Confidentiality In Arbitration

By Marc Alexander

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How confidential is arbitration? Discussing the expectations of parties in bilateral arbitration (as opposed to class arbitration), Justice Alito noted that under the Class Rules of the American Arbitration Association (AAA), "the presumption of privacy and confidentiality" that applies in many bilateral arbitra-

tions "shall not apply in class arbitrations," potentially frustrating the assumptions of parties who agreed to arbitrate, but did not explicitly agree to class arbitration. (*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 686.) But does a presumption of privacy and confidentiality really apply to most bilateral arbitrations?

Preliminarily, commentators distinguish between the privacy and confidentiality of arbitration. In Louis Brandeis' classic formulation, privacy is "the right to be let alone." Confidentiality, etymologically related to fidelity, implies a full duty of trust, and is broader than the ability to avoid unwanted intrusion, for it implies a duty not to spill secrets. While it is true that arbitration is generally private because the public is excluded from the arbitration hearing, it does not follow that the arbitration proceedings remain confidential. Rather, confidentiality depends on the degree to which the proceedings are kept secret from third parties, and that in turn depends on the rules of the arbitral forum, the presumptions of the law of the country about whether arbitration is confidential, and any agreement of the parties to keep information confidential. In short, without additional information, it is unsafe to presume that the existence of the arbitration, communications during arbitration, documents exchanged in an arbitration, and the arbitral award are "confidential."

Just as confidentiality may refer to keeping various things secret, it may also apply to various persons: the arbitrator, the parties, witnesses, experts, third parties, the arbitral forum, and staff.

Without confidentiality safeguards, a party or a third party can leave an arbitration hearing and disclose communications that have occurred within an arbitration, as well as the contents of documents, the existence of the arbitration, and the arbitral award.

The presumption of confidentiality varies from country to country. In the United States, there is no general rule in the Federal Rules of Civil Procedure or in the Federal Arbitration Act requiring that communications or documents in an arbitration be kept confidential in the United States. The same is the case with the California Rules of Civil Procedure and the California Arbitration Act: There is no general rule requiring confidentiality.

Indeed, in at least one instance, patent arbitration, any award must be reported to the Patent Office. (35 U.S.C. § 294(d).) Without a report, the award is unenforceable. (35 U.S.C. § 294(e).) Where issues of invalidity and infringement are involved in a patent dispute, and enforcement of an award is desired, complete confidentiality is impossible.

In *United States v. Panhandle Eastern Corp.* (D.Del. 1988) 118 F.R.D. 346, 347, Panhandle attempted to prevent disclosure of documents relating to arbitration proceedings held in Switzerland between Panhandle and Sonatrach. Panhandle argued that disclosure to third parties of documents related to the arbitration would severely prejudice its ongoing business relationship with Sonatrach and the Algerian Government. The court, however, found that Panhandle failed to satisfy the "good cause" requirement of Rule 26(c) of the Federal Rules of Civil Procedure, and that its filing was untimely. No general expectation of confidentiality protected Panhandle in arbitration.

The issue of preserving confidentiality in arbitration proceedings can come up in connection with a third-party's discovery request to obtain documents from the arbitration. The obligation of the original parties to protect confidentiality is not the issue here, for either the parties had that obligation or they did not. If the parties had an obligation to maintain confidentiality, then

they should not voluntarily disclose confidential information. Rather, the issue is whether a third-party litigant's right to obtain discovery will trump the confidentiality of the proceedings. Judge Easterbrook has written, "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." (*Gotham Holdings LP v. Health Grades, Inc.* (7th Cir. 2008) 580 F.3d 664, 665.) A court gets to decide whether a third party's showing of "good cause" permits discovery of purportedly confidential information.

A confidentiality provision cannot absolutely bar court-ordered discovery by third parties of relevant information in California. However, a compelling state interest is required to abrogate the constitutional right to privacy in California. Disclosure of third-party private information is not justified " 'simply because inadmissible, and irrelevant, matter sought to be discovered *might* lead to other, and relevant, evidence.' [Citation.]" (*Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court* (1996) 51 Cal.App.4th 233, 239.)

