Maintaining Confidentiality in Arbitration

by Theodore K. Cheng

Proponents of arbitration as a dispute resolution process often cite that one of its advantages over conventional court litigation is the ability to maintain the confidentiality of the proceedings. Some even refer to arbitration as a "private" dispute resolution process. That aspect of arbitration has come under scrutiny, particularly in the case of consumer and employment disputes, and most recently, with respect to allegations of sexual harassment.

For example, back in 2015, there were the *New York Times* series of editorials that were critical of arbitration, denouncing companies who compel their customers and employees to sign arbitration agreements that waive their right to proceed in court and have their disputes decided in an arbitral forum where, according to the editorials, the deck is stacked against them.[1] Then, among other high profile developments, in the Summer of 2016, former Fox News anchor Gretchen Carlson filed a sexual harassment lawsuit against Roger Ailes, the founder and former Chairman and CEO of Fox News and the Fox Television Stations Group. As reported in *The Hollywood Reporter*, Mr. Ailes contended that Ms. Carlson had "ignored an arbitration provision in her multi-million dollar contract in order to 'tar' [his] reputation," and that he would remove the case to federal court and the entirety of the "dispute to confidential arbitration, citing a provision in her contract that demands disputes be arbitrated by a three-member panel."[2] But the assumption that merely commencing an arbitration will ensure the confidentiality of the proceedings is both overbroad and misleading.

You might expect that, if the arbitration is commenced with a recognized and reputable provider, such as the American Arbitration Association (AAA), the CPR Institute, JAMS, or Resolute Systems, the rules and procedures of those organizations would maintain the privacy of the proceedings. Yes and no. Certainly, those rules and procedures would impose obligations on the provider's staff and the arbitrators to protect information about the proceedings. For example, in the AAA's Statement of Ethical Principles,[3] the AAA defines an arbitration proceeding as a "private process." Moreover, it states that "AAA staff and AAA neutrals have an ethical obligation to keep information confidential." Indeed, under Canon VI of the Commercial Code of Ethics for Arbitrators in Commercial Disputes, the AAA and the American Bar Association set forth an arbitrator's obligations to maintain the confidentiality of the proceedings. Additionally, in the Statement of Responsibilities and Understanding that each AAA arbitrator must submit on an annual basis, the arbitrator confirms that she/he "agree[s] to serve in accordance with all applicable AAA-established procedures and the Code of Ethics for Arbitrators in Commercial Disputes and the Model Standards of Conduct for Mediators, as applicable, in effect now and as they may be amended."

What about the parties and their counsel? Notwithstanding the provisions governing the AAA staff and AAA arbitrators, the Statement also sets forth that "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." Arbitration has been described as a "creature of contract," and, in that regard, the parties to an arbitration clause are free to customize their dispute resolution process with a great degree of flexibility – far more than is available if the dispute were governed solely by court rules and procedures. In particular, if confidentiality is a concern, the parties may agree to maintain the privacy of any future dispute resolution proceedings, including arbitration.

Critically, absent such an agreement, as is the case in conventional court litigation, the parties would theoretically be free to engage in *any* disclosure of the proceedings, ranging from publicly speaking about the case to the media to revealing information or documents obtained during the proceeding itself. For example, in the case of Ms. Carlson, her employment contract with Fox News apparently specified in its arbitration clause that "all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence."[4] Such a clause is much broader in maintaining the secrecy of the arbitration than is commonly found in typical arbitration proceedings, as it essentially prohibits disclosures of any facts, evidence, and even allegations (proven or otherwise) pertaining to the dispute.

What about witnesses who participate in the arbitration hearing? Unless there is a separately applicable agreement in place between the witnesses and the parties to the arbitration (e.g., a non-disclosure agreement, a cooperation agreement, etc.), witnesses (and especially third-party witnesses) are neither named parties to the arbitration proceeding nor are they signatories or otherwise bound by the arbitration agreement. Thus, as a general matter, they have no obligation to maintain the privacy of any of the procedural or substantive information to which they are exposed or about which they learn as a result of their participation in the arbitration proceedings.

Thus, it is little wonder that, much like in conventional court litigation, parties to arbitration proceedings have increasingly sought to enter into stipulated protective orders governing the confidentiality of the proceedings and/or the designation and use of materials produced by parties (and third-parties) to which access may be circumscribed. As in court litigation, these stipulations are presented to the ultimate adjudicator for approval, or, alternatively, the

parties may engage in motion practice before the arbitrator or panel on that issue.

