Welcome to the second in our series of briefings for in-house counsel on key aspects of international arbitration. In this briefing we will examine the key issue of confidentiality in arbitration, which, alongside enforceability (to be explored in a subsequent briefing), is generally perceived to be one of the main advantages of arbitration.

Confidentiality refers to the obligations of the parties not to disclose information or documents concerning arbitration proceedings to third parties, including the initial submission of the dispute to arbitration, the documents produced in the proceedings (including witness evidence and written submissions) as well as the Award and its reasons. Whilst confidentiality will not be appropriate in every case (depending on the parties’ situation), generally speaking parties tend to desire to hold their arbitration proceedings on a confidential basis.

The question addressed in this briefing is whether the obligation of confidentiality in arbitration is as strict as it is generally perceived to be. We will examine this issue from two perspectives: that of the applicable national law and that of the institutional rules governing the arbitration.

“THE QUESTION ADDRESSED IN THIS BRIEFING IS WHETHER THE OBLIGATION OF CONFIDENTIALITY IN ARBITRATION IS AS STRICT AS IT IS GENERALLY PERCEIVED TO BE.”
Confidentiality of arbitral proceedings under English law
The confidentiality of arbitration has long been recognised in English law. Back in 1880, in the context of an arbitration clause in a partnership agreement, Sir George Jessel MR said “As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public”.

This is reflected by the general position under English law that the parties to arbitration, and the tribunal, are under implied duties to maintain the confidentiality of the arbitration, even in the absence of any such duty being expressly agreed. However, although the English legal system has traditionally been a great defender of arbitral confidentiality, more recent case law has established a number of exceptions which override this implied protection. These include:

1. **Order of the Court**: where a party to litigation seeks disclosure of documents generated in an arbitration, the court will compel such disclosure only if it considers it necessary for the fair disposal of the case (bearing in mind the confidentiality of the documents);²

2. **Protection of Legal Rights**: this most commonly involves disclosure to third parties, where disclosure of the relevant document is “reasonably necessary” to protect the “legitimate interests” of an arbitrating party in founding or defending a cause of action against the third party³ (for example, to enable a party to claim an indemnity for its liability to another arbitrating party⁴); and

3. **The interests of justice or the public interest**: This exception has been used in a number of different situations. One example is London & Leeds Estates Ltd v Paribas Ltd,⁵ in which the reports of an expert in a previous arbitration which were said to be inconsistent with those he had submitted in the instant proceedings were permitted to be disclosed. Mance J opined that the public interest in exposing such inconsistencies outweighed the parties’ rights to confidentiality. In Westwood Shipping, this exception was applied in the alternative where there was an arguable case of unlawful means conspiracy; Flaux J holding that confidentiality should not stand in the way of uncovering wrongdoing.⁶

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¹ Russell v Russell (1880) 14 Ch D 471
² Science Research Council v Nassé [1980] AC 1028
³ Ali Shipping Corporation v Shipyard Trogir [1997] EWCA Civ 3054
⁴ Hassneh Insurance Co of Israel v Mew [1993] 2 Lloyd’s Rep 243
⁵ [1995] 02 EG 134
⁶ Westwood Shipping Lines Inc and another v Universal Schifffahrtsgesellschaft mbH [2012] EWHC 3837 (Comm)
An International Comparison

Having established the position under English law, we set out below a comparison of a number of other important jurisdictions, which provide for differing degrees of confidentiality in arbitration:

