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ARBITRATION IS A PRIVATE AND CONFIDENTIAL PROCESS ONLY TO SOME EXTENT

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ABSTRACT: *This paper seeks to examine and analyse the levels of privacy and confidentiality of the arbitration process by exploring circumstances and legal provisions surrounding this process.*
KEY WORDS: arbitration process, privacy, confidentiality

INTRODUCTION

Arbitration can be defined as a quasi-judicial process of alternative dispute resolution used in resolving conflicts between two or more parties by a neutral impartial person or panel known as arbitrators/arbiters or an arbitral tribunal ,which upon consideration and deliberation over available evidence, renders a decision known as an arbitration award. An arbitration award is enforceable and legally binding to adversaries and all parties to the process. Arbitration is a dispute resolution method that has been in existence for a couple of centuries evident in ***Kill v Hollister*** [1]where the court overruled the premise that an arbitration agreement can oust the jurisdiction of courts of law is enough proof of existence of arbitration. Primarily, not disputes of all nature are capable of being arbitrated, in essence only civil matters example commercial disputes and in some jurisdiction'semployment and labour disputes and consumer matters. Arbitration can be mandatory where it imposed by a statutory provision or a contractual arbitral clause or voluntary in some case. Over the course of time, arbitration has been anchored into various legal instruments internationally, regionally and in national laws. These laws have also played a critical role in creating institutions that regulate and discharge arbitration services at all aforementioned levels. This paper seeks to examine and analyse the levels of privacy and confidentiality of the arbitration process by exploring circumstances and legal provisions surrounding this process.

Legal Framework

Due to the length of time that arbitration has been practiced, there has developed an elaborate jurisprudence in terms of international conventions, statutes and common law. The Convention on

[1]Kill v Hollister [1946] 95 Eng. Rep 532 K.B

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the Recognition of Foreign Arbitral Awards[2] initially drafted by the International Chamber of Commerce is the most significant international legal instrument relied upon in arbitration. Locally, the Arbitration Act[3] is the guiding principle in dissecting arbitration matters as well as numerous case law precedents for instance ***Fulham Football Club Limited v Richards and Another***[4]. There are however other statutes applicable in arbitration in case to case basis for example the Foreign Judgements Act[5], Limitations Act[6] and the Foreign Limitations Periods Act[7].

Arbitration in the United Kingdom has been instrumental in resolving civil cases especially commercial transactions of international nature arising from Europe and elsewhere. Ideally,pursuant to s.46[8] the arbitrator shall apply substantive laws chosen by the parties in determining merits of a dispute and further, persuaded by the decisions in***Arsanovia Limited v Cruz City 1 Mauritius Holdings***[9], the commercial division in the case of ***HabasSinai VeTibbiGazlarIstihsalAndustrisi AS v VSC Steel Company Limited***[10]developed a three-stage test by which to determine law applicable during an arbitration process. Main factors to be considered according to the court are;- express choice of the parties, the implied choice and thirdly the law with which the arbitration agreement has closest and most reasonable connexion.

Summarily,the *corpus juris* around arbitration deals elaborately with substantive and procedural issues of enforcement of arbitral awards, procedure for challenging awards, interim measures, appointment of arbitrators, arbitration procedure in general, drafting of agreements, rules of evidence and recognition of foreign awards. Although the 1996 Act[11] fails to expressly provide for confidentiality, previous court decisions have created an impression that the arbitration process be private and confidential. A classical example of such is the case of ***Michael Wilson and Partners Limited v Emmott***[12]where the court was categorical that*de legelata*and as a matter of law, there is an implied duty of confidentiality in an arbitration agreement a similar position wasemphasised in ***Economic Department of City of Moscow v Bankers Trust Company***[13]where it was held that privacy and confidentiality were implicit in parties choice to subject themselves to arbitration. This is largely because of the nature of disputes in arbitration which are mostly civil as alluded to before.

[2] The Convention on Recognition of Foreign Arbitral Awards 1958
[3]Arbitration Act 1996
[4]Fulham Football Club Limited v Richards [2011] EWCA Civ855
[5] Foreign Judgements (Reciprocal Enforcement) Act 1933
[6]Limitation Act 1980
[7] Foreign Limitations Period Act 1984
[8]1996 ibid
[9]Arsanovia Limited and Others v Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm)
[10]Habas Sinai VeTibbiGazlarIstihsalAndustrisiAS v VSC Steel Company Limited [2013] 4071 (Comm)
[11] Ibid
[12]Michael Wilson &Partners Limited v John Foster Emmott [2008] EWCA Civ184
[13]Economic Department of City of Moscow v Bankers Trust Company [2004] EWCA Civ 314

