

2008

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Recommended Citation

Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: the Power of Arbitrators*, 35 Fordham Urb. L.J. 83 (2008).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol35/iss1/3>

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Cover Page Footnote

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EVOLVING ISSUES IN REINSURANCE DISPUTES: THE POWER OF ARBITRATORS

*Robert W. DiUbaldo**

INTRODUCTION

Due to its efficient and cost-effective nature, arbitration is often the preferred approach for resolving reinsurance and other complex commercial business disputes.¹ For this reason, reinsurance contracts, as well as many other commercial agreements, often contain arbitration clauses requiring that any and all disputes arising under the contract be resolved by arbitration.² The Federal Arbitration Act (“FAA”) governs most reinsurance arbitrations in the United States.³

Arbitration is a creature of a contract, and the powers that arbitrators possess originate from the parties, who agree to confer specific powers on the arbitrators—either through an arbitration clause in the contract or through a separate agreement.⁴ Typically,

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1. See BARRY R. OSTRAGER & MARY KAY VYSKOCIL, *MODERN REINSURANCE LAW AND PRACTICE* § 5.04 (2d ed. 2000).

2. Parties to an arbitration agreement generally agree to resolve their disputes before either a single arbitrator or a panel of arbitrators. As stated by one notable commentator: “Arbitration clauses in reinsurance contracts have provided an efficient and effective means of resolving commercial disputes between the parties by enabling them to submit their cases to a panel of experts who render an award based on their understanding of reinsurance custom and practice.” See *id.* §§ 5.04, 14.03[d]. For examples of arbitration clauses, see also ROBERT W. STRAIN, *REINSURANCE CONTRACT WORDING 90-92* (3d ed. 1998).

3. See 9 U.S.C.A. § 1 (West 2007). The FAA creates a body of federal substantive law of arbitrability that is applicable to any arbitration agreement within the scope of the Act. See also *New York v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 61 (2d Cir. 1996) (quoting *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996)).

4. For example, reinsurance contracts often contain “honorable engagement” clauses and similar language which courts have interpreted as providing arbitrators with wide discretion to interpret procedural and substantive issues and interpret an agreement with regard to the intent of the parties. STRAIN, *supra* note 2, at 92-93. A sample honorable engagement clause is as follows: “The Panel shall interpret this Agreement as an honorable engagement rather than as merely a legal obligation and shall make its decision considering the custom and practice of the applicable insurance and reinsurance business” *Id.*

arbitration clauses found in reinsurance agreements confer broad power on arbitrators with respect to certain procedural or substantive issues.⁵ As discussed below, where an arbitration clause enumerates specific powers to arbitrators, it is rare that parties challenge an exercise of those powers. Parties often challenge an arbitrator's actions, however, where the arbitrator acts in a manner not expressly provided for in the contract. In such instances, courts will look to the language of the parties' contract, as well as the FAA, to determine whether an arbitrator has exceeded his powers.⁶

Cases discussed in this Article suggest that courts often struggle to grasp the extent of arbitral powers pursuant to the interplay between arbitration agreements contained in reinsurance contracts, industry custom and practice, and the FAA. The result has been contradictory and often inconsistent decisions in this area of the law.

This Article examines emerging areas of the law governing certain procedural powers of arbitrators that has impacted and will continue to impact reinsurance arbitrations, as well as other commercial disputes. Specifically, the Article focuses on an arbitrator's powers with respect to the following procedural issues: (i) consolidation; (ii) non-party discovery; (iii) confidentiality; (iv) summary adjudication; and (v) the enforceability of a hold harmless agreement.

I. CONSOLIDATION

The issue of whether multiple disputes among related parties should be consolidated often arises in reinsurance arbitrations, where many contracts involve several reinsurers sharing a certain risk ceded to them by a single insurer, known as a cedent.⁷ Until recently, the majority of case law has not supported consolidation, absent specific language in the parties' contract.⁸

5. *See id.* at 90-93.

6. *See, e.g.,* Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003).

7. EUGENE WOLLAN, HANDBOOK OF REINSURANCE LAW § 8.07[G] (2003).

8. *See* Local 1351 Int'l Longshoremens Ass'n v. Sea-Land Serv., Inc., 214 F.3d 566, 570-71 (5th Cir. 2000) (noting that the FAA only grants the district court the power to enforce consolidation if it is expressly provided for in the contract). *Accord* Champ v. Siegel Trading Co., 55 F.3d 269, 274-75 (7th Cir. 1995); U.K. v. Boeing Co., 998 F.2d 68, 69 (2d Cir. 1993); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991). *But see* Phila. Reins. Co. v. Employers Ins. of Wausau, No. 02-1943, 2003 U.S. App. LEXIS 6198, at *10-12 (3d Cir. Mar. 31, 2003) (holding that an informal agreement was sufficient to bind parties to consolidate arbitration); *see also*

A sample consolidation clause in a reinsurance contract may appear as follows: “If more than one reinsurer is involved in an arbitration where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results, all such reinsurers will constitute and act as one party for purpose of this clause.”⁹

A party seeking to enforce consolidation in an arbitration agreement may petition the court to do so pursuant to section 4 of the FAA, which provides that “[a] party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.”¹⁰ Although the language of this statute seems clear, courts have interpreted it in a variety of ways.

Early interpretations of section 4 held that an arbitration panel lacked the authority to order consolidation. In *Del E. Webb Construction v. Richardson Hospital Authority*, the Fifth Circuit held that under section 4 of the FAA:

The question of consolidation . . . is for the district court because the court must determine only whether the contract provides for consolidated arbitration, a question free of the underlying facts. Moreover, it is unclear how separate arbitrations could be consolidated by one of the arbitrators. In short . . . under § 4 of the Federal Arbitration Act the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration.¹¹

Other courts have held that consolidation was only appropriate with the parties’ consent or if the contract expressly provided for consolidation.¹²

A new line of cases, however, has emerged from the Supreme Court’s decision in *Howsam v. Dean Witter Reynolds, Inc.*, in which the Court held that “issues of procedural arbitrability, i.e., whether

Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co., 210 F.3d 771, 774 (7th Cir. 2000) (holding that a district court can consolidate arbitration proceedings if it finds that the parties implicitly consented to consolidation).

9. Robert M. Hall, *Consolidation of Arbitrations—A New Rule Emerging?*, 15-12 MEALEY’S LITIG. REP. REINSURANCE 13 (2004).

10. 9 U.S.C.A. § 4 (West 2007).

11. 823 F.2d 145, 150 (5th Cir. 1987).

