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The Principle of Confidentiality In International Arbitration

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Abstract: The principle of confidentiality is diametrically opposed to the principle of publicity, as a generally accepted principle in court proceedings. Confidentiality in arbitration proceedings is practically stated as one of its most significant features and advantages over court proceedings.

The aim of this paper is to examine the principle of confidentiality in international commercial and international investment arbitration. In this context, the author will try to answer the following questions: What is meant by confidentiality in arbitration proceedings? Is there a fundamental difference between the confidentiality and the privacy of arbitration? What does confidentiality involve? What are the future trends of the principle of confidentiality in arbitration proceedings?

For the purposes of this paper, several methods will be applied: normative analysis method, comparison, analogy, and case law method.

Keywords: confidentiality, commercial arbitration, investment arbitration.

INTRODUCTION

Confidentiality is one of the basic advantages of arbitration proceedings and perhaps one of the main reasons why parties choose to arbitrate. Confidentiality is a widely accepted concept by national and international institutional and ad hoc arbitration. As Mr. Justice Brooking, in *Esso Australia Resources* v. *Plowman,* pointed out: *"I think we should recognize a rule of law that it is an implied term of arbitration agreements (which the parties may exclude if they choose) that arbitrations should be heard in private in the sense of the absence of strangers as just defined unless the parties consent to the presence of a stranger."*[1]

According to El-Awa, confidentiality means that access to arbitration information and documents is limited to a number of persons who need to access it for the purpose of the arbitration, regardless of their number, and denying this access to third parties, save for with all parties' consent.[2] El-Awa states that confidentiality as a legal duty may be analyzed into five distinct elements: (a) its addressees; (b) the items (information/documents) covered by the obligation; (c) the time frame within which the obligation stands; (d) exceptions to this obligation, and (e) the consequences of breach.[3]

On the contrary the principle of publicity in court proceedings, according to Janevski and Kamilovska and Garašić, is realized through the following elements: (a) the presence of the citizens in the procedure before the court; (b) announcing the composition of the court; (c) publishing court decisions (d) publishing reports on the work of the courts; (e) publishing the remarks on the work of the court and (f) the possibility to review and rewrite documents.[4]

An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining me confidentiality of information transmitted by

[1] Michael Collins QC, Privacy and Confidentiality in Arbitration Proceedings, Arbitration International, volume 11 number 3 LCIA 1995, p .323.
[2] Mariam M. El-Awa, Confidentiality in Arbitration - The Case of Egypt, Springer International Publishing, Switzerland 2016, p.15
[3] *Ibid., p.17*
[4] Mirjana Ristovska, Natasa Pelivanova, The Application of the Principle of Publicity in Macedonian Procedural Law, Conference Proceedings, Volume I. Faculty of Law, Kicevo, 2020, p. 252

electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body. [5]

As for example, a typical confidentiality clause might say: "*All aspects of (such) arbitration shall be conducted in the strictest confidence, and each party agrees not to disclose any information concerning any dispute or arbitration hereunder to any person except as may be required by law or this Agreement."*[6]

In this context, additional question arises: is there a difference among the concept of confidentiality and the concept of privacy in arbitration?

Richard Smellie gives an interesting answer to this questions. Namely, he claims that arbitration is private, but not confidential: arbitrations are private in that third parties who are not a party to the arbitration agreement cannot attend any hearings or play any part in the arbitration proceedings. Confidentiality – which is concerned with the parties' obligation to each other not to disclose information concerning the arbitration to third parties (and the arbitrator's like obligations to the parties) – does not apply to arbitration as an all-encompassing rule, and indeed in some circumstances will not apply at all. [7]

In the opinion of Trakman, the implied relationship between privacy and confidentiality has several competing features. One feature is that, if the conception of privacy in arbitration is to have commercial and procedural efficacy, it ought to be implied that parties have a duty to maintain confidentiality. This duty is not unlike the implied duty that arises in litigation. Another conception of the relationship between privacy and confidentiality is that the implied duty of confidentiality is inherent in procedure and arises out of long-standing custom and practice. This latter view holds that it is not privacy itself that provides protection from subsequent disclosure, but the efficacy of private arbitration.[8]

Privacy means excluding third parties from arbitral hearings. Only the arbitrators, parties to arbitration, their representatives and witnesses are to attend the arbitral hearings and to take part in the arbitration, save for with the parties' consent. [9] Consequently, confidentiality of arbitral proceedings, as opposed to privacy, does not refer to the ability of third parties to access and observe the proceedings without the consent of the disputing parties and possibly the arbitrator, but to the ability of the parties arbitrating, as well as others, to disclose documents and information used or related to the arbitration.[10]

Another interesting question is whether the concept of confidentiality is applicable in same manner in the investment arbitration as it is in commercial arbitration or there are some exceptions?

