

Confidentiality in arbitration: myth or reality?

The Confidentiality of International Arbitration Awards

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15 April 2015

3rd annual ICC conference on International Arbitration in the MENA
Dubai, United Arab Emirates

14-15 April 2015

Introduction

- Privacy and confidentiality are usually mentioned among the major reason why parties choose arbitration over court litigation in resolving their disputes.
- However, privacy and confidentiality do not connote the same meaning: Privacy deals with the rights of third parties to attend the arbitral proceedings, while confidentiality goes a step further to ensure that parties do not disclose information that relates to the content of the proceedings.

Introduction (cont'd)

- Publication of arbitral awards and other decisions (most importantly, challenges to arbitrators) has become more common but is not without controversy. The trend toward more publication may change many of the assumptions traditionally associated with international arbitration, including confidentiality, concentration of knowledge and expertise in a more or less defined group, and the extent to which arbitral decisions and awards should have persuasive or binding precedential effect.
- The assumption that arbitration is inherently confidential has been taken for granted for many years and no one questioned its ambit and effectiveness. It was only in the 1990s that the extent of confidentiality in arbitral proceedings became a widely debated topic and started to be challenged:
 - Australia: High Court of Australia, *Esso/BHP v Plowman*, [1995], 128 ALR 391
 - Sweden: Swedish Supreme Court, *Bulgarian Foreign Trade Bank Ltd. v A.I. Trade Finance Inc.*, [2000], Yearbook of Commercial Arbitration, vol. XXVI, 2001, 291 *et seq.*
 - USA: United States Court of Appeal Third Circuit in *United States v Panhandle Eastern Corp*, [1998], 842 F.2d 685
- The courts in these jurisdictions held that to the extent that the confidential obligation is said to exist in arbitration, it must be found in the arbitration agreement or the applicable arbitration rule.

Introduction (cont'd)

- English and French courts and some other civil law jurisdictions such as most of Middle Eastern countries still uphold that an implied confidential obligation exists in arbitration unless the parties agree to disclosure.
 - England: *Dolling-Baker v Merret* , [1991] 2 All ER 890, 899; *Hassneh Insurance Co. of Israel et. al. v Steuart J. Mew*, [1993] 2 Lloyd's Rep 243, 249.
 - France: *Aita v Ojeh*, CA Paris, 18 February 1986, 1986 Rev. arb. 583; however, *NAFIMCO v Société Foster Wheeler Trading Company AG*, CA Paris, 22 January 2004, Rev. arb. 2004.647 seemed to question the assumption.
 - UAE courts, Dubai Court of Cassation, judgement No. 157/2009, 27 September 2009, WestlawGulf
 - Lebanon: *Al-Naqib v TMA*, CA Beirut, 3rd civ. ch., No. 1404/2003, 9 October 2003, [2004] 28 LRAIA 59.

Introduction (cont'd)

Confidentiality is generally understood as covering:

(1) the very existence of the dispute and the commencement of arbitral proceedings;

(2) the course of the proceedings;

and

(3) the award.

Introduction (cont'd)

- More recently, calls for increased transparency in the field have added a new dimension to the debate by arguing that the publication of awards is one of the most significant ways to achieve this:
 - Klaus Peter Berger, *Creeping Codification of the New Lex Mercatoria* (Alphen aan den Rijn: Kluwer Law International, 2010)
 - Jan Paulsson, *Cross-Enrichment of Public and Private Law Dispute Resolution Mechanisms in the International Arena* (1992) 9 Journal of International Arbitration 65
 - Cindy Buys, *The Tensions between Confidentiality and Transparency in International Arbitration* (2003) 14 American Review of International Arbitration 121
 - Catherine Rogers, *Transparency in International Commercial Arbitration* (2006) 54 University of Kansas Law Review 1301

Introduction (cont'd)

Publication of arbitral awards and other decisions (most importantly, challenges to arbitrators) has become more common but is not without controversy. The trend toward more publication may change many of the assumptions traditionally associated with international arbitration, including confidentiality, concentration of knowledge and expertise in a more or less defined group, and the extent to which arbitral decisions and awards should have persuasive or binding precedential effect.

