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Arbitration Act 1996: Exceptions to the Rule of Confidentiality

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The Arbitration Act 1996

Arbitrations seated in England, Wales or Northern Ireland are governed by Arbitration Act 1996 (AA 1996 / The Act). In some circumstances, the provisions of the Act may apply to arbitrations seated outside of those jurisdictions. Indeed, the Act makes no distinction between 'domestic' and 'international' arbitrations. Therefore, the legal framework for domestic arbitrations seated in the England & Wales or Northern Ireland and international arbitrations will be the same.

The "non-mandatory provisions" of The Act allow parties to make their own arrangements by agreement but provide rules that apply in the absence of such agreement. For example, the parties may agree to the application of institutional rules or providing any other means by which the matter may be decided. The non-mandatory provisions also permit the parties to elect the law applicable to the agreement which need not be the law of England and Wales or Northern Ireland.[1]

Within this framework, arbitrations governed by AA 1996 are typically conducted in private and there is an understanding that the proceedings and documents generated in the arbitration are subject to confidentiality. For this reason, many parties concerned about the disclosure of commercially sensitive information and potential reputational damage consider arbitration more attractive than litigation for resolving disputes in many jurisdictions. For example, jurisdictions such as Scotland and Singapore have codified provisions in legislation to ensure confidentiality in arbitration proceedings. Norway and Australia have developed "opt-in" and "opt-out" systems respectively.

The implied duty of confidentiality

Although the AA 1996 does not itself impose obligations of privacy or confidentiality, the English courts have consistently held that there is an implied duty of confidentiality.

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In *Dolling-Baker v Merret*, a case which concerned a party's request for disclosure of documents produced in a previous arbitration, the English Court of Appeal held that there is an implied obligation of confidentiality arising out of "the nature of arbitration itself".[2] This implied duty extends to the pleadings, written submissions, notes and transcripts of evidence given in the arbitration and the arbitral award. However, there are some exceptions to the implied duty of confidentiality and circumstances in which the benefits of disclosing arbitral awards and arbitration proceedings are deemed to outweigh the parties' interest in maintaining confidentiality.

Challenges of arbitration awards made in the English courts

The AA 1996 provides recourse to the English courts in order to challenge an arbitral award on grounds of substantive jurisdiction (s.67), serious irregularity (s.68) and on a point of law (s.69).

Although CPR r62.10 dictates that the starting point is that hearings under sections 67 and 68 are held in private, there is no automatic right to confidentiality in respect of the documents and judgments generated in the course of the litigation. Furthermore, judgments that relate to arbitrations proceedings are not necessarily anonymized and the court may publish judgments relating to arbitral proceedings despite the parties requests to maintain confidentiality.

Public interest / interests of justice

There is a developing body of cases in which arbitration proceedings and awards have been divulged in judgments because the English court has determined that the public interest in ensuring and maintaining standards of fairness for arbitrators and parties is greater than the benefit to the parties of maintaining confidentiality in respect of the arbitration. Indeed there are increasing numbers of cases in recent years in which the courts have considered complaints about the conduct of arbitration.

In *Symbion Power LLC*, the court considered that "There is a strong public interest in the publication of judgments, including those concerned with arbitrations, because of the public interest in ensuring appropriate standards in the conduct of arbitrations. That has to be weighed against the parties' legitimate expectation that arbitral proceedings and awards will be confidential to the parties"(at [90]).[3]

In *Teekay Tankers v STX*, the court proceedings referred to arbitration awards and to the arbitrator's reasons. STX contended that this amounted to a breach of confidentiality. However, the court held that disclosure was in the interests of justice.[4]

Similarly, the court may order disclosure of documents generated in arbitration if such disclosure is considered to be necessary for the fair disposal of a case. The court adopted this approach in *Ali Shipping Corp v. Shipyard Trogir*.[5]

However, courts will generally not compromise confidentiality without good reason. In the case of *P v Q* in which the claimant sought to remove two arbitrators from a tribunal for misconduct under s.24 AA 1996, the judgment was anonymized, though it disclosed the application of key principles, which were considered to be of public interest.[6]

Disclosure by consent

Although it is uncommon in commercial arbitration cases, parties may agree to waive confidentiality obligations otherwise implied by law or incorporated into arbitration rules. It may be in the parties' interests to disclose the award and/or they may consider disclosure of arbitration proceedings or an arbitration award for specified purposes. For example, parties may not assume broad preservation of confidentiality in arbitral hearings held in public. Similarly, some documents relating to or referenced in arbitration proceedings may already exist in the public domain, without breach or wrongdoing of either party.

