

# CHAPTER 5

## REVISITING ARBITRATION'S CONFIDENTIALITY FEATURE

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### *I INTRODUCTION*

Years ago, in *Aita v Ojje*,<sup>1</sup> the Court of Appeal in Paris, in an action for annulment of an award, ruled against the property for violating the confidentiality obligation "by cause a public debate of facts that should essentially remain confidential.....the very nature of arbitral proceedings [requires] that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed." Echoing the self-evident principle that International arbitration is characterized by its private and confidential nature a recent American court decision<sup>2</sup> enforced a protective order of confidentiality; it rejected a request for modifying the order to allow the party to use the documents that were part of a previous arbitration.

The Handbook of Arbitration Practice states that it is common wisdom that arbitration is a private tribunal for the settlement of disputes.<sup>3</sup> Confidentiality was perceived as being implicit in an agreement to refer the dispute to arbitration.<sup>4</sup> While confidentiality and privacy are often stated as the defining features and advantages of arbitration as compared to litigation, these are however not to be regarded as the same, they are distinct, albeit interconnected. Yves Fortier viewed the two concepts

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1 Jan Paulsson and Nigel Rawding "The Trouble with Confidentiality" (1995) 2 Arbitration International 303 at 312.

2 *Rio Tinto Plc v Vale SA*, et al 14 Civ. 3042 (RMB) (AJP) (SDNY) Case 1:14-cv-03042-RMB-AJP Document 446 Filed 04/18/16.

3 John Tackaberry and Arthur Marriott *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (3rd edition, Sweet and Maxwell, London, 1998) at 4-5.

4 Alexis C Brown "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration" (2001) 16(4) American University International Law Review 969 at 974.

as corollaries, since privacy is a concern for confidentiality,<sup>5</sup> confidentiality is impossible without privacy; privacy is meaningless without confidentiality.<sup>6</sup>

## **II STRUCTURE OF THE CHAPTER**

This chapter, attempting to revisit the place of the duty of confidentiality in international commercial arbitration, is divided into three sections. The first section introduces the discourse on confidentiality in international arbitration, the arguments and the counter-arguments for a duty to confidentiality. It discusses the scope of the confidentiality clause. The second section of the chapter discusses the existing legislative framework, minimal though, concerning confidentiality. It attempts to map the institutional rules on the nature and scope of the duty to confidentiality within them. The third section discusses the jurisprudence on the contours of the confidentiality clause in a few jurisdictions. This section also attempts to present a threshold for confidentiality in international arbitration, based upon the discussion in the earlier sections of the chapter and also deriving inspiration from the discussion on confidentiality as part of the work of the UNCITRAL Working Group II.

## **III SECTION ONE**

### **3.1 The Difficulty of Defining Confidentiality**

As much as has been written on the subject of confidentiality of international arbitration, there is very little available as a definition. But there is much literature, and well-articulated too, addressing the delimitation of confidentiality. Much of this literature has been the research necessitated by a few decisions<sup>7</sup> that have called into question what was hitherto considered as an essential and intrinsic feature of international arbitration. Paulsson and Reading wrote that confidentiality was least discussed in academic discourse, they further state that even the most comprehensive works on the subject made very limited contribution, beyond repeating the generalities that are presumed rather than being proven.<sup>8</sup> F Patrick Neill opined that that the minimal nature of discourse on the subject has been used in later times by the proponents of two distinct schools of thought on the subject to reach different conclusions.<sup>9</sup> Proponents of restriction and denial of confidentiality as an essential part of arbitration contended that if there was a duty to confidentiality it would have

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5 L Yves Fortier "The Occasionally Unwarranted Assumption of Confidentiality" (1999) 15(2) *Arbitration International* 131 at 131.

6 At 132.

7 For example, *Esso v Plowman* (1995) 128 *Australia Law Report* 391 and *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc* Case No T-1881-99 (Swedish Sup Ct 27 October 2000).

8 See Paulsson and Rawding, above n 1 at 303.

9 Patrick Neill "Confidentiality in Arbitration" (1996) 12(3) *Arbitration International* 287 at 287.

been evidenced in the literature, and the absence of literature proved the fact that there essentially was no enforceable duty of confidentiality; judicial statements on confidentiality evidence the existence of a duty to confidentiality. One author stated that the scope of arbitral confidentiality is a 'far from settled issue'.<sup>10</sup>

### 3.2 *The Case For and Against a Duty of Confidentiality*

#### 3.2.1 *The Argument for Confidentiality – the 'Private Nature of Arbitration'*

The Queen Mary University International Arbitration Survey 2015 stated that 33% of the respondents reported that confidentiality and privacy are the compelling reasons to opt for arbitration over litigation.<sup>11</sup> English courts have favoured a duty of confidentiality on the assumption that the hearings are conducted in private. In *Hassneh Insurance v Mew*<sup>12</sup> Judge Coleman opined:<sup>13</sup>

If the parties to an English law contract refer their disputes to arbitration they are entitled to assume at the least that the hearing will be conducted in private. That assumption arises from a practice which has been universal in London for hundreds of years and [is], I believe, undisputed. It is a practice, which represents an important advantage of arbitration over the Courts as a means of dispute resolution.

Young and Chapman averred that an absence of an express rule of confidentiality did not in any way hinder the recognition of the benefits of privacy that are essential to an arbitration.<sup>14</sup> Jolles reasoned that the argument favouring confidentiality flowed from the private character of arbitration and also from the role that party autonomy plays in arbitration, thus supporting an inherent expectation that the proceedings would be confidential.<sup>15</sup>

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10 Fulvio Fracassi "Confidentiality and NAFTA Chapter 11 Arbitrations" (2001) 2(1) Chicago Journal of International Law 213 at 213.

11 White & Case "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" (6 October 2015) <[www.arbitration.qmul.ac.uk/docs/164761.pdf](http://www.arbitration.qmul.ac.uk/docs/164761.pdf)> accessed April 10th, 2016.

12 *Hassneh Insurance v Mew* [1993] 2 Lloyd's Report 243 (QB Comm Ct).

13 At 246-247.

14 M Young and S Chapman "Confidentiality in International Arbitration, Does the exception prove the rule?; Where now for implied duty of confidentiality under English law?" (2009) 27(1) ASA Bulletin 26 at 26.

15 Alexander Jolles, Sonja Stark-Traber and Maria Canals de Cedie "Confidentiality" in Elliott Geisinger, Nathalie Voser, Angelina M Pett (eds.) *International Arbitration in Switzerland – A Handbook for Practitioners* (Kluwer Law International, Hague, Zurich 2013) at Chapter 7.

Bernstein in his text on Arbitration<sup>16</sup> observed:

There would be little point in excluding the public from an arbitration hearing if it were open to a party to make public, for example in the press or on television, an account of what was said or done at the hearing. It is suggested that a party would be entitled to an injunction to restrain the other party from such publication.

Patrick Neill argued for addressing confidentiality founded upon the private nature of arbitration. He stated that parties ought to be prohibited to "arbitrate by day and publicize by night."<sup>17</sup>

### 3.2.2 *The Counter-Arguments*

Julian DM Lew advanced an important counter-argument to the implied nature of confidentiality implicit in the private nature of arbitration.<sup>18</sup> He averred that privacy is simply an available option to the parties.<sup>19</sup> He further stated:<sup>20</sup>

Privacy of proceedings is available should the parties want it, but there must be a clear intention on both of them that that is intended. In any event, even to the extent that an arbitration is private, and the public are not admitted, this does not necessarily mean that the procedure and the evidence produced in the arbitration are confidential and cannot be disclosed.

