TRANSPARENCY AND CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION

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Annotation: The debate between confidentiality and transparency in international commercial arbitration is not recent. While confidentiality had been considered one of the critical features of international commercial arbitration, lately, it has been argued that transparency is required for arbitration to succeed as an efficient and reliable method of dispute resolution. This article seeks to address if confidentiality forms the cornerstone of all commercial arbitration or the higher calls for transparency are justified and possible without adversely affecting the popularity of arbitration as the most preferred mode of alternative dispute resolution. The authors would argue that confidentiality and transparency are not necessarily adversarial, and it is possible to achieve the right balance between the interests of the arbitrating parties seeking confidentiality and the need for greater transparency. Further, the authors would attempt to examine the process of arbitration and the feasibility of making the various stages of the process more transparent.

Key words: confidentiality, transparency, international commercial arbitration, arbitral award

Xalqaro tijorat arbitrajida shaffoflik va maxfiylik

Annotatsiya: xalqaro tijorat arbitrajida maxfiylik va shaffoflik o'rtasidagi munozaralar yaqinda emas. Maxfiylik xalqaro tijorat arbitraj muhim xususiyatlaridan biri hisoblanadi edi-da, o'tmishda, bu oshkoralik nizolarni hal samarali va ishonchli usuli sifatida muvaffaqiyatga erishish uchun arbitraj uchun zarur, deb ta'kidlaydi qilindi. Maxfiylik barcha tijorat arbitraj tamal toshi yoki oshkoralik uchun oliy qo'ng'iroqlar salbiy muqobil nizolarni hal eng afzal rejimida sifatida arbitraj mashhurligini ta'sir holda oqladi va mumkin hosil bo'lsa, bu maqola hal qilish uchun intiladi. Mualliflar maxfiylik va shaffoflik mutlaqo qarama-qarshi emas deb ta'kidlaydilar va maxfiylikni izlayotgan hakamlik tomonlarining manfaatlari va katta shaffoflik zarurati o'rtasida to'g'ri muvozanatga erishish mumkin. Bundan tashqari, mualliflar arbitraj jarayonini va jarayonning turli bosqichlarini yanada shaffof qilishning maqsadga muvofiqligini o'rganishga harakat qilishadi.

Kalit so'zlar: maxfiylik, shaffoflik, xalqaro tijorat arbitraji, arbitraj qarori

Прозрачность и конфиденциальность в международном коммерческом арбитраже

Аннотация: Дебаты о соотношении конфиденциальности и прозрачности в международном коммерческом арбитраже ведутся не так давно. Хотя конфиденциальность считалась одной из важнейших характеристик международного коммерческого арбитража, в последнее время утверждается, что для успеха арбитража как эффективного и надежного метода разрешения споров необходима прозрачность. В этой статье предпринята попытка выяснить, является ли конфиденциальность краеугольным камнем любого коммерческого арбитража или более высокие требования к прозрачности оправданы и возможны без негативного влияния на популярность арбитража как наиболее предпочтительного способа альтернативного разрешения споров. Авторы утверждают, что конфиденциальность и прозрачность не обязательно являются состязательными, и возможно достичь правильного баланса между интересами сторон, участвующих в арбитраже, стремящихся к конфиденциальности, и необходимостью большей прозрачности. Кроме того, авторы попытаются изучить процесс арбитража и возможность сделать различные этапы процесса более прозрачными.

