

Donald Trump and Stormy Daniels

An Arbitration Case Study

By Brian Farkas

Some law professors have all the fun. Our tumultuous political climate provides endless lecture topics for constitutional law professors. Ditto for those who teach criminal law. And immigration, administrative, and environmental law. Since President Donald Trump took office, these fields have seen an unyielding barrage of policy making, orders, and debates. Whatever one might think of the policies' merits, students are glued to their seats, hanging on their professors' every word.

Pity the poor souls who teach arbitration. How *dry*. How *specific*. How *irrelevant*. In the midst of these deeply consequential discussions about liberty and democracy, arbitration faculty have had seemingly little to contribute to public discourse.

That changed in early 2018, when the press reported that Michael Cohen, President Trump's longtime personal lawyer and lawyer for the Trump Organization, paid \$130,000 to Stormy Daniels (a.k.a. Stephanie Clifford) for her silence about her alleged affair with Trump a decade earlier. In exchange for the payment, Daniels signed a non-disclosure agreement containing a sweeping arbitration clause. This clause mandated absolute confidentiality and said that any disputes would be resolved through private arbitration. Yet Daniels sidestepped the arbitration clause and ignored an order issued by an emergency arbitrator, filing a public lawsuit seeking to invalidate the

entire agreement. Suddenly, arbitration came front and center into the political discussion.

Not only does the Daniels case hold students' attention, but it also illuminates several significant arbitration policy issues.

Brief Factual and Procedural Background

The tale begins in the summer of 2006, when Trump and Daniels allegedly began a year-long intimate relationship.¹ (Trump had married his current wife, Melania, in 2005, and their son, Barron, was born in 2006). Daniels did not discuss the alleged affair for years after it occurred, though sometime in 2011, she disclosed it during an interview with *In Touch Weekly*. *In Touch* declined to publish the story after Cohen purportedly threatened the magazine with a defamation lawsuit. Subsequently that same year, Daniels claimed that an ominous man approached her in a Las Vegas parking lot, urging her to maintain her silence about Trump. For five years, she did just that.

Trump announced his presidential candidacy in June 2015 and won the Republican Party nomination in July 2016. In October 2016, the *Washington Post* published the now-famous *Access Hollywood* tape in which Trump made various lewd remarks about women. Soon afterwards, several women came forward to tell their stories about Trump. Daniels decided that she, too, wanted to share her experience.

Cohen became aware of Daniels' intentions to disclose the affair. He quickly approached her to offer a lump-sum payment of \$130,000 in exchange for her ongoing silence. Daniels now alleges that the explicit purpose of this arrangement was to ensure that the story did not come to light in the weeks before the 2016 election.

“Not only does the Daniels case hold students' attention, but it also illuminates several significant arbitration policy issues.”

Daniels agreed to Cohen's terms. The parties memorialized their agreement in a document entitled "Confidential Settlement Agreement and Mutual Release; Assignment of Copyright and Non-Disparagement Agreement" dated October 28, 2016 (NDA). A separate "Side Letter Agreement" (Side Letter) gave the confidential names of the parties identified only by initials in the NDA: "DD" was Donald Trump, "PP" was Stephanie Clifford, and "EC" was Essential Consulting, LLC, a limited-liability company established by Cohen apparently for the sole purpose of making a settlement payment. Both the NDA and the Side Letter were signed by Daniels and her lawyer at the time, and the NDA was signed by Cohen on behalf of EC. Neither document was signed by Trump, although each had a line for a signature by DD.

Section 4 of the NDA mandated absolute confidentiality with respect to various information

"pertaining to DD and/or his family" and Section 3.2 mandated that Daniels deliver to Trump copies of any existing confidential information, in any medium, by November 1, 2016. In multiple sections, the NDA mandated that neither the underlying confidential information nor the NDA could be made public.

Section 5.2 of the NDA governed dispute resolution among the parties. The full text of Section 5.2, which is reproduced below, provided that the parties agree to binding confidential arbitration by JAMS, that the parties will split the costs of the arbitration equally, that they will have the right to discovery, that the arbitrator can impose damages, and that the parties understand they are giving up their right to trial and their right to appeal any award. The last part was highlighted in bold type.

