Transparency in international commercial arbitration: how much of it is really needed?

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I. INTRODUCTION

It is almost a truism nowadays to say that arbitration is a preferred method to resolve disputes of entities involved in international business. There are many characteristics that make arbitration appealing. The procedure can be fashioned to meet the specific needs of a particular dispute, the parties mainly get to choose who the persons adjudicating their dispute are, the award is final and cannot be appealed in court on the merits and is easily enforceable across the world.

Certainly not of the least importance among these features is the fact that arbitral procedure provides confidentiality. Companies which find themselves entangled in disputes may wish to preserve their commercial secrets and other sensitive information or simply keep the fact of legal and potential financial difficulties away from the gaze of the competitors or public eye in general. Arbitration is well equipped to accommodate these needs.

However, the tide has been slowly turning in recent years. Confidentiality as an innate characteristic of arbitral process has been started to be criticised with increasing frequency as having some serious drawbacks. A proposed solution to these issues is a move towards the other end of the spectrum – introducing more transparency into the arbitral process.

The factors driving this move towards more transparency can be relatively divided into two groups: internal factors and external factors. The first group focuses on the main users of arbitration – the parties - and how transparency can improve the achievement of resolution of a dispute. The second group focuses on the interests of members of the public who are not directly involved in a particular dispute but who for one reason or the other are concerned with the inner workings of arbitration.

The aim of this paper is to propose and attempt to substantiate the idea that the main driving force behind any endeavours to introduce more transparency into arbitration should be interests of the parties directly involved in a dispute. Since the need for transparency in international investment arbitration is a less contested matter[1], this paper will focus solely on international commercial arbitration.

Firstly, the general purpose of arbitration will be delineated and compared to that of litigation in national courts where transparency in an inherent requirement. Then an overview of "traditional" view supporting confidentiality and "progressive" view favouring more transparency will be briefly discussed. After that, standard of transparency already existing in international commercial arbitration shall be established. Finally, analysis shall be provided whether additional transparency is needed to achieve the goals of arbitration from the perspective of the interests of the parties.

[1] This is, among other things, evidenced by the adoption of the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration.

II. ENFORCEABLE ARBITRAL AWARD AS THE MAIN GOAL OF ARBITRAL PROCESS

Any changes proposed or already implemented in a particular field ought to be measured against the main purposes and goals of this field in order to determine their necessity and effectiveness. With this assumption at hand, the essential goal that arbitration serves should be described in order to ascertain whether any initiatives towards more transparency is not mere wandering in the dark and actually help to serve this purpose.

Business entities that opt to direct their disputes to arbitration incur great trouble and expenses in the expectation that this process will lead to an award. They also expect that, subject to any right to recourse to national courts, the award will dispose of all disputed issues in a final manner.[2] Therefore, it can be said that the main purpose[3] of a particular arbitral procedure is to arrive at a final and binding award that puts the contention between the parties to rest. Since arbitration is private and consensual in its nature,[4] that is the parties willingly entrust their matters usually related to immensely high stakes to the arbitral tribunal instead of a national court, their interests should be of primary importance.

That is especially clear if the system of international commercial arbitration is compared to adjudication in national courts. System of courts in a particular state forms a branch of government. It is true that in a specific case a court resolves a particular dispute between specific parties. If a dispute concerns commercial transaction, these parties are either private individuals or companies. However, even in such cases where the court deals with a private dispute, at the same time it is deemed to perform the public function of administering justice.[5] On the contrary, arbitral tribunals are not innately concerned with the noble cause of ensuring justice. They essentially serve as vehicles for settling economic transactions.

These remarks justify the methodological approach used in this paper – that the level of transparency in international commercial arbitration should be measured by its capacity to serve the main purpose of arbitral proceedings – to efficiently provide the parties with a final and enforceable arbitral award.