Ключевые слова: конфиденциальность, прозрачность, международный коммерческий арбитраж, арбитражное решение

Introduction

Two seemingly conflicting concepts of confidentiality and transparency have been continued object of discussions among authorities in the field of international commercial arbitration. Even though the issue of confidentiality versus transparency has been a subject of various discussions, debates and analyses, it remains contentious. Arbitration has historically been considered private and confidential. An empirical study conducted by Dr Christian Bühring-Uhle from November 1991 to June 1992 showed that the third most important reason for choosing arbitration was its confidential procedure. According to the survey, over 60% of the respondents considered confidentiality to be ‘highly relevant’ or ‘significant’. In another survey, in 2018, on the evolution of international arbitration, 87% of respondents answered that confidentiality in international commercial arbitration is of importance. Therefore, the expectation of the parties viz-a-viz expectation of confidentiality in the arbitral process has not changed despite the passage of time. Given the evident popularity of confidentiality and the continued importance placed on it by the arbitrating parties, the

authors, through this article, explore the concept of confidentiality in commercial arbitration and attempt to understand the calls for greater transparency.

This article has been divided into III parts. Part I of the article seeks to understand the concept of confidentiality in the arbitral process. The authors would briefly touch upon what is meant by confidentiality, who is bound by the obligation of confidentiality, the distinction between confidentiality and privacy, the confidentiality obligations in various jurisdictions and the significance of confidentiality in the arbitral process. Part II of the article focuses on the question of what constitutes transparency and how far do the concepts of disclosure and public access differ from transparency. The authors would also answer what is sought to be achieved by greater transparency in commercial arbitration which has primarily been viewed as a resolution of a private dispute as opposed to an investment arbitration which involves a substantial degree of public interest. In Part III of the article, the author attempts to argue that the ostensibly conflicting concepts of confidentiality and transparency can be reconciled and need not necessarily be adversarial to each other. It will be the conclusion part, as well. The author would examine each stage of the arbitral process and attempt to understand how to make each stage more transparent without jeopardizing the advantages the parties seek from the confidential nature of the arbitral proceedings.

Part I: Confidentiality

It is not exist the wide-spread and equally recognized definition of confidentiality. Frankly, we cannot embody several of them. Although, the number of opinions are various, it is widely agreed by authorities that confidentiality means an obligation not to disclose information or documents relating to arbitration to a third party.[1]

Various jurisdictions have attempted to provide statutory recognition to confidentiality and have attempted to define what encompasses confidential in formation. For the sake of illustration, ‘Confidential information’ is defined broadly in section 15(1) of the International Arbitration Act, 1974 of Australia. It includes, inter alia, pleadings, submissions, information supplied to the tribunal by a party, documentary and other evidence, transcripts of hearings, and rulings and awards of the arbitral tribunal.

Confidentiality and privacy are often cited as advantages of arbitration over litigation. These concerns are the primary reasons many parties choose to arbitrate instead of litigate.[2] It is Commentary by scholars and practitioners alike illustrates this presumption: Confidentiality and privacy are supposed to be among the hallmarks of arbitration, together with enforceability and part), control. By this it is usually meant that arbitration has an essentially private nature. Not only Is the hearing in private with

[1] Alexis C. Brown, Presumption Meets Reality, An Exploration of the Confidentiality Obligation in International Commercial Arbitration, 16 Am. U. Int’l L. Rev. 969, 1014 (2001).
[2] Philip Rothman, Pssst, Please Keep It Confidential: Arbitration Makes It Possible, 49-SEP DiSP. RESOL. J. 69 (1994).

strangers excluded, but the parties, by entering into arbitration agreement, accept a mutual obligation not to disclose or use for any other purposes any documents which are prepared for and used in the arbitration. This includes transcripts. notes of the evidence in the arbitration and the award.

Some jurisdictions view this obligation more seriously than others and have protected it by imposing an express confidentiality requirement in their laws. One example is Hong Kong, where parties to an arbitration cannot disclose any information related to the arbitration or the award made in the arbitral proceedings to any third party.[3]

Having said that, confidentiality in arbitral proceedings is not the norm. In the United States, the Federal Arbitration Act is silent on the issue, and in Sweden, there is no generally implied obligation of confidentiality relating to arbitration. On a related note, Australia only recently implemented legislative changes to protect confidentiality in international arbitration, in response to judicial decisions to the contrary. Interestingly, in France, confidentiality is ensured only in domestic arbitration and not international commercial arbitration.

