

Authority of an Arbitration Panel to Order Confidentiality and a Hold Harmless

By

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I. Introduction

The arbitration clauses used in insurance and reinsurance contracts seldom call for confidentiality of the proceeding or require the parties to hold the panelists harmless. Nonetheless, it is very common for the parties to agree to both. But what happens when the parties don't agree? Does the arbitration panel have the authority to order confidentiality and for the parties to hold the arbitrators harmless? The purpose of this article is to examine selected case law and related materials that may shed some light on this question.

II. Procedures and Guidelines

The issues of confidentiality and panel hold harmless may be resolved by any rules or procedures by which an individual arbitration is to be conducted. For instance, with respect to hold harmless:

- The ARIAS-U.S. Practical Guide to Reinsurance Arbitration Procedure (2004 Revised Edition) (ARIAS-U.S. Guide) addresses hold harmless in § 3.7 dealing with Formal Acceptance of the Panel. Comments to this section state that absent extraordinary circumstances, panel members should be held harmless and provides sample forms;
- The ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (2014) (ARIAS-U.S. Rules) addresses hold harmless procedures in §

10, requiring the parties to confer and seek agreement on various items, including whether a hold harmless or indemnification agreement flowing to the Panel and whether the ARIAS-U.S. for should be used; and

- The American Arbitration Agreement (AAA) Commercial Arbitration Rules and Mediation Procedures (AAA Commercial Rules) do not address the issue of hold harmless or immunity of the panel.

Rules and procedures address the issue of confidentiality as follows:

- The ARIAS-U.S. Guide, at § 3.8 notes a general agreement throughout the industry that reinsurance arbitrations should be confidential in most circumstances, “even absent the parties’ complete agreement.” The ARIAS-U.S. Guide suggests that in the absence of agreement, the panel should consider the arguments of the parties and, in its discretion, enter an appropriate order. It also attaches sample forms;
- The ARIAS – U.S. Rules address confidentiality in § 7. Both § 7.1 and § 7.2 provide that unless otherwise agreed by the parties to the arbitration, or ordered by the panel, upon a motion by one party and a showing of good cause, the arbitration will be confidential with certain enumerated exceptions. This suggests, like the ARIAS-U.S. Guide, that a panel has the authority to order confidentiality even if one party opposes it; and
- The AAA Commercial Rules address confidentiality at R-23, Enforcement Powers of the Arbitrator, providing the arbitrator with the authority to order the production of documents or the admissibility of evidence on condition of confidentiality.

III. Supreme Court Precedent

Two cases which help to establish the precedential backdrop are *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002) and *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). These cases addressed the issue of which matters should be handled by the courts rather than an arbitration panel. The issue in *Howsam* was the interpretation of a six-year time limit for bringing a NASD arbitration. The issue in *Green Tree* was whether an arbitration provision could be interpreted to allow class action arbitrations.

The Supreme Court found that the validity of the arbitration clause, and its application to the dispute in question was for a court to decide while the interpretation of the arbitration clause was for the arbitration panel. The *Howsam* court observed:

Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises “a question of Arbitrability” for a court to decide.

...

At the same time the Court has found the phrase “question of Arbitrability” *not* applicable to other kinds of general circumstances where parties would likely expect that an arbitrator would decide the gateway matter. Thus “procedural questions which grow out of the dispute and bear on its final disposition” are presumptively *not* for the judge, but for an arbitrator to decide.”¹

Thus, the *Howsam* court found that the NASD arbitrators should interpret and apply the time limit on initiating a NASD arbitration.²

The *Green Tree* court stated:

[The issue for the courts] include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy..

..

The question here – whether the contracts forbid class action arbitration - - does not fall within [such matters]. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. . . . It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. ³

Based on these cases, it is clear that the questions of confidentiality and hold harmless are matters for the panel, not the courts, to decide.

IV. Hold Harmless Agreements

A. Caselaw

There are a few cases dealing with the authority of an arbitration panel to order the parties to provide a hold harmless. One of those cases is *Pac. Empirs. Ins. Co. v. Moglia*, 365 B.R. 863 (N.D.Ill. 2007) which involved an arbitration clause in an insurance policy. When the insured became insolvent, its trustee sought to recover collateral from the insurer. The bankruptcy court referred the matter to arbitration and the panel asked the parties to execute a hold harmless. The trustee declined. The court upheld the panel's request for a hold harmless and ordered the trustee and insurer to sign it:

“[T]he requested hold harmless agreement really codifies (or perhaps, more accurately, solidifies) the immunity accorded to arbitrators as a quasi-judicial body. . . .

. . . .

