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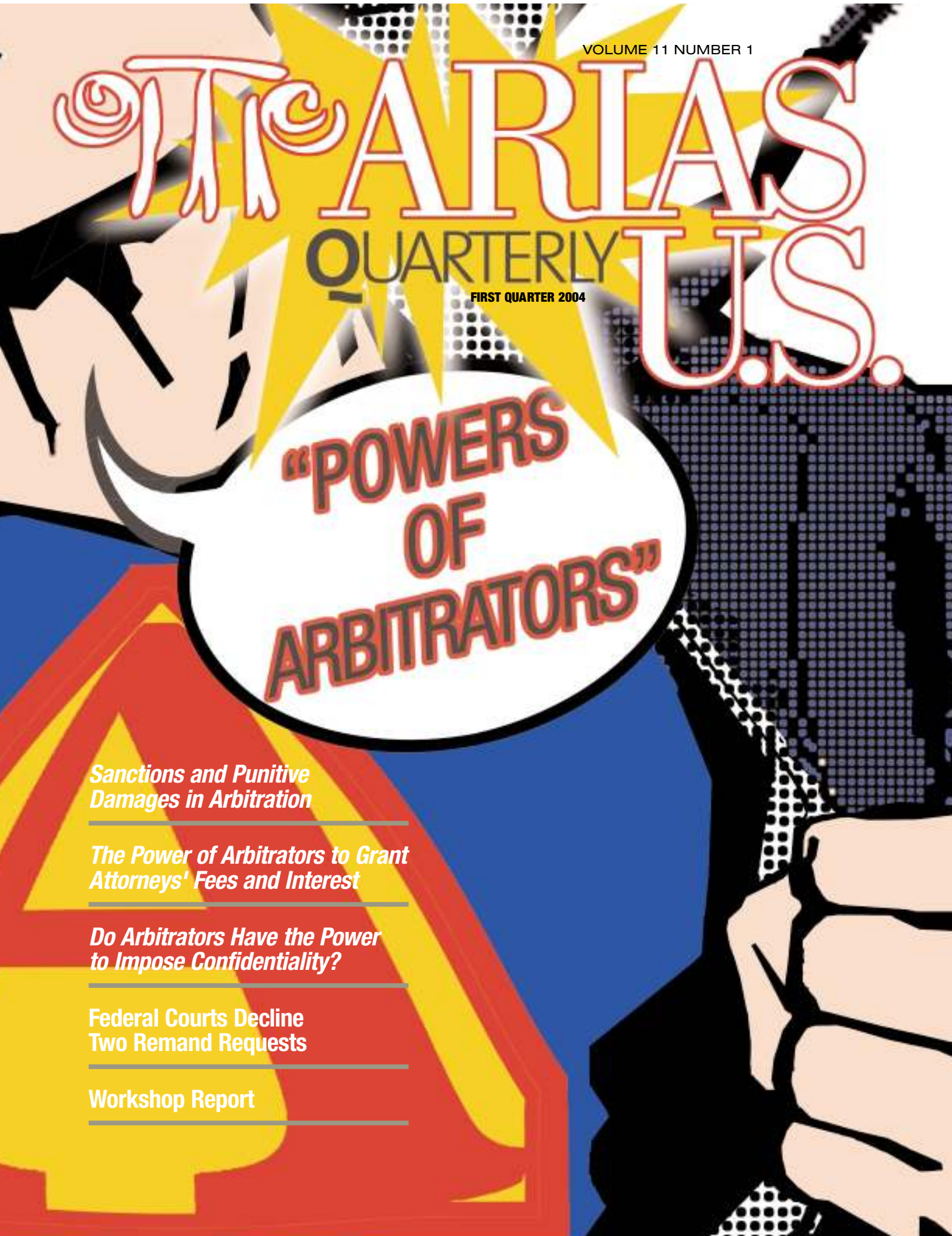

# editor's comments

T. Richard Kennedy

I want to take this opportunity to welcome our new Quarterly Editors, Dan Schmidt, Christian Bouckaert, and Jonathan Sacher. Having just retired as Chairman of the ARIAS•U.S. Board of Directors, Dan has agreed to become Associate Editor. A founding director of ARIAS•U.S., Dan has been active for several years in the work of the Board and its committees. By undertaking this new position, he will be continuing his long tradition of exemplary service to ARIAS-U.S.

Christian Bouckaert and Jonathan Sacher have agreed to become our new International Editors. Christian is a partner and head of insurance and reinsurance practice at the law firm of Norton Rose in Paris, France. A certified ARIAS•U.S. arbitrator who attends many of our meetings, Christian will help us keep abreast of what is happening in arbitrations in Europe. Jonathan Sacher, a partner and head of the insurance and reinsurance department at Berwin Leighton Paisner of London, England, recently served as Chairman of the British Insurance Law Association. As a member of both A.R.I.A.S. (UK) and ARIAS•U.S., he is particularly suited to provide us with ongoing information about the activities of our sister organization in the UK.

I want to specially thank Charles Fortune and Angus Ross who are going off the Board of Editors. Both have contributed greatly to the success of our Quarterly. I am happy to say we are not losing their services, since both Charles and Angus have agreed to continue their good work and counsel as members of the Publications Committee.

Our three feature articles in this issue focus on the power of arbitrators when confronted with certain requests. While award of attorneys' fees or interest may be deemed a form of sanctions, arbitration panels today may be requested to award even more severe penalties, such as punitive damages, based on the conduct of an adverse party. Nick DiGiovanni and Theresa Duckett, in Sanctions and Punitive Damages in Arbitration, thoughtfully review types of sanctions and when they may be appropriate for an arbitration award.

Nearly always, a party seeking a monetary award will ask the panel to include interest. Not uncommonly, one or both parties request that attorneys' fees be awarded against the other party. In an excellent article, entitled The Power of Arbitrators to Grant Attorneys' Fees and Interest, John Nonna and Christa Santos consider limits that may be imposed by the courts on arbitrators when responding to such requests.

Confidentiality of the arbitration proceeding is not always a subject of agreement between the parties. Lawrence Greengrass and Brigitte Nahas, in Do Arbitrators Have the Power to Impose Confidentiality, consider circumstances where such agreement may be lacking. In an extensive analysis, they then review whether the panel has the inherent power to order confidentiality in those circumstances.

This issue includes our first ever Letter to the Editor. We welcome such letters and encourage all members to write us regarding the content of our publication or whatever is on your mind relating to procedures in insurance and reinsurance arbitrations.



## Editorial Policy

ARIAS•U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution.

All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include also a brief biographical statement and a portrait-style photograph in electronic form.

Manuscripts should be submitted as email attachments to byankus@cinn.com.

Manuscripts are submitted at the sender's risk, and no responsibility is assumed for the return of the material. Material accepted for publication becomes the property of ARIAS•U.S. No compensation is paid for published articles.

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VOLUME 11 NUMBER 1

# letters to the editor

Editor, ARIAS•U.S. Quarterly,

Recent articles in trade magazines and ARIAS•U.S. Quarterly have questioned the viability of the arbitration process and highlighted certain parts of it that could, perhaps, be improved. One darker and grimmer view would have us believe that the arbitration system is "broken;" is employed today simply because it was "deemed appropriate in a bygone era;" and, as practiced today, is "satisfying to no one."

There are a variety of suggested panaceas: eliminate the current party appointed process, write more rules, mandate reasoned decisions but not confidentiality, end ex parte communications, award fees and costs, etc. The issues go on and on. But the mere fact that these issues are discussed as frankly and, at times, as heatedly as they are, is surely symptomatic of a healthy system, not a broken one.

Unfortunately, all the hot air and rhetoric is conducted in a vacuum. The fact is that at industry meetings like the Spring and Fall ARIAS•U.S. conferences, the client is more often than not treated much like a corpse at a wake. He or she may be the reason for the gathering, but is otherwise pretty much ignored. ARIAS•U.S. meetings primarily solicit the views of arbitrators and the lawyers, but not necessarily those of clients who, after all, foot the bill. The opinions of random people in the industry are all well and good, but what we really should be doing is to inquire as to what clients actually want.

To that end, Rhonda Rittenberg of Prince, Lobel, Glovsky & Tye LLP and I have prepared a survey that will be sent to executives of insurance and reinsurance companies (as well as arbitrators and outside counsel). If there is adequate response, dissemination of the results will be sought in a future article or presentation.

Of course, no one will be bound by the results and all responses will be kept confidential. There may well be debate as to whether all the right questions have been asked – and in the right way. But, nothing ventured, nothing gained.

Sincerely,
David Thirkill
Vice President,
RiverStone Reinsurance Services ▼

The Quarterly welcomes letters from members and other interested parties. We reserve the right to determine which letters are suitable for publication, but seek to present a range of points of view on issues important to the community. Letters should be addressed to The Editor, ARIAS•U.S. Quarterly, 35 Beechwood Avenue, Mount Vernon, NY 10553 or info@arias-us.org.

feature

# Sanctions and Punitive Damages in Arbitration

*This article is based on a paper presented at the ARIAS•U.S. Fall Conference*

Nick DiGiovanni
Theresa Duckett
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Being able to shape the universe of available remedies is one of the advantages parties have when they agree to arbitrate their disputes. For example, if parties intend to exclude the availability of punitive damages as a remedy, they can contract to do so. If parties want to limit the availability or amount of sanctions, they may. However, often, as with "standard" or "boilerplate" contractual language and arbitration clauses, the intention either gets lost in the details or, never makes it into the agreement. What then? This article will address when sanctions and punitive damages may be awarded in the context of arbitration, and what happens when the arbitration agreement is silent on that subject.

## When is an award of sanctions appropriate?

While the Federal Arbitration Act ("FAA") does not expressly provide for sanctions, parties to arbitration should turn to the procedural rules governing their arbitration to determine whether those rules allow for sanctions. For example, the Reinsurance Dispute Resolution Task Force provides in its Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes that

> [t]he Panel is authorized to award any remedy permitted by the Arbitration Agreement or subsequent written agreement of the Parties. In the absence of explicit written agreement to the contrary, the Panel is also authorized to award any remedy or sanctions allowed by applicable law, including, but not limited to: monetary damages; equitable relief; pre- or post- award interest; costs of arbitration; attorney fees; and other final or interim relief.[1]

Similarly, other ADR resources include provisions for sanctions in their procedural rules and guidelines, e.g., JAMS includes a provision in its Comprehensive Arbitration Rules and Procedures a provision for sanctions[2] and the National Arbitration Forum includes similar provisions in its Code of Procedures[3].

Generally speaking, if the arbitration agreement provides the arbitrator with the authority to impose sanctions, the award of sanctions will be upheld. For example, a California court held that under the terms of the parties' arbitration agreement, the arbitrator had the authority to "grant any remedy or relief to which a party is entitled under California law."[4] In that case, Dr. Laurence David had originally brought suit for breach of contract against Dr. R. Patrick Abergel, who cross-complained.[5] After litigating over four years, the two agreed to arbitrate their dispute, wherein the arbitrator denied all of David's requests for relief and issued a monetary award to Abergel.[6] Abergel then requested sanctions pursuant to California Code of Civil Procedure § 128.5, on the grounds that David's claim was frivolous.[7] The arbitrator agreed and awarded the requested $75,000 to Abergel.[8] Abergel then sought to confirm the award in trial court, except the court did not confirm the sanction award.[9] The trial court held that the parties did not explicitly authorize the arbitrator to award sanctions.[10]

The appellate court reversed the trial court's denial of sanctions and found that the agreement did provide the arbitrator with the authority to award sanctions because the arbitrator had the power to grant any relief available under California law. Since Abergel's request for relief was pursuant to California civil procedure the appellate court held that the relief was appropriate.[11] The appellate court stated:

> [s]imply put, when parties have agreed in writing to binding arbitration and to confer upon their arbitrator the power to "grant any remedy or relief to which a party is entitled under California law," we presume they meant what they said -- and our Supreme Court has declared that they will be held to those words.[12]

Other representative cases have held similarly.[13]

When an agreement is silent as to whether sanctions may be awarded, parties should turn to the rules governing the arbitration.

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Nick DiGiovanni

Theresa Duckett

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While sanctions may be crafted at the arbitrator's discretion, the procedural rules themselves also provide what types of sanctions may be available.

The FAA does not expressly provide for sanctions; however, rules parties expressly choose to govern their arbitration generally provide the arbitrator with authority to award any relief permitted under the applicable law. For example, the Procedural Mediation/Arbitration Guidelines provided by the Reinsurance Association of America, substantively identical to the procedures promulgated by the Reinsurance Dispute Resolution Task Force, provide that

> [i]n the absence of explicit written agreement to the contrary, the Panel is also authorized to award any remedy or sanctions allowed by applicable law, including, but not limited to: monetary damages; equitable relief; pre- or post- award interest; costs of arbitration; attorney fees; and other final or interim relief. [14]

Parties should be acutely aware of the rules with which they wish to govern their arbitration. As mentioned in our introduction, glossing over the "boilerplate" may lead to unintended results, which may lead to ancillary, and unnecessary, disputes.

## What type of sanctions are available?

When available, sanctions vary to match their intended result. For example, the First Circuit affirmed an arbitrator's award of five times the amount of pay an employer lost during a strike, which the arbitrator found to be in violation of a no-strike clause in the collective bargaining agreement between the employer and the union employees.[15]

While sanctions may be crafted at the arbitrator's discretion, the procedural rules themselves also provide what types of sanctions may be available. For example, JAMS provides in its sanctions provision that sanctions for failure to comply with the rules of arbitration may include costs or adverse rulings with respect to issues presented to the panel, including evidentiary issues.[16] The National Arbitration Forum and the Reinsurance Dispute Task Force provide for similar sanctions.[17] In short, absent a contractual provision to the contrary, arbitrators are typically free to fashion their own award for sanctions.

Sanctions may be brought upon the request of a party or by the arbitrator *sua sponte*.[18] If sanctions are available, they are generally available for violating any rules governing the arbitration proceedings. For example, the sanctions provisions in the arbitration rules and guidelines from JAMS, the Reinsurance Dispute Resolution Task Force and the National Arbitration Forum warrant sanctions for failure of a party to comply with the governing rules of arbitration.[19] The National Arbitration Forum Code of Procedure also provides that a party may be sanctioned for bringing unsupportable or unfounded claims or responses.[20] Violations of confidentiality are also sanctionable. [21]

Sanctions are also commonly available when a party fails to comply with or cooperate in the discovery phase of arbitration. In fact, the Ninth Circuit has affirmed what amounted to a default judgment awarded by an arbitration panel for a reinsurer's failure to comply with discovery orders.[22] At the same time, a California court of appeals recognized that even though an arbitrator may be empowered to award sanctions for discovery violations, the arbitrator is not compelled to issue sanctions for a party's non-compliance.[23]

## When is an award of punitive damages appropriate?

Just as parties may agree to make sanctions during arbitration, parties are also free to contractually limit remedies available. If they wish to exclude punitive damages, they may explicitly do so in their arbitration agreement. However, where the agreement is silent on punitive damages and the Federal Arbitration Act ("FAA") applies, punitive damages will likely be available.[24]

The U.S. Supreme Court has held that if parties *do* intend to exclude punitive damages from the arsenal of damages available where the FAA would apply ordinarily, they must do so explicitly -- even where the applicable choice of law provision excludes punitive damages.[25] The plaintiffs in *Mastrobuono v. Shearson Lehman Hutton* entrusted Shearson Lehman to manage their money in a brokerage account.[26] A few years after they entered into the brokerage agreement, the Mastrobuonos discovered that the representative managing their account had lost most of the savings they entrusted to him due because of his corrupt handling of the account.[27] When the Mastrobuonos brought suit against Shearson Lehman, Shearson Lehman filed a motion to stay the proceedings and compel arbitration, as the agreement the Mastrobuonos signed when the opened their account included a provision requiring arbitration of all disputes arising

under the contract. [28]

The parties arbitrated the dispute, and the panel ruled in favor of the Mastrobuonos. [29] The panel not only awarded the Mastrobuonos compensatory damages, but $400,000 in punitive damages as well.[30] Shearson Lehman moved in the Northern District of Illinois to vacate the award of punitive damages, based upon the theory that the panel had no authority to make an award of punitive damages.[31]

How did Shearson Lehman make the argument that the panel was without the authority to award punitive damages? We must return to the arbitration clause in the brokerage contract, which specifically provided that:

> This agreement shall inure to the benefit of your [Shearson's] successors and assigns[,] shall be binding on the undersigned, my [petitioners'] heirs, executors, administrators and assigns, and shall be governed by the laws of the State of New York. Unless unenforceable due to federal or state law, any controversy arising out of or relating to [my] accounts, to transactions with you, your officers, directors, agents and/or employees for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect.[32]

Shearson Lehman's counsel, argued that since the parties agreed that New York law governed the contract, punitive damages could only be awarded by a court. Under New York state law, only a court of law is authorized to award punitive damages.[33]

However, "governed by the laws of the State of New York" are not the magic words in and of themselves. The Supreme Court held that simply including New York law as the choice of law in an arbitration agreement does "is not, in itself, an unequivocal exclusion of punitive damages claims."[34] The Court also noted that the procedural rules the parties had to choose from to govern the arbitration provided for an award of punitive damages.[35] For example, the NASD Code of Procedure authorizes an arbitration panel to award "'damages and other relief.'"[36] Furthermore, the Court found that the simple inclusion of the language that the agreement was to be governed by New York law was ambiguous, at best, regarding the exclusion of punitive damages, and Shearson Lehman "cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it" so as to not injure the innocent party from an unintended or unfair result.[37]

The lesson of *Mastrobuono* is that a general choice of law provision will likely not control the availability of punitive damages in arbitration. If parties wish to truly exclude, or for that matter, include, punitive damages in arbitration awards, they must do so explicitly and without ambiguity. The FAA ensures that an arbitration agreement will be enforced according to its plain terms, and ambiguities will not be read generously. In those few cases where the FAA does not apply, a court will look to the applicable state law to determine whether punitive damages may be awarded by an arbitration panel.[38] For example, a Georgia court affirmed an arbitrator's award of punitive damages where the arbitration agreement included the provision that "[a]ll matters affecting the interpretation of this AGREEMENT shall be governed by and construed according to the laws of the State of Georgia."[39] The court held that under Georgia law, punitive damages were available for the type of willful fraud that plaintiff had proven at arbitration, and in light of the choice of law clause in the agreement, the arbitrator had the authority to award punitive damages. [40]

Furthermore, in certain cases, even where parties explicitly agree to exclude punitive damages, a court may find this exclusion of a fundamental right of recovery to be void and in violation of the law. For example, Virginia's highest state court has held that in a consumer fraud action, where customers had contracts of adhesion with the defendant jewelry retailer, it was unconscionable to let stand a provision in the contract prohibiting punitive damages; the same contract required that parties submit all disputes to arbitration.[41] While the arbitration provision was not unlawful, the court would not enforce the "no punitive damages" which deprived the retailer's customers "of their right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct …." [42]

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If parties wish to truly exclude, or for that matter, include, punitive damages in arbitration awards, they must do so explicitly and without ambiguity.

