SEALING ARBITRATION AWARDS: CONTRACTUAL CONFIDENTIALITY OBLIGATIONS VERSUS THE PRESUMPTION OF PUBLIC ACCESS

By John Pitblado

Arbitration benefits the public by freeing judicial resources. Additional benefits, particularly considerable to sophisticated commercial entities, include reducing costs and protecting confidential proprietary information. The Federal Arbitration Act aims to facilitate efficient and final dispute resolution by permitting parties to seek the courts' confirmation and enforcement of arbitration awards. It is not uncommon for parties to arbitration to seek to maintain such proceedings, as well as documents relating to them, as confidential, whether for business or other reasons. However, such confidentiality may be lost when a party seeks to have the private arbitration award confirmed in court, where there is a strong presumption of public access to the proceedings and records generated therein. Such strong presumption of public access to court records is weighed, however, against strong public policy vested in the right to enter into legal contracts, like private arbitration agreements.

All said, the public right to access of court records is not absolute, and some recent district court decisions indicate a willingness on the part of some courts to consider the benefits of arbitration in allowing parties to maintain the confidentiality of their records. This article briefly addresses the history and purpose of the common law right of access to public records, and then analyzes recent trends in subject case law.

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the U.S. Supreme Court reviewed the common law right of public access to court records. The central dispute there involved the infamous audio recordings of President Nixon, which recordings were in possession of the U.S. District Court for the District of Columbia. The Court ultimately denied access to the tapes sought by the news media, but its holding was hardly a rejection of the right of public access:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . . The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.
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> It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court

> to insure that its records are not used to gratify private spite or promote public scandal . . . [C]ourts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.
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> It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

Id. at 597-599.

Since *Nixon*, courts have identified factors to be considered when weighing whether to allow submissions to be sealed. In *Shingara v. Skiles,* 420 F.3d 301 (3d Cir. 2005), the Third Circuit Court reiterated the following factors:

> (1) whether disclosure will violate any privacy interests;
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> (2) whether the information is being sought for a legitimate purpose or for an improper purpose;
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> (3) whether disclosure of the information will cause a party embarrassment;
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> (4) whether confidentiality is being sought over information important to public health and safety;
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> (5) whether the sharing of information among litigants will promote fairness and efficiency;
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> (6) whether a party benefitting from the order of confidentiality is a public entity or official; and
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> (7) whether the case involves issues important to the public.

Id. at 306 (citation omitted).

While earlier appellate level rulings tended to disfavor sealing records, *see e.g*. *Shingara, supra*; *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110 (2d Cir. 2006); *Baxter Intern., Inc. v. Abbott Laboratories*, 297 F.3d 544 (7th Cir. 2002), some more recent district court rulings indicate increased willingness to allow parties to maintain the confidentiality of arbitration awards and other documents submitted in connection with court proceedings seeking to confirm, vacate or modify such awards.

In *Walker v. Gore*, No. 1:08-cv-0549, 2008 WL 4649091 (S.D. Ind. Oct. 20, 2008) (Hamilton, C.J.), the Court carefully reviewed applicable Seventh Circuit precedent disfavoring the sealing of records, including *Baxter*, *supra*. Nevertheless, the Court distinguished *Baxter* and suggested that, because it appeared the plaintiff may have filed the action for the improper purpose of exposing the defendant's records to public view as a settlement strategy, sealing was appropriate:

> [P]laintiffs wanted to use the prospect of public disclosure to put pressure on defendants, but wanted to reduce the risk of damages for breaching the confidentiality promises. The best argument for sealing at least the contracts and the complaint is that defendants are clearly entitled to compel arbitration of all claims asserted in this action, and that the case remains at the very beginning of the litigation process, where the parties may have reached a settlement before the defendants even filed their expected (and probably meritorious) motion to compel arbitration.

Id. at *2.

Likewise, citing the factors to be reviewed, but bucking the result of *Shingara v. Skiles*, 420 F.3d 301 (3d Cir. 2005), a recent decision from the Eastern District of Pennsylvania analyzed whether parties to a reinsurance contract should be permitted to maintain the confidentiality of the documents submitted in connection with the motion to confirm an arbitration award. The Court granted the motion to seal:

> First, there is a significant "business" privacy interest that would affect Defendant if the Award is disclosed. Second, the purpose behind sealing the Award is legitimate. The parties entered into a Confidentiality Agreement and it is the practice in the reinsurance industry to keep arbitration proceedings, including final awards, confidential. Third, public health and safety issues are not implicated here. Fourth, upholding the terms of the Confidentiality Agreement will promote the voluntary execution of private arbitration agreements; a sound public policy objective. Fifth, neither party is a public entity or official.

Century Indem. Co. v. Certain Underwriters at Lloyd's, London, 592 F. Supp. 2d 825 (E.D. Pa. 2009). *See also, e.g. American Bankers Insurance Company of Florida v. National Cas. Co.*, No. 2:08-cv-13522, 2009 WL 257890 (E.D. Mich. Feb. 3, 2009) (Edmunds, J.) (motion to seal granted where respondent argued that the "public's right of access does not attach, both because the arbitration award was not a judicial document, and because the court did not have proper jurisdiction over the action.").

However, while recent cases such as these perhaps demonstrate an increasing willingness to allow parties to maintain confidentiality by sealing records, the trend – if there is one – may be more geographic. For example, recent decisions from the district courts in the Second Circuit betray an unwillingness to seal records on the basis that the parties have entered into

confidentiality arrangements. *See e.g. Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co.*, Nos. 07 Civ. 8196 (PKC), 07 Civ. 8350 (PKC), 2008 WL 1805459, *1 (S.D.N.Y. April 21, 2008) (Castel, J.) ("GlobalRe did not endeavor to argue that disclosure of any language in the awards would cause it direct or immediate harm. It relied upon its assessment of the danger of a slippery slope that might impair the exchange of information between parties to a reinsurance agreement because of the fear of eventual disclosure. Because such a fear is not justified as applied to the bare bones relief granted or denied in arbitration proceeding, it does not provide an adequate basis to overcome the presumption of access."); *In re Insurance Co. of North America*, No. 08-CV-7003, 2008 WL 5205970 (S.D.N.Y. Dec. 12, 2008) ("[T]he import and effect of the arbitration panel's Summary Judgment Order is the central issue before the Court and thus interpreting its language is not only relevant to the performance of this Court's judicial function, . . . but *necessary* to it. Accordingly, the greatest possible weight is to be given to the presumption of public access to the documents that directly affect this decision.") (citations omitted), *vacated on other grounds*, 2009 WL 1873585 (S.D.N.Y. Jun 30, 2009) (Baer, J.); *Mutual Marine Office, Inc. v. Transfercom Ltd.*, No. 08 Civ. 10367, 2009 WL 1025965 *5 (S.D.N.Y. April 15, 2009) (Slip Copy) (Gardephe, J.) ("[T]he mere existence of a confidentiality agreement" does not demonstrate that sealing is "essential to preserve higher values.").

Thus, it may be prudent for parties that elect arbitration and require protection of confidential proprietary information to be mindful when articulating venue provisions, both in regard to the location of the arbitration itself, and in regard to the court where parties may seek confirmation. In this regard, the Federal Arbitration Act is instructive. "If the parties . . . specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award. . . . If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made." *See* 9 U.S.C. § 9.

Thus, with the help of some recent decisions adding weight to the argument in favor of sealing confidential arbitration awards, public policy strongly supportive of the benefits of private arbitration as reflected in the Federal Arbitration Act, and careful drafting of arbitration agreements, parties may ultimately be more likely to maintain the privacy of confidential proprietary information.