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Transparency in International Arbitration: towards a contemporary paradigm

UNCITRAL's adoption of new Rules on Transparency in Treaty-based Investor-State Arbitration, which will come into effect on 1 April 2014, has prompted the world of international arbitration to focus afresh on transparency and confidentiality in arbitration. In this edition of IAQ, HFW Partner Matthew Parish reflects on the issues in detail.

The very notion of transparency might seem an anathema to the process of international arbitration. One of the dominant motives for parties electing to resolve their disputes by way of arbitration as opposed to court litigation is often said to be confidentiality. If parties are engaged in a dispute, they may wish to resolve their problems in private without their troubles being at risk of airing by the media. In England, court files are available for inspection by the public and journalists: anyone can walk in off the street to examine the pleadings and other court documents, unless the court has made an order closing the court file. Judgments of the High Court are published on the internet.

In the US, the provisions for transparency are even more extreme: in most courts, all court pleadings and other documents filed at court are available for download on the internet without charge.

Civil law jurisdictions may be less welcoming towards members of the public asking to examine court files. However, in all European countries, the general rule prescribed by the jurisprudence of the European Court of Human Rights is that court hearings are open to the public and anybody can sit in the court, observe the proceedings and report upon them. This may be unattractive to parties involved in a dispute because the mere existence of litigation may be embarrassing or because the allegations involved may be scandalous. Arbitration is perceived as a method of resolving disputes away from the glare of adverse publicity.

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Arbitration is often said to be "confidential", but care should be taken over this term. Arbitration hearings are private; members of the public cannot walk into the hearing room and watch what is going on. A stranger cannot walk into the doors of the London Court of International Arbitration (LCIA) on Fleet Street and ask to examine their files. Arbitration awards are not routinely published. However, there are some exceptions. The International Chamber of Commerce has a journal of published and anonymised arbitral awards. ICSID, the World Bank arm that arbitrates disputes between investors and states, routinely publishes its awards provided that the parties to the dispute consent. If one or more of them does not consent, it publishes anonymised extracts nonetheless. There are other ways in which arbitration awards may be published. The University of Victoria, British Columbia, has kept a database of investment treaty arbitration awards accessible to the public on the internet without charge since 2004. Anyone can submit material to the site administrator for publication.

Confidentiality in arbitration proceedings is enshrined in law in some countries' legal systems but in practice it may prove difficult to enforce. In England there is no express reference to confidentiality of the arbitral process in statute, a theme echoed in many jurisdictions. The UNCITRAL Model Law on International Commercial Arbitration, upon which many countries' arbitration laws are based, contains no such provision either. Few institutional rules impose express obligations of confidentiality upon parties to an arbitral process, the LCIA perhaps being the most notable exception. Therefore in most jurisdictions, the notion of confidentiality of the international arbitral process – as opposed to its privacy – is a myth.

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Privacy means that no information about the arbitration will be disclosed to the public unless one of the parties decides to disclose it. Confidentiality, by contrast, means that no information about the arbitration will be disclosed to the public unless *both* parties agree. Confidentiality entails that, in theory at least, one of the parties to the arbitral process can compel the other one not to publish arbitral documents or to disclose the existence, content or outcome of arbitral proceedings. In many jurisdictions, there is no legal obligation of confidentiality; just a *de facto* principle of privacy.

There is a theme within English case law that maintains the obligation of confidentiality notwithstanding the absence of a statutory underpinning. As a general rule, the English courts have seen confidentiality as an implied term of the agreement to arbitrate; the principal case on the point is *Ali Shipping Corporation v Shipyard Trogir*[1].

This seems a strange sort of implied term: why should it be inferred that the parties must have intended that arbitration proceedings be confidential when they entered into an arbitration agreement? Confidentiality is not the sole reason why parties arbitrate; other dominant motives may be neutrality of forum, avoiding home-town justice, and flexibility of procedure. It is not so essential a prerequisite for the international arbitral process that the parties must necessarily be assumed to have intended that arbitration be confidential.

The confidentiality obligation has been repudiated in Australia, the courts of that country recognising that it is essentially unenforceable. The problem is a practical one. Typically, revelation of a dispute is more embarrassing for one party than for another. If this is the case, then it may be more in one party's interests to procure a leak than the other. If a party wishes to publish the arbitral pleadings or documents created or disclosed in the course of the arbitration to the media, or to publish the arbitral award, or issue a press release about the course of the arbitration, it is very difficult to stop them. Many of these things happen as a matter of routine, even in a jurisdiction such as England in which arbitration proceedings are ostensibly confidential. In the contemporary era, disclosure of documents of this kind will typically take place by way of the internet. Soon their distribution will be so widespread that there is nothing any court or arbitral tribunal can do to prevent further dissemination. In theory a damages action might lie for breach of a duty of confidentiality;

1. (1999) 1 WLR 314 (CA)

but it is not clear what the losses might be. Cases where a causal link between disclosure of arbitration pleadings and actual financial losses can be established are few. Moreover establishing the identity of the culprit may be virtually impossible in the age of anonymised internet transmission.

