



CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL
ARBITRATION
TO WHOM DOES THE DUTY OF CONFIDENTIALITY EXTEND IN
ARBITRATION?

by

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ABSTRACT

The purpose of this thesis is to examine the scope of confidentiality binding upon the participants in arbitration proceedings, including the parties and their representatives, the arbitral tribunal, arbitral institutions, and third participants, such as witnesses and experts. The presumption of confidentiality exists in international commercial arbitration. However, the jurisprudence is inconsistent regarding the purpose of arbitration and its interplay with confidentiality. This research will concentrate on the concept and function of confidentiality related to international commercial arbitration and will not examine the issue in other forms of alternative dispute resolution.

In the first chapter I discuss the advantages and disadvantages of the confidential nature in arbitration proceedings, whether it is in favor of or against the effective dispute resolution. The research will approach both ethical and legal concerns, and also will aim to draw conclusions about whether confidentiality is generally expected. If there is a generally expected duty of confidentiality, I will attempt to draw overall conclusions about whether it supports the parties' interests and their expectations or it generates undesired obstacles. Finally, the same chapter will discuss the desired level of confidentiality that should be afforded.

The main chapter addresses the participants one-by-one and attempts to provide an analysis of their obligations, if any, regarding confidentiality. In this chapter I discuss their present status of confidentiality in international commercial arbitration in numerous selected institutional and national arbitration rules.

The last chapter is devoted to providing examples of how the duty of confidentiality may be treated in the future in light of some recent efforts and to propose a uniform default rule on confidentiality that may be followed within arbitration as a technique of alternative dispute resolution.

TABLE OF CONTENTS

ABSTRACT ii

TABLE OF CONTENTS 3

INTRODUCTION 4

CHAPTER 1 REASONS FOR CONFIDENTIALITY 8

1.1. Arguments against vs. in favor of confidentiality 8

1.2. The Legal Nature of Confidentiality 12

1.3. Parties expectations with regard to confidentiality 15

 1.3.1. Is there a general duty of confidentiality? 18

 1.3.2. Ethical considerations 19

1.4. Justification of the Desired Level of Confidentiality to be maintained 21

CHAPTER 2 CONFIDENTIALITY IN ARBITRATION IN RELATION TO THE PARTICIPANTS 25

2.1. Scope and sources of the obligation of confidentiality 27

 2.1.1. Directly: arbitration and/or confidentiality agreement 29

 2.1.2. Indirectly: law applicable to the arbitration procedure 31

2.2. Essential People for Arbitration Proceedings 35

 2.2.1. Tribunal and Individual Arbitrators 35

 2.2.2. Parties themselves 36

 2.2.3. Parties’ representatives 41

 2.2.3.1. Attorney-client privilege 42

 2.2.3.2. Attorney-work product privilege 44

2.3. Third Party Participation and Access to documents in International Commercial Arbitration 45

 2.3.1. Participation is arising from their profession: witnesses, experts, court reporters, interpreters and translators 47

 2.3.2. Arbitral Institutions: members, assistants and staff 49

CHAPTER 3 THE WAY FORWARD - FUTURE PROSPECTS 52

3.2. A Uniform rule on confidentiality 54

CONCLUSION 55

BIBLIOGRAPHY 57

INTRODUCTION

The principle of confidentiality is broadly recognized as one of the major benefits of arbitration proceedings and arbitration awards. It is one of the advantages¹ if not the main advantage why parties while entering into agreement in order to settle their disputes, tend to turn to arbitration instead of public judicial proceedings. Since the dispute only arises, if ever, between the parties in the future, they prefer to know what to expect from the other party and from other participants during the proceedings.

Confidentiality is essentially associated with privacy in most of the cases, therefore, many jurisdictions² consider it as an implied term in the arbitration agreement. Except where otherwise stated in the parties' agreement, it is generally acknowledged that arbitrations are confidential and private in their nature.³ On the other hand, there is a distinction between privacy and confidentiality. They are not identical, though they both refer to the private process between the parties and the members of the arbitrating tribunal. The vital distinction between the two is who is privileged and who is banned to do certain acts. Privacy provides that the hearings are held in camera and outsiders cannot be present, and all information at these hearing are treated as strictly confidential, unless the parties have agreed otherwise. Thus, privacy represents a privilege for the participants of the arbitration proceedings and a restriction for uninvited externals. Adversely, obligation of confidentiality refers to the conduct of the participants. More precisely, a person shall not disclose freely "*any information about the arbitration, any information learned through the arbitral proceedings*

¹ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 4th ed., 2004) at 23, 45; Bernstein et al., *Handbook of Arbitration Practice* (Sweet & Maxwell 3d ed., 1998) at 5.

² See e.g. in England.

³ *Ali Shipping Corporation v. Shipyard Trogir*, 1 Lloyd's Rep. 643 (Eng. C. A. 1998); *Hassneh Insurance Co of Israel v Mew* (1993) 2 Lloyd's Rep 243; *Cf Esso Australia Resources Ltd v The Honorable Sidney James Plowman* (Minister of Energy and Minerals) [1995] 128 ALR 391.

and any award or decision rendered by the arbitral tribunal.”⁴ This duty of confidentiality may apply to the parties, their representatives, the arbitral tribunal and arbitral institutions as well as third parties gaining access to information about the arbitration.

While the private nature of the arbitration hearings is more widely accepted, confidentiality can be much more uncertain and confusing. The scope of this seemingly general duty of confidentiality is various in different arbitration rules, even if they provide an explicit duty of confidentiality. Confidentiality is various in the statutory and common law environment of arbitration. Moreover, interpretations of scholars and practitioners are also not inherent.⁵ Nonetheless, the nature and extent of duty of confidentiality is also subject to limited exceptions justifying the disclosure. Consequently even if there is a general duty of confidentiality, the duty is not absolute. These limits are not just statutory limitations, but also the parties, while drafting their agreement, may realize they do not wish these confidential clauses and agreements to be without exceptions. They should bear in mind their other obligations towards third parties as well. For instance, they may need to disclose information about the award to their shareholders, insurers, or parent company in case of subsidiaries.

Lastly the question is still undoubtedly unanswered whether privacy automatically results in confidentiality. As it was stated, even if the arbitration is not public, it does not necessarily mean that either the materials, content of the hearing such as documents, remain confidential, or whether all participants at the hearing are bound by the duty of confidentiality.⁶ Rüede and Hadenfeldt in 1993 denied that obligation of confidentiality results from privacy. Subsequently, parties are not automatically bound by these duties automatically.⁷

⁴ Alexis C. Brown, *Presumption Meets Reality, An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 Am. U. Int'l L. Rev. 969, 1014 (2001).

⁵ Redfern & Hunter, *supra* note 1, at 27.

⁶ Mason C.J. in *Esso/BHP v. Plowman*, reprinted in 11 Arb. Int'l 235, 245 (1995).

⁷ Thomas Rüede & Rainer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG* 32 et seq. (2d ed., 1993).

As the expert has noted "Privacy is concerned with the rights of persons other than the arbitrators, parties, and their necessary representatives and witnesses, to attend the arbitration hearing and to know about the arbitration. Confidentiality by contrast, is concerned with [...] information relating to the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the award."⁸ Apart from this, the parties' expectations that external people be excluded from their arbitration and the details about their dispute treated as confidential, can still remain true.⁹ However, it is up to the parties whether they rely on the existing institutional rules or they expressly draft their own agreement containing a confidentiality clause.

According to other authors, while privacy means excluding strangers from the arbitration hearings, confidentiality means "the non-disclosure relationship among the arbitration participants."¹⁰ It is in the very nature of the arbitration that parties by signing their agreement, accept a mutual duty binding them from disclosing any information, such as transcripts, notes, evidence, or expert reports, which will be prepared and used in the future arbitration.

On top of all this, one handbook states that it is common wisdom that "arbitration is a private tribunal for the settlement of disputes."¹¹ The observations that I made while researching various articles and interpretations dealing with the issue of confidentiality is how one author refers to it as a common wisdom, and, consequently, raises so many questions and uncertainties among others.

In the following sub-chapters I will demonstrate a legal comparative approach of the duty of confidentiality in arbitration proceedings and the arbitration awards as well and provide various existing rules on this issue, if any. Furthermore, general interpretation of

8 Expert Report of Dr. Julian D.M. Lew in *Esso/BHP v. Plowman*, 11 Arb. Int'l 283, 285 (1995).

9 Gu Weixia, *Confidentiality revisited: Blessing or Curse in International Commercial Arbitration? The American Review of International Arbitration*, 15 Am. Rev. Int'l Arb. para 608 (2004).

10 See Gu Weixia, *supra* note 9, para 609.

11 Bernstein et al., *supra* note 1, at 5 (listing the potential advantages of arbitration).

contract terms and ethical considerations relating to the matter of confidentiality in international commercial arbitration are also taken into account. Preferably, they ought to be taken into account up to a certain point in order to deduce whether there is a general duty of confidentiality on which parties may rely on or not.

CHAPTER 1 REASONS FOR CONFIDENTIALITY

1.1. Arguments against vs. in favor of confidentiality

Among the numerous competing values, most people tend to consider confidentiality in arbitration proceedings as virtuous, which is why many parties have chosen arbitration over litigation. In theory, there is no reason to believe why contracting parties are not allowed to resolve their commercial debates in a confidential manner. Moreover, many arguments are in favor of a wider duty of confidentiality, saying that even if the express rule of confidentiality is missing from the arbitration agreement, the “benefits of privacy are recognized.”¹² It was accepted, for example, in Australia, that “*the efficacy of a private arbitration as an expeditious and commercially attractive form of dispute resolution depends, at least in part, upon its private nature.*”¹³ However, this reasoning was counter-argued that the parties ought to be prohibited to “*arbitrate by day and publicize by night.*”¹⁴ This counter-argument was also criticized by Toohey J’s dissenting judgment, claiming that the privacy of arbitration exists for the purpose of advancing confidentiality.¹⁵ In conclusion, it can be seen there is no straight answer for the issue of confidentiality that can be absolutely recognized or rejected, it always has to be decided on a case-by-case basis and take into consideration both sides’ interests. As is always true in legal issues, there are two sides to the same coin.

In addition to its beneficial nature, confidentiality can also make arbitration more efficient. Even if outsiders are excluded from the hearings of the proceedings, and certain information about the proceedings cannot be disclosed to the public, it does not necessarily

¹² Michael Young and Simon Chapman, *Confidentiality in International Arbitration: Does the exception prove the rule? Where now for the implied duty of confidentiality under English law?* ASA Bulletin, (Kluwer Law International, Volume 27 Issue 1, 2009) at 26.

¹³ Esso case per Mason CJ, *supra* note 6, at 242.

¹⁴ Patrick Neill QC, *Confidentiality in Arbitration*, *Arbitration International*, 12 Arb. Int'l 287, at 290 (1996) at 307.

