

The Confidentiality of Arbitrations in the UAE

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However although arbitration is clearly private (being a product of the private agreement between the parties) whether or not it is confidential depends on where the legal place of the arbitration is.

This article will explore whether arbitration is confidential under UAE law; the limits of any confidentiality; and what actions parties can take to enhance and enforce the confidentiality of their arbitration.

Where does confidentiality come from?

Confidentiality is not an inherent attribute of arbitration, and although many countries recognise that arbitrations are confidential (for example England), other countries take the opposite view (for example Sweden and the United States). Furthermore, even in countries with a long history of arbitration, the extent of the obligation to keep an arbitration confidential is often unclear (although it usually covers the process itself, the award, and the documents disclosed and prepared during the proceedings). Parties cannot assume that by agreeing to arbitration they are necessarily agreeing to a confidential process. They will need to consider what the position is under the law of the legal place of the arbitration.

When discussing matters of UAE law it must be appreciated that the UAE is a complex legal environment. Each of the seven emirates has its own legal jurisdiction, and Dubai has two (Dubai and the DIFC). Each jurisdiction is able to supplement (but not override) federal law, except for the DIFC which by virtue of a change to the UAE constitution is exempt from all federal and local civil and commercial laws. There are also four civil court systems: the Dubai Courts, the Ras Al Khaimah Courts, the Federal Courts (used by Abu Dhabi and the other emirates) and the DIFC Courts. Legal issues can change significantly depending on which jurisdiction is being considered and the attitudes of the courts in that jurisdiction.

Since none of the emirates have enacted any specific law regarding arbitration, all the emirates follow the same federal law provisions and so are broadly consistent when it comes to arbitration. This means that in practice we can speak of the UAE having two seats (or legal places) for arbitration, that of the UAE and that of the DIFC.

Confidentiality under UAE law (excluding the DIFC)

The UAE law on arbitration is found in the UAE Civil Procedure Law (Federal Law No.11 of 1992), Articles 203 - 218. These provisions do not address confidentiality. However in a recent Dubai Court of Cassation case (157/2009) it was stated that as a general principle, arbitration is a private process to be conducted in secret unless the parties agree otherwise. This would appear to confirm that arbitration is a confidential process under UAE law.

Confidentiality under DIFC law

The DIFC has a modern and comprehensive arbitration law, the DIFC Arbitration Law 2008. The law is based on the popular UNCITRAL Model Law of Arbitration, but whereas the Model Law is silent on the issue of confidentiality, the DIFC Arbitration Law specifically addresses it. Article 14 of the law states that 'unless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court'.

Parties using the DIFC as their seat can therefore have greater confidence in the confidentiality of their

arbitration because it is explicitly enshrined in the applicable arbitration law. There have not been any cases relating to the confidentiality of arbitration proceedings, and so the precise limits of confidentiality under DIFC law have yet to be explored, but it is likely that the DIFC Courts will follow the approach taken under English law.

Institutional Rules

From the above it would appear that the confidential nature of arbitration is recognised under both UAE law and DIFC law. Both laws allow the parties to alter the position, and so if an institution is being used, the rules of the institution regarding confidentiality will apply.

Most parties agree to use an arbitral institution to administer the arbitration because it greatly helps to ensure an efficient process. The Dubai International Arbitration Centre (DIAC) and the DIFC-LCIA contain the same rule on confidentiality (DIAC Rules Article 41; DIFC-LCIA Rules Article 30:

“Unless all parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards and orders 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”.

The two other institutions widely used in the UAE are ADCCAC in Abu Dhabi and the ICC based in Paris. Their rules however that do not contain any provision regarding confidentiality, although the ICC Rules do state that hearings are to be private (Rule 26(3)), and arguably this extends to the process itself.

The Limits of Confidentiality

As can be seen from the DIFC-LCIA and DIAC clause on confidentiality, the rules of the institution may include explicit limitations. Even if they do not, most jurisdictions recognise that confidentiality has inherent limits similar to those explicitly referenced in the DIFC-LCIA/DIAC clause above. This means that where disclosure of confidential information is necessary due to court order, or to protect a legal right, or to enforce an arbitral award, the confidential information may legitimately be disclosed into the public domain. Furthermore, witnesses who give evidence during the arbitration are unlikely to be a party to the agreement (unless they are employees of the parties involved), and so cannot be bound by any obligations regarding confidentiality.

As regards enforcing the arbitral award (or taking other court action in relation to the arbitral process), some national courts will seek to preserve the confidential nature of the process. For example the general position under the DIFC Court rules is that claims related to arbitration will be held in private unless the court orders otherwise (DIFC Court Rule 43.41). The general position under UAE law however is that any case filed regarding an arbitral award will be heard in public like any other case, unless upon the application of a party the court is persuaded that there is good reasons to keep the hearings confidential (such as commercial sensitivities, although such occasions will be rare).

Enforcing Confidentiality

Assuming that there is an obligation to keep the arbitration confidential, what actions can a party take to enforce this obligation? This is particularly important because once facts have been made public it is impossible to reverse the situation.

First of all, it must be acknowledged that it is extremely rare for confidentiality to be breached. Usually both parties have a vested interest in keeping the process confidential, and they are often represented by lawyers who are able to advise them of their legal obligation regarding confidentiality.

There are times however, either because of ignorance or because of a potential commercial advantage, where a party may breach or seek to breach confidentiality. In the case of a threatened breach, one solution is to make an application to the arbitral tribunal to seek an order restraining a party from breaching confidentiality. The power of the tribunal is however limited because it cannot itself enforce its orders, though it does have the ability to punish a party in costs. There is also the fact that a tribunal is unlikely to look kindly on a party who deliberately flouts its obligations and the tribunal's orders.

Where however it is essential that confidentiality be preserved, the most effective remedy is to seek an injunction from the local courts restraining the other party from making the disclosure. The local courts in this instance would be the courts in the jurisdiction where it is feared the disclosure will be made, and so specific legal advice will need to be taken in relation to the ability to seek an injunction in that jurisdiction. As regards the UAE and the DIFC, it is anticipated that such an injunction can be sought because both jurisdictions recognise the confidential nature of the arbitral process.

Taking such action does take time and money, but the costs of making such an application ought to be recoverable by way of an order from the local court itself or from the arbitral tribunal at the conclusion of the arbitral process.

If confidentiality is breached, seeking an injunction may be of less value but it may still prevent further and worse breaches. A claim for damages arising from the breach may become available, and if the breach is serious enough it may allow the other party to pull out of the arbitration (although the tribunal usually has a right to continue the arbitration notwithstanding the fact that one party is no longer engaging, so there is a risk that an adverse award will be rendered).

Practical Tips

There are a number of steps that can be taken to reduce the prospect of a party breaching its obligation to keep an arbitration confidential:

a. Even if the law applicable to the arbitration and the institutional rules recognise the confidential nature of arbitration, a clause in the agreement can be included to specifically recognise that any arbitration is to be private and confidential.

b. Once it becomes foreseeable that a dispute between the parties is going to be referred to arbitration, remind the opposing party in writing of their obligation to keep the arbitration confidential and not to disclose documents received during the process.

c. At the preliminary hearing, raise the issue of confidentiality and have it recognized by all the parties and the tribunal, and recorded in the Terms of Reference.

Conclusion

The confidential nature of arbitration is recognised under both UAE law and DIFC law, as well as in the rules of the DIAC and the DIFC-LCIA. Although the confidentiality of an arbitration is not absolute, the ability to resolve disputes in private and, if necessary, to seek orders to prevent sensitive information from entering the public domain, remain key advantages that arbitration holds over court litigation.