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Importance of the Principle of Confidentiality of Arbitration Process in International Arbitration

Akmal Akramov

Senior Lecturer of Tashkent State University of Law

Ne'matov Umidjon

Student of The Tashkent state university of law

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ABSTRACT

In this article, we will analyze the role of the principle of confidentiality in international arbitration law, the obligations of the arbitrator, the parties and the third party in ensuring it, the convenience of this principle in resolving disputes, as well as the jurisdiction of foreign countries in ensuring confidentiality.

Different principles are used to create the legality of international arbitrations: the principles of confidentiality, equality, consent, independence and rigorousness. All of these principles play an important role in international arbitration and help to legally resolve the dispute between the parties and protect the interests of the parties in an appropriate manner. Confidentiality is especially important in resolving disputes and ensuring the fairness of arbitration.

Definition of confidentiality

Confidentiality is one of the hallmarks of arbitration and one of arbitration's most prominent features. The confidentiality inherent to arbitration is attractive to disputants, and as a result, arbitration has evolved as the primary alternative to litigation for resolving civil and commercial disputes. Although the idea that confidentiality in arbitral proceedings is absolute has eroded in recent years, confidentiality is still perceived as a vital acolyte of arbitration. Consequently, there is a need for juridical convergence with regard to traditional notions of confidentiality. There are numerous advantages conferred by confidentiality in arbitration. For example, confidentiality reduces the possibility of damaging continuing business relations, and avoids setting adverse judicial precedents. Additionally, the process offers parties the freedom to make arguments that they would be reluctant to make in a public forum. The private nature of arbitral proceedings offers disputants a forum where they can keep their disputes away from the intrusiveness of the

media and the prying eyes of their competitors. However, the idea that the confidentiality of arbitration affords the parties a more comprehensive shield to guard their information from disclosure than litigation must be qualified. The confidential nature of arbitration regularly clashes with the public interest and with numerous other opposing ideals, such as mandatory disclosure to insurers or shareholders, or when the arbitral award is challenged in a court of law. Challenges to arbitration awards are increasing, and many courts of different jurisdictions are beginning to require the disclosure of materials and documents produced during arbitral sessions notwithstanding express confidentiality agreements signed by the parties. [**1**].

Confidentiality is still regarded as a significant feature of international commercial arbitration. The private nature of arbitration stands in stark contrast to the accessibility and transparency innate to domestic courts. This privacy innate to commercial arbitration is the fruit of international agreements and in that respect, it is important to understand how international commercial arbitration developed in the international community. [**1**].

Confidentiality – the advantage of arbitration

One of the benefits of international arbitration to disputants is that it can keep the proceedings and the decision to be made confidential. Confidentiality is provided in some institutional rules, and can be expanded (to cover witnesses and experts, for example) by the parties' agreement to require those individuals to be bound by a confidentiality agreement. Many companies want confidential procedures because they do not want information disclosed about their company and its business operations, or the kinds of disputes it is engaged in, nor do they want a potentially negative outcome of a dispute to become public. [***2, pages – 3 – 4***].

Despite the information mentioned above, there is a discussion among scientists about why confidentiality is so beneficial. Confidentiality is said to be one of the aspects of arbitration that is highly valued. However, this statement is often made without any meaningful explanation as to why it is valuable or whether the value placed on confidentiality may vary depending upon the context. If it is true that confidentiality is always a highly valued attribute of arbitration, then a high level of confidentiality in arbitration should be maintained.

Richard Naimark and Stephanie Keer did some research and suggested that privacy and confidentiality is not one of the most valued aspects of international commercial arbitration. **[3].** However, Confidentiality in arbitration may be valuable for a variety of reasons. First, parties to the arbitration may not wish to expose certain allegation to the public, e.g., allegation of bad faith, misrepresentation, incompetence, lack of adequate financial resources, etc. Second, parties to the arbitration may not want a "loss" publicized, especially if the party is involved in other cases with similar claims and defenses. Third, parties to the arbitration may want to take position privately that would be difficult to take publicly or, conversely, may be forced to take positions they would not otherwise take to satisfy certain constituencies if the arbitration is made more public (this may be especially true with governments who are answerable to their electorate). Fourth, confidentiality protects confidential or sensitive business information and trade secrets. All of these reasons demonstrate that there is a real value to maintaining a certain degree of confidentiality in arbitration at least in some cases. **[4, pages – 122 – 123].**

Although confidentiality is touted as one of the advantages of arbitration, some arbitral rules place obligations only on the administrators and arbitrators, but not on the parties. **[5].** Moreover, fact witnesses are not bound by confidentiality, nor are experts, unless they sign separate confidentiality agreements. Even if the parties agree on confidentiality provisions, they may be overridden if there is a court challenge. **[6].** Even with an express agreement, however, it is difficult, if not impossible, to prove breach when information leaks out. Nonetheless, a confidentiality clause may at least provide some disincentive to parties to talk freely about the process or results of an arbitration. If parties are concerned about keeping their arbitration proceedings and results confidential, and if the institutional rules do not sufficiently provide for

confidentiality, they might consider using the following clause recommended by the American Arbitration Association:

Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties. **[7].** The clause could also provide that any fact witness or expert witness testifying on behalf of a party will be required by that party to enter into a written confidentiality agreement. [***2, pages – 49 – 59***].

The disputants prefer to turn to the courts, despite the fact that the case has already started in the tribunal court. If the interim relief sought would ultimately require court assistance to be effectuated, such as attachment of a bank account, then going to court immediately could save time. Thus, particularly if the relief is needed urgently, requesting the interim measure from the court may be the most efficient and effective way to proceed.

