CONFIDENTIALITY OR TRANSPARENCY: WHAT SHOULD ARBITRAL INSTITUTIONS DO?*

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Abstract

This article pinpoints the question: to what extent should arbitral institutions publish arbitral awards administered by them, with regard to confidentiality and transparency concerns? While there are increasing proposals in international commercial arbitration ("ICA") on an arbitral institution's duty to implement more transparency in their arbitral processes to increase consistencies of legal interpretations, it is also undisputed that confidentiality—as a relatively opposite concept to transparency—still stands prominent as one of the greatest advantages of ICA. To respond to the imposed question, the article explores and defines in detail the two concepts of confidentiality and transparency; it provides competing arguments for and against each of the two concepts, considering also the role of confidentiality duty as an exception to transparency. Through these methods, the article finds that it is best to first uphold confidentiality duty when there is any. Lacking such a duty, transparency should only be implemented at stages that do not expose extensively parties' substantive dispute information; it is suggested that transparency should only be adopted in the process of an arbitral institution's acceptance of cases and the appointment of arbitrators.

Keywords: International Commercial Arbitration, Confidentiality, Transparency, Arbitral institutions, Arbitral award

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1. Introduction

Confidentiality has long been a recognized 'advantage' of international commercial arbitration ("ICA"). The concept allows parties to settle their disputes in a manner least exposed to public attention and criticism. In parallel, however, it is undisputed that the opposing trend of transparency is on the rise. More arbitral institutions are now publishing documents related to their overseen cases, such as redacted arbitral awards and summaries of decisions on challenge of arbitrators, which raise questions as to the future existence of confidentiality duty in ICA. It is therefore essential to analyze confidentiality and transparency as two opposite ends of the spectrum, particularly to what extent should arbitration-related information be kept confidential or transparent by arbitral institutions. In doing so, this article defines, first, confidentiality and transparency; second, it sets out competing arguments in favor of each of the two concepts; third, it explores circumstantial grounds for the existence of parties' confidentiality duty which may act as an exception to transparency; lastly, it concludes the extent transparency can be adopted by arbitral institutions, in relation to the prior considerations made.

2. Defining confidentiality and transparency

It is significant to first establish an understanding and the connotations of confidentiality and transparency, as it is the heart of this article's discussion. Other similar concepts are to be distinguished from the two concepts for purposes of clarifying the scope of discussion.

Confidentiality, although having no concrete definition for it, has been agreed by authorities to refer to the obligation of not disclosing information or documents related to an arbitration to third parties;[1] it concerns publication restrictions on the arbitral proceedings, the evidence used, and the arbitral awards.[2] At times, the understanding of confidentiality is merged to cover also the idea of privacy, having shared similar notions of keeping certain arbitration aspects secret. However, the nuance of privacy leans towards the idea that the arbitral proceedings are to be conducted in a manner private from non-related parties to enter or participate.[3] This is a relevant distinction to make, since privacy is generally ensured in an arbitration whereas confidentiality is not always absolute.[4] The distinction also scopes down

[1] Srishti Kumar and Raghvendra Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration' (2020) 86 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 463-4.

[2] Stefan Pislevik, 'Precedent and Development of Law: Is It Time for Greater Transparency in International Commercial Arbitration?' (2018) 34 Arbitration International 241, 243.

[3] Pislevik (n 2) 243; Kumar and Singh (n 1) 466.

[4] ibid.

the discussion of confidentiality in this article to not extend to closed proceedings provided under the notion of privacy.

As opposed to confidentiality, transparency in arbitration connotes the extent of visibility the public has with regard to the existence of a dispute, the process of arbitrators' appointment, the background of the arbitrators, the tribunal's manner in handling the case, and the arbitral award.[5] Being the focus of this article *per se*, the appropriate extent of transparency is still a topic of discussion and is harder to define. For now, such scope may be defined through the differentiation of its closely-related concepts of public access and disclosure.

