phase as fast as you can

B. Concurrent with Umpire Selection

1. Employ standard forms

2. Employ tools provided by arbitration clause, if any

C. During the Discovery and Hearing Process

1. Bring evidence of "Malignant Delay" to Entire Panel with request for sanctions

2. Bring evidence of "Benign Delay" to Entire Panel, urging immediate action

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OUTSIDE REINSURANCE: PRAGMATIC TIPS TO MANAGING ARBITRATIONS WITHOUT ACKNOWLEDGED RULES

By: Susan E. Mack

Susan E. Mack, a certified ARIAS•U.S. umpire, arbitrator and qualified mediator, had the privilege of being one of the co-founders of the organization. A retired C-level executive, she has served as insurers' and reinsurers' General Counsel, Chief Claims Officer, Chief Compliance Officer and Chief Treaties Officer. Engaged in the private practice of law in Jacksonville, Florida with Adams and Reese LLP, she is frequently appointed as an umpire and arbitrator in both property/casualty and life/health proceedings. Her arbitration practice has included both reinsurance disputes and disputes between insurance companies and either service providers or large commercial policyholders.

I. The ARIAS•U.S. Model: Knowing What to Expect

Since the founding of ARIAS•U.S. in 1994, the ARIAS•U.S. conferences have maintained a laser focus on continuous improvement of the reinsurance arbitration process. In no small part due to these efforts, participants in the reinsurance arbitration process know what to expect. The reinsurance arbitration landscape is distinguished by:

- Knowledgeable counsel;
- Certified arbitrators and umpires with continuing substantive and ethical education requirements;
- Reinsurance contract arbitration clauses, with stated time constraints, arbitrator qualifications, procedures for resolving umpire selection deadlocks and specifications about what fees and costs can be awarded;
- Agreed parameters, typically understood as a tripartite panel with a neutral umpire and two party-appointed arbitrators who may enter the process with a predilection towards one side's case;
- The ARIAS•U.S. Practical Guide to Reinsurance Procedure; and
- The ARIAS•U.S. Code of Conduct.

Admittedly, the occasional proceeding is marred by unprofessional conduct in the form of lack of courtesy or delaying tactics on the part of counsel, parties or panel members. But, on the whole, due to the frequency with which reinsurance specialty counsel, industry participants and experienced arbitrators encounter each other in the context of reinsurance arbitrations, proceedings run without uncontained contentiousness and undue delay.

II. A Case Study: Efficient Models Break Apart

Outside reinsurance, dispute resolution can involve controversies among:

- Insurers and such service providers as managing general agents or third party administrators;
- Insurers and large commercial insureds;
- Consumers and Banks/Collection Agencies;
- Consumers and Service Providers and
- Investors vs. Investment Brokers (Financial Industry Regulatory Authority or FINRA).

Many of these proceedings are efficiently run, as they are subject to agreed rules and ethical guidelines. The FINRA proceedings are illustrative- arbitration participants are subject to specified Arbitration Rules and the American Arbitration Association/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes.[1] Consumer arbitrations often are governed by the consumer's agreement to a contract containing an arbitration clause specifying the involvement of the American Arbitration Association ("AAA"). These proceedings are aided by the involvement of an AAA staff case manager, and arbitrators are guided by both the aforementioned Code of Ethics for Arbitrators in Commercial Disputes and the AAA Consumer Arbitration Rules.[2]

In my experience, the most significant problems with managing arbitration proceedings occur both when (a) disputes occur outside the reinsurance context and (b) unlike the FINRA and AAA instances, the related contracts fail to specify any applicable administrative rules or ethical codes. The problems are exacerbated by the likelihood that counsel involved in such proceedings outside reinsurance may be more accustomed to the norms of litigation rather than alternative dispute resolution.

Consider this case study: a property/casualty insurance dispute between an insurer and a managing agent is governed by a contract containing a manuscript arbitration clause. The arbitration clause specifies that a panel consisting of an umpire and two arbitrators will constitute the forum, but does not specify (a) time constraints for panel appointment and process completion, (b) the precise qualifications and industry experience of the panelists and. importantly (c) whether the two party-appointed arbitrators may initially advocate the positions of the appointing party or must be neutral. No reference is made in the arbitration clause to a governing set of procedural rules or ethical guidelines. The clause is narrowly drafted; meaning that only disputes "arising out of" the contract and pertaining to contract "interpretation, performance and breach" are subject to arbitration. The clause does specify, however, that deadlock in umpire selection shall result in a federal district court choosing the umpire.

A dispute arises between the insurer and the managing general agent with respect to whether the managing general agent breached the contract by failing to follow the insurer's stated underwriting guidelines.

Predictably, the litigation firm hired by the managing general agent appears to be more comfortable with federal and state court practice than in an arbitral setting with industry practitioners as the forum. The litigation firm attempts to end-run the arbitration proceedings by stating that the issues relates to the formation of the contract rather than a breach of the contract's terms. After eight months, the court rules that the dispute must be referred to arbitration. The managing general agent's lawyer selects an arbitrator whose only industry connection is a brief stint as a junior counsel at a life insurance company. The arbitrator is not a member of any arbitration society such as ARIAS•U.S. or the AAA.

The initial delay caused by the diversion to court is now dwarfed by delays caused by the arbitrator's conduct. He is perpetually unavailable to the insurer's appointed arbitrator, citing that he has business "out of the country" and that his practice is extraordinarily hectic. He does, however, find time to argue that the process should be presided over by three neutral arbitrators, in an apparent attempt to eliminate all ex parte contact and keep the insurer's appointed arbitrator from communicating with the insurer about the proceeding's status or to provide an insurance industry perspective.

When pressed to appoint umpire candidates, the arbitrator finally names candidates who, like himself, are not members of any arbitral society. He provides the candidates' resumes. While each candidate has worked for a period of less than five years in a property/casualty company, the resumes do not show whether each candidate has ever served as an arbitrator.

After a painful year and a half after the court's referral of the dispute to arbitration, the matter ends up again in court. Ultimately, the pace of the matter accelerates substantially when the court chooses a seasoned umpire to complete the panel.

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1 https:/www.finra.org/arbitration-and-mediiation

2 https:/www.adr.org/aaa

III. Little Help Found: Application of Law and Arbitral Codes of Conduct

Unfortunately, there exists little in the way of applicable law or ethical disciplinary rules which could have assisted the insurer and insurer's appointed arbitrator in the described situation.

9 U.S.C.A. 10 authorizes vacatur of arbitration awards procured by evident partiality or corruption of the arbitrators (subsection (a)(2)) or where the arbitrators are guilty of "any other misbehavior by which the rights of any party have been prejudiced" (subsection (a)(3)), but authorizes nothing to ameliorate that pain of interim proceedings that ultimately resolve.

Each of ARIAS•U.S. and the AAA publish ethical rules, but they are self-monitoring. For example, Comment 3 of Canon VII of the ARIAS•U.S. Code of Conduct specifies that "arbitrators should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process." Subpart F of Canon I of the AAA's Code of Ethics states that "an arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants or other abuse or disruption of the arbitration process." Rule 18 of the AAA Rules for Commercial Arbitration Rules and Mediation Procedures provide something more – possible arbitrator disqualification where the arbitrator displays "inability or refusal to perform his or her duties with diligence or in good faith." But, admittedly, these rules do not strictly apply where the arbitrator in question is credentialed by neither ARIAS•U.S. nor the AAA.

IV. Pragmatic Tips to Dealing with Arbitrations Without Rules-or Arbitrations Where a Panel Member Eschews Rules

The arbitrator confronted with delaying or harassing tactics can present his or her concerns to the umpire, in the event that the tactics occur post-umpire appointment. My recommendation to the arbitrator faced with these difficulties prior to umpire appointment (as posed by the case study) is to resort to constructive self-help. Here are pragmatic tips to jump-start such arbitrations:

- **Don't lean into the described delays.** Ask, in writing, when an arbitrator will be available to speak substantively about the proceeding's issues. Assure the arbitrator that you can be available despite time zone differences. When the arbitrator responds, confirm the teleconference start time in writing and indicate how long a session is anticipated to wrap up issues.

- **Break what needs to be accomplished into deadlined steps with consequences for missing deadlines.** For such critical steps as putting forward umpire candidates, document a date and stick to it. Report any unfortunate misses in writing to both counsel, copied, of course to the arbitrator.

- **No matter what the provocation, do not descend to the depths.** When it is apparent that the other arbitrator is employing delaying tactics, perhaps intentionally, it is tempting to indicate that you have "caught on" to these tactics to that arbitrator. Just don't do it-the conversation will disintegrate quickly. Your worst case scenario is being quoted to counsel as the one whose speech or conduct is overly aggressive. Focus your comments on the process.

- **Avoid any attempts to bar communication with counsel.** Keeping appointing counsel in the loop as to the difficulties encountered with the process is key to appropriately enlisting counsel's help with the difficult circumstances.

- **If possible, employ any tools provided by the relevant contract's arbitration clause.** If time limitations exist in the clause, use them to the advantage of the proceeding.

- **Document, document, document.** Documenting deadlines and conduct via email may result in the other arbitrator disagreeing with your observations by email. It is still worthwhile to avoid the possibility that the other arbitrator's contentions will stand without contradiction.

- **Focus on running, not walking, to the next arbitration phase where an experienced umpire can be of great assistance.**

CAN I DO THAT? THE PANEL'S AUTHORITY TO ENFORCE PROCEDURAL RULES AND PREVENT DELAYS

By

Suman Chakraborty

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I. Introduction

There are key words in arbitration clauses that we are all used to reading. We see clauses that tell us that arbitrators are relieved of all judicial formalities. We see clauses that tell us that arbitrators need not follow the rules of evidence. And sometimes we see clauses that expressly allow the panel to adopt such procedures as it sees fit to resolve the parties' dispute. Indeed, the Supreme Court itself has noted that even where clauses are silent on the scope of procedural powers, "it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement."[1]

While we intuitively accept that arbitrators have wide discretion in *setting* arbitration procedures (as long as it does not conflict with anything agreed to by the parties in the contract), there seems to be a little more discomfort around the arbitrators' ability to *enforce* those same procedures. In a reinsurance dispute community like ours, there can be a variety of reasons for that – the refusal to believe an attorney is trying to obstruct; the desire to ensure fairness even if it means bending too far; or even the protection of relationships between arbitrators and the counsel who appoint them. What you *should* do in the face of obstructive behavior and what you *can* do are different questions. Here, we will talk about what you *can* do – in other words, what the legal framework is for assessing arbitrator authority.

II. The FAA: Deference, Deference, Deference

One way to figure out what you *can* do is by identifying the parameters of what you *cannot* do. In the arbitration world, that usually starts and ends with the grounds for vacatur under the Federal Arbitration Act ("FAA") or equivalent state arbitration laws. For our purposes, we will focus on the FAA.

The Supreme Court has stated that it views the FAA "as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[2] It has interpreted the four bases for vacatur listed in Section 10 as being exclusive because "[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."[3]

So what does this mean for our purposes? While few arbitrators begin their decision-making process by asking themselves "what I can do to avoid vacatur," asking oneself "would this be subject to vacatur" gives you the outermost boundaries of what cannot be done.

The grounds for vacatur under the FAA are well known to most. Courts may only vacate an arbitration award:

1) where the award was procured by corruption, fraud, or undue means;

2) where there was evident partiality or corruption in the arbitrators, or either of them;

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

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.[4]

Parties who have taken issue with arbitration procedures have focused on the third item on this list: "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy."

Guilty of misconduct. What does that mean? This is not the kind of misconduct that comes from corruption or fraud, as set forth in Section 10(a)(1) of the FAA. Rather, misconduct here means "not bad faith, but misbehavior though without taint of corruption or fraud, if born of indiscretion."[5] So the conduct was bad, but not with the added element bias or corruption. How do you figure out if behavior constitutes "misconduct?" By looking to the consequence of the action – did it render the process unfair. In assessing arbitration procedures under the "guilty of misconduct" standard, courts have noted that since arbitrators are not bound by formal rules of procedure and evidence, "the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing." [6] Fundamental fairness, in turn, "requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators."[7]

Notice and opportunity are the cornerstones of this analysis. Notice ensures that parties are aware of the procedures that will be applicable to the proceedings. Opportunity ensures that the parties have a chance to present evidence consistent with those procedures.

III. **Using Notice and Opportunity to Avoid Delaying Tactics**

Now that we are armed with the concept of "fundamental fairness," and its companions "notice" and "opportunity," we can apply these terms to our task: ensuring that the arbitration process runs smoothly and that delaying tactics are properly addressed.

A. Assessing Notice

The easiest and most straightforward use of "notice" is a tool that almost every arbitration panel uses: a scheduling order. The use of a scheduling order is one of the universally accepted ways of demonstrating that a party had notice of what the deadlines were, and what the consequences of missing that deadline are. Courts who have reviewed challenges to arbitration awards because of claims of procedural misconduct have frequently pointed to scheduling orders as the clearest indicator of a fundamentally fair process.

For example, in *E.Spire Communications, Inc. v. CNS Communications*[8], a party challenged an arbitration award on the grounds that the arbitration panel prohibited it from introducing exhibits or calling witnesses at the hearing after the party had failed to meet the deadline for disclosing those exhibits and witnesses to the other side. In finding that the panel had not committed misconduct by refusing to allow the party to belatedly identify evidence, the Fourth Circuit noted that the party "was on clear notice from the Scheduling Order of the deadlines and that the deadlines in the Order would be 'strictly enforced.'"[9] This decision is consistent with other courts that have concluded that an arbitral panel does not engage in misconduct by enforcing its scheduling order.[10]

What *E.Spire Communications* teaches us is that a party who is on notice of what they are supposed to do, and what deadlines they have to meet, will have a hard time arguing that they were deprived of a fundamentally fair process when arbitrators crack down on delays. Does this mean all arbitrators have to do is stick to its deadline and all will be fine? Well, not entirely. As in everything in the law, there are always exceptions. Notice is an indicator of a fundamentally fair process, but in the end, it is the process itself that matters. If the refusal to grant an adjournment deprives the party of a fundamentally fair hearing, a court may vacate the award.

That being said, Courts have shown a willingness to defer to the arbitrators' decisions as to whether or not to push deadlines or delay a hearing as long as a reasonable justification is provided for the arbitrators' decision. *Bisnoff v. King*[11] provides an example. In *Bisnoff*, the petitioner sought an adjournment because of an alleged heart condition that he said precluded him from participating in the arbitral proceedings. The panel denied his request in part because it had learned that the petitioner, despite his professed incapacity, had been working at a high-stress job for 30 hours a week without issue. The panel offered other options (such as videotaped testimony) but the petitioner declined and neither he nor his attorney attended the hearing. On a petition to vacate under Section 10(a)(3), the Court upheld the award and stated that the refusal to grant an adjournment did not constitute misconduct. The Court stated that the Panel had articulated a clear and reasonable justification for its decision – *i.e.*, that it did not find credible petitioner's illness claims – and the Court would not second guess that credibility determination.

Compare this with the result in *Tempo Shain Corporation v. Bertek, Inc*.[12], where the Second Circuit did vacate an award because the arbitrator did not adjourn a hearing when a crucial witness' wife suffered a reoccurrence of cancer. There, the arbitrator did not give a reasonable justification for refusing to delay the case. As the *Bisnoff* Court held, "the essential proposition for which *Tempo Shain* stands is that, absent a reasonable basis for its decision, a refusal to grant an adjournment of a hearing, due to a medical emergency, constitutes misconduct under the Federal Arbitration Act if it excludes the presentation of evidence material and pertinent to the controversy thus prejudicing the parties in the dispute and making the hearing fundamentally unfair."[13] Note the "absent a reasonable basis" part – providing a justification for refusing to delay is key.

One final example is one based on a situation which arbitrators may hear a lot: unavailability of counsel. In

Alexander Julian, Inc. v. Mimco, Inc.,[14] a party sought to vacate an award because his chosen counsel was unavailable on the day of the hearing due to a commitment in another case in federal court. The panel refused to reschedule the hearing because it found that any delay would be prejudicial to the other side, and because it believed there was sufficient advance notice for the complaining party to use substitute counsel. The Second Circuit agreed, finding that the arbitration panel had provided "at least a barely colorable justification" for denying the motion to adjourn. Busy lawyers beware.

B. Assessing Opportunity

As noted above, scheduling orders are powerful tools to demonstrate a fair process. Sometimes, a slavish adherence to a schedule might not always result in a fundamentally fair hearing. The *Alexander Julian* case provides a good summary of what courts fundamentally care about:

> In evaluating an arbitrator's decision to deny a postponement, courts consider whether there existed a reasonable basis for the arbitrator's decision and whether the denial created a fundamentally unfair proceeding. A fundamentally unfair proceeding may result if the arbitrators fail to give each of the parties to the dispute an adequate opportunity to present its evidence and argument. Arbitrators need not follow all the niceties observed by the federal courts. They need only grant the parties a fundamentally fair hearing.[15]

In this instance, the Court was speaking about the postponement of a final hearing. But the lesson applies equally to interim deadlines. Think of "opportunity" as "did the parties have a chance to do what they needed to do" and apply it to every step of the arbitral proceeding:

- Did the parties have a chance to weigh in on the initial schedule?
- Did the parties have a chance to weigh in on amending that schedule?
- Did the parties have a chance to put in their overall case?

If the answer is "yes," then the process is likely to be viewed as having been fundamentally fair. There are ways arbitrators can "paper the record" to highlight this fairness.

For the initial schedule, an agreed-upon schedule is obviously the easiest way to show that the parties had a chance to weigh in on the process.[16] If a dispute arises, provide an explanation as to why certain dates were chosen over others. If a party is looking to amend the deadlines, solicit written submissions from the party as to why a delay is needed and provide written reasons for why an extension is being granted or denied.[17] Remember what the Second Circuit said – "at least a barely colorable justification" goes a long way. And finally, arbitrators have to assess the overall process and determine whether they believe the parties have had enough time to complete discovery and prepare their case. That assessment will be given great deference by the Court.

IV. **Conclusion**

There is no bright-line rule as to what constitutes sufficient notice or sufficient opportunity. An arbitrator's duty to be fair and impartial extends to decisions on delays and adjournments just as it does to the overall process. But arbitrators should not shy away from pushing back on delay tactics. The courts' admonition that it will not second guess an arbitrators' ruling applies equally to procedural rules as long as the overall process provides for a fundamentally fair hearing.

(Endnotes)

1 *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp*., 130 S. Ct. 1758, 1775 (2010).

2 *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 588 (2008).

3 *Id.* (internal quotations and citation omitted).

4 9 U.S.C. 10(a) (2016).

5 *Sherrock Bros. v. DaimlerChrysler Motors Co*., LLC, 260 Fed. Appx. 497, 501 (3d Cir. Pa. 2008).

6 *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir. 2002), citing *National Post Office v. U.S. Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985). *See also Wachovia Sec., LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012); *Tempo Shain Corp. v. Bertek, Inc*., 120 F.3d 16 (2d Cir. 1997).

7 *Id. citing Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, 2000 U.S. App. LEXIS 1909 (6th Cir. Feb. 8, 2000).

8 39 Fed. Appx. 905 (4th Cir. 2002)

9 *Id.* at 910.

10 *Trans Chem. Ltd. v. China Nat'l Machinery Import & Export*, 161 F.3d 314, 319 (5th Cir. 1998), *aff'g* 978 F. Supp. 266, 307 (S.D. Tex. 1997).

11 154 F. Supp. 2d 630, 639 (S.D.N.Y. 2001).

12 120 F.3d 16 (2d Cir. 1997).

13 *Bisnoff*, 154 F. Supp. 2d at 638 (S.D.N.Y. 2001).

14 29 Fed. Appx. 700 (2d Cir. 2002).

15 *Id.* at 703 (internal citations and quotations omitted).

16 *See Doral-Financial Corp. v. Calixto Garcia-Velez*, 725 F.3d 27 (1st Cir. 2013).

17 *See Century Indemn. V. AXA Belgium*, No. 11-c-v-7263 (JMF), 2012 U.S. Dist. LEXIS 136472 (S.D.N.Y. Sept. 24, 2012).

