feature

Decision-Making in Reinsurance Disputes: Orders and Awards, Modification, Reconsideration, and Appeal

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I. The Decision

A. Judicial Decision-Making

(1) An Overview

Decision-making in the courts often follows a very formal process, with specific procedural requirements and deadlines along the way. The parties are required to follow a prescribed format for the submission of issues, often with specific page limits and clear deadlines. Both parties know what is required and when submissions are due. Depending on the jurisdiction, the court may have time limits as well, requiring that its decisions be provided to the parties within a certain number of days.

A court need not issue a written ruling or interim rulings, but in certain instances can provide its ruling orally on the record. As for an ultimate ruling, the Federal Rules of Civil Procedure define a "judgment" to include a "decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a).

The final decision in a case can take a variety of forms, depending on the nature of the dispute and the procedure by which it is resolved. If the matter is submitted on a motion for summary judgment under Fed. R. Civ. P. 56, the court will typically issue a detailed opinion, setting forth its factual findings and legal conclusions. If the case proceeds to a bench trial, the parties are much more likely to get a complete written opinion from the court. A jury trial is less likely to result in any written opinion, with the jury's verdict form serving as the basis for any ruling.

(2) Written Decisions

Under the federal rules, a court is not required to issue findings of fact or conclusions of law when ruling on motions, including motions to dismiss or motions for summary judgment. Fed. R. Civ. P. 52(a)(3). In practice, detailed rulings are almost always provided for such motions. When a case is tried to a federal bench, either without a jury or with an advisory jury, the court is required to issue findings of fact and conclusions of law. Fed. R. Civ. P. 52(1). Those findings and conclusions can be made on the record or can be provided in a written decision. *Id.*

A "finding of fact" is defined as the "determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record." BLACK'S LAW DICTIONARY (9th ed. 2009). A "conclusion of law," on the other hand, is an "inference on a question of law, made as a result of a factual showing, no further evidence being required." *Id.* How detailed such findings and conclusions will be depends largely on the nature of the specific dispute and the court in which the parties find themselves.

(3) Modification and Reconsideration of Court Orders

In the courts, specific rules are provided that allow a party to request that the court modify or reconsider any of its orders.

A party can move for relief from any judgment or order on certain enumerated grounds including, among other things, mistake, newly discovered evidence, or fraud. Fed. R. Civ. P. 60. The court can unilaterally correct a judgment or order if it determines that there has been a clerical mistake, an oversight, or an omission. Id.

After trial, a party can bring a motion seeking a new trial. Fed. R. Civ. P. 59. Additionally, a court has the authority to act on its own and order that a new trial be had. Fed. R. Civ. P. 59(d). Following entry of judgment, a party can also file a motion requesting amended or additional findings. Fed. R. Civ. P. 52(b). As with

most motions, the rules provide for specific timelines within which a party must seek such relief.

As a practical matter, motions for reconsideration are rarely granted; the burden that a party must meet to gain such reconsideration is extremely high. The procedural rules provided by the courts, however, do provide a road map and specific grounds for seeking relief from a court judgment or order.

B. Arbitral Decision-Making

(1) Interim Rulings

Interim rulings that may be made by an arbitration panel fall into two basic categories: pre-award rulings that can be referred to loosely as procedural in nature, and interim or partial awards that address some aspect of the merits of the parties' dispute. With respect to rulings in the former category, most reinsurance agreements say very little about pre-hearing procedural matters. In the absence of express contractual provisions governing procedural matters, the arbitration panel itself is typically authorized to establish appropriate procedures that will govern the arbitration. Such procedures may include whether and under what circumstances the panel will entertain requests for interim relief or make rulings on purely procedural issues such as discovery disputes. Although the Federal Arbitration Act, 9 U.S.C. §1 *et. seq.* ("*FAA*"), which governs arbitrations in the United States, does not specify when an interim or partial award should be deemed "final," it seems clear that such procedural rulings do not rise to the level of a final award that can be confirmed or vacated by a U.S. District Court under Sections 9 and 10 of the FAA.

One of the most contentious pre-hearing issues an arbitration panel may be called upon to decide is whether a party -- most often the reinsurer -- will be required to post pre-hearing security. Such security usually takes the form of a Letter of Credit or trust account securing the amount at issue in the arbitration. The request for pre-hearing security is typically raised at or before the organizational meeting.

Because arbitration rulings are generally unavailable publicly, it is impossible to know precisely how frequently arbitration panels receive or grant requests for pre-hearing security. Such requests, however, have grown more common, as evidenced by the fact that ARIAS•U.S. has developed a form of order for security. See, *ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure* (Rev. Ed. 2004), available at www.arias-u.s.org. When a panel does award security, its order is likely to be enforced. Several Federal courts have upheld interim awards granting security to cedents. *See, e.g., Banco de Sequros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); *Yasuda Fire & Marine Ins. Co. of Europe Ltd. v. Continential Casualty Co.*, 37 F.3d 345 (7th Cir. 1994); *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991). They have held that arbitration panels have the power to grant such interim relief and that such awards will be confirmed under Section 9 of the FAA, except in the limited circumstances generally applicable to vacatur of arbitration awards.

With respect to interim and partial awards that arbitration panels issue in ruling on the merits of the parties' claims and defenses, the FAA does not offer any statutory guidance addressing the circumstances under which the courts may intervene during the pendency of the arbitration proceeding for the purpose of either confirming or vacating such awards. This circumstance has led to a body of case law in which the courts have decided discrete issues relating to the finality and enforceability of interim and partial awards that address the merits of the dispute. Even in the absence of a statutory provision specifically authorizing arbitral tribunals to issue interim or partial awards that are final in nature, federal courts have long recognized that arbitration panels have such authority. *See, e.g., Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984) (noting the 'rule that 'an "interim" award that finally and definitively disposes of a separate independent claim can be confirmed "notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration."'") It was no doubt partly for that reason that Congress recognized indirectly the arbitration panel's implicit authority to issue such awards when it amended the FAA in 1988. Section 16(a)(1)(D), which was added to the FAA in 1988, identifies when appeals may be taken from district court orders pertaining to arbitration issues, thus providing that "[a]n appeal may be taken from [a]n order. . .confirming or denying confirmation of an award or *partial award*" 9 U. S . C. §16(a)(1)(D) (emphasis added).

