The value of confidentiality in international arbitration law commercial essay

Law

Introduction

Confidentiality is often cited as one of the main benefits of arbitration as opposed to litigation. Although a presumption of confidentiality, whether implied or explicit exists between the parties to an international commercial arbitration, it is still difficult to examine exactly why confidentiality is important.[1]While confidentiality is an important aspect of international commercial arbitration, many scholars and practitioners challenge the idea that all aspects of international arbitration must always be confidential for arbitration to be valuable. They argue that a more nuanced approach to confidentiality in arbitration may preserve the values of arbitration while at the same time enhancing the competing values to be gained by greater transparency. Therefore, this paper advocates the adoption of a presumption that arbitral awards should be made publicly available, unless both parties object. As will be shown herein, this presumption is justified because the benefits of greater transparency in arbitration brought about by the publication of awards often outweigh concerns for confidentiality. The paper begins by examining why confidentiality is thought to be valuable in international arbitration. Then it discusses who is bound by a duty of confidentiality and the scope of that duty. The paper briefly surveys some of the important international and national arbitral rules and case law both in the public and private context to give an overview of how different arbitral institutions and national courts view the issue of confidentiality. It concludes by comparing the relative costs and benefits of more or less confidentiality in private international commercial arbitration as compared to public or semi-public international arbitration in the areas of trade and investment.

The value of Confidentiality in International arbitration

One of the most frequently cited advantages of arbitration, as distinct from public court proceedings, is that private arbitration proceedings and the award rendered in such proceedings are normally confidential, unless the parties agree otherwise.[2]Parties value arbitration over litigation for a variety of reasons, including, inter alia, greater party autonomy, greater efficiency in terms of both money and time, greater predictability as to the applicable law, the forum in which the dispute will be heard and jurisdictional issues, and greater ability to enforce the resulting decision in foreign countries. Likewise, parties to an arbitration may want to take positions 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. Confidentiality protects confidential or sensitive business information and trade secrets.[3]Moreover, confidentiality is valuable for parties who may not wish to expose certain allegations to the public, for example: allegations of bad faith, misrepresentation, incompetence, lack of adequate financial resources. Also parties to the arbitration who may not want a " loss" publicized, especially if the party is involved in other cases with similar claims and defenses[4]can benefit from the advantages of confidentiality. Hence, the maintaining of a certain degree of confidentiality in arbitration is a reasonably necessity. Confidentiality also 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 in arbitration 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. Still, if the value of confidentiality varies depending on context, then arbitration may be made somewhat more transparent in some contexts without undermining the other aspects of arbitration that make it valuable to the participants.[5]Apart from other perceived advantages, arbitration is thought to enable parties to privately settle a dispute with a final and binding outcome without " washing dirty linen in the public".[6]In reality, however, the principle of confidentiality is less clearly established than generally thought. For example national laws have different approaches and even the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration refrains from laying down a provision on the controversial question of the publication or confidentiality of awards.[7]

The duty of Confidentiality. Subjects. Content. Scope.

The question is who is or should be bound by the duty to maintain confidentiality? There are three main groups of participants in the arbitral process to whom the duty of confidentiality may apply: arbitrators; third parties, such as lay and expert witnesses; and the parties themselves. With respect to arbitrators, it is generally accepted that arbitrators have an ethical duty to maintain confidentiality.[8]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.[9]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. Now that we have some understanding of who is or should be bound by the duty to maintain confidentiality, we must consider what exactly it is that they may want to keep confidential: the existence of the dispute or the arbitration; the substance of the proceedings, including evidence produced during the arbitration process and/or all or part of the award?[10]

