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How to Write Arbitration Awards

November 8, 2023

Debra J. Hall
Susan E. Mack

From the Ground Floor to the Penthouse

- **Basement:** Award's Baseline Elements
- **Ground Floor:** Reasoned v. Non Reasoned Awards
- **Second Floor:** Fees and Costs? Dissents?
- **Third Floor:** Special Considerations with Interim Awards
- **Fourth Floor:** 3rd Party Subpoenas
- **Penthouse:** Pragmatic Concerns

Baseline Elements for All Awards (1)

Recital paragraph

- Parties
- Documents reviewed
- Procedural posture
- Nature of hearing
- Due deliberation

Baseline Elements for All Awards (2)

Relief Granted paragraph

As to monetary relief:

- Sum certain or direct parties to ascertain
- Date and time for payment
- Interest, if any

As to non-monetary relief:

- Specificity
- Avoid relief not sought by either party

Baseline Elements for All Awards (3)

Relief not granted paragraph

- Specific requests denied
- Consider blanket denial such as the following:

"All requests for relief not specifically granted in the above Paragraphs are hereinafter denied."

Baseline Elements for All Awards (4)

Ex Parte Reopening paragraph

- Delay until final resolution of monetary relief
- Within XX days after issuance
- Immediately upon issuance
- And only party arbitrators, not umpire

Reasoned Awards / Awards without Stated Reasons

- Each party defines its terms
- Stage of proceeding at which to address
- Why parties prefer reasoned awards?
- Why parties prefer awards without stated reasons?
- Justification for panel-determined reasoned award

Composition of Reasoned Award

- Summary of relevant facts
- Summary of issues in dispute
- Conclusions (of law or otherwise)
- Monetary and other relief granted
- Reasons for relief granted

Composition of Award without Stated Reasons

- Recital
- Relief granted
- Relief not granted
- Ex Parte Reopening

Interest

- Interest: Pre-award and Post-award
- Interim awards: “Pure” sanctions
- Panel may defer interest and “pure” sanctions

Dissents

- Why do it?
- With or without reasons
- Use in final awards only or discovery and interim awards?
- Alternative language that might suffice...

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"At least a majority of the Panel supports each and every ruling and individual order set out in this Final Order. This does not mean that any individual Panel member agreed or disagreed with any specific ruling or order."

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Interim Orders — Dispositive and Non-Dispositive

Motions to Compel

- setting the stage
- attorney/client privilege and work product

Motions for Summary Judgment

- special considerations
- reasoned award preferred/necessary

Considerations for 3rd Party Subpoenas

- Differences among the circuits
- Subpoena to testify of bring documents (Subpoena Duces Tecum)
- Full or partial Panel
- Remote or in person

Observations / Pragmatic Concerns

- Adding proceedings to existing arbitration
- Who writes the first draft?
- Vacatur

Vacatur-Final Award

- Clarity
- Definitive Nature
- Should Not Seek to Solve Issues the Parties Didn't Submit

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Thank you! Any Questions?

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Attorney-Client Privilege

November 8, 2023

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Overview

Basics of privilege, with focus on:

- **fundamentals of privilege and differences in key states;**
- **dual purpose communications; and**
- **third-party disclosures and common interest.**

Practical considerations for arbitrators, including:

- **understanding the basics and waiver risks;**
- ***in camera* review;**
- **use of a special master; and**
- **crafting orders.**

Hypothetical situations

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PRIVILEGE: THE BASICS

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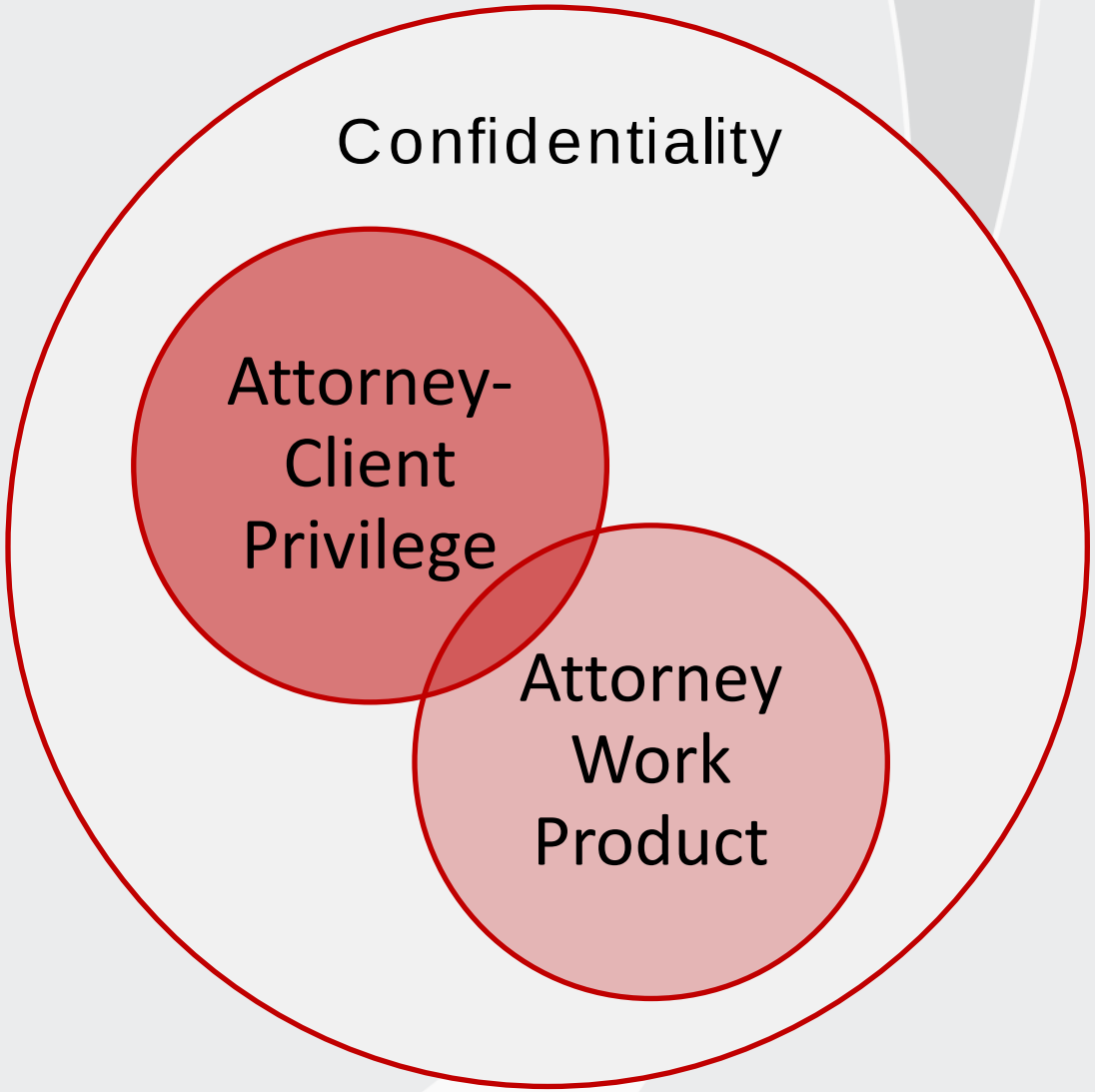
#1: Fundamentals & Differences in Key States


Confidentiality
Attorney-Client Privilege
Attorney Work Product

Privilege and Ethics: A Lawyer's Duty

ABA Model Rule of Professional Conduct 1.6:

- **"A lawyer shall not reveal information related to the representation of a client unless the client gives informed consent . . ." See 1.6(a).**
- **"A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client." See 1.6(c).**
- **"The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information related to the representation, whatever its source." See Rule 1.6 cmt. [3].**

Attorney-Client Privilege

WHAT a confidential **communication**

WHO between an attorney (or their representatives)

WHY for the primary purpose of seeking, obtaining, or providing legal advice

WHAT material prepared

WHO by or for a party or its representative (*e.g.*, attorney, consultant, agent)

WHY in **anticipation of litigation**

U.S. v. Robinson, 121 F.3d 971, 974 (5th Cir. 1997)

Many states have unique differences

California: No anticipation-of-litigation requirement for work product, and no undue hardship exception

Illinois: Only “opinion” work product is protected

New Jersey: No absolute protection for attorney-client privilege; privilege yields for “overriding public policy concerns”

Washington: Privilege does not extend to postemployment communications with former employees

Texas: No “common interest” or “joint defense” doctrine

Privilege and Ethics: A Lawyer's Duty

A corporation can only speak or act through its officers, directors, or employees.

