The Loss Of Confidentiality In NY Arbitral Enforcement Cases

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Individuals and corporate entities alike choose arbitration to resolve their disputes for many reasons, not the least of which is the ability to shield such disputes from the prying eyes of the public. Indeed, confidentiality and the private nature of arbitration are critical to ensuring access to justice without any associated fear of negative publicity or unwanted disclosure of confidential or private information. However, a sobering series of decisions over the years from the federal district courts in New York has made clear that the valued benefits of confidentiality attendant to the arbitration itself—derived primarily from the parties' agreement or the rules of arbitration they have chosen—will almost assuredly be rendered ineffectual if and when recognition and enforcement is sought in New York.

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Pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as codified in the Federal Arbitration Act, petitions to recognize and enforce foreign or nondomestic arbitration awards must be accompanied by a duly authenticated original award or a duly certified copy thereof. While such proceedings are considered summary in nature (awards "shall" be enforced absent a provable basis to vacate, modify or correct the award), the convention does not speak to whether the award, or any documents relevant to its enforcement, can or should be kept confidential. Even when the parties have agreed to maintain the confidentiality of the arbitral proceedings, the enforceability of this agreement post-award is left to the courts of the jurisdictions in which the parties choose to pursue recognition and enforcement. Particularly in the United States, where many award debtors own substantial assets and there exists a readily accessible platform for parties to file documents with the court publicly, this poses a significant confidentiality problem.

New York courts have been very skeptical of attempts by parties to have certain documents in post-award judicial proceedings filed under seal. This includes, in particular, any briefs or exhibits submitted during the course of the arbitration, but especially the award itself. The rationale? The public has both a common law and constitutional right of access to judicial documents filed in civil cases in the United States. Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006) (such "right of public access" is "firmly rooted in our nation's history"); United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995) ("The common law right of public access to judicial documents is said to predate the Constitution"). The ultimate question therefore is whether the public's rights of access to judicial documents — rationalized on the basis that there must be protections against the court's exercise of its own constitutional (Article III) functions — should be given primacy over the parties' contractual rights of privacy and confidentiality in respect of arbitral proceedings and any documents emanating therefrom. The answer, it seems, is that the public's right to access almost universally trumps parties' rights of privacy and confidentiality in New York-based recognition and enforcement proceedings.

As the Second Circuit has previously articulated, albeit in a case not involving post-award

arbitral enforcement, there is both a common law and qualified First Amendment right of access to judicial documents. Lugosch, 435 F.3d at 119-120; United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995).[1] Whether such right may be exercised involves a multi-step determination.

First, the court must determine whether the common law presumption of access can attach, which it will if the documents in question are deemed "judicial documents." Lugosch, 435 F.3d at 119. However, the breadth given to such definition — any item "relevant to the performance of the judicial function and useful in the judicial process" — effectively eliminates any possibility that primary documents in arbitration, especially the award itself, will not qualify for the presumption of public access. Indeed, it is difficult to contemplate how the arbitral award in particular could ever be considered a document that, as one court put it, does not "directly affect[ ] the Court's adjudication" of the recognition and enforcement petition. Alexandria Real Estate Equities Inc. v. Fair, No. 11-cv-3694, 2011 WL 6015646, at *2 (S.D.N.Y. Nov. 30, 2011). See also Redeemer Comm. of Highland Credit Strategies Funds v. Highland Capital Mgmt., L.P., 182 F. Supp. 3d 128, 133 (S.D.N.Y. 2016) ("This weighty interest in public access applies with full force to documents filed in connection with a motion to confirm an arbitration award."); Glob. Reinsurance Corp.–U.S. Branch v. Argonaut Ins. Co. (Global II), No. 07-cv-8196, 2008 WL 1805459, at *2 (S.D.N.Y. Apr. 21, 2008) ("In circumstances where an arbitration award is confirmed, the public in the usual case has a right to know what the Court has done."). Such determination would appear to be the same even where the petition for recognition and enforcement went unopposed. See, e.g., Alexandria, 2011 WL 6015646, at *2 (citing D.H. Blair & Co. Inc. v. Gottdiener, 462 F.3d 95, 109-10 (2d Cir. 2006)); Church Ins. Co. v. Ace Property & Casualty Ins. Co., No. 10-cv-698, 2010 WL 3958791, at *1 (S.D.N.Y. Sept. 23, 2010). But see Continental Ins. Co. v. Fairmont Premier Ins. Co., No. 16-cv-655 (S.D.N.Y. May 9, 2016) (order granting motion to seal document).

