Transparency in international arbitration: balancing the need for openness with the need for confidentiality.

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Transparency in International Arbitration: Balancing the Need for Openness with the Need for Confidentiality

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Introduction:

International arbitration is often presented as an efficient and appropriate alternative to domestic court systems for resolving conflicts. For international arbitration to be effective, it is essential that the procedure adopted be open and accountable. This article will discuss the significance of openness in international arbitration and how it may promote justice, foster trust, and avoid corruption and misbehaviour.

The importance of transparency:

Transparency is an essential component of international arbitration. It is integral to ensuring the fairness and integrity of the arbitral process by minimising opportunities for corruption and misconduct. For instance, disclosing arbitrators' names and potential conflicts of interest can prevent bias and corruption. In *Chartered Institute of Arbitrators v B* ('*Chartered Institute of Arbitrators*'),[3] the England and Wales High Court (Commercial Court) recognised the importance of transparency by allowing the disclosure of confidential arbitration documents to prove an arbitrator's bias. Such disclosures can help to prevent disputes or challenges to the outcome of the arbitration.

Transparency helps build trust and confidence in the arbitration process among the parties involved and the general public. Trust promotes the use of arbitration in resolving disputes and as a reasonable and effective alternative to domestic judicial systems. Ensuring the public's trust in arbitration proceedings was linked to the general public interest in the *Chartered Institute of Arbitrators* case. In that case, the Court allowed the disclosure of arbitral documents in relation to allegations of bias. In doing so, the Court settled the general public's interest as an exception to the principle that arbitrations are confidential.

Trust is especially crucial for international investment arbitration, where one of the parties involved is a state. Since one of the parties is a state, the outcome of such arbitrations affects state policies. For instance, *Biwater Gauff (Tanzania) v United Republic of Tanzania*[4] involved

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[3] *Chartered Institute of Arbitrators v B* (2019) EWHC 460 (Comm) ('*Chartered Institute of Arbitrators*').

[4] *Biwater Gauff (Tanzania) v United Republic of Tanzania (Procedural Order No. 3 of 29 September 2006*) (2006) ICSID Case No. ARB/05/22.

adjudication on the privatisation of water resources. In that case, the tribunal allowed non-governmental organisation representation since it was required to adjudicate a matter of public interest. Following suit, the United Nations recognised the importance of transparency in state arbitrations when, in 2014, it produced the *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules* ('UNCITRAL Rules on Transparency').[5]

Lastly, transparency can facilitate open and fair resolution of disputes in international arbitration. Suppose the rules and procedures of arbitration like the manner of taking evidence and basis of appointing arbitrators can be made public. In that case, parties involved in the arbitration can be clear about what is expected of them, which can help prevent misunderstandings or disputes about the process. The ICC's 2021 Rules offer a detailed list of rules and procedures used in its arbitration, including provisions for the appointment and removal of arbitrators, applicable rules of law and the time limit for arbitration, among other things. This can help prevent disputes on procedural considerations like composition of the Tribunal.

Challenges and risks:

The issue of transparency in international arbitration proceedings is complex and contentious. Transparency is an essential aspect of international arbitration. An English Court of Appeal in *Dolling-Baker v Merrett*[6] held that confidentiality is embedded in the nature of the arbitration. The Court held that parties have an implied obligation not to disclose to third parties the documents disclosed, produced or prepared in the arbitration. At the same time, there are also challenges and risks associated with transparency in this context. One of the critical challenges is the need to balance transparency with confidentiality. The UNCITRAL attempted such balancing by incorporating various transparency provisions in the UNCITRAL Rules on Transparency.[7]

International arbitration is often used to resolve disputes between private parties. Maintaining the confidentiality of those disputes is crucial to protect the interests of the parties involved. For example, trade secrets or other confidential information may be at stake in arbitration. Publicising this information could harm the parties involved. The England and Wales High Court recognises an implied term of confidentiality in arbitration proceedings as a matter of business efficacy, as recognised in *Hassneh Insurance Co of Israel v Stuart J Mew*.[8]

On the other hand, in international investment disputes, one of the parties is the state. Decisions in such arbitrations invariably affect public policies and the general public interest. Thus,

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[5] *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules*, GA Res 68/109, UN Doc A/68/462 (adopted 16 December 2013) ('*Rules on Transparency*').

[6] *Dolling-Baker v Merrett* (1990) 1 WLR 1205.

[7] *Rules on Transparency* (n 3).

[8] *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243.

investment arbitrations may justify the imposition of higher obligations of transparency. For instance, in *Metalclad Corporation v. The United Mexican States*,[9] the Mexican government was held liable for damages for denying a United States corporation the permission to operate a toxic waste landfill in Mexico. This case gained widespread media coverage for its procedural deficiencies, affecting a change in United States policy on transparency in international investment arbitrations. Different approaches must be preferred to tackle both situations.

