

## Arbitration: Private & Confidential

When considering the relative advantages and disadvantages of litigation v arbitration, the confidentiality of arbitration proceedings is promoted as an important factor in favour of arbitration.

The perceived ability to keep matters private while arbitrating a dispute, makes arbitration obviously attractive to commercial parties.

### The root of the obligation of confidentiality

The confidentiality of arbitration has long been recognised in English law, and where England is also the seat of the arbitration, the parties and the tribunal (the arbitrators) are under implied duties to maintain the confidentiality of the hearing, documents generated and disclosed during the arbitral proceedings, and the award, i.e. the determination of the arbitration tribunal on the merits of the claim, analogous to a judgment in court proceedings.

The parties can, by agreement, water down or, more commonly, expand and make watertight those implied obligations of confidentiality, in the latter case either in the arbitration clause of the underlying commercial agreement between the parties, or by entering into a discrete confidentiality agreement.

Although the Arbitration Act 1996 does not provide for confidentiality, many of the institutional rules which govern arbitrations do, and those serve to bolster the implied duties of confidentiality. Many of the institutional rules also contain express provisions in relation to the privacy pertaining to various aspects of the arbitral proceedings.

### Who and what is covered by obligations of confidentiality?

Unsurprisingly, parties to an arbitration are bound by duties of confidentiality.

The position in relation to witnesses of fact who give evidence to the tribunal and/or who may receive documents in connection with their giving evidence of fact to the tribunal is less clear. Therefore, to ensure that witnesses of fact are similarly bound by obligations of confidentiality, they should be put on notice of the confidential nature of the arbitral proceedings by the parties' representatives or by the tribunal.

Expert witnesses are usually subject to a duty of confidentiality by reason of their retainer or having been given notice of the confidential nature of the proceedings.

Confidentiality applies to documents both (i) disclosed, and (ii) generated, in an arbitration.

The first category relates to documents which came into existence other than for the purposes of the arbitration. They must only be used (subject to exceptions, described below) for the purposes of the arbitration.

The second category relates to documents created for or because of the arbitration, such as correspondence between the parties or their representatives, correspondence between the parties and the tribunal, witness statements, expert reports, written submissions, orders etc.

The disapplication of confidentiality most commonly applies to the arbitral award, as it is this document which records the obligations of one

party to the other arising out of the arbitration. Where a party must disclose an award in order to enforce it, the court recognises that they may do so in the interests of justice.

### **How do the details of arbitral proceedings so often enter the public domain?**

The fact that an arbitration has commenced and the identity of the parties to it are not generally considered to attract qualities of confidence, which may account for such information being made public. Beyond that, generally details of arbitral proceedings are revealed (i) because exceptions to the duty of confidentiality in English law apply, or (ii) as a consequence of the interface between arbitration proceedings and the court, in certain limited circumstances.

### **Exceptions to the duty of confidentiality**

The exceptions to the duty of confidentiality are in a state of constant evolution but, broadly, fall in these categories:

- (i) Agreement or consent of the parties to exclude or limit the duty of confidentiality.

While some institutional rules provide for the publication of awards, the parties may expressly agree to limit the duties of confidentiality to permit the disclosure of an award for specified purposes, or agree on an ad-hoc basis, where the disclosure is in the interests of the parties, for example, to an insurer.

- (ii) Court ordered or sanctioned disclosure of documents generated or disclosed in an arbitration.

A court may order disclosure of documents generated in an arbitration which are relevant to the claim before the court where, taking into account the confidentiality of the documents as between the parties to the arbitration, the court considers disclosure necessary for the fair disposal of the case.

- (iii) Disclosure which is reasonably necessary for the establishment or protection of a party's legal rights

A document (in this context, most usually an award) may be disclosed to a third party where such disclosure is reasonably necessary for the protection of the legitimate interests of a party to the arbitration in connection with the advancement of a claim against, or defence of a claim brought by, a third party.

- (iv) Disclosure which is necessary in the interests of justice

There are various examples of when the court has determined that the interests of justice (and in some instances, public interest) in disclosure outweighed the parties' rights to confidentiality in documents disclosed or generated in arbitral proceedings, for example, the disclosure of documents relevant to a subsequent claim that alleged unlawful conduct, or to allow an expert's inconsistent testimony to be exposed.

### **The court's supervisory jurisdiction**

In England, the High Court has jurisdiction in respect of 'arbitration claims', which includes applications under the Arbitration Act 1996, claims to determine whether there is a valid arbitration agreement, whether an arbitration tribunal is properly constituted, claims to declare that an award by an arbitral tribunal is not binding, and enforcement proceedings.

The confidentiality of the arbitration is generally preserved in relation to arbitration claims to the court and, by way of example, arbitration claim forms may only be inspected by a non-party if the court considers that inspection is reasonably necessary to protect or establish a legal right.

While arbitration claims are usually heard in private, the public interest in the administration of justice usually requires hearings determining a preliminary point of law or of appeals on a question of law to be held in public. However, even in these cases, the court retains discretion. That discretion extends to the issues of identification of the parties in a judgment, whether to include or exclude sensitive information, and whether to publish a judgment at all.

Where arbitration claims are brought under the Arbitration Act 1996, which challenge arbitration awards on the grounds of substantive jurisdiction or serious irregularity, it is inevitable that the proceedings require the court to understand the issues which arose in the arbitration and how the arbitral proceedings unfolded. Any judgment on such a challenge could result in information which was confidential in the underlying arbitration entering the public domain.

A plea for the confidentiality of the arbitration proceedings to be preserved must be raised with the court promptly, and if not at the substantive hearing, then before the handing down of the judgment.

### **Is arbitration private & confidential?**

In answer to this question, the answer is not necessarily.

There is much greater scope for ensuring that confidentiality is preserved in arbitration than in litigation, but in arbitration, it is necessary to remain alive to the circumstances which threaten that confidentiality.

### **For further information, please contact:**



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