

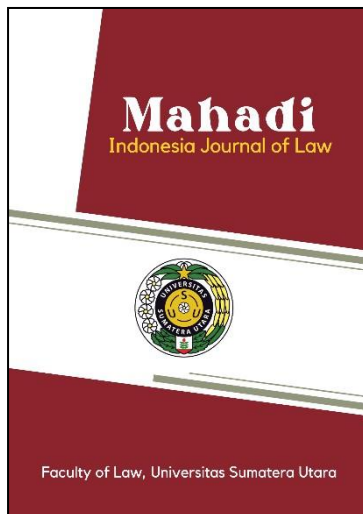


Prospects For Transparency in International Commercial Arbitration (ICA) : Will Indonesia Rise to The Challenge of Introducing Transparency Into It's Arbitration System?

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Abstract

This paper weighs the pros and cons of confidentiality in arbitration and discusses how transparency can enhance the legitimacy of arbitration. Find out how the players can contribute to promote transparency. How arbitration bodies, parties to arbitration, and legislative bodies contribute to promoting predictability and legitimacy in international commercial arbitration (ICA) without sacrificing confidentiality. Explore the possibility of arbitration joining the ICA trend towards transparency. Finally, it discusses the possibility of publishing the full award, and whether Section 69 of the English Arbitration Act could be a better solution to promote transparency and accountability.

Keywords : *International Commercial Arbitration (ICA), Transparency Arbitration System*

INTRODUCTION

This paper aims to review positive moves toward transparency provided by various parties in commercial arbitration (ie, legislators, arbitration parties, and arbitral institutions). Analysing the reasons for the need for transparency, to the point that the publication of the full arbitration award is proposed. Discuss how to promote accountability.¹ It further explains how prospective parties to a dispute may benefit from the publication of an arbitral award and how publication contributes to the development of the arbitration process; International commercial arbitration (ICA) is notable for one of its characteristics, i.e., confidentiality..² It includes the confidentiality of the existence of the proceedings, the issues disputed, the evidence presented, the arbitration hearings, and the arbitration award. In some jurisdictions, parties may obtain confidentiality protections through the application of institutional rules or through the application of national arbitration rules, and whether there is an express or implied in the

¹ Matthew Carmody, 'Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency be Applied to International Commercial Arbitration?' (2016) 19 Int'l Trade & Bus L Rev 96.

² Nigel Blackaby and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press 2015), 124.

arbitration agreement.³ The presumption of confidentiality has only recently been challenged by both academics and practitioners, leading to a lengthy debate about moving away from secrecy and introducing transparency in commercial arbitration.⁴ Despite its advantages, confidentiality in commercial arbitration can be questioned. It is generally not subject to government oversight, and the merits of an arbitration award cannot be challenged. Conflicting arbitration awards may exist for the same or similar disputes using the same or different arbitration rules and/or institutions.⁵ Current arbitration rules provide a very limited solution to this risk.

This paper examines the strengths and weaknesses of confidentiality in arbitration and how transparency strengthens the legitimacy of arbitration. In the next chapter, we will take a closer look at the availability of transparency in the current ICA practice and the role of various actors in facilitating transparency. How arbitration institutions promote the predictability and legitimacy of ICA while maintaining the confidentiality of arbitrations through the disclosure of arbitrator information, decisions on arbitrator challenges, and publication of redacted awards. In addition, Indonesia's ability to keep up with current transparency trends in the ICA will be examined. Chapter 3 provides for the possibility of publishing the full arbitration award and whether the s. 69 of the English Arbitration Act (EAA) is the solution we sought to promote legitimacy in arbitration.

Confidentiality in Arbitral Rules

Arbitration institutions have different confidentiality rules to protect their users. This includes referee and center authority tasks. Article 30 of the London Court of International Arbitration (LCIA) Rules of Arbitration 2014 articulates general obligations of confidentiality and all arbitrations, including final awards, will be conducted privately and confidentially. However, the award may be published with the written consent of all parties and the arbitral tribunal.

On the other hand, the 2021 ICC Arbitration Rules are silent on confidentiality. The ICC guidelines stipulate that an arbitration award may be made public only with the consent of the parties. In addition, it provides for confidentiality obligations binding ICC members under Appendix I Article 8 regarding the confidential nature of the work of the Court and Appendix II Article 1 about the 'Confidential Character of the Work of the International Court of Arbitration'. Furthermore, Article 26(3) of the ICC Rules provides that privacy in arbitration is strictly guaranteed and that no third party shall be permitted to participate in the hearing unless the consent of the parties and the arbitral tribunal is obtained.

