Rethinking Confidentiality in International Commercial Arbitration

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Confidentiality is assumed to be an essential feature of international commercial arbitration that users value[1] and that therefore it should remain enshrined as a matter of freedom of choice given that the arbitral process is a 'private' contractually agreed process unlike the judicial process that is a 'state' process administered in the public interest. However, it may be time to rethink this assumption, to more carefully delineate privacy from confidentiality, and to ask how much confidentiality is appropriate and whether it should apply to the award.

The existing national law approach. Before considering the question of a rethink, it is necessary to recap the existing position. Most national arbitral laws cloak international commercial arbitration with confidentiality subject to limited exceptions.

Some national laws have gone down the route of allowing the question of confidentiality and its exceptions to be developed as a matter of law. English law has adopted this route and deliberately chosen not to statutorily enact confidentiality on the basis that the exceptions to confidentiality are still evolving.[2] The present state of English law is that set out by the Court of Appeal in *Emmott v Wilson & Partners*,[3] (further to the earlier Court of Appeal decision in *Ali Shipping v Trogir*[4]). The Court of Appeal held that the obligation of confidentiality was implied by law (not business efficacy) and imposed an obligation on the parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration *including the award*, subject to exceptions. Those exceptions being: (1) consent; (2) order or leave of the court (but not as a matter of general discretion); (3) if disclosure was necessary to protect a legitimate interest of an arbitrating party; and (4) ***possibly*** public interest. In particular, Lord Collins (then Collins LJ) stated:

> "105. But case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration. The obligation is not limited to commercially confidential information in the traditional sense.
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> 106. As I have said above, this is in reality a substantive rule of arbitration law reached through the device of an implied term. That approach has led to difficulties of formulation and reliance (perhaps, over-reliance) on the banking principles in *Tournier*.
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> 107. In my judgment the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case by case basis. On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure."

[1] The Queen Mary, White & Case annual international arbitration survey consistently finds that confidentiality is of importance to the vast majority of those who respond to the survey. For the 2018 survey, 87% of respondents believed that confidentiality was important in international commercial arbitration and should be opt-out rather than opt-in.
[2] See the Departmental Advisory Committee Report on the Arbitration Act 1996 at §11-17.
[3] Emmott v Michael Wilson & Partners [2008] 1 Lloyd's Rep 616 (CA) at §105-107.
[4] See also Ali Shipping Corporation v Trogir [1998] 1 Lloyd's Rep 643 (CA) at page 651.

Although *Emmott v Wilson* reflects the position as a matter of English law, some concerns have in the past been expressed as to a lack of adequate delineation between privacy and confidentiality and whether or not any such obligation extends to the award. See the Privy Council's observations in *Associated Electric and Gas Insurance Services v European Reinsurance*:[5]

> "The *Ali Shipping* case, like the present case, concerned the use in one arbitration of material obtained in an earlier arbitration with a view to supporting a plea of issue estoppel in the later arbitration. The parties were not however the same and the decision of the Court of Appeal to grant an injunction restraining the use of the material was based upon the view that the plea was clearly unsustainable. However Potter LJ, who delivered the leading judgment, having followed *Dolling-Baker v Merrett [1990] 1 WLR 1205* affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term and then to formulate exceptions to which it would be subject: *[1999] 1 WLR 314* , 326–327. Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. ***Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied.*** An award may have to be referred to for accounting purposes or for the purpose of legal proceedings (as Aegis referred to it for the purposes of the present injunction proceedings) or for the purposes of enforcing the rights which the award confers (as European Re seek to do in the Rowe arbitration). Generalisations and the formulation of detailed implied terms are not appropriate. But in any event, the *Ali Shipping* case provides no assistance for either argument of Aegis. It is interesting to note that the reasoning in the above-referred-to passages of the judgment of Potter LJ seem to have been strongly influenced by the description of the duty of confidentiality a banker owes to his customer given in *Tournier v National Provincial and Union Bank of England [1924] 1 KB 461* , both in the implied term and the exceptions to the duty. The Tournier case was not cited or expressly referred to in the *Ali Shipping* case. ***But the use of parallel reasoning in both cases shows that the court in the Ali Shipping case was not considering what rights an award gave rise to nor any question of what is involved in the enforcement of an award***." (Emphasis supplied)

Some national laws have statutorily enacted confidentiality and with it therefore the exceptions to confidentiality. New Zealand has gone down the route of statutorily enacting confidentiality of information disclosed in the arbitration and its exceptions in its Arbitration Act 1996.[6] Hong Kong has also enacted specific legislation concerning confidentiality in its revised Arbitration Ordinance. The Ordinance[7] permits disclosure of information relating to the arbitration where the disclosure (1) is agreed by the parties; (2) is to protect the party's legal right or interest; (3) is to enforce or challenge an arbitral award before a court or other judicial authority in or outside Hong Kong; (4) is obliged by law to be made to any government body, regulatory body, court or tribunal; or (5) is made to a professional or any other advisors of the party.

