Kluwer Arbitration Blog

How Confidential Is Arbitration In English Law?

Jade Hu (Seladore Legal) · Monday, August 26th, 2024

The confidentiality of arbitrations seated in England is long-established in English law. In the absence of an express agreement to dispense with confidentiality, English law recognises an implied obligation on parties and arbitrators to maintain the confidentiality of the hearing, the award and other materials produced in the proceedings (*Dolling-Baker v Merrett* [1990] 1 WLR 1205*;* and *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314).

However, a recent decision of the English Commercial Court reminds parties there is no absolute right to confidentiality of an arbitration. In *Mordchai Ganz v Petronz FZE and Abraham Goren* [2024] EWHC 1011 (Comm), the Court published an un-anonymised and un-redacted judgment concerning challenges to an arbitration award. This judgment suggests that publication of such challenges will be the default position in most cases, notwithstanding the confidentiality of the underlying arbitral proceedings. This post considers the decision, its implications and practical tips for arbitrating parties to protect confidential information from publication.

Background

The dispute arose from a share purchase agreement pursuant to which Mr Ganz and Mr Goren allegedly agreed to sell their shares in a company to Petronz ("the SPA"). The SPA provided for disputes to be resolved by arbitration under the LCIA rules.

Petronz did not pay the purchase price and Mr Ganz referred the dispute to arbitration. The tribunal delivered its award in favour of Petronz and Mr Goren. The tribunal found that the SPA was not an authentic and binding agreement; therefore, the arbitration agreement was invalid and the tribunal had no jurisdiction over the parties.

Mr Ganz sought to challenge the award under sections 67(1)(a) and 68 of the Arbitration Act 1996. These provisions permit a court application to challenge an award on the grounds of substantive jurisdiction and/or serious irregularity.

The Court dismissed both challenges and upheld the tribunal's decision.

Prior to handing down its judgment, the Court considered an application from Mr Goren, who objected to the judgment's publication.

The Arguments

Mr Goren's objection to publication included the following arguments:

1. Article 30 of the LCIA rules contains an undertaking by the parties and tribunal to keep confidential all awards and materials in the arbitration. Having upheld the tribunal's award, the Court should not undermine the confidentiality of the award by publishing its judgment.
2. The judgment contained sensitive and confidential matters, and its publication would cause reputational damage to Mr Goren.
3. There was no public interest in the outcome of the challenge, and Mr Ganz had no good reason for the judgment's publication.

Mr Ganz, however, argued for publication on grounds that there was no valid arbitration agreement and the case concerned points of law and practice which would be of public interest. He also claimed the need to use the judgment in winding-up proceedings as a legitimate reason for publication.

The Decision

Dame Clare Moulder DBE confirmed that when determining whether to publish a judgment on an arbitration application, the correct approach was to weigh "[t]*he factors militating in favour of publicity together with the desirability of preserving the confidentiality of the original arbitration and its subject matter*" (applying *City of Moscow v Bankers Trust* [2004] EWCA Civ 314 at 40).

The party objecting to publication does not have to prove detriment beyond "*the undermining of its expectation that the subject matter would be confidential*" (paragraph 15). However, the Court did not accept that publication would only be desirable where it can be done without disclosing confidential information: "*Any confidential information which falls to be disclosed as a consequence of publication has to be considered and weighed against the public interest factors*" (paragraph 28).

Weighing the arguments, the Court found in favour of publication. In particular:

1. Mr Goren could not rely on an expectation of confidentiality arising from an arbitration agreement where the Court found there was no enforceable arbitration agreement. Once joined to the arbitration, he may have had an expectation of confidentiality pursuant to LCIA Article 30. However, this would not prevent publication of the Court's judgment: "*The supervisory jurisdiction of the Court is an entirely separate process*" (paragraph 18).
2. Regarding Mr Goren's second argument, the judgment did not refer to all the matters before the tribunal, but only the essential elements of the underlying dispute. Further, Mr Goren had not identified any specific confidential information that he sought to protect. Concerns around reputational damage to Mr Goren related to his own actions, which did not constitute a good reason to withhold publication.
3. Regarding Mr Goren's third argument, the Court found that the issue is not whether Mr Ganz had a good reason for publication. Rather, there were matters of public interest over and above the specific issues raised by the case which weighed in favour of publication. These were the public

interest in: (i) the operation and practice of arbitration; and (ii) the desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent.

Commentary

This is not the first time the English Courts published a judgment on an arbitration claim (an earlier example is *Manchester City Football Club v Football Association Premier League* [2021] EWCA Civ 1110). Arbitration awards also often come into the public domain in the context of enforcement proceedings in England and abroad.

The decision in *Ganz* illustrates that the strong presumption in favour of open justice in English litigation means courts will be careful to scrutinise a party's request for confidentiality before deciding that a judgment should be withheld from publication. In other words, although a balancing test is applied to determine the question, the starting position weighs towards publication. To successfully argue otherwise will likely require more than proving an expectation of confidentiality.

The decision may be welcome for claimants in circumstances where arbitral confidentiality might help fraudsters or wrongdoers retain a cloak over their wrongdoing.

However, where sensitive information is involved, arguably, decisions like *Ganz* risk deterring parties from choosing arbitration in London (although which law governs confidentiality is not straightforward and was considered in a previous article here). The point was considered by Mance LJ (as he then was) in *City of Moscow,* who concluded (at 32) that it was doubtful such decisions would have a chilling effect on London-seated arbitrations. However, he found it "*easier to accept that, having arbitrated unsuccessfully here, a party could well be deterred from making an arbitration claim in court if there was a risk that by doing so really confidential matters might be disclosed*." The judgment did not consider, although it is interesting to note, that this could also have implications for the public interest in the operation and practice of arbitration: English Courts cannot exercise their supervisory jurisdiction if parties do not bring arbitration applications.

Nevertheless, parties choosing to arbitrate in England should be aware that their confidential information could be disclosed if the English Court's supervisory jurisdiction is sought by the losing party. Below are some take-aways for parties seeking to manage that risk:

1. The parties' expectations regarding confidentiality remain relevant to the Court's consideration. Parties should ensure there is a valid arbitration agreement that provides the arbitral proceedings and final award will be private and confidential.
2. It is worth remembering that, subject to exceptions, hearings of arbitration claims in the English Courts are generally held in private (CPR 62.10).
3. Parties seeking to protect confidential information should raise this with the Court promptly; ideally at the substantive hearing so that the Judge can (at least) consider avoiding references to sensitive information while the judgment is drafted. In any event, the point should be raised before the judgment is published.
4. In doing so, the party should articulate precisely what information is confidential and why; the detriment it would suffer by publication; and/or why publication of that information would not be in the public interest.

5. Parties may also consider seeking anonymisation of their names and/or redaction of confidential information if the judgment is published. In practice, either would be hard to achieve. Powerful reasons (such as the protection of trade secrets) are usually required to justify redactions (see for example, *Unwired Planet International Ltd v Huawei Technologies Co Ltd and another* [2017] EWHC 3083 (Pat)). As for anonymisation, the Court, as a general matter, only grants this if it considers it necessary to secure the proper administration of justice and to protect the interests of any persons (CPR 39.2(4)).

The issue of confidentiality was recently considered by the Law Commission, in its review of the Arbitration Act 1996 (which contains no express provisions regarding confidentiality). Its final report published in 2023 concluded that a default rule on confidentiality was undesirable, given the varying approaches in different contexts and that any default rule would necessarily be subject to exceptions. The report concluded that English law's current approach works well, and therefore the development of the law of confidentiality in the arbitral context would be better left to the courts.

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