(2) Reasoned vs. Non-Reasoned Awards

While arbitration hearings are often quite similar to trials in court, arbitral awards generally bear little resemblance to judicial opinions. It remains the exception rather than the rule in the United States that an arbitration panel will issue a "reasoned award." Rather, arbitral awards generally state the relief that is being awarded, but do not set forth detailed "findings of fact" or "conclusions of law," and may offer little if any other explanation for the result.

There are several justifications for this practice. The *ARIAS•U.S., Practical Guide to Reinsurance Arbitration Procedure* offers a few:

> Common arguments against "reasoned" awards are (a) they could discourage compromise awards when otherwise appropriate; (b) arbitration awards accompanied by written decisions may be challenged more frequently by petition to a court; (c) experience shows that "reasoned" decisions are often tailored predominantly to avoid reversal or criticism; and (d) requirements for "reasoned" decisions will ultimately favor appointment of lawyers as arbitrators, whereas the essence of arbitration frequently is to obtain a business, rather than legalistic, resolution.

ARIAS•U.S., Practical Guide to Reinsurance Arbitration Procedure (Rev. Ed. 2004), §5.4, Comment C.

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Once an arbitration panel has issued its final award, its jurisdiction generally ends, under the traditional formulation of the doctrine of *functus officio* (from the Latin phrase for "having performed his office"). At that point, the panel is barred from modifying its award except in limited circumstances.

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This leads to a key difference between arbitral awards and judicial decisions: arbitral awards are often compromises designed to address circumstances that arise in the context of a business relationship. Reinsurance arbitration agreements typically contain "honorable engagement" clauses that allow arbitrators to disregard the rules of law that govern the resolution of disputes in the courts. Moreover, since party arbitrators in American reinsurance arbitrations are expected to be partisan, they may bargain with one another to craft a result that gives something to both sides, often referred to as a "split the baby" award.

A fine article appeared in a recent edition of the *ARIAS•U.S. Quarterly* that discussed the trend toward increased use of 'reasoned awards' in American arbitrations, and traced the emerging case law defining the standards by which courts will review the sufficiency of such awards. Derek T. Ho, The Standards for a Reasoned Award: Emerging Lessons from Case Law, 19 *ARIAS•U.S. Quarterly* 1, at 17-19. Without reiterating or critiquing the findings of that article, a few important principles are worth noting. First, it is fair to say that the criteria for determining what constitutes a "reasoned award" remain sparse and ill-defined. Second, there have been a handful of judicial decisions over the past decade in which a "reasoned award" has been defined as "something short of findings and conclusions but more than a simple result." *Arch Dev. Corp. v. Biomet, Inc.*, 2003 WL 21697742, at *4-5 (N.D. Ill., July 30, 2003). *See, Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011); *Sarofin v. Trust Co. of the West*, 440 F.3d 213, 214 n.1 (5th Cir. 2006). Finally, the case law indicates that courts are very reluctant to overturn arbitral awards for failure to provide sufficient reasons.

(3) The Doctrine of Functus *Officio*

Once an arbitration panel has issued its final award, its jurisdiction generally ends, under the traditional formulation of the doctrine of *functus officio* (from the Latin phrase for "having performed his office"). At that point, the panel is barred from modifying its award except in limited circumstances.

One court has explained the doctrine this way:

> As a general rule, once an arbitration panel renders a decision regarding the issues submitted, it become *functus officio* and lacks any power to reexamine that decision. . . . Despite certain distinctions between common law and statutory arbitrations,. . .the *functus officio* doctrine has been routinely applied in federal cases brought pursuant to the Federal Arbitration Act . . . (.) The policy underlying this general rule is an "unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to reexamine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion."

Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 331-332 (3d Cir. 1991).

Nevertheless, there are exceptions to this rule. The Third Circuit Court of Appeals has noted three instances in which an arbitration panel can act following the issuance of an award:

> (1) an arbitrator "can correct a mistake which is apparent on the face of his award" . . . ; (2) "where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination," . . . [and] (3) "where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify."

Id., at 332.

Moreover, even when the arbitrators are barred from changing their award, a reviewing court may remand an award to the panel for clarification in the event the award is ambiguous in some way. *Hyle v. Doctor's Associates, Inc.*, 198 F.3d 368, 370 (2d Cir. 1999).

In reinsurance arbitrations, the *functus officio* doctrine most often creates difficulty when arbitration panels attempt to correct a final award. For example, in *Colonial Penn Insurance Co. v. Omaha Indemnity Co.*, *supra*., the final award included an element of relief that was based upon an inaccurate assumption of fact by the panel. When it learned of its mistake, the panel attempted to

issue a new award. The Third Circuit, however, held that the doctrine of *functus officio* barred the panel from substituting the second award for the first. It explained that the "mistake on the face of the award" exception did not apply. That exception was intended to apply to "clerical mistakes or obvious errors in arithmetic computation." *Id*., at 332. The mistaken factual assumption upon which the panel issued its first award did not create an error that was apparent on the face of the award.

