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Breakfast | 8:00 – 8:30 am

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THE NEW FRONTIER

Eighth Annual Symposium - October 13, 2016

Harvard Club – Back Bay, Boston, Massachusetts

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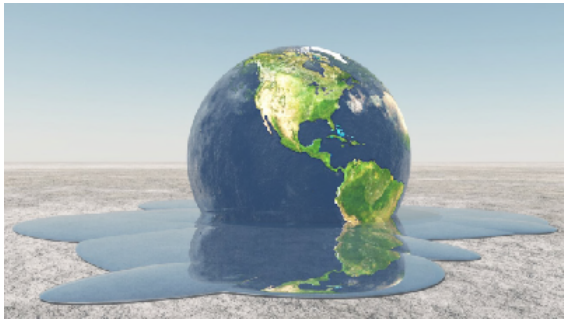
Keynote Address

"Climate Change: Challenges and Opportunities for the Reinsurance Industry"



Dr. Megan E. Linkin, Ph.D., CCM

Swiss Re Management (US) Corporation

Climate Change: Indisputable Science

Evidence of Climate Change:

A review of the last decade

Energy and Environment

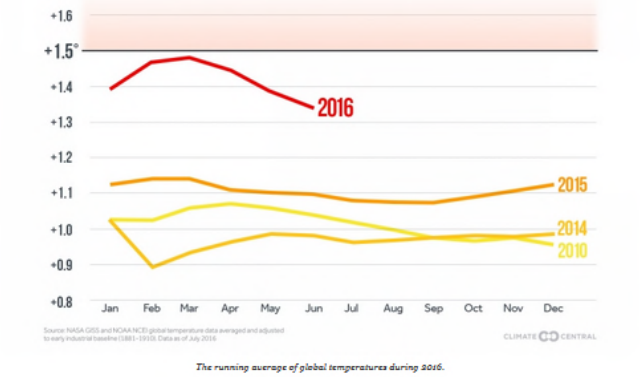
It's official: 2015 'smashed' 2014's global temperature record. It wasn't even close

First Half of 2016 Blows Away Temp Records

Published: July 19th, 2016

By Andrea Thompson

The first half of 2016 has blown away temperature records, capped off by a record hot June, once again bumping up the odds that 2016 will be the hottest year on record globally, according to data released Tuesday.



The running average of global temperatures during 2016.

Sea ice in Arctic shrinks to second lowest level on record

By SETH BORENSTEIN AP Science Writer Sep 15, 2016 (...)

Lack of Evidence of Climate Change:

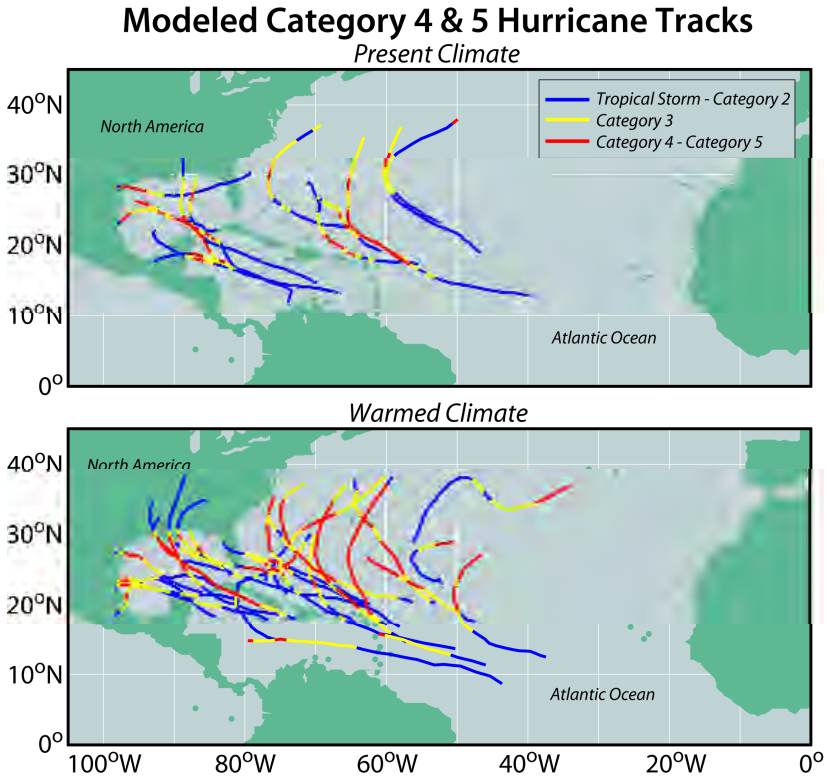
A review of the last decade

Challenges facing the reinsurance industry

Challenges facing the reinsurance industry

Can we assess current or future nat. cat. risk using history?

- Current catastrophe models rely on historical databases of hurricanes, floods, tornadoes and winterstorms to assess risk posed by natural catastrophes.
- Sea level rise, increasing ocean temperatures and shifting atmospheric circulation patterns could lead to a new risk landscape, not represented by history.



Source: Bender, et al. (2010)

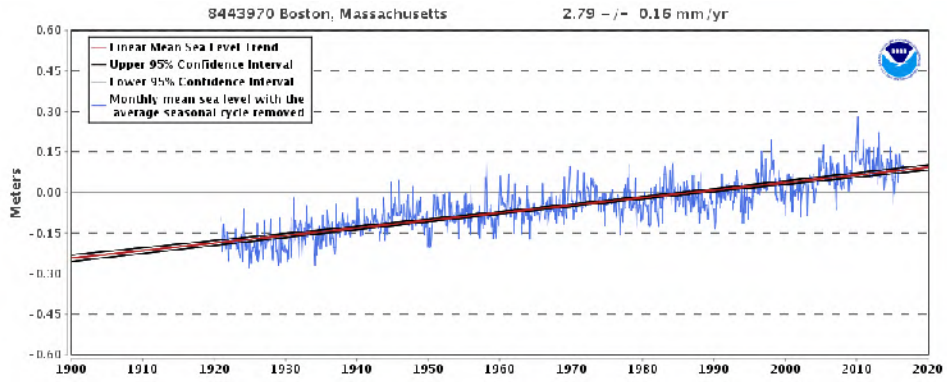
Challenges facing the reinsurance industry

Will new risks emerge?

