

Reinsurance Arbitrations May No Longer Be Confidential

Law360, New York (December 20, 2013, 9:21 AM ET) -- Practitioners who spend a significant portion of their time arbitrating reinsurance disputes have seen an increasing number of attacks in recent years on many of the long acknowledged benefits of arbitration. Whether one agrees with those attacks or not, they are pervasive. Although some continue to trumpet the streamlined and cost-effective nature of arbitration, others argue that discovery is at least as extensive — and expensive — in arbitration as it is in litigation, if not more so. While there clearly are benefits to having disputes resolved by a panel of experts steeped in the knowledge of the reinsurance industry, many complain that panels are unfairly comprised of biased party-arbitrators and non-neutral umpires.

Until recently, however, the third leg of the pro-arbitration stool — confidentiality — has largely remained intact. Parties routinely signed confidentiality agreements to govern their proceedings. Court actions seeking confirmation or vacatur of arbitration awards were rare, typically filed under seal, pursuant to the provisions of relatively standard confidentiality agreements, which courts generally honored. Thus, insurers and reinsurers could proceed with arbitration comfortable in the knowledge that their dirty laundry, and their confidential documents, would not be aired publicly.

The comfort of confidentiality may no longer be a reality. Parties are, more than ever, willing to seek confirmation or vacatur of arbitral awards in the courts, and courts seem less willing to allow those matters to remain under seal in certain circumstances. A recent decision of the U.S. District Court for the Southern District of New York, *Eagle Star Insurance Company Ltd. v. Arrowood Indemn Co., Ltd.*, 2013 U.S. Dist. LEXIS 135869 (S.D.N.Y. Sept. 23, 2013), provides an example.

The Eagle Has Landed

Eagle Star involved a somewhat unusual fact pattern. Eagle Star Insurance Company and Home and Overseas Insurance Company (Eagle) sought to confirm an award resulting from an arbitration with Arrowood Indemnity Company (Arrowood). Eagle's petition to confirm, and Arrowood's subsequent motion to dismiss, contained information deemed by the parties to be confidential arbitration information (arbitration information), in accordance with the confidentiality agreement governing their dispute (the confidentiality agreement). As a result, the parties sought to file their briefs and supporting evidence under seal, which the court initially allowed, via three different sealing orders. Before the court issued a substantive decision, the parties reached a settlement and filed a joint stipulation of dismissal, thereby obviating the need for the court to address the merits of their dispute.

Normally, this is where the case would have ended. Instead, five insurance companies (the movants) that were involved in separate, ongoing arbitrations with Arrowood sought to intervene, and to unseal any records that had been filed in the case, asserting both a common law and First Amendment right to

access judicial documents. After addressing certain procedural arguments, the court conducted a three-step analysis.

First, the court analyzed whether the documents sought by movants qualified as “judicial documents,” for which a presumption of access applied. *Id.* at *5. The court concluded that they did, because they were “relevant to performance of the judicial function and useful in the judicial process” — a relatively low burden. *Id.* (citations omitted).

Second, the court considered the weight that should be given to the presumption of access, by looking to “the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.” *Id.* at *7 (citations omitted). Because the confidential information sought by movants was at “the heart of what the [c]ourt [was] asked to act upon,” the court concluded that the “weight of the presumption of access ... is correspondingly high.” *Id.*

Third, the court sought to balance the high presumption of access against any competing considerations supporting continued confidentiality. The primary considerations identified by Arrowood were its expectation of confidentiality (due to the confidentiality agreement and the court’s prior sealing orders), and the possibility that disclosure would “compromise its position with respect to the separate arbitrations in which it is engaged with Movants.” *Id.* at *9. The court concluded that those considerations failed to trump the presumption of public access, and unsealed the documents filed by the parties. *Id.*

Although the facts of *Eagle Star* are somewhat unusual, the notion that courts will not protect the confidentiality of arbitration information in certain circumstances is not uncommon. In fact, a number of recent court decisions have rejected attempts by parties to file confidential arbitration information under seal. See *Century Indemn Co. v. AVA Belgium*, 2012 U.S. Dist. LEXIS 136472, *43 (S.D.N.Y. Sept. 24, 2012) (“At bottom, the confidentiality agreement at issue in this case may be binding on the parties, but it is not binding upon the [c]ourt. 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 agreements to arbitrate — i.e. the arbitration award.’”) (internal citations omitted); *Secure Health Plans of Ga. LLC v. DCA of Hawkinsville LLC*, 2011, U.S. Dist. LEXIS 1549 (M.D. Ga. Jan. 7, 2011) (“to the extent the perceived need for filing under seal is based on boilerplate confidentiality language in the arbitration agreement, that likely would not constitute a sufficiently compelling reason to keep the results of the arbitration confidential”).