12. Volt Info. Scis., Inc. v. Bd. of Trs. of Stanford Univ., 489 U.S. 468, 476 (1989) (holding that district courts do not have the power under the FAA to consolidate arbitrations absent the parties’ consent).

prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.”¹³ 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.”¹⁴

Post-*Howsam* decisions have interpreted consolidation as a procedural issue best left in the hands of arbitrators.¹⁵ For example, following the *Howsam* decision in 2002, the First Circuit held in *Shaw’s Supermarkets, Inc. v. United Food & Commercial Workers Union, Local 791* that the issue of whether multiple grievances before the American Arbitration Association should be consolidated into a single proceeding was for the arbitrator, not the court, to decide.¹⁶ The First Circuit also relied on the Supreme Court’s 2003 decision in *Green Tree Financial Corp. v. Bazzle*, where the Court held that arbitrators should decide procedural questions and issues of contract interpretation.¹⁷

In 2004 the United States District Court for the District of Massachusetts cited *Shaw Supermarkets, Inc.* with approval in *Employers Insurance of Wausau v. First State Insurance Group* and noted that “[u]nder *Howsam* . . . this [consolidation] is a procedural matter for the arbitrator.”¹⁸

This trend continued in 2005 when several federal district courts held that consolidation was an issue of contract interpretation and arbitration procedure—matters that parties would expect arbitra-

13. 537 U.S. 79, 85 (2002) (emphasis omitted).

14. *Id.* at 84 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).

15. See, e.g., *Certain Underwriters at Lloyd’s v. Cravens Dargan & Co.*, 197 F. App’x 645, 647 (9th Cir. 2006); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 576-77 (7th Cir. 2006); *Shaw’s Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791*, 321 F.3d 251, 254 (1st Cir. 2003); *Employers Ins. of Wausau v. First State Ins. Group*, 324 F. Supp. 2d 333, 336-37 (D. Mass. 2004).

16. 321 F.3d at 255 (citing *Howsam*, 537 U.S. at 83-84 (2002)).

17. 539 U.S. 444, 452-53 (2003). In *Green Tree*, the Supreme Court considered whether an arbitration panel can address disputes arising under identical arbitration provisions in contracts between a commercial lender and several of its clients in class arbitration. *Id.* at 447. The South Carolina Supreme Court interpreted the arbitration provisions as permitting class arbitration. *Id.* The Supreme Court overruled the South Carolina Supreme Court and held that the arbitral tribunal, and not the court, had the requisite authority to decide whether class arbitration was appropriate. *Id.* at 454. The Court noted that “arbitrators are well situated” to answer questions concerning contract interpretation or arbitration procedures. *Id.* at 452-53.

18. *Employers Ins. Co. of Wausau*, 324 F. Supp. 2d at 336.

tors to decide.¹⁹ In *Certain Underwriters at Lloyd's v. Century Indemnity Co.*, the Eastern District of Pennsylvania refused to consolidate multiple arbitrations brought by members of a reinsurance program against their reinsurer, Lloyd's, because the reinsurance contracts at issue did not explicitly provide for consolidation.²⁰ The program members did not move the Court to compel consolidation of multiple arbitrations, but rather initially submitted a single demand for arbitration against Lloyd's.²¹ Lloyd's challenged this procedure, arguing that it had not consented to consolidation and that the reinsurance contracts did not provide for this option for resolving disputes between the parties.²² The Court held that, although the program members did not seek an order consolidating the disputes, there was no contractual language supporting consolidation and, even if there was, such a request must be directed towards the arbitration panel.²³

Over the past two years, courts appear to have erased whatever doubts remained as to whether consolidation is an issue properly left to arbitrators.²⁴ In a case of first impression, the Seventh Circuit held in *Employers Insurance Co. of Wausau v. Century Indemnity Co.* that the question of whether an arbitration agreement between a reinsurer and its reinsured prohibited consolidated arbitration was a procedural one for the arbitrators to determine.²⁵ Relying on the Supreme Court's decision in *Howsam* and the First Circuit's decision in *Shaw's Supermarkets, Inc.*, the Seventh Circuit characterized consolidation as a "procedural issue" and a "matter of contract interpretation" that an arbitration panel is well suited to address.²⁶

Similarly, in *Certain Underwriters at Lloyd's v. Cravens Dargan & Co.*, the Ninth Circuit, citing *Howsam* and *Green Tree*, noted that under the FAA, "courts may only decide certain gateway matters, such as whether the parties have a valid arbitration agreement

19. See, e.g., *Certain Underwriters at Lloyd's v. Century Indem. Co.*, No. 05-2809, 2005 U.S. Dist. LEXIS 16675, at *6-8 (E.D. Pa. Aug. 1, 2005); *Blimpie Int'l Inc. v. Blimpie of the Keys*, 371 F. Supp. 2d 469, 473-74 (S.D.N.Y. 2005).

20. 2005 U.S. Dist. LEXIS 16675, at *6-8.

21. *Id.* at *6.

22. *Id.* at *7-8.

23. *Id.* at *8.

24. See, e.g., *Certain Underwriters at Lloyd's v. Cravens Dargan & Co.*, 197 F. App'x 645, 647 (9th Cir. 2006); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 577-78 (7th Cir. 2006); *Allstate Ins. Co. v. Global Reinsurance Corp.*, No. 06 Civ. 4419, 2006 WL 2289999, at *1 (S.D.N.Y. Aug. 8, 2006).

25. *Employers Ins. Co. of Wausau*, 443 F.3d at 577-78.

26. *Id.* at 578.

at all or whether a concededly binding arbitration clause applies to a certain type of controversy.”²⁷ The appellate court affirmed the district court’s decision that it was for the arbitrators to decide whether a single arbitration panel should resolve multiple reinsurance disputes.²⁸

Other recent decisions have further cemented an arbitrator’s powers with respect to consolidation. In *In re Allstate Insurance Co.*, the court ordered a panel of arbitrators to decide whether disputes arising from two reinsurance contracts should be consolidated and noted that “submitting the question of consolidation to an arbitration panel comports with the strong federal policy favoring out-of-court resolution of arbitrable controversies.”²⁹ In another case, the Third Circuit relied upon *Green Tree* and *Howsam*, and held that the issue of consolidated or separate arbitration proceedings concerns matters of contract interpretation, not arbitrability, and thus was an issue for arbitrators to decide.³⁰ Additionally, in *Dockser v. Schwartzberg*, the Fourth Circuit, while specifically ruling on a different issue, noted that procedural questions should be remitted to arbitrators, specifically citing consolidation.³¹

Based on the cases discussed above, it appears that the consolidation issue has now been resolved in favor of preserving that power for arbitrators. Indeed, the First, Third, Fourth, Seventh, and Ninth Circuits, as well as a district court in the Second Circuit, have held that this issue is properly left for arbitrators to decide.³² An underlying theme in the recent decisions is that courts are wary of imposing their own views of efficiency in arbitral disputes, thus interfering with parties’ agreements to arbitrate. Supreme Court decisions in *Howsam* and *Green Tree* have provided courts addressing this issue with ample precedent.

Although the law is becoming more settled in this area, practical problems remain. For example, a dispute between the same parties involving several reinsurance contracts with arbitration agreements may result in the formation of multiple arbitration panels—before the consolidation issue is either raised by one of the parties or de-

27. 197 F. App’x at 646-47 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002)).

28. *Id.* at 647.

29. No. 06 Civ. 4419(DAB), 2006 WL 2289999, at *1 (S.D.N.Y. Aug. 8, 2006).

30. *Certain Underwriters at Lloyd’s London v. Westchester Fire Ins.*, 489 F.3d 580, 585-86 (3d Cir. 2007).

31. 433 F.3d 421, 427 (4th Cir. 2006).

