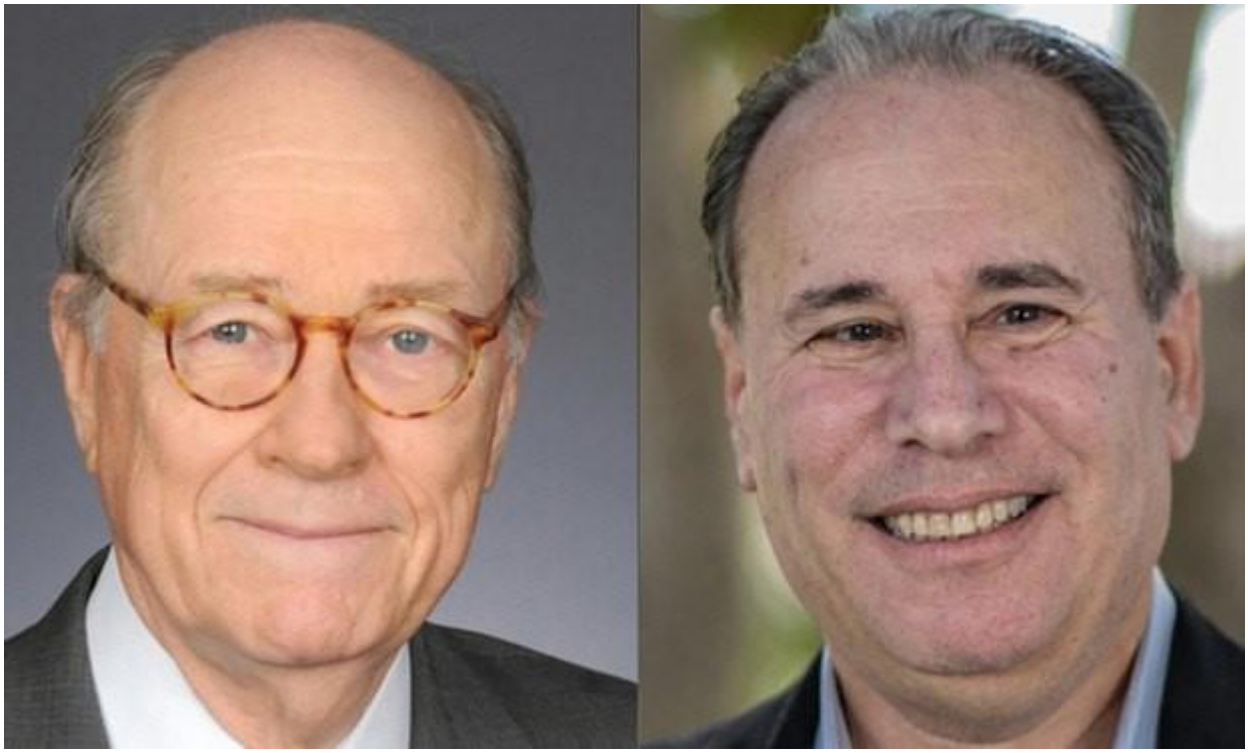
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Disclosure Restrictions in International Arbitration: Whose Confidentiality Is It Anyway?

In their International Litigation column, Lawrence W. Newman and David Zaslowsky discuss the various ways that parties to international arbitrations may be restricted by laws and institutional rules, as well as their own agreements, in the use they may make of awards and other information emanating from their proceedings. Thye suggest that careful considerations be given before accepting general rules that may limit later use or access to such material.

By **Lawrence W. Newman and David Zaslowsky** | January 26, 2022 at 12:15 PM



One of the aspects of international arbitration that is much discussed in published commentaries is the confidentiality of arbitral proceedings—what it consists of, the extent to which it is or should be imposed, by whom, and who should be affected. In this article, we explore the extent to which parties may be advertently or inadvertently bound by confidentiality restrictions limiting their present or subsequent disclosure of information, including awards, from arbitration proceedings in which they are involved.