This presentation outlines:

- 1.the arguments against and for publication of international arbitration awards.
- 2.how some national laws and major institutional rules have dealt with the issue, before turning to
- 3.the specificity of investor-state and other public law related arbitration awards
- 4.some proposals for a uniform solution

A. Arguments against and for publication

1. *Arguments against publication*

A number of well-grounded arguments have been put forward against the publication of awards. They are based on the premise that confidentiality derives from party autonomy and extends to all parts of the arbitration, including the award. In other words, the award is simply a matter of a private contract between the parties and, as such, should not be disclosed to the public.

➤ See e.g., Elina Zlatanska, *To Publish, or Not To Publish Arbitral Awards: That is the Question ...* (2015) 81 Arbitration 25

Arguments against publication (cont'd)

Erosion of arbitration (Martin Hunter [1987])

- Parties and their witnesses may become reluctant to admit certain facts during the proceedings and less prone to seek a settlement through negotiation.
- Impair the co-operation and good relations between businesses that are vital for their growth.
- Arbitration will become very similar to litigation and this may deter parties from using it to settle their disputes.
- Arbitration should be seen as a single process and the award cannot be considered separately as something requiring less confidentiality.

Arguments against publication (cont'd)

Protection of technical and business data

- Parties may fear that they will no longer be able to safeguard certain types of sensitive information such as, *inter alia*, client lists, trade secrets, know-how, intellectual property and research and development.

Additional cost and delay

- Added costs and time of issuing an award suitable for publication.

Arguments against publication (cont'd)

Absence of a real academic value

- Disputes usually involve a unique set of facts and the decisions have to take into account a diversity of factors.
- Awards may not serve as a useful guide for future disputes as it is impossible to draw general conclusions from them.
- Awards are addressed only to the parties and limited to “doing justice” in the particular situation.
- The function of arbitration is to “decide, not to teach”

Arguments against publication (cont'd)

Impact on parties' reputation

- Information about the dispute and the arbitration may jeopardise the parties' reputation, especially following a loss that may have an adverse effect on future business ventures.
- The publication of an award may lead to further disputes against the losing party in similar cases, who may suffer for a long time and incur further economic loss.

Arguments against publication (cont'd)

Risk for the business of arbitral institutions

- Publication of awards will increase institution's expenses, which will entail an increase in the cost of the service provided.
- Risk of “flight” from institutions allowing systematic publication of awards in favour of other forums that safeguard the principle of confidentiality.
- Loss of market share because those institutions will become less attractive in the eyes of arbitration users.

Arguments for publication

- It is believed that keeping a repository of arbitral awards can serve the wider public interest as well as the ultimate self-interest of parties. The most frequently used arguments in favour of systematic publication show that a body of published awards can be beneficial in various ways:

Development of law

- The international business community needs a stable body of rules. International commercial arbitration increasingly contributes to the development of norms of commercial usage.
- The insight of arbitrators is extremely valuable because it reaffirms and sometimes even produces procedural and substantive rules which can then become part of practice and be followed in the future.
- The publication of arbitral awards can therefore contribute to the uniform and autonomous development of international arbitration law as well as the *lex mercatoria*.

Arguments for publication (cont'd)

Certainty and predictability

- International business requires certainty and predictability. Arguably, the publication of awards will increase the foreseeability of outcomes.
- Reduction in the number of frivolous claims.
- In cases where the parties decide to use arbitration, consideration of previous awards would help their lawyers plan and prepare more efficiently ahead of arbitration proceedings.

Arguments for publication (cont'd)

Consistency

- International companies usually rely on numerous contracts between different parties for their business ventures.
- The arbitration clauses in these contracts are not necessarily the same, and this can produce multiple arbitrations arising out of the same transactions.
- The risk is that different tribunals may give different solutions on similar issues of fact and law. Without the publication of awards, it would be impossible to prevent divergent decisions that can pose a threat to the credibility, the reliability and, ultimately, the authority of international arbitration.
- Development of a binding or persuasive precedent system.

Arguments for publication (cont'd)

Education and training

- The availability of published awards will help to train new arbitrators, as well as making practising arbitrators more aware of the reasoning of other arbitrators and of the way in which they applied the laws and rules when faced with similar situations.
- A rapidly changing global economy generates increasingly complex trade relations involving parties from different parts of the globe. Such a world requires highly skilled arbitrators who can solve disputes in an expeditious and efficient manner.
- Furthermore, arbitral tribunals are often composed of arbitrators who come from different legal backgrounds and who may have different approaches concerning the application of certain principles. The published awards will offer insight as to how to apply those principles.

