STUDY ON THE TRANSPARENCY IN THE INTERNATIONAL ARBITRATION PROCEEDINGS

Written by ***Shuyi Xu***

3rd Year LLB Student, Guangdong University of Foreign Studies, Guangzhou, China

ABSTRACT

Keeping a balance between transparency and confidentiality is essential for the justice and efficiency of international commercial arbitration. This paper attempts to address the transparency required of international arbitration proceedings from three perspectives: evidence disclosure, third-party participation and making arbitration awards public. It argues that any disclosure of evidence shall be limited to those pertaining to public interests or to satisfy the public interests, and the third-party participation should also satisfy three criteria. Besides, the manner and degree of the disclosure of arbitration awards should be considered to balance the transparency and confidentiality.

Keywords*:* International Commercial Arbitration; Transparency; Public Interests

ISSN 2581 3382

INTRODUCTION

As the institutional connotation of the principle of transparency in international investment agreements has been greatly expanded, the transparency reform of international commercial arbitration should also be put on the agenda as soon as possible to meet the needs of international commercial development. How much transparency should international commercial arbitration procedures require? To what extent should the information be disclosed? Whether third-party participation is required or not? How to conduct public adjudication? This paper attempts to answer these questions and analyze the importance of transparency reform in international commercial arbitration as well as the balance between transparency and confidentiality concerning public interests.

DISCLOSURE OF EVIDENCE AS AN IMPORTANT ELEMENT FOR TRANSPARENCY

The arbitration tribunal has the power to order evidence discovery. During the arbitration proceedings, it can request the parties to produce documents and evidence within a specified period and evaluate the admissibility, relevance, and significance of the evidence presented. Evidence disclosure is the same as other procedural matters in arbitration, which means that parties' autonomy should be given priority. At the same time, the distinctions between arbitration and litigation should be borne in mind. One of the reasons why most people tend to settle commercial disputes through arbitration instead of litigation is that the parties have greater autonomy in arbitration. To exploit to the full its favorable conditions, the process of specific application does not have to be as strict as that of litigation. For instance, the arbitration tribunal can either order the parties to disclose evidence on its initiative or order the other party to disclose evidence upon the application of one party.

Besides, great discretion on the premise of respecting the parties' agreement should be given to the arbitration tribunal so that the parties can have full autonomy to agree on the means of dispute resolution. Subject to the agreement of the parties, the arbitration tribunal may decide on all matters of procedure and evidence, including deciding whether or not to disclose, what documents to disclose and when to disclose. At the same time, the admissibility, relevance and

ISSN 2581 3382

importance of submissions by the parties and the time and manner of exchange of materials, etc., can also be decided by the arbitration tribunal.[i]

What's more, besides respecting parties' autonomy, the arbitration tribunal should safeguard the order and efficiency of arbitration with its authority. In other words, in the conflict between private interests and public interests, the arbitration tribunal must stand in the public interests. For example, sometimes, in order to protect their interests, the parties may not obey the instructions of the arbitration tribunal on evidence discovery and refuse to provide the documents requested by the arbitration tribunal, which leads to disputes inevitably. On the one hand, differing from litigation, the arbitration tribunal does not have a judicial compulsion. On the other hand, there is no written law forbidding the arbitration tribunal to impose sanctions. In this situation, we should consider the public interests involved in the evidence. Take public privilege as an example, public privilege refers to the right to be exempted from testifying because the disclosure of relevant information will lead to damage to the national interests or public interests. International commercial arbitration also includes confidential evidence that is particularly sensitive to international institutions. At present, the arbitration tribunal has no right to make adverse presumptions against the parties who refuse to cooperate with the other party's information inquiry. Therefore, a more feasible procedure is that one party requests the arbitral tribunal to order the other party to supplement the documents that were first questioned but not submitted in time.[ii]

Acknowledgedly, the privacy of arbitration procedures is one of the most essential considerations for parties involved, but we should not overlook the involvement of public interests as well. As Zhao Hui noted, "the transparency reform is to ensure the impartiality of the arbitration. The main purpose of disclosing information in the distribution of substantive information is to serve a specific regulatory purpose. Hence any disclosure of confidential information in the arbitration shall be limited to the specific information necessary to protect or to satisfy the public interests."[iii] Therefore, the key to establishing limited information disclosure in international commercial arbitration is to clarify the scope and degree of information disclosure. Due to the confidentiality characteristics of international commercial arbitration, the disclosure of information should be strictly limited, and the personal information of relevant parties and the information involving business secrets of the relevant

ISSN 2581 3382

parties should be more confidential. Thus, in order to achieve fairness and justice, it is indispensable to allow the existence of confidentiality exceptions under certain circumstances. What should be particularly mentioned is that complete disclosure is impossible. The idea of full transparency is seductive but unpractical in that the arbitration tribunal should not ignore the situations where confidentiality should be given priority over transparency and mandatory disclosures. To solve these problems, Avinash Poorooye and Rondn Feehily proposed that the work-product doctrine may be applied to achieve a "judicially enforceable duty of confidentiality."[iv] In this way, the interests of all parties would be balanced before deciding on disclosure issues in cases where confidentiality must be maintained and enforced.

