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FROM CONFIDENTIALITY TO TRANSPARENCY IN BUSINESS CONTRACTS CONCLUDED BY A STATE

Od poverljivosti do transparentnosti u poslovnim ugovorima zaključenim od strane države

Abstract

This paper analyses the issue of confidentiality in international business contracts concluded by a state and explores the shift from confidentiality to transparency emerging in recent years. Confidentiality obligation may be established with respect to information arising out of or connected to the contract, or with respect to the elements of the dispute settlement mechanism. While the principle of confidentiality still predominantly governs the information arising out of or connected to the contract, the dispute settlement system gradually becomes much more permeable to the principle of transparency. This is particularly true for the treaty-based investor-state arbitration, whose legal framework has undergone significant changes over the last decade. The reason for the emergence of the principle of transparency in international business contracts concluded by a state lies in greater public interest. Still, confidentiality obligation is most often included in international business contracts concluded by a state by free will of contracting parties, and the parties to the contract are encouraged to use this possibility. To that effect, they may find model confidentiality clauses and model contracts prepared and published by international organisations particularly useful.

Keywords: *confidentiality, transparency, international business contracts, confidentiality clause, non-disclosure agreement, dispute settlement.*

Sažetak

Predmet rada predstavlja analizu obaveze poverljivosti u međunarodnim poslovnim ugovorima zaključenim od strane države. U posebnom fokusu je tendencija pomeranja do sada dominantnog principa poverilјivosti ka principu transparentnosti, koja naročito dolazi do izražaja poslednjih godina. Obaveza poverljivosti može da bude ustanovljena kako u pogledu podataka i informacija koji proističu iz ugovora ili su u vezi sa njim, tako i u pogledu pojedinih aspekata rešavanja sporova iz tog ugovora. Dok princip poverljivosti i dalje dominira u pogledu podataka i informacija koji proističu iz ugovora ili su u vezi sa njim, dotle se princip transparentnosti u poslednje vreme sve češće uspostavlja u fazi rešavanja sporova. To naročito dolazi do izražaja u oblasti rešavanja sporova između ulagača i države prijemnice ulaganja, a koji proističu iz povrede međunarodnog sporazuma o zaštiti ulaganja. Razlog za uvođenje i jačanje principa transparentnosti u međunarodnim poslovnim ugovorima zaključenim od strane države ogleda se u prisustvu javnog interesa, koji inače, nije karakterističan za poslovne odnose između „čisto" komercijalnih ugovornih strana. Ipak, kako se i u poslovnim ugovorima zaključenim od strane države obaveza poverljiivosti najčešće uspostavlja slobodnom voljom ugovornih strana, one bi ovom pitanju trebalo da pristupe oprezno i svrsishodno. U tom smislu, ugovornim stranama od značajne pomoći mogu biti modeli klauzula i sporazuma o poverljivosti izrađeni od strane međunarodnih organizacija.

Ključne reči: *poverljivost, transparentnost, međunarodni poslovni ugovori, klauzula poverljivosti, sporazum o poverljivosti, rešavanje sporova.*

Introduction

International business contracts often contain some exclusive, specific and delicate information. That information may refer to various aspects of business of contracting parties – commercial, technical, financial, etc. It is of vital importance for the contracting party to which the information refers to keep them confidential due to their economic value, as well as potential business consequences that their disclosure could entail. As a matter of fact, the contracting party may find out sensitive information on its counterpart at any point during the conclusion and performance of the contract – from initial negotiations to acceptance of the offer to conclude the contract to the fulfilment of contractual obligations, as well as during the settlement of a dispute which may arise between the parties. For these reasons a confidentiality clause is often inserted into international business contracts [5, pp. 262ff], [8, pp. 241-244], [2, pp. 134ff], [3, p. 80], [3, p. 409], [9]. By virtue of the confidentiality clause, one or both contracting parties assume the obligation to keep as confidential and not to reveal to third parties without prior consent of the counterpart any information on the counterpart or in relation to the contract that became known to it at any point during the conclusion and performance of the contract [12, pp. 239-248].

