

CONTRACTOR ALERT

Contractor Alert is a joint publication by this Contractor and the law offices of Richard M. Sissman, Esquire, located at 1485 Chain Bridge Road, Suite 105, McLean, VA 22101. This newsletter is designed to give general information on the matters covered. Space limitation prevents exhaustive treatment or analysis of this topic. This newsletter is not intended to substitute for advice on specific legal problems. If you are interested in receiving a complimentary issue or to be placed on our mailing list, contact Richard M. Sissman, Esq. We welcome and appreciate your suggestions for future article topics.

Joint Publication by this Contractor and Richard M. Sissman, Esquire

LXXIX--April-May 2000

CONFIDENTIALITY OF ARBITRATION PROCEEDINGS

Most State arbitration statutes expressly provide for the confidentiality of communications made by its participants in an alternative dispute resolution (ADR) procedure. It further provides that such communications may not be used as evidence against the participant and that any record made at such a proceeding is confidential. All communications by the arbitrators are confidential.

Federal Rules:

Federal statute provides for confidentiality of communications including those of the arbitrators in connection with voluntary alternative dispute resolution procedures in the administrative process but do not so provide with respect to arbitrations outside the administrative process. The Federal Courts have not expressly defined the extent of the confidentiality of arbitrations under federal law. Some federal courts have however considered the privacy of arbitration proceedings in connection with other issues. For example in deciding that an Age Discrimination of Employment Act claim was not subject to mandatory arbitration under the pre dispute arbitration agreement, the federal district court in Massachusetts considered the effect of the privacy of arbitration proceedings. Among other things the court noted that litigation served public functions that could not be duplicated by arbitration.

Private Organizations' Rules:

The National Association of Securities Dealers, Inc. Code of Arbitration Procedure like the federal statute governing non-administrative arbitrations is silent concerning the privacy or confidentiality of arbitration proceedings. The American Arbitration Association's Commercial Arbitration Rules (AAA Rules) do not specifically address the issue of the confidentiality of communications by the parties or the arbitrators, although they generally provide for privacy.

The Code of Ethics for Arbitrators in Commercial Disputes imposes an obligation of confidentiality on arbitrators. Similarly one commentator has expressed the opinion that although the law does not necessarily require it, arbitrators should not give out any information. For Construction Disputes, the rules of JAMS/Endispute Comprehensive Rules expressly provide for confidentiality of the proceeding and the award.

The National Arbitration Forum Code of Procedure generally provides for confidentiality of the proceedings and is somewhat more specific than the AAA rule.

Confidentiality of Arbitration Awards:

The statutes, private rules and commentary permit some confusion over whether and

top what extent arbitration awards are confidential. The provisions of the federal statute governing ADR prohibit disclosure of dispute resolution communications. Arbitration awards are not, however, included in the statutory definition of dispute resolution communication. The Federal Statute therefore does not seem to prohibit disclosure of the award.

In conclusion, the statutes and rules concerning the privacy of arbitration are generally that federal statutes expressly mandate confidentiality only for ADR procedures in the administrative process; the AAA commercial rules generally provide for privacy to be maintained by arbitrators but do not specifically address the issue of the confidentiality of communications by the parties or the arbitrators. Arbitration awards are generally not confidential and disclosure of awards is not necessarily prohibited, perhaps in part because of the need for a mechanism for challenging or enforcing awards through the courts which are public forums.

If you should have any questions please call Mr. Sissman at (703) 903-9646 in Virginia.