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Notes from a Quiet Corner: User Concerns About Reinsurance Arbitration – and Attendant Lessons for Selection of Dispute Resolution Forums and Methods

Jeffrey W. Stempel
University of Nevada, Las Vegas -- William S. Boyd School of Law

NOTES FROM A QUIET CORNER: USER CONCERNS ABOUT REINSURANCE ARBITRATION – AND ATTENDANT LESSONS FOR SELECTION OF DISPUTE RESOLUTION FORUMS AND METHODS

By
Jeffrey W. Stempel*©

I. INTRODUCTION

Issues of arbitrability have generated considerable case law and controversy in the United States in the nearly thirty-five years since the U.S. Supreme Court launched what I have termed the era of "new" and "mass" arbitration in *Southland v. Keating*.[1] Mass standardized arbitration imposed on workers (in everything from the tech industry to waitressing at Hooters or Waffle House) and customers (in credit card accounts, cellular phone accounts, etc.) spurred a flood of cases[2] and commentary, much of it critical due to

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* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Bill Boyd, Dan Hamilton, Doris Lee, Ted Lee, , and Ann McGinley as well as to David McClure for valuable research assistance. Thanks also to Tom Carbonneau, Chris French, Nancy Welsh, Chris Drahozal, Ed Sherman, Kristen Blankley, Susan Karamanian, Allen Blair, Oluwaseun Ajayi and other Symposium participants and special thanks to Stephanie Lapple and the *Yearbook* staff as well as to Daren Brodish and Penn State's IT experts for facilitating my participation in the program.

[1] *See* Southland v. Keating, 465 U.S. 1 (1984). I consider *Southland*-style arbitration to be different than its predecessors in that prior to *Southland*, the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (initially enacted in 1925 and taking effect in 1926) was for much of its history considered procedural. *See* Bernhardt v. Polygraphic Co., 350 U.S. 198, 211-12 (1956) (viewing Act as solely procedural and not controlling outside of federal court litigation as well as being frequently subject to limitations on its application to certain statutory claims such as securities and civil rights suits). *See also* Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990) (criticizing such judge-made exceptions to the scope of the Act). *Southland* declared the Act to be federal substantive law that, pursuant to the Supremacy Clause, made inapplicable state law with targeted special treatment of arbitration agreements such as the California law regarding franchise agreements. *Accord* Doctor's Associates v. Casarotto, 517 U.S. 681, 688 (1996) (extending this approach to strike down Montana law requiring that arbitration clauses in franchise agreements be sufficiently prominent).

This in turn prompted increased use of arbitration clauses beyond the realm of particular industries (e.g., shipping, commodities trading) in which they had traditionally been used, ushering in what I have termed "new" or "mass" arbitration through the use of mandatory arbitration clauses in standardized consumer contracts such as mobile phone and credit card arrangements, with vendors using a take-it-or-leave-it approach to the negotiability of the arbitration clauses. *See* Jeffrey W. Stempel, *Tainted Love: Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 829-77 (2012) (reviewing post-*Southland* U.S. Supreme Court jurisprudence and the rise and growth of new, mass arbitration); Jeffrey W. Stempel, *Mandating Minimum Fairness in Mass Arbitration*, 76 U. CINN. L. REV. 383, 393-404 (2008) (same); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007) (same).

[2] *See, e.g.*, Rent-A-Center West v. Jackson, 558 U.S. 1142 (2010) (enforcing arbitration clause in rental equipment contract); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (enforcing arbitration clause in restaurant's credit card use contract); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 357 (2011) (enforcing prohibition on class action claims in mobile phone contract); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996)(enforcing arbitration clause contained in packaging of

the perceived lack of sophistication and bargaining power of those upon whom arbitration (of a type chosen by the employer or vender) is imposed.[3] Commercial arbitration, however, appears to have continued to function much as it did at the time of the enactment of the Federal Arbitration Act, the New York Convention on International Arbitration, and *Southland*.[4]

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software disc). *But see* EEOC v. Waffle House, Inc., 534 U.S. 279, 297-298 (2002) (permitting government agency to take enforcement action against a diner chain on behalf of employees without being bound by arbitration clauses in employee documents); Hooters of America, Inc. v. Phillips, 173 F.3d 933, 941 (4th Cir. 1999) (refusing to enforce arbitration clause in bar & grill employment agreement on ground of asymmetry and unfairness of the clause); Klocek v. Gateway, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (refusing to enforce arbitration clause in box in which personal computer was shipped).

[3] *See, e.g.*, Stempel, *Tainted Love*, *supra* note 1; *Mandating Minimum Fairness*, *supra* note 1; *Kangaroo Courts*, *supra* note 1; Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17 (2003); Jean R. Sternlight, *Panaca or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); 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(1997). *But see* Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002) (defending *Southland* analysis, viewing legislative history as supporting view of the Act as substantive law, and *Southland*'s impact on the law and dispute resolution).

[4] *See* The Federal Arbitration Act, 9 U.S.C §§ 1-16, which was the product of extensive lobbying by the business community, particularly international commercial business centered in New York, that wished to overturn judicial reluctance to enforce pre-dispute arbitration agreements in commercial contracts. *See* Stempel, *Pitfalls of Public Policy*, *supra* note 1, at 275-77 (reviewing background and legislative history of the Act); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1383-1421 (1991) (same). These commercial actors preferred arbitration because it was faster and cheaper than litigation and allowed decisions to be made according to industry custom and practice and rough justice rather than strict application of contract law, which was then quite formalistic. The fear of the business community was that parties who were shirking on their contractual commitments would not abide by arbitration clauses and thus delay reckoning on their accounts if the arbitration agreements were not specifically enforced by courts. Similar incentives motivated the business community's support for the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the "New York Convention" which provides for similar enforcement of arbitration agreements in international contracts.

Since passage of the Act, and since *Southland* ushered in the new era of more aggressive enforcement of commercial arbitration clauses (or, more specifically, arbitration clauses contained in commercial arbitration agreements), there has been little or no complaint by the business community, save for the type of concern regarding increased delay and expense and some concerns about whether the arbitration decisions are sufficiently accurate. Certainly, there has been little complaint by business (at least large business) that arbitration has been forced down its throat. By contrast, the new mass arbitration has attracted significant scholarly and political criticism. *See* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 491-93 (2011) (reviewing proposed legislation and other political responses against new mass arbitration); Mike Sacks, *Arbitration Kickback: Supreme Court's Anti-Consumer Rulings Trigger Democratic Bills*, HUFF. POST, (Oct. 20, 2011), http://www.huffingtonpost.com2011/10/20/arbitration-supreme-court-decisions-democratic-bills_n_1022207.html. More recently, the Consumer Financial Protection Bureau established during the Obama Administration has proposed rules limiting arbitration. Although the Trump Administration has announced plans to curtail the activities of the Bureau or perhaps even attempt its abolition, the political climate remains one in which the new mass arbitration is controversial, usually criticized by liberals and Democrats while being defended by pro-business conservatives (as distinguished

Commercial arbitration is, after all, the type of arbitration Congress had in mind when passing the Act: merchants within the same business community taking their disputes before an informal (at least more informal than a court) tribunal where arbitrators from the industry would decide based in large part on the custom, practice, and general norms of the industry. Lisa Bernstein's examination of arbitration in the diamond trade is perhaps the classic example,[5] but similar circumstance appear to attend shipping, commodity sales (of many types), and disputes between insurers.[6] This sort of "traditional" arbitration has, of course, become less traditional since the time the Act was enacted and in particular has probably become more litigation-like due to increased disputing, higher stakes, and greater investment of legal resources by the disputants.

But commercial arbitration is still a far cry from consumer/employment arbitration and should present fewer concerns than the new mass arbitration, both in theory and in practice. This perception seems to be correct. One does not hear big firm lawyers or their commercial clients complain much about arbitration while the enforceability of mass consumer and employment arbitration clauses continues to create controversy and has spurred (largely unsuccessful) attempts at government regulation. Nonetheless, the lower visibility and fewer sparks surrounding more traditional commercial arbitration does not mean an absence of concern by its participants.

Reinsurance arbitration provides a window into these issues and should prompt some rethinking about planning for dispute resolution by commercial actors and their counsel. Reinsurance, discussed in Part I below, is insurance purchased by insurers (or perhaps by self-insurers looking to spread the risk they have taken on). When a dispute over coverage of a claim arises, the disputants are, by definition, experts in the field and comparative sophisticates who traditionally include arbitration clauses in their contracts for all the usual reasons: confidentiality; streamlined disputing; avoidance of lay juries; reduced odds of punitive damages; and the ability to present the dispute to arbitrators familiar with the industry.

But as discussed in Part II below, even in this area of seemingly idea conditions for commercial arbitration, complaints have emerged. Seasoned veterans of the reinsurance market sometimes talk wistfully of figurative "good old days" when arbitrations were perceived to work better. In spite of the traditional reverence for pragmatic dispute resolution according to custom and practice, consideration is being given to use of a model code of reinsurance law as one means of obtaining more consistent and satisfying outcomes

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from populist conservatives) and Republicans, at least sufficiently to prevent passage of proposed legislation curtailing the Supreme Court's line of pro-arbitration cases.