ARIAS•U.S. PRESENTATION NOVEMBER 2016

ULTIMATE DODGEBALL: HOW TO AVOID DELAYING TACTICS BY ARBITRATION PARTICIPANTS:

DISCOVERY

By

Robert M. Hall

I. Some Non-Payers Vague About Their Defenses

- Critical to Force Articulation of Issues at Organizational Meeting
- Discovery Limited to Those Issues
- No Discovery on Other Issues Until Identified to Panel and Opposing Parties
- Cutoff Date for New Issues
- Consider Denying Late Addition of New Issues and Discovery Thereon

II. Standards for Discovery

- Federal Rules – May Lead to Admissible Evidence – Very Broad
- You Are an Expert Panel – Use Your Expertise
- Allow Discovery of Most Probative Evidence

III. Documents Discoverable

- Courts Sometimes Do Not Understand Likely Location of Probative Evidence
- Courts Sometimes Do Not Understand Difficulty of Extracting Evidence
- Courts Sometimes Have Problems Connecting Evidentiary Dots
- Use Your Expertise to Pinpoint Probative Evidence and Avoid Excessive Costs

IV. Course of Dealing Issues

- Can Require Very Costly Discovery
- Consider Whether Course of Dealing is Probative

- If Underwriting or Claim Handling in the Field is Probative, Use Samples

V. Excessive Depositions

- Time Consuming, Expensive and Indicative of a Fishing Expedition
- Set Limit on Depositions at Organizational Meeting
- Require Justification of All Depositions to Exceed Limit
- Consider a Final Ceiling with Counsel to Decide Whom to Depose

VI. Panel Remedies for Discovery Delays

- Assess Attorneys' Fees
- Bar Introduction of Documents or Witness Testimony
- Bar Defense or Claim

HOW REINSURANCE ARBITRATIONS CAN BE FASTER, CHEAPER AND BETTER (REVISTED)

By

Robert M. Hall

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I. Introduction

This is an update of an article which first appeared in 2004[1] and was intended as an action plan for remedying some of the more significant problems with the reinsurance arbitration process. Unfortunately, this action plan has not progressed very far since then.

One of the reasons for this is identified in an article authored by noted commenter, Larry Schiffer, which is entitled, significantly, "Mirror, Mirror on the Wall."[2] In this article, he suggests that the problems may be less with the arbitration system itself but more with participants who find advantage in gaming the system.

In my opinion, this advantage may be a severe attenuation of the process by a party that is reluctant to pay or which hopes to find a reason not to pay in scorched earth discovery. This advantage may be to the law firm whose stock in trade is to make every dispute, regardless of importance or the merits, into an ordeal similar to crawling through broken glass for 20 miles on hands and knees. This advantage may be to the arbitrator who no longer wants to work hard, make difficult decisions or articulate them in writing to those paying the bills.

As Mr. Schiffer observes in his article, the three constituent parts of the arbitration process need to work together to improve, and reduce gaming of, the arbitration process. Remedies in several critical areas are suggested below.

II. Discovery Standards in Arbitrations

A major problem in arbitrations is discovery. While most counsel are responsible in terms of discovery, arbitration panels sometimes field requests for massive deposition and document discovery, some of which is not well targeted or would produce information largely tangential to a resolution of the dispute on the merits. Not only is this burdensome, costly and time consuming, it may be functionally impossible to execute (due in part to limitations on subpoena power) or when the discovery is sought from disbanded or disaffected third parties such as agents. When a party is unable to convince an agent third party to cooperate, that party may be accused of playing hide the ball.

One of the hurdles with placing reasonable boundaries on discovery is acquiescence by panels in the views of counsel as to standards for discovery. The Federal Rules of Civil Procedures allow discovery of documents which may lead to admissible evidence. Since there is no standard for admissible evidence in arbitrations, this rule is not very meaningful in the arbitration context. Moreover, very broad discovery is less necessary for arbitrations than litigation since: (a) arbitration is supposed to faster and less costly than litigation; (b) arbitrators are expert in the business and require less detail than a court to understand the transaction at issue and what went wrong; and (c) arbitration panels are familiar with the business records of insurance and reinsurance entities and can focus discovery on those locations most likely to contain probative evidence. "The test is whether the parties

have had a fair opportunity within the context of due process to present their case."[3]

In this light, perhaps arbitration panels should adopt a standard for discovery more appropriate for arbitrations: that which is likely to produce evidence probative to the issues in dispute. This would reduce high volume - low result discovery and the time and cost related to thereto and provide the panel with the information most useful to resolve the dispute which has caused non-performance.

III. Panel Involvement in Shaping Issues

In the typical arbitration, the parties define the issues to be placed in front of the panel. Often, the panel first becomes involved in shaping issues when discovery disputes arise. However, such involvement usually deals with the connection between the discovery desired with and a line of inquiry thought to be significant by counsel. The panel sometimes makes little effort during the discovery phase to connect the line of inquiry with the issues identified in the dispute.

Viewed historically, this passivity is understandable. Arbitration is the creature of the contract between the parties. The authority of the panel is limited to that granted in the arbitration clause. In addition, the partisan aspects of the party arbitrator process make it difficult to force counsel into an early definition of the issues. (*See* § VII on all-neutral panels.) However, a relatively passive role for the panel has significant disadvantages in large, complicated and hotly contested arbitrations. Counsel may have very different views of the case leading to a failure to meet squarely on the issues. This can lead to inefficient efforts of counsel and, occasionally, a tragic failure to grasp the panel's priorities and inclinations. This, in turn, can lead to a lopsided result on a matter that could have been settled with more panel intervention.

While it may be hard for the panel, and painful to counsel, the speed and efficiency of the arbitration process may benefit from more panel involvement in shaping and prioritizing the issues in the dispute. This can start at the organizational meeting with counsel being required to reveal the substantive reasons for non-performance on either side. It can continue with a discovery plan that is tied to specific issues plus a conference call prior to filing the briefs to further define the issues. Finally, there should be a conference call after the briefs but before the hearing so as to prioritize testimony to the issues most important to the panel and most in controversy. This would serve to better focus and shorten the hearing.

IV. Saving Time and Money Prior to the Hearing

There are a number of factors which influence the scheduling of an arbitration hearing. Many players must be available: counsel, arbitrators, witnesses and company representatives. They must be available for a block of time (one or more weeks for the hearing and a week before for preparation). Discovery must be completed (eight or more months) and briefs written and issued (one month). Therefore, twelve months is often the minimum lead time necessary to schedule a hearing.

Sometimes counsel believe that more lead time is necessary. This can result from their schedules or their view of necessary discovery i.e. audits can be cumbersome to arrange and time consuming. It can also result from intervening motion practice *i.e.* security, dispositive motions and discovery disputes. Some parties and their counsel are in no hurry to bring a dispute to resolution.

Slippage in the schedule prior to the hearing can have a disastrous result. If the hearing has to be rescheduled, this may add many months to the duration of the arbitration due to the necessity of juggling the schedules of all the relevant parties. Therefore, it is incumbent on the relevant players to achieve interim steps within the designed time periods. This can be done in several ways:

- Arbitrators need to identify issues of relationships with relevant parties prior to the organizational meeting so as to resolve them without disrupting the proceeding at a later time

- Telephonic organizational meetings to avoid the scheduling conundrum at the front end
- Counsel have to identify with some particularity the reason for non-performance early on so as to focus discovery e.g. general statements of misrepresentation, concealment and breach of contract are not useful
- Firm dates for the interim discovery and briefing must be established at the organizational meeting with consequences for failure to meet them without good cause
- Periodic status reports from counsel to detect slippage in the schedule and identify emerging problems
- Meet and confer requirements for counsel before bringing disputes to the panel in order to avoid piecemeal and confusing presentations of such disputes to the panel
- Deciding interim issues on written submissions and/or argument by conference call to reduce scheduling problems
- Dealing with dispositive issues first (*see* Section V., *infra*.)

One the best ways in which pre-hearing delays can be avoided is for parties to be very involved in the discovery requested by counsel in order to focus on important witnesses and documents and to be efficient in the way that information is sought. Parties know how to focus requests to get maximum result from modest amounts of information. For instance, if the issue is the reason for entering and exiting a line of business, focusing on the business plans for the years in question will reveal more concise and useful information than a vague request for all documents related to a company's involvement in a line of business (every piece of paper and electronic file?).

V. Saving Time and Money at the Hearing

Hearings are very expensive. Teams of lawyers and arbitrators are billing by the hour. Executives are taken away from other duties to testify. Hotels charge considerable amounts to provide space, room, board and equipment for the event.[4] To the extent that a hearing cannot be completed within the time allowed, more expenses are incurred. Therefore, a reduction in hearing time is directly responsive to common criticisms of reinsurance arbitrations.

Sometimes, on the opening day of a hearing, the panel is faced with a number of motions and arguments over use of hearing time, or other matters, that seriously delay the taking of testimony putting the arbitration behind schedule from the outset. These issues are best addressed by means of a conference call after the final briefs are submitted and before the hearing starts. This allows the panel to resolve these issues with some time for reflection and without a courtroom full of lawyers, witnesses and company representative waiting for testimony to start.

In some disputes, there are threshold issues which might be decided on a summary basis in that they have no or few disputed facts.[5] For instance, a common defense of reinsurers is that the cedent misrepresented the program on placement so as to justify rescission and administered the program so poorly as to violate the duty of utmost good faith. The placement defense involves limited players and documents and if successful, will obviate the rest of the hearing. The administration defense involves many players, many transactions and time-consuming audits. Panels and counsel should consider bifurcating such a dispute to focus on the placement issue first and to allow the administration issue to follow on at its naturally slower pace. If the cedent is found to have misrepresented the business in material fashion, discovery on administration can stop and a time-consuming hearing thereon is avoided. If no material misrepresentation is found, the dispute is in a better posture for settlement.

Another means by which hearing time can be saved is for the panel, after it has reviewed the briefs, to give counsel direction as to the issues and witnesses of most interest to the panel. Counsel are often grateful for this because it helps them prioritize their efforts and decide which witnesses are needed for live testimony. While panel consensus on point may be difficult to achieve absent an all-neutral panel (*see* Section VII*., infra.*), it is a

worthwhile tactic in an effort to achieve an efficient and focused hearing.

For major witnesses at the hearing, considerable time can be saved by the use of British-style direct testimony i.e. written statements submitted to the panel prior to the hearing. Cross and re-direct is handled live. In this fashion, direct testimony is more organized and concise and does not take up hearing time. The panel has already absorbed the written testimony and opposing counsel are better prepared for cross.

For minor witnesses, deposition designations, rather than live testimony, can save considerable hearing time. They can be prepared by counsel and read offline by the panel. This may require somewhat more complete depositions of minor witnesses by both sides as would ordinarily be the case. However, it saves hearing time where the aggregate costs are much higher.

Technology has added a new dimension to the arbitration process; however, technology can add costs without real benefit. Written deposition designations can obviate segments of videotaped depositions of minor witnesses. Demeanor evidence, which the primary benefit of videotaped depositions, is seldom a significant factor. The businessmen and businesswomen who are the subject of the depositions are used to presenting themselves well so the benefit of viewing them as they give their testimony is often marginal. The panel can read the testimony much faster than it can be given on videotape and they can read it offline, thus saving considerable hearing time.

Certain technology is very helpful to the panel to the panel before, during and after the hearing. Briefs, exhibits and attachments provided electronically allow the panel to be productive even while traveling. LiveNotes or similar technology provides the panel a live feed to testimony as it is given. This helps the panel to absorb it better and to annotate it so that the panel can more easily find it later and use it in their deliberations.

VI. Awarding Costs in Reinsurance Arbitrations

Absent a contractual provision to the contrary, it is clear that an arbitration panel can award costs (e.g. attorneys' fees and other costs of the arbitration) to the prevailing party.[6] Until recently, there has been considerable reluctance on the part of arbitration panels to do so.

This reluctance may have several sources. One may be the American rule in litigation that each party must pay its own costs, absent extraordinary circumstances. The American rule is in contrast to the rule in other jurisdictions (*e.g.* England) where costs are granted routinely to the prevailing party as a means of deterring marginal litigation.

Traditionally, reinsurance arbitrations were largely good faith disputes between business partners which could be resolved relatively quickly and cheaply with the aid of some market practitioners. There were few costs to award and the dispute was something the parties wished to put behind them so they could continue trading. This is no longer the case.

Finally, the party arbitrator system creates a certain degree of partisanship which may deter a panel from awarding costs even when deserved. While a panel, or a majority thereof, may be willing to rule on all issues for one party, they know that awarding costs may subject the losing party arbitrator to the considerable disappointment of the party and its counsel who may believe that their arbitrator has failed in his or her partisan responsibility.

Obviously, the arbitration process has changed in recent years. It is no longer a low cost, expeditious resolution of good faith disputes between trading partners. All too often, it has become a scorched-earth proceeding involving parties in runoff or with discontinued operations and with no interest in a future trading relationship.

With a low probability of costs being awarded, there is little disincentive to taking novel if not outrageous positions. Sometimes arbitrators encounter highly skilled advocates making earnest arguments in favor of the most unlikely positions in support of totally unacceptable behavior by their clients. Fortunately, a growing number of

panels are willing to grant costs under such circumstances. This trend would accelerate with a move to all-neutral panels which will eliminate partisanship in arbitration proceedings. It has become evident that granting costs in appropriate circumstances is a tool that must be wielded to combat legitimate criticisms concerning the length and costliness of the arbitration process.

VII. All-Neutral Panels

Reinsurance arbitrations in the United States traditionally have used two arbitrators appointed by the parties and a neutral umpire. To most, the role of the party arbitrator is to make sure his or her party's position is articulated and fully considered by the panel and then to seek a just result. To a minority, the role of the party arbitrator is simply to advocate the position of the party. Others have a view of their role somewhere in between.

Regardless of where party arbitrators fall within this spectrum, their role is difficult and conflicted. Only with a struggle can a party arbitrator put behind him or her the appointment process, discussions with counsel prior to the termination of ex parte communications and the effort to assure balance to the proceeding. The result often is a partisan element to the proceeding which can impact virtually all phases: (1) umpire selection; (2) timing of the hearing; (3) scope and nature of discovery; (4) length and focus of the hearing; (5) the nature of panel deliberations; and (6) the nature and clarity of panel rulings.[7]

The impact of this partisan element takes several forms. Debate within the panel is elongated to little purpose. Negotiations tend to be distributive in nature *i.e.* working toward the middle from outer parameters determined by the positions of the parties. Unfortunately, this tends to reward the party which takes the most extreme position and tends not to consider that the proper answer may be within entirely different parameters. Hearings may be longer than necessary to assure that each counsel can present their arguments in full, regardless of whether the panel finds all of such arguments useful. The reasoning behind the panel's ruling on the merits may be mushy and poorly articulated. Common denominator approaches to findings and remedies are easier to cobble together than creative ones.

All-neutral panels would increase the efficiency and quality of the arbitration process significantly by eliminating the partisan element. Without party identification, arbitrators can focus on obtaining the right answer rather than positioning themselves with respect to other arbitrators. Panels can act more decisively and efficiently with less debate and face-saving compromise. The varying areas of expertise of the individual panelists can be better utilized. The panel can give more effective direction to counsel as to witnesses and the focus of issues at the hearing which can result in a better hearing in less time and with less cost. Finally, panelists are better able to produce clear and decisive answers which proceed from the evidence rather than an internal negotiation process.

Several groups have given thought to methods of selecting all-neutral panels. ARIAS•U.S. has developed a system for selecting neutral panels. In addition, the Dispute Resolution Task Force, consisting of individuals from a cross section of interested parties, has devised its own method. While there does not seem to be a groundswell to utilize these devices, it may be too soon to evaluate their success.

VIII. Reasoned Awards

British arbitrators regularly issue rulings of 20 or more pages, notwithstanding the ability to appeal the arbitration tribunal's decision on the law pursuant to the Arbitration Act of 1996. There is no right to appeal the decision of a US arbitration panel although its ruling may be vacated on very limited grounds focused on conflict of interest and lack of due process. One might conclude that US arbitrators would be more inclined to issue "reasoned awards" as final rulings on the merits but this is not the case. Some have a sincere, if mistaken, belief that "reasoned awards" may prolong the dispute, by providing fodder for a motion to vacate, rather than conclude it.

For purposes of this discussion, I will define a "reasoned award" as 2 - 3 pages of findings of fact and conclusions of law. No more is necessary to tell parties and their counsel why they won or lost.

Reasoned awards contribute to better arbitrations for several reasons. First, composing a reasoned opinion requires clarity of thought concerning what the panel decided and why. Mushy reasoning and "split the difference" approaches to damages can seldom survive this process. Panels often render awards which do not match the reasoning or damages claimed by either party and there is absolutely nothing wrong with this. It is important, however, for the panel to have a logical reason for doing so and be able to express it in writing. This will provide better rulings by arbitration panels.

The second reason why reasoned awards produce better arbitrations is feedback to the parties and their counsel. Arbitrated disputes are becoming very large in size and considerable legal and other expenses are associated. If the parties choose to have their dispute resolved by experienced senior members of the insurance community, they have a right to know the basis upon which the panel decided. This is not merely a matter of idle curiosity. An adverse decision by a panel may cause a party to re-examine its position on similar disputes. The decision may cause the party may re-examine its decision making process when problems with clients and markets arise so as to make better evaluations as to which matters to compromise and which to pursue to an adversarial conclusion.

To lose an arbitration and not know why causes parties and their counsel to disrespect the arbitration process itself. When the process is disrespected, parties and their counsel either turn away from it or engage in some of the negative behavior cited in earlier sections. Either is detrimental to the arbitration process.

Finally, case law suggests that a court is less likely to find that a panel exceeded its authority if a motion to vacate is filed.[8] With a reasoned award, it is easier for the court, which is unfamiliar with the business, to understand creative solutions to arcane business problems.

IX Conclusion

The reinsurance arbitration process is legitimately criticized as having become too long, costly and contentious. In part, this results from marketplace changes *i.e.* larger disputes between parties with no continuing business relationship. However the relevant players (arbitrators, parties and their counsel), must look in the mirror and accept a share of the responsibility for this situation. These players must be willing to adopt techniques to promote efficiency and clarity, such as those described above, if arbitration is to remain a viable alternative to litigation.

ENDNOTES

1 XI ARIAS•U.S. Quarterly No. 2 at 33 (2004).

2 XVII ARIAS•U.S. Quarterly No. 4 at 10 (2010) (hereinafter *Schiffer*).

3 *Schiffer* at 13.

4 Today, a number of court reporters have office space available for arbitrations and make such space available for free if they are used as the court reporters for the hearing.

5 *See generally*, Robert M. Hall, *Are Formal Hearings Necessary for Interim Issues in Reinsurance Arbitrations?,* TIPS Alternative Dispute Resolution Committee Newsletter, Spring 2010 at 5, also available at the author's website: robertmhall.com.

6 *See generally* Robert M. Hall, *"Inherent Authority" of Arbitration Panels to Grant Attorneys' Fees and Costs*, XVI ARIAS-US Quarterly No. 2 at 9 (2009).

7 *See generally,* Caleb Fowler, Robert M. Hall and Lawrence O. Monin, *All-Neutral Arbitration Panels,* XV Mealey's Reins. Rpt. No. 24 at 23 (2005).

8 *See generally,* Robert M. Hall, *Are "Unreasoned" Arbitration Awards "Irrational?*", ARIAS-US Quarterly No. 4 at 7 (2009).

ARIAS•U.S. PRESENTATION NOVEMBER 2016

ULTIMATE DODGEBALL:

HOW TO AVOID DELAYING TACTICS BY ARBITRATION PARTICIPANTS

PRELIMINARY MATTERS - BEGINNING THE PROCESS WITH EFFICIENCY

By

Susan Grondine-Dauwer, Esq.

