Fifty Shades Of Arbitration: Getting Your Mojo Back

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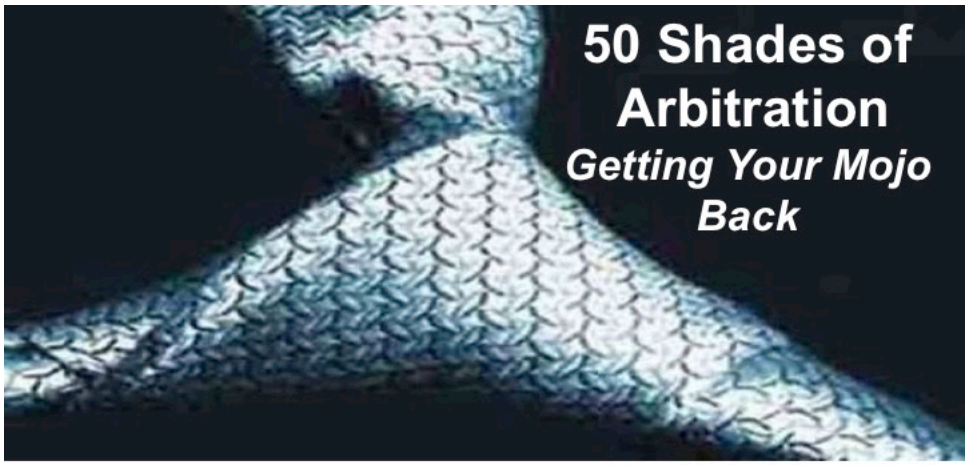

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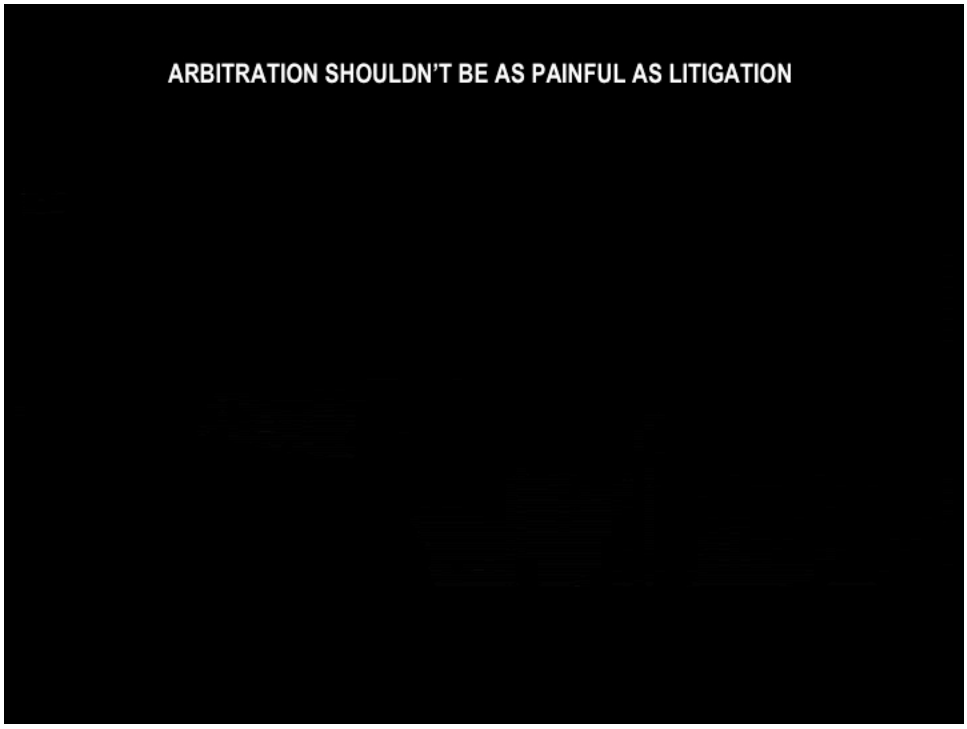

HOW WE LOST OUR MOJO

We were seduced by arbitration because it appeared to be the answer to our litigation woes, but now some view it as:

- just as expensive as litigation
- with discovery often as expansive as litigation
- with "split the baby" awards
- with arbitrators who are not required to follow the law
- with no real avenue for appeal

When you lose your MOJO, you start writing articles like this:

HOW WE LOST OUR MOJO

ARBITRATION AND THE GODLESS BLOODSUCKERS

by Richard Neely, Esq.

