PART VII:

ARBITRATION AND PROFESSIONAL RESPONSIBILITY

CHAPTER 26

CONFIDENTIALITY DURING AND AFTER ARBITRATION

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I. Introduction

In contrast to judicial proceedings, where there is a presumption of public access to records and proceedings, arbitration is presumptively confidential.[1] For many parties, this may be one of the most influential reasons for choosing arbitration. Yet there are no automatic guarantees that the arbitration proceeding will actually remain confidential and the degree of confidentiality the parties obtain in arbitration will, in large measure, be dependent upon their own advance planning and the procedural mechanisms they implement.

In addition, because arbitration awards frequently become the subject of litigation in a proceeding to confirm, vacate or modify the award, the parties may find that the confidentiality they secured in arbitration evaporates when the dispute reaches the public forum.

Surprisingly, there is no established mechanism for ensuring that the parties receive the benefit of any bargained-for confidentiality when litigating over an arbitration award, and little case law addressing this issue. Indeed, much of the case law that does exist suggests that the courts will not automatically respect a confidentiality agreement entered into in their arbitration. Nevertheless, there are compelling arguments to

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[1] The presumption generally is a practical one rather than a legal one. While most parties elect to conduct their arbitrations in confidence, in the absence of specific agreement, statute, or arbitral rule, the parties generally are free to divulge details of the proceedings. *See, e.g.*, *United States v. Panhandle Eastern Corp.*, 118 F.R.D. 346, 349-50 (D. Del. 1988).

be made for protecting the parties' confidentiality when an arbitrated matter ends up in court. This chapter briefly discusses general confidentiality principles in arbitration and related litigation, identifies some mechanisms that might help promote confidentiality in arbitration, and lays out an argument, in reliance on some of the precedents that do exist, for maintaining confidentiality when an arbitration award becomes the subject of litigation.

II. Confidentiality in Arbitration

Since arbitration is a creature of contract, the parties are free to provide for virtually any degree of confidentiality that they wish. Theoretically, confidentiality in arbitration should be easy to achieve; the parties and the arbitrator need only agree to keep the proceedings confidential. A leading arbitration treatise explains succinctly: "Privacy of arbitration is one of the essential factors carefully observed in institutional arbitration where no one other than the parties is allowed to gain any knowledge of the records and files."[2] Thus, the major administrative bodies explicitly recognize that confidentiality in arbitration is to be expected. The American Arbitration Association ("AAA"), for example, has instructed its arbitrators: "One of the reasons that parties resort to arbitration is their desire for privacy. You should therefore maintain the privacy of proceedings, unless both parties agree to open the hearings or unless a statute provides otherwise."[3] The practitioner should be careful not to assume, however, that this presumption of confidentiality is independently enforceable or that it binds the parties. Neither is the case. The AAA's instruction is illustrative in that it directs the arbitrator to maintain confidentiality, and to presumptively close the hearings to the public, but it does not require the parties themselves to maintain confidentiality.[4] The Federal Arbitration Act[5] does not require

[2] M. Domke, DOMKE ON COMMERCIAL ARBITRATION § 24.07 at 387 (3d ed. 1998).

[3] AMERICAN ARBITRATION ASSOCIATION, A GUIDE FOR COMMERCIAL ARBITRATORS 18 (1995). *See also* R-25 of the AAA Commercial Arbitration Rules and Mediation Procedures (Eff. Oct. 1, 2013) (the "AAA Commercial Rules").

[4] The October 1, 2013, amendments to the AAA Commercial Rules for the first time expressly provide that the arbitrator is empowered to "condition[] any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality." Rule R-23(a). That rule essentially authorizes the entry of protective orders of the type

confidentiality,[6] nor do the rules of many of the major domestic administrative bodies.[7] Thus, if the parties want to ensure that the

commonly entered in judicial proceedings, but not necessarily the type of blanket order that would render the entire proceeding confidential.

[5] 9 U.S.C. §§ 1-16 (2015).

[6] However, a few states do have statutes providing for some degree of confidentiality in arbitration. *See, e.g.*, Mo. Rev. Stat. § 435.014(2) (2015) ("Any communications relating to the subject matter of such disputes [in arbitration, conciliation or mediation] made during the resolution process by any participant, mediator, conciliator, arbitrator or any other persons present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery."); N.C. Gen. Stat. § 1-567.54(d) (2015) ("Unless otherwise agreed by the parties, or required by applicable law, the arbitral tribunal and the parties shall keep confidential all matters relating to the arbitration and the award"); *See also* Ark. Code Ann. 16-7-206(a); Tex. Civ. Prac. & Rem. Code Ann. § 154.073 (Vernon 2015); Va. Code Ann. § 8.01-576.10 (2015). Be careful, however: a statute that immunizes information from discovery, or prevents its admission in evidence, does not necessarily prevent a party from otherwise voluntarily disclosing the information. In addition, the state statutes may not be as protective as their language suggests. *See, e.g.*, *Knapp v. Wilson N. Jones Memorial*, 281 S.W.3d 163, 172-75 (Tex. App. 2009) (records from arbitration are subject to discovery, despite statute, when not sought for the purpose of changing the arbitration award or seeking additional damages against the losing party in the arbitration). While the Revised Uniform Arbitration Act (2000), does not expressly mandate confidentiality, Section 17(e) provides that the arbitrator may impose a protective order as to certain information (but does not clearly permit the entire arbitration to be designated as confidential): "An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State." (Nearly all states have adopted the Uniform Arbitration Act (2000) or its predecessor, the Uniform Arbitration Act (1956), but not all have adopted that particular language). Finally there are a number of federal and state statutes that may impose confidentiality in particular types of arbitrations, such as those involving consumers, health care and administrative and court-related arbitrations.

[7] The AAA Commercial Rules, for example, provide only that the "[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary" but, even then, that "[i]t shall be discretionary with the arbitrator to determine the propriety of the attendance of any person other than a party and its representatives." AAA Commercial Rules R-25. The rules do not, however, speak to whether the parties themselves must maintain confidentiality (except when subject to a specific order by the arbitrator, *see* note 4, *supra*, concerning protective orders under Rule R-23(a)). Rule 26 of JAMS Comprehensive Arbitration Rules & Procedures (Eff. July 1, 2014) is similar insofar as it imposes confidentiality obligations on JAMS and the arbitrators, but not on the parties, and it permits the issuance of orders "to protect the confidentiality of proprietary information, trade secrets or other sensitive information," but on its face does not authorize any degree of confidentiality that would go beyond what is available in a court. *But see*

proceedings remain confidential, it is incumbent upon them to take affirmative steps by entering into an appropriate confidentiality agreement that precludes disclosures by the parties themselves.