Confidentiality vs. Privacy

A crucial distinction, for example, must be drawn between the " privacy" of the arbitral proceeding and the " confidentiality" of the proceeding. The privacy of the proceeding refers to the ability of uninvited third parties, such as former spouses, business partners, and the media, to access and observe the proceedings, and perhaps disclose those observations, without the consent of the disputing parties, and possibly the arbitrator.[11]The confidentiality of the proceeding, however, refers to the ability of the disputing parties, the arbitrator, witnesses, and others who attended the arbitration to disclose publicly oral statements made in arbitration, documents tendered in arbitration, or observations of conduct by parties, witnesses, and arbitrators during the course of the arbitration. When considering confidentiality of arbitration communications, yet another important distinction must be drawn between disclosures to third persons in the general public and disclosures to institutions in the context of formal legal proceedings. Disclosures to third persons in the general public include a wide range of possibilities, from disclosures to spouses, family members

and friends to business partners and competitors, and students in classrooms and training sessions. Since these disclosures are in the private realm, the law historically has permitted parties to regulate them through the law of contract, and that law is generally well developed.[12]Disclosures in the context of formal legal proceedings can also take many forms, such as disclosure pursuant to a deposition or in response to a discovery request, testimony during a trial, as well as the work of other public bodies, such as investigations and hearings by administrative agencies, legislatures, and grand juries. Unlike disclosures to third persons generally, which implicate private interests, disclosures in formal legal proceedings implicate public interests, specifically, the public's interest in accessing the information pursuant to governmental fact-finding, adjudication, or policy development and legal regulation.[13]

Flexibility. Transparency. Confidentiality.

As article 15(1) of UNCITRAL Arbitration Rules states: " Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case", the difference between domestic court litigation and international arbitration proceedings can be easily deduced. [14]The flexibility and the discretion granted to the arbitral tribunal in how to shape and schedule the proceedings are the expression of the broad powers that arbitral tribunals possess. This flexible approach is reflected in the UNCITRAL Notes on Organizing Arbitral Proceedings, and also the ICSID Convention and ICSID Additional Facility are based on the same philosophy,

although they are more detailed on the procedures for the arbitration than the UNCITRAL Arbitration Rules.[15]Transparency has become one of the central aspects of good governance claims directed against States. Transparency is also increasingly demanded from private parties as an important aspect of corporate social responsibility. According to traditional transparency demands, all branches of government should avoid secrecy in their dealings with citizens. While the traditional transparency demands may be primarily addressed towards the administrative and the legislative branch, they also have implications for the judiciary, requiring it to abolish secret courts, to conduct its proceedings publicly and to publish its decisions. [16]Arbitration could be regarded simply as an alternative to judicial dispute settlement where such transparency considerations do not arise as a result of the presumed confidential nature of arbitration. The better approach is to look at the underlying functions fulfilled and values protected by transparency which apply to dispute settlement methods in general and to arbitration in particular.[17]The publication of judicial and arbitral decisions is a precondition for the evolution of a consistent case-law which creates legal certainty in the form of assuring that all cases are treated equally. It thus ensures predictability for its actual and potential users. This will in turn increase the confidence in the system of dispute settlement. For arbitration, it is important to be perceived as a true alternative to judicial dispute settlement. The special expertise of arbitrators which is often portrayed as one of the particular advantages of arbitration will only be sufficiently appreciated if their " products", arbitral awards, decisions and orders, are also publicly available and thus open to public and scholarly scrutiny. Finally,

there may be a justified public interest in the outcome of certain disputes which affects not only the parties to the dispute but either the public at large or certain segments of the public. This justified interest is frequently expressed in specific legal disclosure requirements imposed upon companies by national law. These requirements may trump confidentiality rules; in particular where arbitration rules qualify confidentiality through legal disclosure duties. All of these considerations are also valid in the context of investment arbitration. The evolution of a consistent case-law is only possible through the publication of decisions and awards on jurisdiction and on the merits as well as of orders addressing crucial procedural issues. The public availability of judicial or quasi-judicial decision is particularly important where the substantive rules governing disputes between parties are of a highly general and vague character. This is a phenomenon not unknown in international law where sometimes very abstract rules are agreed upon in treaties, often in the form of vague compromise formulations, which are in need of interpretation by dispute settlement institutions.[18]Confidentiality is generally regarded as one of the hallmarks of commercial arbitration and usually ranks high among the perceived main advantages of arbitration over other forms of dispute settlement. It is usually assumed that many firms appreciate the privacy and confidentiality of arbitral proceedings because it protects business secrets and may help to protect the public image of companies when even the mere fact of litigation released to the public might cause harm to its reputation. The confidential nature of arbitration proceedings may also contribute to a reduction of tensions between the parties. In the absence of the requirement to publicly comment on various

procedural steps during dispute settlement procedures, it might be easier to agree on certain non-disputed aspects of a case and thus to accelerate the proceedings. Ideally, the confidential nature of proceedings may even facilitate settlement talks between the parties and ultimately a mutually-agreed-upon solution, be it in the form of an award on agreed terms or a direct settlement agreement between the parties. Confidentiality and transparency are squarely conflicting principles serving competing interests.