The Second Circuit, however, noted an important caveat to the *functus officio* doctrine in the more recent case of *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc*., 592 F.3d 329 (2d Cir. 2010). In *T. Co. Metals*, the court noted that the doctrine applies only "absent an agreement by the parties to the contrary." *T. Co. Metals, supra*., at 342, quoting *Hyle v. Doctor's Associates, Inc*., 198 F. 2d 368, 370 (2d Cir. 1999). Parties are therefore free to empower their arbitrators to reconsider an award. *See, Glass, Molders, Pottery, Plastics & Allied Workers Int'l. Union, Local 182B v. Excelsior Foundry Co*., 56 F. 3d 844, 848 (7th cir. 1998) (Posner, C.J.) ("*Functus Officio* is merely a default rule, operative if the parties fail to provide otherwise. There is no legal bar to authorizing arbitrators to reconsider their decision, and some rules for arbitrators. . .do authorize reconsideration.") The Second Circuit found that the arbitrator in *T. Co. Metals* was empowered by both parties to consider requests for revisions to be made in the arbitration award by virtue of the fact that they had previously agreed to conduct the arbitration pursuant to the AAA's International Dispute Resolution Procedures, which authorize reconsideration in certain circumstances. *T. Co. Metals, supra*., at 343.

The court also made an important additional finding that may provide a further opening for parties seeking to avoid application of the doctrine of *functus officio* in order to seek reconsideration or modification of an arbitral award. In response to arguments by one of the parties as to the narrow scope of the reconsideration authority afforded under the AAA's procedures, the court held that, by directly petitioning the arbitrator to amend his original award, both parties had expressed a mutual intention that issues regarding the scope of the AAA procedures should be decided by the arbitrator himself. *Id*., at 344. Accordingly because the court concluded that the arbitrator did not exceed his powers by revising his original award, in a way consistent with his interpretation of his reconsideration authority, the Second Circuit reversed the decision of the district court to vacate the amended award and remanded the case to the district court with instructions to confirm the amended award. *Id*., at 347.

II. Appellate Rights

A. In the Courts

(1) An Overview

In a case that has been decided by a trial-level court, be it federal or state, the losing party has an automatic right to appeal from the final judgment to an intermediate appellate court. In the federal system, those courts are the United States Circuit Courts of Appeals. Such courts may affirm, modify, vacate, set aside, or reverse any judgment, decree or order of a trial court that is lawfully brought before them for review. An appellate court may remand the case to the trial court and direct the entry of any appropriate judgment, decree, or order, or require such further proceedings as may be just under the circumstances.

Appellate courts can avoid deciding a difficult question, which has not been fully argued by the parties to an appeal, if it can afford the appellant full relief without reaching that question. Instead, it will generally defer a decision on the issue until another case is presented in which the resolution of the issue will affect the outcome of the appeal. *Hodge v Seiler*, 558 F.2d 284 (5th Cir. 1977).

The highest court of the state (usually the state Supreme Court; in New York, the New York Court of Appeals) is considered to be the final authority on state law matters. In determining a matter of state law, federal courts are required to follow the decision of the highest court of the state. *Huddleston v. Duyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944). A federal court is also required to follow a rule announced as *dictum* in an opinion by the highest court of the state, when the rule is authoritative and relied upon by lower courts in the state. *Neuburgh Land & Dock Company v. Texas Company*, 227 F.2d 732 (2d Civ. 1955). A Federal court will always ascertain and apply the applicable

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Whereas the parties are entitled to judicial review of a trial court's final judgment by an intermediate appellate court, appeals to the U.S. Supreme Court or to the highest court of a state are usually discretionary, meaning that litigants must request that the higher rank court accept the case for further review. In practice, only a very few cases are accepted for review by the U.S. Supreme Court or by the highest courts in larger states.

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state law, even if it must rely on an opinion of an intermediate state court in determining what the law is. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed. 109 (1940). A Federal court, however, is not bound to follow a state court's interpretation of Federal law.

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(2) Interlocutory Appeals

An interlocutory appeal is an appeal of a ruling by a trial court that is made before a final judgment in the case has been entered. Most jurisdictions generally prohibit such appeals, requiring parties to wait until the entry of a final judgment before permitting challenges to any of the trial judge's pre-trial or trial rulings. Many jurisdictions, however, make exceptions for decisions of trial courts that are especially prejudicial to the rights of one of the parties. For example, if a party is asserting some sort of immunity from suit or is claiming that the court lacks personal jurisdiction over the party, it is recognized that being forced to wait for the conclusion of the trial would violate the party's right not to be subjected to a trial at all. In the federal courts, the U.S. Supreme Court has created a test for the availability of interlocutory appeals, which are authorized by 28 U.S.C. §1292. This test, called the collateral order doctrine, allows for such appeals only if:

1. The outcome of the case would be conclusively determined by the issue;
2. The matter appealed was collateral to the merits of the case; and
3. The matter would be effectively unreviewable if immediate appeal were not allowed. *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989).

In addition, several statutes directly confer the right to interlocutory appeals, including appeals from court orders denying arbitration under the FAA. 9 U.S.C. §16. There is currently a split of authority as to whether a stay of proceedings should issue in the district court while an interlocutory appeal on the arbitrability of a dispute is decided. *Compare, Bradford-Scott Data Corp., Inc. v. Phuysician Computer Network*, 128 F.3d 507 (7th Cir. 1993) *and Britby v. Co-op Banking Corp.*, 916 F.2d 1405 (9th Cir. 1990). An interlocutory appeal under the collateral order doctrine usually warrants a stay of proceedings.

(3) Standards of Review

Appellate courts, including the Federal circuit courts of appeals as well as state appellate tribunals, review the decisions of lower courts under various standards of review, depending on the nature of the lower court ruling. Unless a review is "*de novo*," the reviewing court will determine whether the lower court's decision was "clearly erroneous" or an "abuse of discretion." Traveling down the funnel (from widest to narrowest) of the series of appellate review standards, the broadest scope of review is *de novo* (from the Latin meaning "from the beginning," "afresh" or "anew"), which is normally applied to questions of law, then "abuse of discretion," normally applied to procedural issues, and finally "clearly erroneous," normally applied to factual findings of a trial court.

As examples of the application of these standards in an arbitration context, the issue of whether the parties are contractually bound to arbitrate their disputes will be reviewed under the *de novo* standard, and the admissibility in evidence of a handwriting expert's testimony regarding a forged arbitration document will also be reviewed under the de novo standard. The lower court's decision to admit or exclude such expert's testimony will be reviewed under the abuse of discretion standard, and its factual findings with regard to the question of whether or not the document was a forgery will be reviewed under the clearly erroneous standard.