International business contracts are generally concluded by business entities, but they can also be concluded by a state. When a state enters into an international business contract, it normally does so in "private" capacity, i.e. without using its *imperium* (supreme power) [21, pp. 27-33]. An example would be the case when a state sells its shares in a company. The case in which a state is one of the contracting parties in such a transaction is no different from the case where the same contract is concluded between business entities – both parties freely decide whether they want to conclude a contract, they shape its content within the boundaries set by applicable law and negotiate the value of the transaction freely, etc. However, there may also be cases where international business contracts concluded by a state are of a mixed nature – they essentially represent commercial transactions, but the state nevertheless undertakes some obligations that it can perform only in its public capacity, e.g. the stabilisation obligation, grant of a concession, etc. Irrespective of the type of the contract, i.e. whether it is purely commercial or mixed, the involvement of the state in an international business transaction has certain repercussions in the field of confidentiality. This is due to the fact that, unlike in the case of a transaction between two business entities, a business transaction involving a state attracts a wider public interest. Consequently, there is tension between the need of the contracting parties to keep some of the elements of their business relation confidential and the need of the public to ascertain whether the state exercises its commercial role with sufficient prudence and diligence.

This paper will present the legal regime applicable to the confidentiality obligation in international business contracts concluded by a state and explain the shift from confidentiality to transparency that exists with respect to some elements of these contracts. To that effect, the paper will first analyse the substantive aspects of the confidentiality obligation. It will then assess the confidentiality of the dispute settlement system in international business contracts concluded by a state and, finally, it will consider the emergence of the transparency principle in resolution of certain types of disputes.

Substantive aspects of confidentiality obligation in international business contracts

Proper understanding of the confidentiality obligation in international business contracts requires a summary overview of critical substantive issues that arise from this obligation – its legal basis, subject matter, temporal scope, as well as sanctions in case of breach thereof.[1]

Legal basis of the confidentiality obligation. In most legal systems, the obligation to keep certain information confidential (usually the information which qualifies as trade secret) is prescribed by law. Depending on specific aspects of confidentiality obligation, its legal regime can be regulated by general acts governing criminal law, labour law, company law, competition law, etc. Additionally, confidentiality obligation can also be governed by specific

1 For further details, see [12, pp. 239-248].

laws on trade secrets. On the other hand, general rules of the law of obligations usually consider breach of the confidentiality obligation to be the grounds for civil liability, either contractual or tortious, on the basis of the good faith principle, as well as other general principles of the law of obligations and appropriate standards of diligence.[2]

The legal system of Serbia contains a specific Law on the Protection of Trade Secrets, while the Law on Companies explicitly prescribes the obligation of the persons having special duties towards the company to protect the confidentiality of trade secrets (Arts. 72-74) [13, pp. 290-291]. On the other hand, the Law of Obligations (Law of Contracts and Torts) does not contain any explicit obligation of confidentiality, yet this obligation can be derived from the general principle of good faith, as one of the basic principles of the Law. Confidentiality obligation is expressly provided for in the Predraft of the Serbian Civil Code, in the part regulating the negotiations on conclusion of a contract. Namely: "If one party divulged confidential information to the other or enabled it to become aware of such information, the other party, unless otherwise agreed, must not make those information known to third parties nor use them for its own interests, irrespective of the fact whether the contract was subsequently concluded or not. The liability for the breach of obligation of confidentiality may consist in the compensation of damage and in handing over to the injured party any benefit received by the party in breach by way of such breach" (Art. 23).

As far as the legal regime of business contracts concluded by the state in Serbian law is concerned, one should also consider the Data Secrecy Law. This Law governs the confidentiality of information important for the protection of public interests of the Republic of Serbia. It recognises trade secrets as a type of confidential information, but it does not define the legal regime of those secrets. Rather, it points to a specific law that would govern this issue (Art. 7). That woud mean that the aforementioned principles and rules of Company Law and Law of Obligations also apply to business secrets relevant for the state.