Public access to adjudicatory proceedings can be defined as the general citizen's rights to attend or access proceedings.[6] The scope of public access is rather broad, exposing almost all elements of a case to the general public that it hardly coincides with the private character of ICA. Transparency, on the other hand, is considerably the subset of public access;[7] it does not publicize information on arbitral cases to the extent of public access and can better be adopted without undermining the general nature of arbitration. While transparency is being increasingly supported for its advantages, as will later be discussed, public access in the context of ICA is not seen to have great significance; Rogers has raised an argumentative illustration, questioning '[w]hat sense would it make … to insist that a Brazilian citizen has a "right" to attend a hearing in Austria for a case between a Chinese and Russian party that is governed by German law?'.[8]

Another concept that shares characteristics with transparency is disclosure. Whilst transparency emphasizes its focus on how an institution handles substantive information, disclosure concerns the substantive information itself.[9] The publicizing purposes of the two concepts are different: transparency aims to assure scrutiny and evaluates the decision-making process, however, disclosure benefits the particular recipient of the information.[10] Indeed, disclosure may assist in the promotion of transparency, for example in the situation where arbitrator's information is disclosed in their appointment to ensure a transparent decision-making process.[11] Yet, for the purposes of this article's discussion, disclosure will not be significantly addressed in the arguments to prevent the blur between the two concepts.

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[5] Kumar and Singh (n 1) 471.

[6] Catherine A. Rogers, 'Transparency in International Commercial Arbitration' (2006) 54 University of Kansas Law Review 1301, 1304.

[7] Kumar and Singh (n 1) 472.

[8] Rogers (n 6) 1306.

[9] ibid 1310.

[10] ibid 1309-10.

[11] ibid 1310-11.

3. Purposes of confidentiality and transparency

Having defined the core understanding of confidentiality and transparency, this article now turns its focus to the competing considerations supporting each concept. This analysis can be an influential factor in evaluating the areas that confidentiality are to be conserved and the areas that transparency are to be implemented. It should always be noted that, despite the rising support in transparency, the application of the concept should not undermine the core facets of ICA in which confidentiality forms a part.

3.1 Arguments supporting confidentiality

The very first supporting argument for confidentiality is how the concept has normatively been integrated to ICA's characteristics. Often in a discussion on the benefits of ICA, confidentiality will be raised as part of the positive list,[12] and there are grounds that have shaped this common view. When a dispute arises, businesses would indeed want to conceal any related information to the dispute to maintain their reputation and business conduct. Especially, if the concerning dispute revolves around the businesses' trade secrets, confidentiality responds as the key mechanism in keeping such information private.[13]

It may be argued against complete confidentiality, based on the definition discussed previously, that the scope of transparency covers mainly the procedural aspects of an arbitration; it would not extend to publicize relevant substantive aspects like trade secrets. However, this argument may be countered that the published procedural information itself may be used by the public to raise controversies related to how the tribunal derive at the final award. This would still inherently affect a business' reputation and its conduct. Even if the identities of parties are not given in the publication, in reality, parties still run the risk of being recognized by the public through the substantial facts that are required—to a certain extent—to be given for the understanding of the procedural decision published. For instance, if transparency is to be implemented on how procedurally the tribunal came to its conclusion of the award through its taking of parties' evidence, definitely at least some substantive elements of the dispute would need to be disclosed for the understanding of such procedural undertaking. In these kinds of processes, the substance of the evidence would be significantly connected to the tribunal's procedural conduct; the identities of parties are at a higher risk of being identified and the disclosure of the substantive information is higher. In the end, the potential risk of recognition and substantive disclosure would disinterest parties to use arbitration. Because confidentiality covers both the substantive and procedural aspects of

[12] *See* Franco Ferrari, Friedrich Rosenfeld, and John Fellas, *International Commercial Arbitration: A Comparative Introduction* (Edward Elgar Publishing 2021) 15; Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017) 4.

