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The time has come
A Plea for Abandoning Secrecy in Arbitration

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RÉSUMÉ

L'auteur appelle à la transparence dans l'arbitrage international, affirmant que la publication des décisions augmenterait la qualité, la légitimité et la cohérence de l'arbitrage international. Il soutient que la confidentialité n'est plus d'actualité, et qu'il est nécessaire de changer d'attitude et d'ouvrir le monde de l'arbitrage international au public, estimant que la publicité est l'un des piliers fondamentaux de la justice.

ABSTRACT

Juan Armesto Fernandez calls for transparency in international arbitration, claiming that the publication of awards would increase the quality, legitimacy and consistency of international arbitration. He argues that secrecy is outdated; we need to change our attitude and open the world of international arbitration to the public. After all, publicity is one of the basic pillars of justice.

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice"Jeremy Bentham [1]
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> "Arbitration proceedings are less and less confidential" – Yves Derains [2]
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> "Long term, we are likely to see confidentiality become the exception rather than the rule" – Brooks. W. Daly [3]

1. Many still defend the saying of Serge Lazareff: "If, as Ihering wrote, form is the twin sister of freedom, then confidentiality is the twin sister of arbitration" [4]. The world

1. Jeremy Bentham: "Constitutional Code, Book II, ch. XII, sect. XIV" in "The Works of Jeremy Bentham, published under the superintendence of ... John Bowring", IX, (1843), p. 493.
2. Yves Derains: "Evidence and Confidentiality", in "Confidentiality in Arbitration – 2009 Special Supplement ICC International Court of Arbitration Bulletin", p. 57.
3. Brooks W. Daly in the preface to Ileana M. Smeureanu: "Confidentiality in International Arbitration", (2011).
4. Serge Lazareff: "Confidentiality and Arbitration: Theoretical and Philosophical Reflections" in "Confidentiality in Arbitration – 2009 Special Supplement ICC International Court of Arbitration Bulletin", p. 81.

of commercial arbitration is still shrouded in mystery; it is "surrounded by secrecy which works against the public interest", as the Financial Times famously put it [5]. The existence of cases, the names of arbitrators, and the decisions adopted – everything is confidential. But in our hearts we all know that the situation must change, that the defenders of secrecy are fighting a rearguard action, and that their position is doomed: transparency will become the norm, and secrecy the exception.

2. It is easy to explain why secrecy will eventually disappear: it is contrary to the mood of times. Franchise voting, hereditary privileges, inquisitorial procedures, military tribunals: you could always find valuable reasons to defend institutions such as these. But they have gone down the drain of history, because they were seen as incompatible with new concepts and ideologies: democracy, human rights, rule of law. The same development is affecting secrecy. We – thankfully – live in a world where citizens are not cowed by authority, where they demand knowledge, as an instrument for increased control. The quest extends to all walks of life and society: patients require to be fairly informed about their illness and their chance of recovery; investors want to receive all relevant information affecting listed companies; "Freedom of Information Acts" grant citizens the right to inspect government records. In all jurisdictions judgements are public – there cannot be rule of law if justice is not publicly administered; and in the most progressive countries the entire judicial records are open to inspection by citizens.

The drive for knowledge and transparency has been reinforced by the revolution in information technology. In the days of printing, the cost of disseminating and receiving information was high, and information could only be viewed by the privileged few with access to first class libraries. Today internet, webs and search engines have democratized access and reduced costs of dissemination and acquisition to nil: a merchant in London has access to the same information as his peer in Timbuctu, a scholar in Harvard is not better positioned than his colleague in Cochabamba. The technical availability and the low cost have exacerbated the thirst to know.

3. Arbitration has not completely escaped this transparency revolution. But the result has been schizophrenic.

In investment arbitration, openness is now the norm. In its initial stages, there were some timid attempts to extend the traditional shroud of secrecy, prevalent in commercial arbitration, to the new field of investment arbitration. But thanks to ICSID and to the attitude of the USA and Canada in NAFTA arbitration [6], the general rule now is a high degree of openness. The ICSID web site includes a list of all arbitrations filed, the name of the arbitrators are known, hearings are increasingly streamed through the internet, and almost all awards – including *ad hoc* decisions – are now published (and a couple of trade publications thrive by disseminating the decisions among the interested). It is now possible to keep track of the investment decisions issued by any

5. Michael Peel/Jane Croft: "Arbitration: Case Closed" in Financial Times (Apr. 15, 2010).

6. See "Notes of Interpretation of Certain Chapter Eleven Provisions" issued by the Free Trade Commission on July 31st, 2001; see also Joachim Delaney/Daniel Barstow Magraw: "Procedural Transparency" in "The Oxford Handbook of International Investment Law", 2008, p. 741.

arbitrator, of the tribunals in which she participated, and of the law firms which acted in each single case.

