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What Does *Confidentiality* Inside The Arbitration Mean?

Diana - Loredana HOGAŞ[1]

Abstract

The principle of confidentiality is one of the highlights of the institution of arbitration. Its application is not uniform in the national legislation. The parties to an arbitration agreement may experience various unpleasant situations such as unwanted disclosure of issues they wanted to keep secret, although they had relied on the fact that the private nature of arbitration would protect them from prying eyes and unwanted third parties. In this article we take a brief foray into national and international legislation, analyzing the way in which the principle of confidentiality is applied.

Keywords:

Confidentiality, arbitration, Romanian Code of Civil Procedure, UNCITRAL Model Law of International Commercial Arbitration;

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Introduction

The private and confidential nature of arbitration motivates parties to use this institution of arbitration to end the dispute between. In fact, they may be surprised to learn that they have no legal leverage to protect the secret specifically the desired information from prying *eyes*.

One of the major advantages of arbitration, namely, confidentiality, imposes on arbitrators and the parties, the obligation to respect the confidentiality of arbitration.

Literature review

The doctrine debates two viewpoints regarding the confidentiality within the institutions of arbitration. Thus, some authors consider that this principle is closely linked to the private nature of arbitration, representing two sides of the same coin, given that the parties may hinder others from taking part in the arbitration (Tweeddale, Tweeddale, 2007). The optional and conventional nature of arbitration is the one that enables the parties to implement the obligation of confidentiality via the arbitration agreement (Bobei, 2013).

This view is supported by the jurisprudence of the English courts which in the case of Emmott v. Michael Wilson & Partners said that *the duty of confidentiality in arbitration is implied by law and arises out of the nature of arbitration (...).*

The other side argues that privacy can only be applied as a result of an agreement entered into by the parties, arbitration not being confidential in its nature (Smeureanu, 2008). This position is supported by the American judicial practice (Moses, 2012) and the Austrian and the Swedish ones (Thomson, Finn, 2007).

Of international conventions in the matter to arbitration, the Washington Convention for the regulation of Investment Disputes between States and Nationals of other States on March 18, 1965, is the only one that provides the art. 48 in which they state that no sentence shall be published without the consent of the parties.

Model Law UNCITRAL does not contain regulations on the duty of confidentiality, but the UNCITRAL Rules updated in 2010, it is stated in art. 34 Section 5 that arbitration awards cannot be published without the consent of the parties or when disclosure is required under a

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legal obligation to protect or pursue a legal right or in connection with legal proceedings before a court or other authorities.

Approach

The doctrine stresses that the definition of the scope of the duty of confidentiality is a major problem (Hwang, Chung, 2009). Why? Because it would have to include too many issues, difficult to consider every time: who should be bound by confidentiality, what are the documents and information protected by privacy, which are exceptions to the confidentiality obligation.

In accordance with national legislation, we will try to outline a response for each of the three essential questions for definition of privacy in the arbitration institution: Who has the duty of confidentiality? Which is the content of that obligation? and Which are the exceptions to this requirement?

The first question refers to people who have the duty of confidentiality. Who must comply with this requirement?

The only clear and precise regulation of the obligation of confidentiality is stated in art. 565 lit. c in the Romanian Code of Civil Procedure of 2010, for Arbitrators: *Arbitrators are responsible, under law, for damage, if they do not respect the confidential nature of arbitration, by publishing or disclosing information which they receive as arbitrators, without the consent of the parties*. But only arbitrators are the ones who can disclose confidential matters relating to arbitration? Certainly not!

In the art. 546 para. 1) Romanian Code of Civil Procedure of 2010, states that in cases of arbitration, the parties may submit claims and exercise their procedural rights in person or by proxy. Also, they may be assisted by other specialists.

Except parties, in order to resolve the dispute, the arbitration may be attended by witnesses, experts, and others who may learn about issues that the parties intended to be confidential. According to art. 581 of the Romanian Code of Civil Procedure of 2010, third parties can participate in the arbitration proceedings through voluntary intervention or forced intervention, but only with their consent and the consent of the parties. From this provision we have an exception the case of the ancillary intervention, which is possible without these conditions.

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For lawyers, there is always the professional confidentiality clause, so there is no question of disclosure of information without repercussions. However, there is no explicit legal provision obliging them to obey confidentiality with respect to knowledge gained as a witness, expert and so on. Moreover, the parties have no such regulated binding obligation of confidentiality either.