[5] *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

[6] Arbitration clauses are common in shipping contracts and commodities contracts as well as the insurance and reinsurance contracts discussed in this article. In addition, arbitration provisions are common in collective bargaining agreements. However, labor arbitration differs significantly from commercial arbitration and is beyond the scope of this article even though the Supreme Court's labor arbitration decisions have of course impacted arbitrability doctrine. *See, e.g.*, Linda Hirschman, *The Second Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985) (discussing Supreme Court decisions providing for more aggressive enforcement of labor arbitration clauses as well as commercial arbitration clauses).

in reinsurance disputes. However, the fledgling model code – the *Principles of Reinsurance Contract Law* (hereinafter the "*Principles*" or the "PRICL") as currently being discussed and drafted by the Project Group assembled for the task, is focused more on substantive rules rather than procedural means of resolving dispute.[7] The efficacy of even the soundest set of *Principles* may be limited if the industry continues to select dispute resolution methods it finds suboptimal.

As part of an effort to determine the extent of satisfaction or dissatisfaction with reinsurance arbitration, I communicated with a number of persons involved with reinsurance, many of them members of the PRICL Project Group, of which I am also a member. All asked (insisted, really) that their identities be confidential and adequately protected in this comment but all gave permission for use of the substance of their statements to me in this commentary. This included conversations with roughly a dozen experts with more than 200 years of collective experience regarding the reinsurance industry.[8]

I am, of course, not purporting to present what I have learned from these exchanges as a rigorously quantitative assessment in the manner of a customer survey or opinion poll. Rather, it is more of a focus group that was composed of industry experts rather than average citizens. And although militant statisticians who are persuaded only by large samples may grimace, I insist that such research is empirical (i.e., fact-based) even if it is not a statistical presentation based on large numbers. Just as focus groups have become as or more important than polling in America politics, deeper discussions and observations can be more helpful than simply counting case outcomes or obtaining yes/no opinions, particularly if the discussions are with experts.

To be sure, the impressions of persons in the reinsurance industry have an element of subjectivity and are based on perceptions that may differ from reality (if one could determine reality with certainty). But to a large degree (in business, politics, law, and life), perception is reality and perception is what drives behavior. Consequently, I find the assessment of industry sources informative and well worth considering in both evaluating the current state of reinsurance arbitration and suggesting some different perspectives on

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[7] The *Principles* are a project supported by the governments of Austria, Germany and Switzerland and operated by a steering committee composed of insurance professors at the Universities of Vienna (Prof. Martin Schauer), Frankfurt (Prof. Manfred Wandt), and Zurich (Professors Helmut Heiss and Anton Schnyder) in collaboration with a Project Group composed of other professors and (perhaps most importantly) insurance and reinsurance executives and their counsel including the five largest global reinsurers (Munich Re, Swiss Re, Hanover Re, SCOR and Lloyd's) as well as four of the six largest global insures (AIG, AXA, Zurich and Generali). The group began work in 2015 in drafting the *Principles* and hopes to have a completed code available for adoption perhaps as early as 2019.

[8] In the interests of citation efficiency and saving *Yearbook* space as well as protecting the identities of my sources, this commentary will not be making specific citations to specific interviews, conversations, or email exchanges with the sources. Although to some extent, the information has been gathered over years of my informal interaction with persons in the insurance and reinsurance industry as part of my teaching and scholarship, the most particularized exchanges focused on obtaining information for this Symposium and commentary took place during Fall 2016 and early 2017 and involves a number of my colleagues in the *Principles* Project Group as well as other insurance and reinsurance sources. I am grateful to the *Yearbook* for its cooperation with this informal treatment of this information in order to facilitate discussion and preserve confidences. As discussed in text, I am treating this investigation more in the nature of a focus group or investigative newspaper article than as a survey or quantitative empirical project.

dispute resolution in this field of commerce.

What I found particularly interesting was the consistency of the views expressed. In a given case reinsurers and reinsureds might clash regarding the result and the manner in which a particular dispute was handled. But regarding reinsurance arbitration as a whole, industry insiders appear to hold a consistent view concerning the favorable and unfavorable attributes of the current arbitration environment.

II. REINSURANCE: A LOW PROFILE BUT IMPORTANT INDUSTRY

My insurance casebook authors and I have referred to insurance the "Rodney Dangerfield of law" in that, like the famous (at least to persons of my age) self-deprecating comedian, insurance tends to "get no respect," at least compared to more gripping (at least to most people) areas such as constitutional law, civil rights, discrimination, and (of course) dispute resolution and the enforceability of pre-dispute arbitration agreements.[9]

But insurance is big business. If insurance were a nation, it would have the third largest economy in the world.[10] However, insurance, for the most part, remains in the shadows, save perhaps for automobile insurance which every American driver must purchase to license a car. For example, it is well known that Warren Buffett is one of the world's richest persons and his company Berkshire Hathaway, with its roughly $250,000 per share stock price and holdings like Dairy Queen, is frequently mentioned in the news media. But it is seldom prominently noted that Berkshire is primarily an insurance and reinsurance company.[11]

And if insurance is seen as obscure and dry, reinsurance is its stuffy older brother. But reinsurance is, if anything, even bigger business than insurance in terms of both dollars (or euros or other currency) as well as in terms of impact. To a large degree, the placement of insurance (and hence coverage of risks that facilitates modern economies) hinges on the availability of reinsurance, which is why reinsurance has been labeled (accurately, in my view) a "silent regulator."[12] Consequently, the operation of reinsurance is an important segment of world commerce.

But what exactly is reinsurance? Most simply, it is insurance purchased by insurers. Insurance can be defined as the incurring of a small but certain loss (premium payment) in

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[9] *See* JEFFREY W. STEMPEL, PETER S. SWISHER & ERIK S. KNUTSEN, PRINCIPLES OF INSURANCE LAW 1 (4th ed. 2011).

[10] RICHARD ERICHSON ET AL., INSURANCE AS GOVERNANCE 4 (2004).

[11] *See* Annual Letter from Warren Buffett, Chairman of the Board, to Shareholders of Berkshire Hathaway, Inc. (Feb. 24, 2017) (on file with Berkshire Hathaway, Inc.) (describing the company's operations and giving particular credit for its success to premium dollars received for investment through holdings such as National Indemnity Company and National Fire and Marine Insurance Company, both acquired by Berkshire in the 1960s, as well as to insurance holdings like GEICO and reinsurance components of Berkshire such as General Reinsurance).

[12] *See* Aviva Abrahamson, *Reinsurance: The Silent Regulator?*, 15 CONN. INS. L.J. 345, 375-406 (2009) (noting degree to which availability of reinsurance shapes insurance policy terms and availability of insurance, which in turn has substantial impact on commercial activity and world economy generally).

return for a contractual promise of protection from a much larger but contingent loss. The very nature of insurance is the transfer of risk from the policyholder to the insurer, who in turn is paid to take on the risk (through premium payments) and then pools and spreads the risks so that they are sufficiently manageable, with the insurer unlikely to be wiped out be a spate of bad luck.[13]

For example, a property insurer sells policies to a sufficient large group of policyholders that have uncorrelated risk (e.g., the buildings insured are dispersed throughout the country and not all located near the Gulf Coast or on a fault line), making it unlikely that a single hurricane or other catastrophe will affect all policyholders. In the meantime, the insurer invests the premiums collected and earns income from the outset of the contract even though claims from a policyholder will either never come or come later.

It's a good business model for those who know what they're doing. Warren Buffett again provides a good example, crediting the premium dollars collected by Berkshire-owned insurers for much of company's returns over the past 40 years.[14] But even with sound underwriting, efficient operations, and a diverse pool of risks, insurers often want to spread the risk still further and are willing to pay reinsurers to do so. Having reinsurance in place also increases the underwriting capacity of insurers, and permits them do additional business without running afoul of risk-based capital requirements and other regulations.

When an insurer buys reinsurance, it is a "cedant," because it cedes risk to the reinsurer. For example, an insurer may pay the reinsurer a set premium in return for agreeing to cover any losses up to a set amount (and "excess of loss" reinsurance contract) or the insurer may cede a both percentage of its premiums and a percentage of the risk to the reinsurer (a "quota-share" reinsurance contract). Reinsurance contracts specific to a particular risk are generally referred to as "facultative certificates" while contracts covering a larger block of the insurer's business are called reinsurance "treaties" and generally contain provisions establishing automatic acceptance of risks within the scope of the treaty and other provisions establishing an ongoing system between the contracting parties. Treaties generally having a longer duration as well as a wider scope.[15]

For example, Complete Security Insurance Company may be interested in selling general liability insurance policies to widget manufacturers and good at doing it but worried about what may happen if Acme Widgets is hit with a rash of product liability litigation. To protect itself, Complete Security purchases reinsurance from SuperSolvent Re. SuperSolvent may in turn spread the risk further by buying its own insurance, which is called "retrocession," from another reinsurer or "retrocessionaire" in terms of this second contract.[16] In some cases of larger or concerning risks, there may even be additional

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[13] *See* JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL & KNUTSEN ON INSURANCE COVERAGE §§ 17.01-17.07 (4th ed. 2016) (defining and describing reinsurance); STEMPEL, SWISHER & KNUTSEN, *supra* note 9, at §§ 12.01-12.03 (discussing excess, umbrella and reinsurance and its distinctions for ordinary primary insurance).

[14] *See* Annual Letter from Warren Buffett, *supra* note 11.

[15] *See* STEMPEL & KNUTSEN, *supra* note 13, at §§ 17.01-17.07.

[16] *See* STEMPEL & KNUTSEN, *supra* note 13, at §§ 17.01-17.07.

purchases of reinsurance.

