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Confidentiality and NAFTA Chapter 11 Arbitrations

Fulvio Fracassi*

I. INTRODUCTION

It is often said that confidentiality is one of the benefits of international commercial arbitration and one of the principal reasons why business people have made arbitration the forum of choice for the resolution of international commercial disputes. Others have gone further and suggested that parties "place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration."[1] No authority is generally cited for such a proposition but it is seen as implicit or a corollary to an agreement to resolve a dispute by way of arbitration.[2] Claimants in the North American Free Trade Agreement ("NAFTA") Chapter 11 arbitrations have generally relied on this notion that the private nature of arbitrations gives rise to a duty of confidentiality, with some success, to support their contention that materials generated and produced in Chapter 11 proceedings cannot be made publicly available. This has led to criticisms from nongovernmental organizations ("NGOs") and others that the NAFTA Chapter 11 dispute settlement mechanism is secretive and not open to public scrutiny. This paper argues that the existence of a general principle of confidentiality applicable to commercial arbitrations is far from a settled issue, and more importantly, if it does exist, it should have no application in the context of NAFTA Chapter 11 arbitral proceedings.

II. THE CONFLICTING STATE OF THE LAW ON CONFIDENTIALITY

The question of whether the private nature of commercial arbitrations gives rise to a general principle of confidentiality that applies to arbitrations and the materials generated and produced therein has been the subject of much debate and discussion

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1. Expert Report of Stephen Bond Esq (in *Esso/BHP v Plowman*), 11 Arbit Intl 273 (1995).
2. See Ronald Bernstein, *Handbook of Arbitration Practice* 193 (Sweet & Maxwell 3d ed 1998).

over the last few years. This lack of consensus is amply demonstrated by case law and commentaries on this subject. As L. Yves Fortier, President of the London Court of International Arbitration, notes in his recent article on confidentiality in arbitrations:

> These questions [of privacy and its corollary confidentiality] have, in fact been the subject of much heated debate recently, in various jurisdictions and institutions. The conclusions reached in those instances demonstrate what might be called a *definite lack of consensus.*[3]

A brief analysis of some of the more well-known decisions is appropriate for purposes of this discussion. The recent decision of the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc* is of particular note.[4] The parties in this case were involved in an arbitration in which the defendant had an award affirming the tribunal's jurisdiction published in an arbitration journal. Upon learning of the publication, the Bulgarian Foreign Trade Bank applied to the arbitral panel to have the arbitration agreement declared null and void for alleged breach of the confidentiality obligation. The panel refused to do so and ultimately issued a final award. The issue was appealed to the domestic courts and made its way to the Swedish Supreme Court. The court found that the existence of a privacy rule in an arbitration agreement does not give rise under Swedish law to a separate duty of confidentiality. More specifically, the court found that the private nature of commercial arbitrations and the existence of an in camera rule in an agreement to arbitrate simply means that the public does not have a right to attend hearings. There is no contradiction, the court notes, with parties to the dispute being simultaneously entitled to disclose information to outsiders concerning the arbitration proceedings. The court concludes by holding:

> the Supreme Court considers that a party in arbitration proceedings cannot be deemed to be bound by a duty of confidentiality, unless the parties have concluded an agreement concerning this.[5]

A similar approach was taken by the High Court of Australia in the case of *Esso/BHP v Plowman,*[6] one of the more noted cases on the issue of confidentiality of arbitral proceedings. Briefly, in this case the Minister for Energy and Minerals of the state of Victoria made clear his intention to disclose all information produced in the arbitration by Esso/BHP. Soon after making this announcement the Minister applied to the court to confirm that he was entitled to do so. Ultimately, the case reached the Australian High Court. The High Court held that there was a distinction between

3. L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality,* 15 Arbit Intl 131, 131–32 (1999).

4. *Bulgarian Foreign Trade Bank Ltd v A.I. Trade Finance Inc,* Case no T 1881-99 (Swed S Ct 2000), unofficial English translation available online at <http://www.chamber.se/arbitration/shared_files/news_display.asp?lang=2&id=35> (visited Mar 25, 2001).

