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Departing from confidentiality in international dispute resolution

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I. INTRODUCTION

1. Jeremy Bentham famously said: “Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”¹
2. In that context, I propose to do three things:
 - (a) Consider the extent to which justice is public in the three forms of international dispute settlement under consideration this evening;
 - (b) Consider some difficulties with the status quo;
 - (c) Propose a change to how international commercial arbitration is dealt with.

II. HOW CONFIDENTIAL IS INTERNATIONAL DISPUTE RESOLUTION NOW?

Inter-State disputes

3. The ICJ is the high watermark of publicity. After consultation with the parties:
 - (a) written pleadings and evidence annexed to them are routinely made available online from the commencement of the hearing,²

¹ As quoted in Rt Hon Beverley McLachlin PC, Chief Justice of Canada, “Openness and the Rule of Law”, Annual International Rule of Law Lecture, London, 8 January 2014, and see “Publicity in the Courts of Justice” in JH Burton (ed), *Benthamiana: Select Extracts from the Works of Jeremy Bentham* (1843), p 115.

² International Court of Justice, *Rules of Court* (adopted 14 April 1978), Article 53(2). The rule provides: “The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings”. In the last ten years, written pleadings have been made available in this way

- (b) hearings are open to the public,³ including on the internet,⁴ and
 - (c) judgments are of course public.⁵
4. Inter-State arbitration is historically its secretive elder cousin, but the Permanent Court of Arbitration has now brought it out into the light to a large degree. It has done so with a considerable degree of flexibility, including the ability to keep certain parts of the evidence and written and oral submissions confidential, while the remainder of the arbitration is fully transparent.⁶
 5. One might fairly say that most inter-State cases are mostly transparent most of the time.⁷

Investment arbitration

6. In NAFTA and CAFTA cases just about everything is public. In most other investment arbitrations the award is public, but the evidence, written pleadings and hearings are private.
7. The trend is for more transparency, in large part in response to strong and justified calls for greater information as to how and by whom cases constraining the regulatory freedom of States are being decided, and with what consequence for the public purse.

in all contentious cases, and the accompanying evidence in 14 of the 21 cases for which written pleadings are available.

³ *Statute of the International Court of Justice*, Article 46; International Court of Justice, *Rules of Court* (adopted 14 April 1978), Article 59.

⁴ Since 2004: see International Court of Justice Press Release, “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, 19 February 2004 <<http://www.icj-cij.org/docket/index.php?pr=157&code=mwp&p1=3&p2=4&p3=6&case=131&k=5a>>, referring to the “exceptional interest in this case shown by the general public, civil society and the media worldwide”.

⁵ International Court of Justice, *Rules of Court* (adopted 14 April 1978), Article 94(2): “The judgment shall be read at a public sitting of the Court and shall become binding on the parties on the day of the reading.”

⁶ See *The “Enrica Lexie” Incident (Italy v India)* (PCA Case No 2015-28) Rules of Procedure, 19 January 2016, Article 23 (Transparency); *The ARA Libertad Arbitration (Argentina v Ghana)* (PCA Case No 2013-11) Rules of Procedure, 31 July 2013, Article 12 (Publicity of Proceedings).

⁷ Apologies to Louis Henkin.

8. Responding to those calls, the UNCITRAL Transparency Rules have from 2014 provided a basis for just about every aspect of an investment arbitration to be public,⁸ but there is only a limited number of cases in which they are already in operation.⁹
9. The Mauritius Convention involves an election by States to apply the UNCITRAL Transparency Rules to arbitrations under investment treaties dating from prior to the adoption of those rules. It will enter into force in October this year for all three States that have ratified it (Canada, Mauritius and Switzerland).
10. The future might be bright, but we are in large measure still living in the past. Most cases are not under NAFTA, CAFTA or the UNCITRAL Transparency Rules.

International commercial arbitration

11. It might be fair to say that most commercial arbitrations in most places are mostly confidential most of the time, but the direction of travel is away from comprehensive confidentiality.
12. Most commercial arbitrations are conducted under the rules of one arbitral institution or another, and most subject to the national law of one seat or another, and there is no uniform approach to confidentiality. Even where confidentiality is, as the LCIA Rules put it, the “general principle”, various exceptions exist, including for disclosures required by law or for the purpose of challenging an award.¹⁰

⁸ Article 2 requires publication of basic information about filed cases. Article 3(1) requires disclosure of key documents, including the tribunal’s decisions and awards and statements of claim and defence. Article 5 allows for participation of non-disputing third parties in certain circumstances. Article 6(1) requires public hearings.

