

Confidentiality in U.S. Arbitration

By Laura A. Kaster

Introduction

Almost all definitions of arbitration include the word “private,” whether in reference to the use of a private third-party neutral or in defining the process itself. Many people assume that the privacy of the process equates to confidential treatment of information exchanged during arbitration. Indeed, decisions of the United States Second and Fifth Circuit Courts of Appeals have stated that confidentiality clauses are so common in arbitration that an “attack on the confidentiality provision is, in part, an attack on the character of arbitration itself.”¹

Privacy is the dominant feature of arbitration and distinguishes it from open court proceedings. Both the American Arbitration Association rules² and JAMS’ Rule 26 (c) (2009) give the arbitrators considerable discretion to exclude any non-party from any part of a hearing.

Nevertheless, the assumption that arbitration will always protect confidential information can be misleading and is certainly overbroad. Moreover, the scope of protections will be impacted by the circumstances in which information is subsequently sought. Therefore, parties should take care to protect trade secrets, sensitive financial information, work product, and attorney-client privileged communications within the arbitration itself by seeking a protective order and appropriately marking and maintaining the information so that confidentiality is maximized. Parties proceed at their peril if they do not consider the scope of confidentiality provided by their agreement and by the orders of the arbitral tribunal. Corporate parties should also be mindful of their reporting obligations and account for them in drafting their confidentiality agreements, because the regulatory reporting or disclosure requirements may not permit them to agree to complete confidentiality.

Organization Rules and Canons Impact Nondisclosure of the Proceedings

It is almost universally the case that the arbitral organization’s administrative personnel and arbitrators have an obligation to protect information about the proceeding. However, parties may or may not have confidentiality obligations, and frequently witnesses have no obligation to maintain either procedural or substantive information in confidence.

JAMS Rules are permissive, allowing the arbitrators to establish protective orders relating to trade secrets and other sensitive information, but imposing confidentiality only on the arbitrators and JAMS.³ Thus, neither parties nor witnesses are covered unless further action is taken.

CPR, the Institute for Conflict Prevention & Resolution, has rules for non-administered arbitration and it pro-

vides for confidential treatment of arbitration materials by the parties and arbitrators but not witnesses.⁴

The AAA and ABA have Canons governing the obligations of arbitrators to maintain confidentiality of the proceedings.⁵ However, the AAA specifies in its Statement of Ethical Principles⁶ that while arbitrators and AAA staff have a duty of confidentiality, it is neutral as to whether the parties should enter into a confidentiality agreement or agreed order pertaining to the confidentiality of the proceeding or the award: “The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public.”

Some strictures may apply automatically. For example, all U.S. arbitrators are bound by the ABA Code of Ethics for Arbitrators in Commercial Disputes (2004).⁷ Canon VI of the Code provides that “An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.” And Canon VI B further elaborates that: “The arbitrator should keep confidential all matters relating to the arbitration.” This gives some comfort, but history indicates that the primary concern in most cases will not be breach of confidentiality by arbitrators but by parties and witnesses.

When confidentiality is a central concern, the rules of the selected arbitral organization should be carefully examined. Specific attention to a confidentiality agreement in the arbitration agreement, and additional protections either in the terms of reference or a protective order entered by the arbitral tribunal, are also important because the choice of applicable law in the absence of these pro-active efforts is not always clear.

Federal Law

The U.S. Patent Act

Under the Patent Act, 35 U.S.C. §294, arbitration of patent disputes, including invalidity and infringement are arbitrable, but under §294 (d) and (e), any award must be reported to the Patent Office and becomes part of the patent prosecution file. The award is not enforceable until such a report is made. Thus, full confidentiality is not possible with respect to U.S. patent litigation where issues of invalidity and infringement are raised.

