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TRANSPARENCY OR CONFIDENTIALITY OF PUBLICLY AVAILABLE AWARDS IN THE REALM OF INTERNATIONAL COMMERCIAL ARBITRATION: A SCRIMMAGE OR A HAIRLINE?

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Abstract:

The pressing priority of Confidentiality and Transparency in the realm of arbitration isdiscernible by its nature. This constitutive feature of confidentiality and transparency is well recognized across the globe with attracting private entities for the redressal of a dispute arisingbetween them. These facets of an arbitration process have streamlined the entire mechanism based on the intellection of trust and reliability which has invigorated the private entities to choose for Arbitral proceedings instead of the arduous proceedings of the court. Notwithstanding anything mentioned above, the current scenario in the arbitration expanse has been cursed and clamped down. This paper gravitates to underscore delineation of confidentiality in context with the serviceable data affixed with the publicly available awards and how it possesses the quality of persuasive precedence to pre-determine the mechanism of arbitral system for the purpose of expeditious redressal of a dispute and how transparency becomes the need of the hour in consonance with the same. This paper reckons with multifarious institutional rules perambulating through different bodies set for governing and administering the arbitral proceedings under exuviate of confidentiality and transparency.

Keywords:

Confidentiality, Transparency, Arbitration.

1. Introduction:

The term arbitration was coined with the sole purpose of redressing a conflict arising between two parties so that an optimal outcome can be witnessed. This streamlined mechanism was incorporated with the sole purpose of eradicating the shortcomings of the laborious process of the Judicial institutions. This apparatus is administered and governed by well-established Institutional rules and Ad hoc rules under which antecedent arbitration regulations have been enshrined through which the entire process is governed i.e., appointment of adjudicating authority, arbitrators, and constitution of the tribunal etc. Furthermore, due to the advent of globalization and technological advancement the emergence of the concept of International Commercial Arbitration supervened from the ramifications of disputes ensuing from the commercial transactions between the parties under the head of trade relation. One such other homogeneous component i.e., Investor State Arbitration came into existence as a result of themulti-lateral treaties and bi-lateral treaties. These abovementioned procedures of arbitration have always been seen in homologue with the concept of confidentiality and transparency. These two facets of the arbitral proceedings warrant that not even a single morsel of dossier will be disclosed to anyone, and it ensures to safeguard the faith of the parties in dispute in this dispute settlement mechanism. However, it has already been

made crystal clear the fact that imposition of the obligation of confidentiality and Transparency is non-binding. Over the years the abovementioned cardinal facets of the arbitral proceedings have been facing a lot of backlashes as confidentiality in the process of arbitral proceeding can act as a hinderance in the process of adjudicating authority determining the predictability of an award due to the variance arising from the interpretation of law in passing an arbitral award overlooking the persuasive value of the previously passed award. This has become an impetus for us to depend upon the principle of transparency under this mechanism. Thus, in this paper an equipollence between these two facets of the arbitration will be underscored in order to address the abovementioned issue without any passivity.

2. Confidentiality in the expanse of international arbitration:

The anatomy of role played by confidentiality in an arbitral proceeding is of foremost importance. Since international commercial arbitration is the method where all the disputes arising in a cross-border commercial transaction are addressed, an expeditious redressal of the same is expected by the parties. The one thing that always pacifies their agitation is the discreetnature of the proceedings.[1] This confidential nature of the arbitral proceeding has shrouded the concept of transparency and has overlooked public interest in all aspects.

2.1 Delineating Confidentiality:

Confidentiality being the elementary trait of arbitration beguiled the disputants to choose arbitration as a dispute settlement mechanism instead of relying on the arduous process of judicial institutions. Nevertheless, the nature of confidentiality in recent times have crumbledsince it warrants an unwanted imposition on the arbitral proceeding which with the passing days is now being repulsed by many since overlooks the public interest.[2] Thus, the primordial concept of confidentiality needs a judicious correction. The particularity of the confidential nature of the arbitral proceeding has drawn a fine line between the advantages[3] and the disadvantages it proffers. Thus, the tussle between the inherent nature of arbitration and the onset of transparency has been an issue of concern.

