CONFIDENTIALITY: Not To Be Overlooked When Drafting the Arbitration Clause

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Over the years, many arguments have been made for what are truly the benefits of international arbitration over local litigation. There are many factors that are listed and ensuing arguments over their continued veracity. Complaints are launched about whether such factors truly remain a benefit (the largest and most obvious one which comes to mind is costs, but that horse has been beaten enough).

I attended the local Netherlands Chapter meeting for the Chartered Institute of Arbitrators on Tuesday evening in The Hague. I will not provide a recount of this meeting with its intriguing presentation from Peter Rees, Legal Director of Royal Shell plc as the Paris Journal of International Arbitration will no doubt do an excellent job in their upcoming report on the event. In any case, I would like to explore one topic – confidentiality – which has been inspired by Mr Rees' remarks.

When new to arbitration, I was also convinced that confidentiality was a true hallmark of the benefits which international arbitration offers. Over time, with experience and increased knowledge I learned – is that truly so? Some jurisdictions protect confidentiality within dispute resolution, true. Yet, confidentiality of the proceedings or even the very existence of the arbitration itself may not automatically be protected. Mr Rees pointed out (1) that Australia was an example of a jurisdiction getting away from this protection, and (2) general counsel WANT this protection, especially in industries in which a dispute may arise in one part of the world between businesses while in another part of the world amiable and profitable projects are still ongoing. These parties do not want their dirty laundry aired.

Most arbitral institutions do indeed somehow address confidentiality in arbitration, but either they simply encourage the tribunal to respect the confidentiality of sensitive information or perhaps require the parties to, very few have an all-encompassing, mandatory confidentiality provision; Although, the LCIA does appear to have such a clause (see LCIA Arbitration Rules Clause 30). Also note that the 2012 ICC Arbitration Rules Article 22 authorizes the tribunal to "take measures for protecting trade secrets and confidential information", but it is not compulsory. This does not mean that in practice tribunals do not strive to protect the privacy of the parties, but there is often not a concrete protection already in place.

Moreover, key jurisdictions' arbitration acts also vary dramatically. The US Federal Arbitration Act does not address confidentiality, although courts generally recognize this as important to arbitration. The United Kingdom courts do generally also protect the privacy of the proceedings and associated documents; however, other countries grant no such confidentiality assumption without a specific

provision for confidentiality in the arbitration agreement. Even though this is not a guarantee, it is worth including confidentiality protection in the arbitration clause. As Mr Rees noted, in-house counsel take risks and sometimes that means a tighter arbitration clause even when they do not know yet the circumstances which may lead to a dispute. So for those representing in-house counsel – they want confidentiality protected. For in-house counsel – be alert to the confidentiality protections.