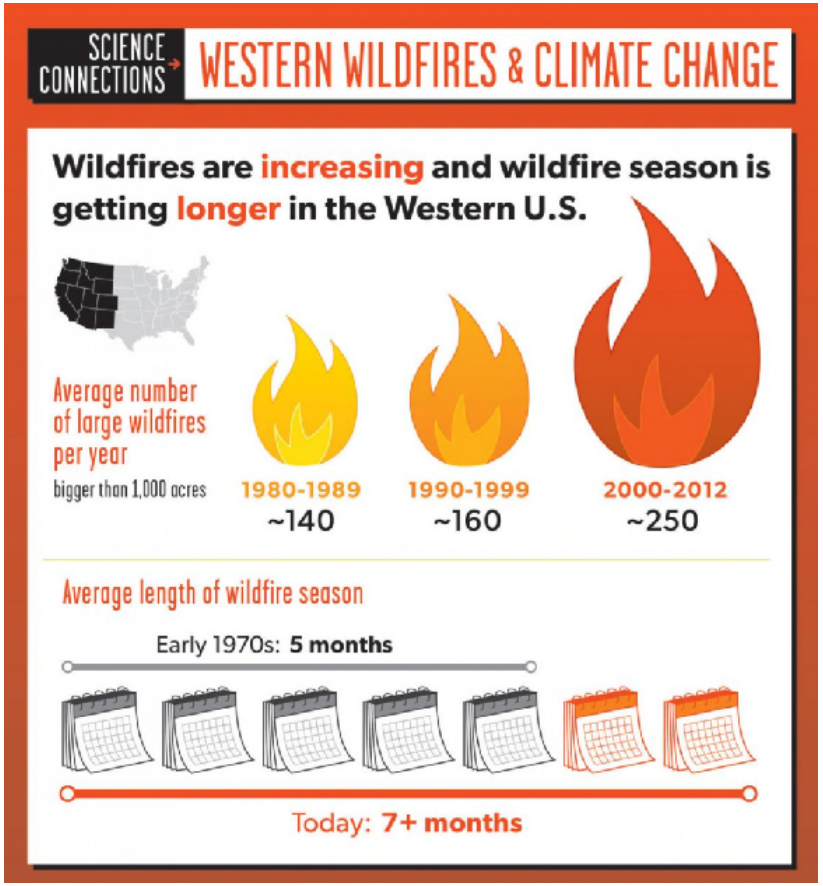
NOAA: 'Nuisance flooding' an increasing problem as coastal sea levels rise

Study looks at more than 60 years of coastal water level and local elevation data changes

July 28, 2014 (Updated information added 10/31/2014)



- Sea level rise is increasing the nuisance flooding along the US East Coast.
  - Changes in the 100 year and 500 year flood plain
- Length of wildfire season in western North America is increasing.
  - From NASA: "Climate change has exacerbated naturally occurring droughts, and therefore fuel conditions."
- Development along wildland/urban interface (WUI)

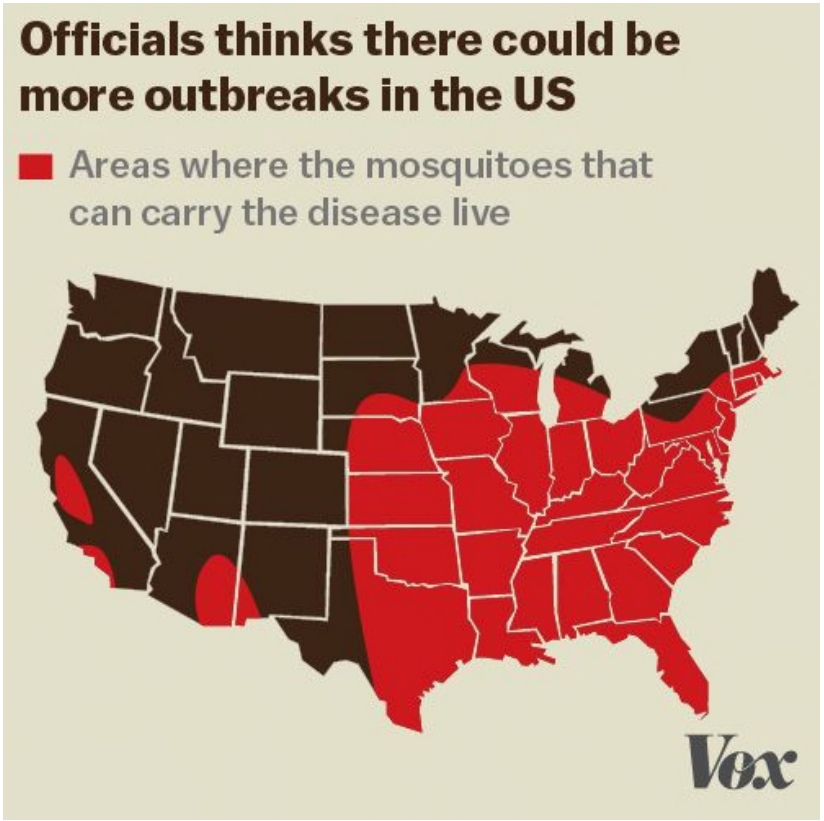


Sources: NOAA, Union of Concerned Scientists

Challenges facing the reinsurance industry

What's the public health impact?

- Increases in frequency of heat waves could lead to increases in case of heat stroke and heat exhaustion.
- Infectious diseases could migrate to more northerly latitudes.
- Favorable conditions for disease outbreaks in tropical locations could increase in frequency.
  - Zika serves as a lesson.