The process of Mediation vs. Confidentiality

In the face of rising court costs and increased delays, mediation has become popular in recent years. In mediation, a neutral third party with no stake in the outcome of the dispute and no power to impose a solution on the parties helps the disputants to resolve their conflict.[19]Once used only for specific types of disputes, mediation is rapidly finding employment as a problem solving method for disputes that were formerly resolved only through the adversarial process. Mediation has become popular for several reasons. First, agreements reached through mediation usually have a higher compliance rate than judgments handed down by the courts. The mediating parties invest a great deal of time, effort, and money into reaching an agreement and are more likely to abide by the terms of the agreement.[20]Second, the mediation process preserves ongoing relationships among the disputing parties. Because of the inherent flexibility in the mediation process, it is possible for agreements to include conditions other than the payment of money. Consequently, the win-lose situation inherent in the adversary process is avoided.[21]Also, future relations between the parties can improve because a successful mediation session reveals a new and relatively

inexpensive process by which the parties can resolve future disputes. Third, mediation involves considerably less time and expense than other forms of dispute resolution. The costs in attorney’s fees alone often make it uneconomical for parties to try to settle a minor dispute through the adversary process. By utilizing informal mediation, the parties can save money and preserve future relations with each other. Perhaps the most appealing aspect of mediation is its promise of confidentiality. Mediators emphasize that all information revealed in a mediation session should remain confidential.[22]A mediating party presumes that everything he says during the course of the process will remain confidential. Unlike a judge or an arbitrator, the mediator has no ability to coerce the parties. Therefore, the mediator must guarantee confidentiality to the parties so that they will be willing to reveal their true interests.[23]Confidentiality, then, is as essential to a mediator as it is to an attorney, a doctor, or a psychiatrist. At least four reasons justify the need for confidentiality in mediation. First, it would be nearly impossible for the mediator to discover all of the underlying problems at issue without a guarantee of confidentiality. Second, confidentiality allows the mediator to maintain neutrality in the eyes of the disputants. It is important that the disputants view the mediator as an unbiased person. If one of the disputants views the mediator as biased, he would surely not trust him and, therefore, the mediator's task would be nearly impossible to achieve. Third, a mediator who guarantees confidentiality is protected from the distractions of frequent subpoenas that could impede his efficiency. Finally, the confidentiality aspect of mediation makes it a very attractive alternative to other forms of dispute resolution. Parties often prefer to keep

disputes out of the newspapers; by settling these disputes through mediation, privacy is protected. Confidentiality in mediation is protected in several ways. None of the methods, however, are foolproof. For example, rules of evidence usually protect only the admissibility of the information dealing with proof of the validity of the plaintiff's claim. Moreover, these rules do not exclude evidence in subsequent litigation over related claims raised after the mediation. Furthermore, evidentiary rules usually do not provide protection from public disclosure of information and from use of information in administrative and legislative hearings. Private agreements are a second method used to protect confidentiality in mediation. At the outset of mediation, disputants agree that nothing said during the mediation will be disclosed. Courts do not always uphold these agreements; however, many states have enacted legislation that specifically deals with the issue of confidentiality in mediation. Some of these statutes provide for limited protection of confidentiality, while others have provided for blanket protection.[24]There is constant debate over which methods should be employed to keep disclosed information confidential. It is essential that such information remain confidential if mediation is to continue to be an attractive alternative to dispute resolution.

Confidentiality issues presented by multiparty proceedings

Because arbitration is a private form of dispute resolution, strangers are normally excluded from the arbitration. However, the privacy of the proceedings and use of confidential information therein may be affected if separate arbitral proceedings involving additional parties are consolidated or identical testimony and evidence are introduced into separate proceedings.