⁹ *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea* (ICSID Case No ARB/14/22) Procedural Order No. 2 on Transparency, 17 September 2015. *See also, Iberdrola, S.A. and Iberdrola Energía, S.A.U. v Plurinational State of Bolivia* (PCA Case No 2015-05) Terms of Appointment, 7 August 2015, Article 14.1.

¹⁰ Concerning arbitral rules, *see*:

ICC Rules (2017), Article 22(3): “Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration.”

III. DIFFICULTIES CREATED BY THE CURRENT DEGREE OF CONFIDENTIALITY

13. I turn to some examples from investment arbitration designed to show that continued movement towards transparency is desirable.
14. The first is that in February this year two identically constituted and very distinguished investment tribunals hearing parallel claims against the Russian Federation concerning investments made in Crimea¹¹ issued Interim Awards finding that they had jurisdiction. The text of the decisions is not public, although we know, thanks to press releases issued by the PCA and the claimants' counsel, that in each case the tribunal found that it had jurisdiction under the Russia-Ukraine bilateral investment treaty on the basis that Russia was in control of Crimea at the relevant time.¹²

LCIA Rules (2014), Article 30.1: "The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority."

SCC Rules (2017), Article 3: "Unless otherwise agreed by the parties, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award."

SIAC Rules (2016), Rule 39.1: "Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential." But note the exceptions in Rule 39.2.

¹¹ *PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation* (PCA Case No 2015-21); *Aeroporto Belbek LLC and Mr. Igor Valerievich Kolomoisky v The Russian Federation* (PCA Case No 2015-07). In each case the members of the tribunal are Professor Pierre Marie-Dupuy (Presiding Arbitrator), Sir Daniel Bethlehem, KCMG, QC (appointed by the Claimants), and Dr. Václav Mikulka, appointed on behalf of the Russian Federation by the appointing authority (Mr Michael Hwang) in the *PJSC Privatbank* arbitration, and by the former appointing authority (Judge Bruno Simma) in the *Aeroporto Belbek* arbitration.

¹² Permanent Court of Arbitration Press Release, "Arbitration Between PJSC CB PrivatBank and Finance Company Finilon LLC as Claimants and the Russian Federation" (PCA Case No 2015-21), 9 March 2017 <<https://pcacases.com/web/sendAttach/2093>>; Permanent Court of Arbitration Press Release, "Arbitration Between Aeroporto Belbek LLC and Mr. Igor Valerievich Kolomoisky as Claimants and the Russian Federation" (PCA Case No 2015-07), 9 March 2017 <<https://pcacases.com/web/sendAttach/2090>>; Hughes Hubbard, "Hughes Hubbard Secures First Award Holding Russia Responsible in Crimea", 1 March 2017 <<https://www.hugheshubbard.com/news/breaking-news-hughes-hubbard-secures-first-award-holding-russia-responsible-in-crimea>>; A Ross, "Crimea cases against Russia to proceed", *Global Arbitration Review*, 9 March 2017 <<http://globalarbitrationreview.com/article/1137587/crimea-cases-against-russia-to-proceed>>; LE Peterson, "In Jurisdiction Ruling, Arbitrators Rule that

15. The application of an investment treaty on the basis of control over territory rather than sovereignty over territory is an important point, and there are eight other “known”¹³ tribunals already seized with the same point against the same non-appearing respondent concerning the same territory. Having them do so uninformed by how those before them have treated this point of principle is hardly a desirable situation.
16. A second example arises from participation in investment arbitrations of entities that have an interest in the dispute but are not party to it, an opportunity that is increasingly sought and increasingly granted.
17. In *Micula v Romania*, the arbitral tribunal ordered that Romania could have no contact with the European Commission concerning the arbitration, but granted leave to the European Commission to file submissions as a Non-Disputing Party, without having seen the parties’ submissions. It also granted leave for three representatives of the European Commission to appear at the hearing, not to make oral submissions, but instead to be cross-examined by the claimants’ counsel including on matters of law, in circumstances where the cross-examiner knew what all of the issues before the tribunal were, but the Commission’s representatives subject to the cross-examination could not.
18. There are two points to draw from these examples.
 - (a) The first is that debating and developing the law would be much better served by investment awards being public.