As a practical matter, designating the proceeding as confidential is only half the battle. The proceeding must actually be kept confidential and, in this regard, the degree of confidentiality the parties achieve is a direct function of their decision whether or not to employ arbitration, and if so, the procedures they implement.[8]

Generally, any procedure the parties adopt to increase the confidentiality of their dispute will carry with it increased burdens. For example, the surest way to maximize confidentiality is to disclose the information to the fewest people. Thus, at one extreme, the parties might provide for an *ad hoc* arbitration, and they could not only dispense with an administrative body but could eliminate court reporters and third-party witnesses who could otherwise be the source of "leaks." While such procedures would minimize the number of people aware of the dispute, it would impose obvious additional burdens on the parties and the arbitrator. At the same time, it is important to keep in mind the limits of what the parties can control: even if the parties agree between themselves to not disclose information concerning the proceedings, that does not necessarily bind other participants, such as witnesses; and even if everyone who participates in the arbitration process assumes an obligation to maintain confidentiality, and vigorously abides by that obligation, third parties may nevertheless subpoena information from the parties, witnesses, or even from the arbitrators.[9]

Rule 18 of the International Institute for Conflict Prevention & Resolution Non-Administered Arbitration Rules (Eff. Nov. 1, 2007), and its Rule 20 for Administered Arbitrations (Eff. July 1, 2013), which do impose a confidentiality obligation on the parties, except in connection with judicial proceedings ancillary to the arbitration. Confidentiality is generally more expected (and often more protected by the rules of administrative bodies) in international arbitration.

[8] As discussed below, the decision to arbitrate provides the parties with the ability to protect the confidentiality of matters that might not be protected in the courts. Conversely, in certain situations, arbitration may provide weaker mechanisms for insuring confidentiality than does the judicial system because courts have the power to punish violations of their orders as contempt.

[9] *See, e.g.*, *Niester v. Moore*, No. 08-5160, 2009 WL 2179356, at *3 (E.D. Pa. July 22, 2009) ("Even a formalized private agreement to keep materials confidential does not prevent discovery of those materials"); *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87-88 (E.D.N.Y. 1981) ("parties [may not] contract privately for the confidentiality of documents, and foreclose others from obtaining, in the course of

III. Mechanisms for Increasing Confidentiality

The parties' objectives in seeking confidentiality will differ from case to case and will determine the appropriateness of procedural mechanisms to ensure that confidentiality is maintained. For example, the parties may wish to protect only one piece of evidence (perhaps a single confidential document) or multiple documents on a single subject (*e.g.*, testimony and documents relating to a technology claimed to be a trade secret). In other cases, they may wish to avoid disclosing even the fact that a dispute has arisen between them.

A. Confidentiality Agreement in Arbitration Agreement

To the extent possible, the objectives should be identified in advance of drafting the arbitration agreement so that necessary safeguards can be

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litigation, materials that are relevant to their efforts to vindicate a legal position"); *Universal City Studios, Inc. v. Superior Court*, 110 Cal. App. 4th 1273, 1282 (Ct. App. 2d Dist. 2003) (existence of a confidentiality agreement is not enough; a showing of injury from the disclosure is also required); *Kamyr v. Combustion Eng'g*, 161 A.D.2d 233, 233, 554 N.Y.S.2d 619, 620 (App. Div. 1st Dep't 1990) ("Evidentiary material at an arbitration proceeding is not immune from disclosure"). *Cf. Galleon Syndicate Corp. v. Pan Atlantic Group*, 223 A.D.2d 510, 511, 637 N.Y.S.2d 104, 105 (App. Div. 1st Dep't 1996) (requiring production of documents but implying in *dictum* that the analysis might be different if there had been a confidentiality agreement); *Pasternak v. Dow Kim*, No. 10-5045, 2013 WL 1729564, at *3 (S.D.N.Y. April 22, 2013) (stating, in *dicta*, that the "fact that [a subpoena] seeks testimony and other materials from a confidential arbitration is a barrier that cannot be overcome"). *See also* Matthew Gierse, *You Promised You Wouldn't Tell: Modifying Arbitration Confidentiality Agreements to Allow Third-Party Access to Prior Arbitration Documents*, 2010 J. DISP. RESOL. 463 (2010). Third-party participants (*e.g.*, witnesses and arbitrators) in the arbitration present additional issues because, if the parties do not receive notice that a third-party subpoena has been served, the witness or the arbitrator might quietly comply even if the subpoena otherwise might have been successfully resisted. *See, e.g., Scott v. Metro. Trans. Auth.*, 10 Misc. 3d 1058, 809 N.Y.S.2d 484 (Sup. Ct. Nassau Co. 2005) (upholding subpoena for arbitrator's notes). A few states, however, have adopted statutes that protect an arbitrator from subpoenas. *See, e.g.*, Mo. Rev. Stat. § 435.014(1) (2015) ("no person who serves as arbitrator … shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the arbitration"); Ark. Code Ann. § 16-7-206(b) (2015); Cal. Evid. Code § 703.5 (Deering 2015); Tex. Civ. Prac. & Rem. Code Ann. § 154.073 (Vernon 2015). *See generally* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 Kan. L. Rev. 1255, 1263 (2006) (noting that these are the only four states that have statutes that provide any protection for arbitration confidentiality with respect to discovery and admissibility in connection with arbitrations generally).

built into the agreement itself.[10] Once a dispute arises, the benefits of confidentiality often favor one party more than the other. Thus, it can be expected that the party who benefits less may resist steps to impose confidentiality, either because those steps can be onerous, or simply in deference to the time-honored litigation principle that one should refuse to agree to anything that benefits an adversary.

B. Location of the Arbitration

In international arbitrations, the location (or the "seat") of the arbitration typically is given careful consideration because the law of the seat will govern certain procedural aspects of the arbitration. In domestic arbitrations, consideration of location seldom goes deeper than thoughts of convenience because the parties generally assume that the location does not substantially matter. However, as some states have adopted statutes impacting confidentiality,[11] it may be possible to enhance the confidentiality of the arbitration by locating the hearings in such state or by employing a choice of law provision.