Obviously, legal provisions cannot foresee all particular circumstances of each specific case that may occur in practice, so they cannot always provide answers to all questions that may arise with respect to confidentiality. For these reasons, contracting parties regulate the confidentiality obligation at their own discretion, stipulating confidentiality clauses in their contracts or concluding specific confidentiality (non-disclosure) agreements. In both cases, the legal basis of the confidentiality obligation is of a contractual nature and the contracting parties are in principle free to tailor it to their specific needs and interests, within the boundaries set by the public policy, mandatory rules of the applicable law and *boni mores*. Seeing that the differences between the confidentiality agreement and the confidentiality clause are mainly of a formal nature, the following considerations of the confidentiality obligation shall be made from the perspective of the confidentiality clause.

The confidentiality clause has become a standard term in a large number of international business contracts, especially the ones on transfer of technology, consulting services, conduct of studies, analyses and research, technical and business cooperation, equipment production and delivery, business representation, agency, commission agency and distribution, franchise contracts, contracts concluded within takeover, merger and acquisition transactions, setting up joint venture companies, etc. Additionally, the confidentiality obligation is often stipulated in relation to contract negotiations, where it appears to be particularly useful. Namely, while still considering the possibility of concluding a contract, the parties may reveal sensitive information that could help in assessing the interest for concluding a contract. Since the main contract has not yet been concluded at this stage, the confidentiality obligation is usually introduced by way of concluding a confidentiality agreement as a separate document or by adding the confidentiality clause to some of the agreements on negotiations (letter of intent, memorandum of understanding, preparatory agreement, etc.) [15, pp. 427-438], [18, pp. 495-505].

Subject matter of the confidentiality obligation. When drafting a confidentiality clause, it is particularly important to define the subject matter of the confidentiality obligation.

2 For comparative study of this issue, see [1, pp. 287ff], [7, pp. 194-195]. In English law, this obligation is based on the principle of equity.

Namely, when information relative to a certain business transaction is not protected by law,[3] the intellectual property rules or a contract, the contracting parties are generally not bound to treat them as confidential [24, p. 62], [7, p. 194]. For these reasons, the contract needs to precisely define the scope of information that is to be considered confidential in the specific case, so that its unauthorised use or disclosure to third parties by the contractual counterpart represents a breach of the confidentiality obligation and is subject to sanctions. Additionally, it is implied that even in absence of such a contractual clause, when one party expressly declares that certain information is to be considered confidential, the other party tacitly undertakes the obligation of confidentiality by the very receipt of such information. Furthermore, even in absence of an explicit contractual clause or express declaration of confidentiality, the contractual counterpart may be obliged to keep the confidentiality of information on the basis of the principle of good faith. That would be the case where, because of specific nature of the information in question (e.g. know-how, business strategy, list of clients or suppliers, audit reports, etc.) or the professional capacities of contracting parties (especially when the contractual counterpart or third parties may become competitors to the contractual party to which the information relates), its use or disclosure by the contractual counterpart would be contrary to the principle of good faith.[4]

Apart from the definition of the subject matter of confidentiality obligation, contracting parties often stipulate the scope of information to which the confidentiality obligation does not apply.[5] In the most general sense, this information may be classified under four groups: 1. information which is generally available to the public; 2. information which must be disclosed in conformity with mandatory legal requirements, court judgments or decisions of other competent organs; 3. information that has already been known to the contractual counterpart before it was disclosed to it by the party which was in possession of the information; 4. information whose disclosure the party to which such information relates has explicitly allowed.

Duration of the confidentiality obligation. As a rule, contracting parties define the temporal scope of application of the confidentiality obligation.[6] In that context, it is possible to distinguish between the clauses that stipulate the time limit for the duration of confidentiality obligation and the clauses in which confidentiality obligation is stipulated for an indefinite period of time. In most cases, confidentiality clauses specify a limited duration of confidentiality obligation. The moment when the aforementioned obligation comes into force and the moment when it expires depend on the specific circumstances of each case. Those could be: the moment in which the confidential information is made known to the other party, the moment of conclusion of the contract, the moment of expiry of the contract, a certain moment following the expiration of the contract or any other moment or point in time. In order to avoid situations that may lead to a dispute, the parties should define the moments limiting the duration of the confidentiality obligation in a way that can be objectively ascertained and proven (e.g. the moment of conclusion of the contract). Moreover, contracting parties should pay attention to

