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Are Arbitrations Private and Confidential?

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Privacy and confidentiality in arbitration are sometimes the primary reason for choosing arbitration. However, they are distinct concepts. You can be pretty sure of getting privacy, but not necessarily confidentiality, with careful drafting.

One of the primary reasons parties choose arbitration over litigation is that the proceedings will be private or confidential, or both. But are they?

Privacy and confidentiality are different concepts. Privacy means free from observation by others. Confidentiality refers to an obligation to not disclose information.

Privacy

An Ontario arbitrator recently ordered a hearing to be public. He assumed, without deciding, that a contractual arbitration under the Ontario Arbitration Act was "presumptively private". However, he overrode the presumption based on the public nature of the dispute, the minimal impact the presence of the public and the media might have on the proceedings, the minimal negative effect on the parties, and a legitimate public interest to be served in ordering a public hearing. The circumstances of the case are unique, but the procedural result serves as a warning to those who assume privacy.[1]

Confidentiality

Confidentiality is a different matter. It relates to the parties' and arbitrators' obligations not to disclose information about the arbitration to anyone not involved. Of course, some degree of confidentiality will be lost when a party seeks to appeal or enforce an arbitration award through the courts. At a minimum, the award will be filed with the court and become part of the public record. But what of use of arbitration evidence in other proceedings?

Courts in Australia reject the notion of an obligation of confidentiality in arbitration, while courts in England strongly support it. In England, a term imposing confidentiality is implied in arbitration agreements as a matter of law on the basis that it is an essential corollary of the expected privacy of arbitration proceedings. Exceptions are made to permit or require disclosure where parties consent, where a court orders disclosure in the interests of justice, or when required by the legitimate interests of an arbitrating party (such as enforcing an award).[2]

Our courts have not found it necessary to resolve the contradictory Australian and English approaches. The British Columbia Supreme Court declined to follow the Australian approach, but found the use of an otherwise confidential award and a transcript of portions of the hearing to fall within the "reasonable and necessary" use exception to confidentiality.[3]

[1] The "Blue Box" arbitration decision can be found here: http://www.amo.on.ca/AMO-PDFs/Waste-Management/Blue-Box/Blue-Box-Arbitration-Public-Private-Decision-2014.aspx
[2] *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All E.R. 136 (C.A.)
[3] *Hi-Seas Marine Ltd. v. Boelman* 2006 BCSC 488

The Ontario Superior Court of Justice held that arbitration hearing transcripts were made relevant by issues pleaded in a court action by the party seeking to maintain the confidentiality. In ordering disclosure, the court made several interesting findings:

- It was contemplated by the arbitrating parties that the arbitration would be a private, confidential process.
- The expectation of confidence applied to all aspects of the proceedings, including discoveries, oral evidence and the resulting transcripts.
- The confidentiality of the process was of significance to witnesses at the arbitration who were given assurances by the party calling them that their testimony would not form part of the public record.
- The arbitrator ordered that no portion of the discovery or hearing transcripts or the evidence contained in them shall be communicated to any person apart from counsel to the parties in the arbitration.

The court stated that there was an expectation of confidentiality and that the arbitration relationship generally benefits greatly from the element of confidentiality which should be fostered. Nevertheless, the court ordered production of the transcript as an exception to the general obligation of confidentiality "to ensure fairness to the defendant in the circumstances."[4]

What can parties do to ensure privacy and confidentiality?

An agreement between the parties that the arbitration shall be private must be respected by arbitrators. The agreement makes express the otherwise presumed privacy. Absent such agreement, arbitrators may decide that the proceedings will be open to the public when exercising their jurisdiction to "determine the procedure to be followed in the arbitration."[5]

Confidentiality, and the intended extent of it, should also be expressed in arbitration agreements. However, be aware that courts may override the intended confidentiality where justice so requires.

When considering a set of rules to govern an arbitration, scrutinize the confidentiality and privacy provisions. The current National Arbitration Rules of the ADR Institute of Canada provide for confidentiality:

> 33. The parties, the witnesses and the Arbitrators shall treat all meetings and communications, the proceedings, documents disclosed in the proceeding, discovery and the awards of the Tribunal as confidential, except in connection with a judicial challenge to, or enforcement of, an award, and unless otherwise required by law.

The requirement to treat "the proceedings" as confidential may amount to an agreement for privacy that is not otherwise mentioned in the rules.
The October 2013 draft of the proposed updated ADRIC rules provides that

> [T]he parties, the tribunal, and the Institute shall keep confidential the existence of the arbitration and the meetings, communications, documents, evidence, rulings, orders, decisions, and interim and final awards…

except in identified circumstances. It is expected that these rules will include a specific provision regarding privacy. However, it was not in the October draft.

Other Considerations

There may be statutorily mandated arbitrations where statutes, regulations, or prescribed rules of procedure may permit, require, or prohibit public hearings and publication of awards.

Be aware that privacy and confidentiality agreements between arbitrating parties do not apply to witnesses and other non-parties. If confidentiality is to be thoroughly maintained, satisfactory arrangements with the non-parties will need to be made.

[4] *Adesa Corp. v. Bob Dickenson Auction Services Ltd.* 2004 CanLII 45491 (ON SC)
[5] Provincial arbitration acts and many rules provide for this arbitrator jurisdiction. See, for example, *Arbitration Act*, RSA 2000, c A-43, s. 20(1).

Discuss privacy and confidentiality during the first pre-hearing conference with arbitrators. Discuss it early so you won't have to discuss it often.
Finally, recognize that while even a private arbitration cannot guarantee confidentiality, litigation in the courts is, generally, open to all observers and on the record!

Jim McCartney is a commercial arbitrator in Calgary. He is a director of ADRIC and on the committee drafting its new arbitration rules. He will chair a panel on Confidentiality in Arbitration and Mediation at the ADRIC conference in Montreal October 23 & 24, 2014.

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