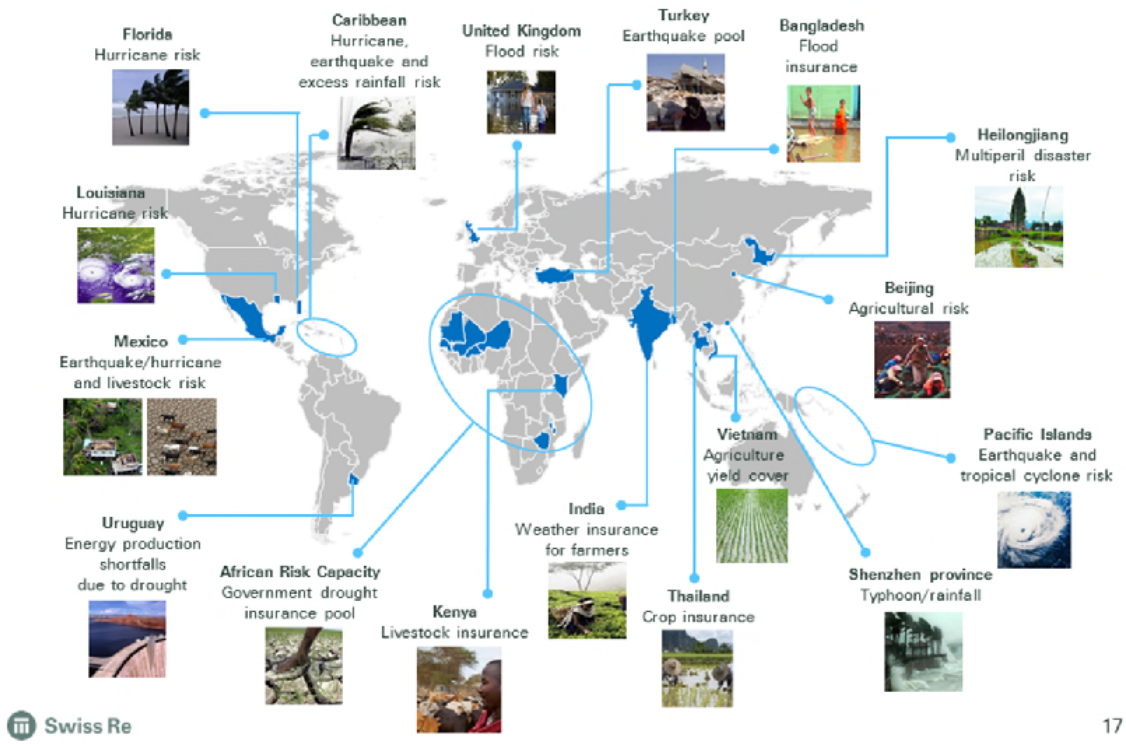
Source: CDC via Vox

Opportunities for the reinsurance industry

Opportunities for the reinsurance industry

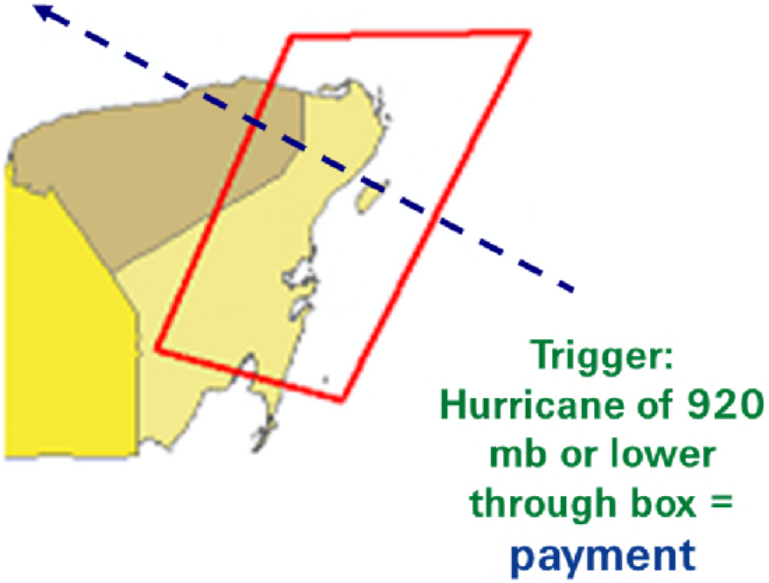
Public sector partners

- The public sector is transferring natural catastrophe and weather risk to the private market.
  - Ex-ante financing mechanisms better address post-event recovery than post-event financing.
  - Allow the public sector to put a price tag on risk.
- Numerous successful transactions in the marketplace
  - MultiCat Mexico
  - CCRIF SPC (formerly the Caribbean Catastrophe Risk and Insurance Facility)
  - Pacific Catastrophe Risk and Insurance Facility (PCRAFI)



Opportunities for the reinsurance industry

New product availability



- Parametric, or index-based, products settle quickly using third party information.
- The use of funds is flexible.
- Allow for an injection of liquidity in the near immediate wake of a natural disaster, getting money to the affected when it's needed to most.

Opportunities for the reinsurance industry
Distribution to the bottom of the pyramid

- Natural disasters disproportionately affect the lowest income populations.
- Mobile technology is allowing for simplified purchase and claims procedures
  - Ex-ante financing mechanisms better address post-event recovery than post-event financing.
- Numerous transactions in the marketplace
  - Fonkoze
  - Kenya Livestock Insurance Program (KLIP)
  - R4 in Africa

Conclusions

- *There is indisputable evidence that climate change is and will occur.*
- *If left unchecked, the challenges facing the reinsurance industry will be unlike those observed previously.*
- *Working across sectors and through the development of new products, climate change can be addressed effectively.*

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"Peeling the Bermuda Onion: Bermuda Form Policies And Arbitration"

Panelists:

Rod S. Attride-Stirling, ASW Law Limited, Bermuda

Sonia M. Valdes, MedMarc Insurance CompanyTony

Moderator:

John T. Harding, Lewis Brisbois Bisgaard & Smith LLP

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The Bermuda Insurance Market

- In the midst of the global financial crisis, the Bermuda market has remained resilient.
- In March 2016, Bermuda was awarded full equivalence with Europe's Solvency II system.

