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Defining the Indefinable: Practical Problems of Confidentiality in Arbitration

Michael HWANG S.C.* and Katie CHUNG**

This article seeks to provide a comprehensive review of the international law on confidentiality in arbitration both in terms of theory and in practice (by examining national legislation and the rules of the various institutions). The essential point is that the problem is not in defining confidentiality but in defining the exceptions to the duty of confidentiality where such a duty is recognized. The argument is made that, in practice, it is difficult to come up with a comprehensive formula for, or list of, all the exceptions to the obligation of confidentiality. However, there is an examination of the most comprehensive and recent attempt to codify the exceptions to the duty of confidentiality in the New Zealand Arbitration Act 1996 (2007 Amendment). Nonetheless, even as the New Zealand Arbitration Act 1996 recognizes, no code can be fully comprehensive, and there must be room for an independent third party (either the tribunal or the curial court) to rule on permitted exceptions to the obligation of confidentiality.

I. INTRODUCTION

It is a particular pleasure to deliver the second Kaplan lecture in Hong Kong in honor of Neil Kaplan, whom I have known for some fifteen years. No one needs reminding that Neil is internationally recognized as one of the super-arbitrators of the world. We also know that, quite apart from his personal career, he has also devoted much of his time over the years to building up the cause of international arbitration, both in Hong Kong and the world, by his judgments in the Hong Kong High Court, his chairmanship of the Hong Kong International Arbitration Centre (HKIAC), and then later on the world stage as chair of the Chartered Institute of Arbitrators. More than any other person, he put Hong Kong on the world map of arbitration and led the way for Hong Kong to be recognized, not only for having a fine arbitration institution, but also for having many fine practitioners in international arbitration. This perception has established Hong Kong as Asia's leading center for international arbitration (although Singapore may have something to say about that in the near future). But Neil has also unselfishly nurtured neophytes into the world of international arbitration, and I am one of those neophytes whom he mentored and assisted over the years. He opened many doors for me and helped me with advice and encouragement to enable me to mutate from a litigator to an arbitrator, and his example is one that I intend to follow in terms of putting back what I have got out of this world of international arbitration.

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** Katie Chung, Associate, Chambers of Michael Hwang S.C. This is an expanded version of the Kaplan Lecture delivered by the first author in Hong Kong on November 17, 2008.

II. THE PROBLEMS OF DEFINING THE DUTY

It is not always realized that the definition of the scope of the duty of confidentiality is a major problem. This is why so few definitions at the legislative and institutional levels have been attempted, and why the existing definitions are not completely successful. But practitioners who do attempt to find a contractual definition quickly find out how difficult a mutually acceptable solution is to achieve, which is why, in practice, there are few model clauses available.

In common law countries, attempts have been made to define the duty through the courts, mainly through the device of the implied term, but these attempts have run into conceptual difficulties, although they have provided valuable insights into the nature and scope of the problem.

III. TO WHOM DOES THE DUTY EXTEND?

The first question is: who should know about the arbitration? Once this is ascertained, then the duty can be imposed on such persons. It should be uncontroversial that the persons who are entitled to know about the arbitration (and all its aspects) are the parties, their counsel, the tribunal and the administering institution (if any).

But problems start immediately we go beyond this inner circle, starting with the position of witnesses, actual and potential. Are they entitled to be fully briefed on the facts and documents relating to the arbitration or only to the extent necessary for them to assist in their function as witnesses? If the latter, who decides on the boundaries of the permitted disclosures? And what about persons who are being considered as witnesses but have not yet agreed to do so? How far is it permissible to show them confidential documents after the commencement of the arbitration? These are not questions to which case law, legislation or institutional rules have given any answer.

IV. TO WHAT INFORMATION AND DOCUMENTS DOES THE DUTY EXTEND?

We start with the issues of:

- (a) the existence of the arbitration; and
- (b) the decision of the tribunal.

Should either of these facts be confidential? In the latter case, should the contents of the award (as opposed to its outcome) be confidential as well? Again, existing law and rules do not give a clear or uniform solution.¹

¹ See *infra* Figure 1, where the first author's scorecard on the protection of confidentiality by 12 arbitral institutions clearly shows that, while not all institutional rules treat the existence of an arbitration as confidential, most institutional rules treat the contents of an arbitral award as confidential.

We then move onto the more difficult question of the documents which will be used or referred to in the course of the arbitration. And here we begin to receive some assistance from the courts. Case law has given some protection for the confidentiality of documents generated in the course of the arbitration (e.g., pleadings, witness statements, submissions, transcripts and documents disclosed by the other party) not otherwise in the public domain.² The starting point for an examination of the Commonwealth position on confidentiality is the recent decision of the English Court of Appeal in *Emmott v. Michael Wilson & Partners*,³ where the court made the following pronouncements on the obligations of the parties.

Lawrence Collins, L.J. stipulated:

[a]n implied obligation (arising out of the nature of arbitration itself) 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, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court.⁴

Likewise, Thomas, L.J.:

[a] specific obligation of confidentiality in relation to documents produced by each party to the arbitration under the process of disclosure applicable by the procedural law of arbitrations conducted in England and Wales. This is analogous to that imposed by the courts of England and Wales in proceedings before them. As between the parties, all such documents are covered by the obligation of confidentiality.⁵

It is important to note that there are at least three classes of documents:

- (a) documents which are inherently confidential;
- (b) documents which are disclosed by parties for purposes of the arbitration, whether voluntarily or pursuant to tribunal orders for production; and
- (c) the award.

Different considerations apply to each of these classes.

In the case of inherently confidential documents (e.g., those containing proprietary commercial information), they will attract the same protection within the arbitration as they do outside it, that is, they will not depend on any doctrine of arbitral confidentiality for that protection.⁶

In the case of documents disclosed by the parties, they will have the protection afforded to similar documents in litigation (sometimes known as “the *Riddick* principle”),⁷ which means that they may not be disclosed without the permission of the other party or the tribunal.

² See, e.g., *Dolling-Baker v. Merrett*, [1990] 1 W.L.R. 1205 (C.A.); *Hassneh Insurance Co. of Israel v. Stuart J. Mew*, [1993] 2 Lloyd’s Rep. 243 (Q.B. (Comm. Ct.)); *Ali Shipping Corp. v. Shipyard Trogir*, [1999] 1 W.L.R. 314 (C.A.); *Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich*, [2003] 1 W.L.R. 1041 (P.C.); *Emmott v. Michael Wilson & Partners*, [2008] EWCA (Civ) 184 (C.A.).

³ *Emmott*, *supra* note 2.

⁴ *Id.* para. 81.

⁵ *Id.* para. 129.

⁶ *Id.* paras. 79, 81.

⁷ *Derived from Riddick v. Thames Board Mills Ltd.*, [1977] Q.B. 881 (C.A.).

The confidentiality of awards depends on what the applicable institutional rules provide. Ad hoc arbitrations will depend on the applicable ad hoc rules (usually United Nations Commission on International Trade Law (UNCITRAL) Rules in the case of international arbitrations),⁸ and the applicable arbitral law, but this is rarely likely to have any express provision governing confidentiality.⁹

V. WHAT IS THE JURIDICAL BASIS OF THE DUTY?

After some differences of judicial opinion in the English courts,¹⁰ a definitive statement has now emerged from the English Court of Appeal in *Emmott v Michael Wilson & Partners*,¹¹ which seems to have settled the juridical basis for the duty. Judicial opinion in other parts of the world remains divided. *Emmott* has laid down the following principles:

- (a) The obligation of confidentiality in arbitration is implied by law and arises out of the nature of arbitration.
- (b) This obligation is a substantive rule of law masquerading as an implied term.
- (c) It imposes an obligation 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, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration.
- (d) The content of the obligation may depend on the context in which it arises and on the nature of the information or documents in question; the limits of the obligation are still in the process of development on a case-by-case basis.
- (e) The principal cases in which disclosure will be permissible are where:
 - (i) there is consent (express or implied) of the parties;
 - (ii) there is an order or leave of the court;
 - (iii) it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and
 - (iv) the public interest or the interests of justice require disclosure.

VI. DIFFICULTIES IN THE ABSOLUTE NATURE OF CONFIDENTIALITY

Whatever may be the juridical basis of the duty, it is clear that the duty cannot be an absolute one. Several practical situations immediately come to mind which call for exceptions to the duty.

⁸ The UNCITRAL Arbitration Rules do not provide for confidentiality except for hearings to be held in camera unless the parties agree otherwise (see art. 25(4)) and the publication of the award (see art. 32(5)).

