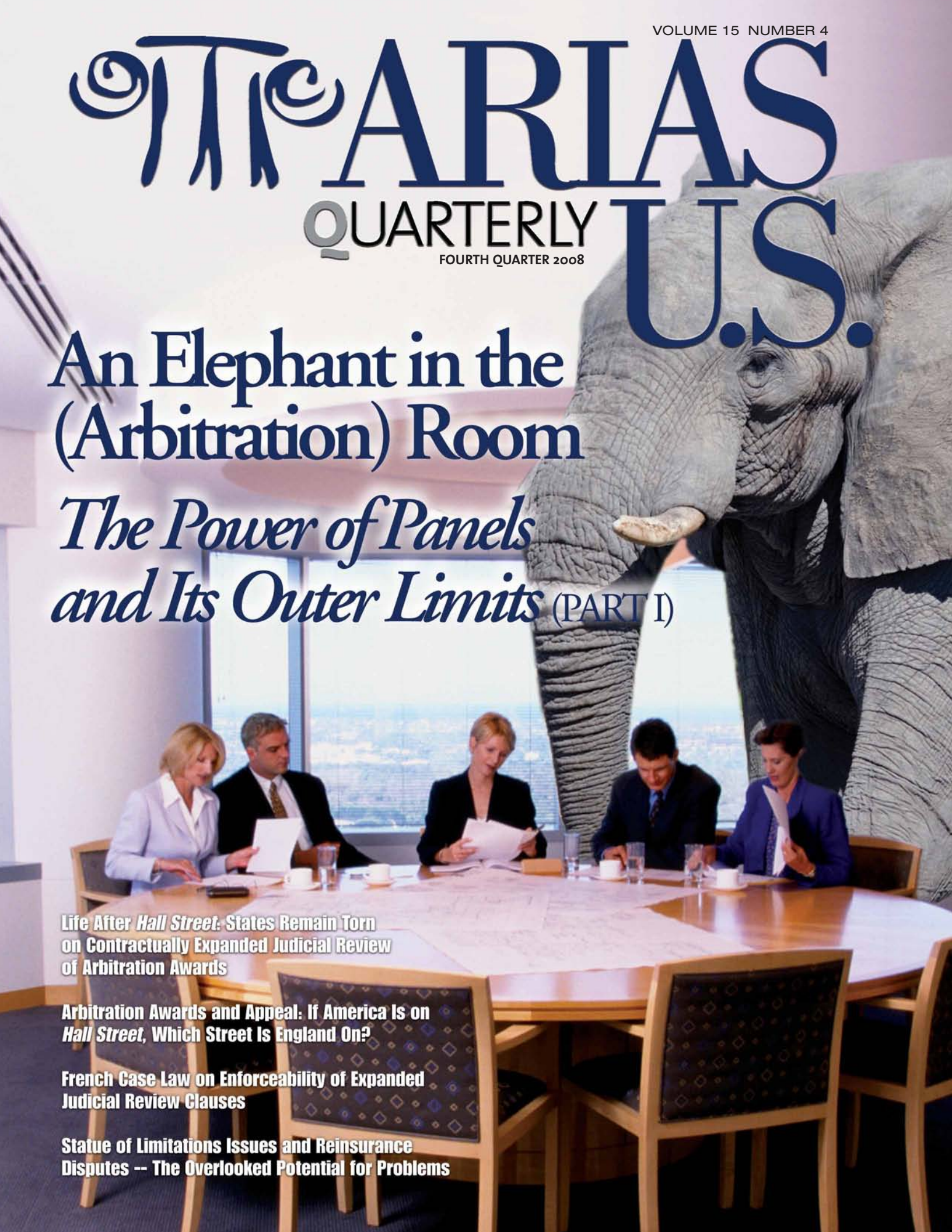
VOLUME 15 NUMBER 4

TDARIAS QUARTERLY U.S.

FOURTH QUARTER 2008



An Elephant in the (Arbitration) Room

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feature

An Elephant in the (Arbitration) Room—The Power of Panels and Its Outer Limits (Part I)

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I. INTRODUCTION[1]

Arbitration remains the most prevalent method of dispute resolution in the reinsurance world. One of its principal benefits continues to be the available supply of industry professionals who are, unlike most judges, steeped in the practical realities of the reinsurance business. It is further lauded as an efficient, economical, and often confidential means of resolving disputes — goals frequently shared by parties seeking to perpetuate on-going business relationships.

In recent years, however, as the business has evolved, and reinsurance relationships have become increasingly complex, reinsurance disputes have been more adversarial. In response to the number of arbitrations, the increasingly large dollar amounts at stake, and the number of sophisticated parties involved in writing business (and "running off" maturing books), arbitrations have become more formal and trial-like. As a result, participants have resorted more readily to traditional litigation techniques and strategies.[2] In turn, arbitrators are frequently required to perform acts which, in the past, remained exclusively within the province of judges. Common examples include rulings on motions to compel the production of documents, security motions, and disputes involving the participation of third-party witnesses. Although the scope of judicial authority on such matters is generally well-established, the outer limits of an arbitrator's powers are less clear, despite the proliferation of industry arbitrations.

It is, however, widely acknowledged that arbitration is a creature of contract, and that arbitral authority derives from the parties' legally binding agreement to arbitrate. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). But, when the relevant contract is ambiguous, silent, or inconclusive concerning the scope of arbitrators' authority, they — or the proponent of their actions — must find extrinsic authority for their (quasi-) judicial acts or run the risk that their award may be vacated by a reviewing court. The relevant statutory repositories of arbitral authority generally give arbitrators broad latitude to fashion the relief they are authorized to award. *E.g.*, Federal Arbitration Act (the "FAA"), 9 U.S.C. §10(a) (2008) (providing narrow, specific grounds for vacating arbitration awards); Revised Unif. Arbitration Act (the "RUAA") §21(c) (2000) ("an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding"). Parties can, of course, also contract to follow the rules of private organizations, which often specify the species of relief arbitrators may award. An arbitrator's knowledge of the limitations on his or her powers is crucial to ensuring judicial confirmation of awards and to protecting the integrity and efficacy of arbitration as a viable alternative to litigation.

The purpose of this article is to discuss the "elephant in the [arbitration] room" — the outer limits of arbitrators' authority to engage in certain traditionally judicial acts which are incident to and (perhaps, ironically) requisite to the effective conduct of industry arbitrations. Given the breadth of the topic, this article will be published in two parts. The first installment briefly describes the principal sources of arbitral authority in the United States and abroad, and it examines the question whether they confer on arbitrators the power to award multiple damages, including punitive damages, attorney's fees, and interest.[3] The second part, to be published in the next edition of *ARIAS•U.S. Quarterly*, analyzes whether the same authorities confer on arbitrators the power to order injunctive relief, exercise subpoena powers, and issue confidentiality

orders. The discussion aims both to mark the outer limits of an arbitrator's power to engage in these functions and to describe some of the practical challenges faced by arbitrators in the exercise of their powers.

II. SOURCES OF ARBITRAL POWER

A. The Federal Arbitration Act

The Federal Arbitration Act (the "FAA"), 9 U.S.C. §1 *et seq.* (2008), governs any contract involving interstate commerce, which means that most reinsurance contracts fall within its purview. *See* 9 U.S.C. §2. The FAA was enacted in 1925, in an effort to reverse historic judicial hostility towards arbitration and to ensure that arbitration agreements are enforced according to their terms. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995); *Volt Info. Sciences, Inc. v. Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Although it has largely achieved these goals, the FAA is not without its limitations — some of which emanate from its silence concerning the scope of arbitrator power.

Although the FAA does not provide express instructions concerning the nature and scope of arbitrators' authority, it does declare "a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *See Preston v. Ferrer*, 128 S.Ct. 978, 981 (2008). In so doing, it "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) (citation omitted). In brief, arbitral awards can only be overturned under unusual circumstances — most importantly for present purposes, "[w]here the arbitrators exceeded their powers." 9 U.S.C. §10(a)(4) (2008). Thus, despite its silence with regard to the forms of relief a panel may order, the FAA provides broad latitude for arbitration panels to act in a manner consistent with the mandate advanced in the relevant arbitration agreement.[4]

B. State Law: The Uniform Arbitration Act

Arbitration agreements may also be governed by state law. "Where ... the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." *Volt Info. Sci. v. Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).[5] Many state arbitration statutes are modeled on the Uniform Arbitration Act (the "UAA"), which was originally promulgated in 1955 to buttress arbitration "in the face of oftentimes hostile state law." *Revised Unif. Arbitration Act* (the "RUAA"), *Prefatory Note* at p. 1 (2000). The UAA acknowledges the sanctity of arbitration agreements but, like the FAA, it does not adequately address certain realities of modern arbitration. To that end, in 2000, the UAA was revised in an effort to provide a "more up-to-date statute to resolve disputes through arbitration." *Id.* To date, forty-nine jurisdictions have adopted the UAA, the RUAA (or revised UAA), or substantially similar legislation as their state arbitration statute. Uniform Law Commissioners, A Few Facts About the ... *Uniform Arbitration Act* (2008), http:// www.nccusl.org/ nccusl/ uniformact _factsheets/ uniformacts-fs-aa.asp; Cornell University Law School, *Law by Source*: *Uniform Laws* (2003), http://www.law.cornell.edu/uniform/vol7.html. *See, e.g.*, Mass. Gen. Law ch. 251, §§1-19.[6]

The complexity of modern arbitration (which often rivals the intricacy of judicial proceedings), and the sophistication of the legal arguments raised in those arbitrations, magnifies arbitrators' need to possess authority to address the myriad of issues that may arise during the course of a protracted proceeding. To that end, unlike the (original) UAA, which — in many cases — failed to arm arbitrators with rudimentary powers (for example, it granted no specific power to award non-monetary damages), the RUAA empowers arbitrators to "order such remedies as the arbitrator considers just and appropriate under the circumstances of the proceeding." RUAA at §21(c) (2000). Consistent with the growing importance of judicial functions in arbitration, it also arrogates to arbitrators express authorization for specified quasi-judicial acts. *Id.* at §§8 (injunctive relief); 17(a) (subpoenas); 17(e) (protective orders); 21(a) (punitive damages); 21(b) (attorney's fees). *Infra* at Part III.

