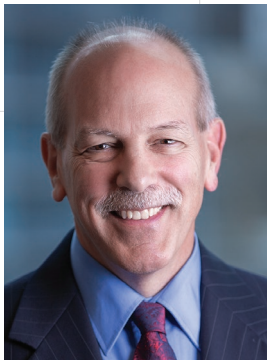

Arbitrations: privacy, confidentiality and the appraiser

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Members of the real estate appraisal profession are well acquainted with commercial arbitration in their roles as expert opinion witnesses and as arbitrators. They understand that an attractive feature of commercial arbitration is the private nature of the dispute resolution process. However, this is not to say that commercial arbitrations are necessarily confidential.

Understanding the limits of confidentiality in commercial arbitrations may be of interest to real estate appraisers in at least three respects: 1) access to an appraiser's work file and appraisal report prepared for the arbitration, 2) access to transcripts recording the evidence of an appraiser during an arbitral hearing, and 3) disclosure of the final arbitral award that discusses the appraiser's opinion evidence.

Privacy and confidentiality

Privacy in relation to arbitrations speaks to who may participate in and attend an arbitration proceeding. In *Arbitration Law of Canada: Practice and Procedure*,[i] the author J. Brian Casey refers to English case authority stating that parties to an arbitration can assume that their arbitration will be conducted in private. In our country, the British Columbia Court of Appeal recognized privacy as "the central character of arbitration" in a case in which Translink, the public provider of transportation services in the Lower Mainland of British Columbia, attempted to initiate an arbitration involving several contractors engaged under separate contracts without the consent of the contractors.[ii] In the course of rejecting Translink's attempt to consolidate separate arbitrations into one proceeding without the contractors' agreement, the court made the point that, absent agreement of the parties, strangers to an arbitration are to be excluded from the conduct of the arbitration.

On the other hand, confidentiality cannot be presumed.[iii] While there is some judicial authority supporting implied confidentiality in arbitrations, the question is not settled in Canada.[iv] Therefore, it is prudent to consider whether confidentiality is addressed in a) the agreement or submission to arbitrate, b) the rules the parties may have adopted to govern the arbitration procedure, and c) the procedural legislation governing the arbitration.

Agreements to arbitrate/submissions to arbitration

An agreement to arbitrate generally refers to an agreement entered before a dispute arises. The agreement may be as simple as a clause in a contract directing that any dispute between the parties will be referred to arbitration. For example, commercial leases with renewal options and rent review/reset provisions often contain brief arbitration clauses, perhaps only stipulating the arbitration legislation that will govern, but making no reference to any other items such as confidentiality.

Submissions to arbitration arise after a dispute has manifested itself and the parties agree to submit their dispute to arbitration. The submission document is likely to be more comprehensive, addressing procedural issues including required levels of confidentiality.

Arbitration legislation

If the parties in arbitration do not cover confidentiality in their arbitration agreement or submission to arbitration, the governing procedural law may fill the gap. For example, arbitration legislation in British Columbia expressly deals with confidentiality. The *Arbitration Act*, SBC 2020, c. 2, governing domestic arbitrations, provides the following at Section 63:

> **Privacy and confidentiality**
> **63** (1) Unless otherwise agreed by the parties, all hearings and meetings in arbitral proceedings must be held in private.
> (2) Unless otherwise agreed by the parties, the parties and the arbitral tribunal must not disclose any of the following:

(a) proceedings, evidence, documents and information in connection with the arbitration that is not otherwise in the public domain;
(b) an arbitral award.

(3) Subsection (2) does not apply if the disclosure is
(a) required by law,
(b) required to protect or pursue a legal right, including for the purposes of preparing and presenting a claim or defence in the arbitral proceedings or enforcing or challenging an arbitral award, or
(c) authorized by a competent court.

See also British Columbia's *International Commercial Arbitration Act*, RSBC 1996, c. 233, at section 36.01.