32. *See supra* notes 15-30 and accompanying text.

cided by a given panel. In such a situation, lack of clarity as to which arbitrators have the authority to address the issue may lead to additional disputes. Moreover, parties could subject themselves to conflicting decisions from different panels. As the Seventh Circuit stated in *Connecticut General Life Insurance Co. v. Sun Life Assurance Co. of Canada*: “Arbitral panels are ad hoc, making it difficult to coordinate their decisions on such a question. And there are no contractual or statutory provisions for transferring cases between panels, should multiple arbitrations be commenced when the contract envisaged a single consolidated one.”³³ As such, consolidation remains an issue of which arbitrators, practitioners, insurers, reinsurers, and other commercial entities should be wary.

II. NONPARTY DISCOVERY

Perhaps no issue involving the power of arbitrators has been the subject of more debate over the past few years than nonparty discovery.

Section 7 of the FAA provides, among other things, that “arbitrators . . . or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”³⁴ Section 7 further states that an arbitral subpoena “shall be served in the same manner as subpoenas to appear and testify before the court.”³⁵

While this language is fairly straightforward on its face, courts have struggled to balance the discovery powers available to arbitrators under the FAA with the goals of arbitration—avoiding the burden, expenses, harassment, and lack of efficiency commonly associated with discovery in litigation.³⁶

A. The Territorial Limitations of a Panel’s Authority to Compel Nonparty Discovery

Rule 45 of the Federal Rules of Civil Procedure (“FRCP”) governs the service and enforcement of subpoenas, including subpoenas that an arbitration panel issues pursuant to section 7 of the

33. 210 F.3d 771, 773 (7th Cir. 2000).

34. 9 U.S.C.A. § 7 (West 2007).

35. *Id.*

36. See GRAYDON S. STARING, *LAW OF REINSURANCE* § 22.2 (1998).

FAA.³⁷ FRCP 45, and thus section 7 of the FAA, places limitations on the territorial reach of nonparty subpoenas.³⁸ Specifically, FRCP 45 provides that a subpoena must be served “within the district” of the court enforcing the subpoena or “within 100 miles of the place of deposition, hearing, trial, production or inspection specified in the subpoena.”³⁹

With respect to nonparties, FRCP 45 states that a court shall quash or modify a subpoena if it:

[R]equires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that . . . such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held.⁴⁰

Nonetheless, early decisions addressing the scope of arbitral subpoenas served on nonparties illustrate that both courts and arbitrators were reluctant to apply the jurisdictional limits of FRCP 45 and section 7 of the FAA.⁴¹

Prior to 2006, only two federal circuit courts had addressed the issue of whether an arbitration panel had the authority to subpoena documents and testimony from a nonparty outside the 100-mile limits of FRCP 45. In 2000, the Eighth Circuit held in *In re Security Life Insurance Co. of America* that the geographic limits of

37. *Dynegy Midstream Serves., LP v. Trammochem*, 451 F.3d 89, 94-96 (2d Cir. 2006).

38. *Id.*

39. FED. R. CIV. P. 45(b)(2). FRCP 45 provides, as follows:

Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena.

Id.

40. FED. R. CIV. P. 45(c)(3)(A).

41. See *In re Security Life Ins. Co. of Am.*, 228 F.3d 865, 872 (8th Cir. 2000) (holding that the 100-mile territorial limit does not apply to a subpoena requesting documents but might to a subpoena requesting deposition testimony); *Amgen Inc. v. Kidney Ctr. of Del. County, Ltd.*, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995), *remanded on other grounds*, 95 F.3d 562 (7th Cir. 1996) (holding that because the parties agreed to arbitrate their dispute pursuant to the Federal Rules of Civil Procedure, Rule 45(a)(3)(B) provided a mechanism for arbitrators to compel deposition and testimony from a nonparty located outside the 100-mile barrier).

FRCP 45 do not apply to an arbitral subpoena requesting documents from a nonparty, since “the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel.”⁴² Notably, while the Eighth Circuit addressed the subpoenas as applied to documents sought from a nonparty, it did not address whether the territorial limits would apply to a nonparty forced to travel over 100 miles to testify at a hearing or deposition.⁴³

In 2002, the Third Circuit held in *Legion Insurance Co. v. John Hancock Mutual Life Insurance Co.* that an arbitration panel sitting in Pennsylvania could not subpoena a nonparty in Florida to produce certain documents and employee testimony, as the geographic limits of the FRCP limited an arbitrator’s subpoena power under section 7 of FAA.⁴⁴ Several decisions over the past year may have resolved the apparent split between federal circuit courts on this issue, suggesting that courts may apply the 100-mile rule to nonparty subpoenas on a more consistent basis going forward.

In early 2006, the Northern District of Georgia’s decision in *Festus & Helen Stacy Foundation, Inc. v. Merrill Lynch, Pierce Fenner & Smith Inc.* rejected the Third Circuit’s decision in *Legion Insurance Co.* and held that that territorial limits of FRCP 45 do not apply to the enforcement of a nonparty subpoena for documents issued by arbitrators under the FAA.⁴⁵ Notably the court’s holding in that case relied heavily upon the Southern District of New York’s decision in *In re Arbitration of Trammochem*.⁴⁶ The Second Circuit later reversed the Southern District of New York’s decision and held that an arbitral subpoena was subject to the geographical

42. *In re Security Life*, 228 F.3d at 871-72.

43. *Id.* (“However, as the only live controversy in this case concerns the panel’s subpoena of documents, we must reserve the question for another day.”). In 2004, a federal district court addressing this issue also held that an arbitration panel sitting in Minnesota had the authority to enforce a subpoena compelling the production of documents from a nonparty in New York, but not the prehearing deposition of that nonparty. *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. Civ. 02-4304, 2004 WL 67647, at *1-3 (D. Minn. Jan. 9, 2004).

44. *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 33 F. App’x 26, 27-28 (3d Cir. 2002) (“[U]nder the FAA, Rule 45 also governs the service of arbitration subpoenas . . . a subpoena *duces tecum* issued by a federal court cannot be served upon a nonparty for the production of documents located outside the geographic boundaries specified in Rule 45.”).

45. *Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1378 (N.D. Ga. 2006).

46. *In re Arbitration of Trammochem*, No. 05 MISC.M8-85, 2005 WL 1400096, at *2 (S.D.N.Y. June 15, 2005), *rev’d and remanded*, *Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89 (2d Cir. 2006).

limits of FRCP 45.⁴⁷ Therefore, the precedential value of *Festus & Helen Stacy Foundation, Inc.* may be limited.