¹⁵ Esso case, *supra* note 6, at 256.

result in the existence of the arbitration or the award remaining secret. The outcomes of many arbitration proceedings become public domain, even if the hearings were kept private and the private interest of the parties' restrictions of disclosure is maintained. Besides parties competing private interests, the public's interest in disclosing the outcome of the arbitration should also be taken into account and should stand in balance. Additionally, whenever parties turn to formal legal proceedings instead of private nature arbitration proceedings, despite the fact that an explicit confidentiality clause exists, communication from arbitration proceedings can be subject to disclosure.¹⁶ US courts recognized a strong national policy favoring arbitration under the FAA and expressed its concern about the willingness of parties to choose arbitration if they are aware that their negotiations, which can involve prejudicial information as well, can be discovered in future legal proceedings.¹⁷

In 2001 in the international forum of Doha Declaration the World Trade Organization, and also the European Community in the next year raised the issue of a more transparent and open process in the resolution of international disputes. A similar proposal was followed by many opposing arguments.

Illustrating the trend favoring the transparency of the international dispute resolution process, the Free Trade Agreement between Singapore and the USA includes an express, mandatory clause requiring that awards, orders, and written submissions be made open to the public, with the exception of making open information, which is confidential, protected personal business information.¹⁸ Similar agreement was concluded between the US and Chile in 2003.¹⁹

¹⁶ Reuben, Richard C., *Confidentiality in Arbitration: Beyond the Myth*, 54 Kansas Law Review 1255 (2006), at 1271.

¹⁷ Reuben, *supra* note 16, at 1285, and see also *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (holding that the Arbitration Act establishes a "federal policy favoring arbitration").

¹⁸ Chapter 15, para. 15.20.4. of the Agreement.

¹⁹ Tweeddale, Andrew, *Confidentiality in Arbitration and the Public Interest Exception*, 21 Arb. Int'l.(2005) at 63.

In conclusion, while confidentiality is widely recognized as a positive aspect of arbitration, several arguments against confidentiality also bear relevance and should be taken into consideration.

First, reasonable counter-arguments arise from arbitration proceedings involving several parties. It would be impractical that the same arbitration clause would apply to all of the parties, given the fact that these multi-party international business transactions may involve different disputes between different parties.²⁰

The second justification relates to public access to judicial records which “serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.”²¹ On the other hand, this reasoning has been defeated in numerous cases when the relevant communications records “contain business information that may harm a party's competitive standing.”²² Trade secrets, concerning the market, for example, are recognized grounds for protection.²³

Contrary to the presumption in favor of public access to decisions, parties should take care as to what extent they request disclosure. In some cases, when the request for disclosure has been wider than necessary, the court has denied to seal an entire record.²⁴

Basically, the issue of access to judicial records arises from two circumstances. Firstly, when one party requests the court to place certain records under seal; and secondly, when a party requests access to a record from previous cases. In practice, it is observed that the court is usually not in favor of sealing an entire record without stronger argument than “only” the parties have an agreement. This does not mean that the court does not respect the

²⁰ Stewart R. Shackleton, *Global Warming: Milder Still in England: Part 2*, 2(4) Int'l Arb. L. Rev. 117, at 125 (1999) (discussing confidentiality agreements in arbitration).

²¹ *SEC v. Van Waeyenberghe*, 1993, 990 F.2d 845, 849 (5th Cir.).

²² Lewis E. Hassett and Cindy Chang, *Public Access v. Arbitration Confidentiality: A Balancing Act That Tilts Towards Access*, (ed. of Mealey's Litigation Reports: Reinsurance June 29, 2008) at 5.

²³ See e.g. *Std. Inv. Chtd., Inc. v. NASD*, No. 07CV2014, 2008 U.S. Dist. (LEXIS 4617 at 27); *Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, No. 2:05CV302, 2007 U.S. Dist. (LEXIS 22095 at 20-24).

²⁴ See *supra* note 16, at 1255.

intent and will of the parties, but rather attempts to strike a proper balance between parties' agreements and public policy concerns simultaneously.²⁵

Thirdly, protecting the arbitration information is a disadvantage while it may mean a barrier of studying and training purpose.²⁶ As long as the awards are kept confidential in addition to the proceeding correspondences, these awards cannot be referred back to in future cases as a worthy precedent. Unfortunately, this could impose greater efforts and expense on new participants down the road. Predictability of the outcome of the arbitration is supported by similar cases already decided. This encourages parties to choose arbitration and save expense and time.²⁷ Meanwhile, arbitration reduces "the number of cases filed in court."²⁸ Although these precedents are not binding in later proceedings, they still offer a predictable, perhaps even certain pattern for subsequent parties. Besides parties, future arbitrators and judges can learn from the disputes already settled.²⁹ Precedents can be found where parties gave their consent of the hearings to the public of the hearings and the publication of not only the award, but the pleadings as well.³⁰

Fourth, Delissa Ridgway, as an arbitrator and arbitration scholar, is of the opinion that predictability has advantages not only for educational purposes, but also provides economic and social stability for the parties. Being aware of previous outcomes of similar cases, parties may familiarize themselves with the likely legal sequence of their acts.³¹

Fifth, insisting on the protection of unconditional confidentiality and investing too much effort is useless. As Gaillard and Savage pointed out, "confidentiality will never be

²⁵ Hassett and Chang, *supra* note 22, at 7.

²⁶ See Commercial Arbitration, Encyclopaedia Britannica, available at <http://www.britannica.com/bcom/cb/article/0/0,5716,109579+2+106463,00.html>

²⁷ Brown, *supra* note 4, at 1010.

²⁸ *Nixon v. Warner Communications, Inc.*, 435 U.S.(1978), at 597; *Lederman v. Prudential Life Ins. Co. of Am.*, 897 A.2d, (N.J. Super. Ct. App. Div. 2006), at 371.

²⁹ Francois Dessemontet, *Arbitration and Confidentiality*, 7 Am. Rev. Int'l Arb. (1996) at 303.

³⁰ B.Kwiatkowska, "The Australia and New Zealand v Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal", 16 International Journal for Marine and Coastal Law, (2001) 239-293, at 261.

³¹ Delissa A. Ridgway, *International Arbitration: The Next Growth Industry*, 54-FEB Disp. Resol. J. (1999), at 50, 52.

absolute: a small circle of people will be aware of the award, and that circle will grow if the award gives rise to litigation before the courts and thereby becomes public.³²”

Finally, the argument of public interests requesting disclosure may include the following circumstances: the nature of the dispute and the surrounding circumstances that are needed for shareholders – including potential shareholders –, partners, creditors, or those who have a legitimate interest in connection with one of the parties in dispute; certain records that are required for financial purposes of a company; or one of the participants is subject by other duties to reveal information, such as fiduciary duty, duty to insurers, duty to auditors, duty to disclose related information as evidence in other arbitration or court proceedings.³³ However, under Singapore arbitration rules information revealing the identity of the parties or any prejudiced information is prohibited. The court may refer to such cases and even publish them, without identifying any of the parties.³⁴

1.2. The Legal Nature of Confidentiality

Before turning to the details of the various jurisdictions dealing with duty of confidentiality, and from among those, which ones are mainly subject to this duty, I feel that it is necessary to provide some background information of the treatment of confidentiality and its legal nature. I need to remark in advance that the issue of confidentiality is subject to differing judicial treatment in different jurisdictions. English courts have categorized the legal nature of confidentiality according to three aspects: contractual obligation, legal obligation, or to be considered in terms from a spectrum perspective.³⁵

³² Fouchard, Gaillard, Goldman on International Commercial Arbitration (Emmanuel Gaillard & John Savage eds. 1999) at 188.

³³ Claudie R. Thompson and Annie M. K. Finn: *Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution!* Dispute Resolution Journal, vol. 62, no. 2 (May-July 2007) at 4.

³⁴ Singapore Arbitration Act Article 57(3); International Arbitration Act Article 23(3), 23(4), 57(4).

³⁵ Thoma I (2008) *Confidentiality in English arbitration law: myths and realities about its legal nature*. J Int'l Arb 25(3) at 300.

In case law, when confidentiality was considered as a contractual obligation of the parties' agreement,³⁶ an implied nature of confidentiality was associated to it.³⁷ In other cases, even if there was an express confidentiality clause in the arbitration agreement, it was ruled that such duty is never absolute. Similar to contract law, interpretation of contract terms always applies, since the parties' agreement is a contract as well, containing numerous clauses, for instance, a confidentiality clause.³⁸ In the *Associated Electric and Gas Insurance Services (AEGIS) v European Reinsurance Company of Zurich* case it was "judicially established the rule that clauses can be interpreted so as to override a requirement for confidentiality, even if this contradicts their literal terms."³⁹ Under English legislation the courts are not allowed to change or override explicit terms of the contract, and to apply implied terms, given the fact that they have been drafted by the parties.⁴⁰ Express terms are superior over implied terms,⁴¹ therefore, the same matter cannot be decided according to both of them. The parties' intention and will should be respected primarily. On the other hand, interpretation of express terms is accepted, setting aside their literal meaning in certain situations, as the clauses are not always detailed and clear for the involved parties.⁴² Consequently, even if there is an express confidentiality clause in the arbitration agreement, the literal meaning is not absolute, because after interpreting the courts may disregard them and give floor to exceptions.

As far as the spectrum perspective is concerned, arbitration contrary to judicial proceedings are regarded as confidential proceedings.⁴³ The parties undertake the risk of

³⁶ *Associated Electric and Gas Insurance Services (AEGIS) v European Reinsurance Company of Zurich* [2003] 1 All E.R. (Comm.) 253, paras. [1]–[22].

³⁷ *Hassneh Insurance Co. case and Ali Shipping case by Colman J*, *supra* note 3.

³⁸ Thome, *supra* note 35, at 302.

³⁹ *AEGIS case*, *supra* note 36.

⁴⁰ *Jacobs v Bratavia & General Plantations Trust Ltd.* [1924] 1 Ch. 287, 297 (Ch); *Lynch v Thorne* [1956] 1 WLR 303, 306 (CA).

⁴¹ *Aspdin v Austin* (1844) 5 QB 671, 683 (QB).

⁴² Kyriaki Noussia, *Confidentiality In International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law*, Springer-Verlag Berlin Heidelberg (2010), at 59.

⁴³ Thome, *supra* note 35, at 312.

communication regarding the arbitration when initiating court proceedings, however, it does not necessarily mean that they lose their right to confidentiality at the same time.⁴⁴

Regarding the non-absolute nature of duty of confidentiality, legal scholars recognize exceptions and limitations: consent of the parties; necessary disclosure for the protection of third party's rights; or a court order made it permissible.⁴⁵

It should be noted that under Swiss law, confidentiality obligations belong to the arbitration proceedings as well as the underlying contract.⁴⁶ Therefore, it is in connection with both the procedural and the substantive part of the agreement. Swiss law considers that the "confidentiality obligation belongs to the sphere of private and not procedural (public) law although the arbitration agreement to which it relates is governed by procedural law."⁴⁷ The argument for this is quite acceptable, which says that confidentiality clauses in arbitration agreements do not have impact on the proceedings itself, but rather governs the relationship between the parties and their acts outside the proceedings. The legal defect and its consequences also support the same argument, since a questionable confidentiality clause does not have an effect on the procedural part of the arbitration proceedings. Rather it has consequences in two forms; an issued order prohibiting the parties from disclosing information about the ongoing arbitration, as well as the ability to award damages for breach of such duty. If duty of confidentiality was incorporated into the parties' agreement, either directly by express terms or indirectly by incorporating institutional rules, a procedural remedy is available from the tribunal with its power.⁴⁸ This approach was further supported

⁴⁴ Noussia, *supra* note 42, at 57.

