Lost in translation – what does confidentiality in arbitration really mean?
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Why do parties choose arbitration over litigation? Surveys repeatedly show that one of the single most important features of arbitration for the parties involved is the confidentiality that is generally viewed as being attached to the process. It will doubtless come as a surprise to many potential users of arbitration, therefore, that confidentiality is neither a “given” nor does it apply uniformly across those jurisdictions where parties traditionally using arbitration may wish to do business. If users of international arbitration are relying on some form of international “norm” or implied duty as regards confidentiality, then they are likely quickly to come a cropper. Is it time the international arbitration community demanded a more consistent confidentiality standard?

In determining the level of confidentiality afforded to arbitration proceedings, a number of key considerations arise; any express agreement between the parties; the law governing the contract in question; the law governing the situs or place of the arbitration; and any relevant Institutional Rules.

Arbitration is a consensual procedure. As such, the first port of call is generally to examine any express agreement which may exist between the parties. If privacy and confidentiality are of great importance to the parties, the best way to ensure this is achieved is to make specific provision in the arbitration agreement. Such a provision can, if necessary, be supported by an appropriate order of the Tribunal in due course. Clarity is the key. Those drafting arbitration clauses need clearly to state who is bound by it - and if third parties are to be bound, they will have to enter into separate confidentiality agreements - and exactly what material or information is to be treated as confidential.

In the cold light of day, it is obvious that giving thought to the issue of confidentiality right at the
outset can save considerable uncertainty further down the line. However, haste to seal a deal can often mean that parties do not think that far ahead. Equally, parties may actually consider the issue up front but assume, incorrectly, that all countries are like their own.

In the absence of an express obligation of confidentiality, the parties must look to the governing law. Unsurprisingly, the position on confidentiality and privacy varies, sometimes greatly, between jurisdictions. The analysis below, therefore, seeks to examine, under a specifically chosen sample of varying local laws, to what extent the arbitration process can be said to be truly confidential. The sample includes established EU states such as England & Wales and Sweden, more recent EU joiners such as Hungary, states which are in the process of acceding to the EU such as Romania, candidate countries such as Croatia, states which are still potential candidate countries, such as Bosnia-Herzegovina and, finally, a state wholly outside the EU, The People’s Republic of China.

**England and Wales**

It is a commonly held view that arbitrations in England and Wales are private and confidential. Whilst there is no statutory provision in the Arbitration Act 1996 which deals with such issues, arbitration is generally considered by the English Courts to be a private means of dispute and English law recognises that it is an implied term of arbitration agreements that the proceedings are private and confidential. This broad position is however subject to a few notable exceptions discussed below.

In the 1999 case of *Ali Shipping Corp v Shipyard Trogir*[^1], the Court of Appeal considered the exceptions to the general rule of confidentiality. The court set out the following exceptions recognised under English law:

- Disclosure made with the express or implied consent of the party who originally provided the material;
- Where there is an order of the Court, for example where an order is made for disclosure of documents generated by an arbitration for the purposes of a later Court action;
- Where leave of the Court has been given. Potter LJ recognised here that difficulties would arise with the question of what grounds would give rise to such leave being given;
- Disclosure when and to the extent reasonably necessary for the establishment or protection of an arbitrating party’s legal rights vis-à-vis a third party; and
- Disclosure required in the public interest.

*Confidentiality attaching to documents*

[^1]: Ali Shipping Corp v Shipyard Trogir
This principle of confidentiality attaching to documents created for or disclosed in an arbitration was taken a step further by the Court in the 2005 case of *Glidepath BV and Others v John Thompson & Others*[2], where the production of documents was necessary to assist in establishing a separate claim. There the Court considered and applied *Ali Shipping Corp v Shipyard Trogir* and held that arbitration proceedings and materials produced were treated as confidential to the parties and the arbitrator, subject to certain exceptions. It held that even at the stage before the Court ordered a stay, the private and confidential nature of proceedings ancillary to the arbitration process ought to be protected. The permission of the Court to a third party (i.e. a stranger to the arbitration and to the proceedings in which the stay had been ordered) to inspect the documents on the Court file should not be granted unless all the parties to the arbitration consented or there was an overriding reason in the interests of justice.

