

Snapshot: confidentiality in Cayman Islands arbitration proceedings

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As a significant financial centre, it is not surprising that the Cayman Islands has a dedicated Arbitration Act,^[1] nor that this Act provides for arbitrations which have their seat in the Cayman Islands to be confidential, consistent with arbitration laws in many other jurisdictions. However, the breadth of the information deemed to be confidential under the Cayman Islands Act may be surprising to parties who are familiar with arbitration in other jurisdictions.

Section 81(1) of the Arbitration Act provides that "An arbitral tribunal shall conduct the arbitral proceedings in private and confidentially". Section 81(2) then provides that disclosure by the arbitral tribunal or a party of "confidential information relating to the arbitration" shall be actionable as a breach of an obligation of confidence unless the disclosure meets one of several criteria (addressed below).

Critically, "confidential information" is defined as including "information that relates to the arbitral proceedings", all pleadings in the arbitration, all information supplied to the arbitral tribunal by a party, all evidence supplied to the arbitral tribunal, any rulings of the tribunal and any award of the tribunal. It also includes any notes or transcript of oral evidence or submissions given before the tribunal.

As a starting point, section 81(2) and the definition of confidential information together prohibit the disclosure of all information relating to a Cayman Islands arbitration, arguably up to and including the existence of the arbitration itself. Section 81(2) provides for limited exceptions to this position, in which disclosure of confidential information may not be deemed an actionable breach. Those which are likely to be relevant for parties to a commercial arbitration, are where the disclosure:

- a. is authorised, expressly or impliedly, by the parties or can reasonably be considered as having been authorised;
- b. is required by the tribunal, or otherwise made to assist or enable the tribunal to conduct

the arbitration;

c. is required:

i. in order to comply with any enactment or rule of law;

[...]

iii. in order to enable any public body or office-holder to perform public functions properly;

d. can reasonably be considered as being needed to protect a party's lawful interests;

e. is necessary in the interests of justice.

Of these, (a) will generally cover the provision of information to legal counsel, expert witnesses and other service providers (to the extent that the parties anticipated, or must have anticipated, their involvement in the proceeding). Item (c) would include disclosure to markets or to regulators to the extent this is required and it is generally item (d) which may cover disclosure to insurers or, possibly, potential insurers or litigation funders. Item (e) has been held to apply to disclosure necessary for the enforcement of an arbitral award, and equivalent provisions in other jurisdictions have been held to cover disclosure in circumstances where an opposing party has made inconsistent arguments, or given inconsistent evidence, before a different tribunal.^[2]

There are a number of other exception categories which are less likely to be available in a commercial context, including where the disclosure is in the public interest, is required for the proper performance of the discloser's public functions, or is made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory (for example, disclosure protected by parliamentary privilege). In general, these exceptions are likely to be available only where the discloser or a party to the arbitration is a government or public body and the matter in question is one of public importance (which may not be the case for a commercial dispute with a government body).

Ogier has significant experience acting in Cayman Islands arbitrations and related court proceedings. For further information please reach out to the authors, or to your usual Ogier contact.

[1] For more information, see our [guide to arbitration in the Cayman Islands](#).

[2] In one case, an equivalent provision was held to apply where a party to both an arbitration and a court proceeding in a different jurisdiction informed the court of inconsistent positions

taken by its opponent in the arbitration. While not a Cayman Islands case, it is likely that a similar approach would be adopted in the Cayman Islands.

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