- Bermuda is the largest captive domicile with 800 captives generating over $48 billion in annual gross written premiums.
- Bermuda is the third largest insurance centre worldwide and the largest supplier of catastrophe reinsurance to US insurers.
- 15 of the top 40 reinsurance companies are domiciled in Bermuda.

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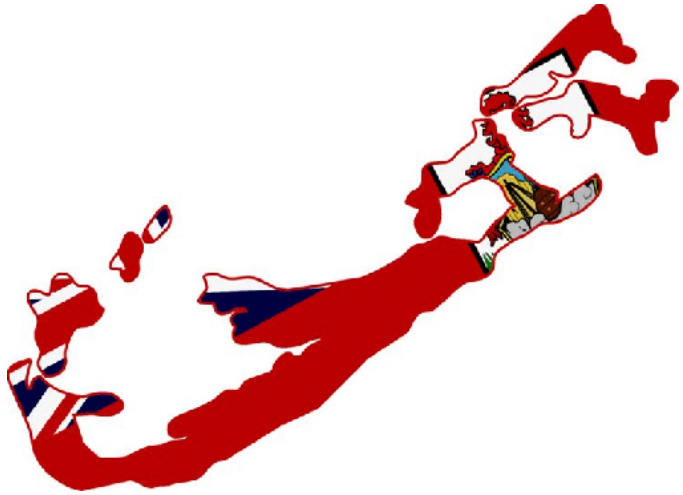
THE BERMUDA FORM:
The History

- Created in the mid-1980s, following the collapse of the US excess casualty insurance market.
- Operates as ‘excess’ insurance.
- Designed to avoid legacy exposures such as long-term gradual pollution and asbestos while providing increased certainty of response.



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THE BERMUDA FORM:
Evolution & Expansion of Bermuda Form Coverage

- The Bermuda Form that exists today similar to policies historically issued by ACE Bermuda Insurance Ltd (now Chubb) and XL Insurance (Bermuda) Ltd (now XL Catlin).
- Coverage began narrowly and has expanded to include different types of coverage.
- Different versions of the Bermuda form have emerged, used not only by Chubb and XL but other insurers in the market.
- Insurance policies written on the Bermuda Form have a distinctly international flavor, whereby the policyholder and the insurers are often based in different countries. This has led to arbitrations taking place in various jurisdictions.

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THE BERMUDA FORM:
Categories of Risk Covered by The Bermuda Form

- The Bermuda Form policy sits above a significant self insured retention and/or a primary insurance program.
- Covers liability from damages on account of personal injury, property damage and/or advertising liability. It can also provide D&O and other types of coverage and may be used for reinsurance.
- The basic period of cover is defined as Coverage A (the Policy Period), while the option to purchase an extended ‘reporting’ or ‘discovery period’, known as Coverage B (Discovery Period).

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The Bermuda Form: Highlights of Unique Policy Provisions

- **General**:
  - Neither purely an occurrence policy nor purely a claims-made policy.
  - Policies written on the Bermuda Form are a mixture each, using as the trigger for coverage the concept of an occurrence reported.
  - The Bermuda Form Distinguishes between two types of Occurrence:
    I. Type 1 relates to injury or damage caused by an event or exposure to conditions which does not involve the Insured's products (event must commence after the inception or retroactive date of the policy and before the termination date); and
    II. Type 2 relates to injury or damage caused by the Insured's products (event must take place during the policy period).

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THE BERMUDA FORM:
Highlights of Unique Policy Provisions

- **Notice:**
  - Fulfills two functions: (1) to 'trigger' coverage; and (2) to fix the limits and retentions that will be applied to a claim or set of claims.
  - Notice should be given promptly, i.e. written notice "as soon as practicable".
  - Claims reported thereafter will fail to trigger coverage.
- **Integrated Occurrence:**
  - Ability to batch multiple losses into a single claim so that such losses are treated as forming one occurrence.
  - Necessary in order to aggregate injuries over a longer period.
  - Benefit the policyholder by allowing it to access the high excess limits of its policy's coverage using a group of claims that, individually, would not exceed the retention.

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THE BERMUDA FORM:
Highlights of Unique Policy Provisions

- **Permissive Notice of Integrated Occurrence:**
  - Modern Bermuda forms allow for permissive notice of an Occurrence to be given at any time during the Policy Period or Discovery Period, and also for permissive notice of an Integrated Occurrence.
  - May give written notice of any Occurrence as an Integrated Occurrence.
  - Once given, all personal injury or property damage falling within the Integrated Occurrence will be considered as such even where the policy has been terminated after the policyholder has given notice.
  - Will normally benefit a policyholder to give notice of an integrated occurrence to aggregate its otherwise individual standard occurrences for the purposes of exhausting limits and reaching attachment points, especially with respect to the higher layers of an excess liability insurance program.

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THE BERMUDA FORM:
Highlights of Unique Policy Provisions

- **Governing Law:**
  - The Bermuda Form typically includes an express choice of New York law (New York 'Minus'), except in so far as such laws:
    1. Prohibit the payment of punitive damages.
    2. Pertain to regulation under the New York Insurance law or regulations issued by the Insurance Department of the State of New York), applying to insurers doing insurance business within the State of New York or as respects risks of insureds situated in the State of New York; or
    3. Are inconsistent with any provision of the Policy.
  - There is also a 'proviso' which calls for the provisions of the Policy to be construed in an evenhanded fashion between the Insureds and the Insurer.
- **Dispute Resolution:**
  - Resolved by means of binding arbitration either in London or Bermuda.