In *Dynegy Midstream Services*, the Second Circuit rejected a New York City-based arbitration panel's attempt to serve a subpoena on a nonparty in Texas.⁴⁸ The Court noted that the FAA does "not contemplate nationwide service of process or enforcement; instead, both service and enforcement proceedings have clear territorial limitations."⁴⁹ The Court found that "not even the strong federal policy favoring arbitration can lead to jurisdiction over a non-party without some basis in federal law."⁵⁰ Moreover, the Second Circuit emphasized that since the parties had chosen to arbitrate their dispute in New York, they could not be allowed to "stretch the law beyond the text of [s]ection 7 [of the FAA] and Rule 45 to inconvenience witnesses."⁵¹

In February 2007, in *Liberty Mutual Insurance Co. v. White Mountains Insurance Group Ltd.*, a federal court in Massachusetts also held that arbitral subpoenas served on nonparties are subject to the 100-mile jurisdictional restrictions set forth by FRCP 45(b)(2), quashing subpoenas that a Massachusetts-based arbitration panel issued on a nonparty in New Hampshire for production of documents within 100 miles of the nonparty's New Hampshire office.⁵² The Court rejected Liberty Mutual's argument that, pursuant to the Eighth Circuit's decision in *In re Security Life Insurance Company of America*, the geographic restrictions embodied in FRCP 45(b)(2) do not apply to subpoenas issued by arbitrators,⁵³ and instead relied on the Second Circuit's decision in *Dynegy Midstream Services*.⁵⁴

47. *Dynegy Midstream Services*, 451 F.3d at 95.

48. *Id.* at 94-95.

49. *Id.*

50. *Id.* at 96.

51. *Id.* The Second Circuit also rejected the suggestion that it should adopt the court's position in *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878, 883 (N.D. Ill. 1995), where the district court enforced an arbitral subpoena seeking documents from a party outside the 100-mile limit by permitting an attorney for a party to the arbitration to issue a subpoena that would be enforced by the district court in the district in which the nonparty resided, as provided by Rule 45(a)(3)(B).

52. No. 06-11901 (D. Mass. Feb. 26, 2007), reprinted in 17-22 MEALEY'S LITIG. REP. REINSURANCE 4 (2007).

53. See Liberty's Opposition to White Mountains Insurance Group Ltd's Motion to Dismiss Petition of Liberty Mutual Insurance Company for Order Enforcing Arbitration Panel's Subpoena Duces Tecum at 8-9 n.2, *Liberty Mut. Ins.*, No. 06-11901-GAO, (Nov. 22, 2006).

54. See *Liberty Mut. Ins.*, No. 06-11901.

The Court offered the following hypothetical to support its decision:

I would say that I also agree that the service under the statute is to be made in accordance with the way a similar subpoena would be served under federal practice. I don't think that invokes all the provisions of Rule 45, but only the service provisions. And I think that includes the service may be done in accordance with Rule 45(b)(2), I think it is, within the district or within a bubble of 100 miles from the place of the sitting of the tribunal.

I think the interpretation that's argued for by Liberty is way too expansive. And if I'm understanding it correctly, would permit me to issue or enforce a subpoena that called for a company located in Sacramento to produce documents in San Francisco as long as they were within 100 miles of each other. I think that would be a strange rule that a court sitting in Boston could do that. I certainly could not under the federal rules as I read them.⁵⁵

Therefore, the District of Massachusetts lacked authority to enforce the subpoenas since the nonparty was served outside the 100-mile geographical limits of FRCP 45.⁵⁶

While the law on this issue is yet to be settled, these decisions indicate that courts may be moving toward a universal application of the territorial restrictions of FRCP 45 with respect to nonparty subpoenas arbitrators issue under the FAA. Indeed, the Second and Third Circuits have incorporated such a rule, and it appears the First Circuit would as well after the District of Massachusetts's decision in *Liberty Mutual*.⁵⁷ Moreover, recent decisions have rejected cases that refused to apply the 100-mile limitation to arbitral subpoenas, including the Eighth Circuit's decision in *In re Security Life Insurance Co. of America*.⁵⁸ A uniform adoption of this rule would have a significant impact on an arbitrator's subpoena power under the FAA.

Nevertheless, even where jurisdiction over a nonparty was established, courts have reached different conclusions regarding an arbitrator's authority to demand certain types of prehearing discovery under the FAA.

55. See Transcript of Hearing on Motion to Dismiss at 14, *Liberty Mut. Ins.*, No. 06-11901-GAO, (Feb. 26, 2007).

56. *Id.*

57. See *supra* notes 52-56 and accompanying text.

58. See *supra* notes 47-56 and accompanying text.

B. An Arbitrator's Authority to Compel Prehearing Depositions

Recent case law continues to illustrate judicial resistance towards permitting arbitrators to compel nonparties to attend depositions prior to the ultimate hearing on the matter. While 2006 did not feature a decision on this issue, cases from the past few years have uniformly held that arbitrators lack the authority under section 7 of the FAA to compel prehearing depositions.⁵⁹

Several early cases from federal district courts held that an arbitrator possessed the authority to compel nonparties to be deposed prior to the arbitration.⁶⁰ In 1988, the Southern District of Florida held in *Stanton v. Paine Webber Jackson & Curtis* that section 7 of the FAA permits arbitrators to compel nonparties to appear for depositions prior to the hearing.⁶¹ The Court noted that under the FAA, "arbitrators may order and conduct such discovery as they find necessary."⁶² A few years later in *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, discussed above, the Northern District of Illinois enforced a subpoena issued by a panel against a nonparty to produce documents and testify at a deposition for use in an arbitration.⁶³

Subsequent to these decisions, however, two federal circuit courts that addressed the powers of arbitrators to compel nonparty discovery under section 7 of the FAA found, at least implicitly, that an arbitration panel lacked the authority to order nonparties to ap-

59. See, e.g., *Hay Group v. E.B.S. Acquisition Group*, 360 F.3d 404, 407 (3d Cir. 2004) (noting that nothing in the text of section 7 of the FAA empowers an arbitrator to compel prehearing depositions); *Atmel Corp. v. LM Ericsson Tel.*, 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005) (holding that section 7 does not authorize arbitrators to issue subpoenas to compel a prehearing deposition of a nonparty); *Odfjell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) (holding that an arbitrator lacked authority under the FAA to issue a subpoena compelling a nonparty to appear for a prehearing deposition and to produce documents at that time); *In re Arbitration Between Hawaiian Elec. Indus., Inc. & HEI Power Corp.*, No. M-82, 2004 WL 1542254, at *3 (S.D.N.Y. July 9, 2004) (holding that it is beyond the scope of section 7 for an arbitration panel to issue subpoenas for prehearing testimony); *In re Arbitration Between the Procter & Gamble Co. and Allianz Ins. Co.*, No. 02-cv-5480(KMW), 2003 U.S. Dist. LEXIS 26025, at *5 (S.D.N.Y. Dec. 3, 2003) ("[A] distinction . . . must be drawn between an arbitrator's power to compel document production before an arbitration hearing, and her power to compel appearances at depositions before an arbitration hearing.").

60. See *Amgen Inc. v. Kidney Ctr. of Del. County, Ltd.*, 879 F. Supp. 878, 880 (N.D. Ill. 1995); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242 (S.D. Fla. 1988).

61. *Stanton*, 685 F. Supp. at 1242-43.

62. *Id.* at 1242.