C. Tailoring the Confidentiality Obligation

When deciding whether to seal or unseal judicial records, courts do consider the reasonable expectations of the parties and have been quick to latch onto language in the protective order or confidentiality agreement that suggests that the confidentiality obligation is not absolute (such that one party would have the right to challenge the other's confidentiality designation) or which acknowledges that the court is the final arbiter of what remains confidential. Such language has been held to undermine the parties' "reasonable reliance" upon the existence of the confidentiality order or agreement and to justify a lower threshold for unsealing or

[10] Even with the parties' agreement, there is no guaranty that a court will respect their wishes. *See, e.g.*, *Baxter Int'l Inc. v. Abbott Labs.*, 297 F.3d 544, 548 (7th Cir. 2002) (refusing to seal the judicial record concerning an arbitration despite the parties' agreement and joint motion for such relief, and noting that "the right judicial response to the initiation of litigation that reveals information subject to contractual confidentiality is not specific performance of the confidentiality agreement but damages for breach of contract.") Because of the likelihood that the parties' confidentiality agreement will not be fully accepted by a court, and given the typical difficulty in proving damages for breach of such agreement, parties might consider a liquidated damages clause to provide not only a remedy for breach of confidentiality, but also an incentive to honor their agreement.

[11] *See, e.g.*, notes 6 and 9 *supra*.

refusing to seal records.[12] Thus, it might be advisable to make it clear in the confidentiality agreement or order that the expectation of confidentiality is absolute and that the parties are agreeing to produce documents and witnesses in the arbitration in reliance upon the promise of confidentiality. At the same time, a confidentiality agreement that is too broad—one that imposes an obligation to keep confidential, even the most mundane and harmless facts—will undermine the argument that the parties would not have produced any of the information but for their reliance upon the agreement. Accordingly, a narrow agreement might be better than a broad one; alternatively, a multi-tier confidentiality agreement that identifies, in one tier, specific information which all parties unqualifiedly commit to keeping confidential, may enhance the protection for the most important information.

D. Dealing with Third Parties

Suppose the parties have agreed to keep not only the entire arbitration proceeding confidential, but also the fact and nature of the dispute. That principle is neutral as between the parties so they might easily agree to incorporate that principle in their arbitration agreement. However, what happens when the arbitration is commenced and one party wishes to interview or call as witnesses third parties who might have knowledge relevant to the dispute? Such questioning will explicitly or implicitly reveal to the third parties the existence of the dispute, if not its nature.

An arbitrator is unlikely to preclude a party from interviewing or calling third-party witnesses because the natural inclination is to refuse to suppress evidence and to permit the parties to present whatever evidence they wish.[13] Therefore, unless the arbitration agreement specifically

[12] *See, e.g., Caxton Int'l Ltd. v. Reserve Int'l Liquidity Fund, Ltd.*, No. 09-cv-782, 2009 WL 2365246, at *2-3 (S.D.N.Y. July 30, 2009) (discussing Second Circuit authorities). As noted above (at note 9) and below (at notes 33 and 56), that sort of rationalization may be viewed as disingenuous insofar as a private agreement between litigants should not cut-off third party rights, or divest the court of its ability to control its own records, regardless of what the parties themselves might expect.

[13] That inclination is understandable given that one ground for vacating an award is the arbitrator's refusal to hear relevant evidence. *See* 9 U.S.C. § 10(a)(3) (2015) (district court may vacate arbitration "where the arbitrators were guilty of misconduct … in refusing to hear evidence pertinent and material to the controversy"); *Cent. Indemn. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 557 (3d Cir. 2009) ("vacatur pursuant to section 10(a)(3) is warranted … where the arbitrator's refusal to hear proffered testimony so

addresses the issue of whether or not there may be third-party witnesses and, if so, what safeguards will be in place, the agreement to not disclose the existence of the dispute may be wholly vitiated once the arbitration proceeds.

If third-parties are to testify, there is little that can be done in arbitration to prevent them from disclosing what they learn. Expert witnesses can be required to sign confidentiality agreements before they are retained, and third-party fact witnesses also could be asked to sign such agreements. But if a third-party fact witness refuses to sign a confidentiality agreement, the parties have no recourse.[14] The witness can be compelled by subpoena to testify, but cannot be compelled to remain silent about the proceeding.

Of course, the arbitrators could refuse to hear testimony from third-parties who refuse to agree to maintain confidentiality. But they might well refuse to take this step on the ground that it is inherently unfair to deprive a party of relevant evidence as a result of the unilateral actions of a third party over whom it has no control.[15] If, however, the arbitration agreement specifically states that no witnesses will be permitted to testify absent a signed confidentiality agreement, the arbitrators might be more inclined to preclude such testimony.[16]

E. Arbitration Clause in Confidentiality Agreement

One detail that is often overlooked is the inclusion of an arbitration clause in the confidentiality agreement that the parties enter in connection

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affects the rights of a party that it may be said he was deprived of a fair hearing"); *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (vacating confirmation of the award because the arbitrators had wrongly refused to permit a witness to testify on the ground that such testimony would be merely cumulative).

[14] Even if third-party witnesses sign confidentiality agreements, the enforceability of these agreements is questionable insofar as there would be no consideration. Nevertheless, such undertakings are likely to have at least some deterrent effect.

[15] In all likelihood, it would also be reversible error to preclude such testimony. *See supra*, note 13.

[16] It likely would not be misconduct for the arbitrator to refuse to hear evidence that the parties precluded by agreement. *In re Civil Service Employees Ass'n v. Soper*, 84 A.D.2d 927, 928, 447 N.Y.S.2d 62, 64 (App. Div. 4th Dep't 1981), *aff'd*, 56 N.Y.2d 639, 450 N.Y.S.2d 786, 436 N.E.2d 192 (1982). Such a condition, however, may invite shenanigans by the parties who could "suggest" to witnesses with adverse testimony that they will be spared the time and inconvenience of having to testify by simply declining to agree to confidentiality.

with the arbitration.[17] The typical confidentiality agreement does not usually contain an arbitration clause. If a party decides to litigate a breach of the confidentiality agreement, the court is unlikely automatically to accept the parties' view of the necessity for confidentiality, as discussed below. Thus, absent an arbitration clause, this could result in the incongruous situation where a breach of the confidentiality obligation relating to an arbitration is litigated in an open public proceeding.[18]

F. Bare Award

Finally, because the arbitration award probably will be confirmed in court so that a judgment can be entered thereon, any findings of fact, conclusions of law, or detailed discussion of the dispute contained in the award may find its way into the public record. To avoid such disclosure, the parties might specify in their arbitration agreement that the award be limited to a monetary award in favor of the prevailing party. Such a bare award will not disclose confidential information (other than who won the dispute) and has the added benefit (or disadvantage, depending on your point of view) of being more difficult to challenge in court because it does not expose the arbitrators' reasoning to attack.

