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ARBITRATION

BY SAMUEL ESTREICHER AND STEVEN C. BENNETT

The Confidentiality of Arbitration Proceedings

The ease with which parties are able to hold closed-door arbitration proceedings may provide a false sense of security regarding the confidentiality of arbitral proceedings.

Unsuspecting parties may be lulled into believing that their closed-door proceedings are confidential, only to find later that they failed to safeguard the confidentiality of the proceedings properly and that arbitral materials from the proceedings are subject to disclosure.

There is no hard and fast legal rule regarding the confidentiality of arbitration proceedings and related materials (such as pleadings, briefs and transcripts of proceedings), and the scope of confidentiality largely depends on where the proceedings are held, which arbitral body's rules govern, and whether the parties have acted proactively to preserve confidentiality.¹

A Presumption of Confidentiality?

The various rules, statutes, and state laws governing arbitration comprise a patchwork of confidentiality protection for arbitration, making a presumption of confidentiality far from certain. Most arbitration-sponsoring



Samuel Estreicher

Steven C. Bennett

organizations maintain rules that reference some element of confidentiality. For example, Rule 23 of the American Arbitration Association (AAA) provides that “[t]he arbitrator and the AAA shall maintain the privacy of the hearings” and further provides that the arbitrator shall have the power to exclude anyone who is not “essential” to the proceeding.² Similarly, the JAMS rules provide that “the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing,” and further that “[t]he Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.”³ It is apparent on the face of these rules, however, that they offer only limited protection.

Moreover, express statutory protection of confidentiality is rare. For example, neither the Federal Arbitration Act nor New York's C.P.L.R. Article 75 (governing arbitration) specifically provides for the confidentiality of arbitral materials. The Revised Uniform Arbitration Act (adopted in an increasing number of states), however, expressly states

that “an arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.”⁴

Some states have adopted specific provisions regarding the confidentiality of arbitration. For instance, Missouri state law provides:

Arbitration...proceedings shall be regarded as settlement negotiations. Any communications relating to the subject matter of such disputes made during the resolutions process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.⁵

The extent of the protection afforded by the statute, however, is not entirely clear. In *Group Health Plan Inc. v. BJC Health Sys. Inc.*, the Missouri Court of Appeals noted the “statute's preclusive effect on the discovery” request for transcripts and exhibits from a prior, unrelated, arbitration proceeding, including deposition transcripts to which respondents were a party.⁶ The Missouri court explained, however, that “[r]egardless ...of the statute's preclusive effect...the parties to the [prior arbitration] also entered into a Stipulated Protective

Samuel Estreicher is Dwight D. Opperman Professor at New York University School of Law and counsel to Jones Day. **Steven C. Bennett** is a partner at Jones Day and the author of “Arbitration: Essential Concepts” (ALM 2002). **Joseph J. Bernasky**, an associate in the labor and employment group at Jones Day, assisted with the preparation of this article.

Order, which was signed by both parties and the [arbitration] panel.” Pursuant to this order, which remained binding after final disposition of the arbitration, only specified individuals with an interest in the arbitration could have access to discovery materials designated confidential, and such materials could be used “solely for purposes of [that] arbitration and for no other purpose.” The Missouri court thus gave the protective order “the deference it would receive as any other arbitration award.” The court further found that there were no “intervening circumstances” that diminished or eliminated the need for the protective order and thus upheld the order and denied the discovery request.

Similarly, although New York’s C.P.L.R. §75 makes no provision for the confidentiality of arbitration, in *City of Newark v. Law Department of the City of New York*, the state Supreme Court for New York County denied the city of Newark’s petition under New York’s Freedom of Information Law (FOIL) for records produced in a prior court-ordered arbitration between the Port Authority of New York and New Jersey and the city of New York.⁷ The panel in the prior arbitration had issued an order that (a) precluded the disclosure of any material information related to the arbitration proceeding, and (b) mandated that the arbitration proceedings remain private and confidential. The court held that the arbitration panel, like a court, had the power to issue orders of non-disclosure that override the FOIL. Without citing the C.P.L.R., the court explained that “orders issued by arbitration panels should be accorded the same deference and have the same force of law as judicial officers.... An arbitrator is a judicial officer, invested with judicial functions, and acting in a quasi-judicial capacity.”