- **When the client is a corporation, the question turns to which corporate employees are within the protection of attorney-client confidentiality?**

Whose communications are privileged?

Upjohn Test

Whether privilege extends to communications with employees depends on the circumstances in which the communications were made.

Federal Standard + Most States

Chadbourne Test

A more complex application of the *Upjohn* test focusing on the dominant purpose of the communication and the circumstances in which communications were made.

California

Control Group Test

Privilege only extends to a small "control group" of top management and necessary advisors.

Alaska, Hawaii, Illinois, Maine, New Hampshire, Oklahoma, South Dakota

Upjohn Test (Federal + Most States)

Privilege will extend to communications with any corporate employee, regardless of status, provided that:

communications concern matters within the scope of the employee's normal corporate duties;

employee is aware that they are being questioned for the purpose of the corporation obtaining legal advice; **and**

communications are considered confidential when made and those communications are kept confidential by the company.

Upjohn Co. v. United States, 449 U.S. 383 (1981).

Chadbourne Test (California)

Whether a specific communication with an employee is privileged will depend on:

- **whether the employee could be liable for the incident at issue;**
- **whether the employee understands the communication is confidential;**
- **whether the company directed the employee to make the statement;**
- **whether the statement is within the scope of the employee's normal responsibilities; and**
- **whether the "dominant purpose" of the communication was for legal advice.**

D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723 (1964).

Chadbourne Test (Alaska, Hawaii, Illinois, Maine, New Hampshire, Oklahoma, South Dakota)

Privilege will extend to communications to:

top management – *i.e.*, employees or officers of the company who have the authority to make decisions based on legal advice received; **or**

necessary advisors upon whom top management actually relies in decision-making

What about former employees?

States apply different rules:

- Treat former employees the same as current employees.
  - 7th Circuit, 9th Circuit, Colorado
- Apply special rules, such as limiting privilege to communications about issues within unique knowledge of former employee.
  - Michigan
- Do not extend any privilege post-employment.
  - Washington, Wisconsin

Copying an attorney on emails is not enough

"[C]ommunications by a corporation with its attorney, who at the time is acting solely in his capacity as a business advisor, are not privileged, nor are documents sent from one corporate officer to another merely because a copy is also sent to counsel."

EEOC v. BDO USA, LLP., 876 F.3d 690, at 698 (5th Cir. 2017).

#2: Dual-Purpose Communications & Work-Product

Dual-Purpose Communications

Blurry line between communications for:

- legal advice (**can be privileged**)
- business, technical, or management advice (**not privileged**)

Difficult to determine if document was prepared:

- in anticipation of litigation (**work product**)
- in ordinary course of business (**not work product**)
- pursuant to public requirement unrelated to litigation (**not work product**)

Dual-Purpose Communications

These communications do not automatically lose their privilege.

Test varies by jurisdiction; generally, courts consider:

- **substance**
- **purpose**
- **title of the in-house counsel**
- **recipients of the communication**

Question to ask:

- **Was the communication used to "facilitat[e] the rendition of predominantly legal advice or services to the client"?**

Stoffels v. SBC Commc'ns, 263 F.R.D. 406 (W.D. Tex. 2009).

Dual-Purpose Work Product

Many circuits provide some protection

> "[A] document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation."

- Consider whether the document:
- was prepared or obtained **because of the prospect** of the litigation; or
- would not have been created in **substantially similar form but for the prospect of the litigation.**

U.S. v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998)

Dual-Purpose Work Product

Other circuits apply a more stringent test:

- **whether counsel was retained;**
- **whether counsel directed the preparation of the document;**
- **whether it was routine practice to prepare this type of document or whether the document was instead prepared in response to a particular circumstance; and**
- **whether the document would have been created regardless of the litigation.**

A document is entitled to work product protection if the **primary motivating purpose** behind the creation of the document was to aid in possible future litigation.

Navigant Consulting, Inc. v. Wilkinson, 220 F.D.R. 467, at 477 (N.D. Tex. 2004).

SCOTUS Declines to Weigh In (For Now)

In Re Grand Jury (October 2022-23 Term)

- **Question Presented: Whether a communication involving both legal and non-legal advice is protected by attorney-client privilege when obtaining or providing legal advice was one of the significant purposes behind the communication.**

- **Outcome: On January 23, 2023, after oral argument, the Court dismissed the *writ of certiorari* for the case. The issue could come up again in a case with facts more suitable to a decision.**

TIG v. Swiss Re

Reinsurer ordered to produce two categories of documents.

Key Case Committee communications and presentations

- high-level committee advising on legal strategies, reserves, and other key issues raised by large and difficult cases.
- court refused to apply a blanket privilege, noting the materials are not "primarily or predominantly of a legal character."
- redaction of legal advice permitted.

Allocation Modeling documents

- modeling potential exposure to underlying environmental claims, including how DJ court might allocate loss across policies.
- after *in camera* review, court agreed such modeling is standard practice for claim evaluation, and non-lawyer business analysis.

TIG Ins. Co. v. Swiss Reins. Am. Corp., 21 Civ. 8975, 2023 U.S. Dist. LEXIS 165288 (S.D.N.Y. Sept. 18, 2023).

#3: Third-Party Disclosures/Common Interest

Third-Party Disclosures

General Rule

- **Privilege may be waived if disclosed to third-parties.**

Subject Matter Waiver

- **Waiver can extend to undisclosed documents if disclosure is intentional and the disclosed and undisclosed documents concern the same subject matter, but in fairness should be considered together. See FRE 502(a).**

Inadvertent Waiver

- **Disclosure in federal action not a waiver if: (1) disclosure is inadvertent; (2) the privilege holder took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify. FRE 502(b).**

Third-Party Disclosures: Waiver Exceptions

Exceptions to general waiver rules – not standalone privileges.

Joint Defense

- **Originated in criminal litigation and extended to civil cases**
- **"If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that *22 otherwise qualifies as privileged ... that relates to the matter is privileged as against third persons."** Restatement (Third) of Law Governing Lawyers §76(1)

Third-Party Disclosures: Waiver Exceptions

Common Interest:

- **No waiver if demonstrated cooperation towards common legal goal.**
- **Some jurisdictions limit application to dual representation by same counsel or communications between attorneys for parties (and not the party itself). *See N. River Ins. Co. v. Phila. Reins. Corp.*, 797 F. Supp. 363, 367-68 (D.N.J. 1992); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007), as amended (Oct. 12, 2007).**

Third-Party Disclosures: Waiver Exceptions

Caution:

- **Not universally recognized**
- **Inconsistently applied – courts can't even agree on the name**
- **Some courts require all parties to be represented by counsel**

Third-Party Disclosures: Waiver Exceptions

Some jurisdictions recognize cedent-reinsurer common interest.

- **Legal and economic interests of cedents and reinsurers are intertwined under the reinsurance contract.**
- **Duty to cooperate and afford access to information reflects understanding that privilege is not waived.**

But other jurisdictions do not recognize common interest based solely in cedent-reinsurer relationship.