The draft 2018 amendments to the Indian Arbitration and Conciliation Act, 1996, propose the insertion of a new provision on confidentiality which would provide for blanket confidentiality with only one exception being for the implementation and enforcement of the award:[8]

> "42A. Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall keep

[5] Associated Electric and Gas Insurance Services v European Reinsurance Co of Zurich [2003] 1 WLR 1041 at §20.
[6] Arbitration Act 1996 (1997 No 99), sections 14A-I.
[7] See section 18 of the Hong Kong Arbitration Ordinance.
[8] See section 9 of the Arbitration and Conciliation (Amendment) Bill, 2018.

> confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.

The disadvantage of statutory enactment is of course the reduction in flexibility in that changes to the scope of confidentiality and its exceptions require statutory amendment.

International arbitral rules. Many of the major international arbitral rules also expressly provide for a confidentiality regime (and defined exceptions). See for example Article 30.1 of the LCIA Rules (2014); Rule 39 of the SIAC Rules (2016); Article 45 of the HKIAC Rules (2018). It is of note that the exceptions recognised in those rules do not extend to the public interest, which reflects the fact that any public interest exception to international commercial arbitration has not been well established or defined as noted by the Court of Appeal in *Emmott v Wilson* quoted above.

The question of rethinking. There are at least two concerns with respect to the blanket of confidentiality that ensconces the arbitral process including the arbitral award: (1) upholding the Rule of Law; (2) the disregard of the public interest that can be engaged in international commercial arbitration as it can be investment treaty arbitration.

The Rule of Law. In 2015, Lord Neuberger gave a keynote speech to the Chartered Institute of Arbitrators in Hong Kong on Arbitration and the Rule of Law in which he advocated for more transparency in arbitration in order to ensure that the Rule of Law is upheld by arbitrators. He identified (based on the analysis of the late Lord Bingham) eight strands to the rule of law, that included the following:

- The law must be accessible, intelligible, clear and predictable.
- Issues should be resolved by law, not discretion.
- Laws should apply equally to all.
- Adjudicative procedures should be fair.

Lord Neuberger went on to note that the strongest external pressures on a judge to get the law right arise from the facts that: (i) his decision will be read, and therefore open to criticism, by anyone who wants to see them; (ii) any decision which he makes can be appealed. He concluded by suggesting that given the absence of (i) and the tiny risk of (ii) (given the principle of one stop-adjudication in arbitration), there was a risk that arbitrators would feel too free to do what they want rather than give effect to the law.

Aspects of the rule of law are enshrined within the arbitral process. Provisions designed to ensure that tribunals act fairly and impartially are mandatory and cannot be contracted out of by choice given that an arbitrator is acting in a quasi-judicial capacity. In other words, consent and freedom of choice, the traditional mantras for confidentiality, are an over simplistic answer to the issue. If, as is suggested, the Rule of Law should be a fundamental aspect of arbitration, and indeed one that parties, if asked in those terms, would expect, then transparency of the award will substantially advance the cause by providing the opportunity for scrutiny and criticism. Indeed, if the parties have chosen an applicable law to apply to the substance of the dispute, then by definition the tribunal is required to apply that law; they cannot decide the dispute ex aequo et bono, unless the parties expressly so provide.[9]

Indeed, the current position is inconsistent. The contents of an arbitral award that is the subject of a jurisdictional challenge before the English Court will inevitably be in the public domain, through the English judgment on the jurisdictional challenge and, as set out above, this is a well-established exception to confidentiality. The result is that the public (and most importantly users and practitioners

[9] See for example Articles 31.1 and 31.2 of the LCIA Rules (2014).

in the field of international commercial arbitration), will have the opportunity to scrutinise the award and the reasoning of the arbitrators and indeed it will be advertised through the many arbitral reporting websites that provide daily alerts.

Take, by way of example the recent case of *J (Lebanon) v K (Kuwait),*[10] being a judgment on jurisdiction in New York Convention proceedings, arising out of an award rendered by a majority tribunal seated in Paris and constituted pursuant to the ICC Rules. By the award, the majority tribunal concluded that the contract had been varied by an alleged form of novation under English law so as to render a parent company an ***additional*** party to the contract with the parent company also allegedly becoming a party to the arbitration agreement applying French law principles of extension even though the basis on which the parent was said to become a party to the arbitration agreement was through its implied performance of the main contract. This determination was impossible as a matter of English substantive law (as was the view of the dissent in a strongly worded dissent) because: (1) a novation involves a substitution of parties and cannot involve the addition of a party; (2) the contract (governed by English law) expressly precluded a change of the parties except by written executed document (of which there was none). The majority tribunal analysis was, unsurprisingly, rejected by the Court on jurisdictional grounds because it was fundamentally inconsistent with English law. Indeed, it has to be inferred that the majority tribunal reverse engineered the legal position to conform to their preferred outcome. But for the fact that the question raised was jurisdictional (and thus substance and jurisdiction were interconnected), the award would not have been the subject of any public scrutiny.

