



Confidentiality and Legitimacy of International Arbitration: Are They Mutually Exclusive?

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FREE REGISTRATION

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Confidentiality has always been considered as one of the main features of international arbitration. Surprisingly, there is no rule in the UNCITRAL model law on confidentiality. As a result, many jurisdictions that adopted the model law do not have any provision on confidentiality. Jurisdictions that did not adopt the UNCITRAL model law, such as England and Wales, also do not provide any specific rule on confidentiality in their legislation. Therefore, confidentiality is left to the parties to determine. Counsels should advise their clients regarding the confidentiality of the process and explain the status quo thoroughly. Only then can arbitrating parties make an informed decision in their arbitration agreement.

To address this important issue, this webinar will start off by defining confidentiality in international arbitration, then moving on to the general perception. Parties who consent to arbitrate generally assume that their arbitration proceedings and all documents produced in the arbitration are confidential. However, the reality is that confidentiality is not something automatically granted to parties when they agree to arbitrate. In fact, party autonomy is governing all the processes in international arbitration, and confidentiality is not an exception. International arbitration is as confidential as parties agree to be confidential. If parties did not decide on the confidentiality of their proceedings beforehand, they might face unpleasant consequences where confidentiality is not a norm.

After setting the above background, this webinar will analyse several issues. First, it will look into the case law from various jurisdictions regarding confidentiality. In most of these decisions, the law does not provide confidentiality as a default rule. After analysing how confidential arbitration is, it will expound on who has the duty to keep this process confidential. The duty of confidentiality can lie with different parties depending on the applicable rules. To this end, the status quo of the arbitration rules of major arbitration institutions and the UNCITRAL rules are to be discussed.

Second, this webinar will explore whether the confidentiality of international arbitration undermines the legitimacy of the process. What ethical and legal consequences may arise from this confidential feature of arbitration? International arbitration is allowed because international agreements and national laws allow this procedure. However, this procedure cannot be used to hide from the public the illegal activities, corruption, or other misconduct of the arbitrating parties. In this sense, there is a conflict between confidentiality and public interest, and arbitration cannot stay confidential where the public has a right to know. This tension between the public interest and confidentiality of international arbitration will be discussed.

Thirdly, it will present the case law in several jurisdictions in detail and elaborate on the exceptions under them regarding when confidentiality can be breached legally. Confidentiality is not absolute and there are certain scenarios a party can legally breach confidentiality.

Overall, this webinar aims to provide an in-depth analysis regarding the relationship between the confidentiality and the legitimacy of international arbitration, furnishing the audiences with important suggestions on how parties in arbitration can secure themselves against potential breaches of confidentiality.

SPEAKER



Can EKEN

Assistant Professor of Law
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Dr Can Eken is an Assistant Professor in commercial law at Durham University. He teaches course on international commercial dispute resolution at Durham Law School. He is a triple-qualified lawyer admitted as a solicitor in England and Wales and an attorney in California, US, and Turkey. He is a Fellow of the Chartered Institute of Arbitrators, and he is on the panel of arbitrators at the Thailand Arbitration Center (THAC) and Shanghai International Arbitration Center (SHIAC). Prior to Durham, Dr Eken practised law and worked as a Research Assistant. Dr Eken completed his LL.M. degree at the London School of Economics and Political Science, and another LL.M. degree at Dokuz Eylül University in Turkey where he also obtained his Bachelor's degree in law with high honours. He completed his Ph.D. degree at the Faculty of Law at The Chinese University of Hong Kong. Dr Eken spent an academic year at the Stanford University during 2019–2020 and two months at the Max Planck Institute in Luxembourg in 2021 as a Visiting Scholar. He has many publications on international commercial arbitration, investment law, third-party funding and online dispute resolution. He regularly gives lectures and consultancy on international commercial arbitration and investment law.

MODERATOR / SPEAKER



Adrian LAI JP

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Adrian is a practising barrister, arbitrator, accredited mediator and certified public accountant. He is instructed as Counsel in a wide range of civil contentious matters, with particular focuses on arbitration, professional negligence and disciplinary matters. He sits as arbitrator – sole arbitrator, co-arbitrator or presiding arbitrator – in international commercial arbitrations conducted under various rules including those of HKIAC, CIETAC, ICC and UNCITRAL. He is named on the panels of many arbitral bodies. In addition to international commercial arbitrations, he has also participated in investor-State arbitrations and State-to-State arbitrations. Adrian is a designated national correspondent of China to the UNCITRAL, reporting on the Hong Kong SAR's implementation of the New York Convention and the UNCITRAL Model Law (as adopted in the Arbitration Ordinance). He also sits on the Advisory Committee on Promotion of Arbitration of the Department of Justice of the Hong Kong SAR. Adrian has keen academic interest in international law, which is beneficial to his handling of cases involving points of international law. In his capacity as the Deputy Secretary General of Asian Academy of International Law, Adrian participates as an observer in the work of the UNCITRAL Working Group III on Investor-State Dispute Settlement Reform.