CONFIDENTIALITY - THE SHAM OF INTERNATIONAL COMMERCIAL ARBITRATION

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I. Introduction

Arbitration is preferred over litigation as it is widely believed to be speedier, less costly, less adversarial and confidentiality of the arbitral proceedings being a flag-ship feature of arbitration. However most of these advantages are slowly being taken away from arbitration, Professor *Lawrence Boo*[1] while delivering one of his lectures to the students of the National University of Singapore stated "it is not necessarily true, atleast in the present day scenario, that arbitration is quicker, less expensive and less adversarial." I could not agree more with this comment, for very often with institutional arbitration in particular and their lengthy procedural rules, the arbitration proceedings end up being longer and more expensive then litigation and very often parties end up resorting to the Court after battling it out for months and sometimes years before an arbitral Tribunal, hence, turning out to be more expensive as well. I must admit that there is atleast a basis for the argument that arbitration is quicker, less costly and less adversarial, but, it is not within the scope of this article to go into the merits of those arguments. However the claim of confidentiality of the arbitral proceedings which is made my most arbitration institutions so as to invite clients to choose their institution is nothing but a sham, for a close review of the rules of these arbitration centres and the corresponding law that may be applicable, will reveal that confidentiality cannot truly be guaranteed.

1. Professor *Lawrence Boo* heads The Arbitration Chambers, Singapore, since it's founding in 1996. He leads the teaching of international commercial arbitration at the faculty of Law, National University of Singapore 1994. see- http://www.arbiter.com.sg/Index_About_Us_Lawerence_Boo.html

Part I of this article questions the veracity of the claim of confidentiality made by arbitration institutions by critically analysing the rules and laws of the most prominent centres for arbitration and thereby justifying my comment that the claim of confidentiality is nothing but a sham.

Part II of this article systematically identifies the potential candidates who may breach the obligation, duty or requirement of confidentiality and also suggests a suitable remedy for each category of persons by proposing to impose sanctions particular to each category of persons and custom made to each situation.

Part III of this article proposes the inclusion of the requirement of confidentiality in the UNCITRAL Model Law and the UNCITRAL Rules coupled with the corresponding sanction for the breach of this requirement and a change to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) to compliment the inclusion made in the UNCITRAL Model Law and the UNCITRAL rules of arbitration.

PART I

(A) UNCITRAL Model Law and the UNCITRAL Rules of arbitration - The United Nations Commission on International Trade Law created the UNCITRAL Model Law so that States would adopt the same into their legal systems which would result in the uniformity of the law of arbitral procedures, hence setting the standards for States to follow. Given the fact that the UNCITRAL Model Law has taken the responsibility to lead the way, what is evident is the conscious effort not to impose a duty of confidentiality on any person involved in the arbitration

proceedings, this, even after the amendments made in 2006. Now it could not be that the topic of "confidentiality" was not brought up while the law was being discussed and drafted, for it is to be noted that various experts in the field of arbitration and arbitral institutions were consulted in the making of this law. It would be a fair assumption, that; the drafters in all their wisdom realised that confidentiality cannot really be guaranteed and hence decided not enter into this messy affair. Now they should be admired for their honesty but criticised for their timid approach to the issue, for not being creative in designing the law in a manner which would not only impose a duty of confidentiality on all the persons involved in the arbitration process, but also ensure its success by imposing sanctions for the breach of the duty of confidentiality.

It could also be that the drafters in being true to their goal of having as less intervention by the Court as possible have left out the requirement of confidentiality, for in order to ensure confidentiality you may need the intervention of the Court in some instances, which I have addressed in this paper at a later stage. It seems like the drafters missed a trick, for many parties chose arbitration over litigation for the sole purpose of confidentiality, hence if the parties were to choose between no Court intervention and no guarantee of confidentiality on one hand and minimal Court intervention and guarantee confidentiality on the other, I believe 9 out of 10 would chose the latter. Further, the Court intervention would act as a deterrent for the breach of the requirement of confidentiality and in most cases would not be resorted to. The above comments hold good for the UNCITRAL Rules of Arbitration as well, for even in the rules there is no express mention of the requirement of confidentiality.

