

When Should Arbitration Panels Award Sanctions?

(And Why Don't They Do So More Often?)

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Defining “Sanction”

SANCTION, n. In the original sense of the word, a penalty or punishment provided as a means of enforcing obedience to a law. In jurisprudence, a law is said to have a sanction when there is a state which will intervene if it is disobeyed or disregarded. ...

In a more general sense, a conditional evil annexed to a law to produce obedience to that law; and, in a still wider sense, an authorization of anything.



Poll:

- Do you think sanctions have a place in arbitration?
 1. Yes
 2. No
 3. I'm not sure

Poll:

- Have you been involved as an attorney, in-house representative (including in-house attorney), or arbitrator in any case in which sanctions were requested?
 1. Yes
 2. No

Poll:

- Have you been involved as an attorney, in-house representative (including in-house attorney), or arbitrator in any case in which sanctions were awarded?
 1. Yes
 2. No

Poll:

- If you responded yes, what was your role in the arbitration?
 1. Attorney
 2. Party representative (including in-house attorney)
 3. Arbitrator or umpire

Poll:

- If you were involved in an arbitration where sanctions were awarded, what form did the sanctions take?
 1. Attorney's fees
 2. Costs
 3. Both
 4. Another form

When can Panels Award Sanctions and what Form Can Such Sanctions Take?



When can Panels Award Sanctions?

- As ever, the contract controls
- Arbitration provisions often reference and incorporate rules or procedures that grant arbitrator's sanctioning authority
 - *E.g.*, ARIAS Procedures for Resolution of US Insurance & Reinsurance Disputes, JAMS, AAA Commercial Arbitration Rules, ICC Arbitration Rules
- Other provisions might grant panel authority to fashion any remedy allowed by a given state's law, which generally includes sanctioning authority
- Courts have also found panels have "inherent authority" to manage the proceedings before them

What Form of Sanctions can Panels Award?

- Arbitrators generally have significant discretion unless limited by contract
- ARIAS procedures authorize panels to “award any monetary relief or sanctions allowed by applicable law” including “monetary damages; equitable relief; pre- or post-award interest; costs of arbitration; attorneys’ fees; and other final or interim relief”
- Courts generally conclude arbitrators may award punitive damages unless explicitly limited in contract; due process limitations are often inapplicable
 - *E.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)
- Arbitrators’ authority to sanction in many cases will not extend to the parties’ attorneys

Why Don't Arbitrators Award Sanctions More Often?

- Despite this often broad sanctioning authority, there is a common perception that arbitrators cannot or will not award sanctions in arbitration.
- Perceived reasons:
 - Fear of losing business
 - Fear of overstepping authority and being reversed by court
 - Sense the the arbitral forum is a place for compromise that should be less sharp than court

When can Courts Award Sanctions and How Often Do They Do It?



When Can Courts Award Sanctions?

- Courts draw authority to impose sanctions from numerous sources
 - Rule 11 of Federal Rules of Civil Procedure (+ state-law analogs)
 - Generally prohibits attorneys from filing frivolous submissions and arguments for purpose of delay
 - Rule 37 of Federal Rules
 - Governs sanctions for discovery abuses
 - 28 U.S.C. § 1927
 - Permits sanctioning of attorney for “unreasonable and vexatious conduct”
 - Inherent authority

What Form Can Sanctions Take in Court?

- Attorneys' fees and costs
- Striking an improper submission
- Reprimanding attorney or party
- Reporting attorney to disciplinary body
- Adverse inference instruction
- Entry of judgment or dismissal

How Often do Courts Award Sanctions?

- Perhaps less often than commonly thought!
- Incidents of sanctions being imposed not tracked on systemic level, so data is sparse
- 1992 Study in Northwestern University Law Review looked at Rule 11 sanctions since major rule overhaul in 1983:
 - Selected nine federal court districts and surveyed practitioners
 - Around 7.5% had been in cases where sanctions had been imposed
 - Around 25% had been in cases where sanctions had been pursued by litigants or brought up by court

How Often do Courts Award Sanctions?

- 2011 study from Judicial Conference Advisory Committee looked specifically at discovery sanctions
 - Study reviewed dockets from 19 districts for all civil cases filed in 2007 and 2008
 - Spoliation motions brought in only .15% of cases (209 cases)
 - When court ruled on motion sanctions awarded 28% of the time
 - For ESI-related spoliation it was higher—around 33%
- 2020 investigation of patent cases by law firm found 56 sanctions motions were brought in patent cases in Q4 2020
 - Granted at about 25% rate

What Would You Do?



Hypothetical:

- During a hearing involving two large of companies, the ceding company demonstrates that in a separate but related matter between the same groups (different contracts), an affiliate of the reinsurer took a diametrically opposed position to position of the reinsurer in this matter.

Poll:

- Should this “fact” be taken into consideration at all by the Panel?
 1. Yes
 2. No
 3. I’m not sure

Poll:

- If taken into consideration, and evidence allowed substantiating the ceding company's assertion, should “sanctions” be imposed?
 1. Yes
 2. No
 3. I'm not sure

Poll:

- Does the Panel have jurisdiction to award sanctions against the reinsurer in these circumstances?
 1. Yes
 2. No
 3. Maybe

Hypothetical:

- During the build-up to a hearing, the panel permitted introduction of certain extrinsic evidence over vigorous objection by a reinsurer. During the hearing a witness for the reinsurer testified to things that were proved essentially false by the detail in the extrinsic evidence. Obviously, counsel for the reinsurer knew the content of that extrinsic evidence.

