Assuming Silence in Arbitration

by Amy J. Schmitz

Justice Samuel Alito assumed that confidentiality is a natural and beneficial aspect of bilateral arbitration proceedings in his recent opinion for the United States Supreme Court in *Stolt-Nielsen S.A. v. Animalfeeds International Corporation*.¹ In that case, the Court held that the parties could not be compelled to participate in class proceedings.²

Writing for the Court in a five-to-three decision, Justice Alito concluded that the arbitration panel had “imposed its own conception of sound policy” in deciding that the parties intended to allow for class arbitration by their silence on the issue.³ He opined that more evidence of intent to allow for class proceedings would be necessary, in part because “‘the presumption of privacy and confidentiality’ that applies in many bilateral arbitrations, ‘shall not apply in class arbitrations.’”⁴

Did Justice Alito assume too much in assuming bilateral arbitration proceedings are confidential?

Arbitration is private but not confidential.⁵ Arbitration is private in that only the parties to the arbitration agreement, the arbitrators, witnesses, and others that the parties invite, may attend the proceedings. However, arbitration proceedings are not necessarily secret, or confidential. Information revealed during the process may become public, and parties may talk to others about the arbitration proceedings unless they agree to keep the information confidential.

The problem is that misperceptions and confusion regarding the secrecy of arbitration create unwarranted expectations for arbitrating parties. Parties enter into a process believing anything they say will be kept quiet, and fail to take measures to contract for confidentiality in their arbitration agreements. This, in turn, may negatively impact parties expecting arbitration to shield their business information, as well as individuals who assume that personal or embarrassing information revealed in arbitration will remain secret.

Nonetheless, some parties do include confidentiality clauses in their agreements, especially when they are concerned with guarding sensitive information or preventing unwanted publicity. This is often true in sophisticated business contexts involving parties who are cognizant of distinctions between privacy and confidentiality in arbitration. Indeed, parties are wise to include confidentiality clauses in their arbitration contracts when they expect possible disputes to involve business secrets or copyright-protected information.

However, confidentiality clauses may be overly oppressive where they hinder the public's access to information impacting health and safety. These clauses also are problematic when they impede individuals’ abilities to obtain information regarding prior claims that they may need to prove patterns of discrimination or other legal violations they may need to succeed on statutory claims. It is in these cases that courts have held such agreements unconscionable or otherwise unenforceable under contract law defenses. This is especially true when there is uneven bargaining power, such as in consumer and employment contexts.

This article will summarize some of the benefits and drawbacks of arbitral privacy and confidentiality clauses, where parties do incorporate them in their arbitration agreements. The article will also address some of the recent holdings with respect to the enforceability of confidentiality clauses. The key is to raise awareness regarding the distinction between privacy and confidentiality, and foster informed and prudent
contracting with respect to arbitration agreements.

**Benefits and Drawbacks of Secrecy**

**Benefits of Privacy**

**Intra-Communal Dispute Resolution**

Privacy of arbitration is especially beneficial for resolving disputes among intra-communal parties who share commercial, cultural, or other communal understandings and norms. Close-knit business and cultural communities have long used arbitration systems to resolve their disputes quickly and quietly in closed forums using their own rules and norms. These communities are usually more concerned with privacy than with establishing judicial precedent. In addition, procedural safeguards of the judicial system are largely unnecessary in these communal contexts because the parties usually share understanding of applicable rules and norms, and enjoy relatively equal bargaining power.

Merchant and trade groups are prime examples of communities that have benefited from the privacy of arbitration. They often opt for private proceedings in order to resolve their disputes without suffering the public embarrassment of litigation. Incommunal groups may then encourage compliance with awards by threatening disclosure that could harm a non-compliant party’s reputation.

For example, the Court of Arbitration for Sport (CAS) provides the athletic community with the means for resolving disputes in accordance with internal standards and customs. CAS rules thus encourage arbitrators to exercise their discretionary power to provide relief that may not be available in court and ease strict application of the law to prevent unjust results. The rules aim to foster consensus building and flexibility, which public proceedings may hamper. At the same time, however, some complain that this lack of transparency in arbitration hinders democratic public participation in the process and shrouds information regarding parties’ transgressions.

**Promotion of Efficiency in Arbitration**

Privacy also may benefit parties by fostering faster and cheaper dispute resolution than parties enjoy in litigation. Public proceedings can be time-consuming, laborious, and expensive. Arbitration, however, may be more efficient partly due to its privacy, and even more so when the parties contract for confidentiality. This was the impetus for Justice Alito’s remarks regarding arbitral secrecy in *Stolt-Nielsen.*

As an initial matter, arbitrators may deliver awards more quickly and cheaply when they need not write reasoned opinions that will be subject to public review. Furthermore, privacy may help minimize “judicialization” of arbitration proceedings, which occurs when arbitrators seek to protect the enforceability of their awards by infusing proceedings with court-like formalities, rules, and procedures. Some argue for greater review of arbitration proceedings to ensure fairness for so-called “little guys,” such as employees and consumers. However, this review also may subject these little guys to greater costs of increased procedural formalities that usually accompany greater transparency. Companies also may pass on increased dispute resolution costs to employees and consumers through decreased wages/benefits or increased prices/rates.

