

Arbitrations, Courts, and Confidentiality

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Generally speaking, parties can resolve their disputes either in a public court or private arbitration. One significant difference between the two is the confidentiality of the process: only private arbitration can afford complete confidentiality. Two recent opinions involving the Delaware Court of Chancery's confidentiality rules underscore the difficulties in seeking confidentiality in a court proceeding.

In the first case, *Al Jazeera America, LLC v. AT & T Services, Inc.*,¹ the Court of Chancery ordered that Al Jazeera America, LLC unredact large portions of a complaint it had filed under seal. The underlying dispute in that case revolved around Al Jazeera America's rights under an Affiliation Agreement between AT & T Services, Inc. and Current TV, LLC, which later merged with and into Al Jazeera America. After the merger, Al Jazeera America sought to exercise rights as the successor to Current TV, but AT & T refused to carry Al Jazeera America's signal, apparently claiming that Al Jazeera America had breached the Affiliation Agreement. Al Jazeera America responded with a breach of contract claim. The complaint, however, was filed confidentially in accordance with Court of Chancery Rule 5.1(e) in order to avoid breaching the confidentiality provisions of the Affiliation Agreement. The proposed public version of the complaint contained extensive redactions, obscuring information such as the basis for AT & T's claim of breach by Al Jazeera America and what Al Jazeera America believed was the real reason why AT & T terminated the Affiliation Agreement.

Several journalists and news organizations objected to the confidential treatment. The Court accepted the arguments of both Al Jazeera America and AT & T that because of the unique nature of their industry they would suffer economic harm if the contents of the Affiliation Agreement were released to the public. Nevertheless, Vice Chancellor Glasscock concluded that evidence of economic harm was not enough to protect all of the negotiations and contractual dealings between the parties. Otherwise, he explained, "this Court would no longer act as a public court but as something akin to a private arbitrator, replicating an option—private arbitration—that the parties could have, but did not, choose for themselves."² Accordingly, the Court ordered Al Jazeera to file a largely unredacted complaint that would allow the public to understand the dispute between the parties.³

The timing of the *Al Jazeera* opinion was auspicious because less than 10 days later the Third Circuit Court of Appeals ruled that judges on Delaware's Court of Chancery could not conduct confidential

¹CV 8823–VCG, 2013 WL 5614284 (Del. Ch. Oct. 14, 2013).

²*Id.* at *5.

³The Delaware Supreme Court has since granted an interlocutory appeal of Vice Chancellor Glasscock's opinion; the complaint will remain under seal pending the outcome of the appeal.

arbitrations.⁴ The roots of the case go back to 2009, when the Delaware General Assembly authorized the Court of Chancery to conduct confidential arbitrations subject only to limited review by the Delaware Supreme Court. As conceived, such arbitrations would have incorporated many advantages of a public proceeding. Arbitrations would have been conducted by a judge or master from the Court of Chancery, assuring a certain level of quality, and the fees involved in handling the arbitration would have likely been considerably less than what parties regularly pay in more traditional arbitration. Moreover, unlike a court proceeding the matters could be handled confidentially.

In October of 2011, the Delaware Coalition for Open Government, Inc. filed a complaint in federal court arguing that such confidential arbitrations violate the public's right of access. Both the District Court and the Third Circuit Court of Appeals agreed. A few weeks ago, the Third Circuit explained that "[p]roceedings in front of judges in courthouses have been presumptively open to the public for centuries"⁵ and concluded that the benefits of access outweigh any need for confidentiality.⁶ Accordingly, the Third Circuit held that the First Amendment provides a right of access to arbitrations conducted by the Delaware Court of Chancery.

Together, these opinions show the pitfalls of using courts to enforce agreements with confidential terms. Although redaction is typically available to protect discrete bits of information (for example pricing terms), there is a firmly ingrained tradition of keeping court proceedings open to the public. As a result, there are limits on what can be veiled from public view even if the parties consent and there is evidence that confidentiality will prevent economic harm to the parties. Ironically, the Court of Chancery's arbitration rules would have offered a compromise of sorts, allowing parties access to the expertise of the Court of Chancery's judges while also allowing parties to insist on a level of confidentiality that is atypical in traditional civil proceedings. But, absent a rehearing by the Third Circuit or Supreme Court review, that middle pathway is unavailable. Accordingly, parties are left with the traditional choice: they can have their day in court or they can be guaranteed confidentiality. When negotiating contracts that are built upon confidential information, parties should give careful thought to these alternatives and the appropriate venue for enforcement. In particular, if a contract or its subject matter cover confidential information, it may make sense to arbitrate any disputes.

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Daniel H Tabak is a partner in the firm's Litigation and Arbitration group. His practice focuses on securities litigation, complex commercial litigation, and bankruptcy litigation, and he has substantial experience representing major financial services companies, private equity firms, energy companies, and other multi-national corporations in high-stakes matters. Mr. Tabak is a graduate of Harvard College and earned his J.D. from Columbia Law School where he was a James Kent Scholar and a Harlan Fiske

⁴ See *Delaware Coal. for Open Gov't, Inc. v. Strine*, 12-3859, 2013 WL 5737309, at *10 (3d Cir. Oct. 23, 2013).

⁵ *Id.* at *7.

⁶ *Id.* at *10.

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