

CONFIRMING ARBITRATION AWARDS:

TO SEAL OR NOT TO SEAL?

by

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I. Introduction

Traditionally, disputes between insurers and reinsurers have been resolved in confidential arbitration proceedings. With few exceptions, the parties sign confidentiality agreements at the outset of the arbitration by which they, and the arbitrators, agree to keep the documents, testimony and rulings of the arbitration panel confidential from third parties.

In order to enforce an arbitration ruling through the courts, however, it is necessary to have a district court confirm the arbitration ruling under the Federal Arbitration Act. When the arbitration ruling is submitted to the court for confirmation, the ruling becomes a public record *i.e.* non-confidential. Thus, a party which seeks to have the ruling confirmed but remain confidential must petition the court to seal its records on point.

In a recent case, the cedent was successful in persuading the court to seal the arbitration ruling: *Century Ind. Co. v. Certain Underwriters at Lloyd's*, 2009 U.S. Dist. Lexis 1774 (E.D. Pa.).¹ However, such efforts in similar cases have proved unsuccessful and the product of a confidential arbitration proceeding has become public. The purpose of article is to explore the case law concerning the sealing of arbitration awards as well as the arguments that may (or may not) persuade a court to so seal.

II. Sealing Court Records – the Case Law Backdrop

With respect to the common-law right of access to judicial documents, the United States Supreme has noted: “The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”² The question remains as to what standards the trial court is to use on making its rulings on point. Even without an exhaustive review of the case law in various jurisdictions, it is evident that there is no single articulation of the relevant standards.

In California, the standards for sealing court records are as follows:

[B]efore substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (1) there exists an overriding interest supporting closure and/or sealing; (2) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (3) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (4) there is no less restrictive means of achieving the overriding interest.³

In Connecticut, the issue has arisen in the context of a rule adopted by the superior court on the filing of documents under seal. This states that there is a presumption that documents filed with the court shall be available to the public. In order to order the documents sealed, the court must “articulate the overriding interest being protected [by sealing] and shall specify its findings underlying such order”⁴

It appears that the second circuit articulates the standards as follows: “Many cases have recognized that the public has a “common-law right of access” to judicial records. . . The burden of demonstrating that a document submitted to the court should be sealed rests on the party seeking such action” *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818 at 826 (2nd Cir. 1997) (internal citations omitted).

In the third circuit, there are a series of cases⁵ which developed a more elaborate standard for sealing documents which involves a balancing of factors. These factors are:

- A. Whether disclosure will violate any privacy interests;
- B. Whether the information is being sought for a legitimate purpose or for an improper purpose;
- C. Whether the disclosure of the information will cause a party embarrassment;
- D. Whether confidentiality is being sought over information important to public health and safety;
- E. Whether the sharing of information among litigants will promote fairness and efficiency;
- F. Whether a party benefitting from the order of confidentiality is a public entity or official; and
- G. Whether the case involves issues important to the public.⁶

Notwithstanding the differences in the articulation of the standard for sealing documents such as arbitration awards, there are many similarities in concept. Below is a review of how these concepts were applied by trial courts to requests for sealing arbitration awards.

III. Rulings in Favor of Sealing Arbitration Awards

DiRussa v. Dean Witter Reynolds Inc., 121 F. 3d 818 (2nd Cir. 1997) involved a motion to confirm an arbitration award concerning employment discrimination. The court was asked to seal the entire file except for the lower court’s opinions and orders pursuant to a confidentiality agreement. The court granted the petition but on the basis that essential information about the case was already contained in public documents:

However, opinions of both this court and the district court, which are not under seal, discuss the facts underlying DiRussa’s termination and clearly indicate that the

arbitrators found that defendants discriminated against DiRussa based on his age. Moreover, the arbitration award is available to the public on Westlaw. Under all the circumstances, we cannot say that the district court abused its discretion in sealing the file, except for the court's orders and opinions in this case.⁷