63. *Amgen Inc.*, 879 F. Supp. at 882.

pear for prehearing depositions.⁶⁴ In 1999, the Fourth Circuit held in *COMSAT Corp. v. National Science Foundation* that an arbitrator may not compel a third party to comply with an arbitral subpoena for prehearing discovery “absent a showing of special need or hardship.”⁶⁵ The court did not define “special need” except to say that “at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable.”⁶⁶ Fundamental to the court’s decision was the fact that parties who agree to arbitrate their disputes “forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes.”⁶⁷ For this reason, the court found that a “hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process.”⁶⁸

Similarly, in 2004, the Third Circuit stated in *Hay Group v. E.B.S. Acquisition Corp.* that pursuant to the “unambiguous” language of section 7 of the FAA, an arbitrator’s subpoena power is limited to “situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.”⁶⁹ The Court noted that had the FAA intended to provide arbitrators with the authority to compel prehearing discovery, it would not have placed limitations on those situations in which a nonparty can be compelled to produce documents and testimony.⁷⁰ As such, the court held that an arbitrator lacks authority to compel prehearing discovery from nonparties, whether it be deposition testimony or document production.⁷¹

64. See *Hay Group*, 360 F.3d at 407; *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 276, 278 (4th Cir. 1999).

65. *COMSAT Corp.*, 190 F.3d at 278.

66. *Id.* at 276.

67. *Id.*

68. *Id.* Note that in *Deiulemar Compagnia De Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473 (4th Cir. 1999), the Fourth Circuit considered the “special need” exception alluded to in *COMSAT*. The court did not define “special need” but observed that, “at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable.” *Id.* at 480. The court went on to hold that there was a special need for discovery in circumstances where evidence concerning the condition of a ship’s engine and hull was crucial to a party’s arbitration claim and where the engine and hull were undergoing repairs, upon completion of which the ship would depart United States waters. In so holding, the court referred to the time-sensitive nature of the party’s discovery request and the “evanescent nature of the evidence sought.” *Id.*

69. 360 F.3d at 407.

70. *Id.* at 408-09 (“If the FAA had been meant to confer the latter, broader power, we believe that the drafters would have said so, and they would have then had no need to spell out the more limited power to compel a non-party witness to bring items with him to an arbitration proceeding.”).

71. *Id.* at 411.

A string of recent cases originating from the Southern District of New York relied upon *COMSAT* and *Hay Group* and uniformly rejected the notion that section 7 of the FAA empowers arbitrators to compel prehearing depositions.⁷² For example, in *Odfjell ASA v. Celanese AG*, the court refused to enforce a subpoena issued by an arbitrator compelling a nonparty to appear for a deposition and produce various documents requested by a party prior to the hearing.⁷³ Following the Third Circuit's holding in *Hay Group*, the court stated that "it would seem particularly inappropriate to subject parties who never agreed to participate in the arbitration in any way to the notorious burdens of prehearing discovery."⁷⁴

In 2005, the court in *Atmel Corp. v. LM Ericsson Telefon, AB*, relied on the Fourth Circuit's decision in *COMSAT*, noting that "the weight of judicial authority favors the view that the Federal Arbitration Act, 9 U.S.C. § 7, does not authorize arbitrators to issue subpoenas for discovery depositions against third parties."⁷⁵ Other recent decisions from federal courts are in accord.⁷⁶

It should be noted, however, that an unpublished decision from the Northern District of Illinois in 2004 held that an arbitration panel had the authority to conduct nonparty depositions prior to the hearing.⁷⁷ Relying on a decision from that same court, *Amgen, Inc.*, the court found that under section 7 of the FAA, "implicit in the power to compel testimony and documents for purpose[s] of a hearing is the lesser power to compel such testimony and docu-

72. See *supra* note 59.

73. 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004).

74. *Id.*

75. 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005); see also *Integrity Ins. Co. v. Amer. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995) (holding that an arbitrator lacked authority under the FAA to compel a nonparty witness to appear for a deposition prior to the arbitration hearing); *ImClone Sys. Inc. v. Waksal*, 802 N.Y.S.2d 653, 654 (App. Div. 2005) (noting that depositions of nonparties may be directed under the FAA where there is a showing of "special need or hardship, such as where the information sought is otherwise unavailable").

76. See, e.g., *Gresham v. Norris*, 304 F. Supp. 2d 795, 796-97 (E.D. Va. 2004) (noting that "a federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship"); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. Civ. 02-4304PAMJSM, 2004 WL 67647, at *3 (D. Minn. Jan. 9, 2004) (holding that a panel could compel a nonparty to produce documents prior to the hearing, but not to attend a deposition); *In re Meridian Bulk Carriers, Ltd.*, No. 03-2011, 2003 WL 23181011, at *1-2 (E.D. La. July 17, 2003) (same).

77. *In re Arbitration Between Scandinavian Reinsurance Co. Ltd. v. Continental Cas. Co.*, No. 04-C-7020, at 3-4 (N.D. Ill. Dec. 10, 2004), reprinted in 15-18 MEALEY'S LITIG. REP. REINSURANCE 3 (2005).

ments for purposes prior to [the] hearing.”⁷⁸ Thus, while it appears that certain jurisdictions, particularly the Second and Third Circuits, are moving towards adopting a hard-line rule that arbitrators do not have the authority to compel a nonparty to be deposed prior to a hearing, lower courts in the Seventh Circuit and Eleventh Circuit have reached the opposite result.

C. The Power to Compel Witness Testimony Before an Arbitrator Prior to the Final Hearing on the Merits

As noted, section 7 of the FAA authorizes arbitrators to “summon in writing any person” to appear “before them or any of them as a witness” and bring documents that may be relevant to the case.⁷⁹ While courts have generally found that this language does not permit arbitrators to subpoena nonparties for prehearing depositions, recent cases illustrate that arbitrators have the authority to compel a nonparty to provide documentary and testimonial evidence before them prior to the ultimate hearing.⁸⁰

In 2005, the Second Circuit in a matter of first impression examined whether section 7 authorizes arbitrators to summon nonparty witnesses to give testimony and provide material evidence at a pre-merits hearing before an arbitration panel.⁸¹ The nonparties objected to the subpoenas on the ground that section 7 does not provide arbitrators with the power to summon nonparties for the purpose of compelling testimonial and documentary evidence in advance of the ultimate hearing on the merits.⁸² The Court noted that “the language of [s]ection 7 is broad, limited only by the requirement that the witnesses be summoned to appear ‘before [the arbitrators] or any of them’ and that any evidence requested be material to the case.”⁸³ Accordingly, while the Second Circuit did not determine whether the FAA empowers arbitrators to issue prehearing discovery subpoenas to nonparties, it found that arbitrators

78. *Id.*

79. 9 U.S.C.A. § 7 (West 2007).

80. *See, e.g., Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 578-79 (2d Cir. 2005) (pointing out that under section 7 of the FAA, arbitrators have the power to summon nonparty witnesses to produce documents and testify before them); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410-11 (3d Cir. 2004) (noting that the plain language of section 7 empowers arbitrators to summon nonparty witnesses before them, not to issue pre-hearing discovery subpoenas); *Guyden v. Aetna, Inc.*, No. 3:05cv1652 (WWE), 2006 WL 2772695, at *7 (D. Conn., Sept. 25, 2006) (recognizing procedure set forth in *Stolt-Nielsen SA*).

81. *Stolt-Nielsen SA*, 430 F.3d at 577.