DODGEBALL IS PRIMARILY SELF-REFEREED, AND PLAYED WITH THE HONOUR RULES

TO HELP FACILITATE THE GAME, REFEREES START THE GAME, CONFIRM HITS AND CATCHES, AND COUNT BALL POSSESSION TIME

- Be prepared before you begin. Delay may be avoided if *all* players are fully prepared
  - Advance panel work sets the pace and helps avoid the potential for delays
- Party arbitrators – Getting the basics down
  - Preliminary discussions with counsel/parties (Non-neutral panels)
  - Understanding the details of the dispute (including amounts at issue)
  - Needs/wants for in-person or telephonic?
  - 30 days – or something more realistic?
  - Ex-Parte – Will it help the process?
  - Clarity of parties and affiliates

DODGEBALL IS PLAYED ON A COURT WITH A CENTERLINE AND TWO SIDELINES

- Selecting an Umpire – The Questionnaires
  - Case specific revisions
  - Realistic but tight timeframe for return
  - Submission of responses to counsel *and* the party arbitrators
- The Lead - Umpires coordinate the panel and parties
  - Preliminary discussions with co-panelists
    - Common (general) understanding of the parties and the dispute including contracts, claims, policies, and amounts in dispute
    - Calendars/ Availability

- Advance written disclosures (pre-circulate)
- Decide up front the format of submissions

THE OPENING "RUSH"

- Requiring organizational meeting preparedness
  - Clear expectations and stating the obvious
  - Setting the roles of counsel and the parties (representatives)
  - Availability

IF YOU ARE OUT, YOUR TEAMMATE CAN CATCH A BALL, WHICH WILL ALLOW YOU TO REENTER THE GAME AFTER TOUCHING THE WALL

  - Case management responsibilities
    - Who's on the team (first and second string)?
  - Requiring Party attendance (representatives with authority)
  - Requiring counsel to meet, confer and agree (or not) prior to the organizational meeting (to include contracts, identification/system numbers/ balances, etc.)
    - Single chart
  - Confidentiality and Hold Harmless
  - Full schedule for the case including regular (and brief) status reports/calls with the panel
    - Proposed hearing date(s)

You can only hold ball for 10 seconds, afterwards it will be considered dead

    - Process for meet and confer between counsel and dealing with non-responders (confirmations)
  - Identification of administrative disagreements to be addressed by the panel at/during the organizational meeting
  - Preliminary statements: Being complete (while reducing time and costs)
    - Affirmative and defensive positions and document productions
      - What you know, How you'll prove it and what you are prepared to give/what you'll need
      - Is case law *really* necessary?

You are out If you step over a sideline or centerline

  - Before you go: Discuss potential sanctions or ramifications for delay tactics or unproductive behavior causing delays

— BREAKOUT SESSION 3 —
Leveraging Summary Adjudication: Cost-Conscious Justice in Reinsurance Arbitration

Thursday, November 17, 2016, 4:10 p.m. – 5:00 p.m.

Materials:

RECENT ARTICLES REGARDING THE USE OF SUMMARY JUDGMENT IN ARBITRATION

Managing Discovery in Arbitration: Bob Dylan & the Asymmetry Principle;

Summary Adjudication in Arbitration Proceedings: Is It Time For Arbitrators to Step Up and Start Hearing and Granting Dispositive Motions in Appropriate Circumstances

Summary Judgment in International Arbitration—No Longer Dismissed

POTENTIALLY RELEVANT RULES & GUIDELINES

Presented by:
David A. Attisani, Choate Hall & Stewart LLP
Neal Moglin, Foley & Lardner LLP

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feature

Managing Discovery in Arbitration: Bob Dylan & the Asymmetry Principle

This article is based on a paper presented at the ARIAS•U.S. 2011 Spring Conference.

David A. Attisani
Ethan V. Torrey

David A. Attisani

Ethan V. Torrey

I. Introduction

Two purported truisms animate the longstanding discourse regarding discovery in reinsurance arbitration. First, there is a pervasive assumption that discovery can and should be circumscribed in some equitable way, in order to address profligate practices. Second, in many (but not all) cases, there is a presumption that the reinsurer is in greater need of more extensive discovery than its cedent. The primary purpose of this brief thought piece is to surface and explore the tension between the assertedly widespread wish to limit discovery and the parties' (sometimes) asymmetrical needs for its putative benefits.

Otherwise stated, when the relevant information in both parties' possession is in rough parity, they may share a mutual interest in limiting the scope of discovery, which may assist the panel in structuring a more efficient arbitration proceeding. In such cases, broad-ranging discovery requests can be deterred by the prospect of "mutually-assured destruction" — *i.e.*, onerous discovery requests propounded by one side will only precipitate like demands, implicating similar burdens and expense, from the adversary. However, when one party enters the process with a far greater volume of potentially relevant information, the parties' mutual interests cannot easily be leveraged to achieve an efficient proceeding, and other means must be considered. In the prescient words of Bob Dylan: "When you ain't got nothin', you got nothin' to lose."[2] The party with "nothing," of course, lacks incentive to stanch the free flow of discovery. Accordingly, it is incumbent upon parties, lawyers, and arbitrators to consider creative mechanisms to achieve the efficiency long-touted as one of arbitration's most attractive hallmarks.

This article proposes that parties and arbitrators consider a more disciplined approach to structuring arbitrations to achieve such efficiencies, even when the parties' interests in managing discovery may not be seamlessly aligned. More specifically, practitioners have at their disposal two under-utilized procedural devices that can be used to narrow or eliminate disputed issues — bifurcation of proceedings and summary adjudication.

II. Bifurcation

Bifurcation presents opportunities to streamline the arbitration process by eliminating wasteful inquiry into areas of potential dispute that may ultimately prove inconsequential.[3] It is, of course, most commonly used to partition the liability and damages phases of an arbitration. In simplest terms, a finding of no liability obviates the need for any damages phase — an exercise that generally necessitates costly fact (and, often, expert) discovery. Bifurcation can also be used to precipitate a finding on one issue that may control or portend the outcome of a second disputed issue. See Alcatel Space, *S.A. v. Loral Space & Communications, Inc.*, No. 02 Civ. 2674 (SAS), 2002 U.S. Dist. LEXIS 11343 at **5-6 (S.D.N.Y. June 25, 2002). In *Alcatel*, for example, the parties segregated selected liability issues, such as the termination date of the contract and its alleged breach, from other liability issues — including tortious conduct in connection with the same contracts.[4]

Bifurcation can also be effective in resolving jurisdictional and choice-of-law issues. *See, e.g.*, Gary Born, *International Commercial Arbitration 1816* (2009) ("The efficient organization of the parties' presentation of disputed issues sometimes occurs by identifying preliminary or 'cut-across' issues, whose resolution will avoid wasted effort

CONTINUED ON PAGE 16

The primary purpose of this brief thought piece is to surface and explore the tension between the assertedly widespread wish to limit discovery and the parties' (sometimes) asymmetrical needs for its putative benefits.

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CONTINUED FROM PAGE 17

meeting, subject to the parties' and the panel's later analysis of its potential usefulness. A number of factors should be considered, including: identification of issues that rationally can be severed for separate adjudication; the likelihood that materially limited discovery will, in fact, put the panel in a position to decide the issue(s) submitted to summary process; and whether the requested summary award would dispose of (or narrow) significant issues in dispute. When these rudimentary questions can be answered in the affirmative, summary adjudication may effectively limit discovery and precipitate a fair outcome that is not unusually vulnerable to challenge. For example, a reinsurance dispute might involve issues pertaining to aggregation, allocation, late notice, choice of law, or potential cover for declaratory judgment expenses. Any one of these issues may, in an appropriate case, represent a substantial portion of the disputed liability, making it a candidate for bifurcation or summary adjudication.9

IV. Conclusion

As this discussion and the collective industry experience attest, streamlining discovery is a laudable goal that is fraught with perceived impediments. Asymmetric institutional information — a feature often endemic to reinsurance arbitrations — can eliminate the salutary deterrence that might otherwise organically limit both the scope of parties' discovery battles and the associated time and expense. In short, Dylan's observation "when you ain't got nothin', you got nothin' to lose" — was right, as far as it goes. But the dynamic of asymmetrical discovery needs and objectives in reinsurance arbitration can be (and has been) addressed effectively.

The most promising approach to the problem is to downsize the task by carefully structuring a sequential arbitration process — in which the panel and the parties: (1) order disputed issues with care; (2) take targeted discovery culminating (if appropriate) in one or more summary hearings; and (3) maximize the use of discovery material elicited at each phase. Techniques such as bifurcation and summary adjudication do not depend for their efficacy on the parties' mutual interest in prodigious discovery, and they can be effective even though the parties' discovery needs and objectives may vary materially. A party with little discoverable information might arguably have nothing to lose by launching an onerous array of discovery demands in a conventional reinsurance arbitration, but an efficient and creative structuring of the process may well leave such a party with little or "nothin' to gain" by doing so.▼

1 The views articulated in this document do not necessarily reflect the positions of Choate, Hall & Stewart LLP or its clients.

2 See http://en.wikipedia.org/wiki/Like_a_Rolling_Stone (last visited Mar. 31, 2011).

3 Certain arbitration rules expressly authorize and arguably seek to encourage bifurcation. See. e.g., AAA Rule 30(b) (arbitrators "may ... bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case"); CPR Rule 9.3a (arbitrators may consider "the desirability of bifurcation or other separation of the issues in the arbitration."). Other rules permit the panel to issue "interim, interlocutory, or partial awards." See, e.g., UNCITRAL Arbitration Rules, Rule 32.1; London Court of International Arbitration Rules, Art. 26.7 ("[t]he Arbitral Tribunal may make separate awards on different issues at different times"). See also RAA, Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes §13.1 (2009) ("The Panel may hear and decide a motion for summary disposition of a particular claim or issue, either by agreement of all Parties or at the request of one Party, provided the other interested Party has reasonable notice and opportunity to respond to such request.").

4 The ICC panel rendered an award in Phase I of the arbitration, and the court confirmed it. The court noted that "[a]n interim award that finally and definitely disposes of a separate, independent claim may be confirmed notwithstanding the absence of an award that finally disposes of all claims that were submitted to arbitration. As neither party has identified any claim in the Phase I award that is not severable from the claims that will be addressed in Phase II, the Award is hereby confirmed." Id. at *15.

5 Reasonable minds can differ on this one, and the scope of the applicable arbitration clause may militate in favor of (or against) the view that the province of an industry panel is sufficient in breadth to embrace all aspects of a dispute, including jurisdiction and governing law.

6 Needless to say, summary awards must — like any other award — safeguard the arbitral parties' rights under the FAA and other governing arbitration rules, in order to insulate them from vacatur. *See, Chem-Met Co. v. Metaland Int'l, Inc.*, No. Civ. A. 96-2548, 1998 WL 35272368 at *4 (D. D.C. Mar. 25, 1998) (vacating arbitration award because governing AAA Commercial Arbitration Rules required an evidentiary hearing and the arbitrators exceeded theft powers under FAA § 10(a)(4), and refused to hear material evidence under FAA § 10(a)(3) when they awarded summary Judgment); *Prudential Sees., Inc. v. Dalton*, 929 F. Supp. 1411, 1417 (ND. Okla. 1996) (vacating NASD arbitration award that dismissed plaintiff's claims without holding evidentiary hearing, under FAA § 10(a)(3) and (4)(c)).

7 Whether summary adjudication and preliminary issues hearings are available depends, of course, on the facts of any individual case, and some commentators have noted that dispositive issues may, in particular circumstances, best be determined in the context of a full factual record. See, e.g., Redfern & Hunter, *Law And Practice Of International Commercial Arbitration* 315 (1991) ("It may emerge, however, that the correct legal interpretation to be put upon the clause which limits or purports to limit liability depends upon the factual situation, and that to ascertain and understand this factual situation adequately it is necessary to enquire fully into all circumstances of the case, with the assistance of expert witnesses on each side."); *see also* RAA Manual for the Resolution of Reinsurance Disputes at 47 ("In a complex case, briefs may not be enough.").

8 From empirical experience, the authors do not share any such generic presumption.

9 Parties to English arbitrations may seek to convene a "preliminary issues" hearing with respect to any legal issue that may narrow or eliminate potential subjects of discovery. The English Arbitration Act permits application to a court, in order to "determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties," unless otherwise agreed by the parties. *See* English Arbitration Act § 45(1). Unlike bifurcation and summary Judgment, however, preliminary issues hearings require a trip to courts, which may nullify some of the savings in time and money otherwise realized through summary process in arbitration. *Cf.* Ned Beale, Lisa Nieuwveld & Matthijs Nieuwveld, Summary Arbitration Proceedings: A Comparison Between The English And Dutch Regimes, *Arbitration International*, Vol. 26, No. 1, 139, 144-45 (2010) ("Arguably, the general procedural discretion conferred upon the tribunal is wide enough to permit the summary disposition of claims" in English arbitrations, but noting that the English Arbitration Act does not expressly permit summary adjudication).

In short, Dylan's observation "when you ain't got nothin', you got nothin' to lose" — was right, as far as it goes.

Summary Judgment in International Arbitration – No Longer Dismissed?

and Irina Tymczyszyn, Bryan Cave LLP

An M&A dispute between Travis Coal Restructured Holdings LLC ("Travis") and Essar Global Fund Limited ("EGFL") and related parallel proceedings in England and New York have shone the spotlight back on the issue of summary judgment in international arbitration. The United States District Court for the Southern District of New York ("New York Court") was due to decide whether it should confirm or vacate an award including a summary finding. In the meantime, the English Court adjourned enforcement proceedings of the same award in England pending the New York court's decision (*Travis Coal Restructured Holdings LLC v Essar Global Fund Limited*, [2014] EWHC 2510).

On 29 March 2010, Essar Minerals Inc ("EMI") (a wholly owned subsidiary of EGFL) purchased shares in Trinity Parent Corporation ("Trinity") from Travis. As part of the consideration, EMI issued promissory notes in favour of Travis to the sum of $203 million. On the same date, EGFL guaranteed EMI's obligation to make payment to Travis in accordance with the promissory notes (the "Guarantee").

Following the acquisition, EMI claimed that Trinity's financial position had been misrepresented by Travis. Following non-payment by EMI, Travis claimed payment from EGFL under the Guarantee. EGFL refused to pay, relying on the alleged misrepresentations by Travis for non-payment (the "Fraud Defences").

The Guarantee included an arbitration clause providing for arbitration under the ICC Rules in New York. Travis commenced arbitral proceedings on 25 May 2012 and the Tribunal comprising Professor William W. Park, Mr Mark Kantor and Mr Philip Lacovara was appointed on 26 October 2012. On 7 December 2012, Travis submitted a motion for summary judgment. EGFL opposed the motion on the basis that the Tribunal did not have the power to determine the claim on a summary basis; and that doing so would contravene EGFL's right to a fair opportunity to be heard on its Fraud Defences. On 25 November 2013, the Tribunal ruled that, in light of the waivers and disclaimers contained in the Guarantee, there were no reasons why the Fraud Defences could deny its effect. Subsequently, on 7 March 2013 the Tribunal granted a final award ordering EGFL to pay Travis $210,889,788.20 under the Guarantee ("Award").

Travis applied to the New York Court to have the Award confirmed and EGFL filed a cross-petition to have the award vacated. Following EGFL's cross-petition, Travis applied to the English Court and successfully obtained judgment to enforce the Tribunal's award. EGFL then applied for an order setting aside the judgment or, in the alternative, an adjournment of the decision on recognition and enforcement of the award pending the determination of EGFL's motion to vacate the award in the New York Court. When faced with an application to adjourn enforcement of an arbitral award under s.103(5) of the Act, one of the factors that the English courts will consider is whether the challenge before the court of the seat has a realistic prospect of success.

It is in this context that the English court looked into the validity of an award made on the basis of a summary judgement procedure. In particular, the court considered the two grounds relied upon by EGFL for the purpose of its motion to vacate: (1) that the Tribunal had acted ultra vires by adopting a summary judgment procedure and (2) that it had manifestly disregarded the summary judgment standard under New York law by dismissing the claim when substantial disputes of fact existed.

In support of its assertion that the Tribunal has exceeded its power by dismissing its defences on a summary basis, EGFL argued that summary judgment is strongly disfavoured in international arbitration and that a distinction needs to be drawn between empowering a tribunal to conduct proceedings efficiently and exercising a summary judgment power. Further, it submitted that (at least in the absence of express power) the exercise of summary judgment by arbitrators constitutes a denial of due process. The English Court rejected these submissions, holding that the question of whether or not a tribunal in international arbitration has the power to make summary judgment will depend on the terms of the arbitration agreement and the procedure adopted by the tribunal.

In this case, the arbitration agreement provided that the *"arbitrators shall have the discretion to hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part, in accordance with such procedure as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue"*. Such wording gave the Tribunal wide powers in respect of any procedure adopted to determine dispositive issues, the Court said. Furthermore, the Court noted the steps the Tribunal took to ensure proper consideration of EGFL's Fraud Defences, including the fact that the Tribunal had heard oral testimony in respect of these defences. The Court indicated that the Tribunal had made every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the nature of the dispute it had to decide. In doing so, the Court found that the Tribunal gave each party a fair opportunity to present its case and, insofar as the Tribunal's decision was summary, the procedure it adopted fell within the ambit of its powers set out in the arbitration agreement.

EGFL's second contention was that the Tribunal misapplied the summary judgment standard under New York law, and determined disputed issues of fact on the basis of the limited evidence that had been submitted and without a full evidentiary hearing. Whilst the English Court observed that this issue is primarily a matter for the New York Court, it indicated that it did not consider that there was any realistic prospect of EGFL demonstrating that the arbitrators *"intentionally flouted"* the New York summary judgment test, which EGFL accepted it had to follow to be successful.

Ultimately, despite the fact that it did not believe that EGFL's challenge had a realistic prospect of success on either of the grounds discussed above, the English Court adjourned the enforcement proceedings of the award pending final determination of the New York proceedings, in order to avoid the risk of conflicting judgments. This would occur if the award was enforced in England and successfully challenged at the seat.

Whilst the English Court did not rule on the availability of summary judgment in international arbitration (it expressly refused to enter into the wider debate concerning the desirability of such procedure in arbitration generally), its findings relating to the prospect of success of the ongoing challenge in New York offer useful insight into what appear to be the prerequisites for summary judgment to be accepted in an international arbitration context. The tribunal must be technically empowered by the parties to decide a claim on a summary basis and the procedure it adopts must comply with due process requirements. The first condition relates to the mandate of the tribunal to which the terms of the arbitration agreement and the applicable procedural rules are relevant, whereas the second condition concerns the more factual issue of what happened during the proceedings.

Starting with the latter, of particular importance is the fact that a hearing was held in this case – a step which even EGFL recognised went beyond the summary judgment procedure adopted in either New York or London. Giving the opportunity to the parties to be heard in relation to the claim or defence to be dismissed appears to designate the limit beyond which a summary procedure may be deemed unfair at least under certain rules and arbitration laws.

In respect of the Tribunal's mandate, in this case, the wording relating to awards on dispositive issues contained in the arbitration agreement did not expressly refer to the disposal of a claim or defence on a summary basis. Further, arbitration laws and procedural rules, including the ICC Rules, generally provide that tribunals may render awards on separate issues.

One may therefore question whether that wording resulted in the scope of the tribunal's prerogatives being increased under the ICC Rules.

In this case, EGFL who had advocated the position that summary judgment was not appropriate in international arbitration, made the point that when the ICC Rules were revisited in 2012, the absence of a summary procedure was deliberate. In the same vein, most major arbitration rules have been revised in the last few years, and yet none of the leading rules have provided for a procedure under which a meritless claim or defence could be disposed of on a summary basis (except for Article 41(5) of the ICSID Arbitration Rules which was introduced in 2006). This suggests that the arbitration community feels that there is no need for such a provision in procedural rules. What remains unclear is the rationale behind this consensus amongst the institutions and the committees who were in charge of the redraft of these arbitration rules. Do these stakeholders agree that there is no need for a summary procedure provision to be included in arbitration rules because they consider that summary judgment is not appropriate in international arbitration? Or do they consider that such a provision is not necessary because summary judgment is de facto already available and (impliedly) allowed under the leading commercial arbitration rules and arbitration regimes?

The authors have now learned that the ongoing proceedings in New York have been discontinued following settlement, under which EGFL agreed to withdraw its motion to vacate. This will enable Travis to proceed with the enforcement of the award in England or any other jurisdictions in which assets are available. Ultimately, despite considerable delay, the use of summary procedure in an arbitration context did not jeopardise the validity of the award that embodied the Tribunal's summary judgment.

