

**Review Article**

## **LEGAL STANCE OF CONFIDENTIALITY IN TRADE ARBITRATION**

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### **ABSTRACT**

Despite comprehensive development of trade arbitration especially in international law, there are still some disputes about some of its features. Problem of legal stance of confidentiality in this kind of investigations is such dispute points where to be legal principle or not rises different scopes and it must have mentioned: it seriously affects trade issue. But in most of related regulations to international arbitration and specially arbitration protocols of WIPO, confidentiality is accepted as a certain principle. In this article, theoretical bases, realm and determinant features and finally, WIPO arbitration approach to this article are evaluated.

**Keywords:** *Confidentiality in Trade Arbitration, Legal Principle, WIPO Arbitration Regulations*

### **INTRODUCTION**

Currently, there are too little international trade contracts can be found where it is not mentioned to refer to arbitration in order to resolve disputes between parties (Skinny, 1989). Actually, the advantages and benefits of arbitration against formal legal trial is in such level that can compensate related difficulties and involvements to application of judges decisions (Habibi, 1999). One of important advantages that arbitration as well as other alternative procedures for dispute settlement such as mediation, negotiation, conciliation and etc. may have is privacy and confidentiality of proceedings flow (Banger, 2001).

Arbitration investigation is intrinsically private and disputed parties principally have not tendency in revealing their provided documents publicly (Lee & Loh, 2008). On the other hand, purpose of being confidential in trade arbitration is guaranteeing that related information to investigation flow not to be revealed (Udobong, 2014). Hence, privacy of arbitration has direct relationship with confidentiality. Because of this reason there is a closed and proximate relationship between disputed parties and member of arbitration board (Redfern & Hunter, 2004).

Current study is specifically seeking to determine accurately and legally this mentioned addressed closure and confidentiality in trade arbitration, in other words clarify “confidentiality” stance in trade arbitration. In this approach, it is necessary firstly; theoretical bases in this context to be assessed and by considering evidence and protocols, dominated and commanding ideas to be determined. Secondly; internal legal regimes and especially international legal regime where apparently and totally at least within domain of international trade have significant developments become distinct. Thirdly, by locating goal of explaining confidentiality stance in trade arbitration at extreme level of accuracy, prominent confinement and sphere of this concept to be determined.

To achieve mentioned objectives, main question to be addressed is whether confidentiality in trade arbitration is accounted as a legal principle or it is based on consensus and law? Or even, may it considered as an exceptionality?

It is known that regarding other alternative approaches in resolving and settlement of disputes such as negotiation, mediation, compromise and etc. there is less doubt and ambiguity and confidentiality in these approaches is a basic and important principle (Burnley & Lascelles, 2004). Despite this fact; since arbitration is accounted as a legal approach to resolving disputes and because of this have kinship with legal investigation, consequently confidentiality context requires to be thought some more than other mentioned alternative approaches. Because of this, it is necessary to answer some marginal questions: First; what are theoretical principles of confidentiality? Second ; how does confidentiality function within

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domains of internal legal regimes and international legal regime? Third; which legal backgrounds are capable to be addressed in order to determine discussion? As we stated, arbitration is one of the most popular approaches in resolving trade disputes and characteristic of confidentiality particularly in intellectual properties law and within international trade is considerable by trader parties of disputes more than before where it seems to consider this issue as a certain subject and prepositioned one at least in most of cases.

This study similar to other theoretical researches is based on library sources and international documentations and analytical-descriptive method.

#### **Theoretical Principles**

For being confidential or obvious regarding trade arbitration, there are disputes in different legal regimes and amongst experts.

Supporters of both sides provide reasons and justifications.

#### **Adverse Ideas**

Strong intention of international community in developing legal norms in international trade arbitration through legislative procedures is one of the most important factor of supporting it to be obvious and limiting confidentiality trends (Smit, 1995).

Furthermore, apparent arbitration may guarantee principles of independence and impartiality of arbitrators. Actually by recognizing that their functions are observed by public, arbitrators try to investigate in a righteous method. In addition to this, apparent conducting arbitration process in an apparent style causes guaranteeing of equal behavior principle against parties in an efficient manner (Assadinejad and Mahdaviifar, 2012).