⁴⁵ Sundra Rajoo, Privacy and Confidentiality in Arbitration (2003) at http://sundrarajoo.com/wp-content/uploads/2009/09/privacy_1_.pdf;

⁴⁶ Philipp Ritz, *Privacy and Confidentiality Obligation on Parties in Arbitration under Swiss Law*, in Michael Moser and Dominique Hascher (eds), *Journal of International Arbitration*, (Kluwer Law International 2010 Volume 27 Issue 3) at 241-242.

⁴⁷ *Id.*

⁴⁸ Lord Mustill and S.C. Boyd QC, *Commercial Arbitration* (2nd ed. 1989), at 461, 524; *Mantovani v. Carapelli SpA* [1980] 1 Lloyd's Rep. 375.

because there is no reason to consider why the breach of such procedural duty would not give rise to claim damages.⁴⁹

1.3. Parties expectations with regard to confidentiality

The answer as to whether parties may rely on the confidential nature of arbitration proceedings is not straight. The state of obligation of confidentiality in various legislations is confusing. Moreover, within the same legal system there may be found differing opinions. In the following paragraphs I will show Switzerland as a perfect example for such uncertain background for the expectation of the parties.

Poudret and Besson, for example, argue that confidentiality generally flows from the arbitration agreement.⁵⁰ Furthermore, Dessemontet refers to that in the case of secret information regarding competition. This duty may arise from the TRIPS agreement⁵¹ in addition to the arbitration agreement.

On the contrary, Bucher and Tschanz stressed that in 1989, if parties considered confidentiality as an essential feature of the arbitration and one of the main advantages why they chose arbitration instead of litigation, they would put more effort into making sure participants maintain it. They also recognized it as associated with principles of good faith and duty of loyalty, including duty of care and protection. Stacher, drawing on the attention of the parties presumed intentions, claims that implied duty of confidentiality exists only when the given circumstances suggest a reasonable person would desire such obligation.⁵² This

⁴⁹ Mustill and Boyd, *supra* note 48, at 524; also Simon Crookenden, *Who Should Decide Arbitration Confidentiality Issues?* (Kluwer Law International 2009, Volume 25 Issue 4) at 608.

⁵⁰ Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (2d ed., 2007) para 369.

⁵¹ Trade-Related Aspects of Intellectual Property Rights (TRIPS) Art. 39; see also Dessemontet, *supra* note 29, at 308, 310.

⁵² Marco Stacher, *Die Rechtsnatur der Schiedsvereinbarung* (thesis St. Gallen, SGIR vol. 36, 2007) para 388.

question can be decided on a case-by-case basis, and the good faith principle should be taken into account in all circumstances.

In this regard, a widely acknowledged presumption of confidentiality is associated with arbitration proceedings, ensuring the expectation of the parties. The law should not create obstacles to the expectations of the parties. The parties expect their international dispute and the relevant information, such as records, nature of the dispute, business strategy, or even the parties' position in previous proceedings to be treated confidentially. Under the Federal Arbitration Act, arbitration is called a "creature of contract"⁵³ and the aim is to give floor to the reasonable expectations of the parties. Indeed, the Consumer Due Process Protocol explicitly addresses the role of the arbitrator during the arbitration proceedings, namely, "consistent with general expectations of privacy in arbitration hearings, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law."⁵⁴

Case law also ensures the expectation of the parties, as in the Esso case. Stephen Bond, in an expert report wrote that arbitrations "*place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration*", consequently that parties had a "*legitimate expectation of confidentiality in regard to the arbitration.*"⁵⁵

Paradoxically, despite the many arguments which favor parties' expectations of confidentiality, only a handful of the arbitration laws contain mandatory provisions⁵⁶ contain mandatory provisions. Even when they are contained, they are merely an outline of the confidential nature, but it is up to the parties whether they desire to enter into a separate confidentiality agreement tailored specifically to their individual needs.

⁵³ See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("Arbitration is simply a matter of contract between the parties [...]"); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39, 78 (1999).

⁵⁴ National Consumer Disputes Advisory Comm., American Arbitration Ass'n, Consumer Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Consumer Disputes (1998), available at <http://www.adr.org/sp.asp?id=22019>

⁵⁵ A copy of the expert report can be found in *Arbitration International*, Vol. 11 No. 3 (1995), at 273-282.

⁵⁶ The second chapter will provide further discussions of it.

In conclusion, the confidentiality nature of the arbitration proceedings is the primary reason why parties prefer them over court proceedings. Other advantages of arbitration can be attractive for the parties as well, for example, flexibility of the proceedings and the enforceability of awards. A recent survey by the School of International Arbitration, Queen Mary, London, seems to support this assumption.⁵⁷

⁵⁷ Michael Young and Simon Chapman, *Confidentiality in International Arbitration: Does the exception prove the rule? Where now for the implied duty of confidentiality under English law?* ASA Bulletin, (Kluwer Law International, 2009, Volume 27 Issue 1) at 30.

1.3.1. Is there a general duty of confidentiality?

First and foremost, if parties want the proceedings kept confidential, they are advised to stipulate a duty of confidentiality in the arbitration clause or a separate arbitration agreement. They may rely on a set of arbitral rules, however these do not provide uniform rules on duty of confidentiality. Therefore parties should keep in mind whether or not confidentiality is covered by the incorporated rules. Certainly this question is relevant only in the case when issues of confidentiality bears relevance for the parties. The parties may speculate which rules they incorporate into their agreement, the one containing confidentiality clause, or the one without it. However, in my opinion, if the parties would like their arbitration proceedings to have a confidential nature, they may take affirmative steps to draft a separate clause invoking such duty.⁵⁸ If one party later argues an implied obligation of confidentiality, another one can raise an objection against it. A party cannot rely on implied obligation alone while failing to provide an express one during the conclusion of the contract. Even with express provisions, the parties are sometimes faced with the situation when disclosure is granted in exceptional circumstances.

In light of the above mentioned, I will demonstrate some examples for both cases where countries have recognized or denied implied duty of confidentiality. In France, for instance, arbitrating parties may not rely on implied nature. Confidentiality is compulsory as regards mediation,⁵⁹ thus there is no such compulsory provision regarding arbitration, except under article 1496 of the Code of Civil Procedure where the discussions are confidential between the arbitrators.

In contrast, under English law, implied duty is recognized with certain exceptions, such as consent of the parties, order of a court, protection of legitimate interest of a party, and

⁵⁸ *Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, No. 01 Civ. 8854, 2006 WL 1004472, (S.D.N.Y. April 17, 2006) at 4.

⁵⁹ Article 131-140 of the Code of Civil Procedure.

public interest.⁶⁰ In case of Australia and Sweden, the answer is not as obvious, since these countries recognize the private nature of confidentiality. However, they do not deny the confidential one either.⁶¹ The Swedish Supreme Court ruled that privacy of an arbitration hearing “does not mean that the arbitration is confidential.”⁶² Under Swedish law duty of confidentiality exists when the parties enter into a specific agreement.

Recognition of a general duty of confidentiality “*runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways.*”⁶³

1.3.2. Ethical considerations

While parties are encouraged to incorporate a confidentiality clause in order to prevent each other from disclosing any correspondence with regard to their dispute to external people, arbitrators are bound by such duty ethically.

A number of arbitrator institutional and ethical rules do not contain positive confidentiality requirements, but sometimes instruct the arbitrators not to disclose arbitration communications. However, this restriction is only limited to disclosures to the general public and general third parties. It does not restrict arbitrators to disclose information in further legal proceedings. For instance, the American Arbitration Association Commercial Arbitration Rules provide that arbitrators “maintain the privacy of the hearings unless the law provides to the contrary.”⁶⁴ Similarly, the arbitration rules of the International Institute for Conflict Prevention and Resolution (CPR) require that “arbitrators and CPR shall treat the proceedings ... as confidential ... unless otherwise required by law or to protect the legal rights of a party.”

⁶⁰ See Emmott case.

⁶¹ Young and Chapman, *supra* note 12, at 42, 45.

⁶² Id. at 37.

⁶³ Id. at 38.

⁶⁴ Am. Arb. Ass'n, Com. Arb. R. & Mediation Proc. R. 23 (amended 2005), available at <http://www.adr.org/sp.asp?id=22440#R23>.

The same requirement was expressed in the main code of ethics of arbitrators, such as the ABA Code of Ethics for Arbitrators in Commercial Disputes, approved in 2004: "all significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law."

In conclusion, it appears that arbitral ethical rules do not prohibit discovery of arbitration communications. The arbitrators have to maintain a balance between the parties' confidential expectation and the legal requirements to disclose information in formal proceedings when they are required by law

1.4. Justification of the Desired Level of Confidentiality to be maintained

Over the past decade, the debate over the principle of confidentiality received particular attention. In a number of cases, parties to a commercial arbitration have to realize their assumption of confidentiality may be rejected. While many countries have recognized some level of implied duty of confidentiality, others reject it on the principle of party autonomy and certain exonerating circumstances. But what are these circumstances? Do they protect the parties' or external third parties interests? What are the justified reasons why third and external parties may claim discovery of confidential information? Besides private interests, how can public interest play a part in discovering confidential information? Is there are any other privilege of the parties that they may rely on not to disclose prejudiced information about their ongoing case?

From the previous chapters I gave some examples, both through rules and case law when claiming private nature of arbitration proceedings was not enough to include the communication under the umbrella of confidentiality. For me – being a lawyer - it is quite obvious that the main device used by parties if they desire to keep their business relationships to be confidential is to draft properly a confidentiality clause into their contract as a duty of the parties, or incorporate a set of arbitral rules, explicitly providing that the rules be followed. However, incorporating a set of arbitral rules even if they contain confidentiality clause is not always enough to protect personal information. I believe it illegitimate to reject a parties' claim to protect their sensitive information since parties may have been counting on their case to be treated confidential. For example, websites of numerous arbitral institutions advertise themselves by providing their clients with the advantage that their dispute will be treated confidentially. I think it is quite reasonable for the parties to expect confidentiality based on these advertisements. They have a reason to view these websites and their contents as an offer. So if they choose to turn to arbitration instead of litigation, especially when they

turn to a certain arbitral institution based on these offered or promised advantages, it will be binding upon the participants. Therefore, they could expect their dispute to be resolved with the exclusion of third parties, especially media and envious competitors. Although, even if there is a binding confidentiality clause, depending on the arbitral institution, it is still uncertain who is bound by such duty. In the following chapter I will introduce as well as interpret a number of confidentiality clauses in order to answer the above-mentioned questions.