Federal Case Law

Federal courts will enforce arbitration confidentiality between parties to an arbitration confidentiality agreement or arbitral order,⁸ but the availability of protections for materials other than attorney-client privileged information,

trade secrets or confidential financial, health or otherwise protected or privileged information as provided in the Federal Rules of Civil Procedure, is much more tenuous. The analytical problem facing parties seeking to protect their information against third-parties was carefully described by Judge Easterbrook in rejecting a plea to protect arbitral information from disclosure in *Gotham Holdings*.⁹ In one of few Appellate Court rulings on this issue, the court specified that contracts bind only the parties:

No one can “agree” with someone else that a stranger’s resort to discovery under the Federal Rules of Civil Procedure will be cut off.... Indeed, we have stated more broadly that a person’s desire for confidentiality is not honored in litigation. Trade secrets, privileges, and statutes or rules requiring confidentiality must be respected, see Fed.R.Civ.P. 45(c)(3)(A)(iii), but litigants’ preference for secrecy does not create a legal bar to disclosure... [The parties] were entitled to agree that they would not *voluntarily* disclose any information related to the arbitration.... Disclosure would be authorized only when a third party had a legal right of access.

In *Lawrence E. Jaffe Pension Plan v. Household Int’l Inc.*,¹⁰ the plaintiff subpoenaed a third party seeking all arbitration documents relating to an earlier, separate arbitration against Household. There was a blanket confidentiality agreement in that arbitration endorsed by the arbitrator. The third party was willing to produce but concerned that he would violate the confidentiality order, Household moved to quash the subpoena. The court refused to reach what it viewed as the novel issue of its authority to countermand the arbitrator’s order, staying the discovery against the third-party and requiring the parties to address the discovery issues in the underlying action. Because the material was produced, there was no further ruling.

In another opinion by Judge Easterbrook, the Seventh Circuit addressed and rejected the notion that parties to an arbitration confidentiality agreement could prevent the Court from disclosing information when it was integral to its decision-making function. In *Baxter Int’l Inc. v. Abbott Labs.*,¹¹ the underlying arbitration involved a patent license agreement. The parties agreed that disclosure would be damaging. The Court noted that the litigation under these circumstances might be a way to leverage the desire for confidentiality to obtain a settlement, but it nevertheless rejected a joint motion of the parties to maintain the confidentiality of certain documents, including portions of the contract in dispute. The Court explained:

the *dispositive* documents in any litigation enter the public record notwithstanding any earlier agreement. How else are observers to know what the suit is about or assess the judges’ disposition of it? Not only the legislature but also students of the judicial system

are entitled to know what the heavy financial subsidy of litigation is producing. These are among the reasons why very few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed. In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is entitled to be kept secret on appeal.... [M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed.¹²

Moreover, the Court remarked that the means of enforcing a confidentiality agreement when breached by the filing of litigation was damages, not specific performance.¹³

When an arbitration award must be filed in a court to be enforced, a similar analysis may be triggered, thereby exposing it to publication. This issue was addressed in *Global Reinsurance Corp.-U.S. Branch v. Argonaut*.¹⁴ The district court in that case had initially sealed an arbitration award submitted for enforcement but on reconsideration reversed itself, holding that the plaintiff had not made a showing of harm sufficient to justify impinging the presumption of access to judicial materials, particularly in light of the fact that the mere filing of an award for enforcement did not require the submission to the court of any underlying documentation, which could remain protected. This suggests that the greater the information disclosed in an award, the more confidentiality may be threatened, so that the desire for a reasoned award may have to be tempered or satisfied in a form that is separate from the award itself if there is a great desire or need for privacy. In *Alexandria Real Estate Equities, Inc. v. Fair*,¹⁵ the court employed a different rationale for refusing to seal copies of an arbitration award, record and documents that gave an account of an arbitration. In that case, the court relied on a qualified First Amendment right of access to judicial documents and proceedings, which the party seeking the sealing bears the burden of showing that higher values overcome the presumption of public access. Fair was seeking to protect information about his employment history, which the court found insufficiently sensitive, unlike medical information or attorney-client privileged information; the arbitral rules of confidentiality were insufficient to overcome the First Amendment presumption of access.

In *American Central Eastern Texas Gas Co. v. Union Pacific Resources Group*,¹⁶ a motion for injunctive relief and to declare JAMS privacy rules applicable to protect an arbitration award apparently was received with contumely because the court published the prior arbitral finding of

antitrust violations against the Duke defendants in its own decision. The arbitrator in the underlying arbitration had previously refused to impose the JAM's privacy rules, finding that there had been no agreement to adopt them by the parties. The district court found that Duke's claim to irreparable injury was essentially that it would likely face additional claims based on the underlying facts and that was not sufficient in the face of the strong public interest in knowing "the results of arbitration proceedings that involve allegations of anticompetitive and monopolistic conduct."¹⁷