Second, if documents are deemed "judicial," the court must then determine the weight of the presumption of access. Lugosch, 435 F.3d at 119. The Second Circuit, however, has been somewhat vague in articulating this test, stating rather nebulously that the "weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of [the court's] Article III judicial power and the resultant value of such information to those monitoring the federal courts." Id. In fact, many courts appear to skip this step entirely (or assume its satisfaction) in determining whether the public's access to documents should trump concerns of confidentiality. See, e.g., Aioi Nissay Dowa Ins. Co. Ltd. v. Prosight Specialty Mgmt. Co. Inc., No. 12-cv-3274, 2012 WL 3583176, at *6 (S.D.N.Y. Aug. 21, 2012); Alexandria, 2011 WL 6015646, at *2-3.

Third, once the court has determined the weight of the presumption of access, it must then "balance competing considerations against it," including, for example, "the danger of impairing law enforcement or judicial efficiency" and "the privacy interests of those resisting disclosure." Lugosch, 435 F.3d at 120. Finally, in a step that often tends to be considered alongside the third step, the courts have stated that, notwithstanding the presumption of access under either the common law or qualified First Amendment standards, documents may be kept under seal if "specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id. In a typical arbitral enforcement case, these third and fourth steps are likely to be the most relevant for parties seeking to seal, given that most documents arising out of or related to the arbitration (particularly the award itself) will almost certainly have satisfied steps one and two.

Unfortunately for parties seeking to maintain confidentiality, the federal district courts in

New York, in applying the Second Circuit's test, have frequently determined that the public has a near unfettered right of access to arbitration awards, memorials, and other related documents submitted with petitions for recognition and enforcement. Indeed, outside a party advancing specific demonstrations of attorney-client privilege (Lugosch, 435 F.3d at 125), national security concerns (United States v. Aref, 533 F.3d 72, 82-83 (2d Cir. 2008)), privacy interests of innocent third parties (Amodeo, 71 F.3d at 1050-51), existing trade secrets (Istithmar World PJSC v. Amato, No. 12-cv-7473, 2013 WL 66478, at *3 (S.D.N.Y. Jan. 7, 2013)), or sensitive patient information (Pal v. N.Y. Univ., No. 06-cv-5892, 2010 WL 2158283, at *1 (S.D.N.Y. May 27, 2010)), requests for judicial sealing tend to be viewed with suspicion by the New York courts. Istithmar, 2013 WL 66478, at *3 ("Courts in this district have generally been loath to seal arbitration awards").

For example, the New York federal courts have been unpersuaded by "the possibility of future adverse impact[s]" on a party whose confidential information in the arbitration is later made public. Alexandria, 2011 WL 6015646, at *3; Global II, 2008 WL 1805459, at *1 (refusing to seal arbitration awards despite "the risk that [disclosure] will impair [plaintiff's] negotiating position with other reinsurers" and demanding proof of how "disclosure of any language in the awards would cause [the party] direct or immediate harm"). These courts have been equally unsympathetic to the notion that foreign law potentially mandating confidentiality, coupled with concerns of international comity, outweighs the "strong presumption in favor of" and "pressing interest in open access to court records." Redeemer, 182 F. Supp. 3d at 130, 134.