B. In Arbitration

Arbitral awards are not self-enforcing. Accordingly, the FAA provides a mechanism for court enforcement of such awards. The prevailing party may take the arbitration panel's award to a court of competent jurisdiction and obtain a judgment, entitling that party to enforce the award against the losing party in the same

manner as if the judgment had been entered by a court of law in the first place. Congress, however, did not leave the losing party without any recourse, or compel courts to automatically approve every arbitral award regardless of the fairness or legitimacy of the underlying arbitration proceeding. To the contrary, the FAA provides several specific but highly limited grounds upon which a reviewing court can vacate, modify, or correct an arbitral award. 9 U.S.C. §10. Congress also specified the arbitration-related district court orders from which parties can seek further appellate review, including orders confirming, denying, modifying, correcting, or vacating an award. 9 U.S.C. §16.

In addition to the statutory grounds for review, courts have created narrowly defined common law grounds for vacating an arbitration award. Recent case law, however, has cast substantial doubt on the continued vitality of such common law grounds for attacking arbitral awards.

(1) Statutory Grounds for Vacating, Modification or Correction of an Arbitral Award

Section 9 of the FAA provides for judicial confirmation of arbitral awards. Specifically, the statute provides in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. §9. Given this language, issues arising from a proceeding to confirm an arbitral award turn on whether there are any grounds for vacating or modifying an award. The grounds for vacating or modifying an arbitral award are extremely narrow, and are set forth in Section 10 of the FAA.

Under Section 10(a), a reviewing court may vacate an arbitral award, upon the application of any party to the arbitration, in these circumstances:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. §10.

The first three grounds set forth in Section 10 involve a review of the actions of the parties and the arbitrators in order to determine if the proceeding was fair, and have nothing to do with the merits of the arbitrators' decision. And while the fourth ground seems to provide for some substantive review of the award, the U.S. Supreme Court has interpreted it to bar reviewing courts from considering whether the arbitrators correctly decided the merits of the case. *United Paperworkers Int'l. Union v. Misco, Inc.*, 484 U.S. 29 & 37-38 (1987). As one court put it, in reviewing arbitral awards a district or appellate court is limited to determining "whether the arbitrators did the job they were told to do — not whether they did it well, or correctly, or reasonably, but simply whether they did it." *Remmey v. PaineWebber, Inc.,* 32 F.3d 143, 146 (4th cir. 1994) (quoting *Richmond, Fredricksburg & Potomac R.R. v. Transp. Comm'n Int'l. Union*, 973 F.2d 276, 281 (4th Cir. 1992).

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Despite the narrow grounds for vacating arbitral awards, attempts to vacate awards remain relatively common. We therefore analyze each of the grounds for vacating separately:

[a] Corruption, Fraud or Undue Means

The first statutory grounds for vacating an award — that the award be "procured by corruption, fraud, or undue means," -- is rarely used. Fortunately, egregious conduct, such as corruption and fraud, is extremely rare.

The term "undue means" is not much broader than the words "corruption" and "fraud." Courts have held that undue means "must be read in conjunction" with those two words, *National Casualty Co. v. First State Ins. Co.*, 430 F.3d 492 (1st Cir. 2005), and "clearly connotes behavior that is immoral if not illegal. *A. G. Edwards & Sons, Inc. v. McCullough*, 967 F.2d 1401, 1403 (9th Cir. 1992). Accordingly, vacating an award on the basis of "undue means" has been held to require "proof of intentional misconduct," in addition to a "causal relation between the undue means and the arbitration award." *Painewebber Group., Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988, 991-994 (8th Cir. 1999).

Courts have rejected arguments that "undue means" extends to parties' withholding documents from discovery in reliance on reasonable assertions of privilege, id. at 994, to parties' submission of legally objectionable evidence, *American Postal Workers Union v. United States Postal Service*, 52 F.3d 359 (D.C. Cir. 1995), or to parties' assertion of frivolous defenses. *A.G. Edwards, supra*.

[b] Evident Partiality

The second statutory ground for vacating an award, "evident partiality" of an arbitrator, is a more commonly used ground than the first. Courts have held, however, that "evident partiality" means more than the mere appearance of bias. *See, e.g., Applied Industrial Materials Corp. v. Ovaler Makine Ve Sayayi, a.S.*, 492 F.3d (2d Cir. 2007). Such a low standard for vacating awards would be inconsistent with the language of the FAA and would likely frustrate the purpose of arbitration. *International Produce, Inc. v. A/S Rossharet*, 638 F.2d 548, 552 (2d Cir. 1981).

At the same time, however, some courts have indicated that the "evident partiality" standard may not require a showing of actual bias. For example, the Seventh Circuit has concluded that "evident partiality within the meaning of Section 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party in the arbitration." *Ment Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983). Other courts have shown an inclination to find "evident partiality" if an arbitrator fails to disclose a potential conflict. *See, e.g., Applied Industrial Materials Corp., supra* at 138.

Vacating an award for evident partiality is particularly difficult when the arbitrator in question is party-appointed. Where a party-appointed arbitrator is expected to be partial, some courts have found that the evident partiality standard may not apply at all. *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002).

Courts have upheld arbitration awards against a variety of challenges based on "evident partiality." For example, courts have declined to find "evident partiality" where arbitrators were alleged to have close personal or professional relationships with a party or another panel member, *Transit Casualty Co. v. Trenwick Reinsurance Co.*, 659 F.Supp. 1346 (S.D.N.Y. 1987), where the umpire was slated to be a witness in another case involving the same law firms that represented the parties in the first arbitration, *International Produce, Inc., supra*, where an arbitrator engaged in *ex parte* communications with the party that appointed her, *Nationwide Mutual Ins. Co., supra*, where two of the arbitrators had failed to disclose that they had been involved in an ethics controversy when they were state judges many years earlier. *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F. 634, 646 (9th Cir. 2010).