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Confidentiality and Privacy

Litigation in English courts is in many instances conducted publicly and judgements reported and published, non-parties to the case can easily access statements and other documentation a sharp dissimilitude to arbitral agreements and proceedings which are considered as a general rule, private and confidential. In ***Russell v Russell (1880)***[14] distinguished justiciary Sir George Jessel opined in verbatim that as a rule, people entering into arbitration agreements aremanifestly oblique the view of hiding their quarrels from the public eye. The obiter dicta in Russell greatly informed the decision in a more popular case of ***The Eastern Saga(1984)***[15] where the court overturned a decision by the arbitrators that the hearing between owners and charterers was to take place contemporaneously with that pitting charterers against sub-charterers. The court held that the concept of private arbitration was implicit that strangers would be excluded from the proceedings and to access of documents incidental thereto. That neither the arbitrator(s) nor a single party can ex parte insist that the hearing of a matter shall be determined concurrently or in consonance with another notwithstanding how fettered the disputes may be or how convenient that course may be. Removal of the general principles of privacy and confidentiality would occasion an inconceivably imminent threat to the diligence and integrity of the arbitration process Patrick Neil (1996)[16].

Privacy and confidentiality have for the longest time in the arbitration context been used interchangeably. However scholars and practitioners in the past few decades have made attempts to define the two terms separately by defining confidentiality as non disclosureof particular data to general public whereas describing privacy as the underlying inhibition to third parties from attending arbitral proceedings and hearings. The concept of privacy in arbitration agreements, awards and proceedings is also expressed in Civil Procedure Rules[17] 62.2(1) and universally evident in a majority of institutional practice rules and directions just to mention article 25(4) of UNCITRAL Rules[18], article 53(c) of the World Intellectual Property Organisation(WIPO) arbitration rules, Rules of the Court of Arbitration of the International Chamber of Commerce at article 21(3) and most relevant to our jurisdiction Rules of London Court of International Arbitration(LCIA) article 19(4)and article 30(1) which provides that unless there is an express agreement in writing to the contrary, the parties as a general principle undertake to keep confidential all awards jointly with all other materials in the arbitral proceedings. In essence, arbitration in comparison to other means of dispute resolution is seen to have a parties-centred approach which bolsters the sense of privacy and only an express agreement of parties can waive this duty implicitly imposed by the virtue of existence of arbitration agreement and long standinglegal practices.

[14]Russell v Russell [1880] LR 14 Ch D 471
[15]Oxford Shipping Company v Nippon Yesen Kaisha [1984] 2 Lloyd's Rep 373 QB ;3 All ER 835
[16] Sir Patrick Neil QC, Confidentiality in Arbitration (1996) 12 Arb Int 287
[17]Ibid
[18]Arbitration Rules (United Nations Commission on International Trade Law) UN DocA/31/98 Supp No.17

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Unlike in litigation, arbitration is not characterized by complexities and technicalities of rules of procedure, in practice parties in an arbitration arrangement have the freedoms to pursuant to section 15 of the 1996 Act[19] appoint an arbiter or tribunal of their choice, s.16 gives parties further right to impose restrictive qualifications of their pleasure as was evident in***Jivraj v Hashwani***[20]where an arbitral agreement stipulated that the arbitrators must be Islimali Muslims. The claimant argued that the agreement was invalid as it contravened the Employment EqualityAct[21] but the Supreme Court disagreed and upheld that indeed features of religion, beliefs, culture or otherwise can be justly imposed in an arbitration agreement. Parties are able to choose their jurisdiction and seat as well as the set of laws applicable to their particular disputes which makes almost the whole process a private affair. The only instances that arbitration proceedings are when parties have not made their own arrangements s.4 (2) and where there exists a mandatory provision as set out in schedule 1 of the Arbitration Act. Some of these include rights of parties to stay legal proceedings, time extension by court, removal of an arbitrator by court and when an award is challenged. All the above is proof that to a certain extent, the whole process is predominantly characterised by private choices of the parties save for the instances in schedule 1. The duty of confidentiality and privacy in arbitration as previously mooted is by its own nature is a general rule and thus there are exceptions to it. Some of these exceptions are technical while others have developed under common law precedents to create a recognisable list in general, theyare however under constant change and it would be correct to conclude that onus is vested upon the adjudicating authority to consider the circumstances by case to case basis. This position was asserted in the case of ***Westwood Shipping Lines Inc. WeyerhaueuserNR Company v Universal Schiffahrtsgessellschaft MBH,Michael Bremen***[22] whose judgement was highly reliant on the rudimentary principles set out in ***Tournierv National Provincial and Union Bank of England***[23] where Bankes LJ (as he then was) laid down instances when the concept of confidentiality is overridden by other compelling elements. Ideally, in accordance to ***Glidepath BV v Thompson***[24]the court inherently possessesa general and unlimited jurisdiction to determine the applicability and existence of an exception.