Arguments for publication (cont'd)

Legitimacy and transparency

- The publication of awards will make the system more transparent and fair by allowing the public to see that justice is done.
- A relatively homogeneous body of awards can further promote arbitration as an efficient and reliable means of settling disputes. Thus, if the work of arbitrators is rendered more visible, the legitimacy of the system will be strengthened: future users of arbitration will gain a better understanding of the process and will be encouraged to use it.

Arguments for publication (cont'd)

Quality of arbitral awards

- The publication of awards, including the names of the arbitrator(s), would, presumably, make them more careful when writing an award since they would more meticulously clarify their analysis and justify their decisions.

Prevention of conflict of interests

- Another important benefit of the publication of awards is the prevention of conflict of interests. This is very important since the arbitration field is often described as closed to newcomers and said to favour the same small players of players.
- There is a real concern that arbitrators will favour the parties who appoint them regularly in different cases because this will guarantee even more appointments in the future. Arguably, the publication of awards will help preventing such conflicts.

Arguments for publication (cont'd)

Integrity and reputation of arbitrators

- It is argued that the publication of awards will help prevent instances of misconduct and misapplication of the law.
- The publication of awards will allow some kind of external scrutiny and control over the arbitrators' decision-making.
- Besides, the publication of awards under arbitrators' names will assist them in building their reputation which they require in order to become established in the field and to be recognised by their peers.
- Access to published awards under one's name will help arbitrators build a track record, which will allow parties to make well-informed decisions as to who is the best-suited individual to deal with their case

Arguments for publication (cont'd)

Status of arbitration institutions

- Finally, it has been said that publication of awards rendered under the auspices of a given institution would enhance its reputation. Parties not only will have a better idea of which institution is the most appropriate to hear their specific dispute, but also will have more confidence that a given institution can handle their case in a reliable and careful manner. This may also promote “healthy” competition amongst the arbitral institutions.

B. How do national laws deal with the issue?

National laws have given different treatment to the duty of confidentiality in international commercial arbitration. A study conducted at Queen Mary School of Law in 2013 has shown that, based on a compilation of over 50 national arbitration laws, they may be divided into three groups:

- See, M. Florencia Villaggi, *International Commercial Arbitral Awards: Moving from Secrecy towards Transparency?* Queen Mary School of Law, London, 2013

(i) First group: the large majority of national laws that do not contain any rule as to a duty of confidentiality in arbitration

This is the case with the arbitration laws of Germany, Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Korea, Denmark, Egypt, Slovenia, USA, Russian Federation, Finland, England, Guatemala, Holland, Honduras, Ireland, Italy, Japan, Lebanon, Mauritania, Mexico, Nigeria, Panama, Paraguay, Poland, Portugal, Qatar, Sweden, Switzerland, Tunisia, UAE (except for DIFC), and Uruguay.

National laws (cont'd)

(ii) Second group: national laws that provides for confidentiality as a general principle

Such is the case of the laws of Bolivia, Costa Rica, Croatia, Dominican Republic, Dubai DIFC, El Salvador, Spain, France (domestic arbitration), Philippines, Nicaragua, Morocco, India, Norway, Czech Republic, Venezuela, Hong Kong, Bermuda, Singapore, Taiwan and Zambia.

(iii) Third group: a few national laws that contain provisions governing confidentiality more completely.

Recent legislation of New Zealand, Peru and Scotland.

National laws (cont'd)

The same study identifies only five jurisdictions whose legislation deal expressly with the confidentiality or publicity of the arbitral award (i.e. Morocco, Philippines, Peru, Scotland and Norway).

- Moroccan law establishes that the publication of the award or extracts may be made, only with the permission of the parties.
- Similarly, the Philippine Alternative Dispute Resolution Act of 2004 provides that the arbitration proceeding, including files, testing, and the award should be considered confidential and will not be published, except with the consent of the parties. However, it incorporates another exemption: the publication is permitted for the limited purpose of disclosing to a court the relevant documents in cases where resorting to the court is allowed from therein. Provided, however, that the court in which the action or the appeal is pending may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof.

