Are Arbitral Awards Truly Confidential: Recent Court Judgment Proves Otherwise

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Arbitration is a dispute resolution mechanism that enjoys a multitude of benefits and advantages; one of the prime benefits being the confidentiality that befalls the proceedings and the subsequent arbitral awards. This is because parties do not see any upside to the publicity as disputes do not look good. And no one wants the world to know confidential information about how one operates their business, much of which may be disclosed in litigation. Despite the consensus that arbitral awards enjoy the utmost confidentiality, a recent judgment has proven otherwise, leaving individuals and companies scavenging for possible determents that could protect their confidentiality.

FACTS

In early 2021, the United States Court of Appeal for the Third Circuit warned that arbitration might not be as confidential as the parties to disputes probably think it is and want it to be. But in their decision, the Court provided some easy measures to preserve the much-desired confidentiality of arbitration.

The case developed when two insurance companies encountered a dispute. The parties took the matter to arbitration where one of the companies won. Accordingly, the arbitrator issued an award in favor of that company. It is important to note, a winner in arbitration does not automatically have the legal right to enforce an arbitral award against the loser. Instead,

the winner needs to go to court, file the award in court, and ask the court to issue a regular court judgment based on the award. This is often referred to as the "enforcement of the arbitral award". That judgment is just like any other judgment issued by a court. The holder of the judgment, the "judgment creditor," can use it against the loser's bank accounts and other property to claim the amount they have been awarded.

The company that won the arbitration did exactly that. It filed the arbitration award in court and requested the court issue a judgment in order to enforce the contents of the award. Furthermore, the company asked the court to seal the court papers, to preserve the confidentiality of the arbitration award. This is when another insurance company, curious about how the arbitration turned out, filed papers asking the court to unseal the award "*under the common-law right of access*".

The Court ruled in favor of the curious third party asking for the Court to unseal the award, declaring that the filing of the award was a judicial record, and therefore should be open to the public. The court ordered it unsealed and the third party got to see the award and whatever secret information it disclosed.

This demonstrates an inconsistency with the structure of arbitration and puts parties in an awkward position: if the party wants to enforce the award by obtaining a court judgment, the party is faced with the risk of losing the confidentiality which may have been a reason the party opted for arbitration in the first place.

WHY THIS IS SIGNIFICANT TO THE UAE?

Despite the jurisdiction of the case in question being the United States, individuals and companies in the UAE need to be weary as they could face similar difficulties.

In the UAE, after an award is rendered by an arbitrator, the

winning party must submit an application to the local courts requesting the enforcement of the award's contents. Article 48 of UAE Federal Law No. 6 of 2017 on Arbitration states:

"The arbitrators' awards shall be confidential, and they may not be published in whole or in part, unless with the written approval of the Parties. The publication of the judicial judgments which cover the arbitration award shall not be considered a violation of this principle."

Hence, UAE legislation acknowledges that arbitral awards are confidential in principle, however, the publicity of the local courts judgment enforcing the contents of the award do not violate the principle of the awards confidential. Therefore, the details of such award can be made public.

Furthermore, in its ruling for case no. 32/23 issued on 08 June 2003, the UAE Federal Supreme Court stipulated that:

"It is sufficient that the arbitrators' award includes a copy of the arbitration agreement, a summary of the statements and documents of the parties, the grounds on which the award is based, its ruling, date, and location of issuance and the signatures of the arbitrators. The court ratifying such an award must verify the fulfilment of such conditions without broaching the subject matter, except of the dispute matters related to the public order."

Thus, for the local courts in the UAE to enforce the arbitral award, the application must include details of the dispute, which the parties may want to keep confidential. This would arguably mean that third parties could have access to said details by being privy to the court judgment for the enforcement of the award.

PROTECTIVE MEASURES TO MAINTAIN CONFIDENTIALITY

There are a number of measures that a party can take to ensure that an arbitral award issued in their favor maintains its

illustrious confidentiality.

The first is setting a time limit for the opposing party to comply with the contents of the award. The party can request that when the arbitrator(s) issue(s) an award, the opposing party has a set number of days in which to comply, or to agree to comply within a short time following its issuance. If the time limit for the opposing party's compliance was in place, then there would be no need to file the award with the court and risk a breach of confidentiality.

As a second protection, the parties might agree that they will direct any arbitrator to issue as short and simple and award as possible – ideally just stipulating the amount that the opposing party must pay. Such an award minimizes any loss of confidentiality, as opposed to a "reasoned" award, in which the arbitrator might explain the basis for the award and, in doing so, go into details that the parties might want to keep private.

Finally, the parties might mix and match, directing the arbitrator to issue two awards. One would require payment of a certain amount and could be the basis for a judgment in that amount, although that judgment would inevitably become a public document. The second award would explain the reasoned basis for the award.

CONCLUSION

In his analytical work on arbitration and the confidentiality that they possess, Francois Dessemontet, a Professor of law at the Universities of Lausanne and Fribourg in Switzerland, stipulated that *"the cloak of confidentiality that surrounds the arbitral proceedings puts the parties, their counsel and the arbitrators in a somewhat awkward position in many instances."*

This statement is highlighted by the inconsistency that sometimes befall the arbitral proceedings. However, parties

can realign those inconsistencies by putting in place protective measures that maintain the confidentiality of their disputes. Every individual or company that is subject to arbitration proceedings, must keep these measures in mind and implement them prior, throughout, and following the conclusion of the proceedings.

Author: **Abdulla Abuwasel**

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com