[c] Misconduct

Under the third ground for vacatur set forth in Section 10 of the FAA, a court may vacate an arbitration award if the arbitrators "were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." This provision focuses on the arbitrators' conduct of the arbitration proceeding.

As with the other grounds for vacating an award, however, this ground is also quite narrow. Arbitrators have broad discretion to conduct the arbitration in the manner they see fit. As one court has stated, "The misconduct must amount to a denial of fundamental fairness of the arbitration proceeding in order to warrant vacating the award" for misconduct under Section 10(3). *Transit Casualty Co., supra*.

Given the deference afforded to the arbitrators in procedural matters, courts have upheld awards when the panel refused to hear oral argument, *British Ins. Co. of Cayman v. Water Street Ins. Co., Ltd.*, 93 F. Supp. 506 (S.D.N.Y. 2000), refused discovery requests, *One Beacon America America Ins. Co. v. Odyssey America Reinsurance Corp.*, 2009 WL 4509183 (S.D.N.Y. Nov. 18, 2009), refused a submission offered by a party, *Transit Casualty Co., supra*, excluded evidence, *One Beacon America Ins. Co. v. Swiss Reinsurance America Corp.*, 2010 WL 5395069 (D. Mass. Dec. 23, 2010), and conducted *ex parte* interviews with panel-retained experts. *United States Life Ins. Co. v. Superior National Ins. Co.*, 591 F.3d 1167 (9th Cir. 2010). It is particularly difficult to vacate an award on the basis of misconduct where the contract includes an "honorable engagement" clause, as most contracts do. The honorable engagement clause provides in substance that the arbitrators need not follow the strict rules of law or observe judicial formalities in making their decision. As the First Circuit Court of Appeals observed:

> Here, the relevant contract provisions not only relieved the arbitrators of any obligation to follow "the strict rules of law," but also released the arbitrators from "all judicial formalities." In

> the face of a clause that broad, which makes no mention of the production obligations of the parties or of the discovery procedures to be followed, and which so fully signs over to the arbitrators the power to run the dispute resolution process unrestrained by the strict bounds of law or of judicial process, a party will have great difficulty indeed making the showing, requisite to vacatur, that their rights were prejudiced.

National Casualty Co., supra at 497-498.

There have been cases, however, where the courts have held that an arbitration panel's refusal to hear key evidence constituted sufficient grounds to vacate an award under Section 10(a)(3). For example, the Second Circuit held that a panel's refusal to hear evidence of an important witness amounted to misconduct, justifying vacatur. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d. Cir. 1997). The court said that "there was no reasonable basis for the arbitration panel to determine that [the witness's] omitted testimony would be cumulative . . ." Thus, the court concluded, "the Panel excluded evidence plainly 'pertinent and material to the controversy'," sufficient to warrant vacatur. *Id.*

[d] Exceeding Powers

The final statutory ground for vacating an arbitration award is "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. §10(a)(4).

This ground for vacating an award is a necessary outgrowth of the fundamental principle that arbitration is a creature of contract. Thus an award can be vacated if an arbitration panel ignores a contractual limitation on its authority. In one case, the Ninth Circuit Court of Appeals vacated an arbitration award where an arbitrator ignored a contractual forum provision. *Polimaster Ltd. v. RAE Systems, Inc.*, 623 F.3d 832 (9th Cir. 2010).

Nevertheless, where an arbitration provision is broad, courts are reluctant to hold that a panel has exceeded its powers. The Second Circuit has explained that Section 10(a)(4) does not authorize the courts to correct an erroneous decision. The court stated:

> We have "consistently accorded the narrowest of readings" to the FAA's authorization to vacate awards pursuant to § 10(a)(4). . . . Our inquiry "focuses on whether the arbitrators had the power based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue."

Banco de Seguros del Estado, supra.

Moreover, arbitration panels are typically found to have discretion to order remedies they deem appropriate, as long as they do not exceed the power granted to them in the contract. The Seventh Circuit has expressly recognized that arbitration panels have the implied power to order remedies that are not specifically expressed in the contract. *Yasuda Fire & Marine Ins. Co. of Europe, Ltd., supra*. The court has said:

> Although parties to arbitration agreements may not always articulate specific remedies, that does not mean remedies are not available. If an enumeration of remedies were necessary, in many cases "the arbitrator would be powerless to impose any remedy, and that would not be correct. Since the arbitrator 'derives all his powers from the agreement, the agreement must implicitly grant him remedial powers when there is no explicit grant.'"

Yasuda Fire & Marine Ins. Co., supra at 351.

For example, it is well-established that arbitrators have the power to award pre-hearing security, even where the contract is silent on the issue. *Banco de Seguros del Estado, supra*. This approach has also been used to confirm awards of sanctions made by arbitration panels. *Reliastar Life Ins. Co. of New York v. EMC National Life Co.*, 564 F.3d 81 (2d Cir. 2009).

Finally, under Section 10(a)(4), an award can be vacated if it is "completely irrational." *Avio v. Underwriting Members of Syndicate 53 at Lloyd's*, 618 F.3d 277 (3d Cir. 2010). It is very difficult to persuade a court that an arbitrator's award was *completely* irrational. It is not enough that the court might disagree with the award. There must be "absolutely no support at all in the record justifying the arbitrators' determinations for a court to deny enforcement of an award." *Id.*

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Moreover, arbitration panels are typically found to have discretion to order remedies they deem appropriate, as long as they do not exceed the power granted to them in the contract. The Seventh Circuit has expressly recognized that arbitration panels have the implied power to order remedies that are not specifically expressed in the contract.

In addition to these statutory grounds for vacatur, courts have traditionally enjoyed the power under common law principles to vacate arbitration awards. The common law doctrines of vacatur that courts have used are that the award was "arbitrary and capricious," "completely irrational," a violation of "public policy," and that the award was made in "manifest disregard of the law."