As is probably apparent from this description, reinsurance is not an activity for the faint of heart or the uninitiated. While some insurers may be small, local, or affinity based (e.g,. the mythical Amiable Brotherhood of Duck Call Carvers Mutual Protective Society), most insurers are reasonably large and sophisticated. So are most reinsurers. Although there are large U.S.-based reinsurers (Berkshire/Buffett companies once again), London (through Lloyd's of London syndicates and London Market companies) and Central Europe (Zurich, Munich, Vienna and nearby areas) are, along with New York, the most prominent reinsurance centers.[17]

The international and global nature of reinsurance has tended to foster a long-standing practice of arbitrating reinsurance coverage disputes. Because a reinsurance certificate (and whatever retrocession may also be on the risk) often involves companies from different countries, the type and location of the dispute resolution forum is important. Neither reinsurer nor reinsured wants to argue a coverage dispute in a hostile forum. U.S. courts are particularly feared by some in the industry because of the use of lay juries (thought to be either too unsophisticated or too antagonistic toward large business and foreign entities) and because punitive damages, although rare, are more common in the U.S than in other jurisdictions.

The type and location of the forum may be even more important than the law applicable to the dispute.[18] As noted earlier, insurance policies and reinsurance certificates or treaties are contracts—and contract law is probably the area of law with the least variance among countries. For example, although U.S. contract law is generally less formalist and text-driven than English contract law, the two are not that different. By contrast, U.S. and English law can differ dramatically regarding tort liability standards, civil rights, discrimination, securities, banking, or intellectual property.

The most common issues in arbitration appear to concern the adequacy of a prospective reinsured's disclosure of risks to the prospective reinsurer, determination of the boundaries and number of covered "events" or "occurrences," and the fairness of a reinsured's claims handling and characterization, particularly allocation of claims payments to particular reinsurance contracts, policy years, or categories of loss.

In some ways, the reinsurance business model is even more attractive and potentially lucrative than the insurance business model in that the reinsurer is able to obtain many of the same benefits (e.g., receipt of premium dollars available for investment years before claims are paid or even made, payment in less valuable currency due to inflation, broad risk spreading that lowers the risk of unexpected underwriting losses) without having to invest the same proportion of its resources in sales, application processing, underwriting assessment, claims administration, and defense of underlying claims. All that work—and the higher overhead that comes with it—is done by the insurer.

However, this reinsurer advantage is also a potential detriment in that it forces the

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[17] Because of the prevalence of arbitration for resolving reinsurance disputes, there are comparatively few reported judicial opinions concerning reinsurance, with most reported cases concerning reinsurance involve New York or English law.

[18] As one of my reinsurance sources put it bluntly but memorably, "we might accept Russian law, but Russian courts? Never." Contracting parties often forget, however, that even the best body of law is only as good as the tribunal applying it.

reinsurer to rely on the insurer's judgment regarding acceptance, pricing, and handling of risks and claims. The insurer has a pronounced informational advantage over the reinsurer that in turn makes the reinsurer very interested in knowing all pertinent information about the risks for which the ceding insurer is seeking reinsurance.

This information asymmetry also exists between prospective policyholders and insurers and is typically addressed by front line primary insurers in their use of an application form that requires the applicant to answer an extensive series of questions. Should the answer to any of these questions be incorrect and material to the risk, the insurer may rescind the policy and avoid coverage.[19] Nothing prevents reinsurers from using the same interrogation-like approach to their underwriting, but this both runs against tradition (reinsurance as something of a "handshake" transaction within a reasonably cohesive business community) and runs into practical problems.

The speed and fluidity of reinsurance placement makes extensive use of questionnaires unwieldy (and independent examination nearly impossible), as does the broader scope of reinsurance, which even for more targeted facultative risks normally encompasses a wider variety of risks than even the most comprehensive of insurance policy packages sold to a single business. For treaty reinsurance, the breadth is even larger and in addition, the nature of treaty reinsurance is that the reinsurer agrees in advance to accept risk falling within the treaty upon the insurer's tendering of the risk into the pool of the treaty. There is no realistic opportunity for reinsurers to police this process prior to a risk being placed in the treaty pool.

As a result, U.S. law has historically imposed in prospective reinsureds a higher standard of conduct than that which is imposed on prospective policyholders, who are in essence only required to answer truthfully questions asked by a prospective insurer. There is no duty of the prospective policyholder to volunteer information that may be relevant to the risk (although intentional concealment may support a rescission defense). The prospective reinsured, however, is required to disclose to the prospective reinsurer all information it possesses that is material to the risk.

This has been the prevailing view since the roughly 250 years since Lord Mansfield's famous decision in *Carter v. Boehm*[20] and is commonly referred to as the duty of "utmost good faith."[21] It, of course, also imposes on the prospective reinsured a significant undertaking. The prospect of non-compliance by a reinsurer experiencing "sticker shock" when facing a demand for payment from higher-than-expected claims volume and costs is likewise a burden on a prospective reinsured. Issues regarding the adequacy of disclosure appear to be the most common grounds for dispute between

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[19] *See* STEMPEL & KNUTSEN, *supra* note 13, at §§ 4.01-4.11 (discussing and describing the insurance application doctrine and the availability of rescission as an insurer defense if questions material to the risk are not accurately answered by the applicant/prospective policyholder or by policyholders seeking to renew coverage).

[20] *See* Carter v. Boehm [1766] 3 Burr. 1905, 97 Eng. Rep. 1162. The case has attracted widespread attention over the years and remains despite its age the case most commonly cited regarding the duties owed during the reinsurance contracting process.

[21] *See* STEMPEL & KNUTSEN, *supra* note 13, at §§ 17.01-17.07; STEMPEL, SWISHER & KNUTSEN, *supra* note 9, at § 17.03; *see, e.g.*, Reliastar Life Ins. Co. v. IOA Re, 303 F.3d 874 (8th Cir. 2002) (applying Minnesota law) (summarizing and applying the doctrine).

reinsured and reinsurer.

The heightened duties imposed on a reinsured also extend to the claims process and the characterization of claims. For example, a reinsured would not be acting in good faith if it immediately paid policy limits on clearly frivolous claims subject to 100 percent reinsurance coverage just so that the insurer could avoid paying the costs of defending the claims.

The nature of the reinsurance bargain is that the reinsurer can reasonably expect the insurer with a duty to defend to actually defend when this is warranted and to spend some of the reinsured's money vanquishing weak claims so that they do not result in unjustified payments for which the reinsurer is ultimately liable. The issue becomes even more complex when claims are colorable but not necessarily sure winners. Should a reinsured have fought harder and driven a better settlement bargain? Did it overpay on the claim with good generous a settlement?

Conversely, if defense costs are within the scope of reinsurance, a reinsured may arguably act unfairly toward the reinsurer by unnecessarily running up disputing costs on the underlying claim when prompt settlement would have resulted in lower net payment. The "follow-the-fortunes" and "follow-the-settlements" doctrines generally protect reinsureds by forbidding the reinsurer from second-guessing the conduct of reinsureds so long as the conduct was reasonable[22] – but this can lead to disputes about the reasonableness of a reinsured's decision to defend or settle quickly or only after protracted defense.

Similarly, when a reinsured pays a claim, it must also characterize and classify the claim by type of claim and policy year. This, in turn, has implications for the respective obligations of reinsurers connected to the risks. It would fall below the required good faith standard if, for example, a reinsured took a batch of expensive claims clearly most connected to Year X and labeled them Year Y claims in order to obtain greater reinsurance than would otherwise be available had the claims been assigned to Year X.

Relatedly, reinsurance coverage is generally linked to particular "occurrences" or "events," the defining of which is not always clear or easy. For example, are 200 lawsuits involving a single allegedly defective prescription drug one event/occurrence or are there 200 events or occurrences? The answer can result in dramatically larger or smaller reinsurer liability to the reinsured. Because answering the question is difficult and the law often unclear, this issue provides another frequent source of disputes between reinsurer and reinsured.[23]

Although the issues discussed above appear to provide the bulk of reinsurance

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[22] *See* STEMPEL & KNUTSEN, *supra* note 13, at §§ 17.01-17.07; *see, e.g.*, Unigard Security Ins. Co. v. North River Ins. Co., 4 F.3d 1049 (2d Cir. 1993) (applying New York law and follow-the-fortunes doctrine). In the United States, the follow-the-fortunes and the follow-the-settlements doctrines are generally treated as synonymous but in England and Europe, the former connotes binding the reinsurer to judicial and economic results incurred by the reinsured while the latter connotes giving deference to the reinsured's settlement decisions and restricting the reinsurer's ability to second-guess settlements made in underlying claims so long as the settlements were within the range of reasonable and were not the product of fraud or collusion.

[23] *See* STEMPEL & KNUTSEN, *supra* note 13, at §§ 17.01-17.07 (discussing judicial determinations regarding the number of occurrences and inconsistency in the case law); Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Loss*, 61 ALA. L. REV. 957, 957 (2010) (reviewing concept of determination of number of occurrences, conflicting case law, and proposing simplified approach).

coverage controversy, there are of course many others presenting potential for contentious arbitrations. For example, in a case arising out of the 9/11 World Trade Center attacks, the parties disagreed about whether rescue worker claims of injury from airborne particles were sufficiently "caused" by the clean-up efforts to fall within the scope of the reinsurance at issue.[24]

III. REINSURANCE ARBITRATION CONCERNS

Perhaps unsurprisingly, arbitration has traditionally been the default form of dispute resolution for reinsurance. And, as noted above, the participants are sophisticates with some relative leverage and bargaining power. The current conventional wisdom is that ceding insurance companies have more leverage because reinsurers are hungry for business and to some extent dependent upon the insurers (who have the sales staff and underwriting infrastructure) to give it to them. But one nonetheless does not see take-it-or-leave-it contracts imposed upon reinsurers in the manner one finds for consumers looking to open a mobile phone account, a checking account, or get on a ski lift.

There is another leveling factor at work: the largest insurers are also reinsurers. Although particular divisions of an organization may be devoted to their respective tasks, the organizations themselves have an incentive to seek an even-handed tribunal for resolving disputes rather than one that will consistently favor one side or another because the organization will be an insurer seeking coverage one day and a reinsurer resisting coverage the next.