C. International Law: The UNCITRAL Rules

The multinational character of the reinsurance business ensures that not all disputes will be governed by the FAA or state arbitration statutes. Disputes between a

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An arbitrator's knowledge of the limitations on his or her powers is crucial to ensuring judicial confirmation of awards and to protecting the integrity and efficacy of arbitration as a viable alternative to litigation.

Like the FAA, however, the UNCITRAL rules give little guidance with respect to the scope of arbitrator powers. They state only that, "[i]n addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards."

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domestic party and a foreign party are governed by the United Nations Commission on International Trade Law Arbitration Rules (the "UNCITRAL rules"), whenever parties agree to their use. *See* UNCITRAL rules at Art. 1.1.

The UNCITRAL rules provide a framework in which geographically diverse parties can resolve disputes with the aid of procedurally neutral guidelines.[7] Like the FAA, however, the UNCITRAL rules give little guidance with respect to the scope of arbitrator powers. They state only that, "[i]n addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards." *Id*. at Art. 32.1.

D. Commercial Rules For Arbitration

In addition to the federal, state, and international statutes governing arbitrator conduct, a few trade groups and other commercial organizations have promulgated arbitration codes that parties may agree to follow. For example, the American Arbitration Association (the "AAA") and ARIAS•U.S. ("ARIAS") have issued guidelines which, in part, seek to define the scope of arbitrator authority. *See* AAA, *Commercial Arbitration Rules and Mediation Procedures* (amended and effective Sept. 1, 2007) ("AAA Rules"), available at http://www.adr.org/sp.asp?id=22440; ARIAS-U.S., *Practical Guide to Reinsurance Arbitration Procedure* (2004) ("ARIAS Practical Guide"), *available at* http://www.arias-us.org/pdf/Practical_Guide.pdf. Similarly, in 1997, an insurance and reinsurance industry task force comprised of international and domestic representatives of insurers, reinsurers, experienced industry arbitrators and industry trade associations was formed, in an attempt to formalize the process used by the reinsurance industry to resolve disputes. Those efforts culminated in the "Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes" ("RAA Procedures"), which provide a framework for the conduct of reinsurance industry arbitrations. *See* RAA Procedures, *available* in RAA Manual for the Resolution of Reinsurance Disputes (2001 & 2007 updates).

Parties who elect contractually to import these (or similar) commercial codes and guidelines may benefit from a more precise delineation of their arbitrators' powers than those who rely on the baseline guidance provided by state or federal law. For instance, the RAA Procedures expressly state:

> The 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.

Section 15.3 (emphasis supplied); *see also* ARIAS Practical Guide §§4.4 ("The Panel has the authority to enter interim awards in appropriate cases."); 5.3, Comment C ("[T]he panel may specify a payment date and a rate of interest.").

Despite these various attempts to codify and/or define the extent of arbitrators' powers, when the applicable rules provide no specific authority to award various forms of relief, and the parties' contract is silent on the issue, a panel's authority to act in traditionally judicial capacities is often unclear. Case law interpreting the FAA and state statutes, together with related policy arguments, has been used to help define the scope of arbitral authority and to justify actions desired by one party over the other side's objections. Some of the most frequently discussed and disputed powers — the power to award multiple damages, interest, injunctive relief, subpoenas, and confidentiality strictures — are discussed in this article.

III. FIVE (QUASI-) JUDICIAL FUNCTIONS

A. Multiple Damages

The prerogative of arbitration participants to shape their proceeding includes the joint ability to select the menu of remedies arbitrators may award at its conclusion. For example, parties can contract to include or exclude multiple or punitive damages and attorney's fees as available remedies. When the subject contract is silent on the issue of remedies, case law and legislation fill the gaps to provide the authority needed to ensure judicial confirmation of awards

prescribing these remedies.

1. The Power To Award "Multiple Damages"

It is not surprising that there is some degree of confusion over an arbitrator's authority to award multiple damages. This uncertainty may derive, in part, from disagreements over the purposes and proper characterization of multiple damages remedies. If they are viewed as a means to punish and deter parties, they serve the same function as punitive damages and should be evaluated according to the considerations that inform a panel's authority to award that type of relief. If, however, they are compensatory in nature, the proper analysis is whether the panel is imbued with the power to award compensatory relief above the principal amount of a contractual loss. In this connection, the United States Supreme Court has recognized that there is often a fine line between compensatory multiple damages and punitive damages. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785-86 (2000) (treble damages under the False Claims Act are "essentially punitive in nature," because "the very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers").

The better view is that multiple damages are more compensatory in nature, which makes them distinguishable from punitive damages. E.g., Investment Partners, L.P. v. *Glamour Shots* Licensing, Inc., 298 F.3d 314, 317 (5th Cir. 2002) ("[u]nlike punitive damages, which punish a wrongdoer, treble-damages compensate an injured party"). Although the FAA does not expressly provide for an award of sanctions, its broad language recognizes, if only by implication, that arbitrators may issue such awards. 9 U.S.C. §10(a) (providing courts with limited, specific grounds for vacating an arbitration award). For example, in **Glamour Shots**, the plaintiff filed a lawsuit in federal court seeking an award of treble damages under federal antitrust law. When the defendants moved to compel arbitration, the plaintiff responded that the arbitration clause was void because it prohibited arbitrators from awarding "punitive damages." **Glamour Shots**, 298 F.3d at 316. The court affirmed the arbitration agreement and held that the arbitrators were free to award multiple damages on the ground that "[u]nlike punitive damages, which are designed to punish a wrongdoer and deter future wrongful conduct, treble-damages compensate an injured party." *Id.* at 317. As a consequence, the court authorized the panel to award treble damages in accordance with federal law, even though the agreement expressly barred punitive damages. *Id.* at 317-18.

In a similar ruling, the Supreme Court of Connecticut recently confirmed an arbitration award of multiple damages where such damages were authorized by state law and not definitively excluded by the arbitration agreement. *Harty v. Cantor Fitzgerald & Co.*, 881 A.2d 139 (Conn. 2005). In *Harty*, the parties' employment contract contained an arbitration clause, stating that "arbitrators are not authorized or entitled to include as part of any award rendered by them, special, exemplary or punitive damages or amounts in the nature of special, exemplary or punitive damages...." *Id.* at 144. The award included double damages, attorney's fees and costs. *Id.* The court affirmed the double damages award on the ground that the relevant state statute allowed them in the circumstances at bar, and because the arbitration clause was ambiguous on the subject of whether such damages were excluded. *Id.* at 155-56. The court, however, vacated the award with respect to attorney's fees and costs, finding that fees and costs were elements of punitive damages, which were expressly barred by the parties' contract. *Id.* at 157; *see also infra* at Section III.A.2.

The RUAA attempts to clarify the parameters of a panel's power to award multiple damages. The RUAA expressly permits arbitrators to award "punitive damages or *other exemplary relief* if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." RUAA at §21(a) (emphasis supplied). Even though an arbitration agreement is a form of contract, the parties cannot confer authority to award multiple damages on an arbitrator by agreement. There must be an independent legal basis for the award. *See* RUAA at §21, Comment 1.[8] In an effort to address concerns over excessive or unjustified awards, the RUAA requires arbitrators to "specify in the award the basis

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The court affirmed the arbitration agreement and held that the arbitrators were free to award multiple damages on the ground that "[u]nlike punitive damages, which are designed to punish a wrongdoer and deter future wrongful conduct, treble-damages compensate an injured party."

On the other hand, when a party engages in egregious conduct, the aggrieved party — regardless of whether it seeks relief in court or in arbitration — should be entitled to the full panoply of available remedies.

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in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief" — unless the parties waive their right to receive these details. *Id*. at §21(e). As a result, barring some other serious infirmity, courts do (and, they should) affirm a wide range of arbitral awards in RUAA jurisdictions, including multiple damages awards.

2. Punitive Damages

Although once considered to be outside the scope of arbitral power, a number of modern authorities agree that arbitrators may award punitive damages under the FAA, UAA, certain state arbitration statutes and private procedural guidelines. *See* RUAA at §21(a), Comment 1; *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52 (1995); see also *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc*., 598 F. Supp. 353, 361 (D. Ala. 1984) ("This Court agrees that there is no public policy bar which prevents arbitrators from considering claims for punitive damages.").

The view that only courts should be vested with the power to award punitive damages may emanate from the perception that arbitrators, who may not (as a group) be as well versed in judicial decisions and procedural safeguards, are unequipped to determine the appropriate quantum of punitive damages to impose. On the other hand, when a party engages in egregious conduct, the aggrieved party — regardless of whether it seeks relief in court or in arbitration — should be entitled to the full panoply of available remedies. These competing considerations highlight the controversy over punitive damages which has recently been at the forefront of the debate concerning the scope of arbitrator power.

(a) State Arbitration Law

As noted above, the RUAA expressly permits imposition of punitive damages. RUAA at §21(a). State statutes modeled on the original UAA, which does not directly reference punitive damages, are less clear. *See* UAA at §§1-25 (1956).

For example, in Massachusetts, a UAA jurisdiction, the state's highest court affirmed an award of punitive damages, even though the state arbitration statute did not expressly authorize them. *Drywall Systems, Inc. v. ZVI Construction Co.*, 761 N.E.2d 482 (Mass. 2002); M.G.L. Ch. 251. In *Drywall*, the Supreme Judicial Court held that, since there was no express statutory or contractual limit on punitive damages or multiple damages under Massachusetts law, both punitive damages and multiple damages could be awarded in arbitration. In the Court's parlance: "Absent contrary statutory direction, the strong public policy in favor of arbitration of commercial disputes should be given effect." *Id*. at 486 (citation omitted).