IV. Judicial Proceedings

Judicial proceedings present a problem for confidentiality in two respects. First, because non-parties to the arbitration may seek to discover information about the arbitration through judicial proceedings of their own. Second, because the parties to the arbitration may be forced to go to court to seek to confirm or vacate the arbitration award and, in that context, the court may require public disclosure of information that the parties had kept confidential during their arbitration.

[17] The parties might encounter some resistance in attempting to incorporate an arbitration clause into a confidentiality agreement with an ADR provider because that organization could not ethically administer an arbitration to which it is a party and would find it distasteful to have its arbitration administered by a competitor.

[18] If the breach of a confidentiality agreement is to be arbitrated, a court should still be available to grant a preliminary injunction or other interlocutory relief. The court is less likely to address the broader issue of confidentiality of the arbitration proceedings in this context because it will not reach the merits of the dispute.

Over the past few years, the federal courts have shifted their position with respect to the granting of confidentiality orders and sealing the record in civil commercial cases. At one point, such orders were granted routinely by federal courts at the request of the parties. Then the circuit courts admonished that a record should be sealed only in exceptional cases. This position may be softening, but it remains true that federal courts generally will not seal the record simply because the parties might agree that they desire the proceeding to be kept confidential.[19]

The Supreme Court has recognized the existence of a general, common-law right of public access to judicial records.[20] "Thus, while public access to court records and proceedings is not absolute, there has been a long-standing presumption in its favor and against sealing."[21] A similar presumption of openness is embodied in the New York Uniform Rules for Trial Courts which provides, in part: "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof."[22] Thus, courts have been instructed that they "must

[19] A comprehensive discussion of judicial attitudes toward sealing orders, protective orders and secrecy orders is found in Laurie Kratky Dore, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

[20] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

[21] *Encyclopedia Brown Prod. v. Home Box Office*, 26 F. Supp. 2d 606, 610 (S.D.N.Y. 1998).

[22] 22 N.Y.C.R.R. § 216.1(a) (McKinney 2015). In determining whether good cause exists, courts must weigh the interests of the public against the interests of the parties. *Id.*; *Danco Laboratories, Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 5, 711 N.Y.S.2d 419, 423 (App. Div. 1st Dep't 2000) (holding that, even upon a showing of good cause, only limited portions of the record could be sealed). However, certain New York State Judges have "authorized sealing the records of [New York Civil Practice Law and Rules] Article 75 proceedings [relating to arbitrations] since the matter properly belongs in arbitration . . . [and] the material filed with the court belongs not in the court, but in the files of the arbitrating body." *Cohen v. S.A.C. Capital Advisors, LLC*, No. 112479/05, 11 Misc. 3d 1054(A), 2006 WL 399766, at *8 (Sup. Ct. NY Co., Jan. 3, 2006), quoting *Feffer v. Goodkind, Wechsler, Labaton & Rudoff*, 152 Misc.2d 812, 815–816 (Sup.Ct. N.Y. Co. 1991), *aff'd*, 183 A.D.2d 678, 584 N.Y.S.2d 56 (1st Dept.1992). Despite such sweeping language, however, it is unlikely that records relating to an arbitration will be sealed without a simultaneous showing that proprietary or confidential information is at issue and without considering the public interest. *E.g.*, *Jetblue Airways Corp. v. Stephenson*, No. 650691/2010, 31 Misc. 3d 1241(A), 2010 WL 6781684, at *5-6 (Sup. Ct. NY Co., Nov. 22, 2010), *aff'd*, 88 A.D.3d 567, 931 N.Y.S.2d 284 (1st Dep't 2011).

carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need."[23]

V. Protecting Information from Strangers to the Arbitration

The fact that all participants in the arbitration agreed to maintain confidentiality does not necessarily address what happens when third parties serve subpoenas (or other discovery) upon the participants. "No one can 'agree' with someone else that strangers' resort to discovery under the Federal Rules of Civil Procedure will be cut off."[24] A private agreement to maintain confidentiality is not going to be binding on non-parties who have a legitimate need for the information.[25]

On one hand, this situation presents the same issue that occurs when a confidentiality agreement is executed outside the arbitration context. The courts will not allow a private agreement to preclude a non-party to that agreement from discovering information under appropriate circumstances. On the other hand, courts seem to be reluctant to disregard such agreement entirely when entered in connection with an arbitration, perhaps because it then resembles a protective order in a litigation which enjoys at least a presumption of legitimacy and a higher burden of proof to overcome.

The analogy to a protective order is not perfect, however, because unlike a court, which "must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need,"[26] an arbitrator typically does not make any findings as

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[23] *In re Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994). *See also Baxter Int'l*, 297 F.3d at 546-47 (rejecting joint motion of the parties to the arbitration seeking to seal the judicial record without a showing that trade secrets or other legitimately confidential information was at stake).

[24] *Gotham Holdings v. Health Grades*, 580 F.3d 664, 665 (7th Cir. 2009) (enforcing subpoena for nonprivileged materials parties to arbitration pledged to keep confidential).

[25] *See supra* note 9. *See also Contship Containerlines, Ltd. v. PPG Industries, Inc.*, No. 00-cv-0194, 2003 WL 1948807, at *2 (S.D.N.Y. April 17, 2003) (fact that international arbitration held in London was confidential under English law was insufficient to protect submission to the arbitral panel and hearing transcripts from discovery in United States litigation, and noting that disclosure could prevent the plaintiff from taking inconsistent positions in the subsequent litigation); *Lawrence E. Jaffe Pension Plan v. Household Int'l*, No. 04-N-1228, 2004 WL 1821968, at *2 (D. Colo. Aug. 13, 2004) (finding, on the facts presented, "no compelling reason to resolve the novel question of whether a district court can supersede a confidentiality order in a collateral proceeding").

