Confident in International Arbitration's Confidentiality?

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At the same time, however, the scope of confidentiality in international arbitration can vary from one jurisdiction to another and from one stage of the arbitral process to another. Moreover, the relevance of confidentiality is today broadly discussed in the international arbitration community. Indeed, two leading practitioners have recently argued that the implied duty of confidentiality under the law of England & Wales should be brought to an end. While they do not depict the confidentiality of the arbitral process as something that is necessarily negative, they maintain that, rather than being a presumption, confidentiality should be a choice for the parties.

In view of this evolving legal landscape, this article provides an overview of confidentiality in international arbitration and highlights some circumstances in which aspects of the arbitral proceedings or the award itself may become exposed.

Confidentiality in the UAE and the Broader Gulf Region

In the UAE, domestic law provides no general duty of confidentiality. Nevertheless, in Case No. 157/2009, the Dubai Court of Cassation held as a general principle that arbitration is a private process to be conducted in secret unless the parties agree otherwise.

The procedural rules of arbitral institutions in the UAE reinforce this notion. The Dubai International Arbitration Centre (DIAC) provides for the confidentiality of arbitration proceedings "save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award." Similarly, the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) has rules on the confidentiality of awards (Article 28) and hearings (Article 33).

Confidentiality in the UAE's so-called "offshore" jurisdictions is even more robust. In the Dubai International Financial Centre (DIFC), Article 14 of the DIFC Arbitration Law, DIFC Law No. 1 of 2008, provides that "[u]nless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court." This standard is reflected in Article 30 of the rules of the DIFC-LCIA Arbitration Centre, which provide that "the parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials … and all other documents produced," while Article 19(4) of the DIFC-LCIA rules provide that "all hearings shall be held in private, unless the parties agree otherwise in writing."

The Arbitration Regulations of the Abu Dhabi Global Market (ADGM) likewise take a robust approach to confidentiality. Section 40 of the ADGM Arbitration Regulations states that "unless otherwise agreed by the parties, no party may publish, disclose or communicate any Confidential Information [defined as "any information relating to: (a) the arbitral proceedings under the arbitration agreement; or (b) an award made in those arbitral proceedings"] to any third party" and then provides a list of limited exceptions (e.g., pursuing a legal right or having a legal obligation to disclose the information to a governmental or regulatory body, court, or tribunal), which could lead to the publicity of some information related to the arbitration.

The situation in the Gulf Region more broadly is not dissimilar, though national arbitration laws tend to be

silent on the matter of confidentiality.

In Bahrain, Arbitration Law No. 9 of 2015, like the UNCITRAL Model Law that it mirrors, is silent on the question of confidentiality. However, Article 20(4) of the rules of the Bahrain Chamber for Dispute Resolution (BCDR-AAA) states that "[h]earings are private unless the parties agree otherwise or the law provides to the contrary."

Like the Bahraini law, the new Qatar arbitration law is silent on confidentiality. Under Article 41 of the rules of the Qatar International Centre for Conciliation and Arbitration (QICCA), however, every step of the arbitration is described as confidential and no publication is made without the prior written consent of all parties.

Article 43.2 of the Saudi arbitration law provides that the arbitral award shall remain confidential unless the parties agree otherwise, but the law does not have a provision relating to the confidentiality of the proceedings. The Saudi Centre for Commercial Arbitration (SCCA) covers both of these bases through its rules. Article 38 of the SCCA's arbitration rules provides that "[c]onfidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator, nor by the Administrator" and goes on to state that "[e]xcept as provided in Article 22 [relating to privilege], unless otherwise agreed by the parties or required by applicable law, the members of the Tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the Award."

Confidentiality in International Arbitration Beyond the Gulf Region

Broadly speaking, confidentiality is also recognized in arbitral proceedings in most of the prevailing international arbitration jurisdictions, although there are some differences in the contours of the confidentiality provided. Many countries provide for a duty of confidentiality either implicitly (e.g., England and Singapore) or explicitly (e.g., Switzerland and Hong Kong). Other countries, such as the United States and Australia, are more reluctant to edict a principle referring to arbitration as a confidential method of dispute resolution, leaving it to the parties or the courts to decide. Sweden, where arbitration is public unless the parties agree otherwise, sits at the far end of the spectrum.

Some countries lack precision on the matter. For example, France clearly provides for a duty of confidentiality in domestic arbitration, but whether such provision applies to international arbitration is still unclear and debated amongst French practitioners.

The procedural rules of most of the key international arbitral institutions also generally refer to arbitration as being confidential unless the parties agree otherwise. The London Court of International Arbitration (LCIA), International Centre for Dispute Resolution (ICDR), Singapore International Arbitration Centre (SIAC), and Hong Kong International Arbitration Centre (HKIAC) all provide a mandatory duty of confidentiality unless otherwise agreed by the parties.