<table>
<thead>
<tr>
<th>DUTY OF CONFIDENTIALITY</th>
<th>NO DUTY OF CONFIDENTIALITY</th>
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<td><strong>France</strong>: confidentiality is ensured by the 2011 reform of the French Code of Civil Procedure but only in domestic, not international, arbitrations</td>
<td><strong>Australia</strong>: courts have decided that confidentiality is not “an essential attribute” of arbitration and there is no implied duty</td>
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<td><strong>Hong Kong</strong>: the Arbitration Ordinance 2011 has express provisions regarding confidentiality and, as a default position, court proceedings relating to arbitration are to be heard in closed court</td>
<td><strong>Canada</strong>: hearings are conducted in private but there are doubts as to whether any further duty of confidentiality exists</td>
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<tr>
<td><strong>New Zealand</strong>: the Arbitration Act 1996 provides that every arbitration agreement carries an implied term that parties and the tribunal will not disclose confidential information</td>
<td><strong>Germany</strong>: although it is generally accepted that arbitrators are under implied obligations of confidentiality, there is thought to be no general implied obligation (and there is no express obligation) that parties maintain confidentiality</td>
</tr>
<tr>
<td><strong>Singapore</strong>: obligation of confidentiality applies as by default as a result of case law</td>
<td><strong>India</strong>: there is no express or implied duty of confidentiality, and even an express agreement may not be enforced in certain circumstances</td>
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<td><strong>United Arab Emirates</strong>: proceedings are confidential by default</td>
<td><strong>Russia</strong>: there is no express duty of confidentiality in Russian arbitration proceedings or arbitration-related court proceedings</td>
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<tr>
<td><strong>Sweden</strong>: courts have taken the view that duties of confidentiality cannot be implied</td>
<td><strong>Switzerland</strong>: Swiss legislation is silent on the issue but it is part of Swiss legal doctrine that arbitrators must maintain confidentiality</td>
</tr>
<tr>
<td><strong>USA</strong>: the US Federal Arbitration Act is silent on the issue and US courts have been reluctant to infer any implied duty of confidentiality</td>
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**The Institutional Arbitral Rules**

The second possible way in which a duty of confidentiality may be imposed in arbitration proceedings is via the relevant institutional rules. The institutional arbitral rules provide for confidentiality, this will override the position under the relevant national law. Conversely, where national law provides for confidentiality, the absence of such a provision in the applicable institutional rules will not negate that protection.

We consider below the confidentiality obligations in the five sets of arbitration rules chosen for these briefings, being those we come across most frequently in the context of international commercial disputes:

<table>
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<tr>
<th>INSTITUTION</th>
<th>RULE</th>
<th>PROTECTION</th>
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<tr>
<td>London Court of International Arbitration</td>
<td>Article 30 of the LCIA Rules 2014 contains express provisions imposing obligations of confidentiality, subject to exceptions which largely mirror those in English law.</td>
<td>Strong</td>
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<tr>
<td>Singapore International Arbitration Centre</td>
<td>Rule 35 of the SIAC Rules 2013 contains detailed provisions imposing obligations of confidentiality, subject to exceptions.</td>
<td>Strong</td>
</tr>
<tr>
<td>Stockholm Chamber of Commerce</td>
<td>Article 46 of the SCC Rules imposes a duty of confidentiality on the SCC itself and the tribunal but not the parties.</td>
<td>Weak</td>
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<tr>
<td>International Chamber of Commerce</td>
<td>The ICC Rules 2012 are largely silent on the question of confidentiality but Article 22.3 entitles the tribunal to make orders concerning confidentiality and to take measures to protect confidential information.</td>
<td>Weak</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>The UNCITRAL Rules 2013 do not include a general confidentiality obligation, although Article 34(5) details the circumstances in which an award can be made public.</td>
<td>Weak</td>
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</table>

**Conclusion**

As the foregoing demonstrates, it should not be assumed that arbitration necessarily provides total confidentiality as far as the proceedings, documents and Award are concerned. Confidentiality (or not) will depend on the jurisdiction or institutional arbitral rules applicable to the particular arbitration.

It is obviously crucial to have this in mind at the time of drafting an arbitration agreement. Even where the chosen governing law/institutional rules do not provide for confidentiality, a party can still insert an express provision into the arbitration agreement requiring confidentiality which will (generally) take precedence over the
applicable law/rules. Such a provision will be appropriate in many cases in the absence of clear national law or institutional rules.

However, having a clear confidentiality obligation is not the magic bullet. In practice it is often the case that a party will only consider its confidentiality rights after a wrongful disclosure has been made, and the horse has bolted. For this reason, a party should always be alert to the behaviour of the other side, so that an injunction can be applied for in the event of any suggestion of a breach. Given that it is often difficult (if not impossible) to assess the loss arising from a breach of confidentiality (as it will manifest in damage to a party’s reputation), it may also be sensible for the parties to agree liquidated damages payable in the event of a breach of confidentiality (subject to the applicable laws on penalties).

FOR MORE INFORMATION

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