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TRANSPARENCY VS CONFIDENTIALITY IN INTERNATIONAL ARBITRATION: A NEW GLOBAL BALANCE

Abstract

The confidentiality of international arbitration has long been viewed as one of its key advantages over litigation, and has been a fundamental characteristic of the arbitral process. Yet, in recent years, this fundamental characteristic has faced growing challenges, especially in investor–state arbitration, where disputes often raise questions about the public interest, regulatory matters and state sovereignty. The call for transparency has questioned the role of excessive confidentiality and prompted questions about the balance between private dispute settlement and public accountability.

This article explores the rise of the confidentiality-transparency debate in international arbitration through a doctrinal and comparative study of prominent regimes and developments. It examines the responses of regimes like the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law Transparency Rules, noting the slow but steady move towards transparency in investor–state disputes, while also reflecting on the ongoing significance of confidentiality in commercial arbitration.

The research concludes that absolute confidentiality or transparency is neither normatively nor practically viable. Confidentiality is necessary for safeguarding commercial interests and ensuring procedural efficiency, but transparency is important for bolstering legitimacy, predictability and public accountability, particularly in the context of state actions. The paper suggests that a context-sensitive hybrid approach - distinguishing commercial and public law aspects of arbitration - is essential to harmonise these values and to determine the future of international arbitration.

Keywords: *International Arbitration; Confidentiality; Transparency; Investor-State Disputes; United Nations Commission on International Trade Law Transparency Rules; International Centre for Settlement of Investment Disputes; Commercial Arbitration; Party Autonomy; Public Interest; Legitimacy.*

1. Introduction

International arbitration has become a favoured means of dispute resolution in cross-border disputes due to its flexibility, impartiality, and speed, in contrast to litigation in state courts. It is based on party autonomy, which enables the parties to agree on procedural rules, arbitrators, and the law that applies to their dispute. A unique characteristic that has long drawn parties to arbitration is confidentiality. Where proceedings in court are public, arbitration takes place behind closed doors and disclosure of documents, evidence and awards is generally limited. This feature has been deemed important, especially for business parties as a means to safeguard their trade secrets, confidential information and reputation.¹

But this traditional basis has been put into question in recent years. The growing use of arbitration in disputes involving public law, such as investor–state arbitration, has created a countervailing need for transparency. These disputes involve the conduct of sovereign states,

¹ Gary B. Born, *International Commercial Arbitration* 2783–85 (3d ed. 2021).

public goods and regulatory actions, and hence have public interest implications. Consequently, some argue that excessive confidentiality erodes the legitimacy of arbitration by hiding decisions that can have an impact on the general public.² This has led to a debate regarding the need for arbitration to remain a purely private institution or move towards a more transparent form of arbitration in line with principles of public accountability.

It's essential to distinguish between commercial arbitration and investor - state arbitration. Commercial arbitration generally involves private parties and relates to disputes over contracts, where privacy is attractive and feasible. On the other hand, investor–state arbitration is a dispute between a private investor and a state, and will often relate to a regulatory measure, an environmental protection measure or a public interest measure. In these circumstances, the stakes can go beyond the parties involved, and require increased transparency and public engagement.³

In this context, the main issue is whether confidentiality is still the overriding characteristic of contemporary international arbitration? This poses several research questions: whether confidentiality is an implied or inherent feature of arbitration or a contractual obligation subject to the agreement of the parties; whether transparency should prevail in matters of public interest; and whether it is possible to develop a consistent global approach to these principles across different jurisdictions.

This paper suggests that although confidentiality remains highly important to maintaining the efficiency of commercial arbitration, the greater integration of public law principles calls for a nuanced approach towards transparency. A contextual approach blending confidentiality and transparency is needed, rather than an all-or-nothing approach. This approach would allow arbitration to continue to be efficient and attractive while at the same time, becoming more legitimate and transparent in the international legal system.⁴

² United Nations Comm'n on Int'l Trade Law (UNCITRAL), *Rules on Transparency in Treaty-based Investor-State Arbitration* (2014, revised use post-2015 developments).

³ Stephan W. Schill, *The Multilateralization of International Investment Law* 45–50 (Cambridge Univ. Press 2015).