- **No common interest if adverse interests, even if share interest in outcome of underlying coverage litigation.**
- **Common commercial and financial interest ≠ common legal interests.**

Caselaw

Courts finding common interest between cedent and reinsurer:

- *Ansur America Ins. Co. v. James Borland, et al.,* No. 3:21-cv-59, 2023 U.S. Dist. LEXIS 190193 (S.D.N.Y. Oct. 23, 2023)
- *Ooida Risk Retention Group, Inc. v. Bordeaux*, No. 3:15-cv-00081, 2016 U.S. Dist. LEXIS 12851 (D. Nev. Feb. 3, 2016)
- *Hawker v. BancInsurance, Inc.,* No. 1:12-cv-01261, 2013 U.S. Dist. LEXIS 180831 (E.D. Cal. Dec. 27, 2013)
- *Hartford Steam Boiler Inspection and Ins. Co. v. Stauffer Chemical Co., Nos.* 701223, 701224, 1991 Conn. Super. LEXIS 2527, at *2-5 (Conn. Super. Ct. Nov. 4, 1991)
- *Durham Indus. v. N. River Ins. Co.,* No. 79 Civ. 1705, 1980 U.S. Dist. LEXIS 15154 (S.D.N.Y. Nov. 21, 1980)

Caselaw

Courts holding insurer-reinsurer relationship insufficient to establish common interest:

- *Fireman's Fund Ins. Co. v. Great Am. Ins. Co.*, 284 F.R.D. 132 (S.D.N.Y. 2012)
- *Progressive Cas. Ins. Co. v. Federal Deposit Insurance Corp.*, 49 F. Supp. 3d 545, 558 (N.D. Iowa 2014)
- *Regence Grp. v. TIG Specialty Ins. Co.*, No. 07-1337, 2010 U.S. Dist. LEXIS 9840 (D. Ore. Feb. 4, 2010)
- *N. River Ins. Co. v. Columbia Cas. Co.*, No. 90 Civ. 2518, 1995 U.S. Dist. LEXIS 53 (S.D.N.Y. Jan. 5, 1995)
- *Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 40 A.D.3d 486 (N.Y. App. Div. 1st Dept. 2007)

Caselaw

Cedent/reinsurer relationship alone insufficient to warrant "common interest" protection:

- Although "follow the fortunes" provision establishes "common commercial interest," in order to establish "common legal interest," parties must demonstrate "cooperative and common enterprise toward identical legal strategy, " and communications are only protected if made in furtherance of identical legal strategy/shared interest
- "In order then for documents and communications shared amongst…litigants to be considered confidential, there must exist an agreement, though not necessarily in writing, embodying a cooperative and common interest"
- "[T]he interests of the ceding insurer and the reinsurer may be antagonistic in some respects and compatible in others," so common interest cannot be assumed merely by status of parties, as it is unclear whether disclosure is intended to further common interests
- Right to Associate Clause does not imply "common legal strategy" where reinsurer has not asserted any rights under provision

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PRACTICAL CONSIDERATIONS FOR ARBITRATORS

#1: Understanding the Basics and Waiver Risks

Basics and Waiver Risks

Resist temptation to require production of everything.

Courts increasingly permitting policyholder discovery of reinsurer communications.

- **Policyholder counsel share information**
- **Documents can be easily mischaracterized**
- **Potential ammunition to establish coverage and/or bad faith**
- **Create disadvantage in future settlement negotiations**

Once toothpaste is out of the tube . . .

#2: In Camera Review

In Camera Review

In litigation, refers to the court reviewing documents in chambers to determine if they are discoverable.

- **can resolve relevance and privilege disputes.**
- **although the panel sees the documents, the opposing party does not unless they are deemed discoverable.**

Disputed documents can be presented to entire panel or only to party-appointed arbitrators (or only to umpire if parties agree).

Afford Panel opportunity to consider relevance when making privilege determinations.

#3: Use of Special Master

Special Master

Engaging special master not otherwise involved in arbitration.

- **recognizes that arbitration panelists serve both an adjudicatory and fact-finding function.**
- **neither the panel nor the opposing party sees the documents unless deemed discoverable.**

Can save time and money.

#4: Crafting Orders

Crafting Orders

Federal Rule of Evidence 502(d): non-waiver orders binding in other state and federal proceedings

- courts have specified that such non-waiver orders intended to apply to private arbitration proceedings.

Unclear if courts respect and enforce non-waiver arbitration orders, or review issue *de novo* (without deference).

Best practices for crafting orders:

- include express non-waiver language and common interest findings.
- potential tension if state production is non-compelled and documents are subject to common interest.
- prior to production, execute confidentiality/non-waiver agreement and specify permitted uses and party-obligations if third-party seeks disclosure.
- limit privileged information disclosed in arbitral orders.

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HYPOTHETICAL SITUATIONS

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Hypothetical #1 – Is it Privileged?

Waterproof Manufacturing Company sells a chemical product that Spotless Carpets incorporates into its rugs and carpets. Residents near the Spotless Carpet manufacturing plant sue Waterproof when the chemical is found in soil and groundwater surrounding the plant.

Waterproof seeks coverage from its insurer, Budget Insurance Company, which later results in a DJ action. Sam Spreadsheets (a non-lawyer) prepares an internal exposure analysis that includes a per-policy allocation.

Hypothetical #1 – Is it Privileged?

Question #1: Assume we are in a jurisdiction with unsettled law on allocation and the pollution exclusion under these facts.

In preparing the exposure analysis, Sam incorporates coverage counsel's analysis of existing law and her views on how the trial and appellate courts are likely to rule on all sums vs. pro rata and the pollution exclusion.

Are the exposure analysis and allocation privileged?

a. Yes.

b. No.

c. It depends (explain).

Hypothetical #1 – Is it Privileged?

Question #2: Assume the foregoing, except Bill Boss (a non-lawyer) makes the final decision about the percentage likelihood of all sums vs. pro rata and application of the pollution exclusion.

Are the exposure analysis and allocation privileged?

a. Yes.

b. No.

c. It depends (explain).

Hypothetical #2 – Is There a Common Interest?

Assume the exposure analysis and allocation are privileged.

While the DJ action is still pending, Budget Insurance Company provides notice of the claim to its reinsurer, Utmost Reinsurance Company.

Hypothetical #2 – Is There a Common Interest?

Question #1: Utmost Reinsurance states it does not have enough information to reach a coverage determination. It demands production of all coverage and claim analysis. Budget Insurance provides all existing claims and DJ files, including the privileged exposure analysis and allocation.

Is there a common interest?

a. Yes.

b. No.

c. It depends (explain).

Hypothetical #2 – Is There a Common Interest?

Question #2: Assume instead that Utmost Reinsurance has denied the reinsurance claim due to late notice. Budget Insurance maintains that, until shortly before it provided notice, it had no reason to believe the loss would reach Utmost's layer. Budget Insurance then provides to Utmost Reinsurance drafts of the privileged exposure analysis and allocation.

Is there a common interest?

a. Yes.

b. No.

c. It depends (explain).

Hypothetical #3 – Is Privilege Waived?

Assume we are in a jurisdiction that *generally accepts* that a cedent and its reinsurer share a common interest in resolution of the underlying coverage action.

After receiving notice, but before the DJ action is resolved, Utmost Reinsurance demands arbitration against Budget Insurance.

Hypothetical #3 – Is Privilege Waived?

Question #1: In the arbitration, Utmost Reinsurance demands production of all coverage and claim analysis, including the privileged exposure analysis and allocation. Budget Insurance turns over the documents without objection.

Are the documents still subject to a common interest, or did Budget Insurance waive privilege?

a. Yes.

b. No.

c. It depends (explain).