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Generally speaking, punitive damages will be more likely available in tort cases than pure contract disputes.[48]

Similarly, the Fifth Circuit has recognized that while parties may agree to proscribe the availability of punitive damages in an arbitration agreement, not all damages labeled as "punitive" will be precluded. In *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, a franchisee brought an antitrust action against its franchisor.[43] The federal district court in which the action was brought granted the franchisor's motion to compel arbitration, pursuant to the agreement between the parties.[44] The court rejected the franchisee's argument that the arbitration clause was unenforceable because it precluded punitive damages, which the franchisee was entitled to seek as antitrust treble damages.[45] The Fifth Circuit agreed, noting that while courts from the U.S. Supreme Court down have referred to such damages as "punitive damages," a distinction lies between common law punitive damages and statutory treble damages.[46] The Fifth Circuit held that treble damages were the result of a "mathematical expansion" of the arbitrator's award, and "are not 'punitive' for the purposes of interpreting the scope of an arbitration clause."[47]

## In what type of case are punitive damages available?

Generally speaking, punitive damages will be more likely available in tort cases than pure contract disputes.[48] The court in *Garrity*, when it found that punitive damage awards in arbitration were against public policy, explained that "[i]t has always been held that punitive damages are not available for mere breach of contract, for in such a case only a private wrong, and not a public right is involved."[49] Virginia and Texas state laws provide similar authority.[50]

While punitive damages are typically not available for mere breach of contract, punitive damages are typically available in fraud actions, especially in securities fraud actions.[51] An award of punitive damages has also been upheld where a party demonstrated a "total disregard of and contempt for the rights of petitioner under the [reinsurance] treaty."[52]

Punitive damages, as in litigation, may also be awarded to punish the wrongdoing alleged in a dispute. For example, a court confirmed the award of punitive damages against parties for breach of a partnership agreement and their fiduciary duties.[53] The court further held that the arbitrator did not exceed his authority by ordering that the award of punitive damages be paid to various charitable organizations.[54] Similarly, the Tenth Circuit affirmed an arbitration panel's award of punitive damages in an action brought by landowners against Amoco Pipeline Company for damages sustained as a result of a leak in a pipeline.[55] The court held that "the arbitrators awarded punitive damages based upon several factors, including Amoco's egregious conduct prior to and after the discovery of contamination, Amoco's awareness and blatant disregard of the pollution, and Amoco's *concealment* of the pollution . . . ."[56] The court affirmed the award, as the rules allowed for the award of punitive damages, and "the arbitration panel did not act in manifest disregard of the law in awarding punitive damages" under these circumstances.[57]

## How are punitive damages calculated?

Courts have held that arbitrators are not required to disclose basis for awards.[58] So long as there is some basis grounded in the facts, courts will typically uphold the award, provided that punitive damages are available in that state or under law governing agreement. The usual standard of review, although very limited, requires that the award not be "inherently unreasonable" nor demonstrate "a manifest disregard of the law."[59]

So while courts have narrow review authority and generally speaking, an arbitrator's authority to award punitive damages is discretionary, what guidance is there for determining how punitive damages are awarded? In reviewing the issue of whether an arbitrator's award of punitive damages was excessive, one federal district court relied upon two U.S. Supreme Court decisions for guidance.[60] In *Gore*, the Court provided three key factors for calculating a punitive damages award and determining whether it was excessive. First, the court could consider the state's interest in punishing and deterring future misconduct, measured alongside fairness and notice issues. The court could then determine the ratio of actual damages to punitive damages; for example, a compensatory award of $2500 and an award for punitive damages of $2,500,000 might raise red flags. Finally, the court could compare the punitive damages awarded and the potential civil or criminal penalties that could be imposed for comparable misconduct.

So while an arbitrator may consider the Supreme Court's Gore factors when calculating punitive damages, courts have held that due process considerations are not required in arbitration. A California appellate court held that arbitration is not a state action subject to due process.[61] Even state court enforcement of an arbitration award does not necessarily amount to state action subject to due process review.[62]

## Conclusion

As long as the arbitration agreement provides for sanctions or punitive damages, the arbitrator may award them. The parties must be mindful that broad intentions are not necessarily achieved with broad language, and explicit exclusions, or inclusions, are more valuable to all parties than ambiguous boilerplate. As long as the arbitrator is not stepping outside of his or her authority, the discretion is broad in awarding either punitives or sanctions, and as a result, parties should be very cautious about drafting, or accepting, the rules of arbitration.

1 Procedure 15.3, Procedures for the Resolution of US Insurance and Reinsurance Disputes, prepared by Reinsurance Dispute Resolution Task Force, *available at* http://www.reinsurancearbitrators.com/procedures/award.html.
2 Rule 29, JAMS Comprehensive Arbitration Rules and Procedures, prepared by JAMS, available at http://www.jamsadr.com/comprehensive_arbitration_rules-2003.asp.
3 Rules 4, 29G, 30K, and 46, Code of Procedure, prepared by National Arbitration Forum, *available at* http://arbitration-forum.com/code/index.asp.
4 *David v. Abergel*, 54 Cal. Rptr. 2d 443, 444 (Cal. Ct. App. 1996)(quoting the arbitration agreement between the parties).
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.* at 444-45.
12 *Id* at 445.
13 *See, e.g., Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994 (Cal. 1994) (holding that where award based upon terms of arbitration agreement, court will uphold award).
14 Procedural Mediation/Arbitration Guidelines prepared by the Reinsurance Association of America, 15.3.
15 *Cadillac Auto. Co. of Boston v. Metro. Auto. Salesmen Local Union No. 122*, 588 F.2d 315, 316 (1st Cir. 1978).
16 Rule 29, JAMS Comprehensive Arbitration Rules and Procedures, prepared by JAMS, *available at* http://www.jamsadr.com/comprehensive_arbitration_rules-2003.asp.
17 Rules 29G and 30K, Code of Procedure, prepared by National Arbitration Forum, *available at* http://arbitration-forum.com/code/index.asp; Procedure 15.3, Procedures for the Resolution of US Insurance and Reinsurance Disputes, prepared by Reinsurance Dispute Resolution Task Force, *available at* http://www.reinsurancearbitrators.com/procedures/award.html.
18 *Id.* at Rule 46. Likewise, a court may award sanctions for a party's failure to comply with arbitration. In one case, a court awarded sanctions in the amount of $2,000 against a union who refused to submit its dispute to arbitration on the grounds that the agreement to arbitrate was never memorialized in writing. *Todtman, Young, Tunick, Nanchamie, Hendler, Spizz & Drogin, P.C. v. Richardson,* 672 N.Y.S.2d 84, 88 (N.Y. App. Div. 1998) (holding that refusal of firm's union client to submit to arbitration despite stipulation in open court warranted sanctions as the union's refusal was without merit and was intended to delay resolution of the dispute).
19 Rule 46, Code of Procedure, prepared by National Arbitration Forum, *available at* http://arbitration-forum.com/code/index.asp; Procedure 15.3, Procedures for the Resolution of US Insurance and Reinsurance Disputes, prepared by Reinsurance Dispute Resolution Task Force, *available at* http://www.reinsurancearbitrators.com/procedures/award.html; Rule 29, JAMS Comprehensive Arbitration Rules and Procedures, prepared by JAMS, *available at* http://www.jamsadr.com/comprehensive_arbitration_rules-2003.asp.
20 Rule 46, Code of Procedure, prepared by National Arbitration Forum, *available at* http://arbitration-forum.com/code/index.asp.
21 *Id.* at Rule 4.
22 *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826 (9th Cir. 1995).
23 *Alexander v. Blue Cross of Calif.*, 88 Cal. App. 4th 1082, 1089-91 (Cal. Ct. App. 2001) (upholding authority of panel to award sanctions during discovery where parties either agree to sanctions or state statute provides for sanctions while also holding that a grant of such authority is not a mandate).
24 FAA, 9 U.S.C. § 2.
25 *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).
26 Peter M. Mundlheim, The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of Mastrobuono, 144 U. PENN. L. REV. 197 (1995).
27 *Id.*
28 *Mastrobuono*, 514 U.S. at 54.
29 *Id.*
30 *Id.*
31 *Id.* at 54-55.
32 *Id.* at 59 (quoting the contract).
33 *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976) (holding that punitive damages void in arbitration agreements under New York law as a matter of public policy). Indiana has a similar policy. *See, e.g., Underwriting Members of Lloyds of London v. United Home Life Ins. Co.,* 549 N.E.2d 67 (Ct. App. Ind. 1990)(holding that award of punitive damages not available from arbitration panel applying Indiana law as a matter of law). *Compare with NCR Corp. v. SAC-CO, Inc.*, 43 F.3d 1076, 1078 (6th Cir. 1995) (upholding magistrate's vacating award of punitive damages against non-party to arbitration subject to FAA).
34 *Mastrobuono*, 514 U.S at 60.
35 *Id.* at 61.
36 *Id.* (quoting NASD Code of Arbitration Procedure ¶ 3741(e)(1993)).
37 *Id.* at 62-63
38 Barry R. Ostrager and Mary Kay Vyskocil, MODERN REINSURANCE LAW AND PRACTICE § 14.03[f] (2d ed.).
39 *Faiyaz v. Dicus,* 537 S.E.2d 203, 206 (Ga. Ct. App. 2000).
40 *Id.*
41 *Ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002).
42 *Id.* at 278.
43 298 F.3d 314, 315 (5th Cir. 2002).
44 *Id.*
45 *Id.* at 316-17.
46 *Id.* at 317.
47 *Id.* at 317-18.
48 *See Gateway Tech., Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995).
49 *Garrity*, 353 N.E.2d at 795.
50 *Gateway*, 64 F.3d at 999.
51 *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (leading authority on upholding award of punitive damages despite NY choice of law provision, which did not cover such damages); *B.F. Kelley, Jr. v. Michaels*, 59 F.3d 1050, 1055 (1995)(upholding award of punitive damages even though arbitration contained NY choice of law provision; agreement silent as to punitive damages); *Davis v. Prudential Secs., Inc.,* 59 F.3d 1186 (11th Cir. 1995) (upholding award of punitive damages against securities dealer); *Sanders v. Gardner,* 7 F. Supp. 2d 151 (E.D.N.Y. 1998) (upholding award of $10 million in punitive damages against securities dealers); *see generally* Peter M. Mundlheim, The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of Mastrobuono, 144 U. PENN. L. REV. 197 (1995).
52 *Am. Trust v. United Int'l Ins. Co.,* No. 91 C 5977, 1991 WL 281164 (N.D. Ill. 1991).
53 *Lefkovitz v. Wagner,* 291 F. Supp. 2d 764 (N.D. Ill. 2003).
54 *Id.* at 772.
55 *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001).
56 *Id.* (emphasis in original)
57 *Id.* The parties agreed to use the Rules for Non Administered Arbitration of Business Disputes. *Id.* at 930.
58 *Sanders*, 7 F. Supp. 2d at 158-59.
59 *See, e.g., Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 13 (2d Cir. 1997) (holding that an arbitrator's award is reviewed under the standard of "manifest disregard for the law"); *Davis*, 59 F.3d at 1190 (noting that "[i]t is well-settled that judicial review of an arbitration award is narrowly limited"); *NCR Corp. v. SAC-CO, Inc.*, 43 F.3d 1076, 1078 (6th Cir. 1995) (noting that "[t]he standard of review in arbitration cases is generally extremely narrow"); *Greening v. Stratton Oakmont, Inc.*, No. 96-15370, 1997 U.S. App. LEXIS 9671, at *4 (9th Cir. 1997) (holding that a court "will not overturn an arbitrators calculation of damages, even if it is mistaken, so long as it is not 'completely irrational.'").
60 *Sanders*, 7 F. Supp. 2d at 176, *citing BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).
60 *Rifkind & Sterling, Inc. v. Rifkind*, 33 Cal. Rptr. 828, 28 Cal. App. 4th 1282, 1291(Cal. Ct. App. 1994).
61 *Id.* at 1291-92. ▼

feature

# The Power of Arbitrators to Grant Attorneys' Fees and Interest

*This article is based on a paper presented at the ARIAS•U.S. Fall Conference*

John Nonna
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*LeBoeuf, Lamb, Greene & MacRae, LLP*

John Nonna

Christa Santos

I know no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion.

-Thomas Jefferson

(September 28, 1820)

## I. Introduction

Arbitrators have broad equitable powers in granting remedies. "Courts have occasionally vacated the awards in commercial arbitrations on the grounds that the arbitrators have exceeded their powers in granting remedies which they were not authorized to grant ... Generally, however, the courts have been reluctant to vacate commercial arbitration awards on this ground, especially where there is no express restriction on the remedies an arbitrator is authorized to award in the arbitration agreement." Andrew M. Campbell, J.D., Annotation, *Construction and Application of § 10(a)(4) of Federal Arbitration Act (9 U.S.C.A. § 10(a)(4) Providing For Vacating of Arbitration Awards Where Arbitrators Exceed or Imperfectly Execute Powers*, 136 A.L.R. Fed. 183, *2a (1997).

In fact, the Federal Arbitration Act, 9 U.S.C. § 10 (2000) ("FAA"), provides only the following narrow grounds for vacating an arbitration award:

(a) 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

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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.

This broad grant of authority, however, must always be considered in the proper context, bearing in mind that arbitration is a creature of contract. Accordingly, when courts are called upon to consider whether or not the arbitrators "exceeded their powers" under § 10(a)(4) of the FAA, the court must examine the arbitration agreement to determine the extent of the broad grant of authority conferred upon the arbitration panel. In the arbitration context, the question of whether an arbitrator has exceeded his powers "is whether the arbitrator had the authority to rule on a particular issue under the terms of the controlling arbitration agreement." *Kahn v. Chetcuti*, 123 Cal. Rptr. 2d 606, 608-09 (2002). [*See also Cowen & Co. v. Anderson*, 558 N.E.2d 27, 28 (N.Y. 1990) (The scope of the arbitrator's authority must be determined from the language of the agreement, using accepted rules of contract law.); *Walter A. Stanley & Son v. Trustees of Hackley Sch.*, 366 N.E.2d 1339, 1340-41 (N.Y. 1977) (The essential determination of which issues should be submitted to the arbitrator for resolution must be based upon the parties' intentions, as expressed in their agreement.)]. Ultimately, the arbitrators have only so much authority and power as the parties confer upon them in the arbitration clause. In addition, the parties, by agreement, can expand or limit the arbitration panel's authority. Ultimately, the almost absolute power that arbitrators possess stems from the parties themselves who have chosen to confer that power on the arbitrators.

Given the broad grant of equitable powers when fashioning awards, and the narrow grounds for vacating arbitral awards under the FAA, it is not surprising that, generally speaking and considering the terms of the arbitration agreement, arbitral awards of attorneys' fees and interest are considered appropriate.

**A. Aribtral Awards of Attorneys' Fees**

If the parties agree to submit the issue of attorneys' fees to the panel, it is well within the panel's power to make such an award. Accordingly, an arbitration panel may award attorneys' fees, even if not otherwise authorized by law to do so, if both parties submit the issue to the arbitrators. *See First Interregional Equity Corp. v. Haughton*, 842 F. Supp. 105, 112-113 (S.D.N.Y. 1994).

The insistence by the courts that the parties must have agreed to submit the issue of attorneys' fees to the panel derives from the general "American Rule" that litigants are required to pay their own attorneys' fees, absent specific legislation or a contract providing otherwise. *Rosati v. Bekhor*, 167 F. Supp. 2d 1340, 1347 (M.D. Fla. 2001), citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683-84 (1983). "The question ... is whether an arbitrator may award attorneys' fees against a party to the arbitration when the arbitration agreement does not expressly authorize it. An affirmative answer to this question would permit imposition of a penalty not contemplated or even authorized by the parties to the arbitration agreement." *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.*, 433 N.W.2d 669, 670 (Wis. 1988). As *Rosati* suggests, parties may enter contracts that specifically provide for the award of attorneys' fees.

Even in the absence of a contractual provision in the arbitration agreement, by their actions, parties may put the issue of attorneys' fees before the panel. For example, in *Spector v. Torenberg*, 852 F. Supp. 201 (S.D.N.Y. 1994), the parties against whom the award of attorneys' fees had been made agreed to the award of attorneys' fees by including a request for reasonable attorneys' fees in their arbitration demand and, in addition, acquiesced to the award of attorneys' fees by including a request for attorneys' fees in their post-hearing briefs, and by failing to object to such fees during final argument. 136 A.L.R. Fed. at *5a.

With respect to the narrow grounds articulated in the FAA for vacating an award, "the statute does not allow courts to 'roam unbridled' in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specific ways." *Marshall & Co. v. Duke*, 941 F. Supp. 1207, 1210 (N.D. Ga. 1995),

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Given the broad grant of equitable powers... and the narrow grounds for vacating... it is not surprising that... arbitral awards of attorneys' fees and interest are considered appropriate.

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... if there is no basis on which the arbitrator can ground its power to award attorneys' fees, the arbitrator will be deemed to have exceeded his authority.

quoting *Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992), *overruled in part on other grounds*. In *Marshall*, on Plaintiffs' Motion to Confirm Arbitration Award and Defendants' Motion to Vacate Arbitration Award in the context of alleged violations of the Securities Exchange Act of 1934,[1] the Defendants argued that the arbitration panel lacked the power to award attorneys' fees, relying on § 10(a)(4) of the FAA. In reaching a final award which included the award of attorneys' fees, the panel relied on three bases for its power to award attorneys fees: 1) the parties had agreed to submit the issue of attorneys' fees and expenses to the panel; 2) the National Association of Securities Dealers rules and Uniform Submission Agreement provided for submission of all disputes by the parties to arbitration; and 3) the right to award attorneys' fees under the common law bad faith exception to the "American Rule." The Court held that "the panel's reliance upon the listed sources of power was proper." *Marshall*, 941 F. Supp. at 1213. The Court also noted that "the § 10(a)(4) prohibition against arbitrators' exceeding their powers 'is to be accorded the narrowest of readings.'" *Id.*, quoting *Blue Tee Corp. v. Koehring Co.*, 999 F.2d 633, 636 (2d Cir. 1993).

In 1998, the American Arbitration Association ("AAA") Commercial Arbitration Rules stated that "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties..." Effective January 1, 1999, AAA Commercial Arbitration Rule 43 became the new rule regarding the "Scope of Award" and was amended to specifically provide that the "award of the arbirtrator(s) may include ... attorneys' fees *if all parties have requested such an award or it is authorized by law or their arbitration agreement*." *Heartland Premier Ltd. v. Group B and B, LLC.*, 31 P.3d 978, 981 (Ks. 2001) (emphasis added), quoting 1999 AAA Commercial Arbitration Rule 43 (d)(ii); *See also Livingston v. Associates Fin. Inc.*, 339 F.3d 553 (7th Cir. 2003).

Similarly, in Maryland, for example, the Maryland Uniform Arbitration Act, Md. Code Ann. Cts & Jud. Proc. § 3-201 et seq. (2002), vests the arbitrator with the authority to award attorneys' fees only if the parties so agreed. *Id.* at §3-221. Likewise, in Florida, Fla. Stat. Ch. 682.11 (2003), requires parties to pay the fees and expenses of arbitration, but not counsel fees, in accordance with the arbitrator's award, "unless the parties provide otherwise in their contract." *In re Arbitration between Prudential-Bache Sec., Inc. and Depew*, 814 F. Supp. 1081, 1083 (M.D. Fla. 1993).[3]

In addition, as seen in *Marshall & Co. v. Duke*, 941 F.Supp. at 1213, arbitrators have the power to award attorneys' fees pursuant to the "bad faith" exception to the American Rule. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-259 (1975) ("A court may assess attorneys' fees ... when the losing party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons...'", quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974).