Institutional rules and practice

Institutional rules

The arbitration rules of the major international and regional institutions differ as to the treatment of the award. Some of them (i) establish a duty to maintain the awards confidentiality as a general rule, with limited exceptions. But there are others that, (ii) have no express provision regarding publicity or confidentiality of the award. And lastly, there are those rules that expressly provide for the publicity of the awards (iii) only with express consent of the parties, or (iv) as a general rule, unless objected by the parties.

(i) First group: Confidentiality of the award with limited exceptions

The London Court of International Arbitration (LCIA) Arbitration Rules (2014) establishes that *“unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration.”* (Art. 30.3)

Similarly, the Arbitration Rules of the **Arbitration Institute of the Stockholm Chamber of Commerce (SCC)** also set forth that *“unless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.”* (Article 46 SCC)

The **World Intellectual Property Organization (WIPO)** Arbitration Rules contain a precise provision regarding the disclosure of the award which states that parties shall treat the award as confidential and may only disclose it to third parties to the extent that: (i) the parties consent; (ii) it falls in the public domain as a result of a court action; or (iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party’s legal rights against a third party. (Article 75 WIPO)

Institutional rules and practice

Institutional rules (cont'd)

- **The Swiss International Arbitration Rules** set forth that:

“unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers’ Arbitration Institution, the members of the Court and the Secretariat, and the staff of the individual Chambers.”

However, “an award or order may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions: (a) A request for publication is addressed to the Secretariat; (b) All references to the parties’ names are deleted; and (c) No party objects to such publication within the time-limit fixed for that purpose by the Secretariat.”

(Article 44.1 Swiss International Arbitration Rules [2012]).

- The Arbitration Rules of the **International Chamber of Commerce (ICC)** establish an explicit rule of confidentiality of the award over the institution, but not the parties or the arbitrators, by providing that *“additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.”* (Article 34.2 ICC Arbitration Rules [2012]). The internal rules of the International Court of Arbitration also stress the confidentiality of their work. However, since 1985, the ICC has allowed the Secretary General of the Court to publish edited and redacted copies of awards, eliminating the names of the parties, as guides for the benefit of lawyers and arbitrators.

Institutional rules and practice

Institutional rules (cont'd)

- The rules of the **Beirut Chamber of Commerce and Industry (BCCI)** contain a provision that is virtually identical to the wording of the ICC rules. (Article 23.2 BCCI)
- The rules of the **Hong Kong International Arbitration Centre HKIAC** forbid institutional publication without the express consent of the parties. (Article 42.2)
- The rules of the **Cairo Regional Centre for International Commercial Arbitration (CRCICA)** provides that *“The Centre undertakes not to publish any decision or arbitral award or any part thereof that reveals the identity of any of the parties without the prior written consent of all parties”* (Article 40.3).
- Article 41.3 of the **Qatar International Centre for Commercial Arbitration (QICCA)** is identical to the CRCICA rules.
- The Dubai International Arbitration Centre (DIAC) states *“unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards and orders in their arbitration together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain...”*. (Article 41.1)
- **DIFC-LCIA Rules** Article 30 contains a similar provision.
- The rules of the **Court of Arbitration for Sport (CAS)** provide in Art. R43 covering its ordinary procedure that : *“The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides.*

Institutional rules and practice

Institutional rules (cont'd)

(ii) Second group: No provision regarding the award

- An example of a set of rules that have no specific provision regarding the confidentiality of the award can be found in the **China International Economic and Trade Arbitration Commission Arbitration Rules (CIETAC)** Arbitration Rules, which have an express provision regarding the presumed confidentiality of the hearings, Article 36 CIETAC Arbitration Rules (2012) but include no rule as to the publication of the award.
- Similarly, the rules of the **Commercial Arbitration Centre for the States of the Co-operation Council for the Arab States of the Gulf in Bahrain** (1994) do not contain any provision regarding the confidentiality of the award, but only concerning the confidentiality of the hearings (Article 22.4)