This is not to say that disclosure of confidential arbitration information is inevitable when an arbitral proceeding ends up in court. Parties who have signed an agreement to keep their arbitration information confidential typically are required to, and should, undertake good faith efforts to jointly file their documents under seal. Courts, or their clerks, sometimes will grant such a joint sealing motion via margin order, which will not always generate a judicial opinion.

In fact, the documents at issue in *Eagle Star* likely would have remained sealed if not for the challenge by the movants. Also, courts that reject blanket sealing orders often will allow for certain confidential or trade secret information — or information which is not directly pertinent to the court’s decision — to be filed under seal. And, it remains possible to convince a court, even in the face of a challenge, that confidentiality is critical to the proper operation of the arbitration process, while private arbitration results have little value to the public at-large. See *Century Indemn Co. v. Certain Underwriters at Lloyds, London*, 592 F. Supp.2d 825 (E.D. Pa. 2009); *Seals v. Herzing Inc.-New Orleans*, 482 Fed. Appx. 893 (5th

Cir. 2012). Nonetheless, recent case law suggests that if a party or third-party objects to a sealing motion, there is a possibility that confidential arbitration documents will not be (or remain) sealed.

Practical Considerations

In light of the issues addressed above, parties considering arbitration face three critical questions.

First, do they want confidentiality at all? Confidentiality does present certain potential negatives. For example, confidentiality can limit the precedential and *res judicata* effect of an arbitration award, often leading to the same parties repeatedly arbitrating the same issue before different panels. Also, the prospect of a public appeal may help to rein in a potentially biased arbitrator or a party considering unreasonable positions. As former U.S. Supreme Court Justice Louis Brandeis famously wrote, “Sunlight is the best disinfectant.” If, after careful consideration, a party determines that confidentiality is not truly necessary, or wanted, then it need not worry about the implications of cases like *Eagle Star*. It should be noted, however, that the industry in general does not appear to have reached that conclusion. See ARIAS Practical Guide, chapter III (“It is generally agreed throughout the industry that reinsurance arbitrations are and should be confidential in most circumstances, even absent the parties’ complete agreement.”).

Second, if a party desires confidentiality, what steps can it take to increase the likelihood that its confidential arbitration information stays confidential? There are several options, not all of which can be explored in this article. By way of example, parties can agree to waive their right to challenge or confirm an arbitral award in the courts. They also can agree to a private right of appeal. Organizations such as the ABA and ARIAS-US are exploring and/or implementing such programs, which allow parties to avoid public disputes and maintain confidentiality, while keeping some measure of appellate review. In addition, parties that lose in arbitration can quickly comply with the award, thereby decreasing, if not eliminating, the likelihood that a motion to vacate or confirm is filed.

Although the options discussed above, and others too, may help to minimize the possibility that arbitration information becomes public, they all carry at least some risk, and none truly guarantees confidentiality. For example, parties might not be comfortable eliminating or materially limiting their rights of appeal. Also, none of the options described above — or any other course of conduct, besides avoiding a formal dispute altogether — eliminates the possibility that a party will seek redress in the courts if it believes that it has been substantially and unfairly prejudiced in the arbitral process. Therefore, any party involved in arbitration must be mindful of the fact that there is no ironclad means to keep a dispute out of court, and potentially out of the public domain.

Third, how should the possibility that arbitration information may become public shape a parties’ behavior during a confidential arbitration? Certainly, parties should be cautious in advancing positions in arbitration that they would not be comfortable advancing publicly — i.e. arguments: (a) contrary to their stated corporate positions; (b) asserted as a cedent that are contrary to positions taken by the same company as a reinsurer (or vice-versa); or (c) contrary to positions asserted publicly by certain affiliates or related entities.

Also, parties should carefully consider whether to disclose privileged, confidential or otherwise sensitive documents in arbitration, because arbitrators cannot always protect such information. See, e.g., *Regence Group v. TIG Spec. Ins. Co.*, 2010 U.S. Dist. LEXIS 9840 (D. Or. Feb. 4, 2010) (ordering production of privileged documents previously produced in confidential arbitration involving one of the parties). Finally, a party should not seek to confirm or challenge an arbitral award in court unless it is

comfortable with that award and any related documents becoming public, because the ultimate lesson of recent cases like Eagle Star is that there is simply no way to guarantee that arbitration information remains confidential once a court gets involved.

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