**Drawbacks of Privacy**

**Abuse of Closed Proceedings**

More powerful parties may take advantage of the closed, or private, proceedings in arbitration. Powerful parties may use this privacy to intimidate parties who are emotionally sensitive or vulnerable to the stresses of participating in a dispute resolution process. This is especially true when a party does not have legal representation or is unfamiliar with the arbitration process.

For example, a sexual harassment claimant may be emotionally vulnerable when asserting sensitive claims in the private atmosphere of arbitration proceedings. Hearings often take place in a small conference room where claimants may have to assert and explain their allegations while sitting across a narrow table from the alleged harasser, who also may be the claimants’ boss. In addition, informal arbitration procedures generally lack the decorum of judicial rules that may protect vulnerable parties and witnesses. At the same time, the Federal Arbitration Act (FAA) limited review of arbitration awards generally leaves such intimidation unchecked.

**Prevention of Public Access to Information**

Some criticize the absence of published opinions in arbitration because it hinders development of precedent and public law, as well as the public’s access to information that may affect civic interests. Arbitrators’ bare awards fail to provide the parties with direction regarding future behavior. Lack of published opinions in arbitration also may allow for privatization of the law.

This may be especially troubling with respect to discrimination, consumer protection, and other claims affecting public health or safety. It is in these areas that published opinions are often necessary to clarify and develop otherwise ambiguous statutory law. In addition, published opinions can be useful in providing information regarding products’ safety, companies’ legal violations, and other public policies.

In arbitration, however, lack of public exposure may allow companies to hide improprieties and prevent the public from learning about safety and fairness concerns. Companies also may use this privacy to exert influence over government agencies charged with protecting product safety and control media report-
ing regarding their products. Nonetheless, some institutional rules require limited publication of awards in particular contexts, such as class arbitration.

**Repeat Player Advantages of Privacy**

Privacy and confidentiality clauses may work together to augment repeat players’ advantages in arbitration. Many posit that businesses and other powerful parties that routinely arbitrate enjoy advantages in selecting arbitrators and presenting their cases. Corporate employers, for example, generally have legal teams that gather information about arbitrators, whereas employees often lack access to this information.

Furthermore, repeat players may then use their power to impose one-sided confidentiality provisions through their form contracts. This may allow powerful repeat players to use privacy and confidentiality to hide violations affecting public interests, such as those involving employment discrimination and manufacturing laws. Secrecy may therefore save repeat players from unfavorable public relations of trial. It also may stymie individuals’ abilities to gather evidence of habitual offenses or patterns of illegal conduct.

At the same time, the FAA preempts state law attempts to curb these advantages by legislating special disclosure or publication rules for arbitration where contracts affecting interstate commerce are involved. For example, a state could not require separate notice and consent for arbitration clauses in form contracts. FAA law also precludes states from legislating transparency rules for arbitration proceedings that would contravene the parties’ arbitration agreement. Essentially, preemption rules regulate arbitration agreement challenges to general contract defenses.

**Holdings Regarding Enforcement of Confidentiality Clauses**

Some courts have recognized onerous impacts of confidentiality clauses in holding arbitration provisions unconscionable under general contract law. In McKee v. AT&T Corp., for example, the court held that a confidentiality provision in AT&T’s consumer services agreement was unconscionable under Washington state law because it allowed AT&T to conceal consumer fraud. The court opined that the confidentiality provision augmented repeat player advantages. It also hindered the state’s strong policy favoring open administration of justice.

Similarly, the court in Ting v. AT&T Corp. highlighted these concerns in finding that the same confidentiality provision in AT&T’s arbitration clause was unconscionable under California law. The court in that case emphasized that AT&T’s routine use of this clause allowed it to potentially prevent seven million Californians from obtaining information regarding prior claims. This included evidence consumers would need to prove patterns of discrimination or intentional misconduct. The confidentiality clause also provided AT&T undue advantages in gathering knowledge on how to negotiate its form contracts and control claims.

The court echoed these concerns in Acorn v. Household International, Inc. In that case, the court found that the arbitration rules incorporated in the arbitration clauses in the claimants’ loan contracts were unconscionable in part because they allowed arbitrators to hold closed hearings and required that awards be kept confidential. The court concluded that this improperly allowed the lender to prevent “the scrutiny critical to mitigating [repeat player] advantages.” Such concerns also have led other courts to reach similar conclusions in uneven bargaining contexts.

Nonetheless, many courts uphold confidentiality provisions in arbitration agreements. For example, the United States Court of Appeals for the Third Circuit concluded that the confidentiality provision incorporated in an employment agreement was not unconscionable. The court opined that the provision did not favor the employer or impede the employee’s ability to obtain relief on her discrimination claims. The court highlighted the FAA policies of enforcing arbitration contracts and protecting arbitration’s privacy, and concluded that the confidentiality provision comport with these policies.

