CONFIDENTIALITY IN ARBITRAL PROCEEDINGS: A COMPARATIVE ANALYSIS OF INVESTMENT ARBITRATION AND COMMERCIAL ARBITRATION

by Saumya Bazaz
Year III, B.A. LL.B.
Gujarat National Law University

Introduction

Confidentiality is one of the hallmark considerations among parties when choosing arbitration as their preferred dispute resolution mechanism. There are various reasons for this. Primarily disclosure of information such as trade secrets, pricing policies, technical know-how, production methods or profit margins could harm a party's standing among its competitors. It could also have an impact on the image of a company in front of the public at large. Additionally, it may expose the financial situation of a company, the existence of a defective product, situations or agreements that could compromise the image of a company in front of the public and competitors. While parties to an arbitral agreement are at liberty to enter into confidentiality agreements enforceable during the arbitral proceedings, however, often these agreements do not bind the agents, representatives, third parties, arbitrators or the administrative staff of the tribunal.[1] However, the scope of the duty of confidentiality as well as who is confined within the contours of such duty are points of contention in both International Commercial Arbitration ["**ICA**"] and International Investment Arbitration.

This article aims to compare ICA and International Investment Arbitration on the maintenance of confidentiality of proceedings. It further proceeds to analyze the scope of the duty or obligation of confidentiality, the stakeholders on whom such obligation lies and discuss the varying degrees of importance given to confidentiality between the two types of arbitration. The aforementioned elements shall be discussed with the help of applicable rules/conventions as well as landmark judicial decisions.

International Commercial Arbitration (ICA)

i. *Privacy v Confidentiality*

[1] *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA).

Confidentiality is considered an inherent and one of the most significant advantages and incentives of opting for ICA by parties.[2]

Theoretically, 'privacy' and 'confidentiality' are used interchangeably for one another. But practically, within ICA, they are two distinct concepts. Whereas 'privacy' is restricted to the active and live proceedings and concerns with who can be a party to the proceedings. Whereas confidentiality transfers responsibility to the parties and obligates them not to disclose any information regarding the proceedings.[3] While privacy is limited to the non-participation of certain groups of individuals during the proceedings, however, confidentiality is meant to ensure non-disclosure after the proceedings have culminated.

The distinction between the two is further contrasted by their impacts on a non-party in an arbitration agreement. Privacy calls for only the parties in conflict to attend the arbitral proceedings restricting the non-disputing parties from it. The same is done to prevent any external interferences from disturbing the proceedings.[4] Therefore, confidentiality only obligates the parties involved in the proceedings and not non-parties who are free to disclose information; however, this is subjected to public policy considerations and exceptions.[5]

ii. *Scope of confidentiality*

One of the contentious points in confidentiality is its scope which essentially refers to the extent of confidentiality and to whom the same is applied.

As common practice dictates, the duty and obligation of confidentiality lies upon the witnesses, experts, secretaries, staff, court reporters, translators and any other people involved or part of the proceedings.[6] The materials that are subject to confidentiality include memorials, pleadings, documents, reports, witness statements, awards, precedents or any other evidence presented in the proceedings.[7] This also includes any information presented in arbitration filings.

---

[2] Marlon Meza-Salas, 'Confidentiality in International Commercial Arbitration: Truth or Fiction?' (*Kluwer Arbitration Blog*, 23 September 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/> accessed 4 January 2021.

[3] Alexis Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' [2001] 16(4) American University International Law Review.

[4] Mayank Samuel, 'Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?' (*Kluwer Arbitration Blog,* 21 February 2017) <http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/> accessed 5 January 2021.

[5] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2255.

[6] Marlon Meza-Salas, 'Confidentiality in International Commercial Arbitration: Truth or Fiction?' (Kluwer Arbitration Blog, 23 September 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/> accessed 4 January 2021.