To my mind, arbitration, as an alternative dispute resolution technique, should find some middle ground and maintain a balance between the parties' interests and public interest. It should be flexible in certain aspects as being an alternative process to meet the expectations of the parties. If the parties want to have a confidential proceeding, they may address this duty, among a number of other significant issues, in their arbitration agreement in order to have tailor made clauses for their individual needs. The confidential nature of the proceedings cannot be contemplated upon if the parties neither stipulate express confidentiality clauses nor the applicable rules that contain binding express duty upon the participants. Consequently, parties cannot hide communications and evidences under the umbrella of arbitration or the relevant, necessary parts for other court proceedings that might be used. Indeed, if they have connections to other either arbitration or litigation proceedings, they are important and helpful. The parties requesting discovery of communications and evidence need to provide a reason for their request and prove that it is otherwise unavailable, though fulfilling the request cannot cause harm to the arbitration process and third participants.

Basically, if we see the purpose of arbitration, more precisely the purpose to solve arising problem between the parties by a private dispute resolution technique, most of the arbitral rules contain a privacy clause. These clauses say that the hearings shall be kept in private and third parties cannot be present except the parties of the case, arbitrators, experts

and witnesses. However, if later the expert reports, witness statements and records, transcripts from the hearings may be disclosed it would be contradictory with the private nature. This paradox was already raised in the Hassneh case, and naming the problem “would be almost equivalent to opening the door of the arbitration room to a third party.”⁶⁵ So I maintain that privacy has to have some connection with confidentiality, which makes difference between internal people’s and external people’s positive obligation not to disclose information about the case, or not to be present at the hearing. Otherwise it would be equivalent of having opened-door arbitration proceedings. To keep privacy without maintaining some level of confidentiality would lead to the same result, the parties alternative dispute resolution technique would be the same as a court proceeding. Of course, other advantages of arbitration would be still valid, such as flexibility and saving time and money. But with regard to confidentiality, it cannot be listed among the advantages of arbitration any more. I anticipate it would not keep parties from choosing arbitration if they desire so, however it will make it less attractive, at least in some particular cases.

Lastly, I will introduce in detail the WIPO Rules⁶⁶ on the issue of confidentiality, since it is a perfect example of the rules that make distinctions between the confidentiality of the existence of the arbitration, disclosure made during the proceedings, as well as disclosure of the award. In Article 73 there is an explicit provision, except where otherwise required by law, that parties may not disclose unilaterally, any information about the existence of the arbitration. In the next article it says all information, documentary, or other evidence given during the proceedings are treated as confidential, therefore, cannot be disclosed if it is not available from other sources, more precisely, if it is not already in the public domain. According to this article, witnesses are also bound by such duty, since they are not regarded as third party, and it stipulates that parties are responsible for such witness’ acts to maintain

⁶⁵ *Hassneh case*, *supra* note 3.

⁶⁶ WIPO Arbitration Rules, Article 73-76, available at <http://www.wipo.int/amc/en/arbitration/rules/>

some degree of confidentiality. As a consequence the same confidentiality is required from the witnesses as it is required from the parties. As for the award, it may be disclosed only in the case of parties consent, or it is already considered as being in the public domain. Under articles of the WIPO Rules, in addition to parties and witnesses, Arbitral Center and Arbitrators are also required to maintain confidentiality. The article gives an explanation as to what constitutes confidential information. In accordance with the WIPO Rules, any information not being in the public domain, or information disclosed during the proceedings, is not constituted as confidential. It may apply to statistical data concerning the case and parties; therefore, they fall under the scope of confidentiality. However, the aforementioned rules also provide the possibility of disclosure in the case of court proceedings started in connection with the award, but only to the necessary extent.

CHAPTER 2 CONFIDENTIALITY IN ARBITRATION IN RELATION TO THE PARTICIPANTS

Jan Paulsson and Professor Hans Smit set up different classifications of the applying duty of confidentiality. Paulsson bases his classification on the timing of the procedure, i.e. “Confidentiality before, during and after the arbitration proceedings.”⁶⁷ Take into consideration the judicial practice Professor Smit’s approach seem to prefer, more precisely, categorizing the applying duty according to who is subject to it or the scope of such duty. For the question of "on whom the obligation may rest", he divided the participants of the arbitration proceedings who may be bound by such an obligation into three main groups: the group of the parties themselves, their representatives, and the arbitrators are the first two, explicitly naming their role during the arbitration proceedings. The third group involves everybody else who is neither a party of the arbitration agreement an arbitrator, nor an arbitrator having power to decide the parties’ dispute. In this regard, the arbitrators’ confidentiality is an imposed obligation, due to the nature of their profession. It is both an ethical and a professional expectation from an arbitrator to treat all information in connection with the parties, their contractual dispute and relationship discrete and as service providers are responsible to preserve the confidential and private nature of the proceedings. Arbitrators are participants without having personal interests in the case. Consequently, their situation is the least questionable and uncertain, whereas it can be concluded that almost all of the arbitration rules contain provisions relating to the arbitrators. This is in harmony with the parties’ presumable expectations when choosing arbitration over litigation. With regard to the parties and the third procedural participants it is rather a condition than a general duty.⁶⁸ The different approaches of duty of confidentiality in existing arbitration rules also support this

⁶⁷ Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 1994 ICC International Court of Arbitration Bulletin 48, and 11 Arb. Int’l 303 (1995).

⁶⁸ Gu Weixia, *supra* note 9, at 616.

argument, namely, the duty of confidentiality is rather an imposed duty on the arbitrators, and a condition on other participants depending on the parties agreement and other applicable rules. Ordinary, there is no imposed duty of confidentiality on third participants, unless otherwise agreed by the parties. Indeed, parties may not be bound by the obligation of confidentiality under the applicable rules, though, they may be bound by their separate confidentiality agreement or confidentiality clause. In any case, this imposed duty of confidentiality does not apply to their legal representatives, absent specific contractual agreement. Paulsson and Rawding define legal representative as “a stranger to that agreement.”⁶⁹

Owing to the fact that the primary source of the arbitration proceeding is the parties’ agreement, it is rather complex to answer whether there is a general expectation of confidentiality binding upon the parties. It is complex because the applying rights and obligations can differ significantly depending on the applicable rules; jurisdiction in which arbitration takes place or the rule under which it is administered.⁷⁰

Given the fact that witnesses appear voluntarily at the arbitration proceedings to testify, it would be improper and unethical to impose such a duty on them.⁷¹ They are not parties to the agreement, therefore, it would be unreasonable to assume that they are undertaking any obligation or expect them not to breach any assumed obligation of confidentiality by disclosing information regarding the arbitration.

Following the determination to whom the duty of confidentiality applies, it is also essential to determine what they are bound to keep confidential and what they are expected not to disclose. The scope of the duty of confidentiality is another main aspect according to

⁶⁹ Paulsson and Rawding, *supra* note 67, at 318.

⁷⁰ See, e.g. Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 Am. Rev. Int’l Arb. 121 (2003) at 124.

⁷¹ Gu Weixia, *supra* note 9, at 617.

which this duty is concentrating. This scope may include the mere existence of the arbitration proceeding, the content of the proceedings, or the award.

2.1. Scope and sources of the obligation of confidentiality

In practice there are two ways of determining the scope of the duty of confidentiality. From a macro point of view, applicable law, arbitration institutions, and national laws are regulating the issue of confidentiality. From a micro point of view, the parties themselves can exercise control over this obligation and they can provide an express, detailed confidentiality clause satisfying their requirements.⁷² Besides these two sources of confidentiality, case law can provide certain guidelines. However, there is no inherent tendency in respect to deciding disputes regarding the question of confidentiality.

Due to the party autonomy principle in arbitration proceedings, there is an established hierarchy among these sources. First of all, the parties' agreement applies. Second of all, there is applicable law in the absence of expressed provision in the parties' agreement. The third source may be helpful for the parties though they are not binding upon them. The problem arises when neither the parties' agreement, nor the applicable arbitration rules do not impose the duty on the participants. These problems are decided on a case-by-case basis, and it depends on the jurisdiction whether such duty is considered an implied obligation.

In the US, seventeen states⁷³ have statutes ensuring certain levels of confidentiality. Most of these statutes provide protection of confidentiality in specific forms, including consumer and health-care arbitrations.⁷⁴ Since there are no statutory protections in all fifty states, it means that, for instance, in New York, under the FAA, information relating to

⁷² Id., at 636.

⁷³ Arkansas, California, Missouri, Texas, California, Connecticut, Georgia, Kansas, Maryland, Missouri, Nebraska, New Jersey, North Carolina, South Carolina, Tennessee, Utah, Virginia and Wisconsin.

⁷⁴ Reuben, *supra* note 16, at 1274.

arbitration may be entirely published and disclosed to outsiders.⁷⁵ As another example, Missouri State Laws provide specific provisions, however, it imposes duty not to disclose “any communications relating to the subject matter of such disputes made during the resolutions process by any participant [...]”⁷⁶ In conclusion, it does not concentrate on who is bound by this duty, but rather what shall not be discovered. It imposes a general duty of confidentiality. At the federal level, congress has provided confidentiality provisions to arbitrations concerning federal agencies. Section 574 of the Administrative Dispute Resolution Act of 1996 imposes a duty on both the parties and the arbitrators.

Case law in the US also addresses the issue of when both parties’ agreement and applicable rule are silent on the matter of confidentiality.⁷⁷ The court allowed disclosure due to the reasons that there was no evidence that the parties had ever agreed in confidentiality of the arbitration proceedings, and the ICC had not imposed any obligations of confidentiality upon the parties or upon the tribunal. Furthermore the party failed to prove any harm suffered as a result of the disclosure.

Regarding the implied nature of confidentiality in the light of the court decisions, we can distinguish countries recognizing an implied duty and countries denying it.

Alternatively, in England in the absence of statutory provision addressing confidentiality in the Arbitration Act of 1996, case law clarified the implied nature of confidentiality. Although, this duty is not absolute and subject to exceptions, in the Emmott case confidentiality is recognized as “an obligation, implied by law arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration [...]”⁷⁸ In the *Dolling-Baker v Merrett*⁷⁹ and the *Ali Shipping Corporation v*

⁷⁵ Id.

⁷⁶ Mo. ANN. STAT. §435.014 (west 2008).

⁷⁷ *United States v. Panhandle Eastern Corporation*, (D.Del. 1988), 118 F.R.D. 346, 350.

⁷⁸ *Emmott v. Michael Wilson & Partners* (2008) 1 Lloyd’s Rep 616.

Shipyard Trogir cases, the court came to the same conclusion that in the lack of an express arbitration clause there is an implied term of confidentiality. This also demonstrates that confidentiality belongs to arbitration, and the participants owe to a general obligation to each other. Exactly the above mentioned is denied in Australia in the Esso case.⁸⁰ Basically confidentiality does not belong to arbitration proceedings. Likewise, even if there are confidentiality clauses in the parties' agreement, they are subject to exceptions.