82. *Id.*

83. *Id.* at 578-79.

have the authority to require nonparties to appear before them with documents and provide testimony on relevant issues prior to the final hearing.⁸⁴

The Second Circuit's holding in *Stolt-Nielsen SA* was consistent with the Third Circuit's opinion a year earlier in *Hay Group, Inc.*, in which the court held that "[s]ection 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 documents at that time."⁸⁵ Note, however, that unlike the Second Circuit in *Stolt-Nielsen SA*, the Third Circuit did not specifically discuss whether arbitrators have the authority to compel discovery before them prior to the final hearing on the merits.⁸⁶

Recently, in *Guyden v. Aetna, Inc.*, the District of Connecticut recognized *Stolt-Nielsen SA* for the proposition that arbitrators may obtain information from a nonparty through a pre-merits hearing before them.⁸⁷ The Court noted:

Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.⁸⁸

While the court did not specifically address this issue, it cited the discovery procedure utilized by the arbitrators in *Stolt-Nielsen SA* with approval.⁸⁹

Stolt-Nielsen SA and related decisions have the potential to significantly impact the scope of discovery available in arbitrations because these cases provide arbitrators and parties with another mechanism to compel prehearing discovery, especially in those jurisdictions that do not recognize the authority of arbitrators to order prehearing depositions or document production under the FAA. Under *Stolt-Nielsen SA*, an arbitration panel can convene

84. *Id.* at 581.

85. *Hay Group, Inc.*, 360 F.3d at 407.

86. *Compare id.* at 405-14, with *Stolt-Nielsen SA*, 430 F.3d at 577-80.

87. *Guyden v. Aetna, Inc.*, No. 3:05cv1652 (WWE), 2006 WL 2772695, at *7 (D. Conn. Sept. 25, 2006).

88. *Id.* at *8.

89. *See id.* at *7.

prior to the final hearing in a matter and require nonparties to appear before them at a particular location and produce documents and testimonial evidence.⁹⁰

This procedure may also provide parties and arbitrators with an end-run around the 100-mile jurisdictional limits of nonparty arbitral subpoenas that have been enforced by certain jurisdictions. As discussed above, several jurisdictions have held that an arbitral subpoena is only enforceable if properly served on a nonparty within 100 miles of the location where the arbitrators are “sitting.”⁹¹ While courts have yet to specifically address the precise meaning of “sit,” there is precedent from several federal courts that a panel is “sitting” in the location where the underlying arbitration is actually taking place.⁹² Nonetheless, due to the uncertainty on this issue, an arbitration panel could decide to “sit” in a location other than where the arbitration is taking place but within 100 miles of the nonparty from whom discovery is sought for the sole purpose of complying with the territorial limits of FRCP 45 and section 7 to obtain nonparty discovery.

D. Prehearing Document Production Under the FAA

Unlike prehearing depositions, arbitrators have more latitude with respect to ordering nonparty document production. Indeed, most jurisdictions have held that arbitrators have the authority to compel a nonparty to produce documents prior to the hearing and directly to the parties to the arbitration, though there are some jurisdictions that have found otherwise.

The United States Court of Appeals for the Sixth and Eighth Circuits, as well as district courts in the Second, Fifth, Seventh and Eleventh Circuits have held that the FAA empowers arbitrators to compel prehearing document discovery from nonparties.⁹³ One of

90. See 430 F.3d at 578-79.

91. See *supra* notes 48-56.

92. See *Gresham v. Norris*, 304 F. Supp. 2d 795, 796 (E.D. Va. 2004) (“[A] district court maintains jurisdiction over such a petition [to enforce a subpoena under 9 U.S.C. § 7] if the situs of the pending arbitration is within its jurisdiction.”); *Thompson v. Zavin*, 607 F. Supp. 780, 783 n.5 (D.C. Cal. 1984) (noting that the only federal court that has the power to enforce or issue a nonparty subpoena under the FAA is the district court in which the arbitrators were “sitting”).

93. See, e.g., *In re Sec. Life Insur. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000); *Am. Fed’n of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999); *Festus & Helen Stacy Found. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. Civ. 02-4304PAMJSM, 2004 WL 67647, at *3 (D. Minn. Jan. 9, 2004); *In re Arbitration Between the Procter and Gamble Co. and Allianz Ins. Co.*,

the most recent decisions on this issue, *Festus & Helen Stacy Foundation*, upheld the validity of prehearing document subpoenas issued to nonparties, characterizing the scope of discovery as a “procedural question” that should be left for the arbitrators to determine.⁹⁴

Similarly, in June 2007, the Southern District of New York enforced an arbitrator’s order compelling the production of documents from a nonparty who was a signatory to the arbitration agreement between the two parties to the arbitration.⁹⁵

By contrast, the United States Court of Appeals for the Third and Fourth Circuits, as well as a district court in the First Circuit, have taken a far less deferential view with respect to document discovery from nonparties prior to the hearing.⁹⁶ In 2007, the District of Massachusetts addressed this issue as a matter of first impression in the First Circuit. The court granted a nonparty’s motion to dismiss an arbitral subpoena that sought prehearing document production.⁹⁷ While acknowledging the jurisdictional split, the court found the cases in the Third and Fourth Circuits—*Hay Group* and *COMSAT*—more persuasive on this issue, as opposed to the decisions set forth above that have upheld prehearing nonparty document subpoenas by arbitrators under the FAA:

I recognize the split of authority. I think that the two more persuasive cases are the Fourth and Third Circuit cases, particularly the Third Circuit case, and that this is not—this document subpoena, which on its face simply calls for the delivery or production of documents and doesn’t even include a witness in its

2003 U.S. Dist. LEXIS 26025, at *5 (S.D.N.Y. Dec. 3, 2003); *In re Meridian Bulk Carriers, Ltd.*, No. 03-2011, 2003 WL 23181011, at *2 (E.D. La. July 17, 2003); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995); *Amgen Inc. v. Kidney Ctr. of Del. County, Ltd.*, 879 F. Supp. 878, 883 (N.D. Ill. 1995); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242 (S.D. Fla. 1988).

94. *Festus & Helen Stacy Found.*, 432 F. Supp. 2d at 1379.

95. See *In re Arbitration Between Live Receivables Trust and Syndicate 102 at Lloyd’s of London*, No. M8-85 (S.D.N.Y. Mar. 12, 2007), reprinted in 18-2 MEALEY’S LITIG. REP. REINSURANCE 3 (2007).

96. See, e.g., *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004); *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 275-76 (4th Cir. 1999); *Liberty Mut. Ins. Co. v. White Mountains Ins. Group Ltd.*, No. 06-11901 (D. Mass. Feb. 26, 2007), reprinted in 17-22 MEALEY’S LITIG. REP. REINSURANCE 4 (2007).