Other states have attempted to bar punitive damages altogether on the ground that one of the key differences between arbitration and litigation — the essentially private nature of industry arbitration — restricts relief to purely compensatory damages. "[S]uch damages are a social exemplary remedy rather than a private compensatory remedy." Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3D* at §213.45 (2008). For example, under New York law, arbitrators lack authority to award punitive damages, even if the parties to an arbitration have privately agreed otherwise. *Garrity v. Lyle Stuart, Inc*., 353 N.E.2d 793, 795 (N.Y. 1976). The United States Supreme Court has emphasized, however, that the FAA preempts state law barring an arbitration award of punitive damages, unless the parties agree in their contract that their arbitrator(s) may not award such damages. *See Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 62-64 (1995). But, when the FAA does not apply, arbitrators bound to follow New York law (for example) may not award punitive damages.

(b) Federal Arbitration Law

In *Mastrobuono, supra*, the Supreme Court upheld an award of punitive damages under the FAA, in the face of New York's prohibition against such awards in arbitration. *See Garrity v. Lyle Stuart, Inc*., 353 N.E.2d 793, 794 (N.Y. 1976) ("An arbitrator has no power to award punitive damages, even if agreed upon by the parties.").[9]

The Plaintiffs in *Mastrobuono* had signed a contract including an arbitration agreement when they opened a securities trading account with the defendant brokerage firm. *Mastrobuono*, 514 U.S. at 53. The agreement did not expressly reference punitive damages. Instead, it stated only that it was governed by the "laws of the State of New York" which, in turn, prohibit arbitrators from

awarding punitive damages. *Id*. A few years after opening their account, the plaintiffs sued the defendant brokerage firm for mismanaging their assets. *Id*. The brokerage successfully moved to compel arbitration, and the arbitration panel awarded both compensatory and punitive damages. *Id*. The respondent brokerage later argued on appeal that the panel was not authorized to award punitive damages, and the issue ultimately reached the United States Supreme Court.

The Supreme Court held that the general choice of laws provision in the agreement was not sufficient to limit the availability of punitive damages. *Id*. at 62. Rather, "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators." *Id*. at 63-64. Noting that the FAA was enacted to preempt state laws prohibiting arbitration, the Court reasoned that "when a court interprets [choice of law] provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" *Id*. at 62 (quoting Volt, 489 U.S. at 476).

The Court further intimated that, even in states where punitive damages are prohibited, the parties must specifically state in their agreement that punitive damages are outside the scope of arbitral authority if they wish to avoid imposition of punitive damages. The holding highlights, among other values, the judicial deference to an arbitrator's power to fashion circumstantially appropriate relief which has become a regular feature of modern U.S. jurisprudence. *See also Bonar v. Dean Witter Reynolds, Inc*., 835 F.2d 1378 (11th Cir. 1988) (affirming the ability of arbitrators to award punitive damages in an employment arbitration governed by the FAA and the AAA Rules even though the dispute was also governed by New York law, which prohibits punitive damages in arbitration); Am. *Trust v. United Int'l Ins. Co*., 1991 U.S. Dist. LEXIS 18412 (N.D. Ill., Dec. 31, 1991) (affirming an arbitral award of punitive damages assessed against a reinsurer when the arbitration agreement stated that "arbitrators are relieved from all judicial formalities and may abstain from following the strict rule of law").

Interestingly, at least one court has taken *Mastrobuono* a step further. *See Ex parte Thicklin*, 824 So.2d 723, 730-33 (Ala. 2002). In *Thicklin*, the Alabama Supreme Court ruled that an arbitration agreement specifically prohibiting an award of punitive damages in arbitration could not be enforced because such a provision was "unconscionable." In other words, an arbitrator had the power to award punitive damages, even though the parties' own arbitration agreement — from which the arbitrators derived their appointment and their authority — evinced their joint intention to bar that form of recovery. *Id*. The impetus for this extreme ruling was a fact pattern involving "gross, oppressive, or malicious fraudulent acts committed intentionally." *Id*. at 732. The court reasoned that "[i]f parties to an arbitration agreement waive an arbitrator's ability to award punitive damages, the door will open wide to rampant fraudulent conduct with few, if any, legal repercussions." *Id*. at 733. The court struck the provision barring punitive damages from the arbitration agreement, but otherwise upheld the agreement and compelled arbitration. *Id*. at 734.

Taken together, the *Mastrobuono* and *Thicklin* decisions, plus the RUAA — which now expressly authorizes punitive damages — demonstrate the growing acceptance of a panel's power to award punitive damages. Many industry panels, of course, remain reluctant to award punitive damages absent an unequivocal demonstration of knowing and truly egregious conduct. If, however, arbitrators specify in their award a colorable basis in law and fact for a punitive damage award, it will likely be upheld by the courts. This kind of specification of an award's underpinnings, of course, comes close to a "reasoned award," which parties may elect to avoid for other reasons.

(c) Commercial Rules

Even absent statutory guidance, some courts have confirmed arbitrators' authority to award punitive damages in arbitrations governed by commercial rules, provided that the parties' contract does not specifically proscribe this form of relief. For example, notwithstanding the silence of Wisconsin law on the subject of a panel's authority to award punitive damages, a Wisconsin court nonetheless affirmed a punitive damages

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The Court further intimated that, even in states where punitive damages are prohibited, the parties must specifically state in their agreement that punitive damages are outside the scope of arbitral authority if they wish to avoid imposition of punitive damages.

The statutory authorities are mixed. The FAA (again) fails to supply any independent authorization for an award of attorney's fees. Likewise, the UAA permits an award of attorney's fees only upon agreement of the parties.

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award in an arbitration governed by the AAA Rules. *See Winkelman v. Kraft Foods, Inc.*, 693 N.W.2d 756, 758 (Wis. Ct. App. 2005).[10]

In *Winkelman*, the court held that "an arbitrator may award punitive damages if permitted to do so under the rules adopted by the parties, so long as the award is not otherwise proscribed by the parties' agreement." *Id.* at 765. It is worth observing that the punitive damages awarded in *Winkelman* were not statutorily mandated; instead, they were fabricated by the panel to "fill in the interstices in the existing relevant law." *Id.* at 764 (citations omitted). The court added that punitive damages promote good conduct in commercial dealings, and that punitive damages cannot possibly be in violation of any law, since there is no such proscription against them in Wisconsin. *Id.* at 764.

The ARIAS guidelines are silent on this topic. Nevertheless, given the preponderance of state and federal authority upholding punitive damage awards by arbitrators, such awards are likely to be upheld, as long as they are reasonable and do not conflict with the remedies or other principles adopted by the parties.

3. Attorney's Fees

Rising counsel fees and more complex and protracted arbitration proceedings have intensified the efforts of prevailing parties to recoup legal fees expended in arbitration. A panel's authority to award attorney's fees, however, is generally more limited than its power to award multiple and punitive damages. According to the weight of authority, counsel fees are available in arbitration when the parties' contract so specifies, or when there is a statutory basis (such as a civil rights violation or a finding of bad faith) that mandates fee-shifting. There is nothing surprising about these limitations, which reflect U.S. reinsurance arbitration practice and which are consistent with the so-called "American Rule" — absent special legislation or a contract that provides otherwise, each party must pay its own counsel fees. *See, e.g., Rosati v. Bekhor*, 167 F. Supp.2d 1340, 1347 (M.D. Fla. 2001).

But, where arbitrators can ground their award in an exception to the American Rule, courts have concluded that arbitrators do not exceed their powers in awarding attorney's fees. *See Marshall & Co. v. Duke*, 941 F. Supp. 1207 (N.D. Ga. 1995), aff'd, 114 F.3d 188 (1997). In *Marshall*, the losing party sought to vacate an arbitration award that included over $600,000 in attorney's fees, awarded after plaintiffs established that the defendants' contentions were frivolous and that they had conducted the underlying litigation in bad faith and for improper purposes. *See id.* at 1214. The federal trial court found that the arbitrators did not exceed their powers in awarding fees and confirmed the award. *Id.* at 1215; *see also* 9 U.S.C. at §10. In reaching its conclusion, the court noted both that the parties had agreed to submit the fee issue to the panel, and that the "bad faith exception to the American Rule" extends to arbitration. *Id.* at 1213. *See also Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991) ("In light of the broad power of arbitrators to fashion appropriate remedies and the accepted 'bad faith conduct' exception to the American Rule [of paying one's own fees], we hold that it was within the power of the arbitration panel in this case to award attorneys' fees").

The statutory authorities are mixed. The FAA (again) fails to supply any independent authorization for an award of attorney's fees. Likewise, the UAA permits an award of attorney's fees only upon agreement of the parties. *See* UAA at §10. Courts in UAA jurisdictions have nonetheless concluded that a fee award may fall within a panel's powers if there is a statutory or common law basis for it. *See LaRoche v. Flynn*, 771 N.E.2d 792 (Mass. App. Ct. 2002) (attorney's fees are permitted if allowed under a statutory claim submitted to arbitration); *Kolar v. Arlington Toyota, Inc.* 675 N.E.2d 963, 966 (Ill. App. Ct. 1996), *aff'd*, 688 N.E.2d 653 (Ill. 1997) (because a panel has power to dispose of all requests for relief, it had the power to award attorney's fees). In *Drywall*, the Massachusetts Supreme Judicial Court held that an arbitrator may award attorney's fees — despite the lack of a fee-shifting agreement between the parties and the presence of a general statutory prohibition against awarding attorney's fees in arbitration under M.G.L. Ch. 251, §10 — because claims under the Massachusetts consumer protection statute (M.G.L. Ch. 93A) "override[] the general unavailability of Attorney fees."[11] *Drywall Systems, supra*, at 482. At least a few other courts have reached similar conclusions. *E.g., David v. Abergel*, 54 Cal. Rptr.2d 443, 445 (Cal. Ct. App. 1996) (confirming an award including attorney's fees, because the award was based on a California rule of civil procedure, which

authorized awards of attorney's fees for bad faith or frivolous claims); *Todd Shipyards*, 943 F.2d 1056, 1064 (arbitrator could award attorney's fees under the "bad faith" exception to the American Rule).