Party-specific arbitration clauses cannot bind others in multi-party arbitrations. It would be impractical that the same arbitration clause would apply to all of the parties, since the disputes between different parties may arise in a varied manner and with different content.<sup>21</sup>

Lew further stated that an immense advantage could be derived from the publication of awards. For example, subsequent arbitral awards<sup>22</sup> have adopted the

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16 Ronald Bernstein *Handbook of Arbitration Practice* (Sweet & Maxwell, 1987) at paragraph 13.6.3.

17 Neill, above n 9 at 307.

18 Julian D M Lew "Expert Report on Esso v Plowman" (1 September 1995) 11(3) *Arbitration International* 283 at 283-284.

19 At 286.

20 At 286.

21 Stewart Shackleton "Global Warming: Milder Still in England – Part II" (1999) 2(4) *International Arbitration Law Review* 117 at 125.

22 *European company v American and Egyptian parties (Award)* ICC case No 5721 1990 117 J.D.I.1020 (1990); ICC Case No 5730, 1988 Award, 117 J.D.I.1029 (1990); ICC case no 6519 *French Group of Companies v English Company* 1991 award, 118 J.D.I.1065 (1991); ICC case no 7155, *Norwegian company v Three French Companies* 1993 award 123 J.D.I.1037 (1996).

solution spelt out in the *Dow Chemical arbitral award*<sup>23</sup> on jurisdiction over a group of companies.

Public access to arbitral documents could promote trustworthiness of the process, and ensure increased public interest in arbitration as an appropriate method to resolve international commercial disputes. Besides parties, future arbitrators could gain significantly in knowledge from the settled jurisprudence on the subject.<sup>24</sup>

Further confidentiality, in its entirety, can never be realized – there is always a small circle of people that is aware of the award, and that circle would grow if the award is placed into litigation and thereby it becomes public.<sup>25</sup>

Finally, the counter-argument to the private nature of arbitration leading to an implied duty of confidentiality is founded within the public interests requiring disclosure; the nature of the dispute and the surrounding circumstances that require the dispute to be known to the stakeholders, existing and potential.

### 3.3 *Duty of Confidentiality – The Scope of its Application*

At the core of the issue of confidentiality is the determination of its scope. The implication of an implied duty is that the proceedings of the arbitration would be kept between the parties only.<sup>26</sup> Is this obligation applicable to substantive elements or is extended to procedural elements as well. Another pertinent question is 'should the fact of arbitration' remain confidential?

#### 3.3.1 *The 'Fact of Arbitration'*

Can the existence of an arbitration process be brought within the confidentiality obligation? Dessemontet commented that in some cases the mere fact that an arbitration process exists between the parties, and that the decision of the tribunal was pending could be viewed as a secret.<sup>27</sup> Parties, intending to avoid adverse publicity, may wish for the existence of arbitration to remain confidential. There is,

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23 ICC Case No 4131, *Dow Chemical France v Isover Saint Gobain*, September 23, 1982, Interim Award, IX Y.B. COM. ARB, 131, 136 (1984); CA Paris, 21 October 1983, *Isover Saint Gobain v Dow Chemical France 1984 REV.ARB* 98.

24 Francois Dessemontet "Arbitration and Confidentiality" (1996) 7 *The American Review of International Arbitration* 299 at 303.

25 Emmanuel Gaillard and John Savage (eds.) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at 188.

26 Loukas A Mistelis "Confidentiality and Third Party Participation *UPS v Canada and Methanex Corporation v United States*" (2005) 21(2) *Arbitration International* 211 at 211.

27 Dessemontet, above n 24 at 300.

however, no blanket rule regarding the application of the confidentiality obligation to the existence of the arbitration.<sup>28</sup>

Ensuring confidentiality of the fact of arbitration may be difficult because when courts are approached with regard to arbitration the existence of arbitration would be in public record.

- (1) In situations of frequent involvement in arbitral proceedings between the same parties, it might be impossible to keep the fact of such involvement confidential.<sup>29</sup>
- (2) Arbitrators and counsel often disclose – mostly by implication – a party's involvement in arbitration. While institutions do publish only sanitized reports, it could be possible that the identity of the parties could be derived from the description within the report.<sup>30</sup>
- (3) Inability to bind third parties to confidentiality agreements is another important reason. Leaks are inevitable since international arbitration involves a number of participants - expert witnesses, law firm support staff, employees of the parties, employees of the administering institution who are not bound by confidentiality agreements - mostly in supporting roles.<sup>31</sup>

### 3.3.2 *To What Information and Documents Does the Duty Extend?*

Confidentiality extends to documents generated during the course of arbitration - pleadings, submissions, transcripts and documents disclosed by the parties. There are three types of documents - different considerations apply for determining the confidentiality protection to each of them.

- (a) documents that are inherently confidential (those containing proprietary information) would attract the same protection within arbitration as they do outside it, i.e. they do not depend upon any confidentiality obligation for that protection.
- (b) documents disclosed by the parties would have the same level of protection as is available to similar documents in litigation, courtesy the *Riddick* principle<sup>32</sup> - they may not be disclosed without the permission of the other party or the tribunal.

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28 At 300.

29 Brown, above n 4 at 1003.

30 At 1003.

31 At 1004.

32 Derived from *Riddick v Thames Board Mills Ltd* [1977] QB 881 (CA).

- (c) the award - depends upon the administering institution's rules, and in case of ad hoc arbitrations on the applicable ad hoc rules, and the applicable arbitral law; however, it is rare that there is any express provision governing confidentiality.<sup>33</sup> While institutions and trade journals report the sanitized award, such sanitizing is often ineffective in protecting the party's anonymity.<sup>34</sup> Further parties themselves could be responsible for disclosure of the contents of the award – when they challenge or enforce the award in a national court.

### 3.3.3 *Witness Testimonies*

Fact witnesses, except those who are the employees of one of the parties, are not bound by the duty of confidentiality. Further if a fact witness testified in an arbitration and then testified different testimony in a future arbitration, such testimony from the first arbitration may be disclosed in the subsequent proceeding. While parties might encourage fact witnesses to keep their knowledge of the dispute private, unless such fact witness is under a contractual obligation to the parties (an employee), it is difficult to protect the confidentiality of the testimony.<sup>35</sup>

Parties could bind expert witnesses through a confidentiality agreement. Their testimony, however, could be called in proof in the court where it appeared that the views expressed by him in that proof were different from his views expressed in the court proceedings.<sup>36</sup>

### 3.3.4 *Trade Secrets and Proprietary Information Revealed during Arbitral Proceedings*

Protection of trade information is the primary motivation for many parties choosing arbitration as their dispute resolution mechanism.<sup>37</sup> Therefore it could be intuitively stated that a possible duty to confidentiality should, at its very least, encompass a duty to protect information about trade secrets from disclosure. Institutional Rules, especially WIPO,<sup>38</sup> provide a comprehensive regulation of trade secret confidentiality.

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33 Michael Hwang and Katie Chung "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26(5) *Journal of International Arbitration* 609 at 612.

34 Brown, above n 4 at 1013.

35 At 1006.

36 *London and Leeds Estates v Paribas* [1995] 1 EGLR 102.