3 For example, Serbian Law on Companies defines the trade secret as any information whose disclosure to a third party could cause damage to the company, as well as any information which may have economic value because it is not generally known and is not readily available to third parties who could gain economic benefit from its use or disclosure, and which is protected by the company with appropriate safeguards aimed at maintaining its confidentiality. Information which is considered a trade secret can be production-related, technical, technological, financial or commercial information, a study, a research result, as well as a document, drawing, formula, object, method, procedure, notice or instruction of internal nature, etc. A trade secret is also any information defined as such under the law, other regulation or a company by-law. A company by-law may identify as trade secret only such information that complies with the requirements of the trade secret as provided in the Law. Furthermore, a company by-law may not define all information relating to the company's operations as trade secret (Art. 72 Par. 3-6).

4 For an overview of case law on this issue, see [1, p. 290].

5 This approach is also adopted in Serbian Law on Companies, which stipulates that the disclosure of privileged information shall not be deemed a breach of duty to maintain confidentiality if such disclosure is: obligatory under the law; necessary for the performance of business operations or protection of the company's interests; made to the competent authorities or general public with the sole purpose of calling attention to an offence punishable under the law (Art. 73).

6 Serbian Law on Companies envisages that the persons having special duties towards the company should abide by the confidentiality obligation for two years upon expiry of their contract, whilst allowing for a longer term if so provided under the Memorandum of Association, Articles of Association, the decision of the company or employment contract. However, the Law does not allow such term to exceed 5 years (Art. 72 Par. 1), which means that any contractual clause providing for a longer or unlimited duration of this duty would be subject to the sanction of nullity.

the potential existence of the rules of applicable law that limit the duration of the confidentiality obligation in an imperative way. For example, that could be the case with the rules pertaining to competition law. On the other hand, some confidentiality clauses provide for an indefinite duration of the confidentiality obligation. Namely, in order to protect confidential information in case of any kind of contract termination, the parties may stipulate that the confidentiality clause "survives" such termination. In these and similar cases, it is necessary to stipulate that the confidentiality obligation expires when the confidential information becomes publicly known. The validity of this clause should be assessed from the standpoint of mandatory rules of applicable law and general principles of the law of obligations [8, p. 241]. Finally, when the confidentiality clause does not regulate the issue of duration of confidentiality obligation whatsoever, it should be deemed that the parties opted for its indefinite duration.

Sanctions for breach of the confidentiality obligation. Confidentiality obligation may be breached in two ways: by unauthorised disclosure of confidential information to third parties and by unauthorised use of confidential information. The breach of confidentiality obligation entails liability for damage.[7] The valuation of damage for breach of confidentiality obligation in international business contracts represents a very complex question. Not only does such assessment require determination and proof of the value of damage sustained in each specific case (which is particularly difficult in practice, due to the nature of the obligation in question), but also a good command of applicable law, in particular of its rules governing the types of damage, the scope of recoverability, limitation, exclusion and exemption of liability, which are all issues in relation to which national legal systems may have different and sometimes even diverging solutions [10, pp. 468-479], [17, pp. 271-289], [16, pp. 95-133]. In order to avoid the aforementioned problems, the contracting parties in international business contracts sometimes stipulate a lump sum that is to be paid in case of breach of confidentiality obligation. The payment of this sum is often secured by a bank guarantee. Nevertheless, having in mind that national legal systems may treat these issues in different ways, it is necessary to check the validity and legal effects of the aforementioned clauses from the standpoint of relevant rules of applicable law.