Other states have acknowledged but circumnavigated the American Rule by prohibiting an award of attorney's fees altogether, unless the relevant arbitration agreement provides otherwise. *See* Md. Code Ann. Cts. & Jud. Proc. §3-221(b) (2002) ("Unless the arbitration agreement provides otherwise, the award may not include counsel fees."); *see also UBS Warburg, LLC v. Auerbach, Pollak & Richardson, Inc.*, No. 119163-00, 2001 N.Y. Misc. LEXIS 1324, *7-8 (Sup. Ct. Oct. 2, 2001) ("Absent any basis for the award in the parties' agreement or by statute, the award of attorneys' fees exceeded the authority of the arbitrators").

In one of several areas where the RUAA attempts to address the realities of modern arbitration with greater precision, it expressly adopts the statutory and contractual exceptions to the general rule against counsel fee-shifting: "An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." RUAA at §21(b).[12]

Leaving aside the various written repositories of arbitral authority, the parties and the panel may (on their own) seek to leverage one of the traditional benefits of arbitration: self-help. If both parties request a specific form of relief, the panel is likely to consider granting it — even where it is not expressly authorized by the contract at issue — unless its imposition would violate applicable law. A joint request for an award of attorney's fees, for example, may reflect the parties' intent where the contract is silent or ambiguous on the issue. In the alternative, the parties may simply wish to confer broader authority on the panel during an arbitration proceeding. In either scenario, a panel may consider itself empowered to award the type of relief requested, even though a court would likely demand some evidence of authority for its actions beyond the mandate of the parties themselves.

Even when a panel has authority to award attorney's fees, the award must be reasonable and devoid of "corruption, fraud, or ... evident partiality." FAA at §10(a). Arbitrators should, among other available precautions, review counsel's bills in order to ensure that their award is economically reasonable. As noted above, however, courts generally defer to an arbitrator's judgment with respect to the components of his or her award. *E.g., Softkey, Inc. v. Useful Software, Inc.*, 756 N.E.2d 631 (Mass. App. Ct. 2001) (arbitrator had not exceeded his powers where attorney's fee award was based on the arbitrator's assessment of the degree to which each party had prevailed in the arbitration and their conduct therein).

B. Interest

It is widely acknowledged that a panel's authority to award damages includes the power to impose both pre- and post-award interest. *See, e.g., InterDigital Communications Corp. v. Nokia Corp.*, 407 F. Supp.2d 522 (S.D.N.Y. 2005) (award of prejudgment interest was necessary to compensate patent holder and did not manifestly disregard New York law); *United States v. Praught Constr. Corp.*, 607 F. Supp. 1309 (D. Mass. 1985) (confirming award of interest to promote policy favoring arbitration). Although not expressly articulated in the FAA, the Act has been interpreted to support interest awards. *E.g., Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 62-63 (3d Cir. 1986) (confirming award made under the FAA, which was interest-bearing from the date of issuance); see also *Holz-Her U.S., Inc. v. Monarch Machinery, Inc.*, No. 3:97CV56-P, 1998 U.S. Dist. LEXIS 15394, at *29 (W.D.N.C. July 24, 1998) ("numerous courts have held that arbitrators have the power to award interest").

The RUAA may also be interpreted to authorize interest awards, even though the issue is not addressed squarely. The RUAA states, in relevant part:

> [A]n arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award ... or for vacating an award.

RUAA at §21(c). By contrast, the most recent version of the AAA Commercial Rules leaves little room for dispute. They expressly authorize awards of interest, permitting

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[A]n arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award ... or for vacating an award.

These principles must, however, be understood in light of the arbitration agreement itself. Since an arbitrator's powers ultimately derive from private agreement, parties can (of course) specifically preclude a panel from awarding interest by prohibiting interest awards in their agreement.

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arbitrators to award "interest at such rate and from such date as the arbitrator(s) may deem appropriate." AAA Commercial Rule 43(d)(i). *See also* ARIAS Practical Guide, Ch. 5.3, Comment C ("the Panel may specify a payment date and a rate of interest if payment is not made by the specified date").

The rationale for permitting interest awards in arbitration is closely linked to the policies supporting enforcement of arbitration agreements and promoting an arbitration process insulated from judicial interference. As one court framed the issue:

> Given 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 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.

United States v. Praught Constr. Corp., 607 F. Supp. at 1309, 1312 (D. Mass. 1985).

These principles must, however, be understood in light of the arbitration agreement itself. Since an arbitrator's powers ultimately derive from private agreement, parties can (of course) specifically preclude a panel from awarding interest by prohibiting interest awards in their agreement. *See, e.g, Holz-Her U.S., Inc. v. Monarch Machinery, Inc.*, 1998 U.S. Dist. LEXIS 15397, at *29 (W.D.N.C. July 24, 1998) (confirming AAA panel's award of interest, because "neither party specifically objected to the award of interest"). If, as is common, the agreement is silent, the existing statutes and rules support interest awards, as long as the rate of interest is reasonable. If an interest award appears to be excessive, it may be subject to vacatur on the ground that the arbitrators exceeded their powers. *See* FAA at §10; UCO *Terminals, Inc. v. Apex Oil Co.*, 583 F. Supp. 1213, 1217 (S.D.N.Y.) (arbitrators' award of interest at an annual rate of 12% was not "irrational"), *aff'd*, 751 F.2d 371 (1984). State statutes prescribing the rate applicable in the relevant jurisdiction(s) are frequently used as a metric for the reasonableness of arbitral interest awards.

The next installment of this article will address the authority of panels to order injunctive relief, exercise subpoena powers, and issue confidentiality orders.▼

1 The views expressed in this article do not necessarily reflect the views of Choate Hall & Stewart LLP or any of its clients.

2 The American Arbitration Association reported 20,711 commercial arbitration filings in 2007, a 46 percent increase over the previous year. *See AAA, National News*, available at http://www.adr.org/sp.asp?id=34719.

3 Although there are certainly many other quasi-judicial acts that could potentially fall within the purview of this article, we have elected to focus on these recurring problems in an effort to stake the bounds of arbitral authority in the areas most germane to modern industry arbitrations.

4 In other words, the framework for analyzing arbitral authority is predicated on judicial deference. In order to vacate an arbitration award, a court must find that the award falls within one of the four categories enumerated in Section 10 of the FAA, or shows a "manifest disregard of the law." *Houdstermaatschappij v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (citing Wilko v. Swan, 346 U.S. 427, 436-37 (1953)). Thus, arbitration awards are almost impregnable to attack, and courts generally affirm them, thereby promoting and sustaining arbitrators' authority to fashion appropriate relief.

5 A state arbitration statute will only be preempted by the FAA to the extent that state law may conflict with the FAA and restrict the rights of parties who have agreed to arbitrate. *Volt*, 489 U.S. at 477-79.

6 According to The National Conference of Commissioners on Uniform State Laws, thirteen states adopted the RUAA between 2000 and 2007 — four others introduced it in 2008. Uniform Law Commissioners, *A Few Facts About the ... Uniform Arbitration Act* (2008), www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp.

7 Some countries, like Bermuda, have adopted the UNCITRAL rules in their entirety. *See* Bermuda International Conciliation and Arbitration Act at §§2, 23 (1993). An arbitration seated in Bermuda is, therefore, governed by the UNCITRAL rules, to the extent that it is not governed by other rules invoked through a choice-of-law provision in the parties' agreement or otherwise.

8 Similarly, "there is doubt whether [the contracting parties] can eliminate the right to ... punitive damages or other exemplary relief" under the RUAA. *See* RUAA at §21, Comment 2 (citing cases).

9 New York has a broad arbitration statute, which is similar in scope to the original UAA. It provides that awards can be vacated when an arbitrator has "exceeded his power." N.Y. C.P.L.R. at §7511(b)(1)(iii).

10 The AAA Rules do not expressly grant arbitrators the authority to award punitive damages. Instead, they give an arbitrator authority to issue "any remedy or relief" he or she deems appropriate. See AAA Commercial Arbitration Rule 43.

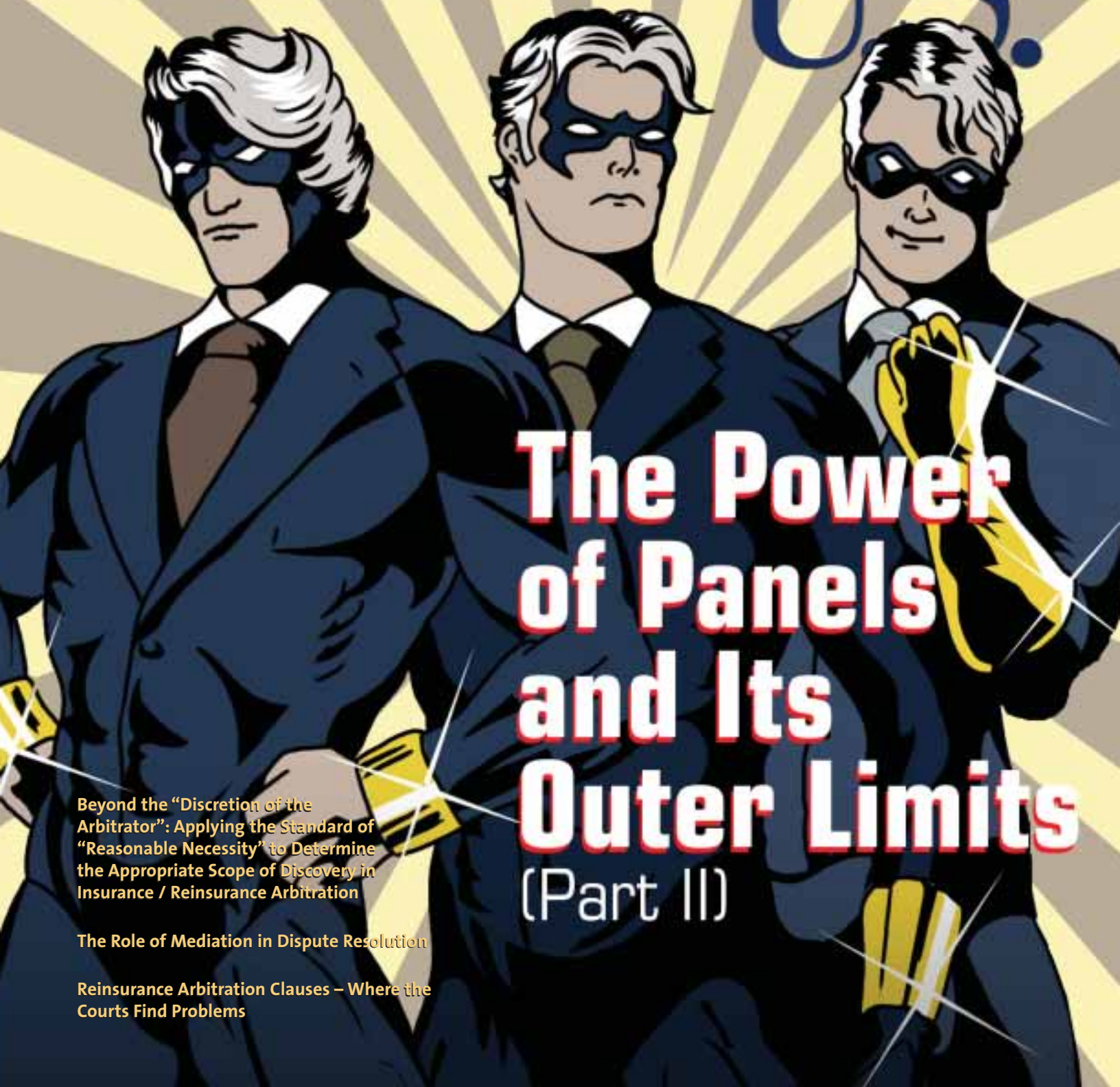
11 Chapter 93A is intended to address "unfair or deceptive act[s] or practice[s]."

