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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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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 Secs., Inc. v. Dalton*, 929 F. Supp. 1411, 1417 (N.D. 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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