In February 2018, claiming to be inspired by the Women's March and the emergence of the #MeToo

"In recognition of the mutual benefits to DD and PP of a voluntary system of alternative dispute resolution which involves binding confidential arbitration of all disputes which may arise between them, it is their intention and agreement that any and all claims or controversies arising between DD... and PP... shall be resolved by binding confidential Arbitration to the greatest extent permitted by law. Arbitration shall take place before JAMS ENDISPUTE ("JAMS") pursuant to JAMS Comprehensive Arbitration Rules and Procedures... and the law selected by DD... in a location selected by DD, and will be heard and decided by a sole neutral arbitrator ("Arbitrator") selected either by agreement of the Parties, or if the Parties are unable to agree, then selected under the Rules of the selected arbitration service. The costs and fees associated with any Arbitrator and/or Arbitration service shall be split equally among the parties to any such dispute. The Parties shall have the right to conduct discovery in accordance with the California Code of Civil Procedure Section 1283.05 et. seq. or any similar provision existing in the jurisdiction selected by DD and the written discovery requests and results of discovery shall be deemed to constitute Confidential Information. The Arbitrator

shall have the right to impose all legal and equitable remedies that would be available to any Party before any governmental dispute resolution forum or court of competent jurisdiction, including without limitation temporary, preliminary and permanent injunctive relief, compensatory damages, liquidated damages, accounting, disgorgement, specific performance, attorneys fees and costs and punitive damages. It is understood and agreed that each of the Parties shall bear his/its own attorneys' fees, expert fees, consulting fees, and other litigation costs (if any) ordinarily associated with legal proceedings taking place in a judicial forum, subject to the Arbitrator's reassessment in favor of the prevailing party to the extent permitted by law.

Each of the Parties understands, acknowledges and agrees that by agreeing to arbitration as provided herein, each of the Parties is giving up any right that he/she/it may have to a trial by judge or jury with regard to the matters which are required to be submitted to mandatory and binding Arbitration pursuant to the terms hereof. Each of the Parties further understands, acknowledges and agrees that there is no right to an appeal or a review of an Arbitrator's award as there would be a right of appeal or review of a judge or jury's decision."

movement, Daniels purportedly threatened to breach the NDA and publicize her affair with Trump. In response, on February 22, 2018, Essential Consulting filed an emergency arbitration proceeding in Los Angeles pursuant to Section 5.2 of the NDA seeking a temporary restraining order. An emergency arbitrator was appointed — Hon. Jacqueline A. Connor, a retired California state court judge. On February 27, 2018, Connor issued an order prohibiting Daniels from violating the NDA by, among other things, disclosing any of the confidential information covered by the NDA to the media or through court filings.²

Notwithstanding the arbitrator's order, Daniels filed a lawsuit in the Superior Court of California, Los Angeles County, on March 6, 2018. Both the NDA and a partially redacted version of the Side Letter were filed as exhibits.

The lawsuit does not seek money damages but rather a declaratory judgment that the NDA is not an enforceable contract.³ Daniels' argument has two prongs: First, the NDA is not a valid contract because Trump never signed it. Second, even if the NDA were a contract, it should be held unenforceable on public-policy grounds.

On March 16, 2018, Essential Consulting's attorneys quickly filed a Notice of Removal pursuant to 28 U.S.C. § 1441(b) to move the case to the federal court in the Central District of California.⁴ On April 2, 2018, Essential Consulting then filed a motion to compel arbitration pursuant to Section 5.2 of the NDA — in other words, a motion seeking an order requiring Daniels to bring her claims in private arbitration rather than court.⁵ Trump joined that motion the same day.⁶

The arbitration agreement and subsequent lawsuit about its enforceability — both still pending before

“Daniels' argument has two prongs: First, the NDA is not a valid contract because Trump never signed it. Second, even if the NDA were a contract, it should be held unenforceable on public policy grounds.”

the California federal court — reveal at least four important topics for arbitration advocates and scholars to consider.⁷

Is arbitration confidential?

A common subject of confusion is whether arbitration is a confidential proceeding. The short answer is that while arbitration is private, it is not always confidential unless explicitly agreed by the parties.⁸

Arbitration is private in the sense that the case is not filed on a public docket. In arbitration, unlike in state or federal litigation, the public cannot see the names of the parties, the names of the neutral(s), or any filed documents. The date, time, and location of trials are public; not so in arbitration. And while jury verdicts and judicial opinions are public, arbitral awards are private.

If an attorney is concerned about the confidentiality of the proceeding, she should include language in the arbitration clause itself providing that any dispute that may arise shall be entirely confidential, including the existence of that dispute, filings and testimony related to that dispute, and any resulting award. There should be penalties (liquidated damages) built into that agreement, so that neither party is likely to breach.

Indeed, this is precisely what the Daniels NDA does. Section 5.1.2, entitled “Liquidated Damages,” explicitly provides that each breach of the agreement shall result in a payment of \$1,000,000 from Daniels to Trump as the “reasonable and fair value to compensate DD [Trump] for any loss or damage resulting from each breach....”

Yet even when there is agreement on confidentiality, a party seeking to escape an arbitration clause can do exactly what Daniels did here — file a complaint in a public court asking the court to void the contract. This is effectively an end run around the process, because even if the party following the agreement (here, Essential Consulting) opposes the lawsuit, it has already “lost,” as the confidentiality has been violated. Once the contract has been made public, the media has access to it, as we know very well from the extensive reporting on the subject.