5. Id at 10.

6. *Esso Australia Resources Ltd v Plowman,* 128 Austl L Rep 391 (1995).

the privacy of hearings and the secrecy of proceedings in general and concluded that confidentiality is not an essential attribute of a private arbitration and is not to be implied from an agreement to arbitrate. Moreover, it held that a requirement to conduct proceedings in camera did not impose an obligation prohibiting disclosure of documents and information provided in and for the purposes of the arbitration.[7] The court then went on to hold that even if some kind of confidentiality did attach it was not absolute and that a public interest exception applied:

> [I]n the public sector, the need is for compelled openness, not for burgeoning secrecy. The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by public utilities?[8]

The proposition that the private or in camera nature of commercial arbitration proceedings is distinct from and does not give rise to a general obligation of confidentiality that applies to arbitrations and documents produced therein has also found support in the US District Court in *United States v Panhandle Eastern Corp.*[9] In this case, the US Government sought and was granted an order for the production of documents relating to an International Chamber of Commerce arbitration involving a subsidiary of Panhandle. The court's statement that there was a failure to point to any actual agreement of confidentiality, documented or otherwise, strongly suggests that the court gave very little weight to arguments made regarding the confidentiality of arbitrations arising from an agreement to arbitrate in private.[10]

Admittedly, this is far from a one-sided issue. Distinguished English commentators and noted arbitrators have expressed the view that a duty of confidentiality does apply to commercial arbitrations and that this duty of confidentiality attaches to documents produced in an arbitration.[11] To this effect, in a comprehensive review of this issue a distinguished English commentator stated:

> But, for my part, if I had to express my opinion as to the common perception of English lawyers and other professionals practising in English arbitrations and, speaking more broadly, about the common perception of those practising in the field of international commercial arbitration, I would say that the common understanding has always been that not only are arbitrations to be held in private, but that all information concerning them and what transpires in the arbitration room is to be treated as strictly confidential.[12]

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7. See id at paras 34–35.
8. Id at para 40.
9. *United States v Panhandle Eastern Corp*, 118 FRD 346 (D Del 1988).
10. See id at 350.
11. See Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* 27–30 (Sweet & Maxwell 3d ed 1999).
12. Patrick Neill, *Confidentiality in Arbitration*, 12 Arbit Intl 287, 301 (1996).

Lord Justice Potter of the English Court of Appeal in *Ali Shipping Corporation v Shipyard Trogir*[13] also provides an insight into the English view on confidentiality of arbitrations. After citing previous decisions of the English courts on this issue with approval, Potter, LJ, concludes that confidentiality does not arise because of the private nature of arbitrations but attaches as an implied term to an arbitration agreement. In this regard, Potter, LJ, states:

> It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the Court is propounding a term which arises "as the nature of the contract itself implicitly requires."[14]

The most recent decision to recognize the conflicting nature of judicial decisions and authoritative writings on the issue of confidentiality of arbitrations has been the NAFTA Chapter 11 arbitral decision in *Methanex Corp v United States*.[15] In this decision, the *Methanex* tribunal was considering a petition from non-parties to the arbitration to participate as amicus curiae in which the petitioners also requested access to confidential documents generated and produced in the arbitration. In responding to this portion of the petitioners request, the *Methanex* tribunal considered case law discussed above and concluded that with respect to Sweden, Australia and the United States, the existence of a clause or undertaking in an arbitration agreement to conduct proceedings in private does not give rise to an obligation of confidentiality, particularly in cases where public authorities or the public interest is involved.[16] Although the tribunal acknowledged that English decisions generally point in the opposite direction, it also states that:

> Even in England, however, the present position is arguably equivocal in regard to public authorities (including a state party), particularly given the absence of any statutory rule in the English Arbitration Act 1996.[17]

Ultimately, the *Methanex* tribunal did not make a final determination as to the existence or applicability of a general duty of confidentiality to NAFTA Chapter 11 arbitrations given the existence, in that case, of a consent order regarding disclosure and confidentiality agreed to by the disputing parties.

