Kluwer Arbitration Blog

Confidentiality in Arbitration Revisited: Protective Orders in the Philippines

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Confidentiality in arbitration arises through the agreement of the parties, by selecting arbitration rules with explicit provisions thereof, or under domestic statutory regulations. Few national laws regulate confidentiality in arbitration. This is because a large number of countries follow the UNCITRAL Model Law on International Commercial Arbitration, whose drafters made it clear that "confidentiality may be left to the agreement of the parties or the arbitration rules chosen by the parties." (Report of the Secretary-General on Possible Features of a Model Law in International Commercial Arbitration, UN Doc. A.CN.9/207, para. 17, in XII Y.B. UNCITRAL 75, 90 (1981)). In 2006, the UNCITRAL Model Law revised version was released again without any reference to confidentiality.

In some jurisdictions, despite a lack of explicit regulation, it appears that the confidential character of arbitration may be observed as a matter of practice or can derive from non-related bodies of law (such as personal data protection laws or intellectual property regulations). There are only a few countries that expressly address the confidentiality of the arbitral process. Among those are New Zealand, Norway, Spain, Romania, Peru, and the Philippines. (See, for a detailed overview, Kluwer's new Privacy and Confidentiality in Arbitration Smart Chart).

The Philippines stands out not only for regulating confidentiality in its domestic arbitration law, but also for putting in place court mechanisms to protect it. The Philippine Congress enacted the first arbitration law in 1953 (Republic Act 876 of 19 June 1953). Fifty years later, the arbitration framework was supplemented with the Republic Act 9285 of 2004, also known as the Alternative Resolution Act of 2004 (the "ADR Act"). Through the ADR Act, the Congress pledged to "actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve disputes" (Section 2 of the ADR Act). The ADR Act incorporated the UNCITRAL Model Law (1985) to govern international commercial arbitrations and added new provisions for areas not covered by this instrument. Notably, the ADR Act explicitly provides for confidentiality of arbitration proceedings. Section 23 of the ADR Act reads as follows:

> "The arbitration proceedings, including the records, evidence and the

> arbitral award, shall be considered confidential and shall not be published except (1) with the consent of the parties, or (2) for the limited purpose of disclosing to the court of relevant documents in cases where resort to the court is allowed herein. Provided, however, that the court in which the action or the appeal is pending may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof."

Section 23 must be read in conjunction with Section 3(h). Section 3(h) defines confidential information as "any information relative to the subject of … arbitration expressly intended by the source not to be disclosed, or obtained under circumstances that would create a reasonable expectation on behalf of the source that the information shall not be disclosed." The definition covers oral and written communication, work product materials, pleadings, motions, witness statements, and reports filed or submitted in the arbitration or for expert evaluation.

The last part of Section 23 refers to the scenario when courts are requested to issue protective orders on confidentiality while arbitration proceedings are pending or are otherwise subject to judicial review. Among others, this provision was further developed by the Supreme Court in a separate set of Special Rules on Alternative Dispute Resolution procedures (the "Special Rules"). Rule 10 of the Special Rules describes the procedure for protective orders to preserve the confidential character of commercial arbitrations in the Philippines.

The application for confidentiality orders can be made by the party, counsel or witness who disclosed or was compelled to disclose "information relative to the subject of [arbitration] … under circumstances that would create a reasonable expectation, on behalf of the source, that the information shall be kept confidential" (Rule 10.1). The request can be made "without express written consent of the source or the party who made the disclosure". (Id.). The Rules do not define the meaning of the "source". Most likely, the term refers to the "owner" of confidential information or, more generally, to the person having a "reasonable expectation" that the information would be kept secret. Simply put, if party A is called to testify in court about the subject of the confidential arbitration A v B, A can provide the requested testimony and unilaterally prevent others from making further disclosures by applying for a confidentiality order. Party B and Witness X in the same arbitration can likewise rely on the same protection mechanism after testifying or making other disclosures. Additionally, it appears that if A (or B or X) disclosed before the court a confidential fact that non-party C provided for the limited purposes of the arbitration, A (or B or X) could likewise seek an order prohibiting further disclosure unless and until C gave its consent.