Over the past several decades, more and more major international disputes have been resolved through arbitration. It is likely that, earlier, such disputes would have been heard in courts, resolved through negotiation or even not pursued all. Businesses and investors have been drawn to international arbitration as a way of avoiding local courts and their unfamiliar procedures and influences, and replacing them with tribunals whose members they have had a hand in selecting. But they are also reported to have been drawn to arbitration for reasons of the privacy and confidentiality of the proceedings, which the parties may prefer over the wide-open process in U.S. and other courts, where case filings may be available electronically and hearings are presumptively can be open to

the public. Although court proceedings in some other countries do not partake of this kind of openness, judgments in civil cases are generally available to the public and, most importantly, the parties are not legally restricted as to what they may communicate to others concerning the proceedings (in most circumstances).

The meaning of confidentiality in international arbitration varies. Institutional rules generally provide that hearings are private, excluding nonparticipating persons and that the deliberations of arbitrators are kept secret. Also, the rules of administering institutions invariably include provisions that restrict their administrative staff and the arbitrators from disclosing information concerning proceedings and their outcome.

These institutional rules generally provide for exceptions from confidentiality for disclosure for legally permitted or mandated court proceedings such as those involving confirmation of, or challenges to, tribunal awards and for other required reporting disclosures.

There are differences in the extent of confidentiality imposed, in particular with respect to what can be regarded as the underlying presumption or baseline extent of required confidentiality. For example, under English law, there is legal presumption that arbitrations constitute a confidential process. Therefore, not only are the arbitral proceedings themselves treated as confidential but also this mandatory confidentiality is extended to court proceedings in which arbitral awards are challenged. Court opinions in such cases mask the identity of the parties and other salient information about the arbitral dispute.

Few countries and few U.S. states have laws that impose confidentiality restrictions. France is one of them, providing by statute for mandatory confidentiality in domestic arbitration (Articles 1464 and 1506 of the Code of Civil Procedure), but not for international arbitration, which was recently excepted from this restriction, reportedly to comport with international arbitration practice.

In the United States, the Restatement of the U.S. Law of International Commercial and Investment Arbitration, §3.11(b), (2019), states that courts in the United States have not recognized and applied implied confidentiality in the way the courts in England have. This report is quarrelled with, however, in a recent article in the *American Review of International Arbitration* (Volume 31, No; 2020) by Gary Born, who, after presenting a useful tour d'horizon of state and institutional confidentiality restrictions, contends that there is implied in U.S. statutory and treaty law, and alluded to in obiter dicta in certain U.S. appellate court opinions, the existence of such a presumption of confidentiality in international commercial arbitration, notwithstanding the acknowledged paucity of specific authority in support of the contention.

Apart from confidentiality restrictions that might be imposed by law on participants in arbitration proceedings, most confidentiality restrictions in arbitration are the product of party agreement—what the parties directly or indirectly agree to impose upon themselves. Contracts might specifically provide for confidentiality concerning the parties' arbitration. Or, parties to arbitration proceedings often enter into direct agreements after a dispute has commenced, when the parties, aware of the issues at stake, jointly determine that is in their interests to impose limitations on themselves on the extent to which matters relating to the arbitration may be disclosed to persons outside the arbitration. If one of the parties—perhaps the one on the winning side of an award—later wants to deviate from a restrictive agreement by publicly disclosing the award, they will be stuck with what was agreed.

The parties may also impose confidentiality limitations on themselves indirectly, through agreeing to arbitrate in accordance with institutional rules that may include confidentiality restrictions that are binding on the parties. The rules of institutions differ as to the scope of their confidentiality rules. As mentioned, institutions require confidentiality on the part of their staff, and on arbitrators appointed in accordance with their rules. Fewer institutions, however, impose mandatory restrictions on parties whose disputes they administer. Two of the most frequently used international arbitral institutions in the United States, the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (ICDR) have no rules imposing confidentiality obligations on the parties to arbitration proceedings administered by them. It is has been reported that both

institutions have considered confidentiality restrictions in the course of periodic reviews of their rules but have rejected them.

Not only does neither institution impose confidentiality restrictions on the parties' publication of awards, but both have published masked versions of their awards. Indeed, the ICDR recently amended its rules to permit, with the consent of the parties, the Administrator to "publish or make publicly available redacted awards, decisions and rulings that have become public in the course of enforcement or otherwise." ICDR Rule 40.3, as amended March 1, 2021.

