

# **SPECIAL POWERS OF COMMERCIAL ARBITRATORS**

*Presented by:*

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# Introduction

Arbitrators can and often do provide for damages in their awards. But what other remedies are within the arbitrator's authority? And what limits apply?

In this interactive program a panel of experienced commercial arbitrators will discuss with the audience topics such as:

- Injunctions, declaratory relief, and specific performance
- Reservation of jurisdiction to enforce remedies
- Sanctions, attorney fees and punitive damages
- Emergency relief such as escrows, receivers, security deposits and *Mareva* injunctions

The discussion will cover the relevant law and recommended practices for commercial arbitrators in utilizing these remedies.

# Gary Benton

- U.S. and International Arbitrator
- Expertise in international business, private investment, technology and emerging growth matters
- AAA-ICDR and other US and international panels
- Adjunct Faculty, Santa Clara Univ. Law School
- Founder and Chairman of the Silicon Valley Arbitration and Mediation Center (SVAMC)
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- Arbitrator and mediator with expertise in construction and commercial cases
- Governing Committee of the ABA Forum on the Construction Industry from 2007 to 2010
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- Member of AAA's large complex case panel and CPR, FINRA and California Public Works panels
- Fellow, College of Commercial Arbitrators and Chartered Institute of Arbitrators
- Previously, business trial partner at three international law firms for over 35 years
- Co-chair of DR Section's Arbitration Committee (2017-2019)
- Member, DR Section's Governing Council
- Taught ADR as Adjunct Professor at the Law School of Santa Clara University  
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- Fellow, Chartered Institute of Arbitrators and College of Commercial Arbitrators
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- Florida Supreme Court Certified Mediator
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- Arbitrator and Mediator for AAA, ICR, CPR, Trinidad & Tobago DRC
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# ARE THE ARBITRATOR'S POWERS TO FASHION A REMEDY LIMITED?

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*A. Yes*

*B. No*

*C. It Depends*

## Arbitrator's Powers In General

- Remedy awarded must bear some relationship to contract and breach. *Advanced Micro Devices Inc. v Intel Corp.*, 9 Cal. 4<sup>th</sup> 362, 885 P.2d 994 (Cal 1994);
- Fact that a court could not or would not award the same remedy is not ground for vacature. RUAA sec. 21(c)
- Provider Rules: Any remedy or relief that is just and equitable and within the scope of the parties' agreement; AAA R-47(a); JAMS Rule 24(c)
- Exception: Limits on remedies in the parties arbitration agreement; *See O'Flaherty v Belgium*, 9 Cal. Rptr. 3d 286, 295-96 (dicta)

## Equitable Relief

- Arbitrator has broad authority to award specific performance, injunctions and declaratory relief. AAA Rule R-47(a); JAMS Rule 24 (c)
- Award granting claimant a permanent, non-exclusive, royalty-free license to respondent's intellectual property in a particular form of microprocessor technology, in addition to \$200 million in damages, affirmed. *Advanced Micro Devices Inc. v Intel Corp.*, 9 Cal. 4<sup>th</sup> 362, 885 P.2d 994 (Cal 1994)

# ARE ARBITRATORS AUTHORIZED TO AWARD PUNITIVE DAMAGES?

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*A. Always*

*B. Never*

## Punitive Damages

- Punitive damages may be awarded if authorized by law in a civil action for the same type of claim or the parties agree. RUAA 21(a)
- *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (1991) (Award of \$1 Million in punitive damages affirmed for breach of contract, bad faith and fraud despite New York law prohibiting punitives)
- *Willoughby Roofing & Supply Co., Inc. v Kajima Int'l, Inc.*, 598 F.Supp. 353 (N.D. AL 1984), *aff'd per curiam*, 776 F 2d 269 (1985) (punitive damage award affirmed in breach of contract action where respondent committed willful fraud in terminating contract & AAA Rules applied)

## Punitive Damages, cont'd

- *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (Under FAA and NASD Rules, award of punitive damages affirmed despite New York law prohibiting same in arbitration)



# WHEN MAY ARBITRATORS IMPOSE SANCTIONS?

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- A. Always*
- B. Never*
- C. It Depends*

## Sanctions

- The FAA is silent on an arbitrator's powers to award sanctions.
- The RUA gives arbitrators the same sanction authority that a court would have in a civil action
- AAA Rule R-23: Enforcement Powers of Arbitration
  - (d) In the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and
  - (e) Issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law