The impact of judicial pronouncements from courts in Australia, Sweden and the United States on the distinction between privacy of arbitrations and a duty of confidentiality cannot be denied. Certainly they counterbalance the approach taken by the English courts and arguably create severe doubts on the question of whether, as a

13. 1 Lloyd's 643 (Eng Ct App 1998).
14. Id at 651.
15. UNCITRAL Decision (Jan 15, 2001) (on file with the Chicago Journal of International Law).
16. See id at paras 43, 45.
17. Id at para 44.

general legal principle, international commercial arbitrations are confidential.[18] As Edward C. Chiasson, QC, notes:

> Commercial arbitration is the creature of consent. Parties can agree that their chosen dispute resolution process will be confidential, but if they do not do so it is questionable whether a legal requirement of confidentiality will exist independent of such agreement.[19]

After much consideration of this difficult issue by courts and various jurists, all that can really be concluded is that confidentiality should not be assumed simply because parties have entered into an arbitration agreement containing a clause or undertaking to conduct proceedings in private.

III. THE APPLICABILITY OF A PRINCIPLE OF CONFIDENTIALITY TO NAFTA CHAPTER 11 ARBITRATION

Even if one accepts as a general principle that the private nature of commercial arbitrations or the existence of a privacy rule in arbitration agreements give rise to an obligation of confidentiality, such a principle, arguably, has no application to NAFTA Chapter 11 arbitral proceedings.

NAFTA is not a private commercial arbitration contract but an international treaty between three sovereign states. Arbitrations under NAFTA Chapter 11 are between an investor and a state. They are not between private parties who chose to resolve their dispute by way of arbitration in order to preserve the confidentiality of the dispute. Therefore, NAFTA cannot implicitly give rise to an obligation of confidentiality owing to non-parties to the treaty. Moreover, NAFTA Chapter 11 contains no general rule or principle of confidentiality prohibiting the publicity of Chapter 11 proceedings.

The first NAFTA Chapter 11 tribunal to consider this issue was in *Metalclad Corp v United Mexican States*.[20] The Mexican government had sought a formal order from the tribunal that the proceedings were confidential and that breach of such an order would permit Mexico to request that the tribunal enforce sanctions. In rejecting Mexico's request, the *Metaclad* tribunal held that NAFTA, ICSID (Additional Facility) Rules, and the UNCITRAL Arbitration rules contain no express restriction on the freedom of the disputing parties to make publicly available information concerning the arbitration.[21]

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18. Consider Editorial, *The Decision of the High Court of Australia in* Esso/BHP v Plowman, 11 Arbit Intl 231 (1995).
19. Edward C. Chiasson, QC, *Confidentiality and Arbitration*, 58 Advocate 417 (2000).
20. ICSID Case No ARB(AF)/97/1, Award (Sept 2, 2000) at para 13 (on file with the Chicago Journal of International Law).
21. Although the Tribunal did recognize that nothing in NAFTA Chapter 11 or the applicable arbitration rules prohibited publicity of the arbitration, the Tribunal did state that it would be of advantage to the orderly conduct of proceedings and maintenance of working relations between the disputing parties if during proceedings both parties limited public disclosure to a minimum. Id.

The NAFTA Chapter 11 tribunal in *SD Myers, Inc v Canada* has also recognized the non-applicability of a general principle of confidentiality to NAFTA Chapter 11 arbitrations:

> The Tribunal considers that, whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any *general principle* of confidentiality exists in an arbitration such as that currently before this tribunal. The main argument in favour of confidentiality is founded on a supposed implied term in the arbitration agreement. The present arbitration is taking place pursuant to a provision in an international treaty, not pursuant to an arbitration agreement between disputing parties.
>
> There is no direct contractual link between the disputing parties in the present case, and there is no arbitration agreement between them. In the absence of an established *general principle* it is necessary to examine the treaty itself and the UNCITRAL Rules, which apply to the arbitration proceedings by election of MYERS exercising its right under Article 1120 of the NAFTA, as well as the Tribunal's previous procedural orders.[22]

