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CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION

BY ILEANA M. SMEUREANU

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Foreword

When asked about the advantages of arbitration over courts, the freshly minted arbitration lawyer begins her list with "faster, cheaper, and confidential." After a few years in practice, all of these advantages are qualified, and none more than the description of international arbitration as "confidential." Most rules of procedure for international arbitration, in fact, say very little about the extent to which arbitral proceedings are confidential. National laws and national courts have taken varying stances on the matter and new developments, such as the rise of investor-state arbitration where public interest has brought pressure for greater transparency, are having a transformative influence on traditional thinking about confidentiality.

Over a period of years, Ileana Smeureanu invested her time and effort on this evolving area and has now produced a leading work on the subject. It was gratifying to be told that Ileana's time spent at the Permanent Court of Arbitration had helped to shape her thinking on confidentiality, and as a result, the contents of this book. I can see now that the PCA's caseload, ranging from commercial disputes where strict confidentiality was agreed by the parties, to inter-state proceedings where all pleadings and hearings were made public, provided a good laboratory for testing thoughts of what deserves confidential treatment in international commercial arbitration.

Ileana's book reveals the assaults from various quarters on the commonly held assumption that international commercial arbitration is by nature confidential. She surveys the national court cases finding no guarantee of confidentiality in the absence of an explicit agreement of the parties, and indicates the types of explicit agreements that can assist in preserving confidentiality. Practitioners will benefit from these and from the examination of the risks of disclosure in proceedings that may follow the arbitration, such as enforcement proceedings or proceedings to challenge an award.

The greatest force eroding the presumption of confidentiality is the public interest, which in some jurisdictions has overcome an explicit agreement to keep an arbitration confidential. Public interest has been most clearly recognized in the investor-state context, where ICSID has created a presumption of transparency, rather than confidentiality, in the 2006 amendments to the ICSID Rules related to public hearings, amicus briefs, and the publication of awards.

Where States or other public entities are parties to the arbitration, the public interest will typically be higher than in disputes between purely private parties, but there is no reason to believe that the public interest is always higher when a dispute arises under an investment treaty rather than a contract. The UNCITRAL Working Group II, fresh from completion of the 2010 UNCITRAL Arbitration Rules, has embarked on the creation of standards of transparency for investment treaty arbitration under the UNCITRAL Rules. While jurisdiction under the ICSID Convention is restricted to investment arbitration involving States, the UNCITRAL Rules are one of the most widely used sets of procedural rules in arbitration under international commercial contracts. UNCITRAL's transparency standards, once adopted, will inevitably be applied with increasing frequency in any contract claim involving a State entity. Publicly traded corporations seeking high marks for corporate responsibility or needing to comply with disclosure requirements under domestic securities regulations may also be attracted or feel pressure to adopt UNCITRAL's new transparency standards in their arbitration clauses.

Long term, we are likely to see confidentiality become the exception rather than the rule, despite there being no decrease in the traditional need for protection of certain information, whether it can be trade secrets, or sensitive government records. With presumptions of confidentiality being overcome by new exceptions and the techniques for pursuing it being more complex, Ileana's guide to navigating this world will be of ever increasing value.

Brooks W. Daly
The Hague, March 11, 2011

Preface

This work seeks to explore the current dimension of confidentiality in international commercial arbitration. At first glance, commercial arbitration may seem a confidential process. Upon closer inspection, however, few legal concepts in international arbitration are more indefinite in nature, dubious in scope and uncertain in inexistence than confidentiality. When tested before arbitral tribunals and national courts, arbitral confidentiality manifestly lacks conceptual uniformity and shows clear limitations.

The first chapter of this book distinguishes between confidentiality and privacy in arbitral proceedings and provides a definition of the aforementioned.

The next chapter analyzes the legal basis of confidentiality in ad hoc and institutional arbitration.

The third chapter examines the measures of confidentiality along the various phases of the arbitral process and in the context of parallel or subsequent court proceedings related to the arbitration. The last part of this chapter also sets forth a typology of limitations to the scope of confidentiality.

The fourth chapter reviews the various actors that could be bound to observe the term of confidentiality provisions.

Finally, the last chapter breaks novel ground by purporting to establish certain criteria to assess the breach of confidentiality in international arbitration and the proper sanctions thereof.

Acknowledgments

The process of writing this book has been focused, intense, often abrupt, at times exhausting but, most of all, a continuous learning experience. My journey into the realm of confidentiality in international arbitration has been closely guided by Professor Tibor Várady from Central European University (Budapest, Hungary) and Emory University School of Law (Atlanta, USA). Without his most knowledgeable advice, insightful comments and academic dedication, this work would not have been possible. It was a privilege to work under his supervision.