37 Dessemontet, above n 24 at 299.

38 Arbitration Rules 2014 (WIPO), Article 76 (a), Article 54.

### 3.3.5 *Deliberations of the Tribunal*

Gaillard and Savage emphasized upon maintenance of confidentiality of all matters related to arbitration as an unflinching obligation, and cannot take in any exception under any vague or cautious institutional rules as the case may be.<sup>39</sup> This duty extends to the deliberations between members of the tribunal as well.<sup>40</sup>

## IV *SECTION TWO*

### 4.1 *Some Instances of Legislating a duty to Confidentiality*

While national legislations, in fulfillment of NYC obligations and drawing inspiration from UNCITRAL Model Law, have attempted to provide a structure for international commercial arbitration, there are very few instances of a country codifying a duty of confidentiality. Literature on confidentiality in arbitration has articulated extensively on the New Zealand example of codifying confidentiality.<sup>41</sup> Few other attempts to develop an enforceable statutory duty have also been made elsewhere.

#### 4.1.1 *New Zealand*

The New Zealand Arbitration Act, 1996, introduced a statutory implied duty as to confidentiality and privacy. The inclusion was perceived as a reaction to a concern on arbitral processes following the decision in *Esso* case<sup>42</sup>. Section 14 of the Act:

.... an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.

A presumptive confidentiality to arbitration extended to all aspects of the arbitration from the fact of arbitration to the award, subject only to parties agreeing otherwise. The default rule established a statutory implied obligation of confidence in all arbitral proceedings. Williams commented that the major defect with this statutory provision was that it failed to address the obvious exceptions to the general rule of confidentiality, especially the consequences arising from a challenge to the arbitral award before courts and its effect on the confidentiality as envisaged in

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39 Gaillard and Savage, above n 25 at 613.

40 At 627-28.

41 Brown, above n 4 at 990.

42 David AR Williams and Amokura Kawharu "Arbitration and Dispute Resolution" (2009) New Zealand Law Review 99 at 100.



Section 14.<sup>43</sup> Soon enough these inadequacies were brought to the fore in the case of *Television NZ Ltd v Langley Productions Ltd*.<sup>44</sup> where it was held that the arbitral confidentiality has to give way to the principle of open justice when the parties resorted to the courts to challenge the arbitral award.

Further to the New Zealand Law Commission Report of 2003, the arbitration law was amended to include a comprehensive confidentiality regime. Section 14 has been replaced by a set of provisions that have encapsulated the jurisprudence on confidentiality. While the presumptive obligation to confidentiality in all arbitral agreements unless parties agreed otherwise has been retained as Section 14B, Section 14C listed exceptions, for example, disclosure is allowed when it is necessary to protect a party's legal rights in relation to a third party. Further Section 14F, allowing a rebuttable presumption in favour of public hearings of arbitral matters in open courts, reflects a balancing of the competing interests in transparency and accountability of the judicial process and the expectation of commercial parties to keep the arbitration confidential.<sup>45</sup> The legislation further stated that disputed issues concerning confidentiality would first be addressed by the arbitral tribunal, the High Court could be approached on appeal against such tribunal decisions. Williams commented that while the 2007 Act did not indicate the methodology for evaluating competing interests, the general presumption of open justice would prevail.<sup>46</sup>

#### 4.1.2 Hong Kong

Hong Kong first enacted confidentiality as a statutory feature through an Arbitration (Amendment) Ordinance (No 2) (Cap 341) 1989. It allowed a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court and further restrict the reporting of proceedings otherwise than in open court.

The Hong Kong Arbitration Ordinance 2011 (Cap 609) attempted to provide increased clarity with regard to confidentiality of arbitration. Section 17(5) allows courts to order publication of award-based judgments sanitized as they think fit; it could order a blanket prohibition of reporting on proceedings heard otherwise than in open court for a period of up to ten years.<sup>47</sup> Section 18 provided for prohibiting disclosure of information about arbitral proceedings and awards, but makes an

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43 At 101.

44 *Television NZ Ltd v Langley Productions Ltd* [2000] 2 NZLR 250; Williams, above n 44 at 101.

45 Williams, above n 42 at 101.

46 Ibid.

47 Arbitration Ordinance 2011 (Hong Kong), Section 17 (5) (b).

exception within Section 18 (2)(b) to allow disclosure or communication that a party is obliged to make by virtue of other provisions of the law – disclosure or communication of information to protect or pursue the legal rights of a party; disclosure required in legal proceedings; disclosure required to be made to any government body, court, tribunal or a regulatory authority.

The Hong Kong Arbitration Ordinance 2011 does not provide guidance to the judicial authority or the tribunal to order disclosure of information in situations where the Ordinance contemplated such disclosure. The Bills Committee of the Legislative Council parsed a variety of material that guided its consultation paper,<sup>48</sup> but decided against providing an exhaustive list of situations requiring disclosure, citing impossibility of such list being prepared, like the commentary on the New Zealand Law Reform efforts, which discussed similar difficulties.<sup>49</sup>

#### 4.1.3 *Singapore*

Section 22 of the Singapore International Arbitration Act allows a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court.<sup>50</sup> Section 23 restricts reporting of proceedings heard otherwise than in open court. Singapore law on confidentiality is almost similar to the position in Hong Kong in Sections 16 and 17. Does failure to apply for a closed court proceedings mean a waiver of confidentiality in Singapore?<sup>51</sup> Hwang and Chung cited two examples<sup>52</sup> to flag the differential rationale - where arbitration cases heard in courts were reported without disclosure of parties' names, and when cases reports identified the parties' names.

#### 4.1.4 *Dubai International Financial Centre*

The DIFC Arbitration Law<sup>53</sup> makes a reference to confidentiality of the arbitration unless agreed otherwise by the parties. The International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration' stated that a general obligation of confidentiality is contained in Section 14 of the Arbitration Law of the

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48 See LC Paper No CB (2) 1404/09-10(01), Hong Kong Department of Justice, April 2010 <<http://legco.gov.hk/yr08-09/english/bc/bc59/papers/bc590430cb2-1404-1-e.pdf>> at 9.

49 Hwang and Chung, above n 33 at 642-43.

50 International Arbitration Act 1994 (Singapore), Section 22.

51 Hwang and Chung, above n 33 at 636.

52 *VV v VW* [2008] 2 S.L.R. 929 (HC); *International Coal Pte Ltd v Kristle Trading Ltd* [2009] SLR 945 (HC).

53 Arbitration Law 2008 (DIFC).

Dubai International Financial Centre which provides that, unless otherwise agreed, 'all information relating to the arbitral proceedings be kept confidential, except where disclosure is required by an order of the DIFC Court.'<sup>54</sup>

Legislations identifying and delimiting the confidentiality obligation in arbitration also exist in France<sup>55</sup> and Spain.<sup>56</sup>

## **4.2 Mapping Institutional Rules for Confidentiality**

Unlike national laws, the rules of almost all of the main arbitration institutions contain provisions providing for some form of confidentiality (at least as regards the privacy of hearings, publication of awards and the duties of the institution).<sup>57</sup> The foregoing discussion on confidentiality in international arbitration helps in the derivation of a few attributes of this feature, which in turn could be used as the criteria for mapping institutional rules. These attributes are

- confidentiality in terms of the existence of arbitration
- confidentiality of the documents produced for and in the course of arbitration
- confidentiality of the evidence of third parties
- confidentiality of the award

### **4.2.1 LCIA**

An expansive content is read into the obligation of confidentiality within the LCIA Rules, 2014. Article 30 creates a general rule of confidentiality that extends to all matters regarding the arbitration – awards, documents, materials not otherwise in the public domain/deliberations of the tribunal to remain confidential to its members,<sup>58</sup> except as required by the applicable law for pursuing legal rights/for enforcing or challenging an order or award. The parties are under an obligation to keep confidential all awards and all materials in the proceedings created for the purpose of the arbitration, as well as all documents produced by another party in the proceedings that are not otherwise in the public domain.