Model contracts and model clauses. Model contracts and model clauses made by international organisations may be considered desirable and recommendable solutions from an international standpoint. For these reasons, and having in mind the differences between national systems of contract law and the risks of drafting imprecise, unclear and contradicting contract clauses, these documents appear to be optimal solutions that should be taken into consideration when drafting international business contracts in general, and confidentiality clauses in particular. In that sense, International Chamber of Commerce (ICC) (http://www.iccwbo.org) was particularly active in preparing model contracts and model clauses. Among other documents, ICC has drafted the ICC Model Confidentiality Agreement.[8] Similarly, the International Trade Centre (ITC) (http://www.intracen.org) created a series of model contracts that take into account the increasing sophistication of international trade transactions and incorporate internationally recognised standards and best practices [9]. The clauses of these contracts include confidentiality clauses. For example, the ITC Model Contract for an International Corporate Joint Venture proposes the following confidentiality clause: "12.1 Each of the Parties shall at all times use all reasonable efforts to keep confidential (and to ensure that its employees and agents keep confidential) all commercial and technical information which it may acquire (i) in relation to the JVC or (ii) in relation to the clients, Business or affairs of the other party (or any member of its respective group). Neither party shall use or disclose any such information except with the consent of the other party or, in the case of information relating to the JVC, in the ordinary course of advancing the JVC's Business. The restrisction in this Article 12.1 shall not apply to any information that is: 12.1.1 Publicly available through no fault of that party;

7 In case of a company employee, the sanctions provided by Serbian Law on Companies for a breach of confidentiality duty are indemnification and expulsion from company (Art. 74).

8 https://iccwbo.org/resources-for-business/model-contracts-clauses/confidentiality/.

12.1.2 Already in the possession of that party prior to its disclosure without any obligation of confidentiality; or 12.1.3 required to be disclosed by that party pursuant to any law, stock exchange regulation or binding judgement, order or requirement of any court or other competent authority. 12.2 Each party shall use all its respective powers to ensure (so far as it is able) that the JVC and its officers, employees and agents observe a similar obligation of confidence in favour of the Parties to this contract. 12.3 The provisions of this Article 12 shall survive any termination of this contract." [9, p. 29].

Confidentiality of the dispute settlement regime

Practice shows that the preferred method of dispute settlement in international business contracts, including the ones where a state is one of the contracting parties, is arbitration. A recent survey of more than 1,000 respondents conducted by the experts from the School of Law at Queen Mary University of London shows that 48% of respondents would opt for arbitration as a method of resolution of cross-border business disputes, while 49% would opt for arbitration in conjunction with some other form of alternative dispute resolution (ADR), such as mediation [19, p. 5]. That makes 97% of respondents who show their preferences for arbitration, either alone or combined with another ADR method. On the other hand, only 1% of respondents would opt for cross-border litigation [19, p. 5].

Arbitration is perceived as better adapted to settling disputes arising out of international business transactions than litigation due to a number of specific features – it is seen as more flexible, more efficient, less costly, more neutral [11, pp. 458-459], [14, pp. 238-239] and, in particular, confidential [22, pp. 349-351]. The principle of confidentiality of arbitration, in broad sense, requires the parties to arbitration proceedings not to reveal any aspect or element of the arbitration proceedings or any information that could lead to identifying those aspects and elements to third parties (names of the parties to the dispute, content of the statement of claim and the answer to the statement of claim, applicable law, applicable procedural rules, place of arbitration, names of arbitrators, names of witnesses and experts, etc.), including the existence of the dispute itself. It is often argued that the principle of confidentiality helps to achieve a very important aim for the business community – it preserves the reputation and the integrity of the parties as it keeps the information on their dispute out of the public eye. The above-mentioned Queen Mary Survey shows that 87% of respondents believe that confidentiality of international commercial arbitration is important, while 36% of them would place it among three most valuable characteristics of this dispute settlement method [19, p. 7].

Confidentiality of arbitral proceedings may be introduced in two ways: directly or indirectly. If confidentiality is introduced directly, the parties to an international business contract containing an arbitration clause agree therein on confidentiality of the proceedings and define the scope of information protected. That method is very similar to agreeing on confidentiality of information contained in or connected to the underlying contract. The indirect method of agreeing on confidentiality means that the arbitration clause itself is silent on the issue of confidentiality, but the choice of rules applicable to arbitration proceedings will indirectly influence the issue of confidentiality, since arbitration rules of major arbitral institutions normally contain provisions on confidentiality of the proceedings. For example, Article 22(3) of the ICC Arbitration Rules issued in 2017 prescribes that: "upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information". Article 30.1 of the 2014 Arbitration Rules of the London Court of International Arbitration states that: "the parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority". A very recent 2018 version of the Arbitration Rules of the

