

CONFIDENTIALITY REVISITED: BLESSING OR CURSE IN INTERNATIONAL COMMERCIAL ARBITRATION?

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I. INTRODUCTION

A. General Remarks

At a time when international arbitration is gaining increasing popularity with transnational businesses, there is general agreement that, among the principal advantages of arbitration as a method of dispute resolution,¹ confidentiality is one of the most attractive selling points.

The importance of confidentiality mainly flows from the fact that arbitration is essentially a private process. A former Secretary-General of the ICC stated,

It became apparent to me very soon after taking up my responsibilities at the ICC that the users of international commercial arbitration, *i.e.* the companies, governments and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration. When inquiring as to the features of international commercial arbitration which attracted parties to it as opposed to litigation, confidentiality of the proceedings and the fact that these proceedings and the resulting award would not enter into the public domain was almost invariably mentioned.²

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¹ General advantages of international commercial arbitration include: party autonomy, expertise, procedural flexibility, confidentiality, world recognition and enforcement. For a detailed discussion of the advantages and attributes of arbitration, *see* CHRISTIAN BUHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 134-41 (1997); *see also* RICHARD GARNETT & JEFF WAINCYMER, *A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION* 11-14 (2000).

² *Expert Report of Stephen Bond Esq.* in *Eso/BHP v. Plowman* (1995), *reprinted in* 11 *ARB. INT'L* 273, para. 6 (1995). "Those allegations in commercial disputes may involve bad faith, misrepresentation, technical or managerial incompetence, lack of adequate financial resources, or whatever the case may be." *See also* ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* PARAS. 1-53 (4th ed. 2004).

B. *The Legal Definition of Confidentiality*

1. *Privacy v. Confidentiality*

The duty of confidentiality has always been considered as originating naturally from the private nature of the arbitration proceeding. This notion is controversial to the extent that it fails to distinguish “confidentiality” from “privacy.” Unfortunately, however, only passing reference has been made in the contemporary texts on arbitration laws and institutional rules as to the legal definition of confidentiality and the distinction between the seemingly synonymous concept of privacy.³

As one author has noted, “Privacy is concerned with the right 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.”⁴ Whilst the purpose of a private hearing is to maintain the confidentiality of a dispute that has been submitted to arbitration – to that extent, confidentiality and privacy are two sides of the same coins.⁵ It remains true that parties often come to arbitration with the expectation and belief, not just that their dispute will be determined in private, but also that matters raised within the arbitration proceeding will be treated as confidential.

³ As virtually all arbitration rules do, Article 21 of the ICC Rules 1998 solely confirms a party’s right to privacy rather than confidentiality. Other major institutions, in dealing with the issue, mainly reach general consensus upon the privacy of the hearing, the arbitrator’s duty not to disclose and the confidentiality of the arbitration award. See AMERICAN ARBITRATION ASSOCIATION (“AAA”) INTERNATIONAL ARBITRATION RULES 2001, Art. 34; STOCKHOLM CHAMBER OF COMMERCE (“SCC”) ARBITRATION RULES, Arts. 9 and 20(3); CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION (“CIETAC”) ARBITRATION RULES, Art. 34(6); UNCITRAL ARBITRATION RULES, Arts. 32(5) and 25(4). On the other hand, however, some common law jurisdictions provide specific protection to confidentiality alongside the general privacy requirement. See LONDON COURT OF INTERNATIONAL ARBITRATION (“LCIA”) RULES, Art. 30; SINGAPORE INTERNATIONAL ARBITRATION CENTER (“SIAC”) RULES, Art. 34.6; WORLD INTELLECTUAL PROPERTY ORGANIZATION (“WIPO”) RULES 1994, Arts. 73-76, which provide separately for “Confidentiality of the Existence of the Arbitration,” “Confidentiality of Disclosure Made During the Arbitration,” “Confidentiality of the Award,” and “Maintenance of Confidentiality by the Center and Arbitrator.”

⁴ *Expert Report of Dr. Julian D.M. Lew in Esso/BHP v. Plowman*, 11 ARB. INT’L 283, 285 (1995).

⁵ Sophie Napper, *The Privy Council on Confidentiality And The Enforcement of Awards in Associated Electric & Gas Insurance Services Limited v. European Reinsurance Company of Zurich*, 6(2) INT’L A.L. R. 43-44 (2003).

Simply speaking, privacy refers to excluding strangers⁶ from taking part in the arbitration hearing, while confidentiality refers to the non-disclosure relationship among the arbitration participants. On one hand, privacy lies at the core of the arbitration proceedings. Third parties may only be admitted to the hearing of an arbitration dispute with the express consent of the parties to the proceedings and the arbitrator. On the other, even to the extent that an arbitration is private and the public are not admitted, it does not necessarily follow that documents produced for and as a result of that hearing are confidential, nor are those present at the hearing necessarily bound by terms of confidentiality.⁷

In any event, the “secrecy” attribute⁸ of international arbitration, is by no means equal to the absolute binding obligation of “confidentiality,” which must be subject to necessary exceptions.

2. *Legal Privilege v. Confidentiality*

Confidentiality and privilege are inherently different concepts. However, they may overlap and even cause confusion.

Privilege has been defined as the right of a person to withhold from a judicial tribunal information which might assist it to ascertain facts relevant to an issue upon which it is adjudicating. Put simply, the legal privilege refers to “a legally recognized right to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information.”⁹ In the legal profession, lawyers owe their clients a duty of confidentiality that communications are privileged during the time the client is obtaining legal advice. However, this guarantee of professional privilege is not absolute and can be overridden in certain circumstances.¹⁰ The duty of confidentiality under the legal privilege is actually a “fiduciary obligation that a professional owes to his client based on the factual context of their particular relationship.”¹¹

⁶ In *Esso Australia Resources v. Plowman*, [1994] at 1 VR 1, Mr. Justice Binnie defined strangers as “persons whose presence is not necessary or expedient for the proper conduct of [the] proceedings.”

⁷ As expressed by Mason C.J. in *Esso/BHP v. Plowman*, reprinted in 11 ARB. INT'L 235, 245 (1995).

⁸ Sometimes “secrecy” is used interchangeably with “privacy” in arbitration terminology.

⁹ See Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L COMP. L. Q. Vol.50 345 (2001).

¹⁰ In Hong Kong, a court order or the law may prevent professional privilege from being effective. For example, the operation of professional privilege is disallowed by Section 13 of the Prevention of Bribery Ordinance (Cap.201) where the communication was not made during his course of employment or the consultation was made to a friend who was a lawyer but later refused to act as such.

¹¹ *Canadian Transit Co. v. Girdhar*, 2001 CarswellOnt 2830, 14 C.P.R. (4th) 34.

Arbitration differs from litigation in that the applied evidentiary rules are more flexible.¹² 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. In a recent Canadian case,¹³ the tribunal protected certain confidential business documents from disclosure by considering the facts of the case, *i.e.*, whether the confidentiality agreement specifically covered the documents, as well as the nature of the information contained in the documents.¹⁴

C. Split Schools in the International Arbitration Community

Traditionally, in civil-law jurisdictions such as France, Germany and Switzerland, where arbitration is considered an efficient method of private dispute resolution, it has been taken for granted that great importance be attached to confidentiality as a fundamental feature of international commercial arbitration.¹⁵ Arbitrators, the parties and their advisers have traditionally respected not only the privacy of the hearings but also the confidentiality of the proceedings and documents.¹⁶ In *Aitah v. Ojeh*, the Paris Court of Appeal held that, “it is in the very nature of arbitration proceedings to ensure that the highest level of secrecy governs the resolution of private disputes in accordance with the parties’ agreement.”¹⁷

Similarly, common-law jurisdictions have also affirmed the principle of confidentiality in international commercial arbitration. In England, confidentiality may be based upon the parties’ agreement, even where such agreement is only implicit. Furthermore, the duty of confidentiality could be implicit in an agreement

¹² For example, *see* Section 2GA of the Hong Kong Arbitration Ordinance (Cap.341): When conducting arbitration proceedings, an arbitral tribunal is not bound by the rules of evidence and can receive any evidence that it considers relevant to the proceedings, but must give such weight to the evidence adduced in the proceedings as it considers appropriate.

¹³ *Pope & Talbot Ltd. v. I.W.A.-Canada*, 2002 CarswellBC 3325, 106 L.A.C. (4th) 19.

¹⁴ Noral Gallagher, *Legal Privilege in International Arbitration*, (2003) INT’L ARB. L. REV. at 45-46.

¹⁵ Mr. Bond, who was for many years Secretary-General at the ICC in Paris, gave illustrations of this continuing concern and cited *inter alia*, standard French and Swiss textbooks on Arbitration. *See supra* note 2.

¹⁶ Under French arbitration law, the principle of confidentiality of the arbitrators’ deliberations is enshrined in Article 1469 of the New Code of Civil Procedure (Nouveau Code de Procedure Civile or NCPC), and has the value of *order public*.