Regarding the latter aspect, the doctrine stresses that not only arbitrators, lawyers, experts, witnesses have confidentiality obligation on the issue, the debate during the arbitration or arbitration proceedings, but also parties, given the contractual nature of the arbitration agreement in accordance with art. 1.272 of the Civil Code of 2011.

Therefore, the legal obligation of confidentiality under regulation of the Romanian Code of Civil Procedure of 2010, is left as a task of the arbitrators only. However, in accordance with art. 541 para. 2) which stipulates that the disputing parties and the arbitral tribunal may determine the rules of procedure derogating from the common law, but subject to public order and the provisions of the law, and art. 544 para. 2), which stresses that the parties may determine by agreement or by a written arbitration concluded afterwards, procedural rules which the arbitral tribunal must follow during the trial proceedings, they can insert into the arbitration agreement a confidentiality clause that would oblige both themselves and other persons participating in arbitration to respect privacy during disclosure in order to settle the arbitration dispute. Obeying the contractual nature of arbitration, the parties have the right to decide on keeping the confidentiality of the arbitration proceedings or not.

Regarding the scope of the duty of confidentiality of arbitrators, as long as a term is not regulated by the Code of Civil Procedure, it is not limited neither in time nor in space (Roş, 2010).

Indeed, there is an attenuation of that obligation when arbitration is contested for an annulment by the public debates in state judicial proceedings. However, the arbitrator must respect confidentiality in this case (Bobei, 2013). Along with other authors, we believe that as long as the action for annulment occurs throughout the arbitral proceedings, the legislature should not leave to the discretion of the court the public or the private character of the hearings that are to settle actions for annulment of arbitral awards, but this power should be given

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to the parties: *assessing the action for annulment as an extension of the arbitration, we believe, on this basis, that the law wide debate in the court of common law must be public or nonpublic according to the will of the parties (...)* (Roş, 2010, p. 330).

The next question that seeks the answer is: what is protected by the duty of confidentiality? In accordance with art. 565 lit. c) Romanian Code of Civil Procedure of 2010, arbitrators are obliged not to disclose information they have acquired in as arbitrators. Also, the arbitration award is rendered in open court, but according to art. 605 para. 1), it shall be communicated to the parties. But as I said, in accordance with art. 541 para. 2) and art. 544 para. 2), the parties may agree on privacy and other issues than those set out in the judgment of arbitration.

The last question seeks the answer is: which are the exceptions to the application of this obligation? First, arbitration courts must respect the fundamental principles of civil trial under art. 575 para. 2), under penalty of cancellation of the arbitration process, trial which will be governed by the principle of equal treatment of the parties, to respect the rights of defense and of the adversarial principle.

In the art. 586 para. 2) states that the purpose of resolving the dispute, the arbitral tribunal may order any evidence provided by law, and in the art. 588 para. 2) provides that the arbitral tribunal can compel evidence by a party that holds. Therefore confidentiality can not oppose this provision, although it may not want to bring these samples to the parties precisely because this would disclose certain matters of interest to them. We must not forget that the arbitral tribunal was assigned to resolve the dispute, and to this end shall all evidence to ascertain the truth.

The doctrine held that, under these regulations, *there is therefore the possibility of invoking the need to protect confidential or sensitive information as an excuse for not producing a sample* (Roş, 2010, p 332).

We must not forget, however, that the parties may agree on the mode of inquiry, according to art. 576 para. 1), which provides that the parties may determine by agreement the arbitration rules of procedure in dispute or it may empower the arbitrators of this. Of course, these rules must comply with public policy and mandatory rules of law.

Where the arbitral award is being contested for annulment or enforcement is sought, as we have said, the confidentiality obligation shall continue to be respected by the arbitrators. However, the relevant

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competent national courts will take note of the content of the arbitration. Moreover, they will hear the case, applying the rules of the common law in terms of publicity, the judge will decide on non-public nature of the proceedings, at the request of the parties, according to art. 17 and art. 213 of the Code of Civil Procedure of 2010.

Doctrine revealed that both laws in force and permanent arbitration institutions are faced with the issue of a precise formulation and of limiting the exceptions to confidentiality in arbitration matters.