Scholars have supported the notion that the duty of confidentiality should not be explicitly provided like the duty of good faith and fair dealing which are implied in law. Fortier acknowledges that 'those who support or extol confidentiality as one of the defining characteristics of arbitration rely upon this "very silence and absence of discussion" as a proof that duty exists surely and is simply taken for granted'. The courts in United States of America (USA) and Australia have not recognized the implied legal duty of confidentiality, whereas the courts in few countries have set the precedence that confidentiality is a necessary part of definable category of a contractual relationship.

Confidentiality is considered to be one of the most prominent features of commercial arbitration. While the need for transparency was advocated for investment arbitrations since there is a significant element of public interest, international commercial arbitration remained protected owing to the private nature of the disputes and party autonomy.

Keep commercial arbitration confidential has been considered necessary due to various factors. A party may not wish to publicize the allegations of bad faith, misinterpretation, lack of adequate financial resources, wilful breach of contract or the like which can not only result in garnering a bad name but also affect the future business interests of the party. Further, the parties seek to protect trade secrets, elements of technical know-how, research and development, or intellectual property, which can form a part of the arbitral proceedings as well as the arbitral award. It has also been argued that confidentiality of the process has ensured an efficient and

[3] Hong Kong Arbitration Ordinance (Cap. 609).

dispassionate dispute resolution as opposed to 'trial by press release'. There is a free and fair adjudication in the absence of public scrutiny, and the confidential nature of the arbitral proceedings facilitates settlement by minimizing public posturing. Therefore, it can be safely concluded that there is a need to maintain a certain degree of confidentiality to protect business interests as well as the sanctity of the arbitral process.

Part II: Transparency

Transparency has not been defined in international law.[4] In terms of international arbitration would mean how much visibility the public has about the existence of a dispute between two parties, the process of appointment of arbitrators, the background of a potential arbitrator, the tribunal's handling of the case and finally, the arbitral award. The proponents for more transparency in international commercial arbitration have argued that the process as well as the outcome of arbitration does not only affect the parties, but has broader implications for the global business community as a whole. Hayes argues that there is a need for greater transparency because business is not conducted in a vacuum.[5]

Transparency has evolved to be a norm in investor-state arbitration. The reason often cited is that it 'take[s] into account public interest involved in such arbitrations'. In absolute contrast, one common reason for supporting less transparency (by corollary more confidentiality) in international commercial arbitration is that traditionally matters of 'public interest', such as consumer cases, health and safety issues and employment issues rarely arise in such proceedings.

While arguing for transparency in commercial arbitration, it is important to note that it is not identical with the concept of public access. Transparency refers to information about a decisional process provided to interested parties, whereas public access, as its name suggests, is a right of all citizens to ensure fairness and justice in the process of decision-making. Transparency is a narrower concept which may be considered a subset of the broader concept of public access. In a common law system, the right of public access is guaranteed because of the law-making power conferred upon the judges. Public access, therefore, becomes an individual right.

It is clear that transparency is deep-rooted in investor-state arbitration. However, it contrasts with the strong preference of the parties to international commercial arbitration (usually multi-national companies or private individuals) to resolve disputes in an environment of confidentiality with limited disclosure norms. The reasons for this are plenty. For example, the public has little stake-holding in their private matter;

[4] Poorooye, *supra* n. 47, at 282.
[5] Paul Hayes, A New Lex Mercatoria? Resolving The Tension Between Confidentiality And Transparency In International Commercial Arbitration (Kuching, Sarawak 2014).

confidentiality improves the efficiency of the arbitration (by making it harder for third parties to interfere), and disclosure may adversely affect the company's stock price.[6]

Having said that, commentators have long argued for putting in place greater transparency even in international commercial arbitration. The calls for more transparency in commercial arbitration arise from the arguments that despite being private disputes, the implications of commercial arbitration affect the non-parties to the dispute as well. The greater calls for transparency have been justified on arguments that the effects of commercial arbitration are not just restricted to the parties. Pislevik argues that there are implications of confidentiality in commercial arbitration in commercial certainty, future litigants, public confidence as well as the government.