¹⁷ *See* Georges Flecheux, *Note on the Case Aitah v. Ojeh*, 1986 REV.ARB. 583.

to arbitrate even in the absence of a provision such as Article 21(3) of the International Chamber of Commerce ("ICC") Arbitration Rules.¹⁸

In English orthodoxy, there has been little controversy where a general consensus has been reached that confidentiality is implied from the inherent private nature of the arbitration. This leading position had long maintained its authority through a line of case laws, including *Dolling-Baker v. Merrett*,¹⁹ *Hassneh Insurance Co. v. Mew*²⁰ and *Ali Shipping v. "Trogir"*,²¹ until it was recently challenged by the Australian High Court decision in *Esso Australia Resources v. Plowman*,²² which held that whilst arbitration was a private arrangement, it was not necessarily confidential.

The denial by Australian courts of a general implied obligation of confidentiality as found in the *Esso Australia* case has been embraced independently by court decision of two other jurisdictions, namely *Panhandle Eastern Corp.*²³ in the U.S. and *Bulgarian Bank*²⁴ in Sweden.

The Australian approach has placed in doubt the widely held assumption that confidentiality constitutes an essential feature of an arbitration, where a chain of reactions in academic analysis has been brought about.²⁵ According to Paulsson's observations, these cases manifest a split between the "old world" and the "new world" as to whether a general rule of confidentiality must be inferred from the nature of the arbitral process or whether confidentiality is an exception to be narrowly circumscribed by specific agreement between parties or special institutional rules for unusual kinds of disputes.²⁶

Indeed, it is rather surprising that, while confidentiality is so generally assumed to be identified with arbitration, the extent to which it applies in particular situations is so uncertain, where we find a variety of views ranging from the top that confidentiality covers all aspects of arbitration to the bottom that it covers none. As the case often goes, the proper view appears to be somewhere in between.

¹⁸ ICC INT'L ARBITRATION RULES, Art. 21(3): Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted. Available at http://www.iccwbo.org/court/english/arbitration/rules.asp#articles_21.

¹⁹ *Dolling-Baker v. Merrett*, [1991] 2 All ER 890.

²⁰ *Hassneh Insurance Co. of Israel v. Stuart J. Mew*, [1993] 2 Lloyd's Rep. 243.

²¹ *Ali Shipping Corporation v. Shipyard "Trogir"*, [1998] 2 All E.R. 136.

²² *Esso Australia Resources Ltd. v. Plowman*, High Court of Australia, April 7, 1995, (1995) 128 A.L.J. 391, (1994-1995) 183 CLR 10, summarized in XXI Y.B. COM. ARB. 137 (1996).

²³ *United States v. Panhandle Eastern Corporation* (D.Del. 1988) 118 F.R.D. 346

²⁴ *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, (Swedish Supreme Ct. 2000), reproduced in 15(11) INT'L ARB. REP. at B-1 (2000).

²⁵ See Expert Reports and Case Notes of authors regarding the *Esso* case in 11 ARB. INT'L (1995).

²⁶ CRAIG, PARK & PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 317 (3rd ed. 2000).

II. CONCEPTUAL BASIS FOR CONFIDENTIALITY

A. *Threshold Logic for the Duty of Confidentiality*

There is no general binding rule that arbitration proceedings are private and confidential that precludes parties from divulging details to third parties. The threshold logic of establishing the duty of confidentiality can be traced by a hierarchy of sources:

- a. The parties' confidentiality agreement, or arbitration agreement expressly providing for confidentiality;
- b. The applicable law or the institutional arbitration rules clearly provide for a duty of confidentiality.

The extent to which arbitration proceedings, their content, the nature of the dispute and all aspects of the arbitration remain confidential is, in the first place, a matter for agreement by the parties. The fundamental basis of any arbitration is the agreement of the parties to submit their dispute to arbitration. Party autonomy has always been and remains the essential ingredient in the framework of arbitration.²⁷ Parties can expressly provide in an arbitration agreement that absolute or specific levels of confidentiality shall apply to their arbitration.

Where parties are silent as to the conduct of certain aspects of the arbitration, *e.g.*, confidentiality, then it is the *lex arbitri*,²⁸ the law that governs the arbitration, that will regulate these particular issues. Surprisingly, until recently, neither the national arbitration laws nor the institutional rules imposed a general requirement of confidentiality. There have been only general assumptions that the hearings in the arbitration are not open to the public.²⁹

²⁷ The subject matter of the arbitration, the arbitrators' power and authority, the arbitration rules to be applied, how the arbitration is to be conducted, and the underlying law, are determined in the first place by the parties.

²⁸ In practice, the *lex arbitri* refers to a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The *lex arbitri* is likely extended to such matters as: the conduct of the arbitration, including (possibly) rules concerning the disclosure of documents, the evidence of witnesses and so on. For detailed analysis, see Redfern & Hunter, *supra* note 2, at 78-81.

²⁹ This is also the case in both the UNCITRAL Model Law and UNCITRAL Arbitration Rules, where it is only generally acknowledged that international arbitration is to some extent confidential, and thus the precise reach of the concept of confidentiality is an unfilled gap. For general discussions, see *Expert Report of Dr. Julian D.M.Lew*, *supra* note 4; see also Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121 (2003).

The question then arises whether, absent the parties' express confidentiality agreement or clause, and absent express provisions in either arbitration laws or institutional rules, the confidentiality obligation can be implied in law, by fact, by custom or otherwise.

B. *When Implication Comes into Play*

We know from Lord Diplock, that an arbitration clause may import primary or secondary obligations and it may have implied conditions as to the procedure attached to it.³⁰ In appropriate cases, the law will imply terms into the major contracts of everyday occurrence, such as those concerning the sale of goods, employer-employee and landlord-tenant. The arbitration agreement is such a common contract that it must surely qualify to join this group. With a vacuum in the laws and rules governing confidentiality, it is up to the tribunal to decide whether the law should imply into the agreement to arbitrate a widely drawn obligation of confidentiality.

In civil-law regimes, the agreement to arbitrate by the parties carries with it an *implicit agreement of confidentiality*. This principle was clearly recognized in France in *Aiter v. Ojeh*.³¹ Another leading civil jurisdiction, Sweden, on the other hand, took a completely different approach. In a recent case, the Svea Court of Appeal adopted the view that "the parties who had agreed to arbitrate assume a *duty of good faith* not to make public information concerning the arbitration."³²

Implications are also read into the law by common-law arbitrators. In *Ali Shipping*, the English Court of Appeal held that the duty of confidentiality between parties to an arbitration did not come from the parties' intention but arose as a matter of law in every arbitration – the *law should imply* into the agreement to arbitrate a widely drawn obligation of confidence.³³ Again, the Chief Justice

³⁰ *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981] AC 909, 982, per Lord Diplock.

³¹ *Cour d'appel*, Paris, Feb. 18 1986, 1986 REV. ARB. 583. See CRAIG, PARK & PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, *supra* note 26 at 316 (The Paris Court of Appeal "imposed substantial civil damages on the appellant for having 'caused a public debate of facts which should remain confidential,' thus infringing 'the very nature of arbitral proceedings that they ensure the highest degree of discretion on the resolution of private disputes, as the two parties had agreed.'").

³² *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank (Svea App. 1999)*, reprinted in 14(4) INT'L ARB. REP. at A-I (1999). The courts, in dealing with the question of whether publication of the interim award constituted a fundamental breach of the duty of confidentiality in arbitration, stated that account should be taken of "whether there was an acceptable reason for the publishing, to what extent the other party has been caused damage by this and, should it occur, whether the information was given with the purpose of harming the opposing party."

³³ *Ali Shipping Corporation v. Shipyard Trog*, *supra* note 21 at 136.

Mason in *Esso/BHP* conveyed his Australian perspective that there should be an implied undertaking not to disclose documents made available in an arbitration through discovery, just as would be the case in court proceedings.³⁴

Accordingly, there may be a general practice allowing the arbitrators to determine the issue of confidentiality with regard to all the circumstances surrounding the case. In exercising this discretion, it is suggested, somewhat along the line of the English tradition, that confidentiality be regarded as part of the arbitration: “through custom and usage, confidentiality has become an implied term of the arbitration agreement.”³⁵ In the meantime, however, quoting Mason C.J.’s words in *Esso/BHP*, “[a]nd the obligation is necessarily subject to the public’s legitimate interest in obtaining information about the affairs of public authorities.”³⁶ To the extent confidentiality rests on a contractual basis, it must give way to demands for disclosure based on law, for a private contractual arrangement cannot shield information from disclosure required by law. Last but not importantly, cautious attention shall be paid that when implications come into play, they must be subject to some qualified exceptions.

III. SCOPE AND EXTENT OF CONFIDENTIALITY

The crucial problem here lies in the question, in what circumstances must this general assumption of confidentiality give way?

A. Two Outstanding Issues

Jan Paulsson starts his analysis with a classification based upon the timing of the procedure, *i.e.*, “Confidentiality before, during and after the arbitration proceedings” respectively.³⁷ Whilst in this regard, it seems preferable to share the view of Professor Hans Smit who frames the question around two outstanding issues: first, who is *subject to the duty of confidentiality*, *i.e.*, “on whom the

³⁴ *Esso Australia Resources Ltd. v. Plowman*, *supra* note 22, *per* Mason C.J. at 32.