Users of arbitration do of course take the risk that their chosen tribunal gets the law wrong (save where the legal question is also jurisdictional) because there is no appeal (generally), but should users also be assumed to take the risk that tribunals disregard the law and/or do not feel compelled to apply the law? What is more, and in any event, is that acceptable as a conceptual model for international commercial arbitration and having confidence in the process?

It is suggested therefore, that the application of the Rule of Law militates towards the publication of awards in order to improve the quality of and confidence in arbitral awards. There is a move towards publication of awards under some international arbitral rules, but these proposals are not sufficient from a Rule of Law perspective because they allow parties to out of publication. Under the HKIAC Rules (2018) the HKIAC may publish any award (subject to anonymising it as regards the parties), but only if neither party objects.[11] The ICC's latest Note to Parties (2019) provides for the publication of awards no less than two years after notification of the award and subject to either party objecting.[12] Such moves nevertheless recognise the need for greater transparency in international commercial arbitration.

The Public Interest. There is of course an increasing recognition in the investment treaty arbitration field of the need for transparency because of the public interest that it by definition engages, given that the state is a party to the arbitration.[13] ICSID awards are routinely published. What is more, this drive towards transparency has led to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (adopted by resolution of 16 December 2013) precisely because of the public interest involved in such arbitrations. Under those Rules (which are opt-in):

- Publication of information concerning the names of the disputing parties and the economic sector involved will be made publicly available at the commencement of the arbitral proceedings (Article 2).

- The pleadings, witness statements and expert reports (without exhibits), transcripts, orders, decisions and awards will be made available to the public (Article 3).

[10] J (Lebanon) v K (Kuwait) [2019] EWHC 899, Judgment of 29 March 2019.
[11] See Article 45.5(b) of the HKIAC Rules (2018).
[12] ICC Notes (2019) at §40-43.
[13] See for example Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No.3, 29 September 2006 at §114; one of the early decisions grappling with this.

- Third parties may be permitted or may be invited to make submissions (subject to the discretion of the tribunal after consultation with the parties) (Articles 4 and 5).

- Hearings shall be in public, unless there is a need to protect confidential information or the integrity of the arbitral process, in which case that part of the hearing will be held in private (Article 6).

- Confidential and protected information will not be made available to the public, which includes confidential business information, information protected against public disclosure under the treaty or under national law, information that would impede law enforcement (Article 7).

Such public interest, as exemplified by the above Rules on Transparency, are not confined to investor state arbitration but will apply to arbitrations entered into with state entities and potentially in other arbitration as well. For example:[14]

- **The Bernard Tapie arbitration**. This was an arbitration to settle the case between Tapie and his companies and the state-owned Crédit Lyonnai over the alleged under- sale of his interest in Addidas. The arbitration panel ordered the government to pay Euro 403 million to Tapie and his family (including moral damages). The award was later set aside by the Paris Court of Appeal on the basis that the award was tainted by fraud due to connections between Tapie, his counsel and one of the arbitrators. In connection with this Christine Lagarde, who had become the IMF Chief, was found guilty of negligence in allowing the pay-out. This arbitration, when it came into the public domain, caused public outcry. How could such issues involving the public interest and tax payers' money be determined behind closed doors?

- **The recent Privy Council decision in Maharaj v Petroleum Company of Trinidad and Tobago ("Petrotrin**").[15] In this case a Mr Maharaj sought disclosure of witness statements filed by the state owned oil and gas company (Petrotrin) in LCIA arbitration proceedings arising out of a failed joint venture between Petrotrin and a private entity (World GTL) the build, finance and operate a gas-to-liquid plan in Trinidad. The venture failed at very substantial cost to Petrotrin due to guarantees it had given to World GTL. The witness statements were sought in connection with the decision take by the State to drop legal proceedings initiated against the former executive chairman of Petrotrin for alleged failure to exercise due care in making the decision to enter into the guarantee. The Privy Council determined that there was an arguable case of judicial review, identifying the following potential public interest benefits in disclosure:

> "(a) to enable the public to understand and, if appropriate, criticise decisions taken by Petrotrin in embarking on the joint venture and in entering into the guarantee which have proved to be so costly to it; (b) to enable the public to be fully informed about those matters and Mr Jones's involvement in them so that they could, if appropriate, criticise or oppose the appointment of Mr Jones to roles within government with a focus on energy matters, such as his appointment as a member of the Cabinet Standing Committee on Energy; and (c) to enable the public to understand, and if appropriate criticise, the decisions to bring the civil claim against Mr Jones in the first place and then to abandon it."