One would thus expect reinsurance arbitration to be something of a dispute resolution Nirvana. And perhaps it is relative to the complaints one hears regarding litigation and certain areas of mass arbitration. But there nonetheless appears to be a consistent chorus of concern and even criticism from industry veterans regarding: delay; expense; arbitrator expertise; arbitrator neutrality; and the increasingly litigation-like aspects of arbitration.

To a degree, these complaints might be regarded as the baseline degree of dissatisfaction that accompanies any activity in an imperfect world. Commuters may chronically complain of slow traffic on the way to work but would they really prefer a grid of eight-lane highways cutting up their neighborhoods? But the concerns consistently voiced in my de facto focus group of reinsurers, reinsureds, and counsel for both types of entities is almost certainly more than mere grumbling.

Regarding delay, the 9/11 reinsurance coverage matter noted above provides an example. Efforts to locate survivors and remediate the Trade Center site of course began immediately; workers began complaining of respiratory and other problems rather shortly thereafter, with informal claims beginning within a year or two. Disagreement arose between the reinsureds and reinsurers within a few years thereafter. Arbitration commenced but an award was not rendered until December 2015. Litigation ensued, seeking to confirm (the reinsured position) or vacate (the reinsurer position), with a ruling

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[24] *See* Simmonds v. Gammell, [2016] EWHC 2515 (Comm) (Queen's Bench Commercial Court, Oct. 10, 2016); *see also* STEMPEL & KNUTSEN, *supra* note 13, at Ch. 6 (regarding causation); Peter Nash Swisher, *Insurance Causation Issues: The Legacy of* Bird v. St. Paul Fire & Marine Ins. Co., 2 NEV. L.J. 351, 384 (2002).

rendered in October 2016—fifteen years after the initiation of the activities leading to the claim.[25] Although traditional litigation may not have been much faster in view of the size and stakes of the matter, the elongated path to resolution in this arbitrated matter undermines the traditional argument that arbitration is faster and cheaper than litigation. And this episode is not all that rare.

Regarding expense, the increased adversarialism and formality of arbitration has undoubtedly raised costs and, if industry insiders are to be believed, not necessarily improved the quality of outcomes. Quality aside, there is no denying that a contested reinsurance arbitration is expensive, for reasons addressed below. Because of the need to pay arbitrators and secure a forum location rather than free-ride on a government's provision of judges, courtrooms, and judicial staff, arbitration may in fact be more expensive than litigation. The view of those familiar with the process is that a contested reinsurance arbitration will typically require $2 million or more in disputing expenditures, a figure that rivals or exceeds the amounts spent for complex civil litigation in the United States and other industrial nations.[26]

To a degree, the concerns about delay, expense, and logistical burden stem from a common cause. The increasing stakes of reinsurance disputes and the expansion of the industry has in the view of many moved the industry from its traditional community of shared norms to one in which disputes are more frequent and the parties less willing or able to resolve controversy informally in order to get-along and go-along. Although the insurers and reinsurers may be "repeat players"[27] who are constantly working in the field, they may

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[25] *See* Simmonds v. Gammel, Case No. CL-2016-000062 [2016] EWHC 2515 (Comm) (Queen's Bench Commercial Court, Oct. 10, 2016). The substantive dispute in the case was whether the workers compensation and respiratory injury claims (roughly 10,000 in number) of injured rescue and clean-up workers were sufficiently causally linked to the 9/11 terrorism to constitute a single "event" as required by the reinsurance contract at issue. The arbitrators, in a 2-1 split decision, determined there was sufficient causality, finding in favor of the reinsureds, with the court affirming.

Reinsurers not involved in the case appear to regard the arbitration decision as incorrect but acknowledge that the court decision is probably correct in confirming the award in light of the deferential standard of review accorded arbitration. They have also cited this case as an example of their concern that judicial unwillingness to overturn an arbitration decision becomes viewed as endorsing the arbitration decision as completely correct legal analysis to be applied in subsequent disputes.

[26] For example, in one comprehensive study of antitrust claims with a sufficient record to determine disputing costs, the average cost per party was $195,000 and the median cost $59,000 for a group of cases the authors characterized as unusual in that they by definition were more extensively litigated, thus creating the record from which disputing expenses could be determined. *See* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1014-15 (1986). In 2017 dollars, those figures would be $432,000 and $131,000 respectively. Although precise data is difficult to obtain, the prevailing view is that litigation in the U.S. and the U.K. is significantly more expensive than in EU countries, which generally do not permit extensive (and expensive) discovery. *See, e.g.*, John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826-30 (1985) (praising German system for reduced discovery and adversarialism and attendant streamlined procedure).

[27] The term "repeat players" is of course taken from Marc Galanter's classic article and is used synonymously to indicate sophisticated individuals or entities that are experienced in disputing and capable of developing and maintaining economy of scale and expertise greater than that of "one shot player" disputants such as individuals or entities lacking similar experience and resources. *See* Marc Galanter, *Why the "Haves" Come*

not consistently be abutting one another—and therefore needing to be accommodating to one another as was the case in decades past. What was the domain of the "relational" contract in which the parties were more concerned about continuing good business relations than strict enforcement of legal rights[28] has become more like arms-length, episodic contracting in which the parties are more interested in vindicating their rights—and finances—in the instant lawsuit, with reduced opportunity for logrolling and horse-trading.

And with more disputes, higher stakes, and less informal or cooperative ethos comes a greater incentive to legalize the arbitration process so that it looks more like litigation. Insurers and reinsurers may not like it, but to a large degree their own behavior drives the phenomenon. Where the parties once might have trusted each other enough to accept an informal exchange of information and documents has become more like traditional litigation with formal production, motions insisting upon production and inspection, and depositions as well as increased motion practice in the service of obtaining rulings more compelled by law than custom, norms, or the rough justice of the trade. All of this has both been prompted by the greater involvement of lawyers and in turn has prompted more involvement by lawyers.

Technology has combined with increased proceduralism in the form of extensive e-discovery and its attendant need for data experts combing through an ever larger universe of digital information arguably relevant to a coverage dispute. As noted above, a substantial portion of the arbitration disputes concerns the manner in which an insurer/reinsured has assigned or "allocated" particular losses to particular policy years or reinsurance contracts. This makes very interesting to reinsurers the internal records of the insurer/reinsured, who may have taken an unduly self-serving approach and allocated claims in a manner that maximizes reinsurer liability but may not reflect the actual facts or more reasonable classification of claims.

And with greater proceduralism comes a need for more activity, both before the tribunal and in preparation for motions, meetings, preliminary hearings, and the ultimate hearing, which is then followed by a longer period of deliberation and a more extensive written ruling by the tribunal in what has been a consistent post-*Southland* trend for both traditional and new/mass arbitration. Whereas arbitration decisions prior to the late twentieth century were often a sentence or two declaring the victor and the amount of the award, arbitration awards now typically are at least as long as a scholarly U.S. federal trial court decision and sometimes rival pivotal appellate court *en banc* opinions in length. Although industry participants may decry this development in the abstract, they have to a large degree brought it on themselves for the perfectly good reason of wanting an

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Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95, 97-98 (1974). In addition to having substantial financial resources, liability insurers and reinsurers are by definition in the dispute resolution business, making them the ultimate repeat players.

[28] Stewart Macauley's study of business relations in practice is considered the seminal work in this area. *See* Stewart MacCauley, *Non-Contractual Relations and Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61 (1964) (businesses involved in disputes often give less attention to legal rights than thought and more attention to maintaining harmonious and profitable business relations); *see also* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 672 (1986) (farmers with grazing disputes typically work toward informal equitable solutions rather than strict enforcement of property rights).

explanation as part of any proceeding that may compel or deny payment in the millions of dollars.

As noted, lawyers are both a cause and effect of this regime. The increasing use of larger and more sophisticated legal teams to prosecute and defend arbitration claims not surprisingly results in more involved proceedings that in turn may require an additional infusion of legal counsel. Likewise, more legally formal and complex dispute resolution tends to require a greater investment of legal resources. Further, the arbitrators themselves increasingly are attorneys (most commonly English solicitors or their continental equivalents) rather than insurance or reinsurance executives. Ability to obtain seasoned industry officials as arbitrators is hindered because currently active executives are either busy or burdened by conflicts of interest while retired executives may be uninterested in accepting appointments or resisted by the parties out of concern that their mental faculties have slipped.

But whether old or young, sharp or dull, attorney or insurance/reinsurance executive, arbitrators are consistently expensive. The going rate in London is in the range of £1,500 ($1,800) per hour, often with a daily or half-day minimum (relevant in motion hearing or status conferences, even if conducted by phone or teleconference) and most significant arbitrations have three arbitrators, with the prevailing model being one in which each disputant picks a "party-appointed" arbitrator and these two (usually in consultation with the disputants) in turn chose an "umpire." In a significant matter with a week or two of hearings, the cost of arbitrators for the hearing days alone can range from $100,000 to a quarter-million dollars.

The stated norm is that, notwithstanding party selection, the two party-appointed arbitrators as well as the umpire should approach the dispute in a neutral fashion. Although this is a noble sentiment, I have always thought it an excessively sanguine view of both the process and human nature generally. To be sure, there are occasions when the arbitrators are able to rise above connections that might cloud their views of the evidence, law, or industry practice But the fact remains that the party-appointed arbitrators know who appointed them. And to the extent the arbitrator is interested in continued work or continued selection by an insurer or reinsurer that can generate such future appointments, the party-appointed arbitrator is predisposed to favor the appointing party and in some arbitration forums is expected to be an open partisan, one permitted even to work with the appointing party in the presentation of its case.