German Arbitration Institute (DIS) provides in Article 44.1 that: "unless the parties agree otherwise, the parties and their outside counsel, the arbitrators, the DIS employees and any other person associated with the DIS who are involved in the arbitration shall not disclose to anyone any information concerning the arbitration, including in particular the existence of the arbitration, the names of the parties, the nature of the claim, the names of any witnesses or experts, any procedural orders or awards, and any evidence that is not publicly available". As it can be seen from the provisions cited, they all give grounds for some form of confidentiality of arbitral proceedings, either by way of opting in (e.g. ICC Arbitration Rules), or by way of opting out (e.g. DIS Arbitration Rules).

However, despite the fact that confidentiality is a highly valued feature of international commercial arbitration, there are voices in favour of promotion of procedural transparency. These voices seem to be particularly numerous when one of the parties to international commercial arbitration is a state or an entity which may be linked to a state through the rules of attribution in public international law. The need for transparency may particularly emerge when arbitration is supposed to consider and review public policies and other measures of public interest taken by the state or when the value of the dispute is so high as to justify the public interest in the development and the outcome of arbitration proceedings.

The importance of the debate on the place of transparency in international arbitration proceedings where one of the parties is a state was recognized by the United Nations Commission on International Trade Law (UNCITRAL), which in 2010 entrusted one of its working groups with the task to develop appropriate legal standards for transparency in treaty-based investor-state arbitration. As it may be seen, UNCITRAL has decided to focus on a very precise type of international business disputes: the disputes between a foreign investor and the host state that arise out of the potential breach of international standards of investment protection enshrined in international investment treaties. The choice of the filed where the principle of transparency is to be introduced seems to be justified by both types of main concerns regarding confidentiality that we have previously identified. Considering that the state's obligation to grant certain standards of treatment to foreign investments and to protect them accordingly stems from public international law[9] (we recall that UNCITRAL has limited its work to treaty-based investment disputes only), the arbitral tribunal, in order to reach a decision on the claim, must inevitably review some public policies and their application.

Additionally, the amount claimed in dispute is often very high – a study conducted by the European Commission a couple of years ago showed that the average amount claimed was $622.6 million, while the average amount awarded was $16.6 million [4, pp. 8-9]. Notwithstanding the striking difference between the average amount claimed and the average amount awarded, it can be concluded that the value of investment disputes is indeed high.

It should also be noted that the specialised procedural framework applicable to a large number of investment arbitrations, the one set by the International Centre for Settlement of Investment Disputes (ICSID), has somewhat reduced the ambit of the principle of confidentiality. Namely, the ICSID publishes the basic information on requests for arbitration and, under certain conditions, allows the submission of third-party briefs, as well as the participation of third parties in hearings [6, pp. 243-247].

The debate around transparency in treaty-based investor-state arbitration led to some specific results which can be seen as the beginning of the gradual emergence of the transparency principle in investment matters. This point will be further explored and developed in the following section of this paper.

Emergence of the principle of transparency in dispute settlement regime

UNCITRAL has begun the mission of developing appropriate legal standards for transparency in treaty-based investor-state arbitration by drafting the specialized Rules on Transparency in Treaty-based Investor-State Arbitration, the Convention on Transparency in Treaty-based Investor-

9 This is a general obligation of the host state with respect to the investors coming from the state with which the treaty has been concluded and it exists irrespective of whether or not the host state has entered into a particular contract with the investor.

State Arbitration (the Mauritius Convention) and by amending its Arbitration Rules.

Rules on Transparency in Treaty-based Investor-State Arbitration. UNCITRAL Transparency Rules represent a major step toward the shift of paradigm of confidentiality in treaty-based investor-state arbitration. Namely, the Transparency Rules set transparency, rather than confidentiality, as the default principle in arbitration proceedings to which they apply [6, p. 248]. The proceedings shall remain confidential only if there is an adequate agreement to that effect. Additionally, some information, such as confidential business information or the information the disclosure of which would impede law enforcement, shall nevertheless remain confidential by virtue of the transparency exception contained in Article 7 of the Transparency Rules.

