Kluwer Arbitration Blog

The English Approach to the Law Governing Confidentiality in International Arbitration

Maxi Scherer (WilmerHale & Queen Mary University of London), Maria José Alarcon (Assistant Editor for Investment Arbitration) (Squire Patton Boggs – Paris), and Veronika Reisinger (NYU School of Law) · Thursday, August 18th, 2022

In November 2021, the Law Commission of the United Kingdom announced its review of the English Arbitration Act 1996. Among the critical issues of the reform is the debate on whether to codify the existing principle of implied confidentiality of arbitration proceedings under English law. While the principle of implied confidentiality is largely settled in England, the question of which law governs confidentiality issues is not.

Confidentiality in Arbitration: Definition and Delimitation

Despite privacy and confidentiality regarded as universally recognized "essential ingredient[s] of arbitration" (see *Hassneh Insurance Co of Israel v Mew*), confidentiality in arbitration lacks a universal definition and description of the duties associated with it. In common law jurisdictions, the legal bases for confidentiality duties have been developed over the course of various court decisions of binding nature, whereas civil law has developed this concept by means of (a few) isolated statutory provisions (e.g., Spanish Arbitration Act, art. 24.2, Peruvian Arbitration Law, art. 51.). Nonetheless, both common and civil legal traditions agree that confidentiality encompasses "a duty of an individual to refrain from sharing confidential information with others", except when there is the legal authority, justification, or express consent to do so (see *Legal Dictionary*).

Generally speaking, confidentiality and privacy are conceptually different: "[p]rivacy means that no 'outsider' is allowed to participate in arbitral proceedings, whereas confidentiality refers to an obligation not to disclose information acquired during arbitration." While some authorities have drawn a sharp distinction between the two (see *Dolling-Baker v Merrett*; *Ali Shipping*), others have treated privacy and confidentiality as one and the same (see *London and Leeds Estates Ltd v Paribas Ltd*; *Hassneh Insurance Co of Israel v. Mew*). Nonetheless, the two concepts are intertwined, and are often assessed together.

Implied Obligation to Maintain Confidentiality of Arbitral Proceedings Under English Law

The English Arbitration Act 1996 does not expressly provide for confidential arbitral proceedings,

since the drafters in 1996 regarded privacy and confidentiality to be "better left to the common law to evolve" given the myriad of exceptions to confidentiality, while acknowledging that "none doubt at English law the existence of the general principles of confidentiality and privacy" (*Emmott*, citing Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, 1996, reprinted). Thus, English common law has long recognized the duty of confidentiality as an implied obligation arising out of the parties' agreement to arbitrate (see *ex multis Ali Shipping*; *Dolling Baker*). In fact, the parties' choice to arbitrate instead of litigating in court is (partly) due to their expectation of the hearings being private (see *Emmott*, at 62; *Hassneh Insurance Co of Israel v. Mew*, at 246-7; *City of Moscow*, at 2 and 30).

Which Law Governs Confidentiality Issues?

Despite frequently applying the concept of an implied duty of confidentiality, English legislators and courts have yet to answer the question of which law governs confidentiality duties. Today, case law is far from uniform and rarely touches specifically upon the governing law aspect. Yet, in cases where different laws govern the arbitration agreement, the law of the seat and/or the underlying contract, the question of the applicable law to determine confidentiality will have to be tackled. Below, three approaches to the applicable law are presented.

(i) The Law Governing the Arbitration Agreement: Confidentiality as an Implied Duty of the Arbitration Agreement?

Given that English law recognizes an implied duty of confidentiality arising out of the agreement of the parties to arbitrate, the logical consequence is that the law governing the arbitration agreement also governs all matters related to confidentiality. Even more so, if parties expressly provide for a duty of confidentiality within their arbitration agreement, the law governing the arbitration agreement will determine confidentiality stipulated therein.

Recalling the English decisions *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* and *Kabab-Ji SAL v Kout Food Group*, even if the law governing the agreement governs confidentiality, whenever there is a lack of an explicit choice thereof, English courts will likely apply the law of the main contract to the arbitration agreement and its implied duty of confidentiality.

(ii)* Lex contractus*: Confidentiality as a Substantive Matter?