⁴ OECD, *Transparency and Public Participation in Investor-State Dispute Settlement Proceedings* (2019).

2. Conceptual Framework: Confidentiality vs Transparency

Confidentiality has long been considered as one of the distinctive features of international arbitration, as opposed to litigation in public court. Confidentiality, at its essence, is the duty to maintain privacy of arbitral proceedings, hearings, pleadings, evidence and, in some instances, the arbitral award. It is more than privacy, which merely precludes public attendance at arbitration proceedings, in that it creates an obligation for parties to keep confidential any information obtained during the arbitration proceedings.⁵ It has been a key attraction of arbitration, especially in commercial disputes, in which confidentiality is crucial for the protection of sensitive business information.

The law of confidentiality is not consistent across the world. It is largely founded on the doctrine of party autonomy, which enables parties to explicitly agree to confidentiality obligations in arbitration agreements or rules. Moreover, some arbitral institutions include confidentiality provisions in their rules. For example, the London Court of International Arbitration Rules expressly obligate parties and arbitrators to uphold confidentiality, while the Singapore International Arbitration Centre does so, subject to certain exceptions. But the scope and enforceability of these provisions differ, highlighting the lack of a global consensus.⁶

There are several benefits to confidentiality. It preserves trade secrets, confidential data, and other business information that is vital in technology, finance and intellectual property industries. It also preserves business reputation by avoiding potential negative publicity through disputes. Moreover, confidentiality adds to the flexibility of arbitration procedures, allowing parties to resolve disputes behind closed doors. This, in turn, enhances the efficiency and appeal of arbitration as a dispute resolution option.⁷

On the other hand, arbitration transparency relates to openness of arbitration proceedings, such as public access to arbitration hearings, disclosure of documents and publication of arbitration awards. Historically confined in commercial arbitration, transparency has gained momentum,

⁵ Gary B. Born, *International Commercial Arbitration* 2778–80 (3d ed. 2021).

⁶ London Court of International Arbitration Arbitration Rules 2020, art. 30; Singapore International Arbitration Centre Rules 2016, r. 39.

⁷ Julian D.M. Lew et al., *Comparative International Commercial Arbitration* 27–30 (Kluwer Law Int'l 2015).

especially in investor–state arbitration, which concerns disputes with sovereign countries and public interest.

The rise of transparency is associated with the public interest aspect of contemporary arbitration. Investor-state disputes often raise matters of public concern, such as environmental, health and regulatory matters. In these circumstances, confidentiality can erode democratic legitimacy and trust. Therefore, legal developments have embraced transparency. For instance, the United Nations Commission on International Trade Law Transparency Rules include public hearings, publication of the documents, and opportunities for third party involvement. The International Centre for Settlement of Investment Disputes, on its part, has become more transparent by permitting publication of awards and greater openness in procedural matters.⁸

Transparency has legitimating effects, contributes to predictability of arbitral awards, and holds governments accountable. It brings arbitration into line with other rule of law considerations, especially when public interests and governance are at stake.

The balance between confidentiality and transparency highlights a dilemma in international arbitration. Confidentiality enhances efficiency, privacy and party autonomy, contributing to arbitration's appeal for commercial parties. But transparency enhances legitimacy, accountability, and public trust, particularly in matters affecting state interests. These goals can be in tension because while greater transparency may undermine commercial privacy, confidentiality may render arbitral decisions less acceptable and legitimate.

A doctrinal question is whether confidentiality is an implied term of arbitration or merely contractual in nature. Some common law courts have confirmed the existence of a duty of confidentiality implied by the nature of arbitration. But this view is not without controversy, and some jurisdictions deny that there is any implied duty of confidentiality in arbitration unless expressly consented to by the parties.

This has led to considerable debate among academics and courts. Some academics believe confidentiality is an inherent part of arbitration, while others consider it a matter of consent. The

⁸ United Nations Commission on International Trade Law, *Rules on Transparency in Treaty-Based Investor-State Arbitration* (2014); International Centre for Settlement of Investment Disputes, *Arbitration Rules* (amended 2022).

divergent approaches across jurisdictions reflect the complexity of the issue, and suggest a nuanced approach is needed to strike the right balance between confidentiality and the growing demand for transparency in arbitration proceedings.