In England, the courts have considered the need for confidentiality in arbitration since the case of a nasty partnership dispute between brothers was sent to arbitration. *Russell v. Russell* (1880) LR 14, Ch D 471. There is now a presumption of confidentiality in arbitration established by case law in England. (See *Emmott v. Michael Wilson & Partners Limited* (2008) EWCA (Civ.) 184.) An exception to the presumption is where "the interests of justice" require otherwise. *Emmott* broadened the exception to include circumstances where the "interests of justice" were not limited to "interests of justice" in England.

Singapore has followed English law, recognizing a presumption of confidentiality in arbitration, with an exception in cases of necessity. (*Alice Remy, L'Arbitrage International, entre Confidentialité et Transparence* (2013) p. 20 <http://idc.u-paris2.fr/sites/default/files/alice_remy.pdf>.)

In France, confidentiality in arbitration appears to be in flux. A 1986 decision of the Paris Court of Appeal held confidentiality should be presumed in disputes of a private nature. A 2003 decision of the same court confirmed that position, while mentioning an exception where there is a legal requirement for the information. However, a 2004 decision of the same court held that a party seeking sanctions for a breach of confidentiality in arbitration must establish a basis in French law for the existence of a rule requiring confidentiality. In other words, the presumption of confidentiality did not flow from the mere existence of an arbitration. (Remy, *supra*, pp. 20-21.)

In the United States, state arbitration rules vary from state to state. Some 35 states plus the District of Columbia (but not California) have adopted some version of the Uniform Arbitration Act of 1956 or 2000. (https://www.law.cornell.edu/uniform/vol7#arbit.) However, neither the 1956 nor the 2000 UAA guarantees privacy or confidentiality. In fact, neither version of the UAA refers to privacy. The 1956 UAA does not even refer to confidentiality. However, Section 17(e) of the 2000 UAA 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." Thus, while the arbitrator may issue protective orders to protect confidentiality, there is no presumption in the 2000 UAA that an arbitration will be confidential.

Delaware has its own interesting twist on the confidentiality of arbitration proceedings, requiring that arbitration proceedings providing access to historically state

resources must be held in public. In *Delaware Coalition for Open Government, Inc. v. Strine* (3d Cir. 2013) 733 F.3d 510, plaintiff challenged the confidentiality of business dispute arbitrations established by Delaware law and implemented by the Delaware Chancery Court, making use of active judges in the courthouse as arbitrators. The district court found the proceedings must be open to the public, and the Third Circuit affirmed, holding that the First Amendment right of access applied to business dispute arbitrations before Delaware's Chancery Court. The Third Circuit applied an "experience and logic test" to find that the long history of access by the public to the courthouse overrode the desire for confidentiality, resulting in the invalidation of the Delaware statute.

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In addition to the rules of the country or state in which the arbitration occurs, one must consider the rules of the arbitral association under which the arbitration is conducted. These rules differ widely.

The American Arbitration Association does not have a general rule requiring confidentiality. However, the AAA's Statement of Ethical Principles does address the subject: "An arbitration proceeding is a private process. In addition, AAA staff and AAA neutrals have an ethical obligation to keep information confidential. 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. Where public agencies are involved in disputes, these public agencies routinely make the award public." Thus, while privacy, rather than confidentiality, generally applies to AAA proceedings, the arbitrator, the AAA, and staff do have an ethical duty of confidentiality. Similarly, Canon VI of the ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) provides: "An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office."

Class arbitration under the AAA's Supplementary Rules for Class Arbitrations dispenses with privacy and confidentiality. This makes sense, because transparency is important in a class dispute to the members of the class, and often to the public. Rule 9(a) of the Supplementary Rules provides: "The presumption of privacy and con-

fidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings." The AAA maintains a docket on the web for class arbitrations.

While the parties to AAA proceedings do not have a general duty to maintain confidentiality, the arbitrator has the power to condition "any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality." (AAA R-23.)

