Limits of confidentiality in international commercial arbitration

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The confidentiality and privacy of international arbitration proceedings is a contentious and unsettled subject.

The participants to arbitration proceedings regard confidentiality as an essential aspect of the arbitral process, which assists in the effective, efficient resolution of international commercial disputes, and which imposes significant obligations on parties and sometimes on third parties. There are however, some views, that deny that confidentiality is a necessary feature of international arbitral proceedings, or that the parties have any legally-enforceable right to confidential arbitral proceedings.[1]

As a first step, it is important to distinguish between "privacy" and "confidentiality" in international arbitration.

"Privacy" is typically used to refer to the fact that, under virtually all national arbitration statutes and institutional arbitration rules, only parties to the arbitration – and not third parties or the public (as for the case of court litigation) – may attend arbitral hearings and otherwise participate in the arbitral proceedings. The privacy of the arbitration serves to prevent interference by third parties in the arbitral process, by making various submissions in the arbitration.

The term "confidentiality" is typically used to refer to the parties' obligations not to disclose information concerning the arbitration to third parties or the public. Obligations of confidentiality extend not only to prohibiting third parties from attending the arbitral hearings, but also to prohibiting parties to an arbitration from disclosing written pleadings and submissions in the arbitration, hearing transcripts, as well as, evidence adduced in the arbitration, materials produced during disclosure and the arbitral award(s) and orders, to third parties.[2]

However, this obligation of confidentiality may not be regarded as an absolute one. Depending on the situation, confidentiality may have certain limits. Such limits have been outlined over time by the arbitration practice, given the lack of explicit provisions within the national arbitral statues or institutional arbitration rules.

1. The removal of confidentiality based on public interest

[1] Gary B. Born, *International Commercial Arbitration (Third Edition)*, Chapter 20: Confidentiality in International Arbitration, p. 3001, Kluwer Law International Publishing House, 2021.

[2] Gary B. Born, International Commercial Arbitration (Third Edition), Chapter 20: Confidentiality in International Arbitration, p. 3005, Kluwer Law International Publishing House, 2021.

In international commercial arbitration, the removal of confidentiality based on public interest was first articulated in the arbitration-related claim brought before the British court in *Hassneh Insurance*.[3]

During the arbitration proceedings, the respondent attempted to submit documents from a previous arbitration case in which the claimant was a party to, the latter claiming that the submission of documents other than the arbitral award (witness statements, hearing notes) would be an infringement. of confidentiality.

In that case, the court noted that any disclosure of documents presented in the oral proceedings to any third party "*would almost be equivalent to opening the door to the hearing room of the arbitration to that third party*." The court also ruled that, while the arbitral award may be implicitly regarded as having a potentially public nature, given its subsequent verification by the enforcement courts, the documents underlying its issuance are confidential.[4]

Several other cases seem to suggest that British courts recognized a new public interest-type of limitation on confidentiality in arbitration. In *City of Moscow*[5], the courts held that there was no breach of confidentiality in disclosing the fact of the commencement, the existence or the result of an arbitration where there was a legitimate reason for disclosure, such as the duty of disclosure owed by a company to its investors and shareholders if the dispute was likely to impact the corporate accounts.

In *AEGIS v. European Re*[6], it was concluded that it should be differentiated between the materials produced during the arbitration proceedings and the arbitral award. In respect of the confidentiality of the arbitral award, it is self-understood that the arbitral award has a different nature, since it is automatically used for other purposes, such as accountancy, enforcement and other related judicial proceedings purposes.

A more thorough rationale for limiting the scope of confidentiality took shape in Australia, in the famous *Esso* case. Called to reveal information from an arbitration involving two public utility companies, the judge Mason CJ held that despite a duty of confidentiality in arbitration (which could only exist through the parties' express agreement), the public in Australia had a legitimate expectation to be informed about the disputes of their public authorities. The court held that the public sector was in need for compelled openness, not for burgeoning secrecy.

The argument was further developed in the sense that the public / consumers had a legitimate interest in knowing the conduct of the arbitration proceedings, all the more so as the end result would affect the final price to be paid by them for public utilities.

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[3] *Hassneh Insurance Co of Israel and Others v. Steuart J Mew [1993].*

[4] https://open.uct.ac.za/bitstream/handle/11427/13187/thesis_law_2014_bohara_pc.pdf;sequence=1

[5] *Department of Economics, Policy and Development of the City of Moscow and Another v. Bankers Trust Co. and Another* [2004].

[6] *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich* [2003].

In a New Zealand case, new criteria for confidentiality were proposed. In the *TVNZ* case[7], the court ruled that, considering the type of company, which was state-funded, and given the object of the contract, which concerned news broadcast on public television, there was a public interest in the faith of the arbitral award.