[7] Alexis Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' [2001] 16(4) American University International Law Review.

iii. *Legal instruments and rules on confidentiality in commercial arbitration.*

One of the most important legislations for ICA is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"]. Unfortunately, New York Convention does not provide any provision regarding confidentiality.[8] On the flip side, the International Chamber of Commerce Rules, 2021[9] ["**ICC Rules**"] under Article 22 do stipulate a duty of confidentiality, but only upon the arbitrators and the staff of the International Court of Arbitration and not the parties themselves. There are also instances where confidentiality is contingent upon the existence of a confidentiality agreement. Such can be seen in The UNICTRAL Arbitration Rules, 2010,[10] which provides for confidentiality under Article 34(5) in the publication of arbitral awards to protect parties' legal rights. However, this is subject to the agreement between the parties and restricts the obligation of confidentiality to certain specific aspects only.

The London Court of International Arbitration ["**LCIA**"][11] under Article 30 imposed an obligation of confidentiality on the parties enforcing the secrecy of proceedings. The Singapore International Arbitral Centre ["**SIAC**"][12] also provided for a general obligation of confidentiality. This confidentiality expanded to cover the parties' identities as well as the sealing of arbitration documents.[13] Domestic legislations such as The Indian Arbitration and Conciliation Act, 1996[14] also provide an express duty of confidentiality as incorporated through the 2019 amendment under Section 42A, where confidentiality of proceedings is imposed upon the arbitrators and the arbitral institution.

When the provisions embedded in the various rules, conventions and legislations are taken into consideration, it is evident that different and varying stances have been taken by them on confidentiality. They either recognize an implied and general duty among the parties or vest the duty on the arbitrators and staff only. However, there may also be a circumstance such as the New York Convention, which completely rejects the concept of confidentiality. There is no definite

---

[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (NYC).
[9] International Chamber of Commerce Rules of Arbitration (adopted 8 October 2020, entered into force 1 January, 2021) art. 22
[10] The United Nations Commission on International Trade Law Arbitration Rules (adopted 1976, entered into force 15 August 2010) art 34(5).
[11] London Court of International Arbitration Rules (entered into force on 1 October 2014) art. 30.
[12] Singapore International Arbitration Centre Rules (entered into force 1 August 2016).
[13] Mayank Samuel, 'Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?' (*Kluwer Arbitration Blog*, 21 February 2017) <http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/> accessed 5 January 2021.
[14] The Indian Arbitration and Conciliation Act 1996, s.42A.

position on the matter of confidentiality. This leads to a doubt as to whether confidentiality practically is now a major advantage or benefit of ICA.

Therefore, in order to eradicate the dilemma over which arbitral rules the parties adopt for confidentiality issues, a simpler solution would be to address it within their arbitration agreement. The parties should negotiate and come to an agreement with a uniform, well-drafted confidentiality clause that also prescribes any consequences or remedies followed by such a breach of confidentiality. The parties can negotiate and agree upon a united stance on confidentiality that they choose to be governed by.

Although the parties would still have to approach a tribunal/court for a breach of the duty of confidentiality, such an agreement helps in making sure that the parties are on the equal footing over-interpreting the duty of confidentiality and on whom such duty is levied irrespective of the jurisdiction they opt, ensuring a predictable and stable outcome to the confidentiality dispute.

iv. *Judicial perspectives on confidentiality*

The jurisprudence of courts across the globe and tribunals have vastly differed in their interpretations of confidentiality. As a result, it may serve to be useful to address certain landmark cases which provide an insight into the developing jurisprudence.

Aita v Ojjeh[15]

The Court of Appeal of Paris held that the annulment of arbitral proceedings violated the duty of confidentiality since it leads to public discussion and debate on the facts of the case, which should remain confidential.

The fallacy in this decision arises not from the actual *ratio decidendi* but from the failure on the court's part to mention either the grounds on which the obligation of confidentiality arises or its limits.

