SANDBERG PHOENIX

PROFESSIONAL LIABILITY BLOG

Arbitration: Not So Confidential After All?

AUTHOR: SANDBERG PHOENIX

Introduction

Arbitration is a powerful tool for those involved in a professional malpractice action—an area of liability that, despite numerous state efforts, can still be resolved using alternative dispute resolution. See, e.g., Triad Health Management of Georgia, III, LLC v. Johnson, 679 S.E.2d 785, 789 (Ga. App. 2009) (statute providing that "no agreement to arbitrate shall be enforceable unless the agreement was made subsequent to the alleged malpractice" is preempted by the Federal Arbitration Act); Marmet Health Care Ctr. v. Brown, 132 S.Ct. 1201, 1203 (2012) (state law prohibiting a particular type of claim from arbitration is preempted by the Federal Arbitration Act). Unlike public litigation, arbitration provides parties with privacy and confidentiality. Indeed, confidentiality is seen as the principal advantage of arbitration. See, e.g., Global Reinsurance Corp. v. Argonaut Ins. Co., 2008 WL 1805459, *1 (S.D.N.Y. Apr. 21, 2008). This advantage can be particularly useful in the professional malpractice context, whereby arbitration ensures a spotlight is not placed directly over the facts surrounding the alleged malpractice. But, is arbitration truly confidential? Emerging case law suggests the answer is "not really" or "maybe not." See, e.g., Eagle Star Ins. Co., Ltd. v. Arrowood Indem. Co., 2013 WL 5322573 (S.D.N.Y. Sep. 23, 2013).

The Eagle Star Opinion: Be Wary of Involving the Court System If You Intend Arbitration to Remain Confidential

In *Eagle Star*, the parties to a private arbitration proceeding petitioned the Southern District of New York to confirm an arbitral award. Id. at *1. Previously, the parties had agreed to keep any "arbitration information" confidential. Id. In light of that agreement, the district court permitted the parties to file under seal the petition and supporting papers (including the arbitral award itself). Id. On June 27, 2013, the district court noted that, "while [it] permitted the parties … to file all arbitral information … under seal[,] … confidential documents may be opened upon notice to the parties pursuant to further order of the Court." Id. (citing Eagle Star Ins. Co, Ltd. v. Arrowood Indem. Co., No. 13-CIV-3410 (S.D.N.Y. Jun. 27, 2013)). Thereafter, the parties submitted a joint stipulation of discontinuance, noting the parties had reached a settlement. Id. (the district court noted that, as a result of the discontinuance, it "never issued any decision on the merits of confirmation"). The filing of the

stipulation did not end the case. A group of five insurers came forward to intervene in the action for the "limited purpose of asking the Court to unseal certain documents previously filed under seal." Id. The district court initially commented that the named parties' discontinuance alone did not affect its jurisdiction to consider the insurers' motion to intervene because "it simply does not follow … that the filing of a stipulation of dismissal divests a court of jurisdiction either to dispose of material in its files … or to modify or vacate its own protective orders with respect to such documents." Id. (citing Gambale v. Deutsche Bank AG, 377 F.3d 133, 139-40 (2d Cir. 2004)). More importantly, the district court stated it need not consider the merits of the insurers' intervention because it could "*sua sponte* unseal the records at issue irrespective of a motion to intervene." Id. Accordingly, the district court looked directly to the merits of whether the arbitration document should be unsealed. Incredibly, the district court unsealed all documents relating to the arbitration—including the arbitration award itself. Id. at *3 (instructing the clerk of the court to unseal "all previously sealed documents in this case"). The district court reasoned there is a strong public policy favoring public access to "judicial documents"—those materials filed with the court that are "relevant to the performance of the judicial function and useful in the judicial process." Id. at *2. In light of this public policy, the district court found that a confidentiality agreement between parties—taken alone—is "insufficient to demonstrate that sealing is necessary." Id. at *3. The district court concluded by finding that, even if the parties may have relied on the sealing of their arbitration documents to some degree, "they were on notice of the possibility of unsealing" given the court's previous orders. Id.