The LCIA Rules also carry the proviso that a party is entitled to disclose such documents: (a) if it is under a legal duty to do so; (b) if disclosure is necessary to

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54 Filip De Ly, Mark Friedman and Luca Radicati Di Brozolo "International Law Association International Commercial Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration" (2012) 28(3) *Arbitration International* 355 at 361.

55 Code of Civil Procedure 2011 (France), Article 1469.

56 Arbitration Act 2003 (Spain), Article 24(2).

57 Ly et al, above n 54 at 366.

58 Arbitration Rules 2014 (LCIA), Article 30.2.

protect or pursue a legal right; or (c) to enforce or challenge an award in bona fide legal proceedings. As for an arbitrator's duty of confidentiality, the LCIA Rules stipulate only that the deliberations of the arbitral tribunal are confidential. The LCIA does not publish awards unless both the parties and the arbitral tribunal consent.<sup>59</sup>

#### 4.2.2 ICC

ICC Arbitration Rules 2012 do not make a reference to confidentiality. A reason could be that since these rules are used in many jurisdictions, it would be difficult to factor in a confidentiality rule that would not conflict with national arbitration laws. They refer to the corollary of confidentiality, privacy, as a binding obligation on the parties. Article 26(3) provides that the arbitration hearings shall be held in private, barring the attendance of people not involved in the arbitration. The tribunal may, upon application by the party(s) make orders with regard to the confidentiality of the arbitration proceedings and also take measures regarding protecting trade secrets and confidential information.<sup>60</sup>

The Internal Rules of the ICC International Court of Arbitration prevent disclosure of its proceedings.<sup>61</sup> However, the US court in the *Panhandle*<sup>62</sup> case was of the view these rules were neither binding on the parties nor on the tribunal, and therefore it refused to deny discovery of documents which had been filed in an ICC arbitration in a separate court action.

#### 4.2.3 WIPO Rules of Arbitration

WIPO Arbitration Rules 2014 are by far the most comprehensive statement on confidentiality. They include a general provision on confidentiality – Part VII deals with confidentiality, it has a general explanation on confidentiality as to the existence of arbitration.<sup>63</sup> Further it provides for a binding obligation not to disclose any information revealed during the arbitration, including documentary evidence and information.<sup>64</sup> The award is to be treated confidential and not revealed to third parties except by the consent of the parties or under an order of the court or competent

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<sup>59</sup> At Article 30.3.

<sup>60</sup> Arbitration Rules 2012(ICC), Article 22(3).

<sup>61</sup> Article 6 of the Internal Rules of the ICC ICA provides that the work of the Court is of a confidential nature, which must be respected by everyone who participates in that work in whatever capacity.

<sup>62</sup> *United States v Panhandle E Corp* 118 F.R.D. 346 (D.Del.1988).

<sup>63</sup> See Arbitration Rules 2014 (WIPO), above n 38 at Article 75(a).

<sup>64</sup> At Article 76.

authority.<sup>65</sup> The Rules also impose such obligations upon the Center and the Arbitrators.<sup>66</sup>

#### 4.2.4 SIAC

SIAC Arbitration Rules 2013 also provide for an extensive confidentiality structure including non-disclosure of the existence of arbitration.<sup>67</sup> Rule 35.1 enjoins upon the parties and the tribunal to treat all matters related to the proceedings and the award as confidential, at all times. The Rules further prohibit disclosure of any information, pleadings, documents, evidence and other material that was part of the arbitration. However, this rule also provides for disclosure in a few situations,

- in applications for challenge and enforcement of the award;
- pursuant to the order of or a subpoena issued by a competent court;
- for pursuing or enforcing a legal right or claim;
- required by law or any regulatory body; or
- pursuant to an order by the Tribunal on application by a party with proper notice to the other parties.<sup>68</sup>

Rule 35.4 allows the tribunal to make an order on appropriate measures, including imposing sanctions, for breach of this Rule.

#### 4.2.5 HKIAC

Article 42 of the HKIAC Arbitration Rules 2013 provides for the confidentiality of the arbitration – it covers the existence of the arbitration and also the arbitral award. The obligation under this Rule extends to the emergency arbitrator, witnesses, experts as well as the staff of the tribunal and of the HKIAC. Further while the Hong Kong Arbitration Ordinance 2011 did not list the circumstances for allowing disclosure of information/documents that were part of the arbitral proceedings, the HKIAC rules provide an exhaustive list of situations where disclosure of information is not prevented.<sup>69</sup>

- (a) (i) to protect or pursue a legal right or interest of the party; or
- (ii) to enforce or challenge the award referred to in Article 42.1; in legal proceedings before a court or other judicial authority;

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<sup>65</sup> At Article 77.

<sup>66</sup> At Article 78.

<sup>67</sup> International Arbitration Centre Rules 2013 (Singapore), Rule 35, 35.3.

<sup>68</sup> At Rule 35.2.

<sup>69</sup> International Arbitration Centre Arbitration Rules 2013 (Hong Kong).

- (b) to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or
- (c) to a professional or any other adviser of any of the parties, including any actual or potential witness or expert.

Deliberations of the arbitral tribunal are confidential.<sup>70</sup> Awards could be published, in entirety or in a sanitized version with identity of the parties removed, with the permission of the HKIAC, such publication; publication would not be allowed if the party(s) have raised any such objection.<sup>71</sup>

Institution	General Confidentiality	Existence of arbitration	Documents used/generated	Arbitrator	Witnesses	Award
LCIA	*		*	*		*
ICC						
UNCITRAL						*
HKIAC	*		*	*		*
SIAC	*	*		*		*
WIPO		*	*	*	*	*

### 4.3 Judicial Opinion

#### 4.3.1 Absence of an Implied Duty of Confidentiality

*Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)*<sup>72</sup> concerning a dispute over the proposed increase in the price of natural gas supplied by Esso to two public utilities, the Gas and Fuel Corporation of Victoria (GFC) and the State Electricity Commission of Victoria (SEC), triggered the question on the existence of implied duty of confidentiality. The appellants did not provide details of the calculations to GFC and SEC and commenced arbitration. The Minister brought an action against the appellants seeking a declaration that any disclosure of information that was a part of the arbitration was not a subject of confidentiality. Mason, CJ held that there was a distinction between privacy and the duty of

<sup>70</sup> At Article 42.4.

<sup>71</sup> At Article 42.5.

<sup>72</sup> *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391 (HCA).

confidentiality.<sup>73</sup> Confidentiality, unlike privacy, is not 'an essential attribute' of commercial arbitration. Since there was no contracted obligation of confidentiality, such obligation could not be implied. Mason CJ, nonetheless, conceded that similar to the obligation on each party not to disclose the proceedings or documents and information provided in judicial proceedings, an obligation of confidentiality attaches to documents that were part of the arbitration.<sup>74</sup> However, such obligation is necessarily subject to the public legitimate interest in obtaining information about the activities of public authorities; since the subject matter of the arbitration also affected public's interest in knowing the utilities bills calculations, this might well have been a factor influencing the decision in the *Esso* case.<sup>75</sup> The Court further ruled that the Minister for Energy and Minerals, who was not a party to the arbitration, was entitled to discovery of arbitration documents and information.