One of the exceptions of confidentiality and privacy in arbitration is instances where there is compulsion by law. This could be pursuant to disclosure provision enshrined in CPR 5.4(5)[25]or in

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[19] Ibid
[20]Jivraj v Hashwani [2011] UKSC 40
[21] Employment Equality (Religion and Beliefs) Act 2003
[22]Westwood Shipping Lines Incorporated and Weyerhaueuser NR Company v Universal SchiffahrtsgessellschaftMBH and Michael Bremen [2012] EWHC 3837 (Comm)
[23]Tournier v National Provincial and Union Bank of England [1924] 1 KB 461
[24]Glidepath BV and others v Thompson and Others [2005] EWCA Civ 1017; [2005] ArbLR 27
[25] Civil Procedure Rule England

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occurrences where a judge invokes other discretionary powers to achieve the same effect. A court as a matter of law, may order disclosure of documents generated during an arbitration process if it deems such documentation as being of inalienable importance to the claim before it whilst taking into account all privacy existing laws if it reasonably considers that such a disclosure necessary for the fair determination and disposal of the matter before it.This assertion was applied in ***Ali Shipping Corporation v Shipyard Trogir***[26] where the application sort an order for disclosure of documents emanating from a previous arbitration process for purposes of use in a later court action. Such is possible through leave of court obtained as an order following successful filing of a discovery application as was illustrated in ***Dolling-Baker v Merrett***[27].However, in an associated case of ***Associated Electric and Gas Insurance Services Limited v European Reinsurance Company of Zurich***[28]the Privy Council as presented by Lord Hobhouse tended to depart slightly from that population bottom line being that courts must consider peculiarity of each case's facts. Secondly, in***Hassneh Insurance Company of Israel v Mew***[29]the court held that disclosure against the rule of confidentiality and privacy is permissible in occasions where there is imminent need for protection of a party's legal entitlements vis a vis a third party. This is essential in formulating a claim, defence and counter-claim against the third party, as was clearly demonstrated in the case of ***Insurance Company v Lloyds Syndicate***[30]where an award was obtained against the leading reinsurer and the question arose as to whether the defendant was entitled to show the award and justifications to the other insurers and the court was opined to the affirmative. A good example of this exception is where insurers who could potentially be affected by the outcome of an arbitral proceeding have to be informed promptly and once the award is given, there is need to disclose to them so that they can fulfil their obligations as may be set out in the final award.

Another exception to the general rule is where duty to the public and interest of justice outweighs the underlying parties' rights to confidentiality. This exception was clearly dealt with in ***London and Leeds Estates Limited v Paribas Limited***[31]where Mason CJ propounded that in any event the duty to confidence except in relation to documentation compulsorily produced, is subject to a public interest exception. Examples include disclosure of documents relevant to a subsequent claim or in bid to evaluate consistency of expert testimony. This averment was also depicted in ***Commonwealth of Australia v Cockatoo Dockyard Pty Limited***[32] in which court of appeal of New South Wales decided that an arbitrator or tribunal bears no power to impose either procedural or substantive direction imposing an obligation of confidentiality to a party, where such an imposition would occasionnon-disclosure to a public authority information engendered by an arbitration

[26] Ali Shipping Corporation v Shipyard Trogir [1999] 1 WLR 314
[27]Dolling-Barker v Merrett [1990] 1 WLR 1205
[28][2003] 19(4) Arb Int 483
[29]Hassneh Insurance Company of Israel v Stuart J Mew [1993] 2 Lloyd's Rep 243
[30]Insurance Company v Lloyd's Syndicate [1995] 1 Lloyd's Rep 272
[31]London and Leeds Estates Limited v Paribas Limited (No.2) [1995] 1 EGLR 102
[32]Cockatoo Dockyard Pty Limited v The Commonwealth of Australia and Another [2001] NSWCA 468

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process which ought to be made known to that authority in premise of public health or even issues to do with environmental conservation.

Lastly but not least, is where parties have expressly consented to excluding or limit the general duty of confidentiality. This may be done for specified instances or on ad-hoc basis according to the agreement between the parties where the aforesaid disclosure is in the interest of a particular party. This position was clear in Ali Shipping[33] and is comparatively most uncontroversial exception owing to the fact that will of involved parties is core.