⁹ See, e.g., Singapore International Arbitration Act (Cap. 143A) [hereinafter "IAA"], ss. 22–23 and Hong Kong Arbitration Ordinance (Cap. 341), ss. 2D–2E.

¹⁰ *Supra* note 2.

¹¹ *Emmott*, *supra* note 2.

A. ENFORCEMENT ACTIONS

Clearly, the winning party in an arbitration must be allowed to disclose the contents of the award if it has to proceed with enforcement action to obtain its rights under the award.

In *Hassneh Insurance Co. of Israel v. Stuart J. Mew*,¹² Colman, J. considered that the award was subject to a duty of confidentiality, even though the award identified the parties' respective rights and obligations, and was at least potentially a public document for the purposes of supervision by the courts or enforcement in them.¹³ However, Colman, J. held that the implied duty of confidentiality is subject to the following exceptions:¹⁴

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

This holding is still valid as it is not inconsistent with the pronouncements of the Court of Appeal in *Emmott*.

B. PARALLEL ACTIONS

The problem here is where there are different arbitrations between the same (or different) parties arising from the same or related disputes. Where the tribunal is the same in different arbitrations between the same parties, there should be no practical difficulty in migrating information about the first arbitration into the second arbitration. Where the tribunal is different, some theoretical and practical difficulties can be encountered. Although the parties may be the same, the choice of a different tribunal may be due to the wish to keep the two arbitrations separate and discrete from each other, precisely to prevent the migration of information which may be relevant in one arbitration but would be viewed as irrelevant or prejudicial to the outcome of the second arbitration. And where the parties are different in two arbitrations, the difficulties could become even greater.

These difficulties typically arise in construction cases, where there are likely to be separate arbitrations between employer and main contractor on the one hand, and between main contractor and subcontractor on the other. They also frequently arise in reinsurance cases where there is one arbitration between primary insurer and the insured, and another arbitration between primary insurer and reinsurers.

¹² [1993] 2 Lloyd's Rep. 243 (Q.B. (Comm. Ct.)).

¹³ *Id.* at 248.

¹⁴ *Id.* at 249.

The source of the problem is the general lack of power to consolidate two arbitrations,¹⁵ which is generally viewed as a deficiency in the arbitral process that is an inevitable consequence of the principle of the consensual basis of arbitral jurisdiction.

All these difficulties were canvassed in a quartet of English cases.

In *Dolling-Baker v. Merrett*,¹⁶ the plaintiff representative underwriter claimed against the first defendant (a representative underwriter for two Lloyd's syndicates) for sums of money allegedly due under an aggregate excess of loss reinsurance effected through the second defendants, the placing brokers for that reinsurance. The first defendant sought to avoid the reinsurance policy on grounds of non-disclosure. The plaintiff claimed, in the alternative, against the second defendant for negligence. There had been an earlier arbitration involving a similar type of reinsurance in which the first defendant was representative underwriter and the second defendants were placing brokers, and where the first defendant also sought to avoid the reinsurance policies on grounds of non-disclosure (the "Turner arbitration"). In that arbitration, the arbitrator had declared that the reinsurance was invalid, and so the first defendant had succeeded in avoiding liability in the Turner arbitration. In *Dolling-Baker*, the plaintiff wanted disclosure of documents in the Turner arbitration, which included, amongst other things, transcript evidence and the award itself (the "Turner documents"). The Turner documents were in the possession, custody and control of both the first and second defendants. The plaintiff failed to obtain discovery on the ground that they were not relevant to the issues in the current action and that even if they were, the production of the Turner documents for inspection was not necessary for disposing fairly of the issues. The first defendant also succeeded in obtaining an injunction against the second defendant from disclosing those documents used in the Turner arbitration. Parker, L.J., in the English Court of Appeal, held that there was an implied obligation of confidentiality arising out of the nature of arbitration itself. He considered that:

As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation 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, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.¹⁷

In *Hassneh*, the plaintiff reinsurers sought an injunction to restrain disclosures by the defendant reassured of certain documents engendered in the course of an arbitration

¹⁵ One exception is the Hong Kong Arbitration Ordinance, s. 6B, which allows the court to consolidate two or more arbitration proceedings in certain circumstances, e.g., a common question of law or fact arises in both or all of the arbitrations (s. 6B(1)(a)). Other exceptions include the LCIA Rules, art. 22.1(h), the SIAC Rules, rule 24 and HKIAC Administered Arbitration Rules, art. 39, all of which allow joinder of third parties with their consent but not necessarily the consent of all the existing parties.

¹⁶ [1990] 1 W.L.R. 1205 (C.A.).

¹⁷ *Id.* at 1213.

between the plaintiffs and the defendant. The defendant was reinsured by the plaintiffs under various reinsurance contracts, and the placing brokers were C.E. Heath & Co. The defendant had commenced the arbitration against the plaintiffs claiming to recover under those reinsurance contracts. The plaintiffs raised various defenses, which included non-disclosure and misrepresentation. The defendant also sought to make a claim against their placing brokers in court (because there was no arbitration agreement between them), in case the defendant failed against the reinsurers. The defendant, however, lost its arbitration against the plaintiffs in an interim arbitral award issued by the tribunal. Hence, the defendant sought to proceed against the placing brokers, claiming on the basis of negligence and breach of duty as placing brokers. The defendant therefore wanted to disclose to the placing brokers the interim award and the reasons for that award. The plaintiffs were content that the defendant should disclose the interim award to the placing brokers and the reasons as referred to in the interim award. However, the plaintiffs objected to the disclosure of the whole of the reasons or the disclosure of any other documents (such as pleadings, witness statements or transcripts), and sought an injunction to restrain such disclosure on the basis that the disclosure would be a breach of confidence by the defendant. Colman, J. held that the implied duty of confidentiality in arbitration applied to documents generated in the course of the arbitration (e.g., transcripts, pleadings, witness statements, submissions), and documents disclosed during the arbitral process. However, as discussed above, the implied duty of confidentiality was subject to the exception that the disclosure of the reasoned award was reasonably necessary for the protection of the arbitrating party's rights vis-à-vis a third party, so that to disclose it would not be a breach of the duty of confidence. Colman, J. cited the English Court of Appeal case of *Tournier v. National Provincial and Union Bank of England*¹⁸ as the basis for this qualification to the implied duty of confidentiality. In *Tournier*, Bankes, L.J. set out the following four qualifications to a bank's duty of confidentiality:

- (a) where disclosure is under compulsion of law;
- (b) where there is a duty to the public to disclose;
- (c) where the interests of the bank require disclosure; and
- (d) where the disclosure is made by the express or implied consent of the customer.

In *Hassneh*, Colman, J. found that the disclosure of the reasoned award was reasonably necessary for the defendant to establish his causes of action against the placing brokers. However, Colman, J. did not extend the exception to the other documents generated or disclosed in the course of the arbitration, as they were merely the materials which were used to give rise to the award which defined the rights and obligations of the parties to the arbitration. Accordingly, Colman, J. held that the qualification to the duty of confidentiality based on the reasonable necessity for the protection of an arbitrating party's rights against a third party could not be expected to apply to such documents.

¹⁸ [1924] 1 K.B. 461 (C.A.).

In *Insurance Co. v. Lloyd's Syndicate*,¹⁹ the defendant reassured commenced arbitration against the plaintiffs as lead underwriters under a contract of reinsurance. The plaintiffs had contended that they were entitled to avoid the contract of reinsurance on the grounds of non-disclosure, or alternatively that the plaintiffs were not liable under the policy wording to indemnify the defendant against a particular class of risks. Subsequently, the syndicate of five other reinsurers all asserted that they were not bound to indemnify the reassured against such risks. The arbitral tribunal later issued an interim award in favor of the defendant reassured, which then sought to disclose the award to the five other reinsurers in order to persuade them to accept liability. The plaintiffs applied for an injunction to restrain the defendant reassured from disclosing the interim award. In granting the injunction, Colman, J. applied the reasonable necessity test which he had laid out in *Hassneh*²⁰ and found that, although the disclosure of the award and reasons might have a persuasive effect on the syndicate of the five other reinsurers, their disclosure would be irrelevant to founding the basis of any cause of action by the defendant reassured against the reinsurers, as they were not bound by the arbitration agreement between the plaintiffs and defendant. Accordingly, Colman, J. held that the interim award was not a necessary element to the establishment of the defendant's legal rights against the five following reinsurers, and the defendant reassured would be in breach of an implied duty of confidentiality if it were to disclose the interim award to those five reinsurers.