**Confidentiality attaching to the award**

Under English law, whilst the duty of confidentiality extends to the award itself, there is an important exception which must be borne in mind; namely the disclosure of the arbitral award in separate proceedings to enforce or protect the legal rights of a party to the arbitration agreement.

In the 1993 case of *Hassneh Insurance Co. of Israel and others v Mew*[3], Court had to decide whether a party to an arbitration could disclose an arbitral award in separate court proceedings against a third party in order to justify its claim against that third party. In the event, the Court decided that the award could be disclosed (setting aside the general duty of confidentiality) in circumstances where the disclosure was reasonably necessary to establish or protect a party’s legal rights against a third party. The Court held that, unlike other documents used in arbitration, an award determines the parties’ rights and obligations and is also potentially a public document in the context of supervision or enforcement by the Court. This decision was considered and applied by the Court the following year in the case of *Insurance Co. v Lloyd's Syndicate*[4].

This issue of the extent of confidentiality attaching to an award was considered further by the Privy Council in the 2003 case of *Associated Electric and Gas Insurance Services Ltd (“Aegis”) v European Reinsurance Co. of Zurich*[5]. Here the issue was raised as to whether an express confidentiality agreement relating to an earlier arbitration between two parties prevented one of those parties referring to the earlier award in a later arbitration between them. The Privy Council considered that the rationale for the duty of confidentiality was to determine disputes between parties to the arbitration in a manner that did not involve the disclosure of information to parties with interests adverse to those involved in the arbitration. The Privy Council held that the use of the earlier award in a later arbitration between the same parties would not give rise to this danger. Their Lordships went on to hold that to prohibit any disclosure of the award would frustrate a fundamental purpose of the arbitration by preventing enforcement of the award.
A further exception exists under English law to the general duty of confidentiality of an award where, if an application is made which seeks to invoke the Court’s supervisory powers in relation to the arbitration, or if the Court’s assistance is sought with regard to the enforcement of the award, a party may put the award and any reasons before the Court. In relation to the judgment itself, the Court held that in cases where publication of the Court’s judgment could result in the disclosure of sensitive or confidential information and/or where one of the parties can show that it will be prejudiced by the publication, the Court may order that its judgment should be released only to the parties involved or the Court may frame its judgment in a way so as to ensure no confidentiality is lost.

In summary, English law recognises an implied term in arbitration agreements that proceedings are confidential which also gives rise to an obligation not to disclose or use documents obtained in arbitration for any other purpose. In addition, arbitral awards are also considered confidential, though there is an important exception to this where disclosure of the award in separate proceedings is required to enforce or protect legal rights. The safest course of action, therefore, for parties wishing to arbitrate any dispute in an entirely confidential manner where English law is relevant is to ensure that a suitable confidentiality provision is specifically inserted into any arbitration agreement.

Sweden

Arbitrations in Sweden are governed by the Swedish Arbitration Act 1999, applicable to domestic and international disputes. There is no special law for cases where one or both parties are domiciled abroad. In complete contrast to the position in England, the Swedish Arbitration Act does not include any basic rules concerning the confidential nature of the proceedings. Parties to the arbitration are not under any duty of confidentiality, sanctioned by liability in damages or otherwise. Such obligation is neither inherent in the arbitral procedure, nor can it be inferred as having been agreed upon. There is, therefore, nothing to prevent a party to arbitration from making a dispute public if he or she wishes to do so.

Furthermore, under the Swedish Arbitration Act arbitrators themselves are not under any contractual obligation to maintain any confidentiality concerning matters relating to the dispute. In practice, however, it appears that this notwithstanding, arbitrators do observe a certain level of “discretion” regarding the arbitral proceedings.

Swedish case law on confidentiality in arbitration is very limited and the Supreme Court confirmed the above interpretation of the provisions (or lack of provisions) on confidentiality in the Swedish Arbitration Act in Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc[6].