12 In addition to bad faith claims, certain statutes such as those targeting employment discrimination, civil rights, and antitrust violations permit courts to order attorney's fees in appropriate circumstances.

VOLUME 16 NUMBER 1

ARIAS U.S. QUARTERLY

FIRST QUARTER 2009



The Power of Panels and Its Outer Limits (Part II)

Beyond the "Discretion of the Arbitrator": Applying the Standard of "Reasonable Necessity" to Determine the Appropriate Scope of Discovery in Insurance / Reinsurance Arbitration

The Role of Mediation in Dispute Resolution

Reinsurance Arbitration Clauses – Where the Courts Find Problems

feature

An Elephant in the (Arbitration) Room — The Power of Panels and Its Outer Limits (Part II)

David A. Attisani
Jennifer A. Brennan

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This installment ...analyzes the practical challenges faced by arbitrators who exercise those powers.

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In Part I of this article, published in the last edition of *ARIAS Quarterly*, we endeavored to examine the outer limits of arbitrators' authority to perform certain traditionally judicial acts in the context of an industry arbitration. The first installment described the principal sources of arbitral authority in the United States and abroad — the Federal Arbitration Act ("FAA"), state law (the Uniform Arbitration Act ("UAA") or Revised UAA ("RUAA")), international law (the "UNCITRAL rules"), and various commercial rules, including those promulgated by the American Arbitration Association ("AAA Rules") and ARIAS (the "ARIAS Practical Guide") — and whether these principles confer on arbitrators the power to award multiple damages. This installment advances the analysis by examining the extent of an arbitrator's power to order injunctive relief, exercise subpoena powers, and issue confidentiality orders, and it analyzes the practical challenges faced by arbitrators who exercise those powers.

I. FIVE (QUASI-) JUDICIAL FUNCTIONS

A. Interim Relief/Pre-Hearing Security

An arbitrator's authority to grant injunctive relief remains an unsettled issue, which the courts continue to address on a case-by-case basis. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (if permitted under the terms of the parties' arbitration agreement, an arbitrator may order injunctive relief).[1] In the reinsurance context, when the financial condition of one party is precarious or unknown, relief is generally requested in the form of a motion seeking pre-hearing security. In these financially troubled times, such requests have begun to proliferate based — not only on the respondent's condition, but also — on perceptions of vulnerability associated with their business partners and the market(s) in which they operate. The scope of a panel's authority to issue security awards must be defined, so that parties know whether a court will likely enforce them. This is particularly true when a party seeks to attach its adversary's assets. This section generally describes the sources of an arbitrator's authority to award interim relief — with emphasis on requests for pre-hearing security.

1. Sources of Authority

If a contract expressly authorizes arbitrators to award interim relief, the courts will generally enforce the award. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("courts are bound to interpret contracts in accordance with the expressed intentions of the parties"). If the relevant contract is silent with respect to interim relief, however, the panel may look elsewhere for guidance.

Although the FAA and UAA are silent on the issue, the RUAA expressly states that an "arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary ... to promote the fair and expeditious resolution of the controversy, to the same extent and under the same condition as if the controversy were the subject of a civil action." *See* Section 8(b). There is, however, no express reference to "security motions."

Article 26 of the UNCITRAL rules also provides for broad interim relief, which expressly includes security orders. It says, in pertinent part:

> INTERIM MEASURES OF PROTECTION
>
> (1) At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the

conservation of the goods forming the subject-matter in dispute, such as *ordering their deposit* with a third person or the sale of perishable goods.

(2) Such interim measures may be established in the form of an *interim award*. The arbitral tribunal shall be entitled to require security for the costs of such measures.

(3) A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Id. (Emphasis supplied).

Interim relief is also expressly authorized by a few of the private commercial codes. For example, the ARIAS Practical Guide states, in Chapter 4.4, that "[t]he Panel has the authority to enter interim awards in appropriate cases." The ARIAS Guidelines also contain a sample form Pre-Hearing Security Order, and they note that security orders are commonly utilized in appropriate cases. The AAA Commercial Arbitration Rules arm panel members with even broader authority:

(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.

Id. at R-34 (emphasis supplied). The broad language of the AAA Rules articulates the role of interim measures in maintaining the status quo, and it also provides specific examples of authorized forms of relief. The AAA Rules add that an "arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." R-43(a).

Finally, procedural guidelines recommended by industry professionals expressly authorize panel members to award interim relief, concluding that the decision to do so is "almost

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To the Editor...

Reinsurance arbitrators are generally interested in the location of an arbitration proceeding only in the context of making travel plans or deciding which jurisdiction's law will apply. For the lawyers involved, however, the issues are a little more complex, including the issue of whether or not he or she is engaging in the unlicensed practice of law. While most jurisdictions do not consider the participation in an arbitration proceeding in a state where the lawyer is not admitted to be the unlicensed practice of law, there are some exceptions.

The Committee on Arbitration of the Association of the Bar of the City of New York prepared an excellent paper recently that has been published in the Bar Association's publication, The Record, entitled "Unauthorized Practice of Law and the Representation of Parties in Arbitrations in New York by Lawyers Not Licensed to Practice in New York." Although focused on New York, it includes an excellent state-by-state summary of the law in each jurisdiction, which might be of significant interest to the lawyer members of ARIAS. The article can be accessed from the Bar Association's web site (2008 Issue 3, at p. 700) at: http://www.nycbar.org/Publications/THERECORD.htm.

Sincerely,
Peter H. Bickford
New York

Letters to the Editor may be sent to T. Richard Kennedy at trk@trichardkennedy.com

As a general matter, and within reason, an arbitration panel may establish the scope of discovery in a reinsurance arbitration, subject to any agreement between the parties. In the absence of statutory authority, however, neither the parties nor the arbitrators control the flow of information from third parties.

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exclusively within the discretion of the panel of arbitrators." *See* RAA Procedures at §8.1 ("A Panel may issue orders for interim relief, including pre-award security.").

2. Pre-Judgment Security and The Courts

Given the silence of the FAA and UAA — and the failure of many jurisdictions to adopt the RUAA — the question whether a panel has authority to grant injunctive relief in arbitrations not governed by commercial rules (absent express authorization from the parties' arbitration agreement) remains one for the courts. The current weight of judicial authority — and industry practice — supports an arbitrator's discretion to award equitable relief, including pre-hearing security orders.

In general, this broad discretion to preserve the status quo is rooted in a pragmatic recognition of the parties' limited ability to enumerate every possible problem (and the related undertakings) a panel may need to address in the future. *E.g., Yasuda Fire & Marine Ins. Co. v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994). The arbitration clauses found in older reinsurance contracts often specify without elaboration, for example, that the arbitrators are "free from all judicial formalities." Faced with this kind of omnibus honorable engagement provision, a number of courts have construed it as a talisman meaning "inherent authority." As one court said:

> Courts in this Circuit have firmly established the principle that arbitrators operating pursuant to [honorable engagement clauses] have the authority to order interim relief in order to prevent their final award from becoming meaningless.

British Ins. Co. of Cayman v. Water Street Ins. Co., 93 F. Supp.2d 506, 516 (S.D.N.Y. 2000) (citations omitted); *see also Forum Ins. Co. v. First Horizon Ins. Co.*, 1989 WL 65041, at *3 (N.D. Ill. June 8, 1989) (panel had "inherent power, aside from any treaty, to order ... security"). More broadly, the Seventh Circuit Court of Appeals has explained the need for flexible interpretation of a panel's inherent powers:

> [W]e would be remiss if we did not emphasize how important a wide range of remedies is to successful arbitration. Although parties to arbitration agreements may not always articulate specific remedies, that does not mean remedies are not available. If an enumeration of remedies were necessary, in many "cases the arbitrator would be powerless to impose any remedy, and that would not be correct. Since the arbitrator 'derives all his powers from the agreement, the agreement must implicitly grant him remedial powers when there is no grant.'"

Yasuda, 37 F.3d at 351 (citations omitted).[2] In other words, if arbitrators are to be charged with stewardship over this form of adjudicative process, then the courts will not deprive them of the tools needed to run it and to deliver meaningful remedies, even if those powers need to be implied in the parties' agreement.

3. The Unauthorized Insurers' Process Act

Although the import of state Unauthorized Insurers Process Acts (the "UIPA") on the arbitration process is debatable, parties in arbitration have argued from time to time that the UIPA bears, in certain circumstances, on a panel's authority to issue security. The UIPA is a model statute adopted, in varying forms, by all fifty states.[3] It provides, among other things, that pre-appearance security is required from unauthorized insurers before they may file a pleading in court. A common iteration of that restriction provides:

> Before any unauthorized foreign or alien insurer *files* any pleading in any proceeding against it, it shall either: (A) deposit with the *clerk of the court* in which the proceeding is pending, cash or securities ... sufficient to secure payment of any final *judgment* which may be rendered in the proceeding....