Accordingly, if there is no basis on which the arbitrator can ground its power to award attorneys' fees, the arbitrator will be deemed to have exceeded his authority. For example, *In re Arbitration between UBS Warburg, LLC and Auerbach, Pollak & Richardson, Inc.*, No. 119163/00, 2001 N.Y. Misc. LEXIS 1324 (Sup. Ct. Oct. 2, 2001), the court found that the arbitration panel exceeded its authority by awarding almost $1.2M in attorneys' fees because "[n]either the agreement pursuant to which the arbitration proceeding was conducted, nor any applicable law permits APR to obtain attorneys' fees ... Absent any basis for the award in the parties' agreement or by statute, the award of attorneys' fees exceeded the authority of the arbitrators." *Id.* at **20-21.

Courts have upheld limitations that parties have placed on the power of the arbitrators to award attorneys' fees. For example, in *CBA Industries, Inc. v. Circulation Management, Inc.*, 578 N.Y.S.2d. 234 (2d Dept. 1992), the arbitration provision expressly provided that "the expense of the arbitration shall be borne equally by the parties to the arbitration, provided that each shall pay for and bear the cost of its own experts, evidence *and legal counsel*." *Id.* (emphasis added). The court found that this provision in the arbitration agreement "constituted an express limitation on the arbitrator's power" to award attorneys' fees to the prevailing party. *Id.* at 235.

In *Raytheon Co. v. Computer Distributors, Inc.*, 632 F. Supp. 553 (D. Mass. 1986), the court held that the arbitrators had not exceeded their powers when they concluded that the prevailing party was not entitled to attorneys' fees under applicable state law. The court noted that the FAA, although applica-

ble, does not expressly provide for the award of attorneys' fees in arbitration proceedings, and that attorneys' fees are generally not awarded in federal litigation. In addition, there was no federal statute establishing a right to attorneys' fees for a violation of the state statute that was breached, and the arbitrators found that the Massachusetts state statute did not permit them to award attorneys' fees under the facts of the case. 136 A.L.R. Fed. at *5b.

Based on the foregoing, it is evident that although arbitrators are granted broad equitable powers when fashioning their awards, at the same time, an award of attorneys' fees must be based on a specific grant of authority. The power to award attorneys' fees may be found in the arbitration agreement, by the conduct of the parties when submitting their disputes to the arbitrators, or by specific legislation or statute.

With respect to the calculation of attorneys' fees, it appears that as long as the arbitration agreement includes a provision for the award of attorneys' fees, the arbitrator's calculation of such fees is unlikely to be disturbed, particularly if there is nothing in the agreement that limits the arbitrator's calculation of such fees. In *Softkey, Inc. v. Useful Software, Inc.,* 756 N.E.2d 631 (Mass. 2001), the arbitrator took into consideration the extent to which each party prevailed in relation to its reasonable expectations, and the conduct of the parties during discovery. In addition, the arbitrator included a "qualitative" component with respect to Softkey's "stonewalling" during the arbitration. On appeal, Softkey claimed that there was error in confirming the arbitrator's qualitative component in the calculation and allocation of attorneys' costs and fees. The court disagreed, finding that "there is nothing in the agreement that explicitly prevents such consideration" and that the arbitrator had not exceeded his authority. *Id.* at 634.

**B. Arbitral Awards of Interest**

The broad authority of arbitrators to grant remedies includes the power to award interest. "With regard to interest, numerous courts have held that arbitrators have the power to award interest." *Holz-Her U.S., Inc. v. Monarch Mach., Inc.*, No. 3:97CV56-P, 1998 U.S. Dist. LEXIS 15394 at *29 (W.D. N.C. Jul. 24, 1998), citing *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986). However, bearing in mind that arbitration is a creature of contract, the arbitrators have only so much authority and power as the parties confer upon them in the arbitration clause. In *Holz-Her*, since neither party specifically objected to the arbitrator's award of interest, the court confirmed the award. *Id.* at *29. As was the case in *Holz-Her*, objections to arbitral awards of interest are predominantly made pursuant to § 10(a)(4) of the FAA.

Reinsurance commentators and case law recognize the broad power of an arbitration panel to award both pre-award and post-award interest. "An arbitration panel has the power to award preaward and postaward interest ... Arbitration panels have broad authority to issue an award within the scope of the arbitration agreement, and the power to award interest has been upheld." Robert W. Hammesfahr & Scott W. Wright, *The Law of Reinsurance Claims,* § 12.7 C 4 (1994), citing *United States v. Praught Constr. Corp.*, 607 F. Supp. 1309 (D. Mass. 1985), *Watertown Firefighters, Local 1347 v. Town of Watertown*, 383 N.E.2d 494 (Mass. 1978). In *Praught*, the court found that:

> [G]iven the current policy of encouraging arbitration, the trend of allowing arbitrators to award interest makes sense ... If interest were only to be awarded by courts, then either successful parties will be forced to spend more time and money to recover interest or unsuccessful parties will be unjustly enriched by the use of someone else's money. The incentive to dispute a contract and to delay resolution of any dispute is greater if interest is not a part of the arbitrator's award. Therefore, allowing arbitrators to award interest is not only in line with current case law but also helps to streamline the arbitration process and save court resources.

607 F. Supp. at 1312.

In *Praught*, the court also described the current state of flux in the law between the traditional rule and the current trend to avoid unjustified windfalls in interest awards:

> [A]n arbitrator's award constitutes an unliquidated claim on which the party in whose favor the award has been made is entitled to interest from the date that party first applies to the court for confirmation of the award ...

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Under the FAA, a confirmed arbitration award bears interest from the date of the award, and not from the date of the judgment confirming the arbitration award.

> In the past few years the traditional rule has evolved in favor of the arbitrator's right to award interest to avoid an unjustified windfall ... We find a considerable body of authority elsewhere allowing interest from the date of an arbitral award.

*Id.* at 1310-1311 (internal citations omitted).

In addition, the *Praught* court stated:

> An arbitrator's award of interest, when made as a component of an award, is an integral part of the total remedy that he fashions, and as such, is not subject to the statutory provisions which apply to court-awarded interest on contract claims. (citations omitted) 'Provisions of law applicable to judicial actions and proceedings do not necessarily apply to arbitrations. Parties who submit their controversies to arbitration forgo those provisions and leave all questions of law and fact to the arbitrators. *The right of interest involves questions of law and fact that are within the purview of the arbitrators.*'

Id. at 1311, quoting Eager, *The Arbitration Contract and Proceedings* § 131 (1971).

Based on the fluid state of the law, the court in *Praught* found that the arbitrator had properly ordered pre-award interest until the award was paid in full because, by not paying the plaintiff money owed him under the contract, the defendant had earned over $3,000 in interest on money rightfully belonging to the plaintiff. In addition, the court found that, at that time, an interest rate of 12% was reasonable because this was presumably the amount of money that could be earned in a money market account.

In *Watertown Firefighters, Local 1347*, the court addressed the question of the running of interest on a last and best offer award and found that allowing interest from the date of award on a last and best offer award should be the general rule because it "fixes definite or ascertainable dollar amounts and is by the statute declared presumptively 'binding on the parties' when made. The rule commends itself also because it encourages swift obedience by the parties to the award ... [T]he general rule may bend in particular cases to equitable considerations." 383 N.E.2d at 500-501.

In addition to the narrow grounds for vacating an arbitral award under the FAA, some courts have recognized a "manifest disregard of the law" by the arbitration panel as grounds for vacating an award. *J.A. Jones Constr. Co. v. Flakt, Inc.*, 731 F. Supp. 1061, 1063 (N.D. Ga. 1990), citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,* 808 F.2d 930, 933 (2d Cir. 1986); *Stroh Container Co. v. Delphi Indus.,* 783 F.2d 743, 750 (8th Cir. 1986), cert. denied, 476 U.S. 1141 (1986). In *J.A. Jones*, the defendant, Flakt, argued that the arbitrators exceeded their authority by awarding pre-award interest to the plaintiffs, disregarding New Jersey law that does not allow arbitrators to award interest for any period prior to the making of the award. In addition, Flakt argued that imposing an interest rate of 10%, rather than a lower rate in accordance with a New Jersey court rule, exceeded the arbitrator's authority under the FAA. The court held that even if the 11th Circuit recognized the "manifest disregard" standard, there were no grounds to apply it in this case.[3] "If a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it." *Id.* at 1064, quoting *O.R. Sec., Inc. v. Prof'l Planning Assoc.*, 857 F.2d 742, 747 (11th Cir. 1988). In this case, the arbitrators did not provide a reasoned award, so there was no basis to conclude that they knew the law and disregarded it. 731 F. Supp. at 1064.[4]

In addition, the court adeptly explained that its ability to vacate an award under §10(a)(4) of the FAA is not dependent "on the outcome of a particular legal decision but rather on whether the arbitrators were requested to make the decision at all." *Id.* In this case, the parties' contract provided that any dispute, controversy or claim arising out of or relating to their agreement would be resolved by arbitration. Accordingly, the arbitrators had not "exceeded their powers" under § 10(a)(4) of the FAA since the parties had clearly requested that all disputes were subject to arbitration, which would include a claim for interest.

Under the FAA, a confirmed arbitration award bears interest from the date of the award, and not from the date of the judgment confirming the arbitration award. *Sun Ship, Inc. v. Matson Navigation Co.,* 785 F.2d 59, 63 (3d Cir. 1986). In *Sun Ship*, a ship builder objected to the arbitrator's award of interest on two grounds: 1) that in awarding

prejudgment interest at the prime rate the arbitrators exceeded their authority because, under Pennsylvania law, prejudgment interest is limited to the statutory rate; and 2) that the arbitrators exceeded their authority in awarding pre-award interest. The court found that these arguments were "frivolous," not only because of the broad language of the arbitration clause,[5] but because the joint letter of instruction submitted to the arbitration panel specifically provided that if the panel awarded interest, it simply had to "state or describe" the relevant interest rate and the date from which interest should commence. The letter of instruction also provided that the interest could be stated as a percentage, or described in reference to an objective standard, e.g. prime plus 2. The court found that:

> [O]nce the parties have gone beyond their promise to arbitrate and have supplemented the agreement by defining the issue to be submitted to an arbitrator, courts must look both to the contract and to the submission to determine his authority.

*Id.* at *62, citing *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co.*, 442 F.2d 1234, 1236 (D.C. Cir. 1971).

With respect to the applicable interest rate, the court noted that in federal question cases, the rate of prejudgment interest is committed to the discretion of the district court. Accordingly, the case was remanded to the district court for a determination of the appropriate interest rate.[6] In addition, the court held that because both claims involved federal questions (a maritime transaction and a contract in interstate commerce) and arose under the FAA, interest was to be awarded from the date of the award.

Under AAA Commercial Arbitration Rule 43(d)(i), the arbitrator may award "interest at such a rate and from such date as the arbitrator(s) may deem appropriate."

As the foregoing authority confirms, it is well within an arbitration panel's broad grant of power to impose post-award interest, and pre-award interest when appropriate. In addition, the rate of interest, if not provided for by the parties in the arbitration agreement, is well within the discretion of the arbitration panel, so long as the amount is reasonable and appropriate.

## II. Conclusion

Despite the broad grant of authority given to arbitrators, and the deference given to arbitral awards, parties should be mindful that ultimately the scope of the power of arbitrators, and the range of remedies available to them, will always be considered in light of the terms of the arbitration agreement. This limitation on the power to grant certain remedies is particularly true for awards of attorneys' fees, which must have been contemplated and agreed to by the parties. The power to award interest is seen as an integral part of the arbitration panel's remedy. However, the intent of the parties to submit this issue to the panel is still likely to be considered.

1 15 U.S.C. § 58j(b) 2000.

2 The court also noted that in the 11th Circuit, "if an arbitration clause in a contract is ambiguous, but can be read to include an award of attorneys fees, a court will not vacate the award." Id. at 1083.

3 The Eleventh Circuit has never vacated an arbitration award on the grounds of "manifest disregard of the law by the arbitrators." 731 F. Supp at 1064, citing O.R. Sec., Inc. v. Prof'l Planning Assoc., 857 F.2d 742, 747 (11th. Cir. 1988).

4 This decision leaves open the possibility that if an arbitrator knowingly disregarded a statutory provision regarding interest, and this disregard could be discerned from the award, it would provide grounds to vacate. However, most arbitration agreements free panels from judicial formalities and strict adherence to rules of procedure and evidence.

5 The arbitration clause provided that "any dispute or difference as to any matter or thing between Matson and Shipbuilder arising out of or relating to the Contract or any stipulation in the contract which cannot be settled by Matson and Shipbuilder...shall [be] submit[ted] to arbitration." 785 F.2d at 61.

6 The Sun Ship opinion was criticized in Northrop Corp. v. Triad International Marketing S.A., 842 F.2d 1154 (9th Cir. 1988) because the Sun Ship court relied on the mistaken premise that actions under the FAA are within federal question jurisdiction. However, an independent jurisdictional basis is required. Id. at 1155. ▼

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# news and notices

# Save the Dates for the 2004 Annual Meeting

**Hilton New York will once again be the venue for the annual Fall Conference. A much larger space, the Trianon Ballroom, will be the location of the general sessions. Details of the program will be announced in September.**

## Arbitrator Training Workshop Sets a New Course

The first workshop in the new format (six simultaneous mock arbitrations) took place on February 23-24 at Tarrytown House in Tarrytown, New York. A report on this event is on page 18 of this issue.

Now that a viable program has been developed that can handle 54 students at one time, there should be adequate capacity to enable every member to attend who has not yet done so. We also expect that those who have already participated will now be able to start returning for refresher training.

September 9-10 is the date for the next workshop, which will again be at Tarrytown House. Registration timing will be announced in May; it will take place in late July beginning at a specified time and day here on the website. The website calendar is always the first place that scheduling information is available.

## Directory Completed

All members received the 2003-2004 Directory at the end of January. It contains an extensive overview of the Society, as well as a complete membership list and profiles of all certified arbitrators, as of the end of 2003. Members should keep in mind that, while the arbitrator profile pages in the Directory are useful for easy reference, the online profiles are updated continuously. Whenever you are using specific information about an arbitrator, it may be worthwhile to check the latest information on the website. Also, in sorting out the experience of potential arbitrators, recognize the value that the search system offers in giving you an extensive list of descriptors through which to search, analyze, and compare them. The search keywords are not included in the Directory.

## Spring Conference

Announcement brochures for the 2004 Spring Conference were sent to members and friends in late March. The event is set for June 9-11, 2004 at The Breakers in Palm Beach, Florida.

The theme for this year's spring gathering is "Do You Want to Be a Super Arbitrator? Interacting on Discovery, Ethics, and Case Management." The program will include extensive use of audience response technology, where everyone will respond to questions by indicating answers on a wireless keypad. Results will be projected a few seconds later on a large screen.

The Breakers is a classic, elegant resort, with a beautifully renovated interior and spa. By taking advantage of the early off-season, we get good weather, reasonable rates, and a location that is easy to get to (Palm Beach International Airport). Plan to be there from Wednesday noon until Friday noon, if not through the weekend.

All the details about the program are in the brochure and posted on the website, where online registration with a credit card is available. Hotel reservations are the responsibility of each attendee. The Breakers' reservation system can be accessed by calling 1-888-BREAKERS (1-888-273-2537). Be sure to say that you are coming for the ARIAS Conference to get a room from our block at the special rates of $185 Superior, $220 Deluxe, and $320 Oceanfront. You will want, at least, to stay overnight on June 9 and 10.

## Recertification

All Certified Arbitrators whose certification expired at the end of December should have received recertification certificates in January. **Maintenance of certification requires attending at least one seminar within the two-year certification period.**

Anyone who did not attend a conference or workshop during the past two years has been notified of his lapsed status and has been withdrawn from the website biography section until he attends another conference.

If your certification has lapsed and you have not been recertified or notified, please contact info@arias-us.org .

## Promoting to Other Members

Members are asked to refrain from using our member contact information for broad based solicitations. With everyone fighting the proliferation of spam, use of member email addresses to contact a large number of members may well be detrimental to any business relationship.

## Annual Dues

**If you have not paid your 2004 annual dues by June 30** (corporate dues are paid by the key contact), **you will be considered to have withdrawn**. Final notices are being sent in April to anyone who has not yet paid.

## New Certifications/Umpires

**At the January 14 Board meeting**, the following twelve members were certified as ARIAS•U.S. Arbitrators. Biographies of recently certified arbitrators can be found on page 34 of this issue of the Quarterly.

- Clive Becker-Jones
- Katherine L. Billingham
- James Cameron
- Bruce A. Carlson
- Jens Juul
- Elliot S. Orol
- Michael R. Pinter
- George C. Pratt
- George M. Reider
- Don A. Salyer
- Jack R. Scott
- Savannah Sellman

At the same meeting, the following two members were confirmed for the ARIAS•U.S. Umpire List.

- Robert J. Federman
- George C. Pratt

**At the March 4 Board meeting**, the following five members were certified as ARIAS•U.S. Arbitrators. Their biographies will be included in the next issue of the Quarterly.

- Howard D. Denbin
- Michael W. Elgee
- Klaus-Heinz Kunze
- Timothy C. Rivers
- Barry Leigh Weissman

At the same meeting, the following two members were confirmed for the ARIAS•U.S. Umpire List.

- Charles M. Foss
- Richard L. White

## I. Davis Jessup, II

We note with sorrow the passing of Dave Jessup, a long-time member of the reinsurance community. Dave joined ARIAS•U.S. in early 2002 and was certified in February of 2003. He lived and worked in Summit, New Jersey. He was 61 years old.

# SPECIAL ANNOUNCEMENT

To All ARIAS•U.S. Members,

At its meeting on March 4th, the ARIAS•U.S. Board of Directors discussed and subsequently adopted an amendment to the Certification Criteria to be effective for arbitrator certification applications received after January 1, 2005. The amendment imposes a three-year window for qualifying conferences (new limitation) and arbitrations (increased from two years).

The amendment to Section 2b of the Certification Criteria is as follows:

b. Arbitration Experience - Have completed, within three years preceding the date the completed application is received by ARIAS•U.S.:

(i) Three ARIAS•U.S. conferences or workshops [or two ARIAS•U.S. conferences or workshops and one conference sponsored by A.R.I.A.S. (UK)]; or

(ii) Two ARIAS•U.S. conferences or workshops and one completed insurance/reinsurance arbitration as arbitrator or umpire; or

(iii) One ARIAS•U.S. conference or workshop and two such arbitrations.

For purposes of this paragraph, an arbitration is "completed" only if there has been a Final Award following an evidentiary hearing or the granting of summary judgment.

This amendment reflects changes in the organization since the Criteria were first adopted, mainly that we are offering more opportunities for members to attend qualifying conferences and the belief that our certified arbitrators should be exposed to the most current views on important arbitration issues.