[26] *Orion Pictures Corp.*, 21 F.3d at 27.

to the necessity for maintaining confidentiality and the confidentiality agreement is rarely tailored to protect only legitimate trade secrets or otherwise demonstrably sensitive information. To the contrary, in an arbitration context, the typical confidentiality agreement is entered merely upon the parties' request and blankets everything, often including the mere fact that a dispute exists.[27]

Thus, while certain courts have at least implied that a confidentiality agreement in an arbitration is entitled to some weight,[28] it is probably a mistake to attach too much significance to those statements and to rely

[27] The other problem with the analogy is that, when a court's protective order is challenged; the court that entered the order is available to revisit its findings and make a determination as to whether the order should be lifted. An arbitrator, in contrast, becomes *functus officio* upon issuance of the award and has no power to revisit any prior determination. *See Bayne v. Morris*, 68 U.S. (1 Wall.) 97, 99 (1863) ("Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end").

[28] *See, e.g., Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, No. 04-C-2649, 2004 WL 1376409, at *2 (N.D. Ill. June 18, 2004) (citing the parties' confidentiality agreement, which provided that the arbitral award would be filed under seal, as one reason for rejecting a proposed judgment that would have disclosed some contents of the award); *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 41 A.D.3d 362, 365, 841 N.Y.S.2d 225, 227 (App. Div. 1st Dep't 2007) ("Given the important public interest in protecting the rights of parties who submit to confidential arbitration, the court correctly concluded that no aspect of the Belgian arbitration, to which [defendant seeking discovery] is not a party, may be subject to compulsory disclosure in this litigation"), *aff'd*, 11 N.Y.3d 843, 873 N.Y.S.2d 239, 901 N.E.2d 732 (2008); *Group Health Plan, Inc. v. BJC Health Systems, Inc.*, 30 S.W.3d 198, 205 (Mo. Ct. App. 2000) (holding that one arbitrator could not abrogate a protective order entered by another arbitrator in an unrelated dispute and entering a permanent injunction preventing the discovery of information in violation of that protective order); *A.T. v. State Farm Mut. Auto Ins. Co.*, 989 P.2d 219, 220 (Colo. Ct. App. 1999) (implicitly suggesting that a confidentiality agreement or arbitral rules imposing confidentiality would be given significant weight). *But see City of Newark v. Law Dep't of the City of New York*, 305 A.D.2d 28, 32-33, 760 N.Y.S.2d 431, 434 (App. Div. 1st Dep't 2003) (reversing the trial court's determination that arbitrators have the same power as courts to impose a confidentiality order that would override the Freedom of Information Act); *Century Indemn. Co. v. AXA Belgium*, No. 11-cv-7263, 2012 WL 4354816, at *14 (S.D.N.Y. Sept. 24, 2012) (quoting cases standing for proposition the "mere existence of a confidentiality agreement … does not demonstrate that sealing is necessary"); *Eagle Star Ins. Co. Ltd. v. Arrowood Indem. Co.*, No. 13-cv-3410, 2013 WL 5322573, at *3 (S.D.N.Y. Sept. 23, 2013) (following entry of order allowing parties to file arbitration information under seal because of the parties' prior confidentiality agreement, court granted motion to unseal on the grounds that considerations favoring prior order did not outweigh presumption of public access).

upon the existence of the confidentiality agreement as protecting against discovery by third parties. Unfortunately, that also means that there is no way to ensure that events concerning the arbitration will be protected from third-party discovery.

The best measures are, therefore, proactive ones. First, by entering into an agreement that precludes the parties from disclosing even the existence of the arbitration,[29] the parties may minimize the potential for third parties to even know that discoverable information might exist. Second, it is important to follow through and enforce the typical confidentiality agreement's requirement that parties (and their counsel) return or destroy the other party's documents and not retain transcripts and notes. That way, at least you ensure that your information cannot be obtained from your former adversary after the conclusion of the arbitration.[30]

VI. Judicial Proceedings Related to Arbitration

When an arbitration award is brought to court to be confirmed or challenged, the presumption of confidentiality that exists in arbitration collides with the presumption of public access that exists in a judicial proceeding. If the parties had agreed to maintain the arbitration in confidence for reasons that do not satisfy a court's view of "extraordinary circumstances," "compelling need," or "good cause," then the possibility exists that the confirmation or vacatur proceedings will be made public. This could lead to the disclosure of hearing transcripts or evidence admitted in the confidential arbitration hearing.[31]

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[29] This assumes that such agreement would not be inconsistent with, for example, disclosures mandated by the securities laws. However, the breadth of such agreement might lead a court to give it less weight than a more narrow agreement carefully tailored to protect only truly sensitive information. As noted in the text accompanying note 12 above, a two-tier order might be one way to address that weakness.

[30] Your adversary can still be required to give oral testimony, but that is going to result in disclosure that is far less concrete than documents and transcripts would be. In addition, a confidentiality agreement that requires notice to the parties if a participant is subpoenaed will at least give you an opportunity to try to stop such testimony.

[31] It is not inconceivable that one party, in moving to confirm or vacate a confidential arbitration award, could file the entire record of the arbitration in the district court to show that the award was or was not the end product of a full and fair hearing. *See* 9 U.S.C. § 10(a) (2015) (grounds for vacation of arbitration award). Such filing, if public, would wholly vitiate the value of maintaining confidentiality during the arbitration.

