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ARTICLE 34—CONFIDENTIALITY

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ARTICLE 34

Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Except as provided in Article 27, unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.

I. Introduction

The extent to which arbitral proceedings are, or should be, confidential is a topic of recurring debate within the international arbitration community.¹ It is also one of the few areas in which there are notable distinctions between the leading sets of institutional rules. Article 34 of the ICDR Rules—with its focus on imposing a duty of confidentiality on the arbitrators and the institution—represents an innovation by the ICDR that has since been partially adopted by some other **34.01**

¹ See generally GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,250–71; N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) paras 1-96, 2-145–2-176; E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1,412; S Crookenden, ‘Who Should Decide Arbitration Confidentiality Issues?’, 25(4) *Arb Intl* 603–13 (2009); Paulsson and Rawding, ‘The Trouble with Confidentiality’, 11 *Arb Intl* 303 (1995).

institutions.² By comparison, neither the ICC nor UNCITRAL Rules impose any such restrictions on the arbitrators and nor do they, or the LCIA Rules, apply to the institution.³

34.02 It is also important to note what Article 34 is *not*. It does not impose a duty on the parties to keep confidential all information disclosed in the course of the proceeding. In that respect, Article 20(4) provides the limited protection that hearings are ‘private’, meaning that they are not open to the public.⁴ Article 27(4) provides that an award may be ‘made public’ only with consent of the parties or as required by law.⁵ The ICDR Rules otherwise leave issues of confidentiality to the agreement of the parties, any procedural order entered by the tribunal, and the dictates of applicable arbitration laws.⁶

II. Textual commentary

34.03 The Article 34 duty of confidentiality extends to ‘confidential information disclosed during the proceedings by the parties or by witnesses’. Of course, this begs the question: what is ‘confidential information’ in this context? The remainder of the Article provides a very expansive duty to ‘keep confidential all matters relating

² See 2010 SIAC Rules, Art 35 (‘The parties and the Tribunal shall at all times treat all matters relating to the proceedings and the award as confidential’); SCC Rules, Art 46 (‘Unless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award’); Swiss Rules of International Arbitration, Art 43(1):

Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not otherwise in the public domain . . . This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the Chambers.

³ While LCIA Rules, Art 30.1, contains an expansive confidentiality clause for the parties, neither the tribunal nor the institution are bound to its scope. The tribunal need keep confidential only their deliberations (LCIA Rules, Art 30.2) and the institution need protect only the award (LCIA Rules, Art 30.2). Neither the UNCITRAL Rules nor the ICC Rules contain an analogous provision.

⁴ See discussion of Art 20(4) at para 20.09 above. See also AAA Commercial Rules, s R-23 (duty to maintain the privacy of the hearing).

⁵ See discussion of Art 27(4) at paras 27.09–27.11 above.

⁶ See JP Zammit and J Hu, ‘Arbitrating International Intellectual Property Disputes’, 64 *Disp Res J* 74, 77 (2010) (‘Article 34 of the [ICDR’s] International Arbitration Rules provides for arbitrators and administrators to maintain confidentiality, but does not explicitly require the parties to do so’).

While US courts have found confidentiality provisions in other AAA rules to be enforceable, they have not recognized an *implied duty* of confidentiality inherent in an agreement to arbitrate. See *Parilla v IAP Worldwide Services, VI, Inc*, 368 F3d 269 (3d Cir 2004) (holding that the AAA Rules (Employment Disputes) relating to confidentiality were not per se unconscionable under US law); *United States of America v Panhandle Eastern Corp*, 118 FRD 346, 350 (CD Cal 1988) (noting that the applicant, a party to ICC arbitration, failed ‘to point to any actual agreement of confidentiality, documented or otherwise’).

to the arbitration or the award'. Taking the language at face value, this duty must presumably extend to provision of pleadings and evidence, the hearing, the arbitrators' deliberations,⁷ and the actual content of the award. It arguably also extends to the identities of the parties and the existence of a dispute. One commentator noted that Article 34 is an 'unusually strict' rule, preventing disclosure of awards or the identities of the parties.⁸

To provide some international comparison, the 2010 SIAC Rules (extending a duty of confidentiality to the tribunal and the parties) cover 'all matters relating to the proceedings and the award'. They define 'matters relating to the proceedings' as:

proceedings, and the pleadings, evidence and other materials in the arbitration proceedings and all other documents produced by another party in the proceedings or the award arising from the proceedings, but excludes any matter that is otherwise in the public domain.⁹

There are three exceptions to the duty of confidentiality in Article 34. **34.05**

- (1) In keeping with the principle of party autonomy, the parties can agree otherwise.
- (2) There is a carve-out for Article 27—presumably a reference to Article 27(8), in which the ICDR reserves the right, unless agreed otherwise, to publish redacted awards.¹⁰
- (3) Finally, the duty may be abrogated 'as required by applicable law'. Disclosure pursuant to applicable law may encompass, for example, pursuant to a subpoena or as part of public access to judicial records in arbitration-related litigation.¹¹

One also assumes that where information becomes available in the public domain, the Article 34 duty no longer applies to the extent of that disclosure.¹²

Of course, there are no sanctions for a breach of any Article 34 duty. However, if an arbitrator were to commit such an act, it would have serious reputational repercussions. Similarly, the ICDR's success is dependent on protecting confidentiality of information in its control. The broad scope of Article 34 can therefore be understood as one of the ways in which the ICDR encourages parties to use its services. **34.06**

⁷ LCIA Rules, Art 30.2, explicitly provides that the deliberations are to remain confidential, save as to the extent that disclosure of an arbitrator's refusal to participate is required.

⁸ See N Japaridze, 'Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration', 36 Hofstra L Rev 1415, 1422 (Summer 2008).

⁹ SIAC Rules, Art 35.3.

¹⁰ See discussion of Art 27(8) at para 27.11 above.

¹¹ See eg SIAC Rules, Art 35.2 (listing permissible disclosure, although not all situations will apply to the arbitrators or the relevant institution). In the context of disclosure by arbitrators, note also that disclosure of some information may occur in being considered for other appointments.

¹² See eg SIAC Rules, Art 35.3 (confidentiality exception 'excludes any matter that is otherwise in the public domain'); Swiss Rules, Art 43(1) (same). See also *Zurich Am Ins Co v Rite Aid Corp*, 345 F Supp 2d 497 (ED Pa 2004) (unsealing the record and noting that the confidentiality procedures of the AAA did not 'trump the clear law and policy standards . . . for maintaining open and accessible records of legal matters for public scrutiny': *ibid*, 507).

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