The Transparency Rules provide for the disclosure of the basic information regarding the dispute. Pursuant to Article 2 of the Transparency Rules, this basic information includes: the names of the parties in dispute, the economic sector involved and the identification of the treaty under which the claim is brought. This set of information resembles, at least to a certain extent, the set of information on the dispute available under the ICSID framework. However, a significant difference between the ICSID system and the Transparency Rules exists in the field of public availability of hearings. While in the ICSID system the proceedings, as a matter of principle, remain confidential with a possibility for the tribunal to open them up for public subject to fulfilment of certain conditions, Article 6.1 of the Transparency Rules expressly provides that the hearings shall be public. This is an excellent example of the above-mentioned shift of paradigm and it represents a solution that would have been seen as fairly uncommon in the world of arbitration before the adoption of the Transparency Rules. Naturally, there are situations where the hearings shall nevertheless remain confidential. That would be the case where confidentiality of hearings is necessary to protect the integrity of the proceedings or the confidential information laid down in Article 7 of the Transparency Rules (Arts. 6.2 and 6.3). The Transparency Rules also regulate the issues of publication of documents (Art. 3), submissions of third parties (Art. 4) and the so-called non-disputing Party to a treaty (Art. 5), which is in fact the investor's state of origin.

As it may be seen, the Transparency Rules represent a significant change in approach to the issue of confidentiality of arbitration arising out of commercial disputes to which one of the parties is a state [20, pp. 774-796]. It is perhaps precisely due to that fact that their drafters were rather cautious with respect to their applicability by default. Namely, the Transparency Rules will be applied by default only in disputes arising out of investment protection treaties concluded on or after 1 April 2014 and in case the parties have not excluded their application. However, if the drafters of the Rules have correctly assessed the need for enhanced transparency in arbitral proceedings where one party is a state, there should be room for a wider application of the Transparency Rules. That might be the case why UNCITRAL decided to go another step further and to draft the Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention) as well.

The Mauritius Convention. As stated in its Preamble, the Mauritius Convention, same as the Transparency Rules, was drafted with the aim of contributing to the establishment of a harmonised legal framework for a fair and efficient settlement of international investment disputes. However, an important obstacle to achieving that aim is the fact that the Transparency Rules (still) have a fairly limited potential scope of application. In an attempt to help to expand their applicability *ratione personae*, UNCITRAL has drafted the Mauritius Convention. The Convention entered into force on 18 October 2017, i.e. six months after the deposit of the third instrument of ratification, acceptance, approval or accession, as provided by Article 9.1 of the Convention. At the present moment, the Mauritius Convention has 5 State parties, whereas another 18 states have signed the Convention but have not yet become bound by it as they have not yet deposited the instruments of ratification, acceptance, approval or accession (Table 1).

The Mauritius Convention seeks to expand the scope of application of the Transparency Rules using two possible methods: bilateral and unilateral. The bilateral (or multilateral) way is defined in Article 2.1 and it means

Table 1: Current status of the Mauritius Convention

State	Signature	Ratification, accession, approval or acceptance	Entry into force
Australia	X		
Belgium	X		
Benin	X		
Bolivia	X		
Cameroon	X	X	X
Canada	X	X	X
Congo	X		
Finland	X		
France	X		
Gabon	X		
Gambia	X	X	X
Germany	X		
Iraq	X		
Italy	X		
Luxembourg	X		
Madagascar	X		
Mauritius	X	X	X
Netherlands	X		
Sweden	X		
Switzerland	X	X	X
Syria	X		
United Kingdom	X		
United States of America	X		

Source: Prepared on the basis of [23].

that the Transparency Rules shall apply to any treaty-based investor-state arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which both the respondent state and the state of origin of the claimant are parties to the Mauritius Convention and have not made a reservation with respect to its application. The unilateral way is defined in Article 2.2 and it means that the Transparency Rules shall apply to any treaty-based investor-state arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent state is a party to the Mauritius Convention that has not made a reservation with respect to its application, and the claimant agrees to the application of the Transparency Rules.