Summary Adjudication in Arbitration Proceedings: Is it Time for Arbitrators to Step Up and Start Hearing and Granting Dispositive Motions in Appropriate Circumstances?

By Solomon Ebere

I. Introduction

Because arbitration is perceived as becoming a slow and expensive dispute settlement mechanism,[1] there is a strong push to introduce mechanisms for summary disposition of cases as a tool to promote efficiency and speed in the arbitration process.[2] In practice, however, arbitrators remain disinclined to hear and grant dispositive motions. This article examines the possible explanations for this reluctance and whether there are appropriate.

For purposes of this article, dispositive motions are motions that resemble the type of motions filed in US civil litigation and that a court would consider dispositive of a case, such as motions to dismiss for failure to state a claim, motions for summary judgment, motions or judgment on the pleadings, and motions for a directed verdict.

In US civil litigation, these mechanisms are frequently used to set aside unmeritorious claims or defenses, and promote a faster resolution of disputes. Proponents of the introduction of dispositive motions in international arbitration argue that, for similar

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[1] *See, e.g.,* James Lyons, *Arbitration: The Slower, More Expensive Alternative?* Am. Law., Jan.-Feb. 1985, at 107 (quoting then American Arbitration Association President Robert Coulson as stating "[p]eople used to promote arbitration (for its speed, economy, and justice)...like religious zealots...I don't think any of those words are entirely accurate"); *see also* Thomas Stipanowich, *Rethinking American Arbitration*, 63 Ind. L. J. 425, 452-76 (1988) (observing that many surveyed respondents disagreed that arbitration was faster and cheaper than litigation).

[2] *See e.g.*, International Bar Association Rules on the Taking of Evidence in International Arbitration, Article 2, which states, in relevant part: "3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues (...) *for which a preliminary determination may be appropriate*." (emphasis added). The Commentary on the Rules further states: "While the Working Party did not want to encourage litigation-style motion practice, the Working Party recognized that in some cases certain issues may resolve all or part of a case. In such circumstances, *the IBA Rules of Evidence make clear that the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work.*" (emphasis added), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC; *see also* Alfred G. Ferris and Biddle W. Lee, *The Use of Dispositive Motions in Arbitration*, 62 Disp. Resol. J. 17, 24 (1 August 2007) [hereinafter Ferris]; *see also* David W. Rivkin, *21st Century Arbitration Worthy of Its Name*, in Law of International Business and Dispute Settlement in the 21st Century (Liber Amicorum Karl-Heinz Bockstiegel), (Eds: Robert Briner, L. Yve Fortier, Klaus Peter Berger, Jens Bredow) (2001).

reasons, arbitrators ought to use similar procedural tools to resolve disputes at an early stage of the arbitration proceedings where appropriate.[3]

In actual practice, however, arbitrators have been unwilling to hear and grant dispositive motions.[4] Different reasons have been offered to explain this current state of affairs. First, the lack of explicit rules in the major international arbitration rules authorizing them to entertain dispositive motions.[5] Second, that the summary disposition of a case will render the resulting award vulnerable to challenges before courts, notably on the ground that an arbitrator engaged in misconduct by refusing to hear evidence.[6] Third, the differences between civil litigation and arbitration raise concerns about the appropriateness of entertaining dispositive motions.[7]

This article addresses in seriatim whether these explanations have a sound foundation, or if these areas of concern are somewhat overblown in light of the relevant existing legal framework and case law.

This article first examines whether arbitrators have the authority to hear and grant dispositive motions according to US law and the most frequently used arbitration rules. It appears that under the existing legal framework, arbitrators do have the authority, either explicitly or implicitly, to entertain dispositive motions.

So this article then turns to the grounds for vacatur of arbitration awards, and how courts have reviewed arbitration awards that make a summary disposition of a case. The applicable laws and accompanying case law reveals that, unless a panel's decision to

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[3] *See* Ferris, *supra* note 2, at 18 ("Dispositive motions in litigation frequently provide the most efficient means of limiting the scope of the litigation or even ending it, saving the client's and the court's resources and reducing or eliminating the risk of an adverse judgment, The same considerations could apply in arbitration.")

[4] *See* D. Brian King and Jeffery P. Commission, *Summary Judgment in International Arbitration: The "Nay" Case*, ABA International Law Spring 2010 Meeting, at 1 (Spring 2010) [hereinafter *Summary Judgment in International Arbitration: The Nay Case*] (observing that "there is little empirical evidence of use of such a mechanism in the practice of arbitral tribunals."); *see also* COLLEGE OF COMMERCIAL ARBITRATORS, *Guide to Best Practices in Commercial Arbitration*, p.106 (2006) ("Commercial arbitration generally reflects a strong proclivity to avoid court-like motion practice to refine pleadings or to dismiss a matter for failure to state a claim properly.");

[5] *See Summary Judgment in International Arbitration: The Nay Case*, *supra* note 4, at 1 (observing that "none of the major international arbitration rules contemplates summary judgment, at least expressly.")

[6] Id. ("the introduction of a summary disposition mechanism raises concerns about challenges to the resulting award or its enforcement in the courts. Such a challenge could be predicated on the right of parties to have a full opportunity to present their cases, and/or the presumptive right to an oral evidentiary hearing.")

[7] *See* Ferris, *supra* note 2.

dismiss a claim at an early stage rises to the level of depriving one party of its right to a "fundamentally fair hearing", a court will confirm a summary award.

Finally, this article discusses the challenges and unresolved issues surrounding the incorporation of these mechanisms grafted from the American litigation process in international arbitration proceedings, and whether these problems are insurmountable.

II. The Arbitrator's Authority to Consider Motions for Dispositive Motions in International Arbitration

A. The Domestic Framework

Neither the Federal Arbitration Act ("FAA"),[8] nor the Uniform Arbitration Act ("UAA")[9] speak expressly to the issue of dispositive motions. However, courts have assumed that arbitrators have the authority to grant dispositive motions.[10] This assumption was expressly incorporated in the 2000 Revised Uniform Arbitration Act ("RUAA"), which reads, in relevant part: "[a]n arbitrator may decide a request for summary disposition of a claim or particular issue."[11]

B. The Institutional Arbitration Rules

The arbitration rules of the major arbitration providers also do not speak directly on the issue of dispositive motions. But, they include general provisions that give arbitrators wide latitude to conduct the proceedings, including the authority to consider dispositive motions[12], such as: Article 16.3 of the AAA's International Arbitration Rules,[13] Article

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[8] Federal Arbitration Act ("FAA"), 9 U.S.C. 1 et seq., *available at* http://www.adr.org/sp.asp?id=29567

[9] Uniform Arbitration Act ("UAA"), Article 12(a), *available at* http://www.adr.org/sp.asp?id=29567

[10] *See* Ferris, *supra* note 2, at 18 ("as a few courts had occasion to review the propriety of a dispositive motion while considering a petition to vacate an award, it became increasingly clear that arbitrators had such authority.").

[11] 2000 Revised Uniform Arbitration Act ("RUAA"), Section 15(b), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm. As of 2007, it has been enacted in 12 states.

[12] *See e.g.*, Michael Hollering, *Dispositive Motions in Arbitrations*, 1(1) ADR Currents 1, 8 (Summer 1996) (observing that in practice, AAA arbitrators have been exercising the authority to hear and decide dispositive motions.)

[13] AAA International Arbitration Rules, Article 16:3: "The Tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."

20 of the ICC Rules,[14] Article 14.2 of the LCIA's Arbitration Rules,[15] and Article 15.2 of the UNCITRAL Rules.[16]

Moreover, other institutional arbitration rules provide arbitrators with express authority to entertain dispositive motions, such as: Rule 32(c) of the AAA's Construction Industry Rules,[17] Rule 27 of the AAA's Employment Arbitration Rules,[18] Rule 18 of the JAMS Comprehensive Arbitration Rules,[19] and Rule 12504 of the Financial Industry Regulatory Authority's Code of Arbitration Procedure for Customer Disputes.[20]

C. Recent Developments in Investment Arbitration

In the investment arbitration context, several recent developments reflect the progressive introduction of dispositive motion mechanisms in the resolution process. In 2006, the International Centre for the Settlement of Investment Disputes ("ICSID") revised its Arbitration Rules. One of the most significant amendments was the introduction of Article 41(5), which provides arbitrators with the specific power to

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[14] ICC Arbitration Rules, Article 20: The Tribunal "shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."

[15] LCIA Arbitration Rules, Article 14:2: "Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration."

[16] UNCITRAL Arbitration Rules, Article 15.2: "If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials."

[17] AAA Construction Industry Rules, Rule 32(c): "The arbitrator may entertain motions, including motions that dispose of all or part of a claim, or that may expedite the proceedings, and may also make preliminary rulings and enter interlocutory orders."

[18] AAA Employment Rules, Rule 27: "The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."

[19] JAMS Comprehensive Arbitration Rules, Rule 18: "The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request."

[20] FINRA Code of Arbitration Procedure for Consumer Disputes, Rule 12504 (Motions to Dismiss Prior to Conclusion of Case in Chief): allows for the filing of motions to dismiss on very limited grounds, including: "(a) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or (b) the moving party was not associated with the account(s), security(ies), or conduct at issue."

summarily dispose of a case.[21] This mechanism was for the first time used by two very distinguished panels in the recent cases *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*,[22] and *RSM Production Corp. v. Grenada*.[23] In *Global*, an ICSID panel composed of Sir Franklin Berman QC, Professor Emmanuel Gaillard and Mr. Christopher Thomas QC granted a motion to dismiss a claim early in the proceeding, after only two rounds of short written submissions by each side, followed by two rounds of oral argument, completed within a day.[24] Nine days after the *Global* Award was issued, the panel in *RSM* upheld Grenada's objection that the claimant's claim was "manifestly without legal merit" after only one round of written submissions and one round of oral submissions.[25] The *RSM* Tribunal consisted of J. William Rowley QC, Professor Pierre Tercier and Edward W. Nottingham.

Another relevant development is the evolution of multilateral and bilateral investment treaties ratified by the US. While Chapter 11 of the North American Free Trade Agreement ("NAFTA") is silent with respect to dispositive motions, recent accords, including the Central American Free Trade Agreement (CAFTA)[26] and the 2004 U.S. Model Bilateral Investment Treaty,[27] have established a procedural framework for the handling of motions for summary disposition.

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[21] ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), Article 41(5): "Unless the parties have agreed to another expedited procedure for making preliminary objections, *a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit*. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly notify the parties of its decision on the objection." (emphasis added).

[22] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, Award, ICSID Case No. ARB/09/11 (Nov. 23, 2010), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C660

[23] *RSM Production Corp. v. Grenada*, Award, ICSID Case No. ARB/10/6 (Dec. 10, 2010), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded

[24] *See Global*, *supra* note 22, at para 18.

[25] *See RSM*, *supra* note 23, at para. 1.3.

[26] *See* CAFTA-DR, Article 10.20 ("Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26."), *available at*: http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

[27] *See* U.S. Model Bilateral Investment Treaty, Article 28 (contains identical language than CAFTA Article 10.20), *available at*: http://www.state.gov/e/eeb/ifd/bit/index.htm

III. Judicial Review of Summary Awards

The authority of arbitrators to decide motions for summary disposition is generally challenged at the award enforcement stage, but in the vast majority of cases, without success. There is a relatively simple reason for this. While courts have the authority to review arbitration awards to ensure that parties to arbitration are not deprived of a fair and just hearing,[28] the strong federal policy favoring arbitration[29] has led both federal and state courts to confirm summary awards in the vast majority of cases.[30]

A. Grounds for Vacatur

According to Section 10(a) of the FAA, and the corresponding arbitration laws of virtually every state,[31] a court may vacate an award:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
3. *where the arbitrators were guilty of misconduct* in refusing to postpone the hearing, upon sufficient cause shown, or *in refusing to hear evidence pertinent and material to the controversy*; or of any other misbehavior by which the rights of any party have been prejudiced; or
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.[32] (emphasis added)

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[28] *See* William W. Park, *Why Courts Review Arbitral Awards*, in FESTSCHRIFT FUR KARL-HEINZ BOCKSTIEGEL 595, 596 (2001), *available at* www.williamwpark.com/.../Why%20Courts%20Review%20Awards.pdf ("Efficient arbitration implicates a tension between the rival goals of finality and fairness...Freeing awards from judicial challenge promotes finality, while enhancing fairness calls for some measure of court supervision...To this end, legislators and courts must engage in a process of legal tuning that seeks a reasonable counterpoise between arbitral autonomy and judicial control mechanisms.").

[29] *See generally* the FAA's legislative history, as per, e.g., H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) ("Arbitration agreements are purely a matter of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.")

[30] *See* Ferris, *supra* note 2, at 20-22.

[31] The relevant state laws have incorporated similar narrow grounds, based on the language found either in Section 12(a) of the UAA, or Section 23 of the RUAA.

[32] FAA, 9 U.S.C. 10(a). It is interesting to note that other jurisdictions that often host international arbitration cases have adopted grounds for judicial review that echo the ones found in the FAA, such as: the English Arbitration Act, Section 68, *available at* http://www.legislation.gov.uk/ukpga/1996/23/contents, the French New Code of Civil Procedure, Article 1504, *available at* http://www.iaiparis.com/lois_en.asp#t5, and the UNCITRAL Model law on International Commercial Arbitration, Article 34, upon which

In addition to the statutory grounds quoted above, courts have created two extra-statutory grounds: vacatur for "manifest disregard of the law",[33] and vacatur for "violation of public policy".[34]

Generally, parties challenging an arbitration panel's decision to grant a dispositive motion have contended either that the arbitrators in doing so had exceeded their power, and/or that they engaged in misconduct by improperly refusing to hear evidence pertinent and material to the controversy. It has been suggested that arbitrators are particularly wary of the latter ground because the early dismissal of a case generally does not permit a full evidentiary hearing, which might expose the resulting award to a challenge on the basis that the arbitrators engaged in misconduct by refusing to hear evidence.[35] Is this fear legitimate? Or is it misplaced?

B. Vacatur of Arbitral Awards Based on the Arbitrator's Refusal to Hear Evidence

An overview of the relevant case law teaches us that both federal and state courts have responded negatively to the contention that granting a disposition motion justifies vacating the resulting award on the ground that the arbitrators refused to hear evidence.[36] Out of all the challenges of summary awards based on the arbitrator's refusal to hear

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an important number of jurisdictions have based their corresponding domestic provisions, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

[33] *See Wilko v. Swan*, 363 U.S. 427, 436-37 (1953) ("the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation."); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("parties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law.")

[34] *See* Gabriel M. Wilner, 1 DOMKE ON COMMERCIAL ARBITRATION 34:07, at 14 (Rev. ed. 1998).

[35] Michael D. Young and Brian Lehman, *Arbitrators Are Less Prone to Grant Dispositive Motions Than Courts*, New York Law Journal (June 26, 2009) (noting that "arbitrators are sensitive to the fact that one of the grounds for vacatur under the Federal Arbitration Act is the arbitrator's refusing to hear evidence that is pertinent and material to the controversy at issue. Sensitivity to this ground for vacatur frequently leads arbitrators to admit even arguably duplicative or irrelevant evidence at a hearing, and causes them to be all the more concerned about deciding a case without any kind of evidentiary hearing.").

[36] *See* Ferris, *supra* note 2, at 21(observing that "courts have not been receptive to arguments that granting a dispositive motion, by itself constitutes an arbitrator error that would warrant a judicial decision to vacate an arbitration for refusing to hear matieral evidence or exceeding arbitral powers."); *see e.g.*, the seminal case *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (Cal. Ct. App. 1995), and *Goldman Sachs & Co. v. Patel QDS:224S164*, 222 N.Y.L.J. 35 (S. Ct., N.Y. Cty. 1999)

evidence, only one case has been found in which a court vacated a summary award on that ground.[37]

Moreover, the case law consistently signals that a court may rely upon this ground to set aside a summary award only if the early dismissal of the case deprived a party of its right to a fundamentally fair hearing.[38] It also consistently signals that arbitration panels need not schedule oral evidentiary hearings to ensure the parties' right to present their case, but may do so through other means, such as declaration, affidavit or transcript.[39]

The Southern District Court's decision in *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*[40] is illustrative of the courts' consistent jurisprudence on challenges of summary awards based on the arbitrator's refusal to hear evidence. In that case, the court recognized the NASD arbitrators' authority to grant dispositive motions and affirmed the summary award challenged. By way of background, claimants sought compensation for ERISA violations, unauthorized and excessive trading, fraudulent concealment and excessive frauding, fraudulent concealment, negligent misrepresentation, constructive fraud, violation of NASD fair conduct rules and lack of supervision.[41] Respondents moved to dismiss on the grounds of lack of standing and preemption.[42] The arbitral panel invited the parties to submit memoranda and documents for consideration of the motions, scheduled oral argument and ordered that no witnesses would be permitted to testify or to present evidence during the oral argument.[43] After hearing the oral arguments, the panel granted the motions to dismiss all claims. Following the panel's decision, claimants moved to vacate the award pursuant to FAA Section 10(a)(3). They contended, among other thing, that the Panel was guilty of misconduct because it refused to hear evidence relevant and material to the controversy.[44]

The District court first noted in its decision that "federal courts will not pursue evidentiary review of arbitration proceedings unless fundamental fairness is violated."[45] The court further explained that arbitrators have "*broad discretion as to whether to hear evidence at all and need not compromise speed and efficiency, the very goals of arbitration, by allowing cumulative evidence. What is required is that each party be*

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[37] *See Prudential Secs. v. Dalton*, 929 F. Supp. 1411 (N.D. Okla.1996).
[38] *See Tempo Chain Corp. v. Bertek, Inc.*, 120 F. 3d 16, 20 (2nd Cir. 1997) (citing *Hoteles Condado Beach v. Union De Tranquistas Local 901*, 763 F. 2d 34 (1st Cir. 1985).
[39] *See* Ferris, *supra* note 2, at 21 ("The cases make clear that in the appropriate circumstances an arbitrator does not need to hear live testimony in a full evidentiary hearing and that the parties do not have an automatic right to cross-examine witnesses.")
[40] *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248 (S.D.N.Y 1999).
[41] Id. at 250.
[42] Id.
[43] Id.
[44] Id. at 251.
[45] Id.

given an opportunity to present its evidence and argument."[46] (emphasis added) Looking at the evidence at issue, the court observed that it "had already been presented to the Panel in respondents' written submissions."[47] The court continued, "[i]t is precisely this sort of cumulative presentation that an arbitration panel need not hear."[48] The court concluded therefore that "there was nothing unfair in the Panel's decision not to hear testimony at the [...] hearing and thus no misconduct for purposes of *Section 10(a)(3).*"[49] Consequently, it denied the claimants' petition to vacate the arbitration award.[50]

By contrast, *Prudential Secs. v. Dalton*[51] is the rare exception to the courts' consistent practice on the matter. In this case, the District Court of Oklahoma found that the summary disposition of the case denied the claimant of a fundamentally fair hearing. Consequently, it vacated the award on the ground that "the arbitration panel was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy and exceeded its power in granting the motion to dismiss without hearing such evidence."[52]

Dalton, a former employee of Prudential, alleged in the arbitration that the company included damaging information that would stigmatize him and prevent him from obtaining another position in the securities industry. Prudential filed a motion to dismiss Dalton's claim, which the arbitration panel granted after holding a hearing at which it heard arguments but accepted no evidence. Following the panel's decision, Prudential moved to affirm the summary award while Dalton sought to vacate it. The district court found that Dalton had raise material issues of fact relevant to the Dalton's claim, which if were taken to be true would entitle him to some form or relief.[53] It reasoned that the summary disposition of the case denied Dalton the opportunity to present factual evidence relative to the factual issues presented by his claim.[54] Consequently, the court concluded that "the arbitration panel improperly denied claimant the right to a fundamentally fair hearing," and vacated the award pursuant to Section 10(a)(3) FAA.[55]

It appears, therefore, that courts will refuse to vacate an award that grants a dispositive motion without a full evidentiary hearing where the arbitrators took steps to ensure that the parties, particularly the one opposing the dispositive motion, had been afforded a fair opportunity to present their case.[56]

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[46] Id.
[47] Id. at 252.
[48] Id.
[49] Id.
[50] Id. at 255.
[51] *Prudential Secs. v. Dalton*, 929 F. Supp. 1411, 1417 (N.D. Okla.1996).
[52] Id.
[53] Id. at 1417.
[54] Id.
[55] Id. at 1418.
[56] *See* Ferris, *supra* note 2, at 22 ("The case law suggests that court will not disturb an award that grants a dispositive motion without a hearing on the merits where the

Potentially Relevant Rules & Guide

REINSURANCE ASSOCIATION OF AMERICA--Insurance and Reinsurance Dispute Resolution Task Force **(**2009)

Procedures For The Resolution Of U.S. Insurance and Reinsurance Disputes

13. SUMMARY DISPOSITION AND EX PARTE HEARING

13.1 The Panel may hear and decide a motion for summary disposition of a particular claim or issue, either by agreement of all parties or at the request of one Party, provided the other interested Party has reasonable notice and opportunity to respond to such request.