³⁵ Hans Smit, *Breach of Confidentiality as a Ground for Avoidance of the Arbitration Agreement*, 11 AM. REV. INT’L ARB. 574 (2000). For a detailed analysis of the implied approach, see a chain of English cases, *Dollin –Baker v. Merrett*, [1990] 1 WLR 1205 (Eng. CA); *Hassneh Insurance Co. v. Mew*, [1993] 2 Lloyd’s Rep. 243 (QB); *Hyundai Engineering v. Active Building* (unreported); and *London & Leeds Estates Ltd. v. Paribas Ltd.* (No.2) [1995] EG 134, *discussed in* Patrick Neill, *Confidentiality in Arbitration*, 12 ARB. INT’L 287, 291-96 (1996). This approach has also been adopted by France in *Aiter v. Ojeh*, *supra* note 31, that an “agreement to arbitrate carries with it an implicit agreement by the parties to confidentiality.”

³⁶ *Supra* note 22, at 33.

³⁷ Jan Paulsson and Nigel Rawding, *The Trouble with Confidentiality*, 1994 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 48, and 11 ARB. INT’L 303 (1995).

obligation may rest"; and second, *the scope of the duty of confidentiality*, in that "if there is such a duty to what extent arbitration is confidential."³⁸

1. *Who is Subject to the Duty of Confidentiality?*

There are three main groups of participants in the arbitral process to whom the duty of confidentiality may apply: arbitrators; third parties, including legal representatives and witnesses, no matter whether lay or expert; and the parties themselves. The confidentiality of the arbitration is both an obligation imposed upon the arbitrators as well as a condition they can impose upon the parties and other procedural participants.

With respect to arbitrators, it has generally been recognized that they have an ethical duty to maintain confidentiality.³⁹ The arbitrator must preserve the confidential and private nature of the proceedings. He or she is not allowed to communicate any details or names without the parties' consent.⁴⁰

On the other hand, it is also generally accepted that third parties are not bound by any duty of confidentiality, absent specific contractual arrangements.⁴¹ Thus, "while parties may remain bound by their obligations under the... [confidentiality] agreement, their legal representative may discontinue in that function, and so become a stranger to that agreement."⁴² Witnesses of course, are also a potential source of limitless leaks. A witness in an arbitration normally appears voluntarily and is not subject to any obligation in the agreement to arbitrate; however, it would "seem unrealistic and even dangerous to attempt to impose a duty [of confidentiality] on witnesses."⁴³

³⁸ Hans Smit, *Case-note on Essp/BHP v. Plowman*, 11 ARB. INT'L 299, 300 (1995).

³⁹ See, e.g., Art. 9 of the International Bar Association's Ethics for Arbitrators; Canon VI.B of the AAA/ABA *Code of Ethics for Arbitrators in Commercial Disputes*. Likewise, Rule 6 of the INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID) RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS requires an arbitrator "to sign a declaration promising to keep confidential all information coming to the arbitrator's knowledge as result of his or her participation in the proceeding, as well as the contents of the award." Generally speaking, the arbitrators will have the least reason for not preserving confidentiality, but may still be driven by concerns for the public weal or professional obligations to make disclosure. The point is that the nature and scope of this ethical duty may vary with the situation presented and it is therefore difficult to make generalizations. See Smit, *supra* note 38.

⁴⁰ For a list of the different duties of arbitrators, see *Final Report on the Status of the Arbitrator*, 7(1) ICC BULLETIN 27, 30 (ICC ed. 1996).

⁴¹ See Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. L. REV. 969, 973 (2001).

⁴² Paulsson & Rawding, *The Trouble with Confidentiality*, *supra* note 37, at 318.

⁴³ Some commentators therefore suggest that, "Perhaps, at the most, a duty could be placed on *parties* to the effect that they should seek to obtain from witnesses they wish to call an undertaking that they will not disclose what they learn about the case outside the arbitration." *Id.* 319.

The more complicated situation involves the parties themselves. Absent an express confidentiality agreement or arbitration agreement expressly providing for confidentiality between the parties, the duty of parties to maintain the confidentiality of the existence and the details of the proceeding “may vary significantly depending upon the tribunal and the applicable law and procedures, as well as the type of information at issue and the way in which the information may be used.”⁴⁴ Generally, parties may have to disclose what has occurred or is likely to occur in an arbitration in order to preserve the public interest or to safeguard their own personal interests.⁴⁵

Among those arbitration participants, the arbitrator’s duty of confidentiality seems the least controversial and uncertain, and is always clearly spelled out in arbitration rules and codes of ethics, given the fact that arbitrators are service providers with no personal interest in the case. More often than not, these rules may only address one side of the table, (*i.e.* arbitrator), without a similar duty of confidentiality imposed on the parties or other participants to the arbitration proceeding. Even where a duty of confidentiality is obviously imposed on the arbitrator, several institutions place no restrictions on the parties.⁴⁶ Therefore, the focus of the rest of this discussion will be mainly on the circumstances where parties need to maintain their duty of confidentiality.

2. *Scope of the Duty of Confidentiality*

After analyzing “on whom this duty of confidentiality must rest,” it is thereafter necessary to consider what exactly it is that they may want to keep confidential. This may include: (1) the existence of the dispute or the arbitration proceeding; (2) the substance of the arbitration proceeding, *i.e.* the information

⁴⁴ Buys, *supra* note 29, at 124.

⁴⁵ There are many arbitrations which necessitate reference to other parties or keeping them advised or informed of the developments, for instance, to keep the insurer fully informed when a claim is backed by insurers (particularly in international shipping disputes); a parent company for the purposes of recording contingent liabilities in its accounts; a supervisory authority as in the case of a responsible ministry in respect of a public utility (*see* Esso/BHP, *supra* note 22); or several parties with similar disputes but only one arbitration ongoing.

⁴⁶ These include the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA) under both their domestic and international arbitration rules.

exchanged and evidence produced or discovered during the process;⁴⁷ and (3) all or part of the award.⁴⁸

In international practice, it might be argued that arbitrations cannot be completely confidential because there are often instances in which a private party in arbitration needs to reveal information regarding the proceeding, or even may be legally obligated to reveal such information.⁴⁹ For instance, the party may well have the duty to disclose the fact of the arbitral proceedings, the names of the participants, the nature of the dispute and the possible financial consequences thereof to auditors, creditors, insurance companies and shareholders.⁵⁰

With respect to the scope of confidentiality, institutional rules only authorize non-publication of the award,⁵¹ or publication of the “sanitized” award.⁵² Generally, drafters are reluctant to specify to which extent this obligation of confidentiality may extend, or alternatively, the contents that might be subject to disclosure. The only exceptional circumstance may be found in the Arbitration Rules of the World Intellectual Property Organization (“WIPO”), which include the most detailed provisions regarding the parties’ duty of confidentiality of the respective type of the information.⁵³

Regarding the existence of the arbitration proceeding, it seems unrealistic and undesirable to establish an absolute prohibition against unilateral publication of the

⁴⁷ Concerning the hearings and evidence, attention must be given to whether confidentiality means prohibiting the arbitration participants from discussing the hearings and the evidence, and/or prohibiting the parties from using any information or documents obtained in the proceedings in later proceedings with the same or different parties. A similar factual background may be found in *Associated Electric & Gas Insurance Services Limited v. European Reinsurance Company of Zurich*, [2003] 1 W.L.R. 1041 (UK PC).

⁴⁸ Concerning the award, one must determine whether confidentiality should extend to the result, the reasoning (if given) or both, or simply to any identifying information about the parties. There are cases when one of the parties wanted to rely on the award of the first arbitration as *prima facie* evidence in the successive proceedings, and both the reasoning and the result were invoked. See *Ali Shipping Corporation v. Shipyard “Trogir,”* *supra* note 20.

⁴⁹ For details, see discussions below at Sec. III(B) *infra*.

⁵⁰ CRAIG, PARK & PAULSSON, *supra* note 26, at 312.

⁵¹ See, e.g., UNCITRAL ARBITRATION RULES Art. 32(5): “The award may be made public only with the consent of both parties”; see also revised INTERNATIONAL ARBITRATION RULES OF AAA Art. 27.4 (July 2003): “An award will not be disclosed unless the parties consent or disclosure of the award is required by law.”

⁵² “Sanitized” awards refer to awards that have been redacted to ensure that the identity of the parties remains confidential. For example, ICC ARBITRATION RULES Art. 28(2) provides: “Additional copies [of the award] certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.”

