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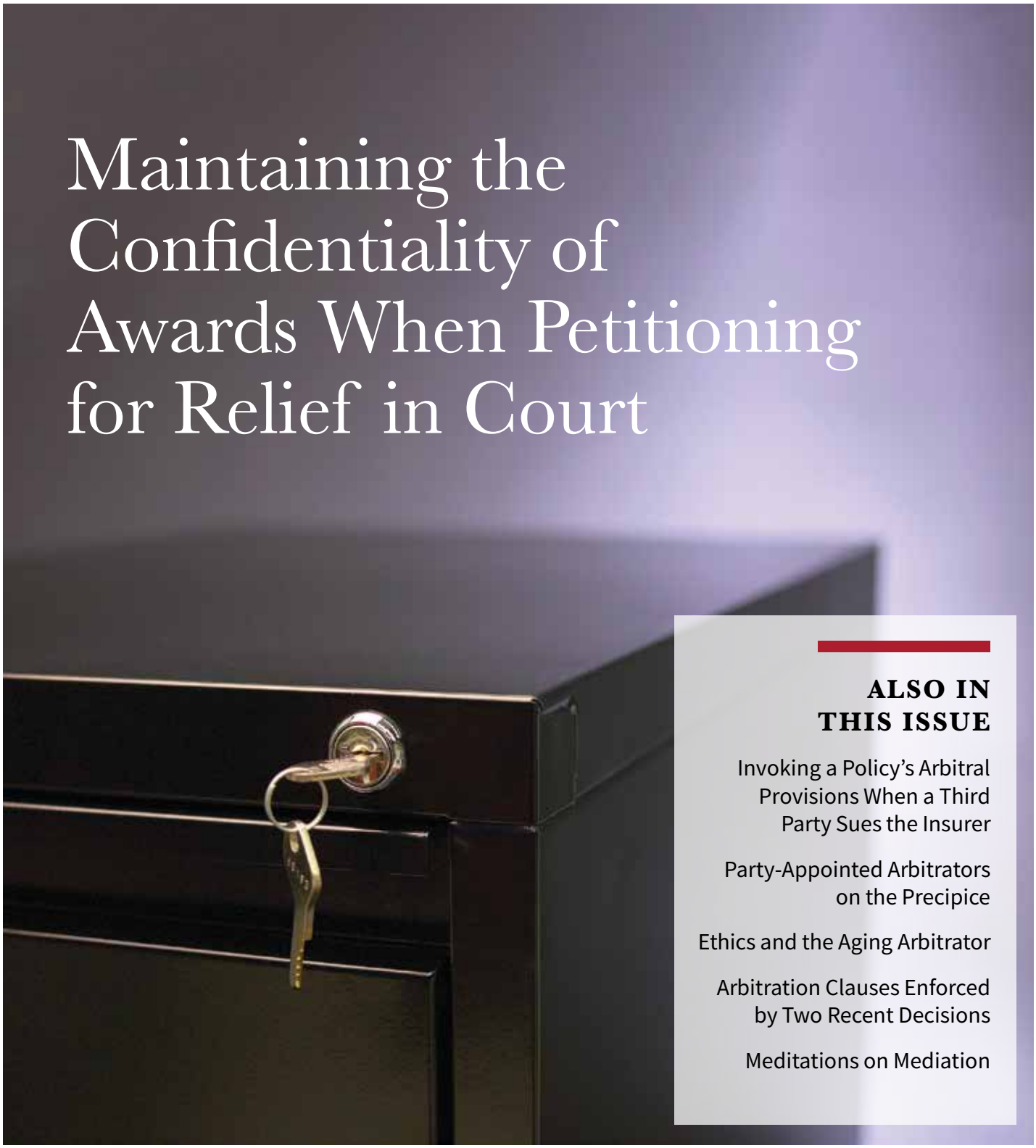
Maintaining the Confidentiality of Awards When Petitioning for Relief in Court



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Maintaining the Confidentiality of Awards When Petitioning for Relief in Court

By Amy J. Kallal and Andrea Fort

In current arbitration practice, a panel's issuance of a final award does not necessarily mean the end of proceedings between the parties. One or both parties may choose to go to court to exercise rights under the Federal Arbitration Act, sometimes in an attempt to vacate the award but, more often, simply to have it confirmed so that it has the force of a court judgment. The rationale for invoking court assistance at the end of a private, confidential arbitration differs from case to case, the most straightforward being to facilitate collection of the award or to have the ability to enforce compliance. Other considerations may also come into play, but they should always be informed by the fact that it is increasingly difficult to ensure that an award will remain confidential once the court's jurisdiction is invoked.