In contrast to the reinsurance cases discussed above, *London & Leeds Estates Ltd. v. Paribas Ltd. (No. 2)*²¹ raises the question of whether the parties in an arbitration owe any duty of confidentiality to an expert witness in an arbitration where the witness was found to have given evidence that was inconsistent with the evidence that he had given in previous arbitrations. *London & Leeds* arose out of a rent review arbitration between the plaintiff landlord and the defendant tenant. The landlord retained an expert valuer (the "Expert") who gave evidence on the office rental market in London's West End relevant to the review date of April 1991. The Expert was also involved in two previous arbitrations, the "Euston Tower" arbitration and "Delta Point" arbitration, in which the Expert had given contrary expert evidence on behalf of the tenants. Counsel for the defendant tenant in this arbitration had also been counsel for the tenant in the Euston Tower arbitration, and had cross-examined the Expert on the evidence he had given in the Euston Tower arbitration. The defendant's expert in this arbitration was the arbitrator in the Delta Point arbitration, but he had completed and published his award, and the only ancillary matters left outstanding were costs and interest. Subsequently, the defendant tenant issued subpoenas addressed to the Expert relating to his Euston Tower and Delta Point proofs (witness statements), and to the defendant's expert relating to the Expert's Delta Point proof. The plaintiff landlord and Expert applied by separate summons to set aside the subpoenas addressed to the Expert and the defendant's expert. By the hearing of the

¹⁹ [1995] 1 Lloyd's Rep. 272 (Q.B. (Comm. Ct.)).

²⁰ *Supra* note 12, at 275.

²¹ [1995] 1 E.G.L.R. 102 (Q.B.).

present case, the defendant's expert had complied with the subpoena addressed to him. It was not disputed that the parties to the Euston Tower and Delta Point arbitrations owed each other a duty of confidence and privacy in respect of the arbitration and the evidence given during it. Mance, J. held that the plaintiff landlord had no *locus standi* in the matter as it was not a party to any confidential relationship involving the information sought by the subpoenas. However, Mance, J. held that the Expert had *locus standi* to object to the subpoenas as he was owed a duty of confidentiality by the parties to the Euston Tower and Delta Point arbitrations in respect of his evidence. The issue before Mance, J. was whether it was necessary for the fair disposal of the action or for the saving of costs for the duty of confidentiality to be overridden. Mance, J. held that, where a witness was proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest. Mance, J. therefore concluded that the duty of confidentiality attaching to the proof in the Euston Tower arbitration was overridden in the interest of the fair disposal of the proceedings.

VII. HOW HAVE THE COURTS DEALT WITH EXCEPTIONS?

Legislatures and arbitral institutions have generally recognized the difficulty of enacting a comprehensive code of exceptions or a formula for creating exceptions. Hence, exceptions have been introduced into the common law by incremental additions.

A. PUBLIC INTEREST

The nature of the arbitration may give the public a legitimate interest in certain aspects of the arbitration. In *Esso Australia Resources Ltd. v. Plowman (Minister for Energy and Minerals)*,²² the arbitration concerned a dispute over a proposed increase in the price of natural gas supplied by the appellant vendors (Esso/BHP) to two public utilities, the Gas and Fuel Corporation of Victoria (GFC) and the State Electricity Commission of Victoria (SEC) allegedly due to the imposition of a new tax on gas. GFC and SEC had entered into separate sales agreements with the appellants. Both the GFC sales agreement and SEC sales agreement contained a provision which required the appellants to provide GFC and SEC as buyers of the gas with details of the calculations on the basis of which an increase or decrease in the price of gas was derived. The appellants did not provide the details of the calculations to GFC and SEC. The appellants later commenced arbitrations pursuant to the arbitration clauses in the GFC and SEC sales agreements, respectively. Subsequently, the Minister for Energy and Minerals brought an action against the appellants, as well as GFC and SEC, seeking a declaration that any information disclosed in the arbitration was not subject to any duty of confidentiality. By way of counterclaim, the

²² [1995] 128 A.L.R. 391 (H.C.A.); *Esso* was followed by the Supreme Court of New South Wales in *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.*, (1995) 36 N.S.W.L.R. 662.

appellants sought declarations, based on implied terms, that each arbitration was to be conducted in private and the documents or information supplied in the arbitration were subject to a duty of confidentiality. Both GFC and SEC brought a crossclaim against the appellants seeking declarations in the same terms as the declarations sought by the minister. The claims for confidentiality arose from the appellants' response to requests by the minister, GFC and SEC for details of the calculations on which the appellants' claims for price increases were based. The appellants had declined to give details unless GFC and SEC entered into agreements that they would not disclose the information to anyone else, including the minister, the Executive Government and the people of Victoria. Mason, C.J., delivering the judgment of the majority in the High Court of Australia, considered that there was a distinction between privacy and the duty of confidentiality, and that it was clear that complete confidentiality of the proceedings in an arbitration could not be achieved.²³ Mason, C.J. held that, while an arbitration proceeding is private, confidentiality is not an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration. To that extent, Mason, C.J. therefore rejected the English approach to the obligation of confidentiality as an implied term. Nonetheless, Mason, C.J. was prepared to accept that there is, similar to the obligation of confidentiality attaching to documents obtained on disclosure in judicial proceedings, an obligation of confidentiality that attaches to documents which a party is compelled to produce pursuant to a direction by the arbitrator.²⁴ That obligation is, however, necessarily subject to the public's legitimate interest in obtaining information about the affairs of public authorities. The subject matter of the arbitration also affected the public's interest in knowing how the cost of their utilities bills was derived, and this might well have been a factor influencing the decision of the High Court of Australia. Likewise, Robertson, J. in the New Zealand case of *Television New Zealand Ltd. v. Langley Productions Ltd.*²⁵ found that the public interest in knowing how much a well-known TV personality was paid was additional justification for not suppressing reporting of the court hearing of the appeal from the arbitration hearing.

This feature is particularly prevalent in International Centre for Settlement of Investment Disputes (ICSID) arbitrations, where there is clearly a public interest in any arbitration by an investor against a government, especially if the claim is for a large sum of damages. This explains why it is commonplace for investment arbitrations to be relatively freely reported; awards are rarely secret, and inevitably find their way into the public domain.²⁶

²³ *Id.* at 400–01.

²⁴ *Id.* at 404.

²⁵ [2000] N.Z.L.R. 250 (H.C.).

²⁶ ICSID must promptly publish the legal reasoning of ICSID awards regardless of the publication of the award as a whole. See ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), rule 48(4); art. 48(5) of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States requires consent of the parties for the publication of the award in its entirety. The Secretary-General of ICSID arranges for publication of an award in an appropriate form with a view to furthering the development of international law in relation to investments. See ICSID Administrative and Financial Regulations, reg. 22. Rule 37(2) of the ICSID Arbitration Rules allows the submission of *amicus* briefs by third parties. ICSID awards, available at <www.investmentclaims.com>.

B. WHERE THE MATTER HAS COME TO COURT

An arbitration claim often comes to court for, among other things, the enforcement or setting aside of the arbitral award, and the issue is whether the implied obligation of confidentiality in the arbitration proceeding extends to the court proceedings. While parties may have agreed to arbitrate confidentially and privately, this cannot dictate the position in respect of arbitration claims that are brought before the courts. One countervailing factor that militates against the extension of the implied obligation of confidentiality to court proceedings is the principle of open justice.

For instance, under the English Civil Procedure Rules (CPR) rule 62.10, the English courts have the discretion to order an arbitration claim to be heard in public or in private. Further, CPR rule 62.10²⁷ excludes the application of the ordinary rule under CPR rule 39.2, under which hearings are to be held in public unless the court decides that there is a special reason based on confidentiality to hold the hearing in private. Under CPR rule 62.10(3), apart from applications for the determination of a preliminary point of law under section 45 of the English Arbitration Act 1996, or an appeal under section 69 of the English Arbitration Act 1996 on a question of law arising out of an award, all other arbitration claims are heard in private.