The Wellington High Court speaking through Robertson, J, in *Television New Zealand Ltd v Langley Productions Ltd*<sup>76</sup> held that knowing how much a well-known TV personality was paid was additional justification for not suppressing reporting of the court hearing of the appeal from the arbitration hearing.<sup>77</sup>

*Panhandle* decision<sup>78</sup> from the United States, is another important judicial statement that denied an implied duty of confidentiality. In this case, the federal government sought to have Panhandle, a US company, produce documents from an ICC arbitration between Panhandle's subsidiary and the Algerian State Oil company. Panhandle objected and argued that arbitration being confidential in nature disclosure would frustrate the parties' expectations. The court, ordering disclosure of arbitral information, held that confidentiality is not an implied duty unless parties had contracted for it. It further held that the ICC-ICA Rules are an internal regulation mechanism, and place no obligation of confidentiality on the arbitrating parties.<sup>79</sup>

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73 At 400-401.

74 At 404.

75 Hwang and Chung, above n 33 at 618.

76 *Television New Zealand Ltd v Langley Productions Ltd* [2000] N.Z.L.R. 250 (HC).

77 At 618.

78 *United States v Panhandle E Corp*, above n 62.

79 Jefferey W Sarles "Solving the Arbitral Confidentiality Conundrum in International Arbitration" (October 10, 2015) <<https://m.mayerbrown.com/Files/Publication/cc689d95-b8ba-4179-b72f-08b83ec47ad1/Presentation/PublicationAttachment/917049de-2412-4695-894d-09fc7f42c303/Confidentiality.pdf>> at 4.

In the *American CentETex Gas Co v Union Pac Res Group*<sup>80</sup> case the court denied a preliminary injunction to seal an arbitration award in which the movant was found liable for antitrust violations because the public had a convincing countervailing interest in knowing the results of arbitration that involved allegations of anticompetitive and monopolistic conduct.

The Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc*<sup>81</sup> held that there was no implied duty of confidentiality in arbitrations. In a banking dispute arbitrated under Austrian law in Stockholm, the UN-ECE rules requiring hearings to be held *in camera*. One of the parties published the interim award, and the other party approached the Swedish court for annulment of the award on the ground that there was an implied obligation of confidentiality that was violated. The Stockholm City Court annulled the award stating that confidentiality is an implied condition in an arbitration agreement, which in the instant case was silent on the point. The Swedish Court of appeal reversed the decision citing that the *in camera* provision in the rules related only to hearings and not to the awards. On a further appeal to the Swedish Supreme Court, it was held that the UN-ECE rules do not forbid disclosure of the outcome of the proceedings, neither does the Swedish law make arbitration proceedings secret unless the parties contract for secrecy – meaning that there is no implied duty of confidentiality.

#### 4.3.2 Implied Duty to Confidentiality Exists

English Law holds the position in favour of an implied duty of confidentiality. *Dolling-Baker v Merrett*,<sup>82</sup> decision specified that arbitration proceedings, voluntary and consensual as they are, entail an implied obligation on parties not to disclose or use for any other purpose any documents prepared for or used within the arbitration, the notes and transcripts of the evidence thereof, and indeed not to disclose any information given by any witness in that arbitration.<sup>83</sup>

Following *Dolling-Baker*,<sup>84</sup> the English Commercial Court broadened the definition of the implied duty of confidentiality in *Hassneh*.<sup>85</sup> The Court extended the application of an implied duty of confidentiality to arbitral awards.<sup>86</sup> It held that

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80 *American Cent E Tex Gas Co v Union Pac Res Group* (2000) WL 33176064 at 1.

81 *Esso v Plowman*, above n 7.

82 *Dolling-Baker v. Merrett* [1990] 1 WLR 1205.

83 At 1213 per Parker L J.

84 *Dolling-Baker v. Merrett*, above n 82.

85 *Hassneh Insurance v Mew*, above n 12.

86 At 247.



the legal basis for the implied duty of confidentiality in England also ought to be derived from aspects of custom and business efficacy.<sup>87</sup> The Commercial Court held that disclosure of an arbitral award without party consent possible only if such disclosure is reasonably necessary for the protection of the party's rights or if disclosure is in the interest of justice.<sup>88</sup>

The most expansive statement on confidentiality in arbitration is the *Ali Shipping Corp*<sup>89</sup> decision. The Court of Appeal granted an injunction to prevent disclosure of arbitral documents from an earlier arbitration – the defendant wished to use those documents in subsequent arbitration proceedings that raised related defences against companies that were related to the claimant in the earlier arbitration. The Court expressly held that the term confidentiality was implied in every arbitration agreement as 'an essential corollary of the privacy of arbitration proceedings'<sup>90</sup> and also as a necessary incident of a definable category of contractual relationship. However, acknowledging the difficulty in establishing the boundaries of this implied obligation, the Court of Appeal suggested that the definition of a broad set of exceptions might best solve this dilemma.<sup>91</sup>

- Party consent,
- order of court,
- leave of court,
- protection of an arbitrating party's legitimate interest, and
- disclosure required in public interest.

In addition, the Court of Appeal noted that no exception of the duty of confidentiality should go beyond the standard of reasonable necessity.<sup>92</sup>

Two other decisions that followed the precedent of *Ali Shipping* decision, but with subdued enthusiasm that resulted in a structured erudition of the confidentiality obligation are *Department of Economic Policy and Development of the City of*

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87 At 246.

88 At 249.

89 *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 (CA).

90 At 326.

91 Christopher Henkel "The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration Summer" (2012) 37 North Carolina Journal of International Law & Commercial Regulation 1059 at 1070.

92 *Ali Shipping Corp v Shipyard Trogir*, above n 89 at 327.

*Moscow and Another v Bankers Trust Co. and Another*,<sup>93</sup> and *Emmott v Michael Wilson & Partners Ltd.*<sup>94</sup>

*City of Moscow* case involved a challenge to the validity of an arbitration award and, in particular, the question of whether the judgment dismissing this challenge should be available for publication. In an appeal from the Commercial Court's order that the original judgment should remain private and not be available for publication, the English Court of Appeal rejected the notion of a generalized duty of confidentiality. Dismissing the appeal against the order refusing publication of the judgment the Court held that the parties' wish for confidentiality and privacy should outweigh the public interest in public hearings; nevertheless, the court retained a supervisory role. The court distinguished between considerations of publicity at the level of court hearings and those governing the publications of court judgments and held that "[t]he consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court."<sup>95</sup> Following this rationale, the court consequently also rejected the perception that confidentiality in arbitrations is the dominant factor in determining whether or not a duty of confidentiality extends to court proceedings.<sup>96</sup>

The *Emmott* decision is a comprehensive statement on the nature of the implied duty to confidentiality and exceptions to it. Arbitration proceedings were commenced in England; at the same time, court proceedings were also initiated in the British Virgin Islands and New South Wales in Australia. During the arbitration proceedings in England, the claimant withdrew allegations of fraud and conspiracy but continued to pursue them in the court proceedings in the British Virgin Islands and New South Wales against the defendants. *Emmott* sought disclosure of documents from the arbitration proceedings in England to prove that defendants tried to mislead the courts in the British Virgin Islands and Australia. The English Court of Appeal concluded that the documents sought for disclosure were in principle confidential, but subject to two exceptions.

- disclosure may be allowed if the documents are reasonably necessary for the protection of *Emmott's* legitimate interest, such as defending against a claim brought in court by a third party.