For at least the past decade (if not longer), practitioners representing clients who elect to seek judicial confirmation have been keenly aware that filing a petition in court brings with it the risk that the award may become public knowledge, an outcome that is arguably at odds with the reinsurance industry's tradition of confidential and commercial dispute resolution. More often than not, courts across the country will deny requests to seal an award, unseal awards *sua sponte* and even grant motions to unseal by third-party intervenors (usually another company with exposure to the same claim or reinsurance contract). This last scenario may be of particular concern to a cedent who has "lost" an arbitration with one reinsurer but still seeks to collect from other reinsurers on the same claim.

With the unfavorable award made public, those other reinsurers now can attempt to introduce the decision into the record in their own arbitration with the cedent and argue that it should be given preclusive effect by the arbitrators.

It is a debate unto itself whether this new reality is a positive development—for example, by ensuring the same "fairness" inherent in the judicial process by preventing a party from taking multiple bites at the apple under the same treaties for the same claim—or just another example of how reinsurance arbitration has strayed from its original aim of ensuring efficient, businesslike, and (importantly) confidential dispute resolution. Whatever one's view, parties and their counsel should keep in mind all possible ramifications of simply filing a petition to confirm an award (even if no action is further taken in the proceeding), as recently seen in the Third Circuit.

The *Penn National* Award and Unsealing

Earlier this year, a long-running dispute between Pennsylvania National Mutual Casualty Insurance Company and one of its reinsurers, Everest Reinsurance Company, ended with the unsealing of an award from an arbitration to which Everest had not even been a party. Everest was able to obtain this result even though (1) Penn National had withdrawn its petition to confirm the award mere days after filing and (2) the district court had made no substantive decision based on the award or relied on it in any way.

After the dispute made its way to the Third Circuit for a second time, the court held that the arbitration award was a judicial record to which a common law right of access applied and that Penn National had not demonstrated a specific harm to overcome the presumption of public access [1]. Following remand to the district court, the award was finally unsealed. Although not binding precedent for the Third Circuit (since the decision was not issued by the full court) [2], *Penn National* is nevertheless a significant case on the unsealing of arbitration awards.

The award concerned Penn National's cession of lead paint claims under certain excess-of-loss treaties subscribed to by various reinsurers. Two of the reinsurers on the treaties, New England Reinsurance Corporation and Hartford Fire Insurance Company, did not accept Penn National's reinsurance presentation, leading to arbitration and ultimately an award in favor of the two Hartford companies in March 2018 [3]. Although Penn National lost its bid for any reinsurance recoveries, and a panel majority concluded that Penn National's cession methodology was "unreasonable" and violated a policy limits warranty and that the Hartford companies were entitled to attorneys' fees, Penn National filed a petition in the Middle District of Pennsylvania in April 2018 to confirm the award.

Together with its petition to confirm, Penn National also filed an unopposed motion to seal the award, based on the terms of the standard ARIAS·U.S. form confidentiality agreement, which the district court granted. A few days later, Penn National withdrew its petition.

The dispute with Everest began after Penn National subsequently demanded arbitration against Everest on the same claims and treaties that were at issue in the proceeding with the Hartford companies. Penn National and Everest disagreed about the interpretation of a consolidation provision in the treaties, whereby reinsurers were to "constitute and act as one party," and also as to whether their dispute should be decided by the original panel in the Penn National-Hartford arbitration or by a new panel.

Both parties sought relief in district court in November 2018 with competing motions to compel arbitration. Two months later, in January 2019, Everest also moved to intervene in the original confirmation proceeding and to unseal the award issued in the Penn National-Hartford arbitration. The district court allowed Everest to intervene but denied the motion to unseal. Everest appealed the decision, together with a related order granting Penn National's petition to compel arbitration.