In the common law, these exceptions have been introduced by incremental additions. The exceptions are: public interest, where the matter has come to court, consent of the parties, by compulsion of law, with leave of court, disclosure for legitimate protecting legitimate interests of an arbitrating party, where the interests of justice or the public interest require it, where there is an obligation of disclosure, everyday situations, where disclosure is made to professional or other advisers and persons assisting in the conduct of the arbitration (Hwang, Chung, 2009).

Discussion

Permanent arbitration institutions drafted more detailed and clear regulations on issues related to confidentiality obligations discussed above.

In the Rules of Arbitration of the International Commercial Arbitration Court at Bucharest covered in art. 8 the duty of confidentiality, according to which the case file is confidential and no person other than those involved in conducting the litigation states that no one has access to the file without the written consent of the parties.

It also states that the Court of Arbitration, the arbitral tribunal and the staff of chambers of commerce must ensure the confidentiality of arbitration, having no right to publish or divulge information that came to their knowledge during the performance of their duties, without consent of the parties.

In the art. 9 some exceptions to this rule are provided, namely: in the case of arbitral awards, they can be published in full only with the consent of the parties, otherwise arbitration awards can be published as partial summary or commented in legal matters arising in magazines, papers or collections of arbitral practice, but without the name or

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designation of the parties or other information likely to be prejudicial to their interests.

Also for science or research, but after a final award, the president of the Court of Arbitration, or failing that, the first deputy may authorize the case study of the files.

As a result of the foregoing, we can state that the gaps left by the Romanian legislature were covered by permanent arbitral institution in Bucharest.

Rules of the International Court of Arbitration in Paris provide the art. 22 para. 3) which states that unless the parties have agreed otherwise, the arbitral tribunal may take any action on protecting the confidentiality of the arbitration proceedings.

Moreover, there are the provisions of art. 30 of the International Arbitration Court in London, according to which, unless the parties have agreed in writing to the contrary, it is implied that they wish to apply the principle of confidentiality with regard to all arbitral awards rendered in the arbitration proceeding, together with all materials and documents required by the arbitration.

An exception from this obligation of confidentiality is provided for, i.e. they are exempt from this requirement provided above if the disclosure is required under a legal obligation to protect or pursue a legal right or annul an arbitration award recognition, following the principle of good faith before a state court or other authority.

In paragraph 2) of the same article they stipulate that the deliberations of the arbitral tribunal are confidential and under paragraph 3) they provide that such arbitration awards and parts thereof will not be published by the Court without prior consent of the parties and the arbitral tribunal.

American Arbitration Association Rules provides in art. 27 para. 4) that an arbitration award may be made public only with the consent of all parties or that which the law so provides, and art. 34 provides that the arbitrators and the arbitration administrator is obliged to respect the confidentiality of information disclosed during the arbitration proceedings by the parties or witnesses.

Except as provided in art. 27 above the otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal

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and the administrator have the obligation to keep confidential all matters relating to both arbitration and the arbitration award.

In the case of Emmott v. Michael Wilson & Partners, the Court of Appeal has found that: *There is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose for use for any purpose any documents prepared for and used in the arbitration , or disclosed and produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration of the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration.*

At the same time, the Court has laid down the following exceptions by the obligation of confidentiality: where there is consent, express or implied; where there is an order, or leave of the Court; where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and where the interests of justice require disclosure.

Conclusions

The doctrine has developed a number of models of confidentiality clauses in support of parties to protect their interests in the arbitration. Such a model would be the following arbitration clause: *If a consultant/expert witness concludes that its legal duty requires disclosure of such material, before making any such disclosure, it will give the parties to the arbitration notice of its intention to disclose material covered by this agreement. If the parties will not consent to the disclosure, the consultant/ expert witness and the parties will agree that the question of whether there is any applicable and overriding law and duty in relation to the material under consideration will be presented for decision to the arbitrator appointed under this agreement. The parties and the consultant/expert witness agree to be bound by the ruling of the arbitrator whose decision will be final and binding (Thompson, Finn, 2007).*

However, these statements do not resolve the issue of confidentiality in arbitration matters as they are not disseminated internationally. Along with other authors, we consider that this power can be used by the international institutions concerned with international arbitration matters such UNCITRAL, the ICC Commission , the International Council for Commercial Arbitration and others. The latter could develop and promote a model clause regarding obligation of confidentiality in arbitration matters.

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Biodata

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