2.2 Confidentiality vis-à-vis Privacy:

Before the delineation of stance of confidentiality in international arbitration the primary concern is to shed some light on the distinctiveness between privacy and confidentiality.[4] The private nature of this mechanism gains the confidence of the disputants regarding the fact thatthe entire proceeding will remain discreet.[5] This has misled the disputants involved in a dispute to inherently assume the fact that the confidentiality aspect is the part and parcel of the mechanism.[6] This has given birth to the onus of bifurcating the particularity of confidentiality and privacy.

Privacy tends to eliminate all sorts of hinderances by any third party who has not received theconsent of the disputants or the arbitrators to attend the arbitral proceeding making sure that there is no outbreak of sensitive data relating to the process.[7] This feature of the arbitration proceeding has clamp down the parameter of transparency as disclosure of sensitive and discreet data for the purpose of public interest.[8] Thus, it can ascertained that privacy and confidentiality are two different sides of the same coin where they have different thrust of approach but possess complementary features.[9] Thus, the inference drawn from the above made observation is that there is a dearth of domestic and international consensus concentrating on confidentiality resulting in making the entire procedure more nubilous and not transparent.[10]

2.3 International standing:

[1] Steve K, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' Kluwer Law International, 127, 2005.
[2] Florentino P. Feiciano, The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration, 87 PHIL. L.J. 1, 2 (2012).
[3] *Id*
[4] KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH Law, 27 1st ed., 2010.
[5] Alexis C. Brown, Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration, 16 Am. U. INT'L L. REV. 969, 974-75 (2001).
[6] NOUSSIA, *supra* note 4.
[7] Richard C. Reuben, Confidentiality in Arbitration: Beyond the Myth, 54 U. KAN. L. REV. 1255, 1256 (2006).
[8] NOUSSIA, *supra* note 4.
[9] Michael Fesler, The Extent of Confidentiality in International Commercial Arbitration, 78(1) ARB. 48, 49 (2012).
[10] Avinash Poorooye & Ronan Feehily, Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance, 22 HARV. NEGOT. L. REV. 275 (2017).

The international standing is still quite ambiguous on the fact that confidentiality is an essential aspect of the arbitral proceeding. The provisions enshrined under New York convention and United nation commissions on international trade law (UNCITRAL) model law does not specifically mentions about the intrinsic feature of confidentiality.[11] Whereas in terms of domestic laws there are few countries such as New Zealand, Spain acknowledging the confidential nature of arbitration.[12] Despite the international and domestic standing on the discreet nature of arbitration it is still an accepted fact that parties are designated with the autonomy to give consensus on the confidentiality of the arbitral proceeding.[13] However, whenthe disputants do not reach to a mutual agreement on the abovementioned subject the onus lieson the judicial institutions to give an independent reasoning regarding the implicit imposition of confidentiality in an arbitral proceeding.[14] There are several contrasting opinion of the judicial institutions regarding this elementary trait of arbitration as to whether there should bean implied duty or written agreement as to consider the confidentiality of an arbitration agreement.[15] For instance it is considered to be the intrinsic nature of arbitral proceeding to be confidential and discreet under English jurisdiction and to prevent it from any sort of encroachment by any third party who is not related to the proceeding.[16] On the other hand in the landmark judgment of ***Esso Australia Resources Ltd v Plowman*** case the Hon'ble High Court of Australia underscored the fact that an express agreement is the key to provide the confidentiality to an arbitration proceeding.[17] Thus, it is unequivocal to understand the fact that different countries have different sets of approach in concluding the confidential nature of an arbitral proceeding.