Further, in *Those Certain Underwriters at Lloyds, London v. Occidental Gems*, the First Department upheld a trial court’s rejection of a Special Referee’s recommendation for the production of documents and testimony from a confidential arbitration proceeding in Belgium, noting the “important public interest in protecting the rights of parties who submit

to confidential arbitration.”⁸ But, in *Galleon Syndicate Corp. v. Pan Atlantic Group Inc.*, the same court 11 years before had required production of evidence submitted in a prior arbitration proceeding because “in the absence of a confidentiality provision ... evidentiary material at an arbitration proceeding is not immune from disclosure.”⁹

Concerns of Parties

When parties seek access to arbitration-related information, courts often engage in balancing, weighing the public interest in the disclosure of the information on the one hand and the parties’ interest in maintaining the confidentiality of the information on the other. The results of such balancing are frequently uneven across jurisdictions, creating uncertainty for parties that seek to ensure confidentiality in arbitration.¹⁰

Maintaining the privacy of these proceedings is often very important to the parties and is arguably integral to a properly functioning arbitration system.¹¹ Arbitration, which can readily be held in private settings, provides parties with an alternative to the openness of courtroom proceedings. Parties may have varying concerns about the confidentiality of arbitration. Disclosure of arbitral materials that reveals trade secrets, for example, can be of particular concern. Parties may also wish to prevent the public disclosure of arbitral material that implicates business strategies or even the party’s position in a prior arbitration proceeding if inconsistent with the party’s current stance on the issue. Indeed, in some instances, a party may wish to shield from disclosure the very existence of a pending proceeding or prior arbitration proceeding.

Practical Guidance

The ease with which parties can exclude outsiders from an arbitration proceeding may provide a false sense of security.¹² In addition to holding closed-door proceedings, parties should consider seeking a confidentiality provision in their arbitration agreement and incorporating into the agreement any appropriate institutional

confidentiality rules.¹³ Parties must also recognize that these contractual steps offer only limited assurance of confidentiality, particularly with respect to third parties.

An order from the arbitrator or arbitration panel requiring that the proceeding be private and confidential can be key in preventing against future disclosure. Indeed, in cases such as *City of Newark* and *Occidental Gems*, it was the existence of such orders that blocked access to the requested arbitral material.

Finally, care should be taken to consider the choice-of-law provision in the arbitration agreement, for the law respecting the confidentiality of arbitral proceedings may be more favorable in some jurisdictions than it is in others.



1. In the arbitration of statutory claims, confidentiality could potentially raise public policy concerns; these matters are outside the scope of this article.

2. American Arbitration Association, Commercial Arbitration Rules, as amended and effective Sept. 1, 2007.

3. JAMS Comprehensive Arbitration Rules and Procedures, Rule 26 Confidentiality and Privacy, Revised March 26, 2007.

4. See Uniform Arbitration Act (revised 2000) §17(e).

5. MO. ANN. STAT. §435.014 (West 2008).

6. 30 S.W.3d 198, 203-04 (Mo. Ct. App. 2000).

7. 194 Misc2d 246, 754 NYS2d 141 (N.Y. Sup. 2002).

8. 41 AD3d 362, 364-65, 841 NYS2d 225, 277 (1st Dept. 2007).

9. 223 AD2d 510, 510, 637 NYS2d 104, 105 (1st Dept. 1996).

10. Compare *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002) (noting interests to be weighed; holding that public interest in sealed information outweighed parties’ interest in confidentiality); with *City of Newark*, 754 NYS2d at 144.

11. See, e.g., *Group Health Plan Inc.*, 30 S.W.3d at 205 (parties unlikely to submit to arbitration if materials produced for arbitration could be “freely discovered in future unrelated proceedings”); *Occidental Gems*, 841 NYS2d at 277.

12. See *Galleon Syndicate Corp. v. Pan Atl. Group Inc.*, 637 NYS2d 104, 105 (3rd Dept. 1996) (materials prepared for prior arbitration not immune from discovery); *Kamy Inc. v. Combustion Eng’g. Inc.*, 554 NYS2d 619, 619 (2d Dept. 1990) (same); *Milone v. Gen. Motors Corp.*, 446 NYS2d 650, 650 (1st Dept. 1981) (same).

13. *A.T. v. State Farm Mut. Auto. Ins. Co.*, 989 P.2d 219, 220 (Colo. Ct. App. 1999) (claimant’s failure to obtain either confidentiality agreement or agreement to adhere to institutional rules precluded finding that arbitration-related information was confidential).