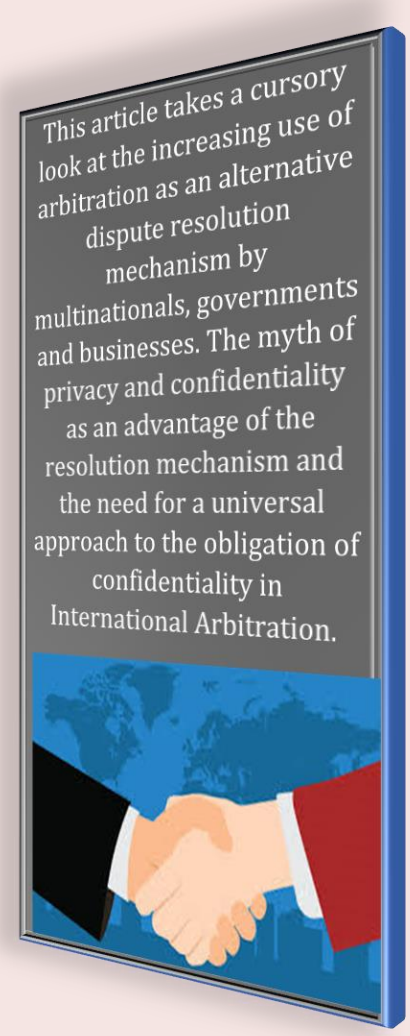
INTERNATIONAL COMMERCIAL ARBITRATION: THE PRIVACY AND CONFIDENTIALITY QUESTION



Introduction

International businesses as well as governments are embracing the use of arbitration as a means to resolving their contract disputes. The rationale behind this attitude is because of the nature of the process, it is primarily private and there is the notion that the privacy of the process guarantees its confidentiality, hence the favourable disposition to it by disputing parties.[1] However, in reality, the privacy of arbitration has not guaranteed its confidentiality, as institutional Rules, National laws, Court decisions reveal.

It is the misconception of these two concepts in arbitration, that this paper seeks to address. In a bid to set perspective, it is important to define Privacy and Confidentiality to give some clarity to their meaning.

Privacy in the context of arbitration connotes that only parties to the arbitration are permitted to attend the hearing of the tribunal.[2] This will prevent third parties from being privy to classified information that parties may have tendered in proving their case.

On the contrary, confidentiality is an express obligation on all the parties to an arbitration not to disclose to a third-party information relating to the arbitration.[3] Hence, confidentiality has a wider scope in that in addition to third parties' being excluded from the proceedings, the arbitrating parties are prohibited from revealing the contents of documents, any information revealed during the process.

This article shall consider the interpretation of these two words in National laws, Institutional Rules, Court decisions, with a conclusion on the best approach for arbitrating parties.

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[1] Gary B. Born, International Commercial Arbitration (Second Edition) (Kluwer Law International, 2014) pp. 279.
[2] Ibid
[3] Ibid.

Examining Privacy and Confidentiality

The definition given above will generally imply that the privacy of the process will not automatically guarantee the confidentiality of the process. The arguments on this topic is diverse, whilst those who advocate for confidentiality are of the view that, of what importance is the privacy of the arbitration process, if the parties can without restraint disclose classified information to third parties who were seemingly prevented access in the first place.[4]

On the other hand, the critics of confidentiality do not accept this analysis because privacy in arbitration is narrower in scope than the obligation of confidentiality.

This argument is further heightened by the differing position we have under the Arbitration legislations, Rules of Countries, Arbitral Institutions on the subject of privacy and confidentiality. For arbitrating parties, this issue must be borne in mind when drafting an arbitration clause and Agreement or selecting an Arbitral law.

We now consider Privacy and Confidentiality under National laws as well as Court Decisions, Institutional Rules to further get clarity on the interpretation given to the two words in arbitration.

National law

The confidentiality obligation question under National Laws takes differing positions from one country to another. Very few national law have express confidentiality obligations on parties, majority of the laws grant the parties liberty to agree to either a confidential or non-confidential arbitrations. It is the inclusion of the obligation the Court recognize and gives effect to, however, the Courts may be inclined to imply confidentiality obligations from the relationship between the parties to the arbitration.