N.Y. Ins. Law at §1213(c) (emphasis supplied); *see also*, e.g., Del. Code Ann. tit. 18 at §2107(a); Me. Rev. Stat. Ann tit. 24-A at §2107(1); Mass. Gen. Laws Ch. 175B at §3(a). In some states, reinsurers are exempted from the security requirement, if they "designat[e] the commissioner of insurance or his successor in office [as the reinsurer's] true and lawful attorney upon whom may be served all lawful process in any action, suit or proceeding instituted." *See, e.g.*, Del. Code Ann. tit. 18 at §2107; Me.

Rev. Stat. Ann tit. 24 at §2106; Mass. Gen. Laws Ch. 175B at §3A.

There is an ongoing debate over the applicability of these statutes, if any, to industry arbitration. On one hand, the statutes specifically point to judicial proceedings — as opposed to arbitrations — in their reference to a "filing" with the "clerk of the court" and by noting that "the court" may dispense with security orders in certain circumstances. Others argue, however, that the statutes may be applied, if only by analogy, to the arbitration context, because state legislatures clearly recognized — when they adopted the UIPA — that pre-hearing security was essential to protect their citizens in disputes involving foreign insurers. *See* N.Y. Ins. Law at §1213(a) ("The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state ....").[4]

At least one court faced with this issue has held that the New York UIPA did not undermine or otherwise affect an arbitration panel's authority to order pre-award security. *See British Ins. Co. of Cayman v. Water Street Ins. Co.,* 93 F. Supp.2d 506 (S.D.N.Y. 2000); *see also General Reinsurance Corp. v. Underwriting Members of Lloyd's*, No. 103047/02, at 6, 10 (N.Y. Sup. Ct. Oct. 8, 2002) (when an arbitrating party petitioned the court to obtain pre-hearing security under the New York UIPA, the court denied the petition because the UIPA does not necessarily apply to arbitrations, and "the question of whether petitioner is entitled to security should rest with the arbitration panel"). Still, because the language of each state statute varies, each one must be examined individually in order to determine whether it arguably addresses an arbitrator's ability to manage the subject proceeding and to award pre-hearing security.

In short, arbitrators are generally authorized to order injunctive relief. If, however, the proceedings are not governed by a source of authority expressly arrogating this authority to the panel, and the parties' arbitration agreement is silent on the subject of injunctive relief, a panel's authority to award injunctive relief may be (and, it sometimes is) subject to dispute.

B. Subpoena Power

As a general matter, and within reason, an arbitration panel may establish the scope of discovery in a reinsurance arbitration, subject to any agreement between the parties. In the absence of statutory authority, however, neither the parties nor the arbitrators control the flow of information from third parties. *See Matter of the Arbitration between Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995) (non-parties "never bargained for or voluntarily agreed to participate in an arbitration"). Because relevant information is often in the possession of non-parties to a reinsurance arbitration — including brokers, MGA's, and other participants in the disputed reinsurance program — the ability of a panel to issue deposition or document subpoenas may be critical to its final disposition.

Arbitral authority to subpoena non-parties must be found in sources extrinsic to the contract that launched the arbitration and enabled the arbitrators. *See, e.g., Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004) ("[a]n arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the Federal Arbitration Act"); *National Broadcasting Co., Inc. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) ("If discovery were to be obtained from ... Third Parties ... the authority to compel their participation would have to be found in a source other than the parties' arbitration agreement").[5] Because reinsurance contracts often involve risks and cedents located in different states, most reinsurance contracts are interpreted according to the FAA, absent the parties' selection of a specified state's law. Under the FAA, "arbitrators ... 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." *Id*. at §7 (emphasis supplied). The UAA,[6] RUAA,[7] the UNCITRAL rules,[8] and the AAA Rules[9] each authorize some form of arbitral subpoena power.

The FAA, UAA and RUAA allow panels to compel attendance of non-parties at a hearing, but they do not directly address the scope of a panel's power to order pre-hearing discovery from third parties. Similarly, although AAA Rule 31(d) may be interpreted to authorize pre-hearing discovery from non-parties, if a non-party refuses to comply with the subpoena, the party seeking discovery must enforce the subpoena in court. The federal circuits called upon to consider the issue are split — some permit discovery subpoenas to be issued; some require a showing of "special need"; and, a third group has ruled out arbitral discovery subpoenas altogether. Moreover, there is no consensus as to whether these subpoenas may be used to compel the appearance of deponents or, in the alternative, whether they may be used only to obtain documents.

A recent decision by the Court of Appeals for the Second Circuit, however, may signal "an 'emerging rule' that [an] arbitrator's subpoena authority under FAA § 7 does not include the authority to subpoena nonparties or third parties for pre-hearing discovery." *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, No. 07-1197, 2008 WL 4978550 (2d Cir. Nov. 25, 2008) (citation omitted).

1. Pre-Hearing Discovery Not Allowed

In adopting reasoning previously applied by the Court of Appeals for the Third Circuit, the Life Receivables court took a strict constructionist view of the FAA and staked the outer bounds of permissible, non-party discovery in arbitrations governed by the FAA. *See id.; see also Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). In *Hay Group*, the Third Circuit held that Section 7 of the FAA ("Section 7") did not authorize a panel to order pre-hearing document production from non-parties. *See Hay Group*, 360 F.3d at 407. In reversing the federal trial court's ruling below, the Court in Hay Group held that "Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the

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For these reasons, confidentiality provisions are viewed by some as an essential component to the formula that has made arbitration the principal means of resolving formal reinsurance disputes. In fact, some practitioners argue that confidentiality should be considered an implied term of reinsurance agreements (especially older contracts), even if it is not expressly set forth in the parties' contract.

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documents at that time." *Id*. at 407; *see also Integrity Ins. Co., v. Am. Centennial Ins. Co*., 885 F. Supp. 69, 72-73 (S.D.N.Y. 1995) (arbitrators were free to order pre-hearing document discovery, but had no power to issue deposition subpoenas, because the burden was too high for non-parties who "never bargained for or voluntarily agreed to participate in the arbitration").

Applying the same reasoning, the *Life Receivables* court strictly construed the language of the FAA, noting that "[w]hen a statute's language is clear, our only role is to enforce that language according to its terms." *Life Receivables*, 2008 WL 4978550, at *5 (citations omitted). Because Section 7 only permits document discovery from non-parties if they appear before members of the panel, the court concluded that the FAA does not authorize arbitrators to compel pre-hearing document discovery from non-parties. As a result, if an arbitrator were to issue a third-party subpoena, the subpoena likely would not be enforced by a court in the Second Circuit.

Although arbitrators may be limited in their ability to compel discovery from non-parties, they are not powerless. In fact, the *Life Receivables* court expressly noted that Section 7 of the FAA is not restricted to merits hearings — a panel could order a witness to appear at a preliminary hearing with the requested documents in hand. *See id*. at *6.[10] Of course, such orders sometimes induce non-party witnesses to produce their documents, in order to avoid the inconvenience of appearing in person. *Id*. At a minimum, the limitations of Section 7 should cause both parties and arbitrators to consider more closely the scope of discovery requests and their relevance to the issues in dispute. *See id*. In this respect, the FAA provides some measure of control on the elephantine expansion of arbitration proceedings.

2. Pre-Hearing Discovery Permitted

In contrast to these more recent decisions, the Sixth Circuit Court of Appeals ruled, in 1999, that a panel could compel not only a third party's attendance at an evidentiary hearing, but also pre-hearing production of documents from non-parties. *Am. Fed'n of Television and Radio Artists v. TJBK TV*, 164 F.3d 1004, 1009 (6th Cir. 1999). The court determined that the FAA's authorization of document subpoenas for production at an evidentiary hearing "implicitly include[s] the authority to compel the production of documents for inspection by a party prior to the hearing." A similar rationale has been employed by courts with respect to an arbitrator's authority to issue deposition subpoenas. *See Amgen Inc. v. Kidney Ctr. of Delaware County, Ltd*., 879 F. Supp. 878 (N.D. Ill. 1995). Like the court in *American Federation*, the *Amgen* court held that the FAA-granted authority to compel testimony at a hearing also included the power to compel testimony prior to an evidentiary hearing.

In 2000, the Eighth Circuit offered a more nuanced approach to the problem of arbitral subpoenas to produce documents. *Security Life Ins. Co. of Am. v. Duncanson & Holt Inc*., 228 F.3d 865, 870-71 (8th Cir. 2000). In *Security Life*, the Court paid special attention to the non-party's involvement in the issues under review. It held that an arbitrator could compel pre-hearing discovery of a non-party who was "not a mere bystander pulled into [a] matter arbitrarily, but is a party to the contract that is the root of the dispute, and is therefore integrally related to the underlying arbitration, [even] if [it is] not an actual party." *Id*. at 871; *see also Meadows Indemnity Co. v. Nutmeg Ins. Co*., 157 F.R.D. 42, 45 (M.D. Tenn. 1994) (pre-hearing discovery of non-parties allowed, because the subpoenaed recipients were "intricately related to the parties involved in the arbitration and [were] not mere third-parties who [had] been pulled into this matter arbitrarily"); *Festus & Helen Stacy Foundation, Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc*., 432 F. Supp.2d 1375, 1379 (N.D. Ga. 2006) (the FAA impliedly permits arbitrators to order pre-hearing discovery from non-parties). Most of these rulings predate the *Hay Group* and *Life Receivables* decisions. As a result, it is an open question whether these courts would rule the same way if the question were presented today.

3. Pre-Hearing Discovery Permitted Based on a Showing of "Special Need"

A middle ground approach forged by the Fourth Circuit, but rejected by the Second Circuit in *Life Receivables*, applies a balancing test — arbitral orders for pre-hearing discovery of a non-party are enforceable, if the requesting party can demonstrate a "special need or hardship." *COMSAT Corp. v. Nat'l Sci. Found*., 190 F.3d 269, 275 (4th Cir. 1999). Although the court declined to define its standard in the

abstract, it did require that, "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable." *Id*. at 276.