Parties might insert a confidentiality clause in the main contract that primarily dictates the confidential execution of the contract. *Haas* and *Oberhammer*, for instance, argue that this contractual confidentiality should also extend to ancillary arbitration proceedings. In those cases, confidentiality arises as an express obligation of the main contract, which is why the law of the main contract will govern confidentiality.

Even absent a contractual confidentiality provision, confidentiality may be regarded as a substantive rather than a procedural matter, which is why the *lex contractus* would apply. In England, especially in line with the business efficacy test, contracts will frequently be impliedly confidential if confidentiality is necessary for business efficacy or essential "to make the contract work" (see *Ali Shipping*, considering *Hassneh Insurance Co of Israel v. Mew*, though later stating that "the implied term ought properly to be regarded as attaching as a matter of law" and not to the

efficacy of a contract). For instance, licencing contracts of intellectual property rights may inherently require confidentiality to protect the parties' rights. Hence, confidentiality is imminent in the contract, which extends also to subsequent proceedings arising thereout.

(iii) Law of the Seat: Confidentiality as a Corollary of Hearing Privacy?

The law of the seat represents the procedural law of the arbitration and typically governs matters like the conduct of the hearings as well as the relationship of the arbitration to national state courts. In fact, the law of the seat may also serve as the legal basis for confidentiality duties. This notion is primarily based on considering confidentiality as a logical extension of privacy. In *Hassneh Insurance Co of Israel v. Mew*, Colman J acknowledged that "[i]f it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing." Similarly, in *Ali Shipping*, Potter LJ mentioned that "the obligation of confidentiality [] arises as an essential corollary of the privacy of arbitration proceedings." If one, thus, regards confidentiality as an extension of the privacy of arbitration, the law governing privacy, namely the law of the seat, will also govern confidentiality issues.

Similar to England, Singapore has adopted a view that considers confidentiality to be an implied duty. However, the Singaporean High Court in *AAY v. AAZ* [2011] 1 SLR 1093 took a clear stance on when this notion of confidentiality applies: "[W]here Singapore is to be the seat of the arbitration [] confidentiality will apply as a substantive rule of arbitration law, not through [Singapore's arbitration legislation], but from the common law."

In light of the review of the Arbitration Act 1996, it should be noted that the attractiveness of a seat to arbitrate may be tied to the notion of confidentiality provided for by that law. In 1995, the Australian High Court sent shock waves throughout the arbitration community when it stated in *Esso* that arbitration is a public process unless a contrary agreement explicitly provides for confidentiality. As reflected in case studies finding that 83% of in-house counsel regarding confidentiality as an "important" or "quite important" characteristic of arbitration, New Zealand in 2007 saw the need to react to *Esso* by explicitly providing for confidential arbitration proceedings whenever New Zealand is the seat of an arbitration. In 2010, Australia decided to return to confidential arbitrations to increase its attractiveness as a seat for international commercial arbitrations and incorporated an almost verbatim provision as that of New Zealand's. Likewise, English courts have acknowledged the importance of confidentiality in the choice of England as a seat: "Among features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality" (see *City of Moscow*).

A similar view was taken in the recent *Halliburton v Chubb* case in England, where the court *obiter* held that for an English-seated arbitration with New York being the law governing the underlying contract, "it is necessary to consider the obligation in English law on an arbitrator to uphold the privacy and confidentiality of an arbitration which has an English seat and the boundaries of that obligation." At the same time, the court left open when English law would be applicable: "English-seated arbitrations are both private and confidential, *if* the law governing the confidentiality of the arbitration is English law" (emphasis added).

Concluding Remarks

The question of which law determines the arbitration agreement's implied duty of confidentiality is yet to be answered by English lawmakers or courts. Ultimately, the law governing confidentiality issues will depend on whether confidentiality is understood (i) as arising from the arbitration agreement itself, (ii) as an extension of a confidential contract between commercial parties, or (iii) as being a corollary to the privacy of arbitral proceedings. Thus, it is yet to be seen if and how the review of the English 1996 Arbitration Act addresses this debate and tackles what is said to be "one of arbitration's principal attractions" (Lord Neuberger of Abbotsbury).

This entry was posted on Thursday, August 18th, 2022 at 8:23 am and is filed under Confidentiality, England, English Arbitration Act
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.