This issue is of particular importance, especially given the fact that "many investment arbitration cases involve public interest considerations that revolve around such issues as public health, the environment, and economic crises, and involve allegations of State misconduct and corruption making them often highly politicized and of direct interest to constituents."[11]

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[5] Leon E. Trakman, Confidentiality in International Commercial Arbitration, Arbitration International Volume 18 Number 1, LCIA 2002, p.7

[6]https://www.lawinsider.com/clause/confidentialarbitration#:~:text=All%20aspects%20of%20such%20arbitration,by%20law%20or%20this%20Agreement

[7]Richard Smellie, Is arbitration confidential? Partner at Fenwick Elliott

[8] Opt.cit., p.8-9

[9] Mariam M. El-Awa, Confidentiality in Arbitration - The Case of Egypt, , Springer International Publishing Switzerland, 2016, p.15

[10] Kyriaki Noussia, Confidentiality in International Commercial Arbitration, Springer, 2010, p. 1

[11] Timothy Foden and Odysseas G. Repousis, Giving away home field advantage: the misguided attack on confidentiality in international commercial arbitration, Arbitration International, Oxford University Press, 2019, p.11

Trakman considers that exceptions to requirements of confidentiality are variously justified and they arise by agreement between the parties, through party practice and trade usage, or on account of express or implied legal duties.[12]

LEGAL FRAMEWORK OF THE PRINCIPLE OF CONFIDENTIALITY

Nowadays, it is undisputable fact that there is no consistent approach regarding confidentiality in international arbitration. There are different legal solutions adopted by national laws and by institutional arbitration rules. Perhaps, the only common feature amongst the sources which deal specifically with confidentiality is that all leave a broad margin to party autonomy.[13]
The arbitration rules of London Court of International Arbitration (LCIA)[14] contain specific provision on confidentiality in article 30:

"30.1 The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorized representative, witness of fact, expert or service provider.
30.2 Article 30.1 of the LCIA Rules shall also apply, with necessary changes, to the Arbitral Tribunal, any tribunal secretary and any expert to the Arbitral Tribunal. Notwithstanding any other provision of the LCIA Rules, the deliberations of the Arbitral Tribunal shall remain confidential to its members and if appropriate any tribunal secretary, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26.6 and 27.5.
30.3 The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal."

Additionally, article 19 par. 4 from LCIA arbitration rules regulate the private character of arbitration:

"All hearings shall be held in private, unless the parties agree otherwise in writing."

International Chamber of Commerce (ICC) Arbitration Rules[15] also includes special provision on confidentiality. Article 22 par.3 provides that:

"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."

UNCITRAL Arbitral Rules (as revised in 2010)[16] contain implicit provisions on confidentiality, in article 28 and article 34:

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[12] Leon E. Trakman, Confidentiality in International Commercial Arbitration, Arbitration International, Volume 18 Number 1, LCIA 2002, p.16
[13] Filip De Ly, Mark Friedman And Luca Radicati Di Brozolo, International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration', Arbitration International, vol. 28, no. 3 LCIA, 2012, p.359
[14] https://www.lcia.org/lcia-rules-update-2020.aspx
[15] https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/
[16] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf

"28 (3) Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire."

"34 (5) An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority."

On the other side, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[17] includes special provision for exceptions to transparency in article 7:

"Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.

2. Confidential or protected information consists of:

(a) Confidential business information;

(b) Information that is protected against being made available to the public under the treaty;

(c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(d) Information the disclosure of which would impede law enforcement.

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:

(a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents;

(b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

(c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2.

Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests."

Convention on the Settlement of Investment Disputes between States and Nationals of Other States [18]does not contain explicate provision on confidentiality. Confidentiality is manifested through the article 48 par.5 that reads as follows:

[17]https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf

[18] https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf

"The Centre shall not publish the award without the consent of the parties."

Rules of the Permanent court of Arbitration attached to the Economic chamber of Macedonia[19] are similar to UNCITRAL Arbitral Rules in relation to confidentiality. Specifically article 58 par.3 provides that

"The arbitral award may be published only upon accordance of both parties."