Courts have also ignored the parties' agreements where public policy strongly supports disclosure. In *Omaha Indem. Co. v. Royal Am. Managers, Inc.*,¹⁸ the court found that if parties to the arbitration testified, federal prosecutors could use arbitration testimony transcripts for impeachment in a criminal trial, even though the material was the subject both of a stipulation of confidentiality and a protective order. In *City of Newark v. Law Dep't of the City of N.Y.*,¹⁹ the City of Newark sought to compel disclosure under the Freedom of Information Law of documents relating to an arbitration between New York City and the Port Authority. The Appellate Court reversed the denial of the petition holding that the arbitration tribunal did not have the power to deny the public access under the Freedom of Information Law.

Other district courts faced with discovery demands have been more sympathetic to the privacy and confidentiality interests of ADR. In *Fireman's Fund Ins. Co. v. Cunningham Lindsey Claims Management*,²⁰ the court applied a balancing test, weighing the "ADR confidentiality interest" which it viewed as akin to settlement confidentiality against the relevance and significance of the evidence relating to the amount awarded in an arbitration proceeding. Finding that the subject matter of the dispute was relevant but the amount of the award was less so, it did not find a compelling reason for ignoring the ADR confidentiality and denied production. But it must be noted that the court had permitted production of another substantive order from the same arbitration.

State Case Law on Arbitration Confidentiality

If the parties clearly specify their election to be governed by state arbitration procedural and substantive law, that law will control.²¹ There are some state courts that appear to be more favorably disposed to confidentiality than their federal counterparts, which apply federal statutory law and look toward the federal rules of evidence and civil procedure.

There are at least four states that have general (although varied) statutory protections for arbitration communications: Arkansas,²² California,²³ Missouri,²⁴ and Texas.²⁵ The Revised Uniform Arbitration Act provides that arbitrators and arbitral organizations are not competent to testify to matters that have come before them.²⁶ Several states also have selective statutory provisions and rules

that govern arbitration confidentiality in specific types of cases.²⁷

One Missouri court refused to permit production of arbitration materials, including transcripts of testimony and evidence, and the award itself. It relied upon Missouri's statutory protections, which treat arbitration communications as akin to settlement communication. In *Group Health Plan, Inc. v. BJC Health Systems, Inc.*,²⁸ Group Health Plan sought an injunction to prevent BJC from obtaining arbitration materials in an arbitration between the two companies, arguing that the arbitrator had exceeded her authority in ordering production of confidential information. The materials sought related to an earlier arbitration to which Group Health Plan had not been party. Testimony was taken by the trial court on the confidential nature of the documents, some of which contained patient information and some of which had been marked attorneys' eyes only in the prior arbitration. The trial court imposed the injunction and on appeal, the Appellate Court affirmed, relying heavily on the statute and the fact that the parties had also entered a stipulated protective order. The statutory language related specifically to evidentiary use of arbitration material. It provided: "No admission, representation, statement or other confidential communication made in setting up or conducting such [arbitration] proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery."²⁹

The Missouri Court distinguished an earlier ruling by the Colorado Appellate Court in *A.T. v. State Farm Mutual Automobile Ins. Co.*³⁰ which had rejected a claim of confidentiality for medical information disclosed during a prior arbitration. The Colorado Court relied on the fact that the parties had not entered into a confidentiality agreement and that the arbitration was not conducted under rules that provided for confidentiality. Moreover, the plaintiff had made no effort to secure a protective order to preserve psychological disorder records.

States in which legislation expresses protection for arbitration communications are likely to be far more favorably disposed to parties seeking relief from production. But even in Missouri, the court system will not permit total anonymity for matters that need to be disclosed when arbitration enforcement in court is sought. In *CPK/Kupper Parker Communications, Inc. v. HGL/Gail Hart*,³¹ the court noted that the trial court had permitted the filing of the case with the identification of the parties by initials based on arbitration confidentiality. The court specified that because the courts are open and public, only protection of minors could justify anonymous filing.