Note to 13.1: By authorizing the Panel to grant summary disposition, the Parties using these Procedures do not intend to waive their rights under the Federal Arbitration Act to contest the appropriateness of such an action, where such rights have been reserved.

13.2 If a Party has failed to participate in the pre-hearing proceedings and the Panel reasonably believes that the Party will not participate in the hearing, the Panel may proceed with the hearing on an ex parte basis or may dispose of some or all issues pursuant to ¶13.1. The non-participating Party shall be provided with notice thirty (30) days prior to the hearing or disposition pursuant to ¶13.1.

ARIAS U.S. (2004)

Practical Guide to Reinsurance Arbitration Procedure

6.3 STREAMLINED HEARING:

The Panel should consider whether a streamlined procedure would serve the parties' best interests: for example, submission of the dispute to the Panel on the briefs alone or with briefs and oral argument, but no live testimony. It may be feasible in some instances to hold a telephonic Organizational Meeting, followed by the exchange of relevant files, followed by a hearing (attended by counsel and the lead representative of each party) at which the Panel attempts to resolve the matter; and if it cannot, the process so narrows the issues for discovery and briefing that no further evidentiary hearing is required.

ARIAS U.S. (2016)

Rules For The Resolution Of U.S. Insurance and Reinsurance Disputes

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Note to 13.1: By authorizing the Panel to grant summary disposition, the Parties using these Rules do not intend to waive their rights under the Federal Arbitration Act or any other applicable law to contest the appropriateness of such an action, where such rights have been reserved.

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AMERICAN ARBITRATION ASSOCIATION (2013)

Commercial Arbitration Rules and Mediation Procedures

R-33 DISPOSITIVE MOTIONS:

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

— GENERAL SESSION —
Pursuing Arbitration that is Fair

Friday, November 18, 2016, 8:30 a.m. – 9:15 a.m.

Materials:

The Ungoverned Brain - A Wild Card in Arbitral Decision-Making
Thinking Open-Mindedly to Promote Good Decision-Making

Presented by:
Richard Waterman, Northwest Reinsurance Inc.
Charles Ehrlich, ARIAS•U.S. Certified Arbitrator
Sylvia Kaminsky, Insurance/Reinsurance Consultant
Elizabeth M. Thompson, Arbitrator/Mediator

The Ungoverned Brain: A Wild Card in Arbitral Decision-Making

article

By Charles D. Ehrlich

Charles D. Ehrlich

If asked how she makes decisions, a reinsurance arbitrator might reply: "Through careful deliberation I apply my experience and concepts of fairness to the evidence presented, pertinent law, industry custom and practice, and the arguments of counsel."

Sounds great. Makes sense. But not totally accurate.

In reality, our brains take capricious detours. Arbitrators, counsel, and parties need to understand those detours and their possible effect on decision-making. This article identifies some of those detours, and suggests ways to keep them from leading us astray. We'll discuss the effects of inadmissible evidence, confirmation bias, hindsight, anchoring, framing, and, most captivating, self-serving bias.[1] We'll follow with a brief diversion into food's influence on decision-making. Then we'll look at some ways to avoid these thought detours.

Inadmissible Evidence

Inadmissible evidence is the classic challenge to a decision-maker; how to un-ring the bell? In fact, it's impossible – as demonstrated by several experiments with judges.[2]

Consider first a privileged document that is bad for the plaintiff. Seventy-one percent of the judges who saw the document ruled against the plaintiff. Of the judges who didn't see the document, only 45 percent ruled against the plaintiff. In other words, even though the document should have played no role in decision-making, it did.

Remedial measures taken after an accident are also generally inadmissible – the rationale being that eliminating dangerous conditions should be encouraged. So, what happened in an experiment where one group of judges learnt of remedial actions and the other group did not? All of the judges who didn't know about the subsequent fix ruled for the defendant. Only 75 percent of those who knew about it ruled for the defendant.

Lastly, let's look at a prior criminal conviction. Half of our judges were told that a personal injury plaintiff had been convicted of a swindle more than a decade before his accident; 80 percent of them ruled the conviction should be excluded. Yet, those judges awarded the plaintiff a median of $400,000; judges who didn't know about the conviction awarded 25 percent more.

We would likely all agree that offering clearly inadmissible material in order to ring the bell that cannot be un-rung is unethical. But admissibility is often fairly debatable. Thus, one might argue that counsel are well-advised to advance even evidence with a low probability of being admissible. One can certainly say that arbitrators need to be cautious how information admitted "for whatever it's worth" affects their decision-making.[3]

Confirmation Bias

Moving next to confirmation bias, this phenomenon was often a key plot point in the wonderful British detective series, *Inspector Morse*. Morse would rather quickly lock in on a likely suspect and then doggedly accumulate evidence confirming the unlucky person's guilt. The dramatic twist to the story was often that Morse's initial conclusion was wrong; he had been led astray by confirmation bias.

Confirmation bias occurs in legal decision-making. A variety of studies show that jurors often make an initial call on the case, and then listen carefully to evidence supporting that inclination while discounting contrary evidence.[4] In an experiment with judges, all were asked to evaluate evidence bearing on whether suspect #1 had committed a murder. Half of the participants were later told of a possible second suspect; the other half were not. Nevertheless, all evaluated the evidence, and the likely guilt of suspect #1, similarly. Suspect #2 was disregarded.[5]

Confirmation bias isn't a new concept. In 1620 the English philosopher Francis Bacon

Charles D. Ehrlich

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The judges who knew the outcome saw it as predictable at roughly double the rate of those who predicted without knowledge.

observed, "The first conclusion colors and brings into conformity with itself all that comes after."[6]

A variant of confirmation bias has the mysterious label "Implicit Egotism." In plain English, it means that we gravitate to people who resemble ourselves.[7] Thus, many reinsurance arbitrators may give additional credence to evidence coming from middle-aged, well-spoken, conservatively dressed, Caucasians of the professional class, i.e., their clones, while discounting witnesses who differ significantly from that prototype.

Hindsight Bias

Turning to hindsight bias, I think this phenomenon derives from our unconscious yearning to see the world as proceeding from cause to effect in a logical and predictable fashion.

Judges in an experiment were given information about an area that might experience a flood, including costs of flood protection.[8] They were told that if there was a greater than 10 percent likelihood of a flood, negligence liability would attach if a flood occurred. All were told that no protective measures were taken; half were told there had been a subsequent flood. Twenty-four percent of those who didn't know about the flood found negligence. More than twice as many, 57 percent, of those who knew about the flood found negligence. In other words, with the "benefit" of hindsight the judgment as to what was reasonable behavior *before the flood* changed 100 percent.

In another experiment, judges were given a hypothetical trial court sanctions ruling. They were asked to predict the most likely outcome on appeal: affirmance or vacation or a lesser sanction. Some of the judges were told of the "outcome;" the others were not. The judges who knew the outcome saw it as predictable at roughly double the rate of those who predicted without knowledge.

In a reinsurance arbitration, might "hindsight bias" incline a panel to find coverage for an event "post facto," even though the parties would have given a different answer when the contract was being agreed? Might a policy buy-out look far more reasonable if the policyholder later experienced an asbestos disaster than if measured at the time of the deal? Since reinsurance disputes almost always arise "post facto," arbitrators need to be especially wary of hindsight bias.

Anchoring

Moving to "anchoring," I'll observe that many of us grew up thinking that taking reasonable positions leads to the best outcomes, that rationality is rewarded. Anchoring experiments appear to rebut that concept. Instead, anchoring suggests that counsel (or party-appointed arbitrators) consider taking the most aggressive positions possible that don't careen into absurdity.[9]

In one anchoring experiment, judges were given the facts of a serious personal injury case in which liability was conceded.[10] Half of the judges were told that the plaintiff's lawyer had demanded $10,000,000 at a settlement conference; the other half were told only that "a lot of money" had been demanded.

The judges were then asked what damages they would award. Judges who hadn't been given the $10,000,000 number awarded an average of $808,000, with a median of $700,000. Those who knew the number averaged an award of $2,210,000, with a median of $1,000,000. Thus, a settlement demand several multiples of what either group of judges was willing to give nevertheless served as an anchor leading to much higher awards than if no specific demand had been made.

A second experiment presented another personal injury case in which only damages were at issue.[11] One group of judges was initially asked to rule on a motion to dismiss, made on the ground that damages couldn't exceed a hypothetical $75,000 jurisdictional threshold; the other group was not given that motion. Virtually every judge who had the motion denied it – in other words, it didn't have much merit. Nevertheless, the motion served as a very effective anchor. The "motion group" awarded damages that averaged $882,000, with a similar median. The "non-motion group" awarded an average of $1,249,000, with a median of $1,000,000. Thus, a motion of minimal merit, one that a conservative counsel might well not even present, was such an effective anchor that it reduced the damage awards by almost one-third.

How might anchoring affect a reinsurance arbitration? Consider allocation of continuing losses; there are often several approaches, each resulting in a significantly different outcome for the parties. A party strongly arguing for a return-maximizing approach that is isn't the most supportable one may nevertheless anchor the Panel to high-return alternative outcomes rather than low return alternative outcomes.[12] A similar approach might affect the result in a life insurance premium dispute, for example.

Framing

Our next concept, framing, teaches that that the verbal presentation of an event can have significant subconscious influence on the listener's assessment of what happened. In one experiment, the subjects were shown film of a car accident. Then, divided in subgroups, they were asked to estimate how fast the cars had been going when the accident occurred. The question was asked using a different descriptor for each subgroup, starting with "contacted," and then moving up through "hit," "bumped," "collided" and "smashed." The result? The more that the descriptor connoted a violent event, the higher the speed estimated by the test group.[13] Then, a week later, the groups were asked if they saw broken glass after the accident –although there was no broken glass in the film. The "smashed" group was more likely than any other to "remember" the non-existent broken glass.[14]

Interestingly, my experience in arbitration suggests that framing is used ineffectively because it's overly exaggerated. Thus, when counsel portrays a failure to

produce documents as the most egregious wrong since the Spanish Inquisition, the Panel is more dubious than terribly upset. That said, is it possible that more effective framing has influenced me without my knowing?

Self-Serving Bias

This brings us to self-serving bias, which might prompt the reader to ask "what on earth is that?" Self-serving bias is simply the conviction that we're right (because we're smarter) and those who disagree with us aren't either right or as smart. Thus, in a classic 1977 study, 94 percent of professors rated themselves above average relative to their peers.[15] In another study, 32 percent of the employees of a software company said they performed better than 19 out of 20 of their colleagues.[16]

In another study, judges were asked to estimate how their rate of reversal on appeal compared to their fellow jurists. The top quartile represented those who were reversed the most, the bottom quartile those who suffered the least reversals.[17] Surprise! Fifty-six percent put themselves in the bottom quartile – more than twice the number that could mathematically fit there. With another 31 percent putting themselves in the second lowest quartile, 87 percent of the judges thought that they had better records than 50 percent of their peers.[18] While arbitrators rarely face reversal, is there any reason to believe that our confidence in our judgment may not be similarly a bit overconfident?

And, what if it all actually comes down to our tummies?

An Israeli study looked at the decisions of judges ruling on prisoners' parole applications.[19] Judges who had recently eaten were more likely to rule favorably on an application. The longer a court session went on without a meal, the more negative the judges' decisions became. The authors attribute this phenomenon to "decision fatigue." In other words, the more decisions the judges made the more depleted their energy, and when their energy was depleted they were more likely to rule in favor of the status quo, i.e., continued incarceration.

Applying this learning to arbitrations, perhaps the party seeking relief should ensure that the panel is well supplied with energy bars, while the party opposing should try to extend proceedings well into the lunch hour.

So, what are we in the reinsurance arbitration community to make of all this? Of course, we can shrug it off as sociological mumbo-jumbo, having little relevance given our specialist qualifications and particular niche in the decision-making world. But, why would our analytical processes be significantly "better" those of other professional decision makers? Are we simply indulging in self-serving bias if we think we're immune from the subconscious?

So, let's experiment. Let's consider some processes that may sharpen our decision-making, including the following:

- Before coming to a final conclusion on an issue, run your tentative view though a mental checklist of the potentially skewing factors: inadmissible evidence, confirmation bias, hindsight, anchoring, framing, and self-serving bias. Consider whether any of them have affected your conclusion.
- Think about whether any other factor external to the merits is playing a part in your conclusion, e.g., reputation of counsel, (un)likeability of a witness, coherence of presentation, past experience with a party, etc. If it might be, try to re-examine your conclusion with that factor eliminated.
- When you've arrived at a tentative conclusion, take pen to paper (fingers to keyboard) and write up your reasoning. That helps clarify thinking and sometimes reveals that the tentative conclusion doesn't hold up.
- List the key points supporting each party's position and informally score them, say from 1 to 10. Then add up the scores; if there are significantly more points on the position you aren't inclined to support, you may want to deliberate further.
- Experiment by agreeing with your co-panelists to discuss the evidence at the end of each hearing day rather than withholding comment until deliberations. This approach can foster consideration of differing views before they've all solidified into cement.

Justice Scalia, in his treatise on advocacy, cautioned, "[w]hile computers function solely on logic, human beings do not. All sorts of extraneous factors – emotions, biases, preferences – can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are)."[20]

While advocates face the hurdles Scalia noted, those of us who are arbitrators can conscientiously work to recognize them and eliminate them. ▼

ENDNOTES

1. This article owes a considerable debt of gratitude to the work of Edna Sussman (www.SussmanADR.com), who has analyzed decision-making in depth and gathered much source material.
2. Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,* 153 U. PA. L. Rev. 1251 (2005).
3. It appears arbitrators are reluctant to exclude evidence, preferring rather to "give it whatever weight, if any, it deserves." That's likely a distinction without a meaningful difference in outcome.
4. W. Kanasky, Juror *Confirmation Bias: Powerful. Perilous. Preventable*., www.courtroomsciences.com.
5. Eyal Peer and Eyal Gamliel, *Heuristics and Bias in Judicial Decisions*, aja.ncsc.dni.us/publications/courtrv/cr49-2/CR49-2Peer.pdf
6. Edna Sussman, *Arbitrator Decision Making*, The American Review of International Arbitration, 2013 v. 24 no.3 502.
7. Brett W. Pelham, Mauricio Carvallo and John T. Jones, *Implicit Egotism*, Current Directions in Psychological Science, April 2005 vol. 14 no. 2 106.
8. Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 433 (2007).
9. While I haven't encountered anything in the literature dealing with absurd or unreasonable positions advanced as anchors, experience suggests that such positions do not anchor, reduce credibility, and are generally unwise.
10. *Id*. at 431.
11. *Ibid*.
12. I reiterate my belief that an effective anchor needs to be within some ambit of reason; that an absurd position backfires.
13. Elizabeth F. Loftus and John C. Palmer, *Reconstruction of Automobile Destruction: an Example of the Interaction Between Language and Memory,* Journal of Verbal Learning and Verbal Behavior 13, 585-589 (1974).
14. *Ibid*.
15. *Everyone Thinks They Are Above Average*, Lifescience.com, February 7, 2013, 12:25 PM.
16. *Ibid*.
17. Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 436-37 (2007).
18. *Ibid*.
19. Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, PNAS, April 26, 2011 v. 108 no. 17 6889–6892.
20. Sussman, supra note 6, at 490.

article

Thinking Open-Mindedly to Promote Good Decision-Making

By Richard G. Waterman

Richard G. Waterman

It is a high honor to be recognized by your peers to serve on an arbitration panel. It is also a gratifying and humbling experience to be considered as someone worthy of serving in a judicial capacity to resolve an industry dispute. I enjoy working with knowledgeable colleagues on arbitration panels who demonstrate their skills to navigate complex arbitration proceedings with a heightened appreciation of their vital responsibility to balance fairness with utmost integrity and professionalism.

Integrity and professionalism are high-minded words that few of us can define fully. If you have not recently read the *ARIAS·U.S. Code of Conduct*, I suggest you get a copy, read it again and re-read it every time you consider accepting an arbitration appointment. The Code of Conduct serves as a reminder of how important it is for each of us to uphold the integrity of the arbitration process by acting honestly, diligently and in good faith in rendering fair and just decisions without being influenced by outside pressure, fear of criticism or self-interest. It's a daunting reality that we really need each arbitrator to be an exceptional, unbiased kind of person. Quite a job description. Obviously, we cannot expect perfection when coping with intractable arguments and making judgments in an environment of practical uncertainties.

Rendering Just Decisions

All of us believe that we are capable of rendering fair and just decisions when serving on arbitration panels. Under ideal conditions, that is probably true. ARIAS·U.S. members are known to be smart and thoughtful, and they usually base their decisions on facts and experiential reasoning. Nonetheless, predispositions, outside pressures, influences and the demands of fairness are probably far more powerful than we can imagine. Arbitrators are not professional judges, we are not subject to the constraints of judicial ethics, review of our decisions, and our panel appointments are short-term, unlike some judges appointed to life terms. Consequently, extraneous pressure, criticism and second guessing are commonplace.

Furthermore, since we are business people with business experience deciding a business controversy, our judgment and reasoning have a tendency toward our expectations, preconceptions, and prior beliefs that influence our interpretation of new information. When examining evidence relevant to a given belief, people are inclined to see what they expect to see and conclude what they expect to conclude. Information that is consistent with their preexisting beliefs is often accepted at face value, whereas evidence that contradicts them is critically scrutinized and often discounted. Our beliefs may thus be less responsive than they should to the implications of new information.

More generally, the early stages of arbitration decision analysis, before all the possibilities and evidence are available, can be useful to understand what the disagreement is about and measure the probability of different outcomes. The evaluation of facts and search for possibilities can also be used as a way of understanding what sort of evidence is needed to support a particular hypothesis. Since we have a natural tendency to look for evidence that confirms our vision of the facts, early stages of thinking analysis should take into account facts that disagree with our initial hypothesis. Even in testing a hypothesis, however, decision makers tend to look for instances where the hypothesis proved true. We take pieces of information that corroborate our hypothesis and treat them as evidence. Of course we can easily find confirmation for just about anything if we just look.

The confirmation problem pervades our decision making since most conflicts usually involve a mental bias that is not receptive to alternate perspectives. When people say they sincerely believe a particular view, that is what they sincerely believe. Each of us has unique experiences and convictions. Democrats and Republicans, for instance,

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look at different parts of the same data and rarely converge to the same opinions. Global climate change and immigration policy are two highly contested real world issues that define political identity and produce strong feelings that affect decision making. Once our minds have developed a certain view of the world, we tend to only consider instances proving us to be right. Paradoxically, the more information we have, the more justified we feel in our opinions.

Open-Minded Thinking

Open-minded thinking to increase the probability of good decision making is something we all want to do. Acquiring the ability to think open-mindedly allows us to consider alternate possibilities and evidence against possibilities that we have already determined seem strong. Good open-minded thinking and decision making consist of an active search for relevant information in proportion to the problem to be decided, effective use of the available information to develop confidence that an appropriate amount and quality of thinking has been done, and fairness to other possibilities than the one we initially favor.