⁵³ This is partly because of the particular nature of the disputes it deals with, *i.e.* intellectual property, trade secrets, commercial confidence; the 1994 WIPO ARBITRATION RULES provide in Arts. 73-76 for confidentiality of “the Existence of the Arbitration,” “Disclosure Made during the Arbitration” and “Award.”

mere existence of the arbitration. A legitimate need to divulge such information shall be qualified and suggestions of a general principle of non-disclosure subject to limited exceptions have been proposed.⁵⁴

As for the information exchanged and evidence produced or discovered during the process, there remains a strong body of opinion that confidentiality of material substance disclosed in arbitration proceedings is a desirable element of arbitration and that it should be maintained to the maximum extent possible.⁵⁵ What could be taken as a recommending reference is the stipulation by the 1998 Arbitration Rules of the London Court of International Arbitration (“LCIA”), where documentary or other evidence given by a party or a witness in the arbitration shall be kept confidential and shall not be disclosed for purposes other than the arbitration without the consent of all parties or order of a court [or arbitral tribunal] having jurisdiction.⁵⁶

Concerning confidentiality of arbitral awards, as discussed above, a general consensus has been reached that unilateral publication or disclosure of the award without the express consent of both parties is prohibited⁵⁷, and in fact, the UNCITRAL Model Law Working Group refrained from inserting a provision on publication of awards,⁵⁸ notwithstanding the fact that awards may fall into the

⁵⁴ Jan Paulsson and Nigel Rawding suggested the following stipulations concerning confidentiality (in institutional rules or contractual clauses), “No information concerning an arbitration, beyond names of the parties and the relief requested, may be unilaterally disclosed to a third party by any participating party unless it is required to do so by law or by a competent regulatory body, and then only:

- by disclosing no more than what is legally required, and
- furnishing to the arbitrator details of the disclosure and an explanation of the reason for it.”

See Paulsson & Rawding, *The Trouble with Confidentiality*, *supra* note 37, at 315.

⁵⁵ REDFERN & HUNTER, *supra* note 2 at 30.

⁵⁶ See LCIA ARBITRATION RULES Art. 30.1, “Unless the parties expressly agree in writing to the contrary, the parties undertake as a *general principle to keep confidential ... all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain* – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority” (*emphasis added*). Paulsson and Rawding further suggest, “An arbitrator, when issuing an order for the production of documentary or other evidence, may in his discretion make such order *conditional upon the other party or parties’ specific written undertaking not to disclose* any of the evidence (or details of it) to third parties” (*emphasis added*). Paulsson & Rawding, *supra* note 37, at 316.

⁵⁷ This general understanding of confidentiality of the arbitral award is deemed as one of the most attractive components of international commercial arbitration. Since international businessmen do not want any adverse inference to be drawn from the arbitral result by the commercial community, this is also one of its selling points when arbitration is promoted as a more advantageous dispute resolution mechanism compared with litigation.

⁵⁸ Indeed it was observed, “It may be doubted whether the Model Law should deal with the question whether an award may be published. Although it is controversial since there are good reasons for and against such publication, the decision may be left to the parties or the arbitration rules

public domain as a result of challenge or enforcement actions,⁵⁹ or invoked as a protective weapon against a third party,⁶⁰ or presumed to be published in the international maritime arbitration societies.⁶¹ We have no quarrel with the institutional publication of illustrative awards, sanitized to protect the parties' anonymity.⁶²

In sum, the confidentiality of the arbitration hearings will be protected in international arbitration practice. In most cases, this protection has been further extended to the evidence produced in connection with those hearings. However, with the exception of WIPO, none of the major arbitration institutions expressly bar the parties from divulging the existence of the arbitration,⁶³ as well as give clear specifications as to the confidentiality of material substance disclosed in arbitration proceedings. For arbitral awards, major institutional rules provide for confidentiality of the award, subject to disclosure with the consent of both parties',

chosen by them." See UNCITRAL Secretariat's Note A/CN.9/207. See also HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 845, para. 101 (1989).

⁵⁹ This may also involve the situations where the arbitration proceeding needs to undergo supervisory review by the court both for recognition and enforcement. The most interesting position in this respect is the updated provisions contained in the *Hong Kong Arbitration Ordinance* (Cap. 341, effective on June 30, 1997), which provides in Section 2D that "Proceedings under this Ordinance in the Court or Court of Appeal shall on the application of any party to the proceedings be heard otherwise than in open court," which means publication of the proceedings may be withheld if a party so requests and may be subject to the sanction of contempt (Updated Section 5 of the 1989 *Hong Kong Arbitration Ordinance*).

⁶⁰ See, e.g., the *Hassneh Insurance Co. case*, *supra* note 20; and the *Ali Shipping case*, *supra* note 21. In both cases, the winning party wanted to invoke the successful award of the first arbitration as *prima facie* evidence in the subsequent arbitration proceeding against the opposing party.

⁶¹ Many of the maritime arbitration rules reverse the usual presumption that international arbitration awards shall remain confidential. Instead, many provide that awards are published as a matter of course unless both parties request in advance that such award not be published. See, e.g., the Society of Maritime Arbitrators (SMA) webpage on publications, available at <http://www.smany.org/sma/sma-pubs.html>; see also Japan Shipping Exchange (JSE) Rules of Maritime Arbitration, Sec. 36, available at <http://www.gsid.nagoyau.ac.jp/project/apec/lawdb/japan/dispute/jseord-en.html>.

⁶² For example, extracts published in the *ICCA Yearbook* or *ICC Bulletin*, where awards are referred to only by their docket numbers without naming the parties involved. By the same token, the "sanitized" ICC awards, by removing the names of the parties and geographical and industrial facts which would risk identifying the case and its participants, are encouraged for educational purposes. We have not perceived any breach of confidentiality. For a detailed analysis for the positive effects of publishing the "sanitized" arbitral awards, see Paulsson & Rawding: *The Trouble with Confidentiality*, *supra* note 37, at 312-13.

⁶³ An example is found in *Amco Asia Corp. et al v. Republic of Indonesia*, where the ICSID tribunal agreed that the ICSID Rules of Arbitration "do not prohibit individual parties from discussing the case and the status of the arbitration, publicly or otherwise." Procedural Decision of 9 December 1983, 24 ILM 365 (1985). The decision is summarized in Paulsson & Rawding: *The Trouble with Confidentiality*, *supra* note 37, at 307-08.

as required by law, for purpose of recognition and enforcement procedures, or in the form of a “sanitized” report for research purposes.⁶⁴

B. *Criteria for Justified Disclosure*

The crucial problem that here follows here is determining under what circumstances must this general assumption of confidentiality be overridden. Apart from the parties’ consent as an unequivocal qualification to disclosure, this article tries to propose certain criteria for other conditions, which is based upon a “*balance of interests*” as a policy consideration to justify the so-called “compulsory disclosure.”

1. *The “Balance of Interests” Approach*

There are two main categories of interests contemplated, namely, “public interests” and “private interests.” The former justifies disclosure (1) under compulsion by law, which can be further elaborated as either pursuant to court order requiring disclosure of prior arbitration documents for the purposes of a subsequent court action, or legal obligations by regulatory bodies⁶⁵; (2) by leave of the court for review and enforcement procedures; or (3) by arbitral parties when a government or governmental organ is involved.⁶⁶ “Private interests” refers to those situations when disclosure is necessary to protect the legitimate interests of an arbitration party.

2. *Public Interests*

While ground (2) above, “disclosure by leave of the court”⁶⁷ in the first category (“public interests”) seems quite clear, circumstances falling into grounds (1) and (3) are less so. In this regard, experiences may be borrowed from a pair of Australian cases, namely *Esso/BHP*⁶⁸ and *Commonwealth v. Cockatoo*,⁶⁹ from which a literature of “public interests” has rapidly flourished.

⁶⁴ LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* at para. 24-99, 24-104 (2003).

⁶⁵ Obligations to auditors, banks, other creditors, insurers, shareholders and etc.; by the same token, the right of a sub-contractor to know the terms and circumstances of an arbitral dispute between the main contractor and the owner of the works. What is strikingly surprising is the comments by Brennan J. in *Esso/BHP*, where he put the language, “... information should be kept confidential and not be disclosed except (a) under compulsion by law; (b) *where there is a duty, albeit not a legal duty, to the public to disclose*; ...”, where moral duties seem to qualify the justification.

⁶⁶ See, e.g., the *Esso/BHP* case, *supra* note 22.

⁶⁷ The award or even the procedural details will become public if court decisions are initiated concerning its validity or enforcement.

⁶⁸ *Esso/BHP* case, *supra* note 22.

⁶⁹ *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662.

The Australian court in *Esso/BHP* explained the “public” by holding that there should be an implied duty of confidentiality and non-disclosure except in the following:

Firstly, where a party in possession of a document or information is under a common law or statutory duty to disclose this material to a third party; secondly, where there is a duty, albeit not a legal one, to disclose the document or information to the public.⁷⁰

It goes without saying that there are circumstances in which the public might have a legitimate interest in knowing what has transpired in an arbitration, and in such a case, there exists a “public interest” exception to the duty of confidentiality. Some hints may be traced from the comments by the trial judge, Marks J. in *Esso/BHP*, where a “public interest factor” had been referred to:

The outcome of the dispute will affect all Victorians who use gas and/or electricity. The financial condition of the State and the people who live in it already is the cause of much anxiety. It is essential that it is known as soon as possible whether the price of natural gas is to rise.⁷¹

Alternatively, there must exist a strong desire to ensure public access to information of legitimate concern to justify a real public interest in making that disclosure.⁷² How disputes are actually decided concerns not only the parties to the arbitration, but may also have substantial effects on the world at large, including shareholders, administrative regulators, consumers, and the like.⁷³ Decisions affecting them should be subject to public scrutiny. The “public interests” exception was applied in *Cockatoo Dockyard* by Kirby P, with its objective to prevent a party from quarantining information that ought legitimately to have been released to the public simply because it was disclosed during the course of an arbitration.