Arbitration Institute rules

There are a number of arbitration organizations, each with its own set of procedural rules for arbitration, including rules dealing with confidentiality. The ADR Institute of Canada (ADRIC) rules are an example:[v]

4.18 Privacy and confidentiality

4.18.1 Unless the parties agree otherwise, the arbitration proceedings must take place in private.

4.18.2 Unless the parties agree otherwise, the parties, any other person who attends any portion of the arbitral hearings or meetings, the Tribunal, and the Institute must keep confidential all Confidential Information except where disclosure is:
(a) required by a court;
(b) necessary in connection with a judicial challenge to, or enforcement of, an award; or
(c) otherwise required by law.

4.18.3 The Tribunal must decide issues related to privacy or confidentiality (or both) under this rule.

4.18.4 Nothing in this rule precludes disclosure of Confidential Information to a party's insurer, auditor, lawyer, other advisors, or other people with a direct financial interest in the arbitration. Any such person to whom Confidential Information is disclosed must keep it confidential and use it solely for the arbitration, and must not use or allow it to be used for any other purpose unless the parties agree otherwise or the law requires otherwise.

The ADRIC rules define "Confidential Information" and "Document" as follows:

Confidential Information includes the existence of arbitration and the meetings, communications, Documents, evidence, awards, rulings, orders, and decisions of the Tribunal in respect of the arbitration.

Document has an extended meaning and includes a photograph, film, sound recording, permanent or semi-permanent record, and **information** recorded or stored by any device, including electronic data.

The extent of confidentiality by agreement of the parties, by legislation, or by rules adopted for arbitration can and does vary.

It is also important to bear in mind that an agreement or submission to arbitrate is binding only on the parties to the arbitration so that further steps are required to ensure that non-party participants (i.e., witnesses, advisors) are somehow bound by terms of confidentiality. ADRIC Rule 4.18.4 tries to address this situation, but it may be that it simply alerts parties in the arbitration to the need for them to impose terms of confidentiality on non-parties they involve in the arbitration. For example, it is common practice when engaging expert witnesses to participate in an arbitration to include confidentiality provisions.

Exceptions to requirements for confidentiality

Where an agreement, enactment, rule or arbitral order for confidentiality exists, the question arises whether there are any exceptions. The examples of legislation and rules referred to above indicate certain exceptions by their very terms. For example, under the British Columbia arbitration legislation, it is not a breach of confidentiality to disclose confidential information in compliance with a court order or the enforcement of an arbitral award. The ADRIC Rules expressly permit disclosure to certain professional advisors.

Bringing the issue of confidentiality closer to home, can a report expressing an opinion of value prepared by an appraiser for an arbitration proceeding be disclosed in a subsequent Complaint proceeding under the Appraisal Institute of Canada (AIC) *Consolidated Regulations*? Assume for this scenario that the ADRIC Rules have been adopted. Unless the parties otherwise agree, the ADRIC Rules purport to impose a duty of confidentiality on all who attend any portion of the arbitral proceedings. This Confidential Information includes Documents (as defined in the ADRIC Rules) and evidence, e.g., appraisal reports and oral testimony in relation to the reports.

Assume also that it is the opposing party that wants to lodge a Complaint with the AIC based on an alleged breach of the *Canadian Uniform Standards of Professional Appraisal Practice* (*CUSPAP*). If the party retaining the appraiser alleged to have breached *CUSPAP* consents, then there appears to not impede the ADRIC Rules. If there is no consent, then the party wishing to file the Complaint will have to rely upon either ADRIC Rule 4.18.2(a) [court required disclosure], or (c) [disclosure otherwise required by law] to avoid an allegation that the requirement for confidentiality has been breached.

Since *CUSPAP* and the AIC *Consolidated Regulations* are not law and would not in themselves provide an exception under the ADRIC Rules, it is necessary to consider when confidentiality agreements in arbitration can be circumvented. At least five classes of exception have been discussed in the case law: [vi]

(i) express or implied consent of the party in the arbitration who originally produced the material;
(ii) an order of the court, e.g., an order for disclosure of documents generated by arbitration for the purposes of a later court action or arbitration;

(iii) leave of the court, but the grounds for obtaining leave are not clear;
(iv) disclosure where reasonably necessary for the protection of the legitimate interests of an arbitrating party; and
(v) the interests of justice/public interest.

Assuming no consent, the two exceptions that might apply are the protection of legitimate interests of an arbitrating party and the interests of justice/public interest. Under the legitimate interests exception, it might be difficult to articulate the actual interest to be protected. The Complaint could lead to a sanctioning of the appraiser, but it will provide no direct remedy for the Complainant.