Poor thinking tends to be characterized by too little search for facts. We often ignore evidence that goes against a possibility we like. The favoritism for a particular possibility may cause us to prematurely cut off our search for alternative possibilities or for reasons against the one we have in mind. This favoritism therefore leads to insufficient thinking and overconfidence in hasty conclusions that are generally biased in simply reaffirming beliefs that were previously found to be appealing.

To a large extent, open-minded thinking and rational judgment are contextual. Some people have better judgment in some contexts than do others. A person may have astute judgment in practicing a certain trade or profession and quite poor judgment in another such as politics or teaching. To understand how people process and reflect about reasons underlying their judgment, it is important to emphasize the distinction between technical and practical knowledge. Technical knowledge can be abstractly acquired from books and lectures and employed in a step-by-step fashion. Technical knowledge is composed of factual and theoretical knowledge that enables us to understand a particular field of endeavor. Practical knowledge, by contrast, is acquired through experience practicing it. Practical knowledge cannot be taught in classrooms or books and cannot be fully acquired by attending a series of lectures. We learn important things about complex and unpredictable problems that emerge in real life situations by gaining experience doing the activity and absorbing practical knowledge from mentors who know what they doing practicing the skills of a particular kind of activity.

Open minded thinking challenges us to use both technical knowledge and experiential knowledge that we have already acquired when addressing decision analysis. Experience, coupled with a sufficiently thorough search for facts and possibilities, deepens our ability to decide rationally. It allows us to search memories for possibilities centered on knowledge that is already there. To illustrate, the popular notion of a superior chess player is someone who has a logical mind and makes deductions on the basis of each move, planning many moves ahead. It is well established now, however, that is not how a chess player's mind works. An expert player usually thinks only a few moves ahead. What makes the expert so formidable is the immense number of specific patterns of pieces on the board that are stored in memory. An expert beats a novice because the expert can recognize a pattern of pieces on the board, matching it to a similar pattern stored in memory, to which is attached a memory of a suitable move. Nonetheless, if an arrangement of pieces is randomly placed on the board not part of an actual game, the chess expert's powers of recognition and memory drop to the level of a novice.

It has been commonly observed that no board game can replicate the complexity and unpredictable conditions of an arbitration. Since all pieces of a chess match are visible on the board, the game eliminates any hidden strategic placement of pieces or opportunity for deception by opponents. In an arbitration setting, omissions of relevant evidence are frequently prevalent, satisfactory answers to pertinent questions are unavailing and underlying argument strategy is concealed. Card games are better models of an arbitration. Contract bridge, for example, is a popular card game that entails a mixture of memory, tactics, probability and the exchange of communications. Most of the time a bridge player sees only one-quarter of the cards in play and some of the observable information might be false or misleading. The difficulty of weighing truth and deception is one reason computers do not win at bridge whereas at the highest level of chess, computers do very well. Experienced people simply have an enormous store of technical knowledge, practical conceptual knowledge and problem solving reasoning methods to draw on that no machine can imitate.

Open minded thinking challenges us to use both technical knowledge and experiential knowledge that we have already acquired when addressing decision analysis.

Accuracy in Decision-Making

We should not expect that more and more technical knowledge will obviate the need for informed, reflective judgment during arbitration deliberations. Each piece of evidence presented in an arbitration proceeding has weight with respect to a given possibility. The weight of a given piece of evidence determines how much it should strengthen or weaken the possibility. Obviously, all pieces of information are not equal in importance. Sometimes a lot of data can be meaningless. At other times one single piece of information can be very meaningful. Critical reasoning that is overly focused on details may not always be beneficial for the quality of judgments. A deliberation style focused on too much detail may overlook aspects of the global picture that affect accurate judgment. In the view of many, being able to use just the right amount

Once formal knowledge and expertise in a domain have been established, intuition can be highly reliable for judgments and decisions.

and type of information is essential for good decision making. With the knowledge that business disputes entail ambiguities, interpretations of facts along with a range of contingencies and possibilities, the human judgment of experienced arbitrators will be needed to think open-mindedly and draw on their networks of knowledge to make better decisions to achieve fairness.

Although the best judgments and decisions are made after careful deliberation and a thorough analysis of the pertinent facts, we also engage an intuitive system during our decision making. Intuition is assumed to yield better judgments in certain situations. For instance, recent research has revealed the importance of intuition in making decisions when faced with uncertainty created by incomplete information. Intuition is a process of thinking. It refers to concepts ranging from gut feelings to snap judgments to premonitions. Intuition has been generally defined as a process of thinking and judgment in the absence of complete information. Decision making influenced by intuition is most accurate when experience has been acquired in a similar environment.

In our consideration of intuition as a reliable and valid assessment component in arbitration deliberations, we need to distinguish between general knowledge and expertise in the role of judgment and decision making. Expertise depends on a person's experience with and knowledge about a particular subject matter. People with general technical business knowledge but insufficient practical experience are often unsure of why they feel the way they do and are more likely to rely on intuition to generate reasons that are only marginally related to their expressed judgment. In contrast, knowledgeable people who possess both technical and practical business experience have a better understanding of why they feel the way they do based on actual experiences and are more likely to come up with high quality reasons to support their opinions during deliberations. This type of expert judgment is characterized by the ability to make accurate judgments when complete relevant evidence is unavailable or when unqualified assertions are not supported with evidence. Once formal knowledge and expertise in a domain have been established, intuition can be highly reliable for judgments and decisions. This makes sense because the knowledge necessary to perform competently is often the same knowledge required to guide open-minded decision making.

An important difference between arbitration and litigation to resolve industry disputes is recognition of the different levels of knowledge and experience that are available for analytic judgment. A judge in court is an expert on the law. Because judges lack practical knowledge and experience in a large variety of contexts in which they are called upon to make judgments, judges have learned to rely on legal argument and explicit legal rules on which to base their reasons for their judgment. A distinctive characteristic of arbitration is the knowledge and experience arbitrators have gained through training and years of practical experience that qualifies them to put their knowledge into practice during their deliberations and decisions. Experienced arbitrators are likely to make accurate judgments when they rely on factual determinations and analytical reasoning as well as the use of their experience-based intuition. As the quality of evidence improves, the role of intuition diminishes.

Summation

Opened-minded thinking and good decision making require the active search for information and use of knowledge that has already been acquired and is stored in memory. Of course, knowledge is used in all thinking, not just problem solving. In the context of arbitration deliberations, debate and differences are a necessary part of the process. Deliberation calls for a high degree of respect in listening to opposing views and the ability to acknowledge the good faith and strong arguments of those with other opinions. We are not in a position to disagree with sincere beliefs. What we can do if we disagree with opposing views is encourage open-minded thinking based on an examination of hard evidence and stimulate an awareness of biases, obsolete opinions or inaccuracies of knowledge in memory to counter thinking that might be the basis for errors in judgment. In some instances, a clear-cut solution cannot be found. To decide rationally in situations where a winner-take-all outcome cannot be reached, a third position or synthesis that combines the strongest features of the contending party positions may be a sensible outcome as well as more integrity preserving than either of the polar alternatives.

It is not clear how one acquires the disposition and capacity to think open-mindedly, to see matters from another's point of view, engage in various forms of give-and-take discussion and reflectively review and revise previously held positions. Psychological investigations into practical knowledge indicate that it is reasonable to suppose that such a disposition and capacity are often fostered by example, encouragement and criticism. Technical knowledge and practical experience deepen an ability to decide. Persons who serve on arbitration panels want to make decisions that are just or equitable. Because of this desire, we learn to make good judgments in various contexts by emulating others who know what they are doing and are regarded as having sound judgment. We also acknowledge that each other's viewpoints have some claim to equal respect and consideration. Thus, we need to cultivate in ourselves and in others the capacity and willingness to investigate and assess previously held positions in response to new information, insights, arguments, or understanding. ▼

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— GENERAL SESSION —
Is My Arbitrations Final, or is it Groundhog Day?

Friday, November 18, 2016, 10:30 a.m. – 11:15 a.m.

Materials:

PAPER - IS MY ARBITRATION FINAL OR IS IT GROUNDHOG DAY?

Presented by:
Robert Lewin, Strook & Strook & Lavan LLP
Hon. Brian Cogan, U.S. District Judge for the Eastern District of New York
Brad Rosen, Berkshire Hathaway Group
Anthony Vidovich, XL Catlin

Is My Arbitration Final or Is it Groundhog Day?

STROOCK & STROOCK & LAVAN LLP[1]

I. INTRODUCTION

It is universally recognized that one of the most important benefits of arbitration is finality. As recognized by the United States Court of Appeals for the Second Circuit, "parties choose to arbitrate because they want quick and final resolution of their disputes." *Florasynth v. Pickholz*, 750 F.2d 171, 177 (2d Cir. 1984). The statutes governing arbitration practice and procedure, namely the Federal Arbitration Act ("the FAA"), the New York Convention, the Uniform Arbitration Act ("the UAA"), and New York Civil Practice Law and Rules ("CPLR") Article 75, each embody the principle of finality by providing narrow grounds upon which an arbitration award may be vacated or modified, and by establishing truncated time frames in which to do so. Underscoring the importance of the finality of arbitration awards, the Supreme Court has held that Sections 9-11 of the FAA (concerning the confirmation, modification and vacatur of arbitration awards) substantiate " a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, LLC v. Mattel, Inc*., 552 U.S. 576, 588 (2008).

Despite the bedrock principle of finality of arbitration awards, more and more parties are attempting to avoid unfavorable awards, most often through motions to vacate. What happens when efforts to vacate an unfavorable award fail, or there is no attempt made to vacate an award within the applicable timeframe? The answer would appear to be that the award (now a judgment) is final and binding. This article addresses the finality of arbitration awards post-confirmation, and whether parties can nonetheless obtain a second bite at the apple through the commencement of a second arbitration.

II. THE ARBITRATION MERRY-GO-ROUND

There are two different factual circumstances under which parties have sought to commence a second ar-

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1 It is important to understand that opinions and comments expressed in these materials and during the conference sessions are not necessarily those of ARIAS•U.S., the firms or companies with which the speakers are associated, or even the speakers, themselves. Some arguments are made in the context of fictitious disputes as illustrations of methods of handling issues. Others are individual opinions about the handling of an issue. Every dispute or matter presents its own circumstances that provide the context for decisions.

bitration against the very same party with whom it has previously arbitrated: (1) where a party commences a second arbitration which is allegedly precluded by the first arbitration on *res judicata*[2] or collateral estoppel grounds, as was the case in *Citigroup, Inc. v. Abu Dhabi Investment Authority*, 776 F.3d 126 (2d Cir. 2015) ("*Citigroup*") and (2) where a party tries to undo unfavorable results of the first arbitration by bringing a second arbitration that directly attacks the first award, as was the case in *Arrowood Indemnity Co. v. Equitas Ins. Ltd.*, No. 13 cv 7680, 2015 WL 4597543 (S.D.N.Y. July 30, 2015) ("*Arrowood*"). Parties faced with a second arbitration demand from the same party against whom they have previously arbitrated must determine whether the facts of their case are more aligned with those in *Citigroup* or *Arrowood*.

A. Claim Preclusive Effect of an Arbitration Award

It is well established that arbitration awards have the same claim preclusive effect as judgments issued by courts. *See e.g.*, *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985) ("When an arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence, the determination of issues in an arbitration proceeding should generally be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated," citing to Restatement (Second) of Judgments § 84(3); *see also* Barry R. Ostrager & Mary Kay Vyskocil, *Modern Reinsurance Law & Practice* (3d ed.) § 14.06[a] ("[c]onsistent with the strong federal public policy favoring arbitration as an efficient and effective means of dispute resolution, courts have uniformly held that the doctrines of res judicata and collateral estoppel apply to arbitration awards to bar subsequent consideration of previously considered claims and issues.").

Even though arbitration awards are entitled to the same claim preclusive effect as judgments, a number of courts have found that the degree to which arbitration awards are afforded claim preclusive effect is arbitrable. *See, e.g.*, *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum Corp.*, 88 F.3d 129, 136 (2nd Cir. 1996) ("*Belco*"); *Indep. Lift Truck Builders Union v. NACCO Materials Handling Grp., Inc.*, 202 F.3d 965, 968 (7th Cir. 2000).[3] This principle aligns with the long-standing federal policy favoring

2 "The doctrine of claim preclusion, or *res judicata*, bars the subsequent litigation of any claims that were or could have been raised in a prior action." *Citigroup, Inc. v. Abu Dhabi Investment Authority*, 776 F.3d 126, fn. 1 (2d Cir. 2015).

3 Notably, in New York State Courts applying CPLR Article 75, courts are empowered to enjoin a second arbitration on the grounds that it is barred by res judicata following an earlier arbitration between the parties. *See e.g.*, *American Honda Motor Co., Inc. v. Dennis*, 259 A.D.2d 613 (2d Dep't 1999); *Lari v. Slanetz*, 240 A.D.2d 581 (2d Dep't 1997); *Matter of Pete Klein Assoc. v. Goldenberg*, 183 A.D.2d 717 (2d Dep't 1992).

arbitration. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (holding "that the applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not the judge.").[4] The Second Circuit in *Belco* determined that preclusion "is as much related to the merits [of the dispute] as such affirmative defenses as a time limit in the arbitration agreement or laches[.]" *Belco*, 88 F.3d at 136. Notably, although arbitrators have the authority to determine the claim preclusive effect of an arbitration award under the law of some circuits, arbitration panels nonetheless have discretion to apply that principle; arbitrators "need not follow judicial notions of issue and claim preclusion." *Lindland v. United States of Am. Wrestling Ass'n, Inc.*, 230 F.3d 1036, 1039 (7th Cir. 2000).

The preclusive effect of an earlier arbitration award was recently explored by the Second Circuit in *Citigroup*, where *Citigroup* attempted to use the All Writs Act to bypass the arbitrability of the defense of claim preclusion as set forth in *Belco*. In that case, the parties, Citigroup, Inc. and the Abu Dhabi Investment Authority ("ADIA") participated in an arbitration in which ADIA "asserted claims of fraud, securities fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing" against Citigroup. *Citigroup*, 776 F.3d at 127. Following a lengthy hearing, the Panel ruled for Citigroup and dismissed ADIA's claims. *Id.* Citigroup sought to confirm the award, and ADIA moved for vacatur, in the United States District Court for the Southern District of New York. The District Court denied ADIA's motion for vacatur and entered a judgment confirming the award. *Id.* ADIA appealed the District Court's decision, and the Second Circuit affirmed. *See Abu Dhabi Inv. Auth.*

4 In *Howsam*, the United States Supreme Court termed "any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits." *Howsam*, 537 U.S. at 83. "Questions of arbitrability" are those "narrow circumstance[s] where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84. The Supreme Court also determined that "'questions of arbitrability' [are] *not* applicable in other kinds of general circumstance where parties would likely accept that an arbitrator would decide the gateway matter;" for example, "'procedural' questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator to decide." *Id.* at 79, 84 (citing to *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964)).

v. Citigroup, Inc., 557 Fed.Appx. 66 (2d Cir. 2014).

While ADIA's appeal was pending in the Second Circuit, ADIA commenced a second arbitration against Citigroup, alleging that Citigroup breached its contract and breached its implied covenant of good faith and fair dealing. *Citigroup,* 776 F.3d at 127. ADIA alleged, within the arbitration demand, that the second arbitration was different from, and not an attack upon, the first arbitration. *Citigroup, Inc. v. Abu Dhabi Invest. Auth.*, No. 1:13-cv-6073-PKC, Dkt. No. 28-1, ECF No. 25 (S.D.N.Y. 2013). Citigroup then commenced an action in the Southern District of New York seeking to "enjoin the second arbitration on the ground that ADIA's new claims were barred by the doctrine of claim preclusion, or *res judicata*, because they were or could have been raised in the first arbitration." *Citigroup*, 776 F.3d at 128. Citigroup argued that the Court had the authority to enjoin the second arbitration "pursuant to the Declaratory Judgment Act, the All Writs Act, the Federal Arbitration Act…and the district court's 'inherent authority to protect its proceedings and judgments.'" *Id*. at 127-128. (internal citations omitted). Consequently, ADIA sought to dismiss Citigroup's complaint and filed a motion to compel the second arbitration. *Id.* at 128. The District Court granted ADIA's motions, noting the "strong federal policy favoring arbitration," and citing to *National Union Fire Ins. Co. of Pittsburgh v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996), in which the Second Circuit "held that the preclusive effect of a prior arbitration that had been confirmed by a state court was to be decided by the arbitrators." *Citigroup*, 776 F.3d at 128. The District Court also rejected Citigroup's argument that the second arbitration should be enjoined pursuant to the All Writs Act[5], finding that, although the Second Circuit had left the question of whether an arbitration could be enjoined unresolved in *In re American Express Securities Litigation*, 672 F.3d 113 (2d Cir. 2011) ("*American Express*"), the instant case involved "only garden-variety res judicata concerns." *Citigroup, Inc. v. Abu Dhabi Inv. Authority*, No. 13 Civ. 6073, 2013 WL 617315, at *5 (S.D.N.Y. Nov. 25, 2013). The District Court further noted that to apply the All Writs Act would "swallow the *Belco* rule" because it "would apply to virtually any instance where a second arbitration is purportedly precluded by a federal court judgment confirming the first arbitration award." *Id.*

The Second Circuit affirmed, noting that from prior Second Circuit jurisprudence regarding the claim-preclusive effect of arbitrations, "it is a simple intuitive step to conclude that arbitrators should also decide

5 The All Writs Act authorizes Federal Courts to "issue all writs necessary to appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C.A. § 1651(a).

the claim-preclusive effect of a federal judgment confirming an arbitral award." *Citigroup*, 776 F.3d at 131. In responding to Citigroup's argument that a second arbitration would afford ADIA an opportunity to re-arbitrate issues decided in the first arbitration, in violation of the "limited statutory grounds under which a district court may vacate or modify an arbitration award" provided by the FAA, the Court of Appeals stated that the District Court simply confirmed the award, without "review[ing] the merits of any of ADIA's substantive claims or the context in which those claims arose," and therefore, "a district court unfamiliar with the underlying circumstances, transactions and claims, is not the best interpreter of what was decided in the arbitration proceedings, the result of which is it merely confirmed." *Id.* at 132-133. Citigroup also argued that if the court did not "permit the use of the All Writs Act to protect federal judgments confirming arbitration awards, [the court] effectively would be relegating those judgments to 'second-class status' as compared to federal judgments following from proceedings on the merits," in violation of 9 U.S.C. § 13, which provides that judgments confirming arbitration awards "'shall have the same force and effect, in all aspects, as, and be subject to all the provisions of law relating to, a judgment in an action.'" *Id.* at 134. The Second Circuit rejected this argument, holding that "Citigroup's argument presents a false choice," because the real issue before the court is not about the degree of "preclusive 'force and effect'" that ought to be given to a judgment confirming an arbitration award as compared to other judgments, but rather "when, if ever, a federal court's interest in protecting the integrity of prior federal judgments authorizes it to use the All Writs Act to reserve for itself the exclusive prerogative to determine the claim-preclusive effect of those judgments." *Id.* at 134.

Citigroup demonstrates the difficulty of obtaining an injunction on the grounds that an earlier arbitration should be given claim preclusive effect. The case has made clear that the claim preclusive effect of an arbitration award, even when said award is confirmed by a federal court, is an issue for the arbitrators, rather than the court.