Once I received a gift of instructional tapes on how to be a second mortgage broker. There I learned that in the mortgage business, penalty fees are a major profit center: Because people don't want lose their homes, they will pay a $50 late fee. The tapes told me to *encourage* people to be late. Indeed, late fee income frequently rivaled interest income!

The lesson from mortgage lending was that more organizations than we would like to imagine are in business to exact small sums from desperately poor people. How else to explain the "over the limit" penalty on your credit card? If you pay your bill, going over the limit would appear an unmixed blessing to the bank. But since the bank has you by the little round ones, why not squeeze? Indeed, quasi-monopoly businesses like banks vindicate Jesus' pronouncement: "For unto every one that hath shall be given, and he shall have abundance: but from him that hath not shall be taken away even that which he hath." 24 *Matthew 29*

All of which brings me to the subject of consumer contractsB particularly credit

neutral arbitration forums into collection agencies to exact the last drop of blood from desperate debtors. Here's how it works: All bank credit card contracts (and most other consumer contracts like your wireless telephone contract) have arbitration clauses that make arbitration the exclusive remedy for either side in any dispute.

In a credit card claim the consumer won't spend money to fight the case because she owes the money. So it turns out that credit card arbitrations are done entirely on the written record, without oral presentation and without an appear-

ance by the consumer. The consumer, of course, is entirely naive. Thus the consumer gets paperwork in the mail and, being overwhelmed already by debt-related calls, simply ignores it. Default follows, at which point all the paperwork is sent to the arbitrator. The arbitrator then enters judgment for the credit card company and collects his $150. The credit card company enforces the award in court and sells the debtor's house.

But that is not the outrage: The outrage is that the bank doesn't just ask the arbitrator for the debt plus legal interest. Rather, the bank asks for substantial costs related to the arbitration *itself*, and those costs are significantly higher than court filing fees. In essence, because all of the work of collection is really done by the arbitration organization (in my case the National Arbitration Forum) what the fees amount to is the consumer paying the credit card company's legal fees! In one case that I handled, the fees alone amounted to $450. Furthermore, the arbitration company sends the arbitrator a judgment form already filled out so that all the arbitrator need do is check the appropriate box and sign his or her name. It looks like a collection agency to me!

HOW TO GET OUR MOJO BACK

In the next 20 minutes, we will learn tips on:

- How to actually think that *"Arbitration is good"*

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- **How to Protect Your MOJO**

MOJO TIP 1: "ARBITRATION IS GOOD"

Luke Skybarker Yoda Marrs

1. NO BAD ARBITRATIONS - ONLY BAD OWNERS (DRAFTERS)

- Creature of contract - what you make of it
- Don't forget – can always amend Arbitration provision (pre or post dispute)

MOJO TIP 1: "ARBITRATION IS GOOD"

2. WHY ARBITRATION IS GOOD – FULLY "CUSTOMIZABLE"

Where else can you: pick your judge - design your own justice system tailored to your business/transaction/agreement?