Another concern is the possibility that openness may be utilised to undermine the arbitration procedure. In rare instances, participants in arbitration may attempt to gain an unfair advantage by exploiting publicly available information to influence the outcome. Such behaviour may impede arbitration and undermine the system's fairness and credibility.

Thus, it is crucial for arbitration tribunals and other parties to strike a just balance between the need for openness and the need for confidentiality. To guarantee that the arbitration process is fair, effective, and respected by all parties, the challenges and risks of transparency in international arbitration must be thoroughly explored and appropriately handled.

Dealing with the challenges and risks of transparency:
Given the significance of transparency in international arbitration and the attendant challenges and risks, it is vital to investigate how to address these concerns. One method is establishing explicit standards and procedures for openness in international arbitration and ensuring that they are regularly followed. For instance, arbitration tribunals may be compelled to publicise the arbitration's rules and processes and any findings and awards. This may guarantee that the parties to the arbitration are informed of the decision-making process and criteria. It may avert disagreements and misunderstandings.

The Rules on Transparency opt for such transparency provisions in investment arbitrations.[10] The rules provide for public disclosure of information and documents used in arbitral proceedings, subject to given safeguards. Right from initiating proceedings, the parties' names, the economic sector involved, and the applicable treaty would be disclosed. All notices, submissions, exhibits and transcripts of the proceedings would be available to the public. Additionally, the tribunal may publish expert reports and witness statements upon request. These provisions are subject to safeguards to prevent the disclosure of confidential information, undue burdens or delays to the arbitral process.

The Vienna International Arbitral Centre (‘VIAC’) follows the same principle. According to Article 41 of the VIAC’s Rules of Arbitration and Mediation,[11] the institution can publish an

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[9] *Metalclad Corporation v The United Mexican States (Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information of 27 October 1997)* (1997) ICSID Case No. ARB(AF)/97/1.

[10] *Rules on Transparency* (n 3).

[11] Vienna International Arbitral Centre, *'Rules of Arbitration and Mediation'* (adopted 1 July 2021).

anonymised summary or extracts of its awards unless parties raise an objection. In practice, too, it routinely publishes such edited extracts of awards.

In addition, arbitration tribunals can be required to publish the names of arbitrators involved and any potential conflicts of interest that they may have. This helps to ensure that the arbitrators are impartial and independent to minimise concerns about bias or corruption. The International Chamber of Commerce has sought to achieve such transparency. Article 5 of Appendix II of the ICC's Rules of Arbitration allows the court to give reasons for its decisions on an arbitrator's appointment, removal or replacement.[12] The ICC has published the names of arbitrators adjudicating its cases since 2016.

Another approach is to provide adequate safeguards for confidentiality in international arbitration. Parties and institutions can establish clear rules for what can be made public and what must be kept confidential. The ICSID's approach in *Burlington Resources Inc. v. Republic of Ecuador*[13] is illustrative. There, the publishing of investment arbitration proceedings was subjected to a three-fold requirement of identification of (i) necessary excerpts, (ii) purpose and (iii) necessitating reasons.

Singapore's Arbitration Act offers another model for balancing confidentiality with transparency.[14] Section 57(3) of that legislation allows disclosure of confidential information subject to the consent of concerned parties. Additionally, the court may reveal confidential information, but only if it would not reveal the identity of any party or any matter that the party wishes to remain confidential.

Institutions can also establish procedures for protecting confidential information during the arbitration process. This can take the form of a requirement for parties to submit confidential information to the arbitration tribunal in a sealed envelope or a provision allowing the arbitration tribunal to redact confidential information from any public documents, amongst other things. Article 7 of the UNCITRAL Rules on Transparency provides for prompt designation and redaction of confidential information. Any information a state considers must remain confidential to protect 'essential security interests' would be exempt from disclosure.

Overall, dealing with the challenges and risks of transparency in international arbitration requires a careful balance between the need for transparency and the need for confidentiality. Establishing clear guidelines and rules and providing adequate safeguards for confidentiality can foster just settlement of disputes by arbitration.

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[12] International Chamber of Commerce, *'Rules of Arbitration" (adopted 1 January 2021)* r 11.

[13] *Burlington Resources Inc. v Republic of Ecuador, (Decision on Counterclaims of 7 February 2017)* (2017) ICSID Case No. ARB/08/5.

[14] *Arbitration Act* (Singapore. cap 10, 2002 rev ed).

Conclusion:

In conclusion, transparency is an essential component of international arbitration. It promotes fairness and impartiality, increasing public confidence in the process. However, transparency also poses challenges and risks in international arbitration, lest it is used to undermine the process. For effective redressal, transparency needs to be balanced carefully with confidentiality.

A proper balance of transparency and confidentiality may be found by establishing clear guidelines and rules for transparency and providing adequate safeguards for confidentiality. The appropriate level of transparency in international arbitration proceedings will depend on each case's specific circumstances and the parties' varying needs. By promoting fairness and accountability, building trust and confidence, and minimising corruption and misconduct, transparency is essential for ensuring that the arbitration process is fair, effective, and respected by all parties.