Moreover, some people tried to draw confidentiality issue to margins by manifesting confidentiality issue to be compromising and derivative and explain that they state parties must directly point to confidentiality of arbitration exactly such as other contractual terms and conditions. Arbitration confidentiality is admitted in main contract or arbitration contract or in some cases after occurrence of disputes or during trial in related court (Khazaei, 2009). It is also possible that in regulations and practices of arbitration body that is responsible of arbitration such as article 30 of London court of international arbitration act, it is addressed. Hence, basis of confidentiality of arbitration is regulation or law of arbitration (Fortier, 1999).

In this framework and by regarding legislative characteristics, concealment of consultations amongst judges is a general norm that is existed in many types of trials. Arbitration also is not excluded of this norm and consultations to make decision are in closed arbitration. In arbitration and before termination of investigations, principle of equality between both parties and defense right inhibits that one judge reveal ideas of other judges about arbitration issue. Application guarantee of this kind of action is cancellation (dismissal) of arbitrator or cancellation of arbitrator's verdict. After termination of investigations, respect to arbitrator's independence prevents one of arbitrators reveals stance of other arbitrators regarding provided resolution. In this case, protection of arbitrator's idea revelation is responsibility of that arbitrator who reveal that idea against one who his/her idea is revealed. Therefore, close consultations among arbitrators in order to make decision in trials is its implication of its characteristic and is not obliged trial itself and its becoming open court. This kind of limitation is not preventing regarding trial revelation in other cases and particularly by other individuals such as dispute parties (Loquin, 2006).

#### **Conformable Ideas**

Main reason of confidentiality and privacy should be sought in arbitration's approach intrinsic and features and other approaches of resolving disputes. Nature and intrinsic of these approaches are such that only involved parties and legitimate individuals as representatives of them have right to enter trial flow and acknowledge addressed issues in trials (Misra & Jordan, 2006).

Traders are not intended to be recognized as a person who has dispute with his/her trade sides, because this reputation will damage their credibility. Traders also are not intended that their other trade rivals to be

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informed about prices and terms and conditions of their contract with disputed parties. Since arbitration is a private investigation, sessions are held in a close court attitude and judges are prevented about revelation of dispute issues and context. In summary, reason of arbitration growth as a method of resolving disputes is conformity of this approach with business and trade terms and conditions and less damages to dispute sides (Shirovi, 2013).

In endorsing confidentiality of trade arbitration; some people reason that confidentiality is agreed implicitly by both parties. In other words, information and documentations concealment in arbitration is an implicit obligation of involved parties in contract unless direct consensus of parties or court verdict consider it legitimate. This idea was announced by London appeal court in its 1990 verdict (Enayat, 1999). In Iran law also it can be stated that if according to prevalent norm in trade, confidentiality is accounted as a part or subject to context of contract or indications imply this issue, it is considered to be included in contract subject although it is not stated directly or involved parties are not aware of norm. Furthermore, meaning of confidentiality principle is not considering trade arbitration in all cases and under any condition confidential, but it means that basis would be confidentiality of arbitration action unless reverse case is stipulated. Also means that all parties intend arbitration to be conducted confidential but if they stipulate that arbitration not to be confidential, then there is not any reason for observing this principle because that principle is established to support involved parties and their interests (Estreicher & Bennett, 2008).

### **Jurisdiction**

Arbitration norms specifically and particularly in confidentiality issue are diversified in different countries but important matter is the fact that domain of international trade arbitration also significantly influenced by this issue. For example, UNCITRAL Model Law on International trade arbitration (1985) concealed confidentiality issue as addressed in the following, however where we face more advanced law and less conservativeness in international trade arbitration, we will find confidentiality issue completely organized.

### **Internal Law**

In compliance to a scope on confidentiality, in internal laws of countries confidentiality feature is hardly considered (Paulsson & Rawding, 1995). In context of keeping the secrets in most countries there is legislative source and secrets are deposited to individuals upon liability. This liability is seen in articles 13-226 of France penal act and article 648 Islamic punishment act of Iran. But in particular case regarding arbitration, in some countries confidential trial is only recognized to be formal if it is stipulated in arbitration contract (Thomson & Finn, 2007).

Australia and USA are suitable evidence for this stance, in a case of two companies in Australia known as ESSO case which refer to arbitration, one of parties avoid surrendering requested documents from ministry of energy and associated this to confidentiality of the case. According to issued verdict by Australia High Court, confidentiality is not one of the main features of trade and private arbitration where by implying that being able to avoid surrendering or publishing provided documents and information in trade arbitration investigations. Some information such as technical and trade information about Gas extraction regions, however may be really confidential and upon verdict of court they could be prevented to published, but on the contrary, information that are requested by ministry of energy can not have secret source (Bernstein & Marriott, 1995).