- **Clients want to keep lawyers at bay?** Provide <u>stair step</u> process:

  Negotiation (Principals) → Mediation* → Arbitration

  * AAA: Effect. 10/1/13 Arbs $75K+ to be mediated *unless opt out* (Comm R-9)

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- **Want to pick your own Judge**? Go ahead:

  __ Yrs exper in bus → Former Judge → Predetermined List

  "must have at least 20 years experience in [financial] matters"

  "…in insurance coverage matters involving property claims"

  "…in oil and gas matters and who [previously worked at E&P company]"

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- Hate Delays? Eliminate: Short Award Time Fuse – its jurisdictional!
- **Hate expensive/time consuming motions, procedural disputes, discovery battles, expert battles**? Further **streamline** – **here is how**:

MOJO TIP 2: STREAMLINING ARBITRATION

1. PLANNING AHEAD – THE PRE-HEARING CONFERENCE

- Always submit (b/f 1st hearing) detailed **scheduling order** (message: *you are organized, assertive, prepared, efficient*)
- Include **deadlines**: Witness list, Discovery, Motions, Briefs, Exhibits, Affidavits, Disclosures, Hearing)

  Tip: only include deadlines for events you want to occur!

American Arbitration Association
Dispute Resolution Services Worldwide

Arbitrator: Scott D. Marrs, Beirne, Maynard & Parsons, LLP (smarrs@beirne.com)
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER
Order # _____ Case # _____
Pursuant to the Commercial Arbitration Rules of the American Arbitration Association (AAA), a preliminary hearing was held on _____, before Arbitrator(s) _____
(a) for Claimant(s): _____ Appearing at the hearing was:
(b) for Respondent(s): _____
By Agreement of the parties and Order of the Arbitrator(s), the following is now in effect.
1. Case Deadlines:

Date	Description of Deadline
	Amend/specify claims/counterclaims (and monetary amounts), file any motion to join parties.
	Close of uncontested facts to be filed/served.

MOJO TIP 2: STREAMLINING ARBITRATION

2. DISCOVERY- THE BEAST *"Discovery accounts for 50%+ of all litigation costs"*

Streamline Discovery: can Limit → Prohibit → Accelerate

MOJO TIP 2: STREAMLINING ARBITRATION

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a. Written discovery: limit: number (Interrog/RFP/RFA) & Scope

AAA (eff 10/1/13): may order docs "intend to rely on" and allow RFP for other docs that are "relevant and material" to outcome (R-22) [tracks '10 IBA Rules art 3]

CPR: discovery as arbitrator deems "appropriate" (R-11)

JAMS: "directly relevant to significant issues" (JAMS Discovery Protocol)

IBA Model: (can be adopted any time): only docs will "rely upon"

b. ESI (electronic): Limit scope → No. of Custodians → Prohibit

c. Depositions: Limit # of depos → Length → No Objs → Prohibit

* should know the arbitration rules re: depos:

MOJO TIP 2: STREAMLINING ARBITRATION

2. DISCOVERY- THE BEAST *"Discovery accounts for 50%+ of all litigation costs"*

	Rules Regarding Depositions
AAA	Commercial: **Silent**, but discretion Complex: **Exceptional Case & Good Cause** (L3f) Employment: Discretion (R-9) Construction: "**Extraordinary**" cases (R-22)
JAMS	Limit: 1 depo. but discretion (R-17b)
CPR	Discouraged, but discretion (R-11) **CPR Protocol on Disclosure** "[w]here parties have agreed on **depositions**, Tribunal should... **scrutinize and regulate** the process . . . [and possibly impose] **strict limits** on length and number of depositions ..."

MOJO TIP 2: STREAMLINING ARBITRATION

3. DISCOVERY DISPUTES

- provide disputes can be decided by 1 Arbitrator (reduces costs)
  * AAA Complex R-L3e (eff 10/1/13) clarifies: any 1 Arbitrator can decide disputes
- provide all disputes submitted via letter to the Arbitrator

Streamlining ADR hedges against **Northcote Parkinson's Law:**
"work expands to fill the [attorney] time available for its completion"
-- The Economist (1955)

MOJO TIP 2: STREAMLINING ARBITRATION

4. WRITTEN SUBMISSIONS

- **Briefs:** provide limits on number of **briefs** (pre/post Hearing), page numbers, font, spacing
- **Dispositive motions:** Agree Arbitrator can consider – **WHY?**