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Section 11 of the FAA provides equally narrow grounds for modifying or correcting an award, allowing the court to do so, upon application of either party to the arbitration:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. §11.

Like Section 10, courts interpreting Section 11 have insisted that these provisions not be misused as a pretext for correcting arbitrators' decisions or the merits. *See, e.g., Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980). Courts have limited the application of Section 11 to the correction of obvious mathematical or clerical errors, See e,g, Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188, 194 (4th Cir. 1998), or to the striking of "all or a portion of an award pertaining to an issue not at all subject to arbitration," *See, e.g., Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 997-98 (9th Cir. 2003).

(2) Common Law Grounds for Vacating an Arbitration Award: The "Manifest Disregard" Doctrine

In addition to these statutory grounds for vacatur, courts have traditionally enjoyed the power under common law principles to vacate arbitration awards. The common law doctrines of vacatur that courts have used are that the award was "arbitrary and capricious," "completely irrational," a violation of "public policy," and that the award was made in "manifest disregard of the law." The origin of the doctrine of "manifest disregard" was a seemingly innocuous piece of *dictum* in the 1953 U.S. Supreme Court case *Wilko v Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). In *Wilko*, the Court held that an arbitration clause in a margin agreement between a broker firm and its customer was void pursuant to Section 14 of the Securities Act. *Id.* at 438. The Court considered whether "a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would 'constitute grounds for vacating the [arbitral] award pursuant to Section 10 of the [FAA].'" *Id.* at 436. The Court stated that the "failure would need to be made clearly to appear. In unrestricted submissions. . .the interpretation of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* at 436. This statement became the basis for the modern doctrine of manifest disregard, as interpreted by the circuit courts of appeal after this decision.

The Second Circuit Court of Appeals has defined "manifest disregard of the law":

> An arbitral award may be vacated for manifest disregard of the law "only if 'a reviewing court . . . finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" . . . We have emphasized that an arbitral panel's refusal or neglect to apply a governing legal principle 'clearly means more than error or misunderstanding with respect to the law.'"

Wallace v. Buttar, 378 F.3d 182 (2d Cir. 2004).

Other circuits have followed a similar approach. As the Eighth Circuit has explained:

> Manifest disregard requires something more than a mere error of law. If an arbitrator, for example, stated the law, acknowledged that he was rendering a decision contrary to law, and said that he was doing so because he thought the law unfair, that would be an instance of 'manifest disregard.' To require anything less would threaten to subvert the arbitral process.

Lincoln National Life Ins. Co. v. Payne, 374 F.3d 672, 675 (8th Cir. 2004).

Although the doctrine of manifest disregard traditionally has been available in every circuit as a basis of judicial relief from arbitration awards, parties have been rarely successful in using it. This is because all the circuits set a high subjective standard for vacatur on this ground. Application of the

doctrine to reinsurance arbitration may be more limited than in other fields of commerce. This is because of the presence in reinsurance agreements of "honorable engagement" clauses. Presumably, if the parties have already *agreed* that the arbitration panel may disregard otherwise applicable legal principles, it is unclear how the "manifest disregard of the law" doctrine would apply. Despite its low success rate, manifest disregard remains one of the most popular claims for a losing party to make in an attempt to gain relief from an adverse arbitral award.

(3) Can the Parties Expand Appellate Rights?

Notwithstanding the fairly well-established doctrine of "manifest disregard," the U.S. Supreme Court, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 396, 170 L.Ed. 2d 254 (2008), ruled that the FAA provides the exclusive grounds for vacatur of arbitral awards. This ruling created uncertainty over whether the common law doctrine of manifest disregard remains a valid ground for vacatur. In *Hall Street*, the plaintiff, Hall Street Associates, L.L.C. leased a manufacturing site to the defendant, Mattel, Inc. As part of the lease, Mattel agreed to indemnify Hall Street for any costs that resulted from its failure, or its predecessor's failure, to follow environmental laws while using the site. *Id*. at 579. In 1998, tests showed that Mattel's predecessors had left high levels of trichloroethylene ("TCE") in the property's well in violation of a state environmental law, which forced Mattel to cease its use of the well. Id. In 2001, Mattel gave High Street notice of its intent to terminate the lease, and Hall Street later filed suit claiming that Mattel had to indemnify Hall Street for the cost of cleaning up the TCE under the terms of the lease. *Id*.

Following a bench trial in the district court, the parties drew up an arbitration agreement to deal with the indemnification claim. The agreement stated that the district court "shall vacate, modify or correct any award: (i) where the arbitrators' findings of facts are not supported by substantial evidence or (ii) where the arbitrators' conclusions of law are erroneous." Id. The arbitrator decided for Mattel, holding that "no indemnification was due, because the lease. . .did not require compliance with the testing requirements of the Oregon Drinking Water Quality Act." *Id*. at 580.

Hall Street filed a motion to vacate the arbitration decision, arguing that the arbitrator committed a legal error by finding that the Oregon Act did not apply to the terms of the Lease. *Id*. The district court agreed and vacated the award on the basis of the terms set out in the arbitration agreement, and remanded the case for further consideration by the arbitrator. *Id*. On remand, the arbitrator applied the Oregon Act and therefore decided for Hall Street.

This case eventually made its way to the Supreme Court, where the court was confronted with the issue of whether Sections 10 and 11 of the FAA were the exclusive grounds for vacatur and modification of an arbitral award, or whether the FAA allowed parties to supplement the statutory grounds for vacatur by contract. *Id*. at 581. Hall Street attempted to argue that Sections 10 and 11 were not exclusive grounds in light of the court's prior decision in the *Wilko* case.