In *Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co.*,²⁸ the English Court of Appeal considered the effect of CPR rule 62.10, as well as its implications on the publication of court judgments on arbitration claims. In an arbitration in London, Bankers Trust Co. (BTC) was successful against one party but not against two other parties, one of which was the government and the other a department of the city of Moscow (“Moscow”). BTC proceeded to challenge the arbitral award under section 68 of the 1996 Act on the ground of serious irregularity, which was eventually dismissed. The arbitration took place in private and the arbitral award was published only to the parties. While BTC’s application was also heard in private as it fell within CPR rule 62.10(3)(b), the judge omitted to mark the judgment as “private” when it was handed down. Lawtel, an online law reporting service, obtained a copy of the judgment in good faith and summarized it. The summary was later sent to Lawtel’s (approximately 15,000) email subscribers with a link to the full judgment. After the mistake was discovered, the full judgment was deleted, but the email summaries remained on the computers of Lawtel’s

²⁷ CPR rule 62.10 reads as follows:“(1) The court may order that an arbitration claim be heard either in public or in private. (2) Rule 39.2 does not apply. (3) Subject to any order made under paragraph (1): (a) the determination of: (i) a preliminary point of law under section 45 of the 1996 Act; or (ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award, will be heard in public; and (b) all other arbitration claims will be heard in private. (4) Paragraph (3)(a) does not apply to: (a) the preliminary question of whether the court is satisfied of the matters set out in section 45(2)(b); or (b) an application for permission to appeal under section 69(2)(b).”

²⁸ [2004] 3 W.L.R. 533; *see also* *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela S.A.*, [2008] EWHC 532 (H.C.), a case concerning an application to set aside a freezing order that had been granted pursuant to s. 44 of the Arbitration Act 1996 in support of an intended ICC arbitration. The application for setting aside fell under CPR rule 62.10, which provided that such an application should be heard in private unless the court ordered that the hearing be in public. As the freezing order had received considerable publicity, Walker, J. decided pursuant to CPR rule 62.10 that the hearing on the application for setting aside should be in public save for those aspects of the matter which were confidential.

email subscribers. Prior to this, however, the existence of a dispute between the parties (not the subject matter), the identities of the parties and the existence of BTC's application in court had already been freely mentioned to the press by the parties. As the respondent wanted the general investment community to know that the allegations of financial default against them had been the subject of detailed consideration in arbitration, the respondent applied to the court for an order for general publication of the full judgment or alternatively, a summary of the judgment. The lower court held that the judgment on the section 68 application should remain private and that neither it nor Lawtel's summary should be available for publication. Moscow appealed to the Court of Appeal on the basis that either the full judgment should be made available, or the Lawtel summary should be available either for general publication or limited publication to specified financial institutions.

In dismissing the appeal against the order refusing publication of the judgment, the English Court of Appeal held that the parties' wish for confidentiality and privacy should outweigh the public interest in public hearings. However, the Court of Appeal added that the court retained a supervisory role under the English Arbitration Act 1996, and the court had to be ready to hear representations from either party for the hearing to continue in public or, where appropriate, to raise that possibility itself.

The Court of Appeal, however, allowed the appeal in respect of the Lawtel summary, and held that Moscow could publish the Lawtel summary for general circulation since it did not disclose any sensitive or confidential information, and there were no other grounds to preclude its publication.

Significantly, the Court of Appeal held that CPR rule 62.10(3)(b), in providing for arbitration claims to be heard in private, represented only the starting point of the analysis, and could easily give way to a public hearing. The court further held that, even though a hearing might have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in public, where this could be done without disclosing significant confidential information.

Mance, L.J. considered various factors which were relevant to whether a judgment should be given in public:

The public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militates in favour of a public judgment in respect of judgments given on applications under section 68. The desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity ... Arbitration is an important feature of international, commercial and financial life, and there is legitimate interest in its operation and practice. The desirability of a public judgment is particularly present in any case where a judgment involves points of law or practice which may offer future guidance to lawyers or practitioners.²⁹

A similar position has been taken in New Zealand concerning the treatment of arbitral awards in enforcement or challenge proceedings in the courts. In *Television New*

²⁹ [2004] 3 W.L.R. 533, 555.

Zealand v. Langley Productions,³⁰ disputes arose out of interrelated contracts between Television New Zealand Ltd. (TVNZ), a state-owned enterprise, Langley Productions and one of its newsreaders (H) and litigation ensued. TVNZ sought to keep the court file confidential, but Langley Productions and H sought the opposite. There was an arbitration clause in the contract between TVNZ and Langley Productions but not in the contract between TVNZ and H. The parties eventually agreed to submit their disputes to arbitration. The arbitration agreement contained a specific confidentiality clause expressing itself subject to section 14(2) of the New Zealand Arbitration Act 1996. After the award was rendered, TVNZ applied to the High Court to appeal against the decision of the arbitrator, and Langley Productions applied to enforce the award. TVNZ then applied for an order that the confidentiality provisions no longer applied, and Langley Productions and H opposed the application. Robertson, J. held that the confidentiality provisions in the arbitration no longer applied, as “the confidentiality which the parties have adopted and embraced with regard to their dispute resolution in arbitration cannot automatically extend to processes for enforcement or challenge in the High Court.”³¹ He also noted that the parties specifically chose to allow for the right of appeal, and that one party had sought to register the award and enforce it in the High Court. Robertson, J. concluded that, once either of those steps occurred, the principles applicable to the High Court hearings would determine the question of access and public knowledge. If the cloak of confidentiality in private dispute resolution necessarily applied to subsequent proceedings in the High Court, then this would require a clear and unambiguous determination of Parliament. Accordingly, Robertson, J. held that the arbitral award should be available for public scrutiny and without any impediment being created by the confidentiality clause in the TVNZ–Langley Productions contract, and that the proceedings to dispose of certain matters would also take place in public.

C. CONSENT OF THE PARTIES (PRE/POST DISPUTE; IMPLIED?)

The consent of the parties to public disclosure of the existence of the arbitration (as well as arbitration-related information) is another exception to the implied obligation of confidentiality. For instance, the consent of the parties can be written into the substantive agreement between the parties, or given after a dispute has arisen in a post-dispute arbitration agreement. The implied consent of the parties can arise from the parties’ conduct after a dispute has arisen. One example of this is where an arbitrating party applies to the court for the removal of an arbitrator, in which case that arbitrating party implicitly gives consent to the challenged arbitrator to disclose matters concerning the arbitration to the court. A further question that arises in this context is whether an application to the court arising out of an arbitration, without an arbitrating party asking for those proceedings to be held in camera (assuming such provisions exist in the relevant national court), amounts to a consent to public disclosure of all facts and documents put before the court.

³⁰ [2000] N.Z.L.R. 250 (H.C.).

³¹ *Id.* para. 38.

D. BY COMPULSION OF LAW

Statutory provisions may override any obligation of confidentiality that parties may have provided for in an arbitration agreement and compel disclosure of arbitration-related documents. Anti-money laundering legislation, for instance, imposes a duty of disclosure on a person who suspects that a transaction may involve property that, directly or indirectly, represents the proceeds of crime. In Singapore, the relevant anti-money laundering legislation is the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A) (SCA). Section 39(1) of the SCA³² imposes a duty of disclosure on a person who knows or has reasonable grounds to suspect that certain property may represent the proceeds of, or is used in connection with, drug trafficking or other criminal conduct. However, section 39(6) of the SCA³³ excuses an arbitrating party from any breach of the obligation of confidentiality, and bars any claim against the arbitrating party as a result of a disclosure pursuant to section 39(1) of the same Act.³⁴ Likewise, any police or public authority may have statutory power to demand production of documents, and there is no privilege attaching to documents submitted in arbitration.

E. WITH LEAVE OF COURT

Although various cases have recognized the disclosure of arbitration-related documents with leave of court as an exception to the obligation of confidentiality,³⁵ the question remains as to whether or not a court or tribunal order for disclosure overrides the obligation of confidentiality.³⁶

In *Hassneh Insurance*, Colman, J. advised on the disclosure of arbitration documents subject to an obligation of confidentiality as follows:

If a party is put in a “potentially extremely hazardous” position and cannot decide whether to disclose documents as in doing so he may therefore be in breach of his duty of confidentiality to the opposite party to the arbitration or be accused of failing to disclose a relevant document in his possession which would be necessary for fairly disposing of the litigation, he should first write

³² Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A), s. 39(1) reads as follows: “39. Duty to disclose knowledge or suspicion (1) Where a person knows or has reasonable grounds to suspect that any property: (a) in whole or in part, directly or indirectly, represents the proceeds of; (b) was used in connection with; or (c) is intended to be used in connection with, any act which may constitute drug trafficking or criminal conduct, as the case may be, and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge or suspicion or the information or other matter on which that knowledge or suspicion is based to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable after it comes to his attention.”

