A Conversation on Confidentiality – or "Holding the Cards Close"

Rob Harris: "Dave, I don't envision you as a follower of Hollywood gossip, any more than I am. Nonetheless, my guess is that you did pay attention to the recent news about the arbitration award directing that Kevin Spacey pay $31 million to the "House of Cards" production company, arising out of Spacey's violation of the company's sexual harassment policy."

Dave Reif: Since the long lines disappeared at the grocery checkout line, I don't get a chance to read *People* and the other entertainment magazines. But it was all over the news that the production company claimed that Spacey's misdeeds resulted in his removal from the show with all the associated costs and damages. The complaint in the *Spacey* action specifically refers to the tribunal's proceeding as a "confidential arbitration." So much for confidentiality!!! So, an interesting and very important question is whether there is a way to confirm a favorable award or set aside an adverse one without giving the details of the award. Thoughts?

Rob: First, I assume we are not discussing the separate but important issue about whether in regards to certain consumer and employment discrimination claims, legislatures should outlaw a company's ability to keep awards and settlements confidential. Instead, we are talking about contract claims and other larger scale commercial disputes where the parties each have legitimate confidentiality interests. As to these disputes, I see two aspects to confidentiality. First, what can the parties do to keep the actual award including its discussion of the evidence—in all its sordid detail—hidden from public consumption. Second, which I suspect is more challenging, is whether there is a way to prevent disclosure of who won and who lost, the amount of the award, or even the fact that there was an arbitration.

In *Spacey* the production company's petition to confirm stated that "not even a redacted copy of the Award is attached" because a Stipulated Protective Order directed that "all testimony" was designated "confidential." Counting on the parties stipulating to a protective order is risky. So, answering your question with a question, what can attorneys do ***before*** the relationship sours to limit public exposure of a subsequent award?

Dave: It seems to me that, like everything else in arbitration, the issue could start with the agreement itself. The parties certainly can't keep a judge from unsealing the arbitration award, but there are guardrails they could erect on their own conduct. How about including some of these in the contract's dispute resolution clause: The parties will not attach the award to any application to compel or vacate; the parties will not address the result of the arbitration, except as "necessary" to define the dispute; the parties will jointly move the court to seal the record of the arbitration, including the award. These are broad brush and would need tailoring, but you get the idea.

Rob: Yes, and like many good ideas, the challenge is implementation. The transactional attorneys drafting dispute resolution provisions sometimes have not spent much time in the litigation or arbitration trenches and (understandably) have not had occasion to consider the

nuances of post-award enforcement proceedings. Your contract solution will require a substantial education effort. Who knows, maybe our dialogue will go viral.

Dave: In that case, contract drafters reading this might come up with additional ideas. Theoretically, they could go so far as to preemptively agree to waive the right to petition to vacate. If so, an application to confirm – at least under the Federal Arbitration Act – could be very barebones. I can't imagine, though, allowing a client to assume that great a risk and a court might strike down such a provision as a matter of public policy.

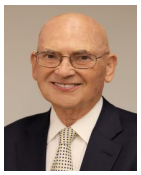
Rob: So, let's fast forward, and assume the population of contract drafting attorneys do not embrace your suggestions. After an arbitration is commenced—but before it goes to award—the attorneys who, unlike their transactional partners, do understand how enforcement of the award may result in disclosure of information that the parties may prefer be kept confidential. While the arbitration is still being contested, the attorneys can suggest to their clients that a confidentiality agreement be put into place. What should that include?

Dave: Let's start with considering what needs to be kept confidential. Are we talking about the ultimate award, i.e. the winner and, where applicable, the amount won, or are we talking about sensitive information that may have come up in the course of the arbitration. The parties can agree that the arbitrator in the award will not discuss detailed evidence or even the reasoning for the award, Under the "manifest disregard" standard and the deference given to an arbitrator's decision, an arbitrator should be able to write a confirmable award with only the vaguest reference to the underlying evidence. I have to admit to being stumped, though, on how to deal with the first hypothetical – a desire to completely shield the award. Maybe, even in arbitration, deciding to not settle your dispute has some downside – and gives your opponent some leverage.

Rob: As a practical matter, I agree. I suppose theoretically the parties could include a provision that neither of them would file with the court an application to confirm or vacate the award, with a hefty liquidated damages provision if the loser refused to pay the award. But except in the rarest of cases, no lawyer would risk his malpractice policy by permitting his client to agree to such a provision.

Dave: I'd like to end our discussion with a plug for an upcoming online seminar, hosted by the University of Maryland Law School's Center for Dispute Resolution, on February 4th. Mitchell Zamoff, of the University of Minnesota Law School, who has been doing work in this area, will be presenting on *"Stop the Unseal! The Importance of Safeguarding Confidential Commercial Arbitration Awards in Uncontested Confirmation Actions."* I'm looking forward to seeing what he has to say and reading his research.

ABOUT THE CONVERSATIONALISTS:



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After four decades of litigation and dispute resolution over the full range of disputes, Dave Reif retired from active trial practice to concentrate on providing individual, commercial, and business arbitration, mediation, and neutral services.

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