As for the interests of justice/public interest exception, English courts have allowed disclosure of arbitration material from one arbitration to be used in a subsequent proceeding as a cross-examination tool where it was suggested that the witness was deviating from previous sworn testimony.[vii] In one Ontario case, an order that arbitration transcripts of evidence be produced in a court action was reconciled with the expectation of confidentiality as follows:[viii]

> **56** I am satisfied that there was an expectation of confidentiality in the Arbitration. The arbitration relationship generally benefits greatly from the element of confidentiality. The confidentiality of arbitration proceedings should be fostered to maintain the integrity of the arbitration process. I do not regard confidentiality as essential to the arbitration process ... In balancing the interests served by confidentiality against the interests served in determining the truth and disposing correctly of the litigation, I do not think the confidentiality of arbitration proceedings should be elevated to the status of a privilege such as solicitor-client or spousal privilege or, on occasion, doctor-patient or spiritual adviser-penitent. I am not persuaded that the confidentiality of the arbitration process, including the need to encourage the truth of the evidence therein, is so important as to outweigh the need in this court for justice if that requires the disclosure. The principle to be protected by such a privilege does not go to the heart of our adversarial system of justice or to the *Charter* or other societal values. The recognized privileges are based on the need for frank disclosure of potentially prejudicial information to obtain proper advice or the need to preserve a socially important relationship. Even these privileges are limited in scope and subject to an exception where the party entitled to the privilege puts the advice or the contents of the disclosure in issue or where other paramount considerations based on justice prevail.

Under the general rubric of interests of justice/public interest, the disclosure of the alleged offending appraisal material in furtherance of a Complaint might be justified but would the Complainant want first to obtain a court order permitting disclosure to avoid possible repercussions by disclosure of confidential information? This raises the additional consideration of the remedy for breach of the duty to keep all matters related to the arbitration confidential. A lawsuit for damages is possible, but it will vary from case to case what harm, if any, an innocent party has suffered from improper disclosure.[ix]

Closing

Appraisers accepting arbitration assignments should understand the breadth and depth of the confidentiality requirements under which they will provide their services and satisfy themselves that they can abide by those requirements. Although it should not impact the quality of the work performed, it is prudent to be aware of the possible disclosure of work product, testimony and the orders and awards made by the arbitral tribunal. If an appraiser receives a request to disclose information covered by confidentiality terms, it is prudent to be sure of the basis upon which the request is founded to avoid breaching a duty of confidentiality an appraiser might have accepted.

End notes

[i] J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure* (Huntington, New York: JurisNet LLC, 2017), pp. 271, 272

[ii] *South Coast British Columbia Transportation Authority v. BMT Fleet Technology Ltd.*, 2018 BCCA 468, at para. 31, leave to appeal dismissed 2019 CarswellBC 1601

[iii] *Arbitration Law of Canada: Practice and Procedure*, p. 272

[iv] see for example *Hi-Seas Marine Ltd. v. Boelman*, 2006 BCSC 488 at paras. 61-66, appeal dismissed 2007 BCCA 137; *London and Leeds Estates Ltd. v. Paribas Ltd. (No. 2)*, [1995] 1 E.G.L.R. 102

[v] ADRIC Arbitration Rules, Version 2 effective 01 December 2016 (https://adric.ca/rules-codes/arbrules/); See also Vancouver International Arbitration Center *International Commercial Arbitration Rules of Procedure* as amended January 1, 2000, Article 18 (https://vaniac.org/arbitration/rules-of-procedure/international-commercial-arbitration-rules-of-procedure/)

[vi] *Hi-Seas* at para. 65

[vii] *London and Leeds Estates Ltd.*

[viii] *Adesa Corp. v. Bob Dickenson Auction Service Ltd.*, 2004 CarswellOnt 5087, [2004] O.J. No. 4925 (Ont. S.C.J.) at para. 56

[ix] see for example *B&L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCSC 849 where a counterclaim was made against the Plaintiff alleging breach of an agreement to arbitrate and breach of confidentiality provisions in relation to the arbitration

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