

Confidentiality in Arbitration

Commentaries on Rules, Statutes, Case Law and Practice

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Foreword

Few subjects have been so consistently debated in international commercial arbitration as confidentiality. Defended by some and decried by others, the extent to which arbitration proceedings are confidential has been the subject of conflicting interests, divergent legislation and regulations and evolving (and not necessarily consistent) case law.

For a long time, it was neither questioned, nor disputed that confidentiality attached to arbitration proceedings. In the 1990s, however, the notion that confidentiality was implicit in an arbitration agreement was challenged in a number of important decisions by national courts. As the demand for access to information grew and the media brought new opportunities and, with them, an appetite for ever more open communication, the preservation of (or necessity for) confidentiality became a subject of discussion of arbitration policy at all levels.

In a number of jurisdictions, courts and arbitral institutes and institutions have attempted to bring some clarity to the issue, but those efforts are hardly characterized by unanimity: diverse positions have been taken, and continue to be held. In essence, they pit the importance attached by parties to secrecy and discretion in the conduct of business against pressure to make information concerning arbitrations more readily available and the process more 'transparent'.

This publication compares differing cultural approaches to confidentiality in a comprehensive manner. Its primary purpose is to focus on aspects of the problem likely to be of particular interest to arbitration practitioners. It offers an overview of rules and regulations relating to confidentiality in arbitration; the impact of an express or acknowledged requirement for confidentiality upon the conduct of the proceedings themselves; and particular issues affecting confidentiality in relation to State parties. In a forthcoming issue of the Bulletin, consideration will be given to the treatment of confidentiality in the specific context of ICC arbitration proceedings.

If there is one conclusion to be drawn from the various contributions that follow, it is that parties and arbitrators cannot afford to overlook, much less, take for granted, the issues raised by the question of confidentiality in international arbitration proceedings. It is hoped that the insights and guidance offered by the highly experienced practitioners who have contributed to this Supplement will point them in the right direction.

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