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Integrated Occurrence Provision

- Definition:
  - An occurrence encompassing actual or alleged personal injury, property damage and/or advertising injury to two or more persons or properties which commences over a period longer than thirty (30) consecutive days which is attributable directly, indirectly or allegedly to the same actual or alleged event, condition, cause, defect, hazard and/or failure to warn of such.

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Specific Provisions
Integrated Occurrence

- Aggregation clause which allows the insured to associate or add claims similar claims together as one occurrence.
  - Permissive right of the insured only
  - Insured issues a Declaration and defines what is the integrated occurrence
  - Insured responsible for only one per occurrence retention
  - Allows insured to access higher tower limits
  - Telescopes prior bodily injury claims into the year of the Declaration

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Integrated Occurrence

- Issues
  - How specific should the Notice/Declaration be?
    - Ex. Mass tort alleging defective product manufacture and design leading to numerous types of injuries
  - What about different types of coverages available-will they “integrate” based on the same Notice?
  - Are all injuries including those occurring after the policy expiration swept into the Notice of Integrated Occurrence?

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Specific Provisions
Application of New York Law

- The contract and arbitration are governed by the substantive law of New York except for:
  - Punitive damages are covered.
  - No contra proferendum-ambiguities in the insurance contract will not be construed against the drafter. Both parties will be treated in an even handed manner.
  - Where ambiguity is found, arbitrators will allow evidence of the intent and representations made by the parties.

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Bermuda Form Exclusions
Expected or Intended

- Traditional
- Integrated Occurrence- injury to claimants subject to this exclusion if:
  A. The insured has historically experienced a level or rate of actual or alleged injury.
  B. The insured expects or intends a (certain) level or rate of actual or alleged injury.

  Carveback: injuries will not be deemed excluded to the extent they are “fundamentally different in nature or at a level of rate vastly greater in order of magnitude.”

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Expected or Intended

- Integrated Occurrence is declared:
  - Injuries attributed to products sold after the Notice of Integrated Occurrence are excluded from coverage if similar to and not vastly greater in order of magnitude than prior injuries.
  - Problems?

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Other Exclusions

- Injuries prior to the retro date
- Prior Knowledge of an incident or occurrence
- Toxic Substances
- Repetitive Stress

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Use of Bermuda Form: Life Sciences Risks

- Life Sciences risks include drug and device manufacturers as well as those parties involved in clinical trials.

- Form is also used:
  - Oil and Gas companies
  - Chemical manufacturers
  - Large multinationals
  - To insure property and/or sites

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Bermuda Form & Life Sciences Risks

- Structure of the program
  - Excess over large SIR program
  - Multiple coverages may utilize the same limits
  - Automatic refills
  - Declaration of Integrated Occurrence

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Bermuda Form Issues

- Affect diverse claims
  - Asbestos
  - Construction Defect
  - Environmental
  - Food
  - Molestation
  - Products Claims
  - Tragic Accidents

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Bermuda Form & Life Sciences Risks

- Variety of Allegations
  - Products- Manufacturing Defect, Design Defect and Failure to warn
  - Product Recall
  - Property
  - Directors and Officers
  - Public Liability- prem ops

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Bermuda Form & Life Sciences Risk

- Occurrence First Reported

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Bermuda Form & Life Sciences Risks

- Aggregation clauses
  - Integrated Occurrence
  - Batch/Lot
  - Series loss clause

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Bermuda Form Aggregation Clauses

- Batch/Lot language
  - Generally- “all BI/PD arising out of one manufactured, prepared or acquired lot of goods or products will be considered one occurrence.”
  - Requires an occurrence plus a first reporting requirement to connect a batch.

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Aggregation Clauses

- Originally meant to apply to manufacturing defects such as contaminated products, non-conforming products.
- Broadly applied now by carriers to apply to failure to warn claims.
- Very little case law.

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Bermuda Form Aggregation Clauses

- Series Loss Clause
  - Used in the Bermuda form
  - "The limit of liability in Item 3 of the Declarations is the maximum liability for all damages and claims expenses because of all claims for which this policy applies regardless of the number of insureds, claims made or persons or entities making claims."
  - Used in conjunction with Related Claims language such as "All Related Claims shall be deemed to be first made on the date the earliest such Related Claims is first made against the Insured, regardless of whether such date is before or during the Policy Period."

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THE BERMUDA FORM:
Arbitrating Claims Under The Bermuda Form – Does it Work?

- In Bermuda there exists a user-friendly international arbitration law and a judiciary committed to upholding the arbitral process making Bermuda an attractive venue.
- Arbitrations in Bermuda are governed by two statutes:
  1. The Arbitration Act 1986 (the 1986 Act); and
  2. The Bermuda International Conciliation and Arbitration Act 1993 (the 1993 Act).

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THE BERMUDA FORM:
Arbitrating Claims Under The Bermuda Form – Does it Work?

- **Model Law** United Nations UNCITRAL
  - Powers of the Court to interfere with the arbitral process are reduced to a minimum.
  - An application can be made to the Supreme Court of Bermuda in only very limited circumstances.
  - The Bermuda courts will uphold arbitration agreements.
  - Court proceedings brought in Bermuda in breach of an arbitration clause will be stayed under Article 8.
  - *Muhl v Ardra* [1997] The Supreme Court of Bermuda has refused to enforce a foreign judgment obtained in breach of a Bermuda arbitration clause.

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THE BERMUDA FORM:
Arbitrating Claims Under The Bermuda Form – Does it Work?

- **Appointment of Arbitrators:**
  - Parties get to choose the arbitrators.
  - An arbitral tribunal will generally consist of three arbitrators.
  - All arbitrators must be neutral. This is an area of where Bermuda arbitration is most distinguishable from US arbitrations.
  - Arbitrators in Bermuda may not be partisan or advocates (following UK/international model).
  - There can be no ex parte communications.
  - The tribunal must treat both parties equally.