MOJO TIP 2: STREAMLINING ARBITRATION

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- Arbitrators reluctant to deprive parties of day in court (hearing) since:
  often results in an appeal based on the FAA (Sec 10a3), which lists a "refusal to hear evidence" as a ground for vacating award
- but times are changing with revisions to Arbitral rules:

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AAA: Comm Rule 33: new, for first time (eff 10/1/13)
(Constr R-27c and Employ R-32c: have had for years)

CPR: No specific rules, but implicit authorization (R-9)

JAMS: Yes, specific rule (R-21.1)

MOJO TIP 2: STREAMLINING ARBITRATION

5. BATTLE OF THE EXPERTS (PREVENTING)

- Prohibit → Liability Experts (arbitrator should be expert)
- Provide for → Neutral Fact Finder/Expert to advise Panel
- Provide for → Expert **Reports** only (no testimony)
- Provide that → only the Arbitrator questions the experts

MOJO TIP 2: STREAMLINING ARBITRATION

6. **EVIDENCE AT THE HEARING (STREAMLINING)**

- **Witnesses** → limit number per side
- **Testimony** → no *direct* "examination" (only "statements") (cross examination only - or only parties give live testimony)
- **Exhibits** → Pre-mark, pre-admit (joint ones by agmt – no duplicates), no authentication required (unless objection)
- **"HOT DOC" notebook** → Always provide

  (only 10% docs vital) vital: Gives Arbitrator a ROADMAP
- **CHRONO BOARD** → Always provide
- **Draft AWARD** → Provide: FACTS, EVID, LAW = RULING

MOJO TIP 3: MAKING ARBITRATION CONFIDENTIAL

"Arbitration is CONFIDENTIAL"

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MOJO TIP 3: MAKING ARBITRATION CONFIDENTIAL

"Arbitration is NOT ALWAYS CONFIDENTIAL"

	AAA American Arbitration Association www.adr.org	CPR Institute for Conflict Prevention & Resolution www.cpradr.org	JAMS Judicial Arbitration & Mediation Service www.jamsadr.com
CONFIDENTIALITY REQUIRED?	**NOT REQUIRED OF THE PARTIES** Arbitrator shall maintain privacy of hearings. • No rule for parties. • Does not explicitly give arbitrator power to issue protective orders. • Only the "privacy of the *hearings*" is mentioned in the rules – directed to the arbitrator and AAA. (R-25).	**YES, REQUIRED OF THE PARTIES** **Arbitrator** and **parties** required to treat proceedings and discovery confidential. (R-18) • May issue order to protect confidentiality of trade secrets or "other sensitive info." (R-11).	**NOT REQUIRED OF THE PARTIES** **Arbitrator** to "maintain confidential nature of proceeding and Award." (R-26a). • No rule for **parties**. • Arbitrators may issue protective orders. (R-26b).

MOJO TIP 3: MAKING ARBITRATION CONFIDENTIAL

"Arbitration is CONFIDENTIAL"

If you include a Confidentiality Provision:

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"Arbitration is CONFIDENTIAL"

If you include a Confidentiality Provision:

The parties shall maintain the confidential nature of the arbitration proceeding and the Award, including the Hearing (except as necessary to prepare for or conduct the arbitration hearing on the merits, as necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement, or as required by law or judicial decision).

MOJO TIP 4: PROTECTING YOUR MOJO

The Last - *But Most Important* **Tip**

How to Guard Against Inadvertently Give The Panel The Power to Award Millions In Attorney's Fees Against Your Client

- Necessitating Placing Your Malpractice Carrier On Notice
- And Losing Your Mojo All Over Again

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The Last - *But Most Important* **Tip**

How to Guard Against Inadvertently Give The Panel The Power to Award Millions In Attorney's Fees Against Your Client

Q: this provision protects you against award of attorney's fees:

"the parties are responsible for their own attorneys fees"

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IF: 1) agreement incorporates **AAA Commercial Rules**, and

2) both parties request attorneys fees (regardless of whether agreement provides "no fees"):

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AAA Commercial R-47d(ii) ("Scope of Award") provides:

"The award of the arbitrator(s) may include … **an award of attorneys' fees if all parties have requested such an award** or it is authorized by law or their arbitration agreement".

