**Commercial realities of arbitration today**

Important current concerns in relation to arbitration, including privacy, confidentiality, injunctive relief and expedited procedures

**Confidentiality (vs privacy)**

It is important to appreciate the difference between privacy and confidentiality in the context of international arbitration. The privacy of the proceedings limits who is entitled to be present during those proceedings whereas the question of confidentiality generally concerns whether and under what circumstances a party or participant in an arbitration may be bound by an affirmative duty not to disclose information related to the arbitration.

Selecting arbitration as a dispute resolution mechanism does not automatically mean that the proceedings will remain confidential. Although some legal systems provide that arbitration proceedings are confidential, this is not a universal rule. Even in those legal systems that provide for confidentiality as a general rule (either as an express or implied duty), there are many exceptions. In addition, there are practical limits on enforcement mechanisms even when confidentiality applies.

Not all institutional arbitration rules (discussed in more detail in the element ‘Institutional –v- Ad hoc Arbitration’) provide that the proceedings shall remain confidential. Therefore, reliance is put on the confidentiality provisions in the underlying contract. Hopefully these will be drafted broadly enough to include the confidentiality of the arbitration proceedings. Sometimes parties separately address confidentiality in the arbitration agreement itself.

In England, the Arbitration Act 1996 is silent on the issue of arbitral confidentiality. Nevertheless, English courts have consistently held that there is an **implied duty** of confidentiality in arbitration. In *Ali Shipping Corp v Shipyard Trogir* [1999] 1 W.L.R. 314 (19 December 1997), the English Court of Appeal held that an implied duty of confidentiality arises as an essential corollary of the privacy of arbitral proceedings, and that the duty is implied as matter of the law. At the same time, the court indicated that general exceptions to the broad rule of confidentiality recognised by English law will also apply to the duty of confidentiality, namely, consent, order of the court, leave of the court, disclosure being reasonably necessary for the protection of the legitimate interests of an arbitrating party and public interest (for example, where it is in the public interest to order disclosure of statements of case from an arbitration in order to avoid a foreign court being misled).

In the UK it is important to note that arbitral privacy or confidentiality does not always override the principle of open justice. In *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Company [2004] EWCA Civ 314*, the English Court of Appeal clarified that while arbitration-related hearings are often held in private, the same rule of privacy does not apply to judgments rendered in relation to those hearings. Judgments should be published if they can be made public without disclosing significantly sensitive or confidential information.

The law of the seat sets out the confidentiality duties placed on the parties and participants in an arbitration. Whilst the English courts have recognised an implied duty of confidentiality in arbitration agreements, not all jurisdictions do. This is therefore an important issue to be aware of when you are dealing with an international arbitration seated in another jurisdiction or against a party based in another jurisdiction. For instance, the US tends not to recognise an implied duty of confidentiality. If an arbitration is seated in the US, this could cause challenges for a client. Similarly, if you have a US counterparty to an English seated arbitration, they may operate as if no confidentiality obligations apply. These challenges can be exacerbated when you are using arbitration rules that do not contain an express duty of confidentiality such as UNCITRAL. To protect your client’s interest, ensure that there is an express duty of confidentiality in the arbitration agreement (whether in a contract before the dispute or a stand-alone arbitration agreement after) that extends to the arbitration hearing itself, any appeals therefrom, all participants and all documents disclosed, produced, prepared for or used in the arbitration.

The LCIA Rules 2020 contain updated provisions regarding confidentiality. Under Article 30, the arbitral tribunal and the parties are bound to keep confidential all materials created for the purposes of an arbitration, and any documents produced during an arbitration that is not in the public domain, as well as any award. The 2020 version of the rules extends that obligation to all persons involved in the arbitration, including the parties’ authorised representatives, fact and expert witnesses, and service providers, by imposing a positive duty on parties to obtain confidentiality undertakings from them – presumably when their involvement in the arbitration has been fixed.