Hypothetical #3 – Is Privilege Waived?

Question #2: Assume that Budget Insurance refuses to produce the documents, and Utmost Reinsurance moves to compel. The Panel orders production of all documents, citing only relevance. Prior to the production, the parties execute a joint stipulation stating the documents are being produced pursuant a common interest and non-waiver.

Are the documents still subject to a common interest, or did Budget Insurance waive privilege?

a. Yes.

b. No.

c. It depends (explain).

QUESTIONS

DISCLAIMER

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Issuance & Enforcement of Arbitral Subpoenas

Including Authority of Panels to Conduct Third-Party Pre-Hearing Discovery

By

Debra J. Hall and Robert M. Hall

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I. Introduction

This article examines an arbitration panels' authority to pursue third party pre-hearing discovery. Although the judicial trend is to deny enforcement,[1] some courts have recognized the express authority of panels to convene preliminary hearings for the purpose of taking witness testimony along with the production of documents. However, therein lies a potential minefield of issues for the arbitration panel, including the use of inconsistent language within and among the relevant statutes and conflicting institutional arbitration rules.

Significantly, we highlight the contrast between the authority of an arbitration panel to *issue* a subpoena with its authority to *enforce* a witness' compliance. This distinction raises a policy question for an arbitration panel—does the panel perceive their role with respect to the issuance of subpoenas as merely an administrative one, issuing the form and substance of the summons[2] as requested? Or should the panel examine any draft subpoena and its issuance, with an eye toward its ultimate enforcement?

II. Circuit Court Split on Pre-Hearing Discovery of Non-Parties

Any analysis of an arbitration panel's authority to issue subpoenas must start with the Federal Arbitration Act ("FAA").[3]

Section 7 entitled "Witnesses before arbitrators; fees; compelling attendance" provides:

> The arbitrators . . . or a majority of them, may summon in writing, any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case . . . . Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or

> neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Federal Circuits are split on whether this language permits an arbitration panel to issue a documents-only subpoena to a non-party in the course of discovery. The Second,[4] Third,[5] Fourth[6] and Ninth[7] Circuits have interpreted §7 to require the appearance of a testifying witness before one or more members of the panel, thus not permitting a pre-hearing documents-only subpoena.

These restrictive interpretations of FAA §7 stand in contrast to the more liberal view of the Eight Circuit[8] that the authority granted by §7 to subpoena relevant documents for production at a hearing includes the "implicit power" to subpoena relevant documents prior to the hearing. The Sixth Circuit, while declining to apply the FAA to the labor matter before it, expressly relied on a similar view of §7.[9]

While the Fourth Circuit adopted the interpretation that §7 precludes discovery subpoenas as a general matter and in the specific case that was before them, the Court noted in *dicta* that pre-hearing document subpoenas might be enforced upon a showing of special need or hardship, though the Court did not define the parameters of this exception except to observe that the information must, at a minimum, be otherwise unavailable. [10]

A joint committee report of the New York Bar is an excellent resource on arbitration subpoena issues, including a list of federal district court cases in other circuits following the restrictive interpretation of §7.[11]

There has also emerged a divergence of view between the Second Circuit and the New York state courts. Some of the state courts have taken a view similar to that of the Fourth Circuit. [12] For a discussion of the implications of this federal/state court split, *see* the *New York Bar Report*.[13]

III. Obtaining Non-Party Compliance in the Face of the Circuit Court Rulings

The Stolt-Nielsen Alternative

Learning its lesson from a prior attempt, the arbitration panel in *Stolt-Nielsen Trans. Group, Inc. v. Celanese AG, ("Stolt-Nielsen")*[14] issued subpoenas to Stolt-Nielsen directing its custodian of records to appear and testify at an arbitration proceeding and to bring certain documents with him. The district court enforced these subpoenas and the custodian appeared before the entire panel bringing documents and providing testimony on evidentiary issues and objecting to certain questions on the grounds of privilege.

Stolt-Nielsen appealed the district court order arguing that Section 7 does not empower arbitrators to summon non-parties to testify and produce documents in advance of a "merits hearing" characterizing it as a "thinly disguised effort to obtain pre-hearing discovery." The Second Circuit rejected this argument, upholding the preliminary nature of the hearing citing three factors: (a) the custodian was not summoned to a deposition designed to elicit information in preparation for a hearing; (b) the custodian gave testimony directly to the arbitration panel and the panel ruled on certain issues and reserved others for later; and (c) the testimony of the custodian became part of the record to be used by the arbitrators to resolve the dispute. The court commented that the fact that the custodian's testimony was in advance of the final hearing on the merits was irrelevant since there may be preliminary matters to be determined and hearings are often continued for extended periods. The Second Circuit also made it clear that they were not suggesting that all three factors had to be present in other cases.[15]

The concurring opinion of Judge Chertoff in the Third Circuit's *Hay Group* decision discussed a similar procedure, whereby a single arbitrator may compel a third-party to appear with documents and then adjourn the proceedings.[16] The Second Circuit cited both the procedure outlined by Judge Chertoff's concurrence and its decision in Stolt-Nielsen as examples of how arbitration panels are not powerless to compel third party discovery under FAA §7**.**[17]

Arbitration panels should be aware that institutional arbitration rules have failed to keep abreast of developments in this area. For example, AAA Commercial Rules at R-34 (d) provide "An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." Although the majority of Circuits have ruled that arbitrators cannot issue subpoenas for documents alone, this provision may be operative in the Eighth and Sixth Circuits as well as arbitrations conducted under some state statutes. Likewise, insurance/reinsurance arbitration rules permit panels to issue subpoenas for the production of documents in contravention of the rulings in the majority of Circuits.[18]

This brings us to the next questions regarding who and how to issue the subpoenas, how many arbitrators must attend a hearing, where the hearing can be held, and what other traps to avoid in the enforcement (as opposed to the issuance) of the summons.

IV. Issuance of Subpoenas—Process & Procedure

A. Only Arbitrators Can Issue Summons

Section 7 provides that "the arbitrators, or a majority of them" may summon any person to attend before them, as a witness and to bring documents. Unlike certain state statutes (*e.g.,* New York Civil Practice Law and Rules ("C.P.L.R.") §7505 that permits an arbitrator or any attorney of record the power to issue subpoenas), only the arbitrators can issue summons in an arbitration to which the FAA applies.

B. Opposing Party Objection to Issuance

Typically, the requesting party presents the subpoena to the arbitration panel for its approval and signature.[19] Sometimes the opposing party raises objections to the issuance of subpoenas

generally, the authority or jurisdiction of the panel, or to the scope of the requested summons. The arbitration panel should carefully consider any authority or jurisdiction issues as the issuance of subpoenas not within the panel's authority or jurisdiction undermines the integrity of the process and the panel itself. However, issues of scope are generally beyond the ability of the opposing party to raise. Rather, the subpoenaed witness more properly brings such issues before the appropriate Federal district court by way of a motion to quash or to modify the subpoena.[20] A party does not have standing to assert any rights of the nonparty, absent a personal right or privilege.[21]

C. Nationwide Service of Process

FAA §7 provides that witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." Rule 45 of the Federal Rules of Civil Procedure ("FRCP") provides for nationwide service of judicial subpoenas.[22] By extension, an arbitral subpoena can be served anywhere in the United States.

Two questions remain: Can an arbitral summons require the witness to appear at the location where the arbitration is pending even if it is far from the witness' domicile? And if the witness fails to appear, how and by whom is the subpoena enforced?

D. Location of Third Party Witness Compliance

While an arbitral subpoena can be served anywhere in the United States, it can command compliance only within 100 miles of the witness, unless other conditions exist as noted below. FRCP Rule 45(c)(1) sets forth the territorial limits for complying with a subpoena, providing in relevant part:

> A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense.