HOW TO GET OUR MOJO BACK

Told you we would learn tips on:

- How to actually think that *"Arbitration is good"*
- How to Streamline the Process
- How to make Arbitration CONFIDENTIAL
- **How to Protect Your MOJO**

CONCLUSION – "ARBITRATION IS GOOD"

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The Last 2 - ***But Most Important*** **Tips**

#1: **How to Effectively Create Right of Appeal**

- Guard Against Rogue Results

#2: **How to Guard Against Inadvertently Give The Panel The Power to Award Millions In Attorney's Fees Against Your Client**

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#1: **How to Effectively Create Right of Appeal**

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#1: **How to Effectively Create Right of Appeal**

United States Supreme Court: *Hall Street Assoc. v. Mattel, Inc.*, 128 S. Ct. 1396, 552 US 576 (2008), prohibits contractual expansion of *judicial* review.

Thus: you cannot (by contract) imbue a court with jurisdiction to hear an appeal of arbitration award. But:

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Thus: you cannot (by contract) imbue a court with jurisdiction to hear an appeal of arbitration award. But:

- you can: provide in ADR clause the right to appeal to another *arbitration (appeal) panel*
- bypasses "judicial review" prohibition in *Hall Street*

CPR, AAA and JAMS have promulgated "appeals" provisions →

MOJO TIP 4: PROTECTING YOUR MOJO

The Last 2 - *But Most Important* Tips

#1: **How to Effectively Create Right of Appeal**

CPR, AAA and JAMS have promulgated "appeals" provisions →

Example: CPR Appeal Procedure

"**An appeal may be taken under the CPR Arbitration Appeal Procedure** from any final award of an arbitral panel in any arbitration arising out of or related to this agreement that is conducted in accordance with the requirements of such Appeal Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration".

(R 8.2) (establishes narrow grounds for appeal beyond statutory grounds under FAA, Sec. 10)

CPR: **CPR Arbitration Appeal Procedure** (R 8.2) (3 former federal judges)
AAA: **AAA Arbitration Appeal Procedure** (APP-1) (number of arbitrators not specified)
JAMS: **JAMS Optional Arbitration Appeal Procedure** (R-34) (3 former federal judges)

To Further Limit Appeals, Consider Providing That →

MOJO TIP 4: PROTECTING YOUR MOJO

The Last 2 - *But Most Important* Tips

#1: **How to Effectively Create Right of Appeal**

To Further Limit Appeals, Consider Providing That →

- Can only appeal if award more than $ X
- Can't appeal if the award is unanimous (with panel of 3)
- Can't appeal unless Appellant escrows award pending appeal

INTERNATIONAL PERSPECTIVES ON ARBITRATION CONFIDENTIALITY

BY SCOTT D. MARRS AND MARTIN D. BEIRNE

"Confidentiality" is a poorly understood concept among most advocates and parties alike. There is a distinction between privacy of the proceedings, and confidentiality relating to filings, discovery, evidence, and the award. Most international arbitration rules require the proceedings to be "private" (i.e., only those who participate in the hearing, such as parties and witnesses, may be present in the hearing itself). Although the proceedings may be "private," this does not mean that filings, discovery, evidence, and the award will be kept "confidential."

Not all arbitration rules provide for confidentiality. Even where confidentiality is required, some tribunals only impose confidentiality on the tribunal/arbitrator, and not the parties themselves. Therefore, it is important to understand the distinctions made in the rules of the applicable arbitration forum, as well as how to obtain confidentiality in the absence of any rules providing same. This article discusses the distinctions between rules of the four largest international arbitration forums, and how various countries treat confidentiality.