The situation in investment arbitration sits in stark contrast with that of commercial arbitration. Here the *status quo* is unmovable and total secrecy amazingly is still the norm. It is impossible to obtain a list of the arbitrations filed at the ICC, the LCIA, the AAA or any other major institution. Designations of arbitrators are protected as state secrets. Awards are not published [7]. Previous decisions of any arbitrator are unknown. No information on parties, tribunals and law firms is available.

4. I submit that the present situation is untenable. Change is unavoidable and should come swiftly.

In my opinion, the first step should be for institutions to publish on the internet a list of the cases filed, together with the names of the arbitrators, and a short summary of the subject matter [8]. The practice of ICSID could serve as a template. Relationships between parties and the institution, between parties and arbitrators, between arbitrators and law firms and between arbitrators themselves would become much more transparent. Opponents of transparency will argue that the increased knowledge will lead to additional challenges of arbitrators. That may well be the case. But it is only fair that this happens: if users feel that the facts amount to a lack of independence or impartiality, they must have the right to mount a challenge. The problem does not go away by hiding the facts.

But this first step is not enough: a further step is necessary. Arbitration institutions should change their rules, establishing that commercial awards should be published, except if both parties have agreed, in the arbitration clause or during the procedure, that the decision should remain secret. The present practice should be reversed, publication of awards should become the default rule, and secrecy an opt-in. In the published documents, names and other identifying characteristics of the parties could be deleted, but the names of arbitrators should always be included [9]. Institutions should retain an exceptional power to postpone or waive publication for good cause.

5. The publication of awards would increase the quality, the legitimacy and the consistency of international arbitration.

Publicity is one of the basic pillars of justice. As Bentham said "[p]ublicity 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" [10]. The rule of law requires – as Lord Bingham said – that "all persons and authorities within the state,

7. The ICC publishes sanitized excerpts of awards several years after they have been rendered, without disclosing either the names of the parties, of the lawyers or of the arbitrators.

8. To achieve this aim, an amendment of the institutions' rules would be sufficient. It is doubtful whether the principle of confidentiality in arbitration – if it exists at all – can be expanded to include the very the existence of the proceedings; see Ileana M. Smeureanu: "Confidentiality in International Arbitration", 2011, p. 31.

9. In agreement Gary B. Born: "International Commercial Arbitration", II, 2009, p. 2287.

10. Jeremy Bentham in "The Works of Jeremy Bentham, published under the superintendence of ... John Bowring", IV, (1843), p. 316.

whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts" [11].

A national court system in which judges would be authorized to issue secret judgements is simply unthinkable; it would be anathema to any idea of justice and of rule of law. The surprising thing is that many of those who as a matter of fact defend publicity in the administration of justice, support secrecy of arbitration awards. This incongruity might have been justified so long as arbitration was a restricted system of solving commercial disputes between a few merchants with equal bargaining power and similar levels of knowledge. Today arbitration has expanded its frontiers: it has become a truly worldwide system for the adjudication of economic disputes. Participants come from many countries, developed, in the process of developing and underdeveloped, they include SME's and multinationals, companies which are private, public or government owned, and governments themselves. Most parties do not come from western countries, from the traditional homeland of arbitration. Thus the decisions of institutions, the awards of arbitrators, the relationships between the different players impact on a much wider audience. Secrecy is increasingly difficult to justify.

Publicity of awards would also be a prime instrument of quality control. It is essential that arbitrators know that the views and arguments expressed in their awards will be reviewed by lawyers, by academics and by prospective users of their services. As Gary Born has said with his characteristic understatement "publication of arbitral awards might have positive effects on the quality of decision-making (and decision-explaining), because tribunals would have greater incentives to make defensible, persuasive and careful decisions" [12]. And the speed of decision-making – a staple criticism of international arbitration – would also improve: delays would be public, and the reputation of slow decision makers would suffer.

Ana del Palacio likes to say that successful arbitration is the result of two countervailing forces: efficiency and legitimacy. Increased transparency in general, and publication of awards in particular, would not only result in increased efficiency, it would also reinforce legitimacy. Many merchants and many states perceive the world of international arbitration as secretive, and this lack of transparency limits its appeal – especially in countries outside the first world. It is a standing joke in arbitration circles that MAFIA stands for "Mutual Association For International Arbitration". We insiders take it in fun – but to many outside our circle it is a stark reality.

Our industry is offering users a system for fair and equitable adjudication of conflicts. And by and large we have succeeded. I have never come across malfeasance. There is nothing to hide. But we act as if there indeed was something to hide, and in the process undermine the confidence which users, especially users who are only occasional participants, have in the system. Abolition of secrecy would broaden the appeal of arbitration, and would permit that new parties, and new lawyers

11. Lord Bingham of Cornhill, Sixth Sir David Williams Lecture, 16th November 2006, available at http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php.