[13] Cindy Galway Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 American Review of International Arbitration 121, 123.

information, the full assurance of secrecy would arguably align better with parties' initial intention in resorting to the ICA mechanism.

As will be discussed, one of the rationales for transparency is to enhance consistent interpretation of laws and rules. However, case laws in the realm of ICA would not be regarded as binding precedents *per se*. The maximum influence that similar prior cases can have on the tribunals' discretion in subsequent cases are as inspirations. The non-binding status allows tribunals to derogate from the findings of the prior cases, which questions the initial purpose to increase transparency in ICA; with prior cases acting as mere considerations that need not be followed by the tribunal, the purpose to increase consistency in the interpretation of law may less likely be achieved through transparency alone. As such, the importance of maintaining confidentiality would need to be weighed against the risk of losing it for an uncertain uniformity of legal interpretation.

Closing doors from the public attention, confidentiality can also prevent public influences on the arbitral proceedings. At times, when parties are subjected to the public's views, they may hesitate to take a particular positions, even though such positions may have been chosen had the proceedings been conducted in a private manner.[14] Additionally, arbitrators' discretion on the case may also be similarly affected, where they will 'feel compelled to go beyond resolving the present dispute';[15] they may focus on the law-making consequence of their decision and on promoting themselves as arbitrators.[16]

As a final remark on confidentiality, the notion may act as an incentive for parties to perform accordingly to the award rendered. Enforcement of awards through domestic courts would be required if parties do not abide by it.[17] In such case, the information that arises in the arbitral proceedings would also be subjected to the review of the particular court, where it may be publicized after the court has rendered its decision.[18] If parties would like to maintain the secrecy of their information, it would be better for them to adhere to the award than risk the chance of getting their substantive dispute information exposed.

3.2 Arguments supporting transparency

The concept of transparency was inspired by the characteristics of international investment arbitration ("investment arbitration"). A great number of investment arbitration cases are connected to the consideration of public interests, such as public health,

[14] ibid.

[15] Pislevik (n 2) 247.

[16] ibid.

[17] Sherlin Tung and Brian Lin, 'Chapter II: The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: to Have or Not to Have?' (2018) Austrian Yearbook on International Arbitration 2018 77, 80.

[18] ibid.

environment, or foreign investment in the public sectors.[19] In these disputes, the public is indirectly involved as those who pay for the arbitration-related fines through their payment of taxes and are subjected to the outcome of the case.[20] Lower levels of confidentiality in investment arbitration cases are thus adopted as a way to inform the status of the undergoing disputes to the affected general public. Respectively, one may view that because most ICA cases are private disputes between private parties where the public is less involved and affected by the arbitral awards rendered, an arbitral award rendered in ICA cases may not affect a broad segment of society.[21] Still, it cannot be automatically inferred that there is no need to implement transparency in the procedural concerns of ICA at all; there are aspects that ICA and the general public can benefit from in the implementation of transparency.

As aforementioned, the main purpose of transparency in ICA is to develop uniformity in law. With more awards being published, whether restricted to only the procedural concerns or inclusive of the substantive elements, legal certainty and predictability will increase.[22] The publication will help eliminate inconsistencies of disputes with the same or similar facts.[23] While it is true that these publications do not have the capacity as binding precedents and will only bind parties to such arbitration, well-written and reasoned awards do have their persuasive value.[24] Indeed, arbitrators have the discretion to deviate from the prior awards. Yet, if such deviation is so unreasonably great that the irrationality can generally be observed by others, arbitrators would unlikely choose to employ the illogical decision. Arbitrators would want to promote their competencies as part of the decision-making tribunal. To do so, they would be aiming to establish their fair and rational character; unreasonably diverging from similar antecedents would be a hindrance to their advertisement as an arbitrator rather than a promotion. Additionally, on the argument that the arbitrator will instead emphasize the law-making consequences of their decision,[25] this consequence may instead be beneficial to ICA with arbitrators feeling more obligated to rigorously scrutinize their awards; the level of care put into the decision will be higher, thus benefiting ICA overall.