Finally, asunder from the common law exceptions discussed above, the concept of confidentiality in arbitration also faces other inhibitions occasioned by institutional rules as some arbitration institutions primarily publish the award which is *ex faciae*a contradiction of confidentiality rules, another is absence or inadequate statutory provisions as to what qualifies as private information which may leave the tribunal with a great discretionary power to make decision on the same hence creating inconsistency. Although not as significant, the fact that arbitration proceedings may involve examination of witnesses which is a commonplace source of leaks and disclosures made arbitrarily. The 1996 Act does not expressly impose confidentiality duty on witnesses since doing so has a foreseeable consequence of demotivating potential witnesses. This creates a grey area reason being disclosure by witnesses is only a matter of trust and gentlemen's agreement as opposed to provision by statute or precedent.

In essence one can confidently draw from the sentiments deponed in my arguments above that there is much greater insistence on ensuring confidentiality is preserved in the arbitration process as compared to litigation and proceedings before statutory tribunals. There is however an inherent need for legal scholars and practitioners to remain alive to the intricacies and intrigues associated with determination of where privacy and confidentiality is applicable. In situations where arbitration matters are brought under 1996 Act, it might be inextricably inevitable that the court must get a clear insight on the conduct and proceedings of arbitration which could easily result to disclosure of information which was regarded as confidential during arbitration.

Trends

Before introduction and commencement of the modern-day arbitration statutes, tenets of law of contract and conflict of cases were the basic authorities'arbitrators could rely on as was in ***Cie d'Armemente Maritime v Cie Tunisienne de Navigation***[34]. Currently there is a renewed effort to enhance protection of arbitration by providing for in camera hearings and restricting access to files by third parties. Modern laws also contemplate circumstances where details of an arbitral may released to the public domain for instances where the respondent seeks an injunction to oppose

[33] Ibid
[34][1970] 2 Lloyd's Rep 99

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legal action instituted against an arbitral agreement like was witnessed in ***West Tankers Inc. v Ras RiunioneAdriatica***[35] where the application challenged an award on the premise of grievous irregularities or a mistake of law.

In a nutshell, I aver that the extent of confidence obligation is highly reliant on the context in which it arises and the character of documents and information in question. As arbitration continues to develop as a highly preferred method of resolving civil disputes, limits and specific application of the confidentiality obligation are still developing and precedents on that area of law keep on being set, reviewed and improved as social and legal trends advance. It is the imperative for arbitrators to ensure that their conduct is compliant with set precedents available statutory provisions as well as obligations arising appointment under varying arbitral agreements. In ***Emmott v Michael Wilson and Partners***[36], Lawrence Collins LJ is categorical at paragraph 61 that the August house made a deliberate decision inspired by s.81 1996 Act to leave the development of confidentiality and privacy jurisprudence to courts in spite of the palpable reform and subsequent codification of arbitration law. The justification as to why confidentiality and privacy have not been included in existing and any recent legislation is captured by Lord Bramwell[37]when he mooted the concept as being unsettled and to a large extent static and therefore unfit for codification.

CONCLUSION

Gathering from the discussions made above, it is crystal clear that privacy and confidentiality is a crucially essential element of arbitration agreements, proceedings and subsequent award which is divergent to the procedure in litigation in court of law which in accordance with the holding in ***Teekey Tankers Limited v STX Offshore and Shipbuilding Company Limited***[38]avoid imposing an indiscriminate blanket confidentiality. I am of the opinion that the parties with confidentiality concerns should be proactive in ensuring they seek appropriate orders to facilitate concealment ofconfidential matters, bring the attention of the court to any pre-existing issues of confidentiality arising fromarbitral proceedings and be in a position to sufficiently proof before the court extent of damage they are likely to suffer in case such confidentiality is breached.

Albeit confidentiality and privacy being a vitally critical in arbitration, it has been comprehensively exemplified in my assertions above that this rule is not absolute and therefore is subject to various exemptions that have been discussed above in great detail. There is however an indispensable need for substantial and rigorous analysis of concept of confidentiality to ensure that the underlying principles are uniform and create a predictable legal framework to safeguard all

[35]West Tankers Incorporated v Ras RiunioneAdriaticaDi Sicurta [2005] EWHC 454; [2005] ArbLR 67
[36] Ibid
[37]Lord Bramwell's Arbitration Code 1884-1889 (1992) 8 Arb Int 329
[38][2017] EWHC 253 (Comm)

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parties to the dispute. In that breath I unequivocally agree with the statement that 'arbitration is a private and confidential process only to a certain extent'.

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