(iii) Third group: Publicity of the award with express consent of the parties

- The **UNCITRAL Arbitration Rules** provide that “[a]n 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.” (Article 34.5 UNCITRAL Arbitration Rules [2010]).
- The Arbitration Rules of the **International Centre for Dispute Resolution (ICDR)** also establish that “an award may be made public only with the consent of all parties or as required by law”. (Article 27.4 ICDR Arbitration Rules)
- The same rule is provided for in the **Bahrain Center for Dispute Resolution (BCDR-AAA)** arbitration rules (Article 27.4)
- Art. 48.5 of the **ICSID** Convention and its Arbitration Rule 48.4 state that “[t]he Centre shall not publish the award without the consent of the parties”, but Rule 48(4) then provides that it “may, however, include in its publications excerpts of the legal rules applied by the Tribunal without the parties’ consent”.

Institutional rules and practice

Institutional rules (cont'd)

(iv) Fourth group: Publicity of the award, unless objected by the parties

- Many of the maritime arbitration rules provide that awards are published as a matter of course, unless both parties request in advance that the award not be published. See for example, the Arbitration Rules of the **Society of Maritime Arbitrators (SMA)** Section 1, Rules of Procedure of the **Association of Maritime Arbitrators of Canada (AMAC)**.
- The Arbitration Rules of the **Milan Chamber of Commerce** provide that: (i) the Chamber of Arbitration, the parties, the Arbitral Tribunal and the expert witnesses shall keep the proceedings and the arbitral awards confidential, except in case it has to be used to protect one's rights; (ii) for purpose of research, the Chamber of Arbitration may publish the arbitral award in anonymous format, unless, during the proceedings, any of the parties objects to publication. (Article 8 Arbitration Rules of the Chamber of Commerce of Milan [2010]).
- The **Singapore International Arbitration Centre (SIAC)** amended its rules effective April 2013 to add Rule 28.10 providing that it may publish any award with the names of the parties and other identifying information redacted. Although consent is therefore not required, a SIAC Practice Note states that SIAC shall consult with the parties, and may consult with the arbitrators, prior to such publication.
- The **Court of Arbitration for Sport (CAS)** has two sets of rules: an ordinary arbitration procedure and an appeal procedure. Appeals are against the decision of a federation, association or sports-related body. The two types of arbitration have different rules concerning publication. Art. R43, covering ordinary arbitration, states that “[a]wards shall not be made public unless all parties agree or the Division President so decides”. Art. R59, covering appeals from federations or other sports-related bodies, mandates CAS publication - unless both parties agree that they should remain confidential. Publication of either type of award (ordinary or appeal) is generally in full, unredacted form unless the institution believes there is a reason to redact the name of a party (*e.g.*, if a minor) or witness (*e.g.*, to corruption in a sports organization).

Institutional rules and practice

Current institutional practice

Regardless of the rules, A review of current practice of major international institutions undertaken in February 2014 by the New York City Bar Association shows the following findings:

➤ See, New York City Bar Association, *Publication of International Arbitration Awards and Decisions, A Report by the Committee on International Commercial Disputes*, February 2014.

- Swiss Chambers of Commerce and HKIAC currently publish nothing with respect to awards or decisions.
- At the other end of the spectrum, ICSID, SMA, and CAS publish certain awards and other decisions of significance in full, unredacted form. ICSID does so if the parties consent. SMA does so unless the parties stipulate to the contrary in advance of the arbitration.
- ICDR began in 2012 to publish excerpts or summaries of selected awards and decisions in what so far is a single volume published by Juris called ICDR Awards and Commentaries. Information identifying the parties and arbitrators is redacted.
- ICC publishes extracts or summaries of awards and procedural orders in its Bulletin, which is available by subscription, in periodic analyses of awards addressing particular topics. The extracts do not identify the parties or arbitrators and redact facts that would tend to identify the parties. Such extracts are not typically released until three years after the arbitration in question was closed. ICC does not publish decisions on challenges to arbitrators. In addition, redacted extracts of selected ICC awards are also published and commented in the *Journal du droit international* (JDI also known as *Clunet*) and in the *Collection of ICC Awards* edited by Messrs Arnaldez, Derains, Jarvin and Hascher and published by Kluwer Law International (Kluwer Law International 1974-2011)

Institutional rules and practice
Current institutional practice (cont'd)