The Hong Kong International Arbitration Centre specifically provides for confidentiality under Article 42 of the Administered Arbitration Rules (2013). Those rules provide for confidentiality of the arbitration and the award. Confidentiality covers the arbitral tribunal, any Emergency Arbitrator, expert, witness, and secretary of the arbitral tribunal and HKIAC. There are some commonsense exceptions allowing for disclosure, for example, to pursue a legal right, or where disclosure is required by law. Awards are not published, except under limited circumstances, and with redactions.

The World Intellectual Property Organization, which provides arbitration rules for the protection of intellectual property, has strict rules protecting confidentiality. Especially in the case of trade secrets, the intellectual property derives its value from the fact that it is secret. WIPO Arbitration Rules (2014) expressly provide for confidentiality for trade secrets (Article 54), for the existence of the arbitration (Art. 75), for disclosures made during the arbitration (Art. 76), for the award (Art. 77), and by the center and the arbitrator (Art. 78). Independent experts appointed by the arbitrator must sign a confidentiality undertaking (Art. 57).

In contrast to the WIPO rules that address confidentiality with specificity, the rules of the International Court of Arbitration of the International Chamber of Commerce do not require confidentiality, except with respect to the work of the Court itself (Art. 6). However, "Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in con-

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nection with the arbitration and may take measures for protecting trade secrets and confidential information." (Art. 22(3).)

The United Nations Commission on International Trade Law has propounded arbitration rules for international trade disputes. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2013) recognize "the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations." Transparency and accountability are intended to "promote good governance." The Rules may apply pursuant to the parties' agreement or pursuant to a treaty binding the parties to the Rules. While providing for transparency, the Rules include exceptions to transparency that swallow up the efforts at transparency. Thus, Article 7 provides that "confidential or protected information" shall not be made available to the public. Confidential or protected information includes, among other exceptions, (a) confidential business information, (b) information that is protected against being made available to the public under the treaty, (c) information that is protected against being made available to the public under the law of the respondent State, and (d) information the disclosure of which would impede law enforcement.

Arbitral awards are made enforceable by confirming them as judgments. This requires taking the arbitration award from the private arbitration proceeding to a judge, and asking the judge to issue a judgment based on the award. This is an obstacle to protecting the confidentiality of the terms of the award and the legal basis for confirming the award as a judgment. How does one keep an arbitral award confidential when seeking to confirm it as a judgment?

In California, the Judicial Council Form for a Petition to Confirm, Correct, or Vacate Contractual Arbitration Award (form ADR-106) requires information such as: identity of the parties, amount or property in dispute, venue (e.g., where the arbitration was held or where the agreement was made or to be performed), the agreement to arbitrate, a summary of the dispute subject to arbitration, identification of the arbitrator, date of the arbitration award, terms of the award, proof of service, and request to confirm, correct, or vacate the award. Thus, at the point one seeks confirmation of the award by the court, some basic information becomes public. Of course, one could move to seal the record—but good luck with that.

To conclude, here are some practical suggestions for addressing the many issues presented by confidentiality in arbitration: (1) address the issue in detail in the arbitration agreement; (2) consider (a) to whom confidentiality will apply, (b) to what information confidentiality will apply, (c) how documents will be exchanged, (d) how confidentiality will be enforced, (e) how to bind third parties, and (f) what penalties apply to a breach of confidentiality (e.g., liquidated damages); (3) in your agreement, consider specifying what exceptions to confidentiality should exist; (4) consider whether a presumption of confidentiality will be provided by the country or state where the arbitration will take place; (5) know the confidentiality provisions of the arbitration rules that will be incorporated in your agreement; (6) make use of stipulations and protective orders as may be necessary; and (7) consider pocketing the award until judicial enforcement becomes necessary—but don't wait until you are time-barred from enforcing the award.