In December 2019 [4], the Third Circuit vacated the district court's order denying the motion to unseal, finding that the lower court erred by using the factors set out in *Pansy v. Borough of Stroudsburg*, 23 F. 3d 772 (3d Cir. 1994), which apply to orders preserving confidentiality of documents produced in discovery under the Federal Rules. These factors include: "(1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to

public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public" [5].

Instead, the Third Circuit directed that the relevant analysis should follow its 2019 *Avandia* decision [6], which clarified the standard of review when discovery materials are filed as court documents. This standard is "the more rigorous common law right of access," which not only recognizes "fewer reasons to justify the sealing of court records," but also "begins with a presumption in favor of court access" [7]. On remand, the district court granted Everest's motion to unseal and initially also denied Penn National's motion to stay the unsealing pending appeal. Following a motion for reconsideration, a stay was granted while an appeal was taken.

Once again before the Third Circuit, Penn National argued that the award was not a judicial record and thus not subject to a presumptive common law right of access. Everest countered that under clear Third Circuit precedent, a non-discovery document, like the arbitration award at issue, becomes a judicial record upon its filing with a court. Everest further argued that Penn National had failed to make the requisite showing of a clearly defined and serious injury to rebut the presumption of access.

The Third Circuit sided with Everest, citing *Avandia* to explain that the common law right of access "attaches to judicial proceedings and records" [8]. The court further noted that it had rejected the test used in other circuits to determine whether a document is a judicial record, i.e., a test that turns on the use a court has made of a document.

In the Third Circuit, the relevant issue is whether a document "found its way into the clerk's file," and once Penn National filed the award it had become a judicial record, regardless of what use (or not) the district court had made of it [9]. The Third Circuit also rejected Penn National's arguments as to the specific harm it would sustain if the award was unsealed, finding that an affidavit by one of its officers "assert[ing] that other reinsurers might choose to forego paying Penn National and contest their contractual obligation to pay if they learned of the contents in the arbitration award" did not amount to a "clearly defined injury" [10]. This was because the averments in the affidavit did not allow for a determination of "how many relationships could be impacted, the amount of money that could be at stake, the types of actions other parties may pursue, or the likelihood that any such actions would be successful" [11].

Prior Unsealing Cases with Intervenors

The *Penn National* case is not the first, and is unlikely to be the last, decision showing judicial antipathy to sealing what the courts appear to view as simple business records subject to public disclosure once a party has invoked the judicial system. Of particular relevance to the reinsurance industry, the unsealing of an award is a likely result even where the effort is led by a third-party intervenor seeking a tactical advantage in its own dispute with a party. In 2013, for example, two cases resulted in unsealing in the Southern District of New York, a common venue for petitions to confirm.

In the cursory decision *Generali U.S. Branch v. Arrowood Indemnity*, the court unsealed a reinsurance arbitration award, *sua sponte* and without finding it necessary to even decide the intervenor's motion to unseal [12]. Citing the fact that the unreasoned award at issue was, by its terms, "not probative of either party's position," the court rejected arguments that disclosure of the document could cause any harm. A few months later, in *Eagle Star v. Arrowood Indemnity* [13], unsealing was granted despite the objections of both the cedent and reinsurer to the original arbitration.

The *Eagle Star* court first confirmed that the sealed arbitration award had become a judicial document when the petition to confirm was filed. The court further held that the award remained a judicial document, even though the parties later agreed to dismiss the proceeding: "Simply because the parties later filed a stipulation of dismissal does not mean that the parties did not invoke the judicial power upon the initial filing of these documents" [14]. Furthermore, the fact that the court had not decided the original petition to confirm or the cedent's motion to dismiss did not change the strong presumption of public access to the award. The award constituted the "heart of what the Court [had been] asked to act upon" [15].