Advocates for greater transparency also argue that disclosure of information related to international commercial arbitration could enable its recipients to make critical strategic decisions (such as protecting against health and safety threats or informing consumers of the products they purchase) or serve national regulatory interest (such as reducing bribery in international arbitration). The most important argument for increased transparency is the fact that 'public interest' is not exclusive to investment arbitration. For example, an indemnification claim between two private parties or multi-national companies could have an underlying aspect of human rights violation or environmental liability.

Although there are concerns of damage to reputation due to adverse publicity, decrease in stock prices, loss of business opportunities, etc., the authors are of the view that there ought to be greater transparency in revealing the existence of a dispute. The authors argue that revealing the fact of the existence of a dispute would neither be detrimental to the parties nor undermine the arbitral process and would go a long way in providing transparency to the opaque arbitration process. Instead of damaging the reputation of a company, this would increase the investor confidence in the company and enhance the reputation of a company as more socially responsible. This is particularly important for public companies or companies based on the public-private partnership model which rely on public funds as a result of which there is a substantial public interest argument in favour of disclosing the presence of a dispute. Further, in disputes such as consumer or employment disputes, the public interest element is very strong, and the public would be interested in knowing the presence of a dispute. The authors also argue that in case of parties where there is no bargaining power parity, such as contracts with insurance companies, consumer contracts, employment agreements, even express confidentiality obligations should not supersede public interest.

Third-party funding is the process of financing a legal claim wholly or in part, by a third party who is not related to the dispute. This third party will, by way of

[6] Rogers, *supra* n. 50, at 1312.

agreement, be entitled to a share of a favourable award, or nothing in the event of an adverse award. Due to increased costs of arbitration proceedings, there is an increasing focus on third-party funding in international commercial arbitration. There is an absence of any specific rules or legislation to address third party funding, and there is a need to lay down some regulations or standard of disclosure in case of third party funding in international commercial arbitrations. The authors are of the opinion that the existence of third-party funding as well as the identity of the funder should mandatorily be disclosed as it increases transparency in the process and also reduces the risk of conflicts of interest. This makes the entire arbitration process more robust and enhances confidence in the process. It is also essential that there is a mandatory disclosure of the identity of the funder since a failure to disclose could mean a risk that court may set aside the award or deny its enforcement on the ground that there was an undisclosed conflict.

Part III: CONCLUSION

Although arbitrations have historically been considered confidential so much so that the entire arbitral process became opaque, there has been a significant change in the traditional practices, and we are moving towards more transparent arbitral processes. The current drive towards greater transparency ought to be welcomed; however, this is fundamentally different from transparency in investor-state arbitrations. There seems to be no unified approach to confidentiality and transparency in international commercial arbitration. Despite the blurring lines, there is still a preference for transparency in investment arbitration and confidentiality in international commercial arbitration. The authors do not argue that confidentiality of arbitral process should be done away with and have put forth a case that confidentiality and transparency can be reconciled to support the continued preference of arbitration as the most favoured mode of dispute resolution. There is a need to bring about a balance between the concepts of confidentiality and transparency since the former is responsible for bringing commercial parties to arbitration, whereas the latter is necessary for ensuring justice in the process. The authors do not support the view that there should be unrestricted public access in all steps of international commercial arbitrations. However, they believe that greater transparency should be advocated for in the context of the existence of a dispute, appointment process of arbitrators and for the publication of the arbitral award. This will increase the confidence of the stakeholders in the arbitration process. Lack of insight into the arbitral process can hamper the popularity of international commercial arbitration. The arbitral community must make the arbitral process more transparent to make international commercial arbitration the most reliable method for settlement of business disputes.

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