3. Legal Framework and Comparative Analysis

Institutional rules play a crucial role in governing confidentiality and transparency in international arbitration, with different approaches and priorities for privacy and transparency.

The International Chamber of Commerce (ICC Rules) takes a moderate approach to confidentiality. The rules provide for arbitral proceedings to take place in secret, but do not require an absolute duty of confidentiality on the parties unless agreed.⁹ Recently, the ICC has also embraced more openness, publishing anonymised excerpts of awards and occasionally complete awards with the parties' permission. This is a response to an institutional aim to provide a contribution to the development of arbitral jurisprudence while protecting the parties' interests.

However, the London Court of International Arbitration (LCIA Rules) offers the highest level of confidentiality protections. Article 30 of the LCIA Rules explicitly requires parties, arbitrators and the institution to maintain confidentiality of awards, materials and proceedings, with limited exceptions (legal obligation, enforcement). This is a more "traditional" understanding of arbitration as an ad private process.¹⁰

The Singapore International Arbitration Centre takes a nuanced approach. Its rules refer to confidentiality as a characteristic but also allow flexibility for disclosure in certain situations, such as to comply with law or protect legal rights. The SIAC rules exemplify a balance of confidentiality and real-world concerns in arbitration practice.¹¹

The trend towards transparency is particularly pronounced in investor-state arbitration, involving states and matters of public interest. The International Centre for Settlement of Investment Disputes has steadily embraced transparency. The revised ICSID Arbitration Rules (2022)

⁹ International Chamber of Commerce, Arbitration Rules 2021, art. 22; see also ICC, *Note to Parties and Arbitral Tribunals on the Conduct of Arbitration* (2021).

¹⁰ London Court of International Arbitration Arbitration Rules 2020, art. 30.

¹¹ Singapore International Arbitration Centre Rules 2016, r. 39.

promote the publication of awards, decisions and orders, even in the absence of party consent (where information is redacted).¹² Hearings can also be published, unless objected to by a party, indicating a shift towards greater transparency.

The United Nations Commission on International Trade Law Transparency Rules take a more formal approach to transparency. These rules require the public availability of certain documents, such as statements of claim and defence and public hearings. They also permit the intervention of third parties by way of amicus curiae submissions, thus promoting inclusivity and transparency. Crucially, these rules acknowledge that investor - state disputes may raise public interest questions, warranting greater transparency than commercial arbitration.¹³

Court interpretations also highlight the different approaches to confidentiality in arbitration.

In the United Kingdom, the courts have long accepted confidentiality as an implied duty of arbitration. But the obligation is not without limitations and exceptions, such as the need to disclose in order to protect legal rights or for reasons of justice. This reflects a recognition that confidentiality needs to be weighed against other interests.¹⁴

By contrast, Australian courts have adopted a more conservative approach to confidentiality. Australian courts have eschewed the idea of absolute or automatic confidentiality, arguing that these must be expressly agreed to. This approach restricts the role of implied confidentiality and prioritises contractual certainty over presumptions of confidentiality.¹⁵

In India, the Arbitration and Conciliation Act, 1996 has been substantially amended by the insertion of Section 42A which expressly requires confidentiality of arbitration proceedings, except to the extent required for enforcement of an award. This section explicitly acknowledges confidentiality but the scope and ambit of this provision is still evolving, especially in the context of public interest disputes which require transparency in proceedings.¹⁶

¹² International Centre for Settlement of Investment Disputes, Arbitration Rules (2022), rr. 62–63.

¹³ United Nations Commission on International Trade Law, *Rules on Transparency in Treaty-Based Investor-State Arbitration* (2014).

¹⁴ *Emmott v. Michael Wilson & Partners Ltd.* [2008] EWCA (Civ) 184 (U.K.).

¹⁵ *Esso Australia Res. Ltd. v. Plowman* (1995) 183 CLR 10 (Austl.).

¹⁶ Arbitration and Conciliation Act, 1996, § 42A (as amended 2019).