US v Panhandle Eastern Corp[16]

In this case, the US Government had sought the documents regarding an arbitral proceeding held under the ICC Rules. On the other hand, Panhandle Corp. sought a protective order to prevent the disclosure of the proceedings. The US District Court of Delaware provided access to such documents because the rules or the agreement did not provide for confidentiality between the parties but only to the members of the court.

---

[15] *Aita v Ojjeh,* Court of Appeal of Paris, Judgement of 18 February 1986, Revue de l'arbitrage, p. 583.
[16] *The United States v Panhandle Corp* [1998] 118 F.R.D. 346 (D. Del.).

It is important to note that this case was central in not considering whether the parties have a general understanding on confidentiality or not. If there exists no confidentiality agreement, there shall exist no duty to ensure the same either. However, this principle has to be looked at in the context of disputes which are in the public interest. The party then becomes obligated to show and establish a good cause for the maintenance of a protective order, and that denial of the same will lead to a serious injury to the party.

Dolling-Baker v Merrett[17]

In this case, the court was asked to adjudicate whether the duty of confidentiality is an implied obligation. The English Court of Appeal held that an implied obligation of confidentiality arises out of the nature of arbitration itself.

This case was path-breaking as it recognized an implied duty that the courts, until then, had refused to accept. However, the importance of arbitration proceedings as a precedent was also showcased in this case as the documents were sought to serve in a precedential capacity. The court, although it remained determined about the recognition of this implied duty, did not consider this duty to be applied rigidly when the documents are required for future proceedings. The existence of a fair trial also superseded the implied obligation of confidentiality.

This case is not only central in terms of recognition of an implied obligation but also a landmark in its considerations of the exceptions to such obligation.

Esso Australia Resources v Plowman[18]

In this case, the High Court of Australia drew a distinction between privacy and confidentiality wherein the court downplayed the importance of confidentiality and held it not to be an essential attribute of arbitral proceedings, unlike privacy.

The implied obligation of confidentiality was declined and was considered to be fatal to arbitral proceedings, although this does not negate the fact that the proceedings are private. This case was the one that absolutely went against the previous landmark holdings, negating an implied obligation or general duty of confidentiality.

This opinion, however, is flawed because although the court considered privacy to be of utmost importance, it failed to recognize that privacy exists to maintain the confidentiality of proceedings. Confidentiality is the result of the privacy of proceedings.

---

[17] *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA).
[18] *Esso Australia Res v Plowman* [1995] HCA 19.

International Investment Arbitration

i. *Transparency superseding confidentiality in investment arbitration*

Although the concept of confidentiality originated from ICA, it has been adopted and translated into the investment arbitration regime as well.[19] The general duty of confidentiality demands that the documents pertaining to a dispute are not disclosed to non-disputing parties. However, transparency is given a superseding effect to confidentiality in investor-state arbitration.

Transparency is highly interlinked with the concept of confidentiality while being a contrasting and competing element to that of confidentiality. Transparency is highly sought-after essentiality, especially in international investment arbitration.[20] This is due to the fact that investor-state disputes concern issues involving public service and public interest. Non-disputing parties, as well as the NGOs, contribute by compelling the tribunals to take into account the large-scale effects of the award outside the monetary considerations.[21]

Transparency acts as a public policing initiative against the parties, representatives, arbitrators as well as administrators of the arbitral institution, knowing that their acts are being analyzed and scrutinized by the public at large.[22]

ii. *Legal instruments on transparency and confidentiality in investment arbitration*

In addition to the existing tribunal rules and conventions, there are certain specific instruments peculiar to the investment regime which regulate confidentiality.

Under the ICSID Convention,[23] transparency and confidentiality are not vested under the Convention or the rules as a presumption which is dependent on the agreement between the parties based on their consent, the applicable treaty and the tribunal.