B. Collateral Attack on Judgments Confirming Awards

The collateral attack doctrine, where applicable, is a strong defense to potentially never-ending attempts to re-arbitrate final awards. This doctrine is rooted in *Corey v. New York Stock Exchange*, 691 F.2d 1205 (6th Cir. 1982), where the Sixth Circuit held that a party's attempt to sue the New York Stock Exchange for actions of its arbitrators and its arbitration director, stemming from an arbitration proceeding between

Corey and Merrill Lynch, amounted to "an impermissible collateral attack on the arbitrators' award." *Corey*, 691 F.2d at 1207. The Court held that "[t]o allow a collateral attack against arbitrators and their judgments would also emasculate the appeal provisions of the Federal Arbitration Act. 9 U.S.C. §§ 9, 10." *Id.* at 1211. A "collateral attack" on an arbitration award is a later and distinct proceeding which seeks to "challenge the very wrongs affecting the award for which review is provided under section 10 of the Arbitration Act." *Corey*, 691 F.2d at 1213. Other courts have also recognized that permitting collateral attacks on arbitration awards would render the FAA's provisions for vacatur and modification meaningless. *See, e.g.*, *Ibarzabal v. Morgan Stanley DW, Inc.*, 333 Fed. Appx. 605 (2d Cir. 2009) (Summary Order); *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 749-750 (5th Cir. 2008); *Sander v. Weyerhauser Co.*, 966 F.2d 501 (9th Cir. 1992); *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338-1339 (9th Cir. 1986); *Prudential Securities Inc. v. Hornsby*, 865 F. Supp. 447, 450 (N.D. Ill. 1994) ("[t]he strictures of section 10 and section 12 [of the FAA] are designed to afford an arbitration award finality in a timely fashion, promoting arbitration as an expedient method of resolving disputes without resort to the courts"); *Alexander v. American Arbitration Ass'n*, No. C01-1461, 2001 WL 868823, at *5 (N.D. Cal. July 27, 2001) (finding that a Plaintiff's complaint amounted to an improper collateral attack where "plaintiff in the present case was allegedly harmed by the impact of the acts instituted by the AAA on her award. Her complaint has 'no purpose other than to challenge the very wrongs that affect the award for which review is provided' for.") (citing to *Corey*, 691 F.2d at 1213).

Courts have also held that the collateral attack doctrine applies whether the second proceeding commenced by a disgruntled party is a litigation *or* an arbitration. In *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 911 (6th Cir. 2000), a party, after prevailing in an arbitration, later commenced both an arbitration and a litigation, contending that Merrill Lynch had interfered with the original arbitration. The initial arbitration involved "a dispute over Merrill Lynch's handling of Decker's securities investments," while the later-filed complaint alleged that "Merrill Lynch owed Decker a duty not to interfere with the arbitration process by directly or indirectly hiring that chairperson of the arbitration panel during the course of the arbitration, conduct it should have known would harm her." *Id.* at 908. The second arbitration, filed after the District Court granted Merrill Lynch's motion to dismiss Decker's complaint as a collateral attack on the first arbitration award, and while Decker's appeal of the District Court's ruling was pending before the Sixth Circuit, alleged the same claims as those asserted in the complaint. *Id.* at

908. The Sixth Circuit held that the collateral attack doctrine applied to subsequently commenced arbitrations, as well as to litigations: "[t]he FAA provides the exclusive remedy for challenging acts that taint an arbitration award whether a party attempts to attack the award through judicial proceedings or through a separate second arbitration. It would be a violation of the FAA to allow [Plaintiff] to arbitrate the very same claims that we have determined constitute an impermissible collateral attack when previously presented for adjudication by a court." *Id. at 911.*

Other courts have also enjoined arbitrations and denied motions to compel on the basis of the principles underlying the collateral attack doctrine. *See e.g., Prudential v. Hornsby,* 865 F. Supp. 447 (N.D. Ill. 1994) (enjoining second arbitration and denying motion to compel arbitration where the claim in the second arbitration was premised on a newly asserted fraudulent concealment of documents from the first arbitration panel); *Federated Rural Elec. Ins. Exchange v. Nationwide Mut. Ins. Co.*, 134 F. Supp. 2d 923 (S.D. Ohio 2001) (denying motion to compel and enjoining arbitration where the party sought to re-arbitrate a prior award based on an appellate court decision rendered nearly four years after the award was issued); *Prime Charter Ltd. v. Kapchan*, 287 A.D.2d 419 (1st Dep't 2001) (permanently enjoining a second arbitration commenced by respondent during the pendency of the first arbitration after an unfavorable ruling because it was "a preemptive collateral attack on any future award issued in" the parties' first arbitration) (citing the FAA).

The collateral attack doctrine was recently invoked by the Southern District of New York in the context of a second arbitration proceeding between two parties that had previously arbitrated. *See Arrowood Indemnity Co. v. Equitas Ins. Ltd.*, No. 13 cv 7680, 2015 WL 4597543 (S.D.N.Y. July 30, 2015) ("Arrowood II").[6] This case was a follow-up to a prior attempt by Respondents Equitas Insurance Limited and Certain Underwriters at Lloyd's of London ("Underwriters") to challenge a judgment which confirmed an arbitration award on Fed. R. Civ. P. 60(b)(3) grounds. In the Rule 60(b) action, the District Court held that the Federal Arbitration Act trumps the Federal Rules of Civil Procedure on vacatur of judgments and that Underwriters were time-barred from challenging the arbitration award under the FAA. *See Arrowood Indemnity Co. v. Equitas Ins. Ltd.*, No. 13 cv 7680, 2015 WL 2258260, at *5 (S.D.N.Y. May 14, 2015) ("Arrowood I"). While the Rule 60(b)(3) motion was pending, Underwriters commenced a second arbitration which incorporated the allegations contained in the Rule 60(b)(3) motion and sought to revisit the award issued by the arbi-

6 Stroock & Stroock & Lavan LLP represented Arrowood Indemnity Company in this action.

tration panel in the first arbitration between the parties. Notably, Underwriters sought, in the second arbitration, to recover monies they paid pursuant to the confirmed award in the first arbitration.[7] *Arrowood II.,* 2015 WL 4597543, at *4 (S.D.N.Y. July 30, 2015). Arrowood moved to enjoin the second arbitration on the ground that it was a collateral attack on the award in the first arbitration, and Underwriters cross-moved to compel the second arbitration. *Id.*, at *6. The District Court enjoined the second arbitration, and denied the motion to compel, holding that "the Second Arbitration demand to recover sums already paid [pursuant to the First Arbitration award] amounts to a collateral attack on the merits of the Award." The District Court noted that "[i]n the same way that a Rule 60(b)(3) motion cannot be used to bring an untimely challenge to an arbitral award on a ground enumerated in the FAA, the FAA does not permit a second arbitration demand to be used to nullify an arbitral award, in whole or in part, on the same untimely ground." *Id.*, at *6. Further, the District Court stated the "[s]uch arbitral mulligans are forbidden by the FAA, which is the 'exclusive remedy for challenging acts that taint an arbitration award [,] whether a party attempts to attack the award through judicial proceedings or through a separate second arbitration.'" *Id.*, at *5 (quoting *Decker*, 205 F.3d at 911).

Arrowood Indemnity is the first case in the Second Circuit to apply the collateral attack doctrine to enjoin a second arbitration that sought to do an end run around a confirmed arbitration award.

Parties in reinsurance disputes who find themselves presented with a second arbitration demand from a person or entity against whom they have already arbitrated, which seeks to challenge the first arbitration award itself, can invoke the collateral attack doctrine to preserve the finality of the first award. It is critical that a party faced with a second arbitration demand determine whether that demand is an attempt to arbitrate claims that have already been, or could have been, decided in an earlier arbitration (à la *Citigroup*[8]) or whether it is a direct attack on the award issued in the first proceeding itself, which can only be challenged through the mechanisms and per the time limits set forth in the FAA (à la *Decker* and *Arrowood*). The latter category, which involves an attempt to undo the outcome of an earlier arbitration, is also applicable when the attempt to challenge an earlier award involves new parties. *See Corey*, 691 F.2d at 1213 ("Corey's claims constitute a collateral attack against the award even though Corey is pres-

7 Underwriters also sought an audit, which the District Court found to be related to the request for reimbursement. *Arrowood II*, 2015 WL 4597543, at *7.

8 Citigroup did not use the collateral attack doctrine when it sought to enjoin ADIA's second arbitration demand.

ently suing a different defendant than his original adversary in the arbitration proceeding and is requesting damages for the acts of wrongdoing rather than the vacation, modification of correction of the arbitration award."). The distinction between the two may well result in having to go forward with a second arbitration versus obtaining an order to enjoin it. The collateral attack doctrine, where applicable, is a powerful tool in the arsenal of preserving finality of arbitration awards that has received little attention up until now.

III. CONCLUSION

Claim preclusion and the collateral attack doctrine are two separate legal principles employed by parties faced with a second arbitration demand seeking to arbitrate the same or similar dispute. The collateral attack doctrine, which goes to attacks against the arbitration award itself, has been embraced in a number of courts, including the United States District Court for the Southern District of New York. In light of parties' efforts to undo final arbitration awards through various devices, the collateral attack doctrine is an important remedy of which parties in reinsurance arbitrations should be mindful. Practitioners faced with an adversary's attempt to sidestep a final arbitration award ought to be attuned to whether their situation aligns more closely with *Citigroup* or with the principles first enunciated in *Corey* and *Decker,* and later reiterated in *Arrowood*.[9]

9 For further information please contact Robert Lewin at rlewin@stroock.com or Michele Jacobson at mjacobson@stroock.com.

— GENERAL SESSION —
Comparative Ethics: Lessons to be Learned from Other Arbitration Regimes

Friday, November 18, 2016, 11:15 a.m. – 12:05 a.m.

Materials:

ETHICS FACT PATTERN

ARIAS•U.S. CODE OF CONDUCT

AAA CODE OF ETHICS

Presented by:
Cecilia F. Moss, Chaffetz Lindsey LLP
Larry P. Schiffer, Squire Patton Boggs (U.S.) LLP
Kelly Turner, American Arbitration Association
Mark Kantor, Independent Arbitrator

ARIAS•U.S. 2016 FALL CONFERENCE

COMPARATIVE ETHICS: LESSONS TO BE LEARNED FROM OTHER ARBITRATION REGIMES

Fact Pattern

I. Background

Insure Em All, Inc. ("Insure") issued two excess policies to Asbestos Is Us ("Asbestos"). The first policy was a first excess layer of $100 million xs $10 million. The second was a $100 million xs $110 million layer. The Primary Policy (which Insure did not write) was an $8 million dollar policy which sat on top of a $2 million Self Insured Retention. Asbestos was named as a defendant in hundreds of thousands of complaints by asbestos plaintiffs, alleging bodily injury or death due to asbestos exposure. Asbestos estimated its total liability to exceed $200 million. Asbestos commenced a declaratory judgment action against Insure, seeking insurance coverage under the two excess policies (the "Asbestos Litigation").

Insure's liability to Asbestos hinged on whether there was one or multiple occurrences. If the court found multiple occurrences, Insure would have no coverage obligation. With one occurrence, its policies would be exhausted. Insure's lawyers and consultants conducted an analysis into the likelihood of success of its multiple occurrences defense. Insure's advisors concluded that there was a 50/50 chance that it would succeed. Based on that advice, Insure offered to settle with asbestos for a 50% discount. Asbestos accepted and the parties settled. Insure then allocated its $100 million settlement payment to its policies using the "rising bathtub" method. As a result, it allocated the full $100 million payment to the first excess layer.

No Pay Reinsurance ("No Pay") facultatively reinsured Insure's first layer. Based on Insure's rising bathtub allocation, the policy that No Pay reinsured was exhausted. Insure therefore billed No Pay for the full limit of its facultative certificate. No Pay did not pay, arguing that it should have benefited from the same 50% discount that Insure received. Insure demanded arbitration.

II. Appointment of No Pay's Arbitrator:

Following receipt of the arbitration demand, No Pay engaged counsel and began the process of securing a party-appointed arbitrator. No Pay's in-house and outside counsel called ARIAS•U.S. certified arbitrator, Hired Gun, to discuss the matter and his potential appointment. After clearing conflicts, No Pay's counsel described the facts and explained their belief that No Pay should benefit from the same discount that Insure secured through its settlement with Asbestos. After finishing his description of the facts, No Pay's counsel asked Hired: "Will you rule in our favor?" Hired responded, "based on what you have told me, I will certainly rule in your favor."

- **Applicable Canons:**

1. ARIAS•U.S. Code of Conduct ("ARIAS•U.S. Code") Canon II, Comment 2.

2. American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes ("AAA Code of Ethics") Canon I (D), and Canon X (A)(2).

III. Appointment of Insure's Arbitrator:

Insure's counsel also called a potential party-appointed arbitrator, Joe Paladin. In addition to describing the facts, he sent certain documents to Paladin, including a Settlement Memo from Insure's claims department to management. The Settlement Memo explained that Insure's settlement with Asbestos was based on the legal advice that Insure had a 50/50 chance of success on its number of occurrences defense. The memo also advises management that, "as always, we will allocate the loss using the rising bathtub method." In discovery, however, Insure withholds the document as privileged.

At the hearing, Insure's arbitrator, Paladin, references the Settlement Memo and suggests that there is no basis for No Pay's bad faith argument because Insure always uses the rising bathtub method. No Pay calls for Paladin's resignation. Paladin declines to voluntarily resign and No Pay asks the Panel to remove him.

- **Applicable Canons:**

1. ARIAS•U.S. Code Canon V, comment 3.

2. AAA Code of Ethics CANON I, comment H.

3. AAA Code of Ethics Canon X, Comment (B)(2).

IV. Appointment of the Umpire:

Once the two party-appointeds are in place, they schedule a call to discuss possible umpire candidates.

Ultimately, they narrow it down to two candidates. Umpire candidate #1 has been ARIAS•U.S. certified for 2 years. During those two years, she has been appointed as an arbitrator 5 times. Although she has never been appointed by either party, she has been appointed by Insure's law firm 3 times.

Umpire candidate #2 has worked in the industry for 40 years, both in-house and for law firms. He has never worked for either party. He is currently Of Counsel in a law firm that regularly represents insurers and reinsurers. One of the firm's partners currently represents No Pay. Candidate #2 works in different office from this partner, has never worked on the No Pay cases, and has no knowledge of them. However, a formal ethical wall is not currently in place.

After a coin toss, the Panel is formed with Umpire Candidate #2. Insure suggests the appointment is improper because, although he is on a salary, some of Candidate #2's compensation is necessarily derived from the firm's work for No Pay. Insure also objects because there is no formal ethical wall in place between him and the firm's work for

No Pay. Insure reserves the right to challenge the award based on umpire bias. Upon appointment, the Umpire immediately puts an ethical wall in place at his firm.

- **Applicable Canons:**

1. ARIAS•U.S. Code Canon I, Comment 4 (h) and (j).

2. ARIAS•U.S. Code Canon I, Comment 3(c).

V. Organizational Meeting/Motion to compel

At the organizational meeting, the Panel orders that: (1) ex parte communications as to any interim issue will terminate when the issue is submitted to the Panel for decision; and (2) the final cut off of ex parte communications will occur following the submission of the Pre-Hearing Reply Briefs.

No Pay indicates that it will seek vast discovery into all of Insure's litigation files relating to the Asbestos Litigation, including the file of Insure's coverage counsel, as well as any documents related to Insure's pre-settlement analysis and/or the basis for its settlement.

The parties and the panel agree to a briefing schedule for the motion to compel. Both parties communicate with their party-appointeds regarding the motion prior to submitting their briefs to the panel. The Panel orders production of the litigation record, but upholds the privilege of communications between Insure and its attorneys regarding the underlying litigation and the settlement. It also allows Insure to withhold the Settlement Memo that was sent to management describing the basis for the settlement.

Insure reaches out to its party-appointed, Paladin, to understand the rationale of the Panel's decision and also to understand how it affects the Panel's thinking on the merits. Paladin explains that the Panel felt that the facts of the underlying litigation were relevant to the basis for Insure's settlement and that No Pay was entitled to investigate whether that settlement was reasonable. However, he also explains that the Panel believed that the communications between Insure and its attorneys were privileged. No Pay learns of this discussion and reserves its right to move to vacate the award based on the conversation.

- **Applicable Canons:**

1. ARIAS•U.S. Code Canon V, Comments 4 and 6.

2. ARIAS•U.S. Code Canon VI, Comment 3.

3. AAA Code of Ethics Canon X, (C)(4)(b).

VI. Pre-hearing Briefs

Two weeks prior to the due date of the opening pre-hearing briefs, Insure's attorney sends a draft of Insure's pre-hearing brief to Paladin and asks him to comment on whether it should keep or abandon its second argument.

A few days later, Paladin sends back a heavily red-lined mark- up of the brief, providing comments on the entire brief and recommending that Insure retain its second argument, but also adding a third argument that was not in the original draft.

- **Applicable Canons:**

1. ARIAS•U.S. Code Canon V, Comment 6.

2. ARIAS•U.S. Code Canon II, Comment 2.

VII. Hearing

At the hearing, several witnesses are called to testify. Most witnesses are presented on direct and are cross examined. Each are also asked a few questions by each party appointed arbitrator and by the umpire. However, Hired Gun (No Pay's arbitrator) interrupts the questioning of the Insure witness who was responsible for billing the reinsurers. He proceeds with an aggressive cross examination which lasts 20 minutes. Insure objects and reserves its right to move to vacate the award based on arbitrator misconduct.

Before the hearing, the umpire reviews the brief, but assigns an associate to read and summarize the cases for him and to prepare a draft final award based on the associate's evaluation of which party should win. The umpire does not read the cases himself and relies entirely on his associate's summary of them. At the conclusion of the hearing and following Panel deliberations, the umpire removes the word "draft" from the award drafted by his associate and publishes it as the final award in the matter.

- **Applicable Canons:**

1. ARIAS•U.S. Code Canon VII, comments 4, 5.

2. AAA Code of Ethics Canon X, A(1).

3. ARIAS•U.S. Code Canon VIII, Comment 3.

November 13, 2015

ARIAS•U.S. Code of Conduct

This version of the Code of Conduct was revised and became effective as of January 1, 2014, for conduct taking place after that date. It is an integration, with significant updates and amendments, of the original Guidelines and the Additional Ethics Guidelines adopted by ARIAS in 2010. The date on the PDF version of the Code reflects subsequent amendments to the Code as approved by the Board.

INTRODUCTION

ARIAS·U.S. is a not-for-profit corporation organized principally as an educational society dedicated to promoting the integrity of the arbitration process in insurance and reinsurance disputes. Through seminars and publications, ARIAS·U.S. trains knowledgeable and reputable professionals for service as panel members in industry arbitrations. The ARIAS·U.S. Board of Directors certifies as arbitrators individual members who are qualified in accordance with criteria and procedures established by the Board.

The continued viability of arbitration to resolve industry disputes largely depends on the quality of the arbitrators, their understanding of complex issues, their experience, their good judgment and their personal and professional integrity. In order to properly serve the parties and the process, arbitrators must observe high standards of ethical conduct and must render decisions fairly. The provisions of the Code of Conduct should be construed to advance these objectives.

PURPOSE

The purpose of the Code of Conduct is to provide guidance to arbitrators in the conduct of insurance and reinsurance arbitrations in the United States, whether conducted by a single arbitrator or a panel of arbitrators, whether or not certified by ARIAS·U.S. and regardless of how appointed. Comments accompanying the Canons explain and illustrate the meaning and purpose of each Canon. These Canons are, however, not intended to override the agreement between the parties in respect to arbitration and do not displace applicable laws or arbitration procedures. Though these Canons set forth considerations and behavioral standards only for arbitrators, it is expected that the parties and their counsel will conform their own behavior to the Canons and will avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.

This version of the Code of Conduct was revised and became effective as of January 1, 2014, for conduct taking place after that date. It is an integration, with significant updates and amendments, of the original Guidelines and the Additional Ethics Guidelines adopted by ARIAS in 2010.

DEFINITIONS

1. Affiliate: an entity whose ultimate parent owns a majority of both the entity and the party to the arbitration and whose insurance and/or reinsurance disputes, as applicable, are managed by the same individuals that manage the party's insurance and/or reinsurance disputes;

2. Arbitrator: a person responsible to adjudicate a dispute by way of arbitration, including the umpire on a three (or more) person panel of arbitrators;

3. Party: the individual or entity that is named as the petitioner or respondent in an arbitration, as well as the affiliates of the named party;

4. Umpire: a person chosen by the party-appointed arbitrators, by an agreed-upon procedure, or by an independent institution to serve in a neutral capacity as chair of the panel.

Canon I

INTEGRITY: Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently.

Comments:

1. The foundation for broad industry support of arbitration is confidence in the fairness and competence of the arbitrators.

2. Arbitrators owe a duty to the parties, to the industry, and to themselves to be honest; to act in good faith; to be fair, diligent, and objective in dealing with the parties and counsel and in rendering their decisions, including procedural and interim decisions; and not to seek to advance their own interests at the expense of the parties. Arbitrators should act without being influenced by outside pressure, fear of criticism or self-interest.