Based upon the limited public information that exists, Ms. Carlson may have breached her employment agreement with Fox News by disclosing the facts, and possibly the evidence, pertaining to her sexual harassment complaint against Mr. Ailes. That dispute settled in September 2016, two months after she commenced the lawsuit, so we will never know how the merits of that issue would have been decided.[5] In any case, it is essential to know and understand how the default rules regarding confidentiality operate in an arbitration proceeding. It is also a best practice to engage opposing counsel early in the process to address this issue and raise it at the preliminary hearing with the arbitrator or panel.[6]

Finally, the parties' bargained-for confidentiality may, in fact, turn out to be fleeting if, after the issuance of an award, one or both parties seek confirmation or vacatur of the award in court. In that circumstance, the contents of those petitions, which would undoubtedly include both the award itself and information derived from the arbitration proceeding, would generally be publicly disclosed. Indeed, federal courts have long espoused the presumption that judicial documents should generally be accessible to the public.[7] At least in the Second Circuit, such access is balanced against any privacy interests that are at stake. That said, the burden to overcome the presumption of public access is high and is not automatic even if all the parties seek to maintain the confidentiality of the arbitration award. As the court in *Century Indemnity Co. v. AXA Belgium*[8] noted,

> the confidentiality agreement at issue in this case may be binding on the parties, but it is not binding upon the Court. And while parties to an arbitration are generally permitted to keep their private undertakings from the prying eyes of others, the circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, *i.e.*, the arbitration award.

Notwithstanding the limitations discussed above, arbitration remains one of the only adjudicative processes in the overall dispute resolution spectrum over which confidentiality can, for the most part, be maintained, particularly during the pendency of the proceedings. The alternative – conventional court litigation – offers no similar advantage. Thus, although arbitration clauses are, in many instances, an afterthought, it would be prudent for both litigators and transactional attorneys to consider upfront whether and to what extent the parties wish to seek resolution in a private and confidential manner once a dispute should arise. The selection of the adversarial forum becomes far more difficult to realize once a dispute has already arisen.

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Endnotes:

[1]*See, e.g.*, N.Y. Times Editorial Board, "Arbitrating Disputes, Denying Justice," *N.Y. Times* (Nov. 7, 2015), available at http://www.nytimes.com/2015/11/08/opinion/sunday/arbitrating-disputes-denying-justice.html?_r=0; N.Y. Times Editorial Board, "In Arbitration, a 'Privatization of the Justice System,'" *N.Y. Times* (Nov. 1, 2015), available at http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; N.Y. Times Editorial Board, "Arbitration Everywhere, Stacking the Deck of Justice," *N.Y. Times* (Oct. 31, 2015), available at http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

[2]Ashley Cullins, "Roger Ailes Claims Gretchen Carlson Evading Contract, Confidentiality Obligations," *The Hollywood Reporter* (July 8, 2016), available at http://www.hollywoodreporter.com/thr-esq/roger-ailes-claims-gretchen-carlson-909450.

[3]AAA Statement of Ethical Principles, available at https://www.adr.org/StatementofEthicalPrinciples.

[4]Noam Scheiber and Jessica Silver-Greenberg, "Gretchen Carlson's Fox News Contract Could Shroud Her Case in Secrecy," *The N.Y. Times* (July 13, 2016), available at https://www.nytimes.com/2016/07/14/business/media/gretchen-carlsons-contract-could-shroud-her-case-in-secrecy.html.

[5]Eriq Gardner, "Gretchen Carlson Lawsuit Against Roger Ailes Ends in Settlement," *The Hollywood Reporter* (Sept. 6, 2016), available at http://www.hollywoodreporter.com/thr-esq/gretchen-carlson-lawsuit-roger-ailes-925881.

[6]For more on the confidentiality issues in arbitration proceedings, including a practical checklist to consider adopting, *see, e.g.*, Laura A. Kaster, "Confidentiality in U.S. Arbitration," *NYSBA New York Dispute Resolution Lawyer,* Vol. 5, No. 1 (Spring 2012), at 23.

[7]*See, e.g., Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-23 (2d Cir. 2006).

[8]No. 11 Civ. 7263 (JMF), 2012 U.S. Dist. LEXIS 136472, at *43 (S.D.N.Y. Sept. 24, 2012) (internal citations and quotations omitted).