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# Managing Discovery in Arbitration: Bob Dylan & the Asymmetry Principle

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## 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

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and expense. Typical examples of this are jurisdictional issues, choice-of-law questions, and separation of liability and damages."). Resolution of these "gatekeeper" issues may eliminate the need for discovery into other areas, provided that the Panel is both adept in these areas and declines to dismiss them as procedural technicalities aloof from the commercial dispute properly submitted to industry arbitrators.[5]

Bifurcation will be ineffective, however, if it results only in reordering events without eliminating issues subject to discovery. *E.g. Halliburton Energy Servs., Inc. v. NL Indus.*, 553 F.Supp.2d 733 (S.D. Tex. 2008) (confirming arbitration award where panel bifurcated proceedings into two phases relating to [1] a restructuring plan and [2] allocation of environmental remediation costs among various parties, and it permitted supplementation of the record as to the earlier contract phase during the second allocation phase); *Marathon Oil Co. v. Arco Alaska, Inc.*, 972 P.2d 595 (Alaska 1999) (affirming order declining to vacate arbitration award, where panel altered its decision concerning liability in later damages phase of arbitration). Arbitrators should be circumspect in their review of a party's request for (what amounts to) rehearing of an earlier phase of the case, even if the courts have generally declined to vacate in the wake of retrospective modifications. Otherwise, bifurcation amounts to temporarily re-arranging the deck chairs on a ship bound for all of the same ports — *i.e.*, there will be no net discovery saving.

## III. Summary Adjudication

Early decision on contract provisions, waiver, governing law, preclusion, or other issues can, in some cases, resolve selected substantive claims and defenses. Although often discussed, summary adjudication is used sparingly in reinsurance arbitration, despite the hospitable legal landscape supporting its employment. A number of courts have confirmed arbitration awards, after a panel has awarded summary judgment with respect to purely legal issues. *E.g., Sherrock Bros., Inc. v. DaimlerChrysler Motors Co.*, No. 06-4767, 260 Fed.Appx. 497, 2008 U.S. App. LEXIS 282 (3d Cir. Jan. 7, 2008). In *Sherrock Bros.*, for example, the Third Circuit Court of Appeals concluded that arbitrators did not violate Sections 10(a)(3) and (4) of the FAA when they determined—on summary process — that the doctrines of res judicata, collateral estoppel, and waiver precluded the subject claims. The Court said:

> [A]n arbitrator is empowered to grant *any* relief reasonably fitting and necessary to a final determination of the matter submitted to him, including legal and equitable relief . . .. . . We will decline to find the arbitrators' decision to grant summary judgment irrational where they concluded no disputed facts were present and the disposition was based on legal doctrines that were resolved on written submission.

Id. at **12-14 (emphasis in original). *See also Vento v. Quick & Reilly, Inc.*, No. 04-1413, 2005 U.S. App. LEXIS 6986 (10th Cir. Apr. 20, 2005) (affirming trial court's approval of panel's decision as a matter of law, and dismissing plaintiff's claim with prejudice); *Sheldon v. Vermonty,* 269 F.3d 1202, 1206 (10th Cir. 2001) (FAA § 10(a)(3) did not preclude an arbitrator from granting a motion to dismiss "facially deficient claims with prejudice").

Courts have, of course, also upheld arbitration awards granting summary judgment on grounds other than preclusion or waiver principles. *E.g., Hodgson v. IAP Readiness Mgmt. Support*, No. 5:lOcv86/RS/MD, 2010 U.S. Dist. LEXIS 106095 at *13 (N.D. Fla. Sept. 20, 2010) (refusing to vacate summary arbitration award with respect to the alleged breach of an employment contract, and concluding that "summary judgment is permissible in arbitration"); *Campbell v. American Family Life Assurance Co. of Columbus, Inc.*, 613 F. Supp.2d 1114 (D. Minn. 2009) (denying motion to vacate arbitration award, specifying that insurer did not violate sales coordinator agreement with its employees, for refusal to hear pertinent and material evidence under FAA § lo(a)(3), and concluding that "summary judgment is permissible in arbitration").[6]

