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CONFIDENTIALITY IN COMMERCIAL ARBITRATION

UNDERSTANDING THE LAW COMMISSION'S APPROACH TO THE ARBITRATION ACT 1996

Summary

Privacy and confidentiality are often cited as key factors for why parties prefer to arbitrate rather than litigate their disputes. English law provides for confidentiality of arbitrations, notwithstanding there is no express provision in the Arbitration Act 1996. In the recent review of the Act, the Law Commission decided against including express provision for the confidentiality of arbitration. Nevertheless, parties must take advice regarding dispute resolution provisions in their contracts, and this includes considering confidentiality when drafting arbitration agreements.

Confidentiality of Arbitrations under English Law

Given the importance of this issue to commercial parties, it is unsurprising that the issue of confidentiality featured prominently in the Law Commission's recent consultation on potential amendments to the Arbitration Act 1996. Twenty-five years after the Act came into force, the Law Commission has revisited the statutory provisions governing commercial arbitrations seated in England and Wales. It did so with the intention of ensuring that the Act remains fit for purpose and continues to promote the UK as a leading destination for commercial arbitration.

Although privacy and confidentiality have long been considered a hallmark of arbitrations seated in England and Wales, the Arbitration Act does not contain any provisions stipulating these key tenets. Instead, much as in other important areas of law, the contours and nuances of privacy and confidentiality in commercial arbitrations have been developed and upheld by the courts. Confidentiality is, therefore, an implied duty agreed to by the parties by electing to seat their arbitration in England and Wales, albeit one in which a number of exceptions apply.

The question the Law Commission grappled with during its consultation on potential amendments was whether the Arbitration Act should be updated to expressly codify the confidentiality of arbitrations or leave this to be developed by the courts.

While the Law Commission reiterated the importance of privacy and confidentiality of commercial arbitrations seated in England and Wales, it identified that confidentiality can never be applied as a blanket rule. Indeed, the Law Commission noted that, while it would be easy to introduce a statutory provision regarding the inherent confidentiality of commercial arbitrations seated in England and Wales, it would be more challenging to capture all of the possible exceptions to this rule.

For example, parties may often need to disclose certain details of the arbitration to third parties, be they auditors, regulators or other parties where disclosure of information relating to such disputes may be required by law.

The Law Commission considered whether it would be appropriate to try and codify a non-exhaustive list of the permitted exceptions to the general rule of confidentiality within the Act. However, it took the view that even this approach would ultimately reduce the nuance and flexibility that could be better developed by the courts.

Identifying Expectations of Confidentiality in Arbitration Agreements

It is a feature of confidentiality that, once it has been lost, it cannot be recovered. While the common law provides protections to parties where confidentiality has been breached, it is imperative that the lack of a statutory provision in the Arbitration Act 1996 is not misinterpreted by parties as being an acceptance that English-seated arbitrations are not, by default, private and confidential.

Such misinterpretation may be more likely to arise where parties are less familiar with the English common law. Indeed, many overseas parties elect to seat their arbitration in England and Wales but may be unfamiliar with how the English courts have developed and enforced the principles of confidentiality in arbitral proceedings. The lack of any express provision in the Arbitration Act could risk misunderstandings regarding the extent to which confidentiality is an inherent feature of English-seated commercial arbitrations.

In this context, the Law Commission's preliminary conclusion – to maintain the *status quo* in relation to confidentiality in commercial arbitrations – means that parties not wishing to rely solely on the implied duty established under the common law to protect them may benefit from addressing the issue of confidentiality expressly when drafting their arbitration agreement.

Including such wording provides clear expectations on parties at the outset that it is mutually recognised that arbitral proceedings will remain private and confidential between the parties. It also provides the parties with an opportunity to clarify any specific carveouts to such confidentiality that may be relevant given the commercial context (for example where a party has disclosure obligation to inform the market about the existence of any material disputes it is involved in).

Accordingly, while the common law will protect parties regardless of a statutory provision in the Act or express wording in their arbitration agreement, parties may benefit from including clear wording in their arbitration agreement recognising the confidentiality of any proceedings, subject to the exceptions set out in law.

Furthermore, by identifying such expectations in the arbitration agreement itself, parties will have established clear boundaries prior to any dispute arising, which may help to mitigate the risk that one party later seeks to publicise the arbitration in order to use the resulting media attention to support its claim.

Alternatively, some parties may want to seat their arbitration in England and Wales but do not wish to be bound by the inherent privacy and confidentiality of commercial arbitration seated in England and Wales. For such parties, it will be necessary to include "opt-out" wording in the arbitration agreement. This will allow the parties to operate within their own bespoke regime once a dispute commences without the default position of the common law governing the approach to confidentiality.

Slaughter and May has a leading arbitration practice and was one of the six law firms involved in the Law Commission's consultation surrounding the review of the Arbitration Act 1996.

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