2.4 Institutional Rules:

Various institutional rules have different antithetical thrust towards dealing with the confidentiality aspect in International commercial arbitration. For instance, London court of International Arbitration (LCIA) have tilted their reasoning in professing the confidentiality aspect of the mechanism[18] while other institutional rules have a stark contrasting opinion for e.g., International Commerce of Chamber, International Centre for Dispute Resolution rules and procedures (ICDR) and Vienna rules.[19] Further ahead traversing through other institutional rules such as Australian Centre for International Commercial Arbitration, Milan Chamber of Arbitration, the Hong Kong International Arbitration Centre (HKIAK),Belgian Centre for Arbitration and Mediation (CEPANI), the Singapore International Arbitration Centre (SIAC) or the World Intellectual Property Organization (WIPO), UNCITRAL model law, Stockholm Chamber of Commerce (SCC), International commercial arbitration court (ICAC) and Japan Commercial Arbitration Association (JCAA) among others demands mandatory reliance and tacit obligation to consider confidentiality as the primary characteristics of an arbitral proceeding. Thus, it can be concluded from the above made observation that in the realm of institutional rules recognition to the confidential nature of the commercial arbitration is widely recognized but the gravity of its implication vary since there is no stringent uniform law underscoring this aspect of the arbitral proceeding.

2.5 An Implied duty:

It is an accepted fact that confidentiality plays a cardinal role in an arbitral proceeding yet the tussle between its implicit applicability and its recognition deriving from an expressed agreement formulated by disputants is ongoing. Since confidentiality is germane to an arbitration and magnetizes parties to seek redressal of their disputes the purpose of arbitration is fulfilled.[20] However, acting as an inherent duty of the arbitration the confidentiality has some where delimited the party's autonomy and is curtailing down their authority to determine the procedures of the proceedings. This has created a lot of ruckuses in the realm of international arbitration to ascertain the fact that whether there is an obligation to adhere to theconfidential nature of the proceeding or not.

International Law Association Committee have foregrounded their suggestion for the fact thatif there exists any ambiguity regarding the inherent duty of confidentiality and stated that to eliminate any sort of perplexity

[11] Francisco Blavi, A Case in Favour of Publicly Available Awards in International Commercial Arbitration: Transparency v. Confidentiality, 2016 INT'l Bus. L.J. 83 (2016).
[12] C. de los Santos and M. Soto Moya, Confidentiality under the new French arbitration law: a step forward? 11 Spain Arbitration Review 79, 84 (2011).
[13] Born, International Arbitration: Law and Practice, p.196 (2012)
[14] International Law Association, Report on Confidentiality in International Commercial Arbitration, pp.8, 9, (2010) available at http://www.ilahq.org/en/committees/index.cfm/cid/l9.
[15] *Id*, 13 pp.196, 197.
[16] Hassneh Insurance Co of Israel v. Stuart J Mew 2 Lloyd's Rep. 243 QBD (Comm. Ct). [1993]
[17] Esso Australia Resources Ltd v Plowman, XXI Yearbook of Commercial Arbitration, pp.137, 151. (1996).
[18] LCIA Rules of Arbitration art.30.
[19] *Id*, 13 p.199.
[20] *Id*, 12 p. 79, 89

regarding the abovementioned matter the disputants are conferred with the authority to formulate an expressed agreement stating the same.[21]

3. Transparency in the expanse of International Arbitration:

The present century has witnessed numerous changes, especially in the way conflicts are resolved. Faster ways of dispute resolution have been gaining attraction because of which the process of arbitration has gained much prevalence. It outweighs the bane of the arduous court procedures and provides confidentiality, a requisite for many private entities. However, this has not been able to maintain consonance with the aspect of transparency which seems just as important as confidentiality in the view of safeguarding public interest especially in a time like today where the state is shifting towards a welfare state rather than a mere police state. Since times in the media trial, confidentiality has been viewed upon as one of the most important aspects of arbitration because it is significant to maintain business relations and abstain it from damages prevent judicial precedents that may appear adverse and provide the much-needed privacy from media keeping intact the reputation of the parties involved, away from besmirchment.