THIRD-PARTY PARTICIPATION AS A FACTOR IMPACTING TRANSPARENCY

From a historical perspective, international investment arbitration originated from international commercial arbitration, and traditional commercial arbitration is characterized by confidentiality as it only refers to the parties' private interests. Whereas, due to the existence of public interest elements, the public demand for openness and transparency is strong in the international investment arbitration between investors and countries so international investment arbitration pioneered the reform in transparency.

At present, with the increase in international commercial trade, countries gradually relax arbitration restrictions in order to promote their economic development. However, as the scope of arbitration expands, more factors relevant to public interests have been involved in the arbitration disputes, and the stakeholders involved in arbitration proceedings are no longer limited to the parties. In many situations, it is also concerned with the interests of a third party. Due to the objective existence of the "third party", tribunals should and must consider the existence of reasonable interests and injuries other than that of the two parties. Therefore, the arbitration procedure must have a certain degree of transparency in circumstances involving the interests of a third party.[v]

Above all, international commercial arbitration should no longer be stuck to the confidentiality of traditional commercial arbitration, but to increase procedural transparency and to allow third parties to participate. "Third-party participation" refers to the participation of a third party, independent of the parties, in any arbitrations or proceedings in its independent capacity by

ISSN 2581 3382

filing a written document or otherwise, in an attempt to have a certain impact on the process and decisions of the arbitration. Notedly, the "third party" here is different from the witnesses or "evidence" provided by one of the parties that appear at the arbitral tribunal. The "third party" here is an independent party that is not controlled by the parties, such as a friend of the court (amicus curiae for Latin) and public participation. Friends of the court usually have professional knowledge in some fields, and submit expert opinions to the court in order to safeguard the public interests, which is helpful for judges to make judgments beneficial to the public interests.

In the arbitration proceedings, the arbitration tribunal can decide discretionarily whether to accept the opinion of its Friends. Nevertheless, when considering the opinions from amicus curiae or other third parties, three criteria should be followed. First, the applicability of the case, that is, whether the subject matter of the case is appropriate to receive the written opinion of an amicus curiae. Second, the content of the opinion of a third party, or the appropriateness of a third party's submission of the written opinion in the case. Third, the submitting procedure of the written opinion of a third party.[vi] It should also be bear in mind that the acceptance of third parties' opinions is a procedural issue instead of implying substantive rights granted to them in order to prevent excessive participation.

Though it is not compulsory to adopt the opinions of amicus curiae, it's undoubtedly that amicus curiae can provide some factual and legal arguments beneficial for tribunal decisions, which eventually help to improve the transparency and justice of the tribunal. To avoid some amicus curiae participating in proceedings with evil intention, it is necessary to restrict the qualification of the third party. Otherwise, third-party participation will be meaningless or even damage the efficiency of the arbitration.[vii] There are several ways to minimize the adverse effects of increased transparency and public participation. For instance, limiting the number of pages and topics would contribute to reducing costs and preventing delays in processing amicus briefs. At the same time, due to the complexity of the issues, institutional restrictions on documentation may not yield the best results, as they would prevent the parties and the tribunal from conducting an in-depth analysis of the case. Thus, tribunals should be given some discretion to determine the limits of placement or to expand institutional limits when necessary.[viii]

ISSN 2581 3382

MAKING ARBITRATION AWARDS PUBLIC AS AN IMPORTANT STEP FOR TRANSPARENCY

As mentioned before, the privacy of proceedings is one important factor contributing to the popularity of international arbitration. In general, arbitral awards are therefore not published and the parties typically sign a non-disclosure agreement. However, when arbitration involves the public interests, such as public health and environmental protection, the nondisclosure of arbitration procedures and relevant documents will reduce the public's trust in the dispute settlement mechanism and lead to the legitimacy crisis of arbitration.[ix]

To avoid the above problems, more and more international commercial arbitration awards have been disclosed in recent years, which is an important achievement in transparency reform. The arbitration awards disclosed can serve as extremely important resources for parties, arbitrators and arbitration institutions. For instance, parties can learn the custom of adjudication from previous cases and select appropriate arbitrators according to their actual needs. Arbitrators, when they are faced with clueless cases, have a choice to refer to and invoke past cases to maintain the continuity and reasonableness of awards. What's more, it will greatly benefit academic research and arbitration practice in the future, which helps integrate theory with practice and promote increased transparency in international commercial arbitration.