Protection of Business and Trade Secrets

Independent of the arbitral dispute, preexisting secret processes, financial information, such as offers, bids, profit margins, formulas, data, programs, customer lists, and a wide variety of information may be critical to business

success and to contractual agreements. Although the rules and law discussed above have focused on the protections available generally for matters that arise out of the arbitration, including the facts of the dispute and the award, here the focus is on the protection of the underlying information that the parties treated as confidential prior to the dispute and protecting that information during arbitration. Some of the same provisions, concepts, and rules apply, but by and large, they do not specifically address this issue and they do not define what is protected. In addition, care must be taken to avoid such stringent protections that a party in an arbitration hearing would be unable to meet its burden of proving its case because information is inaccessible to a party with the burden of proof or to its experts under confidentiality protections.

Remedies

Enforcement is a thorny problem. The measure of damages may be difficult and timely preventive action by way of injunctive relief requires knowledge that disclosure is likely.

Injunctive Relief to Enforce Confidentiality

In *ITT Educational Services v. Arce*, 533 F.3d 342 (5th Cir. 2008), the Court upheld a permanent injunction preventing disclosure of the rulings, decisions and awards of an arbitration and the use of evidence created for that arbitration made confidential pursuant to the agreement of the parties. Arce's counsel had signaled her intent to use information about the arbitration results and other confidential information in a separate similar arbitration proceeding brought by a student against ITT. In the face of the argument that the arbitrator had found that the contract had been induced by fraud, and rejecting the argument that the confidentiality provision was itself unconscionable and against public policy, the Court ruled that the arbitration clause containing the confidentiality provision was separable from the contract that contained it and not vitiated by any finding of fraud. It therefore ruled that the confidentiality agreement had continuing viability and was enforceable. The arbitration provision stated under the heading "Resolution of Disputes" that the enforceability of the arbitration provision would be governed by the Federal Arbitration Act under the Commercial Arbitration Rules of the American Arbitration Association and that: "All aspects of the arbitration proceeding, and any ruling, decision or award by the arbitrator, will be strictly confidential. The parties will have the right to seek relief in the appropriate court to prevent any actual or threatened breach of this provision."

The Court held that without injunctive relief, ITT would be without remedy and would suffer irreparable injury and that the student could prove his own case without benefit of the confidential information as he had bargained for.

However, U.S. courts are chary to permit parties to use confidentiality issues as a shield to prevent enforcement of an arbitration award. In *AT&T Corp. v. Pub. Serv. Enterprises of Pennsylvania, Inc.*,³² AT&T sued PSE and others seeking to pierce the corporate veil and obtain judgment from a prior arbitration with PSE. PSE filed a complaint claiming that the AT&T suit itself breached the confidentiality agreement in the underlying arbitration. The court granted AT&T's motion to dismiss the PSE complaint, concluding that the case, although novel, was an effort to collect the underlying judgment and was therefore a continuation of the arbitration proceeding. Therefore, the confidentiality provisions were not breached. In addition, the court limited PSE's motion to seal, holding PSE's concerns did not provide grounds for sealing the entire case: "The parties' confidentiality concerns are fully protected by their ability to designate any filing or portion thereof as 'confidential,' and filing such pleadings or section under seal. To the extent that confidential materials are contained only in an exhibit or an appendix to any court filing, only such exhibit or appendix shall be filed under seal."³³

The Seventh Circuit has held that when the alleged breach of confidentiality is the act of filing or producing the material in litigation, injunctive relief or protective orders may not be available unless the material is subject to a recognized privilege or the requisite particularized showing of harm is made; damages may be the only resort.³⁴

Remedies Before the Arbitration Tribunal

A party denied critical information may certainly raise that issue with the tribunal, particularly where basic fairness is implicated. In addition, breaches of the tribunal's confidentiality orders or rules could also lead to tribunal sanctions or presumptions. Certainly, matters bearing on these issues should at least be preserved with the arbitral tribunal if the affected party will want to challenge enforcement of the award. But the critical role of the tribunal is to keep the barn door closed before the horses escape. The terms of reference and protective orders are critical to this end. The arbitration will not convert information that is not protected as a trade secret into confidential information nor will it insulate witnesses in the arbitration from their duty to provide evidence that is not independently protected.

Practical Conclusions

One of the painful realities of agreements containing arbitration clauses is that those clauses are most commonly an afterthought. Many and varied considerations face the drafter of a contract that includes an arbitration provision. But even in the glow of agreement, the parties, particularly those who have undertaken an ongoing relationship, may be able to agree that if any dispute arises, they will want to resolve it privately and confidentially.