When additional parties are added to an arbitral proceeding, the additional parties may not be entitled to the same confidentiality as the original parties. In circumstances where witnesses and evidence are heard consecutively in separate proceedings or stipulated into the record of a second proceeding, sensitive and unrelated information may be revealed in the second proceeding. These two sets of circumstances may arise, for instance, in multiparty contractual disputes where some or all of the contracts at issue contain agreements to arbitrate. Examples include disputes between a contractor and subcontractors in an international construction venture or disputes among parties to a string contract in the context of trading commodities.[25]However, it may be advantageous or efficient for disputes involving similar facts or parties to be heard together, or for testimony and documents used in one proceeding to be introduced into another proceeding. Whether an arbitrator or court will order arbitration proceedings consolidated is uncertain and may depend upon the applicable national law or institutional rules at issue.

Case law

National courts have differed on the ability of a party to prevent the disclosure in a subsequent litigation of information from a commercial arbitration. As the following cases illustrate, English courts have imposed a legal undertaking of confidentiality where parties submit to arbitration. In contrast, United States and Australian courts have been unwilling to imply an absolute confidentiality requirement in arbitration. Issues commonly raised in arbitral confidentiality disputes are presented in the following cases.

[26]English CourtsHassneh Insurance Co. of Israel v. Mew involved an

unsuccessful arbitration for the defendant insurer. In a subsequent litigation, the insurer attempted to proceed against its reinsurance broker, C. E. Heath & Co. The insurer wanted to disclose the arbitrator's prior award and reasons to C. E. Heath & Co. The court ruled that, where reasonably necessary to establish a defense or cause of action concerning an arbitrating party's rights against a third party, an award and any of the tribunal's reasons could be disclosed without leave of the court or breach of the duty of confidence. The court stated that " since the duty of confidence must be based on an implied term of the agreement to arbitrate, the term must have regard to the purposes for which awards may be expected to be used in the ordinary course of commerce and in the ordinary application of English arbitration law".[27]The court observed that while questions of discovery are for the arbitrators, questions concerning the confidentiality of material generated in arbitration and the extent such materials may be used in subsequent proceedings are for the court. The court analogized the relationship of arbitral participants concerning confidentiality to that of a customer and banker and ruled against the production of arbitral pleadings, witness statements, disclosed documents and transcripts of evidence in the subsequent litigation, holding that a high standard of confidentiality attaches to such documents. The Mew confidentiality standard was recently tightened in Insurance Co. v. Lloyd's Syndicate. In Lloyd's Syndicate, the court ruled that disclosure of an arbitral award or its reasons is forbidden unless strictly necessary to protect an arbitral party's legal rights or establish a cause of action against a third party. The court further stated that the mere fact that an award may be persuasive or assistive to a party in a subsequent litigation

is insufficient to justify an exception to the " implied duty" of confidentiality which attaches to every arbitration. The confidentiality issue in Lloyd's Syndicate concerned an interim arbitral award in arbitration between a reinsurer and Lloyd's Syndicate. When the reinsurer desired to reveal the award to other reinsurers in order to demonstrate their liability for disputed losses, Lloyd's Syndicate petitioned the court for a permanent injunction against such disclosure. In granting a permanent injunction, the Lloyd's Syndicate court observed that if the Mew confidentiality standard was interpreted to mean that arbitration documents " persuasive" or " helpful in subsequent, unrelated litigation could be revealed, confidentiality in arbitration would often be uncertain and unenforceable. The court, therefore, adopted a necessity requirement and interpreted the Mew confidentiality standard to state: " It is sufficiently necessary to disclose an arbitration award in order to enforce or protect the legal rights of a party to an arbitration agreement only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement. The making of the award must therefore be a necessary element in the establishment of the party's legal right against the stranger."'The Lloyd's Syndicate court found an exception to this rule unwarranted, as the prior arbitration was inconclusive of legal rights in the subsequent suit between the reinsurers, despite the overlap of issues. The court, further, imposed a permanent injunction to prevent the breach of arbitral confidence, despite a finding that disclosure would cause no " commercial detriment" to Lloyd's Syndicate. In granting the injunction, the court stated that a party to a prior arbitration " need not ordinarily show