³³ *Id.* s. 39(6) reads as follows: “(6) Where a person discloses in good faith to a Suspicious Transaction Reporting Officer (a) his knowledge or suspicion of the matters referred to in subsection (1)(a), (b) or (c); or (b) any information or other matter on which that knowledge or suspicion is based, the disclosure shall not be treated as a breach of any restriction upon the disclosure imposed by law, contract or rules of professional conduct and he shall not be liable for any loss arising out of the disclosure or any act or omission in consequence of the disclosure.”

³⁴ *Id.* s. 39(1).

³⁵ *Ali Shipping*, *supra* note 2, at 327; *Emmott*, *supra* note 2, para. 107.

³⁶ See, e.g., ROBERT MERKIN, *ARBITRATION LAW* para. 17.32 (4th ed. 2008), where Merkin expresses the view that: “[i]t has nevertheless been doubted whether these exceptions actually exist, in that the cases in which disclosure has been permitted following an order or permission of the court rest upon either the need to protect a party’s legitimate interest or the interests of justice.”

to his opposite party in the arbitration inviting consent to disclose; if this is not forthcoming, he should decline to let the third party inspect the same without first obtaining an order of court under O. 24 r. 11 of the Rules of Court.

However, the English Court of Appeal in *Emmott* expressed the view that the court does not have a general power to order or give permission for disclosure of arbitration-related documents when an arbitration is underway. Thomas, L.J. considered that leave of the court is a matter which arises in circumstances where the court is deciding the issue as between a party to the arbitration and a stranger (as where the court is ordering disclosure in litigation of arbitration documents in the possession of one party) or in circumstances where the arbitration has come to an end. Thomas, L.J. further considered that:

[i]t is difficult to see readily how it is consistent with the principles in the 1996 Act that there is to be an implied term which requires resort to the court during the currency of the arbitration for the court to determine these issues as between the parties to the arbitration ... I cannot accept that the implied term of confidentiality should be formulated to confer by this means jurisdiction on the court; it would be contrary to the ethos and policy of the Act.³⁷

Collins, L.J. in *Emmott* expressed similar sentiments:

[i]t does not follow from the fact that a court refers to the possibility of an exception for the order or leave of the court in a case where it has the power to make the order or give leave ... the court has a general and unlimited jurisdiction to consider whether an exception to confidentiality exists and applies.³⁸

These remarks are problematical, because they seem to preclude the intervention of an independent third party to resolve difficulties in defining the scope and extent of exceptions to confidentiality. However, this problem will be addressed in the conclusion below.

F. DISCLOSURE FOR PROTECTING LEGITIMATE INTERESTS OF AN ARBITRATING PARTY

The disclosure of arbitration documents for the protection of the legitimate interests of an arbitrating party is clearly a potentially very wide exception. The enforcement of an arbitrating party's rights under an earlier arbitration award would certainly be a disclosure for protecting the legitimate interests of the winning party. Alternatively, a party may wish to disclose an arbitration award to adduce evidence of a position that was taken by an arbitrating party in an earlier arbitration so as to raise issue estoppel. In *Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Company of Zurich*,³⁹ a case arising out of two separate arbitrations concerning European Reinsurance's ("European Re.") obligation to indemnify AEGIS under a reinsurance agreement, European Re. sought to refer to the arbitration award obtained from the first arbitration in the second arbitration on the basis that the same dispute had been raised on the pleadings in the second arbitration between the same parties. The tribunals for both the first and second arbitrations

³⁷ *Emmott*, *supra* note 2, para. 124.

³⁸ *Id.* para. 87.

³⁹ *AEGIS*, *supra* note 2.

were different. As there was an express confidentiality agreement between the parties that had been entered into in the course of the first arbitration, AEGIS contended that the award in the first arbitration should not be disclosed to the tribunal in the second arbitration because it would breach the confidentiality of the first arbitration. Subsequently, AEGIS obtained an *ex parte* injunction against European Re. in order to stop European Re. from referring to the award from the first arbitration, thereby precluding European Re. from raising a plea of issue estoppel in the second arbitration. European Re. applied unsuccessfully to discharge the injunction. European Re. then appealed successfully to the Court of Appeal of Bermuda, and discharged the injunction. AEGIS appealed to the Privy Council and sought to reinstate the injunction to restrain European Re. from disclosing the arbitral award in the first arbitration to any third party, including the tribunal in the second arbitration. The issue before the Privy Council was whether, on its proper construction, a confidentiality agreement that the parties had entered into in the first arbitration precluded reliance on the arbitral award in the second arbitration.

In dismissing AEGIS' appeal, the Privy Council held that the confidentiality agreement between the parties did not preclude reliance on the arbitral award in the first arbitration. The Privy Council was of the view that the principle of issue estoppel meant that the parties to proceedings were bound by an earlier arbitral award on the same issue, and that confidentiality was immaterial. In that context, the Privy Council considered that issue estoppel was "a species of the enforcement of the rights given by the award just as much as it would be a cause of action estoppel" even though it was a rule of evidence rather than a mechanism for enforcement as such.⁴⁰

There is a requirement of reasonable necessity in the application of this exception for disclosure in the protection of the legitimate interests of an arbitrating party. In *Ali Shipping Corp. v. Shipyard Trogir*,⁴¹ Potter, L.J. framed this requirement as follows: "disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party".

However, Potter, L.J. also added that:

In this context, that means reasonably necessary for the establishment of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by the third party.⁴²

In *Ali Shipping*, Potter, L.J. noted the comments of Colman, J. in *Hassneh Insurance* that it was not enough that an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed, nor that their disclosure would be "merely helpful, as distinct from necessary, for the protection of such rights," but went on

⁴⁰ *Id.* para. 15.

⁴¹ *Ali Shipping*, *supra* note 2, at 327.

⁴² *Id.* See also *Glidepath B.V. v. Thompson* (No. 2), [2005] 2 Lloyd's Rep. 549 (Q.B. (Comm. Ct.)), in which the court held that a non-party to an arbitration agreement who applies for access to arbitration-related documents on a court file must show that access to the arbitration-related documents is (a) reasonably necessary to protect or establish the legal rights of the third party, or (b) in the interests of justice.

to qualify the concept of reasonable necessity as he considered that the court should take a rounded view.

Potter, L.J. stated that:

When the concept of reasonable “necessity” comes into play in relation to the enforcement or protection of a party’s legal rights, it seems to me to require a degree of flexibility in the court’s approach. For instance, in reaching its decision, the court should not require the parties seeking disclosure to prove necessity regardless of difficulty or expense. It should approach the matter in the round, taking account of the nature and purpose of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere.⁴³

One question that arises from Potter, L.J.’s observations above is whether the protection of the legitimate interests of an arbitrating party is only confined to the protection of that arbitrating party’s legitimate interests vis-à-vis a third party. Notably, in *Emmott*, the Court of Appeal did not appear to confine the protection of the legitimate interests of an arbitrating party vis-à-vis a third party only.

Thomas, L.J. did not state that a third party was necessary to establish this exception: “Use can, however, be made [of arbitration documents] if it is reasonably necessary to protect the legitimate private interests of a party.”⁴⁴

G. WHERE THE INTERESTS OF JUSTICE/THE PUBLIC INTEREST REQUIRE IT

If a party has given inconsistent evidence in two separate arbitrations, it is clear that the interests of justice (sometimes called public interest) would require disclosure of arbitration documents in spite of any obligation of confidentiality. In *London & Leeds*,⁴⁵ it was found that an expert valuer in an arbitration had given contrary expert evidence in two previous arbitrations. As discussed above,⁴⁶ Mance, L.J. held that, where a witness was proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest. Mance, L.J. therefore held that the duty of confidentiality that the parties in the two previous arbitrations owed to the expert valuer in respect of his evidence in those arbitrations was overridden in the interests of the fair disposal of the proceedings.

It is useful to note that there is an issue of whether the interests of justice is an exception in itself, or whether it is part of a wider public interest. The English courts appear to be divided in their opinion on this. The public interest exception was expressly recognized by Mance, L.J. in *London & Leeds*,⁴⁷ and also by Thomas, L.J. in

⁴³ *Id.*

⁴⁴ *Emmott*, *supra* note 2, para. 132(iii). Collins, L.J. expressed the same view at para. 107: “where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party.”

⁴⁵ *London & Leeds*, *supra* note 21.

⁴⁶ *Id.*

⁴⁷ *Id.* at 109.

