ARE CONFIDENTIALITY AND TRANSPARENCY SIMPLY TWO SIDES OF THE SAME COIN?

CLARE CASHIN, Partner, Philip Lee Solicitors, writes the requirement for confidentiality in arbitration has led to inconsistent awards.


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"Don't talk anything you can whisper. Don't whisper anything you can smile. Don't smile anything you can nod. Don't nod anything you can wink."

Perhaps that quote is a little too clandestine when merely questioning the merits of confidentiality in certain Alternative Dispute Resolution (ADR) processes, but it might at least set the scene for deliberations.

Arbitration remains a cornerstone of dispute resolution in Ireland. There has been, of late, a significant growth in alternatives to litigation and arbitration; the introduction of statutory adjudication to the construction industry in the Construction Contracts Act 2013 and the Courts' continuing emphasis on mediation, notably the Mediation Act 2017, are just two examples. However, an arbitration clause is still standard in most construction contracts used in this jurisdiction, so the conduct of the process deserves attention.

While there are numerous benefits to arbitration, including the cost, time efficiency and expertise of the arbitrator, the confidential nature of arbitral hearings is seen as a key advantage over litigation. But is this the best approach to serving the industry?

The presumption of confidentiality in arbitration is accepted in practice, being less of an implied term of contract and more a procedural benefit. However, this presumption is by no means absolute or guaranteed; an arbitration that ends up being the subject of court orders will become public, for example. Practice generally dictates that the following three principles be followed:

- Proceedings should be in private
- Confidentiality is implied in all instances
- Confidentiality is subject to certain limitations, being court orders, consent, public interest and necessity, for the most part.

Arbitration generally lacks consistency in its practice across jurisdictions, with little uniformity. In Ireland, the Arbitration Act 2010 (the 2010 Act) gives force to the United Nations Commission on International Trade (UNCITRAL) Model Law. The 2010 Act, however, is notably mute regarding confidentiality.

Recently, the UNCITRAL Arbitration Rules were amended to incorporate the rules on transparency for investor-state arbitrations (because of the public interest element and involvement of public funds). Accordingly, in those incidences, the presumption of confidentiality has been significantly undermined.

The most immediate reason to baulk at the opening up of private arbitrations in this manner is that the parties have actively chosen (or the institution governing the contract has selected) arbitration because of the privacy and confidentiality that it inherently offers. The confidentiality of the process is one of its most valued components. Other advantages include a degree of informality and candour of witnesses.

The problem with confidentiality however is that it has led to inconsistent awards, an absence of precedent in the industry, and an ultimate lack of transparency. In the construction industry, many disputes are settled through arbitration and a large bank of precedent is therefore not being made available. Relaxing the obligations of confidentiality could see significant benefits, namely:

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- Increased consistency of arbitral awards
- Avoidance of future disputes given the benefit of having precedent
- Improved procedural standards
- Efficiency in the selection of the arbitrator, given the expertise required in industries such as construction.

Arbitration is a significant area of law which operates in a vacuum. While legal precedents are cited throughout the arbitration process, the resulting decision is rarely, if ever, publicised – leading to an inconsistent, unforeseeable body of law, with decisions being made entirely on a case-by-case basis. Great analysis and impressive solutions are found in arbitrations, but we never get to glean those lessons and to learn.

Admittedly, there does not appear to be any great motivation for reversing the presumption of confidentiality. However, the principle of administering justice in public is as fundamental as it is, given the predictability, accountability and legitimacy that are encouraged when parties and judges are answerable to the public. It is surely time to consider making arbitral awards public, even if the proceedings themselves remain private. It is certainly time that this conversation became live within the construction industry. C