I owe a special thank you to Brooks Daly, Deputy Secretary General of the Permanent Court of Arbitration, Sylvie Renaut-Picard and Natacha Pinon of the ICC Court of Arbitration Secretariat, Sabiha Shiraz, former Counsel and Senior Registrar of the Singapore International Arbitration Center, Dr. Ivan Szasz of Squire, Sanders and Dempsey LLP (Budapest), Andrew Chan of Allen & Gledhill LLP (Singapore), Professor Peter Hay from Emory University Law School, Professor Margaret Moses from Loyola University Chicago School of Law, and Eleanor Taylor of Kluwer Law International.

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Introduction

In an age when court litigation is almost everywhere perceived as a time-consuming, burdensome, rigid and costly process, arbitration has imposed itself as the norm for dispute resolution in most international business transactions.[1] Complex in nature, blending common and civil law elements, arbitration is above all a contractual creation, built on the principle that parties are free to dispose of their controversies through voluntary agreement. As a complex alternative method of dispute resolution, arbitration gives parties a full opportunity to choose the procedural law, the channels of dispute administration (institutional or ad hoc), the composition of the decision-making body, the language of the proceedings[2] as well as the seat of arbitration, and secures a final and binding determination through awards that are enforceable in domestic courts.

Parties resort to arbitration for its overall ingenuity or because of what they perceive as imperfections or shortfalls in ordinary court litigation. In a famous survey from the mid-nineties, Christian Bühring-Uhle noted that the most important features that drove parties to arbitration were the *neutrality* of the forum and the guarantee of *international enforcement of awards* due to countries' widespread ratification of the New York Convention on the Recognition and Enforcement of

1. Gerald Aksen, *Ad Hoc Versus International Arbitration*, 2 ICC ICArb. Bull. 8-14 (1991) reproduced in Tibor Várady, John J. Barcello III & Arthur T. von Mehren, INTERNATIONAL COMMERCIAL ARBITRATION. A TRANSNATIONAL PERSPECTIVE, 93 (Thompson West, 2nd ed., 2003). *See also*, Margaret L. Moses, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (Cambridge University Press, 2008), at 1.
2. *See*, for a sophisticated commentary on languages in international commercial arbitration, Tibor Várady, LANGUAGE AND TRANSLATION IN INTERNATIONAL COMMERCIAL ARBITRATION. FROM THE CONSTITUTION OF THE ARBITRATION TRIBUNAL THROUGH RECOGNITION AND ENFORCEMENT PROCEEDINGS (TMC Asser Press, 2006).

Foreign Arbitral Awards.[3] Other reasons, in order of importance, were the *confidentiality* of proceedings (rated as the least questioned aspect), followed by the *absence of appeals* and *limited discovery*. Since the first edition of Bühring-Uhle's book, these features had been largely tested, interpreted and commented upon worldwide. Judging by recent developments, this ordering of importance remains roughly unchanged.

Confidentiality is a paramount issue in international commercial arbitration.[4] A former secretary general of the Court of International Arbitration of the International Chamber of Commerce acknowledged a decade ago that many parties chose arbitration mainly because the arbitral proceedings and the resulting award would not enter into the public domain: "Indeed it became quickly apparent to me that should the ICC adopt a publication policy or any other policy, which would mitigate or diminish the strict insistence on confidentiality by the ICC, this would constitute a significant deterrent to the use of ICC arbitration."[5] For reasons easy to imagine, businesspersons do not want their trade secrets, business plans, strategies, contracts, financial results or any other business information to be publicly accessible, as would commonly happen in court proceedings. Arbitration, as a private dispute resolution mechanism is, on the whole, designed to offer the promise of secrecy, affording the participants, under the large umbrella of the party autonomy principle, the power to control who may have knowledge about the matters in controversy and how such matters are finally resolved.

For many years, the confidential character of arbitration has been a matter more assumed than explicitly recognized[6] in the multiple laws impacting every international dispute.[7] In concrete terms, however, when tested before domestic courts and arbitral tribunals, arbitral confidentiality proved a manifest lack of conceptual uniformity and showed clear limitations. Once an Australian court decided that confidentiality in arbitration existed only through the explicit agreement of the parties,[8] the arbitral community entered an era of much turmoil. The literature of that time depicts a state of great confusion. When Patrick Neill declared that "if some Machiavelli were to ask [him] on the best method of driving international commercial arbitration away from England [. . .] the best way [would be] [. . .] to announce that English law no longer regarded the privacy and confidentiality [. . .] as a fundamental characteristic of the agreement to arbitrate.[9]