3. The parties' confidence in the arbitrator's ability to render a just decision is influenced by many factors, which arbitrators must consider prior to their service. There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve:

a) where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings;

b) where the candidate does not believe that he or she can render a decision based on the evidence and legal arguments presented to all members of the panel;

c) where the candidate currently serves as a lawyer for one of the parties (where the candidate's law firm, but not the candidate, serves as lawyer for one of the parties the candidate may not serve as

an arbitrator unless the candidate derives no income from the firm's representation of the party and there is an ethical wall established between the candidate and the firm's work for the party);

d) where the candidate is nominated for the role of umpire and is currently a consultant or expert for one of the parties;

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

f) where the candidate sits as an umpire in one matter and the candidate is solicited to serve as a party-appointed arbitrator or expert in a new matter by a party to the matter where the candidate sits as an umpire.

4. Consistent with the arbitrator's obligation to render a just decision, before accepting an appointment as an arbitrator the candidate should consider whether any of the following factors would likely affect their judgment and, if so, should decline the appointment:

a) whether the candidate has a financial interest in a party;

b) whether the candidate currently serves in a non-neutral role on a panel involving a party and is now being proposed for an umpire role in an arbitration involving that party;

c) whether the candidate has previously served as a consultant (which term includes service on a mock or shadow panel) or expert for or against one of the parties;

d) whether the candidate has involvement in the contracts or claims at issue such that the candidate could reasonably be called as a fact witness;

e) whether the candidate has previously served as a lawyer for either party;

f) whether the candidate has previously had any significant professional, familial or personal relationships with any of the lawyers, fact witnesses or expert witnesses involved such that it would prompt a reasonable person to doubt whether the candidate could render a just decision;

g) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a party involved in the proposed matter;

h) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a law firm or third-party administrator or manager involved in the proposed matter;

i) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a party involved in the proposed matter;

j) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a law firm or third-party administrator or manager involved in the proposed matter; and

5. ***Relationship between comments 3 and 4.*** Comment 3 sets forth circumstances in which an arbitrator must refuse to serve. If none of those circumstances applies, comment 4 sets forth circumstances an arbitrator should nevertheless consider in deciding whether to serve. In some cases, comment 3 will "almost" apply – usually because the arbitrator has a relationship described in comment 3 with an entity that is related to a party to the current arbitration, but that is not strictly within the definition of "party." Thus, one of the circumstances set forth in comment 3 may apply
   (i) to an entity that is an affiliate of a party to the current arbitration, but that is not within the definition of "party," or
   (ii) to an entity having the same third-party administrator or manager as a party to the current arbitration.

   In such a case, the arbitrator should refuse to serve, in line with the general principle that in upholding the integrity of the arbitration process an arbitrator should not get too close to the edge on issues of ethics or process fairness. If, however, it is clear that the relationship between the entity with the "comment 3" relationship to the arbitrator and the party to the current arbitration is attenuated, and that, by reason of the attenuation, the reasons for the mandatory "do not serve" rules in comment 3 are not implicated, then the arbitrator may (but need not) choose to serve.

6. The parties to a proceeding in which an individual is sitting as an umpire or is being proposed as umpire may, by agreement reached without the involvement, knowledge, or participation of the umpire or candidate, waive any of the provisions of paragraphs 3 (c), (d), (e), or (f) above and 5. The umpire or candidate shall be informed of such agreement.

7. Consistent with the arbitrator's obligation to render a just decision, an arbitrator should consider whether accepting an appointment as a consultant or expert in a new matter by a party to the

arbitration where the person sits as an arbitrator would likely affect his or her judgment in the matter where he or she sits as an arbitrator.

Canon II

FAIRNESS: Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.

COMMENTS:

1. Persons contacted to serve as an arbitrator should ascertain before accepting an appointment the identities of the parties, including as appropriate and to the extent known, present and former affiliates, predecessors and successors; identities of counsel; identities of other arbitrators; identities of witnesses; general factual background; and the anticipated issues and positions of the parties.

2. Arbitrators should refrain from offering any assurances, or predictions, as to how they will decide the dispute and should refrain from stating a definitive position on any particular issue. Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract), they should avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions and the panel has fully deliberated on the issues. Arbitrators should advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration objectively. Party-appointed arbitrators are obligated to act in good faith and with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly.

3. Party-appointed arbitrators should not offer a commitment to dissent, or to work for a compromise in the event of a disagreement with the majority's proposed award. Party-appointed arbitrators may advise the party appointing them whether they are willing to render a reasoned decision if requested.

4. After accepting an appointment, arbitrators should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, that would likely affect their ability to render a just decision.

Canon III

COMPETENCE: Candidates for appointments as arbitrators should accurately represent their qualifications to serve.

Comments:

1. Candidates should provide up-to-date information regarding their relevant training, education and experience to the appointing party (or parties if nominated or selected to serve as the umpire) to ensure that their qualifications satisfy the reasonable expectations of the party or parties.

2. Individuals who serve on arbitration panels have a responsibility to be familiar with the practices and procedures customarily used in arbitration that promote confidence in the fairness and efficiency of the process as an accessible forum to resolve industry disputes.

Canon IV

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

COMMENTS:

1. Before accepting an arbitration appointment, candidates for appointment as arbitrators should make a diligent effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be arbitrators or potential witnesses. Such disclosures should include, where appropriate and known by a candidate, information related to the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer's existing or past financial or business relationship with the parties that others could reasonably believe would be likely to affect the candidate's judgment.

2. A candidate for appointment as arbitrator shall also disclose:

a) relevant positions taken in published works or in expert testimony;

b) the extent of previous appointments as an arbitrator by either party, either party's counsel or either party's third party administrator or manager; while it may be true in some circumstances that only the party technically appoints the arbitrator, the purpose of this rule is to require disclosure of the relationships between the candidate and the parties as well as the candidate and either parties' counsel or third party administrator or manager; such relationships that must be disclosed include appointments as an arbitrator where the party's counsel and/or the party's third party administrator

or manager acted as counsel or third party administrator or manager for a party making the appointment; and

c) any past or present involvement with the contracts or claims at issue.

3. No later than when arbitrators first meet or communicate with both parties, arbitrators should disclose the information in paragraphs 1 and 2 above to the entire panel and all parties. When confronted with a conflict between the duty to disclose and the obligation to preserve confidentiality, an arbitrator should attempt to reconcile the two objectives by providing the substance of the information requested without identifying details, if that can be done in a manner that does not breach confidentiality and is not misleading. An arbitrator who decides that it is necessary and appropriate to withhold certain information should notify the parties of the fact and the reason that information has been withheld.
4. It is conceivable that the conflict between the duty to disclose and some other obligation, such as a commitment to keep certain information confidential, may be irreconcilable. When an arbitrator is unable to meet the ethical obligations of disclosure because of other conflicting obligations, the arbitrator should withdraw from participating in the arbitration, or, alternatively, obtain the informed consent of both parties before accepting the assignment.
5. After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw and should not withdraw at his or her own instigation absent good reason, such as serious personal or family health issues. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator must do so. In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when one or more of the following circumstances exist.

a) when procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal;

b) if the arbitrator, after carefully considering the matter,- determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly; or

c) if required by the contract or law.

6. The duty to disclose all interests and relationships is a continuing obligation throughout the proceeding. If any previously undisclosed interests or relationships described in paragraphs 1 and 2 above are recalled or arise during the course of the arbitration, they should be disclosed immediately to all parties and the other arbitrators together with an explanation of why such disclosure was not made earlier.

Canon V

COMMUNICATION WITH THE PARTIES: Arbitrators, in communicating with the parties, should avoid impropriety or the appearance of impropriety.

Comments:

1. If an agreement between the parties or applicable arbitration rules establish the manner or content of communications among arbitrators and the parties, those procedures should be followed.

2. Party-appointed arbitrators may communicate with the party who is considering appointing them about their fees and, excepting those who by contract are required to be "neutral" or the equivalent, may also communicate about the merits of the case prior to acceptance of the appointment until the date determined for the cessation of ex parte communications.

3. A party-appointed arbitrator should not review any documents that the party appointing him or her is not willing to produce to the opposition. A party-appointed arbitrator should, once all members of the Panel are selected, disclose to the other members of the Panel and the parties all documents that they have examined relating to the proceeding. Party-appointed arbitrators may consult in confidence with the party who appointed them concerning the acceptability of persons under consideration for appointment as the umpire.

4. Except as provided above, party-appointed arbitrators may only communicate with a party concerning the dispute provided all parties agree to such communications or the Panel approves such communications, and then only to the extent and for the time period that is specifically agreed upon or ordered.

5. When party-appointed arbitrators communicate in writing with a party concerning any matter as to which communication is permitted, they are not required to send copies of any such written communication to any other party or arbitrator.

6. Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and (c) provide his or her impressions as to how an issue might be viewed by the Panel, but may not disclose the content or substance of communications or deliberations among the Panel members. An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.

7. Whenever the umpire communicates in writing with one party on subjects relating to the conduct of the arbitration or orders, the umpire should at the same time send a copy of the communication to

each other arbitrator and party. Whenever the umpire receives any written communication concerning the case from one party on subjects relating to the conduct of the arbitration that has not already been sent to every other party, the umpire should promptly forward the written communication to the other arbitrators and party.

8. Except as provided above or unless otherwise provided in applicable arbitration rules or in an agreement of the parties, the umpire should not discuss a case with a single arbitrator, party or counsel in the absence of the other arbitrator, party or counsel, except in one of the following circumstances:

a. Discussions may be had with a single arbitrator, party or counsel concerning ministerial matters such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the umpire should promptly inform the other arbitrator, party or counsel of the discussion and should not make any final determination concerning the matter discussed before giving each arbitrator, party or counsel an opportunity to express its views.

b. If all parties request or consent to it, such discussion may take place.

c. If a party fails to be present at a hearing after having been given due notice, the panel may discuss the case with any party or its counsel who is present and the arbitration may proceed.

Canon VI

CONFIDENTIALITY: Arbitrators should be faithful to the relationship of trust and confidentiality inherent in their position.

Comments:

1. Arbitrators are in a relationship of trust with the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain a personal advantage or advantage for others, or to affect adversely the interest of another.

2. Unless otherwise agreed by the parties, or required or allowed by applicable rules or law, arbitrators should keep confidential all matters relating to the arbitration proceedings and decision.

3. Arbitrators shall not inform anyone of an arbitration decision, whether interim or final, in advance of the time it is given to all parties, or assist a party in post-arbitral proceedings, except as is required by law. An arbitrator shall not disclose contents of the deliberations of the arbitrators or other communications among or between the arbitrators. Notwithstanding the previous sentence, an arbitrator may put such deliberations or communications on the record in the proceedings (whether as a dissent or in a communication to all parties and panel members) to the extent (but only to the

extent) reasonably necessary to expose serious wrongdoing on the part of one or more panel members, including actions that are contemplated by Section 10(a) of the Federal Arbitration Act.

Canon VII

ADVANCING THE ARBITRAL PROCESS: Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings, and written awards.

Comments:

1. When the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrators to comply with such procedures or rules unless the parties agree otherwise.

2. Individuals should only accept arbitration appointments if they are prepared to commit the time necessary to conduct the arbitration process promptly.

3. Arbitrators should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

4. Arbitrators should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage (and, if necessary, order) similar conduct of all participants in the proceedings.

5. Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them understand and assess the testimony; however, arbitrators should refrain from assuming an advocacy role and should avoid interrupting counsel’s examination unless clarification is essential at the time.

Canon VIII

JUST DECISIONS: Arbitrators should make decisions justly, exercising independent judgment and should not permit outside pressure to affect decisions.

Comments:

1. When an arbitrator's authority is derived from an agreement between the parties, arbitrators should neither exceed that authority nor do less than is required to exercise that authority completely.

2. Arbitrators should, after careful review, analysis and deliberation with the other members of the panel, fairly and justly decide all issues submitted for determination. Arbitrators should decide no other issues.

3. Arbitrators should not delegate the duty to decide to any other person. Arbitrators may, however, use a clerk or assistant to perform legal research or to assist in reviewing the record.

4. In the event that all parties agree upon a settlement of issues in dispute and request arbitrators to embody that agreement in an award, they may do so, but are not required to do so, unless satisfied with the propriety of the terms of settlement. Whenever arbitrators embody a settlement by the parties in an award, they should state in the award that it is based on an agreement of the parties.

Canon IX

ADVERTISING: Arbitrators shall be truthful in advertising their services and availability to accept arbitration appointments.

Comments:

1. It is inconsistent with the integrity of the arbitration process for persons to solicit a particular appointment for themselves. However, a person may indicate a general willingness to serve as an arbitrator.

2. Arbitrators shall make only accurate and truthful statements about their skills or qualifications. A prospective arbitrator shall not promise results.

3. In an advertisement or other communication to the public, an individual who is an ARIAS•U.S. certified arbitrator or umpire may use the phrase “ARIAS•U.S. Certified Arbitrator (or Umpire as the case may be)” or “certified by ARIAS•U.S. as an arbitrator (or umpire as the case may be)” or similar phraseology.

Canon X

FEES: Prospective arbitrators shall fully disclose and explain the basis of compensation, fees and charges to the appointing party or to both parties if chosen to serve as the umpire.

Comments:

1. Information about fees should be addressed when an appointment is being considered. The better practice is to confirm the fee arrangement in writing at the time an arbitration appointment is accepted.

2. Arbitrators shall not enter into a fee agreement that is contingent upon the outcome of the arbitration process. Arbitrators shall not give or receive any commission, rebate, or similar remuneration for referring a person for alternative dispute resolution services.

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The Code of Ethics for Arbitrators in Commercial Disputes

Effective March 1, 2004

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association® and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA®.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the **Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.**

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

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CANON I: An arbitrator should uphold the integrity and fairness of the arbitration process.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) any known direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) the nature and extent of any prior knowledge they may have of the dispute; and

(4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

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G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

CANON III: An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV: An arbitrator should conduct the proceedings fairly and diligently.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to Paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude *ex parte* requests for interim relief.

CANON V: An arbitrator should make decisions in a just, independent and deliberate manner.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

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CANON VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII: An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII: An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX: Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and

(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

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CANON X: Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations Under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations Under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and

(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations Under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;

(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);

(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;

(4) Canon X arbitrators may not at any time during the arbitration:

(a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;

(b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or

(c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;

(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

(7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations Under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations Under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations Under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

Expand your Professional Networks by Joining an ARIAS•U.S. Committee!

Volunteer for an ARIAS•U.S. committee and tap into a vibrant network, share your expertise, and help shape the organization's activities. ARIAS•U.S. committees are served by current dues-paying members of the association who express particular interest in or possess relevant skills attributable toward the objectives of the committee. Below is a list of current ARIAS•U.S. committees.

Arbitrator's Committee
Education Committee
Ethics Discussion Committee
Finance Committee
Forms & Procedures Committee
International Committee
Law Committee
Mediation Committee
Member Services Committee
Quarterly Editorial Board
Strategic Planning Committee
Technology Committee

Please note that volunteer spots are limited and the committee you apply for might not be available. Opportunities for involvement do open up throughout the year; email info@arias-us.org if you are a member and interested in joining a committee.

ARIAS•U.S. Quarterly
— Call for Article Submissions —

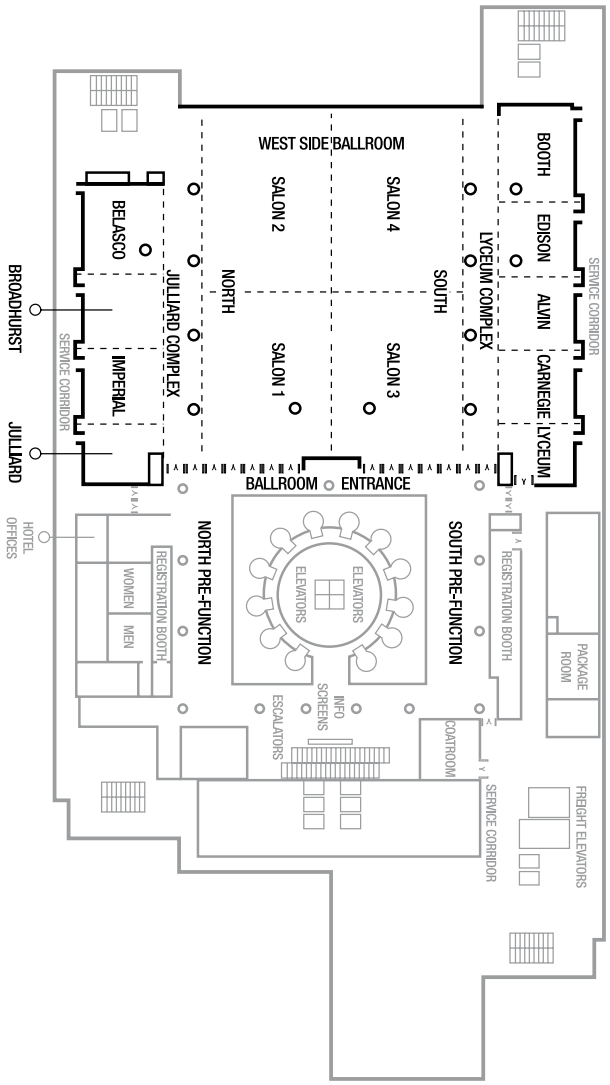
Interested in submitting an article for the next *Quarterly* publication?

ARIAS•U.S. welcomes articles written by its members addressing issues in the field of insurance and reinsurance arbitration and dispute resolution. The page limit for submissions is 5 single-spaced or 10 double-spaced pages.
The deadline for the next issue is November 15, 2016.

Want to earn MCLE Credits for your article submissions?

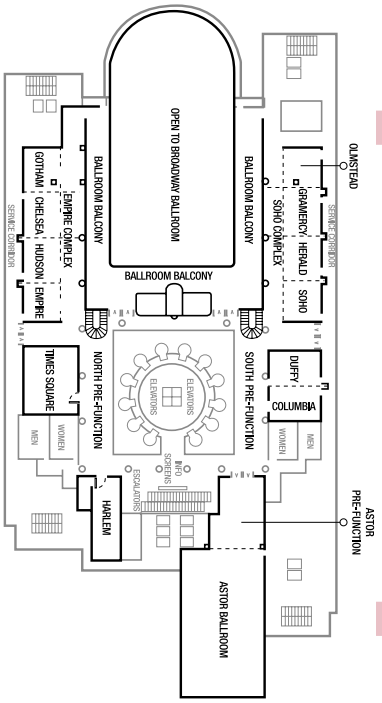
MCLE credit may be earned for legal-based writing directed to an attorney audience upon application to the New York CLE Board. Guidelines for obtaining MCLE credit for writing, as well as a Publication Credit Application, are available on the NY courts website at www.nycourts.gov/attorneys/cle/apppubcredit.pdf.

If you're interested in penning an article or have suggestions for topics you'd like to see addressed, please contact Tom Stillman at tomstillman@aol.com.



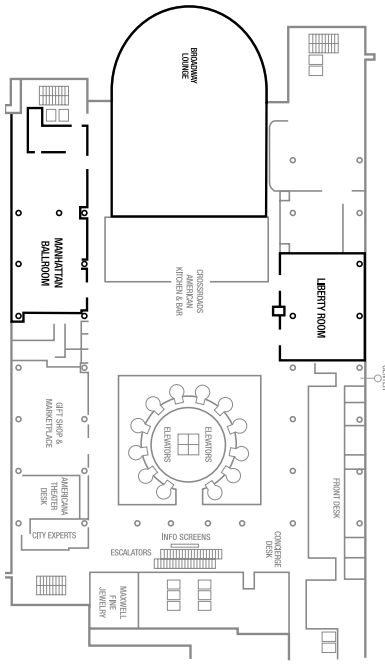
5th Floor

REGISTRATION
BREAKFAST
GENERAL SESSIONS
BREAKOUT SESSIONS
COMMITTEE MEETINGS



7th Floor

COCKTAIL
RECEPTION



8th Floor

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