(B) The International Arbitration Act (CAP 143A) of Singapore – The International Arbitration Act has more or less followed the footsteps of the Model Law with regard to confidentiality. It only makes a mere mention of it in two places, one being in Part II, Section 23, and what worries me about this section is that there is no requirement on the Court to conduct Court proceedings in private, the title of Section 23 reads "Restrictions on reporting of proceedings heard otherwise than in open Court" thereby it means if the Court decides to hold proceedings in private, only then will the provisions of this section apply. Further, Section 23 does not give binding directions to the Court to keep all matters of the arbitration proceedings confidential, the Court is given the discretion to decide what information to keep confidential under Section 23(2) and Section 23(4). The only other mention of requirement of confidentiality is to be found in Part II, Section 19(c)(b), which imposes a duty on the confidentiality on officers of an arbitral institution who are appointed by the minister to authenticate the award or the arbitration agreement or to certify copies thereof, now it is to observed that somehow the drafters of this act have successfully crossed a whole list of persons (the Arbitrators, the parties to the dispute, the witnesses and the expert witness) without imposing any duty of confidentiality on them and reached the officers appointed by the Minister. Finally, even if the parties expressly provide of the requirement of confidentiality of the arbitral proceeding in the arbitration agreement, there is no mode of ensuring confidentiality under the provisions of this act.

(C) SIAC Rules of Arbitration (Rev 2010) – The SIAC rules of arbitration have fared slightly better than the IAA of Singapore. Section 35 of the rules covers confidentiality and thankfully imposes a duty of confidentiality on the Arbitrators as well, but leaves out witness, expert witnesses, officers of SIAC, administrators and others who may have access to such confidential information. Further, for any breach of confidentiality by the parties the Tribunal has the power to take appropriate measures including issuing an order or award for sanctions or costs. But what happens when the Arbitrators have

breached the requirement of confidentiality? However unlikely, it seems, it is possible to construct an argument for a ground for setting aside of an arbitral award under the Article 34(2)(iv) Chapter VII of the First Schedule of the IAA or a ground for refusal of recognition or enforcement under Article 36(1)(a)(iv) of the First Schedule of the IAA or under the similar provision (Article 5(d)) in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* as the case may be. The relevant portion of the provision that the party may rely on as a ground for refusal or setting aside is that the "arbitral procedure was not in accordance with the agreement of the parties". But what if the party seeking enforcement of the award itself is the victim of the breach of confidentiality? Hence, it has to be said that the SIAC rules, particularly with regard to confidentiality, have left a lot to be desired.

(D) CIETAC Rules of Arbitration 2005 has included all the possible persons who could have access to confidential information and imposed a duty on them to keep all such information confidential, however there again no corresponding sanctions to this duty and from a plain reading of this article it seems like this article has been included only as a formality. Further there is no mention of the requirement of confidentiality in the Arbitration law of china either.

(E) AAA/ICDR International Arbitration Rules 2009 – Though Article 20(6) of these rules makes a mention on the principles of legal privilege to be taken into account by the Tribunal, it is again of no binding value. Article 34 of the ICDR Rules cover confidentiality a little more significantly than Article 20(6), though Article 34 imposes a duty on the parties, witnesses, Arbitrators and administrators to maintain confidentiality, it fails to mention the remedy for the breach of this duty, hence, it is to be assumed that recourse has to be sought by bringing the breach to the notice of the Tribunal, hence this falls in exactly the same situation as the SIAC Rules and thus carries with it the same problems.

(F) The Arbitration Amendment Act of 2007 of New Zealand has taken a giant leap towards covering confidentiality in a more wholistic manner. This act has inserted Sections 14 to 14-I solely for the purpose of addressing the need for confidentiality of the arbitration process, some notable characteristics of these provisions are, firstly, the inclusion of Section 4 which clearly defines what amounts to confidential information in relation to arbitral proceeding, secondly, Section 14 makes these provisions applicable by default, hence these provisions will not apply only if the parties expressly agree in writing that they should not apply. This is a noticeably different approach when compared with the *International Arbitration Act of 1974 (taking into account amendments upto Act No.5 of 2011 of Australia.* Where the default position taken here is that the provisions relating to confidentiality (covered under Section 23(c) to 23(g)), shall not apply unless the parties expressly opt-in for them to apply. In my view it is a wrong approach taken by the IAA of Australia, for parties to a dispute would be under the impression that the arbitration proceedings are confidential and hence may not even be aware of such requirement of opting-in only to be found wanting at the time when the dispute arises.