We are giving substantial advance notice of this change so as not to prejudice imminent certification applications.

CHARLES M. FOSS
Chairman of the Board of Directors
ARIAS•U.S.

feature

# Expanded Arbitrator Training Workshop a Solid Success!

The first intensive arbitrator training workshop in the new format took place on February 23-24 at Tarrytown House in Tarrytown, New York. The event had been quickly relocated when the Hastings Hotel in Hartford went out of business on New Year's Eve. After some adjustments, the registration process began, as previously scheduled, at 10:00 a.m. on January 7. In just under an hour, the 54 positions were filled. Over the next three hours, seven more requests were received (for the waiting list). This event was only open to members who had not previously attended a workshop.

The program, itself, began on Monday evening, February 23, with a reception and dinner in Biddle House, one of the historic buildings that are the focal points of the facility. Previous receptions, when 27 students participated, had always been lively events, as everyone actively discussed the many aspects of the next day's mock arbitration hearings. With 54 students, the discussions reached a new level of intensity, which carried over into the dinner. The addition of the dinner allowed much more pre-hearing interaction than in earlier workshops.

On Tuesday morning at 8:30 a.m., the workshop began with practical advice for reinsurance arbitrators from veteran arbitrators Dick Kennedy, Marty Haber, and Ron Gass. Three hour-long hearing segments then took place in each of six rooms, with a break for lunch in the middle.

In each of the six rooms, arguments for each side of the dispute were presented by associates of one of the participating law firms. The firms were:

- Bingham McCutchen
- Chadbourne & Parke
- Choate Hall & Stewart
- Day, Berry & Howard
- LeBoeuf, Lamb, Greene & MacRae
- Simpson Thacher & Bartlett

Evaluations submitted by students after the event indicated a high degree of enthusiasm for the experience. Feedback from the law firms suggests that their participation


feature

proved to be exceptional training, as well.

Now that the pent-up demand seems to have been satisfied, Mary Lopatto, who coordinates the workshop series, intends to create a second tier of registration, so that those who have previously attended will have the opportunity to attend again, after all interested new members have registered.

Workshop creator and ARIAS Board Chairman Charlie Foss, commented, "With the new format having been well tested and found to be sound, we look forward to continuing this extremely successful event in the months and years ahead."

September 9-10 is the date for the next workshop, which will again be at Tarrytown House. Registration timing will be announced in May; it will take place in late July beginning at a specified time and day here on the website. The website calendar is always the first place that scheduling information is available. ▼

# *Around the Tarrytown Workshop*

# Around the Tarrytown Workshop

feature

# Do Arbitrators Have the Power to Impose Confidentiality?

*This article is based on a paper presented at the ARIAS•U.S. Fall Conference*

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## I. INTRODUCTION

The term "arbitration" refers to "[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision."[1] In certain industries, such as reinsurance, when there is a conflict between two parties it is custom and practice for them to choose to resolve their dispute through arbitration rather than in open court. It is therefore also custom and practice for these parties to include arbitration clauses in their agreements.[2] The purpose of these clauses is to ensure that the dispute will be resolved by disinterested third parties who are familiar with reinsurance practices, technicalities, and customs.[3] At least one commentator has argued that courts, unlike these third parties, are "less than appreciative of reinsurance disputes revolving around arcane language steeped in industry custom and practice."[4]

Some arbitration clauses, especially those contained in reinsurance agreements, include confidentiality provisions.[5]

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Some arbitration clauses, especially those contained in reinsurance agreements, include confidentiality provisions.[5] These provisions require that the arbitral proceeding, the award, and the reasons behind it be kept confidential. Parties can also enter into separate confidentiality agreements[6] or non-disclosure agreements,[7] or arbitrators can sometimes issue protective orders,[8] which likewise require that information and materials obtained in discovery and all hearing records, briefs, and arbitral awards must be kept confidential and cannot be disclosed except under limited circumstances.[9]

Some have argued that even when there is no confidentiality provision in an arbitration clause and even in the absence of a confidentiality agreement, it is nevertheless customary for the parties to keep the proceeding confidential.[10] Others have argued that in the absence of a confidentiality provision or agreement, it is open to debate whether the proceeding is confidential.[11]

In his treatise *Handbook on Reinsurance Law*, Eugene Wollan provides his thoughts on the duty of confidentiality. He states:

> The traditional unwritten but widely accepted practice was to treat arbitration proceedings as confidential, and sometimes the arbitration clause specifically so provides. . . .
>
> The courts are reluctant to read in a confidentiality requirement that has not been agreed by the parties or imposed by the panel, although under appropriate circumstances privilege may attach to some of the evidence adduced during the arbitration. (British law, by contract, infers a duty of confidentiality.) Most of the organizations active in reinsurance arbitrations continue to favor confidentiality as the hallmark.[12]

This article will discuss the usual situation in which the arbitration clause of the reinsurance contract does not contain an express confidentiality provision and there is no confidentiality agreement, but where one party nonetheless seeks to have the arbitrators order confidentiality and the other party objects to such an order. In these circumstances, do the arbitrators have the power to order confidentiality? And should the Panel have that power? Several publications have dealt with confidentiality in general, as well as with more specific issues such as the confidentiality of arbitral awards.[13] Few if any, however, have discussed the precise issue presented here. This article will also provide various arguments for and against authorizing the Panel to order confidentiality in the absence of agreement. Finally, this article will provide some possible suggestions for anticipating and avoiding the problem in the first instance.

## II. CONFIDENTIALITY IN ARBITRATION

Arbitral proceedings are, typically, private and confidential. Indeed, confidentiality is considered by most to be one of the cornerstones and attractions of arbitral proceedings,[14] an

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intrinsic element of arbitration[15] that the parties to an arbitration prefer[16] and expect.[17] Most commentators would argue that confidentiality is one of the most important requirements, benefits, and advantages of arbitral proceedings.[18] They would also argue that confidentiality is an inherent part of the arbitration process,[19] and that it is one of the most attractive qualities of Alternative Dispute Resolution[20] (ADR).[21]

Moreover, some, such as ARIAS•U.S., would argue that in some industries -- reinsurance, for example -- there is a general consensus that "arbitrations are and should be confidential in most circumstances, even in the absence of complete agreement between the parties. [However,] [t]he better practice is for the panel to enter an order of confidentiality in such circumstances." [22]

**A. Reasons for Confidentiality**

Commentators have advanced several reasons for maintaining confidentiality in arbitral proceedings. For example, it is believed that keeping such proceedings confidential encourages the parties to communicate candidly. Because the goal of arbitration, and all ADR, is full and open communication between the parties, some have argued that the motive to participate in ADR is lost when confidentiality is jeopardized.[23] Some likewise believe that confidentiality encourages the parties to compromise. It also enables the parties to keep their differences out of the "public eye." [24] Finally, according to one source, confidentiality is easier to maintain in arbitration as opposed to litigation. [25]

Moreover, according to one commentator, the reinsurance community favors keeping arbitration awards confidential for some or all of the following reasons: U.S. arbitration awards generally are not "reasoned" awards, i.e., they do not contain the facts underlying the award; "human nature links the Panel with the result," thereby "skew[ing] the search for an umpire or arbitrator in disputes involving similar issues"; arbitrations often implicate other confidential agreements; publishing arbitral awards invites third parties to seek discovery; keeping them confidential permits the resolution of disputes "without locking the parties into positions, or destroying business relationships"; and keeping these awards confidential makes arbitration less like litigation.[26]

**B. U.S. Rules Regarding Confidentiality**

In the United States, there are two national statutes governing arbitration -- the Federal Arbitration Act (FAA)[27] and the Revised Uniform Arbitration Act (RUAA).[28]

The U.S. Supreme Court has recognized that the FAA "clearly enunciates a congressional intention to favor arbitration."[29] In addition, the RUAA, which is fashioned after the FAA[30] and has been adopted by thirty-five states,[31] recognizes that:

> [A]rbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their specific agreement on a particular issue. In most instances the RUAA provides a default mechanism if the parties do not have a specific agreement on a particular issue.[32]

"The purpose of the UAA[33] is to afford parties the opportunity to reach a final disposition of differences in an easier more expeditious manner than by litigation." [34]

Neither statute, however, explicitly states whether arbitrations are required to be kept confidential when the contracts governing these disputes do not expressly require confidentiality.[35] In addition, neither statute states whether the Panel has the power to make these proceedings confidential.[36] Federal courts have also failed expressly to define whether there is a duty to maintain confidentiality in arbitrations under federal law.[37]

As a result, several commentators have argued that "confidentiality is more illusory than real under U.S. law"[38] and that, "in the absence of a specific provision in the arbitration agreement or the institutional rules, the legal basis for a requirement of confidentiality is unclear."[39]

Still, the RUAA does provide that "[a]n arbitrator may issue a protective order to prevent the disclosure of privileged information, *confidential information*, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State."[40] A handful of the thirty-five states that have adopted the RUAA have likewise adopted this language regarding protective orders.[41] In addition, at least one state court of appeals has held that a protective order signed by an arbitration Panel should be given the same "deference" as any other arbitration award.[42] That court further noted the rule that "lifting a protective order to disclose documents should only occur when intervening circumstances have diminished or eliminated the reasons why the protective order was issued."[43]

Moreover, several state arbitration statutes do expressly provide for mandatory confidentiality in commercial arbitration proceedings. These statutes range from the specific to the more general. For example, the Texas arbitration statute provides that communications by parties and records made during ADR procedures are confidential and are not subject to disclosure, and that neither the participants nor the arbitrators/mediators may be required to testify in later proceedings or to disclose information or data relating to or arising out of their arbitration/mediation.[44] Texas courts have construed this provision in at least two cases; but, according to one source, no Texas court has attempted fully to define the rules of confidentiality in arbitral proceedings.[45]

A Virginia statute provides that all memoranda, work products, and materials contained in the case files of a dispute resolution program in addition to all communications are required to be kept confidential[46] and are not subject to disclosure except under limited circumstances.[47] Similarly, Missouri's arbitration statute provides that arbitration proceedings shall be regarded as settlement negotiations and that, therefore, any communication by a participant or

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... some state arbitration statutes appear to mandate that arbitrations are confidential proceedings, and some even appear to permit arbitrators to issue protective orders to prevent the disclosure of "confidential information."

arbitrator shall be confidential. That statute also dictates that confidential communications are not admissible as evidence or subject to discovery.[48]

North Carolina's arbitration statute provides that, unless the parties agree otherwise, all arbitral hearings and meetings shall be held *in camera* and that confidential information disclosed during these proceedings shall not be divulged by the arbitrators.[49] It further requires the arbitrators and the parties to "keep confidential all matters relating to the arbitration and the award," unless the parties agree otherwise or to the extent they are required to order disclosure under applicable law.[50]

Finally, one of California's arbitration statutes requires only that the state's dispute resolution programs provide the county annually with statistical data regarding, *inter alia*, the number of disputes resolved, and that such data "shall maintain the confidentiality and anonymity of the persons employing the dispute resolution process."[51]

Several state courts have also grappled with the issue of confidentiality. One of the issues these courts have focused on is whether confidential information from a prior arbitration is discoverable in a later, unrelated arbitration. While these courts do not necessarily agree on the parameters of the rule of confidentiality, they do appear to agree that documents from a prior arbitration that were not protected by a confidentiality agreement or otherwise (*i.e.*, by a protective order) *are* potentially discoverable in a subsequent arbitration. For instance, at least one New York state appellate court has held:

> There is no confidentiality privilege precluding disclosure of the material requested as the parties to the arbitration proceeding governed by the Rules of the American Arbitration Association are, *in the absence of a confidentiality provision*, not prohibited from disclosing documents generated or exchanged during the arbitration and since evidentiary material at an arbitration proceeding is not immune from disclosure.[52]

The court therefore held that the items at issue, *viz.*, documents prepared by one of the parties and reports prepared by an accounting firm in connection with the prior arbitration proceeding, were not confidential, were not protected from disclosure, and were subject to discovery by plaintiff -- which was not a party to that arbitration -- because the "material [was] sufficiently likely to bear on the dispute and to assist in preparation for trial . . . ."[53]

The Colorado Court of Appeals reached a similar holding in *A.T. v. State Farm Mutual Insurance Company*.[54] In that case, the parties to the prior arbitration had not entered into a confidentiality agreement or "disclosure-restriction provision" and had not requested and received a protective order from the arbitrators or the court; the arbitration had also not been conducted under the rules of the AAA, which according to the court "would have provided confidentiality."[55] The court therefore held that the information from the prior arbitration had not been made confidential, and it affirmed the lower court's grant of summary judgment in favor of the insured.[56] According to the court:

> There is a presumption that the public has access to court records.
>
> Because an arbitration record is potentially public in nature and plaintiff failed proactively to preserve it as confidential, we agree with the trial court's conclusion that the plaintiff's medical information disclosed in the arbitration proceeding was not confidential.
>
> We also agree with the trial court's qualification that its conclusion does not render the entire arbitration akin to a public record available to anyone for any purpose. We hold only that the arbitration record, under the facts here, was available to defendant to use in another unrelated case in which plaintiff was involved.[57]

According to another state court, the *A.T.* court "implicitly held that parties could protect their confidential documents by so agreeing or by using arbitration rules that provided confidentiality."[58]

In contrast, in *Group Health Plan, Inc. v. BJC Health Systems, Inc.*,[59] the Missouri Court of Appeals affirmed the lower court's holding that confidential information from the prior arbitration was *not* discoverable in the later, unrelated arbitration.[60] However, in that case the parties to the prior arbitration had entered into a protective order that was signed by the arbitration Panel.[61] According to the court:

> Though we recognize that arbitrators enjoy wide latitude in granting discov-

> ery pursuant to arbitration proceedings, such latitude does not encompass the abrogation of a decision made previously by an arbitration panel in an unrelated dispute. To permit arbitrators to conduct illimitable discovery that is unrestricted even by a confidentiality agreement signed by an arbitration panel would have a chilling effect on the willingness of parties to arbitrate their disputes. Few parties would be willing to submit confidential matters to an arbitrator knowing that those materials could then be freely discovered in future unrelated proceedings, regardless of any actions taken to ensure confidentiality. We believe that the UAA, like the FAA, must be interpreted so "as to further, rather than impede, arbitration." To that end, it is improper for an arbitrator to require a nonparty to an arbitration to turn over confidential information in violation of a protective order entered in a previous arbitration. If the information sought is relevant to the present arbitration, it can surely be discovered through other means.[62]

As shown above, some state arbitration statutes appear to mandate that arbitrations are confidential proceedings, and some even appear to permit arbitrators to issue protective orders to prevent the disclosure of "confidential information." In addition, some state courts have held that confidential information from a prior arbitration is not discoverable in a later, unrelated arbitration if the parties to the prior arbitration agreed to keep it confidential. Nevertheless, few if any of these state statutes and/or cases appear to set forth explicitly whether an arbitration Panel has the authority to keep confidential an arbitral proceeding and award in the absence of the parties' unanimous consent or a confidentiality agreement.[63]

### C. Institutional Rules Regarding Confidentiality

Several arbitral institutions have set forth rules regarding the confidential nature of arbitral proceedings. For example, according to the Code of Professional Responsibility for Arbitrators of Labor–Management Disputes, "[a]ll significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law."[64] In addition, "[i]t is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties."[65]

Two articles of the International Chamber of Commerce (ICC) likewise provide for confidentiality, but only for proceedings before the International Court of Arbitration -- the arbitration body attached to the ICC -- not for proceedings before the actual arbitral tribunals.[66]

For example, Article 6 of Appendix I provides that "[t]he work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity."[67] Article 1 of Appendix II further provides that sessions of the ICC court are open only to its members and to the Secretariat, that if other parties are invited to attend they must "respect the confidential nature of the work of the Court," and that "documents submitted to the Court, or drawn up by it in the course of its proceedings, [should be] communicated only to the members of the Court and to the Secretariat and to persons authorized by the Chairman to attend Court sessions."[68] Similarly, Article 19.4 of the London Court of International Arbitration (LCIA) Rules provides that "[a]ll meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise."[69]

Finally, the ARIAS-U.S. arbitration rules also dictate that arbitrations should be confidential proceedings. Pursuant to these rules, "[t]he confidentiality of arbitration proceedings should be memorialized in an order entered by the arbitration panel setting forth the terms and scope of the confidentiality agreement."[70] Canon VI of these rules further provides as follows:

**Confidentiality: Arbitrators should be faithful to the relationship of trust and confidentiality inherent in their position.**

**Comments:**

1. Arbitrators are in a relationship of trust with the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain a personal advantage or advantage for others, or to affect adversely the interest of another.

2. Unless otherwise agreed by the parties, or required or allowed by applicable rules or law, arbitrators should keep confidential all matters relating to the arbitration proceedings and decision.

3. It is not proper at any time for arbitrators to (1) inform anyone of an arbitration decision, whether interim or final, in advance of the time it is given to all parties; (2) inform anyone concerning the contents of the deliberations of the arbitrators; or (3) assist a party in post-arbitral proceedings, except as is required by law.

4. Unless otherwise agreed by the parties or by applicable rules, arbitrators are not obligated to return or retain notes taken during the arbitration. Notes, records and recollections of arbitrators are confidential and shall not be disclosed to the parties, the public, or anyone else, unless (1) all parties and the panel agree to such disclosure, or (2) a disclosure is required by law.[71]

A few arbitral institutions venture even further and provide that arbitrators are authorized to keep confidential arbitral proceedings and awards, though some of these rules are somewhat vague in terms of arbitrators' specific powers. For example, the JAMS rules provide that "arbitrator[s] may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information."[72] Likewise, Rules 18 and 27 of the AAA's Rules for the Resolution of Employment Disputes grant arbitrators "the authority to make appropriate rulings to safeguard" the confidentiality of an arbitration pro-

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ceeding.[73] While these rules are rather unspecific, one could argue that, under them, an arbitration Panel has the power to issue an order keeping the proceeding and award confidential even in the absence of the parties' consent or a confidentiality provision or agreement.