Russia is Obligated Under BIT to Protect Ukrainian Investors in Crimea Following Annexation”, *Investment Arbitration Reporter*, 9 March 2017 <<http://www.iareporter.com/articles/in-jurisdiction-ruling-arbitrators-rule-that-russia-is-obliged-under-bit-to-protect-ukrainian-investors-in-crimea-following-annexation/>>; C Simson, “Ukrainian Investors’ Claims Against Russia Pass First Hurdle”, *Law 360*, 9 March 2017 <https://www.law360.com/internationalarbitration/articles/900136/ukrainian-investors-claims-against-russia-pass-first-hurdle?nl_pk=9b877cd2-14cd-44b2-9236-580d05d4fb74&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration>.

¹³ A Ross, “Crimea cases against Russia to proceed”, *Global Arbitration Review*, 9 March 2017 <<http://globalarbitrationreview.com/article/1137587/crimea-cases-against-russia-to-proceed>>.

- (b) The second is that there are serious questions about how usefully third parties can contribute to an arbitration without access to the pleadings of the parties.
19. The first of those points is equally applicable to international commercial arbitration, with respect both to law and procedure.
20. A number of you will be aware of the controversy surrounding the extent to which for the purposes of international arbitration barristers who are members of the same chambers should be regarded as independent from each other. That debate has existed for some time in the context of ICSID arbitration,¹⁴ but has since spread to international commercial arbitration.
21. The ICC does not publish its decisions on challenges to arbitrators, so it is only by way of anonymised anecdote that I can tell you this about the ICC's decision in a recent case.
22. Party A had appointed a London barrister as arbitrator. He was a member of the same chambers as counsel for the other party, and no point about that was taken by anyone. But when that other party then also nominated as arbitrator a barrister from the same set of chambers, the continental client felt like there was a club forming of which neither it nor its own counsel, not based in London, were members. Party A challenged the second nomination, at the same time offering to withdraw its own, and the ICC declined to confirm both arbitrators, leaving each party to nominate a new one.
23. Leaving to one side whether that decision might be right or wrong:
- (a) First, how can the question be properly debated if reasons are not given and published?
- (b) Second, without published reasons, how can clients be properly advised as to what the ICC might be expected to do in similar

¹⁴ *Hrvatska Elektroprivreda d.d. v Republic of Slovenia* (ICSID Case No ARB/05/24) Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008.

circumstances, and what impact that should or should not have on a party's choice of arbitrator?

24. A second example from international commercial arbitration is directed to the proposition that there are a number of high quality arbitral awards dealing with matters of general interest that very few people have the benefit of reading.
25. Recently an arbitral tribunal chaired by Lord Collins, of which Gary Born and Toby Landau QC were the other members, rendered a 350 page award that addresses numerous issues of English tort and contract law, makes findings dismissing allegations that had been publically made of corruption involving officials of a State and of State-owned entities, and includes a detailed discussion of *res judicata* in the context of international arbitration, all of which is confidential.
26. Sir Bernard Rix has said that the dearth of published arbitral decisions means that commercial law is going “underground” as parties choose to submit to arbitral tribunals rather than to courts what he eloquently called “the basic feedstock of our commercial law”.¹⁵

IV. WHAT CHANGES SHOULD BE MADE TO INTERNATIONAL COMMERCIAL ARBITRATION?

27. In a speech given in March this year, the Lord Chief Justice of England and Wales, Lord Thomas, referred to “the need to make the Commercial Court the most attractive place to resolve disputes”, including because “resolution of disputes involving legal issues before the court is the best way not only of determining the dispute but of developing the law”.¹⁶
28. My own view is that sophisticated commercial parties are sufficiently well equipped to determine for themselves where their dispute is best resolved. The more serious point concerns the potential impediment to the development of

¹⁵ Rt Hon Sir Bernard Rix, “Confidentiality in International Arbitration: Virtue or Vice?” Jones Day Professorship in Commercial Law Lecture, Singapore Management University, Singapore, 12 March 2015, p 19.

¹⁶ Rt Hon the Lord Thomas of Cwmgiedd, “Keeping Commercial Law Up to Date” Jill Poole Memorial Lecture, Aston University, 8 March 2017, para 41.

the common law that might flow from their choice. Reacting to that by more readily allowing appeals from arbitral tribunals to courts, as the Lord Chief Justice has suggested,¹⁷ is not an alternative that would assist London to remain an important seat of international arbitrations.