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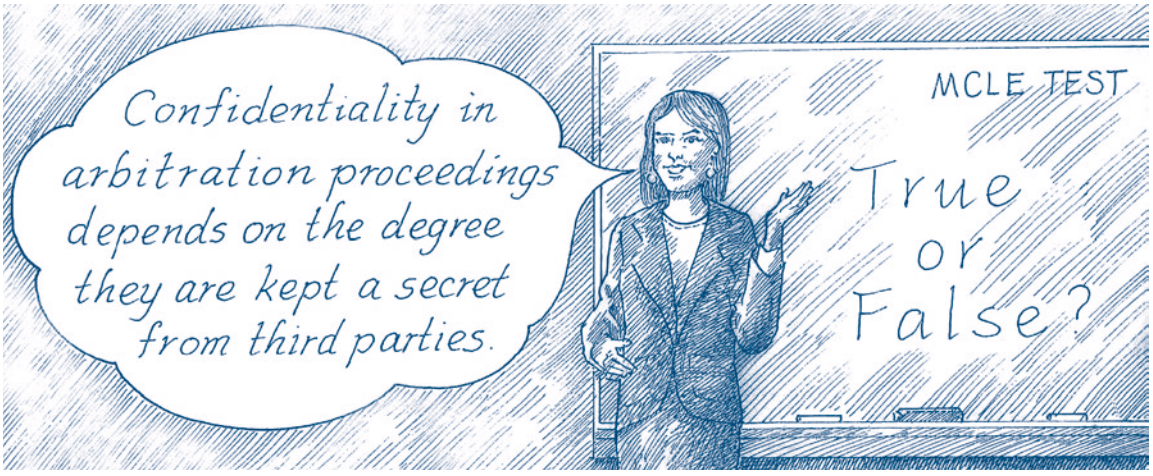
MCLE Test

Questions for Self-Study Test (1 hour of credit)



1. ***True or false?*** In arbitration, privacy and confidentiality are distinct concepts.

2. ***True or false?*** The Federal Rules of Civil Procedure address confidentiality in arbitration.

3. ***True or false?*** The Federal Arbitration Act, 9 U.S.C., § 1 et seq., provides that arbitration proceedings held under the Act shall be deemed confidential.

4. ***True or false?*** The California Rules of Civil Procedure and the California Arbitration Act provide that arbitration proceedings in California be confidential.

5. ***True or false?*** Under the United States Patent Act, patent law issues may be arbitrated, but the award is not confidential, because the award must be reported to the Patent Office in order to be enforceable.

6. ***True or false?*** A federal court may enter an order to protect parties to an arbitration from having to disclose confidential information in the arbitration to a third party seeking discovery.

7. ***True or false?*** Parties to an arbitration may effectively preserve their confidentiality by agreeing that a stranger's resort to discovery under the Federal Rules of Civil Procedure will not override the right of the parties to the arbitration to protect their confidentiality.

8. ***True or false?*** Calfornia courts recognize that parties can bar discovery by third parties of "relevant information" by agreeing that the information is confidential.

9. ***True or false?*** In England, unlike the United States, a general presumption exists that arbitrations are confidential.

10. ***True or false?*** French law, like English law, also presumes that arbitrations are confidential.

11. ***True or false?*** Many states pattern their arbitration statutes on the 1956 or 2000 Uniform Arbitration Act, and those model acts include a presumption of privacy and confidentiality in arbitration.

12. ***True or false?*** The Uniform Arbitration Act of 2000 does provide that an arbitrator may issue a protective order to prevent the disclosure of confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were subject to a civil action in the state.

13. ***True or false?*** A federal district court and court of appeal have invalidated a state statute allowing retired judges to arbitrate cases in the courthouse outside the presence of the public.

14. ***True or false?*** The American Arbitration Association has a general rule providing that AAA arbitrations shall be private and confidential.

15. ***True or false?*** The American Arbitration Association has stated that arbitrators are ethically bound to keep information confidential.

16. ***True or false?*** The Statement of Ethical Principles of The American Arbitration Association opines that parties should agree to keep the proceeding and award confidential.

17. ***True or false?*** The ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) provides that the arbitrator should be faithful to the relationship of trust and confidentiality.

18. ***True or false?*** In class arbitrations held before the AAA, no presumption of privacy and confidentiality applies.

19. ***True or false?*** The arbitration rules of the World Intellectual Property Organization include strict protections of confidential information.

20. ***True or false?*** The United Nations Commission on International Trade has propounded wide-reaching Rules on Transparency in Treaty-based Investor-State Arbitration that will make it practically impossible to protect the confidentiality of information in arbitrations conducted under the UNCITRAL rules.