Lastly, note that one author's survey of such arbitral institution rules led him to conclude that, while there is no consistency, these rules can be grouped into two categories -- those that protect confidentiality and contain general rules affording express protection and those that provide for only a "minimum obligation of confidentiality."[74] According to that author, the following institutions belong to the former category: the World Intellectual Property Organization (WIPO), LCIA, the China International Economic and Trade Arbitration Commission (CIETAC), and the Japan Commercial Arbitration Association (JCAA). The latter group, which constitutes the majority, consists of the following organizations: the UNCITRAL Arbitration Rules, the ICC Rules, the Rules of the American Arbitration Association (AAA), the Stockholm Chamber of Commerce (SCC), the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (ICAC), and the Belgian Centre for Arbitration and Mediation (CEPANI-CEPINA).[75]

**D. Foreign Rules Regarding Confidentiality**

According to one source, few national arbitration laws contain provisions that "guarantee *ex lege* the confidentiality of arbitration."[76] Nevertheless, courts in England, France, Australia, and Sweden have addressed the issue of whether there is an implied duty of confidentiality in arbitration proceedings.[77]

English courts have "shown a particularly high respect for the confidentiality of arbitrations."[78] Indeed, these courts have held that there is a legal right and duty of confidentiality in arbitral proceedings, though this rule is somewhat qualified in regard to arbitral awards and the reasons behind them.[79]

At least one French court has also held that there is a presumption of confidentiality in arbitration. According to the Paris Court of Appeal, "it is in 'the very nature of arbitral proceedings that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed.'"[80]

Australian courts, on the other hand, "have been unwilling to protect, in subsequent litigation, materials prepared for or during an arbitration in the absence of an explicit confidentiality provision."[81] One of the leading cases in Australia regarding this issue is *Esso Australia Resources Ltd. v. The Honourable Sidney James Plowman (Minister for Energy and Minerals)*. In that case, the court pointed to the distinction between privacy and confidentiality. The court held that privacy is "innate" to arbitration and that arbitral hearings are to be held privately unless the parties consent to the presence of non-parties. However, it does not necessarily follow that information and documents exchanged during arbitral proceedings are confidential.[82] That case was followed by *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, in which the Court of Appeal of New South Wales held that an arbitrator does not have the power to issue a procedural order imposing an obligation of confidentiality, which in that case would have prevented the government (a party to the arbitration) from disclosing information in pursuit of the "public interest."[83]

Finally, at least one Swedish court has held that there is no legal duty of confidentiality, implied or inherent, in an arbitration agreement.[84]

## III. THE ARBITRATORS' AUTHORITY

There are few statutes or court decisions in the United States governing the power of arbitrators, and most of those that do exist concern vacating arbitral awards.[85] There is even less statutory and case-law guidance regarding whether an arbitration Panel has the power to order confidentiality.

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Recent Supreme Court decisions do suggest that arbitrators, not courts, are to decide gateway procedural issues.[86] Thus, where the parties have a typically broad arbitration clause whereby they agree to arbitrate "*all* disputes, claims, or controversies arising from or relating to this contract," the question of confidentiality may well be among the "disputes" or "controversies" "arising from or relating to" the agreement that arbitrators are empowered to decide for themselves.[87]

Furthermore, according to one New York treatise, "[a]n arbitrator possesses considerable

discretion in determining whether to grant a party disclosure, and he can grant disclosure where the documents cannot be obtained from any other source and deny disclosure where the documents are not pertinent and material evidence."[88]

In addition, "[c]ontracts contain implicit as well as explicit terms, and arbitrators' authority to interpret the latter is as great as their authority to interpret the former."[89] It is also "well-established that the arbitrator may interpret ambiguous language, but he may not, however, disregard or modify unambiguous contract provisions."[90] This means that "[i]f the arbitrator interprets unambiguous language in any way different from its plain meaning, [the arbitrator] amends or alters the agreement and acts without authority."[91] However, because "contracts often lack explicit provisions for specific kinds of remedies[,] it falls to the arbitrator to devise one."[92]

Nevertheless, "[a]lthough the arbitrator's authority is broad, it is not unlimited."[93] "[A]n arbitrator may not venture beyond the bounds of his or her authority. . . . [A]n arbitrator has the authority to decide only the issues actually submitted."[94] In fact, "[a]n arbitrator exceeds his powers when he 'rules on issues not presented to [him] by the parties.'"[95]

The Code of Ethics for Arbitrators in Commercial Disputes, which was prepared in 1977 by a joint committee of the AAA and the American Bar Association, provides some additional rules governing the conduct of arbitrators. Canon VI of these rules provides:

> **CANON VI.**
> **AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.**
>
> B. Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.[96]

It appears from this language that arbitrators have the duty to keep an arbitration proceeding and award confidential. Nevertheless, some might argue that this duty does not necessarily translate into the authority to impose confidentiality on the parties. Hence, the question remains: should arbitrators have the power to order confidentiality?

## IV. ARBITRATORS SHOULD HAVE THE POWER TO ORDER CONFIDENTIALITY

As demonstrated above, there does not appear to be a uniform rule in the United States as to whether an arbitration Panel has the power to impose confidentiality on an arbitral proceeding, in the absence of the unanimous consent of the parties, a confidentiality provision or agreement, or a state statute authorizing arbitrators to issue protective orders. The situation will, however, arise where one of the parties will wish to disclose the arbitral proceeding to third parties that may or may not be affected by the result -- *e.g.*, a reinsurer's retrocessionaires, a ceding company's other reinsurers, or the public -- and the other party will object to disclosure. In that situation, does the Panel have the power to order confidentiality? This section provides some possible arguments in favor of this right.

First, one could argue that it is custom and practice for arbitral proceedings and awards to be kept confidential -- *i.e.*, that there is an unwritten rule of confidentiality in arbitration. Accordingly, even if the contract at issue does not specify whether the arbitrators have the power to order confidentiality, they nevertheless have an inherent right to do so. Similarly, if the parties wished to counter this custom and practice, they would have inserted a specific provision in their contract expressly prohibiting the arbitrators from imposing confidentiality orders.

A second, related argument in support of the Panel's right to order confidentiality is that the guarantee of confidentiality is implicit in the arbitration clause itself and in arbitration rules in general and that confidentiality is an inherent part of the arbitration process. For example, according to one source, though the AAA Commercial Rules do not specifically provide for arbitrators' authority to order confidentiality, "the authority of the arbitrator to grant an order is implied in the rule authorizing the protection of parties' property . . . and that allowing steps necessary to move the arbitration along."[97]

Third, one could argue that parties expect that arbitral proceedings and awards will be kept confidential. They are more likely to compromise and to communicate openly and candidly during arbitral proceedings as a result of this guarantee of confidentiality. If one of the parties requests a confidentiality order and if the Panel is prohibited from imposing confidentiality, that party's intent and expectations will be frustrated, along with its willingness to communicate freely and to compromise.

Fourth, one could argue that an arbitration Panel should have the power to impose confidentiality because the parties chose to resolve their dispute through arbitration -- which is traditionally kept secret -- rather than through the open and public court system. Again, inasmuch as the parties expected or are deemed to have expected from the outset that the proceeding and award would be kept confidential, failing to permit the Panel to make them confidential will frustrate the parties' expectations.

Fifth, it is well known that arbitrators themselves "generally prefer that the proceedings and the award be confined to the parties, particularly where they, as arbitrators, are bound to keep the proceedings confidential."[98] Hence, permitting arbitrators to impose confidentiality will be in keeping with their expectations and preferences.

Sixth, one could argue that the Panel should be permitted to order confidentiality because, as the Ninth Circuit has stated in Medi-Soft, Inc. v. Royco, Inc., "[t]he remedy ordered in an arbitration does not need to be specifically provided for in the agreements, as long as the remedy is intended to provide an appropriate remedy to resolve all the disputes between the parties."[99] In that case, the court held that the arbitrators had not exceeded their authority by terminating some provisions of the parties' medical

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... parties to an arbitration agreement should decide at the outset, prior to executing their arbitration agreement, whether the arbitral proceeding and award will be kept confidential. They can even agree to insert a confidentiality provision into their arbitration clause.

license agreements.[100] Confidentiality is not exactly a remedy. But it may be a means to a remedy, in that the Panel may feel that the parties will be unable to compromise and resolve their dispute unless they receive a guarantee that the arbitral proceeding and any remedies imposed as a result will be kept confidential and out of the public spotlight.

Seventh, one could argue that by consenting to arbitration under JAMS' or another arbitral institution's rules requiring that arbitral proceedings and awards be kept confidential, the parties have implicitly consented to keeping their proceeding and award confidential.[101]

Eighth, at least with respect to those arbitrations that are conducted under the various arbitral institutional rules, one could argue that since it is the duty of the arbitrators to interpret and apply those rules,[102] it is also within their discretion to decide whether the rules permit the Panel to keep confidential the particular proceeding and award.

Finally, as noted above, because U.S. arbitration awards are normally not "reasoned" awards -- containing a full analysis of the facts underlying the award -- some might argue that publishing these awards yields few, if any, benefits. Hence, arbitrators should have the power to keep them confidential.

## V. ARBITRATORS SHOULD *NOT* HAVE THE POWER TO ORDER CONFIDENTIALITY

There are also obvious arguments against permitting arbitrators to order confidentiality where the parties have not unanimously consented thereto and where the arbitration clause does not expressly provide for this power. This section will seek to provide some arguments against conferring this authority upon the Panel.

The strongest argument against permitting the Panel to impose confidentiality is probably that there is no national rule that grants arbitrators this power. If Congress wished to cloak arbitrators with this power, would there not be a federal law so providing?

Another strong argument against permitting the Panel to order confidentiality is that "[a]rbitration is a creature of contract."[103] Indeed, the "the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties."[104] The central purpose of the FAA is to "ensure[] that private agreements to arbitrate are enforced according to their own terms."[105] Parties may structure their arbitration agreements as they see fit, as "a matter of consent, not coercion."[106] Since the Panel's power is derived from the agreement containing the arbitration clause, if the parties did not choose to insert a confidentiality provision in their agreement, the arbitrators should not be authorized to order confidentiality.

A related argument against entrusting the Panel with this power is that the authority of the arbitrators extends only as far as the agreement of the parties. "[A]ny power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties. He has no independent source of jurisdiction apart from the consent of the parties."[107] Hence, if *both* parties do not agree and consent to confidentiality, the Panel has no power to order it.

One could also argue that if the parties did not choose to include a confidentiality provision in their agreement, then they obviously did not wish to keep their proceeding and award confidential. Hence, permitting the Panel to order confidentiality simply because one of the parties later demands it would frustrate the parties' original intent.

Furthermore, one could argue that the Panel does not have the power to order confidentiality in the absence of the parties' consent or an arbitration clause so authorizing because the majority of U.S. states do not authorize arbitrators to do so. Indeed, as noted above, only a handful of the states that have incorporated the RUAA into their own state arbitration statutes have actually adopted the RUAA's language regarding protective orders.[108]

Lastly, one could argue that if the Panel is permitted to impose confidentiality, it will also be permitted to interfere with the fairness of arbitration proceedings. For instance, at least one court has held that when arbitrators impose confidentiality, and especially when they keep arbitral awards confidential, they favor repeat arbitration participants.[109]

## VI. POSSIBLE SOLUTIONS TO THE PROBLEM

To remedy the problem discussed at length above, parties to an arbitration agreement

should decide at the outset, prior to executing their arbitration agreement, whether the arbitral proceeding and award will be kept confidential. They can even agree to insert a confidentiality provision into their arbitration clause.

The confidentiality provision can be very general or more specific. For example, it can state that the following aspects of the arbitral proceeding should be kept confidential: evidence and documents; written and oral arguments; the existence of the arbitration itself; the identity of the parties and the arbitrators; the content of the award; the measures that should be followed to keep the proceeding confidential; and the circumstances in which there can be disclosure -- *e.g.*, in the interests of the public or as required by law or a regulatory body.[110]

Following is a sampling of some typical confidentiality provisions:

> • The Parties hereby mutually agree that the existence, terms and content of any Arbitration or Dispute Resolution entered into pursuant to this Agreement, as well as all information or documents evidencing any Results, final Order, Judgment, Settlement or the performance thereof, shall be maintained in confidence and not be given, shown, disclosed to, or discussed with any third person or party except: (a) by prior written agreement of both parties; (b) solely as contemplated by this Agreement and limited thereby, courts or other tribunals whose assistance is necessary to secure or protect a right of the parties relating to the performance of this Arbitration Agreement or the enforcement of an award rendered pursuant hereto, in which case the existence and content of such proceedings shall be disclosed only to the extent necessary and all efforts contemplated by this Agreement to maintain the confidentiality of documents and information shall be taken; (c) counsel and accountants who shall agree to maintain its confidentiality; (d) to the extent required by applicable reporting requirements; and (e) upon compulsory legal process.
>
> • Confidentiality – Upon the request of either party, the final decision and the judgment shall remain confidential, except that disclosure shall be allowed to the extent required for state or federal tax purposes, by securities and insurance regulatory officials, or by auditors and reinsurers of the parties subject to their agreement of confidentiality.
>
> • The parties undertake and agree that all arbitral proceedings conducted by reference to this clause will be kept strictly confidential, and all information disclosed in the course of such arbitral proceedings will be used solely for the purpose of those proceedings.[113]

In resolving a dispute between the United States and Iran, the Iran-U.S. Claims Tribunal was governed by the following confidentiality provision:

> All awards and other decisions shall be made available to the public, except that *upon the request for one or more arbitrating parties, the arbitral tribunal may determine that it will not make the entire award or the decision public*, but will make public only portions thereof from which the identity of the parties, other identifying facts and trade or military secrets have been deleted.[114]

If it is too late to insert a confidentiality provision into the arbitration agreement, one of the parties or even the arbitrators can bring this issue to the attention of the parties, and the Panel can record any agreed upon principles on the duty of confidentiality. Arbitral institutions, in addition to the U.S. government, may also wish to address this issue.[115]

## VII. CONCLUSION

As demonstrated above, there is a dearth of U.S. cases and statutes on the specific question of whether there is an implied duty of confidentiality in arbitrations and whether an arbitration Panel has the inherent power to order confidentiality in an arbitral proceeding. There are, however, arguments for and against entrusting arbitrators with this power. The arguments in favor of permitting the Panel to impose confidentiality are largely public policy and historical in nature, while the arguments against granting the Panel this power often favor strict contract principles and statutory law. While the latter arguments are more tangible, in that they rely, for example, on statutes, that does not necessarily make one set of arguments any more persuasive than the other.

In the end, at least for now, which arguments will prevail will be left to the discretion of individual arbitration Panels, who will decide this issue themselves in the absence of a successful appeal to federal or state court. ▼

1 BLACK'S LAW DICTIONARY 105 (6th ed. 1990).

2 ROBERT W. STRAIN, REINSURANCE 32 (rev. ed. 1997); *see also* Richard S. Bakka, *Claims Management*, in STRAIN, REINSURANCE 568 [hereinafter "Bakka"] (noting that "[s]ome facultative certificates include a provision for arbitration of disputes, while others do not").

3 STRAIN, *supra* note 2.

4 Bakka, *supra* note 2.

5 Reinsurance Association of America, *Manual for the Resolution of Reinsurance Disputes* 55 (1997) [hereinafter "RAA Manual"]. Note, however, that a review of typical sources of arbitration provisions, e.g., the Brokers & Reinsurance Markets Association's (BRMA) website, failed to reveal any mention of a confidentiality requirement. *See* BRMA, Contract Wording, Arbitration Bcwrb006, available at http://www.brma.org/Download/Bcwrb006.doc (last modified January 1, 1998); see also Reinsurance Association of America, *Reinsurance Contract Clauses, Arbitration* (August 2002) (none of clauses in tab containing arbitration clauses appears to refer to confidentiality).

6 Note, however, that the reach of confidentiality agreements is somewhat limited. For example, these agreements cannot be used to prevent a nonsignatory from seeking to disclose information obtained from an arbitral proceeding. RAA Manual, supra note 5, at 55; see also infra text accompanying notes 52-62; *cf. World Bus. Ctr., Inc. v. Euro-American Lodging Corp.*, 764 N.Y.S.2d 27, 2003 N.Y. App. Div. LEXIS 9062, at *10 (1st Dep't Aug. 28, 2003) ("Interrelatedness, standing alone, is not enough to subject a nonsignatory to arbitration."). Note also that parties to a reinsurance arbitration often execute confidentiality agreements during their organizational meetings. ARIAS-U.S./AIDA Reinsurance & Insurance Arbitration Society, *Chapter III: The Organizational Meeting*, available at http://www.arias-us.org/index.cfm?a=40 (last visited September 30, 2003) [hereinafter "ARIAS-U.S."].

7 Non-disclosure agreements are basically confidentiality agreements. Parties enter into non-disclosure agreements when they wish to exchange confiden-

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tial information. These legal agreements had historically been common in employment contracts, though they are now becoming increasingly more common in reinsurance agreements, in part because parties are concerned that confidential information provided to an attorney will not be subject to the attorney/client privilege. It is unclear, however, whether courts of law will honor these agreements. BRMA, *Confidentiality Agreements. What are they? When are they used? Why are their uses growing within the reinsurance industry?* (2000), available at http://www.brma.org/white/pdf/confidentiality agreements.pdf (last visited September 25, 2003).

8 Protective orders or confidentiality stipulations, which are becoming increasingly more common especially in terms of keeping information revealed during discovery confidential, can be initiated upon the parties' agreement, at the request of one party, and/or at the direction of the Panel. However, the decision whether to make a protective order belongs to the Panel. Violation of such orders/stipulations can result in liability for breach of contract damages, an order for specific performance, the preclusion of certain evidence, or fees against the violating party. Charles S. Baldwin, IV, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451, 457-458, 458 n.34 (Summer 1996) (citing American Arbitration Association's (AAA) Commercial Arbitration Rules, Rules 10 and 34, as well as AAA's Supplementary Procedures for Large, Complex Disputes, Proc. 5(a), at 10).

9 RAA Manual, *supra* note 5, at 55; GRAYDON S. STARING, LAW OF REINSURANCE § 22:6[2] (1993). One might argue, however, that even if parties to an arbitration can agree to maintain the confidentiality of their proceeding and award, they cannot maintain that confidentiality indefinitely because the parties cannot contract away their rights to seek court review of the arbitral award, and once a party moves in court to confirm or vacate the arbitral award, the court has the power to make that award public. *See Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 2003 U.S. App. LEXIS 18166, at *16, 21 (2d Cir. Sept. 3, 2003) ("Since federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with § 10(a) [of the FAA]. . . . Parties seeking to enforce arbitration awards through federal-court confirmation judgments may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliance with § 10(a) and the manifest disregard standard."). While this argument has some merit, note that in practice parties are usually able to maintain the confidentiality of their proceeding and award because they sign confidentiality agreements stating that if either party moves to confirm or vacate the award in court that party will have to do so under seal. *See* James Veach, *Confirming Confidential Arbitration Awards in "Open Court,"* 10-16 MEALEY'S LITIG. REP. REINSURANCE 7 (1999). (Mr. Veach is a partner in Mound Cotton Wollan & Greengrass.) While some courts are reluctant to seal such proceedings, that issue is beyond the scope of this article.

10 Veach, *supra* note 9.

11 Jose Rosell, *Global Development: Confidentiality and Arbitration,* 9 CROAT. ARBIT. YEARB. 19, 21 (2002). Compare this with mediation, where it appears that confidentiality is required. See, e.g., Cecilia G. Morris, *Guidelines for Mediating Attorney Fee Disputes*, NEW YORK LAW JOURNAL, January 28, 1998, p. 1 ("At all times, before, during and after the sessions, the mediator is compelled to respect the confidentiality of the information communicated during the separate sessions. All information is confidential, unless it is specifically authorized to be disclosed to the other party. The mediator is not a judge or arbitrator.").

12 EUGENE WOLLAN, HANDBOOK ON REINSURANCE LAW § 8.07[C], at 8-31 (2003 Supp.) (citing *Galleon Syndicate Corp. v. Pan Atlantic Group, Inc.*, 223 A.D.2d 510, 637 N.Y.S.2d 104 (1st Dep't 1996); *Ins. Co. v. Lloyd's Syndicate*, 1 Lloyd's Rep. 272, 275 (Q.B. 1995); *Hassneh Ins. Co. of Israel v. Mew*, 2 Lloyd's Rep. 243, 247 (Q.B. 1993)). (Mr. Wollan is of counsel to Mound Cotton Wollan & Greengrass.)