Similarly, duty of confidentiality was also denied in Sweden. The only methods of ensuring the confidentiality nature are either expressly providing confidentiality clauses or incorporating arbitration rules containing confidentiality clauses.⁸¹

New Zealand, has actually gone further by enacting the obligation of confidentiality in Section 14 of New Zealand's Arbitration Act of 1996 in order to prevent other decisions from serving as a precedent favoring discoverability. This country The Act provides 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."⁸²

2.1.1. Directly: arbitration and/or confidentiality agreement

In the light of the above mentioned, it is doubtful that relying on institutional rules would provide an effective solution for deciding the issue of confidentiality in arbitration proceedings. Many arbitral institutions intend to ensure the private and confidential nature of the proceedings by enacting rules dealing with these aspects. However, not all of them provide clear terms without limitations and exceptions. "The question of confidentiality is

⁷⁹ *Dolling Baker v. Merrett & Another*, (Eng. C.A. 1990), 1 W.L.R. 1205.

⁸⁰ *Esso case*, *supra* note 3.

⁸¹ *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.* Case No. T 1881-99 (Swedish Sup. Ct. 27 Oct. 2000)

⁸² New Zealand Arbitration Act, Article 14 (1996)

<http://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html>

best left to the parties in their commercial agreement or arbitration agreement.”⁸³ Parties may discuss this issue when entering into agreement to arrive at a consensual result. This negotiation may lead to different results depending on the interest of the parties and the nature of the transaction between them. The parties are also entitled to address this issue at a preliminary stage of the arbitration proceeding⁸⁴ or amend the obligation at a later date. The confidentiality clause must comply with the relevant applicable rule, however, the parties’ agreement will be the primary source of the proceedings, therefore, determining the duty of confidentiality. In any unaddressed points, such as exceptions, the applicable rule will govern this obligation. The parties may stipulate what is to be kept confidential and who is bound by the obligation. The dispute relating to such legal duty “will be presented for decision to the arbitrator who is appointed under this agreement.”⁸⁵ Subsequently, the arbitrating panel will determine the disclosure to be allowed under both the parties’ agreement and the applicable rules, as well as to what extent it is allowed. Since arbitration is a consensual process, the tribunal also needs to take into consideration the parties’ autonomy and good faith principle.

Even if the arbitration rule contains confidentiality clauses, the parties may ”opt out” of these clauses. Consequently, the arbitrating tribunal is required to set aside the provision regarding confidentiality if the parties have agreed to do so.⁸⁶ On the other hand, these existing confidentiality clauses are considered as default rules for the non-addressed issues, including confidentiality. Article 30 of the LCIA and article 46 of the SCC Rules maintain this argument, stating that the duty of confidentiality is binding “[u]nless the parties expressly agree in writing to the contrary” and “[u]nless otherwise agreed by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.”

⁸³ Thomson and Finn, *supra* note 33, at 4.

⁸⁴ *Id.*

⁸⁵ *Id.* at 6

⁸⁶ Young and Chapman, *supra* note 12, at 32.

Additionally, the parties may set up the extent and nature of confidentiality obligations by drafting an appropriate clause. They “may also address of what sanctions shall follow in the event of breach.”⁸⁷

Uncertainty arises under the interpretation of parties’ intentions, such as tacit declarations. It is unclear whether silence of the parties accepting contract by conduct manifests to enter into a confidentiality agreement or not. Under Swiss law, “silence is only a valid declaration of intention if it can be shown clearly that the person in question wanted to express his intention to be legally bound; and tacit declarations are to be determined from an active behavior.”⁸⁸ If the parties have not raised the issue of confidentiality in previous negotiations, it is not accepted that the parties have consensually exchanged and expressed their intent with regard to this.⁸⁹ Therefore, the pure fact that the parties have agreed that all of their forthcoming disputes shall be decided by arbitration is not enough to establish a confidentiality duty.

2.1.2. Indirectly: law applicable to the arbitration procedure

Incorporating institutional rules is not likely to perfect uncertainties pertaining to confidentiality when they lack uniformity. Some of them provide greater protection while some of them provide wider range of exceptions.

Some of them grant that arbitrators shall maintain the confidentiality of the proceedings.⁹⁰ Only a few of them grant parties are prohibited from disclosing communications. Rules providing confidentiality without specifying the person to be bound by such duty also can be found. For example, Article 25(4) of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) says that hearings

⁸⁷ Sundra Rajoo, *supra* note 45, at 6.

⁸⁸ Peter Gauch et al., *Schweizerisches Obligationenrecht, Allgemeiner Teil, Vol. I* (9th ed. 2008); at 189

⁸⁹ Ritz, *supra* note 46, at 237-238.

⁹⁰ *See, e.g.*, American Arbitration Association, International Arbitration Rules, art. 34 (Effective June 1, 2009) <http://www.adr.org/sp.asp?id=33994>

shall be held “in camera.”⁹¹ Instead, they concentrate on determining what is bound to be maintained confidential, rather than who. In addition, the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) clarifies that “*there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case.*”

According to the three main international conventions governing international commercial arbitration, the matter of confidentiality is not settled in their provisions. The primary purpose of the New York Convention, the Geneva Convention and the Panama Convention, as is reflected in their titles, is the enforcement and recognition of international arbitral awards. Therefore they do not concentrate on the details of the arbitral process itself.⁹²

Considering National Legislation, as previously referred to it, New Zealand for example, enacted a confidentiality provision in its Act. According to one argument the reason behind it is to prevent cases like the Esso precedent.⁹³ There is a list of other national legislations without confidentiality provision.⁹⁴

Institutional Rules also does not give uniform solution governing confidentiality in arbitration proceedings.

In LCIA Arbitration International and CIETAC (China International Economic and Trade Arbitration Commission) disclosing information of the arbitration proceedings to

⁹¹ United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules, art. 25(4) (adopted 15 December 1976), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>

⁹² See Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html; European Convention on International Commercial Arbitration of 1961, available at <http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/>; Inter-American Convention on Arbitration of 1975, available at <http://www.adr.org/sp.asp?id=31620>; the Panama Convention.

⁹³ David Williams, *New Zealand: The New Arbitration Act--Adoption of the Model Law with Additions*, 1(6) Int'l Arb. L. Rev. 214, 216 (1998); see also *supra* note 82

⁹⁴ These countries include Algeria, Australia, Austria, Bahrain, Belgium, Bermuda, Bolivia, Brazil, Bulgaria, Canada, China, Columbia, Costa Rica, Croatia, Cyprus, the Czech Republic, Denmark, Egypt, Finland, France, Georgia, Germany, Greece, Hong Kong, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kenya, Korea, Kuwait, Lebanon, Libya, Malaysia, Malta, Mexico, Morocco, the Netherlands, Nigeria, Norway, Pakistan, Peru, the Philippines, Portugal, Qatar, Russia, Saudi Arabia, Singapore, Slovakia, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Taiwan, Thailand, Tunisia, the Ukraine, the United Kingdom, the United States, Yemen, and Zimbabwe.

“outsiders” is prohibited for all parties and participants.⁹⁵ Simultaneously, LCIA is subject to exceptions in case of a “*legal duty to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.*”⁹⁶ Article 30.2 and 30.3 goes further and provides that the deliberations of the Arbitral Tribunal are also confidential and the awards cannot be published without consent of the parties.⁹⁷

The ICC Rules of Arbitration give power to the arbitral tribunal to take measures for protecting confidential information and trade secrets and exclude outsiders from the hearings.⁹⁸ However, it lacks general provision on confidentiality, consequently, it does not impose duty on the parties or other participants.

Express duty of confidentiality under AAA’s International Arbitration Rules and SIAC’s rules extend only to the arbitrator, but not the parties.⁹⁹

The Arbitration Rules of the China International Economic and Trade Arbitration Commission recognize a wide obligation extending to all the participants involved in the proceedings. Besides the parties and arbitrators, the witnesses and experts are also bound by the duty of confidentiality.¹⁰⁰

The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce stipulated the Institute and the Arbitral Tribunal “*shall maintain confidentiality of the arbitration and the award.*”¹⁰¹

Duty of confidentiality is compelled by the Chamber, Arbitral Tribunal, and expert witnesses under the 2004 version of the International Arbitration Rules of the Milan Chamber

⁹⁵ London Court of International Arbitration (LCIA) art. 30.1 (effective 1 January 1998) China International Economic and Trade Arbitration Commission (CIETAC) art. 37 (effective 10 May 1998).

⁹⁶ LCIA art 30.1.

⁹⁷ LCIA art. 30.2 and 30.3.

⁹⁸ ICC art. 20(7) and 21(3).

⁹⁹ See *supra* note 90 and Singapore International Arbitration Centre, International Rules (SIAC), art 34.6, October 22, 1997.

¹⁰⁰ China International Economic and Trade Arbitration Commission Arbitration Rules (CIETEC), art. 37, September 5, 2000.

¹⁰¹ SCC art. 46.

of Commerce. Yet such duty is imposed on the parties under the 2010 version of the same rules.¹⁰²

Article 52(a) of the World Intellectual Property Organization ('WIPO') states that "For the purposes of this Article, confidential information shall mean any information, regardless of the medium in which it is expressed, which is (i) in the possession of a party, (ii) not accessible to the public, (iii) of commercial, financial or industrial significance, and (iv) treated as confidential by the party processing it."¹⁰³

The relevant provision of the Commercial Arbitration and Mediation Center for the Americas ('CAMCA') Mediation and Arbitration Rules binds only the members of the tribunal and institutional administrator, but not the parties.¹⁰⁴

In Thailand, since the Thai Arbitration Act (2002) is silent on the matter of confidentiality, the Arbitration Rules of the Arbitration Institute provides that "*the arbitrator, Director and the Institute shall not disclose the award to the public unless with the consent of the parties.*"¹⁰⁵ Furthermore, the Code of Ethics for Arbitrators under the Thai Institute of Arbitration requires the arbitrator to maintain the confidentiality of the information.

Under the International Centre for the Settlement of Investment Disputes ('ICSID') Arbitration Rules, each arbitrator must sign a confidential provision: "I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal."¹⁰⁶ It also refers to the secret nature of the deliberations and the restrictions on publishing the award unless otherwise agreed by the parties.

¹⁰² CAM Rules art. 8(1), 8(2).

¹⁰³ WIPO Arbitration Rules, art. 52(a).

¹⁰⁴ CAMCA Arbitration Rules, art. 36 (1996).

¹⁰⁵ Art. 30.

¹⁰⁶ See ICSID documents Article 6(2) .

The Japanese Commercial Arbitration Association ('JCAA')¹⁰⁷ imposes such duty on the arbitrators, the staff of the Association, the parties, and their representatives or assistants. Indeed, the title of the article that governs this matter is under the heading of "Closed Proceedings, Obligation of Confidentiality."