Powers of the court to intervene in arbitration proceedings

An English court will only intervene in arbitration proceedings to the extent it is permissible under the AA 1996. The disclosure of arbitral proceedings in the circumstances specified above, are quite separate to the court's powers under sections 42, 43, 44 and 45 AA 1996.

S.42 permits the court to make an order to comply with preemptory order made by the arbitral tribunal. S.43 permits the court to order the attendance of a witness to give testimony or produce documents or material evidence in respect of the arbitration proceedings. S.45 allows the courts to determine a question of law arising in the course of the proceedings. S.44 AA 1996 grants the court various powers in support of arbitral proceedings.

These powers are intended to facilitate arbitrations by providing non-interventionist support, including, amongst other provisions, appointing a receiver, ordering the sale of goods that are the subject of the proceedings, granting interim injunctions and making court orders in relation to the preservation and taking of witness evidence. Whilst these powers are rather far-reaching, the parties can agree to exclude sections 42, 44 and 45 of the AA 1996 but cannot agree to exclude s.43.

In practice, the English courts will not intervene in arbitral proceedings unless it is satisfied that the tribunal has no power or is unable to provide the same relief. Such intervention will be intended to cause minimum interference with the progress of the arbitration.

In this context, injunctive relief may be granted by the tribunal, if it has the power, or by the English court, in order to prevent a breach of confidentiality of the arbitral proceedings which might otherwise cause prejudice to one of the parties to the arbitration. In *UMS Holding v Great Station Properties SA*, the English Commercial Court granted an order prohibiting disclosure of an arbitral award even though the court held that it was in the public domain by virtue of an enforcement challenge hearing and therefore, not subject to confidentiality obligations.[7]

Cause for concern?

The English courts will typically uphold the confidentiality of arbitration proceedings, unless there is good reason for exception – e.g., in cases which would otherwise cause real injustice or in support of the arbitration proceedings themselves.

Parties and tribunals may also seek to safeguard confidentiality, by agreeing to rules or contractual provisions, which make the expectations regarding confidentiality in the arbitration explicit. Further, if arbitral proceedings are

challenged in the English courts, given the limited scope of such challenges, the parties usually do not need to reproduce all of the underlying documents pertaining to the arbitration in the court proceedings. Finally, while judgments relating to arbitration proceedings may be published, the English courts allow the parties to make submissions in advance. Where appropriate, judgments may be anonymized, so as not to disclose the party names and the inspection of arbitration claim forms is not permitted without the permission of the court (PD 62).

Whilst confidentiality in arbitration proceedings is not guaranteed, the English courts have sought to develop a careful but pragmatic approach to balancing the parties' need for privacy and confidentiality on the one hand, with public interest, on the other.

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[1] S.4 Arbitration Act 1996, Mandatory and non-mandatory provisions.

[2] Dolling-Baker v. Merrett [1990] 1 W.L.R. 1205 at [1213]

[3] *Symbion Power LLC v Venco Imtiaz Construction Company* [2017] EWHC 348 (TCC), per Justice Jefford at [90]. In *Symbion*, an ICC arbitration in which Symbion sought to challenge the award in the High Court in England, the court refused Symbion's submission that the judgment should be anonymised as the ICC award had already been made public in the U.S. and commented on publicly.

[4] *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm). In *Teekay Tankers*, the agreement between the parties included a confidentiality clause. However, it was held that the disclosure was made in the interests of justice and as such, it was deemed by the English courts to be permissible.

[5] *Ali Shipping Corp v. Shipyard* Trogir [1999] 1 W.L.R. 314.? In *Ali Shipping Corp*, although there was an English arbitration clause in the agreement entered into by the parties, the court held that disclosure of the proceedings was an exception to the doctrine of confidentiality.

[6] *P v Q* [2017] EWHC 148 (Comm).

[7] *UMS Holding Ltd and others v Great Station Properties SA* [2017] EWHC 2473 (Comm)

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