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93 *Department of Economic Policy and Development of the City of Moscow and Another v Bankers Trust Co and another* [2004] EWCA (Civ) 314.

94 *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA (Civ) 184.

95 *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co*, above n 93 at 34.

96 Henkel, above n 91 at 1072.

- disclosure may be appropriate if the duty of confidentiality and the obligation of non-disclosure is only utilized to potentially mislead foreign courts.

The court also recognized that *Emmott* was an unusual case that required a case-specific analysis and thus did not necessarily fit well in the broader set of exceptions outlined in *Ali Shipping*. The court also broadened the exception of disclosure in the public interest or the interest of justice.

The Privy Council, however, adopted a guarded approach in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich (Aegis)*<sup>97</sup> on the use of arbitration materials obtained in a first arbitration to be utilized to support a plea of issue estoppel in a second arbitration. While accepting private dispute resolution as the essential purpose of arbitration, it noted that the enforcement of the arbitral award remains within the domain of the courts. The Privy Council recognized that confidentiality even under an exhaustive confidentiality agreement is only protected if disclosures of the award or parts thereof "raise the mischief against which the confidentiality agreement is directed."<sup>98</sup>

While the foregoing discussion recognizes exceptions to the implied duty of confidentiality, the English Arbitration Act, 1996 omitted any express reference to confidentiality.<sup>99</sup>

An analysis of the *Emmott* decision presents a rubric of the duty of confidentiality in international arbitration – the inclusions and the exceptions to the duty.

- duty to confidentiality in arbitration is implied by law and arises out of the nature of arbitration
- such duty is a substantive rule of law masquerading as an implied term
- imposes an obligation on both parties not to disclose documents prepared for and used in arbitration, transcripts or notes of the evidence in the arbitration or the award, and the evidence given by the witnesses in the arbitration.
- Further the content of this duty is evaluated on a case – by- case basis and is in the process of development
- The principal cases in which disclosure would be permissible are
  - (a) Enforcement Actions
  - (b) Public interest
  - (c) In matters before the court and with the leave of the court

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<sup>97</sup> *Associated Elec and Gas Ins Services Ltd v European Reinsurance Co of Zurich* [2003] 1 All ER 253.

<sup>98</sup> At para 8.

<sup>99</sup> Sarles, above n 79 at 6.

- (d) Statutory duties
- (e) express or implied consent of the parties
- (f) it is reasonably necessary for the protection of the legitimate interests of an arbitrating party.<sup>100</sup>

#### **4.4 Exceptions to the Implied Duty of Confidentiality**

##### **4.4.1 Enforcement Actions**

Colman, J, in *Hassneh*<sup>101</sup> specified two exceptions to the implied duty of confidentiality:

- (a) disclosure of the award (including its reasons) is permitted where it is reasonably necessary for the protection of an arbitrating party's rights vis-à-vis a third party.
- (b) An arbitrating party may bring the award and reasons into court for the purpose of invoking the supervisory jurisdiction of the court over arbitration awards and for the purpose of enforcement of the award itself.

This holding continues to be valid as it is consistent with the decision of the Court of Appeal in *Emmott*.

##### **4.4.2 Public Interest**

Public Interest remains the most articulated exception to the duty of confidentiality, in judicial as well as academic space.<sup>102</sup> Mason CJ in the *Esso* decision referred to a legitimate expectation that the public may have in knowing what transpired in an arbitration. He referred to this as the 'public interest exception'. He then stated that different criteria applied when considering governmental secrets rather than personal secrets and that the courts had to consider governmental secrets 'through different spectacles'.<sup>103</sup>

In the public sector '[t]he need is for compelled openness, not for burgeoning secrecy'. The present case is a striking illustration of this principle. Why should consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the

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<sup>100</sup> Hwang and Chung, above n 33 at 612.

<sup>101</sup> *Hassneh Insurance v Mew*, above n 12 at 259.

<sup>102</sup> See *Esso v Plowman*, above n 7 per Mason CJ; Also see Fortier, above n 5 at 135; Brown, above n 4 at 980; Fracassi, above n 10 at 215; Leon Trackman "Confidentiality in International Commercial Arbitration" (2002) 18(1) *Arbitration International* 1 at 10; Patrick Neill, above n 9 at 297, 311, 315; Michael Collins "Privacy and Confidentiality in Arbitration Proceedings" (1995) 11(3) *Arbitration International* 321 at 328, 331, 333; Hwang and Chung, above n 33 at 618.

<sup>103</sup> Andrew Tweeddale "Confidentiality in Arbitration and the Public Interest Exception" (2005) 21 *Arbitration International* 59 at 61.

outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities.<sup>104</sup>

In *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*,<sup>105</sup> Kirby J expressed the opinion that the public interest demanded transparency in relation to governmental actions. He further emphasized that the private agreement cannot endorse a procedural direction of an arbitrator to exclude from the public domain matters of legitimate concern.

In *AAV v AAZ* (2009),<sup>106</sup> the public interest exception was exercised to vindicate the disclosure which had taken place and to reject the plaintiffs' claim that the arbitration agreement had been discharged and its award should be set aside.

#### 4.4.3 *In Matters before the Court*

Arbitration claims are presented in courts in processes either for vacating the award or for enforcing it – how does the implied duty of confidentiality fare then? Confidentiality obligation, in an arbitral claim before the court, faces and is often trumped by a countervailing factor, the principle of open justice.<sup>107</sup> In the *City of Moscow*<sup>108</sup> case discussing a lower court order refusing publication of the judgment arising out of an arbitral claim, the English Court of Appeal dismissed the appeal holding that parties' wish for confidentiality and privacy outweighed the public interest in public hearings, nevertheless the court under the Arbitration Act, 1996 retained a supervisory role. While allowing publication of a summary of the judgment, Mance, LJ considered various factors that were relevant to whether a judgment should be given in public:

The public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militates in favour of a public judgment in respect of judgments given on applications under s 68. The desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity under the principles of *Scott v Scott*<sup>109</sup> and article 6. Arbitration is an important feature of international, commercial and financial life, and there is legitimate interest in its operation and practice. The

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<sup>104</sup> At 61.

<sup>105</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd* [1995] 36 NSWLR 662.

<sup>106</sup> *AAV v AAZ* (2009) [2011] 1 SLR 1093.

<sup>107</sup> Hwang and Chung, above n 33 at 619.

<sup>108</sup> *Department of Economic Policy and Development of the City of Moscow and Another v Bankers Trust Co and Another*, above n 93.

<sup>109</sup> At 39; *Scot v Scot* [1913] AC 417.

desirability of a public judgment is particularly present in any case where a judgment involves points of law or practice, which may offer future guidance to lawyers or practitioners.<sup>110</sup>

#### 4.4.4 *Consent of the Parties*

Consent of the parties to disclosure of the existence of arbitration and/or its information related to arbitration, is another exception to the implied duty of confidentiality. Such consent could be written into the substantive agreement between the parties or may be agreed upon later in the post-dispute arbitration agreement. Implied consent of the parties could arise from the parties' conduct after a dispute has arisen. Instances of implied consent include:<sup>111</sup>

- when a party to the arbitration applies to the court for removal of the arbitrator, in which case the party gives an implied consent to the arbitrator to disclose matters concerning arbitration to the court
- on an application to a court regarding arbitral matters, if the party did not make an application for an *in camera* proceeding, it may be presumed that the party has impliedly consented for the public disclosure of all facts and documents presented to the court.

