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Keeping Private Arbitrations Private

LAWYERS ARE REGULARLY CALLED UPON to advise clients whether to litigate or arbitrate disputes. The choice involves many factors, not the least of which is whether a particular client's interests are best served by keeping a dispute out of the public eye. Most parties choosing to arbitrate anticipate that privacy will be one of the principal advantages. The world of private dispute resolution is ostensibly a controlled environment in which the public's right of access to information does not apply. This can be a particularly important consideration if the dispute involves a high-profile individual or sensitive information.

That privacy bubble, however, can easily be punctured once the arbitrator renders an award, and prevailing and losing arbitral parties request a court to confirm or vacate it. Confirmation of an award results in a court judgment, without which the prevailing party cannot use all tools available for enforcing the award. The court filings required to seek relief can effectively force a once private proceeding into public view. Parties can ask the court to restrict public access to their filings, but with ever-tightening rules for sealing court documents, keeping private and sensitive arbitral information out of the public record is becoming increasingly difficult.

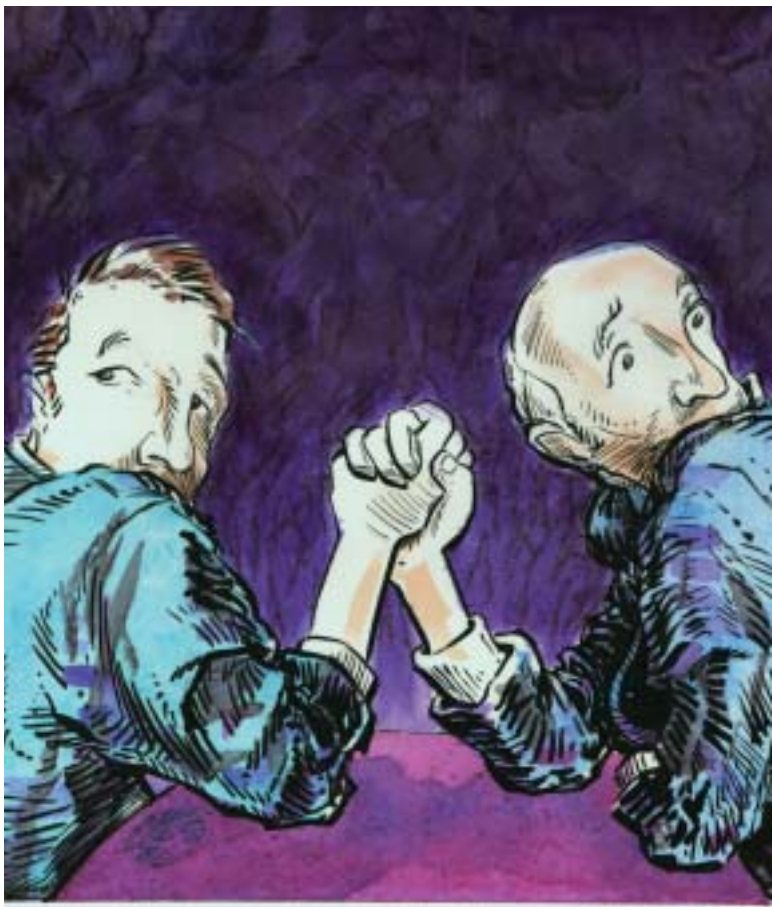
When privacy is a concern, counsel must keep this aspect of the arbitral endgame in mind while drafting an arbitration agreement as well as during an arbitration proceeding. Doing so can improve the chances of avoiding postarbitration court proceedings altogether or, at the very least, position counsel to present the best possible argument for sealing court records.

Limits of Arbitral Privacy

With court dockets jammed, public policy continues to favor private dispute resolution procedures. The California Legislature has declared that "greater use of alternatives to the courts, such as…arbitration should be encouraged…[t]o achieve more effective and efficient dispute resolution in a complex society."[1] Arbitration has been "praised by the courts as an expeditious and economical method of relieving overburdened civil calendars…[and as] an accepted and favored method of resolving disputes."[2]

From a litigant's perspective, one of the primary reasons for entering the arbitral process is to handle disputes in a private setting:[3] "Beyond arbitration's traditional carrots of relative speed and greater economy, privacy is the other leg in this troika of features. Parties A and B may not want their business affairs laundered in public (e.g., trade secrets, processes, procedures, methods, etc.)."[4] Protecting parties' legitimate expectations of privacy can only encourage the use of arbitration as a method of dispute resolution.