The only remedy is to seek massive punitive damages in the arbitration proceeding, assuming Daniels loses the court battle to invalidate the agreement. In her interview with Anderson Cooper on *60 Minutes*,

Daniels herself acknowledged that she was taking a significant financial risk by filing the lawsuit and appearing on television. (Cooper asked, "For sitting here talking to me today, you could be fined a million dollars. I mean, aren't you taking a big risk?" She replied, "I am.... [But] it was very important to me to be able to defend myself").

The distinction between a private process and a confidential one is critical for many parties concerned about the publicity of their dispute. Daniels shows the ways in which one party can subvert the other's desire for secrecy.

Which is the better venue: state or federal court?

As students learn about the statutory framework surrounding arbitration, they often confront a deceptively simple question: What's the difference between arbitration-related state and federal laws? The long answer involves a complex discussion of federalism and the ability of individual states to establish their own procedural laws. The shorter and more practical observation is that some states show greater skepticism toward arbitration in their statutes and common law.

Arbitration scholars are keenly aware that federal courts — led by the US Supreme Court — will invalidate state laws that run counter to the Federal Arbitration Act (FAA).⁹ With its generally liberal laws aimed at protecting consumers and employees from certain types of arbitration agreements, California has been a frequent target for the Supreme Court, which has repeatedly held that the FAA preempts such statutes.¹⁰

When Daniels filed her lawsuit, she and her lawyer were careful to do so in California state court. Within a week of that filing, Essential Consulting, LLC, transferred venue to the Central District of California federal court in Los Angeles. Why? Obviously, each party thought its chosen forum would be strategically advantageous. Daniels' attorneys probably anticipated that California's state courts would be more hostile to the enforcement of the arbitration clause, particularly given the public policy concerns raised.

After venue was transferred to the federal district court, Essential Consulting's motion to compel arbitration reveals Cohen's rationale for preferring federal

“ The distinction between a private process and a confidential one is critical for many parties concerned about the publicity of their dispute. Daniels shows the ways in which one party can subvert the other's desire for secrecy. ”

court: "The strong policy favoring arbitration set forth by Congress in the [FAA] dictates that this motion be granted, and that [Daniels] be compelled to arbitration, as she knowingly and voluntarily agreed to do."

Litigators regularly consider whether to file arbitration-related motions in state or federal court, taking into account the various procedural and political differences. The Daniels case offers a heightened example of such considerations.

Is this dispute arbitrable?

Arbitrability refers to the question of whether arbitrators or courts have the power to rule on the arbitrators' jurisdiction. When one party does not want to be bound by an arbitration agreement or does not believe that the "agreement" is enforceable, a problem arises: Do the arbitrators decide whether they have jurisdiction, or must a judge rule instead? Arbitrability is a somewhat confusing topic, replete with doctrinal complexities.¹¹

The Daniels case makes the topic easy to understand. The NDA containing the arbitration clause was between three parties: Essential Consulting, Daniels, and Trump. Cohen signed the agreement on behalf of Essential Consulting, and Daniels signed it herself. Trump did not sign.

Is it a valid contract? Daniels argues no, because Trump's acquiescence was material to her agreement. Cohen argues yes, because Daniels accepted the \$130,000; under the common law course-of-performance doctrine, the contract should be deemed ratified. Both have legal arguments as to the contract's validity, but the question is, which tribunal should hear the arguments and decide? The arbitrators or the court?

The federal court will issue a determination on this gateway question as it considers Essential Consulting's motion to compel.

How should the #MeToo movement impact arbitration policy?

The dispute between Stormy Daniels and Donald Trump illuminates another active conversation within arbitration: the intersection of confidential arbitration clauses and the #MeToo movement. Many argue that there should be a public policy exception to the enforcement of confidential arbitration clauses when there are allegations of sexual harassment. Such clauses, these voices contend, are used to silence victims and protect predators.

Others disagree, worrying that such a public policy exception could effectively "undo" arbitration clauses in employment contracts, giving many employees an avenue to escape arbitration whenever it doesn't suit them, even if they have previously agreed to arbitrate. Some scholars have also cautioned that a confidential arbitration process can be — at least in some cases — preferable for accusers as well as the accused.¹²

The Daniels case provides a window into this debate. On the one hand, Daniels is a successful producer and savvy businesswoman who voluntarily signed a contract with an arbitration clause. On the other hand, she found herself alone in a hotel room with a wealthy and powerful celebrity, and was allegedly subject to intimidation prior to the execution of the NDA.

For her part, Daniels explicitly rejected any association with the #MeToo movement during her *60 Minutes* interview: "This is not a 'Me Too,'" she told Anderson Cooper. "I was not a victim. I've never said I was a victim. I think trying to use me to further someone else's agenda does horrible damage to people who are true victims."