Emmott.⁴⁸ However, Potter, L.J. in *Ali Shipping* preferred the “interests of justice” which he considered to be narrower than the “public interest” exception.⁴⁹ Likewise, Collins, L.J. in *Emmott* expressly recognized the interests of justice exception, but only tentatively recognized the public interest exception.⁵⁰

Like the legitimate interests exception, there also seems to be a reasonable necessity requirement for the public interest exception, in that disclosure of arbitration documents subject to an obligation of confidentiality should go no further than is reasonably necessary to achieve the purpose of that public interest in disclosure.⁵¹

H. WHERE THERE IS AN OBLIGATION OF DISCLOSURE

Corporations owe an obligation of disclosure to various stakeholders who would, according to conventional theory, be strangers to the arbitration, but who certainly have a legitimate interest in the progress and outcome of the arbitration. Such stakeholders include:

- (a) shareholders;
- (b) bondholders;
- (c) beneficiaries of trust corporations;
- (d) any stock exchange or professional body to which an arbitrating party belongs;
- (e) joint venture partners or anyone covered by the *uberrimae fidei* principle;
- (f) a potential new shareholder acquirer conducting due diligence; and
- (g) insurers under an indemnity policy covering the subject matter of the arbitration.

Likewise, insurance and reinsurance companies may owe obligations of disclosure to each other. Parties who are in contracts with back to back obligations may also be subject to an obligation of disclosure.

I. EVERYDAY SITUATIONS

The authorities do not discuss everyday situations which would most certainly be exceptions to the obligation of confidentiality, but one can conceive of a myriad of such everyday situations. Some examples of these situations include:

- (a) discussing an arbitration with members of the family (after swearing them to secrecy);
- (b) discussing an arbitration with lawyers in the same firm to check for conflicts;
- (c) discussing an arbitration with potential arbitrators;
- (d) disclosing details of an arbitration to an immigration office in a visa application.

⁴⁸ *Emmott*, *supra* note 2, para. 130.

⁴⁹ *Ali Shipping*, *supra* note 2, at 327–28.

⁵⁰ *Emmott*, *supra* note 2, para. 107.

⁵¹ *Pharaon v. Bank of Credit and Commerce International S.A. (in liq.)*, [1998] 4 All E.R. 455, per Rattee, J.

J. WHERE DISCLOSURE IS MADE TO PROFESSIONAL OR OTHER ADVISERS AND PERSONS ASSISTING IN THE CONDUCT OF THE ARBITRATION

Where the disclosure of arbitration documents is made to professional or other advisers and persons assisting in the conduct of the arbitration, this should be treated as a legitimate exception to the obligation of confidentiality. Any disclosure to lawyers who are not involved in the arbitration should not be a problem because lawyers are subject to legal professional privilege in any case. Any disclosure made to persons assisting in the conduct of the arbitration should also be an exception to the obligation of confidentiality. Such persons include:

- (a) potential witnesses, both factual and expert;
- (b) private investigators;
- (c) executives or in-house counsel of affiliate companies;
- (d) secretaries and personal assistants to persons working on the arbitration even if not employees of the arbitrating party (e.g., from related or affiliated companies); and
- (e) independent providers of business services (transcribers, interpreters, photocopiers, hotel business centers, couriers).

VIII. THE PROBLEMS OF DRAFTING

It is clear that there are a myriad number of exceptions to the obligation of confidentiality, some of which have been expressly recognized by the courts. The reservations of the Privy Council in *AEGIS* to adopting Potter, L.J.'s approach in *Ali Shipping* of characterizing a duty of confidentiality as an implied term, and then to formulate exceptions to which it would be subject,⁵² clearly highlight the problems of drafting appropriate national legislation or arbitral rules to provide for some form of confidentiality in arbitration. In delivering the advice of the Privy Council in *AEGIS*, Lord Hobhouse aptly pointed out that formulating exceptions to the obligation 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, and elides privacy and confidentiality.⁵³

The drafters of the English Arbitration Act 1996 were fully aware of the numerous exceptions and qualifications to the obligation of confidentiality, and the consequent difficulty of drafting provisions to govern confidentiality in arbitration. In the English Departmental Advisory Committee Report of February 1996 on the draft Arbitration Bill ("DAC Report"), it was considered that the privacy and confidentiality in arbitrations was one area of law which was better left to the common law to evolve. The DAC Report noted that:

⁵² *Ali Shipping*, *supra* note 2, at 326–27.

⁵³ *AEGIS*, *supra* note 2, at 1050.

Given these exceptions and qualifications, the formulation of any statutory principles would be likely to create new impediments to the practice of English arbitration and, in particular, to add to English litigation on the issue. Far from solving a difficulty, the DAC was firmly of the view that it would create new ones. Indeed, even if acceptable statutory guidelines could be formulated, there would remain the difficulty of fixing and enforcing sanctions for non-compliance.⁵⁴

The New Zealand Law Commission expressed similar views regarding the inadequacy of the previous section 14 of the New Zealand Arbitration Act 1996,⁵⁵ and its failure to deal with the many exceptions to the obligation of confidentiality.⁵⁶ J. Bruce Robertson, J. led the New Zealand Law Commission in drafting its report on the amendments to the New Zealand Arbitration Act (the “Robertson Report”), and the Robertson Report made the following observations on the previous section 14 of the New Zealand Arbitration Act 1996:

Section 14, however, arguably contains flaws: First, the exceptions to the implied term seem insufficiently wide to deal with many everyday situations where disclosure may be necessary. In England, for example, cases have recognized exceptions to their common law rule, which may not be contemplated under section 14. Second, it is arguable that no statutory implied term can ever set out exhaustively all of the exceptions that may arise; these need to be determined on a case-by-case basis.⁵⁷

IX. HOW HAS NATIONAL LEGISLATION DEALT WITH THE OBLIGATION OF CONFIDENTIALITY?

A. UNCITRAL MODEL LAW AND RULES

The UNCITRAL Model Law does not say anything about confidentiality.⁵⁸ Likewise, the UNCITRAL Arbitration Rules do not provide for confidentiality,

⁵⁴ Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* ch. 2, para. 17 (February 1996).

⁵⁵ The previous s. 14 of the New Zealand Arbitration Act 1996 read as follows: “14. Disclosure of information relating to arbitral proceedings and awards prohibited (1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings. (2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection: (a) If the publication, disclosure, or communication is contemplated by this Act; or (b) To a professional or other adviser of any of the parties.”

⁵⁶ New Zealand Law Commission, *Improving the Arbitration Act 1996* (Report 83, February 2003).

⁵⁷ *Id.* para. 5.

⁵⁸ See DR. PETER BINDER, *INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS* para. 11-005 (2d ed. 2005) (“The case, decided by the High Court of Australia, of *Esso v. Plouman* sparked the international discussion on whether the requirement of confidentiality of the arbitral proceedings was adequately protected. The only international text to refer to the issue are the UNCITRAL Arbitration Rules; the Model Law does not deal with the issue and only few national laws make provision for protecting confidentiality of the proceedings. Parties to international commercial arbitration were becoming ‘increasingly concerned over the absence of any rules in respect of confidentiality,’ and further study of the issues was thought to be a good idea. However, despite the Secretariat suggesting a solution in the form of a model legislative provision, the delegates, although holding UNCITRAL to be the right body for attending to this issue, saw only a small likelihood of ‘achieving anything more than a rule to the effect that ‘arbitration is confidential except where disclosure is required by law.’” Accordingly, the topic was at first accorded low priority by the commission, the Working Group however later expressed more interest here.”). See also Report of the United Nations Commission on International Trade Law on the Work of its Thirty-second Session, para. 359 U.N. Doc. A/54/17 (May 17–June 4, 1999),

apart from the award, which may be made public only with the consent of both parties.⁵⁹

The UNCITRAL Notes for Organizing Arbitral Proceedings make the following points:

- (a) There is no uniform answer in national laws as to the extent to which the participants in an arbitration are under a duty to observe the confidentiality of information relating to the case.
- (b) Parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality.
- (c) Participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected.⁶⁰

B. HONG KONG

Currently, section 2D of the Hong Kong Arbitration Ordinance allows a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court.⁶¹ Section 2E of the Arbitration Ordinance restricts the reporting of proceedings otherwise than in open court.⁶²

“Some support was given to the topic [of confidentiality] as one of priority. In support of that view, it was explained that parties involved in arbitral proceedings were becoming increasingly concerned over the absence of any rules in respect of confidentiality. It was felt that it would be useful to study the issues, which were becoming increasingly difficult and thorny. Another view was that, although the topic would merit study, it was not one that should be given high priority by the Commission, because of the absence of any viable solutions. It seemed to some that there was little likelihood of achieving anything more than a rule to the effect that ‘arbitration is confidential except where disclosure is required by law’. The prevailing view was that, albeit interesting, the topic was not of high priority.”; and Report of the Working Group on Arbitration on the Work of its Thirty-second Session, para. 112 U.N. Doc. A/CN.9/468 (March 20–31, 2000), in which interest in “the duty of confidentiality, with regard to both arbitration and conciliation” was expressed by the Working Group.