2.2. Essential People for Arbitration Proceedings

2.2.1. Tribunal and Individual Arbitrators

A number of governing arbitration rules require the arbitrators, regardless of whether they are individual arbitrators or a three-member tribunal, to maintain the privacy and confidential nature of the arbitration proceedings. In most of the cases where the institutional rules contain confidentiality provisions, if any, the arbitrators are bound by the duty of confidentiality. The arbitrators' obligation appears to be the least uncertain and controversial and it is almost always stipulated in codes of ethics as well as in the institutional rules. It is because the parties rely on their expertise and knowledge and also treat them as service providers who will conduct and decide their arising dispute independently and impartially, while keeping the details confidential. According to the American Arbitration Association (AAA) Rules "*The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.*"¹⁰⁸

¹⁰⁷ Japanese Commercial Arbitration Association (JCAA) R. 42 (1998).

¹⁰⁸ AAA, Commercial Arbitration Rules and Mediation Procedure (Rules Amended and Effective June 1, 2009).

Under the JAMS Rules the Arbitrator shall maintain the confidential nature of the proceedings as well as the award. Having power to do so, the arbitrators are entitled to issue orders to protect the confidential, sensitive information.

The arbitral tribunal is expressly obliged to maintain confidentiality of the proceedings and is prohibited from disclosing any information about it by various governing rules. For example, Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Article 34 of the Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"), and article 20 of the International Chamber of Commerce ("ICC") Rules of Arbitration.

The parties agreement may also contain such restrictions on arbitrators not to disclose any "documents, evidence, orders and awards, whether electronic or otherwise, in relation to this arbitration"¹⁰⁹ or use it for the benefit of themselves or any third person.

2.2.2. Parties themselves

The parties' positive duty to maintain confidentiality and not to disclose information about the proceedings is not settled in most of the arbitral rules. The existing rules give more room for the parties to decide upon this issue and to decide to what extent they want to be bound to such an obligation. Because they are faced with the fact that from the moment they incorporate it into their agreement or choose a set of arbitral rules which contain such duty, it becomes an applicable, binding obligation of the parties with the consequences in the event that such a duty is breached, just as in the case of any other breach of obligation. Moreover, there are circumstances when the parties may be under a duty towards third parties to hand over information, such as for the auditors or shareholders. JUSTIFICATION

I already demonstrated some examples for the cases when there was a presumption of

¹⁰⁹ Thomson and Finn, *supra* note 33, at 5.

a duty of confidentiality for participants, but whether this assumption is valid for the parties as well is not reflected in the existing arbitral rules as consistently as it is applied for the arbitrators as service providers.

The ICC sets of rules do not support either the implied nature of confidentiality, nor the entire rejection of confidentiality. It is one of the most commonly used set of rules, and I think this is the reason why the drafters were careful to decide upon this issue instead of the parties choosing the ICC rules. The parties autonomy principle was given more emphasis by containing such flexible rules. It says that “[T]he Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.”¹¹⁰ It is clear from this wording that the article does not explicitly exclude the possibility of disclosing all information relating to the arbitration proceedings. In fact, the word confidential is not even mentioned anywhere in the clause. It simply says that non-parties shall not be “admitted”. Furthermore, there is no distinction made between the participants, whether they are parties, arbitrators, or third parties, but it uses them as a group of people involved in the proceedings. The ICC Rules basically distinguish between the involved people and uninvolved people. Aside from that; it stresses the approval of the tribunal and parties. All in all, it provides confidentiality but it is ultimately up to the parties to decide upon this issue. With regard to the award, the ICC Rules are more strict. It stipulates that “[A]dditional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.”¹¹¹ The only case when the award may be made available is upon the request of the parties, in which case it is mandatory for the Secretary General to make available additional copies.

In the same way, the UNCITRAL Arbitration Rules do not contain an explicit

¹¹⁰ Article 21(3) of the ICC Rules.

¹¹¹ Article 28(2) of the ICC Rules.

confidentiality clause. However, they provide the private nature of the hearings.¹¹² The common aspect in the two mentioned articles is that it ensures the priority of parties' agreement.

Contrary to the ICC and UNCITRAL Rules, the WIPO's Arbitration Rules (World Intellectual Property Organization) are not as flexible. It addresses the issue of confidentiality in two places; once in the chapter of the conduct of the arbitration and again in a separate chapter wholly devoted to this subject.¹¹³ The reason behind its importance is that it provides the scope of the confidential information while separately addressing the definition of what constitutes confidential information for the purpose of this article.¹¹⁴ I am not going into the details of the scope because it could require a whole thesis in itself, but the main features why an information is deemed confidential is that, in addition to its financial significance, it is in the possession of a party who treats it as confidential and is, therefore, inaccessible to the public. I think it would be reasonable to provide an interpretation of the information that is considered confidential. On the other hand, in the separate chapter under the title of Confidentiality, it distinguishes the confidentiality of the existence of the arbitration, and the Confidentiality of Disclosures Made During the Arbitration, the Confidentiality of the Award and the Maintenance of Confidentiality by the Center and Arbitrator. It is the most clear and most detailed confidentiality clause in arbitral rules. However, it approaches the confidentiality issue, as many of the cases in other rules do, from the subject side. That is to say, what is or is not supposed to be protected under the umbrella of confidentiality. Article 73 imposes a duty not to disclose any information unilaterally "by a party to any third party."¹¹⁵ So it does not even name the participants' role in the arbitral proceedings, but refers generally to "a" party and "any third party". However, in Article 76, it expressly addresses the

¹¹² Under Article 28(3) – previously 25(4) "Hearings shall be held *in camera* unless the parties agree otherwise".

¹¹³ Article 73-76 of WIPO Rules.

¹¹⁴ Article 52 of WIPO Rules.

¹¹⁵ WIPO Rules Article 73(a).

duty to maintain confidentiality of the Center and the arbitrators. In any case, the parties' agreement is the primary source. In the absence of a contrary agreement between the parties, the WIPO Rules provides a certain level of confidentiality, and, in my opinion, renders it with enough interpretations as to be more understandable and to avoid uncertainty.

The LCIA Arbitration Rules put more stress on the private nature of the arbitral proceedings by stating that “[a]ll meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise.”¹¹⁶ In Article 30 it stipulates that “[u]nless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all...” information confidential. Furthermore it also provides “The deliberations of the Arbitral Tribunal are likewise confidential to its members ...”¹¹⁷ In the light of this article it be concluded that it imposes duty on both parties and the tribunal and its members, however it does not refer to expert witnesses or other third parties.

In article R-23 of the Commercial Arbitration Rules and Mediation Procedures the privacy of the hearings is maintained. According to the present rules, as amended and effective June 1, 2009, the arbitrator and the AAA are bound by the duty to maintain the privacy of the hearings, and the aspect according to who is entitled to be present at the hearings is named in the clause, stating that “any person having a direct interest in the arbitration is entitled to attend hearings.”¹¹⁸ Article 31 draws the attention of the confidentiality of the lawyer-client communications and it recognizes its importance and legal privilege. These articles did not mention explicitly the role of the participants and to whom the duty of confidentiality or privacy extends, if any.

The AAA rules were subject to revision in 2003, in order to provide for enough transparency, and at the same time, mentions confidentiality. Article 20.4 says that, exactly

¹¹⁶ LCIA art. 19.4.

¹¹⁷ LCIA art 30.1 and 30.2.

¹¹⁸ AAA art. R-23.

like other rules mentioned above, it depends on the parties agreement unless or the law provides otherwise, but the hearings are private.¹¹⁹ As for the confidentiality obligation, article 34 says that “Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.”¹²⁰ It is clear from this wording that the scope of the duty of confidentiality during the proceedings rests upon the arbitrators and administrators, and they are also bound to keep the arbitral award confidential. On the other hand, it does not impose duty on the parties but rather gives floor to parties’ autonomy. In article 27, it also clearly establishes the requirement of the parties’ consent in order to make the award public.¹²¹

Under the CIETEC Rules (China International Economic and Trade Arbitration Commission Rules) unless parties request otherwise, the hearings shall be held in private. It also provides that, in case of closed-door proceedings, “the parties, their representatives, witnesses, interpreters, arbitrators, experts consulted by the arbitral tribunal and appraisers appointed by the arbitral tribunal and the relevant staff-members of the Secretariat of the CIETAC shall not disclose to any outsiders any substantive or procedural matters of the case.”¹²² In my personal opinion, it is the first confidentiality clause where the participants were addressed according to their role and not only generally referred to as “party”, or “any” person. Moreover, it makes some connection between the closed-door proceedings, which are held in camera, and the confidentiality results from the privacy. For me it is more reasonable and acceptable in a case where an arbitration hearing is held in camera, this means the content of the hearing is closed as well. Subsequently, neither the communication from the hearings

¹¹⁹ AAA Art 20.4: (“Hearings are private unless the parties agree otherwise or the law provides to the contrary”).

¹²⁰ AAA art. 34.

¹²¹ AAA art. 27: “An award may be made public only with the consent of all parties or as required by law.”

¹²² CIETEC art. 33.

nor the award shall be disclosed to the public. I accept the argument behind the different definitions given the altering interests of the participants. I absolutely agree with approaching privacy and confidentiality from the perspective of who is under a restrictive obligation not to be present at the hearings or not to discover information. Contrary, I do not believe, when the parties have had a closed-door hearing, by not letting the public into the court room, the content of the hearings, records, transcripts, expert witnesses, or even the award may still be disclosed.

As for the national case law, I can conclude that they do not provide uniform legal background, which the parties may rely on. The only common point in these precedents is they recognize the primacy of the parties' agreement. Consequently, in lack of parties express confidentiality clause or separate agreement, any implied or general duty of confidentiality is rejected.¹²³ Even in England, where some implied nature is accepted in a number of cases, there is no uniform court ruling standard.¹²⁴

2.2.3. Parties' representatives

In the previous chapters I showed several examples of obligation of confidentiality concerning an arbitration dispute. Mainly the arbitration clauses, either in a separate agreement or in the arbitral rules, target the participants, such as parties, tribunal, third parties, and witnesses. However, there are not many examples for imposing confidentiality obligations directly to parties' legal representatives. With regard to the legal counsels the issue of confidentiality is considered either an attorney-client relationship or a work-product

¹²³ See e.g., *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc* (no general duty of confidentiality unless explicitly provided otherwise by the parties; *Esso case*, *supra* note 3 (no absolute duty of the parties to maintain the confidentiality))

¹²⁴ See e.g., *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha* (The Eastern Saga), [1984] 2 Lloyd's Rep. 373, 379. But according to English courts the duty of confidentiality does not necessary extend to the award. e.g., *Hassneh case*, *supra* note 3, (Coleman, J. held that only documents created for purposes of the arbitration are confidential. Other documents and the award may be disclosed, at least under some circumstances).

relationship. During the attorney-client relationship, the communications fall under the attorney work-product doctrine. Nonetheless, the communications fall under the attorney work-product doctrine only during the attorney-client relationship. In cases when the attorney is no longer the legal representative of the client, a confidentiality obligation under an arbitration agreement does not apply to the representative. However, it does not mean that the attorney is allowed to disclose communications from their previous relationship. I will provide interpretation of these attorney-client relationships and work-product doctrine in detail in the following sub-chapters in details.