13 *See generally* Baldwin, *supra* note 8 (discusses protecting confidential information in international arbitrations); Robert L. Ebe, *The Nuts and Bolts of Arbitration*, 22 FRANCHISE L.J. 85 (Fall 2002) (discusses confidentiality in franchise agreements); Tom Perrotta, *Arbitration Confidentiality Gives Way to FOIL Request,* NEW YORK LAW JOURNAL, May 16, 2003, p. 1 (discusses I*n re City of Newark v. Law Dep't of the City of New York*; see *infra* for a discussion of this case); Veach, supra note 9 (discusses confirming arbitration awards in court and more specifically with whether an award becomes a "public record" when one of the parties moves or petitions a court to confirm, modify, or vacate it; author argues that a joint application to seal the proceedings may keep the award out of public record; author also discusses how U.S. courts view an application to seal and how presumption favoring public access can be overcome).

14 STARING, *supra* note 9.

15 Rosell, *supra* note 11, at 19.

16 ARIAS-U.S., *supra* note 6, at *Chapter III: The Organizational Meeting*, 3.7 Confidentiality, Comment A.

17 RAA Manual, *supra* note 5, at 55; *see also* Rosell, *supra* note 11, at 25.

18 Dr. Hrvoje Sikiric, *Comparative Theme: Publication of Arbitral Awards*, 4 CROAT. ARBIT. YEARB. 175, 175, 189 (1997) (article deals with confidentiality issues after an arbitral award is issued, *i.e.*, issues concerning its publication, etc.).

19 RAA Manual, *supra* note 5, at 55.

20 Alternative Dispute Resolution (ADR) refers to: procedures for settling disputes by means other than litigation; e.g., by arbitration, mediation, mini-trials. Such procedures, which are usually less costly and more expeditious, are increasingly being used in commercial and labor disputes, divorce actions, in resolving motor vehicle and medical malpractice tort claims, and in other disputes that would likely otherwise include court litigation. BLACK'S LAW DICTIONARY 78 (6th ed. 1990).

21 RAA Manual, *supra* note 5, at 55.

22 ARIAS-U.S., *supra* note 6, at *Chapter III: The Organizational Meeting*, 3.7 Confidentiality, Comment D.

23 RAA Manual, *supra* note 5, at 55.

24 Veach, *supra* note 9.

25 ARIAS-U.S., *supra* note 6, at *Chapter III: The Organizational Meeting*, 3.7 Confidentiality, Comment A.

26 Veach, *supra* note 9.

27 9 U.S.C. §§ 1-307 (2003).

28 Revised Uniform Arbitration Act §17 (2000).

29 *Luna v. Household Fin. Corp.*, 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002).

30 *Group Health Plan, Inc. v. BJC Health Systems, Inc.*, 30 S.W.3d 198 (Mo. 2000).

31 Revised Uniform Arbitration Act §17(e) (2000), prefatory note (2002) ("Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation."); *see also* 5 N.Y. JUR. *Arbitration and Award* § 138 (2003) ("The Uniform Arbitration Act, which had been adopted in some form by at least 35 states but not by New York . . . ."). *But see* Legal Information Institute, *Uniform Business and Financial Laws Locator*, available at http://www.law.cornell.edu/uniform/vol7.html#arbit (last visited September 19, 2003) (lists 36 states).

32 Revised Uniform Arbitration Act §17(e) (2000), prefatory note (2002).

33 The UAA refers to the Uniform Arbitration Act of 1955, which was revised in 2000 and is now known as the RUAA.

34 *Group Health Plan*, 30 S.W.3d at 202.

35 Derek Lisk, *Confidentiality of Arbitrations*, 63 TEX. B. J. 234, 236-37 (2000); *see also* 9 U.S.C.A. §§ 1-16 (2003). Federal law does, however, provide for confidentiality in administrative dispute resolution procedures. *See* 5 U.S.C.A. § 574 (2003).

36 *See infra* note 40.

37 Lisk, *supra* note 35, at 237.

38 RAA Manual, *supra* note 5, at 55.

39 Hans Smit, *Report: Confidentiality: Articles 73 to 76*, 9 AM. REV. INT'L ARB. 233, 233 (1998); *see also* STARING, *supra* note 9 ("There is, however, no general rule of law on the subject [of maintaining confidentiality] in arbitrations in the United States in the absence of such express agreement.").

40 Revised Uniform Arbitration Act §17(e) (2000) (emphasis added). Some might argue that this language provides arbitrators the power to make arbitral proceedings and awards confidential. However, this argument is not entirely clear-cut. First, this language does not exactly state that arbitrators have the power to make the proceedings themselves confidential. It only states that arbitrators may issue protective orders to prevent the disclosure of "confidential information." *Id.* Second, this language does not explain what types of information are "confidential." More importantly, it does not state whether *all* of the information disclosed at an arbitral proceeding can be considered "confidential," thereby requiring the entire proceeding to be kept confidential. Moreover, note that Comment 4 to this statute states that "[t]he simplified, straightforward approach to discovery reflected in Section 17(c)-(e) is premised on the affirmative duty of the parties to cooperate in the prompt and efficient completion of discovery" and that the intent of this section is to "grant arbitrators the power and flexibility to ensure that the discovery process is fair and expeditious." *Id.* at cmt. 4 (2002).

41 *See e.g.*, HAW. REV. STAT. ANN. § 658A-17(e) (2003); NEV. REV. STAT. 38.233(5) (2003); N.J. STAT. ANN. § 2A:23B-17(e) (2003); N.M. STAT ANN. § 44-7A-18(e) (2003); N.D. CENT. CODE § 32-29.3-17(5) (2003); UTAH CODE ANN. § 78-31a-118(5) (2003). The following states that have adopted the RUAA, however, have not adopted this particular language: Arizona, Arkansas, Colorado, Delaware, and Minnesota. *See* ARIZ. REV. STATUTE §§ 12-1501 – 1518 (2003); ARK. CODE ANN. §§ 16-108-201 – 224 (2003); COLO. REV. STAT. §§ 13-22-201 – 223 (2003); DEL. CODE ANN. TIT. 10, §§ 5701-25 (2003); MINN. STAT. §§ 572.08 – 572.30 (2002).

42 *Group Health Plan*, 30 S.W.3d at 204.

43 *Id.*

44 TEX. CIV. PRAC. & REM. CODE § 154.073(a)-(b) (Vernon 2003); *see also* Lisk, *supra* note 35, at 235, 235 n.3.

45 Lisk, *supra* note 35, at 235.

46 VA. CODE ANN. § 8.01-576.10 (2003).

47 *Id.*

48 MO. REV. STAT. § 435.014 (2003); *see also* Baldwin, *supra* note 8, at 483.

49 N.C. GEN. STAT. § 1-567.54 (2003); *see also* Baldwin, *supra note* 8, at 483.

50 N.C. GEN. STAT. § 1-567.54 (2003).

51 CAL. BUS. & PROF. CODE § 471.5 (2003).

52 *Galleon Syndicate Corp. v. Pan Atl. Group, Inc.*, 223 A.D.2d 510, 511, 637 N.Y.S.2d 104, 105 (1st Dep't 1996)

(emphasis added).

53 *Id.; cf. In re City of Newark v. Law Dep't of the City of New York*, 305 A.D.2d 28, 760 N.Y.S.2d 431 (1st Dep't 2003) (case involved confidentiality orders issued by two arbitration Panels that designated as confidential for the duration of the arbitrations certain documents filed and exchanged; issue was whether these orders overrode public's right of access to government records under the Freedom of Information Law (FOIL); held Panels did not have the power to immunize the records in question from FOIL disclosure because Panels derived their powers from the City of New York's and the City of Newark's respective arbitration agreements and because Panels had no authority to affect the rights of strangers to those agreements; court observed, however, that the argument that an arbitration Panel's confidentiality order should override FOIL as a matter of public policy is an issue to be resolved by the legislature).

54 989 P.2d 219 (Co. 1999), *cert. denied*, 1999 Colo. LEXIS 11852 (Nov. 29, 1999).

55 *Id.* at 220.

56 *Id.* at 221.

57 *Id.* (citation omitted).

58 *Group Health Plan*, 30 S.W.3d at 205 n.3.

59 30 S.W.3d 198 (Mo. 2000)

60 *Id.* at 205.

61 *Id.* at 200.

62 *Id.* at 205 (citation omitted).

63 *But cf. Am. Cent. E. Texas Gas Co. v. Union Pacific Res. Group, Inc.*, No. 2:98cv0239-TJW, 2000 U.S. Dist. LEXIS 18536 (E.D. Tex. August 15, 2000) (case in which one party to arbitration (defendants) filed motion for temporary restraining order and preliminary and permanent injunction or in the alternative a declaration regarding the applicability of the JAMS rules to the parties' arbitration; court notes that arbitrator believed he could not impose a confidentiality order or force a party to comply with the JAMS rules absent an agreement by the parties because the plaintiffs did not agree to be bound by these rules, including the rule which requires confidentiality of arbitration proceedings).

64 Alliance for Education in Dispute Resolution, *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* (as amended and in effect May 29, 1985), C. Privacy of Arbitration, 1., c., *available at* http://www.ilr.cornell.edu/alliance/resources/Guide/code _prof_responsibility_arb.html (last visited September 27, 2003).

65 *Id.*; RAA Manual, supra note 5, at 56.

66 Smit, *supra* note 39.

67 International Court of Arbitration, International Dispute Resolution Services, *Rules of Arbitration of the International Chamber of Commerce (ICC)*, Appendix I, Statutes of the International Court of Arbitration of the ICC, Article 6, Confidentiality, *available at* http://www.iccwbo.org/court/english/arbitration/rules.asp#article_6_1 (last visited September 27, 2003).

68 *Id.* at Appendix II, Internal Rules of the International Court of Arbitration of the ICC, Article 1, Confidential Character of the Work of the International Court of Arbitration.

69 London Court of International Arbitration, *Arbitration; Rules, Clauses & Costs*, Article 19 Hearings, *available at* http://www.lcia-arbitration.com/lcia/arb/uk.htm#s (last visited September 27, 2003).

70 ARIAS-U.S., *supra* note 6, at *Chapter III: The Organizational Meeting*, 3.7 Confidentiality. ARIAS-U.S. provides a sample confidentiality agreement on its website. *Id.* (see Sample Form 3.3).

71 *Id.* at Code of Conduct - Canon VI, *available at* http://www.arias-us.org/index.cfm?a=32 (last visited September 30, 2003).

72 JAMS, S*treamlined Arbitration Rules and Procedures* (revised April 2003), Rule 21(b), Confidentiality and Privacy, *available at* http://www.jamsadr.com/who_we_are.asp (last visited September 27, 2003); *see also* Ebe, *supra* note 13, at 91.

73 American Arbitration Association, *National Rules for the Resolution of Employment Disputes* (as amended and effective November 1, 2002), *available at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\employment\AAA121current.html (last visited September 19, 2003). These rules state:

**18. Confidentiality**

The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.

**27. Interim Measures**

At the request of any party, the arbitrator may take whatever interim measures he or she deems necessary with respect to the dispute, including measures for the conservation of property.

Such interim measures may be taken in the form of an interim award and the arbitrator may require security for the costs of such measures.

*Id.*

74 Rosell, *supra* note 11, at 21-22.

75 *Id.*

76 *Id.* at 21.

77 *Id.* at 20-23; *see also* Baldwin, *supra* note 8, at 484-85 (discussing English law).

78 Baldwin, *supra* note 8, at 482.

79 STARING, *supra* note 9 (citing *Hassneh Ins. Co. of Israel v. Steuart J. Mew*, [1993] 2 Lloyd's Rep. 243 (Q.B.)); *see also* Baldwin, *supra* note 8, at 484-85, 487-88 (discusses English and Australian case law regarding confidentiality in arbitration proceedings); Veach, *supra* note 9 (noting that "under English law the parties to an arbitration are 'entitled to assume at the least that the hearing will be conducted in private' and that this had been the rule in England for 'hundreds of years,'" and discussing *Ins. Co. v. Lloyd's Syndicate,* [1995] 1 Lloyd's Rep. 272 (Q.B. 1994)).

80 Rosell, *supra* note 11, at 20 (discussing *Aita v. Ojjeh).*

81 Baldwin, *supra* note 8, at 482.

82 Rosell, *supra* note 11, at 20; *see also* Baldwin *supra* note 8, at 484-86, 487-88.

83 Rosell, *supra* note 11, at 20.

84 Hans Bagner, *Confidentiality in Arbitration: Don't Take It for Granted*, 11-16 MEALEY'S LITIG. REP. REINSURANCE 9 (December 28, 2000). Bagner provides a comprehensive discussion of *Bulbank v. AIT*. Briefly, in that case, the Stockholm City Court held that an arbitration agreement gave rise to an inherent duty of confidentiality between the parties and that any breach of this duty would be regarded as a material breach of the contract, granting the parties the right to set aside the agreement. *Id.*

One of the parties appealed to the Court of Appeal, which concluded that neither the United Nations Economic Commission for Europe nor the Swedish Arbitration Act explicitly imposes a duty of confidentiality, that this duty is not statutorily regulated, and that there is no implied condition of confidentiality if the agreement is silent. However, the court did not agree that a duty of confidentiality can only be imposed by an express contract provision. The court held that there is a "duty of loyalty" between the parties and that under certain circumstances disclosing information and/or documents can be regarded as breach of this duty. The court further held that some information is more worthy of protection than others (e.g., information concerning the parties' business or their development of the case versus purely procedural issues) and that one should take into account whether there are good reasons for the disclosure, whether one party will be damaged by the disclosure, and whether the information was disclosed to damage the other party. Finally, the court held that the reimbursement of damages was preferable to invalidating the agreement. *Id.*

The Swedish Supreme Court overturned this decision and held that there is no implied or inherent legal duty of confidentiality in an arbitration agreement, though it observed that arbitrations are generally private proceedings. The court also held that the fact that the Swedish Arbitration Act of 1999 was silent in this regard "would suggest that there is no such duty." *Id.* Finally, the court noted that there is no generally accepted opinion that there is a duty of confidentiality in arbitrations and that international opinions are divided on this issue, citing various English, French, and Australian cases. *Id.*

85 In general, and subject to bias or partiality issues, a court's review of an arbitration award is "very limited." *Mo. River Serv. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 854 (8th Cir. 2001), *reh'g en banc denied*, 2001 U.S. App. LEXIS 24036 (8th Cir. Nov. 5, 2001), *cert. denied*, 535 U.S. 1053 (2002). "[T]he question for decision by a federal court asked to set aside an arbitration award . . . is whether they interpreted the contract." *Hill v. Norfolk & W. Ry. Co.,* 814 F.2d 1192, 1194-95 (7th Cir. 1987). "If they did, their interpretation is conclusive." *Id.* at 1195. Furthermore, pursuant to the FAA, 9 U.S.C. § 10(a), an arbitrator's award may be vacated by a court if "an arbitrator exceeds the scope of her authority" or "where it is completely irrational or evidences a manifest disregard for the law." *Mo. River,* 267 F.3d at 854 (internal quotations omitted). It is irrational if it fails to "draw its essence from the agreement," and it manifests disregard for the law "where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it." *Id.*

86 *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 85 (2002) (held National Association of Securities Dealers (NASD) "time limit" rule was a matter presumptively for the arbitrator, not for the judge).

87 *See Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2407 (2003) (in case with broad arbitration clause, court held, citing *Howsam*, issue of whether agreement forbade class arbitration procedures was for the arbitrator, not the court, to decide and that if there was any doubt about this matter, *i.e.*, about the "scope of arbitrable issues," it should be resolved "in favor of arbitration").

88 5 N.Y. JUR. *Arbitration and Award* § 138 (2003); *see also* 5 N.Y. JUR. Arbitration and Award § 150 (2003) ("[A]n arbitrator has the power to sever arbitrable claims and to order disclosure.").

89 *Hill*, 814 F.2d at 1198.

90 *Mo. River*, 267 F.3d at 855 (internal quotations omitted).

91 *Id.*

92 *Id.*

93 *Id.*

94 *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 112-13 (3d Cir. 1996) (citations omitted).

95 *Hoeft*, 2003 U.S. App. LEXIS 18166, at *37.

96 American Arbitration Association, *The Code of Ethics for Arbitrators in Commercial Disputes,* Canon VI(B), *available at* http://www.adr.org/index2.1.jsp?JSPssid=15718&JSPsrc=upload\LIVESITE\Rules_Procedures\Ethics_Standards\code.html (last visited September 19, 2003).

97 Baldwin, *supra* note 8, at 458 n.34 (citations omitted) (citing AAA's Commercial Arbitration Rules, Rule 34 (1993) and AAA's Supplementary Procedures for Large, Complex Disputes, Proc. 5(a) (1993)).

Rule 34 states:

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> (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.
>
> (b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.
>
> (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

American Arbitration Association, Rules and Procedures, *Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)*, *Commercial Arbitration Rules* (amended and effective July 1, 2003), Rule 34, Interim Measures, *available at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\commercial\AAA235current.htm#R34 (last visited September 27, 2003).

> Rule L-4(a) further provides: "Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases." *Id*. at *Procedures for Large, Complex Commercial Disputes*, L-4, Management of Proceedings.

98 Veach, *supra* note 9.

99 21 Fed. Appx. 570, 571 (9th Cir. 2001) (unreported case).

100 *Id.* at 572-73.

101 Note, however, that even if parties do adopt, for example, the ARIAS-U.S. rules or agree to arbitrate in front of an ARIAS arbitrator, the parties may agree to alter the ARIAS-U.S. rules, including the rule requiring confidentiality.

102 In *Howsam,* 537 U.S. at 81, the U.S. Supreme Court was presented with the issue of whether a court or an arbitrator should apply a NASD "time limit rule" to an arbitration proceeding. According to the Court:

> [T]he applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge. . . .
>
> [T]he NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding. And for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy -- a goal of arbitration systems and judicial systems alike.

*Id.* at 85-86 (citations omitted). The Court therefore held that the NASD arbitrator, and not a court, should apply the rule to the underlying controversy. *Id.* at 81.

> Similarly, at least one New York court has held that in an arbitration proceeding pending before the New York Stock Exchange (NYSE), "[a]ll discovery issues, including but not limited to *whether the NYSE rules authorize counsel to issue discovery subpoenas*, and whether the subpoenas seek documents material and relevant to the defense of the arbitration *shall be left for the arbitrators,*" though the court also held that the "Supreme Court has jurisdiction to grant relief from a subpoena issued in the context of an arbitration proceeding." *Platzer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (N.Y. Co. Sup. Ct.), NEW YORK LAW JOURNAL, October 2, 2003, p. 19 (emphasis added).

103 *Matteson*, 99 F.3d at 114 (citations omitted).

104 *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (issue was whether arbitrator properly awarded punitive damages pursuant to arbitration agreement that permitted same in light of fact that agreement was governed by New York law, which permits only courts not arbitrators to award punitive damages; court refused to vacate punitive portion of the award, holding that "if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration.") (emphasis in original).