Until recently, there were surprisingly few reported decisions dealing with this precise issue, perhaps because the orders sealing records are themselves sealed. On the other hand, there are a plethora of cases discussing the general rule (outside the arbitration context) that orders to seal the record can be granted only when certain recognized categories of information (*e.g.*, trade secrets or competitive information) are involved or the potential injury is clearly defined and very serious.[32] Under this rule neither the existence of a confidentiality agreement nor the consent of all parties to the sealing of the record guarantees that a court will permit documents to be filed under seal.[33]

Worse, the public policy rationale for requiring public access to judicial proceedings is no less compelling when the proceedings involve a confidential arbitration award. That policy emphasizes that public scrutiny is necessary to maintain the accountability and, therefore, the integrity of the judicial system.[34] As one court put it: "In circumstances where an arbitration award is confirmed [by a court], the public in the usual case has a right to know what the Court has done."[35] If courts

[32] *See, e.g., Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982), *cert. den.*, 460 U.S. 1051 (1998) ("only the most compelling reasons"); *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 487 (S.D.N.Y. 1996) ("'Good cause' is not established merely by the prospect of negative publicity"). The precise formulation of the standard varies. *See, e.g., EEOC v. Nat'l Children's Ctr.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) ("strength of any property and privacy interests asserted" must be weighed); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) ("compelling reason"); *Leucadia Inc. v. Applied Extrusion Tech.*, 998 F.2d 157, 166 (3d Cir. 1993) ("good cause"); *Secs. Exch. Comm'n v. Van Waeyenberghe*, 990 F.2d 845 (5th Cir. 1993) (declining to hold the presumption of public access to be "strong" and requiring a weighing of the respective interests); *Brown v. Advantage Eng'g*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("extraordinary circumstances").

[33] *See, e.g., Vassiliades v. Israely*, 714 F. Supp. 604, 606 (D. Conn. 1989). The presumption of public access applies most strongly to "judicial documents" which are the foundation for a court's actions. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 122 (2d Cir. 2006) (surveying the circuits). *See also Mercury Interactive Corp. v. Klein*, 158 Cal. App. 4th 60, 67 (Ct. App. 6th Dist. 2007) (documents "filed in court as a basis for adjudication"). Thus, "the mere filing of a paper or document with the court is insufficient to render that page a judicial document subject to the right of public access." *Lugosch*, 435 F.3d at 119, quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). *See also Pintos v. Pacific Creditors Ass'n*, 565 F.3d 1106, 1115-16 (9th Cir. 2009) (noting that "good cause" is sufficient to justify sealing papers associated with a non-dispositive motion, while a "compelling interest" is necessary to justify sealing papers upon which a dispositive motion is based).

[34] *Amodeo*, 71 F.3d at 1048.

[35] *Global Reinsurance Corp. U.S. Branch v. Argonaut Ins. Co.*, No. 07-cv-8196, 2008 WL 1805459, at *2 (S.D.N.Y. April 24, 2008).

consistently were to respect the parties' desire to maintain the confidentiality of their arbitration proceedings, then the vast majority of judicial decisions involving arbitral awards effectively would be beyond public scrutiny. For that reason, courts sometimes assume that, at a minimum, the award itself, and any court orders entered in connection therewith, should be publicly accessible.[36]

Application of these principles often results in frustration of the parties' expectations of confidentiality once the arbitration award reaches the courts. For example, in *Nationwide Mutual Ins. v. Randall & Quilter Reinsurance Co.*,[37] the court initially sealed the record at the request of one of the parties based upon the confidentiality order entered in the arbitration. The other party, which had opposed confidentiality in the arbitration, sought reconsideration of the sealing order on the ground that, among other things, the failure to demonstrate "good cause for filing documents in this court under seal given the presumption which attaches to court proceedings (but not arbitration proceedings) that all documents filed in court will be open to the public."[38] The court agreed, noting that the confidentiality order entered in the arbitration "is simply one factor in the court's calculus and not outcome-determinative."[39] Because it held that insufficient prejudice from unsealing had been demonstrated, and "the public interest in access to court records outweighs any prejudice," the court unsealed a motion for summary judgment (which presumably sought to vacate or modify the arbitration award, although the court's opinion did not specify), and provided that before any other documents are filed under seal, the party seeking to seal

[36] *E.g., Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("once a party seeks judicial review of an arbitration award" the confidentiality of that award is "lost absent compelling justification"); *Istithmar World PJSC v. Amato*, No. 12-cv-7472, 2013 WL 66478, at *3 (S.D.N.Y. Jan. 7, 2013) ("Courts in this district have generally been loath to seal arbitration awards"); *Nationwide Mut. Ins. Co. v. Randall & Quilter Reinsurance Co.*, No. 07-cv-0120, 2007 WL 2326878, at *2 (S.D. Ohio, Aug. 10, 2007) ("a sealing order should not apply to the arbitration award itself or any court orders entered"); *Commercial Union Ins. Co. v. Lines*, 239 F. Supp.2d 351, 358 (S.D.N.Y. 2002) ("at a minimum, the Court's orders and decisions should be available for public review"), *vacated on other grounds*, 378 F.3d 204 (2d Cir. 2004). *But see Century Indemnity v. Certain Underwriters at Lloyd's, London*, 592 F. Supp. 2d 825, 827-28 (E.D. Pa. 2009) (sealing arbitral award in proceeding to confirm based on an analysis that would justify sealing most arbitral awards).

[37] 2007 WL 2326878, at *1.

[38] *Id.*

[39] *Id.* at *2.

them would have to satisfy the test adopted by the Eastern District of Pennsylvania in *Zurich American Ins. Co. v. Rite Aid Corp.*[40]

Rite Aid was a decision in which the court *sua sponte* questioned whether filed documents should be maintained under seal merely because the parties had agreed, in connection with two prior arbitrations, to require such sealing. The two parties in court did not oppose such unsealing, but a non-party, who had been a party to the arbitration, did oppose, arguing that sealing was necessary "to protect her reputation and integrity."[41] The court nevertheless unsealed everything but her tax returns, holding that "[t]he burden of rationalizing the confidentiality of each document sought to be sealed remained with [the advocate for sealing]"[42] and, because much of the information she sought to protect was already public and because the court "had not been presented with persuasive, current evidence to show how public dissemination of the pertinent materials would cause the potentially serious embarrassment intimated."[43]

In so holding, the *Rite Aid* court did not pause long over arguments that such unsealing would conflict with the confidentiality procedures of the American Arbitration Association,[44] or undermine the federal policy of encouraging arbitration with its presumption of confidentiality, because neither can "trump the clear law and policy standards…for maintaining open and accessible records of legal matters for public scrutiny."[45] Subsequent decisions have likewise weighed parties' interest in preserving confidentiality against the presumption of public access to court filings.[46]

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[40] *Id*. (citing *Zurich Am. Ins. Co. v. Rite Aid Corp.*, 345 F. Supp. 2d 497, 507 (E.D. Pa. 2004)).

[41] 345 F. Supp. 2d at 502.

[42] *Id*. at 507.

[43] *Id*. at 506 (internal quotation omitted).