Before analysing whether additional transparency would be justified by these internal factors, a brief overview of advantages and disadvantages of confidentiality in international commercial arbitration shall be provided with a view of seeing what increased openness could provide to arbitration or deprive it off.

III. ADVANTAGES OF CONFIDENTIALITY

Confidentiality has been long considered as one of the pillars of international commercial arbitration and one of the most attractive features to its users.[6] There are few reasons for this.

Firstly, arbitration provides the parties with a highly valued privacy. It is a proceeding, in which the parties may freely address their differences and openly discuss such sensitive matters as their finances, commercial secrets and other issues without exposure to the public and re-

[2] Redfern and Hunter on International Arbitration (Sixth Edition), "Chapter 9. Award", in Blackaby Nigel, Constantine Partasides et al.; (Kluwer Law International; Oxford University Press 2015) pp. 501.

[3] The same could be said about international commercial arbitration law as a whole – that one of its primary goals is to facilitate a legal system that ensures the production of enforceable arbitral awards.

[4] Redfern and Hunter on International Arbitration (Sixth Edition), "Chapter 1. An Overview of International Arbitration", in Blackaby Nigel, Constantine Partasides et al.; (Kluwer Law International; Oxford University Press 2015) pp. 2.

[5] For instance, article 109(1) of the Constitution of the Republic of Lithuania (of 25 October 1992) states that In the Republic of Lithuania, justice shall be administered only by courts.

[6] Sherlin Hsie-lien Tung and Brian Lin, "More Transparency in International Commercial Arbitration: to Have or Not to Have?" in Contemporary Asia Arbitration Journal, Vol. 11, No. 1, pp. 21-44, May 2018.

porting of the media. Avoiding public scrutiny also may allow the parties to take positions that they otherwise would not.[7]

Secondly, confidentiality encourages efficient arbitral process. Since there are no outside pressures, the parties to a particular disputed are encouraged to reach a settlement in a way which most likely would not be possible if there was a public eye fixated of the proceedings. In addition to that, privacy accorded by confidentiality requirement lessens the probability of third parties intervening in the proceedings or undue influence being exercised by other subjects.[8]

Thirdly, confidentiality may help ensure the compliance with final awards rendered by arbitral tribunals. If a situation comes to the enforcement of an award with the inevitable intervention of a relevant national court, the award enters public domain and all the details related to the dispute become accessible to the public. In order to avoid such leakage of potentially sensitive information, the parties have the incentive to voluntarily perform the award. This increases the efficiency of the arbitral system.[9]

Having briefly discussed the benefits of confidentiality, the attention shall now be turned to potentially detrimental effects of this attribute of arbitration.

IV. DRAWBACKS OF CONFIDENTIALITY

While confidentiality is a characteristic feature of arbitration and one of the main selling points of this mechanism of dispute resolution, it faces increasing criticism, which can be summed up in the following points.

Firstly, states and state entities can also be involved in commercial transactions which may lead to disputes being resolved in arbitration. Thus, a public interest may exist in such cases since the public might be effected by the outcome of such cases.[10] Also, transparency is fundamental in those commercial arbitration cases where misconduct or unlawful activities have been committed by public officers or officials of multinational corporations. It is argued that in these cases public policy trumps confidentiality.[11]

Secondly, lack of transparency may result in less accountability of arbitrators. In the light of the fact that it is extremely difficult to challenge arbitral awards, it is of the utmost importance that the arbitrators give full effect to the laws applicable to particular disputes. Without public scrutiny of their awards, arbitrators may feel less incentivised to strive for this. Public awards would also give the users of arbitration more insight into the qualifications of specific arbitrators.[12]

Thirdly, publication of arbitral awards would help eliminate inconcinnities in the interpretations of similar cases. It may prove to lead to more efficient arbitral proceedings because arbitral tribunal may already have interpretative template from a similar case. Parties, in their turn, would know what to expect and how to better formulate their positions.[13]

Fourthly, publishing of arbitral awards may also contribute to the development of the so called "autonomous legal order".[14] Accumulated "case-law" could have significant persuasive

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[7] Redfern and Hunter on International Arbitration (Sixth Edition), "Chapter 2. Agreement to Arbitrate", in Blackaby Nigel, Constantine Partasides et al.; (Kluwer Law International; Oxford University Press 2015) pp. 134.