The Court determined that the phrase in *Wilko* that had given birth to the modern doctrine of "manifest disregard of the law" was too vague to support Hall Street's argument, and thus *Wilko* had no relevance to the case at hand. Instead, the court ultimately decided that Sections 10 and 11 of the FAA were intended to be the exclusive grounds for vacatur and modification of an arbitral award, and emphasized the point throughout its opinion. *Id*. at 585- 586. The court reasoned that the text of Section 9 of the FAA, which states that court "must grant" an order "unless" it can vacate an award "as prescribed" by Sections 10 and 11, "carried no hint of flexibility" with its language. *Id*. at 587. The Court felt that the language of Section 9 "unequivocally" stated that the courts "must grant" confirmation of an arbitral award in all cases, except for the "prescribed" exceptions. *Id*. Any other reading of this section would "open the door to the full-bore legal and evidentiary appeals that can `rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Id*. at 588.

(4) The Future of "Manifest Disregard" after *Hall Street v. Mattell*

The Supreme Court's decision in *Hall Street* has led lower courts to question whether the doctrine of "manifest disregard of the law" is still a valid ground for vacating an arbitral award. Several circuit courts of appeal have considered the issue. At least three circuits have concluded that *Hall Street* eliminated manifest disregard as a ground for vacatur. The Fifth and Eleventh Circuits have conclusively held that manifest disregard is no longer valid. *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010). The First Circuit, however, has made this statement only in *dictum*. *Ramos-Santiago v. UPS*, 524 F.3d 120, 124 n.3 (1st Cir. 2008).

The circuits holding that *Hall Street* did not eliminate manifest disregard as a ground for vacatur have reached this conclusion in different ways. The Sixth Circuit dealt with the issue by simply holding that the court in *Hall Street* did not expressly consider the doctrine of manifest disregard. *Coffee Beanery Ltd. v. WW L. L.C.*, 501 F.Supp. 2d 255 (W.D. Mich. 2007) *rev 'd,* 300 F. App'x (6th Cir. 2008). The Second and Ninth Circuits have read Hall Street less narrowly than the Sixth Circuit and have held that the *Hall Street* decision reached, but did not eliminate, the doctrine. The Second Circuit, in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 548 F.3d 85 (2d Cir. 2008), held that after *Hall Street* courts would now reinterpret manifest disregard as "shorthand" for Sections 10(a)(3) or 10(a)(4) of the FAA, dealing with arbitrator "misconduct" and arbitrators "exceed[ing] their powers." *Id*. at 94. The court based this framework for harmonizing the manifest disregard doctrine and the FAA on the Seventh Circuit's decision in *Wise v Wachovia Securities, LLC*, 450 F.3d 265 (7th Cir. 2006), in which the Seventh Circuit had

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previously held that its definition of "manifest disregard" was "so narrow that it fits comfortably under [Section 10(a)(4) of the F.A.A.]." *Id*. at 268.

The Ninth Circuit has taken a similar approach to the Second Circuit's holding in *StoltNielsen. In Comedy Club, Inc. v. Improv W. Assocs*., 553 F.3d 1277 (9th Cir. 2009), the Ninth Circuit acknowledged that *Hall Street* made the FAA grounds the exclusive ones for vacatur. The court stated, however, that it had "already determined. . .the manifest disregard ground for vacating [was] shorthand for a statutory ground under the F.A.A., specifically 9 U.S.C. §10(a)(4)." *Id*. at 1290. This is essentially the same conclusion that the Second Circuit, borrowing from the Seventh Circuit's decision in *Wise*, had reached. The Ninth Circuit, however, argued that it was unnecessary to "reconceptualize" manifest disregard because it found evidence in its own prior decisions that manifest disregard was the equivalent of a statutory ground for vacatur. *Id*. The Court held that the "exceeding their powers" language in Section 10(a)(4) and its own definition of "manifest disregard" were equivalent.

In sum, the future of the doctrine of "manifest disregard" remains somewhat unclear because of the varying approaches adopted by the Circuit Courts of Appeal in the wake of the Supreme Court's decision in *Hall Street*. It appears, however, that the doctrine, at least to the extent it varies from the statutory grounds for vacatur set forth in FAA, is moribund, if not altogether extinct.

III. The Impact of Rulings on Future Conduct and Claims

A. Legal Principles of Estoppel

Well-established principles of estoppel can serve to prevent parties from relitigating the same issues and the same claims in the courts. Ideally, these principles serve to reduce the need for multiple litigations and create judicial efficiency.

(1) *Res Judicata*: Claim Preclusion

Res judicata, or claim preclusion, refers to an "issue that has been definitively settled by judicial decision." BLACK'S LAW DICTIONARY (9th ed. 2009). It prevents the relitigation of the very same cause in a second proceeding between the same parties or parties who are in privity with each other. *Paramount Farms, Inc. v. Ventilex*, 735 F. Supp. 2d 1189, 1201-02 (E.D. Cal. 2010). Three elements must be satisfied for *res judicata* to apply:

- The claim must be identical to the one already litigated;
- There must have been a final judgment on the merits; and
- The party against whom *res judicata* is being asserted must be the same party from the prior proceeding or be in privity with the prior party.

Paramount Farms, supra., at 1201-02. When these elements are met, the losing party is prevented from litigating the very same claim again in the hope of getting a different result. Conversely, the winning party should not be required to litigate the same issue again, having already achieved a favorable result.

(2) Collateral Estoppel: Issue Preclusion

Under collateral estoppel, sometimes called issue preclusion, the determination of an issue by judicial decision will be conclusive between the parties for any issue that was actually litigated and determined if that determination was essential to the final judgment. RESTATEMENT (SECOND) OF JUDGMENTS § 17 (2011). Collateral estoppel, then, will prevent the relitigation of an issue already decided if specific elements are met:

- The issue must be identical to one raised in a prior proceeding;
- The issue must have been actually litigated and decided;
- The resolution of the issue must have been necessary to support a final and valid judgment on the merits; and
- The party against whom the doctrine is being asserted must have been a party to the earlier proceeding, with a full and fair opportunity to litigate the issue, or have been in privity with the party in the prior proceeding.