⁵⁹ UNCITRAL Arbitration Rules, art. 32(5).

⁶⁰ UNCITRAL Notes for Organizing Arbitral Proceedings, para. 31.

⁶¹ Hong Kong Arbitration Ordinance (Cap. 341), s. 2D reads as follows: “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.”

⁶² Hong Kong Arbitration Ordinance (Cap. 341), s. 2E reads as follows: “2E. Restrictions on reporting of proceedings heard otherwise than in open court (1) This section applies to proceedings under this Ordinance in the Court or Court of Appeal heard otherwise than in open court. (2) A court in which proceedings to which this section applies are being heard shall, on the application of any party to the proceedings, give directions as to what information, if any, relating to the proceedings may be published. (3) A court shall not give a direction under subsection (2) permitting information to be published unless: (a) all parties to the proceedings agree that such information may be published; or (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential. (4) Notwithstanding subsection (3), where a court gives a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, it shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall: (a) give directions as to the action that shall be taken to conceal that matter in those reports; and (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.”

The Hong Kong draft Arbitration Bill 2007 departs from the existing sections 2D and 2E because the presumption now is that arbitration court proceedings will be heard in open court.⁶³ Apart from this significant amendment, the draft Arbitration Bill retains the wording of sections 2D and 2E in clauses 16(2) and 17(1) to (4) respectively. Clauses 17(5) and (6) add a provision allowing judgments to be published with sanitization if the court thinks fit, as well as a blanket prohibition of reporting on proceedings heard otherwise than in open court for a period of up to ten years.⁶⁴ Clause 18 of the draft Arbitration Bill⁶⁵ adopts the previous section 14 of the New Zealand Arbitration Act 1996 (despite criticisms made of it in the Robertson Report) but adds clause 18(2)(b) to cover the publication, disclosure or communication that a party is obliged to make by virtue of other provisions of the law. Clause 18(2)(a) permits the disclosure of information relating to arbitral proceedings and awards made in those proceedings in certain situations “as contemplated by this Ordinance,” which include:

- (a) an application by a party for proceedings to be heard otherwise than in open court (clause 16);
- (b) restrictions on reporting of proceedings heard otherwise than in open court (clause 17);
- (c) a challenge of arbitrators (clause 26);
- (d) court-ordered interim measures (clause 46);
- (e) special powers of the court in relation to arbitral proceedings (clause 61);
- (f) enforcement of orders and directions of arbitral tribunal (clause 62);
- (g) taxation of costs of arbitral proceedings (other than fees and expenses of arbitral tribunal) (clause 76);
- (h) applications for setting aside of arbitral award (clause 82);
- (i) enforcement of arbitral awards (clauses 85, 86);
- (j) enforcement of convention awards (clause 88, 89); refusal of enforcement of convention awards (clause 90);
- (k) consolidation of arbitrations (Schedule 3, clause 2);

⁶³ Hong Kong draft Arbitration Bill, cl. 16(1) reads as follows: “Proceedings under this Ordinance in the court shall, subject to subsection (2), be heard in open court.”

⁶⁴ Hong Kong draft Arbitration Bill, cl. 17(5) and (6) are not in the current s. 2E of the Arbitration Ordinance, and read as follows: “(5) Where a court directs under subsection (4) that reports of a judgment may be published, but any party reasonably wishes to conceal any matter in those reports (including the fact that he was such a party), the court shall: (a) make a direction as to the action to be taken to conceal that matter in those reports; and (b) if it considers that a report published in accordance with the direction made under paragraph (a) would still be likely to reveal that matter, direct that no report is to be published until after the end of such period as it may direct, not exceeding 10 years. (6) A direction of the court under this section shall be subject to no appeal.”

⁶⁵ Hong Kong draft Arbitration Bill, cl. 18 reads as follows: “18. Disclosure of information relating to arbitral proceedings and awards prohibited (1) Unless otherwise agreed by the parties, a party shall not publish, disclose or communicate any information relating to: (a) the arbitral proceedings under the arbitration agreement; or (b) an award made in those proceedings. (2) Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party: (a) if the publication, disclosure or communication is contemplated by this Ordinance; (b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make such publication, disclosure or communication; or (c) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.”

- (l) determination of preliminary question of law by court (Schedule 3, clause 3);
- (m) challenging arbitral award on ground of serious irregularity (Schedule 3, clause 4);
- (n) appeal against arbitral award on question of law (Schedule 3, clause 5); and
- (o) application for leave to appeal against arbitral award on question of law (Schedule 3, clause 6).

There is no guidance given to the court in the current Arbitration Ordinance and the draft Arbitration Bill as to what criteria to apply when ordering a closed door hearing.⁶⁶

C. NEW ZEALAND

As discussed above, the previous section 14 of the New Zealand Arbitration Act 1996 was criticized in the February 2003 Robertson Report, and the main criticisms were as follows:

- (a) Exceptions to the implied term seem insufficiently wide to deal with many everyday situations where disclosure may be necessary.
- (b) No statutory implied term can ever set out exhaustively all of the exceptions that may arise; these need to be determined on a case-by-case basis.
- (c) The previous section 14 did not address the concept of open justice in the context of arbitrations that result in subsequent proceedings for challenge or enforcement in the courts.⁶⁷

In response to the criticisms of the previous section 14 of the Arbitration Act 1996, the New Zealand Law Commission's recommendations were as follows:

- (1) The hearing should take place in private.
- (2) Subject to (c) to (d) below, the arbitral tribunal and the parties to the arbitration agreement should not disclose pleadings, evidence, discovered documents or the award arising from the arbitration.
- (3) The requirement is subject to disclosure when compelled by court order or subpoena, or to a professional or other adviser of any of the parties.
- (4) The arbitrating parties may apply to the arbitral tribunal for an order that they be permitted to disclose information otherwise protected by the implied term. Such an order:
 - (i) should only be made after the arbitral tribunal has heard from the arbitrating parties; and

⁶⁶ Cf. New Zealand Arbitration Act 1996 (with effect from October 18, 2007), s. 14F(2), which provides that the court may order a hearing to be heard in camera "only if the court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private."

⁶⁷ See, e.g., *Television New Zealand Ltd.*, *supra* note 25.

- (ii) if the arbitral tribunal is satisfied that:
 - such an order is necessary to enable the party applying for disclosure to comply with any statutory, contractual or regulatory requirement; and
 - disclosure of the information would have been required if no dispute had arisen or the dispute had been resolved by private means (e.g., negotiation or mediation) other than arbitration.
- (5) If the mandate of the arbitral tribunal has expired, the application referred to in paragraph (d) would be made to the High Court (which would apply the same criteria as the arbitral tribunal).
- (6) If the application is declined by an arbitral tribunal, then there would be an automatic right of appeal to the High Court. There is no appeal where the application is made at first instance to the High Court.

Sections 14A to I of the Arbitration Act 1996 (introduced with effect from October 18, 2007) therefore address the above recommendations by the New Zealand Law Commission in the Robertson Report. These provisions read as follows.

14A. Arbitral proceedings must be private

An arbitral tribunal must conduct the arbitral proceedings in private.

14B. Arbitration agreements deemed to prohibit disclosure of confidential information

- (1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.
- (2) Subsection (1) is subject to section 14C.

14C. Limits on prohibition on disclosure of confidential information in section 14B
A party or an arbitral tribunal may disclose confidential information—

- (a) to a professional or other adviser of any of the parties; or
- (b) if both of the following matters apply:
 - (i) the disclosure is necessary—
 - (A) to ensure that a party has a full opportunity to present the party's case, as required under Article 18 of Schedule 1 [Model Law];⁶⁸ or
 - (B) for the establishment or protection of a party's legal rights in relation to a third party; or
 - (C) for the making and prosecution of an application to a court under this Act; and
 - (ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or

⁶⁸ Art. 18 of Schedule 1 to the New Zealand Arbitration Act 1996 on the equal treatment of parties is the same as art. 18 of the UNCITRAL Model Law and reads: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

- (c) if the disclosure is in accordance with an order made, or a subpoena issued, by a court; or
- (d) if both of the following matters apply:
 - (i) the disclosure is authorised or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and
 - (ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or
- (e) if the disclosure is in accordance with an order made by—
 - (i) an arbitral tribunal under section 14D; or
 - (ii) the High Court under section 14E.