97. Transcript of Hearing on Motion to Dismiss at 13-14, *Liberty Mut. Ins. Co. vs. White Mountains Ins. Group, Ltd.*, No. 06-11901-GAO (D. Mass. Feb. 26, 2007), reprinted in 17-22 MEALEY’S LITIG. REP. REINSURANCE 4 (2007).

scope, is simply not the kind of subpoena that is contemplated by the statute [section 7 of the FAA].⁹⁸

Because of the obvious split in jurisdictions on whether an arbitrator has the power to conduct prehearing nonparty document production under section 7 of the FAA, it is likely that courts will determine this issue on a case-by-case basis, depending on the law of the nonparty jurisdiction to which the parties and arbitrators are subject. Nonetheless, it remains clear that courts are far more willing to uphold documentary discovery, as opposed to depositions, prior to the hearing.

III. CONFIDENTIALITY

As reinsurance arbitrations have become more contentious, so too has the issue of whether arbitration should remain confidential. Many commentators, however, consider confidentiality as one of the hallmarks and attractions of the arbitral process.⁹⁹ Many insurers, reinsurers, and other commercial entities do not want to risk the disclosure of sensitive business or proprietary information or potentially bind themselves to legal positions adopted by arbitration panels.¹⁰⁰

An arbitration agreement may contain a confidentiality provision, which provides: “The parties undertake and agree that all arbitral proceedings conducted by reference to this clause will be kept strictly confidential, and all information disclosed in the course of such arbitral proceedings will be used solely for the purpose of those proceedings.”¹⁰¹

When a contract contains a confidentiality provision, this issue is generally resolved without the need for intervention by arbitrators, as parties often concede that the proceedings are to remain confidential.¹⁰² Problems arise, however, when a contract is silent as to confidentiality.¹⁰³ For example, in the reinsurance context, when a cedent and a reinsurer are engaged in multiple arbitrations involving similar contracts and issues, one party may oppose confidentiality so that it can use favorable awards, orders, or testimony from prior arbitrations, which are traditionally subject to a confidential-

98. *Id.*

99. See STARING, *supra* note 36, § 22:6[2].

100. See *id.*

101. Hans Bagner, *Confidentiality in Arbitration: Don't Take it for Granted!*, 11-16 MEALEY'S LITIG. REP. REINSURANCE 9 (2000).

102. See *id.*

103. *Id.*; see also STARING, *supra* note 36, § 22:6[2].

ity agreement, against the other party in current and future arbitrations between them. Furthermore, even if a confidentiality agreement is in place, a party may still attempt to unilaterally amend or even breach the agreement if the party believes it can influence an arbitration panel.¹⁰⁴ Faced with this potential scenario, the party seeking the protections of confidentiality will look to the court for relief.¹⁰⁵

The FAA does not explicitly state whether arbitrations are required to be kept confidential or whether arbitrators have the authority to impose confidentiality.¹⁰⁶ Federal courts have also failed to address whether there is a duty to maintain confidentiality in arbitrations under federal law.¹⁰⁷ Several commentators have argued that, even in the absence of a confidentiality agreement, it is customary for parties to arbitration to keep the proceeding confidential.¹⁰⁸ Others have advocated for the position that arbitrations should not be confidential unless the parties have agreed to such terms.¹⁰⁹

Recent decisions from foreign courts further illustrate the divergence of opinions with respect to this issue. In 2004, the English Court of Appeals held that arbitration proceedings are not confidential per se, dismissing the traditional view held by English courts that there is a legal right and duty of confidentiality in arbitration.¹¹⁰ Instead, the Court of Appeals held that, absent an express agreement to the contrary, courts should determine whether arbitrations should remain confidential on a case-by-case basis and employ a balancing test in which “the factors militating in favour of publicity have to be weighed together with the desirability of pre-

104. See *STARING*, *supra* note 36, § 22:6[2].

105. See *id.* (pointing out that the court may set aside an arbitration award where the arbitrators, under pressure from one of the parties, failed to comply with the confidentiality clause of the arbitration agreement (citing *Western Employers Ins. Co. v. Jeffries & Co.*, 958 F.2d 258 (9th Cir. 1992))).

106. Derek Lisk, *Confidentiality of Arbitrations*, 63 *TEX. B.J.* 234, 236-37 (2000); see also 9 U.S.C.A. §§ 1-16 (West 2007). Federal law, however, provides for confidentiality in administrative dispute resolution procedures. See 5 U.S.C.A. § 574 (West 2007).

107. See Lisk, *supra* note 106, at 237.

108. See Lawrence S. Greengrass & Brigitte M. Nahas, *Do Arbitrators Have the Power to Impose Confidentiality?*, *ARIAS-U.S. Q.*, First Quarter 2004, at 27, available at http://www.arias-us.org/mp_files/img_ftp/arias2004-Q1.pdf.

109. *Id.*

110. See Dr. Christoph Henkel, *The Evaluation of Privacy and Confidentiality in International Commercial Arbitrations by the English Court of Appeals in City of Moscow v. Bankers Trust*, 15-19 *MEALEY'S LITIG. REP. REINSURANCE* 13 (2005) (citing Dep't of Economic Policy and Develop. of the City of Moscow v. Bankers Trust Co., [2005] (Q.B.) 207).

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erving the confidentiality of the original arbitration and its subject matter.”¹¹¹ Notably, the Court of Appeals relied upon courts in Australia and New Zealand that rejected the notion that confidentiality is essential to the arbitral process.¹¹²

Similarly, at least one Swedish court has held that there is no implied or inherent duty of confidentiality in an arbitration agreement.¹¹³ The court noted that “unless the parties have expressly provided that [the] information is to remain confidential, there is no implied legal duty of confidentiality.”¹¹⁴ Other foreign jurisdictions, however, have held that arbitration is presumed confidential.¹¹⁵

While federal courts have yet to address whether arbitrators have the authority to impose confidentiality under the FAA, one recent state court decision, *City of Newark v. Law Department of New York*, held that an arbitration panel lacked the authority to prevent a nonparty to an arbitration agreement from obtaining certain documents pursuant to the Freedom of Information Law (“FOIL”), despite the fact that the panel had issued a confidentiality order.¹¹⁶ Citing Supreme Court precedent, the court noted that “[a]rbitration is a matter of consent, not coercion,” and thus, the panel had no authority to prevent the nonparty from discovery.¹¹⁷ Nonetheless, the precedential value of *City of Newark* is limited with respect to the confidentiality of arbitrations under the FAA, since the underlying arbitration in that case did not arise under that statute.¹¹⁸

It is arguable whether the issue of confidentiality is within the scope of “procedural” powers left for arbitrators. Recent decisions, relying on Supreme Court precedent, have held that arbitrators, not courts, have the authority to decide procedural issues pursuant to the FAA.¹¹⁹ The ARIAS-US arbitration rules also dictate that arbitrations should be confidential and that arbitrators

111. *Id.*

112. *Id.* (citing *Eso Australia Resources Ltd. v. Plowman*, 128 A.L.R. 391 (1995) and *Television New Zealand Ltd. v. Langley Prod. Ltd.*, [2000] 2 N.Z.L.R. 250).

113. See Bagner, *supra* note 101, at 1.

114. *Id.* at 3.

115. See Greengrass & Nahas, *supra* note 108, at 26.

116. 760 N.Y.S.2d 431, 436 (App. Div. 2003).

117. *Id.*

118. *Id.*

119. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451-52 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002).