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THE BERMUDA FORM:
Arbitrating Claims Under The Bermuda Form – Does it Work?

- **Pleadings:**
  - Follows UK practice, which calls for the exchange of detailed pleadings.
  - One cannot introduce evidence of any fact not pleaded, which avoids the possibility of being "blind-sided" at the arbitration hearing.

  - Questions of privilege are governed by English or Bermuda law, depending on the seat of arbitration.

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THE BERMUDA FORM:
Arbitrating Claims Under The Bermuda Form – Does it Work?

- **Evidence:**
  - An area where US and Bermuda arbitrations differ.
  - Bermuda follows UK practice.
  - There is no oral discovery (i.e. no depositions).
  - Limited documentary discovery focused on issues in dispute.
  - Witness Statements are used as evidence in chief (i.e. no direct evidence).

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THE BERMUDA FORM:
Arbitrating Claims Under The Bermuda Form – Does it Work?

- **Costs:**
  - From a costs perspective, the concept of punitive damages, as exists in the US, has no place in Bermuda or the UK.
  - In addition, in Bermuda Form arbitrations, the loser generally has to pay the costs of the winner; this is not so in the US.

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THE BERMUDA FORM:
Challenges in Arbitrating Claims Under The Bermuda Form

- **The application of various laws:**
  - The application of Bermuda or English procedural law can present a challenge to US arbitrators who are not familiar with these regimes.
- **Potential for increased costs:**
  - Both NY lawyers and Bermuda lawyers need to be involved in Bermuda arbitrations.
  - When the seat of the arbitration is London, NY lawyers, UK solicitors and UK barristers are normally involved adding an extra layer of costs.
  - Additional costs may include: arbitrator's fees, room rental fees, and the costs associated with stenographers. In smaller commercial disputes these additional costs may renders this process inefficient.

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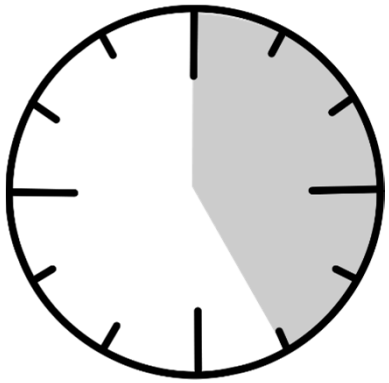
THE BERMUDA FORM:
Challenges in Arbitrating Claims Under The Bermuda Form

- **Time constraints:**
  - Where the parties have chosen a 3-person tribunal, chosen arbitrators are often “experts” in their relevant fields and by consequence are all busy people, it can make it difficult to set hearing dates and can cause some delays. There is also less opportunity for summary dismissal of cases.



- **Precedent value:**
  - As arbitrations are confidential, arbitration awards are generally not for use as future precedents. This can make it difficult to predict the outcome of a case.

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“:…. Bermuda Onions!”

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Morning Break | 10:05 – 10:20 am

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“To Be or Not to Be . . . Neutral”

Panelists:

Susan E. Grondine-Dauwer, SEG-D Consulting, LLC

Mark S. Gurevitz, MG Re Arbitrator & Mediator Services, LLC

Moderator:

Elaine Caprio, Caprio Consulting, LLC

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consultant
arbitration
claim
confidentiality
final
disputes
issues
dispute
contract
U.S.
relief
pre-hearing
interim
parties
serve
Rules
claims
award
witnesses
meeting
insurance

Historically, Neutral Panels were rarely used in reinsurance arbitration conducted in the United States.

They are still rarely used today.

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Early Arbitration Wording

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

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Arguments Made Against Party Appointed Arbitrator System

- Biased and/or Partial toward the Party who selected them
- Ex-Parte communications permit conferring with parties, reviewing and advising on pleadings, and advancing the positions of their Party
- Re-appointment by the same parties and law firms in numerous cases

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"Well, young fellow — have you been naughty, nice, or neutral?"

What does it mean to be neutral?

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Defining Neutrality

- Unbiased
- Impartial
- Independent
- No Conflict of Interest
- Number of Arbitrations Taken
- No Ex Parte Communications
- Not Selected Directly by the Parties
- Not Paid Directly by the Parties

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Industry Guidance Re: Neutrality

- ABA Model Rules of Professional Conduct
  - For Lawyers Serving as Third Party Neutrals
  - Neutrality = No Conflict of Interest
- AAA Rules for Commercial Arbitration
  - For Panel Lawyers and Non-Lawyers
  - Impartiality and Independence
- ARIAS-U.S. Guidelines for Professional Conduct
  - Advocacy Reigned in by Ethical Standards
  - Unbiased
  - No Conflict of Interest

A Brave New World… Neutral Panels

ARIAS-U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes provide:

- The Panel will consist of three ARIAS-U.S. Certified Arbitrators who qualify under the ARIAS-U.S. Neutral Arbitration Panel Criteria, or are ARIAS-U.S. Certified Neutral Arbitrators
- Ex-Parte communications between a party or its representatives and any potential arbitrator are not permitted
- The arbitration panel shall issue a written reasoned decision
- *These Rules can be incorporated into new reinsurance contracts, used in Master Trading Agreements, or Parties can agree to use them in lieu of existing Arbitration Clauses*

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ARIAS-U.S. Neutral Rules Definitions- *Certified Neutral Arbitrator*

- Certified Neutral Arbitrator- An ARIAS-U.S. Certified Arbitrator in good standing and who is on the ARIAS-U.S. Certified Neutral Arbitrator List. Service as an umpire under a non-neutral arbitral process does not disqualify an arbitrator from the ARIAS-US Certified Neutral Arbitrator List.