**Interim and Injunctive Relief**

Parties may need to seek interim and injunctive relief. This could include requests for interim measures aimed at preserving evidence or facilitating the arbitral process, in addition to more traditional requests for preservation of the status quo or securing assets. Parties may also seek anti-suit injunctions to prevent parallel national court litigation. They may seek this relief from the arbitral tribunal, which will have authority under most arbitration rules and national laws to issue such relief. A relatively recent innovation in arbitration has been the introduction of the concept of an “Emergency Arbitrator”. This is a temporary sole arbitrator appointed solely to address an urgent application, perhaps for an interim measure or injunctive relief, pending formation of the Arbitral Tribunal. As such, an Emergency Arbitrator does not remain to determine the merits of the underlying dispute. The Emergency Arbitrator provisions, while not prejudicing a party’s right to seek interim relief from any available court, allow parties to commence emergency proceedings within the framework of their arbitration.

Most arbitration legislation internationally will also permit national courts to order interim relief and injunctive relief in support of an arbitration in certain circumstances. In deciding whether to seek interim relief from an emergency arbitrator, the tribunal or from the court of the seat it will be critical to know the type of relief sought, how urgent the relief is, if the type of relief will need to be sought ex parte, and whether it will need to bind third parties who are not involved in the arbitration. If ex parte relief is needed and the relief will need to bind third parties, it will usually be appropriate to seek relief from a court (either or the seat or, rarely, in another jurisdiction if permitted) rather than an arbitral tribunal. If security for costs of the claim is sought, it will usually only be possible to seek this from the arbitral tribunal.

Under Article 25 of the LCIA 2020 rules, there is a broad power to grant interim or conservatory measures. These include the power to order a party to provide security for all or part of the claim, or to preserve money, goods, documents etc. The LCIA 2020 rules also contain provision for an Emergency Arbitrator in Article 9B.

UNCITRAL 2021 rules allow for interim measures in Article 26:

“Article 26 1. The arbitral tribunal may, at the request of a party, grant interim measures.

An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.”

**Efficiency in time and cost and Expedited Procedures**

After having been acclaimed, for decades, as the preferred method of settling international commercial disputes, arbitration has been criticised for, among other things, being too lengthy, time-consuming and overregulated.

Consequently, parties have looked to arbitral institutions and published rules to increase efficiency in duration and cost. This has included the introduction of expedited procedures, early determination and time-limits for rendering a final award. Institutions also now require arbitrators to confirm that they have the necessary time to devote to the arbitration before accepting an appointment. The ICC will also take into account the diligence and efficiency of an arbitrator when fixing the final sum to be paid to them.

The SIAC rules include an expedited procedure which is available, where parties agree to use it, if the value in dispute does not exceed S$6million or alternatively in cases of extreme urgency. The HKIAC rules include an expedited procedure which is available if the value in dispute does not exceed HK$25 million. In contrast the LCIA rules do not have a separate expedited procedure. Instead, the LCIA 2020 rules have rules for early determination and other procedural aspects to expedite arbitrations within their standard rules. These include Article 9A which sets out an ability to expedite the formation of the arbitral tribunal and Article 14.6 which contains suggested procedural directions (non-exhaustive list) which include the power of the tribunal to shorten timescales, limit evidence, dispense with hearings and allow remote hearings.

The 2021 UNCITRAL rules introduced the UNCITRAL Expedited Arbitration Rules (UNCITRAL EA Rules) which are contained in an annex to the rules. These rules do not apply automatically. The parties must expressly agree to use them.

Rules introducing a time limit for rendering a final award include the SIAC rules which include a provision that the draft award is handed down within 45 days of the closure of proceedings. The ICC rules dictate that the final award must be available within 6 months, and both the LCIA rules and HKIAC rules require the award within 3 months of final submissions. However, it is important to note that these timescales can be extended.

**Summary**

- Privacy of the proceedings limits who is entitled to be present

- Confidentiality concerns whether a party is bound by a duty not to disclose information related to the arbitration.

- Not all legal systems uphold the confidentiality of arbitration.

- Interim relief can be sought from an emergency arbitrator, the tribunal or from a national court. Which is appropriate will depend on the circumstances and the relief sought. - Parties are looking to arbitral institutions and published rules to increase efficiency in duration and cost. This has included the introduction of expedited procedures, early determination and time-limits for rendering a final award.