Other Opinions Around the Nation

The Eagle Star court is not alone in ignoring parties' confidentiality agreements as they relate to arbitration. Last year, Judge Posner considered similar issues and found that, despite the parties agreeing to ask the court to seal certain documents produced in arbitration, "their agreement is not binding on us." See GEA Group AG v. Flex-N-Gate Corp., 740 F.3d 411, 419-20 (7th Cir. 2014). In making this statement, Posner had this to say: Secrecy in judicial proceedings is disfavored, as it makes it difficult for the public (including the bar) to understand why a case was brought (and fought) and what exactly was at stake in it and was the outcome proper. The interest in allowing public access to the judicial record is thus a social interest rather than a concern solely of the litigants. That is why their agreement to seal does not bind us, and, more broadly, why documents that affect the disposition of federal litigation are presumptively open to public view.

Fortunately for the parties in GEA Group, Posner ultimately found the documents would remain sealed because of a compelling "competing interest" that favors recognizing foreign law. Id. at 420. In GEA Group, the parties had the benefit of relying on a German arbitration rule that barred parties from disclosing evidence presented in arbitration. Id. Accordingly, as a matter of comity, Posner felt that the German rule should be honored because "we Americans are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." Id. The Fifth Circuit faced a similar situation (though without a foreign law involved) and agreed to keep records under seal despite public policy favoring free access to court records. See Seals v. Herzing, Inc.-New Orleans, 482 Fed. Appx. 893, 896-97 (5th Cir. 2012). In Seals, the Fifth Circuit was

heavily persuaded by the parties' "express statement that confidentiality was a material inducement ...to settle." Id. Recognizing the strong public policy favoring voluntary settlements, the Fifth Circuit agreed that—under the facts of the case—it outweighed competing public policy favoring public access to court records. Id. Other litigants have not been so lucky. In 2012, the Second Circuit found that the district court acted within its discretion in unsealing confidential, non-privileged documents underlying an insurer's motion to disqualify a reinsurer's counsel involved in an arbitration dispute. See Application of Utica Mut. Ins. Co. v. INA Reinsurance Co., 468 Fed. Appx. 37 (2nd Cir. 2012). In 2002, Judge Easterbrook of the Seventh Circuit strongly opined that parties' confidentiality agreements made in pre-litigation arbitration did not warrant keeping the appellate record secret. He noted that: "[n]ot only the legislature but also students of the judicial system are entitled to know what the heavy financial subsidy of litigation is producing. These are among the reasons why very few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed. In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is entitled to be kept secret on appeal." See Baxter Intern, Inc. v. Abbott Lab., 297 F.3d 544, 546 (7th Cir. 2002) (rejecting argument that confidentiality would promote parties' business interests, and finding that parties would need to explain, document-by-document, why secrecy was required, with supporting legal citations).

Conclusion

Is arbitration truly confidential? Maybe not—if you seek to involve the judicial system. Strong opinions from Judges Posner and Easterbrook of the Seventh Circuit, as well as case law from the Southern District of New York and the Second Circuit, suggest parties may find themselves in a difficult position if they expect to keep arbitration documents under seal while petitioning the courts for confirmation or vacature of an arbitration award. Accordingly, parties involved in a professional malpractice action who choose to engage in arbitration, and who expect confidentiality to be maintained, may wish to consult recent case law in their particular jurisdiction to assure themselves that if a court becomes involved their confidentiality agreement will be maintained. At a minimum, parties considering arbitration should take special precautions when they draft their arbitration agreement. Among other things, they should expressly state that confidentiality is paramount to their agreement, and expressly limit how confirmation will be handled once an arbitral award is issued. By Shane K. Blank Shane Blank Image not found or type unknown