Finally, with exception to the notable differences between the New Zealand and Australian arbitration acts brought out here, both are similar with when it comes to confidentiality, with the New Zealand act covering confidentiality in a little more detail. However the Arbitration Amendment Act of 2007 of NZ has made a bigger blunder than the IAA of Singapore, for Section 14(f) of the NZ act says – "*Court proceedings under Act must be conducted in public except in certain circumstances*" I fail to understand the underlying reasons for the inclusion of this provision for it has undone all efforts towards ensuring some degree of confidentiality. I say a bigger blunder than the IAA of Singapore for as mentioned earlier, that under Section 23 of the IAA of Singapore, there is no requirement on the Court to conduct

Court proceedings in private, the title of Section 23 reads "Restrictions on reporting of proceedings heard otherwise than in open Court". However the Arbitration Amendment Act of New Zealand by virtue of Section 14(f) has gone one step further and against the interests of confidentiality and directed the Court to hold all proceedings in public subject to the exception laid down in 14(f). *Note – There is no such provision in the IAA of Australia.*

Even in view of the detailed provisions laid down the arbitration acts of New Zealand and Australia, the nagging questions that still arise and refuse to be answered are, what are the sanctions imposed when an Arbitrator, party to the dispute, witness, officer of an arbitral institution, administrator and or expert witness breaches the rule of confidentiality?

Though the NZ and Australian arbitration acts have provided directions to the Court and the arbitral Tribunal to conduct arbitral proceedings confidentially, these directions are not coupled with sanctions.

I have not put forth a detailed review of the ICC rules of arbitration and ACICA rules of arbitration, for they have similar shortcomings to some of the rules mentioned earlier and neither of them provide for sanctions to ensure confidentiality, what is notable though is that the ACICA rules of arbitration by virtue of Article 18 lays the liability of maintaining confidentiality by the witness on the party who calls the witness, which in my view is a novel provision. Finally to be brief, the ICC Rules of Arbitration 2012 by virtue of Article 6 to Appendix 1, in my view only makes a declaratory statement on confidentiality with no real binding effect, it also touches upon the subject of confidentiality under Articles 20(7) and 22(3) where, both articles use the word "may", for example - the arbitral Tribunal "may" take measures for protecting a trade secret, again leaving it to the discretion of the Tribunal.

Thereby after a review of some prominent arbitration laws and rules I have portrayed why confidentiality cannot truly be ensured. Hence any claim of ensuring confidentiality, which most arbitral institutions proudly make, is nothing but a sham.

PART II

In this part of the article I systematically identify the persons who may breach the rule of confidentiality, coupled with a proposed remedy for every category of persons and ever type of breach.

1. Breach of confidentiality by the Arbitrator.

The apt place to have found an answer to this would have been the IBA rules of ethics for international Arbitrators; but even the IBA rules have not deliberated on this topic effectively. Though there is a small paragraph (Paragraph 9) in the rules of ethics for international Arbitrators, it is of no real substance. So it would be an appropriate starting point if the IBA comes out with a set of standards to be followed by Arbitrators with regard to confidentiality.

The remedy I propose is for every arbitration institution to constitute a panel/ board of 5 members who shall be of high repute and have expertise in the field of arbitration, solely to deal with cases of misconduct of Arbitrators on the panel of that institution and whenever an Arbitrator is accused of a breach of confidentiality this panel/board should have the authority to decide whether there was a breach of confidentiality by the Arbitrator or not and if found guilty, the Arbitrator shall be removed from the panel of Arbitrators of that institution and a fine may also be imposed depending on the nature of breach, alternatively a ban may be imposed on an Arbitrator from listing himself in any arbitral institution for a period that may be determined by the board depending on the nature of the breach.

2. Breach of confidentiality by a party to the dispute.

(a) *Breach of confidentiality by a party while the arbitral proceeding are still going on.*

Where a party to the dispute breaches the rule of confidentiality, the arbitral Tribunal should have the power to take appropriate measures in the form of an award for sanctions or costs or any other measure it may deem fit. Similar to Section 35.4 of the SIAC rules of arbitration.

(b) *Breach of confidentiality by a party after the award is made by the arbitral Tribunal.*

1.1. *Where the breach is by the party in whose favour the award was made.*

In Scenario 2(b)(1) it shall be a ground for setting aside the arbitral award and a ground for refusing the recognition and enforcement of the arbitral award. I have proposed the relevant additions to the UNCITRAL Model Law and the *Convention on the Recognition and Enforcement of Foreign Awards* in Part III of the article.

(c) *Breach of confidentiality by a party when the award is already enforced, irrespective of whose favour the award is given in.*

The party may approach the Court, the Court may issue a fine and or damages as it deems fit, but in no case shall the fine be less than 20% of the arbitral award or 20,000 U.S. Dollars, whichever is more. The party may seek recourse against this breach either in the Court where the arbitral award was given or in the Court of which the respondent is a resident. Alternatively the party could seek recourse by filing an application with the board/panel mentioned in Part-II(1), however the rules of the arbitral institution should provide for such recourse.