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3. Christian Bühring-Uhle, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS (Kluwer Law International, 1996), at 136.
4. Klaus Peter Berger, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS. NEGOTIATION, MEDIATION, ARBITRATION, vol. II (Kluwer Law International, 2006), at 313.
5. Expert Report of Stephen Bond, Esq. in *Esso v. Plowmann*, 11-3 Arb. Int'l 273 (1995).
6. Jean François Poudret & Sébastien Besson, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION (Sweet & Maxwell, 2nd ed., 2006), at 316, para. 368.
7. For the interaction between the laws impacting each international arbitration, *see*, in general, Christian Bühring-Uhle et al., *supra* note 3, at 44.
8. *Esso Australia Resources Ltd. v. Sidney James Plowman*, 11-3 Arb. Int'l, 235 (1995).
9. Patrick Neill, *Confidentiality in Arbitration*, 12-3 Arb. Int'l 287, 315 (1996).

On a more cautious note, Hans Smit took the view that a simple, plain rule that arbitral proceedings were confidential was inappropriate and clearly undesirable after the *Esso* case.[10] Michael Collins observed, in a similar vein, that formulating a general proposition that confidentiality was applicable in all classes of cases was "so difficult that courts would be wise not to attempt such a task."[11] More drastically, L. Yves Fortier considered that the understanding that arbitrations were private and confidential became more "truism than truth,"[12] while Dr. Julian Lew raised an argument that "[t]he extent to which arbitration proceedings, the content, the nature of the dispute and all aspects of arbitration remain confidential is [. . .] a matter of agreement of the parties."[13]

At the extreme, Paulsson and Rawding gave a cold verdict: when tested, the rule of confidentiality was in fact "not that reliable" since "the emperor of arbitration may have clothes, [*yet*] his raiments of secrecy c[ould] be torn with surprising ease." For them, a general obligation of confidentiality could "be said to [have] existed *de lege lata*. At best, it [was] a duty *in statu nascendi*."[14]

The current role of confidentiality in international commercial arbitration is reflected by the words of a famous commentator, who recently noted, "Confidentiality of the arbitral proceedings serves to centralize the parties' dispute in a single forum and to facilitate an objective, efficient and commercially-sensitive resolution of the dispute, while also protecting the parties' confidences from disclosure to strangers."[15]

The question of confidentiality in arbitration remains yet unsettled. For some, confidentiality remains "one of the attractions of arbitration in the eyes of arbitration users,"[16] for others "often an overrated attribute,"[17] and in between these views, the case law shows that in practical terms nothing is to be taken for granted. Most recently, the ever-growing pressure towards increased transparency in public interest-type arbitration (most notably in investment arbitration)[18] coupled with an amplified call to publish awards[19] has further shaken the grounds of

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10. Hans Smit, *Confidentiality in Arbitration*, 11-3 Arb. Int'l 337, 339 (1995).
11. Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 11-3 Arb. Int'l 321, 334 (1995).
12. L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15-2 Arb. Int'l 131 (1999).
13. Expert Report of Dr. Julian D.M. Lew in *Esso v. Plowman*, 11-3 Arb. Int'l 283 (1995).
14. Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11-3 Arb. Int'l 303 (1995).
15. Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION, VOL. I (Wolters Kluwer, 2009), at 2252.
16. Fouchard, Gaillard & Goldman, INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International, 1999), at 773, para. 1412. *See also*, Leon E. Trackman, *Confidentiality in International Commercial Arbitration*, 18-1 Arb. Int'l 1-18 (2002).
17. Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration. Expectations and Perceptions of Attorneys and Businesses People*, 30 Int'l Bus. Law 203, 207 (2002).
18. Cindy G. Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 Am. Rev. Int'l Arb. 121 (2003); Barton Legum, *Investment Treaty Arbitration's Contribution to International Commercial Arbitration*, 60 Disp. Resol. J. 71 (August-October, 2005).
19. Julian D.M. Lew, The Case for Publication of Arbitration Awards, *in* THE ART OF ARBITRATION-ESSAYS ON INTERNATIONAL ARBITRATION-LIBER AMICORUM PIETER SANDERS 12 SEPTEMBER

confidentiality, and changed it from a common place assumption to one of the most undetermined matters in international arbitration.

Whether theoretical or practical, these debates have drawn attention to its uncertainty and obscurity. Confidentiality remains a distinct feature of arbitration yet, its real dimensions are largely unknown. What do we understand by confidentiality in arbitration? Is it the same as fifteen or twenty years ago? What are its legal basis, scope and limitations to its scope? Who is bound to observe it? How can we quantify its breach? Do recent trends confirm a clear, unqualified duty of confidentiality? For the reasons explained above, these questions are legitimate. It is perhaps better to address them now rather than allow the controversy to snowball.

This book purports to decipher the current degree of confidentiality in international commercial arbitration as reflected by the most important arbitration rules, national laws, other arbitration-related enactments, and practices of arbitral tribunals and domestic courts globally. It is structured in five parts.