Comparing the institutional rules and judicial trends, it is evident that commercial arbitration and investor–state arbitration diverge. In commercial arbitration, confidentiality remains the norm, reflecting the private nature of commercial disputes and the need for business confidentiality. However, investor–state arbitration is leaning towards transparency because of its public law ramifications and the need for accountability.

Yet, a greater trend towards harmonisation is observed. Systems and institutions are increasingly adopting quasi-private and quasi-public approaches. This includes publishing redacted case awards, "open" hearings under certain conditions, and targeted disclosure of documents. These trends suggest a move from "one size fits all" towards contextual and flexible approaches.

This legal landscape reflects an understanding that neither confidentiality nor transparency suits all cases. Rather, the future of international arbitration is to find a delicate balance that takes into account the different types of disputes, while still ensuring efficiency and legitimacy.¹⁷

4. Critical Analysis: Need for a New Global Balance

Although confidentiality is widely considered to be a fundamental characteristic of international arbitration, the absolute nature of confidentiality is increasingly coming under scrutiny. A key issue is the perception of illegitimate proceedings. In cases that have important regulatory or economic implications, such as investor–state arbitration, the lack of public scrutiny contributes to a loss of confidence in the arbitral process. The lack of transparency associated with private decisions may be seen as a lack of accountability, particularly where decisions affect the public purse or government policy.¹⁸

A second major concern is the potential for fragmented jurisprudence. The confidentiality of arbitration awards hampers their publication and, consequently, the building of precedents. In contrast to public judicial proceedings, where decisions are available and help establish legal

¹⁷ Catherine A. Rogers, *Transparency, Confidentiality, and Legitimacy in International Arbitration*, 46 *Harv. Int'l L.J.* 1, 10–15 (2018).

¹⁸ Gus Van Harten, *Investment Treaty Arbitration and Public Law* 152–56 (Oxford Univ. Press 2017).

certainty, arbitration can be shrouded in secrecy. This may result in inconsistent application of legal principles, resulting in uncertainty in international arbitration.¹⁹

Additionally, stringent confidentiality may protect state actions. In investor–state cases, arbitration tribunals deal with disputes over environmental protection, human health, or taxation matters. The absolute confidentiality of such proceedings denies citizens, civil society and other stakeholders access to knowledge of how decisions are made. This has implications for the rule of law and democracy.²⁰

Although confidentiality has its problems, an unfettered move towards transparency is also problematic. The most significant issue is that commercially sensitive information could be disclosed. Companies often opt for arbitration to keep commercial information confidential. Greater transparency might discourage companies from choosing arbitration as a dispute resolution forum, thereby reducing the efficacy of arbitration as a process overall.²¹

Moreover, enhanced transparency could undermine party autonomy, a cornerstone of arbitration. Parties generally expect to have some autonomy, which includes the right to confidentiality. Forced transparency requirements might limit this autonomy and render arbitration less flexible than litigation.

Transparency can also create strategic disadvantages. Document disclosure and public access to proceedings could enable third parties to access information about a party's legal arguments, financial situation, or business practices. This may skew the playing field and deter full disclosure in the course of proceedings. Therefore, transparency may enhance accountability, but it needs to be weighed against potential drawbacks.²²

In recent years, international arbitration has seen the development of refined approaches seeking to reconcile confidentiality and transparency. One example is the release of redacted awards, in

¹⁹ Julian D.M. Lew et al., *Comparative International Commercial Arbitration* 29–32 (Kluwer Law Int'l 2015).

²⁰ Stephan W. Schill, Transparency as a Global Norm in International Investment Law, 8 U.C. Irvine J. Int'l Transnat'l & Comp. L. 45, 50–55 (2019).

²¹ Gary B. Born, *International Commercial Arbitration* 2785–88 (3d ed. 2021).

²² Catherine A. Rogers, Transparency in International Arbitration, 54 U. Kan. L. Rev. 1301, 1310–15 (2016).

which confidential information is redacted but the tribunal's reasoning is left intact. This promotes consistency and jurisprudential development while maintaining confidentiality.