In these circumstances, the rule of law requires that, protective of other competing public interest, the tribunal will define and, where necessary and appropriate, declare the limits beyond which the purported powers in pursuit of

⁷⁰ *Esso/BHP* case, *supra* note 22, *per* Mason C.J. at 32.

⁷¹ *Id.*, quoting from the transcript p.10.

⁷² *Id.*, *per* Mason JC, at 31.

⁷³ On the *res judicata* effects of arbitral awards and societal interest in disclosure of arbitral awards in this context, *see* Section IV(A), *infra* as an example.

private arbitration intrude into competition with other legitimate public rights and duties.⁷⁴

A more thorny issue arises when governments are involved in the arbitration proceedings. “Where one of those parties is a government, or an organ of government, neither the arbitral agreement nor the general procedural powers of the arbitrator will extend so far as to stamp on the government litigant a regime of confidentiality or secrecy which effectively destroys or limits the general governmental duty to pursue the public interest.”⁷⁵ Then “the public interest in the dissemination of information is given priority over all other competing interests, such as the natural desire of a commercial entity ... to restrict to the privacy of the arbitration room material such as price sensitive data and untested allegations made by government witnesses.”⁷⁶

One further concern embarrassing the arbitration community might be that a public interest exception could even arise when there existed merely a moral, as opposed to legal, duty to account to the public for the manner in which a public entity performed its functions.⁷⁷ In the Australian context, these recent decisions have raised significant questions as to how in future any party dealing with a governmental entity could sensibly agree to refer any dispute arising out of those dealings to arbitration in the knowledge that the public entity will have almost unfettered right to disclose any information that might arise during the course of the arbitration, no matter how commercially sensitive it may be, simply by labeling it as a matter of “public interest.”⁷⁸

Anyway, the “balancing approach” proposed by Patrick Neil QC appreciates that these conflicting demands will have to be carefully weighed⁷⁹ where “the court would uphold the public interest in the dissemination of information which ought to be before the public... but the court would nevertheless remain alert to use its authority... to check any threatened abuse of the right to [disclose or]

⁷⁴ *Commonwealth of Australia v. Cockatoo Dockyard Pty Limited* (No. 2), *supra* note 69, *per* President of the New South Wales Court of Appeal, Mr. Justice Kirby at 675.

⁷⁵ *Id.*, at 682.

⁷⁶ Neill, *Confidentiality in Arbitration*, *supra* note 35 at 311. The natural desire of a commercial entity may be expressed by its specifically contracting for dispute resolution through arbitration to restrict the dissemination of the substance of the procedure. *See id.*

⁷⁷ *Per* Justice Brennan in the *Esso/BHP v. Plowman*, *supra* note 22, at 37.

⁷⁸ “[I]n the two Australian cases under review the High Court and the New South Wales Court of Appeal ‘elected not to enquire into the real motivations underlying the decision in each case of a public entity participant to seek to make disclosure’ and they fear lest the threat of publication could be used for tactical purposes in connection with the arbitration itself.” *Citing Rogers & Miller: Non-Confidential Arbitration Proceedings*, 12 *ARB. INT’L* 319, 327 (1996).

⁷⁹ Neil, *Confidentiality in Arbitration*, *supra* note 35 at 313.

publish.”⁸⁰ In a major investment dispute between a State and a foreign investor, an example of such a cautious approach is found in the *Amco Asia Corp. v. Republic of Indonesia* ICSID arbitration, where the arbitrators were not prepared to recognize an explicit duty to maintain confidentiality but only an implied duty not to exacerbate a dispute.⁸¹

3. *Private Interests*

With regard to “private interests,” English courts have been fairly active in developing guidelines, where their judges have long maintained the view that this right to disclose should be carefully constrained and that, while the guiding presumption favors confidentiality, it is not absolute and should be moderated by a recognition that there will clearly arise commercial or other circumstances which may prevail over all other interests and warrant release. Convincing reasons are required to justify the tribunal’s discretion. The tests have been laid down through a line of case precedents in the past decade.

a. *Hassneh Insurance and Insurance Co. v. Lloyd’s Syndicate: “Business Efficacy”*

“In *Hassneh Insurance*,⁸² Mr. Justice Coleman applied a so-called “business efficacy” test, which asks whether the breach of confidentiality is reasonably necessary for the establishment or protection of an arbitrating party’s legal rights *vis-à-vis* a third party.”⁸³ In the *Insurance Co.* case,⁸⁴ he further inquired whether disclosure of the award “[m]ust be ‘strongly persuasive’ of that party’s particular legal rights, or need that party go further and show that it is an ‘essential element in the formulation’ of the related action.”⁸⁵ Mr. Justice Coleman “argued that the disclosure... merely for the reason that it *may* have a persuasive effect in a related dispute would not be sufficient grounds for ousting the undertaking.”⁸⁶

He stated,

⁸⁰ “And the court would thus to the extent necessary in the circumstances allow the obligation of confidence to be overridden.” *Id.*

⁸¹ Procedural Decision of 9 December 1983, 24 ILM 365 (1985). Similar to the *Esso/BHP*, for a major investment dispute between a State and a foreign investor, it is highly unlikely that the elements of the dispute were confidential in nature or that aspects of it had not been the subject of public discussion and controversy.

⁸² *Hassneh Insurance Co. of Israel v. Stuart J. Mew*, *supra* note 20.

⁸³ *Per* Mr. Justice Coleman, *Id.* at 249.

⁸⁴ *Insurance Co. v. Lloyd’s Syndicate*, [1995] 1 Lloyd’s Rep. 272.

⁸⁵ *Rogers & Miller*, *supra* note 78 at 325, *quoting* *Insurance Co. v. Lloyd’s Syndicate*.

⁸⁶ *Id.* (emphasis in original).

... for the purpose of coming within the qualification to the duty of confidence which attaches to an arbitration award, it is sufficiently necessary to disclose an arbitration award ... only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement. The making of the award must therefore be a necessary element in the establishment of the party's legal rights against the stranger. This is the furthest boundary to the qualification which business efficacy will permit.⁸⁷

b. *Ali Shipping v. Shipyard Trogir*: "Reasonable Necessity"

In *Ali Shipping*, Potter LJ expanded upon what constitutes "a necessary element." He held that the court should take a broad approach in requiring a party seeking disclosure to prove necessity.⁸⁸ Potter LJ held that the court should take account of:

... the nature and purposes of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is being directed and the practicality and expense of obtaining such evidence or information elsewhere.⁸⁹

The Court of Appeal found that there was, as matter of law, a duty of confidentiality between the parties to an arbitration. In deciding whether to override that duty, the appropriate test was whether disclosure was reasonably necessary either for disposing fairly of the action or for saving costs.⁹⁰

c. *Associated Electric*: "essential purpose of arbitration"

Later, in *Associated Electric*,⁹¹ regarding the extent of confidentiality applicable to an award, the English judicial approach stepped down a little bit with an even more delicate attitude — by placing emphasis on the *essential purpose of arbitration*. This test certainly reminds us of the similar approach taken in *Hyundai Engineering*⁹² ten years ago, where the disclosing party was required to

⁸⁷ *Insurance Co. v. Lloyd's Syndicate* at 276. Indeed, it should at least readily be assumed that confidentiality can be forfeited to effect important social considerations that underlie the doctrine of *res judicata* — to avoid inconsistent determinations and to forestall repetitive litigations.

⁸⁸ *Ali Shipping Corporation v. Shipyard Trogir*, *supra* note 21 at 147.

⁸⁹ *Id.* at 148.

⁹⁰ See conclusion by ANDREW TWEEDDALE & KAREN TWEEDDALE, A PRACTICAL APPROACH TO ARBITRATION LAW, 259 (1999).

⁹¹ *Associated Electric & Gas Insurance Services Limited v. The European Reinsurance Company of Zurich*, [hereinafter *Associated Electric*], *supra* note 47.

⁹² *Hyundai Engineering v. Active Building & Civil Construction (Pte) limited* (in liquidation), (unreported) 9 March 1994, Phillips J. See discussion in *Editorial*, 11 ARB. INT'L 231, 232 (1995).

demonstrate at the outset that, the disclosure is for a proper purpose or, the “fair disposal of the action.”⁹³

The Privy Council in *Associated Electric* noted that the desirability and merit of this approach were required “to be evaluated having regard to the surrounding circumstances in which this confidentiality agreement was made and the basic principles and purpose of arbitration.”⁹⁴ The court went on to construe the confidentiality agreement so as to give effect to the fundamental purpose of arbitration, namely to determine disputes between parties.