The disclosure of arbitral decisions can serve as an additional mechanism to uphold independence and impartiality requirements. The systematic publication of arbitral awards enables the public to monitor the actions of arbitrators by reviewing the legal reasoning in the arbitral awards as well as by reviewing the parties in the dispute. By knowing that the public can scrutinize their decisions, arbitrators would be less likely to engage in conduct that violates the requirements of independence and impartiality. The arbitrator will be more careful when drafting the awards if their names are attached to the awards, which is conducive to promoting justice in international commercial arbitration.[x]

When making the arbitration awards public, the manner and degree of disclosure should be considered to balance the transparency and confidentiality. In this regard, the practice of 2009 AAA International Arbitration Rules can be used as a reference, as suggested by Lin Qimin. According to the Arbitration Rules, the arbitral tribunal must set out the reasons and basis for making the award, and the award should also be filed and graded in accordance with the requirements of domestic law. Besides, the arbitral institution may disclose or otherwise provide the public with edited anonymous names or other details, or decisions and rulings in

ISSN 2581 3382

the course of execution unless the parties disagree.[xi][xii] As for the passive publicity of arbitral awards, they shall be made public in accordance with the domestic company law, securities law, judicial assistance procedure, or judicial proceedings, and the arbitration institution shall publish the contents of its awards.

CONCLUSION

While confidentiality is an advantageous feature of international commercial arbitration, transparency is also an essential element contributing to the justice of international commercial arbitration, especially when public interests are involved. Therefore, it is important to keep a balance between improving its transparency and maintaining its confidentiality. In this paper, I argue that disclosure of evidence is an important element for transparency in international commercial arbitration, but any disclosure of evidence shall be limited to those pertaining to public interests or to satisfy the public interests. Besides, the participation of third parties is a way to enhance the transparency of international commercial arbitration. When considering third-party participation, the applicability of the case, the content of the opinion of a third party, and the submitting procedure of the written opinion of a third party should be taken into account. Moreover, making arbitration awards public is also an important step for transparency, but the manner and degree of disclosure should be considered to balance transparency and confidentiality.

ENDNOTES

Acknowledgement: The author thanks Dr. Deng Zhaoxia, the assistance professor of the Guangdong University of Foreign Studies, for her invaluable comments and suggestions during the completion of this paper.

[i]See Yan Li & Zhang Jian, 'On the Issue of Evidence Disclosure in International Commercial Arbitration proceedings' (2016) 36 (11) Journal of Suihua University, pp 29-33.
[ii]Ibid, p 30.
[iii]See Zhao Hui, 'Research on the Path to Enhance the Transparency of International Commercial Arbitration' (2019) 19 China's Collective Economy, p 109.
[iv]See Avinash Poorooye & Ronan Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) 22 Harv. Negot. L. Rev, p 319.
[v]See Mao Zhiyuan, 'On the Transparency of International Commercial Arbitration Procedure' (2011) 2 Jinling Law Review, p 150.
[vi]See Liu Tianqi, 'Weighing between Confidentiality and Transparency in International Commercial Arbitration' (2016) 11 Legal System and Economy, pp 103-107.
[vii]See Zhang Qinglin, 'On the Third-Party Participation in International Investment Arbitration' (2014) 36(11) Jinan Journal (Philosophy and Social sciences Edition), pp 70-82.
[viii]See Biris Bogdan Ovidiu, 'Advantages and Disadvantages of Transparency and Public Participation in Investment Arbitration' (2018) 12 Rom. Arb. J., p 16.

ISSN 2581 3382

[ix]See Emily F. Ariz, 'Does the Lack of Binding Precedent in International Arbitration Affect Transparency in Arbitral Proceedings?' (2021) 29 U. Miami Int'l & Comp. L. Rev., p 377.
[x]See Mary Zhao, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach' (2019) 59 Va. J. Int'l L., p 213.
[xi]See Lin Qimin, 'Research on the Transparency of International Commercial Arbitration' (2015) 33(06) Heibei Law Science, p 120.

ISSN 2581 3382