I. INTERNATIONAL ARBITRATION FORUMS ICDR, ICC, LCIA, AND UNCITRAL

The Four Largest International Arbitration Forums are: (1) the International Centre for Dispute Resolution ("ICDR"), (2) the International Chamber of Commerce ("ICC"), (3) the London Court of International Arbitration ("LCIA"), and (4) the United Nations Commission on International Trade Law ("UNICITRAL"). The chart below analyzes the differing rules on privacy and confidentiality for these tribunals.

ICDR **International Centre for Dispute Resolution** **www.icdr.org**	**ICC** **International Chamber of Commerce** **www.iccwbo.org**	**LCIA** **London Court of International Arbitration** **www.lcia.org**	**UNCITRAL** **United Nations Commission on International Trade Law** **www.uncitral.org**
CONFIDENTIALITY NOT IMPOSED ON PARTIES	CONFIDENTIALITY MAY BE IMPOSED ON PARTIES	CONFIDENTIALITY IMPOSED ON PARTIES	CONFIDENTIALITY NOT IMPOSED ON PARTIES
ICDR rules provide that "all matters relating to the arbitration or the award" and all confidential information disclosed by parties or witnesses shall be kept confidential by the arbitrator and the administrator, but this rule does not apply to parties. (Article 34). However, another rule indicates that the ICDR "may publish" select awards, decisions or rulings (if redacted), unless the parties agree otherwise. (Article 27.8).	ICC rules provide: "[t]he work of the Court [tribunal] is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity." (Article 6). These rules exclude from hearings "persons not involved in the proceedings" and "upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information." (Article 22.3)	LCIA rules make the hearings private, and impose a duty on the parties to hold the "materials in the proceedings" (i.e., created for the arbitration) and the award confidential. (Article 30 and 41). This is consistent with English law.	UNCITRAL rules (like the JAMS rules) merely make the hearings private and the award confidential, but do not impose confidentiality on the parties. (Article 34(5) and 38(3)).

II. HOW VARIOUS COUNTRIES TREAT CONFIDENTIALITY IN ARBITRATION

There is a noticeable lack of uniformity in how various countries address arbitration confidentiality. Some countries impose an implied duty of confidentiality; some apply a limited rule, while others have no rule at all. This lack of uniformity creates growing uncertainty in our global economy. International arbitration forums with support from international and governmental bodies should propose and

support a uniform confidentiality rule to create more certainty in cross border and global transactions. The chart below analyzes the differing rules on privacy and confidentiality in countries with the most active arbitration forums.

Australia does not consider arbitration confidential. The High Court of Australia held that confidentiality, unlike privacy, is not "an essential attribute" of commercial arbitration. See Esso Australia Res. Ltd. v. Plowman, 128 A.L.R 391, 183 C.L.R. 10 (Austl. 1995).
Dubai

Dubai (home to the Dubai International Arbitration Centre, or "DIAC," and the Dubai International Finance Centre, or "DIFIC") requires all information relating to arbitration proceedings be kept confidential, except where required to be disclosed by order of the DIFIC Court.
England

England (home of the LCIA, based in London) does not have legislation governing confidentiality (the Arbitration Act 1996 does not address it), but does have case precedent indicating that arbitration proceedings are confidential (unless agreed otherwise). In Ali Shipping Corp. v. Shipyard Trogir, 11 2 All E.R., 1 Lloyd's Rep. 643 (Eng. Ct. App. 1998), the court held that an obligation of confidentiality is implied in every arbitration agreement as "an essential corollary of the privacy of arbitration proceedings." This obligation extends to the award, and to all "pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration." Id. at 651.
France

France (home of the ICC, based in Paris) Civil Code provides that the arbitrator's deliberations are confidential, but does not extend this duty to the parties themselves. See Aita v. Ojjeh, 1986 REVUE DE L'ARBITRAGE 583 (Cour d'appel de Paris, Decision of Feb. 18, 1986).
Hong Kong

Hong Kong (home of the Hong Kong International Arbitration Centre, or "HKIAC")provides that unless otherwise agreed by the parties, a party is not entitled to publish, disclose or communicate any information relating to the arbitral proceedings or any award, unless required to do so by law or to pursue a legal right.