In either system, the practical reality in most cases would appear to be that during deliberations the party-appointed arbitrators fight for the vote of the umpire. Umpires also have their own sets of concerns and allegiances. While they of course try to be fair, they also know that they are candidates for future appointments from the parties as well as selection as an umpire. Although this hardly makes reinsurance arbitration a kangaroo court, it raises concerns about the independence and neutrality of the arbitrators.

Generalist judges may lack expertise about insurance and reinsurance but they are surely more independent and neutral.[29] Added onto these seemingly inherent cognitive

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[29] At a minimum, judges do not need to compete for business and their compensation is fixed, removing even the subconscious incentive to make decisions enhancing the prospects for future appointment as an arbitrator (unless the judge is angling for a post-retirement position in the insurance industry). In the federal system, judges emerge from a rather intense process of scrutiny and have successfully hurdled vetting prior to nomination and during confirmation before they are awarded life tenure. Although American judges are

conflicts, another complaint from reinsurance insiders is that neutrality issues have worsened in recent years, with certain arbitrators being consistent favorites of particular disputants or types of disputants. And if an arbitrator has made prior rulings on a legal issue, contrary rulings in subsequent proceedings may look like positional conflicts, inconsistency, or malleability driven by loyalty to certain disputants or economic self-interest.

Reinsurance insiders also complain that despite the increased formality and cost and the longer and more detailed arbitration awards, the quality of decisions has not improved and may have fallen. This is problematic in their view because the greater prevalence and availability (via electronic databases) has given arbitration decisions—including erroneous and poorly reasoned decisions—more of a quasi-precedential effect than in years past. Instead of a one-page order declaring a winner, the modern arbitration award provides an explanation for the decision, which is generally a good thing. But as a result decisions with flawed reasoning can become unduly influential.

Coupled with this is the deferential standard of review accorded to arbitration decisions under the prevailing law of almost any court that is likely to review and confirm the award. As a result, a reviewing court often affirms awards with problematic reasoning so long as the process was not tainted with corruption and the decision was not beyond the scope of the arbitral submission. But once the result is affirmed and a judgment entered, there is the not insubstantial risk that readers (both lay and legally trained alike) will regard the affirming court opinion as endorsing the problematic reasoning of a confirmed arbitration decision. Over time, this may lead observers toward a distorted and diluted, or at least muddled, view of applicable law.[30]

To be sure, a good deal of any reinsurance industry dissatisfaction with arbitration is not the fault of arbitration per se as a means of dispute resolution. The higher stakes and expansion of the reinsurance market that have driven greater formality have already been noted. Also thought to contribute toward the trend toward more sustained adversarialism is the evolution of reinsurers as well as the evolution of the reinsurance marketplace.

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elected in nearly forty U.S. states, many were initially chosen through merit selection and are subject only to a "retention" election in which they must be affirmatively rejected by voters rather than losing in a head-to-head contest.

In addition, even in states with directly contested elections, incumbent judges are unlikely to be unseated over particular rulings or results, particularly in a low-visibility, low-emotion matter involving reinsurance coverage. If an insurer or reinsurer wanted to target a judge for defeat, the situation might be different as a little political effort appears to go a long way in low-turnout elections such as judicial contests. But I have seen no evidence that the insurance industry has attacked a jurist due to rulings regarding inter-insurer disputes. The industry has, however, worked against judges thought to be too favorable to tort plaintiffs and policyholders. *See* Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 49 (2003) (noting troubling politicization of judicial elections in some states, particularly the involvement of insurers and manufactures in attacking judges seen as overly receptive to plaintiff tort claims); *see also* Jeffrey W. Stempel, *Impeach Brent Benjamin Now!?: Giving Adequate Attention to Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 4 nn.10-11, 12-13 (2010) (noting the intense political battles and enormous financial aid surrounding election for West Virginia Supreme Court post in which challenger backed by business was pitted against incumbent favored by labor and tort plaintiff's bar).

[30] *See* discussion *supra* note 25 and accompanying text.

"Captive" insurers—insurance companies set up by the policyholders themselves with the assistant of brokers and consultants for the purpose of covering the policyholder at lower expense or on more favorable terms[31]—have grown substantially over the past thirty years, as have other alternative risk management vehicles such as risk retention groups and catastrophe bonds.[32]

Perhaps it is the voice of nostaligia speaking, but traditional reinsurers view captives as more likely to engender controversy (through more problematic policy language and less professional and adept underwriting and claims administration) as well as being less amenable to reasonable negotiated resolution. Unlike a traditional insurer that expects to be on both sides of the table over time (through not only different contracts but through its different divisions and activities) and that has an economic self-interest in working with a particular reinsurer, captives are seen as less committed to long-term business relationships with a reinsurer and more likely to litigate claims.

In addition to being less willing to get and go along, captives (even those set up by large commercial entities) generally have less capital than traditional insurers. When things go wrong for a captive in terms of an unexpectedly large claim volume or exposure that is arguably outside the scope of reinsurance coverage, the captive may simply not be in a position to absorb the loss in whole (through forgoing a claim against the reinsurer) or in part through settling on terms acceptable to the reinsurer and must of necessity prosecute the arbitration to its full extent in hopes of obtaining a favorable result.

Perhaps this perception of captives as a problem of sorts is an unfair view of captives. But, like the other perceptions of delay, cost, questionable neutrality and expertise of arbitrators, and excessive procedural complication of a once "purer" arbitration process that accompanied a gentler time of informal dispute resolution, concern about captives is a consistent perception expressed by traditional reinsurers.

IV. RECONSIDERING THE LANDSCAPE OF REINSURANCE ARBITRATION

In light of these expressed concerns, one might ask why insurers, and in particular reinsurers, do not opt for a different method of dispute resolution. One short answer expressed by reinsurers is that it is the ceding insurers (prospective reinsureds) who have the controlling bargaining power, and that a reinsurer as a practical matter must accept the prospective reinsured's arbitration clause (or other reasonable means of dispute resolution) if it wants the business. Rejecting an otherwise sound reinsurance application because of disagreement with an arbitration provision is thought not to be a wise business decision.

But this hardly means that reinsurers are helpless on this point. In a world made more competitive by the presence of catastrophe bonds and other financial instruments serving risk management functions, reinsurers are of course hungry for business. But just

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[31] For a more extensive discussion and description of captive insurers, *see* MARK DORFMAN, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 56-57 (10th ed. 2012); WILLIAM VAUGHAN & THERESE VAUGHAN, FUNDAMENTALS OF INSURANCE 44-46 (11th ed. 2013); STEMPEL & KNUTSEN, supra note 13, at § 22.01[C].

[32] For further discussion of risk retention groups and catastrophe bonds, *see* MARK DORFMAN, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 330-32 (10th ed. 2012); WILLIAM VAUGHAN & THERESE VAUGHAN, FUNDAMENTALS OF INSURANCE 46-47, 149 (11th ed. 2013); STEMPEL & KNUTSEN, *supra* note 13, at § 17.02.

as hunger has its limits, so does business. A reinsurer would presumably not accept a dispute resolution clause providing for decision by a roll of dice, a coin flip, a dart board, or the CEO of the ceding company. Just as a reinsurer would surely resist extreme dispute resolution devices, it has the ability to at least try to bargain for a better form of dispute resolution. Reinsureds, unless they have sufficient bargaining power to select forums clearly slanted in favor, of course also possess a similar interest in improving the dispute resolution processes to which they will be subjected when negotiation fails.

In the eyes of reinsurers, arbitration appears to be a bit like Winston Churchill's famous quip that democracy is the worst form of government except for the alternatives.[33] Insurers and reinsurers, despite complaint, continue to include arbitration clauses in their contracts and show no apparent desire to remove such clauses. Although there appears to be increased interest in mediation (discussed below), they continue to want arbitration in cases where informal negotiation or mediation does not resolve a conflict.

The concerns expressed about arbitration by reinsurers are sufficiently serious to at least prompt some rethinking of the industry's approach to dispute resolution. A number of alternative approaches are sufficiently advantageous and even-handed that they could be proposed by reinsurers without necessarily being rejected by the ceding companies that purportedly have the greater bargaining power on this point.

One extreme approach would be to eliminate arbitration provisions altogether and opt for litigation as the default dispute resolution preference (albeit a type of "customized" litigation apt for reinsurance disputes as discussed below). Although this seems a terminally ill "non-starter" proposal, the insurance industry would do well to withhold any figurative laughter and give litigation at least a little thought as a possibly preferred method of dispute resolution. Complaints about litigation (or at least U.S. litigation) tend to raise three issues: jury trials; punitive damages; and lack of expertise regarding reinsurance matters, which is a function both of the use of lay juries and generalist judges.

Insurance industry concerns about the potential unfairness (due to factors auguring against insurers or business generally) or inaccuracy (due to lack of reinsurance experience and expertise) regarding U.S. litigation are overstated and to a large degree result more from the success of anti-litigation campaigns by some elements of the business community rather than the actual facts of litigation in operation.[34]

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[33] Churchill's statement, often paraphrased and also often quoted with differing language, appears to have been: "Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time . . . . " *See* THE INTERNATIONAL CHURCHILL SOCIETY, (2017), www.winstonchurchill.org (attributing this language to Churchill in a November 11, 1947 House of Commons speech). Note that the Churchill quote acknowledges that the quip originated with someone else but does not give attribution.

