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Expectations of confidentiality in international arbitration

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One of the principal reasons companies that are engaged in international commerce agree to resolve their disputes by international commercial arbitration proceedings, rather than domestic or foreign court proceedings, is the perception of confidentiality and privacy that such proceedings afford. These disputes often require parties to exchange information or documents that contain sensitive, confidential and/or proprietary business information, such as customer lists, sales data, or pricing and cost information. The disclosure of such documents or information to non-parties, or the use of such documents or information by parties for purposes unrelated to the arbitration proceeding, can be devastating to the party trying to protect the confidentiality of the information.

Thus, maintaining the confidentiality of this information should be a key consideration of any company that consents to resolve a dispute through arbitration. Unfortunately, in-house and outside counsel who often negotiate arbitration clauses may not be aware that the laws regarding the confidentiality of arbitration proceedings vary significantly depending on the jurisdiction in which the arbitration takes place as well as the arbitral rules under which it is administered.

Below we examine how four countries that serve as popular venues for international arbitration proceedings—Sweden, England, France and the United States—address the confidentiality of documents and information exchanged in arbitration proceedings. We also address how established arbitral organizations deal with the confidentiality of documents and information exchanged by the parties.

Sweden

Under Swedish law, there is no general duty of confidentiality in arbitral proceedings unless the parties enter into a specific agreement of confidentiality. While a party may be able to rely on a specific statute, such as the Swedish Protection of Trade Secrets Act or the Business Confidentiality Act, to protect certain information, a general duty of confidentiality does not apply.

Even where the parties’ underlying contract contains a confidentiality provision governing documents and information exchanged by the parties during the course of their commercial

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1 See Al Trade Finance Inc. v. Bulgarian Foreign Trade Bank LTD (“Bulbank”), Case No. T 1881-99.
relationship—which should, presumably, encompass documents and information exchanged in any arbitration proceeding involving the parties—an arbitration panel may well decide not to take any steps to enforce such a contractual provision before issuing its final award, which, depending on the type of information that is exchanged, may be too late to be of any use to the party seeking protection.

**England**

By contrast, in England, while there is no statutory provision in the Arbitration Act of 1996 or elsewhere addressing confidentiality in the arbitration context, court decisions have made clear that under English law a duty of confidentiality and privacy is implied in arbitrations. The English Court of Appeal recently explained, however, that while there is “an obligation, implied by law arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration . . . .”, this principle is subject to four exceptions, including the interests of justice.  

Nevertheless, parties arbitrating disputes in England can rely, with some degree of assurance, on the country’s implied obligation of confidentiality to protect sensitive information exchanged.

**France**

In France, while confidentiality is compulsory by law as regards mediation (article 131-14 of the Code of Civil Procedure), there is no such provision as regards arbitration, except article 1469 of the Code, which provides that discussions between the arbitrators are confidential. It has often been alleged that confidentiality was implied by the nature of arbitration, but the French courts do not seem to share this point of view, as illustrated by a 2004 Court of Appeal of Paris decision, which held that a plaintiff claiming damages for a breach of the confidentiality of arbitration proceedings had to prove the ground for the alleged duty of confidentiality.

Article 226-13 of the French Criminal Code provides that “[t]he disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year’s imprisonment and a fine of €15,000”, but is applicable only to arbitrators, not to parties.

Therefore, if parties arbitrating disputes in France want the proceedings kept confidential, then they should insert a duty of confidentiality in the arbitration clause. Even with such protection, however, disclosure can still be obtained in certain cases.

**United States**

The Federal Arbitration Act, codified at 9 U.S.C.A. §§ 1-16, does not provide for the confidentiality of arbitration proceedings or the documents and information exchanged by parties in them. While courts in the United States recognize that confidentiality is one of the principal advantages of arbitration and will enforce confidentiality agreements executed by parties that limit the disclosure of

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information exchanged during arbitration proceedings,\(^5\) parties cannot expect that, absent such an agreement with the other side or an appropriate protective order from the court, documents exchanged during the arbitration proceedings will be protected.

**Rules of arbitral bodies**

Most of the established international arbitration organizations have rules governing the conduct of arbitrations that they administer. Unfortunately, most do not require parties to maintain the confidentiality of documents and information exchanged during the arbitration.

Article 46 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) provides that the “SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award,” but does not obligate the parties to treat any information as confidential. Likewise, Article 34 of the Arbitration Rules of the American Arbitration Association’s International Centre for Dispute Resolution (“ICDR”) only provides that “[c]onfidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator” and that “the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.”

Article 20 of the International Chamber of Commerce (“ICC”) Rules of Arbitration authorizes the Tribunal in any particular arbitration to “take measures for protecting trade secrets and confidential information” but does not require the Tribunal to do so.

By contrast, the London Court of International Arbitration (“LCIA”) Arbitration Rules expressly provide, in Article 30, that “[u]nless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain—save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.”

Similarly, the Arbitration Rules of the World Intellectual Property Organization (“WIPO”), a specialized agency of the United Nations charged with developing an international intellectual property system and which specializes in handling international commercial disputes involving intellectual property, contain detailed provisions concerning the protection of confidential information disclosed by parties. This is not surprising given that the cases WIPO typically administer involve intellectual property that by its very nature (e.g., trade secrets) is confidential.

**Conclusion**

As the above demonstrates, while a company involved in an international arbitration may be able to protect its sensitive and confidential information by relying on the laws of the governing country or the rules of the arbitral body chosen to administer the proceedings or by seeking protection from the

arbitral tribunal (or a court), achieving the desired protection is by no means guaranteed. Thus, drafters should take care to include appropriate language in their operative contracts that specifically protects the confidentiality of documents and information exchanged by the parties during the course of any arbitration arising from the contract.

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