Yet lawyers and clients must still bear in mind the limits of arbitration. However formal an arbitration hearing may be, the arbitrator's ultimate award is not the equivalent of a court judgment. The award amounts to a contract between the parties.[5] That contract can be challenged by the losing party on limited grounds through a petition to vacate.[6] The prevailing party, on the other hand, can request



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the court to enter judgment consistent with the award through a petition to confirm.[7] Obtaining a judgment allows the prevailing party to enforce the award against the losing party through contempt proceedings, debtor examinations, property seizure, and all other enforcement procedures available to judgment creditors.

An unanticipated byproduct of these postaward court procedures, however, can be the undoing of the privacy the parties expected when agreeing to arbitrate in the first place. To seek court confirmation, parties have to disclose their identities, the existence of a dispute, and the arbitrator's decision, including any money damages awarded or equitable relief granted or denied.[8] For a high-profile individual, even those limited disclosures can prove troublesome from a public relations perspective.

If the postaward proceeding is disputed, the scope of potential dis-

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closures can expand substantially. For example, among the permissible grounds for challenging an award under California law are allegations that the arbitrator improperly refused to hear material evidence or that the arbitration process was somehow corrupted.[9] Either of those arguments will necessarily involve discussing the substance of the underlying proceeding. Any last shred of privacy can then vanish.

Sealing Court Records

In an effort to maintain the confidentiality of the arbitral process, parties can ask the court to seal records regarding the arbitration. On its face, such a request certainly seems justified given an individual's right to expect that private personal or business information will be protected.[10] In practice, however, the process is not that simple. Any request to seal records must overcome the general presumption in favor of public access to judicial records and proceedings. That presumption is based on the policy that public access to the courts fosters the appearance of fairness, which is essential to maintaining confidence in the judicial system.[11]

The particular standards for sealing records vary from jurisdiction to jurisdiction, but parties must generally show that 1) a sufficiently strong interest for the sealing order exists, and 2) no less restrictive means for achieving that interest is available.[12] In some instances, courts have found it is not enough that the parties express a mutual preference for sealing, or that the information could generally be embarrassing if publicly disclosed.[13] Some courts have even held it is not enough that the records were only exchanged during arbitration based on an agreement between the parties to keep them confidential.[14] Typically, parties must make some showing of an overriding interest—whether in the form of a proprietary business interest in the information, some potential compromise of the judicial process that would occur as a result of disclosure, or some other sufficient reason.

Moreover, even a successful sealing application might fall short of preserving a party's complete expectation of privacy. Sealing orders must be narrowly tailored, and as a result a court may permit certain documents to be filed under seal but not the entire petition to confirm or vacate.[15] For a party seeking to keep disputes entirely out of the public eye, such half-measures can prove problematic.

The bar that litigants must clear to convince a court to seal records has only gotten higher over the past decade, and that has resulted in an increasing tension between competing public policies. On the one hand, encouraging the use of alternative dispute

procedures such as arbitration is in the public interest. Preserving arbitral parties' legitimate expectations of privacy—not just during the arbitration itself but also during necessary postaward court proceedings—can only serve that public interest. On the other hand, open access to court records is also in the public interest.

Predicting how any particular court will maneuver through this intersection of public interests is impossible. Some judges may acknowledge that preserving the privacy of arbitral parties constitutes an overriding interest sufficient to justify a sealing order. Other courts may not. Illustrating the latter view, one New York court observed, "Court records are presumptively open for public inspection and parties should not assume that their agreement to secrecy in the arbitration proceeding would automatically carry over to a sealing of an arbitration award where the assistance of the court is sought to enforce the award. Courts have obligations to the public that private arbitrators do not."[16]

Precautionary Steps

Lawyers and clients should be cognizant of potential postaward proceedings when considering arbitration. They should think ahead and prepare to fight if they want to keep information about arbitrations out of the public record. Counsel should consider several measures when privacy is a priority.