The Singapore International Arbitration Center (SIAC) Rules 2016 provide for complete confidentiality in Rule 39, except where appropriate action is required. The SIAC may also publish its decisions with the consent of all parties to the dispute.⁶

³ Lusungu Mtonga, 'Analysing the Key Rules As Well As the Approach Taken Towards Confidentiality and Privacy in Arbitration' (2021), available at SSRN: <<https://ssrn.com/abstract=3884327>>, accessed 10 July 2022.

⁴ Polo Comoglio and Chiara Roncarolo, 'Pressing the Guidelines for the Publication of Arbitral Awards: Aiming to the Circulation of a Solid Arbitral Case Law' in Alberto Malatesta and Rinaldo Sali (eds), *The Rise of Transparency in International Arbitration: The Case for the Anonymous Publication of Arbitral Awards* (Juris 2013) 1-26, 1-2.

⁵ Stefano Azzali, 'Balancing Confidentiality and Transparency' in Malatesta and Sali (eds), *The Rise of Transparency* (n 4) xix-xxxii, xxv.

⁶ Rule 32.12 of the SIAC Rules 2016.

Why Confidentiality is Desired

Tracing the history of arbitration, its mechanisms were primarily created and carried out by merchants. A major reason merchants have favored resolving commercial disputes is that it is more efficient than resolving them through the cumbersome court system.⁷ However, confidentiality has not been the primary reason for choosing arbitration.⁸ It is the ability to appoint their own arbitrator(s) specialising in the issue disputed. Confidentiality is nevertheless valued by the arbitrating parties and is considered beneficial in protecting their image.

Confidentiality and privacy in arbitration promote effectiveness by enabling parties to arbitrate without intrusion from the media or third parties that could slow down the arbitration process. Parties are more compelled to present arguments and disclose information that facilitates the arbitration process.⁹ The arbitration process becomes more transparent, its identity is threaten as it becomes more like litigation that is not of a confidential nature.. Furthermore, disclosure of any or all of the award increases the cost of the arbitration and slows down the arbitration process as it increases the amount of time it takes to prepare the award.¹⁰

The Need for Transparency in ICA

The assumption of confidentiality is the standard practice in arbitration and was not challenged until the late 1990s. Overturning the implied confidentiality obligations and initiating lengthy discussions on issues of confidentiality and transparency.

As commercial arbitration has been kept secret for so long, it is often referred as closed judicial. The legitimacy of the arbitration has been questioned. The legal validity of the award has deprived the parties of the opportunity to challenge the constitutional award. This ultimately serves as a shield against the tribunal misapplying the law. Concerns about confidentiality are closely related to the rule of law. Subject to an arbitration agreement, which contains confidentiality obligations, the arbitration follows a rules-based arbitration system.¹¹

The public has begun to question the legitimacy of arbitration as an alternative dispute resolution system.¹² Furthermore, Professor Rogers makes an important point in the article.

“If users of international commercial arbitration want to reap the benefits of a rules-based system, they cannot refuse the transparency it provides.” A study conducted by Queen Mary International Arbitration in 2021 found that the indicated a growing need for greater transparency (29%). Parties are seeking more insight into the arbitration body's process and decision-making process. Arbitration trends are changing and are demanding a degree of transparency.

A plea for more transparency also raises public interest debates.¹³ Disputes in investor-state arbitration involve the government, and the public interest is protected by exposing

⁷ ES Wolaver, ‘The Historical Background of Commercial Arbitration’ (1934) University of Pennsylvania Law Review, 133.

⁸ Lo, ‘On a Balanced Mechanism of Publishing Arbitral Awards’ (n 25), 239.

⁹ Elina Zlatanska, ‘To Publish, or Not to Publish Arbitral Awards: That is the Question’ (2015) 81 Arbitration XXX 25-37, 34.

¹⁰ *Ibid*, 32

¹¹ Stefano Azzali n(5), xxix.

¹² Paul Comrie-Thomson, ‘A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitration Awards’ (2017) Journal of International Arbitration 275-302, 279.

¹³ Robert Argen, ‘Ending Blind Spot Justice’ (n 21), 228.

government misconduct. ICA disputes are mainly between companies or individuals. Nevertheless, private disputes can also violate public policy. For instance, public safety and health, environmental protection, etc., are arbitrations between private parties, but should not be confidential. After all, disclosure of any kind of dispute can be very beneficial not only to arbitration rules, but also to legal developments. In this sense, ICA transparency needs careful consideration, however, transparency that fails to consider the autonomy of the parties may lead to a loss of interest in arbitration. In addition, the arbitration process may be hampered because the parties may not be open and reluctant to disclose certain information during the proceedings does not necessarily waive the parties' confidentiality obligations. It is possible to promote transparency while maintaining confidentiality in commercial arbitration. In fact, this is gradually happening in current ICA practice.

