Kluwer Arbitration Blog

Confidentiality v. Transparency in International Arbitration – A Budapest Conference Recap

Richard Schmidt (SMARTLEGAL Schmidt & Partners) · Thursday, July 6th, 2023

A pioneer in the region of Central and Eastern Europe (CEE region), the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (HCAC) signed a partnership agreement with the Paris-based legal-tech start-up, Jus Mundi, allowing for the online accessibility of anonymized Hungarian arbitral decisions in English. Since the issue of publication of commercial arbitral awards puzzles the arbitration community worldwide, the two parties and the Hungarian Arbitration Association (HAA) decided to organize an international conference on 4 May 2023 in Budapest around the competing principles of confidentiality and transparency. This post summarizes the key takeaways of this event.

Various Approaches to Confidentiality and Transparency

In her opening remarks, **Veronika Korom** (ESSEC Business School), the President of the HAA, highlighted that confidentiality and transparency are one of the key issues in which commercial arbitration and investment arbitration take a diametrically opposed approach.

While in investment arbitration the publication of arbitral decisions is the rule, it has been rather the exception in the field of commercial arbitration, primarily because of the principle of confidentiality, a fundamental distinctive feature of arbitration.

Giving the first keynote speech, **János Burai-Kovács** (BPSS), the President of the HCAC, underlined that unlike in many jurisdictions around the world where legislators remained silent on the problem, the Hungarian Arbitration Act expressly addresses this issue since 2018.

According to the Hungarian *lex arbitri*, the anonymized and searchable extract of arbitral awards, and jurisdictional decisions and orders terminating the arbitral proceedings rendered under the auspices of the HCAC shall be published on the website of the HCAC within 6 (six) months as of the rendering of the decision. The partnership agreement with Jus Mundi, enabling the publication of HCAC awards in English, will hopefully give further impetus to this development.

In his keynote speech, **Jean-Rémi de Maistre**, CEO and Co-Founder of Jus Mundi, underlined that they try to reconcile these competing values by entering into partnership agreements with arbitral institutions and other stakeholders.

He also attired the attention to the exponentially growing number of commercial arbitral awards disclosed on Jus Mundi: in the post-2020 period ten times more commercial arbitration awards have been disclosed on the platform than ISDS awards, and nowadays the overall number of commercial arbitral decisions available on Jus Mundi significantly outweighs the number of ISDS and inter-State awards. These figures are hardly surprising, especially if we recall that on a global level far more commercial disputes are decided via arbitration than investor-State disputes.

Confidentiality v. Transparency in Commercial Arbitration

After the keynote speeches, **Georgios Andriotis**, the director of legal publishing at Jus Mundi, opened the first panel discussion around the competing principles of confidentiality and transparency.

The main arguments for transparency according to **Reinmar Wolff** (University of Marburg) are the development of arbitration law, the increase in quality of arbitration awards, and the marketing of arbitration as an alternative dispute resolution method.

In his opinion, besides the confidential nature of arbitration, the main argument against the publication of arbitral awards is the cost of publication, because anonymization can consume considerable human resources.

Emphasizing that he is not against transparency in principle, **Philippe Cavalieros** (Simmons & Simmons) shared his strong reservations in relation to the publication of arbitral awards in commercial arbitration.

He disputed that the publication could efficiently contribute to the development of arbitration law, because there is already a huge body of jurisprudence and legal literature available in the field of arbitration, so the publication of awards does not have a substantial added value to the development of law nowadays. Furthermore, various arbitral institutions have different policies, therefore full transparency is not an achievable dream.

In addition, many users choose arbitration instead of state courts because of confidentiality, as **Alma Forgó** (Airbus) pointed out. She also stressed that, unlike in investment arbitration where transparency can be justified by the interest of taxpayers, in commercial arbitration the parties pay for a dispute resolution, while the development of law is not necessarily important to them.

Transparency of Dissenting Opinions – A Delicate Issue

Striking a fair balance between confidentiality and transparency can be even a more delicate exercise when it comes to the disclosure of dissenting opinions, which was the subject of the second panel discussion moderated by **Attila Berzeviczi** (HCAC).