Given that contracting parties are often extremely anxious that arbitration disputes be subject to a strictly sanctioned confidentiality - indeed, this is often one of the key reasons for a party to choose arbitration - for arbitrations taking place in Sweden under Swedish law, it may well be prudent to include a provision in the arbitration clause that the parties, their legal
representatives and the arbitrators may not, without proper cause (to be agreed), reveal anything relating to the arbitral proceedings initiated in support of the arbitration clause.

Hungary

The law governing arbitrations sited in Hungary is Act LXXI of 1994 on Arbitration (the "Arbitration Act").

Commercial contracts often contain a clause stating that disputes should be referred to the Court of Arbitration, administered by the Hungarian Chamber of Commerce and Industry. Whilst this perhaps the most common situation, there are two additional arbitration tribunals to which arbitration matters may be referred. The first of these is the Money and Capital Markets Arbitration Tribunal, which is regulated by Act CXX of 2001 on Capital Markets and the second the Telecommunications Arbitration Tribunal, regulated by Act C of 2003 on Electronic Telecommunication. Each tribunal follows its own procedural rules when conducting arbitrations.

Whilst the Arbitration Act does not expressly set out any rules on the subject of confidentiality, section 29 does provide that, unless there is a contrary agreement from both parties, arbitration proceedings are not to be public. In addition, the procedural rules of the respective arbitration tribunals themselves have specific requirements as regards confidentiality; for example, the procedural rules of the Hungarian Chamber of Commerce and Industry's Court of Arbitration, contain the following requirements:-

- Arbitrators may not divulge information or make any statement [to any third party] in respect of any case which has either closed or is in progress.
- The arbitration Court and the parties should both keep information on both proceedings that are pending and decisions already made as confidential.
- In conciliation-mediation proceedings, information in connection with the proceedings can only be supplied to third parties if both the parties and the conciliator-mediator agree.

Whilst there have been no significant changes to the Arbitration Act over the last 10 years, as both the Money and Capital Markets Arbitration Tribunal and the Telecommunications Arbitration Tribunal are relatively new, the procedural rules are evolving. Watch this space!

Romania

Arbitration in Romania is generally conducted according to book IV of the Romanian Civil Procedural Code ("CPC"). The provisions set out in this Civil Procedural Code govern both
institutionalised and ad-hoc arbitration. In addition, there are the Rules of Arbitration (the “Rules”), which govern institutional arbitrations. These Rules have been adopted by the Court of International Arbitration, which is attached to the Romanian Chamber of Commerce and Industry.

Article 14 of the Rules refers to the obligation of confidentiality of the court, the tribunal, the staff of the court and the Chamber of Commerce and Article 7 provides expressly that the arbitration file should be kept confidential. Interestingly, Article 353 of the CPC expressly provides that the arbitrators are responsible for paying damages in circumstances where they are in breach of confidentiality. In this context, a breach of confidentiality would include publishing or divulging any information that comes to light in the course of the arbitration proceedings without the agreement of the parties undergoing arbitration.

Croatia

Although the vast majority of litigation is still handled by the regular courts, it appears that arbitration is becoming increasingly popular in disputes between commercial parties in Croatia.

Following the dissolution of Yugoslavia, Croatia adopted the rules that had formerly been part of a Civil Procedure Code. In addition, in 2001 the Croatian Parliament also passed a new arbitration law. This remains the principal law governing arbitration procedure in Croatia and is known as the Law on Arbitration (National Gazette 88/01). There are different sets of voluntary rules, for example the Zagreb Rules, and parties are allowed to select their own procedural rules. The main institutional arbitration court is called the Permanent Arbitration Court and it forms part of the Croatian Chamber of Commerce.

In a growing arbitration market, prospective international users will be pleased to learn that, in the absence of an express contrary agreement between the parties, arbitration proceedings are confidential.

[1] [1999] 1 WLR 314
[2] [2005] EWHC 818 (Comm)
[3] [1993] 2 Lloyd’s Rep 243
[5] [2003] 1 WLR 1041