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Reinforcing the Definition of Ecocide Proposed by the Independent Expert Panel (IEP) in Light of the Niger Delta Case: Opportunities and Challenges

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Abstract

This paper explores how confidentiality undermines international commercial arbitration (ICA) when viewed from an African perspective, especially in light of the obligation to regulate multinational enterprises. The legal framework surrounding confidentiality is uncertain and unsettled at the international level. It is even more uncertain to determine if the requirements applicable to multinational enterprises under the United Nations Guidelines on Business and Human rights apply in International Commercial Arbitration in countries with a weak commitment to the rule of law. The different approaches taken by several jurisdictions regarding confidentiality hinder the legitimacy of ICA because parties can provide for a confidential regime even in cases where publicity may be required. Therefore, this paper calls for the adoption of an international regime precluding confidentiality in cases that address cross-cutting issues that in turn impact the legitimacy of ICA. This preclusion will apply to proceedings involving issues of competition law, corruption, or state-owned entities.

Keywords: Confidentiality; Delta Case; Justification; Commercial Arbitration; ICA;

Introduction

Confidentiality is described as the essential attribute of ICA. However, the debate over its usefulness is far from settled. Some authors view confidentiality as a habit rather than as a necessity, while other authors consider that international commercial arbitration would not be attractive for its users if the process was not conducted confidentially. Experience has shown that third parties are increasingly exposed to the consequences of awards delivered in ICA cases [1]. Because of this, systematic confidentiality loses its justification. As shown in the case, P & I.D. vs. Nigeria, an ad hoc commercial arbitration, confidentiality can create opportunities for corruption and maladministration of arbitral proceedings. Confidentiality in ICA should not cover the reprehensible conduct of a party or impact third parties to the arbitration agreement. Therefore, the thesis of this paper is that international commercial arbitration can remain confidential except for cases involving state-owned entities, corruption allegations and competition law issues. This position has been adopted by the South African International Arbitration Act (2017) and the African Foundation of Southern Africa (AFSA) Arbitration rules (2021), which adequately address gaps in confidentiality regulation. Therefore, this paper argues that an international recognition of the necessity to address cross-cutting issues in the form of a model law such as the UNCITRAL Model Law will adequately address the critics against the ICA system while giving to the respective jurisdictions the flexibility to tailor their laws according to their necessities [2].

This paper aims to propose a significant legal reform by the exclusion of state-owned entities', competition and corruption issues from the coverage of confidential disputes. After analysing the legal issues posed by the *P& ID VS Nigeria* case, this paper calls for international reform of the regime of confidentiality. In the last chapter, this paper suggests incorporating Article 11 of the 2017 South African International Commercial Act and Article 36 of the AFSA Arbitration rules in the UNCITRAL Model Law.

Discussion

When is confidentiality in international commercial arbitration not justified?

Given that the integrity of ICA proceedings rests on presumptions that its main actors will follow acceptable standards, the importance of third-party scrutiny cannot be sufficiently emphasized. However, several authors maintain that international commercial arbitration solely involves matters governed by party autonomy. Most of their arguments rely on surveys, statistical and theoretical arguments that have no basis in reality. Against the weight of this evidence stands the view that ICA needs to be "in tune with the spirit of the society that it seeks to protect and should accordingly amend itself periodically" [3]. This view is demonstrated by experience that ICA increasingly deals with corruption, competition issues, and state-owned entities. Therefore, the law needs to address those instances in which confidentiality is not justified.

An example to this point includes the *P& ID vs Nigeria* case. *P&ID vs Nigeria* concerns an arbitral procedure that commenced on August 22, 2012, which did not come to the knowledge of the public until 2015 and only after a change of government in Nigeria. In the absence of a legal requirement mandating disclosure of the very existence of the procedure as well as the documents relating to it, the proceedings were held confidentially [4]. As a result of the lack of transparency and reprehensible circumstances surrounding the case, in the delivery of the final award, Nigeria was ordered to pay U.S. $10 billion to an investor for an alleged contract breach. The case arose out of a contract to construct and operate a gas processing facility signed in 2010 between two parties, the Nigerian Ministry of Petroleum Resources and Process and Industrial Development Ltd (P&ID), a British Company.

Three main legal issues raised by the State of Nigeria revolve around corruption and can be linked to the general trends towards the

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regulation of multinational companies conduct from a Business and Human rights perspective.

