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ARBITRAL PROCEEDINGS AT THE CROSSROADS: CONFIDENTIALITY AND TRANSPARENCY AS COMPETING PRINCIPLES

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Abstract

Confidentiality and transparency are considered to be two important, yet conflicting, principles of arbitration. While maintaining confidentiality ensures autonomy, commercial privacy, and efficiency of arbitration, transparency ensures public accountability, esteem, and development of a body of consistent jurisprudence, particularly in the realm of investment arbitration. This paper endeavors to explore the normative foundations, development, legislative regimes, arbitral rules, and comparative decisions on issues of confidentiality and transparency in arbitration, and also proposes a measured approach that ensures a balance between these conflicts..

1 Introduction: Defining the Core Conflict

International commercial and investment arbitration has become the preferred forum for the resolution of high-stake global disputes, offering parties a neutral forum outside of national court systems. A foundational pillar of this system, particularly in commercial contexts, is confidentiality[1228]. Parties often choose arbitration precisely to shield their proprietary business practices, financial data, and negotiated settlements from public scrutiny. This confidentiality is viewed as an essential incentive that encourages candor in submissions and protects market reputation. On the other hand, however, the demand for transparency has been gaining momentum, fueled by public policy concerns, especially in cases involving governmental entities or regulatory matters. Critics worry that excessive secrecy undermines public confidence in the justice system, stifles the growth of consistent jurisprudence, and enables powerful parties to operate outside effective accountability[1229]. The underlying legal issue central to this paper is how to strike a balance between these two principles, given arbitration's hybrid nature: private contract enforcement that produces public effects.

2 The Case for Confidentiality: Protecting the Arbitral Process

There are good reasons to keep arbitration quiet, and it all goes back to why businesses started using it in the first place. Keeping things under wraps applies to three key things: that the arbitration is even happening, what's said during it, and the final decision.

2.1 Commercial and Reputational Advantages

For companies, keeping things secret is a big plus. It keeps things like secret recipes, inventions, and future strategies safe from rivals. Also, if a dispute isn't public knowledge, it stops bad reactions in the market, keeps the company's stock price up, and avoids bad press. This is super important for keeping business steady.[1230] If confidentiality is broken,

[1228] G. Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed., 2021), p. 235.

[1229] S. Kroll, "The Transparency Debate in International Investment Arbitration," *Journal of World Trade* 48, no. 1 (2014): 112-135

[1230] 3M. Mustill and S. Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd ed., 1989), p. 119.

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parties might avoid arbitration, making them go back to rigid and very public litigation.

2.2 Promoting Efficiency and Settlement

Keeping things quiet means people are more likely to share info and have honest talks about settling. If everyone knows their secrets are safe, they'll be more open about giving the full story to the tribunal, which makes it easier to wrap things up fairly. A lot of people think that confidentiality helps cases get settled faster, which cuts down on how much they cost and how long they drag on. That's one reason why arbitration is often better than going to court.[1231]

3 The Case for Transparency: Upholding Public Interest

While confidentiality serves the private interests of the parties, transparency serves the public interest and the integrity of the broader legal order. The arguments for greater openness are particularly compelling when an arbitration award may impact non-parties or public policy.

3.1 Promoting Justice and Legal Development

One big problem with keeping everything secret is how it affects the development of the law. Unlike court decisions, private arbitration awards can't be easily used as examples in future cases. This makes it harder for international business or investment law to develop consistently, which can lead to different decisions in similar situations.[1232] Being transparent would allow experts to examine these decisions and prevent the creation of secret law, making global trade more predictable.

3.2 Public Accountability and Investor-State Disputes

The biggest push for transparency comes from disputes between investors and states. When a government is involved, the dispute involves public money, the government's power to regulate, and often important issues like national independence, public health, or the environment. Keeping these cases secret is undemocratic. The public, whose taxes pay for the defense and any payouts, has the right to know why these decisions are made and how treaties are being understood.[1233]

4 The Regulatory Framework and Institutional Divide

The approach to the dilemma is fragmented, relying heavily on the chosen institutional rules and the seat of the arbitration.

4.1 Commercial Arbitration: The Presumption of Secrecy

In standard commercial arbitration, the rules support keeping things private. Groups like the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Singapore International Arbitration Centre (SIAC) have rules that say arbitration details and outcomes should be kept quiet. For instance, the LCIA Rules say that people involved can't share arbitration info without permission, unless the law says they have to.[1234] Usually, if someone wants to reveal something, it's up to them to that there's a very important legal or public reason to do so.