2.2.3.1. Attorney-client privilege

The lawyer-client relationship has a confidential nature, it is generally accepted. More precisely, it is expected from lawyers to exhibit confidentiality towards their clients. It is a legal professional privilege that was interpreted as a "fiduciary obligation that a professional owes to his client based on the factual context of their particular relationship."¹²⁵ For instance, the Law Society of Upper Canada's Rules of Professional Conduct determines a lawyer duty in relation to confidential information.¹²⁶ "A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or implicitly authorized by the client or required by law to do so." The same article also provides rules for the justified or permitted disclosure by stating, "[W]hen required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required."¹²⁷ According to this interpretation, there are justified reasons when the lawyer is obliged to disclose confidential

¹²⁵ *Canadian Transit Co. v. Girdhar*, (2001) CarswellOnt 2830, 14 C.P.R. (4th) 34.

¹²⁶ Canadian Bar Association's Code of Professional Conduct, Chapter IV.

¹²⁷ Articles 2.03 of the Law Society of Upper Canada's Rules of Professional Conduct (Rule 2).

communications. However, it ensures that no more information is allowed to be disclosed than is required. In case of imminent risk or serious bodily harm, “the lawyer may disclose” information which otherwise would be regarded confidential.¹²⁸

Contrary to this general fiduciary duty in other legal court proceedings, client-attorney relationships are more flexible in arbitration proceedings. “The duty of confidentiality in arbitration, on the other hand, either arises as a natural occurrence, collateral to the arbitral procedure per se, or as a matter of contractual arrangement devised by the parties in the arbitration agreement. Such confidentiality has nothing to do with the particular relationship-based fiduciary obligation.”¹²⁹ As it was demonstrated, it has a different nature in arbitration. In my opinion, it has to have a different nature. I agree with Richard C. Reuben’s example, when he explained that if the arbitration communications cannot be disclosed in other litigation or court proceedings, the arbitrations might be regarded as a solution for a safe place to hide evidences.¹³⁰ Arbitration should find a middle ground, taking into account and respect both evidence necessary for justice and confidentiality in arbitration that might be expected. Moreover, the burden of proof lies on the party requesting the disclosure of evidence. The party needs to prove the evidence is unavailable from other sources and also has to prove the importance of it in order to resolve the dispute.¹³¹ In this case, it was remarked that “the purpose of the doctrine is to protect the attorney's privacy in the performance of her duties as a lawyer advancing the rights of her clients. (...) But the court also noted several other interests that are served by a rule that shields lawyers from the possibility of discovery of

¹²⁸ Article 20.3 (3) of the Law Society of Upper Canada’s Rules of Professional Conduct.

¹²⁹ Gu Weixia, *supra* note 9, at 609-610.

¹³⁰ Reuben, *supra* note 16, at 1258 “...may an attorney engaged in employment litigation against a corporation subpoena documents, records, and testimony from an arbitration involving that corporation and a different employee? The question is deceptively simple, with potentially significant ramifications for the integrity of the arbitration process. If the answer is yes, and arbitrations may be freely canvassed for evidence that may be useful in other cases, then arbitrations conducted in good faith can become fishing holes for well-funded litigants in other cases - to the exploitation of the parties and the process. If on the other hand the answer is no, and arbitration communications are protected against discoverability and admissibility, then arbitrations can be exploited as safe havens in which to hide evidence that might be helpful or necessary for litigants and courts.”

¹³¹ See in *Hickman v. Taylor* case 329 U.S. 495 (1947)

materials developed in the course of client representation. Specifically, the court was concerned about the potential chilling effect the threat of discovery would have on an attorney's willingness to put sensitive issues in writing, which in turn would have a deleterious effect on the quality of client representation (...).¹³² Arbitration, as an alternative technique, is indeed a more flexible way of dispute resolution, though it should not affect other relationships, such as the attorney-client relationship. In my opinion, this will have a chilling effect on the willingness of parties to start arbitration proceedings.

In case law it was established, the parties are responsible to draft proper arbitration agreements containing confidentiality clauses. The parties shall take affirmative steps to maintain confidentiality of their attorney-client privilege, “such as stamping the documents confidential.”¹³³ In contrast when the party’s attorney-client privilege has not been waived, the court found that the communications between legal advisor and client were protected from discovery.¹³⁴ In conclusion confidentiality is given in attorney-client relationship but the parties are required to take some efforts to provide an effective confidentiality clause. Additionally, when third parties are present at the communications between legal advisor and client, providing attorney-client privileges is less reasonable, since third parties cannot be subject to obligations that arise from an attorney-client relationship.

2.2.3.2. *Attorney-work product privilege*

Similar to attorney-client privilege, the work-product doctrine is not enough to protect all communication under the umbrella of confidentiality. The documents, or that is to say, communications that are not made exclusively between the client and its counsel, cannot be

¹³² Id.

¹³³ *Urban Box*, *supra* note 58, But the court “found that the confidentiality agreement did not trump the party’s waiver of the attorney-client privilege with respect to certain documents when it disclosed them at the prior arbitration”.

¹³⁴ *Samuels v. Mitchell* 155 F.R.D. 195 (N.D. Cal. 1994).

regarded as confidential information even if they are used in arbitration. For instance, in case of tax, business, medical, or other records it would create a barrier, because the mentioned documents might be used in arbitration, even though they have not been prepared primarily for the purpose of arbitration.¹³⁵ The case is similar with the transcript of the arbitration proceedings since transcripts are not prepared by either of the parties. However, some level of confidentiality should be maintained as finding the balance between the confidentiality attaching to the work-product doctrine and the argument in favor of evidence being discovered in other litigations when they are necessary and there is no other source for it. Some authors state that there is a requirement that the parties requesting the discovery of evidence need to prove that the evidence cannot be achieved from other sources and it is crucial to their dispute. The requesting parties need to prove they investigated the evidence from other sources than the arbitration first and found it was unavailable.¹³⁶ The discovery of attorney work-product would also weaken the willingness of parties to use arbitration. Contrary to their party autonomy in the selection of the method of dispute settlement, their interests might suffer harm if communications, documents, or records between counsels and themselves were discoverable and admissible.

2.3. Third Party Participation and Access to documents in International Commercial Arbitration

The above-mentioned rules suggest that arbitrators as service providers have a duty of confidentiality that is widely addressed in arbitral rules, while the parties' duty depends primarily on their agreement. How is the role of the arbitral institution treated with respect to itself, counsels, witnesses if the Tribunal is considered as a service provider and owes duty

¹³⁵ Mueller and Kirkpatrick, *Evidence* 1–3 (3d ed. 2003) (explaining the purpose of the Rules of Evidence). at 368–74.

¹³⁶ Reuben, *supra* note 16, at 1297.

keep confidentiality. I devoted a chapter for the two sides of the main actors in the arbitral proceedings, for the parties and the tribunal, and in the following paragraphs I will discuss the role of any other third participants and those who have access to documents in international commercial arbitration. The American Arbitration Association's International Arbitration Rules impose duty on the administrators as well as the arbitrators under the heading of confidentiality. The duty of confidentiality means that under the AAA Rules "[c]onfidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator."¹³⁷

As I already referenced in above-chapter, the CIETEC is the most detailed set of arbitration rules regarding the duty of confidentiality. It explicitly names the parties, their representatives and arbitrators, but also the witnesses, interpreters, experts consulted by the arbitral tribunal, and any relevant staff-members of the Secretariat of the CIETEC.¹³⁸

The LCIA Rules contain confidentiality clauses, however it does not impose duty on third participants, but the parties and the members of the tribunal.¹³⁹ It also acknowledges the parties agreement's primacy, as the parties may provide on the contrary to the general duty on confidentiality stipulated in the LCIA.

The Swiss Rules on International Arbitration contain almost the same confidentiality clause, although it contains a further application of duty of confidentiality binding upon the tribunal-appointed experts, the secretary of the arbitral tribunal, and the Chambers. The awards and deliberation of the tribunal are confidential as well, but the awards may be published under certain conditions, including that the names and references for the parties are deleted.

A number of institutional arbitration rules and other national legislations on arbitration do not address the issue of confidentiality. Neither the English Arbitration Act of 1996, nor

¹³⁷ AAA art. 34.

¹³⁸ CIETEC art. 33.

¹³⁹ LCIA art 30.

the Russian or the German Arbitration Law do not contain confidentiality clauses and, therefore, leave the parties to agree on such duty.

2.3.1. Participation is arising from their profession: witnesses, experts, court reporters, interpreters and translators

Even if duty of confidentiality provisions are incorporated into the parties' agreement, these rules do not always impose such duty upon other persons, who may be involved in the disputes, unless they expressly undertake to preserve confidential nature of the proceedings.

In case law, the exact role of witnesses and the impracticability of their duty of confidentiality was one of the reasons why the implied nature of confidentiality was rejected. In the leading Australian case concerning the issue of confidentiality¹⁴⁰, for instance, Mason LJ argued that even if duty of confidentiality exists, "complete confidentiality of the proceedings in an arbitration cannot be achieved."¹⁴¹ He particularly grabbed the witnesses among those people who might have knowledge about the case yet cannot be banned from disclosing any information that they know of the arbitral proceedings. Besides witnesses, he pointed out that the parties might also have other obligations to reveal information about the outcome of the proceedings, or financial information to their insurers or shareholders, because they are entitled to have up-to-date information.

However, an agreement to arbitrate or a confidentiality clause may not be binding upon all participants. Despite requiring all witnesses to sign a confidentiality clause or a protective order imposing duty on the parties which includes third participants, when they take part in the arbitral proceedings might be effective in order to protect the confidential nature of the proceedings. It is actually a question of drafting techniques, while parties are in

¹⁴⁰ See supra note 6, Esso case.

¹⁴¹ The judgment can be found in *Arbitration International*, Vol. 11 No. 3 (1995) at 244.

the position to exercise their right and decide upon a number of issues separately, including the confidentiality obligation. Even if they agree confidentiality at a certain level they are still in the position to choose whether to draft a clause expressly naming the participants who are bound by such duty or incorporate a general term, such as ‘any participants’ or ‘all participants’. The question of the uniform rule will be elaborated in a different chapter of this thesis but I would like to give an example for a drafting technique applying for expert witnesses and consultants.

“The parties agree that they will expect and require a person who is retained as a [consultant/expert] witness by a party to this arbitration to agree with, and for the benefit of, all parties that all documents, evidence, orders and awards, electronic or otherwise in relation to the arbitration will be kept secret, private, and confidential by the consultant/expert witness and will not be disclosed by the consultant/expert witness to anyone who is not a participant in the proceeding unless the consultant/expert witness is bound by an overriding law or duty.”¹⁴²

The clause contains rules on different stages of the proceedings, in connection with different documents, and provides the secret, private, and confidential nature of the proceedings at the same time. I think it is a good solution because it resolves the dispute about privacy and confidentiality.