29. A much better solution would be to publish more arbitral awards. Lord Neuberger has remarked that the “ossification” of the common law can be avoided “if excellent awards by excellent arbitrators are published”.¹⁸ Sir Bernard Rix has proposed a default rule of the publication of anonymised awards.¹⁹
30. I confess that I have some doubts about the utility of awards that are stripped not only of the names of the parties, but of all information that could identify them.²⁰ Often that will be quite a lot, and one is slow to rely on awards where the full factual circumstances cannot be appreciated, since they can be essential to understanding what was decided and why.
31. I would go further and suggest as a default position that any arbitral award should be public, unless the tribunal, after hearing the parties, decides that it or some part of it should not be. If parties want their arbitration to be confidential they should explicitly agree that by contract. Having confidentiality as the default position when parties have not explicitly turned their mind to the question seems to me to be undesirable.

¹⁷ Rt Hon the Lord Thomas of Cwmgiedd, “Commercial Dispute Resolution: Courts and Arbitration” The National Judges College, Beijing, 6 April 2017; Rt Hon the Lord Thomas of Cwmgiedd, “Keeping Commercial Law Up to Date” Jill Poole Memorial Lecture, Aston University, 8 March 2017; Rt Hon the Lord Thomas of Cwmgiedd, “Launch of TheCityUK’s Legal Services Report 2016”, 20 July 2016; Rt Hon the Lord Thomas of Cwmgiedd, “Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration” The Bailii Lecture 2016, 9 March 2016.

¹⁸ Rt Hon the Lord Neuberger of Abbotsbury, “Arbitration and the Rule of Law” Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015, para 24.

¹⁹ Rt Hon Sir Bernard Rix, “Confidentiality in International Arbitration: Virtue or Vice?” Jones Day Professorship in Commercial Law Lecture, Singapore Management University, Singapore, 12 March 2015, p 21.

²⁰ See Rt Hon the Lord Thomas of Cwmgiedd, “Keeping Commercial Law Up to Date” Jill Poole Memorial Lecture, Aston University, 8 March 2017, para 44.

32. The 1996 English Arbitration Act is deliberately silent on the issue of confidentiality.²¹ Confidentiality is the default position in arbitrations seated in England because the English judiciary implied an obligation of confidentiality into agreements to arbitrate.²²
33. Commercial law might not have gone “underground” if the courts did not dig the burrow in which it may now have begun to live. It is no longer a very weatherproof burrow, since there are now many exceptions to this implied obligation, also worked out by the courts over time.²³
34. My own view is that it would be a commendable step if the English common law were to “un-develop” the implied obligation of confidentiality that it developed, and if those arbitral rules that provide for confidentiality as the default position were changed.

V. CONCLUSION

35. Secrecy is a habit, not a need. Most who defend it do not have a better rationale than their perception that it is what parties to arbitrations want. The accuracy of that premise is questionable as a general proposition. It would be more accurate to say that some parties want some degree of confidentiality in some cases. But even if it were an accurate premise, it would be insufficient.
36. For better or for worse, international commercial arbitration is now a major forum for the resolution of disputes that impact on those other than the parties to them. It is a forum in which claims of corruption of public officials and of breaches of competition law are made and decided, in which States and State-owned entities are routinely parties, and in which large swathes of commercial law, including concerning standard form commercial contracts, are applied

²¹ See Rt Hon the Lord Saville of Newdigate, “Reflections on the English Arbitration Act 1996 after fifteen years” Chartered Institute of Arbitrators, Singapore, August 2012, p 7.

²² See, for eg, *Dolling-Baker v Merrett* [1990] 1 WLR 1205, discussed in Rt Hon Sir Bernard Rix, “Confidentiality in International Arbitration: Virtue or Vice?” Jones Day Professorship in Commercial Law Lecture, Singapore Management University, Singapore, 12 March 2015, p 2.

²³ See discussion of exceptions recognized in *Ali Shipping v Trogir* (1997) ([1998] 2 All ER 136) in Rt Hon Sir Bernard Rix, “Confidentiality in International Arbitration: Virtue or Vice?” Jones Day Professorship in Commercial Law Lecture, Singapore Management University, Singapore, 12 March 2015, p 8.

and developed. There are therefore compelling reasons for people to be increasingly concerned about the fact that it is to a substantial degree happening in secret.

37. The storm of controversy that came to investment arbitration may be on its way to international commercial arbitration, or at least to certain kinds of international commercial arbitration, and justifying secrecy based on the supposed expectations of those who use it will be too narrow a foothold successfully to defend it. There are other interests that matter.
38. Thank you very much for your attention.