12. Gary B. Born, n. 9, p. 2287.

and arbitrators gain confidence and enter the system. Increased acceptance of arbitration throughout the world will benefit all – old hands as well as new hands.

There is still a final advantage of publication of awards: consistency would be reinforced. In principle it is only for judicial decisions to create binding *jurisprudence constante* or *stare decisis*. But well written, well argued awards can and do have persuasive value, and could influence future arbitral decisions – if they have been published and made available to future parties and tribunals. In investment arbitration and in maritime arbitration, where awards have traditionally been published, the reliance on prior arbitral decisions can be readily observed [13].

6. I have described the perceived advantages of greater transparency. But what about the drawbacks? There must indeed be solid reasons for arbitral institutions and revered practitioners to defend with such ardour that every bit of information surrounding commercial arbitration should be kept secret.

The solid reasons in fact boil down to one: it is argued that users demand secrecy, that confidentiality is the main, or at least among the main, advantages of arbitration; if the existence of cases were publicly known or if the decisions rendered by arbitrators were to be published, clients would shy away from international arbitration and revert to other forms of dispute resolution. As Redfern and Hunter say in their standard textbook, confidentiality "still remains a key attraction to many participants" [14].

I beg to differ. The statement that secrecy must be upheld because users demand total confidentiality is an unproven myth – in my reading the available evidence hints in the opposite direction.

Users' opinions can be gauged through surveys. And a number of polls have been conducted, identifying what parties perceive as the main advantages in arbitration. The one I give more trust to is an AAA survey carried out in 2003, which came to the conclusion that users only ranked confidentiality as the seventh most important reasons for using arbitration [15]. But I accept that in other surveys the results may be different. In any case all these surveys suffer from methodological bias: the companies polled are restricted to those which already are active in arbitration; companies outside the system, those which possibly could be convinced to join if there was more openness and transparency, are of course never asked.

There is a better test to establish the real importance which parties attach to secrecy. In most jurisdictions, setting aside or enforcement of an award through the courts requires that the existence of the dispute and the details of the award be publicly disclosed. Yet I have never heard any party waiving its request for annulment or enforcement, because that would entail giving publicity to the award.

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13. The criticism in investment arbitration is that subsequent arbitrators do not rely sufficiently on previous decisions, that the same issues are solved differently in subsequent decisions and that the lack of consistency reduces the predictability of the system. If investment awards were secret, the problem would only be exacerbated!

14. Nigel Blackaby/Constantine Partasides/Alan Redfern/Martin Hunter: "Redfern and Hunter on International Arbitration", 5th. ed., (2009), p. 33.

15. "Improving Economic and Non-Economic Outcomes in Managing Business Conflicts" available under www.adr.org/cs/idcplg

There is also empirical evidence that publicity of awards does not deter parties from opting for arbitration. Shipping is one of the areas where arbitration is more prevalent. Yet, in shipping, awards are routinely published, with all personal details. It is difficult to argue that publication would reduce the attractiveness of commercial arbitration in the eyes of its users, when in the one industry in which it is most popular such publication is the norm.

A final proof that parties do not attach too much weight to confidentiality is how rarely arbitration clauses include specific language on this topic – except in a few industries (oil and gas, pharmaceuticals, ...), where the parties have a legitimate concern that proprietary information may leak to third parties. What should be done when parties have agreed confidentiality clauses? The answer is clear: whatever the parties have agreed should be upheld. Arbitration is a consent based procedure, and the agreement among the parties must be respected. But it is one thing to respect confidentiality obligations when agreed to by the parties, and another to shroud all arbitrations in total secrecy, even when the parties have not voiced any such concern.

Summing up: in my experience, companies decide to submit to arbitration and not to courts not because the first system is more opaque and the second more transparent. I would be very surprised if transparency has ever been a deciding factor. Arbitration is chosen if users perceive it as a fair, impartial, predictable and efficient adjudication system, to be preferred to the local courts. Parties often settle on arbitration because there really is no alternative – when viable alternatives exist, the popularity of arbitration declines.

7. This leads me to the end. A spectre haunts the world of arbitration: the increasing social demand that we abandon our reclusiveness and secrecy, so that stakeholders can gain a better understanding of what we are doing and how we are deciding. For many years now arbitration has been providing merchants, corporations and states with an efficient and impartial system for the adjudication of conflicts. But the world around us is changing fast. Our sector has long ago ceased to be a cottage industry, open only to a few *cognoscenti*. It has become a worldwide system of adjudication, serving a variety of users from different backgrounds, with different ideologies, and with a wide range of expectations of how it should operate. It is our duty to strengthen its legitimacy. A dramatic change in our attitude towards secretiveness would be an excellent first step.