Where the parties agree that confidential treatment of the arbitration itself is the dominant critical issue, the following check list ought to be considered:

- a. Draft a provision in the governing agreement to arbitrate specifying confidentiality requirements for documents or other business secrets that will be exchanged, how they will be identified and what steps must be taken to avoid distribution or disclosure.
- b. Draft a provision in the agreement to arbitrate that expresses the parties' intent that the fact of arbitration, the matters submitted in arbitration, witness statements, the reasoning of the arbitrators, and the award be maintained as confidential by all participants in the arbitration, the arbitrators, witnesses, experts and administrative personnel, except as required by law or financial reporting requirements.
- c. Choose governing law for the agreement that is sympathetic to remedying confidentiality rights.
- d. Consider declining to have a reasoned award to avoid having to submit the reasoning to a court where it may be disclosed. Here there are certainly countervailing considerations, but enforcement or challenge to the award is one place where there is a serious potential for unwanted disclosure or publication.
- e. Provide that without consent of the parties, only such information as is required by law shall be disclosed in connection with enforcement or challenge to the award.
- f. With respect to business secrets, mark them, identify them to the other party and require confidentiality protections for them under the agreement.
- g. Have the arbitration tribunal establish a procedure in a protective order or the terms of reference relating to the treatment of business secrets. Maintain procedures for identifying the materials as confidential, and controlling their use and distribution. Make sure witnesses sign a confidentiality undertaking. At the same time, take care to follow requirements pertaining to the business secrets of your opposing party.
- h. In the terms of reference or protective order, provide for an arbitral expert to review the documents in the event there is a dispute about disclosure to the arbitration tribunal or opposing party.

Even with the maximum effort and care, there remains exposure to disclosure if third-party non-participants in the arbitration have legitimate need of the information in connection with unrelated litigation.

Endnotes

1. *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008), quoting *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004).
2. The AAA Commercial Arbitration Rules R-23 (2009).
3. JAMS Rule 26. (2009).
4. CPR Rule 18 (2007).
5. Canon VI of the AAA Code of Ethics requires arbitrators to maintain the confidentiality of all matters relating to the arbitration.
6. <http://www.adr.org/sp.asp?id=22036>.
7. http://www.abanet.org/dispute/commercial_disputes.pdf.
8. E.g., *ITT Educational Services v. Arce*, 533 F.3d 342 (5th Cir. 2008).
9. *Gotham Holdings LP v. Health Grades, Inc.*, 580 F.3d 664, 665-66 (7th Cir. 2009) (citations omitted).
10. 2004 WL 1821968 (D. Colo. 2004).
11. 297 F.3d 544 (7th Cir. 2002).
12. *Id.* at 546-47 (citations omitted).
13. *Id.* at 548.
14. 2008 WL 1805459 (S.D.N.Y. 2008).
15. 2011 UL 6015646 (S.D.N.Y.).
16. 2000 WL 33176064 (E.D. Tex 2000).
17. *Id.* at *1.
18. 140 F.R.D. 398, 400 (W.D. Mo. 1991).
19. 760 N.Y.S.2d 431, 436-37 (NY App. 2003).
20. 2005 WL 1522783 (E.D.N.Y. 2005).
21. *Volt Info. Sciences, Inv. v. Bd of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).
22. Ark. Code Ann. § 16-7-206 (1999).
23. Cal. Evid. Code § 703.5 (West 1995).
24. Mo. Ann. Stat. § 435.014 (West 1992).
25. Tex. Civ. Prac. & Rem. Code Ann. § 154.073 (Vernon 2005).
26. The Revised Uniform Arbitration Act § 14 (d) (2000) provides with limited exceptions: "(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity."
27. See Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. Kan. L. Rev. 1255, 1264 (June 2006).
28. 30 S.W.3d 198 (Mo.App.Ct. 2000).
29. V.A.M.S. § 435.014(2).
30. 989 P.2d 219 (Colo.Ct.App 1999).
31. 51 S.W. 3d 881, at n.1 (Mo. App. 2001).
32. 2000 WL 387738 (E.D. Pa. Apr. 12, 2000).
33. *Id.*
34. *Baxter Int'l v. Abbott Labs*, 297 F.3d 544, 548 (7th Cir. 2002).

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