METHODOLOGY

This study has several stages that will be used to explain the results of the study. The following is a division made by the author, among others:

1. How different players in ICA contribute to promoting transparency
 - a. Arbitral institution's role in improving transparency in arbitration
 - b. The parties' and legislator's role in promoting transparency
 - c. The potential of Indonesia's arbitration to join the movement towards more transparency
2. The publication of full arbitral awards
 - a. The different views of the publication of full arbitral awards
 - b. s.69 of the English Arbitration Act (EAA) as a solution to promote legitimacy in ICA

RESULT AND DISCUSSION

How Different Players in ICA Contribute to Promoting Transparency

In recent years, there has been a positive move towards transparency in ICA. Arbitration institutions are competing to promote more credible and legitimate arbitration for their users, providing varying levels of insight into their decision-making processes. In addition, ICA transparency comes in many forms, with different agencies and national laws promoting different levels of transparency. This chapter discusses the transparency provided by the current ICA practice.

Arbitral Institution's Role in Improving Transparency in Arbitration

Each arbitration institution maintains data on arbitrations conducted at that institution. The institution publishes an annual report on the general trends of the institution based on the data, including:

1. The arbitrator's duty of disclosure.

Disclosure requirements are case-by-case and should be carefully considered. Non-disclosure is not a disqualification. The Court will consider the circumstances before granting the arbitrator's challenge.
2. Publication of the Arbitrator's Information

Most arbitration institutions publish information about their arbitrators, but as stated in the ICC, they do not provide detailed information about the arbitrator's relationship with the case and its representative parties. To fill the gap, Arbitrator Intelligence will be launched and the first report on arbitrators will be published in 2020. Users can access additional information through Arbitrator Information, which serves as a platform for further arbitration transparency.

3. Decision on the challenge of arbitrators

It is not uncommon for parties to challenge an arbitrator on the grounds that circumstances exist that give rise to valid doubts as to the arbitrator's "fairness or independence." In general, the tests may vary depending on the applicable arbitration rules. The ICC Rule Art. 14(1) allows a party to challenge an arbitrator for "lack of impartiality or independence". With respect to the LCIA Rules, an appeal "will arise where there is reasonable doubt as to the impartiality or independence of the arbitrator.

4. Publication of anonymous arbitral awards

Arbitration institutions have made great efforts to promote transparency in commercial arbitration. We have successfully ensured a satisfactory level of legitimacy in intra-agency arbitration. It successfully fulfills its mission to protect the parties' right to confidentiality in arbitration proceedings while ensuring the necessary level of transparency for the ICA.

Nevertheless, it seems pointless to worry that ICA will lose its appeal if it loses its great qualities. Many people still use arbitration to resolve disputes and welcome the transparency that is emerging in current practice.

The Parties' and Legislator's role in promoting transparency

Bridging the need for transparency while maintaining confidentiality is no small feat. In some cases, the parties may be identified even if the prize is anonymized. Therefore, the current practice is to obtain consent to the publication of the award using only information previously approved by the parties. Parties that agree to publish their awards are certainly contributing to the movement toward transparency.

Because national law is used in arbitration, states are concerned with ensuring that their laws are properly applied. Legislators hope that arbitration awards will be made available for study and will complement their rankings. In addition, national courts can help reduce the cost of publicizing arbitral awards by institutions, as the ICC and Jus Mundi are doing. In this way, legislators have the opportunity to contribute to promoting transparency without infringing on the agency's authority. By joining hands with arbitral institutions, the Court will be able to assemble a thorough body of arbitral awards based in the country.

The potential of Indonesia's arbitration to join the movement towards more transparency

There are several arbitration institutions in Indonesia. The oldest and most commonly used is the Indonesian National Arbitration Board (BANI). Most arbitrations in Indonesia precede BANI. Where the ICC, LCIA, HKIAC and others compete to promote the legitimacy of the institution by providing transparency, such as the publication of arbitrations being conducted at the institution and the arbitration awards compiled, BANI Offers nothing. No

information provided on BANI's Arbitrators, annual caseloads, no platform to provide feedback to the institution. While BANI is strongly holding its confidentiality traits, the Indonesian government has begun to follow the transparency trend by slowly assigning arbitration disputes to designated arbitration bodies based on subject matter. For instance, the recently established Indonesian International Arbitration Center (INIAC) has signed a Memorandum of Understanding (MoU) with Arbitrator Intelligence to promote "more effective, efficient and transparent" arbitration.

The publication of Full Arbitral Awards

Sir Thomas makes the important point that arbitration hinders the development of law, because disputes are decided behind closed doors without appeal and awards are not subject to judicial review. The issue was raised repeatedly not only by Sir Thomas, but also by other experts, as the proposal emerged to publish the full text of the award. However, the proposal has drawn criticism and debate from experts, and is actually seen as causing unnecessary problems in commercial arbitration.