[34] *See Judicial Hellholes,* ATR FOUNDATION, http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2008.pdf (Report of December 2008). ATRA, an organization of manufacturers and other business that contend the U.S. tort system is overly favorable to plaintiffs and burdensome on business, has been publishing the Judicial Hellholes feature annually for roughly 30 years, to broad media coverage. Each year, ATRA selects ten jurisdictions that it contends are so blatantly unfair to business in processing claims that the term "hellhole" is apt. Although the feature may be great lobbying and public relations, it is hyperbolic. My individual epiphany came the year ATRA labeled Clark County, Nevada (the Las Vegas metro area and outlying regions) such a hellhole when it in fact is but a normal U.S. urban jurisdiction. *See id.* For me, being familiar with a state court system that works well and is fair, this was a

The punitive damages concern, although real in terms of its impact on insurance professionals, appears to be exaggerated by any reasonable empirical measure. Punitive damages are only awarded rarely in U.S. litigation[35] and are subject to statutory and judicial limitations[36] as well as constitutional limitations set forth by the U.S. Supreme Court.[37] In addition, as noted below, parties to a reinsurance contract can agree in the contract to preclude punitive damages as a remedy for disputes arising out of the contract just as they might agree to liquidated damages or minimum or maximum damages.

Although U.S. judges are, for the most part, generalists, this hardly makes them unqualified (or even sub-optimal) for presiding over reinsurance disputes. Recall that one of the complaints made about current reinsurance arbitration is that it is difficult to procure seasoned industry executives as arbitrators. As a result, arbitrators today are often solicitors, some of whom may not have had an extensive reinsurance practice but, like generalist judges and lawyers generally, are able to well understand a controversy based on the evidence presented and briefing provided by the parties. Most judges are normally comparable in experience, accomplishment and ability as compared to most arbitrators.

Further, the U.S. legal system provides ample opportunity for the use of expert witnesses as well as other evidentiary submissions to educate the judge about reinsurance and the particular issues presented in a dispute.[38] Although litigation opponents may observe that this is not the same as the decision-maker's own possession of expertise, one counter-argument is the frequent use of expert witnesses in reinsurance arbitrations. If arbitrator-possessed expertise is so vital and useful, one might ask, why are the arbitrators

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bit like reading that Elvis was still alive after serving as a pallbearer. Although some of the jurisdictions identified by ATRA as anti-defendant have been similarly viewed by more neutral sources, the ATRA list is more Breitbart than CNN – but it likely has impacted the perceptions of the entire business and insurance communities.

[35] *See* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 214 (1995) (punitive damages awarded in fewer than five percent of all cases and in fewer than nine percent of cases won by plaintiffs). Because only a small percentage of cases result in trial (five percent or less), this effectively means that fewer than one percent of all cases result in punitive damages, although the risk of a punitive damages award may of course increase the amount of a settlement.

[36] *See, e.g.*, NEV. REV. STAT. § 42.005 (1989) (limiting punitive damages to three times the amount of compensatory damages unless conduct is specifically done with intent to injure). In addition, nearly all courts and many state codes provide that punitive damages can only be awarded if the requisite level of conduct (usually defined as "conscious disregard," "intentional disregard" or "reckless disregard" of the rights of another) is shown by "clear and convincing" evidence. *See generally* DAN B. DOBBS, THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION (2d ed. 1993); JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE (2d ed. 2000); LINDA L. SCHLUETER, PUNITIVE DAMAGES (6th ed. 2010).

[37] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427-28 (2003) (stating that the Constitution requires review of punitive damages awards to assure compliance with due process. Fairness of award will be judged according to the reprehensibility of the actor's conduct and the size of the award will be assessed by reference to government fines levied for similar misconduct and the relation of the punitive award to the compensatory damages in the case. Ordinarily, where compensatory damages are substantial, a punitive damages award more than nine times larger will be permitted).

[38] *See, e.g.*, FED. R. EVID. art. VII (extensive rules governing the admissibility and use of expert evidence, including possibility of judicially appointed neutral experts as well as submissions from experts retained by the parties).

consistently receiving expert submissions in arbitration proceedings?

One partial answer of course is that the arbitrators are seeking to let the parties be fully heard but it is just as likely that even arbitrators with an industry background find expert testimony to be helpful, particularly if the dispute involves an issue on which an executive or solicitor has not worked prior to the arbitration. Substituting a reasonably competent U.S. judge as the recipient receiving the expert submissions that are typical in arbitration hardly seems like a large descent in on the expertise scale.

There still is, however, the drawback (from the insurers' perspective) of juries. Here, the myth of the danger of U.S. litigation for business due to supposedly angry anti-business juries greatly exceeds the reality. As previously noted, a battle between an insurer and a reinsurer is not exactly the type of David-vs.-Goliath match-up that is thought by many defendants to make them fodder for populist anger. Consequently, much of the traditional insurance industry fear of juries, like its fear of punitive damages, is probably exaggerated. Even if the dispute involves a U.S.-based company (most likely the insurer) against a foreign-based company (most likely the reinsurer), juries appear to take their oath of impartiality seriously and will not render monetary awards based on the popularity of the parties but will base their decisions (whether correct or not) on the evidence presented.

Even in David-vs-Goliath situations, juries are not the socialist institutions of income redistribution portrayed by their critics. They are aware that imposition of a large monetary awards may have an impact on the economy and may result in upward pressure on their premiums. In addition to taking an oath of fairness, they are guided by the judge and permitted to hear only admissible evidence and proper argument before being instructed by the judge. Combined with a relentless focus on the dispute, this is likely to produce a rational jury decision rather than a reflexive finding for a popular local figure or punishment of a wealthy outsider.[39] And if there is a seeming runaway jury, the verdict is subject to the substantial controls discussed below.

Increasingly, particularly in federal court, juries are not even permitted to hear and decide cases seen by the judge as insufficiently compelling. For roughly the past ten years, federal judges have had enormous power to dismiss claims or even entire cases found not to have sufficient "plausibility" as determined by the judge's experience and assessment. Although the two cases (*Twombly v. Bell Atlantic Corp*. and *Iqbal v. Ashcroft*) (collectively *Twiqbal*)[40] establishing this powerful application of Fed. R. Civ. P. 12(b) have been

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[39] I admit to being as cynical as the next guy about the wisdom of human beings. As P.T. Barnum famously observed, a sucker is born every minute. But while humans may be cognitive suckers in arguably deceptive or overly image-managed arenas such as product advertising and political elections, it is important to remember that trial is quite different from most of the settings in which the thoughts and emotions of laypersons are manipulated. To be sure, similar efforts take place in trials. But trials are more concentrated and focused, forcing lay jurors—under the guidance of judges who policy the admission of evidence and the behavior of witnesses and counsel—to think deeply and reflectively about the controversy before them. This likely leads to rational analysis that may be lacking when these same laypersons choose consumer products or political candidates. *See generally* DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011) (describing different cognitive processes and results based on the speed of decision, decision-making conditions, and context in which decisions are made); CASS SUNSTEIN & RICHARD THALER, NUDGE (2008) (noting that human judgment can be manipulated but that countermeasures can minimize distortion of thought).

[40] *See* Bell Atlantic Co. v. Twombly, 550 U.S. 544 (2007); Ascroft v. Iqbal, 556 U.S. 662 (2009) (both cases providing that in order to defeat a properly made motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), a claimant must not only plead facts that if true would support relief but that the

heavily criticized by scholars,[41] they remain the law and are dutifully applied by federal trial courts. Although state supreme courts have not universally embraced *Twiqbal*, they nonetheless frequently dismiss claims that are deemed legally insufficient even if all allegations of a pleading are accepted as true.[42]

And before *Twiqbal*, there was the trilogy: three 1986 cases in which the U.S. Supreme Court effectively provided for more aggressive summary judgment practice and required that a party seeking to defeat summary judgment and obtain a jury trial demonstrate that each element of a claim was supported by "substantial" evidence, rather than just a scintilla of evidence.[43] And in some disfavored cases such as anti-trust price-fixing, the Court required direct evidence of conspiracy (which is almost never available) to defeat summary judgment.[44]

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facts pled must be plausible, effectively permitting trial judges to weigh and assess the strength of a claim and determine that it does not require jury trial (or any trial).

[41] *See, e.g.*, SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY (2010); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 201 (2010); *see also* Suja Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 38 (2010); Richard Epstein, Bell Atlantic v. Twombly: *How Motions to Mismiss Become Disguised Summary Judgments*, 25 WASH. U.J.L. & POL'Y 61, 62 (2007) (both articles noting that because under *Twiqbal* judges need not completely defer to the pleadings, the new 12(b)(6) motion is effectively a motion for summary judgment, with Professor Thomas regarding the development as considerably more negative than does Professor Epstein).

Of course, what makes *Twiqbal* bad in the eyes of law professors does not necessarily mean that *Twiqbal* is bad for insurers and reinsurers. Professors complaint (rightly in my view), that *Twiqbal* improperly gives judges too much power to decide the merits of a case based on their instinctive reaction to the allegations (e.g., could a phone company really be engaging in antitrust violations and would it be fair to subject it to the burdens of discovery based on long-shot allegations (*Twombly*)? Would the Attorney General and the FBI director really have had knowledge of and approved ethnic and religious profiling as part of law enforcement (*Iqbal*)?). But what may be bad for plaintiffs alleging tort, discrimination, and civil rights claims is not necessarily bad for insurers. For example, the breach of contract and contract construction claims inherent in reinsurance disputes will likely not be dismissed pursuant to *Twiqbal* but claims for punitive damages or other extraordinary relief might well be, further reducing insurance industry fears of being subject to litigation in the U.S.