[8] Sherlin Hsie-lien Tung and Brian Lin, "More Transparency in International Commercial Arbitration: to Have or Not to Have?" in Contemporary Asia Arbitration Journal, Vol. 11, No. 1, pp. 21-44, May 2018.

[9] Ibid.

[10] Gabriele Ruscalla, "Transperency in International Arbitraition: Any (Concrete) Need to Codify the Standard?, in Groningen Journal of International Law, vol 3(1): International Arbitration and Procedure.

[11] Ibid.

[12] Sherlin Hsie-lien Tung and Brian Lin, "More Transparency in International Commercial Arbitration: to Have or Not to Have?" in Contemporary Asia Arbitration Journal, Vol. 11, No. 1, pp. 21-44, May 2018.

[13] Ibid.

[14] Gabriele Ruscalla, "Transperency in International Arbitraition: Any (Concrete) Need to Codify the Standard?, in Groningen Journal of International Law, vol 3(1): International Arbitration and Procedure.

value and be useful to arbitrators, counsel and parties alike.[15]

In the following section the existing level of confidentiality (or transparency in its turn) shall be briefly described in general terms in order to be able to determine whether transparency needs to be pursued to a greater extent.

V. CONFIDENTIALITY AS IT CURRENTLY STANDS

While international arbitration conventions do not directly address the matter of confidentiality,[16] national legal systems take very different approaches to the question whether international arbitrations are presumptively confidential, as well as to the scope of implied confidentiality agreements.[17]

Only a small number of national arbitration laws prescribe provisions establishing general standard on confidentiality in international arbitration. Instead, most national statutes address only issues of confidentiality related to specific areas of arbitration and mainly leaves the subject to national courts and arbitral tribunals.[18]

The matter is rather different with regards to institutional arbitration rules. The leading arbitration institutions explicitly recognise the requirement of confidentiality in their respective sets of rules. This allows parties who choose institutional arbitration to be aware of the scope of confidentiality that will apply to the proceedings.[19]

For instance, article 30 of the Arbitration Rules of London Court of International Arbitration (hereinafter – LCIA Rules) states that 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 (article 30.1). The deliberations of the arbitral tribunal shall remain confidential to its members (article 30.2). 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 (article 30.3.).

Article 3 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provides that, unless otherwise agreed by the parties, the SCC, the arbitral tribunal and any administrative secretary of the arbitral tribunal shall maintain the confidentiality of the arbitration and the award.

Article 39.1 of the Arbitration Rules of Singapore International Arbitration Centre establishes that, unless otherwise agreed by the parties, a party and any arbitrator, including any emergency arbitrator, and any person appointed by the tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the award as confidential. The discussions and deliberations of the tribunal shall also be confidential.

Article 45 of the Arbitration Rules of Honk Kong International Arbitration Centre states that, unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to the arbitration under the arbitration agreement an award or emergency decision made in the arbitration. This provision also applies to the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC.

Other arbitral institutions have adopted an approach tilting towards more transparency. The most notable example is the Rules of Arbitration of the International Chamber of

[15] Sherlin Hsie-lien Tung and Brian Lin, "More Transparency in International Commercial Arbitration: to Have or Not to Have?" in Contemporary Asia Arbitration Journal, Vol. 11, No. 1, pp. 21-44, May 2018.

[16] Gary B. Born, International Commercial Arbitration (Second Edition), "Chapter 20: Confidentiality in International Arbitration|, Kluwer Law International 2014, pp. 2783.

[17] Ibid. pp. 2784.

[18] Ibid. pp. 2784.