Another notable trend is the growing approval of public hearings in matters of public interest. Under rules such as those of the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law Transparency Rules, hearings can be opened to the public with appropriate safeguards.

Additionally, the involvement of third parties, such as amicus curiae submissions, is increasingly prevalent, especially in investor–state arbitration. This enables non-parties to make submissions about matters of public interest and adds to the legitimacy and inclusivity of the arbitral process.²³

The developments in arbitration suggest the adoption of a "hybrid model" which takes into account different kinds of disputes and circumstances. This model retains the primacy of confidentiality in commercial arbitration, where disputes are often private and have a low level of public interest. However, openness takes on a more prominent role in investor-state arbitration, where state conduct and allocation of public resources are in question.

This model focuses on balancing considerations, depending on the specifics of the case, parties, and the public interest at stake. The hybrid approach does not rely on a standard rule, but rather flexibility, which permits a tribunal or institution to determine openness on a case-by-case basis.²⁴

The importance of balancing is linked to the nature of international arbitration. No longer limited to private matters, arbitration increasingly straddles the boundaries between private and public international law. Investor-state arbitration, in particular, has evolved arbitration into a process that determines matters of governance, regulation and public policy.

In these circumstances, strict confidentiality or transparency is impractical and undesirable. Unfettered confidentiality erodes legitimacy and accountability, while unfettered transparency

²³ International Centre for Settlement of Investment Disputes Arbitration Rules (2022); United Nations Commission on International Trade Law Transparency Rules (2014).

²⁴ OECD, *Transparency and Public Participation in Investor-State Dispute Settlement Proceedings* (2019).

erodes efficiency and trade. As a result, a differential transparency approach is needed, which varying levels of transparency depending on the circumstances of the dispute. This approach will retain the key strengths of arbitration while meeting the challenges of the contemporary legal and regulatory landscape.

In short, the evolution of international arbitration hinges on its capacity to strike this balance. The most promising approach to ensure the continued success and legitimacy of arbitration is to adopt a context-sensitive, flexible approach to transparency that is tailored to the circumstances of the case at hand.²⁵

5. Conclusion and Recommendations

The above discussion shows that the conventional view of confidentiality as an absolute attribute of international arbitration is untenable in the modern legal environment. Although confidentiality remains an essential element in maintaining the efficiency, flexibility and appeal of arbitration, especially in commercial matters, it is now being redefined in the light of the increasing need for transparency. This is particularly true in investor state arbitration, which brings into play the public interest, government accountability and regulatory concerns. As a result, a clear disconnect has emerged with commercial arbitration still heavily focused on confidentiality, while investment arbitration has gradually moved towards transparency-oriented practices.

To some extent, this is not a complete divergence. The institutional practices of organisations such as the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law demonstrate that there is an emerging trend of convergence in which transparency is now being progressively introduced into arbitration while confidentiality is not abandoned. This suggests that the question is no longer between one principle or the other, but between the balance between the two principles.

Based on these trends, some suggestions can be made. First, it is important to establish consistent internationally recognised principles regarding the scope and application of confidentiality and

²⁵ J. Christopher Thomas & Harpreet Kaur, *Transparency in International Investment Arbitration* 10–15 (Cambridge Univ. Press 2021).

transparency. These principles should not be binding rules but should offer a flexible guide suitable for various disputes. Second, transparency should be mandatory in state-related disputes or disputes affecting public resources, due to their public interest. This will increase the legitimacy, accountability and public confidence in arbitration.

On the other hand, confidentiality should be upheld in purely private arbitration, unless expressly agreed by parties. Parties should be permitted to determine the confidentiality provisions according to their needs, thus maintaining party autonomy. Moreover, arbitral institutions should be encouraged to release anonymised or redacted versions of awards, which will aid in the evolution of jurisprudence while protecting confidential data. Finally, there is a need for more procedural clarity, in particular, as to when disclosure should or should not be made.

Ultimately, the future of international arbitration rests not on a simple choice between transparency and confidentiality, but on their harmonisation through a sophisticated, contextual approach. A flexible approach will allow arbitration to maintain its efficiency and commercial appeal while also increasing its legitimacy and responsiveness to public interest considerations in an ever-changing global legal landscape.