### **International Law**

According to paragraph 4 article 25 UNCITRAL arbitration rules ratified in 1976, confidentiality of trial sessions is a principle unless in cases that consensus of involved parties be on open court. Also in compliance with paragraph 5 article 32 of the same rules, lack of publishing arbitration verdict is a principle unless involved parties agree on other styles. In paragraph 3 article 21 of ICC arbitration rules (2012), absence of unrelated to case individuals in sessions is stipulated and in paragraph 7 article 20 also

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it is established that arbitration authority can apply necessary actions so as to protect trade secrets and confidential information.

But in UNCITRAL model rules of arbitration, close or open arbitration is not pointed to and it seems that the issue is left to law regimes of each country for decision making and ratification.

In other rules such as 1992 arbitration rules of Geneva chamber of commerce and industries (Article 2), arbitration rules of UN economy commission of Europe and also Washington convention 1965, regarding resolution of investments disputes among countries and foreign investors (Paragraph 5 Article 48), confidentiality principle is emphasized and stipulated.

#### **Exceptions and Application Guarantees**

Statements and assessment of angles and features regarding confidentiality the question of “Is confidentiality accounted as a legal principle?” can drive us to find a more convincible answer. Available scrutiny in structure of this concept notifies us that we are not faced to a spontaneous generated, contractual and rare concept.

#### *Exceptions*

Overall, these exceptions are arisen from involved parties consensus, public order, objections to ideas and obtained results of alternative approaches for resolving dispute and application of those (Burnley & Lascelles, 2004).

Regarding first exception, it must be stated that parties have authorities to cover some information and documents by confidentiality liability or they have permission to publish final issued verdict. Although, this agreement is accounted to be one of exceptions because it limits sphere of confidentiality (Ibid, 45).

For resulted exception of public order, it must stated that sometimes law imposes liability, providing information, disclosure or issue clearing. Regarding taxation rules and if during resolving a dispute, a specified crime is discovered where due to its importance law makes its disclosure necessary, then this legal task must be applied (Kovach, 2005).

Whenever verdict of judge or other contractual terms of resolution is not applied arbitrarily, then beneficiary can resort to public courts and in this case verdict, agreement and disclosure of trial flow is accepted because of its application’s guarantee and confidentiality principle can not dismiss implication of verdicts and mentioned agreement by negation of referring to courts. It is necessary to mention that statements, confesses and connivances which are performed by parties during implementations of friendly alternative methods of resolving disputes such as mediation has not capability to be referenced in next arbitration or legal trials and most of related institutes have stipulated this issue in their dispute resolution norms.

#### *Implementation Guarantee*

The most important guarantee of confidentiality implementation is civil responsibility of people who breach this liability. In cases that confidentiality is imposed to liable parties in compliance to contract, any one who breaches is obliged to compensate imposed loss to another parties due to contractual responsibility. Loss incurred individual can file a case to compensate loss (Darvishi Hoveida, 2013).

Another addressed issue in arbitration is whether arbitration tribunal itself has legitimacy to try this kind of dispute? Considering that arbitration tribunal has legitimacy of investigating all related claims that are addressed due to parties contract, this dispute would be located within sphere of arbitration tribunal as well (Loquin, 2006).

Regarding an arbitrator who does not observe keeping secrets in negotiations and consultations and disclose secrets to one of the parties, dismissal of arbitrator and even cancellation of verdict of arbitration may be addressed as guarantees of implementation. It is obvious that if laws consider penal guarantees for lack of observing concealment of trial flow by some involved individuals in arbitration and in particular judge or arbitrators, then imposing penal punishment also may be addressed.

In addition to civil and penal responsibilities, disciplinary responsibilities also may impose to third parties who are in charge of implementing trial and resolving disputes. This disciplinary responsibility where

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often are located by arbitration institutes in accompany with moral and professional liabilities of third parties specially in friendly approaches such as mediation are imposed, in most cases prevent confidential issue to be disclosed and practically some issues such as breach of promise and loss compensation arisen of breach from individuals are hardly manifested.

#### **Confidentiality in WIPO Arbitration Rules**

It seems that subject of trade arbitration and its requirements particularly confidentiality issue in some critical context such as intellectual properties is more distinct. Because of this reason and by considering necessity of describing matter in more details within domain of international law, the final section of article to be organized inevitably.