Bouriez v. Carnegie Mellon Univ., 430 F. App'x 182, 186 (3rd Cir. 2011); Par*amount Farms*, 735 F.Supp. 2d at 1202; *Hoffmann-LaRoche Ltd. v. Quiagen Gaithersburg*, Inc., 730 F. Supp. 2d 318, 327 (S.D.N.Y. 2010); *Stonewall Ins. Co. v. Argonaut Ins. Co*., 75 F. Supp. 2d 893, 901 (N.D. Ill. 1999).

(3) Special Considerations in the Application of Res Judicata and Collateral Estoppel

Both collateral estoppel and *res judicata* require that the parties be identical or that the current party be in privity with the party from the prior proceeding. Whether or not the party is considered in privity with the prior party requires the application of a flexible doctrine; in any event, privity will only apply when the actual party fully and fairly represented the current party's interests. *Commonwealth Ins. Co. v. Thomas A. Greene & Co., Inc*., 709 F. Supp. 86, 88- 89 (S.D.N.Y. 1989). In determining whether the parties are in privity, the tribunal asks whether the parties shared the same legal right. *Hartford Accident & Indem. Co. v. Columbia Cas. Co*., 98 F. Supp. 2d 251, 256 (D. Conn. 2000).

Additional issues arise if there are multiple, inconsistent rulings. As a general rule, if there are two inconsistent judgments, the latter one will be given conclusive effect in a third or other subsequent proceeding. RESTATEMENT (SECOND) OF JUDGMENTS § 15 (2011).

Finally, consideration should be given to the burden of proof for establishing that estoppel principles should apply. The proponent of estoppel has the burden of establishing that the earlier issues were identical and decisive. *AXA Corp. Solutions v. Underwriters Reins. Co*., No. 02 C 3016, 2004 U.S. Dist. LEXIS 22609, at *29-30 (N.D. Ill. Nov. 9, 2004). The opponent has the burden of establishing that it did not have a full and fair opportunity to litigate the issue in the prior proceeding. *Id*.

(4) Judicial Estoppel

A third form of estoppel is judicial estoppel, preventing a party from taking a position in a judicial proceeding that is inconsistent with one previously taken.

Under judicial estoppel, a party is prevented "from asserting a claim or right that contradicts what one has said or done before." BLACK'S LAW DICTIONARY (9th ed. 2009).

In determining whether to apply judicial estoppel, the tribunal will ask three questions:

- Is the present position being taken irrevocably inconsistent with the prior position?
- Has the party changed its position in bad faith?
- Can the use of judicial estoppel be tailored to address any affront to the court's authority?

Untracht v. Fikri, 454 F. Supp. 2d 289, 306 (W.D. Pa. 2006). If the elements are satisfied, the party will be prevented from taking inconsistent positions on an issue in a judicial proceeding.

B. Law of the Case and *Stare Decisis*

Two additional legal doctrines prevent the same issue from being relitigated over and over again. The law of the case doctrine prevents an issue from being relitigated within the same proceeding between the same parties, while *stare decisis* prevents a decided rule of law from being relitigated in future proceedings between any parties.

The law of the case is a "doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal." BLACK'S LAW DICTIONARY (9th ed. 2009). Under this doctrine, an issue previously decided will not be relitigated unless there is an intervening change in controlling law or new facts come to light. *City of Pontiac Gen. Emps.' Retirement System*, 637 F.3d 169, 173 (2nd Cir. 2011).

Stare decisis refers to the "doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY (9th ed. 2009). While *stare decisis* provides parties with certainty about established rules of law, it depends on public and widely available decisions that all parties can access. Thus the doctrine has little application to arbitration proceedings, since arbitration awards are seldom "reasoned" and even less often available to panels that may be considering similar issues.

C. Application to Arbitration Proceedings

The courts have broad discretion to determine whether or not estoppel principles should apply to arbitration rulings. *Universal Am. Barge Corp. v. J-Chem, Inc.* 946 F.2d 1131, 1137 (5th Cir. 1992). As a general rule, however, such principles will be applied only to a final arbitration award. *Hartford*, 98 F. Supp. 2d at 255; *Commonwealth*, 709 F. Supp. at 88.

The federal courts might not apply principles of estoppel if it is determined that other federal interests are at stake. *Dean Witter Reynolds, Inc. v. Byrdi*, 470 U.S. 213, 223 (1985). For example, civil rights or federal securities laws will generally trump the application of estoppel principles to an arbitration award. *Id*.

When it comes to arbitration, the courts have indicated that it will be up to the arbitrator to determine whether or not to follow a previous award. *N. River Ins. Co. v. Allstate Ins. Co.*, 866 F. Supp. 123, 128 (S.D.N.Y. 1994). As a creature of contract, however, parties to arbitration can themselves reach an agreement regarding the estoppel effect of any arbitration rulings--interim or final. *See, e.g., Consolidation Coal Co. v. United Mine Workers of Am.*, 213 F.3d 404, 407 (7th Cir. 2000) ("[Any preclusive effect], like most features of arbitration, is indeed a matter of contract rather than a matter of law.").

In agreeing to the estoppel impact of an arbitration ruling, the parties should make sure that the desired impact is addressed in their arbitration agreement and in any confidentiality order.

The confidentiality agreement or order should be carefully drafted to ensure that it will not adversely affect the preclusive effect of a ruling that the parties desire by preventing either side from sharing the results of a final award. If the parties agree that the arbitrator's award should have estoppel effect, they will need to ensure that the confidentiality agreement makes clear that the order can be released to a future panel or court.

The arbitration agreement can include a provision that specifically outlines the preclusive effect of any award as well, clarifying to whom the award will apply and the specific effect the parties wish it to have. Because arbitration is always a matter of agreement between the parties, such agreements, when properly drafted, should serve to provide the parties with the estoppel effect that they desire. ▼

The views expressed in these materials do not necessarily reflect the views of Kerns, Frost & Pearlman, LLC; Larson King, LLP; their attorneys, or any of their clients.

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