Most businesses and parties are skeptical about litigation as they fear disclosures of certain information which is catered to by the arbitral process. The shield of confidentiality renders greater freedom to the parties to put forth their arguments without any reservations. Transparency on the other hand is important to protect the public interest leading to more demand to disclose documents and materials despite confidentiality agreements. The present century lays emphasis on upholding democratic principles where access to information plays a vital role. It is only when the public has access to information that the principle of equity, rule of law and due process can be upheld. Accountability would be meted out in the true sense where every person involved in arbitral process would be mindful of scrutiny by the public. The revision of UNICTRAL Arbitration Rules led way for an immediate need for transparency, especially in investor-state arbitration. Transparency would accord greater predictability and consistency, which is appreciated by businesspeople and would motivate them to approach theprocess of arbitration in the future. “Quality” awards could prove beneficial for the less experienced future arbitrators. The parties seeking arbitration could have greater access to therecords of the arbitrators which would help them in making well-informed decisions regardingthe choice of “ideal” arbitrators. Transparency would provide enhanced access to scholars devoted to contributing to the study and development of arbitration. Thus, a cohesive approach aligning the two in international commercial arbitration is the need of the hour. It is of utmostimportance that the need for confidentiality and transparency be appropriately weighed if it isto be done with the purpose of proving effective and advantageous to the international community of arbitration.[22]

3.1 Transparency and Disclosure:

These terms, though used synonymously are different from each other but capable of co-existing with each other. Disclosure is specific to the type of information it deals with whereas transparency has a wider ambit and pays less heed to the type of information. Disclosure concerns itself with substantive information required to assure the peculiar regulatory purpose whereas transparency deals with the methods by which information is to be handled. Disclosureis a means to achieve the end that is transparency. Disclosure plays a vital role in safeguarding public interest by outweighing the issue of biasness on which most appeals are based.[23]

3.2 Transparency and public interest:

The paradigm shifts from a police state to a welfare state, especially in democracies, has resulted in the public being important stakeholders in the State and its affairs. Gone are the days when private companies had almost little or no involvement in public affairs. With the increase in acquisition of initially government owned sectors by private entities to the extent of influencing policy making with sectors such as telecommunication, pharmaceuticals, water, infrastructure etc., it would not be wrong to say that their actions would influence the public either actively or passively.[24] However, the matter of transparency lies on thin ice as it is important to draw a distinction between matters that concern the public, matters that abstain from it and matters involving corporate practices affecting a considerable number of people shadowed behind a confidentiality clause. The merits of transparency would not only limit itself to increased public welfare but also result in better, persuasive, and well drafted decisions as it

[21] International Law Association, Report on Confidentiality in International Commercial Arbitration, p.20, (2010)
[22] Poorooye & Feehily, *supra* note 10.
[23] Paula Hodges, The Perils of Complete Transparency in International Arbitration - Should Parties Be Exposed to the Glare of Publicity? 3 PARIS J. OF INT'L ARB. 589, 596 (2012).
[24] Claudia Reith, Enhancing Greater Transparency in the UNCITRAL Arbitration Rules - A Futile Attempt?2 Y.B. ON INT'L ARB. 297, 300 (2012).

would be open for scrutiny and the reasoning for the decision arrived at would be open to all providing increased credibility.[25]

4. The work product doctrine:

The focal point of the work product doctrine is to provide bulwark to the brainwave and the work crafted by an attorney since the very inception of a case. This doctrine demands professional discreetness regarding the subject matter so that it cannot be hampered for personal benefit by relying on the original work produced by the adversary.[26] This doctrine is prevalent in U.S. where its applicability in litigation proceedings have become the need of theday. The decussation of the abovementioned doctrine with the confidential nature of the arbitration has been done so that a subtle level of transparency can be maintained while takingpublic interest on par.[27] This outlandish approach has given a ballistic thrust to the confidentiality feature of an arbitral proceeding in a pragmatic sense where elimination of all the shortcomings can be witnessed the pertinence of which was highlighted in the landmark case of ***Hickman v. Taylor***.[28] The aforementioned doctrine provides a substratum to create a link between the two aspects of the law i.e., Confidentiality and Transparency where the sole motive is to dispense justice.