The UNCITRAL Model law represents to a very great extent the national arbitration law of many Countries. The Model law does not impose confidentiality obligation on parties, but however recognizes the autonomy of parties to do so.[5]

Under the English law, the Courts recognize the importance of confidentiality to the arbitral process and this was expressed in an 1880 common law decision thus:

> ***"As a rule, people enter into these contracts with an express view of keeping their quarrels from the public eye, and of avoiding discussion in public, which must be a painful one, and which surely might be an injury even to the successful party in the litigation, and most surely would be to the unsuccessful"***[6]

This age long decision continues to be followed by subsequent English decisions, hence the law recognizes the implied nature of confidentiality as key to the adoption of arbitration in the first place, which is a private dispute resolution option.[7]

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[4] Ibid.

[5] Born (n1) 2

[6] Russel v Russel (1880) 14 Ch. D 471 (Ch) (English High Ct.)

[7] Hyundai Engineering v. Active Building and Civil Construction (Ltd) (in liquidation) March 9, 2004; See also Hassneh Insurance Co. of Israel v Mew.

In Singapore, the English Court's position on implied confidentiality obligations is adopted.[8] The Swiss law does not expressly impose a confidentiality obligation on parties but recognizes the rights of parties to expressly agree and or adopt relevant institutional rules.[9]

In deference to the above Swiss, Singaporean and English law positions, the Australian, French and Swedish law do not imply confidentiality.

In Australia, the High Court considered the question of confidentiality in the case of ***Esso Australia Resources Ltd V. Plowman***.[10] The question in this case bordered on whether a government agency involved in an arbitration can be compelled to disclose documents produced by an adverse party. These documents were considered sensitive, regardless the High Court compelled the disclosure of the said documents to the regulatory agency and citing that confidentiality was not an essential attribute of Australian arbitration.

The Court recognized the privacy of the arbitration but suggested that this cannot be translated to mean confidentiality. The Australian High Court position has been reflected in legislation in the Australian Arbitration Act.[11]

The French law position is also similar to that of Australia, in respect to international commercial arbitration, because not for domestic arbitration until recently.[12] Hence, subject to the agreement of parties otherwise, there is an imposed confidentiality obligation on parties to domestic arbitration.

It is reported that the reason for this differing position is to ensure transparency in international investment arbitrations and not to impose contrary national law rules on international arbitration seated in France. What this French approach allows is the freedom of parties to include the obligations of confidentiality in their arbitration agreement if they decide to have France as the Seat of Arbitration.[13]

Institutional Rules

Where a party has considered the laws of the Seat of arbitration, it should proceed to check for suitable Institutional Rules that addresses the intentions of the parties as regards confidentiality. On the confidentiality question, as is the case with National laws, there are different positions on the implied obligation. While majority of the rules impose this obligation, others do not or have very limited application.

The Swiss International Arbitration Rules, London Court of International Arbitration (LCIA), Australian Centre for International Arbitration (ACICA), Commercial Arbitration and Media Centre for the Americas (CAMCA), are some of the rules that impose confidentiality on arbitrating parties unless parties agree otherwise. The World Intellectual Property Organization (WIPO) Arbitration Rules contain extensive and far reaching confidentiality obligations on parties. This can be justified because of the intellectual property rights it protects.

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[8] This is enshrined in its 2012 Singapore International Arbitration Act 2012.
[9] For example, Article 44 of the 2012 Swiss International Arbitration Rules.
[10] XXI Y.B Comm. Arb. 137, 151 (Australian High Ct. 1995) (1996).
[11] Section 23D- 23G.
[12] Article 1464 of the revised French Code of Civil Procedure.
[13] Born (n1) 8

The UNCITRAL Rules 2010 contain limited confidentiality obligations,[14] the ICC Rules 2012 departing from the 1998 Rules which recognized only the privacy of arbitration only, and not the confidentiality, now addresses the confidentiality obligation. The Rules empowers the tribunals to issue orders providing for confidentiality on a case by case basis.[15]

International Bar Association Rules on taking of evidence also contains limited confidentiality obligations, requiring documents produced during proceedings to be kept confidential by the Tribunal as well as the Parties.