• **The parties can include a confidentiality provision in the arbitration agreement.** This is the most obvious and commonly used precautionary measure. At the very least, a confidentiality provision can provide some general assurance that each party will make a concerted effort not to publicly disclose information exchanged during an arbitration. Adding a complimentary liquidated damages provision can improve the likelihood of compliance.

Confidentiality language also generally signals the parties' mutual interest in preserving privacy. This can secondarily benefit later efforts to obtain a sealing order in any related court proceeding.[17] Absent a confidentiality provision, one or both of the parties can also seek a protective order during the arbitration to achieve the same effect.

• **The parties can stipulate to seal all records exchanged during arbitration.** The parties can agree ahead of time that they will cooperate in any court proceeding to protect the confidentiality of information disclosed during arbitration. If possible, the best time to secure this commitment is at the agreement-to-arbitrate stage, but it can also be done to great effect during arbitral discovery.[18] In crafting the stipulation, counsel should be sure to consider which court will have jurisdiction to enforce it and include language that tracks the applicable sealing standard.

• **The parties can include provisions in the arbitration agreement that encourage voluntary compliance with an arbitration award.** The best way to avoid disclosure through court filings is by avoiding court altogether. If privacy is a high priority, counsel should consider including incentives and disincentives in the arbitration provision to encourage voluntary compliance with an arbitration award and thereby obviate the need for judicial involvement.

One example is a fee-shifting clause for any postarbitration proceeding. Under this type of provision, compliance with the arbitrator's award would be mandatory within a set period of time. Absent timely compliance, the losing party would be obligated to reimburse the prevailing party for all attorney's fees and costs attributable to a successful confirmation petition or a successful opposition to a petition to vacate.

• **The parties can agree to waive or limit the right to challenge an arbitration award as part of an arbitration provision.**[19] Even though the grounds for challenging an award are generally limited, this step involves significant risk. The right to challenge an award constitutes an important protection against fundamental arbitrator misconduct and should not be surrendered lightly. Moreover, a challenge waiver does not, on its own, guarantee an avoidance of court involvement. Arbitration awards still cannot be enforced without court confirmation, so without some other incentive for the losing party to voluntarily comply with the arbitrator's ruling, court intervention could still be required. For that reason, counsel may consider coupling any challenge waiver with a fee-shifting provision for postaward proceedings.

• **The parties may include a forum selection clause in the arbitration agreement.** Assuming that state law governs the dispute,[20] counsel should consider including a forum selection clause in the arbitration agreement identifying a state with more permissive sealing laws and less media presence.[21] A forum selection clause will be considered valid and enforceable as long as the selected forum bears a "logical nexus" or "reasonable connection" to the parties or the dispute.[22]

• **The parties and their counsel can exercise discretion during the arbitration.** There may be times when highly sensitive information is helpful but is also cumulative of other nonsensitive information. In evaluating whether to use the more sensitive information, counsel should keep in mind the risk that it could later be made public.

• **Counsel should be prepared to vigorously argue for a sealing order.** Even if the parties agree that court records ought to be sealed, counsel should still anticipate resistance from

the court, or perhaps even from the press. Counsel should therefore treat joint sealing applications as though they are contested by outlining in as much detail as possible the legal and factual support for a sealing order.

Taking some or all of these precautionary steps still cannot guarantee that private arbitrations will remain entirely private. But thinking ahead in these and other ways can help counsel and clients dramatically increase their chances of keeping private information out of the public record. ■

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[1] BUS. & PROF. CODE §§465(b), (d).

[2] Madden v. Kaiser Found. Hosps., 17 Cal. 3d 699, 706-07 (1976) (internal citations omitted).

[3] *See* Izzi v. Mesquite Country Club, 186 Cal. App. 3d 1309, 1320 (1986); Keating v. Superior Court, 31 Cal. 3d 584, 595 (1982).

[4] Yuen v. Superior Court, 121 Cal. App. 4th 1133, 1141 (2004).

[5] CODE CIV. PROC. §1287.6.

[6] CODE CIV. PROC. §§1285, 1286.2, 1288.

[7] CODE CIV. PROC. §§1285, 1285.4, 1287.4.

[8] CODE CIV. PROC. §§1285.4.

[9] CODE CIV. PROC. §§1286.2.