#### 4.4.5 *By Compulsion of Law*

Statutory provisions override any obligation of confidentiality that parties have agreed to within their arbitration agreements - they could compel disclosure of arbitration-related documents.<sup>112</sup> Obligations arising from the laws relating to corporate governance, anti-money laundering legislations, legislations in the domain of prevention of fraud, corruption and such serious crimes would all trump an obligation of confidentiality, either expressly contracted by the parties or an implied duty.

#### 4.4.6 *With Leave of Court*

Hwang and Chung commented that while various cases have recognized disclosure of arbitration-related documents with leave of court, there is little to state whether the court order for disclosure trumps the duty of confidentiality.<sup>113</sup> The leave of the court is a matter which arises in circumstances where the court is deciding the

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<sup>110</sup> *Department of Economic Policy and Development of the City of Moscow and Another v Bankers Trust Co*, above n 93 at 39.

<sup>111</sup> Hwang and Chung, above n 33 at 621.

<sup>112</sup> At 622.

<sup>113</sup> At 622.

issue as between a party to the arbitration and a stranger (as where the court is ordering disclosure in litigation of arbitration documents in the possession of one party or in circumstances where the arbitration has come to an end. In *Emmott* the court was hesitant to articulate this exception in detail reasoning that such articulation may be inconsistent with the intention of the AA, 1996.

#### 4.4.7 *Disclosure for Protecting Legitimate Interests of an Arbitrating Party*

The enforcement of an arbitrating party's rights under an earlier arbitration award would certainly be a disclosure for protecting the legitimate interests of the winning party. Alternatively, a party may wish to disclose an arbitration award to adduce evidence of a position that was taken by an arbitrating party in an earlier arbitration so as to raise issue estoppel. *Aegis* appealed to the Privy Council and sought to reinstate the injunction to restrain disclosure of the arbitral award in the first arbitration to any third party, including the tribunal in the second arbitration. The issue before the Privy Council was whether, on its proper construction, a confidentiality agreement that the parties had entered into in the first arbitration precluded reliance on the arbitral award in the second arbitration.

In dismissing *Aegis'* appeal, the Privy Council held that the confidentiality agreement between the parties did not preclude reliance on the arbitral award in the first arbitration. The Privy Council was of the view that the principle of issue estoppel meant that the parties to proceedings were bound by an earlier arbitral award on the same issue, and that confidentiality was immaterial. In that context, the Privy Council considered that issue estoppel was "a species of the enforcement of the rights given by the award just as much as it would be a cause of action estoppel" even though it was a rule of evidence rather than a mechanism for enforcement as such.

Such disclosure has to be predicated by a reasonable necessity. *Ali Shipping* decision attempted to articulate 'reasonable necessity' as requiring a holistic approach taking account of the nature and purpose of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere.

#### 4.4.8 *An Obligation to Disclosure*

An obligation of disclosure is owed to the stakeholders of a commercial undertaking. Such stakeholders include,

- shareholders
- joint venture partners

- stock exchange regulatory mechanism
- insurers indemnifying the subject-matter of arbitration
- bondholders
- beneficiaries of trust corporations

## V SECTION THREE

The discourse on the duty of confidentiality moved to the question of inevitability of delimitation. Neither party to an arbitration would want a rule that arbitration was confidential without exception. The parties may need to show the award to insurers or to a parent company.<sup>114</sup>

Further the explosive growth in new entrants to institutional arbitration coupled with the diversity in the language of the confidentiality obligation in these rules presents an evident need to delimit and structure confidentiality and disclosures, so that parties may not indulge in forum shopping for seat of arbitration. Further with the increasing incidence of third party funding in commercial arbitration, and few jurisdictions like Australia even treating it in the same manner as litigation funding,<sup>115</sup> there is an increasing need for delimiting the duty of confidentiality, and making way for more transparency and disclosures in arbitration.<sup>116</sup>

An implied duty to confidentiality has the increased possibility of resulting in inconsistent resolutions of disputes arising from the same transaction. Confidentiality of arbitration proceedings in multi-party contracts could lead to inconsistent resolutions of the references arising out of the same dispute, especially because findings could not be shared between the tribunals.<sup>117</sup>

Confidentiality of the arbitral proceedings could also lead to an inefficient system, especially because unlike litigation, parties to arbitration have little guidance from any form of precedent.<sup>118</sup>

Further, a reciprocal confidentiality obligation could lead to a foreclosing of important advantages like beneficial publicity following a favorable award or forego the potential res judicata effects of an arbitral award.

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114 Tweeddale, above n 103 at 1.

115 *Minister for Transport for Western Australia v Civcon Pty Ltd* [2003] WASC 99.

116 Sai Ramani Garimella "Third Party Funding In International Arbitration" (2014) 3 AALCO Journal of International Law 45 at 57.

117 Brown, above n 4 at 1017.

118 Savage and Gaillard, above n 25 at 188.



### 5.1 *UNCITRAL and Duty to Confidentiality*

Successive UNCITRAL Working Group II<sup>119</sup> documents have averred to confidentiality as an inherent requirement for commercial arbitration.<sup>120</sup>

Realizing the need for a harmonized principle, the Working Group in its 64<sup>th</sup> Session in February 2016<sup>121</sup> suggested that the parties agree on a confidentiality regime, on the following aspects to the extent not precluded by the applicable arbitration law,

- the material or information that is to be kept confidential - the existence of arbitration, identity of the parties and the arbitrators, evidence and information that was part of the proceedings, award;
- measures for ensuring confidentiality of such information and of the hearings;
- circumstances of disclosure of such information in whole or in part to the extent necessary to protect a legal right; and
- other circumstances in which such disclosure might be permissible (for example, information in the public domain, or disclosures required by law or a regulatory body). The parties may wish to consider how to extend the obligation of confidentiality to witnesses and experts.

Whereas the obligation of confidentiality imposed on the parties and their counsel may vary with the circumstances of the case as well as the applicable arbitration law and arbitration rules, arbitrators are generally expected to keep the arbitral proceedings and the post-hearing deliberations confidential.

The report also averred to certain information, commercial secrets or intellectual property being confidential to one of the parties in an arbitration and called for parties and the tribunal to restrict access to such information or material to a limited number of designated persons.

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119 UNCITRAL Working Group II on Arbitration and Conciliation.

120 A/CN.9/WG.II/WP.194; A/CN.9/WG.II/WP.186; A/CN.9/826.

121 UNCITRAL Working Group II "Settlement of commercial dispute: Revision of the UNCITRAL Notes on Organisation of Arbitral Proceedings (A/CN.9/WG.II/WP.194)" (2 November 2015) <[www.uncitral.org/pdf/english/workinggroups/wg\\_arb/a-cn-9-WG.II-WP-194-Notes\\_draft\\_2\\_November\\_watermark.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_arb/a-cn-9-WG.II-WP-194-Notes_draft_2_November_watermark.pdf)> at page 14-15.

## **VI CONCLUSION - THE WAY FORWARD FOR A DUTY OF CONFIDENTIALITY**

Sir Bernard Rix grounded his plea for disclosure of arbitral awards within the reason to strengthen the knowledge on *lex mercatoria*;<sup>122</sup> he suggested a careful delineation of the areas of arbitration, including the awards that need to be put in public space and the manner in which private interests could be protected in the event of such publication.<sup>123</sup> It could be that parties might not prefer disclosure of their arbitral material during the course of the arbitration, as the parties or their competitors to affect the actual course of or tactics in the arbitration itself could use them. But once the arbitration is over, and the award has been made, there would be much less room for objection.