Poll:

- Did counsel for the reinsurer “suborn perjury?”
 1. Yes
 2. No
 3. I’m not sure

Poll:

- Should sanctions be awarded against counsel?
 1. Yes
 2. No

Poll:

- Does the Panel have the authority to do that?
 1. Yes
 2. No
 3. I'm not sure

Poll:

- Should sanctions be awarded against the reinsurer?
 1. Yes
 2. No
 3. Maybe

Hypothetical:

- Under cross-examination at a hearing, a relatively junior fact witness for a ceding company is asked about the difference between her deposition testimony and that offered in the hearing. She confesses she had been “bullied” and coerced to testify as she had during the deposition by a superior at the ceding company. The person who supposedly pressured her is at the back of the room shaking her head vigorously.

Poll:

- Is this something the Panel should consider being sanctionable?
 1. Yes
 2. No
 3. Maybe

Poll:

- Should the cedent's counsel or the Panel call the senior person to the stand to question her regarding the accusation?
 1. Yes
 2. No
 3. Maybe

Poll:

- Does it matter if the altered testimony makes any substantial difference to the merits of the case?
 1. Yes
 2. No
 3. Maybe

Hypothetical:

- During discovery, a ceding company produces a small number of documents per a request for all documents relating to its internal analysis and decisions regarding the underlying claim. The reinsurer, surprised by the dearth of information and review of a privilege log seeks to compel production of the documents arguing the privilege claim for most of the documents is invalid.

Hypothetical:

- In almost every case, the same in-house attorney is merely copied on the emails, although she was the author of a few of the earliest dated documents.
- The cedent opposes the motion, arguing the in-house attorney was present at all group meetings and copied on documents to preserve privilege.
- The reinsurer argues the mere presence of an attorney does not automatically confer privilege and requests *in camera* review.

Hypothetical:

- The Panel appoints a special master to review the withheld documents, and the special master finds that all but 10 of the hundreds of withheld documents are simple business communications, not conveyances of or requests for legal advice. Though the in-house attorney was copied on documents and attended all meetings, the meetings were business meetings.

Poll:

- Should the Panel order the cedent to produce all the documents and caution that any additional documents withheld on the same basis must be produced within 10 days?
 1. Yes
 2. No
 3. I'm not sure

Poll:

- Order as in the first question, AND order that the cedent pay the costs of the special master?
 1. Yes
 2. No
 3. I'm not sure

Poll:

- Order as in 1 and 2 AND order that the cedent pay the reinsurer's attorneys' fees related to the motion?
 1. Yes
 2. No
 3. I'm not sure

Poll:

- Order as in 1–3 AND order additional monetary sanctions?
 1. Yes
 2. No
 3. I'm not sure

Hypothetical:

- On day 1 of a 5-day hearing, a party produces a zip file with 300 additional documents “inadvertently” omitted from discovery without any more explanation as to the reason for not providing these documents timely. The other party promptly objects.

Poll:

- Should the Panel permit the late introduction of the documents?
 1. Yes
 2. No
 3. Maybe

Poll:

- Should the Panel order sanctions against the pedant?
 1. Yes
 2. No
 3. I'm not sure

Poll:

- Does your answer to the previous question depend on whether the Panel decides to admit the late documents or not?
 1. Yes
 2. No
 3. I'm not sure

Poll:

- If sanctions are ordered, what form should they take?
 1. Attorneys' fees for the time it takes opposing counsel to review the documents
 2. A monetary sanction for the delay in production
 3. Statutory interest applied to an award
 4. Something else

Resources

- ARIAS Procedures for Resolution of US Insurance & Reinsurance Disputes (<http://www.arias-us.org/wp-content/uploads/2016/07/Procedures-for-the-Resolution-of-U.S.-Insurance-and-Reinsurance-Disputes.pdf>)
- JAMS Comprehensive Arbitration Rules & Procedures (https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Comprehensive_Arbitration_Rules-2021.pdf)
- AAA Commercial Arbitration Rules (<https://adr.org/sites/default/files/Commercial%20Rules.pdf>)
- ICC 2021 Arbitration rules (https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_c2)



Resources

- Nick DiGiovanni & Theresa Duckett, Sanctions and Punitive Damages in Arbitration, Q1 2002 ARIAS Quarterly (<https://www.arias-us.org/publications/quarterly-archives/>)
- Robert Knuti & T. Monique Jones, Legal Power of Arbitrators to Grant and Limit Discovery, Q4 2002 ARIAS Quarterly (<https://www.arias-us.org/publications/quarterly-archives/>)
- John Barkett, Arbitration: Hot Questions, Cool Answers, ABA Section of Litigation Annual Conference, April 2015
- Federal Rules of Civil Procedure Nos. 11, 37; 28 U.S.C. § 1927



Resources

- Lawrence C. Marshall et al., The Use & Impact of Rule 11, 86 Nw. U. L. Rev. 943 (1992)
- Lionel M. Lavenue et al., Trends in Attorneys' Fees and Sanctions Decisions in 2020 Q4
(<https://www.finnegan.com/en/insights/articles/trends-in-attorney-fees-and-sanctions-decisions-in-2020-q4.html>)