Chapter 11 of North America Free Trade ["**NAFTA**"][24] also provides for provisions that advocate for transparency by sharing documents, evidence and arguments of the proceedings with the non-disputing parties. It allows the non-disputing parties to participate in these proceedings as the

---

[19] Cindy Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' [2003] 14 AM. REV. INT'L ARB. 121.
[20] Rukia Baruiti Dames and Laurence Boisson De Chazournes, 'Transparency in Investor-State Arbitration: An Incremental Approach' [2015] 2(1) BCDR International Arbitration Review.
[21] Natalie Limbasan and Loretta Malintoppi, 'Living in Glass Houses? The Debate on Transparency in International Investment Arbitration' [2015] 2(1) BCDR International Arbitration Review.
[22] Claudia Reith and Loretta Malintoppi, 'Enhancing Greater Transparency in the UNCITRAL Arbitration Rules - A Futile Attempt?' [2012] 2(2) Yearbook on International Arbitration.
[23] International Centre for Settlement of Investment Disputes Convention Arbitration Rules (adopted 12 May 2005, entered into force 10 April 2006).
[24] North America Free Trade Agreement (adopted 17 December 1992, entered into force 1 January, 1994) 19 U.S.C. 3301 (NAFTA).

sharing of necessary documents is critical for such participation. It allows them to monitor and follow the proceedings to raise any concerns needed in time.

With regards to the resolution on transparency as well as participation by third parties, the UNICTRAL Arbitration Rules were insufficient until the incorporation and adoption of the UNICTRAL Rules on Transparency, 2013.[25] These rules are concerned with the question of what should be disclosed. They are aimed at increasing and encouraging transparency by providing public access to arbitral documents. These rules are aimed toward more openness in investment arbitration to secure public interest. However, confidential information still had a provision to be secured as an exception.[26]

iii. *Public interest as an exception to confidentiality and admission of amicus curiae briefs*

The central argument against confidentiality in investor-state arbitrations is that in such proceedings, issues raised before the tribunal have an impact on the legal, public policy and public interest implications. In such cases, the dispute, as well as the arbitral awards, are subjected to public scrutiny as the concerns, objections or recommendations of these groups have to be taken into consideration by the tribunal.

Public interest as an exception to the duty of confidentiality is usually portrayed through the admission of *amicus curiae* briefs prepared by non-disputing parties wherein their concerns, insight, objections as well as any implications the decision will have over their state are articulated and cited.

The first landmark case which allowed an *amicus curiae* brief was the case of *Methanex Corp v United States of America,*[27] which allowed such briefs by civil society groups. This was the first encouraging move by the judiciary towards enhancing transparency in investor-state disputes. This led to a progressing trend towards transparency in disputes concerning human rights or environmental concerns where the public interest is involved.

The amendments that were made to the ICSID Arbitration Rules in 2006[28] further moved towards greater transparency by inducing provisions that encouraged the acceptance of *amicus curiae* submissions and non-disputing party participation.

---

[25] The United Nations Commission on International Trade Law Rules on Transparency (entered into force 11 July, 2013).

[26] Alexander Belohlavek and Loretta Malintoppi, 'Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals' [2011] 2(1) Czech Yearbook of International Law.

[27] *Methanex Corp v United States of America* [2005] 44 ILM 1345.

[28] International Centre for Settlement of Investment Disputes Convention Arbitration Rules (adopted 12 May 2005, entered into force 10 April 2006).

Rule 32(2) removed the mandatory requirement of the consent of the parties and allowed non-disputing parties during the testimony. Further, Rule 37(2) provided that the tribunal, after consulting with the disputing parties, may allow a non-disputing or third-party to file a written submission with the tribunal regarding the dispute.

iv. *Judicial perspective on transparency and confidentiality*

Biwater Gauff Ltd v Tanzania[29]

The ICSID tribunal held that the general duty of confidentiality depends upon the nature of the proceedings and is not an absolute rule.