- The ICSID website publishes the names of cases filed and the arbitrators appointed in each case. See <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases>.
A significant number of ICSID awards and decisions have been published on ICSID's website. These are full text documents that contain the names of the parties, arbitrators and counsel in each case. If the parties refuse consent to publish an award, case excerpts compiled by ICSID are made publicly available, including names of parties, arbitrators and counsel, and excerpts of the legal reasoning of the Tribunal. Decisions can be found at its website: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=OnlineAward>
- SMA has published its awards, both Final Awards and Interim Final awards, since 1963. All SMA published awards disclose the names of the parties, their counsel and the panel members. They are made available by the SMA in its Award Service to which one can subscribe, and they are also available in the LEXIS and Westlaw research data banks. All SMA published awards disclose the names of the parties, their counsel and the panel members. They are made available by the SMA in its Award Service to which one can subscribe, and they are also available in the LEXIS and Westlaw research data banks.
- LCIA does not publish awards but published abstracts of selected challenges to arbitrators in its journal Arbitration International. International. The names of the parties, their attorneys, and the arbitrators are redacted to preserve confidentiality, but the names of the members of the LCIA Court deciding the challenges are published.
- In 2012, SIAC began to select international arbitration awards for publication by LexisNexis.
- Stockholm Chamber currently publishes articles that include selected extracts redacted by its Secretariat. Articles about arbitration in Sweden and extracts of awards can be freely downloaded from the library section of its website (<http://www.sccinstitute.com/library/articles.aspx>)

Institutional rules and practice
Current institutional practice (cont'd)

- CRCICA publishes redacted full texts of its awards in English and Arabic in a series of volumes published by Kluwer.
 - See, M. E. I. Alam Eldin (Ed.), *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration*, Volumes I to iv, Kluwer Law International 1999-201
- The BCCI Arbitration Centre publishes selected awards in full text in the two Lebanese specialised publications.
 - See, *The Lebanese Review of Arab and International Arbitration* (LRAIA) and the *World Arbitration Journal* (WAJ)

C. Distinctive features of investor-state arbitrations and other disputes involving states

- A distinction has been drawn between international commercial arbitration and other types of international arbitration that may require greater transparency.
- As said before, in Investment Arbitration for instance, anyone can surf ICSID or ITA web sites and access almost all of the awards issued by arbitral tribunals or decisions from the annulment committees. Therefore, it is fairly simple to keep track of investment arbitration decisions on any specific point of law and of the awards rendered by any arbitrator.

investor-state arbitrations (cont'd)

- The policy arguments for publication of awards in sovereign arbitration are quite different from the arguments for publication in the context of private commercial arbitration. Claims by investors against a sovereign state have far greater political and public interest implications, so arguments for greater transparency in that type of international arbitration may not necessarily apply or may be of lesser significance to commercial disputes.
- The UNCITRAL introduced in 2013 rules on transparency and access to information in Rules on Transparency in Treaty-based Investor-State Arbitration, which provides for publicity of the awards.
- Moreover, historically, the practice of tribunals hearing matters related to States acting with *ius imperii* (sovereignty) powers has always been public. This concept was applied to 19th century arbitration tribunals and to the prolific work of the International Court of Justice and its predecessor, the Permanent Court of International Justice.
- Similarly, most of the bilateral commissions that settled monetary disputes in the past against sovereign States in the realm of diplomatic protection, such as the Mexico-United States Claim Commission, and subsequently under other specially designed mechanisms, such as the UN Compensation Commission and the Iran-US Claims Tribunals, published their awards, some well before the current concern for transparency of government proceedings.

investor-state arbitrations (cont'd)

- Investment arbitrations involve issues that potentially affect the public interest. Hence, where a public actor such as a state or state entity is involved in the arbitration and there is a statutory requirement demanding disclosure of information concerning the arbitration, this requirement will prevail over the confidentiality principle.
 - See, M. Joyiyota and J. Roman, *Confidentiality in International Arbitration: An Introspection of the Public Interest Exception*, (2006) 23(1) Arbitration International 44
- Most modern democratic states have obligations regarding access to information by their citizens. These obligations stem sometimes from the constitutional principle of public participation in government proceedings and the right of access to public information. Democratic constitutions grants this status to international human rights instruments and thus to the right of information stemming from Article 19 of the Universal Declaration of Human Rights .
 - See, Article 1, Articles 33, 41, 42 et seq. of Chapter Two of the Argentine National Constitution-which establishes new rights and guarantees-and Article 75(22), which is a listing of International Human Rights Treaties to which constitutional status has been granted.
- This argument would apply to both investment and commercial arbitrations where the state is a party to the proceedings.

investor-state arbitrations (cont'd)

- In addition, it has also been submitted to justify the publication of awards that investment arbitration suffers from widespread challenges to arbitrators and is criticised as “unfair”, this is not applicable in the context of commercial arbitration.

