Kluwer Arbitration Blog

Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?

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The terms ‘Privacy’ and ‘Confidentiality’ had been used in arbitration interchangeably until the latter half of 20th century. While ‘Privacy’ means that no third party can attend arbitral conferences and hearings, ‘Confidentiality’ refers to non-disclosure of specific information in public. Private hearings do not necessarily attach confidentiality obligations to the parties to arbitration. The general assumption that arbitration proceedings are both private and confidential stands corrected in the 21st century. Nevertheless, confidentiality is one of the primary reasons for arbitration being the preferred option for commercial dispute resolution.

The said assumption flows from the traditional understanding of arbitration agreement which is a private contractual arrangement. This changed in the 1990s with Australian and Swedish courts rejecting any implied duty of confidentiality in arbitration. The Swedish Supreme Court in *AI Trade Finance* held that no implied duty of confidentiality existed in private arbitrations under the UN-ECE rules or Swedish law. The Australian High Court in *Plowman* observed that private arbitration hearings do not clothe the disclosed information and documents with confidentiality since absolute confidentiality is absent in Australia.

These precedents extend confidentiality protection to only such cases where parties intended to keep particular information private. This led to non-uniform application of confidentiality principle to arbitrations globally. To clarify this, several jurisdictions came out with new arbitration laws and some arbitral institutions amended their rules.

The undesirable publicity of the dispute between US-based consulting firm AlixPartners and financial investor Kingsbridge Capital Advisors has led to a debate over confidentiality of arbitral proceedings (see, for example, Stephan Balthasar’s post on confidentiality in arbitration).

While some nations and arbitral bodies notified that implied confidentiality cannot be assumed in arbitration proceedings, others have followed the traditional approach to impose a duty on the arbitrators, parties or both. The nature of arbitration proceedings and extent of confidentiality is dependent upon:-

- The seat of the Arbitration and;
- The arbitral rules applicable to the Arbitration.

The confidentiality issue is complicated due to the involvement of multiple actors (witnesses, translators, officials of the arbitral institution, etc.) in arbitration who—unlike the arbitrator(s) and parties—are not governed by the arbitral rules or arbitration agreement even though they have access to confidential information.

Confidentiality protection regime- The full picture

There is no uniformity on the confidentiality principle's scope of application amongst countries and international arbitral institutions. Though the English Arbitration Act 1996 is silent on confidentiality, there are three rules:-

- Arbitration proceedings must be held in private;
- Implied confidentiality in every arbitration;
- Such confidentiality is subject to certain exceptions, namely court order, parties' consent, public interest and reasonable necessity. The Court of Appeal in *Shipyard Trogir* formulated these exceptions for the first time.

English courts seek to protect confidentiality as long as it is not conflicting with the delivery of justice. *Emmott* divided all confidential information into two –

- Information inherently confidential (trade secrets); and
- Information protected by implied duty of confidentiality such that the same finds application only in arbitration. It also followed *Shipyard Trogir* to recognize the exceptions to implied confidentiality.

South East-Asia is increasingly becoming the center for international commercial arbitration. Singapore is home to the Singapore International Arbitration Centre (SIAC) and the local arbitration laws explicitly provide for confidentiality in court proceedings emanating from arbitration on the parties' request. The general obligation of confidentiality is implied in the arbitration agreement. In *AAY v. AAZ*, the Singapore High Court opined that non-disclosure of parties' identity amounted to protection of confidentiality of arbitral proceedings. The High Court reiterated the respect for confidentiality in arbitration while considering the question of sealing arbitration documents (for more on court's reasoning, refer to Darius Chan's post).

The Hong Kong Arbitration Ordinance (HKAO) expressly imposed confidentiality in arbitration proceedings from 2011, mandating non-disclosure of any information pertaining to arbitral proceedings. Where parties do not agree on confidentiality measures, statutory restrictions will apply. Mandatory legal disclosures, disclosure necessary for enforcing a right and disclosure in course of challenging the arbitral award are the three exceptions.

The Philippines Alternative Resolution Act 2004 promotes party autonomy in dispute resolution and explicitly provides for confidentiality in arbitral proceedings. Courts can issue protective orders to prevent disclosure of documents which are proved as confidential (for more information on the protective order regime in Philippines, refer to Ileana Smeureanu's post).

However, jurisdictions like US and Australia reject any implied confidentiality. Though the US Court of Appeals have affirmed that any question on applicability of confidentiality in arbitration is a question on the very nature of the process, it is erroneous to presume that all information

tendered during arbitration will remain confidential. Parties have the autonomy to decide if they wish to disclose the details of arbitration and award. However, confidentiality is frequently violated by parties and witnesses in US. The Australian High Court in *Plowman* distinguished privacy from confidentiality, observing that the latter is not an essential attribute of arbitration.

The UNCITRAL and Stockholm Chamber of Commerce (SCC) Rules have a limited role, merely providing for private hearings and confidentiality of awards. The ICC *per se* do not provide for the confidentiality of awards, materials and Tribunal's deliberations, unless requested by the party. LCIA obligates parties to keep the (i) award, (ii) all materials and documents presented and, (iii) the Tribunal deliberations confidential. It allows for three exceptions to this rule namely, court order, parties' consent, public interest and reasonable necessity. Since WIPO aims to protect IP and trade secrets, it has a strict confidentiality protection regime.

How can confidentiality be maintained in International commercial arbitration?

There is no universal approach to maintaining confidentiality in arbitrations. However, parties are free to decide the degree of confidentiality they desire. Special care must be observed while drafting the arbitration clause to ensure confidentiality of parties' dealings and interests. Common and civil law courts have contradicting opinions on different confidentiality issues like:-

- Does the duty of confidentiality extend only to commercially sensitive information and awards or to all information relating to proceedings? ;
- Are witnesses obligated to maintain confidentiality? And;
- Whether confidentiality must be maintained during court proceedings arising out of arbitration?

