

## GRANT OF ATTORNEYS' FEES BY AN ARBITRATION PANEL:

### IS A DEMAND FOR SUCH FEES NECESSARY?<sup>1</sup>

by

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#### **I. Introduction**

Considerable attention has been devoted lately to the match between the issues submitted to reinsurance arbitration panels and the remedies the panel provides. The concern articulated most often is that the panel lacks the authority to go beyond the tasks assigned it and cannot re-write the contract(s) or dispense the panel's own brand of justice. Due process concerns may also be in the background *i.e.* the ability of the parties to argue for and against certain remedies.

One, but only one, context in which this arises is that of attorneys' fees. Absent a flat prohibition in the arbitration clause against a panel granting attorneys' fees, what authority does a panel have or must be given to grant such fees? The purpose of this article is to examine selected case law demonstrating a significant split in authority on point.

#### **II. Cases Holding That There Must Be a Specific Demand for Attorneys' Fees**

This line of cases is exemplified by the recent decision of *White Springs Agricultural Chemicals, Inc. v. Glawson Investments, Corp.*, 660 F.3d 1277 (11<sup>th</sup> Cir. 2011) in which White Springs sought to vacate an award of attorneys' fees against it. The arbitration in question was in two phases with the first phase addressing specified issues (not attorneys' fees) and the second phase all other issues. Once the first phase was complete, Glawson identified attorneys' fees as an issue for the second phase and the panel received briefs and heard argument on point before granting such fees. Under these circumstances, the court rejected White Spring's claim that the issue of attorneys' fees had not been submitted properly to the panel before its ruling on point.

*Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11<sup>th</sup> Cir. 1995) was an appeal of an order affirming the ruling of a securities arbitration panel that each party should pay its own attorneys' fees. The petitioner did not claim attorneys' fees and neither party briefed or argued the issue to the arbitration panel. Apparently, there was a state law that might have been a basis for the petitioner to recover attorneys' fees. The court reversed the lower court on its confirmation of the ruling on attorneys' fees finding that

a demand for “costs” and certain ambiguous submissions to the panel did not amount the necessary request for a ruling on attorneys’ fees.

*See also Interchem Asia v. Oceana Petrochemicals AG*, 373 F.Supp. 2d 340 (S.D.N.Y. 2005) which involved a late shipment of petrochemicals. There was a broad arbitration clause in the contract at issue and the parties demanded attorneys’ fees. The arbitrator found for Interchem and ordered that attorneys’ fees be paid by Oceana and its counsel. The court upheld the award of attorneys’ fees against Oceana but declined to confirm the award against Oceana’s counsel individually. Although AAA Commercial Rule 43 allowed the arbitrator to grant remedies that were equitable and within the scope of the agreement, it found it “implausible to construe” this as justifying an award against the attorney.<sup>2</sup> While acknowledging that a court has the power to sanction attorneys personally as part of its “inherent power to police itself,” the court found no such authority for an arbitration panel to act in similar fashion:

[F]inding that the Arbitrator had inherent authority to sanction [the attorney] would directly contradict the principle that an arbitrator’s authority is circumscribed by the agreement of the parties. That principle flows from the basic understanding that arbitration is a consensual arrangement meant to reflect a mutual agreement to resolve disputes outside the courtroom. Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration.<sup>3</sup>

### III. Cases Holding That There Need Not be a Specific Demand for Attorneys’ Fees

Certainly the leading case in this category is *ReliaStar Life Ins. Co. v. EMC National Life Co.*, 564 F.3d 81 (2<sup>nd</sup> Cir. 2009). The arbitration clause in the relevant contract was broad in that it included any dispute with reference to any transaction relating in any way to the treaty. It called for the panel to consider custom and practice in the life or health business. Most significantly, it provided in § 10.3:

Each party shall bear the expense of its own arbitrator . . . and related outside attorneys’ fees, and shall jointly and equally bear with the other party the expenses of the third arbitrator.<sup>4</sup>

