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Confidentiality in International Commercial Arbitration: Truth or Fiction?

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Confidentiality is usually mentioned among the advantages of international commercial arbitration (ICA). The thought that confidentiality is an innate attribute, seems to be an attractiveness considered to choose ICA to settle disputes. For a long time, it did not seem to be questioned that the private nature of the arbitration process also forced the parties to maintain confidentiality. However, since certain judgments were issued in some countries from the mid-1980s that held: (i) that confidentiality was not an essential attribute of arbitration (*Esso and others v. Plowman* (1995) 128 A.L.R. 391 —High Court of Australia), (ii) that there was no general principle of confidentiality (*U.S. v. Panhandle et al.* (1988) 118 F.R.D. 346 (D. Del) —in United States), or (iii) an implied duty of confidentiality in ICA (*Bulbank v. A.I. Trade Finance* (2000) The Supreme Court of Sweden, case T1881-99), it was evidenced that the belief about confidentiality in ICA was not universal.

When reviewing the comparative law, it is noted that there is no uniform approach on the subject but instead significant differences, since many national legislations do not regulate confidentiality at all, other countries mention it in a very general way, and exceptionally some statutes contain broader regulations. Diversity is so great that even where it is recognized, there are huge differences about its content and scope.

So, it is not surprising that many commentators reject the existence of an implied confidentiality duty in ICA. The truth is that confidentiality in ICA can be misleading, to the point that it has been said it is a "myth" (*See* J.C. Fernández Rozas, *Trayectoria y contornos del mito de la confidencialidad en el arbitraje comercial*, 2(2) Arbitraje – Revista de Arbitraje Comercial y de Inversiones 335, 335-378 (2009).

Confidentiality in National Legislations

Confidentiality in ICA is not protected in most countries, which may be due to the fact that the UNCITRAL Model Law on ICA followed in whole or in part by many countries, contains no provision in this regard. In contrast, the laws of New Zealand, Peru, Scotland and Australia have meticulous regulations on confidentiality.

The situation varies among the countries usually chosen as ICA seats. For instance, although there is no statutory regulation on confidentiality for ICA in Great Britain, there is an important development in case law to protect confidentiality. In the United States, the Federal Arbitration Act

and the Uniform Arbitration Act adopted as a model by most States, do not impose confidentiality requirements. In France, a legal amendment of 2011 established the duty of confidentiality for domestic arbitration, but not for ICA unless the parties have agreed to it.

Confidentiality in Arbitration Rules

Many arbitration institutions regulate confidentiality, but mainly as a duty of the arbitrators and the staff of each center. Some rules are more detailed or there are Codes of Ethics for arbitrators, but they do not always establish a duty of confidentiality for the parties. This is the case with the ICC Rules, whose article 6 of Appendix I, and article 1 of Appendix II, only impose duties on arbitrators and the staff of the International Court of Arbitration, but not on the parties, although article 22.3 authorizes the Arbitral Tribunal to make orders concerning confidentiality upon the request of any party. Similarly, article 37.1 of the ICDR rules of the AAA only imposes duties of confidentiality on arbitrators and Administrator and article 37.2 establishes that the tribunal may make orders concerning confidentiality; in addition, there is a Code of Ethics with provisions on confidentiality for arbitrators that applies to both domestic AAA arbitrations and international ICDR arbitrations.

In contrast, article 30 of the LCIA Rules regulates the duty of confidentiality in a well-defined manner. The UNCITRAL Arbitration Rules do not mention the subject, although article 34.5 seems to recognize an implicit confidentiality of the award by requiring the consent of both parties so that it may be made public.

Personal and Material Scope of Confidentiality

The discussion is not limited to whether or not there is a duty of confidentiality, because even where the duty is recognized, its content and scope vary. Thus, among the people who could possibly be subject to a confidentiality duty, we find the arbitrators, the staff of the arbitration institutions, secretaries, witnesses, experts, court reporters, translators, interpreters or other people involved in the arbitration, the parties and their representatives and advisors.