[42] *See, e.g.*, Walsh v. United States Bank, 851 N.W. 2d 598, 600 (Minn. 2014) (Minnesota Supreme Court in reflective and well-reasoned opinion declines to adopt *Twiqbal* even though language of Minn. R. Civ. P. 12 is equivalent to language of Fed. R. Civ. P. 12); *see also id.* at 601-07.

[43] *See* FED. R. CIV. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (discussed in ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION § 13.3.2 (10th ed. 2016)); STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 886-87 (2010).

[44] *See* Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (affirming summary judgment in price-fixing case on grounds that sustained collaboration of competitors is unlikely and therefore requires direct evidence of conspiracy in order to merit jury trial and subject defendants full burdens of discovery and trial); *see* Michael J. Kaufman, *Summary Pre-Judgment: The Supreme Court's Profound, Pervasive and Problematic Presumption About Human Behavior*, 43 LOYOLA L.J. 594, 611-12 (2012) (scathing but persuasive criticism of *Matsushita* that also regards the case as more perniciously influential than thought in encouraging judges to apply personal preferences in truncating nor defeating disfavored claims); Jeffrey W.

Even if a case is not subject to being shaped by Rule 12 or Rule 56 motions and goes to a jury, the judge retains substantial control over the jury in that the judge controls what the jury will hear by making evidentiary rulings.[45] The parties may further attempt to limit even the mention of evidence through use of motions *in limine*[46] and may also seek judgment as a matter of law on all or part of a case at the conclusion of plaintiff's case and again at the conclusion of the evidence.[47] Then the jury is further controlled by the judge's limitations on the statements of counsel during closing argument (as was also the case with opening statements) and by the judge's instructions to the jury regarding applicable law and permissible conduct by the jury.[48]

If, despite all these controls, the jury reaches a verdict seen by the judge as unsupported by law, the judge may enter judgment as a matter of law reaching a different result.[49] If the verdict is not necessarily completely unsupported by law but unreasonable in amount, against the weight of the evidence, or appears to be the result of improper influences such as passion or prejudice, the judge may order a new trial.[50] In general, these controls are more aggressively used in federal court but only as a matter of degree. State court judges exert similar control over the jury trial process.

If things go horribly wrong for an insurer or reinsurer at trial, there remains the appellate process. Although appellate courts tend to affirm trial results, particularly regarding questions of fact (e.g., which witness was telling the truth) or remedy (e.g., is $1 million in consequential damages too much), the overall rate of affirmance is two-thirds, not ninety percent, suggesting that appellate review is a real check on errors made at trial.[51]

Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Value of Adjudication*, 49 OHIO ST. L.J. 95, 111 (1988).

[45] Because so many insurers and reinsurers outside the U.S. operate in legal systems that do not involve juries, they in may underestimate the degree to which the federal and state Rules of Evidence and their application through judicial discretion can limit the information brought before the jury. Unlike an arbitration or a bench trial in countries with an "inquisitorial" system of litigation, not everything in a case record becomes known to the fact-finder, which limits the infusion of information thought to be irrelevant, distracting, or unduly prejudicial relative to its probative value.

[46] A motion *in limine* is a request for a pretrial evidence ruling forbidding attempted introduction of inadmissible or prejudicial evidence. *See* HAYDOCK ET AL., *supra* note 42, at § 13.6.

[47] *See* FED. R. CIV. P. 50; DAVID F. HERR ET AL., MOTION PRACTICE § 22.03 (7th ed. 2016) (describing motions for judgment as a matter of law and their application); GENSLER, *supra* note 43, at 799-814 (same).

[48] *See* GENSLER, *supra* note 43, at 815-24.

[49] *See* FED. R. CIV. P. 50; HERR ET AL., *supra* note 47, at § 22.03 (describing motions for judgment as a matter of law and their application); GENSLER, *supra* note 43, at 799-814 (same).

[50] See FED. R. CIV. P. 59; HERR ET AL., *supra* note 47, at § 22.04 (describing new trial motions and their application); GENSLER, *supra* note 43, at 935-49 (same).

[51] *See* ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURT OF APPEALS 62-63 (2001) (finding affirmance rate of roughly two-thirds and reversal rate of roughly one-third in federal appellate courts); DONALD R. SONGER ET AL., CONTINUITY AND CHANGE IN THE U.S. COURTS OF APPEALS 105 (2001) (same); Stanton Wheeler, et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts 1870-1970*, 21 L. & SOC'Y REV. 403, 406-07 (1987) (noting that state high courts reverse,

Certainly, trial courts receive more searching review than do arbitration decisions.

Seen in this light, litigation in the U.S. hardly seems like a hellhole situation when compared to arbitration, particularly for reinsurance disputes. Although some expertise in custom or practice may be lost if the dispute is litigated, there also would appear to be comparatively little risk that the result will be tainted by populist prejudice or antipathy toward a particular business because it is a business, because it involves insurance, or because it might be headquartered abroad.

Courts place some limits on the ability to craft a litigation clause. For example, a court may not accept some contractual stipulations of the parties that are seen as unduly treading on judicial authority. But despite some limits, there is considerable room for at least partially customizing litigation as a disputing method. Most obvious are choice of law, choice of forum (personal jurisdiction and venue) clauses, which are routinely enforced by courts so long as not oppressive and bearing some connection to the parties or the contract (which presumably includes risks within the scope of the contract).[52]

Use of these provisions in a reinsurance certificate or treaty can easily accommodate the concerns of both insurers and reinsurers so long as the parties are genuinely interested in having disputes resolved in a neutral, non-corrupt, reasonably competent, and reasonably reliable forum (in terms of expense and time as well as the range of likely outcomes) rather than attempting to obtain a "home court advantage" through a forum selection clause. This desire for rational, reliable, expert and neutral dispute resolution (as well as the desire for saving time and money) is what initially led to the adoption of arbitration clauses. Consequently, it is probably not a pipe dream to think that insurers and reinsurers should be able to agree on dispute resolution provisions that do not advantage the party with greater bargaining power.

As an example, the parties to the reinsurance certificate or treaty could stipulate to dispute resolution in the courts of a particular nation or state/province and a particular venue within the jurisdiction as well as application of a particular body of law and such a provision should be accepted by courts. Selection of remedies clauses something like a modified liquidated damages provision would probably also be enforced in court.[53] For example, the parties could stipulate that punitive damages are unavailable under any circumstances as well as agreeing upon applicable pre- and post-judgment interest (or forgoing interest) rates and limitations or prohibitions on fee-shifting or cost-shifting based on the outcome of the dispute. Conversely, the parties could agree to awarding counsel

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remand, or modify roughly forty percent of cases before them on review). *See also* Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility; Aggregate Efficiency, and Acceptable Justice*, 43 LOYOLA L.J. 628, 649-53 (2012) (noting that trial court summary judgments are reversed or modified roughly a third of the time).

[52] *See* JEFFREY W. STEMPEL ET AL., LEARNING CIVIL PROCEDURE 245 (2d. ed. 2015) (describing choice of forum and choice of law clauses and applicable law); GENSLER, *supra* note 43, at 205-06 ("Courts generally hold that agreeing to a valid and enforceable forum selection clause constitutes consent to be sued in that forum.").

[53] *See* DAVID EPSTEIN ET AL., MAKING AND DOING DEALS: CONTRACTS IN CONTEXT 823-43 (4th ed. 2014) (addressing liquidated damages clauses and finding them generally enforceable unless amounting to imposition of a penalty unrelated to the injury caused by breach of contract); E. ALLAN FARNSWORTH, CONTRACTS § 12.18 (4th ed. 2004) (same).

fees to the prevailing party and to recovery of certain costs beyond those typically awarded by the chosen court.

Less certain would be the fate of provisions limiting discovery or stipulating to a bench trial rather than a jury trial. My view is that such agreements should be untroubling to courts and enforceable even accepting as final and correct today's prevailing case law that largely precludes contracting parties from tinkering with the standard of review of an arbitration outcome.[54] Such provisions have been struck down by courts on the grounds that they interfere too much with the court's authority over its own adjudicating function.

In particular, in one noted case, the Supreme Court refused to be bound by a contractual provision in which the parties stipulated for full judicial review rather than the more limited review established by the Federal Arbitration Act.[55] But in addition to deviating from the statute, this sort of provision has the unseemly effect of acting to have two private parties "order" the court to do more than it is required to do by the statute and arguably is improper in that it places private parties in the position of conscripting the court. Pursuant to this analysis, contracting parties would nonetheless presumably still be permitted to waive or limit their rights of judicial review of arbitration awards if that was the contracting parties' preference. Although this has some aspect of telling the court what it cannot do, it does not enlarge the court's burden or force the court to engage in conduct it would otherwise avoid.

By contrast, a stipulated limitation on discovery (as opposed to an extension or expansion of discovery) merely has the parties restricting their own behavior rather than attempting to control the court. A stipulation to a bench trial, if properly styled as a pre-dispute waiver of jury trial, should also be enforceable unless obtained by coercion in that the parties merely agree to forgo a right they would otherwise have in the absence of their consensual agreement. In view of the U.S. judiciary's willingness to enforce arbitration agreements (particularly standardized clauses en mass in consumer contracts) that operate to remove jury trial, discovery, and even class action status limits on discovery and avoidance of jury trial, specific waivers in a reinsurance contract are logically are enforceable.

If a litigation clause is so customized and crafted, much of what the insurance industry dislikes about arbitration appears to have been removed. The forum location is sufficiently convenient (or mutually inconvenient, with no advantage to a particular party). The presiding judge is more neutral than any arbitrator could hope to be. Moreover, both state and federal courts in the U.S. provide mechanisms for challenging a judge with impartiality issues and obtaining a neutral judge as a replacement. Jury trial is avoided.