- ***The history of the cessation of the Kohinoor.*** The Kohinoor was ceded by treaty entered into by the 10 year old boy king of Punjab (Duleep Singh) to the Queen, on account of alleged debts

[14] The Kohinoor was ceded by treaty entered into by the 10 year old boy king of Punjab (Duleep Singh), faced with little choice, on account of alleged debts owing to the East India company (see *Kohinoor, The Story of the Word's Most Infamous Diamond, Dalrymple and Anand)* at pages 127-128 Translated into a modern setting, a public interest is obviously engaged.
[15] Maharaj v Petroleum Company of Trinidad & Tobago [2019] UKPC 21 at §46.

owing to the East India company.[16] Translated into a modern setting it can be argued that a public interest was engaged by the cessation of a national treasure.

The fundamental problem of course is that without knowledge of the existence of private international commercial arbitration and its subject matter, it is impossible for any third party to know whether a public interest is engaged (this is dealt with in the Transparency Rules by immediate notification of some basic details of the arbitration). In the *Petrotrin* case, the only reason why the public became aware of the LCIA arbitration because the decision to withdraw the claim and the reasons for it were published by the Attorney General (i.e. it was an exceptional case). In the *Tapie* case, the public were unaware until the matter went to the Paris Court of Appeal.

Thus, and again, the public interest is not confined to investor state arbitrations and it is not possible to neatly divide between commercial and investor state arbitration. This again tends to militate to a degree of transparency in international commercial arbitration.

Sector specific public interest. Furthermore, certain types of arbitrations will raise sector related interest (for example mining, telecommunications, oil & gas etc). Users of arbitration in those sectors are likely to want to know how similar issues have been previously determined. Indeed, it can be argued that such transparency tends to prompt efficiency. Indeed, in in *Emmott v Wilson & Partners*,[17] the Court recognised that the law was ripe for development along these lines:

> "Some examples may illustrate the problems. If an insurer which uses a standard form of its own devising with an arbitration clause, arbitrates issues arising on that standard form and has a body of arbitral decisions on that standard form, can a broker who knows of them use them to advise a new client contemplating using that insurer's standard form? In a market where most of the standard forms are considered in arbitrations and participants in the market will as a matter of practice know what they are, should potential entrants to the market have these made available to them so as to provide for greater transparency and competition in a market? If there are a large number of disputes in a market arising out a common factual substratum, to what extent should materials in the arbitration and awards remain private? (cf the litigation arising out of the personal accident spiral - *Sphere Drake Insurance Ltd v Euro International Underwriting Ltd* [2003] Lloyd's Rep IR 525 and *Sun Life Assurance Co v Lincoln National Life Insurance Co* [2005] 1 Lloyd's Rep. 606 at paras 68 and 83). These and similar issues relating to the insurance and reinsurance market were raised in discussions with the Department prior to the passing of the Act. Absent institutional rules (which are however making a real headway in many markets), such issues will, no doubt, be determined as the law is developed on a case by case basis."

Conclusions. It is suggested that further consideration needs to be given (in conjunction with users of arbitration) to the following:

- Distinguishing more clearly between the privacy of arbitration and the confidentiality of documents generated in the arbitral process. There is no reason why as a general rule the arbitral process itself should remain private and therefore not open to the public and therefore members of the public should not, as a general rule, have access to documents generated in the arbitration. Users of arbitration unquestionably value privacy and the autonomy of the parties should prevail to that extent.

- Distinguishing between the confidentiality to the documents generated during the arbitral process (subject to exceptions) and the award itself. The Rule of Law militates towards the publication of the award on the basis that it is in a distinct category. Questions of anonymisation of the parties and/or the non-referral in the award to information that is acutely sensitive are

[16] See *Kohinoor, The Story of the Word's Most Infamous Diamond, Dalrymple and Anand)* at pages 127-128
[17] Emmott v Michael Wilson & Partners [2008] 1 Lloyd's Rep 616 (CA) at §131.

matters that can be accommodated within a regime of publication, in the same way that it is accommodated in the context of judgments of the court relating to arbitration. See *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Company.*[18]

- Developing a public interest exception to confidentiality. The contours of such a public interest exception have not as yet been adequately formulated. Furthermore, in order for a public interest exception to be capable of having practical application there would need to be dissemination of some basic information about the arbitration at the beginning of the process, which will itself engender greater transparency.

[18] Department of Economic Policy and Development of the City of Moscow v Bankers Trust Company [2004] 2 Lloyd's Rep 179 (CA).