[10] *See* Vinson v. Superior Court, 43 Cal. 3d 833, 841-43 (1987) (Under California Constitution art. 1, §1, parties have a right to expect that information about their personal relationships will be protected.); *see also* Fults v. Superior Court, 88 Cal. App. 3d 899, 903-05 (1979) (same). The California Constitution also ensures that parties' sensitive financial information will remain private. *See* Valley Bank of Nev. v. Superior Court, 15 Cal. 3d 652, 656-57 (1975); Moskowitz v. Superior Court, 137 Cal. App. 3d 313, 315-16 (1982). This right to privacy of financial affairs extends to business entities, particularly when the entity is a closely held corporation or partnership identified with a single individual or small group of individuals. *See* Ameri-Med. Corp. v. Workers' Comp. Appeals Bd., 42 Cal. App. 4th 1260, 1287-88 (1996); Schnabel v. Superior Court, 5 Cal. 4th 704, 718 (1993).

[11] *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12-13 (1986).

[12] *See*, *e.g.*, CAL. R. CT. 243.1; NBC Subsidiary (KNBC-TV) v. Superior Court, 20 Cal. 4th 1178, 1204 (1999); Advisory Committee Cmt. to CAL. R. CT. 2.550 (basing California's sealing rules on the "overriding interest" standard articulated in *NBC Subsidiary*).

[13] *See* Foltz v. State Farm Mut. Auto. Ins. Co., 331 F. 3d 1122, 1131 (9th Cir. 2003) (holding that parties' mutual agreement does not dispense with the court's duty to make an independent determination of whether good cause exists for sealing the record); In re Neal, 461 F. 3d 1048, 1054 (8th Cir. 2006) ("[I]njury or potential injury to reputation is not enough to deny public access to court documents.").

[14] *See*, *e.g.*, Universal City Studios v. Superior Court, 110 Cal. App. 4th 1273, 1281-83 (2003).

[15] *See* SmithKline Beecham v. Pentech Pharms., 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (holding that even when an overriding injury has been shown, only the particular provisions that need to be kept confidential should be sealed).

[16] In re [Sealed], 64 F. Supp. 2d 183, 184 (E.D. N.Y. 1999). As a policy matter, it will likely be easier to argue for a sealing order in the context of a purely private arbitration. The interest in allowing public access to information is greater when the dispute involves a risk to public health or safety.

[17] *See* Universal City Studios, 110 Cal. App. 4th at 1283 (noting that "a binding contractual agreement not to disclose," by itself, could constitute "a potential overriding interest" justifying sealing the record); Commercial Union Ins. Co. v. Lines, 239 F. Supp. 2d 351 (S.D. N.Y. 2002) (granting motion to seal in part because the arbitration was conducted pursuant to a confidentiality agreement); West v. West, 1998 WL 894594, at *2 (9th Cir. Dec. 7, 1998) (finding that, under confidentiality provision, party should have filed motion to confirm arbitration award and supporting documents under seal).

[18] *See* DiRussa v. Dean Witter Reynolds Inc., 121 F. 3d 818, 826 (2d Cir. 1997) (approving "sealing the file" when "a confidentiality agreement…entered into by the parties during the discovery phase of the arbitration required that the papers…submitted to the district court be placed under seal").

[19] *See* Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 9-10 (1992) (explaining that even in the absence of an explicit challenge waiver, courts ensure that the parties receive the benefit of their contractual bargain by treating an arbitration award as final and binding); Pacific Gas & Elec. Co. v. Superior Court, 15 Cal. App. 4th 576, 588-89 (1993) (holding that because the scope of arbitration is a matter of contractual agreement, the parties can specify the form of judicial review).

[20] If federal law applies, the Federal Arbitration Act requires that the parties apply to the district in which the arbitration award was made for confirmation or vacatur. 9 U.S.C. §9.

[21] Privacy concerns need to be weighed against convenience to the parties, the favorability of a forum's substantive law, and other factors generally considered in evaluating potential forum selections.

[22] America Online, Inc. v. Superior Court, 90 Cal. App. 4th 1, 12 (2001); Cal-State Bus. Prods. & Servs., Inc. v. Ricoh, 12 Cal. App. 4th 1666, 1682 (1993).