

Is Arbitration Confidentiality Lost When an Award is Filed?

Judge Abraham J. Gafni (Ret.)

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Arbitration is often preferred by contesting parties for many reasons. These may include speed, procedural or evidentiary requirements, decisions by arbitrators with special expertise, no public disclosure of the existence of a dispute or information relating to it, and avoidance of the appellate process. Indeed, careful counsel will assure that all of these issues are considered and incorporated into an arbitration agreement.

After the award is issued, however, the successful party will often petition to have it judicially confirmed by entering it in the court records, essentially as it would any other order of a court. When the award has been recorded on the court's docket, however, does the general public then have access to it as it would to any other court document; and will such access undermine the original desire of the parties to keep confidential, information relating to the arbitration including, in particular, the ultimate result?

This issue was considered recently by the U.S. Court of Appeals for the Third Circuit in a nonprecedential opinion in Pennsylvania, *National Mutual Casualty Company Insurance Group (Penn National) v. New England Reinsurance*, 20-1635 and, No. 20-1872 (3rd Cir. Dec. 24, 2020).

The original arbitration involved insurance claims made by Penn National against two of its reinsurance companies. After an award had been issued in favor of Penn National, it petitioned the district court to confirm the award so that it might reduce the award to judgment under the Federal Arbitration Act (FAA). As part of the confirmation process, it filed the award with the District Court, FAA 9 U.S.C., Section 13.

One day after filing the award, the court granted Penn National's request that the award be sealed. Before the reinsurance companies had responded to the petition to confirm, however, the parties settled the case. Consequently, Penn National sent a letter to the district court withdrawing its petition to confirm. Consequently, the court never acted on it.

Thereafter, Everest Reinsurance Co. (Everest) another of Penn National's reinsurers that had not been a party to the arbitration proceeding, moved to intervene and unseal the award under the common-law right of access. Penn National objected to the unsealing of the award.

Initially, the district court denied Everest's based upon so called "Pansy factors," as referenced in *Pansy v. Borough of Stroudsburg*, 23 F. 3rd 772 (3rd Cir. 1994). Ultimately, however, the district court's order was reversed, and it was instructed to apply the common law right-of-access to determine whether to unseal the award. The district court complied with this analysis, and unsealed the award, but stayed the order pending this appeal which required a de novo review by the Third Circuit.

The appellate court's opinion explained that a common law right of access attaches to judicial proceedings and records. This right allows members of the public to access documents in a judicial proceeding. Thus, a court must first determine if the document is a "judicial record." If the status of a document as a "judicial record" is established, "a court must presume that the common-law right to access attaches." And it is the "filing of a document that gives rise to a presumptive right of public access," and makes the document a judicial record.

A party may oppose such access to the judicial record and overcome the presumption. To accomplish this, however, it must demonstrate that the document is not a judicial record or articulate a "clearly defined and serious injury that would result from the disclosure of the document ". The court must then determine if the presumption of access was outweighed by the harm from the "articulated injury".

Penn National first contended that "the arbitration award is not a judicial record to which the common law right of access applies" even when, as here, the award had been filed.

Rather Penn National claimed that another Third Circuit case, *North Jersey Media v. United States (North Media)* 836 F. 3rd 421 (3rd Cir. 2016) had quoted language from *Pansy*, supra, 23 F. 3rd at 783, that, "The issue is whether a document is a judicial record should turn on the use of the court has made of it rather than whether it has found its way into the clerk's file"

The appellate court rejected Penn National's argument on various bases.

First, it noted that the language quoted above from *North Media* was dictum in that the disclosure being sought there related to "discovery documents, a category of judicial filings that 'are generally not 'judicial records' and do not fall within the common law right of access."

Second, the "use test" referenced in *Pansy*, was the standard adopted by the First Circuit. Under it, "the common-law right of access depended on the 'use' made of the document rather than whether the document found its way into the clerk's file." Here, however, the Third Circuit court made clear that this quoted language from *Pansy* "does not reference our test." "Thus, if the document does make its way into the clerk's file, then the common law right of access ordinarily attaches." Nothing more is required.

The court did recognize that the "use test" did have a function in this analysis as it may have related to discovery materials and settlement agreements. It clarified, however, that "Settlement agreements, like discovery materials, are a category of documents 'ordinarily inaccessible to the public,' and we do not read *Pansy's* recognition of a 'use 'test for anything else but settlement agreements."

In short, Penn National's filing of the arbitration award on the docket with the district court as the first step prior to the filing its motion to confirm the award, resulted in the award becoming a judicial record subject to the common-law right of access.

The court also considered Penn National's claim that it had demonstrated a clearly defined and serious injury sufficient to overcome the presumption of public access. Penn National contended, via affidavit, that if Everest or other reinsurers learned of the contents in the arbitration award, they might forego paying and contest their obligations. The appellate court found that the district court did not abuse its discretion in not finding that a "clearly defined" injury existed because "it could not determine how many possible relationships could be impacted, the amount of money that could be at stake, the types of actions other parties may pursue, or the likelihood that any such actions would be successful."

That the contents of an award are so readily accessible may, as earlier noted, be a matter of concern for one or both of the parties. Thus, careful attention should always be given to what act may undermine the intention to keep the results confidential and what may be done to avoid such a result.

For example, here Penn National filed its award and petition to confirm and then settled the matter with the reinsurers. Consequently, although the petition to confirm was later withdrawn, as the award had already been filed on the judicial docket, it remained subject to public access. Before filing the award, therefore, should Penn National have fully explored and satisfied itself that settlement was no longer possible? Such a settlement, of course, would have obviated this filing and the contents of the award would have remained confidential. In the alternative, did Penn National advise the reinsurers when it planned to file the award and petition to confirm so that they would understand how much time they had to resolve the matter through payment or otherwise?

Similarly, as proof of sufficient harm would be sufficient to overcome the presumption of public access, has preliminary consideration been given to how proof of such harm will be established?

In short, confidentiality is often a factor that will encourage parties to employ arbitration. Do not assume, however, that simply because the parties have agreed to maintain confidentiality between themselves, others may not ultimately have access to such information if the award is filed in court. •

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