Thus, the subpoena should command the witness to appear and testify and bring the requested documents to a place within the geographical limit applicable to the witness, regardless of where the arbitration proceedings are otherwise pending.

E. Motions to Quash

Courts have held that witness objections to relevancy, materiality, privilege and confidentiality should first be brought before the arbitration panel as the proper entity to determine evidentiary issues in the arbitration.[23] However, witness motions to quash based on the limitations imposed by FAA §7 (*e.g.*, the panel exceeded its authority) may also be properly brought before the court with jurisdiction to enforce the subpoena as discussed below.[24] Insurance/reinsurance industry procedures authorize panels to rule on the objections of either a party or a subpoenaed person without specifying the type of objection.[25]

The *New York Bar Report* offers a "Model Federal Arbitration Summons" ("Model Summons") that addresses this and other arbitration subpoena issues with helpful annotations. For example, the text of the Model Summons specifies the type of objections that should be made to the arbitration panel as opposed to the court. The Drafting Committees' purpose for including this language was to overcome any assumption that all objections are to be addressed to the court and thereby avoid the delay caused by unnecessary judicial intervention in the arbitration process.[26]

The Fourth Circuit has noted that the recipient of an arbitrator-issued subpoena is under no obligation to move to quash the subpoena and that by failing to do so, the recipient does not waive the right to challenge the subpoena on the merits. The FAA imposes no requirement on the subpoenaed party, the only remedy being a motion to compel compliance.[27]

V. Enforcement of Arbitral Subpoenas

A. Court Enforcement at Place of Compliance

An arbitration panel's authority to issue a non-party summons does not include the authority to enforce the subpoena—only a court can compel compliance under the FAA.

FAA §7 provides that

> . . . upon petition the United States district *court for the district in which such arbitrators, or a majority of them, are sitting* may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in *the same manner provided by law* for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." (emphasis added)

Additionally, Rule 45 makes it clear that the federal district court *at the place of compliance* with a judicial subpoena is the court in which enforcement should be sought as long as the district court has subject matter jurisdiction.[28] In the absence of jurisdiction, enforcement would be proper in the state court at the place of compliance.[29]

In the event that an arbitration panel opts to hold a Stolt-Nielsen preliminary hearing with non-party testimony and production of documents, the proper court for enforcement of the subpoena would be the district court (or state court) within the 100-mile radius of the witness specified in FRCP Rule 45.

B. Relocating the Panel to Another Jurisdiction

At least one court has upheld a subpoena requiring a non-party to appear and testify before a panel relocated for that purpose.[30]

Additionally, institutional arbitration rules permit panels to conduct hearings at locations other than where the arbitration is pending. For example, AAA International Dispute Resolution

Procedures Article 17 Rule 2 states that a "panel may meet at any place it deems appropriate for any purpose" including conducting hearings. The AAA Commercial Arbitration Rules at R-11 authorizes the arbitrator, in his/her sole discretion, to "conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process." By contrast, insurance/reinsurance industry procedures require that the location of "all proceedings" shall be as agreed by the parties with the ability of the panel to change the location only in the absence of agreement.[31]

Panels should be aware of any restrictions in the arbitration agreement and the applicable institutional arbitration rules, if any, that might require consent of all parties to change the location of a hearing. A recalcitrant party could use this provision to preclude court enforcement of a subpoena.[32] Depending on the wording of the arbitration agreement, the panel might be able to relocate for purposes of a preliminary hearing, interpreting the location provision in the parties' agreement as referring only to the merits hearing. Alternatively, the panel may be able to apply an adverse inference against the party refusing to agree to the panel's attempt to relocate for purposes of hearing testimony and obtaining documentary evidence.[33]

Additionally, serious consideration should be given to changing industry insurance/reinsurance arbitration rules so that they no longer impose an impediment to parties and panels attempting to relocate proceedings for the purpose of obtaining non-party documents.

C. How Many Arbitrators Is Enough?

FAA §7 provides that the arbitrators "may summon in writing, any person to attend before them *or any of them* as a witness." (emphasis added) Courts have cited the ability of a single arbitrator to hear testimony of a witness.[34] By contrast, when it comes to enforcement of a subpoena, §7 provides for enforcement in the district of compliance upon petition to the district court "in which such arbitrators, or a majority of them, are sitting." Thus, while §7 seems to permit the taking of testimony by a single arbitrator, the same section seems to suggest that enforcement is available only where a majority of them are sitting.

The taking of testimony by less than the entire panel of arbitrators could also raise questions under the parties' arbitration agreement that may require that evidence be heard by the entire panel. Additionally, some arbitration rules require that all arbitrators be present for the taking of evidence. For example, AAA Commercial Arbitration Rules at R-34 (a) provide in relevant part: "All evidence shall be taken in the presence of all the arbitrators and all the parties . . ." Some state statutes may have similar impediments. For example, N.Y. C.P.L.R. §7506 (e) provides: "The hearing shall be conducted by all the arbitrators, but a majority may determine any questions and render an award."

The International Commercial Disputes Committee of the Association of the Bar of the City of New York recommended:

> . . .while Section 7 provides that non-party evidence may be taken 'before [the arbitrator] or any of them,' the Committee believes that all arbitrators should be present when a non-party provides testimony in an international arbitration. This is recommended both to ensure that arbitrators carefully weigh whether the non-party's testimony is 'really needed' (to borrow Judge Chertoff's words), and to protect the enforceability of the arbitrators' eventual award from any challenges under the FAA or the New York Convention.[35]

In our view, best practice is to hear testimony before at least a majority of arbitrators and to ensure that the parties agree, on the record, to testimony being taken by less than the entire panel for this purpose. By requiring the presence of a majority, the enforceability provision of FAA §7, which is not subject to waiver by the parties, is clearly met and the parties are thereby precluded from attacking the ultimate award on this basis.

D. Testimony by Electronic Means

Some commentators have suggested, and institutional arbitration rules permit the taking of testimony by electronic means instead of requiring physical presence. For example, AAA Commercial Rules at R-32 (c) permit video conference, internet communication, telephonic conference and other such means as long as the parties are afforded the opportunity to present evidence and cross examine witnesses. Similarly, insurance/reinsurance arbitration rules expressly authorize this practice.[36]

However, the *New York Bar Report* cautions panels that providing for other than physical presence of the arbitrators could provide a recalcitrant witness the opportunity to argue that the panel is not "sitting" in the federal district where the witness is located. Noting that the "touchstone of Section 7" is the *adjudicative* presence of the arbitrator, not the physical presence, the joint committees believe it is "prudent to avoid controversy on this point." [37]

VI. Conclusion

In summary:

- The majority of courts hold that FAA §7 requires that non-party documents be produced by a testifying witness;
- The arbitration panel may convene a preliminary hearing for the purpose of taking testimony and receiving documents as §7 does not limit a panel's authority to a merits hearing;
- Although an arbitration panel has the ability to issue a summons anywhere in the United States, it can command compliance, in accordance with FRCP Rule 45, only within a 100 mile radius of the non-party witness' location;
- Parties have no standing to object to the scope of the subpoena, only the subpoenaed witness has such standing, absent a personal right or privilege;
- Motions to quash based on irrelevancy, materiality, privilege, and confidentiality should be brought before the arbitration panel though challenges to the panel's authority/jurisdiction may be brought before the court ultimately responsible for enforcement of the subpoena;

- The appropriate court to seek compliance with a non-cooperative witness is the district (or state) court where compliance is sought;
- The panel may temporarily relocate for the purpose of taking testimony and receiving documents, except beware of arbitration agreement wording as well as insurance/reinsurance industry procedures that might impose impediments; and
- FAA §7 is internally inconsistent permitting a single arbitrator to hear testimony but providing for subpoena enforcement only where a majority of the panel is "sitting." Testimony before less than a full panel may violate requirements of certain institutional arbitration rules and raise questions of enforceability under the FAA and the New York Convention (in the case of international arbitrations). The best practice is to hear testimony before at least a majority of arbitrators and to ensure that the parties agree, on the record, to testimony being taken by less than the entire panel for this purpose.