#### **Discussion Importance and Necessity**

Arbitration comparing to court trial has many advantages and these advantages are more significant in international disputes and particularly in domain of intellectual properties. To address internationally is more rational to refer to arbitration, because in these cases one of involved parties in dispute hardly accept that case to be addressed in courts of other parties countries. Selecting third country arbitrators is usually is not much of expedience due to lack of acknowledgement from parties about legislation and legal systems of third country (Reeissi, 2006). Disputes of intellectual property have specified characteristics where they cause arbitration has more consistency comparing to court trial. World Intellectual Property Organization (WIPO) is an organization that was established in 1970 to endorse intellectual properties of people throughout world. This organization has tried to enact some norms in order to resolve related disputes to intellectual property instantly and low-costly. In this coordination in 1992, establishes “WIPO Arbitration and Mediation Center “ to resolve intellectual properties disputes instantly by means of this center. WIPO have driven further and developed a new body under title of “instant arbitration “ in addition to usual arbitration rules so as to accomplish aim of low-cost and instant resolution of disputes becomes more certain. WIPO Arbitration and Mediation Center, enact rather comprehensive regulations regarding confidentiality of arbitration and this can help trade, financial and industrial secrets of disputed parties are preserved.

#### **Implementation Mechanism**

Now, we have not aimed to explain confidentiality concept as arbitration regulations of WIPO but we try to point to some arbitration rules of WIPO whereas may be helpful in determining confidentiality legal stance.

Paragraph C article 52 of normal rules states: “... those who uses these information (Information that are accounted classified and confidential based on WIPO regulations) must undertake to guarantee keep information confidential ...”

Article 73 of normal regulations of arbitration states: “A. Other than all related proceedings to arbitration cancellation or implementation of arbitration body verdict, none of information regarding arbitration process must not be disclosed unilaterally for third parties unless law or eligible body have been requested the same. In this case: 1. Information can only be disclosed at level of legal request 2. If it is supposed to state information during arbitration process, there must be consistency between arbitration reference and other involved party in dispute. If it is supposed to conduct so after arbitration termination, then it must be accompanied by other involved party agreement and details of provided information and its reasons must be addressed ...”

In paragraph B article 74 of normal arbitration regulations; it is presented that “Witness who is invoked by one of the involved parties is not accounted to be third party. That party who invokes witness is responsible about confidentiality of information provided to witness. Degree of confidentiality and type of confidential information would be determined by disputed parties.”

Article 75 of normal arbitration regulations and article 68 of instant arbitration regulations acknowledge arbitrator’s verdict confidential and transferring of this verdict is permissible only under following

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provisions: 1. Interested party agreement, 2. It is required that before any proceedings from arbitration reference or eligible legal authorities, public communities are become aware of this verdict, 3. Arbitrator's verdict may have acceptability to be presented only by observing legal requirements and preservation of legal rights of involved parties.

Article 76 of normal arbitration regulations and article 69 of instant arbitration regulations oblige WIPO Arbitration and Mediation Center and arbitrators to preserve information confidential: "A. Center and arbitrator must keep all related information to arbitration process, arbitrator's verdict and any contexts that is not supposed to be presented to public as confidential material unless involved parties in dispute have other consensus in this regard. This instruction is also true in relation to documents and instruments that are provided during arbitration process, other than required ones to be used for arbitrator's decision making or whatever law ratifies ...".

As we have seen, according to articles 73 to 76; all addressed information in arbitration process are totally confidential and it is not required arbitrators recognition.

### **CONCLUSION**

Conducted studies within different domains of legal regimes demonstrate that confidentiality as a principal in trade arbitration and in some countries is accepted where even are reflected in laws where in some other countries such as: Australia and USA it is not as mentioned above. However, what was discussed showed that confidentiality in international trade arbitration and particularly in WIPO regulations is accounted as a legal principle.

What is certain is that trade necessities and requirements of current world dismisses those ideas with definite intentions and resulted to bring private benefits and requirements under considerations other than aggregated benefits based on sovereignty.

Overall, in whatever discussed we tried to provide a range of reliable reasons, justifications and implications so as to determine legal stance of confidentiality in trade arbitration and finally; it seems that we have presented this context as a legal principle to readers.

At end; we may find this implicit conclusion that principle of confidentiality as it was endorsed and its existence necessity to be affirmed and probably in future it has increasing development as a legal principle.

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