In addition, there is a range of legitimate circumstances in which a right or obligation of disclosure might override a confidentiality obligation. In England there is a public interest defence to disclosure, the scope of which is unclear. Arbitration proceedings may legitimately be disclosed to foreign courts in connection with equivalent proceedings, where there are debates over *lis pendens, res judicata* and forum-shopping disputes. Appealing from an arbitration award to national courts is a common phenomenon in England and the United States. In the course of such an appeal, the parties to an arbitration and the substance of their dispute may become public.

The notion that arbitration is a confidential process has already been mostly eviscerated. If someone becomes aware of arbitration proceedings and has access to the documents – whether this be litigant, lawyer, journalist or interested third party – the reality is that the proceedings can be straightforwardly publicised in a multiplicity of ways. One must have a starting point because the case files are locked away, but a journalist with a lead may easily dig out the existence of an arbitral process.

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The public interest aspect of disclosure of international arbitral proceedings has recently taken a further turn with increasing scrutiny over the investor-state arbitration process. While not common knowledge outside rarefied legal circles, the world's sovereigns have signed a dense interrelated network of bilateral investment treaties under which host states grant to foreign investors the right to be treated in accordance with certain fundamental principles of international law. These rights typically include the rights not to have one's property expropriated without due process of law and adequate compensation; to be accorded fair and equitable treatment under the country's legal and administrative system; and to be granted the full protection of the law. These rights supervene upon a country's domestic legal system. The legal rights existing under investment treaties may override domestic laws, and they are enforced by arbitral tribunals. Therefore arbitrators may determine that a state's conduct towards an investor was an international legal wrong meriting an award of damages, notwithstanding that a domestic court in that country has (or would have) held it to be lawful.

An argument is often made that for arbitral tribunals to make determinations of this kind may infringe upon states' sovereignty. That argument is of trite merit; every international treaty infringes to some extent upon domestic sovereignty. Nevertheless, international legal adjudication of the conduct of states is something that arguably, as a matter of public policy, should not be kept private and confidential. Where the parties to an arbitration are private commercial parties, one might argue that the way they may resolve their disputes is nobody's concern but their own. On the other hand, where the conduct of states – whose behaviour is mandatory in the effects upon its citizens, who are spending tax-payers' money to fund that behaviour, and whose decision-making procedures are the product of their domestic political procedures – is arguably always the subject of public interest and legitimate media scrutiny. The argument is therefore that the privacy conventionally

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associated with international arbitration is inappropriate in disputes where the legality of state conduct is at issue. Accordingly, a significant movement has arisen to compel abandonment of the confidentiality principle in investor-state arbitration.

The October 2013 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration is the most recent achievement of that movement. It is not yet entirely clear how these rules will work in practice, as they do not come into force until April 2014. However, the basic concept is straightforward. The UNCITRAL Rules, a respected set of arbitration rules, are commonly used for investor-state arbitration. Where those rules are used in such a case, UNCITRAL will keep a public repository of pleadings and other arbitral documents, and of arbitral awards. Hearings will be public, and amicus curiae briefs may be submitted by third parties to the dispute at the Tribunal's discretion.

Investor-state tribunals administered under the UNCITRAL rules will, for all intents and purposes, become as public as domestic courts in common law countries. The UNCITRAL transparency rules are optional for arbitrations administered under other arbitral rules, making anyone free to adopt the same transparency principles. It remains to be seen whether parties to UNCITRAL investor-state disputes will contract out of the transparency rules (as they are entitled to do), or even abandon UNCITRAL arbitration altogether as a result. Only time will tell how important confidentiality really is to the litigants in investor-state disputes.

But one point can be made with some degree of certainty: the death knell is sounding for confidentiality in international arbitration. The logic that there is some public interest in disputes with states justifying transparency cannot be prevented from spreading to international commercial arbitration in general. Debates between private companies that reveal fraud or wrongdoing on the part of international corporations are surely equally deserving of public scrutiny. This, combined with the ever-pervasive possibility of anonymous internet publication of information about legal disputes, means that the paradigm for international arbitration will become one of transparency. It is surely desirable as a matter of principle, and it cannot be avoided as a matter of practice. If, like judges, their decisions are the subject of public scrutiny, the conduct and standards of arbitrators may also improve as a result. Transparency is a light that shines upon the darkest corners people might otherwise prefer to keep secret, and this principle serves to illuminate the law as much as it does everything else in life.

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Conferences and Events

Litigation in West Africa
HFW London
5 February 2014
Presenting: Xavier McDonald and Stanislas Lequette

APRAG Melbourne 2014
Melbourne
28-29 March 2014
Presenting: Nick Longley
Attending: Damian Honey and Chris Lockwood

HFW extends Season's Greetings to all of our readers with our best wishes for 2014.

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