105 *Id.* (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). According to one New York treatise:

> Being the judges of the parties' choice, substituted for the judges of a court, arbitrators are invested with and exercise judicial functions in the particular case. . . .
>
> *Beyond such powers as are granted by the CPLR, the arbitrators have no others except those conferred by the parties in their agreement or submission, which may not be exceeded.* If the powers are exceeded, the award may be vacated, or its confirmation may be opposed on that ground. The power of arbitrators is confined strictly to the matters submitted to them for determination. . . .
>
> On the other hand, the parties are free to invest the arbitrators with powers surpassing those that could be exercised by the Supreme Court, and any limitation upon the power of an arbitrator must be set forth as part of the arbitration clause itself, since to infer a limitation from the substantive provisions of an agreement containing an arbitration clause calling for the arbitration of all disputes arising out of the contract, or some other broadly worded formulation, is to involve the courts in the merits of the dispute or the interpretation of the contract's provisions, in violation of the legislative mandate. Unless they are chargeable with complete irrationality, *arbitrators are free to fashion the applicable rules* and determine the facts of a dispute before them *without their award being subject to judicial revision.*

5 N.Y. JUR. *Arbitration and Award* § 133 (2003) (emphasis added). This treatise indicates that while arbitrators' powers are confined to those granted to them in arbitration agreements, arbitrators are nevertheless "free to fashion the applicable rules," which some might argue means arbitrators have the power to order confidentiality.

106 *Mastrobuono*, 514 U.S. at 57 (citing Volt, 489 U.S. at 479). See also supra text accompanying note 32.

107 I.*S. Joseph Co., Inc. v. Mich. Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986).

108 *See* statutes cited *supra* note 41.

109 *See Lloyd v. Hovensa LLC,* 243 F. Supp. 2d 346, 352 (D.V.I. 2003) (job applicant was forced to sign dispute resolution agreement (*i.e.*, his application would not be considered unless he signed same) that incorporated the AAA's National Rules for the Resolution of Employment Disputes; AAA Rules 17, 18, and 34, which dictate that the arbitrator should hold closed hearings, that the proceeding should be confidential, and that the names of parties are not publicly available, also therefore incorporated; employee later sued for discrimination, wrongful discharge, etc., and prospective employer sought to compel arbitration under the dispute resolution agreement; held agreement enforceable, but Rules 17, 18, and 34 were not as they would disproportionately favor the employer).

110 Rosell, *supra* note 11, at 24 (citing Sections 31 and 32 of UNCITRAL Notes on Organizing Arbitral Proceedings (1996)).

111 Baldwin, *supra* note 8, at 456-57.

112 RAA Manual, *supra* note 5, at 59 n.93 (emphasis in original and quotations omitted).

113 Bagner, *supra* note 84.

114 Sikiric, *supra* note 18, at 176 (emphasis added).

115 Bagner, *supra* note 84.

# members on the move

*In each issue of the Quarterly, we list employment changes, re-locations, and address changes, both postal and email, that have come in over the quarter, so that members can adjust their address books and Palm Pilots.*

*Don't forget to notify us when your address changes. If we missed your change here, please let us know, so we'll be sure to catch you next time.*

*Because the ARIAS Directory has just come out, we are asking all members to check their listings at the back of the book. Let us know if any changes are needed. The changes will be made in the database and published here in the next issue. Certified arbitrators please check your profiles, as well. Email us at info@arias-us.org with the subject "Member Information Changes."*

*Some of the changes below were in time for the directory printing, most were not.*

## Recent Moves & Announcements

Congratulations to **Randi Ellias** and **Catherine Lamsens**, who were named partners by Chicago-based, ARIAS-member law firm Butler Rubin Saltarelli & Boyd LLP. Both women are 1996 graduates of Northwestern University School of Law and both concentrate their practices in reinsurance matters.

**Richard E. Smith** has announced the formation of a new company, handling insurance, reinsurance, dispute resolution and consulting services. Called Northport Advisors, its administrative offices are located at 191 Post Rd. West, Westport, CT 06880, phone 203-221-2850. His email is rich@northportadvisors.com

**Steven G. Bazil** has been re-appointed to the Board of Directors for The Mutual Fire, Marine & Inland Insurance Company and has been appointed Chairman of the Finance Committee. Mr. Bazil is a principal of Bazil McNulty, the new name of Bazil & Associates, P.C.

Congratulations to **Peter A. Scarpato**, who was recently promoted to Senior Vice President – Profit Center Manager of AIG's Global Surety Division. Peter's new address is AIG, Inc., 175 Water Street, 27th Floor, New York, NY 10038.

**Barger & Wolen, LLP** recently announced the relocation and expansion of its New York office. Email and telephone numbers have not changed, but the new mailing address is 10 East 40th Street, 40th Floor, New York, NY 10016-0301.

**John Heath**, 4370 South Tamiami Trail, Suite 104, Sarasota, FL 34231

**Peter F. Reid's** new address is European American Inc., PO Box # 36, Mountain Lakes, NJ 07046

**Paul Fleischacker** has informed us that his address is now 9239 SE Riverfront Terrace, Wentworth C., Tequesta, FL 33469.

**Peter F. Malloy** can now be found at 95166 Woodberry Lane, Amelia Island, FL 32034.

**John T. Andrews, Jr.** has relocated to 56 Farmersville Road, Califon, NJ 07830-3303.

**Jim Corcoran's** new home address is 49 Lloyd Lane, Lloyd Harbour, New York 11743. His new phone is 631-271-2241.

**Bruce R. Grace** has moved to new quarters, along with the rest of Baach Robinson & Lewis PLLC. They are now at 1201 F Street, NW, Suite 500, Washington, DC 20004, phone 202-833-8900

**Butler Rubin Saltarelli & Boyd** adds "LLP" to its name.

**Norman C. Kleinberg**, Hughes Hubbard & Reed LLP, phone 212-837-6680, fax 212-422-4726, email Kleinber@hugheshubbard.com

## Changes

**Elliot S. Orol** phone 212-452-2192, fax 212-452-2192, email eorol@aol.com

**Michael W. Elgee** phone 203-605-7354

**Donald R. Allard** phone 214-693-8969

**Nasri Barakat** phone 405-755-3929

**Charles Havens III** fax 772-231-8692

**Richard D. Smith** fax 908-903-2222

**Robert B. Green** RBGreen.arb@comcast.net

**John Dunn** Justdunn@bellsouth.net

**Anthony DiPardo**
dipardo@burtandscheld.com

case notes corner

Case Notes Corner is a regular feature on significant court decisions related to arbitration.

Ronald S. Gass

... despite an absence of a fixed deadline in the FAA... such motions must be filed within a "reasonable time" after the award, and in this case, 8 years was not a reasonable time.

# Federal Courts Decline Two Remand Requests

RONALD S. GASS*
The Gass Company, Inc.

This quarter's Case Note Corner features two recent reinsurance arbitration decisions in which the parties filed federal court actions seeking a panel remand and clarification of adverse arbitral awards eight years and one year, respectively, after the award was issued and the panels had disbanded. In both instances, the courts declined the remand requests because they were not made within a reasonable time.

## SEVENTH CIRCUIT REJECTS AS UNREASONABLE MOTION TO REMAND FOR CLARIFICATION EIGHT YEARS AFTER PANEL AWARD

In a colorful U.S. Court of Appeals for the Seventh Circuit opinion, the three-judge panel held that, despite an absence of a fixed deadline in the Federal Arbitration Act ("FAA") for filing a motion to remand an arbitral award for the purposes of obtaining a clarification, such motions must be filed within a "reasonable time" after the award, and in this case, 8 years was not a reasonable time.

In 1995, an arbitration panel awarded the cedent $7.8 million against its reinsurers for asbestos-related losses arising under certain reinsurance contracts. The award provided that the reinsurers, including the Uruguayan state-owned reinsurer, El Banco de Seguros del Estado ("Banco"), pay their shares of the award plus interest and attorneys' fees within 45 days. Any reinsurer who failed to do so was to post an irrevocable letter of credit ("LOC") with the cedent for $9 million "to secure payment of the ultimate liability in this matter." All of the reinsurers except Banco paid their shares within 45 days.

Although Banco acknowledged its obligation to pay its $181,000 share of the award plus interest and attorneys' fees, it obstinately resisted payment for over 6 years despite a court-issued writ of execution. Banco also steadfastly refused to post the $9 million LOC, arguing that the panel only required the LOC to secure payment of Banco's share of the award due at the time of the arbitration and not as security for future debts against it under the contracts. While the subsequent procedural history is convoluted, the upshot was that the cedent ultimately confirmed the award in federal district court and sought to collect against Banco in both Wisconsin and New York.

In 2001, a Wisconsin federal district court ordered Banco to post the $9 million LOC and to pay its share of the award. Notwithstanding Banco's appeal to the Seventh Circuit (which subsequently affirmed), it eventually paid the $181,000 award plus interest and attorneys' fees (by that time totaling more than $1.5 million) but still refused to post the LOC.

Collaterally attacking the panel's award, Banco demanded arbitration on the issue of whether the panel had intended Banco to post the LOC as security against future debts owed to the cedent under the reinsurance contracts or, as Banco contended, merely to provide security until such time as Banco satisfied its debt to the cedent, an obligation it had now discharged. The cedent then sought post-judgment relief from the federal district court, which enjoined the arbitration, awarded $240,000 in additional attorneys' fees to the cedent, and imposed civil contempt sanctions on Banco for disobeying its LOC order starting with a $2,000 per day penalty that rose in stages to $4,000 per day until Banco complied.

On appeal to the Seventh Circuit, the three-judge panel agreed that there was a legitimate disagreement between the parties over the intent of the panel's LOC order but ruled that there was no legal basis for Banco's demand for clarification of the award 8 years later. Acknowledging that the FAA did not fix a specific deadline for filing a federal court motion to remand the award for clarification by the arbitrators, the Seventh Circuit inferred that any such motion must be filed within a "reasonable time." It noted that one of the arbitrators had died in the interim and that the panel would likely be unwilling to clarify an award after it had been challenged in federal court and enforced unless directed

*Mr. Gass is an ARIAS•U.S. Umpire and an ARIAS•U.S. Certified Arbitrator. He may be reached via email at rgass@gassco.com or through his Web site at www.gassco.com.

to do so by the court.

Turning to the issue of whether Banco must post the $9 million LOC, the Seventh Circuit found that the trial court had left the LOC issue open for adjudication and concluded that the panel intended it to secure payment of the debt their award created, i.e., Banco's $181,000 share, and not its future asbestos liability. Hence, Banco, having by this time satisfied its liability pursuant to the award, need not post the LOC.

Citing Banco's "impressive record of obstinacy," the Seventh Circuit refused to lift the $4,000 per day sanction imposed by the court below until such time as Banco paid all amounts due the cedent, including all the cedent's reasonable attorneys' fees incurred in defending against this appeal and all subsequent proceedings in district court required to extract any monies due. And just in case those mounting sanctions were insufficient motivation, the Seventh Circuit concluded with the following admonition: "Further obduracy by Banco will result in the imposition of additional sanctions that will make $4,000 a day seem like the touch of a feather."

*Employers Insurance of Wausau v. El Banco de Seguros Del Estado,* Nos. 03-2484, 03-2771, 2004 U.S. App. LEXIS 1565 (7th Cir. Feb. 3, 2004).

## NO "SECOND BITE AT THE APPLE" FOR LOSING PARTY TO CHALLENGE ARBITRAL AWARD'S TREATY INTERPRETATION AND APPLICATION A YEAR LATER

What happens when the losing party in an arbitration claims a year after the arbitral award is issued that the panel's reinsurance treaty interpretations are so fundamentally flawed that it is impossible to apply them to the disputed claims? That was the key question decided by an Illinois federal district court, which enjoined the re-arbitration of any of the treaty interpretation issues decided by the panel but would permit new arbitration demands seeking interpretations of the language of the panel's award before a new panel.

This dispute arose between a cedent and its six British reinsurers over the terms and conditions of a reinsurance agreement and resulted in an arbitration award favorable to the reinsurers. The panel ordered the cedent to return certain sums that had been paid in error. Although the award was issued on June 6, 2002, the panel retained jurisdiction until July 1, 2002 to resolve any issues arising from its interpretation and application. On June 29, 2002, the cedent requested an extension until July 10, 2002 on the grounds that the accounting applications of the award were "time consuming" and that its counsel was occupied with another hearing. The panel declined the cedent's request to extend its jurisdiction and disbanded.

The cedent did not appeal the award and complied with it over the following year. On June 30, 2003, however, it resubmitted claims for the same losses, which the panel had previously denied, on the ground that the award was "not susceptible of any interpretation that is consistent with the treaty language and is incapable of being complied with." It also served the reinsurers with new arbitration demands claiming that another arbitration was necessary to address "fundamental flaws" in the prior award.

The reinsurers filed this federal district court action seeking to confirm the prior award, to enjoin the cedent from re-arbitrating the same disputes, and in the alternative, remand the dispute to the original panel for clarification of any alleged ambiguities. The cedent moved for summary judgment in its favor on the ground that the one-year statute of limitations for seeking judicial confirmation of an arbitral award under the Federal Arbitration Act ("FAA") had passed.

In denying the cedent's summary judgment motion and confirming the 2002 award, the district court concluded that both the FAA and the Inter-American Convention on International Commercial Arbitration ("Convention") applied because the reinsurers were all foreign corporations. Under the Convention, parties have three years from the date of issuance to confirm arbitral awards, and the court found no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the FAA thereby permitting the reinsurers to elect the most advantageous remedy available.

Regarding the cedent's contention that the award was so flawed and incapable of being reconciled with the treaties as to require a new arbitration, the court held that this really amounted to an attempt to get a "second bit at the apple" before a new panel on the same issues previously decided by the original arbitrators. Because the award was not appealed and thus final, according to the court, "it must be reconciled with the treaties, whatever its supposed defects may be."

The court granted an injunction against the re-arbitration of the same treaty interpretation issues previously decided. However, it also ruled that the cedent may pursue "arbitration of disputes as to [the award's] application to new situations which the original arbitrators never contemplated." Hence, the injunction did not apply to arbitration demands seeking interpretation of the language of the previous panel but did apply to any arbitration demands seeking to alter or correct that language in any manner.

As for remanding this dispute to the original panel for further proceedings, the court held that such award clarification requests must be made within a "reasonable period of time" after the award and that a remand to the original panel more than 18 months after it was disbanded was inappropriate, particularly when the panel had refused to extend its own jurisdiction at the cedent's request for even ten days.

Unionamerica Insurance Co., Ltd. v. Allstate Insurance Co., No. 03 C 7400, 2004 U.S. Dist. LEXIS 458 (N.D. Ill. Jan. 14, 2004). ▼

in focus

# Recently Certified Arbitrators

Clive A.R. Becker-Jones

Katherine L. Billingham

Profiles of all certified arbitrators are on our web site at www.arias-us.org

## Clive A. R. Becker-Jones

Clive Becker-Jones has spent over 32 years in the property and casualty insurance and reinsurance industry. He is currently Senior Vice President and Director of Reinsurance at RiverStone Resources, a subsidiary of Fairfax Financial Holdings. He graduated from Bembridge College in the United Kingdom and became a Fellow member of the Institute of Chartered Accountants in England and Wales in 1967.

Mr. Becker-Jones started his insurance career in 1971, after immigrating to Canada in 1970, by joining Monitor Insurance Group in Montreal as an Accounting Manager. The Group was acquired by ITT/Hartford in 1971. He became Assistant Comptroller in 1974 and subsequently was promoted to Comptroller for The Hartford's Canadian operations when he was transferred to home office in Connecticut in 1977. In 1978 he became Assistant Secretary of The Hartford and assumed responsibilities for management of field and reinsurance accounting functions. During his 16-year tenure with The Hartford, he was responsible for a variety of functions including finance, business planning and reinsurance accounting, contract formation and placement activities. Of particular achievement was the creation and introduction of The Hartford's Reinsurance Workout Department, which he spearheaded in 1983. In this management capacity he was directly responsible for disputed claims, arbitrations/litigation, commutations and the development of financial funding arrangements to assist in reinsurance workout activities.

In 1987 he joined the Forum Group in Bermuda, where he provided reinsurance workout consultancy services to Forum's subsidiary companies. He served as President of the Group's US operations from 1989 to 1993.

Mr. Becker-Jones joined The Resolution Group (TRG) in 1993 as Vice President of reinsurance workout activities. TRG was formed in 1993 to manage the run off insurance/reinsurance operations of Crum & Forster for Xerox Corp. He became Senior Vice President and Director of Reinsurance in 1998 and assumed responsibility for all of TRG's reinsurance operations. TRG was acquired by Fairfax Holdings in 1999, expanding TRG's role to manage other Fairfax run off operations. In his current capacity, he directs all reinsurance workout activities for the Fairfax Group including the settlement of run off reinsurance claims and recovery of impaired reinsurance, with significant time being spent in managing and resolving the Group's major reinsurance disputes.

With a prodigious 32-year career in both active and run-off operations, Mr. Becker-Jones offers an in-depth and distinct understanding of managing the complexities of the current reinsurance environment. His strong financial background coupled with his extensive exposure to reinsurance underwriting, claims and workout activities provides a unique level of experience in, and exposure to, various A.D.R. settings.

## Katherine L. Billingham

Katherine Billingham is an attorney with 22 years of experience in reinsurance and insurance as private counsel as well as in-house counsel. As such, she has participated in numerous arbitrations from the vantage point of both client and advocate. Her concentration has been in the property and casualty area, especially in reinsurance run-off matters. On the direct side, her experience includes asbestos and other excess coverage litigation. Ms. Billingham has had significant involvement in a variety of not only domestic insurance and reinsurance issues, but also those of the London market.

Prior to founding her own law practice in 1990, she was the Vice President, Secretary and General Counsel of Universal Reinsurance Corporation. As such, she was responsible for the arbitrations, commutations, negotiations, litigation management, and other run-off activities of Universal Re and several of its affiliated companies. Ms. Billingham was a leader in the very progressive commutation and run-off program of Universal Re that began in the mid-1980's and which was instrumental in setting the standard for such protocol in the industry.

For the last 14 years, Ms. Billingham has had her own practice. During this period, much of her professional activity has been devoted

to legal consultation for Northwestern National Insurance Company. She handles many of the Company's reinsurance matters, including arbitration and mediation advocacy, contract drafting, commutations and negotiations. She has also been involved in litigating the asbestos and other excess coverage matters for the Company. In addition to her law practice, Ms. Billingham has established a consulting firm, with her most recent client being Equitas.

Previously, Ms. Billingham was a member of the law firm of Carson & Guemmer in Tampa, Florida, where she practiced insurance defense and insurance coverage litigation, exclusively. While the firm's primary focus was in property and casualty insurance, at times Ms. Billingham was called upon to litigate complex life and disability issues, as well.

Since 1990, Ms. Billingham has also served as acting Judge in the local courts, as mediator, and as court-appointed arbitrator and umpire in direct insurance matters. She has authored published articles on reinsurance arbitrations and commutations and has given presentations on the subject at the University of Wisconsin. She earned her certification as a Chartered Property and Casualty Underwriter in 1989. She is Vice Chair of the American Bar Association's Excess, Surplus Lines and Reinsurance Committee, a member of the International Association of Insurance Receivers (serving on its publications committee), is a member of the Ohio and Florida Bars, and is licensed to practice before several federal courts.