Over the past decade, the ambit of the obligation of confidentiality has not yet been clarified while the English judicial attitude lacks objective certainty. Practically speaking, a case-by-case approach is best with specific reference first being made to the subject documents or information in order to determine their relevance or whether they are to be used for a legitimate purpose.

In sum, to protect other competing public and private interests, the rule of law needs to define, and where necessary and appropriate, to declare the limits beyond which the purported powers in pursuit of private arbitration intrude into and compete with other legitimate public and private rights and duties.

IV. PROBLEMATIC SITUATIONS

A. *Arbitration Confidentiality v. Business Transparency*

1. *Disclosure in Due Diligence Process*

By way of example, the due diligence process will be examined as a case study. The hypothetical situation is that, in the course of an arbitration between the Claimant A and the Respondent B, A applied to the tribunal for disclosure of the existence of the arbitration proceeding to C,⁹⁵ as required by the court decision in country A that “the party under due diligence must divulge the existence of any claim to the prospective purchaser.” A is now facing two conflicting obligations,

⁹³ Rogers & Miller, *Non-Confidential Arbitration Proceedings*, *supra* note 78 at 326. The *Hyundai Engineering* case also foreshadows the possibility of the English courts moving away from the strict implied term basis of the confidentiality undertaking to a more flexible regime that may condone disclosure in certain situations when criteria are satisfied.

⁹⁴ *Associated Electric*, *supra* note 47, *per* Lord Hobhouse of Woodborough at 1045, para. 7.

⁹⁵ Company A is undergoing a take-over by Company C. Is A obligated to refrain from divulging the existence of the arbitration and all details in connection with it in due diligence currently being conducted by C? The hypothetical situation was actually one of the issues in the 11th Annual *Williem C Vis International Commercial Arbitration Moot Competition* problem (April 2 to 8, 2004, Vienna), where A relies on Article 34 of the SIAC Rules (Singapore International Arbitration Center) as the legal basis. The Problem is available at <http://www.cisg.law.pace.edu/cisg/moot/moot11.pdf>.

the duty of confidentiality owed to B under the arbitration agreement and the duty of disclosure owed to C under the court decisions.

In this regard, there is a clear *policy and public interest* preference in which the obligation of disclosure in the due diligence trumps the obligation of confidentiality in the arbitration. The reasoning is derived from the legislative goal of a better corporate governance through the due diligence process, which provides a prospective purchaser of a company with a right to know what it will get when it buys a company. This increases the transparency, and reduces the risk and uncertainty of the transaction.⁹⁶ Were the due diligence obligations of disclosure to be overridden by the duties of confidentiality in arbitration, business transactions would be made less transparent and the global market economy would be negatively affected.⁹⁷

A similar analogy to this required disclosure of the tri-party relationship growing out of the due diligence process is the duty to report involving the “Customer (Company) – Bank – Auditor/SFC”⁹⁸ in the corporate governance sector, where the bank owes a duty of confidentiality to the customer and simultaneously has a duty to disclose to the auditor/SFC.⁹⁹ To a certain extent, confidentiality must be sacrificed to maintain financial integrity.

Under circumstances where a law or regulation requires the disclosure of certain documents on the grounds of national economy or financial integrity, arbitrators sitting in a country other than that which issued the regulation in question are generally under no obligation to give effect to it. At the most, they may take such regulations into consideration in deciding what constitutes a legitimate reason for disclosure. Arbitrators sitting in the country which enacted such a regulation might have a more difficult task, as their award will be subject to an action to set aside or to refuse enforcement in that country and the rule in question may be held to be a requirement of public policy.¹⁰⁰

Gaillard and Savage suggest that

⁹⁶ Moreover, due diligence improves the efficiency of the decision-making process and encourages parties to invest, thereby increasing the efficiency and improving the health of a market economy. See MICHAEL WHALLEY & THOMAS HEYMANN, *INTERNATIONAL BUSINESS ACQUISITIONS: MAJOR LEGAL ISSUES AND DUE DILIGENCE*, (2000). See also, WINFRIED F. SCHMITZ, *DUE DILIGENCE FOR CORPORATE ACQUISITIONS*, (1996); W.D. DUNCAN & SAMANTHA J. TRAVES: *DUE DILIGENCE*, (1995).

⁹⁷ CRAIG, PARK AND PAULSSON, *supra* note 26 at 313-314.

⁹⁸ SFC is short for the Securities and Futures Commission.

⁹⁹ For instance, the SFC in Hong Kong mandates that, under the acquisition procedure, the banker shall report the company's balance sheets to the prospective purchaser. See SAY GOO & ANNE CARVER, *CORPORATE GOVERNANCE: THE HONG KONG DEBATE*, (2003) Chapter 6, with the subtitle “*Whistle-blowing and the immunity of the auditor – problem of confidentiality and public interest.*”

¹⁰⁰ The enforcing state can refuse recognition and enforcement by virtue of Article V(1)(e) of the New York Convention on grounds of “violation of the public policy of the enforcing state.”

Where a party seeks to rely on the confidentiality of certain documents so as to defeat the other party's request for compulsory disclosure, . . . one solution may be for a party disclosing confidential documents to do so on condition that the opposing party or parties . . . that receive copies of the documents sign a confidential agreement. The aim of such an agreement is to oblige each signatory to limit the use of the disclosed documents to purposes strictly related to the arbitration, if need be, to limit the number of individuals who will have access to the documents and to return all original documents or copies after the arbitration.¹⁰¹

B. *Disclosure by Publicly Listed Companies*

Listed companies are subject to disclosure obligations which arise from a combination of rules and regulations enshrined in legislation or issued by regulatory authorities, as well as guidelines issued by such regulatory authorities as to the interpretation of such binding obligations.

Companies whose shares are traded on a regulated market are required to publish their annual company and consolidated accounts,¹⁰² where facts which are likely to have a material impact on the company's accounts must be clearly set out. "In this regard, various publicly listed companies make express disclosures in their annual reports concerning current litigation, including, where relevant, a fairly detailed description of its pending disputes."¹⁰³ Arbitrators working with ICSID have reportedly acknowledged that because of duties imposed by domestic laws, a company could find itself "under a positive duty to provide certain information about its activities to its shareholders, especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value."¹⁰⁴

The underlying policy considerations are obvious. The disclosure to the public of timely reliable and complete information is a prerequisite to a company's participation in financial markets. Such disclosure required by regulatory

¹⁰¹ FOUCARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1265, para. 693 (Emmanuel Gaillard & John Savage eds. 1999). For an example of a confidentiality order adopted by consent, see the July 12, 1994 Order in *ICC Case No. 7893*, 125 J.D.I. 1069(1998), and observations by Dominique Hascher, *cited* in Gaillard & Savage, *supra*.

¹⁰² The listed company must also publish a document addressed to the relevant market regulatory body, which contains all information (not only economic but also legal). In EU Member States, this obligation arises in particular from Directive 8/390/CE and legislation pursuant thereto.

¹⁰³ Valéry Denoix de Saint Marc: *Confidentiality of Arbitration and the Obligations to Disclose Information on Listed Companies or During Due Diligence Investigations*, 20(2) J. INT'L ARB. 214 (2003).

¹⁰⁴ Margrete Stevens: *Confidentiality Revisited*, 17(1) News From ICSID 2 (2000), available at <http://www.worldbank.org/icsid/news/n-17-1-2.htm>.

provisions as well as guidelines are intended to guarantee the transparency of the market, and again, to ensure the financial integrity as a whole.

The problem might arise, however, as to how to define the clear boundary of “materiality.” If the ongoing disputes will not be likely to result in a material effect upon the company’s accounts, can the confidentiality survive? So far, there has been no universal legal test on what constitutes “materiality,” with some scholars having suggested a combined approach of “objectivity and subjectivity,” taking into account not only the actual amount of the ongoing dispute, but the likelihood of success, in the balancing of interests.¹⁰⁵ In any event, if such reference in the annual report is merely limited to indicating the existence of an arbitration proceeding, it will not constitute a breach of confidentiality. On the other hand, parties should not be allowed to disclose the details of the proceedings.¹⁰⁶

In conclusion, factors militating in favor of disclosure should be weighed against the desirability of preserving the confidentiality of the original arbitration and its subject matter. When weighing these factors to justify “compulsory disclosure,” an arbitrator should take into account the primary “interests of the parties” in the matter before him, but not withhold publication “out of a generalized concern . . . that publication would upset the confidence of the business community” in international commercial arbitration. If the tribunal withholds disclosure “where a party before it would suffer some real prejudice . . . or where publication” would divulge sensitive matters, parties could rest assured that their “confidentiality in arbitration will, where appropriate, be preserved.”¹⁰⁷

V. DESIRABILITY OF CONFIDENTIALITY

A. *Valued Attribute in Arbitration*

If it is true that confidentiality is always a highly valued attribute of arbitration, then we need to explore the underlying policy considerations. However, if the value of confidentiality varies depending on the context, then it may be possible to make arbitration somewhat more transparent in some contexts without

¹⁰⁵ In the 11th Annual of Williem C Vis International Commercial Arbitration Moot Competition problem, *supra* note 95, some teams raised this point, which was shared by Prof. Lu Song from the China Foreign Affairs Institute and Prof. Katherine Lynch from the University of Hong Kong.