A statutory delineation of the implied duty to confidentiality, rather than varied judicial opinion could ensure a clear delimitation of the confidentiality feature of arbitration.

Given that confidentiality agreements do not bind third parties, it ought to be made incumbent upon the participant in the arbitration who brings the third party into the proceedings to make reasonable efforts to obtain such third party's express agreement to preserve confidentiality and, in addition to that third party's own responsibility, to bear responsibility for failure to take reasonable efforts to ensure that the agreement is carried out.<sup>124</sup>

A confidentiality agreement, in the absence of a statutory delimitation of this feature, could address the following exceptions to an implied duty

- rights of the parties to present the arbitral material in proceedings before the court for enforcement or annulment proceedings or pursuing a legal right;
- responding to a compulsory order or request for information of a governmental or regulatory body;
- making a disclosure required by law or by the rules of a securities exchange; or
- seeking legal, accounting or other professional services, or satisfying information requests of potential acquirers, investors or lenders;

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<sup>122</sup> Sir Bernard Rix "Confidentiality in International Arbitration: Virtue or Vice?" (Jones Day Professorship in Commercial Law Lecture, SMU, Singapore, 12 March 2015).

<sup>123</sup> At 20.

<sup>124</sup> Ly et al, above n 54 at 381.

provided that the disclosure in each of such instances must satisfy the necessity and legitimate purpose sought by the disclosure of that information of the arbitral proceedings.

Sir Rix suggested that the contracting parties could agree on a specific time line for withholding information about arbitral proceedings, institutions may as well have a default timeline stipulating a certain period for such withholding.

## **6.1 *Revisiting Arbitral Confidentiality – The Threshold for a Confidentiality Clause***

### **6.1.1 *Template for a Model Confidentiality Rule***

It is much desirable that States make a statutory provision on confidentiality in their arbitration laws. However, till that situation is achieved, diversity, and especially confusion regarding the existence of implied duty of confidentiality, calls for an urgency in having a default uniform rule, at least as a baseline which could be customized by States in their laws and Arbitral Institutions in their rules. In furtherance of the realization of this situation, Jeffrey Sarles proposed a uniform rule:<sup>125</sup>

In all arbitrations, the arbitrators shall require at the threshold that the parties agree on the scope of confidentiality, failing which the arbitrators shall enter a protective order on the scope of confidentiality. The parties shall by rule be deemed to have agreed to the terms of that order. Any claim asserting a violation of the parties' confidentiality agreement or protective order accruing during the course of the proceeding shall be resolved by the arbitrators. Any violation of the parties' confidentiality agreement or protective order accruing after the proceeding is terminated shall be resolved by arbitration according to the terms set forth in the parties' arbitration agreement. Arbitrators may impose appropriate damages and penalties on parties found to have breached the confidentiality agreement or protective order.

An analysis of Sarles's proposal reveals a few interesting facets that are part of the discussion on this subject.

- (1) Parties, preferably, enter into a confidentiality agreement, failing which it is incumbent upon the arbitrators to enter a protective order on the scope of confidentiality. This is a feature that has appeared in subsequent literature on the subject.<sup>126</sup>

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<sup>125</sup> Sarles, above n 79 at 13.

<sup>126</sup> Hwang and Chung, above n 34 at 644; Rix, above n 122 at 21; Ly et al, above n 54 at 381.

- (2) Claims asserting violation of the parties' confidentiality agreement or protective order shall be presented to and resolved by the arbitrators; such claims ought to be resolved according to the terms agreed within the arbitration agreement. Claims of confidentiality violations, thus, are to be addressed like other arbitral claims.
- (3) Arbitrators could decide upon sanctions and penalties for violations of confidentiality. There has been no uniformity on this aspect. Subsequent authors have also averred to this aspect<sup>127</sup>, as confidentiality is of little use, if it could not be an enforceable obligation and also if there are no remedies available for violation of this duty. However, this is easier said, especially because it is difficult to prove that a party has intentionally violated a confidentiality obligation, and even more difficult to quantify the effect of such unauthorized disclosures<sup>128</sup>, unless parties have agreed for liquidated damages.

### 6.1.2 *A Model Confidentiality Clause*

The International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration'<sup>129</sup> has prepared a model confidentiality clause:

[A] The parties, any arbitrator, and their agents or representatives, shall keep confidential and not disclose to any non-party the existence of the arbitration, all non-public materials and information provided in the arbitration by another party, and orders or awards made in the arbitration (together, the "Confidential Information"). [B] If a party or an arbitrator wishes to involve in the arbitration a non-party – including a fact or expert witness, stenographer, translator or any other person – the party or arbitrator shall make reasonable efforts to secure the non-party's advance agreement to preserve the confidentiality of the Confidential Information. [C] Notwithstanding the foregoing, a party may disclose Confidential Information to the extent necessary to: (1) prosecute or defend the arbitration or proceedings related to it (including enforcement or annulment proceedings), or to pursue a legal right; (2) respond to a compulsory order or request for information of a governmental or regulatory body; (3) make disclosure required by law or by the rules of a securities exchange; (4) seek legal, accounting or other professional services, or satisfy

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<sup>127</sup> Hwang and Chung, above n 34 at 641; Ly et al., above n 54 at 384.

<sup>128</sup> Brown, above n 4 at 1016.

<sup>129</sup> International Law Association International Commercial Arbitration Committee "Confidentiality in International Commercial Arbitration" (2010) <[www.ila-hq.org/download.cfm/docid/536E81FE-3BC8-4144-A70672729D8A6AA8](http://www.ila-hq.org/download.cfm/docid/536E81FE-3BC8-4144-A70672729D8A6AA8)>.

information requests of potential acquirers, investors or lenders, provided that in case of any disclosure allowed under the foregoing circumstances (1) through (4) where possible the producing party takes reasonable measures to ensure that the recipient preserves the confidentiality of the information provided. The arbitral tribunal may permit further disclosure of Confidential Information where there is a demonstrated need to disclose that outweighs any party's legitimate interest in preserving confidentiality. [D] This confidentiality provision survives termination of the contract and of any arbitration brought pursuant to the contract. This confidentiality provision may be enforced by an arbitral tribunal or any court of competent jurisdiction and an application to a court to enforce this provision shall not waive or in any way derogate from the agreement to arbitrate.

The clause and the commentary on the clause<sup>130</sup> help in understanding the drafting of a confidentiality clause and the threshold points to be noted.

- (1) It prohibits disclosure of all information revealing the existence of the arbitration, information and documents provided by the other parties and all information and documents created for the purposes of the arbitration. It does not cover a party's own "historical" documents and documents and information in the public domain.
- (2) Since the confidentiality clause will usually be a part of the arbitration agreement, the reference to the arbitrators contained in it should have the effect of incorporating the confidentiality obligation in the mandate of the arbitrators, even if they are not parties to the confidentiality agreement.
- (3) The parties may wish to consider agreeing upon a form of request to these non-parties asking them to preserve confidentiality, or even upon a written undertaking to be signed by the non-party
- (4) Disclosure is permitted only to the extent necessary to fulfill one of specifically enumerated circumstances requiring disclosure.
- (5) Parties may wish to fix the duration of the obligation and the methods of enforcement of the obligation - a compulsory injunction, or a remedy against a non-party to the arbitration. Liquidated damages tailored to the nature of the breach of obligation could be another method of enforcement.

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<sup>130</sup> Ly et al, above n 54 at 382.