In my opinion, to have a separate confidentiality clause for such participants makes the scope of the duty obvious. Moreover, it would be not reasonable to impose general obligations on witnesses at all, since they take part in the arbitral proceedings voluntarily. They are disinterested parties and to require them to undertake extra obligations might result in them

¹⁴² See supra note 33, at 5.

not appearing at the hearings. Nonetheless, a learned English writer stated that an expert witness "owes an obligation not only to the side for whom he appeared but also to the other side to respect the confidentiality of the arbitration proceedings."¹⁴³ He presumably makes distinction between the role of expert and ordinary witnesses and argues that it is justified if more confidentiality is expected from an expert witness.

As for the court reporters and clerks, the parties may expect that these persons, who are appointed to work on their case, shall keep secret and confidential information that they become aware of it. They will get access to documents, evidence, communications, and reports, electronic or in other form. They are required not to disclose it to any non-participant in the proceedings. The same applies to interpreters and translators, due to the fact that they will have access to certain documents in order to fulfill their job, for example to translate it. However, they are prohibited to disclose any information about the case. It is quite understandable their work is necessary in order to settle international commercial arbitration disputes. However, they may become aware of certain confidential and private information but they shall respect the parties' interest and they cannot give this information to outsiders.

2.3.2. Arbitral Institutions: members, assistants and staff

The provisions of arbitral rules do not typically impose positive duty of confidentiality directly on arbitral institutions as service providers. If they do so, they rather impose duty on the arbitrators, but not expressly upon the whole institution. However, at an arbitral institution, arbitrators involved in the cases are not only ones that come in to contact with the arbitral proceeding; the registrars, counsels, assistants, interns, librarians, IT personnel, and the rest of the staff also have access to the documents and records of the cases. These additional actors are responsible for organizing the ongoing arbitration disputes and, in my

¹⁴³ Neill, *supra* note 14, at 290

opinion, it would provide more safety for the parties if these persons at the arbitral centers were bound by duty of confidentiality, either directly under the parties' agreement or indirectly by incorporating institutional arbitral rules into the parties' agreement.

A few arbitration enactments contain references to the administrators. For instance, article 34 of the AAA International Rules, specifically states that any "confidential information disclosed during the proceedings by the parties or by any witnesses shall not be divulged by an arbitrator or by the administrator."

Under the LCIA (Article 30) and Swiss Rules (Article 43) the parties duty is defined explicitly, stating that they must "undertake a general principle to keep confidential" all or any information relating to the arbitration, including the whole arbitration framework, proceedings, as well as awards. The parties may contract otherwise and stipulate in their agreement that the imposed general duty of confidentiality, under the LCIA and Swiss Rules, is not binding upon them. In this respect, these rules are following the principle of recognizing the parties' agreement as the primary source of the arbitration proceedings. However, the arbitral tribunal and other participants are required to keep confidential all deliberations and communications. The duty of confidentiality is addressed to the parties, their representatives, witnesses, interpreters, arbitrators, experts, arbitral tribunal, secretary of the tribunal, and other relevant staff members, and, in case of the CIETEC, the staff members of the Secretariat.

Besides the CIETEC and LCIA rules, there are other arbitral rules that aim to stretch the obligation of confidentiality to the greatest extent. For example, rules 26 of the Hong Kong International Commercial Center impose a duty of confidentiality upon "the parties and all the participants". Similarly, article 6 of the ICC expressly imposes such obligations upon all participants. More precisely, it stipulates that the work of the International Court of the ICC is "of confidential nature which must be respected by anyone who participates in that

work in whatever capacity”. In this respect, when these rules use the word ‘participants’ it imposes binding obligations to everyone who works for the institution and may potentially handle the communications and documents in whatever form and manner. This approach was supported in the Panhandle case¹⁴⁴, claiming that “[t]he work of the court [being] of confidential nature which must be respected by everyone who participates in that work in whatever capacity.” On the contrary, it was stated in this exact case that the obligation is binding upon the participants and the Court of Arbitration, except for the individual arbitrators and parties who are entitled to agree otherwise in their contract.

¹⁴⁴ Panhandle case, *supra* note 77.

CHAPTER 3 THE WAY FORWARD - FUTURE PROSPECTS

In the light of the above chapters, we can conclude that most national acts and institutional rules lack a uniform solution for issue of confidentiality. Indeed, there are two extreme aspect of interpreting duty of confidentiality; one is recognizing implied and general obligations binding upon participants, the other is rejecting this concept absolutely. These two aspects should be harmonized in order to provide a certain, coherent background for arbitration proceedings that will meet the expectations of the parties.

After all, what are the possibilities and suggestions for the parties to preserve the confidential nature of their dispute?

Taking into consideration that arbitration is a creature of agreement between the parties and the principle of primary source of the arbitration proceedings is the parties' agreement, the trend is leading towards parties themselves expressly providing confidentiality for their entire contractual relation. Nonetheless, in order to protect their communications from undesired disclosure, they are advised to incorporate a detailed clause. Alternatively, in order to decide the proper threshold of permissible, justifiable disclosure, the arbitral tribunals or courts, when deciding disputes, should examine the "checks and balances on interest" of the parties themselves and the public policy of the forum country. These cases should be decided on case-by-case bases since there is no uniform clause for the scope of confidentiality and its limitations. Indeed, "there is a significant doubt as to whether confidentiality is now a major benefit in the context of international arbitrations."¹⁴⁵

On the other hand, obstacles to solving the problem usually arise when parties expect courts to solve their disagreement regarding the duty of confidentiality. However, the courts have difficulties in enforcing confidentiality agreements, mostly due to the fact that suffered damages are not easy to prove. "Nor can one count on national governments to step in and

¹⁴⁵ Kouris, Steven, *Confidentiality: Is International Arbitration Losing One of Its Major Benefits?*, Journal of International Arbitration, (Kluwer Law International 2005 Volume 22 Issue 2) 127 – 139, at 138

resolve their differences on this issue”¹⁴⁶ instead of parties. The parties are suggested to discuss and agree on the issue of confidentiality during their negotiations and provide a stable confidential background for their arbitral proceedings if they desire to do so. Actually, this explains why Hans Smit’s proposal¹⁴⁷ for a single international commercial arbitration institution was not accepted and no steps were taken in order to establish it. Dissenting opinions considered this proposal as a problem, since the disputes subject to arbitration arise many years after than the parties entered into contract. Even though, confidentiality clauses should be long and detailed, there may still arise exceptional circumstances where these clauses do not provide enough protection. For instance, a particular national court would take into account the conflicting public policy interests of the forum country¹⁴⁸. In any case, the parties would have to go to court in case of a breach of confidentiality obligation, even if a confidentiality clause exists.

Either way, contrary to the fact that preventive devices are considered as the most effective solution to avoid later disputes, the question still remains whether there is a need for a uniform default confidentiality clause in arbitration proceedings or not. In case the answer is yes, work is still needed to achieve a stable and predictable atmosphere. In the last part of this thesis I will demonstrate a proposed uniform rule of confidentiality. One of its main advantages is that it reduces the costs by providing a well-drafted confidentiality provision during the negotiations. To provide an effective and practical solution, the parties may also incorporate the consequences and remedies available in case of breach of a obligation of confidentiality. For example, parties may request a protective order and may be entitled to damages.

¹⁴⁶ Sarles, Jeffrey W, Solving the arbitral confidentiality conundrum in international arbitration, available at <http://www.appellate.net/articles/Confidentiality.pdf>

¹⁴⁷ Hans Smit, The Future of International Commercial Arbitration: A Single Transnational Institution, 25 COLUM. J. TRANSNAT’L L. 9, 29 (1986).

¹⁴⁸ Sarles, supra note 143 at 11

3.2. A Uniform rule on confidentiality

Model confidentiality clause¹⁴⁹

“[A] The parties, any arbitrator, and their agents, 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 wishes to involve in the arbitration a non-party – including a fact or expert witness, stenographer, translator or any other person – the party 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 legitimate subpoena, governmental request for information or other compulsory process; (3) make disclosure required by law or rules of a securities exchange; (4) seek legal, accounting or other professional services, or satisfy information requests of potential acquirers, investors or lenders, provided that in each case that the recipient agrees in advance to preserve the confidentiality of the Confidential Information. 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.

¹⁴⁹ See International Law Association, the Hague Conference (2010) Confidentiality in International Commercial Arbitration

CONCLUSION

In the last decades commercial arbitration participants presumed a private and confidential nature if they chose arbitration instead of court proceedings. However, neither national court decisions, procedural rules, nor the treaties and parties contract provide a precise and stable background for the scope of confidentiality and the limits thereof. Therefore, this presumption was called into question by a number of court decisions. Consequently, the participants, after the dispute arises between them, have to deal with the issue of whether confidentiality is uncertain in light of existing rules. Therefore, it is up to the parties to cope with this uncertainty and provide a more reliable solution for the duty of confidentiality in their agreement if they desire to have an existing and binding confidentiality clause binding upon certain participants. In their confidentiality clause, the parties may address the participants who are bound by such duty and provide the scope and extent of this confidentiality, as well as possibly incorporating exceptional justified circumstances when the parties are allowed to disclose information about their arbitral proceedings. Contrary to parties' expectations regarding the duty of confidentiality in their arbitration proceedings, they may find themselves in an unsettled situation during the conduct of the proceedings without any express provisions or existing confidentiality clauses.

At the beginning of gathering the materials for this thesis, I thought confidentiality and arbitration is attached to each other, since confidentiality is in the private nature of alternative dispute resolution techniques and the parties may rely on certain level of confidentiality. But the more I read about this issue the more I had to realize this duty is not absolute. There are always exceptional circumstances or public policy concerns against parties' private interest.

In the first chapter I tried to demonstrate the reputation of confidentiality in the concept of arbitration. I divided it into four parts, and provide insight from different sides, including, general and ethical aspects and also taking into account the parties' expectations

and interests. I also detailed the legal nature of confidentiality and demonstrated the concerns that should be taken into account in order to maintain a desired level of confidentiality.

In the main chapter I demonstrated the applying duty of confidentiality upon the participants, and I have found that the parties agreement is most reliable source of duty of confidentiality. However, even if there is an existing confidentiality clause in the parties agreement, or in other institutional rules the parties should draft their agreement neither too narrowly, nor too widely if they want to provide a certain and stable background for such duty. Finally, they also should take into account the choice of law provision in their agreement.

In case of arbitrators and arbitral institutions we should take into account ethical standards and professional ethical codes and guidelines applying upon them. Still, their duty is less uncertain, exactly due to their profession as service providers. The parties' duty is less clear, since they may agree otherwise in their agreement. In conclusion, their duty is most flexible due to the parties' autonomy principle in arbitration proceedings. Third participants' duty is defined in the least rules, if any, and they are not named expressly, such as witnesses or interpreters, rather these rules contain reference to them as "any" other participants.

Concluding my thesis, I demonstrated a future prospect regarding confidentiality, and how the issue may be treated, but we can see that as there was little chance for deciding upon an uniform default rule of confidentiality 20 years ago, the situation remained the same. However, there are newer and newer attempts to propose a uniform legal background for the obligation of confidentiality. In my opinion as a preventive device it would be a proper starting point, leaving upon the parties to decide about the details.

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