¹⁰⁶ Such details which would violate the duty of confidentiality may involve: name of the parties, amount of the dispute, why parties rush into conflicts.

¹⁰⁷ Department of Economic Policy and Development of the City of Moscow v. Bankers Trust Co., [2004] EWCA Civ. 314, [2004] 2 All ER (Comm.) 193, para.41. A brief introduction is available in [2004] INT’L A.L.R.: News Section, N-48.

undermining the other aspects of arbitration that make it valuable to the participants.¹⁰⁸

Confidentiality in arbitration may be valuable for a variety of reasons. To begin with, parties to the arbitration may not wish to expose certain allegations to the public.¹⁰⁹ In addition, parties choosing arbitration may not want a “loss” publicized, especially if the party is involved in other cases with similar claims and defenses.¹¹⁰ Moreover, parties to an arbitration may want to take positions privately, particularly in the sense that confidentiality protects sensitive business information or trade secrets. All of these reasons demonstrate that there is a real value to maintaining a certain degree of confidentiality in arbitration, at least in some cases.

Quite practical concerns may follow that, if confidentiality should be abolished in international arbitration in a particular jurisdiction, there might be a flight by the arbitration community. At least since *Esso/BHP*, there have been significant concerns with regard to Australia’s standing as a preferred venue for international arbitration, especially in the case of a deal with a government entity as the procedural counterpart.¹¹¹

The paradox is that, while they may complain about the legal vacuum regarding confidentiality in international arbitration practice, parties may find it undesirable for the rules to be too comprehensive. On the other hand, although confidentiality in arbitration is seen as a positive factor, some “side effects” have been raised in arguments by legal practitioners.¹¹² As confidentiality prevents the dissemination of details of reasons and rulings, it may have a negative impact on the development of standardization of commercial practices. Without such precedents or legal principles in place, and without the certainty and consistency they bring,¹¹³ legal counsel may find it difficult to advise their clients properly.¹¹⁴

¹⁰⁸ A recent study suggests that, in fact, privacy or confidentiality is not one of the most valued aspects of international commercial arbitration. See Richard W. Naimark & Stephanie E. Keer, *What Do Parties Really Want From International Commercial Arbitration?*, AAA DISPUTE RESOLUTION J. 78 (Nov. 2002/Jan. 2003).

¹⁰⁹ These all may involve allegations of bad faith, misrepresentation, incompetence, lack of liquidity. See *supra* note 2.

¹¹⁰ Although arbitral awards have no precedential effect, publication of the award may inspire further litigation or result in significant commercial prejudice, notwithstanding the fact that at the enforcement stage the award may be made public. See Paulsson & Rawding: *The Trouble with Confidentiality*, *supra* note 37 at 306.

¹¹¹ For details, see *Expert Reports* and *Case Notes* discussing the *Esso* case in 11(3) ARB. INT’L (1995).

¹¹² The issue was under considerable discussion in the recent Inter-Pacific Bar Association Conference in Seoul, Korea. Some of the points have been concluded in the paper by Christopher To: *The Myth about the Duty of Confidentiality in Arbitration*, HONG KONG LAWYER (Nov. 2005).

¹¹³ Dr. Julian D.M. Lew supported this argument that “the lack of uniformity and, in many instances, the lack of insistence on confidentiality in the practice of international commercial

B. Transparency

The argument for making international commercial arbitration more transparent may be somewhat compelling in that “greater transparency would likely increase knowledge and understanding of the arbitral process, thereby increasing the legitimacy of the use of international arbitration more generally. In particular, increasing transparency in international arbitration . . . would likely result in . . . the following benefits.”¹¹⁵

First, publication of reasoned awards would bring about the development of consistency in the law of arbitration.¹¹⁶ While arbitral awards do not have precedential effect, they “do have persuasive value and ‘can coalesce into collective arbitral wisdom’ that may be drawn upon by future parties and arbitrators.”¹¹⁷ As a general rule, “when the process has consistency and predictability, its legitimacy is enhanced because parties know what to expect.”¹¹⁸ Business persons dislike uncertainty. “Thus, even in arbitration, parties are likely to value certainty and predictability.”¹¹⁹ Second, “greater transparency promotes democratic principles because the affected public, such as the shareholders of a publicly held corporation and consumers, has an opportunity to observe and evaluate the outcome.” Last but not the least, increasingly transparent arbitration may provide an “opportunity for practitioners and academics to understand,

arbitration, suggest that, “[u]nless parties are in agreement, there can be no confidentiality in the conduct of the arbitration.” *Quoted in* Patrick Neil: *Confidentiality in Arbitration*, *supra* note 35, at 302-03.

¹¹⁴ It really boils down to the practical experience and exposure of a particular legal counsel and his ability to negotiate and draft suitable provisions to ensure that the arbitration process maintains the essence of confidentiality.

¹¹⁵ Cindy Buys, *supra* note 29 at 135.

¹¹⁶ GAILLARD & SAVAGE, *supra* note 101, para. 1412.

¹¹⁷ See Richard C. Reuben, *Constitutional Gravity: A Unity Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1085 (APRIL 2000).

¹¹⁸ Cindy Buys, *supra* note 29 at 136. Parties “have a greater understanding of the process, leading to greater satisfaction with it, and are therefore more likely to use it again.” *See id.*, citing Andrea K. Schneider: *Democracy and Dispute resolution: Individual Rights in International Trade Organizations*, 19 U.P.A. J. INT’L ECON. L. 587, 614 (1998). *See also* Richard C. Reuben, *Constitutional Gravity: A Unity Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 U.C.L.A. L. REV. 949, 1085 (Apr. 2000).

¹¹⁹ Cindy Buys, *supra* note 29 at 136. “Consistency is particularly valuable when there are a series of disputes among different parties arising out of the same transaction.” *Id.* at 136 n. 61. *See also* Delissa A. Ridgway: *Int’l Arbitration: The Next Growth Industry*, 54-Feb. DISP. RESOL. J. 50,52 (1999);

analyze, critique and improve the efficacy of the dispute resolution system at issue.”¹²⁰

As Professor Buys notes, “There are, of course, costs to making arbitration more transparent. . . . [I]t is true that if arbitration is made more transparent, parties will not be able to so easily hide damaging allegations.”¹²¹ This potentially negative consequence should be weighed against the greater efficiency and democracy achieved” by allowing the public to observe and hold the parties accountable for their actions, especially where large publicly held corporations or government parties are involved.”¹²² In addition, for commercial worries that transparency could lead to exposure of business confidences or trade secrets, parties could designate such information in a detailed confidentiality agreement “at the very outset of arbitration and any references to that information could be redacted from the final award prior to publication. . . . [Therefore], it would seem that such sensitive information could still be fairly easily protected without making the entire proceeding and/or result confidential.”¹²³

What needs to be noted is that “party autonomy is one of the hallmarks of arbitration” and choices made by the parties ought to be respected in full by arbitrators, tribunals, arbitral institutions as well as courts. “If the parties contract for a certain degree of confidentiality and that choice is not respected, arbitration will become less desirable. . . . To the extent that arbitration loses its confidential nature, it loses one of its distinctive features and becomes more like litigation.”¹²⁴ Finally, “a more transparent process could result in an unwillingness of parties to admit certain facts or take certain positions because of fear of public reaction. All of these potential costs must be weighed in any determination of where to draw the line between confidentiality and transparency in arbitration.”¹²⁵

In sum, “a more nuanced approach to confidentiality in arbitration and allowing a greater degree of transparency where appropriate” could be achieved through “a careful weighing of the . . . costs of confidentiality versus greater transparency under the facts of the particular situation.” In most cases, it is more likely than not that “such a balancing will at least result in a decision to publish the

¹²⁰ Cindy Buys, *supra* note 29 at 136-37. The maritime arbitration societies, partly for the aforementioned reasons, reverse the traditional presumption and make the arbitral awards publishable unless the parties object.

¹²¹ *Id.* at 137. Such concerns of loss of confidentiality can be alleviated by publishing “sanitized” arbitral awards. *See* discussion *supra*, Sec. III (A)(2).

¹²² *Id.*

¹²³ *Id.* at 137 and n. 67.

¹²⁴ *Id.* at 138. Confidentiality is one of the primary facets of arbitration that distinguishes it from judicial litigation. *See* discussion *supra*.

¹²⁵ *Id.*

["sanitized" arbitral] awards to the benefit of the international arbitration community as a whole.¹²⁶

VI. CONCLUSION

A. *Consequences of Breach of Confidentiality*

If confidentiality is imposed and the arbitrating party still discloses the proprietary information, an injunction may be called for. However, arbitrators should be reluctant to direct injunctive relief when the person making the disclosure has a legitimate reason for making it. In that case, damages, if properly ascertainable, may be the only appropriate remedy. Although the person making disclosure has a legitimate interest in making it, yet such disclosure does some harm to the other party. In determining whether injunctive relief is proper, arbitrators should apply their own standards, but grant due deference to the policies of the place where the disclosure was, or is likely to be made.