A downside to seeking relief from the court is that valued confidentiality may be lost. Frequently, there will need to be detailed factual information in support of a request, which may include information that one or both parties would prefer to remain confidential. It may be feasible in some courts to seal the records and close the hearings. However, even if this is possible, a court might require a very strong showing of need before it would agree to take steps to keep the information confidential.

Although there are valid reasons for seeking relief through a court rather than a tribunal, the increasing attention focused on providing arbitrators with the power to grant interim measures suggests a trend in international arbitration to keep as much decision-making as possible under the aegis of the arbitral tribunal. **[2, pages – 104 – 105].**

Confidentiality of the arbitrator's award

The decisions made by the arbitrator must be kept confidential in the interests of the disputing parties, and their confidentiality is essential to the fairness and justice of the arbitral tribunals.

There have been cases where within hours of the award being announced, it appeared on the Internet. When substantial amounts of money are at stake, this kind of disclosure could cause the stock prices of the parties involved to go up or down, depending on the result. [**2, pages – 189]**. This brings about financial and economic damage to the parties. However, it should also be noted that if confidentiality is necessary, there are various ways for the interested disputants to ensure it through international agreements.

Within the arbitral process, the responsibilities to each stakeholder differ. The arbitrators have an obligation to observe a general duty of confidentiality, while the parties' obligations often depend on a confidentiality agreement. In jurisdictions that do imply a general duty of confidentiality, its protection is not absolute, but rather is subject to various limitations or exceptions. Although it was traditionally viewed as almost untouchable, confidentiality may now be overridden through the mandatory disclosure of criminal activities to the appropriate law enforcement authorities or where the disclosure of confidential information is prescribed by law. [**1**].

In addition to this, to disclose confidential information there are some exceptions including in parties consent, falling into the public domain as a result of an action before a national court or other competent authority and establishing or protecting a party's legal rights against a third party. **[8].**

Confidentiality provided in international agreements and contracts

As mentioned above, there are various ways to ensure confidentiality for interested disputants through International agreements, and we will inform you about them through the articles of each agreement.

Disputants would have less confidentiality protection if they chose the ICC Rules or the ICDR Rules. **[2]**. According to ICC Rules, upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information. **[9].** Therefore, trade secrets and confidential information are defended by the request of the disputants.

But, in the ICDR Rules it is provided that Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator**. [5].** But, there are some exceptions which, confidentiality obligation as to information obtained during the process of arbitration is not imposed.

As well as, in WIPO Rules confidentiality, is protected by some articles, is provided : unless the parties agree otherwise, the Center and the arbitrator shall maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed during the arbitration. **[8].**

Introduced in 1976, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) contained constricting confidentiality provisions, where awards and other materials or documents used in the arbitration proceeding could rarely be rendered public. **[1].** In the UNCITRAL, it is written that where there is a need to protect confidential information or the integrity of the arbitral process , the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection. **[10].**

While international commercial arbitration finds its roots in numerous international agreements, the most significant legislative instrument is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, also known as the New York Convention, which currently has 156 signatories. The New York Convention contains no provision for confidentiality in arbitral proceedings, but instead focuses on the enforcement and recognition of arbitral awards and agreements. [**1**].

Duties of the arbitrator in ensuring confidentiality

An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office. **[2, pages – 314 – 315]**. According to the information mentioned above, using any confidential information contrary to someone's interests, informing about the time of decision-making and disclosing information about the court's office by arbitrators are against the international arbitration agreements.

In the ICSID convention, it is written that before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form: I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal. **[11].**

With respect to arbitrators, it is generally accepted that arbitrators have an ethical duty to maintain confidentiality. On the other hand, it also is generally accepted that third parties, such

as, lay or expert witnesses, are not bound by any duty of confidentiality, absent any specific contractual obligations.

The more complicated situation involves the parties themselves. Absent an express agreement between the parties with respect to confidentiality, the duty of parties to maintain confidentiality may vary significantly depending upon the tribunal and the applicable law and procedures, as well as the type of information at issue and the way in which the information may be used. Therefore, the focus of the rest of this discussion will b be on the duty of the parties to maintain confidentiality. **[4, pages – 123].**

Differences in jurisdictions of countries

Jurisdictions vary in their approach to this issue. The United Kingdom and France recognize an implied duty of confidentiality to varying degrees, while Australia, the United States, and New Zealand do not adopt a general presumption of confidentiality unless it is established by the mutual consent of the parties or applicable laws. **[1].**

The main provisions applicable to arbitration in France are set out in Book IV of the Code of Civil Procedure. Article 1469 addresses the principle of confidentiality of the arbitrators' deliberations, with further provisions set out in the French Civil Code. French arbitration law is not based on the UNCITRAL Model Law.

German arbitration law is contained in s.1025 to s.1066 of the German code of civil procedure or Zivilprozessordnung ("ZPO"). The ZPO is based on the UNCITRAL Model Law (1985). It contains no provisions addressing confidentiality and is silent on whether arbitration proceedings are confidential. There is no consensus in Germany as to the confidentiality obligations of the parties. It is generally accepted that arbitrators - unlike the parties - are under an implied general duty of confidentiality. **[12, pages – 46 – 47].**

Although some courts, particularly in England, have found an implied obligation of confidentiality, Australian and U.S. courts tend to only enforce parties' express agreements. **[6].** Australia's Commercial Arbitration Bill 2016 provides for limited grounds for the disclosure of confidential information e.g., in the case of a public interest reason. **[12, page – *40*].** (Doctoral dissertation, London Metropolitan University). As well as, in USA there is the Federal Arbitration Act predated in 1925 and so, it is not based on UNCITRAL MODEL LAW. In FAA, any provisions regarding confidentiality of arbitration process are not existed. It is provided that protecting confidentiality of arbitration process is duty of arbitrators and the disputants.

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