Though the institutional rules favor confidentiality, the ICC Rules does not provide for the same *per se*, leaving it to the Tribunal's discretion. Due to the inconsistencies in domestic laws and institutional rules, parties must protect their interests by having specific confidentiality provisions in arbitration agreement.

- **Confidentiality requirements for documents**– The arbitration clause should provide for confidentiality for all documents exchanged and steps to avoid disclosure. This ensures non-disclosure of business secrets. Where malafide disclosure happens, the defaulting party would be liable to compensate the 'victim'.
- **Confidentiality obligations of third-parties**– Statements, tribunal's deliberations and the final award should be maintained as confidential by the tribunal, parties, witnesses, experts and administrative personnel. All witnesses must sign a confidentiality undertaking.
- **Choice of governing arbitral law-** A legal regime having strong confidentiality protection is preferable.

These provisions apply where adopted arbitral rules fail to provide sufficient confidentiality protection. Though commercial parties consider an expansive arbitration clause detrimental to the deal, it must be comprehensively negotiated at the initial phase. Parties must state clearly the confidentiality protection required to ensure effective drafting of the arbitration clause.

Suggestion for a uniform rule

Different arbitral institutions fail to provide a uniform standard, due to the prevailing competition

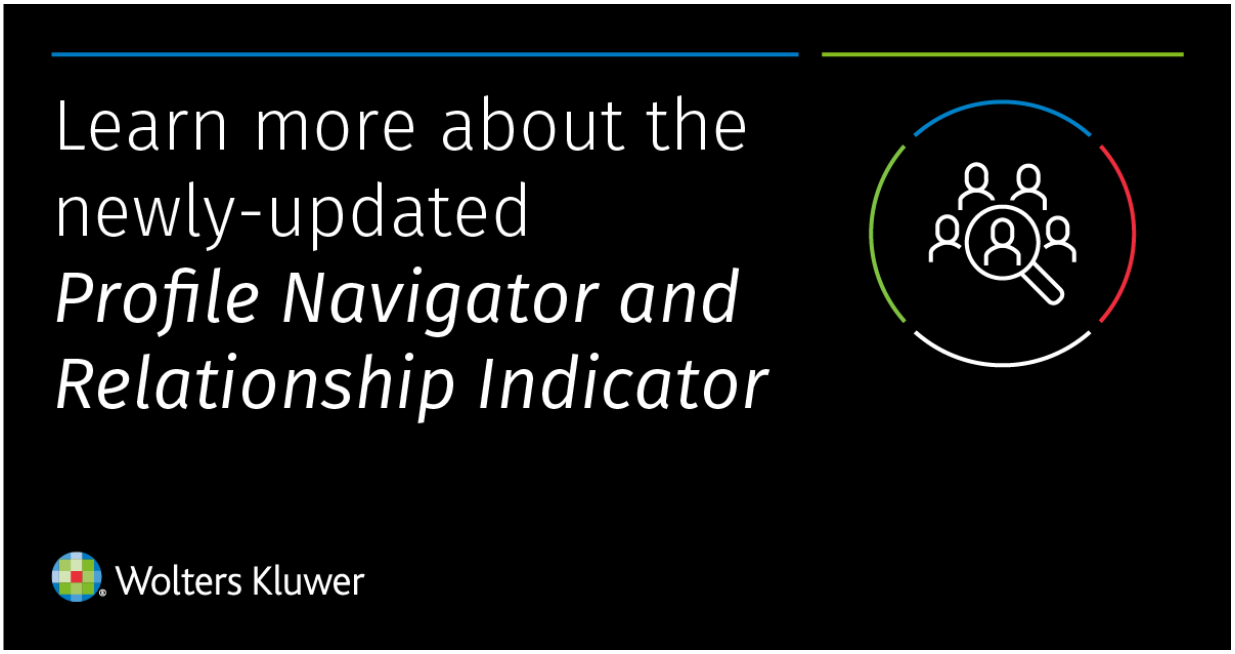
in arbitration business. Since parties often choose a generic arbitration clause to avoid focusing on contingent future disputes, uniform confidentiality protection mechanism is the need of the hour.

This author proposes that when arbitration commences the tribunal should get parties' consent on the scope of confidentiality. Where parties fail to agree, the arbitrator(s) will pass a protective order deemed accepted by the parties. Where a party alleges violation of the confidentiality agreement or protective order, the tribunal can resolve the same. If such violation happens after conclusion of arbitration, it must be resolved by the same tribunal—given its familiarity with the confidentiality agreement/protective order.

A protective order should incorporate certain exceptions. Even if parties only incorporate a generic arbitration clause with no confidentiality protection, this order will still apply. Due to this, parties can avoid approaching courts if confidentiality provisions are breached. An arbitral tribunal however cannot pass a protective order without informing parties about the same on commencement of arbitration. '

Conclusion

In a 2012 post, the author considered confidentiality as one of the biggest benefits of international commercial arbitration, for commercial aspects. It ensures that legal complications in one market do not affect the profitable projects in another. Domestic judicial pronouncements, however, have caused a split in the understanding of confidentiality. Hong Kong and New Zealand provide for statutory confidentiality protection and privacy in court hearings over the awards. England and Singapore provide for implied confidentiality in arbitral proceedings. Local courts further broaden the legal regime by providing exceptions to the general rule of non-disclosure. On the other hand, Sweden and US do not impose any legal duty of confidentiality. In this light, arbitral institutions should strive to remove uncertainties on confidentiality protection regime in international arbitrations.



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