[44] Unlike the AAA's Commercial Arbitration Rules which only recently expressly empowered the arbitrators to make confidentiality rulings (*see* note 4, *supra*), its Employment Arbitration Rules have long provided that "[t]he arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality." AAA Employment Arbitration Rules and Mediation Procedures R-23 (Eff. July 1, 2006 to Jan. 1, 2010).

[45] 345 F. Supp. 2d at 507 n.3.

[46] *See, e.g., Fed. Nat'l Mortg. Ass'n v. Prowant*, No. 14-cv-3799, 2015 WL 570539, at *2 (N.D. Ga. Feb. 11, 2015) (citations omitted) ("Party agreement [to preserve confidentiality of record of arbitration proceeding] alone does not supply an interest in confidentiality sufficient to outweigh the public's right to access to the material upon which a public decision on the merits is founded"); *Scott D. Boras Inc. v. Sheffield*, No. 09-cv-8369, 2009

Nevertheless, when applied to judicial proceedings relating to confidential arbitration awards, this principle of public access wholly undermines the parties' reasonable expectation that arbitration will provide a confidential method of resolving their disputes, and defeats one of the primary advantages of arbitration. The Second Circuit appears to have implicitly endorsed that expectation in *DiRussa v. Dean Witter Reynolds, Inc*.[47] There, it affirmed a district court order sealing the entire record in a proceeding to confirm, modify or vacate an arbitration award (publishing only the court's opinions on procedural matters and attorneys' fees), without pausing to analyze whether the subject matter was sufficiently "exceptional" to justify such order.

In *DiRussa*, the parties had entered into a confidentiality agreement providing that the documents and information disclosed during the arbitration could be used only for purposes of the arbitration and, if filed in court in connection with the arbitration, would have to be filed under seal. While this agreement was "'narrowly drawn' to protect only information produced by the parties and obtained solely by virtue of their production by an opposing party in the course of the NASD arbitration," it nevertheless appears to have encompassed all information produced during the arbitration, without regard to whether or not the information contained trade secrets or implicated privacy concerns.[48] In other words, under the parties' confidentiality agreement, the criterion for confidential treatment was simple: If the information was obtained during the course of the arbitration, then it would have to be filed under seal in any subsequent court proceeding.

The district court in *DiRussa* sealed the entire record. After the plaintiff objected that the order went beyond the scope of the parties' confidentiality agreement, the court acknowledged that only those portions of the record encompassed by the confidentiality agreement, *i.e.*, only the information obtained during the course of the arbitration, was required to be sealed. Nevertheless, it did not alter the order sealing the

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WL 3444937, at *1 n.7 (S.D.N.Y. Oct. 23, 2009) (denying request to seal certain documents because "the presumption in favor of public access outweighs concern for the parties' confidentiality of the general matters discussed in the Petition and arbitration proceeding," subject to the limitation "proprietary business matters discussed in the … arbitration proceedings do justify confidentiality" and authorizing filing of redacted copies of the same).

[47] 936 F. Supp. 104 (S.D.N.Y. 1996), *aff'd*, 121 F.3d 818 (2d Cir. 1997), an age discrimination case in which the former employee arbitrated his claims against his former employer.

[48] 121 F.3d at 826.

entire record because "it [was] not feasible to attempt a partial unsealing within the context of the parties' confidentiality agreement."[49]

The Second Circuit affirmed, holding that "the district court did not abuse its discretion in sealing the file pursuant to the confidentiality agreement."[50] Thus, while the Second Circuit never explained how that ruling is reconciled with the cases holding that a sealing order must be narrowly tailored to protect compelling interests,[51] *DiRussa* nevertheless stands for the proposition that the parties' agreement to maintain confidentiality in an arbitration proceeding can be respected by the courts through an order sealing the record in a proceeding to confirm or vacate the arbitration award, without regard to the merits of the confidentiality agreement itself. *DiRussa*, therefore, is valuable authority for parties seeking to seal post-arbitration judicial proceedings that do not involve subject matter that courts are more commonly willing to protect.[52]

Nevertheless, the sealing of the record when judicial proceedings involve confidential arbitration proceedings may not be irreconcilable with the policy of promoting judicial accountability. An arbitral record that comes before the court in a proceeding to confirm, modify or vacate,

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[49] 936 F. Supp. at 108.

[50] 121 F.3d at 826.

[51] *DiRussa* remains difficult to reconcile with the presumption of public access to judicial records. *See, e.g., Ins. Co. of N.A. v. Pub. Svc. Mutual Ins.*, No. 08-cv-7003, 2008 WL 5205970, at *2 n.2 (S.D.N.Y. Dec. 10, 2008), *vacated on other grounds*, 2009 WL 2381854 (S.D.N.Y. July 29, 2009) (decision on a petition relating to an arbitration is sufficiently similar to a motion for summary judgment that it comes within the Second Circuit's admonition that only "the most compelling reasons" can justify sealing the papers on which the court based its decision). One court tried to explain *DiRussa* this way: "Such an exercise in discretion [to seal the entire record other than the arbitration award or court orders] may be limited to cases where the documents are voluminous and the parties have not assisted the court in determining what portions of the documents are entitled to confidential treatment." *Nationwide Mut. Ins.*, 2007 WL 2326878, at *2. That, however, would seem to reward the parties for not cooperating and turns the burden articulated in *Rite Aid*, *supra*, on its head by ignoring that the obligation to justify the confidentiality of each document remains with the proponent of the sealing order. *Rite Aid*, 345 F. Supp. 2d at 506. *See also DiRussa*, 121 F.3d at 818, citing *Amodeo*, 71 F.3d at 1047 ("The burden of demonstrating that a document submitted to a court should be sealed rests on the party seeking such action").

[52] *See also Century Indemnity*, 592 F. Supp. 2d at 827-28, cited in note 36 *supra*; *Occidental Gems*, 41 A.D.3d at 365, 841 N.Y.S.2d at 227 (refusing to permit discovery of documents and testimony from an arbitration because of "the important public interest in protecting the rights of parties who submit to confidential arbitration").

in which the scope of review is extremely limited[53] may contain documents and testimony that would never have made it into the record in a purely judicial proceeding. The reason is that many of the safeguards inherent in judicial adjudication that are designed to protect parties from scurrilous accusations and unreliable evidence—for example, the rules that require a foundation for evidence and preclude hearsay—are typically dispensed with in arbitration.[54] This difference, under existing precedents, arguably should be enough to outweigh the policy favoring public access to judicial proceedings.