After arbitration subject to a confidentiality agreement, the cedent petitioned the court to confirm the award and seal the award in *Century Indem. Co. v. Certain Underwriters at Lloyds's*, 2009 U.S. Dist. Lexis 1744 (E.D. Pa.). In support of its position, the cedent relied on the confidentiality agreement and the argument that "the integrity of the arbitration process in the reinsurance industry, where such proceedings are typically confidential, could be jeopardized."⁸ In ruling in favor of sealing the arbitration award, the court addressed the seven factors identified by the third circuit (*see* § II, *supra*):

First, there is a significant "business" privacy interest that would affect Defendant if the Award is disclosed. Second, the purpose behind sealing the Award is legitimate. The parties entered into a Confidentiality Agreement and it is the practice of the reinsurance industry to keep arbitration proceedings, including final awards, confidential. Third, public health and safety issues are not implicated here. Fourth, upholding the terms of the Confidentiality Agreement will promote the voluntary execution of private arbitration agreements; a sound public policy objective. Fifth, neither party is a public entity or official.⁹

IV. Rulings Against Sealing Arbitration Awards

Pursuant to a confidentiality agreement, both parties requested that the court seal the documents in the record, including the court's opinion, in *Liberty Re (Bermuda) Ltd. v. Transamerica Occidental Life Ins. Co.*, 2005 U.S. Dist. Lexis 9774 (S.D. N.Y.). The court quoted the entire panel order in text of its opinion before ruling that certain of the documents, apparently not the panel order, could remain sealed:

The parties argue that their strong interest in confidentiality coupled with the federal policy of encouraging arbitration justify sealing the entire Court record. With respect to the documents the parties submitted to this Court that do not form the basis of our opinion, we agree. . . . [T]he presumption of public access in these background documents is minimal, while the parties have an interest in keeping the detailed records of their arbitration from public view.

In the case of this Court's opinion, however, the strong presumption of public access to judicial decisions outweighs the parties' interests in privacy.¹⁰

A motion to reconsider the sealing of documents related to confirming an arbitration award provides the fact situation for *Global Reinsurance Corp. v. Argonaut Ins. Co.*, 2008 U.S. Dist. Lexis 32419 (S.D.N.Y.). The court found insufficient evidence of damages to business relationships to justify the seal:

Today, I held a hearing at which I gave Global Reinsurance Corporation – US Branch (“Global Re”) an opportunity to explain the manner in which the language of the arbitration awards might impair its relationships with retrocessionaires and other participants in the reinsurance industry. Global Re did not endeavor to argue that disclosure of any language in the awards would cause it direct or immediate harm. It relied upon its assessment of the danger of a slippery slope that might impair the exchange of information between parties to a reinsurance agreement because of fear of eventual disclosure. Because such a fear is not justified as applied to the bare bones relief granted or denied in an arbitration proceeding, it does not provide an adequate basis to overcome the presumption of access.¹¹

Universal Studios Inc. v. Superior Court, 110 Cal. App. 4th 1273 (2003) was a motion to seal the settlement agreement, and other documents, related to an arbitration. Pursuant to the California rule for sealing documents (described in §II, *supra*), the court found an overriding interest in sealing the documents, that being a confidentiality agreement. However, the party seeking to have the documents sealed failed to show prejudice given that the documents in question were heavily redacted to remove sensitive financial information.¹²

In *Travelers Ins. Co. v. Connecticut General Life Ins. Co.*, 2003 Conn. Super. Lexis 2756 (2003), the parties to an arbitration asked the court to confirm the arbitration award but to place the award and accompanying documents under seal. In applying the rules of the superior court on court records, the court declined to do so:

The applicants argue that preserving the confidentiality of arbitration proceedings furthers the public policy favoring arbitration. . . .
. . . In short, the court is not convinced that confidential financial records may be sealed simply because parties have a confidentiality agreement or because the matter was initially handled in arbitration. In the instant case, there has been no specific showing that particular records require sealing.¹³

V. Articulating the Reasons to Seal

To put this topic in context, it is important to consider the form and nature of a final order on the merits in reinsurance arbitration. The transaction which formed the basis for the dispute may have taken place many years ago – as many as 30 years for asbestos, pollution and similar long-tailed business. The people involved in the dispute may be long gone from the companies involved. The companies themselves may have gone out of business or been acquired by and absorbed into very different

organizations. The market conditions that caused or contributed to the dispute may have passed from the scene.