2. The removal of confidentiality in the interests of justice

A second limitation of the confidentiality obligation - perhaps the one with the widest range – concerns the cases where either the law or the national courts allow for such a disclosure in the interest of justice.

This limitation is quite complex and any attempt to provide a definition may prove to be quite difficult.

A review of the specific case law shows that the exception from the confidentiality obligation, in the interests of justice may occur: (i) either ***to allow the court a fair assessment of the evidence***, (ii) to ***prevent the incidence of contradictory evidence***; or (iii) ***to protect the legitimate interests of the parties*** to the arbitration. Last but not least, the providing of documents in the interests of justice also covers cases where such production is required by the **applicable legal regime** in particular instances.

The British courts were among the first ones to conclude that the providing of certain confidential documents was required for a fair determination of the matters in dispute. In *Dolling Baker v. Merret*[8], the submission of documents was allowed in order to gather the necessary information for a correct assessment of the case.

Disclosure of information "in the interests of justice" may relate to certain contradictory evidence, such as inconsistent witness statements from one arbitral proceeding to another. While citing the *London Leeds v. Paribas* case, the judge Potter LJ, in *Ali Shipping*[9]*,* emphasized the importance of issuing a fair arbitral award, based on just and non-contradictory evidence.

In the 2017 *Symbion Power LLC*[10] case file, the issue of anonymizing an arbitral award during the annulment proceedings was raised. By dismissing the request for anonymisation, the British courts ruled that "*there is a strong public interest in the publication of judgements, including those concerned with arbitrations, because of the public interest in ensuring appropriate standards in the conduct of arbitrations. That has to be weighed against the parties' legitimate expectation that the arbitral proceedings and awards will remain confidential to the parties*."[11]

The removal of confidentiality ***in order to protect the rights of a party against a third party*** generally depends on the particular situation of each case, as well as on the protection afforded by the applicable law.

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[7] *Television New Zealand Ltd v Langley Productions Ltd* [2000].
[8] *Dolling Baker v. Merrett and Another* [1990] - http://www.uniset.ca/lloydata/css/19901WLR1205.html
[9] *Ali Shipping Corp v Shipyard Trogir* [1999] - https://uk.practicallaw.thomsonreuters.com/D-001-1354?__lrTS=20210521141500965&transitionType=Default&contextData=(sc.Default)&firstPage=true
[10] *Symbion Power LLC v Venco Imtiaz Construction Co* [2017].
[11] *Symbion Power LLC v Venco Imtiaz Construction Co* [2017], para. 90.

For instance, in the *Hassneh Insurance*[12] case, the insurers avoided paying a policy on the grounds of negligence by using an interim arbitral award from a previous arbitration proceeding. The court thus held that the arbitral award was no longer covered by the confidentiality obligation, once its use had become reasonably necessary to protect the rights of a disputing party.

The removal of confidentiality for the purpose of providing the defence was emphasized in *AEGIS v. European Re*[13], in which a previous arbitral award was submitted in a subsequent arbitration in the context of preparing the defence. During two successive arbitrations, in the second arbitration, one party raised *the res judicata* effect of the first arbitral award, arguing that certain determinations were mandatory in the subsequent proceedings.

The main argument was that, regardless of the existence of a confidentiality clause, any attempt by one party to retry legal issues finally settled by a previous arbitral award is practically tantamount to that party's refusal to recognize the effects of that award.

3. Removal of confidentiality under the applicable special provisions

This category of limitation of confidentiality under the specific applicable legislation - the so-called statutory legislation - is quite broad and the rules are different from one area to another.

Typical examples of the obligation to disclose confidential information are those concerning companies whose shares are traded on regulated markets, which are required to disclose certain information under specific regulations.

The European legislation also requires the disclosure of certain information concerning pending legal proceedings, including arbitrations, for the case of companies listed on stock exchanges. Similarly, corporations are subject to a set of reporting obligations towards auditors, banks or insurance companies, either under a legal obligation or a contractual obligation.

The due diligence procedures performed in the sale-purchase process impose the seller's good faith obligation to disclose all relevant information, including on possible ongoing arbitrations.

4. Concluding remarks

The review of recent case law indicates that the confidential nature of arbitration may not be regarded as absolute. On the contrary, there are certain limits to confidentiality that have been continuously shaped by the arbitration case law. Consequently, there can be no reasonable expectation of the parties that the arbitral award will remain confidential under all circumstances.

Hence, it is important to become acquainted with these types of limits, as such are defined by the arbitration case law. This will enable the parties to file certain requests for the submission of various useful documents, respectively to raise appropriate defences throughout the arbitration procedure. Last but not least, being familiar with these limits of confidentiality enables the parties to tailor the

[12] *Hassneh Insurance Co of Israel and Others v. Steuart J Mew [1993].*
[13] *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich* [2003].

confidentiality clauses according to the specifics of the dispute/contract and the legal regime such parties.