The decision on disclosure of information in *Loewen Group, Inc v United States*[23] is yet another example of a Chapter 11 tribunal rejecting the sweeping proposition that a general principle of confidentiality applies to arbitrations under NAFTA. In addition to rejecting the existence of a general obligation of confidentiality, the *Loewen* tribunal made the following statement regarding arbitrations in which one of the parties is a government:

> In the case of an arbitration under NAFTA, particularly an arbitration to which a Government is a party, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs.[24]

Despite these pronouncements, some NAFTA Chapter 11 tribunals have nevertheless interpreted the in camera rule found in the arbitration rules to require disputing parties to keep materials filed in the arbitration confidential. For example, the *SD Myers* tribunal, after finding that no general principle of confidentiality applied to NAFTA Chapter 11 proceedings, concluded that Article 25(4) of the UNCITRAL Arbitration Rules which provides for private hearings extended to written submissions of the disputing parties as such materials effectively form part of the hearing. The tribunal then went on to state:

> It would be artificial and might adversely affect the efficient organization of Chapter Eleven arbitration proceedings if such materials [written submissions, trial exhibits etc.] were to be deemed less private [than the hearings].

22. UNCITRAL Decision (May 13, 2000) (Procedural Order No 16) paras 8–9 (on file with the Chicago Journal of International Law).

23. ICSID Case no ARB(AF)/98/3, Decision (Sept 28, 1999) (on file with author).

24. Id at para 8.

That under the UNCITRAL Rules arbitration hearings are private and cannot be attended by strangers without the consent of both disputing parties is not contested. Nor is it disputed that limiting attendance at hearings may be desirable in order to ensure the orderly and effective administration of arbitral proceedings. However, it is difficult to appreciate how state parties to an arbitration sharing with their constituents arbitral submissions would affect the orderly administration of an arbitral hearing. Measures can easily be put in place, as is regularly done by domestic courts or tribunals, to ensure that confidential business information is protected from disclosure.

It is difficult to reconcile tribunal decisions that on the one hand state that no general principle of confidentiality applies to NAFTA Chapter 11 arbitrations but at the same time extend a duty of confidentiality over materials generated and produced in the arbitrations by virtue of the fact that the hearings are private. As discussed earlier, it is this very notion that confidentiality arises from the existence of a privacy rule in an arbitration agreement that is unsettled in the juridical world. Moreover, the main argument that confidentiality is implied by virtue of the fact that parties have entered into a contract to arbitrate in private clearly has no application in the context of a NAFTA Chapter 11 arbitration. How then can one justify its use in NAFTA Chapter 11 arbitrations?

Furthermore, it is far from clear that the private nature of the arbitral hearings under the UNCITRAL Arbitration Rules or the ICSID (Additional Facility) Rules creates any obligation or expectation of confidentiality over documents submitted in arbitral proceedings. With respect to the UNCITRAL Arbitration Rules, the UNCITRAL Notes on Organizing Arbitral Proceedings make clear that confidentiality cannot be assumed simply because the hearings are private. To this effect, the UNCITRAL Notes provide, inter alia, that:

> Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected.[25]

The UNCITRAL Notes then go on to state:

> An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award).[26]

If the confidentiality of written materials could clearly be derived from the provision requiring in camera proceedings there would be no need for a confidentiality

25. UNCITRAL *Notes on Organizing Arbitral Proceedings* para 31 (UN 1996). The Notes do not impose any legal requirement binding on the arbitrators or the parties.