For example, the Second Circuit has held that documents produced in discovery and "matters that come within a court's purview solely to insure their irrelevance" are not within reach of the presumption of public access precisely because they came before the court without passing through the procedural filters designed to ensure their reliability and truthfulness.[55] Because much of the record of an arbitration will contain similarly unreliable statements due to the lack of strict procedural protections (on the theory that the arbitrators can filter the information themselves without the need to rely on evidentiary rules), the arbitral record should similarly be outside the presumption of public access.

It could also be argued that a confidentiality agreement entered into before or during arbitration is analogous to a protective order entered during litigation. When a confidentiality order in litigation has been challenged, the Second Circuit has reversed the normal presumption requiring the proponent of the order to show good cause for its entry. It stated: "[O]nce a confidentiality order has been entered and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling

[53] *See, e.g.*, 9 U.S.C. § 10 (2015) and N.Y. C.P.L.R. 7511 (McKinney 2015) (grounds for vacating an award generally limited to fraud, corruption, partiality or misconduct).

[54] For example, AAA Commercial Rule R-34(a) provides that "[c]onformity to legal rules of evidence shall not be necessary."

[55] *Amodeo*, 71 F.3d at 1048-49. In so holding, the court cited *United States v. Charmer Indus.*, 711 F.2d 1164, 1171 (2d Cir. 1983) and *United States v. Corbitt*, 879 F.2d 224, 231 (7th Cir. 1989), which noted that pre-sentencing reports in criminal cases generally are kept confidential because, among other reasons, there are no formal limitations on their contents, and they will contain much information which is untrustworthy or simply incorrect. *Cf. Illinois v. Abott & Assoc.*, 460 U.S. 557, 567 n.11 (1983) (noting that "grand jury secrecy has traditionally been invoked to justify the limited procedural safeguards available to witnesses and persons under investigation").

need' warrants the requested modification."[56] As the Second Circuit explained, protective orders serve a "vital function" in avoiding needless "annoyance, embarrassment, oppression, or undue burden and expense," encourage witnesses to be more forthcoming (and incentivize witnesses who would not otherwise be willing to testify) and can make settlement possible.[57]

This analogy breaks down somewhat, however, because a blanket protective order in litigation is not always the same thing as a judicial order sealing particular records which presumably would not have been entered initially without a showing of good cause.[58] Nevertheless, the parties' (and non-parties') reliance on the confidentiality of the arbitration evokes the same considerations that justify reversing the

[56] *Fed. Deposit Ins. Co. v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982). *See also Palmieri v. New York*, 779 F.2d 861, 864-65 (2d Cir. 1985). The question of reliance is tricky, however, because "the mere existence of a confidentiality order says nothing about whether complete reliance on the order to avoid disclosure was reasonable." *Scott D. Boras Inc.*, 2009 WL 3444937, at *1 n.7, quoting *Lugosch*, 435 F.3d at 126. In *Lugosch*, the Second Circuit observed that it was "difficult to see how the defendants can reasonably argue that they produced documents in reliance on the fact that the documents would always be kept secret" when the order itself provided that "[t]his Confidentiality Order shall not prevent anyone from applying to the Court for relief therefrom." 435 F.3d at 126. A court would, presumably, have the power to modify an order for good cause even in the absence of such language. *See, e.g.*, *Gambale v. Deutsche Bank AG*, No. 02-cv-4791, 2003 2003 WL 21511851, at *15-16 (S.D.N.Y. July 2, 2003), quoting Dore, *supra* note 19 ("a court always retains the inherent power to modify or dissolve its protective orders, either *sua sponte* or on motion of a party or interested nonparty"), *aff'd*, 377 F.3d 133 (2d Cir. 2004). *But see AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005), quoting *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) ("Once a court enters a protective order and the parties rely on that order, it cannot be modified 'absent a showing of improvidence in the grant' of the order or 'some extraordinary circumstance or compelling need.'"); *Standard Inv. Chartered, Inc. v. National Ass'n of Sec. Dealers, Inc.*, 621 F. Supp. 2d 55, 74 (S.D.N.Y. Sept. 16, 2007) (collecting reasonable reliance cases). Furthermore, the parties cannot avoid discovery simply by failing to agree on a protective order. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43-44 (C.D. Cal. 1984), quoted in *Lugosch*, 435 F.3d at 126. It is, therefore, difficult to see how a compelling case of reliance could ever be made out.

[57] *Sec. Exch. Comm'n v. TheStreet.com*, 273 F.3d 222, 229-30 (2d Cir. 2001).

[58] As the court explained in *Greater Miami Baseball Club P'ship v. Selig*, 955 F. Supp. 37, 39 (S.D.N.Y. 1997), in the interest of expediency, courts frequently approve the parties' agreement to maintain the confidentiality of anything produced in discovery and so-designated, with "[t]he issue of whether the material really should be kept from public view…left for another day, which fortunately seldom arises." In such circumstances, "the fact that the deposition was designated confidential under the protective order [is not] entitled to any weight." *Id*.

normal presumption of public access in litigation. Given the policy favoring arbitration[59] and precluding courts from second-guessing arbitral decisions, it would seem reasonable to treat the confidentiality of arbitration as a binding element that is not subject to reconsideration by a court.

Unfortunately, however, under the current state of the law, parties may not safely assume that the judiciary will respect their confidentiality agreement once the arbitrated matter reaches the courts.

VII. Conclusion

While there are mechanisms that can be employed to render an arbitration confidential, and several arguments are suggested here that might persuade a court to seal the record concerning the arbitration proceedings when an arbitrated matter reaches the courts, the significant policy and legal precedents favoring public access might result in public disclosure of those proceedings, despite the parties' assumption that they would remain confidential. To the extent possible, therefore, the parties should chart their arbitral course in advance with an eye towards minimizing the risk of unexpected disclosure when a court is asked to rule on some aspect of the arbitration proceeding or a third party seeks information concerning the arbitration.

[59] While courts and parties often refer to the federal policy "favoring arbitration," the Seventh Circuit, in *Gotham Holdings*, noted that there was no such actual policy: the Federal Arbitration Act merely eliminates hostility towards arbitration but does not affirmatively favor it. 580 F.3d at 665.