4.2 Investment Treaty Arbitration: The Shift to Transparency

The rules for ISDS have changed a lot, mostly because of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) and the updated ICSID Arbitration Rules (2022). These rules change the usual approach, making things open unless there's a specific reason to keep them private.

The UNCITRAL Transparency Rules, which are now part of many treaties, say that:

- Main documents like the Notice of Arbitration, arguments, and transcripts should be available to the public
- Hearings should be open, if possible.

[1231] Article 39 of the ICC Rules of Arbitration
[1232] Lord Mustill, "The New Lex Mercatoria: The First Twenty-Five Years," *Arbitration International* 4, no. 2 (1988): 86-105.
[1233] UN Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration (2014)
[1234] LCIA Arbitration Rules (2020), Article 30.1.

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• The final decision must be published.

There are some exceptions to protect things like trade secrets, which can be removed from public documents.[1235] This change shows that people now believe that the public's interest in disagreements involving countries is more important than the business interests of private investors.

5. The Judicial and Statutory Balancing Act

National courts play a vital role in balancing the principles when enforcing or setting aside awards. While the parties' agreement to keep the dispute confidential is typically respected, there are well-established statutory and judicial exceptions that pierce the veil of secrecy.

5.1 Disclosure Required by Law

The most common exception is when a party is legally obliged to disclose information, often due to:

1. Laws or regulations mandate it (for example, public firms must report to securities exchanges).

2. Protecting a legal right becomes necessary (like using an award in court to enforce it).

3. Proving a point in later lawsuits arises. In places such as England and Australia, courts use tests that balance the right to keep arbitrations private with the need for open justice when related cases happen.[1236]

5.2 Impact on Non-Parties and Public Policy

The distinction between private and public interest becomes clearer when an arbitration decision impacts those not directly involved. When a decision touches on things such as environmental permits, big building projects, or anti-trust matters, the state's need for open access usually is more important than the desire for privacy between the parties. Because the issue is a public one, there should be judicial and public reviews.

5.3 Judgements: Balancing Confidentiality and Transparency

A. English law

1. Dolling-Baker v. Merrett

The court saw privacy as understood, but with exceptions.[1237]

2. Ali Shipping Corp. v. Shipyard Trogir

This case made the exceptions clearer. These are:

Agreement, Court order, Fairness, and Societal needs

D. Indian law

1. Oil and Natural Gas Corp. v. Western GECO

Even though it wasn't about privacy, the Supreme Court talked about the place of civic law in arbitrations with state groups.[1238]

2. Section 42A Cases

Since 2019, courts have carefully grown the stated privacy but allowed exceptions for issues like challenges and enforcing rulings**.**

6. Conclusion: A Context-Dependent Framework

A single rule cannot solve the question of secrecy versus openness in arbitration. The best approach depends on the situation and needs a layered framework.

In **international business arbitration** (B2B disagreements), keeping things private should be standard. This is key to why the system is attractive to businesses, so any exceptions should be interpreted carefully, only when needed by law or to protect a legal right.

For **investment treaty arbitration** (Investor-State disagreements), being open should now be standard. When a government and public money are involved, the disagreement changes, calling for public accountability. While some business details may need to be kept private, the processes and decisions should be

[1235] Kalicki, "Investment Treaty Arbitration: The New Balance Between Confidentiality and Transparency," *Dispute Resolution Journal* 72, no. 1 (2017): 39-55.
[1236] *Ali Shipping Corporation v. Shipyard Trogir* [1999] 1 W.L.R. 314 (C.A.).
[1237] *Dolling-Baker v. Merrett*, [1990] 1 W.L.R. 1205 (C.A.).
[1238] *Oil & Nat. Gas Corp. v. W. GECO Int'l Ltd.*, (2014) 9 S.C.C. 263

public. Changes in the future will likely focus on putting these differences into rules and aligning institutional standards. This will help protect the efficiency of business disagreement resolutions while ensuring that global disagreement settlement systems are legitimate and maintain public trust. The push for specific transparency rules for different disagreement types means arbitration can continue to be suitable for different areas, shifting from strict secrecy to a more balanced approach of necessary disclosure.