CASE LAW: ESSO AUSTRALIA RESOURCES LTD. AND OTHERS V. THE HONOURABLE SIDNEY JAMES PLOWMAN AND OTHERS

Esso Australia Resources Ltd and BHP Petroleum (North West Shelf) Pty Ltd were parties to an agreement with the Gas and Fuel Corporation of Victoria (GFC) made in 1975 for the supply of natural gas to GFC. A similar agreement existed between the suppliers and the State Electricity Commission of Victoria (SEC) made in 1981. BHP Petroleum (North West Shelf) Pty Ltd subsequently assigned its rights and obligations under the 1981 agreement to BHP Petroleum (Bass Strait) Pty Ltd. Esso/BHP sought price increases under the agreements, and upon GFC and SEC refusing to pay the increases, the disputes were refer-red to arbitration. The Minister for Manufacturing and Industry Development commenced a proceeding in the Supreme Court of Victoria for a declaration that all information disclosed to GFC and SEC was not subject to any obligation of confidence. By counterclaim, Esso/BHP sought declarations, based on implied terms, that each arbitration **"is to be conducted in private and that any documents or information supplied by any of the parties to any other party thereto in or for the purpose thereof are to be treated in confidence as between each such party and the arbitrators and umpire except for the purpose of the arbitration"**. GFC and SEC made cross-claims against Esso/BHP for declarations in the same terms as those sought by the Minister.[20]

In this case, the High Court explicitly held that under Australian law a general obligation of confidentiality cannot be regarded as implicit in an agreement to arbitrate. While acknowledging that privacy is an inherent feature of arbitration (in the sense that hearings are not open to the public), the Court held that confidentiality is not an

"essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration

nor part of the *'inherent nature of a contract and of the relationship thereby established."* The Court did, nevertheless, acknowledge that an obligation of confidentiality could be imposed on the parties through express contractual provision.[21]

Considering the privacy of arbitration, the Court ruled as follows:

"Subject to any manifestation of a contrary intention arising from the provisions or the nature of an agreement to submit a dispute to arbitration, the arbitration held pursuant to the agreement is private in the sense that it is not open to the public. One writer has asserted that total privacy of the proceedings is one of the advantages of arbitration (5). The arbitrator will exclude strangers from the hearing unless the parties consent to attendance by a stranger (6). Persons whose presence is necessary for the proper conduct of the arbitration are not strangers in the relevant sense. Thus, persons claiming through or attending on behalf of the parties, those assisting a party in the presentation of the case, and a shorthand writer to take notes may appear (7). It does not matter much whether this characteristic of privacy is an ordinary incident of the arbitration, that is, an incident of the subject-matter upon which the parties have agreed, or whether it is an implied term of the agreement. For the most part, the authorities refer to it as an implied term. But, for my part, I prefer to describe the private character of the

[19] https://www.mchamber.mk/upload/Rules%20of%20the%20Permanent%20court%20of%20Arbitration%20attached%20to%20the%20Economic%20chamber%20of%20Macedonia%20-%20unofficial%20consolidated%20text.pdf

[20] https://jade.io/article/67885

[21] Filip De Ly, Mark Friedman And Luca Radicati Di Brozolo, International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration', Arbitration International, vol. 28, no. 3 LCIA, 2012, p.364-365

hearing as something that inheres in the subject-matter of the agreement to submit disputes to arbitration rather than attribute that character to an implied term."[22]

Taking into consideration the confidentiality, the Court was of the view that:

"As the statement just quoted makes clear, the efficacy of a private arbitration as an expeditious and commercially attractive form of dispute resolution depends, at least in part, upon its private nature (9). Hence the efficacy of a private arbitration will be damaged, even defeated, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration. As one text writer has observed (10):

"There would be little point in excluding the public from an arbitration hearing if it were open to a party to make public, for example in the press, or on television, an account of what was said or done at the hearing. It is suggested that a party would be entitled to an injunction to restrain the other party from such publication. And the same principle must apply to the arbitration as a whole, including the pleadings or statements of case, expert reports or witness proofs that have been exchanged, as well as to evidence given orally at a hearing."[23]

CONCLUSION

Confidentiality and privacy are particularly important features of arbitration as an alternative dispute resolution mechanism. Although the principle of confidentiality is not uniformly regulated by legal norms, it is a universal concept and synonym for arbitration proceedings.

The private nature of arbitration is an indisputable fact. Confidentiality, on the other hand, depends on the party autonomy. Therefore, the principle of confidentiality reflects the contractual nature of the arbitration.

Today, the hybrid theory of the legal nature of arbitration is generally accepted. This means that arbitration has contractual and jurisdictional elements. However, confidentiality also applies in the jurisdictional part of the arbitration under the parties will autonomy.

Therefore, it can be concluded that will autonomy of the contracting parties creates the balance between confidentiality and transparency in the arbitration proceedings.

Although the principle of publicity is one of the elements of the rule of law, confidentiality in arbitration is one of the basic elements for its efficient functioning and acceptance.

In this regard, I consider that transparency in international investment arbitration should dominate in terms of confidentiality, especially if the public interest in the country is affected.

Generally speaking, the principle of confidentiality is an integral part of the arbitration process and it will be applied in the future, with some minor modifications.

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[22] Paragraph 27

[23] Paragraph 28

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