

# Keeping the Confidence in International Arbitration

By Christopher Gibson, Partner, Steptoe & Johnson

ICC Members Handbook 2002

For a number of years now, increasing trade in the global economy has encouraged parties involved in cross border transactions to seek efficient, definite and private means of settling disputes. These dispute resolution objectives, reflecting an ever more practical business outlook, have encouraged the growth of international commercial arbitration, sustained by the dispute resolution procedures and services offered by an array of arbitral institutions, such as the ICC, LCIA, ICSID, AAA, and WIPO, to name a few. The advantages of agreeing to arbitrate contractual disputes under the rules of one of these recognized arbitral bodies can be substantial. Similar to selecting a governing law to bring legal certainty, the use of an arbitration provision allows parties to contractually choose a forum and procedure for settling their dispute in a final and binding manner, producing an arbitral award that will be widely enforceable around the globe.

An issue that must be addressed no matter which institution and set of rules is selected, is the level of confidentiality in the arbitration, to which the parties should give careful attention even as they enter into the international transaction. Arbitration, by design, is a private matter between contracting parties and users of international arbitration place a high value on that privacy. The question of how private, however, may ultimately depend upon a sufficient awareness of this issue at the stage of drafting the arbitration clause, as the language used can have far reaching impact on the confidentiality of the proceedings.

Given the state of the law and practice in this area, it is simply not enough to assume that by including a boilerplate arbitration term in a contract, a dispute will be decided away from the public eye and a corresponding cloak of confidentiality will protect the contents, or even fact of, the proceedings. At the outset, parties will need to determine what level of confidentiality is desired. A rough sketch of the disclosure continuum might look something like this: the fact of the arbitration; the identity of the parties (and arbitrators); the general subject matter; the specific facts involved (including evidence and pleadings); the specific decision and award. While the fact that the parties have commenced arbitration proceedings may seem far from problematic, the disclosure of this information alone, particularly in industries where technology is involved, competition is keen and investor confidence is volatile, can have significant and often unanticipated effects. As one moves down the disclosure continuum, the potential implications, including unforeseen consequences such as the risk of issue estoppel in another legal forum, grows dramatically.

The various rules of arbitration, national laws, and the parties themselves may differ in their definition and view of the proper scope of confidentiality. With respect to institutional rules, the LCIA and WIPO provide an express duty of confidentiality -- a reference in the arbitration clause to either of these rules will therefore amount to an express confidentiality agreement. The ICC rules, taking a different approach, specify that persons not involved in the proceedings will

not be admitted to the hearing except with the tribunal's approval, and the tribunal can take measures to protect trade secrets and confidential information. Parties should thus consider confidentiality as an issue at the pre-hearing conference and specifically agree on which information from the disclosure continuum will remain confidential.

Furthermore, choosing which jurisdiction's laws apply to the arbitration proceedings -- again hopefully at the drafting phase -- can make a significant difference. The courts in England, for example, have found that a duty of confidentiality is implied in agreements to arbitrate. In Australia, the courts, surveying the same English law, have found there is no implied duty of confidentiality and parties seeking to maintain confidentiality must set out that intention explicitly. In the United States, a federal court has indicated that without an agreement on confidentiality, any confidentiality understood to occur in the confines of an arbitral proceeding does not necessarily apply in other forums. Still in another jurisdiction, the Swedish Supreme Court has recently agreed with this sentiment, distinguishing privacy from confidentiality, and ruling that a party to arbitration proceedings cannot be deemed to be bound by a duty of confidentiality unless the parties have concluded an agreement to this effect.

Issues that must be carefully considered in the arbitration agreement include not only the confidentiality imposed on the parties and arbitrators, but also whether third parties can be similarly limited. A corollary to private dispute resolution is that fact and expert witnesses are not subject to direct court sanction (such as contempt) emanating from the arbitration. Thus, while the proceedings may continue in private, in the absence of confidentiality agreements with these witnesses, this apparent confidentiality may be suspect.

In short, contractual arbitration can provide an efficient, neutral and private means to settle complex commercial disputes. Like all other binding agreements, however, one must be careful in the drafting to ensure that the desired effect, in this case confidentiality, is achieved. Advice from experienced counsel can provide a framework for confidentiality before and during the arbitration, so that it does not become a vehicle for unwanted disclosure, perhaps resulting in winning the arbitral battle but losing the information war. Steptoe & Johnson provides advice on a full range of dispute resolution issues that arise in contractual and investment contexts, from negotiating and drafting arbitration clauses, to representation in arbitration proceedings, to enforcing arbitral awards abroad. The firms' clients in this area cover a broad spectrum, including governments, individuals, small companies and major energy, technology, construction, defence, insurance and supply corporations operating around the world.