As noted in the Introduction, some panels perceive their role with respect to subpoena issuance as administrative, leaving questions about the conformity of the subpoena with FAA Section 7 and the requirements of FRCP 45 to be decided by a judge. Commentators have suggested that the preferred approach is for arbitration panels to:

> . . . consider carefully the enforceability of proposed subpoenas as a condition of issuance . . . by making well-conceived decisions based on clearly applicable case law, so that the tribunal rules at the point of issuance of a subpoena as it would rule if it were a judge deciding a motion to compel compliance."[38]

ENDNOTES

[1] *See Life Receivables, infra*, Note 4. *Hay Group* signaled what one commentator has called an "emerging rule . . . This growing consensus is evidenced by the wide array of district court decisions – including those within this Circuit – that have adopted *Hay Group's* holding." *Life Receivables* at 215.

[2] The Federal Arbitration Act, 9 U.S. Code §§ 1 – 16 refers at §7 to the issuance and enforcement of arbitral "summons." This article uses the terms "summons" and "subpoena" interchangeably as both refer to "an arbitrator's compulsory process to a non-party witness." *See* New York Bar Report, *infra*, Note 11, at Annotation A.

[3] *Id.*

[4] *Life Receivables Trust v. Syndicate 102 at Lloyd's of London,* 549 F. 3d 210 (2d Cir. 2008) ("Life Receivables").

[5] *Hay Group, Inc. v. E.B.S. Acquisition Corp*., 360 F. 3d 404 (3d Cir. 2004) ("Hay Group"). The opinion of the Court was issued by then Circuit Judge Samuel Alito (before his appointment to the U.S. Supreme Court).

[6] COMSAT Corp. v. National Science Found., 190 F. 3d 269 (4th Cir. 1999) ("COMSAT").

[7] *CVS Health Corp. v. Vividus,* LLC 2017 U.S. App. LEXIS 26236 (9th Cir.) ("CVS Health").

[8] *In Re Sec. Life Insurance of America*,228 F. 3d 865 (8th Cir. 2000)("Security Life").

[9] *American Federation of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F. 3d 1004 (6th Cir. 1999).

[10] *COMSAT*, 190 F.3d *at* 276. The Third Circuit rejected this exception, *Hay Group,* 360 F.3d at 410.

[11] Report of the International Commercial Disputes Committee and the Arbitration Committee of the Association of the Bar of the City of New York, 26 Am. Rev. Int'l Arb. 157 (May 2015) ("New York Bar Report").

[12] In *ImClone Sys. Inc. v. Waskal*, 22 A.D. 3d 387, 388 (1st Dep't 2005), predating the Second Circuit decision in *Life Receivables*, the Appellate Division of New York Supreme Court, First Department, held that in a case governed by the FAA, it would apply §7 to permit discovery depositions of non-parties upon a showing of special need or hardship. The court in *Connectu v. Quinn Emanuel Urquhart Oliver & Hodges*, No. 602082/08, slip op. at 10 (Sup. Ct. N.Y. Cnty. March 11, 2010) followed *ImClone* after and notwithstanding the Second Circuit's decision in *Life Receivables.*

[13] *New York Bar Report* at Annotation E.

[14] 430 F.3d 567 (2nd Cir. 2005).

[15] *Stolt-Nielsen* at 578 (". . . although we hasten to add that we do not suggest that all these factors need be present in every case in order to justify the arbitration subpoenas under Section 7.").

[16] *Hay Group*, 360 F.3d at 413. To the extent that Judge Chertoff's concurrence could be interpreted as compelling the witness to appear with documents, and not taking testimony, it would be contrary to the majority trend that requires the witness to appear for the purpose of taking testimony. See *Life Receivables* at 218 (". . .those relying on Section 7 of the FAA must do so according to its plain text, which requires that documents be produced by a testifying witness.")

[17] *Life Receivables*, 549 F.3d at 218.

[18] Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 1999) at 14.5 ("1999 TF Procedures"); Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 2009) at 14.5 ("2009 TF Procedures"); ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (2014) ("ARIAS U.S. Rules") at 14.5.

[19] FAA §7 requires that a summons issue in the name of and be signed by a majority of the arbitrators. Does this require the panel to circulate the subpoena for signature by multiple panel members? It is difficult to believe that in today's electronic environment that one panel member cannot sign on behalf of the panel. Common practice suggests that a single arbitrator may sign the subpoena, listing the arbitrators by name under the signature line and clearly noting that the signature is "on behalf of a majority of," or if applicable, "on behalf of a unanimous panel."

[20] 9 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE, par. 45.50 at 3. (3d ed. 2000).

[21] *Id.* at Note 10.

[22] FRCP 45(b)(2) was amended effective December 1, 2013 providing for nationwide service. *See* New York Bar Report at Annotation F (noting that the FRCP 45(b)(2) amendments remove at least one procedural hurdle to arbitral subpoena enforcement raised by cases like *Dynegy Midstream Servs., LP v. Trammochem*, 451 F. 3d 89 (2d Cir. 2006) and *Legion Ins. Co. v. John Hancock Mutual Life Ins. Co.*, 33 Fed. Appx. 26 (3d Cir. April 11, 2002)).

[23] *See New York Bar Report* at Annotation I citing *Security Life*, 228 F.3d at 871 (Section 7's requirement that information sought by arbitral subpoena be "material as evidence" does not entitle the witness to judicial assessment of materiality, as such a requirement would be "antithetical to the well-recognized policy favoring arbitration, and compromise the panel's presumed expertise in the matter at hand").

[24] *See New York Bar Report* at Annotation I citing *Ware v. Peacock, Inc*. 2010 WL 1856021 at 3 (N.D. Ill. May 7, 2010) (granting motion to quash arbitration-issued deposition subpoena based on *Hay Group*

and *Life Receivables*); *In re Proshares Trust Sec. Litig*., 210 WL 4967988, at 1 (S.D.N.Y. Dec. 1, 2010) (granting motion to quash document discovery subpoena based on *Life Receivables*).

[25] *1999* TF Procedures at 14.5; 2009 TF Procedures at 14.5; *ARIAS U.S. Rules* at 14.5.

[26] New York Bar Report at Annotation I.

[27] COMSAT, 190 F.3d at 276.

[28] New York Bar Report at Annotation F.

[29] Subject matter jurisdiction is beyond the scope of this article. For a discussion of the topic, see New York Bar Report at Annotation H.

[30] *In re National Financial Partners Corp*., 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. April 21, 2009).

[31] 1999 TF Procedures at 9.1; 2009 TF Procedures at 9.1; ARIAS U.S. Rules at 9.1.

[32] Teresa Snyder, "The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act", 34 TORT & INS. L.J. 101, (1998).

[33] "Adverse Inferences in International Arbitral Practice", ICC International Court of Arbitration Bulletin Vol 22/November 2 – 2011 at 44 ("An arbitral tribunal's power to draw adverse inferences is well established as a matter of international arbitration practice."). Likewise, the International Dispute Resolution Procedures provide that "In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs." International Centre for Dispute Resolution and American Arbitration Association. Article 21.9.

[34] *Hay Group*, 360 F.3d at 413.

[35] *Obtaining Evidence From Non-Parties in International Arbitration in the United States,* The International Commercial Disputes Committee of the Association of the Bar of the City of New York at II. C.. Reference to Judge Chertoff is to the concurrence opinion in *Hay Group*.