The material scope could cover from the fact of the very existence of the arbitration, to the pleadings and memorials of the parties, the documents produced or other evidence such as witness statements or experts reports, the award and other arbitration decisions, as well as information contained in such filings.

The information contained in the arbitration filings can be critical, since it can be, for example, sensitive commercial information such as profit margins, production costs, pricing policies, know-how or trade secrets, the disclosure of which could harm one or both parties involved in an ICA. It could also expose the financial situation of a company or the existence of a defective product, situations that could compromise the image of a company in front of the public and favor competitors.

Absolute Confidentiality Does Not Exist: The Exceptions

A request for annulment, or the request for recognition and enforcement of an award issued in an ICA, are legal actions processed in courts, and in such cases the confidentiality —if any— has to yield, and the award and all information contained therein become public. Something similar happens if judicial assistance is required to request or enforce interim injunctions in an ICA. These situations are called *natural* exceptions to confidentiality.

Also, one or both parties may be legally bound to disclose information related to the arbitration, for example, at the request of some regulatory authority (in banking, securities, or insurance matters), or by a tax, criminal or judicial authority. In these cases, we are before exceptions to confidentiality due the *public interest* that are imposed over the private interest of the parties, although they could be interested in keeping the arbitration away from the public sphere.

There are other circumstances that do not fit with the inevitable situations described above, but some legislations, arbitration rules, or case law in some countries, have also admitted as exceptions to the duty of confidentiality. This is the case, for example, when disclosing the existence of arbitration is reasonably necessary to protect the legitimate interests of one of the parties vis-à-vis third parties, or to protect or enforce a right against a third party acting as a plaintiff or defendant, which has been qualified as a matter of procedural public order. It has also been considered that there is no violation of the duty of confidentiality if certain information related to the arbitration is communicated but there is a legitimate reason to do so. Likewise, the right of certain interested third parties to know the existence and outcome of the arbitration has been recognized, such as a parent company, shareholders of a company, corporate auditors, an insurance company, and even an interested party in acquiring a company that requires a due diligence.

Among interested third parties against whom a party may have a legitimate need to disclose the existence of an arbitration, an ICC publication mentions the case of a sub-contractor, who would be entitled to know the terms and circumstances of an arbitral dispute between the main contractor and the owner of the works (*See* Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* 312 (Oxford/ICC, 3rd.ed., 2000). *A fortiori* —we add—, the owner of the works would have the right to know about an arbitral dispute between his contractor and a sub-contractor. In these cases, the exception seems to be justified in the fact that they are linked contracts that, although they are independent contracts themselves, are closely connected by sharing some degree of identity in the object or cause (*See* J.O.Rodner, *Los Contratos Enlazados – El Subcontrato* 35 (Academia de Ciencias Políticas y Sociales, 2nd.ed., 2013).

Hence, unless explicitly forbidden by the applicable legislation or arbitration rules, or by agreement among the parties, the parties may disclose details of their own arbitration, including to interested third parties, if there are legitimate reasons to justify that they are acting in good faith.

Conclusions and Recommendations

In matters of confidentiality, the only thing that tends to be recognized almost unanimously in national legislations or in the arbitration rules regarding ICA, is the duty of confidentiality of the arbitrators in the performance of their tasks, but not of the parties or other people involved in the arbitration proceedings. That is why arbitrators in ICA usually promote the inclusion of an express agreement about confidentiality among the parties when establishing the bases of the arbitration procedure, commonly called Terms of Reference.

The diversity is so great that even in cases where the applicable rules recognize the duty of confidentiality, bounded people and the protected contents also vary, which indicates that there is no presumption of confidentiality in ICA or at least there is no general principle on the matter.

That is why those interested in protecting their ICA disputes from public dissemination or in avoiding potentially unfavorable or harmful publicity, should verify the applicable law regarding confidentiality, since depending on the circumstances of each case and the agreement entered into

by the parties, it could be the law applicable to the arbitration agreement, the law of the contract, or the law of the seat of arbitration. In any case it is still advisable to include express provisions in the arbitration agreement that deal with confidentiality.

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