New Zealand extends a specific legislative duty of confidentiality on the parties. New Zealand's Arbitration Act of 1996 provides that unless agreed otherwise, "the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings." It is understood that the New Zealand Arbitration Act was passed in response to Australia's Esso decision to clarify that unlike Australia, New Zealand supported a general duty of confidentiality.
Singapore

Singapore (home of the Singapore International Arbitration Centre, or "SIAC") only requires confidentiality of court proceedings brought under particular arbitration Acts, if requested by the parties. Case law does however recognize a general duty of confidentiality as to the hearing and award.
Sweden

Sweden (home of the Stockholm Chamber of Commerce, or "SCC") does not impose confidentiality on the parties. See Case No. T 1881-99 (Swedish Sup. Ct. 27 Oct. 2000).
United States

The United States does not impose an implied duty of confidentiality in arbitration. See United States v. Panhandle E. Corp., 118 F.R.D. 346 (D. Del. 1988), leaving it in large measure to the parties to specifically contract for it. Some states do have specific rules or statutes dealing with confidentiality.

In addition, all domestic arbitration tribunals have rules addressing privacy and/or confidentiality. The American Arbitration Association (AAA) commercial rules do not impose confidentiality on the parties. (R-23). The Judicial Arbitration & Mediation Service (JAMS) rules also do not impose confidentiality on the parties (but does provide that the award shall remain confidential unless the parties agree otherwise). (R-26b, Article 16). However, the Institute for Conflict Prevention & Resolution (CPR) rules do require both the tribunal/arbitrator and the parties to maintain confidentiality. (R-11, R-18).

III. CONCLUSION

If Confidentiality is desired, always insert a Confidentiality Sentence. Although arbitration proceedings are generally private, they are not necessarily confidential, unless the parties specifically contract for confidentiality, or the applicable forum's rules (or a state statute/rule or country rule) dictate confidentiality. Out of an abundance of caution, always include a separate confidentiality sentence in your arbitration provision if confidentiality is desired. Consider inserting following ICDR Model Confidentiality Clause:
Except as may be required by law, neither a party nor its representatives may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of (all/both) parties.

Scott Marrs

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http://www.bmpllp.com/attorneys/scott-d-marrs

Scott Marrs has over 20 years of experience in litigation and legal counseling in international, energy (oil and gas exploration, production, transportation, storage, power, petrochemical, energy marketing, well service), intellectual property (patent, trademark, copyright, trade secrets and covenant not to compete litigation), commercial, product liability and international matters in state and federal courts, and in national and international arbitrations.

He is an Arbitrator with Hong Kong International Arbitration Centre (HKIAC), American Arbitration Association (AAA), British Columbia International Commercial Arbitration Centre (BCICAC), International Institute for Conflict Prevention and Resolution (CPR), International Chamber of Commerce (ICC), Institute for Energy Law (IEL), London Court of International Arbitration (LCIA) and Vienna International Arbitral Centre (VIAC)

Mr. Marrs is on the Board of Directors of the General Counsel Forum (Houston Chapter), on the Advisory Board for the Institute for Energy Law (IEL), and was previously in the Legal, Natural Gas, and Land departments of a major energy company.

Areas of Practice
- Alternative Dispute Resolution (ADR)
- Chemicals
- Class Action Defense
- Commercial Litigation
- Condemnation & Eminent Domain
- Consumer Products
- Energy Litigation
- Franchise & Distribution
- International
- Mass Tort & Toxic Tort
- Products Liability
- Real Estate Litigation
- Technology Litigation
- Transportation & Motor Vehicles
- Intellectual Property

Certification and Ratings
- AV Rated by Martindale Hubbell

Education
- South Texas College of Law, Houston, Texas (J.D., cum laude, 1989) -- Honors: Board of Advocates, Order of the Lytae; Phi Delta Phi; Law Review: South Texas Law Review; Intern: U.S. Court of Appeals for the Fifth Circuit
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