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have the authority to impose confidentiality.¹²⁰ For example, the 2004 ARIAS-US procedures explicitly state that when parties disagree as to the scope of confidentiality, arbitrators should use their discretion in ordering whether and to what extent the arbitration should remain confidential.¹²¹ On the other hand, arbitration is a creature of contract, and there is some validity to the argument that parties should not be bound to confidentiality absent an express agreement to the contrary. Either way, this will be an interesting issue for arbitrators and parties to monitor going forward.

IV. SUMMARY ADJUDICATION

Another procedural issue that has been the subject of debate in recent years is whether arbitrators have the authority to decide a case by summary adjudication, absent an express agreement by the parties to do so.

The FAA does not explicitly grant arbitrators the authority to decide a case by summary adjudication. Recent case law and industry commentary suggest, however, that courts and arbitrators may recognize this power on a more consistent basis going forward.¹²²

In 2001, the Tenth Circuit affirmed a district court's denial of a motion to vacate an arbitration panel's award that was rendered prior to the ultimate hearing in a matter, after one of the parties moved for dismissal of the action.¹²³ The court noted that "there is

120. See ARIAS-U.S., ARIAS-U.S. PRACTICAL GUIDE TO REINSURANCE ARBITRATION PROCEDURE 22 (2004) [hereinafter PRACTICAL GUIDE], available at http://www.arias-us.org/pdf/Practical_Guide.pdf. The AIDA Reinsurance and Insurance Arbitration Society, ARIAS-U.S., is a not-for-profit corporation that promotes improvement of the insurance and reinsurance arbitration process for the international and domestic markets. See ARIAS-U.S., <http://www.arias-us.org/>. AIDA, the Association Internationale de Droit des Assurances, is an international insurance organization that was formed in 1960 for the purpose of promoting and developing knowledge of insurance law. See AIDA, <http://www.aida.org.uk/default.asp>.

121. See PRACTICAL GUIDE, *supra* note 120, at 22.

122. See, e.g., *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, No. 01-C-5226, 2004 WL 442640, at *2-3, *7 (N.D. Ill. Mar. 8, 2004), *aff'd*, 103 F. App'x 39 (7th Cir. 2004) (denying a party's motion to vacate a panel's decision to award summary judgment based on the parties' position statements); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206-07 (10th Cir. 2001) (affirming a district court's denial of a motion to vacate an arbitral award rendered by a panel based on a motion to dismiss filed prior to the hearing); see also PRACTICAL GUIDE, *supra* note 120, at 24; David M. Raim & Nancy E. Monarch, *Summary Disposition in Arbitration Proceedings*, ARIAS-U.S. Q., Second Quarter 2004, at 12; Robert M. Hall & Debra J. Hall, *Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes 5* (2004), www.arbitrationtaskforce.org/images/HallandHallArticle.pdf.

123. *Sheldon*, 269 F.3d at 1206-07.

no express prohibition against such a procedure” and that the arbitrators’ actions did not deprive the party opposing the award of a fundamentally fair hearing.¹²⁴ Similarly, in 2004, the Seventh Circuit denied a party’s motion to vacate an arbitration panel’s decision to award summary judgment based on the parties’ initial position statements filed in the matter.¹²⁵

Additionally, several notable commentators in the reinsurance industry have touted the advantages that motions for summary adjudication can play in the arbitral process.¹²⁶ These advantages include the elimination of costly and time-consuming discovery, the encouragement of settlements, and the promotion of the speedy and efficient resolution of disputes.¹²⁷ While summary adjudication motions have been used somewhat infrequently and granted sparingly in reinsurance arbitration proceedings, there appears to be some movement towards the acceptance of these motions in the arbitral process.¹²⁸

V. HOLD HARMLESS AGREEMENTS

A recent decision in the Northern District of Illinois, *Pacific Employers Insurance Co. v. Moglia*, is another example of courts expanding arbitral powers under the FAA.¹²⁹ In that case, the court examined whether an arbitration panel could compel the parties to sign a “hold harmless” agreement in an arbitration conducted pursuant to the Commercial Arbitration Rules of the American Arbitration Association.¹³⁰ “Hold harmless” agreements are routinely executed in reinsurance and other commercial arbitrations and provide that the parties will not assert any claim, actions, or lawsuits against the arbitrators for matters arising out of or resulting from the arbitration.¹³¹ These types of agreements also provide

124. *Id.* at 1206.

125. *Sphere Drake Ins. Ltd.*, 2004 WL 442640 at *3.

126. See PRACTICAL GUIDE, *supra* note 120, at 43; Raim & Monarch, *supra* note 122, at 12; Hall & Hall, *supra* note 122 at 5.

127. See Raim & Monarch, *supra* note 122, at 12.

128. *Id.*

129. No. 05 C 1366, 2007 U.S. Dist. LEXIS 21967 (N.D. Ill. Mar. 27, 2007).

130. *Id.* at *8.

131. *Id.* at *4-5. An example of a hold harmless agreement provides that the parties will agree to:

[N]ot assert any claim, file any suit, or initiate any action against the Panel or any member thereof in connection with their rendering services as arbitrator and/or umpire in this Arbitration proceeding . . . (ii) indemnify and hold harmless any and all expenses, costs, and fees of any kind incurred by the members of the Panel, and the payment of their reasonable hourly fees, in

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that the parties will indemnify and hold the panel harmless against any and all expenses, costs, and fees that may be incurred, including their reasonable hourly fees, in connection with any action arising out of the arbitration.¹³²

In *Pacific Employers Insurance Co.*, one of the parties to the arbitration refused to sign the hold harmless agreement, and the panel declared that it could not proceed with the arbitration.¹³³ After the case traveled through the court system for several years, the insurers filed an appeal with the Northern District of Illinois to end the stalemate.¹³⁴ The court held that the arbitrators had the authority to require the parties to sign the hold harmless agreement and ordered the objecting party to sign that agreement.¹³⁵ The court relied on the FAA's policy favoring the enforcement of arbitration agreements, as well as other case law enunciating the strong policy in favor of a broad grant of arbitral immunity.¹³⁶

While the *Pacific Employers Insurance Co.* decision is yet another example of the broad powers granted to arbitrators under the FAA, the enforcement of such agreements is a power arbitrators will in all likelihood rarely have to exercise, since most parties agree to sign the hold harmless agreements.

CONCLUSION

Recent decisions illustrate that courts will show great deference to the authority conferred to arbitrators by the FAA with respect to many procedural issues. Nonetheless, a great deal of inconsistency remains in the judicial interpretation of certain arbitral powers.

The resolution of disputes between parties involving the power of arbitrators with respect to issues such as confidentiality and, especially, nonparty discovery, can often impact whether parties will prevail in a current (or future) arbitration between them. Moreover, the determination of these issues, as well as consolidation, summary adjudication, and the enforceability of hold harmless

connection with any claim, action or lawsuit arising or resulting from or out of this arbitration.

Id.

132. *Id.*

133. *Id.* at *2.

134. *Id.*

135. *Id.* at *12.

136. *Id.* at *7, *10.

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agreements, can have a substantial effect on the cost-effectiveness and overall efficiency of arbitration—reasons that parties seek to arbitrate their commercial disputes in the first place.