[36] *1999* TF Procedures at 14.6; 2009 TF Procedures at 14.6; *ARIAS U.S. Rules* at 14.6.

[37] *New York Bar Report* at Annotation F. While not determinative, in the concurring opinion in *Hay Group,* Judge Chertoff noted that obtaining non-party documents through witness testimony requires the arbitrators to decide if they too, are prepared to suffer some inconvenience in order to mandate what is in reality, an advance production of documents. *Hay Group*, 360 F.3d at 413. Obviously Judge Chertoff contemplated physical presence of the arbitrator(s). *See also,* the Second Circuit in *Stolt-Nielsen*, 430 F.3d at 580 ("Nor should we assume lightly that that arbitrators will subpoena third-party witnesses gratuitously, since the arbitrators themselves must attend any hearing at which such subpoenas are returnable.")

[38] *Id.* at Annotation K.

HOW TO WRITE ARBITRATION AWARDS: FROM THE GROUND FLOOR TO THE PENTHOUSE *(90 minutes)*

Presenters:
Debra J. Hall
Susan E. Mack

1. **Introduction (Mack-5 minutes)**
   - How to Craft an Award-Basics to Advanced Topics
   - Starting at the Basement: Baseline Elements for All Awards
   - The Ground Floor (Always): The Final Award: Distinguishing Between Reasoned Awards and Awards without Stated Reasons
   - The Second Floor (Sometimes): Award of Fees and Costs? Dissents and Non-Majority Opinions
   - The Third Floor (Sometimes): Interim Awards on Non-Dispositive and Dispositive Motions
   - The Fourth Floor (Infrequently): Third Party Subpoenas and How to Issue
   - The Penthouse: Observations and Pragmatic Concerns

2. **The Basement: Baseline Elements for All Awards (Hall-10 minutes)**
   a. Recital Paragraph
      - Names of Parties, What Reviewed, Procedural Posture, Nature of Hearing, and Due Deliberation

   b. Relief Granted Paragraph
      - As to any monetary relief, can either (i) state a sum certain or (ii) direct parties to resolve according to specifications, e.g., calculations, reconciliations, and comparisons. In case of (ii), Panel may retain jurisdiction to resolve any disagreements as to the resolution process.
      - As to any monetary relief, state the date and time by which payment must be made.
      - As to any monetary relief, state any interest, including rate and time from which it tolls and to which it tolls.
      - As to any monetary relief, state monetary sanctions, if any (see Section 4).
      - As to any non-monetary relief, set forth with specificity and avoid relief not sought by either of the Parties.

   c. Relief Not Granted Paragraph
   "All requests for relief not specifically granted in the above Paragraphs are hereinafter denied."

d. Ex Parte Reopening Paragraph

- In case of Section 2. b. above, may be delayed until final resolution has been determined.
- Only the party arbitrators; not the umpire.

3. Ground Floor: What the Parties have Bargained For: The Final Award (Mack and Hall-20 minutes)

a. Reasoned vs. Award without Stated Reasons (Mack 10 minutes)

(i) Have each party's counsel define their terms

(ii) Stage of proceeding for deciding reasoned vs. awards without stated reasons (e.g., organizational meeting agenda item, parties pend consideration or simply entrust to the Panel's discretion)

- Why do parties want reasoned awards?
- Why do parties want awards without stated reasons?

b. What a reasoned award encompasses (Hall- 10 minutes)

- Summary of relevant facts
- Summary of issues in dispute
- Conclusions (of law and otherwise)
- Monetary and other relief granted
- Reasons for relief granted

c. What an award without stated reasons encompasses

- Typically what is stated in Section 2 above

d. Justification for reasoned award whether or not the parties request it

4. Second Floor: All Awards -- Other Issues (Mack and Hall- 20 minutes)

a. Interest- Both Pre-Award and Post-Award (Mack-10)

- When is an Award of Interest Appropriate? Or Inappropriate?
- Interest as a Sanction in the Event that the Arbitration Clause Precludes Punitive Damages

b. Interim Awards: "Pure" Sanctions

c. Interim Awards: Panel may Defer Consideration of Interest and "Pure" Sanctions until Final Award

d. Dissents (Hall-10)

- Why interpose a Dissent?
- Dissent without Stated Reasons as Opposed to Reasoned Dissent?
- Do Dissents Serve Any Useful Purpose?
- Dissents- Should they be used in Discovery Motions?
- Alternative Language which Might Satisfy Minority Panel Members

5. **Third Floor-Interim Awards on Non-Dispositive and Dispositive Motions (Mack-15)**
   a. *Motions to Compel Discovery*
      - Setting the Stage for What Will be Appropriate for the Remainder of Discovery
      - Attorney Work Product and Attorney-Client Privilege
   b. *Motions for Summary Judgment*
      - Effects of Granting and Denying
      - Even if Intended to be Entirely Dispositive, Panel's Option to Grant Partial Summary Judgement if Appropriate
      - What Substantiates a Viable Motion-Affidavits and Declarations under Oath
      - Special Considerations in Framing a Motion for Summary Judgment
      - Reasoned Award to be Preferred/Necessary

6. **Fourth Floor-Third Party Subpoenas and How to Issue (Hall-10)**
   a. *To be Considered for Third Party Records, Particularly When a Party Cannot or Will Not Cooperate*
   b. *Mechanics of Issuing*
      - Differences Among Circuits as to full Panel or Partial, in person or remotely
      - Subpoena to Testify before the Panel and bring records (Subpoena Duces Tecum)

7. **Finally The Penthouse-Observations and Pragmatic Concerns (Mack and Hall-10)**
   a. *Additional problems identified during the resolution process:*
      - Considerations of whether to add to existing arbitration, e.g., arbitral efficiency, issue preclusion doctrines.
   b. *Who writes the first draft of the Final Award?*
      - The parties submit their suggested Final Awards, shortly before or after parties' closing.
      - Each party arbitrator submits to Panel initial views as to Final Award prior to deliberation. Umpire may or may not then distribute initial views to Panel.
      - Umpire device-each party arbitrator to write their own Final Award after initial deliberations. Some umpires feel that incents two extremes to come to the middle.
      - `Umpire is the sole author of the Final Award.

c. *Vacatur- which Final Awards can withstand a challenge?*

- Clarity to ensure that Final Award was not Arbitrary
- Definitive Nature of Final Award
- Final Award does Not Attempt to Solve Issues Which the Parties have not Introduced

EXEMPLAR- DENIAL OF SUMMARY JUDGMENT (MAJORITY VO

In the Matter of the Arbitration Between	)	**SIXTH INTERIM ORDER: ORDER REGARDING PETITIONER'S MOTION FOR SUMMARY JUDGMENT**
ANNOYED CEDING INSURANCE COMPANY, Petitioner,	)	
and	)	*Arbitration Panel:*
CONTENTIOUS REINSURER Respondent	)	Lydia Fairplay (Umpire) Debra J. Hall Susan E. Mack

With respect to the Motion for Summary Judgment presented by the Petitioner Annoyed Ceding Company ("Petitioner"), the Panel, consisting of Lydia Fairplay, umpire, Debra J. Hall, arbitrator, and Susan E. Mack, arbitrator, having reviewed and considered the respective submissions of both Petitioner and Respondent Contentious Reinsurer ("Respondent") relating thereto, consisting of briefs, statements of undisputed facts and replies thereto, memoranda and exhibits submitted on May 17, 2023, June 15, 2023 and June 29, 2023 by both Petitioner and Respondent, having heard oral argument at length from counsel for each of Petitioner and Respondents on July 18, 2023, and having duly deliberated, hereby rules and orders, by majority vote , as follows:

1. This Motion raises questions of fact and law that cannot be addressed on summary judgment, and it is therefore DENIED in its entirety.
2. Ex parte communication with the arbitrators may resume as of the date of this Interim Order No. 6. No communication with the umpire may take place at any time.

