

Confidentiality in International Arbitration

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Arbitration proceedings are private, meaning the public cannot participate or observe the proceedings as permitted in traditional litigation. While privacy and confidentiality are often cited as comparative advantages of arbitration, arbitration is not automatically confidential. Parties should be aware of both applicable law and arbitral institution rules when implementing their own express confidentiality agreements.

In the United States, for example, the Federal Arbitration Act and the Uniform Arbitration Act adopted as a model law by most States, do not impose confidentiality requirements on arbitrations. There is also no implied duty of confidentiality in arbitration. Arbitral institutions often have confidentiality rules, but they tend to restrict arbitrators and staff from disclosing information about the proceedings, as opposed to binding parties. Counsel licensed in jurisdictions outside of the United States may be subject to different duties of confidentiality by their rules of professional ethics or their national laws governing attorney conduct which will apply to any arbitrations they handle. Given the absence of a rule-based or implicit duty of confidentiality, parties often explicitly agree to maintain confidentiality in their arbitration clause or in the terms of reference for the proceeding. Arbitral tribunals are empowered to impose orders regarding confidentiality.

Where there are agreements or restrictions regarding confidentiality, it is important to understand the scope of those restrictions. In some cases, parties cannot disclose the fact that the arbitration exists. In others, parties are merely restricted from disclosing conclusions reached in the award. Like in litigation, there are a myriad of other approaches as well, including restricting the disclosure of sensitive proprietary information like trade secrets or know-how.

Confidentiality restrictions can be rendered void if a party involves a domestic court in seeking interim relief or in recognizing or enforcing an award. That court is not bound by confidentiality restrictions agreed to by parties or ordered by the tribunal and may make the award and other information public.

There are other circumstances in which a party may be required to disclose confidential information, for example, as required by law. This can occur in connection with a regulatory investigation or by a judicial authority seeking the information for another matter. Finally, most jurisdictions recognize a public policy exception to confidentiality restrictions. Additional applicable local legislation, case law or arbitral rules may present further exceptions as well.

While parties can be generally assured that the duty of confidentiality of the arbitrators and institutional staff, there is no implied duty of confidentiality for other people involved in the arbitration. In light of that, parties who want to avail themselves of the benefits of confidentiality should reach an express agreement on that point. Even despite such an agreement, there are limitations to confidentiality restrictions in arbitration and parties should carefully consider applicable law to identify potential gaps.

Additional sources:

- Kiran Nasir Gore & Joshua Karton, *Checking the Boxes: Confidentiality and Data Protection in International Arbitration*, Kluwer Arbitration Blog (September 18, 2024). <https://legalblogs.wolterskluwer.com/arbitration-blog/new-white-paper-now-available-checking-the-boxes-confidentiality-and-data-protection-in-international-arbitration/>.
- Confidentiality in Arbitration: Fundamental Virtue or Mere Illusion? Asian International Arbitration Centre (October 10, 2013). <https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-Mere-Illusion?#:~:text=confidentially%20in%20arbitration%20refers%20to,the%20consent%20of%20the%20parties.>