## Sanctions

- AAA Rule R-58 (a)
  - The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

## Sanctions

- Sanctions (cont'd)
  - Federal courts have affirmed awards of sanctions, usually for discovery misconduct.
  - *Hamstein Cumberland Music Corp. v. Williams*, 532 F. Appx. 538 (5<sup>th</sup> Cir. 2013) (under FAA arbitrators have inherent power to award sanctions, affirming a \$500,000 sanctions award for discovery abuses)
  - *Reliastar Life. Ins. Co. v. EMC National Life Co.*, 564 F.3d 81 (2d Cir. 2009) (attorneys fees sanction affirmed where party participated in arbitration in bad faith)

## Attorneys Fees

- FAA is silent on award of fees. Under the RUAA, the American Rule applies generally. RUAA 21(b)
- AAA Rules: Fees may be awarded if authorized by law, the contract or if both parties have requested such an award. AAA Rule R-47(d)(ii)
- *Wells Fargo Bank N.A. v. WMR e-PIN LLC*, 653 F.3d 702 (8<sup>th</sup> Cir. 2011) (affirming fee award under AAA Rules because both parties requested an award of fees in their pleadings.)
- Fee award is mandatory if attorney fees clause is clear. *Christensen v Dewor Developments*, 33 Cal. 3d 778 (1983)

# MAY ARBITRATORS RESERVE JURISDICTION TO RESOLVE DISPUTES AFTER AWARD?

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*A. Yes*

*B. No*

*C. Maybe*

## Reservation of Jurisdiction

- *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F. 2d 1215, 1220 (5<sup>th</sup> Cir. 1991) (future price adjustments in natural gas supply contract post-award)
- *Proodos Marine Carriers Co. v. Overseas Shipping Logistics Co.*, 578 F. Supp. 207, 212 (S.D.N.Y. 1984) (under long-term contract arbitrators retained authority to resolve post-award dispute)
- *Chicago Insurance Co. v. General Reinsurance Co.* 2019 WL 5387819 (S.D.N.Y. 2019) (Final award reserved jurisdiction over post-award disputes arising from final award regarding insurance loss billings)

## Emergency Relief Measures

- Emergency Arbitrators
  - The FAA, UAA, and RUAA do not expressly provide for appointment of Emergency Arbitrators prior to appointment of the merits panel.
  - But major provider rules do provide for emergency arbitrators. E.G. AAA Commercial Rule R-38 (procedural rules for appointment, jurisdiction, award, allocation of costs, and so forth). JAMS Rule 2 (c)(iii) is similar as is CPR Rule 14.8.
  - The movant must show that immediate and irreparable loss or damage will occur without relief and that movant is entitled to such relief. AAA Rule R-38 (e); JAMS Rule 2 (c)(iv)



## Emergency Relief Measures

- Types Of Emergency Relief
  - Measures for preservation of assets, conservation of goods or sale of perishable goods. (CPR Administered Rule14.9)
  - Injunction to preserve the status quo
  - Injunction to preserve evidence
  - Order to deposit money into an escrow account
  - Order prohibiting parties from disclosing confidential information
  - Injunction freezing respondent's assets ("*Mareva* Injunction")

## Emergency Relief Measures

- Enforcement of Emergency Relief Orders/Awards
  - *Sperry Int'l Trade v. Government of Israel*, 689 F.2d 301 (2d Cir. 1982)(interlocutory decision that proceeds of letter of credit be deposited in an escrow account enforced by court)
  - *Yahoo, Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013)(AAA emergency arbitrator award ordering claimant to complete transactions involving transition of search engine markets enforced by court)
  - *Draeger Safety Diagnostics, Inc. v. New Horizons Interlock, Inc.*, 2011 WL 653651 (E.D. Mich. 2011) (Emergency arbitrator's award requiring respondent to immediately return to claimant records, data, reports and equipment enforced by court)

## Recommended Practices

- Require the moving party to describe the specific emergency relief it requests and to give notice of request to the opposing party
- Provide opposing party with an opportunity to respond, on shortened time if appropriate
- Require the moving party to post security if appropriate, and require briefing if time permits
- Explain the contractual/ factual basis for the order/award for emergency relief and cite applicable provider rules authorizing the relief

# QUESTIONS

**THANK YOU**