At the conclusion of an arbitrated dispute under this contract, the panel awarded the cedent nearly \$4 million in attorneys’ and arbitrators’ fees and the costs on the basis that the panel viewed the conduct of the reinsurer in the arbitration as “lacking in good faith.”<sup>5</sup> The district court declined to confirm the award of attorneys’ fees because it violated § 10.3 of the treaty and thus exceeded the panel’s authority.<sup>6</sup>

On appeal, the court characterized the issue as “whether, in light of the parties’ agreement to arbitrate, the arbitrators were authorized to sanction bad faith conduct by awarding attorney’s fees and arbitrator

fees.”<sup>7</sup> The court acknowledged that a party cannot be required to arbitrate a dispute that it has not agreed to submit to panel and that the authority of the panel depends on the intention of the parties as described in the arbitration clause.<sup>8</sup>

As a baseline for its ruling, the court made a broad, general statement on the power of arbitration panels:

[W]e here clarify that a broad arbitration clause, such as the one in this case, . . . confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that sanction may include an award of attorney’s or arbitrator’s fees.<sup>9</sup>

The court took its direction on the facts of this case from the reason for arbitration as a dispute resolution technique:

Indeed, the underlying purpose of arbitration *i.e.* efficient and swift resolution of disputes without protracted litigation, could not be achieved but for good faith arbitration by the parties. Consequently, sanctions, including attorney’s fees, are appropriately viewed as a remedy within an arbitrator’s authority to affect the goals of arbitration.<sup>10</sup>

Given the broad scope of the arbitration clause, the court reasoned that §10.3 was merely a statement of the American Rule on attorney’s fees that is to apply to arbitrations conducted in good faith. Absent a more specific contractual limitation on the power of the panel to grant remedies in a bad faith context, the court declined to apply this section to such a context:

Precisely because the agreement in this case conferred broad authority on the arbitrators, because inherent in such authority is the power to sanction bad faith conduct, and because bad faith is a recognized exception to the American Rule for attorney’s fees, we conclude that the simple statement of that Rule in section 10.3 is insufficient to by itself to swallow the exception.<sup>11</sup>

*ReliaStar* was followed by two subsequent cases in the southern district of New York. *In re Arbitration between General Security National Ins. Co. and Aequipcap Program Administrators*, 785 F. Supp. 2<sup>nd</sup> 411 (S.D.N.Y. 2011); *National Union Ins. Co. of Pittsburgh v. Odyssey America Reins. Corp.*, 2009 U.S. Dist. Lexis 108318 (S.D.N.Y.). However, there are a number of decisions which pre-date *ReliaStar*, some in other circuits, which use somewhat similar reasoning.

*Marshall & Co., Inc. v. Duke*, 114 F.3d 188 (11<sup>th</sup> Cir. 1997) *cert. denied* 522 U.S. 1112 (1998) involved a securities dealer arbitration. The panel denied the claims of the securities investors and awarded the securities brokers substantial attorneys’ fees and costs. The Uniform Submission Agreement used for securities disputes did not address such fees and costs.<sup>12</sup> On a motion to confirm, the district court held that the panel was within its authority to award these costs and fees on the bases: (a) the investors agreed to the panel hearing this issue; and (b) “[E]very judicial and quasi-judicial body has the right to award attorneys’ fees under the common law bad faith exception to the ‘American Rule.’”<sup>13</sup> The court of

appeals affirmed and as to point (b) ruled: “[T]he arbitrators have the power to award attorneys’ fees pursuant to the ‘bad faith’ exception to the American Rule that each party bears its own attorney’s fees.”<sup>14</sup>

An arbitration concerning ship refitting under the rules of the AAA provided the factual backdrop for *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9<sup>th</sup> Cir. 1991). From the opinion, it is evident that the relevant contract contained a broad arbitration clause but did not specifically address punitive damages or attorneys’ fees. It is not evident from the opinion whether one or both of the parties demanded punitive damages and/or attorneys’ fees. The panel denied the claims of the ship owner and granted the shipyard compensatory damages, punitive damages, attorneys’ fees and costs. The panel’s stated rationale for the punitive damages was that the ship owner was guilty of bad faith, deceptive practices and knowingly false representations. The rationale for attorneys’ fees was bad faith during the course of the arbitration that caused it to be extended unnecessarily. The ship owner argued that the panel acted in excess of its authority under law in granting punitive damages and attorneys’ fees.