➤ Karton, *A Conflict of Interests*, (2012) 28 *Arbitration International* 447, 475.

- Finally, investment or public international arbitration, which develop rules through a relatively homogeneous decisions which requires the publication of the awards, unlike international commercial arbitration does not need a body of coherent law because arbitrators mostly apply domestic laws that have been sufficiently developed.

➤ See, Gabrielle Kauffman-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* (2007) 23(3) *Arbitration International* 376

investor-state arbitrations (cont'd)

- The publicity of ICSID awards has led to passionate debates about the consistency - or rather lack of it- of awards dealing with some legal –and sometimes factual- issues. Scholars and practitioners have identified conflicting decision in legal issues such as: (i) the concept of “investment”; (ii) whether the MFN clause can be applied to dispute resolution provisions; (iii) whether contract violations can be upgraded to treaty violations under an umbrella clause; 58 and (iv) the standard required to apply the defence of “state of necessity”. It is submitted that this debate would not have taken place if the awards were not made public.

D. Proposals for a balanced solution

The arguments for and against the publication of awards often take an extreme position. At one end of the spectrum lies the idea that awards can transcend the limited context of the dispute at hand and become a “public good” similar to court judgments. At the other end is the view that the current regime protects parties’ interests and rights and the publication of awards without their consent will only have a detrimental impact on international arbitration practice. In the search for a middle ground, the following mechanisms have been suggested :

Proposals (cont'd)

▪ *Automatic mechanism*

The first proposal establishes a mechanism which requires the parties themselves to identify confidential information which they would not like to see published. The arbitrator will then produce two arbitral awards: one will contain all the confidential information and a second one will be edited to remove all sensitive information. The former will be delivered to the parties whilst the latter will be automatically published.

▪ *Uniform award template*

Another suggestion is that all arbitral awards should be divided into three parts: (1) description of the facts; (2) procedural issues; and (3) the reasons and the decision. The adoption of such a format will facilitate the quick and efficient sanitation of awards because the different parts can be easily edited to protect parties' interests and sensitive information. As with the automatic mechanism, the parties will be given the text of the award before publication and they can raise further objections.

Proposals (cont'd)

Whilst such a solution may remove the problems connected to additional costs and delay when preparing the award, it seems very implausible to impose such a template on arbitrators all over the world, who have entirely different writing styles and who change their own style from one award to another.

▪ *Centralised body in charge of publication*

A somewhat similar proposition has been advanced in relation to the publication of awards. It has been suggested that a public regulatory body in charge of overseeing and regulating arbitral institutions and keeping a depository of arbitral awards, statistics and other arbitration-related information should be established. Such an international institution has to be created by a new treaty or by amending the New York Convention.⁹³

▪ *Online information system*

It has been argued that published awards can be made available through an online database similar to UNCITRAL's "Case Law on UNCITRAL Texts" (CLOUT).

Unfortunately, most of these proposals, though brought forth with good intentions, fall far from being a realistic solution at least on the short or medium runs.

Conclusion

Having a relatively small pool of arbitrators and counsel as well as limited information on what exactly happens in arbitration may be a real concern for users and can jeopardise the system as a whole in the long run. Balancing the parties' private interests with the publication of reasoned awards is not an easy task. But if we want to promote international arbitration as an efficient and reliable method for settling business disputes, information needs to be made available to everyone who has an interest in it. The experience of some major institutions (such as the ICC) shows that it is possible to preserve confidentiality of the information identified by the parties while the award is published in a sufficient length to recognize an important ruling. It may look as a paradox but on the long run less confidentiality will make arbitration even more popular among business entities.

THANK YOU