The circuit split highlights the judiciary's schizophrenic efforts to mark the outer limits of arbitral powers, or (more specifically) to balance the need to arm arbitrators facing litigation problems with judicial tools, on the one hand, against the bench's pervasive suspicion that these devices are best left in the charge of judges, on the other. Some of the key benefits to arbitration, including efficiency and economy, would ultimately be jeopardized if arbitrators were permitted to arrogate to themselves complete authority to order any subpoena, deposition, or other discovery without selective but meaningful judicial oversight. Furthermore, limitless subpoena power would permit a panel to reach non-parties who never agreed to participate in the relevant arbitration, and who otherwise have the right to place their objections before judges — instead of being subjected to industry "judges" selected by private entities with interests potentially inimical to their own.

More broadly, and for the same reason, arbitral power to order pre-hearing discovery of third parties may both exceed and stand at odds with the source of a panel's authority — a private contract that binds only consenting parties. In light of the mixed messages propagated by the courts, arbitrators must consider and manage the tension between their role in "safeguard[ing] the rights of third parties while insuring that there is sufficient disclosure of information to provide for a full and fair hearing." RUAA at §17, Comment 8 (2000).

C. Imposing Confidentiality

Confidentiality and the technical expertise of industry arbitrators were once considered the hallmarks of "private" arbitration. The benefits of confidentiality are palpable. Sealing the arbitration record may encourage parties to communicate candidly and promote compromise. In addition, confidentiality allows parties to avoid disclosure of their claim handling and payment practices which, in some cases, could invite third parties to seek discovery in an effort to advance their own interests. The veil of confidentiality also arguably prevents honorable arbitration positions — which may, in fact, be driven by the circumstances of a specific case, or by an ongoing business relationship — from being mis-characterized as "corporate positions." And, absent confidentiality requirements, a third party's general knowledge of arbitration proceedings and the positions taken therein could unfairly refract public perception of a company, which could (in turn) inhibit its sale of new business. For these reasons, confidentiality provisions are viewed by some as an essential component to the formula that has made arbitration the principal means of resolving formal reinsurance disputes. In fact, some practitioners argue that confidentiality should be considered an implied term of reinsurance agreements (especially older contracts), even if it is not expressly set forth in the parties' contract.

Most U.S. arbitrations still do remain confidential. In the past half decade, however, some parties and their counsel have selectively withheld their agreement to confidentiality provisions, in an effort to use disclosure as settlement leverage against adversaries who may wish to avoid public scrutiny, including disclosure to business partners (or the reinsurance community, writ large) of the relevant facts or the fact of a dispute itself. Other reasons for eschewing confidentiality may include a party's wish to rely on a favorable result for its precedential effect in later arbitrations against the same party, or as a means to encourage future opponents to resolve the same issue in their favor. Regardless of their motivation, a small but growing number of disputes turn on the parties' incompatible wishes with respect to the confidentiality of a reinsurance arbitration, which is typically governed by an arbitration clause that fails to address the issue.

1. Authority To Issue Confidentiality Orders

If only one party wishes to maintain confidentiality, does a panel have the authority to order it? If so, what is the source of that mandate? Although there is little authority available to answer these questions definitively, industry practice, state statutory regimes, and the parties' express agreement may be (and often are) marshaled in an effort to do so.[11]

The "customary" U.S. practice is, of course, to maintain the confidentiality of a reinsurance arbitration and the information and testimony created during its pendency. Unless parties can show that prior arbitrations under the relevant contracts were not confidential, "confidentiality" is often viewed as an implied contract term, which is implemented through the issuance of a confidentiality order. The historical industry expectation of confidentiality suggests that, if a party wanted its dispute to be public, it would (and, should) have articulated that predilection in its contract. Absent express terms or a course of dealing to the contrary, most panels will likely continue to interpret reinsurance contracts to include confidentiality provisions. Given the factual nature of a custom and practice inquiry, arbitrators may feel empowered to order confidentiality with little risk that their order will be found to "manifestly disregard" existing law, or that they will have exceeded their powers.[12]

If, however, one party successfully challenges a custom and practice finding, confidentiality mores may not survive judicial review, absent some form of statutory authorization. *See, e.g., Nationwide Mut. Ins. Co. v. Randall & Quilter Reins. Co.*, 2007 WL 2326878, at *2 (S.D. Ohio Aug. 10, 2007). In *Randall*, the court declined to enforce a panel's confidentiality order on its own merits. Instead, the order was "simply one factor in the Court's calculus and not outcome-determinative" with respect to its decision whether to maintain, during a confirmation proceeding, the confidentiality of documents originally produced in arbitration. *Id*. at *2

The FAA, the UAA and the UNCITRAL Rules are all silent on the subject of confidentiality. The RUAA authorizes arbitrators to preserve confidentiality, but their discretion is not unfettered: "An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected

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from disclosure *to the extent a court could* if the controversy were the subject of a civil action in this State." *Id*. at §17(e) (emphasis supplied). On its face, the RUAA does not confer omnibus authority to seal an entire proceeding, but it does permit an arbitrator to protect specified information. Of course, the focus on specific items invites argument that any unspecified item was not intended to (and cannot) be protected from disclosure. Because most states have not yet adopted the RUAA, formal authorization to order confidentiality in arbitration is not available, unless the relevant arbitration agreement is governed by a state statute that expressly provides for it.[13]

Commercial arbitration codes, to the extent that they may apply, often include only a placeholder for a confidentiality agreement — a state of affairs which may reflect the uncertainty created by challenges to the industry presumption of confidentiality. The ARIAS Practical Guide advises, for example, that confidentiality "should be memorialized in either an agreement by the parties and the Panel, or an order entered by the Panel, setting forth the terms and scope of the confidentiality." *Id*. at Ch. 3.8 (2004). Although the Practical Guide intimates that confidentiality orders are appropriate, it refrains from expressly authorizing an arbitrator to impose confidentiality without the parties' bilateral consent, and it does not identify the source of any such authority.[14] Similarly, while expressly providing that meetings and hearings of the panel are private, the RAA Procedures state only that parties shall use their "*best efforts* to maintain the confidential nature of the arbitration proceedings and the Award." RAA Procedures at §7.2 (emphasis supplied). The failure of these commercial codes to address squarely a panel's authority to issue confidentiality orders may simply reflect the view of the drafters that confidentiality is an implied term of reinsurance agreements.

2. What Is A Party To Do?

Despite the view of some industry players that reinsurance arbitrations should remain confidential, a party may successfully demonstrate that this putative industry practice does not apply to its modern contracts — a plausible scenario given the number of recent entrants into the reinsurance market. Absent agreement of the parties or a statutory mandate, a panel is arguably not inherently authorized to order confidentiality. As one court said: "There is no confidentiality privilege precluding disclosure of the [arbitration] material requested." *Galleon Syndicate Corp. v. Pan Atl. Group, Inc*. 223 A.D.2d 510, 511 (1996). A party that wishes to keep its disputes out of the public domain should take care to insert confidentiality provisions in its contracts. If arbitration is brought under a contract that is silent on the issue, the party desiring confidentiality should raise the issue with its opponent in an effort to reach a compromise.

To date, few courts have been called upon to review confidentiality orders issued over one party's objection — those courts which have addressed the issue have focused on protection of a specific cache of documents, as opposed to the confidentiality of the entire proceeding. *E.g*., *Galleon*, 223 A.D.2d at 511. In view of the FAA's celebrated deference to arbitration, and the widely-held understanding that confidentiality is one of the chief benefits traditionally associated with industry arbitration, most courts will be loath to expose the parties' dispute to the public without appropriate safeguards.

3. Post-Award Practice

Even if both parties agree that their arbitration is confidential, disclosures often occur at the close of a case when one party moves to confirm or vacate an arbitration award in court. In these instances, despite the existence of a confidentiality order, some facts concerning the arbitration are likely to become a matter of public record. *See, e.g., Global Reinsurance Corporation-US Branch v. Argonaut Insurance Company*, 2008 WL 1805459 (S.D.N.Y 2008).

In *Global*, the court was called upon to seal a petition to confirm an arbitration award. By necessity, such petitions often contain confidential facts disclosed during the arbitration. After balancing the competing considerations and acknowledging that it was a "close question," the Court concluded that the petition should be sealed. It reasoned:

> Arbitration remains a species of contract and, in the absence of some governing principle of law . . . parties are permitted to keep their private undertakings from the prying eyes of others. The circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, i.e. the arbitration award.... [D]isclosure of the decretal portions of the awards does present the risk that it will impair [a party's] negotiating position with other reinsurers and that such interest outweighs the public's right of access.

Global, 2008 WL 1805459, at *1. *But see Nationwide Mut. Ins. Co. v. Randall & Quilter Reins. Co*., 2007 WL 2326878, at *2 (S.D. Ohio Aug. 10, 2007) (declining to keep arbitration materials under seal where one party voiced no concern regarding injury to its reputation if they became public).

Upon a request for reconsideration by the party seeking disclosure, however, the Court in *Global* found no evidence that disclosure would cause immediate harm to either party. A party's reliance "upon its assessment of the danger of a slippery slope that might impair the exchange of information between parties to a reinsurance agreement" was insufficient to overcome the presumption favoring public access. Despite acknowledging that the federal policy supporting arbitration is promoted by imposing confidentiality, the court in *Global* observed that, "in the ordinary course," a petition to confirm or vacate an award will not publicize all testimony and documentary evidence that was placed before a panel. *Global*, 2008 WL 1805459, at *1.

