PROTECTING CONFIDENTIAL ARBITRATION MATERIALS BEFORE THE COURTS

by Alexander M. Gay and Alexandre Kaufman

The confidential nature of arbitration is one of the most attractive features of arbitration. However, the extent to which an arbitration can be kept confidential in subsequent court proceedings is an issue that the courts are struggling to resolve. On one hand, the courts have every interest in maintaining an open court and allowing legal issues to be vetted publicly and, on the other hand, the courts must be respectful of party autonomy and the decision made by parties to keep all of the information confidential. However, this is not a zero-sum game where one of the two competing interest succumbs to the other. There is a compromise solution that requires that the courts issue protective orders that limit public disclosure of confidential commercial information and yet provide sufficient information to the public to maintain the rule of law.

While there are no confidentiality provisions in any of the arbitration legislation that exists in Canada, there is an implied presumption under Canadian law that arbitration proceedings are private and confidential.

The presumption is, of course, rebuttable under certain circumstances, to the point where an arbitration may be ordered to be public. The parties to an arbitration can reduce the risk of public disclosure by including a confidentiality provision expressly calling for confidential proceedings. The parties to an arbitration can also elect to adopt the rules of certain Institutions, such as the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC), which contain some confidentiality provisions.

However, while the parties may agree to include a confidentiality provision or adopt certain institutional rules, they lose control of the process the moment that the court is seized with a dispute where the arbitration is part of that litigation. As such, even with the clearest of confidentiality clauses or institutional rules, the courts potentially become a back door to the public disclosure of confidential information that the parties, or one of the parties, believed was confidential in nature.

The English courts recently had occasion to assess the balancing of confidentiality against the public interest in the case of *Symbion Power LLC v. Venco Imitiaz Construction Co.* [2017] EWHC 348 (TCC). In this case, Symbion Power LLC challenged an award under the review provision of the *English Arbitration Act 1996*, alleging serious irregularity. Information in relation to the arbitration was filed in court. The court in this case refused to grant a confidentiality order. The court held that there was a strong public interest in the publication of judgments, including those concerned with arbitrations, because of the public interest in ensuring appropriate standards in the conduct of arbitrations. Of course, this has to be weighed against the parties' legitimate expectation that arbitral proceedings and awards are to be kept confidential. When weighing the factors, the court held that a judge must consider primarily the interest of the parties in the litigation before him/her or in other pending or imminent proceedings. The concerns or fears of other parties cannot be a dominant consideration. The court also held that there can be no question of withholding publication of reasoned judgments on a blanket basis of a generalized concern that their publication may upset the confidence of the business community in English arbitration. In conclusion, the court refused to anonymize the judgment and to grant a confidentiality order.

The *Symbion Power LLC v. Venco Imitiaz Construction Co.* case makes clear that the open court principle, which promotes the rules of law, remains an important driver for the courts when assessing the disclosure of confidential information from an arbitration. A generalized concern that the disclosure of information may have an adverse impact on arbitration as a whole does not weigh heavily in favour of protecting the confidential information. The private commercial interests of the parties are important as are their expectation of confidentiality, but this is secondary or subsidiary to the open court principle.

Courts can, however, take measures that satisfy the open court principle and the individual confidential needs of parties. A court can, for example, limit access to documents that form part of the record and require parties to file two sets of pleadings or documents, one in un-redacted form and one for public consumption. This is a regular occurrence in proceedings under the *Canada Evidence Act,* where the redaction process is taken very seriously by the federal court.

There are countless other measures that can be adopted. For example, the parties to an arbitration agreement can also protect themselves by including provisions in an arbitration agreement requiring the parties to provide advance notice of any court filing, prior to filing them in court. This will allow for proactive measures by any of the parties that are concerned with public disclosure. However, regardless of the measures that are adopted, the courts are masters of their domain and the parties to an arbitration always run the risk of public disclosure the moment the matter is put before the courts.

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Alexander Gay and Alexandre Kaufman are the authors of ***Annotated Ontario Arbitration Legislation - Arbitration Act, 1991 and International Commercial Arbitration Act, 2017***, an essential resource for any legal practitioner involved in arbitrations or advising in the area. This work provides a thorough annotation of both Acts, as well as comprehensive explanations of developments in the relevant case law to each section of these Acts. It includes, where appropriate, reference to Rules of Civil Procedure as they affect the challenges to arbitral awards before the Courts.

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