The main question of dissenting opinions is not the “if”, but rather the “how,” according to **Patrizia Netal** (KNOETZL). She stressed that arbitrators ought to have the right to disagree with the majority standpoint of the arbitral tribunal. However, this right should not be misused by breaching the secrecy of deliberations, which must remain confidential.

However, as pointed out by **Paul Kinninmont** (Freeths), in extreme scenarios, for example, when co-arbitrators in majority act in an unprofessional or otherwise improper way (e.g., *ultra petita* decisions), the dissenting opinion may reveal details of the deliberation.

Davor Babi? (University of Zagreb) stressed that the right of an arbitrator to give a dissenting opinion should be conditional upon the signing of the majority award, and in this respect, he referred to the recent change of the Rules of Proceedings of the HCAC from 2023, expressly codifying this principle.

The panelists agreed that, in terms of transparency, dissenting opinions should share the fate of the award, i.e., they should be disclosed to the parties, and in case the award is published, the dissenting opinion should be published too.

Transparency v. Confidentiality and Legal Marketing

The outcome of the transparency vs. confidentiality debate may concern the marketing activity of arbitration practitioners in the CEE region, which was the subject of the third panel discussion, moderated by **Richard Schmidt** (SmartLegal), lawyer and arbitrator, Board Member of HAA.

While arbitrators are generally not bound by domestic bar restrictions on attorney marketing in Hungary, **Péter Köves** (LKT Partners) pointed out that in double hatting scenarios, these regulations must be respected. **Beata Gessel** (GESSEL) confirmed this was the perspective of Polish law as well. She also stressed the importance of creating valuable content by writing articles, case law analysis, etc., while at the same time respecting the clients' right to confidentiality.

Sneha Ashtikar-Roy, the Head of Marketing at Jus Mundi, presented how Jus Mundi and its sister platform, Jus Connect, can contribute to the marketing and networking activity of counsels and arbitrators. She echoed, from a professional point of view, the personal experiences of the other two panelists that parallel marketing strategies, i.e., law firm and arbitrator marketing, usually strengthen each other.

All panelists agreed that, due to the internet, social media, and legal technology, it is much easier to raise one's profile in the arbitration world nowadays than it was in the 1990s, and that the principle of transparency in the field of arbitration can further increase the efficiency of marketing of counsels and arbitrators.

Takeaways

Based on the inputs of the speakers, the confidentiality vs. transparency debate in the field of commercial arbitration should be resolved by striking a fair balance between these two competing values.

When it comes to the publication of arbitral awards, the solution of the Hungarian Arbitration Act can be a very good example for such a compromise, since through the disclosure of arbitral precedent the case law and arbitration culture can develop. Yet, by way of the anonymization of

arbitral decisions, with the proviso that it is done correctly, the fundamental business interests of the parties are respected.

In relation to the issue of disclosure of the dissenting opinions, the unanimous opinion of the speakers of the second panel is unquestionably right from a theoretical point of view, since it is not easy to find any tenable legal argument for different treatment of dissenting opinions and arbitral awards in terms of transparency. In this respect, the solution of the recently modified Rules of Proceedings of the HCAC, allowing the dissenting arbitrator to give his or her opinion in a closed envelop, which can be opened in a "justified case" when the President of the HCAC so allows, is rather realist than idealist.

While the unequal treatment of arbitral awards and dissenting opinions is hardly supported from the legal point of view, it is true that a third-party control in relation to the disclosure of dissenting opinions can prevent dissatisfied award debtors from using the minority opinion to fuel their arguments in a setting-aside procedure. Therefore, at the end of the day, this Janus-faced solution can contribute to the overall efficiency of arbitral awards.

Finally, finding the middle ground between transparency and confidentiality is the golden rule in the field of arbitrator marketing as well, especially when counsels or arbitrators, being the members of national bar associations, are under the personal scope of domestic restrictions on law firm marketing.

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