The Different Views of the Publication of Full Arbitral Awards

Current practice in the ICA has promoted transparency at the level of organizational transparency. Especially with regard to judicial information and administrative transparency. Some institutions even offer limited access to arbitration awards. Increased transparency in commercial arbitration is beneficial in many ways. Access to the full arbitration award enhances your knowledge and understanding of the arbitration process. However, some argue that each dispute consists of different facts and different legal norms apply. If no general conclusions can be drawn, could it be a useful guide for providing predictability in arbitration? What experts are looking for about award availability is looking for legal issues. In addition to information from court decisions, arbitrator decisions can serve as a field for the further development of law. It will improve the legitimacy of arbitration and the future users will be able to choose arbitration with more peace of mind. Current users will also receive information as to whether the arbitration will be fair.

This situation begs the question. After all, what is the difference between going to court and going to arbitration if the parties have been stripped of confidentiality? to resolve disputes on camera with an arbitrator? Parties should not be obliged to sacrifice their autonomy for the development of law. However, the fact that arbitration is a legitimate dispute resolution system based on the rule of law is also a valid reason for public interest in knowing the legitimacy of the proceedings.

s.69 of the English Arbitration Act (EAA) as a Solution to Promote Legitimacy in ICA

Arbitration is not regulated by any state and is confidential, so it is safe to say that it is not supervised at all. The award is final and binding, the party loses its right to appeal. The lack of transparency and the inability of parties to challenge an arbitration award cast doubt on the legitimacy of the arbitration.

The UK Parliament provides in Section 69 of the EAA the right to appeal against arbitrations in England and Wales. However, the scope of appeal is severely limited. Many argue that choosing arbitration means that parties are waiving their right to have their disputes

decided by a court, yet the Departmental Advisory Committee on Arbitration Law states that parties can resolve disputes through their choice of law in arbitration is the reason parties choose it. Thus, if the parties are not given an opportunity to appeal, will be stripping their right to have their dispute settled with the correct application of their choice of law should the arbitrator fails to apply the law in a correct manner.

For Article 69 to apply, the parties must first determine whether they wish to exclude the jurisdiction of the courts to appeals on a question of law or whether they wish to include the ability to appeal to the courts on the question of law. S.69 of the EAA is not an overriding rule, and if parties to the arbitration wish to waive their ability to appeal the award, they preclude their right to contest the final award under this section of the agreement. Additionally, Section 69 of the EAA is automatically excluded when a party arbitrates under her ICC Rules, LCIA Rules, and the London Maritime Arbitration Association (LMAA) Rules.

Section 69 is becoming one of the selling points of arbitration in the UK. This section of the EAA received mixed opinions from many experts. The ability to appeal an arbitration award to the rule of law contrasts with the finality of an arbitration award. . However, the availability of s.69 of the EAA strikes a balance between the inability of courts to intervene in arbitration while ensuring that the parties' chosen laws are properly applied. This gives parties the freedom to choose whether or not they want this functionality by specifying it in their contract.

Singapore follows the UK's move by recommending appeal on the question of law in an arbitration seated in Singapore. For the time being, appeals under the law are only possible in domestic arbitration. In international arbitration, awards can only be challenged on the limited grounds of the New York Convention.

However, the possibility of parties appealing means that the arbitration process can become inefficient. The conduct of arbitration does not initially permit legal challenges. The availability of this section will help promote legitimacy in English arbitration. Rather than the confidentiality being compromised by the publication of the award, the parties are better protected by the availability of Section 69 of the EAA. Additionally, you have the freedom to choose to maintain confidentiality or challenge the law.

CONCLUSION

This paper has discussed both the confidentiality and transparency aspects of ICA. Users of arbitration want both transparency and confidentiality, leading to the ongoing debate on the subject. It would be a shame to deprive the world of knowledge about arbitration awards because of their value. On the other hand, parties value confidentiality in arbitration and are not interested in losing it. Overall, the current level of transparency in practice addresses the needs of the parties and the professionals. It's been a long road and the changes that have been made have been big moves since the debate began. Ideally, current transparency practices should be implemented by more arbitration bodies. Concerns that increased transparency will result in users losing interest in arbitration have turned out to be false. Instead, the limited transparency in current arbitrations has increased user confidence in the legitimacy of arbitrations.

Still, given all the discussion and arguments in this paper, it is important to take a step back from time to time and think , is that what users really need? After all, the raison d'etre of arbitration is not to seek the correct application of the law. First and foremost, users want

efficient dispute resolution and the ability to enforce arbitration awards internationally, and their disputes are generally unknown to the public. Wouldn't it be an exaggeration for experts to say that transparency in arbitration is a necessary development of the law unless the users themselves start demanding it? Parties agreeing on a certain level of transparency is what led to the current success in the movement towards more transparency in ICA.

The level of transparency in current arbitration practice can be considered well-developed and applied. It would be ideal if most arbitration institutions follow the steps in promoting transparency.

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