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YOUR ARBITRATION IS PRIVATE, BUT IS IT CONFIDENTIAL?

by Ronald Ravikoff
rravikoff@jamsadr.com.

Parties to business arbitrations generally assume that arbitration proceedings will be both private and confidential. The first assumption is correct. Arbitrations are private in that persons who are not a party to the arbitration agreement cannot attend any hearings or play any part in proceedings absent consent of all parties and the arbitrator.

The second assumption is not. While the obligation of the arbitrator (and administrator) to maintain confidentiality is usually clear, generally no such obligation is imposed on the parties. This becomes particularly troublesome in business cases involving such sensitive items as customer lists, trade secrets, proprietary processes, financial information, etc.

Parties, therefore, must take steps to protect sensitive information within the arbitration.

CONFIDENTIALITY STEPS
PROTECTIVE ORDER

The easiest, and most universally used method to secure confidential information is a protective order from the arbitrator.

JAMS Rule 26 (b), for example, is

permissive, allowing the arbitrators to establish protective orders relating to "sensitive information," but imposing confidentiality (Rule 26(b)) only on the arbitrators and JAMS. Thus, neither parties nor witnesses are covered unless action is taken by way of entry of an order.

Canon VI of the American Arbitration Association Code of Ethics requires arbitrators to maintain the confidentiality of all matters relating to the arbitration.

However, the AAA specifies in its Statement of Ethical Principles that while arbitrators and AAA have a duty of confidentiality, "The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. However, the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to

disclose details of the proceeding, unless they have a separate confidentiality agreement."

Likewise the revised Florida Arbitration Code provides: "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." F.S. 682.08(5). The Federal Arbitration Act has no comparable provision.

ENFORCEMENT

The problem with a confidentiality order from the arbitrator is not its issuance or scope—but rather its enforcement. The arbitrator's sole remedy for violation is the imposition of sanctions during the course of the arbitration. This is little comfort when the violation occurs after the arbitration or is done by a witness who is not a party to the arbitration. In those circumstances the party seeking the enforcement of the arbitration clause must go through the lengthy and expensive process of going to court to enforce the right of confidentiality.

Because of this need to seek a court remedy, it is imperative that the confidentiality information be clearly identified during the arbitration proceedings and the order itself be reiterated within the final award.

Of course the main goal in protecting the confidential information is not to get relief after the fact but to seek to prevent its use in the first place.

PROTECTING CONFIDENTIALITY

The best way to ensure confidentiality is not during arbitration, but at the time of the drafting of the arbitration clause controlling the arbitration.

For those businesses that routinely deal with confidential information or enter into a contract where confidential information is uniquely at issue, the arbitration clause should be carefully drafted. The clause should specify that there is a confidentiality issue and lay out the process to be followed.

The arbitration clause may require the arbitrator to enter an order at the beginning of the arbitration, specifying the process for adopting confidentiality. This order would include how the information will be exchanged, how it will be identified and what steps must be taken to avoid distribution. These standards should be entered in the preliminary order and, to the extent necessary, included in the final award.

The arbitration clause should also require all third parties (witness, experts etc.) to agree to and sign off on their understanding of the confidentiality order and the fact that they are bound by it.

AVOID A REASONED AWARD

Confidential matters may be necessarily disclosed in having the arbitrator render detailed findings of fact and conclusions of law in the opinion, (a reasoned award). Consider declining the reasoned award option or provide by agreement that confidential information may not be referred to in the reasoned award.

Perhaps the most effective manner in which confidentiality can be preserved is through the use of a liquidated damages clause within the arbitration clause itself. Under such an approach, the parties, in the arbitration clause, would acknowledge that if information is designated as confidential, and the arbitrator agrees, then in the event of a breach, actual damages are unascertainable and provide for a meaningful liquated damages amount as a deterrent. The threat of such a damages claim would be more effective in deterring a breach of the confidentiality as opposed to the possibility (and cost) of going to court to enforce the arbitrator's confidentiality order.

Of course, any such liquidated damage clause should also be included in the final award of the arbitration.

Both the drafters of arbitration clauses and those handling arbitration trials must be sensitive to their clients' need for confidentiality at the earliest possible time in the process and take steps as appropriate.

Ronald Ravikoff practiced commercial litigation with several national law firms for 35 years. He joined JAMS in 2012 and is a mediator, arbitrator, hearing officer and special master. He can be reached at rravikoff@jamsadr.com.