[19] Sherlin Hsie-lien Tung and Brian Lin, "More Transparency in International Commercial Arbitration: to Have or Not to Have?" in Contemporary Asia Arbitration Journal, Vol. 11, No. 1, pp. 21-44, May 2018.

Commerce. Article 22(3) states 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. Thus, in the ICC Rules the general confidentiality rule is reversed in comparison to that of LCIA Rules.[20]

It should be noted, however, that notwithstanding provisions establishing confidentiality as a general rule in their arbitration rules, nearly all arbitral institutions are taking steps to improve transparency. For instance, the ICC Court announced in January 2016 that it will publish the details of arbitrators sitting in ICC cases and how the appointment was made. However, the parties will have the option of opting out of this disclosure requirement. The SCC had published a report with information about disputes such as size, length, costs, apportionment of costs by the tribunals. A similar report was also released by LCIA. It provided significant information about the disputes and the claims themselves without affecting the confidentiality of such disputes.[21]

It is beyond the scope of this text to try to provide a complete view of confidentiality standard across the whole field of international commercial arbitration. However, this brief overview of existing confidentiality provisions and moves towards more transparency shall suffice as point of departure for the attempt to determine whether any further steps towards more openness should be taken.

VI. INTERESTS OF THE PARTIES AS THE MAIN CRITERIA FOR ANY CHANGES IN THE STANDARD OF CONFIDENTIALITY

In this section it will be contended that the main driving force behind any changes in the current scope of confidentiality accorded to arbitral proceedings should be interests of the parties, chief among them – the strive for the dispute should be resolved in an efficient and final manner.

For this purpose, it is useful to divide the concept of transparency in arbitration into: 1) organizational transparency, which means asking arbitral institutions to be more transparent in their case management and decision-making; 2) legal transparency, asking for publication of arbitral decisions; 3) transparency of proceedings, asking for public proceedings and hearings to be more open.[22] Each of these aspects shall be discussed separately further.

To start with organizational transparency, it encompasses decisions made by arbitral institution that influence arbitral procedure. They include decisions on, among others, jurisdiction, appointment, confirmation and challenges of arbitrators, costs of arbitration and scrutiny of awards.[23]

In recent years, arbitral institutions have taken steps towards more transparency in the decision-making process in relation to these issues. To take ICC as an example, under new policy which became effective from October 2015, the ICC announced that the ICC Court would, on the request of the parties, communicate the reasons for a number of administrative decisions issued under the ICC Rules. Though

[20] Gabriele Ruscalla, "Transperency in International Arbitraition: Any (Concrete) Need to Codify the Standard?, in Groningen Journal of International Law, vol 3(1): International Arbitration and Procedure.

[21] Sarthak Malhotra, "Transparency in International Commercial Arbitration: The Road Ahead", available at: https://ilsquare.org/2016/10/12/transparency-in-international-commercial-arbitration-the-road-ahead/

[22] Victoria Pernt, "How Much (More) Transparency Does Commercial Arbitration Really Need?", available at: <http://arbitrationblog.kluwerarbitration.com/2017/03/04/how-much-more-transparency-does-commercial-arbitration-really-need/>.

[23] Sherlin Hsie-lien Tung and Brian Lin, "More Transparency in International Commercial Arbitration: to Have or Not to Have?" in Contemporary Asia Arbitration Journal, Vol. 11, No. 1, pp. 21-44, May 2018.

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it applies only where parties mutually agree. It applies to decisions made on the challenge of an arbitrator and decisions to initiate replacement proceedings and subsequently replace an arbitrator on the ICC Court's own motion. The ICC Court may also communicate reasons for its decisions on consolidation of arbitration proceedings and *prima facie* decisions on jurisdiction.[24]

Initiatives like this are commendable. They allow arbitration users to become more familiar with reasoning behind administrative decisions of arbitral institutions and to be able to better formulate arguments that would persuade administrative bodies of respective institutions. Such steps towards transparency may also reduce the amount of meritless of frivolous applications since their low chances of success would be rather easy to calculate. This would lead to saved time and money for the parties.[25]

In the light of aforementioned, it may be concluded that organisational transparency and any possible changes bringing it forth is welcome since it serves the interests of the parties to a particular dispute because it increases efficiency of the arbitral proceedings.