The request for a confidentiality order can be made "at any time there is a need to enforce the confidentiality of the information obtained, or to be obtained in [arbitration] … proceedings" (Rule 10.2). The request can be either to suppress or to enjoin confidential information from being disseminated outside the arbitration frame. The competent court is the Regional Trial Court where the "order needs to be

implemented" (Rule 10.3). When arbitration-related information is sought to be released in pending court proceedings, the motion to protect may be filed with that court.

Applying for protective orders is strictly regulated. The applicant needs to show that a "material prejudice" has been or will be caused through the "unauthorized disclosure" of information "obtained or to be obtained" in arbitral proceedings. Obviously, the court has the discretion to decide what is "material", and the applicant bears the burden of showing the prejudice as well as the causal link between the non-permitted disclosure and the damage that has been (or will be) incurred as a result. Linking disclosure of confidential information to a particular source (i.e., a participant or non-participant in the arbitration proceedings) may sometimes be a difficult task. It is easy to recognize the source when the disclosure is made before a court or in separate arbitral proceedings. When leaks occur outside the frame of such proceedings or any other "lawful" channels of disclosure (for example, mandatory disclosures to regulatory agencies), identifying the source may be problematic.

The applicant for a protective order is not under an obligation to prove the confidential character of the materials purportedly shielded from disclosure. Yet, it would be hard if not impossible to describe a material prejudice or the likelihood thereof without at least giving a generic description—without revealing the specific content—regarding the nature of the information in question. Besides the "material prejudice", the applicant must also state: (i) that the information was obtained or would be obtained during the arbitration, (ii) that the person or persons called to disclose confidential information participated in the proceedings, and (iii) the time, date and place of the arbitration (Rule 10.5).

A notice of the request for protective order is made to the opposing party or parties (Rule 10.6). If a party favours disclosure, it thus has an opportunity, within fifteen days from service, to comment on or oppose the request for the confidentiality order. The opponent can refute either the confidential character of the disputed information, its provenance, or the applicant's capacity to file for a confidentiality order. Accordingly, Rule 10.7 provides that the comment or opposition may be accompanied by "written proof that (a) the information is not confidential, (b) the information was not obtained during the [arbitration] … proceedings, (c) there was a waiver of confidentiality, or (d) the petitioner/movant is precluded from asserting confidentiality".

Once these procedural steps are completed, the court decides whether to grant or dismiss the request. Under Rule 10.8, the court's decision-making process should be guided by the following principles:

> "Confidential information shall not be subject to discovery and shall be inadmissible in any adversarial proceeding, whether judicial or quasi judicial. However, evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason its use therein."

Under these principles, information in the public domain and information demonstrably not confidential in nature cannot receive confidential status solely by being used in arbitral proceedings. By contrast, information that is confidential in nature, or about which one of the parties has a reasonable expectation of confidentiality, preserves such character both in proceedings before courts and quasi-judicial bodies in the Philippines. Once issued, confidentiality orders are "immediately executory", even though they can be appealed. Pending appeal, confidentiality orders remain in effect as their application cannot be enjoined (Rule 10.9). Additionally, courts may impose "proper sanctions" for failure to comply with their contents (Rule 10.10).

In general, court orders are efficient instruments to protect confidentiality of arbitration. Their advantage hinges in the authority of courts to enforce them on the parties. Asking for confidentiality protection from courts rather than from arbitrators (when those are not functus officio) may avoid potential challenges to jurisdiction and can save time. On the downside, giving courts more leeway may run the risk that their decisions will not be entirely appropriate for the particularities of every arbitration. Yet, the mechanism envisaged by the Philippines Supreme Court, when read together with the arbitration-friendly legislation adopted by Congress, seems to provide a workable balance. Supporters of confidentiality in commercial arbitration might be pleased to hear that.

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