ARIAS-U.S. Neutral Rules Definitions- *Certified Neutral Arbitrator List*

- Certified Neutral Arbitrator List- A list maintained by ARIAS-U.S. of arbitrators who agree to serve only in a neutral capacity and who meet the ARIAS-U.S. Neutral Panel Arbitration Criteria [found at Section 6.3 below] with respect to the proceeding for which the Arbitrator is asked to serve.

ARIAS-U.S. Neutral Rules Definitions- *Disinterested and Neutral*

- Disinterested- means that no member of the Panel shall be under the control of either Party, nor shall any member of the Panel have a financial interest in the outcome of the arbitration.

- Neutral – means an arbitrator: (i) is disinterested, unbiased, impartial; (ii) meets the standards set forth in these Rules, including, non-exclusively, the Neutral Criteria set forth in Sections 6.3 (a) through 6.3 (d), and (iii) does not act as advocate for any of the party(ies) during the arbitration proceeding(s). The term "neutral" does not mean that the arbitrator has no previous knowledge of or experience concerning issues involved in the dispute.

ARIAS-U.S.
"Neutral Criteria" for Arbitrators

An arbitrator is prohibited from serving on a panel if

- During the past 5 years he/she served more than one time as a party appointed arbitrator for one of the parties or counsel representing the parties, AND
- He/she served as a party appointed arbitrator for one of the Parties in more than 10% of the candidate's total appointments as a party appointed arbitrator or for one of the lawyers, law firms, in-house legal or claims departments of a Party in more than 10% of the candidate's total appointments as a party appointed arbitrator during that period.

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ARIAS-U.S.
"Neutral Criteria" for Umpires or Neutrals

An umpire or neutral arbitrator is prohibited from serving on a panel if

- During the past 5 years he/she served more than one time as an umpire or neutral arbitrator for one of the parties or counsel representing the parties, AND
- He/she served as an umpire or neutral arbitrator involving one of the Parties in more than 20% of the candidate's total appointments as umpire or neutral arbitrator or for one of the lawyers, law firms, in-house legal or claims departments of a Party in more than 20% of the candidate's total appointments as an umpire or neutral arbitrator during that period.

ARIAS-U.S. “Neutral Criteria” - Experts, Consultants, Counsel & Employees

An Expert, Consultant, Counsel or Employee is prohibited from serving on a panel if during the past 5 years he/she served as

- An expert or consultant for one of the Parties in more than 50% of the Candidate’s total appointments as an expert or consultant or for one of the lawyers, law firms, in-house legal or claims departments of a Party in more than 50% of the candidate’s total appointments as an expert or consultant during that period.
- Counsel for one of the Parties in more than 10% of the Candidate’s engagement as counsel during that period or if he/she was employees by one of the parties at any time during the past 5 years.

Arbitration Options

	Party Appointed Arbitrators	Neutral Selection Process	All Neutral Panels	Neutral Umpire	Ex-Parte Communications	Reasoned Awards
ARIAS RULES	✔			✔	✔	
ARIAS NEUTRAL RULES		✔	✔	✔		✔
JAMS		✔	✔	✔		✔
JAMS (HYBRID)	✔			✔	✔	
AAA		✔	✔	✔		✔
AAA (HYBRID)	✔			✔	✔	
ENGLISH RULES	✔		✔			✔

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Benefits


„Het is niet gemakkelijk om Neutraal te blijven."
It's not easy to stay Neutral!
F. B. DEN BOER - MIDDELBURG.

Use of Neutral Rules

- Were you previously aware of the new rules?
  - Have you discussed them with your team?
  - Have you considered using them or are you using them?
- Do you believe that these rules will improve the arbitration process?
- What challenges and concerns do you have about using the Neutral Rules?

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"Judicial Review of Arbitration Awards: Takeaways From "*Deflategate*"

Panelists:

Nick C. Cramb, Mintz Levin Cohn Ferris Glovsky and Popeo PC

Hon. Charles B. Swartwood III (ret.) , JAMS

Jonathan S. Zelig, Day Pitney LLP

Moderator:

Kristin Suga Heres, Zelle LLP

Deflategate Background

Tom Brady

- Patriots Quarterback
- 4x Super Bowl Champ
- 2015 Salary: $8M

Roger Goodell

- NFL Commissioner
- 2015 Salary: $32M

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Deflategate Background

2015 AFC Championship Game

- Patriots defeat Colts, 45-7
- 51 ° + rain: difficult to grip the football
  - Colts throw 2 interceptions, lose fumble

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Deflategate Background

- Initial Allegations
  - Colts accused Pats of deflating footballs to increase their grip on footballs in cold, rainy weather
  - Colts asked Refs to measure game balls at half time and then reported misconduct to the league

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Deflategate Background

- The Wells Report
  - Ted Wells hired by NFL to investigate
  - Paul Weiss litigator; extensive history with NFL
  - $3 million “Wells Report”
  - Exponent provided scientific backing

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Deflategate Background

- The Wells Report: Key Findings on Pats
  - Refs tested 11 Patriots game balls at halftime; found all 11 below NFL minimum 12.5 PSI
  - Pats' equipment personnel removed game balls from ref locker room and were alone with them for nearly 2 minutes
  - "[I]t is more probable than not that New England Patriots personnel" violated rules

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Deflategate Background

- The Wells Report: Key Findings on Brady
  - "[I]t is more probable than not that **Brady was at least generally aware** of the inappropriate activities of [Patriots personnel] involving the release of air from Patriots game balls"
  - Brady provided gifts/memorabilia to Pats equipment personnel, but no quid-pro-quo
  - Texts between equipment personnel indicated Brady knowledge of intentional deflation

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Initial Brady Suspension

- NFL Suspends Brady 4 Games
  - "[T]here is substantial and credible evidence to conclude you were at least generally aware of" the deflation of footballs by Pats personnel
  - Brady "failure to cooperate fully and candidly"
  - This constitutes "conduct detrimental" to NFL

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The Goodell Arbitration Opinion

- Under the CBA, Goodell authorized to serve as arbitrator on disciplinary appeals
- 10-hour hearing held in New York
- Goodell upheld the suspension:
  - New evidence: Brady destroyed cell phone
  - Adverse inference of Brady involvement
  - Conclusion: Brady participated in cheating and then covered it up = “conduct detrimental”

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Grounds for Vacating Award Under FAA

1. The award was procured by fraud, corruption, or undue means;
2. The arbitrators were partial or corrupt;
3. The arbitration were guilty of misconduct that prejudiced the rights of any party;
4. The arbitrators exceeded their powers, or so imperfectly executed them that a final award was not made.