## James Cameron

James Cameron operates Cameron & Associates Insurance Consultants Limited, providing claims consulting services to the Insurance and Reinsurance Community in Canada and internationally. He has a staff of 24 full-time employees and currently lists 14 of the top 20 insurers in Canada as clients.

Mr. Cameron is the representative for Lloyds in Ontario on auto insurance regulatory compliance matters and manages professional liability, medical malpractice, directors and officers and infotech liability claims for the London market. The insurance Institute of Canada, the Insurance Bureau of Canada, the Government of Ontario, Canada (Ministry of Tourism), Insurance Brokers Association of Canada, and many other federal, provincial and municipal government bodies have retained his services.

A past president of the Ontario Insurance Adjusters Association, Mr. Cameron is a current member of the Canadian Insurance Claims Managers Association, Canadian Insurance Accountants Association, Risk Management Consultants of Ontario, and the Ontario Insurance Adjusters Association. Frequently asked to speak at numerous industry events and seminars, he has spoken to Defence Research Institute, Canadian Bar Association, Canadian Actuarial Society, Insurance Institute, Reinsurance Research Council, Canadian Insurance Claims Managers Association, Insurance Bureau of Canada and many other industry groups.

Mr. Cameron's reinsurance background includes five years as Vice President for Swiss Reinsurance Company in Canada, administering the claims function. He has significant experience in commutations, insolvencies, allocation of loss issues, and reinsurance disputes. He has been retained as an expert witness in litigation involving automobile insurance, excess policies, bad faith litigation, professional liability, risk management, and broker's liability.

He has written articles published in WP magazine, where he was the editor for eight years, Reinsurance, Canadian Insurance, Canadian Underwriter, Canadian Journal of Insurance Law, Canadian Insurance Clams Managers Association Insights Bulletin, Journal of Reinsurance, and was featured on the cover of Canadian Insurance Magazine in January 2004.

Mr. Cameron is currently involved in several reinsurance arbitrations as arbitrator or umpire and was on the panel for Citadel v. Employers Re (see ARIAS•U.S. Quarterly, 1st Quarter 2003). He has three children, all currently employed in the company, and is grandfather of two boys and two girls.

## Bruce A. Carlson

Bruce Carlson is an actuary with 27 years of experience working for both insurance and reinsurance companies. His broad background in managerial and technical positions gave him hands-on experience and in-depth knowledge of industry custom and practice in all major functional areas, including marketing, underwriting, claims, con-

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# in focus

James Cameron

Bruce A. Carlson

# in focus

Jens Juul

ARIAS•U.S. encourages members to apply for certification.

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tracts, administration, compliance, actuarial, and reinsurance. He has experience both with individual and group insurance, life and health, on both a direct and assumed basis.

Mr. Carlson graduated from the University of Minnesota in the early 1970's with a Batchelor's Degree in Mathematics and a Master of Science Degree in Computer Science. He started his insurance career as an actuary working for Lutheran Brotherhood Insurance (now Thrivent Financial), becoming a Fellow Member of the Society of Actuaries and Member of the Academy of Actuaries in 1979 and 1980, respectively. In 1994 he graduated from the GHAA Executive Program in Managed Care at the University of Missouri.

Mr. Carlson next spent four years as Chief Actuary for a small mutual insurance company in Minneapolis before joining North American Life and Casualty, which later became Allianz Life Insurance Company of North America. As the Divisional Actuary for the group operation, he was responsible for all reinsurance agreements, inwards and outwards, for that division. In 1989, he became Director of Allianz' healthcare operation, having P&L accountability for their HMO, provider excess, and employer stop-loss business. In that capacity, he became active with industry associations and was a frequent invited speaker at the national conferences of the Society of Actuaries, Self Insurance Institute of America, Society of Professional Benefit Administrators, and other associations. The diverse product lines and multiple market segments Allianz participated in gave him valuable experience working with HMOs, Third Party Administrators and Managing General Underwriters.

In the late 90's Mr. Carlson assumed the additional responsibilities of Allianz' Reinsurance Assumed Business at a time when the industry was rocked by several infamous reinsurance scandals. He quickly began the process of unwinding those complex transactions acquiring valuable experience in both the domestic and international markets dealing with Lloyds, pools, and intermediaries.

At the turn of the millennium, Mr. Carlson co-founded BCS Underwriters, LLC an affiliate company of BCS Insurance Company, devoted to developing commercial group business for BCS. In 2002 he sold his interest in BCS Underwriters and co-founded CP Consulting Services, LLC. Mr. Carlson is a member of ARIAS-U.S., has served as both umpire and arbitrator, and testified as an expert witness in both litigations and arbitrations.

## Jens Juul

Jens Juul, a polyglot economist and a recognized leading innovator of Finite Risk insurance and reinsurance solutions in the U.S. and worldwide, retired early 2002 after a 28-year international reinsurance career, which, among other achievements, saw him found and develop three reinsurance companies.

In 1976, at the tender age of 27, Mr. Juul was sent out to Panama by his then employer, the Norwegian insurance group Storebrand, to start up Alpha Re, a new subsidiary for the Latin American and Caribbean markets. After five successful years in Latin America, he was transferred to Toronto in 1981 to dismantle Storebrand's Canadian agency and to start up a new reinsurance organization. From 1984 to 1985, he doubled as CFO of Storebrand's U.S. subsidiary, Christiania General. Mr. Juul resigned from this two jobs/one pay situation in 1986 to join GTE RE in Bermuda as Managing Director. When it became apparent that the shareholders were less than totally dedicated to a future in the insurance field, he resigned in 1988 and founded Scandinavian Re with the financial backing of the ABB Group. Scandinavian Re was established to exclusively pursue and develop Finite Risk insurance and reinsurance solutions in the U.S., U.K. and worldwide. During the next thirteen years, Scandinavian Re developed into a recognized leading innovator of Finite Risk solutions. Mr. Juul, a published and recognized leading authority on Finite Risk matters, has been a frequent speaker at conferences on both sides of the pond.

Jens Juul, a Bermuda resident and the Honorary Consul of Sweden, is a non-executive director of various for-profit and not-for-profit organizations. He has become a certified ARIAS arbitrator in order to fill the present shortage of finite risk expertise within the arbitration ranks.

# in focus

## Elliot S. Orol

Elliot Orol is a corporate and financial transactions lawyer with over 17 years of experience in the property and casualty insurance industry. He has been the general counsel of both insurance and reinsurance companies, as well as a partner in a major insurance law firm. He was the Managing Director and General Counsel of Gerling Global Financial Products, a worldwide reinsurance intermediary that structured finite reinsurance transactions, financial guaranties, and alternative risk transfer products until its recent closure. As general counsel, he was responsible for all corporate legal affairs, including reinsurance and other agreements, regulatory and employment matters, and several complex reinsurance arbitrations.

Before coming to Gerling, Mr. Orol was a partner at Cozen O'Connor, where he represented a leading Bermuda insurer in its acquisition of a U.S. surety business and the CEO of a large Swiss insurer in the negotiation of a new employment agreement with an acquiring company. He conducted large claims audits, advised clients on matters including Lloyd's syndicate contract issues, onshore and offshore captives, risk retention groups and variable annuities, and undertook a sensitive sexual harassment investigation.

Prior to joining Cozen, Mr. Orol built the legal department and served as general counsel of the GRE Insurance Group, with responsibility for contracts, litigation, claims mediation, employment matters, licensing, regulatory and intellectual property. For almost ten years before that, he was a senior corporate attorney at Continental Insurance, where he negotiated various M&A transactions in the U.K., Hong Kong, Canada and the U.S., and served as general counsel of both Continental's banking subsidiary and financial guaranty group.

Mr. Orol holds J.D. and M.B.A. degrees from the University of Chicago, and a B.S. in mathematics from Binghamton University. He has been a member of the New York Bar since 1981, and is a member of the American Bar Association and its Sections of Dispute Resolution, International and Business Law, and of the American Corporate Counsel Association. He has published an article entitled "Landmark Financial Services Legislation for the U.S." in Reactions magazine, and is a Certified Arbitrator for the National Association of Securities Dealers.

Currently, Mr. Orol is doing legal and contractual consulting work for insurance and reinsurance companies and other corporate clients, and serving as a member of several NASD arbitration panels.

Elliot S. Orol

## Michael R. Pinter

Michael Pinter has spent well over thirty years in the reinsurance industry and retired from the Kemper Insurance Companies in 2001. He spent the vast majority of that time with the Kemper Reinsurance Companies and from 1990 to 1999 was Kemper Reinsurance's Chairman of the Board and CEO.

Mr. Pinter started his career with Kemper as a Kemper Scholar, working for the Kemper organization over the summer months, while attending Blackburn College from 1966 - 1970. That experience led to a full-time assignment with Kemper Reinsurance in 1970. From 1970 thru the mid-80's, Mike worked in a variety of underwriting positions with Kemper Reinsurance. In 1986, he was elected to Executive Vice President and took over responsibility for the Domestic Treaty Underwriting Department. He also joined the company's board of directors. In 1988, Mr. Pinter was elected Senior Executive Vice President and became the Chief Underwriting Officer. He served in that capacity until his election to Chairman and CEO in 1990.

Mr. Pinter was also Chairman and CEO of Kemper Reassuance SA, Kemper Reinsurance London Ltd., and Kemper Reinsurance Bermuda Ltd. He also served as a board member of the Reinsurance Association of America(RAA) and the Broker Reinsurance Market Assoc.(BRMA). He served on several committees of those organizations, including the Contract Wording Committee of BRMA that developed the contract wording manual utilized in the placement of treaties in the broker market.

After the sale of Kemper Reinsurance in 1999, Mr. Pinter stayed with the Kemper Insurance Companies, directing the operations of the ceded reinsurance department, retiring in 2001.

Michael Pinter is a CPCU and was active in the development of the Reinsurance Interest Section of the Society as well as the formation of the ARe program. He completed the

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Michael R. Pinter

# in focus

George C. Pratt

George M. Reider

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Advanced Executive Program at the Kellogg School of Management at Northwestern University.

A veteran of the U.S. Army, he is married with two sons and a daughter.

## George C. Pratt

George C. Pratt is a retired federal judge, having served as a United States Circuit Judge on the Second Circuit Court of Appeals from 1982 to 1995, and as a United States District Court Judge in the Eastern District of New York from 1976 to 1982. He is a Professor of Law (now on leave) at Touro Law Center, where he has taught Civil Procedure, Federal Courts, Class Actions, Civil Rights Litigation, and Appellate Advocacy.

Since his retirement from the bench in 1995, Judge Pratt has served as an arbitrator and mediator in national and international disputes for companies and institutions in industries as diverse as finance, insurance, communications, computer hardware and software, health care, securities, entertainment, patents, utilities, and state agencies. Judge Pratt has also been retained as an expert witness, consultant, special counsel, and special master. His work as a trial and appellate judge and as an arbitrator has involved a variety of insurance and reinsurance disputes. He currently is Special Counsel to Farrell Fritz, P.C. one of Long Island's leading law firms, where, in addition to his arbitration and mediation work, he serves as a consultant on complex federal and state trial and appellate cases.

In addition to his affiliation with Touro Law Center, Judge Pratt was the Distinguished Visiting Professor at Hofstra Law School from 1979 to 1993, and during that same period he served as an Adjunct Professor of Law at St. John's University Law School. Judge Pratt has lectured extensively at civil rights and trial and appellate advocacy programs of PLI, NITA, ALI-ABA, New York State Bar Association and numerous other bar associations. Additionally, he is the author of two volumes on appeals to the federal circuit courts in the current edition of Moore's Federal Practice, and is co-author of a volume on jury charges in federal civil rights cases.

Judge Pratt graduated from Yale Law School in 1953, after receiving his Bachelor of Arts from Yale College in 1950. He is admitted to practice in the state and federal courts in New York State; is a member of the American, New York State, and Nassau County Bar Associations, and of the Alexander Hamilton American Inn of Court; is an arbitrator on the complex commercial case panels of the American Arbitration Association and the Center for Public Resources, and is a Fellow of the College of Commercial Arbitrators.

## George M. Reider

George Reider has over 40 years of in-depth experience in a wide spectrum of the insurance arena centered mainly in property and casualty, with additional exposure to management oversight of health and life claims. His 31 years at Aetna Life & Casualty ranged from claim representative to vice president of countrywide underwriting and claim operations.

Following his private sector experience, George Reider went on to serve as Insurance Commissioner, State of Connecticut from 1995 to 2000, which included one year as President of the National Association of Insurance Commissioners (NAIC). During his tenure as Commissioner, Mr. Reider presided over a number of significant public hearings and as an NAIC officer testified before Congress on various occasions. He also served as a technical adviser on insurance matters to the United States Commerce Department working with the Chinese, Japanese and Eastern European governments. During that same time period, he participated in meetings of the Organization for Economic Cooperation and Development (OECD) in Paris and the International Association of Insurance Supervisors (IAIS).

Upon leaving public office, George Reider spent his one-year stand-back period from the industry teaching at his alma mater, Lebanon Valley College of Pennsylvania, the University of Connecticut and Fordham University School of Law. Since that time, he established George Reider Consulting, LLC and has taken on consulting assignments related to management and regulatory matters. Mr. Reider has also participated in academic and industry panels and presentations. He serves on a number of boards, including The Hartford Steam Boiler Inspection & Insurance Company of Connecticut, the Connecticut Center for Primary Care, and the Editorial Board of the

# in focus

Geneva Association's Paper on Risk & Insurance.

Mr. Reider earned a BS degree in Economics and Business Administration from Lebanon Valley College. He is on the Board of Trustees and was recognized with the Distinguished Alumnus Award in 2001.

## Don A. Salyer

Don Salyer began his insurance industry career in 1959 as a claims adjuster for Johns & Company, an independent claims company with eleven offices in the State of Florida. He handled a wide variety of property, casualty and worker's compensation claims.

In 1962, Mr. Salyer was employed by Continental Casualty Company (CNA) as an underwriter in the Excess and Surplus Division. During 16 years with Continental Casualty, he worked 2 years in Chicago, 3 years in Syracuse, and 11 years in New York City. He held positions in property, casualty, and accident & health areas and was engaged in underwriting, marketing and management. His last position at Continental Casualty was as northeastern regional director of national accounts. This included responsibility for business development and underwriting profit for property, casualty and accident and health.

In 1978, Mr. Salyer joined Guy Carpenter & Company, Inc. as a property and casualty treaty broker. During a 20-plus-year career at Guy Carpenter as an account executive, he was responsible for some of Carpenter's major clients. In this role he reviewed and evaluated client's reinsurance needs, secured contract terms and premium acceptable to the client. He prepared treaty wording and placed coverage with reinsurance markets. The vast majority of the business involved was property, casualty, worker's compensation and professional liability. Mr. Salyer was also involved in some relatively unique lines of business, such as political risk and municipal bond guarantee. He advanced through the ranks at Guy Carpenter, ultimately becoming a managing director and a member of the board of directors.

## Jack R. Scott

Jack R. Scott is Counsel for White and Williams LLP in Philadelphia and a member of the firm's Reinsurance Practice Group.

Before joining White and Williams in September 2000, Mr. Scott had spent 25 years as insurance company corporate counsel. Since 1985, Mr. Scott's experience has been in reinsurance, first with General Reinsurance Corporation, later as Vice President and General Counsel for Life Reassurance Corporation and, immediately before joining White and Williams, as Chief Counsel, Reinsurance for the CIGNA Companies.

Unlike most reinsurance professionals, Mr. Scott's initial reinsurance experience was in the life segment, functioning as counsel to General Reassurance Corporation, the life reinsurance subsidiary in the General Re group of companies. When General Re sold that subsidiary, renamed Life Reassurance Corporation, Mr. Scott left General Re and assumed duties as Life Re's first General Counsel. In 1991, he joined the CIGNA companies and expanded his focus as reinsurance counsel to include CIGNA's various property/casualty assumed and ceded reinsurance operations, domestic and international, in addition to serving as counsel to CIGNA's Life-Accident-Health Reinsurance Division.

As reinsurance counsel with regard to both property/casualty and life, annuity and accident/health issues, Mr. Scott has represented clients in arbitration and in regard to divestitures, commutations and other transactional matters. His experience includes both domestic United States concerns and reinsurance operations in London, Paris and Brussels. He is a frequent speaker on reinsurance and related topics and has authored various articles as well as a chapter entitled "Life Reinsurance" in Reinsurance Contract Wording, published by Robert W. Strain. Among the topics Mr. Scott regularly addresses are the differences between property/casualty and life/health/personal accident reinsurance, managing general agents and arbitration issues.

Mr. Scott has a B.A. in Economics from the University of Richmond, a J.D. from Villanova Law School and an LL.M. (Taxation) from Temple University School of Law. He is a member of the Pennsylvania and Connecticut Bars.

Don A. Salyer

Jack R. Scott

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Savannah Sellman

## Savannah Sellman

Savannah Sellman is a partner in the San Francisco office of Hancock Rothert & Bunshoft, an international law firm, which also has offices in London, England; Los Angeles, California; and Lake Tahoe, California.

Ms. Sellman has worked in the insurance and reinsurance fields for twenty-nine years, representing insurance and reinsurance companies, corporate policyholders and government regulatory agencies. Her practice is full service, encompassing underwriting and risk assessments; insurance and reinsurance contract negotiation and drafting; claims handling, including coverage advice; counseling management and boards of directors; and representation in litigation, arbitration and other alternative dispute forums. Ms. Sellman specializes in professional liability (primarily health care and medical, including managed care organizations, hospitals, health systems and physicians; lawyers; and architects and engineers) and environmental matters (asbestos, pollution, and health hazard, including clergy sexual misconduct).

Prior to joining Hancock Rothert & Bunshoft, Ms. Sellman was Vice-President and General Counsel of Norcal Mutual Insurance Company, Secretary and General Counsel of the Pennsylvania Medical Society Liability Insurance Company, Deputy Attorney General for the Pennsylvania Department of Justice and Assistant Attorney General for the Pennsylvania Department of Insurance. She began her career in 1975 with a judicial clerkship for the Honorable William Lipsett, of the Pennsylvania Court of Common Pleas. Ms. Sellman has taught business law and real estate law at the college level. She has spoken extensively on current insurance and reinsurance issues, both domestically and internationally, including at the 2002 ARIAS Spring meeting in Puerto Rico and at the 2002 and 2003 Mealey's Reinsurance Summits.

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| INITIATION FEE: | $500 | $1,500 |
| ANNUAL DUES (CALENDAR YEAR)*: | $250 | $750 |
| FIRST-YEAR DUES AS OF APRIL 1: | $167 | $500 (JOINING APRIL 1 - JUNE 30) |
| FIRST-YEAR DUES AS OF JULY 1: | $83 | $250 (JOINING JULY 1 - SEPT. 30) |
| TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE) | $_____ | $_____ |

* Member joining and paying the full annual dues after October 1 is considered paid through the following calendar year.

*NOTE:* Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $150 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, fax and e-mail.

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