Publish and be damned: Should we embrace the systematic publication of arbitral awards?

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Summary

Jane Parsons considers the arguments for and against the systematic publication of arbitral awards.

The issue

The debate over whether there should be a systematic publication of arbitral awards is not new, but it has received increased attention over the last couple of years.

Lord Thomas questioned whether confidentiality, which is often cited as one of the key attractions of international commercial arbitration, might be “overrated” in the Bailii Lecture 2016 “Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration”.

In the sphere of investment treaty arbitration it is generally recognised that greater transparency is justified, given the involvement of states, issues of public and/or political interest, as well as taxpayer funds at play. To this end, the publication of party names, awards on the merits and even pleadings is the norm.

The nature of commercial arbitration is altogether different. Party autonomy is key, with parties choosing arbitration and paying for the process. When making this choice, confidentiality is a significant consideration for commercial parties in selecting arbitration over commercial litigation.

Publication of awards

There is no universally recognised concept of confidentiality in arbitration and its application...
varies from jurisdiction to jurisdiction. However, the common theme is that arbitration hearings will be held in private and there is no systematic publication of arbitral awards or decisions.

This is the position adopted by many of the major arbitral institutions. For example:

- HKIAC – there is no publication of awards without the express consent of the parties;
- LCIA – there is no publication of awards without the prior written consent of the parties and the tribunal; and
- SIAC – there is no publication of awards without the consent of the parties and the tribunal.

There is some limited publication of arbitral awards in certain circumstances:

- The ICC publishes extracts of selected awards and procedural orders. The extracts do not identify the parties or the arbitrators, and facts that may identify the parties are redacted. Extracts are generally not released until 3 years after the arbitration proceedings have closed;
- The LCIA publishes selected decisions on arbitrator challenges. The names of the parties, counsel and arbitrators are redacted;
- The SCC publishes selected awards or decisions with the parties’ consent. Awards are redacted to maintain confidentiality and they do not include the names of arbitrators, parties or counsel.

**Arguments for more systematic publication of awards**

**Development of law**

Lord Thomas’ comment that confidentiality in international commercial arbitration might be “overrated” stems from his view that the development of the common law by the UK courts is impeded by arbitration disputes being determined in private and the limited number of appeals of arbitration awards reaching the courts.

If arbitral awards were published as a matter of course, they could contribute to the development of the law and the common law would not be missing a significant body of decisions made by arbitrators.

However this elicits the question: what is the function of arbitration? The sole function in parties’ minds is that they need a decision from the arbitrators in relation to their dispute. It is an inherently private and autonomous process, given that the arbitrators are selected and paid
for by the parties and are not publicly accountable, unlike judges. In this context, the sole function of the arbitral process is to decide disputes and the contribution of arbitral awards to the development of the common law is not a factor.

Another key question is: what is the actual value of past awards? Arbitrators decide disputes by applying the applicable law to the facts. As each case tends to involve a unique set of facts, the extent to which it is possible to draw any general conclusions that can serve as a guide to assist parties, lawyers and the courts in applying the law may be limited.

**Consistency, certainty and predictability**

Parties do expect a degree of transparency so that they have confidence in the process and clarity as to how aspects of their cases are likely to be managed and decided. If arbitral awards were published as a matter of course, this would increase predictability of outcome. It would make the work of arbitrators more visible, which in turn would strengthen the legitimacy of the system and promote a better understanding of the process, which would encourage future users. The publication of awards would contribute to the uniform application of rules, providing enhanced consistency and certainty.

The counter-argument to that would be to what extent past awards are of any actual value in terms of how arbitrators decide the merits of a dispute. Decisions on substantive issues rarely prompt references to past awards. Instead, they usually refer to past court decisions or academic writing.

However, the publication of awards may well be of value when it comes to procedural issues. For example, in relation to how arbitrators interpret and apply specific institutional rules, issues of jurisdiction and the manner and extent to which the tribunal exercises its powers. Users of arbitration tend to have an appetite for openness in this context, particularly in relation to the subject of challenges to arbitrator appointments, and the arbitral institutions have addressed this.

The ICC publishes extracts from procedural decisions made by tribunals on topics such as security for costs, evidence and the determination of applicable law in the absence of party choice. The ICC also publishes anonymised extracts from arbitral awards, providing examples of arbitrator decisions on a variety of subject areas, such as multi-tier dispute resolution and corruption.

The LCIA publishes decisions on arbitrator challenges, albeit anonymised and in the form of a
digest (so far it has done so for the years 1996 to 2010).

The SCC has also recently published (in January 2017) a SCC Practice Note on challenges to arbitrators between 2013 and 2015, which reviews the SCC Board’s decisions, discusses the SCC’s standard for arbitrator impartiality and explains the procedure for challenges.

**Allow parties to make better informed decision about choice of arbitrator**

An important advantage of arbitration is the ability of parties to choose an arbitrator. However, information about arbitrators, such as their past and current appointments and decisions in previous cases, is limited. There is concern that this lack of publicly available information creates an uneven playing field, as larger international arbitration practices (which can call on a large number of people with experience of numerous arbitrators for recommendations) have an advantage. There is also a concern that arbitral appointments lack diversity, as it is generally perceived that it is the same small pool of arbitrators who are appointed. As the results of the 2016 BLP Arbitration Survey: Diversity in arbitral appointments – Are we getting there? confirmed, there is a clear drive to improve diversity, both in respect of gender and ethnicity, and everyone involved in the arbitration process has a part to play. Greater disclosure by way of the publication of awards (including the names of those who prepared them) could widen the pool and inform parties’ choice of arbitrator.

The publication of awards is not the only (and not necessarily the best) way to achieve this. **Arbitrator Intelligence** is a non-profit network that seeks to promote transparency, fairness and accountability in the selection of arbitrators by increasing access to key information about arbitrators and their decision-making, gleaned from arbitral awards.

The arbitral institutions are also providing more information on arbitrator appointments. Last year, the ICC started to publish information in relation to cases registered as of 1 January 2016, including the names of arbitrators and their nationality, if the appointment was made by the Court or by the parties and whether each arbitrator was the president, a sole arbitrator or party-appointed arbitrator.

The HKIAC has been operating an evaluation system since 2015, by which parties can provide feedback on arbitrators such as their familiarity with the applicable laws and rules, their ability to facilitate a fair and effective process and their case management, communication and decision-making skills. Although the HKIAC treats the feedback as confidential, it has reserved the right to publish anonymised statistics.
Conclusion
There is perhaps too much of a focus on the publication of awards being the panacea for all ills. Confidentiality remains important to parties and it is still one of the (albeit not the sole) reasons they choose arbitration. While transparency and the enhanced certainty and clarity it brings is welcomed by users of arbitration, there is a danger that the systematic publication of awards would undermine party autonomy to select a private dispute resolution process, without delivering any real benefit.

Perhaps the approach adopted by institutions to date in publishing certain data, procedural decisions and redacted awards strikes the right balance.

This blog post first appeared on Practical Law Arbitration on 27 February 2017.

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