This case was also central in *amicus curiae* participation and acceptance of *amicus curiae* briefs submitted by NGOs with respect to environmental and human rights issues. This case sought to achieve a balance between confidentiality and transparency in disputes involving public interest. It was accepted that there exists a greater need for transparency in such disputes. However, this was a case where the harmful consequences of transparency were witnessed, leading to aggravation of disputes as well as prejudice to parties. Due to such possible consequences, disclosures were limited and restricted.

Abaclat and Ors v The Argentine Republic[30]

The tribunal, in this case, acknowledged and accepted the risk of incorrect public impressions that come up with disclosure to non-disputing parties. The tribunal also held that in the absence of a confidentiality obligation as per the investment arbitration, the party that insists upon maintaining such confidentiality must satisfy the tribunal that devoid of such confidentiality, the arbitration will face a risk of aggravation of dispute or that disclosure of such dispute will harmfully compromise the integrity of such proceedings.

This case is significant because it recognizes the public interest that is associated with investor-state disputes. Therefore, it holds transparency to a higher standard, thereby creating a greater threshold to prove the necessity for non-disclosure of arbitral proceedings. It also, however, does not downplay the importance of confidentiality and considers the same as an obligation unless maintaining confidentiality will do more harm than good to the state in dispute.

Critical Analysis

[29] *Biwater Gauff Ltd v Tanzania* IIC 82 (2006).
[30] *Abaclat and Ors v The Argentine Republic* IIC 807 (2011).

In the aforementioned discussion on confidentiality, it is very evident that confidentiality has far greater eminence and gravity within the commercial arbitration sphere due to good reason. Confidentiality, although an incentive for the disputing parties for choosing ICA, has its fair share of disadvantages as well. The loss of precedential value of awards is one of them. This loss is further facilitated by rulings such as *Ali Shipping Corporation v Shipyard Trogir,*[31] where the court of appeal applied confidentiality to any information, submissions, evidence and award passed in the proceedings. Such a ruling prevents the advancement of law through precedents by restricting the access to these awards and documents to the public at large. The use of awards as precedents can be encouraged by limiting the time to which the documents and the award of a proceeding have to be kept confidential. Confidentiality should be restricted by a time limit as decided by the tribunal, which in turn helps to fulfil both purposes.

Further, similar to international investment arbitration, there are disputes under ICA which pertain to and involve the public interest and welfare of a state and stringently applying the rule of confidentiality on the same does more harm than good. The tribunals have to make a choice between the need to maintain confidentiality and the public interest at risk or in question. Although International Investment Arbitration prioritizes transparency over confidentiality for the very reason of protecting public interest and welfare, there is a need for tribunals and courts to create certain thresholds/guidelines that regulate the participation of non-disputing parties and justify the breach of confidentiality in the proceedings. The non-disputing parties must add to the dispute and not participate just for the sake of it, as that leads to prolonging of dispute proceedings. Their interest in the dispute should be specific, which directly impacts their welfare. The tribunals should be cognizant of making sure that only after such thresholds are met the participation of non-disputing parties is involved. Due to the sole reason that a dispute involves issues of public interest, confidentiality should not be breached.

Conclusion

From the above discussion, it can be inferred that there is a varying degree of interest and importance that confidentiality plays in the two kinds of arbitral processes. Although the party's general inclination lies in securing the confidentiality of the arbitral processes and awards, the conventions/rules, as well as the courts, seek to impose this confidentiality, taking into account various factors involved during such proceedings and considering whether a general duty of confidentiality can be urged or not. Under International Investment Arbitration, these factors

[31] *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All E.R. 136.

revolve around whether the arbitrable issue has an impact on public interest, health or property since these considerations open the proceedings to public participation and critique. Therefore, both kinds of arbitrations stand on a different footing, where the ICA is disputed over whether a general duty of confidentiality can be imposed and Investment arbitration questions confidentiality and rather advocates for greater transparency. However, due to the varying nature of conventions and rules on confidentiality, there is a budding need to create a uniform rule across the board on confidentiality for both ICA and Investment Arbitration.