First, it was noted that Nigerian counsel ignored blatant corruption red flags. Commentators have also noted the Tribunal's failure to exercise reasonable due diligence in examining other potential corruption red flags. In this case, the Counsel and the Tribunal should have looked at the circumstantial evidences suggesting that the contract was procured through the payment of bribes [5].

Second, allegations were raised that the Nigerian counsel failed to adequately defend the country. He failed to raise to the Tribunal jurisdictional objections that were crucial under Nigerian Law. More precisely, the Counsel neglected to ask for a hearing in which the evidence presented by P& I.D could have been examined [6]. Furthermore, he did not challenge witness statements that were critical to its clients' claims.

Third, the award on quantum relied on a single witness statement from the investor. Strangely, The Arbitral Tribunal did not order the production of potential counter-evidence, which could be reasonably adduced to the evidence that was presented by Nigeria.

These issues which were only later raised by the newly elected government of Nigeria could have been avoided if the proceedings were not confidential.

This case demonstrates that Confidentiality undermines the regulation of multinationals under the business and human rights framework [7]. Companies are allowed to move internationally in countries in which the rule of law is weak and the regulations contain loopholes. As a result, the administration of justice is unnecessarily protracted and rendered unattractive for all parties. In this particular case, the maintenance of confidentiality clauses prevents the public from ensuring that potential corruption cases are dealt with appropriately. As noted by M. June Yeum :

"Commercial arbitration is seen as a "problematic forum" for resolving human rights-related disputes (…) this is due to various features of commercial arbitration, including its "confidentiality, lack of transparency and participation by affected stakeholders, and the lack of human rights expertise of commercial arbitrators."

In accordance with principle 11 of the United Nations Guiding Principles on Business and Human rights, businesses should avoid infringing on Human rights of others and address the human rights impacts of their activities. However, it is necessary to provide the right legal tools to third parties for the enforcement of this provision through the scrutiny of arbitral proceedings in which their interests may be impinged, especially because the Business and Human rights regime is composed of soft laws instrument. International Commercial arbitration does not yet provide such tools [8].

In light of the issues mentioned above, this paper examines why the law has permitted these unfortunate occurrences in a process which supposedly offers all the presumption of credibility and reliability.

A. Call for an international response to the issue of confidentiality

The English Arbitration Act is silent on the legal regime governing confidentiality in ICA [9]. The same text does not regulate the conduct of businesses under the Business and Human rights framework which excludes any breach of the law such as acts corruption. In the case law, there is a duty of confidentiality imposed on parties and arbitrators in ICA that are seated in England. In other words, English courts recognize an implied duty of confidentiality in international commercial arbitration cases. This duty of confidentiality extends not only to the award but to the "pleadings, written submissions, proofs of witnesses, notes of evidence and transcripts." The notable exceptions to this principle derive from the case law and apply where there is:

- The agreement of the parties;
- An order of the court;
- The establishment or protection of a party's legal right;
- The public interest or the interests of justice;

Two main issues can be raised regarding this legal regime: The case law is not sufficiently developed to delineate the contour of the exceptions above. It is necessary to articulate precise legal prescriptions regarding the scope of these exceptions because the reliance on the party's willingness to disclose the documents regarding the arbitration does not guarantee that the process will be transparent. In Hassneh Insurance Co of Israel v Stuart J Mew, the claimant M.Mew, a claim for the disclosure of documents produced during arbitration was dismissed. The English court reasoned that if the public interest exception is to be interpreted broadly, it would significantly reduce the scope of confidentiality. As a result, parties would be participating in a public arbitration instead of private arbitration. This view is not shared in the academic literature [10].

Conclusion

Academic literature has not yet fully developed the theme of the exclusion of confidentiality in competition law, corruption cases and cases involving state-owned enterprises as a means to address Business and Human rights issues in International Commercial arbitration. This situation is partly due to applying the duty of confidentiality to international commercial arbitration. Due to this duty of confidentiality, it is difficult to determine if arbitral processes are carried out under acceptable standards, except when parties contest the awards. It is necessary to publicize more cases involving corruption, competition, and state-owned enterprises to convince the stakeholders that the system needs reforms. Several arbitration laws and arbitral rules still provide for strict confidentiality. With cases such as P&ID VS Nigeria, it appears that addressing cross-cutting issues is essential to protecting the legitimacy of international commercial arbitration. As shown above, the development of confidentiality in England still requires clarification. These clarifications are more greatly needed in the body of the law rather than in the case law. From the comparative international perspective, the South African regime provides for a flexible regime that policymakers can consider in revising their own regimes regarding confidentiality.

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Conflict of Interest

None

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