The question of legal transparency (i.e., publication of awards) is a bit less straightforward. One of the main arguments supporting this aspect of transparency, as previously mentioned, is the consistency of awards that it is supposed to bring. It has two sides worthy of equal attention. On one hand, consistency in the interpretation of law and facts in identical or similar cases may be beneficial to users of arbitration because it would provide them with a certain level of clarity and legal certainty. Disputants, therefore, could have better ability to anticipate the chances of their claims being granted and withhold from certain strategies or arguments which may otherwise prove costly both in time and money. On the other hand, it is indeed an open question as to what extent private subjects employing arbitration as the mechanism of resolving their disputes truly concerned with consistent application of law. They might as well have a singular approach focused on one dispute at hand concerning themselves only with settling their economic transactions in that particular case, irrespective of the intricacies of how law is interpreted and applied in other instances. In such a case, if publication of awards would be compulsory, confidentiality of the award and all the information contained therein would be exchanged into something vaguely useful. What is more, it is certainly difficult to conceive how parties would have any interest of achieving "autonomous legal order" of international commercial arbitration which publication of awards may bring closer to fruition. It could be said to be more of an interest of academics rather than business entities and other private parties.

Currently, publication of awards, in whatever form it may take place, is usually subjected to the consent of the parties. Consistency of application of legal rules should not be a goal of international commercial arbitration law in itself. Therefore, it is suggested that, as far as relevant arbitration rules or other applicable legal provisions require agreement of the parties for the publication of awards, consensual nature of arbitration should be respected and it should be left for the parties to decide whether to contribute to these ancillary overarching goals of arbitration such as consistency and legal certainty.

Finally, what concerns transparency of proceedings, related to, among other elements, public access to the hearings and materials

[24] Rajinder Bassi and Jon Newman, "Increased transparency in international commercial arbitration", available at: <https://www.financierworldwide.com/increased-transparency-in-international-commercial-arbitration#.XiHnTRd-KhZo>.

[25] Ibid.

produced in the course of arbitration, it must be stated its justification is highly dubious. It is "public interest" that is usually quoted as the main basis for opening arbitral proceedings for the eyes of non-participants. However, this category is simply too abstract to drive forward such important changes as making arbitral procedure accessible to whomever. Cross-border character of international commercial arbitration does not make it any easier to define the "public". Is it citizens of the country where arbitration is seated, where claimant or respondent is incorporated, or of the country of enforcement, or is it the so called "arbitration community"?

The issue of procedural transparency certainly brings many difficult questions and it is difficult to see how it would add to the efficiency of arbitral proceedings in reaching the final award in any manner. It seems to be a matter of two extremes - either no access or access to all. But since it is difficult or rather impossible to determine the criteria according to which parties interested in the transparency should be determined, any interreferences with the current state of affairs should be made with the utmost caution or withheld altogether.

VII. CONCLUSIONS

Confidentiality is one of the defining characteristics and selling points of international commercial arbitration. However, recently it became evident that there are certain advantages to introducing more transparency into the system of arbitration. This was followed by certain actual changes in the approaches of some of the leading arbitral institutions, which was implemented by revising their rules.

Various factors influence this movement towards more transparency. They can relatively be divided into internal and external factors, first category being the interests of the parties involved in a dispute, while the latter being the "outsiders", that is subjects who are not directly involved in the arbitral proceedings.

Having in view that all changes should be brought about always keeping in sight the main goal of the arbitral procedure itself – the efficient resolution of a dispute resulting in final and enforceable award - it quickly becomes clear that the internal factors should be the true driving force behind any changes in the scope of confidentiality applicable to arbitration.

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