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Are arbitration proceedings private and confidential or just private

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Some of the challenges faced by corporate entities involved in protracted legal disputes are huge legal fees and delays in our courts. Companies thus elect to have their disputes dealt with by way of private arbitrations which are often covered in their commercial agreements. Arbitrations are the preferred method of dispute resolution as confidentiality and privacy are guaranteed. These two features are underpinned by the autonomy of the parties involved in the proceedings as they are able to dictate the way in which the proceedings will be conducted unlike in public institutions, such as the courts. There does not appear to be any dispute on the privacy of such proceedings. Confidentiality has been clouded in conflicting jurisprudence and our courts have often been called upon to consider this issue to determine whether our laws provide for confidentiality of arbitration proceedings.

Looking at jurisprudence around the world, the courts in South Africa have considered some of the decisions in England and Australia when dealing with the issue of confidentiality of arbitration proceedings.

England's Arbitration Act, 1996, does not contain any provisions addressing confidentiality in arbitrations. However, the courts have determined that an implied undertaking of confidentiality applies to arbitration proceedings. Confidentiality has been described as a necessary incident of a definable category of contractual relationships and was therefore implied by law in arbitration agreements. In John Forster Emmott v Michael Wilson and Partners Limited (2008) EWCA Civ 184, the court recognised that there was a general obligation of confidentiality in arbitration agreements. However, the learned Lord Justice Lawrence Collins set out four exceptions to this general obligation, namely, where there is consent to disclose proceedings or their awards; where there is an order, or leave of the court;whether the disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and where the interests of justice require disclosure, including on the grounds of public interest.

The Australian Commercial Arbitration Act, 1984, does not contain any express reference to confidentiality. In Esso Australia Resources Limited and Others v Plowman (Ministry for Energy and Minerals) and Others 1995 (128) ALR 391 the court was tasked with determining whether confidentiality was an essential attribute of arbitrations. It was held that this was not so and that arbitration proceedings were private and that is why arbitrations were preferred to litigation. However, the court went on to say that confidentiality could not be considered an implied term of an agreement to arbitrate. As justification for this, the learned judge opined that there was no legislative basis for such, further, confidentiality did not attach to witnesses in proceedings as they were thus entitled to disclose information gained as a result of being present at proceedings. In the event that a confidentiality agreement existed between the parties, witnesses to the proceedings were not bound by its terms. The court also set out instances in which arbitration awards could be brought before a court and those included, inter alia, having the award made an order of court or the arbitrator removed from adjudicating the dispute.

The position in South Africa, however, remains unclear. The leading decisions on the matter have yet to establish with finality, whether the implied undertaking of English law and the exceptions thereto or whether the position in Australian law apply in South Africa.

In Replication Technology Group and Others v Gallo Africa Limited [2007] ZACT 99, the court confirmed that there is no legislative basis in the Arbitration Act 42 of 1965 ("Arbitration Act") for privacy or confidentiality of arbitration proceedings. Further, Judge Malan opined that there were instances in the Arbitration Act that provided for the disclosure of the arbitration proceedings or award. The Arbitration Act provides for instances similar to those applicable in the Australian law and which pertain to the disclosure of the arbitration awards or arbitration proceedings.

The above decision was confirmed in another case where the court held that there was no definitive decision made concerning whether or not the English implied term of confidentiality applied in South African law.

In light of this uncertainty, it is becoming increasingly crucial for our law makers to address this issue and come up with necessary amendments to the Arbitration Act with a view to allay the concerns of the litigant corporate community from our country and those from abroad who do business on our shores. Regrettably, this is not an issue with which our courts might have to deal with but only our law makers.