Publications can also benefit the general public who may or will be parties to an arbitration by providing insights into how the arbitration processes have realistically been conducted by their chosen institutions. The publications can act as sources for the public to

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[19] Timothy Foden and Odysseas G Repousis, 'Giving Away Home Field Advantage: the Misguided Attack on Confidentiality in International Commercial Arbitration' (2019) 35 Arbitration International 401, 402.

[20] This is similar to the situation of public international arbitration discussed by Buys (n 13) 134.

[21] Buys (n 13) 135.

[22] *See also* Alexis Brown Stokes, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16 American University International Law Review 969, 1018.

[23] Tung and Lin (n 17) 83.

[24] Buys (n 13) 136.

[25] Pislevik (n 2) 247.

understand the arbitral processes that they may be similarly subjected to. This can favorably influence the parties' choices of arbitral institutions, as well as their conducts in arbitration, to prevent the odds of them being confronted with a similar dispute when they know or can predict of the consequences of their actions through the publications.

Here, the implementation of transparency through institutions' publications also need not cover the entire process of arbitration. It may only be adopted in steps that involve largely procedural concerns. Adopting the concept in parts that involve significant substantive peculiarities of a case, such as the taking of evidence, would be of no great significance to the goal of consistent interpretation—the procedures undertaken by the tribunal in the taking of evidence would be particular to the case due to the substantive facts surrounding it—and the decision published would not be widely applicable to other cases. By this approach, transparency would not undermine confidentiality as the main characteristic of ICA. Arbitration steps involving relevant information that parties seek to keep confidential—but are related to the procedural concerns—may not be published to still uphold parties' interests. Additionally, by providing transparency only on procedural-centric steps makes it harder, or even impossible, for the public to identify parties' identities; it is a general step to go through by any parties to arbitration as oftentimes the cases will be similar to one another that parties cannot be recognized based on the publication.

4. Confidentiality duty as limitations to transparency

The existence of confidentiality duty in a case is another aspect to take into account when arbitral institutions are considering the implementation of transparency through their publishments of awards. When there is an absolute confidentiality duty, it is hard to argue that transparency can still be adopted without undermining such duty; arbitral institutions should refrain from making publications on cases that have confidentiality duty protecting it. However, what can be problematic is the determination of whether confidentiality duty is a default obligation, as the question *per* se is still an unsettled topic in ICA.

To determine the existence of confidentiality duty as a legal obligation, one needs to refer to the content of the arbitration agreement, the chosen law of the seat, and the chosen arbitration rules.[26] In the first source of arbitration agreement, there needs to be an agreement between the parties that give rise to confidentiality duty; this relies solely on party autonomy,[27] and they may or may not address the issue explicitly. If parties have not addressed this concern under their agreement, the law of the chosen seat is then looked at. Each national jurisdiction is different in their approach towards confidentiality duty. For instance, if parties choose England as their seat of arbitration, they will be subjected to

[26] Foden and Repousis (n 19) 405-6.

[27] ibid. 406.

confidentiality duty; although the English Arbitration Act 1996[28] does not explicitly address the issue, English courts have established an implied duty of confidentiality with several exceptions such as consent, order of the court, or reasonable necessity.[29] This would be different if parties chose Thailand as their seat of arbitration, where such issue has not been addressed by the Thai Arbitration Act.[30] With regard to the last source of consideration, generally, arbitration rules do support the existence of confidentiality duty. However, the manner that each set of rules addresses confidentiality duty may be different. Article 39 of Singapore International Arbitration Centre ("SIAC") Rules 2016, for instance, imposes confidentiality duty on parties, unless it has been otherwise agreed.[31] On the other hand, the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules 2021 is silent on the obligation of confidentiality.[32]

It can therefore be noticed that the existence of confidentiality duty is dependent on the circumstances of individual cases. No general assumption can be made that there always exists confidentiality duty; each case is to be construed separately in detail. And when such a duty exists, the obligation will affect the current discussion of confidentiality versus transparency.