Thus, when parties agree to arbitrate under the rules of the ICC or the ICDR, they do not contractually bind themselves to non-disclosure regarding their arbitration proceeding. In this regard, they are in a similar position to third parties, who are not generally bound by institutional confidentiality restrictions, such as independent hearing witnesses (other than experts who may have signed confidentiality agreements) or uninvolved third parties.

There are arbitral institutions, however, that have rules that impose confidentiality restrictions on parties. These include the Singapore International Arbitration Centre and the Stockholm Chamber of Commerce. There are also, in the United States, three institutions whose rules impose confidentiality restrictions on parties: the International Institute for Conflict Prevention and Resolution (CPR), the Federal Arbitration Center (Fed Arb) and JAMS. The CPR restrictions apply to all arbitrations under all of its of various rules, domestic as well as international and administered as well as non-administered.

The Fed Arb Rules, which started out years ago as rules based on the Federal Rules of Civil Procedure (which, of course, have no confidentiality provisions), were revised in recent years to provide for confidentiality that applies not only to administrators and arbitrators but to the parties as well.

JAMS, this past June, amended the confidentiality provisions in its international arbitration rules by adding the word "parties" to those persons that are bound by its broadly applicable confidentiality restriction so that its Rule 16.2 now reads as follows: "Unless otherwise required by law, an award will remain confidential, unless all of the parties consent to its publication."

The impetus for the JAMS rule to impose more stringent confidentiality restrictions for international arbitration than for domestic arbitration is in contrast with the purport of recent revisions to the French statutory law mentioned above that removed confidentiality restrictions for international arbitrations but not domestic. With its focus only on awards, the JAMS provision addresses what is the most likely subject of issues of disclosure versus confidentiality. Awards may contain considerable information that one or more of the parties may want to protect, but their disclosure may also be important to both parties and others for reasons other than those "otherwise required by law." The JAMS provision contrasts with the more nuanced approach of the rules of the London Court of International Arbitration (LCIA), specifically Rule 30.1, which provides:

The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, *to protect or pursue a legal right*, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorized representative, witness of fact, expert or service provider. (emphasis added).

The CPR rules for administered international arbitration contain a similar approach:

Article 20: Confidentiality

Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related disclosure and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.

A party may want to make use of an award to mitigate damages in another proceeding involving related transactions or may want to use an expert's testimony or report in the arbitration to cross-examine a witness in a later related case. Courts in England have considered various circumstances under which confidentiality restrictions may be loosened in order to "protect or pursue a legal right." English courts have permitted disclosure where there was an indication that a witness gave conflicting testimony in different arbitrations, where necessary to protect a party's rights vis-à-vis third parties, where an award involved the same issues raised in litigation and in order to insure that courts are not misled. (Case citations are available in the Born article, p. 237, notes 108 and 109.) The extent to which awards may be used for these purposes in other proceedings will depend on the content and interpretations of institutions' rules with respect to confidentiality of awards.

What conclusions can be drawn from the different approaches taken to party confidentiality restrictions in both the United States and elsewhere in the world? Is there a clear answer to the question raised in the title of this article in the title of this article: Whose Confidentiality Is It Anyway? The answer: The extent of the confidentiality obligation that the parties live by in any given arbitration proceeding depends on how much consideration they give to formulating their own rules in an agreement in contrast to what they may more passively accept as part of the institutional rules governing their arbitration.

Arbitration is a construct of the parties through which they have agreed to have their disputes resolved; courts enforce those agreements, including the rules of the institution that the parties have chosen to administer their arbitration. Parties should be careful when they select the institutional rules under which they may arbitrate to consider the kind of disputes that might arise and whether disclosure restrictions will benefit them or not. What may have earlier seemed to the parties an acceptable restriction may turn out to be, after a dispute has arisen, not what one of the parties now wants? Of course, the parties can always agree to disregard or alter restrictive confidentiality rules, but such agreements cannot always be reached by adversaries, especially if one party does not want details of its loss or likely losing case to be made known. Accordingly, parties should consider confidentiality when they select the institutional rules that will have to live with once a dispute arises.

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