3. Breach of confidentiality by the representatives or witness of one party where the arbitration proceedings is still going on.

In such a case the party calling such a representative or the witness shall be liable for the breach of the rule of confidentiality by the representative or the witness. Hence the provision of Part II(2)(a) of this article shall apply, as if, the party himself committed such a breach of confidentiality.

4. Breach of confidentiality by the representatives or witness of one party where the arbitration proceeding has been terminated.

The provision or Part II(6) shall apply for this scenario. The reason for laying down separate provision for a breach of confidentiality during the arbitral proceeding and after its termination is because it is not practical for the party who relied on these witness to constantly monitor them even after the arbitral proceedings has come to an end.

5. Breach of confidentiality by an officer of the arbitral institution, administrator, interpreter or any other person who has access to any confidential information of the arbitral proceedings by virtue of his or her employment in the arbitral institution.

In my view it is best that, the breach mentioned here should be dealt with by the board/panel mentioned in Part II(1) for it would provide for a speedy remedy and also the board of that institution would have easy access to any evidence if need be. However, again the relevant provisions to this effect should be incorporated into the institutions rules. Further in all cases where the panel finds that any officer, administrator or any employee has indeed breached the rule of confidentiality, there shall be removed/dismissed from there office and also be imposed a fine and or damages to the aggrieved party to an amount the board determines fit depending on the nature of the breach. In no case shall the fine be less than 20,000 U.S. Dollars.

6. Breach of confidentiality by the interpreters and expert witnesses

The aggrieved party may approach the Court and if the Court finds that there has been a breach of the confidentiality by an interpreter of expert witness, the Court may

award damages to the aggrieved party and also impose fine of not less than 20,000 U.S. Dollars.

Burden of proof – In all cases the burden of proving that there has been a breach of confidentiality lies on the party alleging the breach and the proof shall be beyond reasonable doubt.

Waiver of right – In no case shall the party seek recourse under these provisions after 2 months from when the breach took place or 2 months from when he or she should have become aware of the alleged breach.

PART III

Proposed changes to the UNCITRAL Model Law, UNCITRAL Rules of arbitration and to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. In this part I did not have to come up with new self-designed laws but just had to put together the best and most suited provisions from the most recent amendments to the existing arbitration laws.

1. Amendments proposed

(a) Under Article 2 – "Definitions and rules of interpretations" of the UNCITRAL Model Law, add Section 4 of the Arbitration Amendment Act 2007 of New Zealand, which defines confidential information in detail.

(b) Insert Article 33 of the CIETAC rules of arbitration after Article 27 of the UNCITRAL Model Laws, I use CIETAC rules for though the CIETAC rules of arbitration lacks sanctions it is the only institution that covers all possible candidates who could breach the rule of confidentiality. Further, I am aware that the CIETAC rules are rules and not law, but it fits perfectly into the scheme of this proposal. Finally replace the word CIETAC with "this institution" in the Article 33.

(c) Once Article 33 of CIETAC is inserted below/after Article 27 of the UNCIRAL Model Law, insert Sections 14 to 14-E of the Arbitration Amendment Act of 2007 of NZ, however replace the word "High Court" with the word "Court" in 14-E for the UNCITRAL law is meant to have a universal application and hence the word "High Court" may create problems due to the difference in Court systems between civil and common law countries. Note – I have not included Sections 14-F to 14-I for reasons mentioned earlier. The corresponding provisions of the IAA of Australia shall replace the provision of 14-F to 14-I.

(d) Insert the sanctions mentioned in Part II of the article after making the necessary changes if so desired.

(e) Finally the UNCITRAL Model Law should include a breach of confidentiality by the party seeking enforcement of the award as ground available to the party resisting the enforcement, for refusal of recognition and enforcement of the arbitral award, a similar ground should be reflected in the grounds for setting-aside of the arbitral award and also as a ground for refusal for recognition and enforcement of a foreign award in the *Convention on the Recognition and Enforcement of Foreign Awards* (1958).

I think it is clear by now what would be the required changes in the UNCITRAL Model Rules and hence I do not want to be repetitive and mention most of the required changes again.

Conclusion

Confidentiality is one of the key reasons why parties resort to arbitration and if arbitration as dispute resolution process is to gain credibility and popularity in the long run, it would have to ensure confidentiality. I have portrayed through this article that confidentiality cannot be guaranteed under the current set of arbitration rules and laws. However, I have also shown the way for moving towards the goal of ensuring confidentiality. Of course my proposal and suggestions would come with their own loop holes and short comings, but it provides for a good starting point.