There are a number of reasons why summary adjudication—which can be used to great effect in reinsurance disputes—has not been employed pervasively. First, although the FAA and most arbitration provisions do not require arbitrators to hold a full evidentiary hearing, the behavior of some panels evinces their concern at running afoul of the codified proscriptions against "exceed[ing] their

powers" and refusing to hear "evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3), 10(a)(4). As noted, these worries cannot—in the abstract—be dismissed as entirely fictional. *Supra* at n.6; *Chem-Met Co. v. Metaland Int'l. Inc.*, 1998 WL 35272368 at *4.[7]

On the other hand, it is important to observe that, absent a governing arbitration rule to the contrary, courts do not vacate awards solely because they emanate from summary process, and that (more broadly) vacatur of summary awards is anomalous. See *TIG Ins. Co. v. Global Int'l Reinsurance Co.*, 640 F.Supp.2d 519 (S.D.N.Y. 2009). In TIG, the federal trial court confirmed an arbitration award granting partial summary judgment in favor of a ceding company with respect to its reinsurer's fraud and bad faith claims. The court concluded that "[a]rbitrators. . . have great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings, and thus may proceed with only a summary hearing and with restricted inquiry into factual issues." *Id.*. at 523. *See also Brooks v. BDO Seidman, LLP*, No. 09-107884, 2011 N.Y. Misc. LEXIS 834 (N.Y. Sup. Ct. Feb. 22, 2011) (confirming arbitration award that rendered summary judgment for accounting firm in fee dispute with former client and rejecting argument that rendering summary judgment on the merits constituted arbitrator misconduct); RAA Manual for the Resolution of Reinsurance Disputes at 47 (2010) ("During the pre-hearing period, after review of the parties' briefs, the panel should consider whether a formal hearing is necessary. If a full and fair decision can be reached on the basis of the briefs, depositions, affidavits, and other documentary evidence, the panel should suggest that the parties proceed without a hearing."). Those cases that do memorialize vacatur of a summary award are often driven by unusual facts and practices not often employed by sophisticated reinsurance arbitrators in complex cases. In *Chem-Met*, for example, "the arbitrators admitted no documents into evidence," and entered judgment without a written opinion. *Chem-Met*, 1998 WL 35272368 at *2.

In general, "there is a trend towards greater efforts to reduce cost and delay in arbitration, and one can anticipate that summary dispositions will gain wider currency in the future. . . .There should be no doubts concerning a tribunal's authority (absent contrary agreement and subject to permitting the parties an opportunity to be heard) to make awards based on a dispositive motion." Born, *International Commercial Arbitration* at 1817 & n.417. In other words, in appropriate cases — and after ensuring that each party's right to present an essential quantum of evidence is safeguarded — reinsurance arbitrators can afford to employ summary adjudication with more zeal and less trepidation.

A second impediment derives from the principle that arbitration is a creature born of mutual consent, and there is a variety of reasons why one party may object to summary process. *E.g. Granite Rock Co. v. International Bhd. of Teamsters*, 130 S.Ct. 2847, 2857 (2010) ("arbitration is strictly a matter of consent"); *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468, 479 (1989) ("Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit... [T]hey may... specify by contract the rules under which that arbitration will be conducted."). For example, a party whose case turns on evidence extrinsic to the relevant contract might seek to avoid a process that arguably limits the scope of discovery and ostensibly leaves the panel to decide in a vacuum with only the relevant wording to guide it. A deft panel should, however, dig deeper. There is no reason why a svelte pre-summary adjudication discovery period cannot embrace all issues relevant to interpreting the relevant contract provision(s) — including any extrinsic evidence emanating from placing/renewal materials and the parties' course of dealing — and it may cost a fraction of the discovery expense required to support a one- to two-week evidentiary hearing.

Third, a party may be reluctant to commit to a potentially duplicative summary "process within a process," in the incipiency of an arbitration — particularly in light of the presumed reluctance of some arbitrators to issue a summary award.[8] In fact, delay is hard-wired into the arbitration process, which features (not a "notice pleading" regime, but) a "no-pleading" regime, followed by a potentially non-substantive organizational meeting at which each party may seek to avoid being tethered to substantive positions or procedural commitments. One solution is to select and reserve a date for a summary adjudication hearing at the organizational

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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 "[am 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).

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