Practice Pointer: Anticipating When A Court May Not Maintain The “Confidentiality” Of An Arbitral Proceeding

Parties often choose to arbitrate their disputes to maintain the confidentiality of their business operations and to keep private battles out of the public court docket. While clients may expect that information disclosed during the course of arbitral proceedings will remain confidential, occasionally documents provided during the course of arbitration - and reasoned awards themselves - turn up in judicial proceedings. As a result, practitioners must be aware that when parties to an arbitration find themselves embroiled in a judicial proceeding, a court may not be able to maintain the same level of “confidentiality” that was present during the underlying arbitration. In particular, arbitrators should be mindful when they sign confidentiality agreements that arbitrators themselves cannot always protect the contents of any reasoned award from subsequent disclosure.

The United States Court of Appeals for the Third Circuit addressed the limits of confidentiality after the Delaware Court of Chancery offered certain parties the option to voluntarily consent to arbitration. Delaware Coalition for Open Government, Inc. v. Strine, 733 F.3d 510 (3rd Cir. 2013). In such instances, a Chancery Court judge would hear the arbitration, but the materials and communications revealed during the proceedings would not be made public. Once a decision was reached, the Chancery Court would automatically enter a final judgment or decree. The Third Circuit found that such arbitral proceedings could not remain confidential because the public had a “First Amendment right of access to Delaware’s government-sponsored arbitrations.” Id. at 521. Importantly, however, the Third Circuit noted that confidentiality might still be maintained to protect patented, trade secret and other closely held information by operation of Delaware Chancery Court Rule 5.1, which allowed for the non-public filing of documents when certain conditions were met. Id. at 519. Thus, parties to the
court-sponsored arbitrations were only entitled to keep confidential the same types of information protected from disclosure during typical judicial proceedings.

In a recent decision, the Southern District of New York further evidenced the risk of public disclosure of arbitral proceedings in the judicial setting. *Veleron Holding, B.V., v. Morgan Stanley*, No. 12 CV 5966 (CM) (S.D.N.Y. April 16, 2014). The plaintiff filed suit and misused materials provided to it by its parent corporation, which materials were confidential on account of an arbitration that took place between the parent company and a third party. The arbitration did not involve the parties to the judicial lawsuit. Nevertheless, the court ruled that materials filed with the court could not remain under seal “unless some party could explain why a particular page or document in the record qualify[d] as ‘confidential’ ” pursuant to a confidentiality stipulation entered in the litigation (without regards to any confidentiality provisions that governed the arbitration). *Id.* at p. 2. The court did find that portions of an arbitral award between the non-parties could remain confidential because the substance of the award was not necessary to a determination of the issues in the litigation. *Id.* Still, the court noted that “testimony and documents that may have been considered by the [arbitral tribunal] but that relate[d] to the litigation of the allegations” in the suit would likely become public. *Id.* at 3.

As a result, when parties and arbitrators craft confidentiality agreements intended to govern arbitral proceedings, practitioners should keep in mind that such agreements are not bullet proof. If documents relating to the arbitration find their way into a judicial proceeding, such documents may be subject to public disclosure unless the parties are able to avail themselves of the judicial rules that protect information typically deemed confidential in the trade secret and similar contexts.
Accordingly, arbitrators should take steps to ensure that all parties are aware of the risks associated with potential future disclosures of information deemed confidential during arbitral proceedings. Arbitrators are often asked to sign confidentiality agreements and in turn rely on confidential information when rendering reasoned awards. In such instances, arbitrators should make clear that they cannot guarantee the substance of any reasoned award will remain confidential during subsequent proceedings and that the parties themselves may need to employ additional protective measures in the event of future litigation.