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[54] *See* Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 583 n.5, 584-85 (2008) (noting prior circuit split on the issue) (resolved by Supreme Court, which held that a court will not enforce a segment of an arbitration clause providing for broader, litigation-like judicial review of arbitration awards rather than the more limited review provided by the Arbitration Act). Courts take a similar view of agreements in which the parties grant themselves additional time for discovery without the approval of the court as such action likewise puts the parties in the position of changing the rules or adding to the court's burden without first obtaining the permission of the court.

[55] *See Hall Street*, 552 U.S. at 583-86; Ilya Enkishev, Comment, *Above the Law: Practical and Philosophical Implications of Contracting for Expanded Judicial Review*, 3 J. AM. ARB. 61 (2004) (taking similar position after review of case law).

The expensive discovery of which re/insurers complain is limited or perhaps even curtailed. So are the punitive damages so disliked by the insurance industry. In addition, other remedies such as consequential damages (e.g., lost business opportunity or revenue) can be limited or curtailed. Depending on the pre-dispute preferences of the parties, there can either be no judicial review or perhaps even some refinements or curtailments on judicial review and the enforcement or vacating of arbitration decisions.

Thus, through a bit of customization, a clause selecting litigation as the means of dispute resolution can be transformed from an anathema to the industry to a provision that actually addresses industry concerns about the drawbacks of current arbitration. I am not naïve enough to expect any such sea change in the attitudes of the insurance industry any time soon (if ever). Certain viewpoints are very solidly wired into the culture of a given industry. One such view is that U.S. Courts are dangerous places for business – dens of delay, expense and unpredictable laypersons gunning to impose large monetary liability on big business. As discussed above, the impression of the U.S. legal system as unduly hostile to business is misplaced as well as being relatively unimportant in cases involving disputes between commercial actors. But it nonetheless is the hard-wired perception that will probably hold for the foreseeable future.

But even if arbitration is unlikely to be dethroned as the dispute resolution norm in reinsurance contracts, it can be modified along the lines suggested above to attempt to address the concerns raised by its current critics. At a minimum, the arbitration clause can limit or even eliminate discovery altogether, just as depositions, and motions can be forgone or curtailed. Ground rules for e-discovery can be set forth that can prevent this aspect of pre-hearing preparation from becoming the expensive procedural tail that wags the coverage dog. The parties might also consider language that would compel an arbitration panel to act within a certain time and to hold on integrated hearing on the merits so that the dispute is not elongated by piecemeal proceedings. A mutually acceptable location for the hearing can be agreed upon along with procedures for selecting the panel.

Arbitrations lack juries and arbitrators are generally reluctant to award punitive damages, removing these problems. Issues of arbitrator neutrality and competence can be addressed by stipulating in the reinsurance contract to processing the dispute through a particular arbitration organization likely to provide the parties with a choice of sufficiently experienced and knowledgeable arbitrators. If the organization itself does not provide an adequate mechanism for striking potentially biased arbitrators, the parties can stipulate to a means of selection more likely to achieve neutrality, including the ability to strike form the proposed panel arbitrators viewed as tainted or incompetent.

One of the historical shortcomings of insurance and reinsurance arbitrations, in my view, been its preference for the use of party-appointed arbitrators and reluctance to have arbitrations conducted through reputable organizations such as the AIDA Reinsurance & Insurance Arbitration Society (ARIAS),[56] American Arbitration Association (AAA) or Judicial and Mediation Services (JAMS) rather than through the direct interaction of the disputants in picking arbitrators, dates, logistics with use of arbitration laws as their backstop for resolving disagreements about the arbitration process.

Because of the Euro-Centric nature of much reinsurance, arbitration provisions

[56] AIDA is the Association Internationale de Droit des Assurances, a non-profit insurance industry organization that formed ARIAS to serve a as a dispute resolution organization for the industry.

stipulating for arbitration in London pursuant to the English Arbitration Act or with international organizations in Paris or Stockholm are popular. Realizing that I probably carry a Yankee bias for things American, I have always had concerns about the inevitable advocacy that attends the use of party-appointed arbitrators and would prefer an arbitration panel of three neutral arbitrators chosen from lists furnish by ARIAS, AAA, JAMS, or another reputable organization with a stable of qualified arbitrators.[57]

Under the rules of these and similar organizations, the parties are given the opportunity to strike unwanted arbitrators. If this makes assembly of a panel too difficult, the organization then selects the panel. In U.S. courts, the reinsurance contract parties would be further protected in that arbitrator partiality is one of the limited grounds for overturning an award.[58] Consequently, if the arbitration organization imposes even one insufficiently impartial arbitrator on a dissenting party, the proceeding is at risk, providing the organization with strong incentive (along with its professional commitment to fairness and desire to be perceived as fair for business reasons) to make sure the panel really is impartial.

One arguable drawback of using such organizations is that their inventory of arbitrators may not contain many persons with reinsurance expertise. This is a fair criticism, but not necessarily a compelling one. Recall that reinsurance insiders complain that under the current system highly expert and neutral arbitrators are hard to find. The contracting parties might be additionally proactive by agreeing in advance to a list of acceptable arbitrators rather than waiting for a dispute and then hoping to find an arbitrator suited to the dispute or likely to favor one party or another. If the list is reasonably long and kept up to date, the subsequent unavailability of some arbitrators should not present problems.

In addition, of course, reinsureds and reinsurers could modify their dispute resolution clauses to provide for mandatory mediation, including setting forth the ground rules for such mediation, listing approved mediators, and so on. Currently, there is concern that mediation is not done frequently enough or seriously enough, a problem that may be magnified if one of the disputants has post-dispute strategic reasons for resisting mediation, delaying mediation, or using feigned participation in mediation as a tactic.

Mediation provisions in a dispute resolution clause can of course also be customized just as can arbitration and litigation provisions. For example, the parties can agree in advance to a list of acceptable mediators, use of a particular mediation organization, timetable, or location for the mediation as well as to particular mediation procedures. For example, parties might agree to cabined discovery prior to mediation and then to more extensive discovery if the mediation fails to resolve the dispute and arbitration or litigation becomes necessary.

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[57] *See Commercial Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004130 (setting forth protocols for conducting arbitration, including process for selecting an individual neutral arbitrator or panel of neutral arbitrators); *Comprehensive Arbitration Rules and Procedures*, JUDICIAL AND MEDIATION SERVICES (July 1, 2014), https://www.jamsadr.com/
files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf (same).

[58] *See* Federal Arbitration Act, 9 U.S.C. § 10 (1925) (listing grounds for vacating an arbitration award, including "evident partiality of an arbitrator).

Another potential means of improving dispute resolution and arbitration is use of choice of law clauses. Although this is a frequent and useful component of reinsurance contracts, its use could be improved. As discussed above, choice of forum and limitations on procedural devices or remedies may be a more effective means of attacking some of the perceived shortcomings of current reinsurance arbitration. But substantive law and the overall approach of a tribunal to a reinsurance dispute remain important. But the substantive reinsurance law of many jurisdictions (other than perhaps the U.K) may be limited or inconsistent due to differing trial and appellate decisions, the absence of definitive high court precedent, or a variety of opinions in high court decisions.

For that reason, the proposed *Principles of Reinsurance Contract Law* can offer at least some relief for the perceived problems of arbitration. Although not likely to be a lengthy code providing definitive rules for every situation, when completed it will set forth a comprehensive set of principles and ground rules for governing relations between reinsurer and reinsured, particularly as respects the respective duties of the contracting parties and determination of events and occurrences. Also included will be discussion of the application of duties in the context of the characterization and allocation of claims and a provision making remedies for breach of duty proportional rather than all-or-nothing, which may reduce the tendency of some arbitrators to refrain from finding a breach of duty that will in turn require abrogation (under the law of many jurisdictions) of the entire contract.

In addition to a major discussion of respective duties, the *Principles* will discuss other areas that have proven to be sources of coverage disputes including the timeliness and sufficiency of notice, the manner in which the number and scope of events/occurrences are calculated, and the method by which claims are allocated to particular types of coverages, policy years, and specific reinsurance facultative certificates or treaties as well as issues of causation and coverage generally.

The self-contained nature of the *Principles* also provides something of "one-stop shopping" for the contracting parties in that the *Principles* will be a relatively short and concise code of rules, norms, and standards accompanied by illustration and commentary, somewhat in the nature of an American Law Institute *Restatements of the Law*. Reinsurers and reinsured selecting the *Principles* as their applicable law of the contract will thus be relieved of the need to canvas the case law of particular jurisdictions as a prerequisite to choosing the law of a particular jurisdiction.

As currently planned, the *Principles* are not expected to address the process and procedure of dispute resolution. In light of current concerns about the reinsurance arbitration status quo, this may be a missed opportunity. However, as reviewed above, there are a number of steps the insurance industry can take to mitigate its current criticisms of arbitration and dispute resolution generally and improve the process, perhaps even turning toward a cabined or customized form of litigation, hybrid arbitration, or hybrid mediation/arbitration/litigation. In the meantime, however, one expects the hard-wired tradition of arbitration to continue to dominate this area of commerce. But perhaps reinsureds and reinsurers need to begin investing more time in dispute resolution planning at the outset of their contractual undertakings rather than continuing to criticize the results when disputes do arise.

V. CONCLUSION

Despite its seemingly ideal setting for arbitration as the modal form of dispute resolution and long tradition of its use, reinsurance arbitration nonetheless is beset with complaints and concerns. Some echo the concerns expressed by other commercial entities but others appear specific to reinsurance. Although the current world of reinsurance arbitration is hardly in bad straits, opportunities for improvement seem like ripe, low-hanging fruit. Whether the industry will take action remains to be seen.