It should be noted that Articles 2.1 and 2.2 of the Mauritius Convention do not contain any limitations as to the procedural framework or the date of entry into force of the investment protection treaty that serves as the basis for arbitration between the investor and the state. That means that the Convention may expand the scope of application of the Transparency Rules to a large number of treaties and arbitrations arising out of them. As far as the bilateral method is concerned, that potential is still far from being achieved, since only 5 States are parties to the Convention. However, as far as the unilateral method is concerned, that possibility is high even at the present moment, because the status of the investor's state of origin in the Convention does not count in the application of the Transparency Rules as long as the respondent state is a party to the Convention and the claimant (investor) agrees to the application of the Transparency Rules. As the number of parties to the Mauritius Convention keeps growing, one should expect multiplication of possibile situations where the application of the Transparency Rules will be triggered by the Convention, either through the bilateral or the unilateral method. Therefore, it should be expected that the principle of transparency, at least in treaty-based investor-state arbitration, would eventually overpower the principle of confidentiality.

Amendments to UNCITRAL Arbitration Rules. UNCITRAL Arbitration Rules are widely used as a procedural framework for settling investor-state disputes in ad hoc arbitration. Therefore, a natural consequence of the adoption of the Transparency Rules was the creation of some kind of a link between the Transparency Rules and the Arbitration Rules. That link came in the form of amendment to the 2010 version of the Arbitration Rules. The amendment consists of the inclusion of a new paragraph 4 to Article 1 of the Arbitration Rules. That paragraph reads as follows: "For investor-state arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency". That effectively means that the Transparency Rules will supplement the Arbitration Rules if arbitration is initiated pursuant to a treaty on investment protection concluded on or after 1 April 2014, unless the parties to that treaty have agreed otherwise, or if arbitration is initiated pursuant to a treaty on investment protection concluded before 1 April 2014 and the parties

to the arbitration or the parties to the treaty have agreed on the application of the Rules on Transparency.

Conclusion

Confidentiality is an important feature of international business contracts. Its purpose is indeed manifold: it is used for the protection of trade secrets from unauthorised disclosure to third parties, as well as for the protection of the business reputation of parties in case of a dispute between them. As far as the substantive obligation of confidentiality is concerned, it may be established in several ways. First and foremost, it may be agreed upon by the parties to an international business contract, either in the form of a confidentiality clause or in the form of a confidentiality (non-disclosure) agreement. Second, the confidentiality obligation may stem from an express provision of a law or other general legal act. Finally, the confidentiality obligation may be derived from general principles of contract law. As far as the obligation of procedural confidentiality is concerned, it may be introduced by the agreement of the parties, an international treaty or the applicable procedural rules.

The fact that a state is a party to an international busniness contract does not change much in the legal regime of the substantive obligation of confidentiality. However, the regime of confidentiality of the dispute settlement procedure shows some differences with respect to situations where the international business contract is concluded between two "purely" business entities. Namely, in recent years, the principle of transparency has started to replace the principle of confidentiality, at least in a very specific type of disputes – treaty-based investor-state arbitration. Considering the peculiarities of this type of disputes, the members of UNCITRAL decided that it would be appropriate to give to these disputes a transparent, rather than confidential status. Having in mind that the legal texts produced by UNCITRAL are still quite recent, it is too early to make a critical assessment of such approach based on case law.

In any event, it may be concluded that the principle of confidentiality in international business contracts serves legitimate goals. However, since the importance of confidentiality of some elements of the business relationship should be counterweighted against other considerations that a state must consider, such as legitimate public interest or the right to be granted access to publicly significant information, the confidentiality obligation should be most carefully drafted in such contractual relationships. It would be therefore highly recommendable that the parties agree on the scope of the confidentiality obligation, rather than to rely solely on the general legal framework. Thanks to the work of various international organisations and professional associations, parties can take advantage of different model clauses of confidentiality. This can greatly assist them when drafting their contracts, so that the risk of improper, inadequate or inefficient wording of confidentiality clauses and agreements is significantly reduced or hopefully completely eliminated, which is of the utmost importance for both contracting parties.

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