Confirmation and vacation proceedings, however, often deviate from the "ordinary course" adumbrated by the court. The extended arbitration proceedings, and subsequent litigation, between

Commercial Union and EMLICO offers a glaring example of the limited protections offered by confidentiality agreements, when one party petitions a court for relief and publicizes the facts of its arbitration in the process. *See Commercial Union Ins. Co. v. Lines*, 239 F. Supp.2d 351 (S.D.N.Y. 2002), *vacated*, *Commercial Union Ins. Co. v. Lines*, 378 F.3d 204 (2d Cir. 2004).[15] In that case, the confidentiality agreement specified that no party was permitted to disclose confidential information to third parties. The panel also issued an order admonishing that "the parties are not to make any further public statements as respects this arbitration other than its existence." *Id*. at 357, n.7. The parties could, however, use the documents they exchanged, briefs, memoranda, depositions and transcripts of legal proceedings involving the confirmation, modification or vacation of any award or ruling. *Id*. at 354, n.4. As in many other cases, the petition and subsequent court decisions described in detail many of the underlying disputed facts, the impetus for the arbitration itself, and the award. *See e.g. id*. at 354-55.

In sum, even when an arbitration panel issues a confidentiality order, a motion to confirm or vacate its award may also vacate the panel's confidentiality ruling. In general, the judicial trend is to refuse to seal publicly filed documents. We are now at the confluence of this judicial proclivity and the increased appetite of parties to bring their arbitration proceedings into the courtroom for tactical and other purposes — a crossroads that may irrevocably erode one of the benefits traditionally associated with industry arbitration.

II. CONCLUSION

Industry arbitration has historically provided — and, in the view of many experienced practitioners, continues to provide — an attractive alternative to litigation in many cases. Among the principal benefits participants have enjoyed are the (relatively) free exchange of information; in a confidential forum; under the stewardship of industry professionals, who are empowered to conform suitable relief to the contours of unique and evolving problems. As arbitrations grow in number and the disputed stakes continue to rise, however, these benefits are often mitigated by the quasi-judicial process required to produce an award or other definitive result.

Arbitrators have been invited more frequently to undertake acts of a judicial character, in order to preserve and adapt the benefits of arbitration to this more challenging climate of high-stakes disputes. At the same time, they have been called upon to confront the elephant (or, perhaps, the herd of elephants) in the room — the question whether, in each case, the urged or contemplated, quasi-judicial action is not only warranted but also authorized by the parties' agreement or by law. In the past, arbitrators were (believed to be) entrusted with broad authority to decide all of the issues before them. The current trend reflecting more frequent resort to judicial review, however, enhances the risk that arbitration rulings issued without express authority will be vacated.

Some traditionally "judicial" acts, including awards of multiple and punitive damages, imposition of interest, and certain kinds of subpoenas are legally authorized undertakings, as long as they are not expressly barred by the applicable arbitration agreement or by state law. Other familiar forms of relief, such as awards of attorney's fees, are not tools commonly available to arbitration panels, despite their mandate to tailor awards to the circumstances they face. An arbitrator's power to provide injunctive relief and to impose confidentiality strictures on arbitration proceedings remain unsettled issues, lurking at the margins of authorized action, despite the profound need for clarity.

An unfortunate, but perhaps essential, outgrowth of the search for authorization is the risk that panels may (if only temporarily) be divested of certain powers. Arbitration clauses, of course, often contain disengagement provisions that free reinsurance arbitrators from following strict rules of law. In those circumstances, arbitrators enjoy wider (albeit, not absolute) latitude but, when the parties' contract specifies only that the law of a particular jurisdiction will govern, arbitrators must exercise caution with respect to their growing responsibilities. They must, for example, be circumspect when it comes to requested or seemingly required extensions of their powers beyond the grant of authority inherent in a private agreement to arbitrate. Some courts and commentators have, as noted above, previously agreed that a panel's authority to act is limited when the rights of non-parties are implicated by an arbitrator's order. Parties must, for their part, also be aware of the practical and legal limits of a

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Among the principal benefits participants have enjoyed are the (relatively) free exchange of information; in a confidential forum; under the stewardship of industry professionals, who are empowered to conform suitable relief to the contours of unique and evolving problems.

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panel's authority, and it behooves the industry — including trade groups such as ARIAS — to address by rule recurring issues of authority which require significant time and expense to decide time and again.

More broadly, with expanded arbitrator power comes further overlap between arbitration and litigation. As the two processes seemingly grow together, and arbitrations become laden with judicial procedures, arbitration is bound to lose some of its efficiency and, therefore, more than a little of its luster, unless practitioners and trade groups succeed in restoring traditional benefits of arbitration by appropriately calibrating the powers of arbitrators to the goals of parties to industry arbitration.▼

1 Black's Law Dictionary defines "equitable remedy" as: "A remedy, usu. a nonmonetary one, such as an injunction or specific performance, obtained when legal remedies, usu. monetary damages, cannot adequately redress the injury." *Id*. at 609 (3d pocket ed. 2006). For purposes of this article, the authors consider injunctive relief, including pre-award security orders, to be a species of equitable relief.

2 Few cases reject an arbitrator's power to grant pre-hearing security. *But see Recyclers Ins. Group, Ltd. v. Ins. Co. of North America*, No. 91-503, 1992 WL 150662 (E.D. Pa. June 15, 1992). In *Recyclers*, a federal trial court vacated an arbitration panel's order requiring a reinsurer to place $1 million in escrow as security for a possible award against it, finding that the panel had exceeded its authority. The Recyclers court observed that: "arbitrators cannot require a party to post collateral to secure potential liabilities where the parties do not provide the arbitrators with that authority in the agreement to arbitrate." *Id*. at *4.
Apparently recognizing flaws in this reasoning, the same court confirmed a security order just four years later. *See Meadows Indem. Co. v. Arkwright Mut. Ins. Co*., No. 88-0600, 1996 WL 557513, at *2 (E.D. Pa. Sept. 30, 1996). In *Meadows*, the panel ordered a party to post pre-hearing security in the form of a $1.5 million letter of credit. *Id*. at *1. Although the parties had not expressly authorized the arbitrators to impose pre-hearing security, the agreement authorized letters of credit in other contexts. *Id*. The court examined the arbitral award deferentially, expressly rejected the Recyclers holding, and concluded that the parties had "empowered the arbitrators to award relief in any reasonable form at any stage in the proceeding." *Id*. at *4. Ultimately, the court concluded: "the more appropriate rule is that an arbitration award ordering a party to post security before the panel will consider the merits may rationally derive such an award from a contract that does not expressly provide that it may impose such an award." *Id*. at *7. This is the rule followed by most U.S. courts.

3 The UIPA was promulgated by the National Association of Insurance Commissioners in 1949.

4 At least one state, Illinois, has explicitly included arbitrations in its process statute. *See* 215 Ill. Comp. Stat. 5/123(5) ("Before any unauthorized foreign or alien company shall file or cause to be filed any pleading in any action or proceeding, including any arbitration ..."). Omission of this clause from other state statutes may suggest that they did not intend to extend the statute to arbitrations. Of course, as the balance of this article makes clear, the same omission could simply represent another example of state legislatures failing to account for the complexities of modern arbitration.

5 When a non-party resists an arbitrator's subpoena, the ability to enforce it resides with the courts. As a result, venue and jurisdiction may become significant considerations in the context of establishing the parameters of discovery.

6 "The arbitrators may issue (or cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths." UAA at §7(a) (1955).

7 "An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths." RUAA at §17(a) (2000).

8 "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine." UNCITRAL Arbitration Rules Art. at 24 (1976).

9 "An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." AAA at R-31(d) (2007).

10 This tactic was previously approved by the Second Circuit, who ruled that it was permissible to subpoena deponents to "appear and testify in an arbitration proceeding," which was scheduled to take place ten months before the merits hearing. *See Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005). The Second Circuit allowed the subpoenas to stand, concluding that the Act was intended to ensure only that arbitrators be present when a non-party is called to provide information.

11 Some commonwealth countries have advanced national standards either authorizing or prohibiting confidentiality orders in arbitration. For example, Section 10 of the Bermuda International Conciliation and Arbitration Act of 1993 expressly states that arbitration proceedings are available as evidence in any other arbitration or litigation. Section 46 further provides that a court may not make public any part of an arbitration proceeding that a party "reasonably wishes to remain confidential." *Id*. at §46(b). English courts have held that there is a legal right and duty of confidentiality in arbitration proceedings, although there is a limited exception for awards and the reasoning behind an award, which are sometimes "subject to a qualified right of disclosure." *See* Graydon S. Staring, *Law of Reinsurance* §22:6[2] (2008). Australian courts, on the other hand, have found that arbitrators lack the authority to issue orders imposing confidentiality. See, e.g., Charles S. Baldwin, IV, Protecting Confidential And Proprietary Commercial Information In International Arbitration, 31 Tex. Int'l L.J. 451, 482 (1996) (citing Esso Austl. Resources Ltd. v. Plowman (1995) 128 A.L.R. 391, 402, 404 (Austl.)).

12 In practice, it would likely be difficult for a party to establish that a panel of experienced industry professionals "exceeded its powers" by finding that a custom and practice of confidentiality existed in this industry. See FAA, 9 U.S.C. §10(a)(4).

13 A few states have adopted a detailed approach to orders of confidentiality in arbitration. Texas, for example, extends broad confidentiality protection to arbitrations. See Tex. Civ. P. & Rem. Code at §154.073(a)-(b) (West 2008). The Texas statute expressly protects communications made by participants to an arbitration, provides that they may not be used as evidence against the issuer, and states that any record made at an arbitration is confidential. Id. Under Missouri law, all information related to arbitration proceedings is considered confidential, including communications by any participant, arbitrator, or other person present at an arbitration. See Mo. Rev. Stat. at §435.014 (West 2008); Group Health Plan, Inc. v. BJC Health Sys., Inc., 30 S.W.3d 198, 203 (Mo. Ct. App. 2000). In Missouri, protective orders signed by arbitrators (for example) receive the same confidentiality protections as arbitral awards. Id. at 204.

14 The AAA Rules do not directly address the question whether arbitrators have the power to impose confidentiality. Instead they state only that "[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." AAA Commercial Rule 23.

15 The details of the relevant arbitration proceeding were again set forth in a later decision of the same court. See Commercial Union Ins. Co. v. Lines, 2008 WL 2234634 (S.D.N.Y. May 30, 2008).