Perhaps most troubling for parties seeking to maintain confidentiality is that courts have generally been unmoved by the existence of applicable confidentiality orders or agreements between the parties. See, e.g., Clearwater Ins. Co. v. Granite State Ins. Co., No. 15-cv-165 (S.D.N.Y. Mar. 2, 2015) (order denying motion to seal documents) ("[C]ountervailing factors relying on private agreements between or expectations among the parties have little force when weighed against the interest of the public in monitoring the judicial function"); Eagle Star Ins. Co. Ltd. v. Arrowood Indemnity Co., No. 13-cv-3410, 2013 WL 5322573, at *3 (S.D.N.Y. Sept. 23, 2013) (finding "the parties' confidentiality agreement ... insufficient to demonstrate that sealing is necessary"); Century Indem. Co. v. AXA Belgium, No. 11-cv-7263, 2012 WL 4354816, at *14 (S.D.N.Y. Sept. 24, 2012) (determining that "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 [confidential],' 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'"); Alexandria, 2011 WL 6015646, at *3 (rejecting position that the rules of arbitration, which establish confidentiality protections, can overcome the First Amendment presumption of access); Church, 2010 WL 3958791, at *3 (rejecting the position that the "mere existence of a confidentiality agreement" demonstrates that sealing is "essential to preserve higher values"); Mut. Marine Office Inc. v. Transfercom Ltd., No. 08-cv-10367, 2009 WL 1025965, at *5 (S.D.N.Y. Apr. 15, 2009) (same).

In fact, the principle of pacta sunt servanda — considered sacrosanct by arbitration practitioners, as it holds parties to the terms of their agreements and requires the courts to enforce the same — appears to be deemed of lesser value by the courts than that of public access to judicial documents. Aioi Nissay, 2012 WL 3583176, at *6 (while it is "undeniably an important role for a court" to "hold[] competent contracting parties to bargains made by them freely and voluntarily, [which] requires the courts to enforce such agreements," such public policy "does not constitute a 'higher value' that would outweigh the presumption of public access to judicial documents."). Of course, an action may lie to recover damages for breach of contract where a party discloses confidential materials in violation of its

agreement, but outside that, the parties' confidential arbitral materials are fair game for public consumption. Id.

A rare exception to this trend is a May 2016 order by U.S. District Judge Valerie E. Caproni of the Southern District of New York, granting the joint request of the parties to maintain the sealing of an arbitration award in a reinsurance case where both parties agreed that confidentiality was necessary and confirmation was uncontested. Continental Ins. Co. v. Fairmont Premier Ins. Co., No. 16-cv-655 (S.D.N.Y. May 9, 2016) (order granting motion to seal document). While recognizing the Lugosch factors, Judge Caproni nevertheless accepted the parties' arguments that the public's right to access is inapplicable when the documents concern a private arbitration that is subject to a strict confidentiality agreement.

Judge Caproni agreed — in conflict with many of her colleagues — with the parties' statement that "[their] interests in maintaining the confidentiality of the Final Award are sufficiently 'higher values' that trump any public interest in accessing the documents." Id. at 3. In defending their position, the parties cited mostly non-New York cases and an order issued by U.S. District Judge Laura Taylor Swain the year prior, which followed an earlier order issued by U.S. District Judge Katherine Polk Failla granting petitioner's motion to seal. See Century Indem. Co. v. Glob. Reinsurance Corp. of Am., No. 15-cv-6426 (S.D.N.Y. Dec. 10, 2015) (order granting motion to continue sealed filing of documents) ("In light of the confidentiality provisions of the arbitration agreement and consent to confirmation of the award, the parties' request for continued sealed filing of the petition and the award is also granted."); see also Morgan Stanley & Co. LLC v. Gupta, No. 13-cv-6383, (S.D.N.Y. Oct. 29, 2013) (order sealing arbitration record upon agreement of both parties).

It awaits to be seen whether orders such as Judge Caproni's will be considered peculiar to the insurance and reinsurance industry arbitration context and where both parties have consented to sealing and no party has challenged confirmation. Still, Judge Caproni's order offers a breath of fresh air for those award debtors with assets in New York who hope to retain their coveted confidentiality protections post-award. In the end, parties in arbitration who have assets in the United States and who are concerned about the confidentiality of their dispute and any and all documents related thereto, including most notably the award itself, should be aware of the New York courts' general reluctance to seal records in post-award recognition and enforcement proceedings and the risks that this poses to existing secrecy obligations.

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[1] Only the common law right of access is discussed herein. As this entails a less stringent standard than the qualified First Amendment protection, if access is required under the common law framework, it would necessarily also be required under the First Amendment framework.