To what extent does Daniels fit into the #MeToo movement, consciously or not? Should the arbitration clause contained in her NDA be voided if she was subjected to physical, emotional, or situational intimidation prior to its execution? Or should she be held to the agreement as a matter of contract law and assessed liquidated damages for her breach of the agreement? These public policy questions extend far beyond Daniels' particular case; they are relevant for

“ When Daniels filed her lawsuit, she and her lawyer were careful to do so in California state court. Within a week of that filing, Essential Consulting, LLC, transferred venue to the Central District of California federal court in Los Angeles. ”

countless employees, particularly women, with such arbitration clauses in their employment agreements.

Concluding Thoughts

The Stormy Daniels case is replete with salacious details and political intrigue. But it also raises familiar and quotidian issues for scholars and practitioners. Confidentiality, federalism, arbitrability, and the #MeToo movement are all at the forefront of arbitration policy debates. So while constitutional law professors may have the most to say about our current administration, those who study arbitration can now see their work reflected in the headlines, too — for good or for ill. ■

Endnotes

1 This article relies on the allegations in Daniels' complaint, as well as various public reporting. The facts of this dispute were quickly evolving at the time that *Dispute Resolution Magazine* went to press. One of the most significant open factual questions is whether President Trump ever reimbursed Cohen for the \$130,000, and if so, whether he knew the reason for the reimbursement or the existence of the unsigned agreements.

2 Arbitrator Connor's February 27, 2018, temporary restraining order against Daniels is available at <https://www.nytimes.com/files/stormy-Daniels-restraining-order.pdf>.

3 Daniels' March 6, 2018, lawsuit, with the NDA and Side Letter as exhibits, is available at <http://www.chicagotribune.com/news/nationworld/>



Brian Farkas is an Adjunct Professor at Cardozo School of Law in New York City, where he teaches courses on arbitration and dispute resolution. He can be reached at brian.farkas@yu.edu.

ct-stormy-daniels-lawsuit-20180306-htmlstory.html.

4 Essential Consulting's March 16, 2018, Notice of Removal is available at <https://www.politico.com/f/?id=00000162-3136-d513-a767-ffb3e740000>.

5 Essential Consulting's April 2, 2018, Motion to Compel Arbitration is available at <https://www.courthousenews.com/wp-content/uploads/2018/04/Trump-Stormy-ARBIT.pdf>.

6 Trump's April 2, 2018, Joinder in Essential Consulting's Motion to Compel Arbitration is available at <https://www.politico.com/f/?id=00000162-88dd-d2e5-ade3-c9ffa5cf0002>.

7 The factual and procedural background above relates only to the dispute over the enforceability of the arbitration clause pending in California and does not delve into the also-pending criminal case involving Michael Cohen in the US District Court for the Southern District of New York, in which Daniels has sought to intervene.

8 Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006) ("Arbitration is private but not confidential. This is a paradox to the extent that it is seemingly contradictory, but states a truth. Arbitration is private in that it is a closed process, but it is not confidential because information revealed during the

process may become public").

9 Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards A Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131 (2012) (cautioning that "[t]he Court has embraced a preemptive federal arbitration procedural paradigm that expands arbitrator jurisdictional power, minimizes judicial arbitration oversight and marginalizes the role of state contract law and arbitration procedure rules").

10 See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

11 See, e.g., Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 BAYLOR L. REV. 753 (2004) (discussing procedural issues with arbitrability); Kristen M. Blankley, *Arbitrability After Green Tree v. Bazzle: Is There Anything Left for the Courts?*, 65 OHIO ST. L.J. 697 (2004) (outlining U.S. Supreme Court doctrine on arbitrability).

12 Jeannie Suk Gersen, "Trump's Affairs and the Future of the Nondisclosure Agreement," *The New Yorker* (March 30, 2018) (noting the bargaining power created by NDAs, as well as potential benefits of confidential dispute resolution mechanisms for victims).



MEDIATION WEEK

October 14–20, 2018

MEDIATION = CIVIL DISCOURSE

Robust, honest, frank, and constructive deliberation that seeks to advance an interest

Organizations and institutions from around the world will hold events in recognition of ABA Mediation Week. Visit americanbar.org/dispute to find more information about Mediation Week 2018, including:

- A toolkit of resources to help organizations and individuals promote mediation and Mediation Week.
- ABA 2011 Resolution 108, a call for action to make meaningful steps to enhance the constructive role of lawyers in promoting a more civil public discourse.
- Civility and the Legal Profession, A model CLE program for state and local bar associations.
- Instructions for how to register your own Mediation Week event.
- A list of events in your area and around the globe.

ABA Mediation Week celebrates mediation as one of several appropriate dispute resolution processes.

www.americanbar.org/dispute