5. Recommendation:

Since times immemorial, the process of arbitration has found its prevalence especially among businesspeople due to the assurance of confidentiality imbibed in it. The global outcry for enhanced transparency in the arbitral process has turned the age-old notion of arbitration topsy-turvy. It is, however, important to note that the concepts of transparency and confidentiality are not necessarily to be pitted against each other but to be made to co-exist. This would prove beneficial to both the parties as well as the public at large, serving the interests of a welfare state in the utmost sense. The crossroad to bring forth equilibrium in the two concepts would be to set up an institutional rule that would mandate the arbitral awards to be published but contingent to abstaining from publication of overly sensitive and confidential information that would be detrimental to the parties. There can be bifurcation in the ways these institutional rules are to be applied in ICA (international commercial arbitration) and ISDS (investor-state dispute settlement). In ISDS, public disclosure could be kept as default backed by enabling provisions to the parties to withhold information that is confidential. The ICA shall not be bound by the obligation of disclosure where the decision of disclosure is at the party's disposal.The equilibrium could further be reached by the introduction of amicus curiae in the arbitral proceedings on a case-to-case basis. The basis of bridging the gap should be to inculcate transparency but not at the cost of the integrity of arbitral proceedings. Legitimate interests ofparties also play a vital role in bringing confidentiality and transparency at par with each other. To enforce an arbitration award, disclosure could be called upon by one of the parties aiming to protect their legitimate interests or documents of a former arbitration proceeding to serve asevidence of the other party's former plight to raise an estoppel. A uniform application of these cardinal principles is significant where one party can plead for third party submissions considering it serves legitimate interests and helpful to the proceedings. The work-product doctrine is prevalent in USA which deals with protection meted out to the work product of the legal representatives in terms of a continuing case according to which two conditions can suffice the need for disclosure namely, "substantial need principle" and "undue hardship principle". These conditions were laid down in the case of ***Hickman v Taylor***[29] which could proveeffective in bridging confidentiality and transparency in arbitration. The implementation in ICA and ISDS needs to be different because ICA usually deals with matters concerning private parties where substantial need by a third party would not be easy to prove. However, in ISDS, matters of public interest are involved where the ease of proving substantial interest is much higher.

6. Conclusion:

The researcher as per the above-made observation has forged his conclusion and contrives theoutcome. In the realm of International Arbitration, it is a pressing priority to make a level playing field for both confidentiality and Transparency aspects so that one should not overshadow the functioning of the other. The complementary

[25] Christina Knahr & August Reinisch, Transparency versus Confidentiality in International Investment Arbitration - The Biwater Gauff Compromise, 6 THE L. AND PRAC. OF INT'L CTS. AND TRIBUNALS 97, 110 (2007).
[26] Kevin M. Clermont, Surveying Work Product, 68 CORNELL L. REV. 755 (1983); Fred C. Zacharias, Who Owns Work Product? U. ILL. L. REV. 127, 129-32 (2006)
[27] Samuels v. Mitchel, 155 F.R.D. 195 (N.D. Cal. 1994)
[28] 329 U.S. 495 (1947).
[29] *Id*

facet of these two terms should be embraced as a viable solution to resolve the main problem. While taking cognizance of the jurisdictional dilemma concerning the recognition of the confidential nature of arbitration and transparency a uniform approach becomes the indispensable need in the realm of international arbitration. Furthermore, as already mentioned above the work product doctrine can also act asan aid to help in balancing out the absolute nature of confidentiality by giving due considerationto the public interest through which a harmonious relationship between the two can be drawn