Dated: July 31, 2023

_____

Umpire

_____

Arbitrator

Dissenting:

_____

Arbitrator

Dated: July 31 2023

EXEMPLAR: AWARD WITHOUT STATED REASONS

In the Matter of the Arbitration Between	)	**FINAL AWARD**
ANNOYED CEDING INSURANCE COMPANY, Petitioner,	)	*Arbitration Panel:*
and	)	Lydia Fairplay (Umpire) Debra J. Hall Susan E. Mack
CONTENTIOUS REINSURER Respondent	)	

From November 8, 2023 through November 10, 2023, inclusive, the Arbitration Panel ("Panel") consisting of Debra J. Hall and Susan E. Mack, arbitrators, and Lydia Fairplay, umpire, presided over an arbitration hearing in New York, New York between Petitioner Annoyed Ceding Insurance Company (Petitioner) and Respondent Contentious Reinsurer (Respondent). Having considered the pre-hearing initial briefs and reply briefs and the accompanying exhibits, deposition testimony and authorities presented by both Petitioner and Respondent, and upon the evidence and arguments presented by both Petitioner and Respondent at said arbitration hearing, and after due deliberation, the Panel finds and orders as follows:

A.) On or before November 30, 2023 at 5:00 pm EST, Respondent shall remit a total of US$5,500,000 to Petitioner. The total sum represents :(1.) U.S. $5,000,000 as principal and (2.) $500,000 in pre-judgment interest, calculated as simple interest at the rate of 5%

per annum, tolling from November 15, 2021 through November 15, 2023. To that extent, Petitioner's requests for relief are **GRANTED**.

B.) Petitioner's request for post-judgment interest, fees and costs are hereby **DENIED**.

C.) For the avoidance of doubt, all other relief, whether requested by Petitioner or Respondent, is hereby **DENIED.**

D.) The Panel shall retain jurisdiction until such time as all Panel members receive a communication from both Petitioner's counsel and Respondent's counsel to the effect that payment in full as specified in Paragraph A. has been received by Petitioner.

E.) Ex parte communication with the arbitrators may resume at the time that the communication referenced in Paragraph D, is sent to the Panel. No communication may be had by either Petitioner or Respondent with the umpire.

Dated: November 15, 2023

_____ _____

Umpire. Arbitrator

_____

Arbitrator

EXEMPLAR - GRANT OF SUMMARY JUDGMENT (UNANIMOUS)

In the Matter of the Arbitration Between	)	**FINAL ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT**
ANNOYED CEDING INSURANCE COMPANY, Petitioner, and CONTENTIOUS REINSURER Respondent	)	*Arbitration Panel:* Lydia Fairplay (Umpire) Debra J. Hall Susan E. Mack

FINAL ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

Following a settlement between the Parties on certain issues, the only remaining issues before this Panel are those addressed in the Parties' respective motions for summary judgment, all of which involve interpretation of the XYZ Fac Cert and Contentious Reinsurer's request that amounts it paid in response to Annoyed Ceding Insurer's cession of the ABC Claim be returned.

Specifically, both Parties seek a declaration from this Panel as to the operation of the XYZ Fac Cert at issue in these proceedings, and whether Annoyed Ceding Insurer can combine "loss" and "loss expenses" for the purposes of satisfying the reinsurance retention set out in the XYZ Fac Cert. Annoyed argues that … Contentious, on the other hand, argues that …

Having reviewed the Parties' initial briefs, exhibits and cited case authorities (June 30, 2022), the Parties' opposition briefs, exhibits and cited case authorities (July 31, 2022), having heard oral argument and having had the opportunity to ask questions during an

August 21, 2022 videoconference with counsel, and having had the opportunity to deliberate, the Panel hereby rules as follows:

1. The Proper Interpretation of the XYZ Fac Cert

In determining whether the XYZ Fac Cert permits Annoyed to combine “loss” and “loss expenses” as loss for the purposes of eroding the retention for its reinsurance cessions, the Panel focuses on the following operative provisions of the XYZ Fac Cert:

[Excerpts from XYZ Fac Cert]

The Panel finds that the XYZ Fac Cert terms set out above clearly support Contentious’ interpretation of the Fac Cert, even if the underlying policy that Annoyed issued to the Insured combines loss and loss expense within the limits of that policy.

[Panel’s Rationale]

[Why Panel finds the arguments of the Cedent unavailing]

Accordingly, Contentious’ request that the Panel declare that the XYZ Fac Cert preclude Annoyed from including “Loss Expense” as “Loss” under the XYZ Fac Cert, even in those instances when “Loss Expense” comes within the limit of the underlying policy, is GRANTED.

Correspondingly, Annoyed’s request that the Panel order Contentious to continue to pay cessions wherein Annoyed includes “Loss Expense” as “Loss” for the purposes of eroding the XYZ Fac Cert retention is DENIED. For future cessions of the Insured’s Claim, if any, incurred and/or paid “Loss Expenses” shall not be included as “Loss” for the purposes of eroding the XYZ Fac Cert retention. Moreover, Contentious’ future obligation to reimburse Annoyed for such “Loss Expense” shall be calculated in accordance with Par. 150 (zz) of the XYZ Fact Cert.

2. Contentious' Recoupment Claim

Notwithstanding the above, Contentious' request that the Panel order Annoyed to return amounts already paid by Contentious for the ABC Claim is DENIED. Contentious has failed to meet its burden of proof that it paid such cessions "by mistake."

[Panel's Rationale]

[Why Panel finds the arguments of the Reinsurer unavailing]

Accordingly, Annoyed's request that Contentious' recoupment claim be denied in its entirety is GRANTED.

3. Other Matters

a. Any requests of the Parties that they be awarded attorneys' fees and costs of this arbitration are DENIED. Each Party shall be responsible for its own attorneys' fees, costs, and expenses, including the fees and expenses of its appointed arbitrator. As previously agreed, each Party shall be responsible for half the fees and expenses of the umpire.

b. With the issuance of this Final Order, the Panel is *functus officio* and *ex parte* communications between the Parties and the Panel members may resume.

c. Any request for relief of either Party not specifically granted herein is DENIED.

d. To be certain, at least a majority of the Panel supports each and every ruling and individual order set out in this Final Order. This does not mean that any individual Panel member agreed or disagreed with any specific ruling or order.

Dated: September 30, 2022

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Umpire

Arbitrator

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ARIAS 2023 ARBITRATOR AND UMPIRE SEMINAR

NOVEMBER 8, 2023

ATTORNEY-CLIENT PRIVILEGE

Presenters:
Daryn Rush
Kelly Tsai

1. Overview

2. Fundamentals and Differences in Key States

- Privilege and Ethics: A Lawyer's Duty – Rule of Professional Conduct 1.6
- Attorney-Client Privilege vs. Attorney Work Product
- Differences in key states
    - Upjohn Test
    - Chadbourne Test
    - Control Group Test
- Former employees

3. Dual Purpose Communications and Work Product

- Attorney-client privilege: legal advice, not business, technical or management advice
- Attorney work product: prepare in anticipation of litigation
- Factors considered to distinguish purpose
- TIG v. Swiss Re

4. Best Practices to preserve protections

5. Third-party Disclosures and the Common Interest Doctrine

- Waiver
    - General rule
    - Subject matter waiver
    - Inadvertent waiver

- Exceptions to waiver
    - Common interest
        - As applied (or not applied) in reinsurance context
        - Cases

- Best Practices to avoid waiver

6. Practical Considerations for Arbitrators

- Develop understanding of attorney-client privilege and attorney work product
- Recognize risk of waiver
- Take measures to “get it right” and to avoid waiver
    - *In Camera* review
    - Special Master
    - Craft orders to preserve protections

7. Hypotheticals