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The District Court Proceeding

- NFL immediately filed an award confirmation proceeding in SDNY
- One day later, Brady filed to vacate the award in Minnesota
- Case consolidated before Judge Richard Berman in SDNY due to “first to file” rule.

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Photo credit: New York Times

Brady District Court Arguments

(1) Award Disregarded "Law of the Shop" Requiring Notice of Potential Discipline

- Brady had no notice of:
  - "Generally aware" standard of liability
  - Any penalty beyond a fine for tampering
  - Any penalty for failure to turn over evidence
  - Shifting rationale from "generally aware" to "participated in" intentional deflation

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Brady District Court Arguments

(2) Award Violated CBA's "Fair and Consistent" Provision & the Law's Fundamental Fairness Rule

- Suspension for tampering "unprecedented"
- Denied access to Paul, Weiss investigation files that supported the Wells Report
- Denied request to examine NFL's co-lead investigator, EVP Jeff Pash

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Brady District Court Arguments

(3) Goodell Was a Partial Arbitrator

- Barred discovery into his own conduct
- Spent $3 million on the investigation, publicly praised it before the hearing, and then adopted its findings in the Award
- Note: CBA authorized Goodell to conduct investigation, determine punishment, and hear appeals

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NFL District Court Arguments

(1) Goodell Has Exclusive Authority Under CBA

- Law says parties to labor agreement choose their own method of dispute resolution
- Arbitrator need only be "arguably construing or applying the [CBA] and acting within" authority
- CBA authorizes Commissioner to preside over disciplinary appeals "at his discretion"

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NFL District Court Arguments

(2) Brady Had Notice and Process Was Fair

- CBA: Goodell may "suspend a player for a period certain or indefinitely" for conduct he "reasonably judged…detrimental to the league"
- Brady was aware of and consented to cheating, destroyed cell phone evidence of cheating
- Goodell's findings of those facts, and finding that they constitute "conduct detrimental," cannot be challenged in federal court

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District Court Opinion

- Award Vacated
  - Courts vacate awards for “refusal to consider” relevant evidence; “evident partiality”
  - In a CBA context, arbitrator must also follow “law of the shop” in discipline. In the NFL, that means prior notice of potential discipline.

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District Court Opinion

- Reasoning
  - No notice of a 4-game suspension for deflation or destruction of evidence
    - NFL's analogy to steroid policy is inapt
  - No opportunity to examine NFL's co-lead investigator, Jeff Pash
  - No equal access to investigative files

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Second Circuit Opinion

- Award Reinstated
  - "Our obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards"
  - Goodell's CBA authority is "especially broad"
  - The "players and the League mutually decided" that Goodell can play investigator, judge, jury, and appellate arbitrator

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Second Circuit Opinion

- Award Reinstated
  - Brady had sufficient notice due to Goodell's broad "conduct detrimental" authority
    - Obvious that destroying evidence is blameworthy
  - Discipline was "plausibly grounded" in CBA
  - Commissioner's comparison to a steroid violation (warranting 4 games) "not troubling"
    - Arbitrator entitled to "generous latitude" in reaching conclusions based on the record

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Second Circuit Opinion

- Award Reinstated
  - Exclusion of Pash testimony "left to sound discretion of the arbitrator"
    - No "fundamental fairness" violation regardless, because Pash insights regarding the investigation were "collateral" to main issue
  - Exchange of investigation notes was "not require[d]" by the CBA.
    - Goodell only needs to have "arguably construed" the CBA's discovery provisions to earn deference

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J. Katzmann, Dissenting

(1) Goodell Exceeded Contract Authority

- Appeal arbitrator had no authority to expand from charged conduct
- Wells Report found Brady "less culpable" ("generally aware") than Goodell

(2) Award Did Not "Draw its Essence" From CBA

- Goodell's unprecedented penalty (4 games) is "his own brand of industrial justice"

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The Outcome

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Lessons Learned

- Negotiated Arb Clauses = High Deference
  - "Arguably Construed"/"Plausibly Grounded" standards are very high
  - Arbitrator must ignore/toss contract authority
- Discovery Decisions = "Sound Discretion"
  - Must violate "fundamental fairness"
  - Cannot be "collateral" to the main issue
- Plenty of Disagreement
  - 2 of 4 federal judges sided with Brady
  - They were swayed by outsized award

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Does it all boil down to a forum battle?

- Race to the courthouse?
- Some circuits more inclined than others to disturb/uphold awards?

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Partiality Problem?

- 2d Circuit Deflategate decision cited by an insurance company in the context of a disputed reinsurance award
- Insurance Company of America told a federal judge that the Deflategate ruling supported its argument that party-appointed arbitrators were not intended to be neutral, only "disinterested."
  - *Certain Underwriting Members of Lloyds, London Subscribing to Treaty No. 0272/04 v. Ins. Co. of the Americas,* case no. 1:16-cv-00323 (S.D.N.Y)

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Partiality Problem?

- Case to watch: reinsurance arbitration dispute before Second Circuit
- *National Indemnity Co. v. IRB Brasil Resseguros SA*, No. 16-1267 (2d Cir.)

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Another option?

- JAMS has developed its own appellate procedure
- Rule 34: “Optional Arbitration Appeal Procedure”
- Keeps disputes out of the courts
- Good option for insurance/reinsurance disputes?

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