26. Id at para 32.

agreement of the type proposed by the UNCITRAL Notes. Edward C. Chiasson, QC, in his recent article on confidentiality and arbitration, also noted that the UNCITRAL Arbitration Rules simply provide for private hearings and are otherwise silent on confidentiality.[27]

With respect to disclosure of documents produced in NAFTA Chapter 11 arbitrations conducted under the ICSID (Additional Facility) Rules, the official annotations accompanying the original version of the ICSID rules for arbitration under the Convention are of particular note. The relevant portion of the annotations provides:

> The parties are not prohibited from publishing their pleadings. They may, however, come to an understanding to refrain from doing so, particularly if they feel that publication may exacerbate the dispute.[28]

Interestingly, the Additional Facility rules invoked to justify non-disclosure of documents were derived word-for-word from the version of the ICSID Arbitration Rules for which these annotations were prepared. With all due respect, given the above, it is difficult to accept the conclusion that parties to NAFTA Chapter 11 arbitrations are precluded from disclosing documents produced in arbitral proceedings particularly if confidential business information is redacted prior to disclosure. Absent a confidentiality agreement between disputing parties, no confidentiality should attach to documents produced in NAFTA Chapter 11 arbitrations.

There is another element to this debate that I have alluded to but have not yet specifically addressed, and that is the issue of public interest. NAFTA Chapter 11 arbitrations differ from private commercial arbitrations in three fundamental ways. First, they involve claims by a party against a state that challenge sovereign acts under international law. Second, they differ from private commercial arbitrations by virtue of the far-reaching public policy ramifications that their awards may have for all NAFTA Parties. Third, these claims may have serious implications for the public purse for which governments are accountable to the people. The scope and extent of the public policy and monetary implications of these cases becomes evident when one considers the type of cases brought forward to date and the amount of damages claimed. For example, investors have challenged environmental regulations in each of the three NAFTA countries and in some instances the conduct of domestic courts. In all of these cases investors are seeking tens or hundreds of millions of dollars in damages.

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27. Chiasson, 58 Advocate at 418 (cited in note 19).

28. *ICSID Regulations & Rules* Rule 30 n F (ICSID 1975). The annotations were prepared by the Secretariat of the Centre but do not constitute part of the Rules and have no legal force. The Administrative Council considered that they might be useful to the parties to proceedings and published them together with the texts of the Rules.

When NAFTA Chapter 11 tribunals are considering to what extent, if any, confidentiality attaches to NAFTA arbitrations, they should, in my view, also consider the broad and far-reaching public policy and monetary implications of the claims for NAFTA countries. As noted earlier, various jurisdictions have recognized the existence of a public interest exception. With respect to Chapter 11 tribunals, the pronouncements of the *Methanex* tribunal regarding public interest and the benefits of greater transparency are particularly noteworthy:

> The public interest in this arbitration arises from its subject matter [a challenge to an environmental regulation], as powerfully suggested by the Petitions [requesting amicus curiae participation]. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.[29]

Perhaps this statement and others are an indication that Chapter 11 tribunals are beginning to have a greater appreciation for the distinctive nature of Chapter 11 arbitrations and the public interest inherent in these disputes. However, to date, most substantive submissions made in Chapter 11 proceedings are confidential and may not be disclosed, except pursuant to law.[30]

Arbitrations that have broad and far-reaching public policy implications tend to draw attention from media and nongovernmental organizations. Maintaining a shroud of confidentiality over proceedings and documentation simply draws intense criticism and does harm to the legitimacy of the process. Canada and other NAFTA countries have taken concrete steps to improve the transparency of NAFTA Chapter 11 arbitral process by making certain documents such as the notice of intent, notice of arbitration, orders and awards publicly available. In some instances statements of claim and defense have also been made public.

IV. CONCLUSION

Confidentiality is not a prerequisite to resolving disputes under NAFTA Chapter 11.

Investors who choose to submit disputes to arbitration under this chapter of the NAFTA should accept that information and documents relating to these claims must be made publicly available because of their far-reaching public policy and monetary implications. It is too early to tell how this issue will ultimately be resolved. However, the challenge for NAFTA Chapter 11 tribunals will be to address these claims in a

29. *Methanex* at para 49.

30. For the most part NAFTA Chapter 11 Tribunals have recognized that a statutory duty to disclose takes precedence over any confidentiality requirement or agreement arising from a Chapter 11 arbitration.

manner that takes into account the public interest and the accountability of democratic governments to the public.