Indemnity agreements such as that requested by the Panel perform the same crucial function: They are safeguards that provide the security necessary to induce qualified individuals to serve as arbitrators.⁴

Indem. Ins. Co. of N. Am. v. Mandell, 817 N.Y.S. 2d 223 (S.C. App. Div. 2006) was another case in which a party declined an order by an arbitration panel to sign a hold harmless. The court ordered that the hold harmless be signed, again citing common law immunity:

[G]iven that the hold harmless agreement demanded by the arbitrators gives them no more protection than they are already entitled to under the prevailing rule that arbitrators are immune from liability for acts performed in their arbitral capacity, compelling execution of such an agreement is not to add a term to the parties' arbitration agreement but, rather, under governing Pennsylvania law, to enforce a necessarily implied obligation.⁵

B. Hold Harmless at Common Law

There is a great deal of case law supporting arbitral immunity. The theory behind it is explained in *Austern v. Chicago Board of Options Exchange*, 898 F.2d 882 (2nd Cir.1990) at 885-6:

Absolute immunity, “justified and defined by the functions it protects and serves, not by the person to whom it attaches,” has long shielded judges from damages liability for actions taken in the exercise of their judicial functions. This comparatively sweeping form of immunity has also been extended to executive branch officials who perform either quasi-judicial functions, or prosecutorial functions “intimately associated with the judicial phase of the criminal process”. As with judicial immunity, which “protect[s] the finality of judgments [by] discouraging inappropriate collateral attacks . . . [and] also protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants,” the scope of quasi-judicial immunity is defined not by the identity of the actor but by the nature of the function performed, namely freeing the adjudicative process and those involved therein from harassment or intimidation

We are persuaded by these policy concerns and agree that the nature of the function performed by arbitrators necessitates protection analogous to that traditionally accorded to judges. Furthermore, we note that “individuals . . . cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between litigants and saddled with the burdens of defending a lawsuit.” Accordingly, we hold that arbitrators

in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process. (Internal citations omitted)

Similar expressions of broad arbitrator immunity can be found in many cases see *e.g. Olsen v. National Association of Securities Dealers*, 85 F.3d 381, 382 (8th Cir.1996); *International Medical Group v. American Arbitration Assoc.*, 312 F.3d 833, 843 (7th Cir.2002); *Cort v. American Arbitration Association*, 795 F.Supp. 970, 972-3 (N.D.Cal.1992); *Hill v. Aro Corporation*, 263 F.Supp. 324, 326 (N.D. Ohio 1967); *Airco v. Rapistan Corp.*, 446 N.W.2d 372, 376-7 (Minn.1989); *Stasz v. Charles R. Schwab*, 121 Cal.App.4th 420, 430-1 (2004).

This immunity has been extended to organizations that sponsor arbitrations as well. See *e.g. Cory v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir.1982); *Austern, supra* at 886.

V. Confidentiality Agreements

There is considerably less caselaw support for the authority of an arbitration panel to order confidentiality when the arbitration clause does not so require and when one or both of the parties oppose it. There are policy arguments on both sides of this issue. See Lawrence Greengrass and Brigitte Nahas, *Do Arbitrators Have the Power to Impose Confidentiality?*, ARIAS Quarterly, 1st Quarter 2004. While these arguments have yet to produce caselaw supporting the right of a panel to impose confidentiality against the wishes of one or both parties, there is some caselaw describing circumstances in which confidentiality may not be imposed.

In *Galleon Syndicate Corp. v. Pan Atl. Group*. 637 N.Y.S. 2d 104 (S.C. App. Div (1996), a party to one dispute sought to discover documents produced in a separate arbitration in which no confidentiality was applicable. The court rejected the argument that the documents should be confidential:

There is no confidentiality privilege precluding disclosure of the material requested as the parties to the arbitration proceeding governed by the Rules of the American Arbitration Association are, in the absence of a confidentiality provision, not prohibited from disclosing documents generated or exchanged during the arbitration and since evidentiary material at an arbitration proceeding is not immune from disclosure.⁶

A bus/pedestrian collision was the backdrop for *Scott v. Metropolitan Transp. Auth.*, 10 Misc. 1058 3d (A) (S.C.N.Y. 2005). Injured parties sought to obtain documents from an employment arbitration with the bus driver. The court ruled that since there was no agreement that the arbitration would be confidential, documents from that proceeding could be discovered.

City of Newark v. Law Dep't of N.Y., 760 N.Y.S. 2d 431 (S.C. App. Div. 2003) involved two arbitrations, one in Newark and one in New York. The New York panel issued a confidentiality order and the Newark panel deferred to it. A party to the Newark arbitration sought the documents through a Freedom of Information request since the City of New York was a party to the New York arbitration. The court allowed the discovery ruling that a confidentiality order of an arbitration panel did not supersede rights under the Freedom of Information law.

VI. Comments

While there is little caselaw on the issue of a panel's authority to order parties to execute a hold harmless agreement, there is ample caselaw recognizing common law immunity and its application to arbitrators.

It is evident that a panel may impose confidentiality when the arbitration is pursuant to guidelines or procedures that allow the panel to do so. The issue is when there are no such guidelines and the parties disagree on point.

While there seems to be no caselaw on point in the lower courts, the U.S. Supreme Court's decisions in *Howsam and Green Tree* hold that the courts retain the authority to determine the validity of the arbitration clause and its application to the dispute in question, while the issues of contract interpretation and procedure are within the province of the arbitration panel. Confidentiality and a pane hold harmless are a traditional, procedural methods to support private resolution of disputes and should be a matter for the arbitration panel to decide.

ENDNOTES

¹ 537 U.S. 79 at 84. Internal citations omitted, emphasis in the original.

² *Id.* at 85.

³ 539 U.S. 444 at 452.

⁴ 365 B. R. 863 at 866-7.

⁵ 817 N.Y.S. 2d 223 at 224. Internal citations omitted.

⁶ 637 N.Y.S. 2d 104 at 105. Internal citations omitted.