5. In which steps can transparency be implemented?

The article now shifts its focus back to the main question: to what extent should arbitral institutions adopt transparency in arbitral proceedings? To answer this question, the prior discussions will need to be taken into account as a whole. The very first consideration to make here is whether there is an explicit agreement or a default assumption arising from the chosen law of the seat on confidentiality duty.[33] The answer to this question can determine the level of confidentiality to be adopted for a particular case.

If the answer to the question is yes, there is a duty, this article views that such agreement or implication of law should not be undermined, unless parties in the end agree to waive the confidentiality duty. Imposing transparency with the presence of confidentiality duty would undermine party autonomy and interests in arbitration. Even in the case where such duty arises from the law of the seat, no contrary actions supporting transparency should be done; parties may have chosen a particular seat for the protection of confidentiality duty.

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[28] English Arbitration Act 1996.

[29] Foden and Repousis (n 19) 406; Kumar and Singh (n 1) 469; *see* Dolling-Baker v. Merrett [1990] 1WLR 1205.

[30] Thai Arbitration Act B.E. 2545.

[31] SIAC Rules 2016, Article 39.

[32] *See* UNCITRAL Arbitration Rules 2021.

[33] Since this article considers the extent that arbitral institutions should adopt transparency, the consideration of whether arbitration rules have imposed default confidentiality duty does not form part of the grounds here; what has been imposed by arbitration rules currently may be contrary to the opinion of transparency in this article that it would prevent subsequent considerations of the main question.

If, however, there is no explicit agreement or the law of the seat is silent on the default duty, this article is of the view that transparency should be implemented only in some steps of the proceedings. Particularly, the steps include (i) the reason for acceptance or refusal of cases by arbitral institutions, and (ii) the appointment of arbitrators. Taking into account the prior discussions made, these two steps are ones that will not undermine parties' interests in confidentiality, but can be more transparent for better consistency in legal interpretations and public insights to ICA. Since these two processes are least connected to the substantive elements of a case, parties' interests in wanting to keep their substantive information private would be maintained. In parallel, transparency on the two steps can benefit the public the most, provided that all parties to arbitration will be subjected to the same processes; it would be advantageous for them to know what can be expected to prevent any possible dispute. As for the remaining arbitral processes, such as the hearings or the publication of arbitral awards, this article has the opinion of keeping the process confidential. The hearings and the arbitral awards are very closely related to the substantive matters. Publishing these two aspects would be detrimental to the interests of parties. Even in a redacted version, parties still run the risk of being recognized by the public, with the published substantive information pointing to them. Although by keeping these processes confidential there will be less legal interpretation examples for the public to study, such loss does not outweigh the risk that parties may have to face. In fact, if more legal interpretation is needed on particular laws, these would generally arise in the process of enforcement of the arbitral award anyway and need not rely solely on institutional publication. Therefore, unless there is an order by the court asking to disclose arbitration information, arbitral institutions should focus the implementation of transparency only on the process of the institutional acceptance of cases and the process of arbitrators' appointment; it will be the most beneficial approach taken by them as an institution with the role of assisting effective arbitral proceedings.

6. Conclusion

This article views that a certain level of confidentiality should remain for the interests of parties by protecting any relevant substantive information that could be detrimental to their reputation and business conduct. Transparency should be adopted in steps that do not extensively involve parties' sensitive information. For institutions to publish the entirety of the arbitration process, it may not fit with ICA's characteristics and the purpose of transparency itself. With no confidentiality preserved at any stages of the arbitral process, it is likely that there will be lower usage of and support for arbitration. When transparency aims to improve consistencies of arbitral awards, it should not be adopted in a manner that would injure the usage of ICA as a whole; a balance needs to be struck to uphold the benefits of the current arbitration regime, while making improvements on areas that require them.