The district court confirmed the award and the court of appeals affirmed. As to punitive damages, the court noted that the arbitration was pursuant to the AAA rules and that Rule 43 allowed the arbitrators to grant any remedy they deem equitable and within the scope of the agreement (but it did not specifically address costs, attorney’s fees or punitive damages).<sup>15</sup> The court of appeals stated:

We hold that the expansive view that has been taken of the power of arbitrators to decide disputes, coupled with the incorporation of AAA Commercial Arbitration Rule 43 by the parties, provided the arbitration panel here with the authority to make the punitive damage award.<sup>16</sup>

Likewise with respect to attorneys’ fees, the court ruled:

Federal law takes an expansive view of arbitrator authority to decide disputes and fashion remedies, particularly when a dispute arises between parties to a commercial contract with an arbitration clause that incorporates AAA Commercial Rule 43, and which applies to every dispute arising under the agreement. In light of the broad power of arbitrators to fashion appropriate remedies and the accepted “bad faith conduct” exception to the American Rule, we hold that it was within the power of the arbitration panel in this case to award the attorneys’ fees.<sup>17</sup>

In *Synergy Gas Co. v. Sasso*, 853 F.2d 59 (2<sup>nd</sup> Cir. 1988) the arbitrator in a labor dispute granted attorneys’ fees because the employer discharged an employee without just cause, failed to comply with a prior order to reinstate, and acted in bad faith in violating its contractual obligations and in bringing a spurious claim of arbitrator misconduct. The relevant collective bargaining agreement contained a broad arbitration clause but, apparently, did not specifically address attorney’s fees, costs or punitive damages. While there was no formal demand for attorneys’ fees, the court interpreted certain “other claims” language during the hearing as inclusive of attorneys’ fees. The employer challenged the attorneys’ fee award as violating New York public policy barring punitive damages in labor disputes. The court of appeals upheld the award as within the power of the panel and found that it was not punitive

but compensatory in order to reimburse the employee for expenses he would not have incurred had he been reinstated as ordered in the initial arbitration.

#### IV. Commentary

Case law on panel award of attorneys' fee represents a remarkable range of holdings, from: (a) attorneys' fees must be demanded, briefed and argued; to (b) attorneys' fees may be granted without demand, briefing or argument, absent a strict prohibition by the contract at issue. The latter rulings might be explained as a means of allowing a panel to control the arbitration proceeding by sanctioning outlandish behavior by counsel, absent a right to hold counsel in contempt but this reasoning does not reach the much more likely target of the sanction – outlandish behavior of a party. More significantly, *ReliaStar* seems to place few limitations to the ability of a panel to devise remedies, if not rule on issues, that have not been identified, briefed or argued by counsel.

Perhaps the most useful comment in the context of attorneys' fees is a practice tip for counsel to demand, brief and argue for attorneys' fees whenever it seems remotely likely that a panel would grant such fees. This will serve counsel in good stead in whatever court such an award might be challenged.

#### ENDNOTES

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<sup>1</sup> This article is a substantial re-write, expansion and update of an article first published in 2009.

<sup>2</sup> 373 F.Supp. 2d 340 at 357.

<sup>3</sup> *Id.* at 53-4 (internal citations and quotation marks omitted).

<sup>4</sup> 864 F.3d at 84.

<sup>5</sup> *Id.* at 85.

<sup>6</sup> 473 F.Supp.2d 607.

<sup>7</sup> 864 F.3d at 85.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 86.

<sup>10</sup> *Id.* 87.

<sup>11</sup> *Id.* \*88-9.

<sup>12</sup> But an Arbitrator's Manual used for guidance stated that fees might be awarded in exceptional cases. 941 F.Supp. 1207 at 1214.

<sup>13</sup> 114 F.3d 188 at 189-90.

<sup>14</sup> *Id.* at 190.

<sup>15</sup> 943 F.2d 1056 at 1063. *See* cases cited by the court which interpret this rule as allowing the arbitrators to grant punitive damages.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1064.