Finally, the court considered competing factors weighing against the presumption of access, including the privacy interests of the parties objecting to disclosure, and found them insufficient to avoid unsealing. The original confidentiality agreement between the cedent and reinsurer was, according to the court, in itself not enough to establish the need for sealing; neither was the cedent's protest that disclosure of the award would compromise its position in other arbitrations, including an ongoing dispute with the intervenor seeking access to the award. Again, the court made clear that arbitration awards may be unsealed notwithstanding "the risk that [disclosure] will impair [plaintiff's] negotiating position with other reinsurers" [16].

Conclusion

Although apparently not a concern of the courts—whose analysis in unsealing cases focuses on longstanding principles of public access to judicial records—the potential commercial consequences of public disclosure of arbitration awards are clear to industry participants. Given the tradition of confidentiality in reinsurance arbitrations, judicial reluctance to sealing arbitration awards must be taken into account when a party to an arbitration files a petition in court seeking to confirm, vacate or otherwise challenge an award.

Parties should further consider that, at least based on the recent *Penn National* case, defeating a motion to unseal will likely require a strong showing of a "clearly defined injury." According to the Third Circuit's description of relevant factors (such as the amount of money at stake or the likelihood of success of other actions against a party), this could result in the disclosure of further information traditionally protected as proprietary and confidential.

NOTES

1 *Pennsylvania Nat'l Mut. Cas. Ins. Grp. v. New England Reinsurance Corp.*, 840 F. App'x 688 (3d Cir. 2020).

2 The decision is not contained in an official reporter and expressly notes that it is not binding precedent under the Third Circuit's Internal Operating Procedures because it was not heard by the full court. See I.O.P. 5.7 ("Citations. The court by tradition does not cite to its not precedential opinions as authority. These opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.")

3 Mound Cotton's Lloyd Gura, Amy Kallal, and Matthew Lasky represented the Hartford companies.

4 The Third Circuit upheld the district court's order compelling arbitration of the consolidation issue before a new panel. 794 F. App'x 213, 214 (3d Cir. 2019):

By asking us to send the consolidation question to the panel that decided the Hartford Arbitration, Everest invites us to prejudge that question and to disregard the express language of the agreement. But we are bound to enforce the agreement according to its terms and to compel the parties to follow the procedure they agreed to. Because of this, we can only compel arbitration of the consolidation issue before a new panel chosen according to the express terms of the agreement. Consistent with the agreement's terms, the two disputes must be consolidated if and only if: (1) a new panel determines that Everest's dispute is "the same" as the dispute at issue in the Hartford Arbitration, and (2) the panel that decided the Hartford Arbitration is still extant such that it can handle this new dispute.

5 *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (citing Pansy, 23 F.3d at 787-91).

6 *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 924 F.3d 662 (3d Cir. 2019). The *Avandia* decision was filed about two months after the district court's initial order.

7 *Id.* at 670.

8 See 840 F. App'x at 690.

9 *Id.* at 691 (internal citation omitted).

10 *Id.*

11 *Id.*

12 *Generali-U.S. Branch v. Arrowood Indem. Co.*, No. 13 CIV. 3401 (WHP), 2013 WL 12311009, at *3 (S.D.N.Y. July 11, 2013).

13 *Eagle Star Ins. Co. v. Arrowood Indem. Co.*, No. 13 CV 3410 HB, 2013 WL 5322573 (S.D.N.Y. Sept. 23, 2013).

14 *Id.*, at *2.

15 *Id.* (citing *Global Reins. Corp.-U.S. Branch v. Argonaut Ins. Co.*, Nos. 07 Civ. 8196, 07 Civ. 8350, 2008 WL 1805459, at *1 (S.D.N.Y. Apr. 21, 2008)).

16 *Id.*, at *3 (citing G*lobal Reins. Corp.-U.S. Branch v. Argonaut Ins. Co.*, Nos. 07 Civ. 8196, 07 Civ. 8350, 2008 WL 1805459, at *1-*2 (S.D.N.Y. Apr. 21, 2008)).

Amy J. Kallal is a partner at Mound Cotton and has over 20 years of experience in complex reinsurance litigation and arbitration.
akallal@moundcotton.com

Andrea Fort is a Special Counsel with Mound Cotton Wollan & Greengrass LLP in New York. Her practice focuses on complex insurance and reinsurance coverage disputes, in both litigated and arbitrated matters.
afort@moundcotton.com