Decision making by arbitration panels is highly oriented to the particular facts of the instant case.¹⁴ Rulings by panels tend to be very brief and operate at a high level. “Unreasoned” rulings merely state which party won and the amount of damages. “Reasoned” rulings in the United States usually provide merely findings of fact and conclusions of law and seldom exceed two pages in length. It would be difficult for one not involved with the arbitration proceeding to read a final ruling on the merits and understand much about the dispute other than which side won, the damages awarded and, perhaps, the general nature of the issues involved.

Given the above, it would be unusual for the revelation of an arbitration award to jeopardize an insurer’s or reinsurer’s current or future business relationship (holding aside, of course, the other party to the dispute). There is just too much time and distance between past disputes and current or prospective business relationships. There are, however, a number of strong reasons to seal arbitration awards that relate to the nature of the proceeding, the expectations of the parties and the impact, or lack thereof, on the public.

There is a strong federal policy in favor of arbitrations and sealing arbitration awards supports this policy. Reinsurance arbitrations, traditionally, have been confidential proceedings and the parties usually sign confidentiality agreements to this effect. Therefore, the expectation of the parties is that the proceedings and the documents, testimony and results of the dispute will remain private. No precedential effect is intended and future arbitration panels are at liberty to ignore the results of past arbitrations that become public.¹⁵ Therefore, the good faith reasons why a party would seek to avoid sealing an arbitration ruling are difficult to discern.

Likewise, there is no evident public purpose in the public learning the result of an arcane business dispute between an insurer and its reinsurer. The dispute has no impact on an insured’s claim against its insurer. The financial impact of the arbitrators’ ruling may have some impact on the balance sheet of the parties but this is monitored by regulators and rating agencies which advise the public when the financial status of an insurer or reinsurer is downgraded. Moreover, confidentiality agreements used in reinsurance arbitrations typically provide exclusions for regulators and auditors.¹⁶

The above arguments in favor of sealing may not be sufficient to persuade courts that require tangible prejudice to specific business relationships. However, they may be persuasive to those courts which take a broader view of the expectations of the parties, the need to support the arbitration process and the lack public interest in declining to seal arbitration awards related to reinsurance disputes.

ENDNOTES

¹ The author thanks Christine Russell of White and Williams, counsel for the cedent, for providing briefs for this action.

² *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 at 599 (1978).

³ *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 at 1217-8 (1999) quoted in *Universal City Studios, Inc. v. Superior Court*, 110 Cal. 4th 1273 at 1279 (Ct. App. 2003).

⁴ *Travelers Ins. Co. v. Connecticut General Life Ins. Co.*, 2003 Conn. Super. Lexis 2756 (2003).

⁵ *Shingara v. Skiles*, 420 F.3e 301 (3rd Cir. 2005); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476 (3rd Cir. 1995); *Pansy v. Borough of Stroudsburg*; 23 F.3d 772 (3rd Cir. 1994).

⁶ *Shingara v. Skiles*, 420 F.3d 301 at 306 (3rd Cir. 2005)

⁷ 121 F. 3d 818 at 827-8.

⁸ 2009 U.S. Dist. Lexis 1744 *4.

⁹ *Id.* *5-6.

¹⁰ 2005 U.S. Dist. Lexis 974 *19.

¹¹ 2008 U.S. Dist. Lexis. 32419 *3-4.

¹² 110 Cal. App. 4th 1273 at 1283-4.

¹³ 2003 Conn. Super. 2756 *9.

¹⁴ This is the experience of the author in over 100 arbitrations and that of many others in the arbitration community.

¹⁵ See Robert M. Hall, *Res Judicata and Collateral Estoppel Effect of Prior Arbitration Orders: What Impact on Subsequent Arbitrations?* XVII Mealey's Reins. Rpt. No. 17 at 17 (2007) also available at the author's website: robertmhall.com.

¹⁶ See e.g. ARIAS – US Sample Form 3.3: Confidentiality Agreement.