**Conclusion**

Parties often assume too much regarding secrecy in arbitration. They assume privacy and confidentiality are synonymous, as though arbitration is like a trip to Las Vegas: What happens in arbitration stays in arbitration. This is not necessarily true. Arbitration is private, but it is only confidential if the parties’ contract for such secrecy. The problem is that parties’ mistaken assumptions often lead to shortsighted contracting and lack of awareness about the consequences of confidentiality clauses. Business parties often are wise to contractually protect secrecy in intracommunal contexts, but consumers and employees may want to steer clear of burdensome confidentiality clauses that may stymie their abilities to vindicate statutory rights or access information regarding companies’ improprieties.

This article merely summarizes some of the salient issues and recent holdings with respect to arbitral secrecy. Nonetheless, the article invites parties to more carefully draft and negotiate their arbitration contracts. Ultimately, however, this article calls policymakers to work together to craft transparency reforms that appropriately open doors to information in arbitrations involving statutory discrimination, consumer protection, corruption, and fraud, without publicizing personal and proprietary information revealed in arbitration hearings. The key is to balance all par-
ties’ interests in confidentiality and privacy with the public’s legitimate interests in accessing information that may affect health or safety.\footnote{E.g., Vinson v. Superior Court, 740 P.2d 404, 411–14 (Cal. 1987) (ordering trial court to limit scope of claimant’s mental examination); Paul Nicholas Monnin, Proving Welcomeness: The}

Endnotes

2. Id. at 1776-77.
3. Id.
4. Id. at 1769, 1776-77 (quoting the applicable class arbitration rules and assuming that bilateral arbitrations are confidential).
12. See Lindland v. U.S. Wrestling Ass’n, 230 F.3d 1036, 1037–39 (7th Cir. 2000) (ordering U.S. Wrestling to certify Lindland as its nominee for the Olympic Games in accordance with the re-wrestle ordered by an arbitrator).
13. See Carrie Menkel-Meadow, The Lawyer’s Role(s) in Deliberative Democracy, 5 Rev. L. J. 347, 359 (2005) (noting how private dispute resolution processes may be “closer to direct democracy models (town meetings) than representative models”).
18. See Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 Wash. U. L. Q. 637, 637 (1996) (discussing companies’ inclusion of arbitration clauses in their contracts with consumers, employees, franchisees, and other “little guys”).
19. See Stephen J. Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 93 (2001) (proposing that judicialization of proceedings often results in increased business costs that are passed on to the populace through higher prices).
20. For example, courts may limit medical examinations and evidence of sexual behavior. See, e.g., Vinson v. Superior Court, 740 P.2d 404, 411–14 (Cal. 1987) (ordering trial court to limit scope of claimant’s mental examination); Paul Nicholas Monnin, Proving Welcomeness: The

21. 9 U.S.C. Section 1-14, enacted 1925, provided for contractually-based compulsory and binding arbitration.


23. See Mark E. Budnitz, Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection, 10 Ohio St. J. Disp. Resol. 267, 318 (1995) (arguing that arbitration denies consumers statutory protections due to limited discovery, lack of class action procedures, and absence of written opinions or other means “for transmitting data to regulatory and enforcement agencies”).


25. See Id. at 220 (quoting Dr. David Graham, the associate Director of Science and Medicine in the FDA’s Office of Drug Safety, that “[w]e are virtually defenseless” in guarding ourselves from unsafe pharmaceuticals in light of the industry’s influence over the FDA and the media).


28. Id.


30. See Id. at 545–47 (providing example).


33. Id.

34. Ting v. AT&T Corp., 319 F.3d 1126, 1133, 1149–52 (9th Cir. 2003). The secrecy provision stated, “[a]ny arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award.” Id. at 1152 n.16.

35. Id. at 1152.

36. Id. The court’s holding may have been the impetus for AT&T re-writing its confidentiality provision. Id. at 1152 n.16.


38. Id. See also Luna v. Household Fin. Corp. III, 236 F. Supp. 2d 1166, 1180–81 (W.D. Wash. 2002) (finding another lender’s arbitration form provision preventing disclosure of the arbitration award was not necessarily objectionable on its own, but contributed to the overall unconscionability of the arbitration provision).

39. See Davis v. O’Melveny & Myers, 485 F.3d 1066, 1077-79 (9th Cir. 2007) (holding confidentiality clause in an arbitration agreement was unconscionable in an employment context); Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1178-80 (Ohio App. 2004) (holding confidentiality provision was unconscionable in an arbitration clause where it would hinder state statutory consumer protections and the power of public proceedings in enforcing statutory rights).


41. Id. at 280–82.

42. See Iberia Credit Bureau, Inc. v. Cingular Wireless L.L.C., 379 F.3d 159, 175–76 (5th Cir. 2004) (upholding validity of confidentiality provision requiring secrecy of existence and results of arbitration).

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