Where the parties have considered the various national laws, institutional rules, the decision on which position to adopt lies squarely on the arbitrating parties. This is the advantage of arbitration compared to traditional Courts, the autonomy of parties. As rightly cited in an arbitral award:

> ***"Parties are free to conclude any agreements they choose concerning confidentiality. Any such agreement would give rise to rights that are susceptible to protection by way of provisional measures or other relief."***[16]

Therefore, the parties seeking to guarantee the obligation of confidentiality in addition to privacy, must expressly include same in the arbitration agreement. Materials, transcripts and evidence tendered during the arbitration process should be prevented from being seen by a third party.

The right to expressly impose confidentiality obligations are not without limitations: First, the obligation will not be binding on third parties (including witnesses), hence, they are free to disclose any information to which they are privy to. Second, the obligation can be limited on public policy or mandatory law grounds e.g. Security information.

If the parties decide not to include the obligation in their agreement, they can choose to adopt the arbitration law or rules of a State or Institution. English law, Singaporean law and Swiss law are some of the National laws that recognize an implied confidentiality obligation. For institutions, LCIA, UNCITRAL Rules, ICC Rules, International Barr Association (IBA) Rules are some of the Rules containing general and or limited confidentiality obligations on parties.

Confidentiality under Nigerian Arbitration

The main arbitration law in Nigeria is the Arbitration and Conciliation Act (Cap A18 Laws of the Federation of Nigeria) 2004 (ACA) and its application is to both domestic and international arbitration. The Act however, gives parties the liberty to select a different arbitration law of a different Country or the institutional rules of a reputable tribunal or institution.[17] The Act which is largely fashioned after the UNCITRAL Model Law, with the Act including slight differences.

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[14] Articles 28(3), 34(5).
[15] Article 22(3).
[16] Biwater (Tanzania) Ltd v United Republic of Tanzania, Procedural Order No. 3 in ICSID Case No. ARB//05/22 of 29, September 2006. See also Esso Australia Res. Ltd v Plowman XXI Y.B Comm. Arb 137, 151 (Australian High Ct. 1995) (1996).
[17] Section 53 of the ACA.

As regards the question under consideration in this article, the ACA expressly provides for the privacy of arbitration proceedings but does not impose a confidentiality obligation, rather implying it.[18] This is just a reflection of what is prevalent in many other jurisdictions.

Therefore, parties who choose Nigeria as their seat and adopting its Arbitration Rules must deliberately insert a confidentiality obligation clause on each other via their agreement to protect the use of such documents and circumvention of the divulging party.

There is no denying the fact that there is need to amend the present ACA to enable it come in terms with reality of individuals, businesses, governments who may be selecting Nigeria as seat or its applicable Rules.

Conclusion

What is the point of having a private arbitration sitting with no guaranty of the confidentiality of the bundles of documents, evidence tendered in prosecution or defence of the action? The English Court in the ***Hassneh*** case put it succinctly as follows:

> ***"the requirement of privacy must in principle extend to documents which are created for that hearing…the disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party…"***

Businesses generally opt for arbitration as against the traditional court route to dispute resolution, it therefore defeats the purpose, if the parties cannot get the advantage of confidentiality which notionally they assume accompanies the privacy of the whole arbitration process.

The above predicament of arbitrating parties is not even bettered with the inability of the national laws and institutional arbitration rules to clearly provide on the existence or scope of confidentiality obligations in relation to international arbitration.

To further improve businesses and investor confidence in international arbitration, there must be definitive stands on the confidentiality question in National laws and rules of arbitral institutions. If this exists, parties will be more willing to produce relevant documents relevant to arriving at decisions by the tribunals and also the guarantee of that recognition in different Seats.

Whilst the States and Institutions are at the point of resolving this lingering question, it is imperative on arbitrating parties to select National Laws or Institutional rules that are sympathetic to the confidentiality obligation or on the alternative expressly provide for same in their agreements.

What this article has succeeded in achieving, is erase the illusion that privacy and confidentiality Siamese, therefore automatic. It is the conclusion of the author that deliberate steps must be taken to impose the obligation, otherwise there is no guarantee of such recognition in majority of the national laws or Institutional Rules.

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[18] Article 25(4) Arbitration Rules 2004.

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