Article 28(3) of the UNCITRAL Arbitration Rules provides for confidentiality of hearings "unless the parties agree otherwise," and Article 34(5) states that "an award may be made public with the consent of all parties." The use of "may be" instead of "must be" has not gone unnoticed and invites for flexibility.

Although the arbitration rules of the International Chamber of Commerce (ICC) do not expressly provide for a duty of confidentiality, Article 22(3) states that "[u]pon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings … and may take measures for protecting trade secrets and confidential information."

Challenges to the Preservation of Confidentiality in International Arbitral Proceedings

While the confidentiality of arbitration is usually well preserved, especially if parties consider it as *sine qua non*, there are times when confidentiality might be endangered.

The difficulty of approaching the concept of confidentiality in arbitration not only results from the multiplicity of actors involved who might not be bound by the arbitration rules (e.g., witnesses and translators) or the multiplicity of rules dealing with confidentiality in different ways but also because arbitration runs through different stages that might not all fall under the scope of an applicable rule on confidentiality. For example, as noted above, some laws or rules explicitly provide for confidentiality of the award but remain silent on the matter of the confidentiality of the proceedings.

The preservation of confidentiality can be a particularly acute challenge during the enforcement stage. Enforcement of an arbitral award in a foreign country requires recourse to a state court, and the treatment of confidentiality is not uniform at this stage of the process across jurisdictions.

In the UAE, enforcement of arbitral awards is treated like a regular litigation. If a party seeks enforcement of an arbitral award, it has to present its claim to the Court of First Instance where the award-debtor has assets. The enforcement process remains confidential, meaning that judges are not allowed to disclose the award they have been provided. Nevertheless, they sometimes provide information on the case in their final decision that makes references to the award, names and arguments of the parties, and the amount awarded. Since this final decision is publicly accessible, the confidentiality of the award may not always be fully preserved.

With respect to the DIFC, the DIFC Courts issued a Practice Direction supporting for the confidentiality of arbitration-related proceedings in 2013 (Practice Direction 2/2013). Pursuant to DIFC Court Rule 43.41 and Practice Direction 2/2013, all arbitration-related proceedings are to be held in closed court unless one of the parties applies for the matter to be held in open court or the court "is satisfied that those proceedings ought to be heard in open court." Practice Direction 2/2013 also provides that a court "must not make a direction permitting information to be published [in such a closed-court proceeding] unless – (a) all parties agree that the information may be published; or (b) the Court is satisfied that the information, if published, would not reveal any matter (including the identity of any party) that any party reasonably wishes to remain confidential."

Section 30 of the ADGM Arbitration Regulations has substantively identical provisions, though it provides for closed-court proceedings unless the parties agree that the matter should be heard in open court or the court concludes that the proceedings should be held in open court.

Coupled with the rules of an arbitral institution that provides for a high degree of confidentiality, these DIFC and ADGM provisions provide for the possibility of nearly airtight private arbitral proceedings.

In some jurisdictions, however, the arbitral award becomes part of the public record with few limitations during the enforcement stage. In the United States, for example, when a party seeks enforcement of an arbitral award, a copy of the award must be provided to the court, and the ensuing litigation is, most of the time, conducted in public proceedings. In Mead Johnson & Co. v. Lexington Ins. Co., the court concluded that "[o]nce a confidential settlement agreement or arbitration decision becomes the subject of litigation, it must be opened to the public just like any other information." Such rules may result in the confidentiality of the arbitration process not being preserved.

Another consideration that enters into the equation is exactly how one enforces a confidentiality obligation or the appropriate redress once confidentiality is breached. In terms of enforcing confidentiality, a party may apply to the arbitral tribunal for an order prior to the issuance of an award, though ultimately the tribunal may have difficulty enforcing its order other than through imposing costs on the breaching party. Therefore, the best scenario may involve seeking an injunction through the local courts in the jurisdiction where the disclosure is likely to be made, meaning that, once again, the applicable rules may vary depending on the jurisdiction.

Conclusion

While international arbitration is not confidential by nature, arbitral proceedings and awards are still

frequently considered confidential in practice. However, not all national arbitration laws and institutional rules have incorporated confidentiality provisions. As a result, the degree of confidentiality can vary from one jurisdiction to another, and confidentiality might be jeopardized in the event that a party seeks the enforcement of an arbitral award in another country.

However, arbitration is a consensual method of dispute resolution where the parties' convenience is at the heart of the process. The solution is for parties, who might want to reassure themselves that proper protection of confidentiality is in place, to insert a precise clause providing for the confidentiality of arbitration proceedings and awards in their commercial contracts. It is important that such parties diligently choose seats and rules providing for a strong policy on confidentiality.

Al Tamimi & Company's Arbitration team regularly advises on dispute resolution and arbitration matters. For further information please contact Thomas Snider (t.snider@tamimi.com).