Chapter 1 defines the concept and distinguishes it from the related notion of privacy in arbitration.

Chapter 2, devoted to the legal basis of confidentiality in arbitration, shows that confidentiality is first and foremost a contractual creation (which is confirmed at length in the following chapters) and only sporadically is it accepted as a matter implied in the agreement to arbitrate.

Chapter 3, the nucleus of this analysis, reviews the scope of confidentiality in the practice of arbitral tribunals, domestic courts and from the perspective of the major international arbitration institutions in the world. Unlike other authors,[20] this is not a country-by-country monograph about confidentiality. Instead, the analysis is structured along the main stages of the arbitral process. In particular, this chapter examines the degree of confidentiality surrounding the fact of arbitration (i.e., the existence and the initiation of arbitral proceedings) as well as the unfolding of these proceedings. Finally, it also examines the state of secrecy accompanying arbitral awards in subsequent proceedings. In terms of *scope*, the amount of confidentiality that "veils" each phase of the arbitral process is different and at the same time is *limited* by certain factors that reoccur with enough frequency to qualify as patterns of disclosure. It is for this reason that last part of this chapter investigates the *limitations* to the scope of confidentiality.

Chapter 4 identifies the main categories of persons bound by confidentiality of arbitration.

Last but perhaps most difficult, Chapter 5 tests a system of measures aimed at protecting and ultimately sanctioning breaches of confidentiality in arbitrations.

1912-1982 (Kluwer Law and Taxation Publishers, 1982), at 223; Kenji Tashiro, *Quest for a Rational and Proper Method for the Publication of Arbitral Awards*, 9-2 J. Int'l Arb. 97 (1992); Colin Y.C. Ong, *Confidentiality of Arbitral Awards and the Advantage for Arbitral Institutions to Maintain a Repository of Awards*, 1-2 Asian Int'l Arb. J. 169, 175-176 (2005).

20. *See, e.g.*, Quentin Loh Sze On SC & Edwin Lee Peng Khoon, CONFIDENTIALITY IN ARBITRATION: HOW FAR DOES IT EXTEND? (Singapore Academy Publishing, 2007).

At the end of the journey, the issues and questions that can be raised in connection with confidentiality in international arbitration will not have been exhausted. Omitted from the analysis is the matter of effective enforcement of arbitral confidentiality. This matter is dependent on the propensity of domestic courts to recognize the existence of an arbitration-connected obligation of confidentiality, under purely national procedures. Moreover, matters such as privacy in arbitration, legal privilege, professional secrecy, work-product doctrine, trade, and business secrets are notions that fall outside the area of this research. These issues are addressed only in short and as far as necessary to delineate and clarify the subject matter.

This analysis focuses on commercial arbitration. The references to the developments in the neighboring domain of investment arbitration are made only to highlight the current trends. This analysis is also based on the present state of affairs. Confidentiality in arbitration is an evolving concept and above all lacks the uniformity needed to make a sound forecast for the years to come. Above all, this book is written to raise awareness about the various facets and problems posed by confidentiality in arbitration and to signal that here, just as in most fields of arbitration, much is dependent on the parties.

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Chapter 1
Distinguishing Confidentiality from Privacy: A Possible Definition

1. A BRIEF GLANCE AT HISTORY

Until the late 1980s, parties choosing arbitration to resolve their international disputes did not distinguish between confidentiality and privacy, but rather assumed either a causal link or a mere equivalence between the two.[21] The general perception was that the private nature of arbitration implicitly obliged those participating in the proceedings to maintain confidentiality, without questioning its legal basis or scope, or linking it to the nature of arbitral communications. More precisely, arbitral proceedings, including the hearings, were a private matter between the parties and the arbitrators from which third parties were generally excluded. It was self-evident that, because the hearings were private, the parties were prohibited from imparting the details of their case to "strangers." That which was private was at the same time considered confidential.

According to Patrick Neill,[22] the current controversy around privacy and confidentiality in arbitration dates back to early 1980s, and became visible in *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha*.[23] *Oxford Shipping* owes its fame for considering the question whether arbitrators could order concurrent hearings in parallel arbitrations before the same arbitrators. In that case, it was argued that parties in an arbitration were unlikely to contemplate that evidence from one case could be seen and tested by anyone other than the other party to the arbitration agreement or, "come to that, would be challenged by evidence adduced or

21. Steven Kouris, *Confidentiality: Is International Arbitration Losing One of Its Major Benefits?*, 22 J. Int'l. Arb. 127 (2005).
22. Patrick Neill, *supra* note 9, at 290.
23. [1984] 2 Lloyd's Rep. 373.