'proof of loss' in order to receive injunctive relief. United States CourtsThe extent to which United States courts will exclude arbitral documents from a subsequent action is unclear. At least two U. S. federal courts have held that the attorney client privilege and work product doctrines apply to documents prepared for and during an international arbitration, though not necessarily to documents actually produced during the arbitration. In Samuels v. Mitchell, the court ruled that " since arbitrations are adversarial in nature and can be fairly characterized as 'litigation' within the meaning of Federal Rule of Civil Procedure 26(b)(3), documents prepared by or for a party in connection with arbitrations should ordinarily be protected by the work product doctrine. " The court found that documents provided to a third-party accounting firm, for the purpose of keeping the firm updated on the status of a domestic arbitration, but not for legal or expert witness purposes, were protected by the work product doctrine." The court held that the work product doctrine was not waived, as there was no substantial danger that the documents or related information would be revealed to an adversary. The court, however, noted that " there is no dispute regarding documents actually submitted during the Arbitration Procedures since defendants have agreed to produce such documents." The issue of whether documents produced during the arbitration itself were excludable, therefore, was not specifically addressed.[28]At least one U. S. court, however, has refused to exclude documents from a prior arbitration on the ground of confidentiality where the parties and tribunal expressed no intent to keep the documents confidential. In United States v. Panhandle Eastern Corp the defendant was unable to present any " actual agreement of confidentiality" and, instead,

asserted that the parties to the arbitration had reached a " general understanding" of confidentiality. Further, rather than an arbitration agreement, confidentiality stipulation, or arbitral order concerning the confidential treatment of documents by the tribunal, the defendant in Panhandle Eastern Corp cited to International Chamber of Commerce Rules for the contention that arbiters have a general duty to keep the information they are exposed to in confidence. The court rejected this argument, stating that " the rules governing the internal functioning of the Court of Arbitration are not applicable here."[29]Australian CourtsIn Esso Austl. Resources Ltd. v. Plowman, 210 an Australian court held that arbitrating parties are not bound by an implied duty of absolute confidentiality for documents and information obtained in private arbitration. In Plowman, Australia's Minister for Energy and Materials brought an action against two public utilities to obtain pricing information that the utilities gained from Esso Australia Resources in separate prior arbitrations. Esso argued that the arbitrations were private and that the information sought by the Minister was confidential.[30]The court, while recognizing that arbitration is widely recognized as private, observed that the arbitration agreements at issue did not contain confidentiality clauses. The court rejected the view that confidentiality had evolved into an " essential characteristic of private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of arbitration. The court held that an absolute duty of confidentiality or a duty not to disclose documents does not arise from the private nature of arbitration. The court expressed concern that confidentiality is subject to too many factors to allow for the

creation of an absolute duty of confidentiality. One such factor was the " public interest" present in the Ministry's desire to obtain pricing information in the instant case. Although the court observed that an implied obligation of confidentiality arises concerning documents produced under tribunal order, that duty of confidentiality was here outweighed by the " public's legitimate interest in obtaining information about the affairs of public authorities." In Australia, therefore, any precise definition of the confidentiality governing arbitral documents must derive from the contract to arbitrate itself. English, United States, and Australian courts have adopted different analyses and results concerning the confidentiality in a subsequent litigation of documents and information produced in a prior arbitration. It should be noted, however, that a central issue in these cases was that neither the parties nor the tribunal had expressly addressed the issue of confidentiality. The United States and Australian courts' analyses indicate that had the parties or tribunal addressed this issue, the information may have benefitted from a greater degree of confidentiality.[31]

Conclusion

In the end, however, the benefits to be gained by taking a more nuanced approach to confidentiality in arbitration and allowing a greater degree of transparency where appropriate has the potential to greatly benefit international commercial arbitration as a whole. Therefore, scholars, practitioners, parties, judges and arbitrators should engage in a careful weighing of the benefits and costs of confidentiality versus greater transparency under the facts of the particular situation and should not be too quick to presume the existence of a general duty of confidentiality or to

enforce such a duty. In most cases, it is likely that such a balancing will result in a decision to publish the arbitration award to the benefit of the international arbitration community as a whole. Finally, arbitral institutions should consider amending their rules to create a presumption that awards will be published unless both parties object in advance. Such a rule would clarify at least one aspect of the duty of confidentiality and would provide the benefits described above refer to the participants’ obligation not to disclose information about the arbitration to outsiders.