If the disclosure was improper and a legitimate interest of the party complaining of the disclosure had been injured, exemplary damages should be assessed. However, the avoidance of the arbitration agreement (arbitration clause) *per se*,¹²⁷ should rarely be invoked. If ever allowed, such sanctions may flow from those extreme cases of a most outrageous breach of confidentiality that does substantial harm to the opponent. Of course, it may be rather difficult to prove such an egregious breach. The author here proposes to borrow the terminology of "fundamental breach" from the CISG to refer to such substantial harm.¹²⁸ To justify the "fundamental breach," the complaining party must prove that the disclosure has caused a "fundamental change of circumstances" and has rendered his position greatly deteriorated or radically different from what he had originally anticipated.

For arbitrators, "non-compliance with the requirement of secrecy could render the arbitrator in breach personally liable, but would not invalidate the award."¹²⁹

¹²⁶ *Id.* The benefits may help to reach certainty, consistency, educational or academic purposes in arbitration practice and literature.

¹²⁷ Similar to the avoidance of a common commercial contract or a contractual clause. See United Nations Convention on Contracts for International Sales of Goods (CISG), available at <http://www.uncitral.org/english/texts/sales/CISG.htm>.

¹²⁸ For a detailed analysis of "fundamental breach" of the CISG, see SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE 84-123 (10th ed. 2000); see also Clive Schmitthoff, *International Business Law: The New Merchant*, in SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW (Chia – Jui Cheng ed. 1989).

¹²⁹ Gaillard & Savage, *Fouchard Gaillard Goldman On International Commercial Arbitration*, *supra* note 101, at para. 1374.

With regard to the enforcement of the tribunal's order of confidentiality, should the disclosing party fail to comply, the arbitrators should be entitled to draw a negative inference upon the final arbitral award.¹³⁰ Even if the arbitrators would not ordinarily have the means of enforcing compliance with such an order, such an order might be capable of judicial enforcement in certain jurisdictions or otherwise serve as the basis of a claim for damages, if breached.¹³¹

B. *Suggestions*

As we have seen, most national laws and institutional rules have not addressed the issue of confidentiality at all or lack objective certainty in its practical application. Since a general rule of confidentiality is favored by most jurisdictions, an in-between approach should be adopted to harmonize the two extreme attitudes.¹³² Where either the confidentiality is ordered blindly as flowing from the private nature of the procedure, or it is rejected on the theory that no general obligation of confidentiality exists *de lege lata* in international arbitration at all, there is still an argument that the obligation of confidentiality in international arbitration is implied by trade and usage. To achieve the objective, arbitration laws and rules, including those of UNCITRAL and the ICC, should be drafted so as to create an explicit positive duty on the part of the participants in arbitrations, as well as to clearly distinguish the duty of confidentiality from its synonymous term privacy. At the same time, it seems necessary that such a general rule must be tempered by qualified exceptions, for practical, commercial and legal reasons, where the proper threshold would be used upon a study of "checks and balances on interests" to decide if the disclosure were justified.

What shall also be borne in mind is the fact that just as is the case with an order for security for costs,¹³³ the duty of confidentiality may also become a two-edged sword. On one hand, the result of an absolute right to confidentiality may be that a party to an arbitration does not receive justice; on the other hand, the unfettered or loosely restrained right of disclosure may lead to the "public/private interests" being misused. As a result, the tribunal should strike an extremely cautious balance

¹³⁰ IBA RULES OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION, Art. 9.

¹³¹ YVES DERAIS & ERIC A. SCHWARTZ: *A Guide to the New ICC Rules of Arbitration* 256 (1998).

¹³² See Sec. (I)(C) *supra*.

¹³³ The security for costs, as an abnormal interim measure of protection, on one hand, may fall into the trap as being used as an oppressive weapon to stifle the claimant's meritorious claim. Conversely, if security for costs were not posted, the respondent might bear the potential risk of being misused by an impecunious claimant to obstruct the procedure. For detailed policy considerations, see Noah Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 AM. REV. INT'L ARB. 307 (2000).

of interests between the parties by taking into account all the relevant factors under the circumstances surrounding the claim.

Although there is no uniform answer in either national laws or institutional rules as to the exact extent and scope to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case, the impact of the *Esso/BHP*,¹³⁴ *Panhandle Eastern*¹³⁵ and *Bulgarian Bank*¹³⁶ decisions should not in themselves be overstated. From a global perspective, this is really a complex issue where the two schools represented by England and Australia have much to learn from each other. Actually, in the *Associated Electric v. Reinsurance* case,¹³⁷ we have seen a change in the English attitude, where more convergence can be detected:

Their Lordships' reservations concerning the characterization of the duty of confidentiality as an implied term challenges the accepted norm and suggests that their Lordships wish the English law obligations of privacy and confidentiality in arbitration to be defined more precisely.¹³⁸

In practice, there are possibly two workable solutions for the issue of confidentiality: (1) from a macro point of view, in legislation, arbitration institutions and national laws could introduce much clearer and wider ranging rules on the subject of confidentiality; and (2) from the micro viewpoint, in the contracting stage, when parties themselves can exercise more control, parties should provide for more detailed references to confidentiality in their agreement.

With regard to legislation, as we may see, the legislatures of some countries have implemented or may implement shortly supportive statutory provisions on the issue of confidentiality.¹³⁹ Furthermore, various arbitration institutions have revisited their rules so as to cater more specifically to the duty of confidentiality in

¹³⁴ *Esso Australia Resources Ltd. v. Plowman*, *supra* note 22.

¹³⁵ *United States v. Panhandle Eastern Corporation*, *supra* note 23.

¹³⁶ *Bulgarian Foreign Trade Bank Limited v. A.I. Trade Finance Inc.*, *supra* note 24.

¹³⁷ *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Co. of Zurich*, *supra* note 47.

¹³⁸ Audley Sheppard, Case Comment on *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Co. of Zurich*, 6(3) INT'L A.L.R. N25-27 (2003).

¹³⁹ This may also suggest the possible legislative trend for the issue of arbitration confidentiality. For example, the New Zealand Arbitration Act 1996, Section 14(1) entitled "Disclosure of information relating to arbitral proceedings and awards prohibited"; Norway Draft Arbitration Act, "Duty of confidentiality and public access to arbitration." It is not inconceivable that other legislatures will follow suit. *England's Departmental Advisory Committee on Arbitration Law's Report of the Arbitration Bill* of February 1996 has commented that, "in due course, if the whole matter [of the exceptions to confidentiality] were ever to become judicially resolved, it would remain possible to add a statutory provision by way of amendment to the Bill."

arbitration proceedings, albeit to varying degrees.¹⁴⁰ However, there hard work is still needed to achieve a Uniform Default Rule of Confidentiality in international commercial arbitration in order to foster stability and predictability, which are considered two paramount requirements by most participants in international transactions.¹⁴¹

Certainly, the approach of some tribunals in recent years suggests that, prevention is still the best and foremost approach.¹⁴² Such unsettled issues as the exact extent to which confidentiality attaches to the different elements or stages of an arbitration continue to lend support to the warning that parties should not assume that confidentiality attaches to materials produced or information disclosed in arbitration proceedings merely because the proceedings are conducted in "private." The insertion of a contractual clause clearly setting out the parties' duty of confidentiality in arbitration should be considered carefully.¹⁴³ In drafting the appropriate confidentiality provisions, parties might agree on the types of information to be treated as confidential. They might also include the remedies available upon breach of the confidentiality undertaking¹⁴⁴ as well as any circumstances in which confidential information may be disclosed.

To conclude, every practitioner and user of arbitration services should be concerned about the issue of confidentiality in arbitration proceedings. It is important to address this matter carefully in order to gain worldwide acceptance and to build confidence in arbitration as an effective means of international dispute resolution.

¹⁴⁰ For instance, the London Court of International Arbitration (LCIA) revised its rules in 1998, providing far more extensively for confidentiality. The LCIA Rules 1998 include in Article 30, "Unless the parties expressly agree in writing to the contrary, *the parties undertake as a general principle to keep confidential . . . save and to the extent that disclosure may be required* of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award" (emphasis added).

¹⁴¹ PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS 233, Chap. 9/Para. 9-018 (2002). *See also*, Jeffrey W. Sarles, *Solving the Arbitral Confidentiality Conundrum in International Arbitration*, in ADR AND THE LAW 428-39 (18th ed. 2002).

¹⁴² Preventive measures by parties are critical, as institutional recommended "generic" arbitration clauses rarely mention the issue of confidentiality.

¹⁴³ Notwithstanding the fact that it is generally unusual for parties to focus in so great detail at the contracting stage on issues of confidentiality that may arise in a possible dispute in the distant future. Furthermore, the parties in an arbitration might not have the same understanding as regards the extent of confidentiality as is expected.

¹⁴⁴ Useful suggestions and recommendations can be found in Paulsson & Rawding, *The Trouble with Confidentiality*, *supra* note 37; *see also* Leon E. Trakman, *Confidentiality in International Commercial Arbitration*, 18 ARB. INT'L 1 (2002).