14D. Arbitral tribunal may allow disclosure of confidential information in certain circumstances

- (1) This section applies if—
 - (a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under section 14C(a) to (d)); and
 - (b) at least one of the parties agrees to refer that question to the arbitral tribunal concerned.
- (2) The arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.

14E. High Court may allow or prohibit disclosure of confidential information if arbitral proceedings have been terminated or party lodges appeal concerning confidentiality

- (1) The High Court may make an order allowing a party to disclose any confidential information—
 - (a) on the application of that party, which application may be made only if the mandate of the arbitral tribunal has been terminated in accordance with Article 32 of Schedule 1 [termination of proceedings]; or
 - (b) on an appeal by that party, after an order under section 14D(2) allowing that party to disclose the confidential information has been refused by an arbitral tribunal.

- (2) The High Court may make an order under subsection (1) only if—
 - (a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed; and
 - (b) the disclosure is no more than what is reasonably required to serve the other considerations referred to in paragraph (a).
- (3) The High Court may make an order prohibiting a party (party A) from disclosing confidential information on an appeal by another party (party B) who unsuccessfully opposed an application by party A for an order under section 14D(2) allowing party A to disclose confidential information.
- (4) The High Court may make an order under this section only if it has given each of the parties an opportunity to be heard.
- (5) The High Court may make an order under this section—
 - (a) unconditionally; or
 - (b) subject to any conditions it thinks fit.
- (6) To avoid doubt, the High Court may, in imposing any conditions under subsection (5)(b), include a condition that the order ceases to have effect at a specified stage of the appeal proceedings.
- (7) The decision of the High Court under this section is final.

14F. Court proceedings under Act must be conducted in public except in certain circumstances

- (1) A court must conduct proceedings under this Act in public unless the Court makes an order that the whole or any part of the proceedings must be conducted in private.
- (2) A court may make an order under subsection (1)—
 - (a) on the application of any party to the proceedings; and
 - (b) only if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.
- (3) If an application is made for an order under subsection (1), the fact that the application had been made, and the contents of the application, must not be made public until the application is determined.
- (4) In this section and sections 14G to 14I,—

Court—

- (a) means any court that has jurisdiction in regard to the matter in question; and
- (b) includes the High Court and the Court of Appeal; but

- (c) does not include an arbitral tribunal proceedings includes all matters brought before the Court under this Act (for example, an application to enforce an arbitral award).

14G. Applicant must state nature of, and reasons for seeking, order to conduct Court proceedings in private

An applicant for an order under section 14F must state in the application—

- (a) whether the applicant is seeking an order for the whole or part of the proceedings to be conducted in private; and
 (b) the applicant's reasons for seeking the order.

14H. Matters that Court must consider in determining application for order to conduct Court proceedings in private

In determining an application for an order under section 14F, the Court must consider all of the following matters:

- (a) the open justice principle; and
 (b) the privacy and confidentiality of arbitral proceedings; and
 (c) any other public interest considerations; and
 (d) the terms of any arbitration agreement between the parties to the proceedings; and
 (e) the reasons stated by the applicant under section 14G(b).

14I. Effect of order to conduct Court proceedings in private

- (1) If an order is made under section 14F,—
- (a) no person may search, inspect, or copy any file or any documents on a file in any office of the Court relating to the proceedings for which the order was made; and
 (b) the Court must not include in the Court's decision on the proceedings any particulars that could identify the parties to those proceedings.
- (2) An order remains in force for the period specified in the order or until it is sooner revoked by the Court on the further application of any party to the proceedings.

D. SINGAPORE

Section 22 of the Singapore International Arbitration Act (Cap. 143A) (IAA)⁶⁹ allows a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court. Section 23 of the IAA⁷⁰ restricts reporting of proceedings heard otherwise than in open court. The Singapore position set out in sections 22 and

⁶⁹ IAA, s. 22 reads as follows: "Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court."

⁷⁰ IAA, s. 23 reads as follows: "(1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court. (2) A court hearing any proceedings to which this section applies shall,

23 of the IAA is more or less similar to the current sections 2D and 2E of the Hong Kong Arbitration Ordinance.

One unresolved question in Singapore is whether, if no application is made for a gag order, that amounts to a waiver of confidentiality so that all court proceedings can be reported and the party is then released from all obligations of confidentiality. Some arbitration cases heard in the courts are reported without disclosure of parties' names,⁷¹ while other case reports identify the parties' names.⁷² Should the rules of confidentiality be different for these two kinds of cases?

Australia, Sweden and the United States are three important countries where confidentiality is not recognized as a legal incident of arbitration unless parties expressly provide for it.

E. AUSTRALIA

There is no national legislation on confidentiality in Australia, and the High Court of Australia in *Esso Australia*⁷³ has declared that there is no general rule of confidentiality except that there is a rule of privacy in arbitration hearings. However, it also held that the privacy attaching to an arbitration was just an incident of the subject matter of the agreement to arbitrate rather than a term to be implied into the arbitration agreement.⁷⁴

F. SWEDEN

In *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.*,⁷⁵ better known as the "Bulbank case," the Swedish Supreme Court held that there is no implied duty of confidentiality in private arbitrations. Accordingly, there are only two ways to safeguard confidentiality of arbitration proceedings under Swedish law: (i) expressly contract for confidentiality; or (ii) adopt arbitration rules that expressly provide for confidentiality.

on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published. (3) A court shall not give a direction under subsection (2) permitting information to be published unless: (a) all parties to the proceedings agree that such information may be published; or (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential. (4) Notwithstanding subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall: (a) give directions as to the action that shall be taken to conceal that matter in those reports; and (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate."

⁷¹ See, e.g., *VV v. VW*, [2008] 2 S.L.R. 929 (H.C.).

⁷² See, e.g., *International Coal Pte. Ltd. v. Kristle Trading Ltd.*, [2009] 1 S.L.R. 945 (H.C.).

⁷³ [1995] 128 A.L.R. 391 (H.C.A.).

⁷⁴ *Id.* at 401.

⁷⁵ Case T-1881-99.

G. UNITED STATES

Likewise, the United States does not recognize confidentiality as a general rule.⁷⁶

H. DUBAI INTERNATIONAL FINANCIAL CENTRE (DIFC)

Section 14 of the DIFC Arbitration Law (DIFC Law No. 1 of 2008)⁷⁷ does not provide for any release from the obligation of confidentiality in arbitration, and does not envisage any further exceptions other than by an order of the DIFC Court. It is therefore open to the DIFC Court to interpret the general exception of the order of court as allowing the DIFC Court to determine each application for leave under section 14 according to the circumstances and merits of each case, enabling the jurisprudence of exceptions to confidentiality to be incrementally developed by case law, rather than relying only on the established precedents.

X. HOW HAVE INSTITUTIONAL RULES DEALT WITH THE OBLIGATION OF CONFIDENTIALITY?

In a paper published in 2005,⁷⁸ the first author advanced the argument that the common law debate about confidentiality was less important than it seemed because in practice, most arbitrations were institutional and most institutions gave some kind of protection of confidentiality. The first author made an analysis of twelve institutions as to the extent to which they protected confidentiality, and highlighted six aspects of confidentiality:

- (a) whether the rules provided for general confidentiality;
- (b) whether the rules provided for non-disclosure of existence of arbitration;
- (c) whether the rules provided for confidentiality to extend to documents used or generated in the arbitration;
- (d) whether the tribunal was bound by confidentiality;
- (e) whether witnesses were bound by confidentiality; and
- (f) whether confidentiality extended to the award.

⁷⁶ *United States v. Panhandle Eastern Corp. et al.*, 118 F.R.D. 346 (D. Del. 1988). See also *Contship Containerlines, Ltd. v. PPG Industries, Inc.*, 2003 U.S. Dist. LEXIS 6857 (U.S. District Court for the Southern District of New York). Cf. *Derrick Walker v. Craig Kirin Gore*, 2008 U.S. Dist. LEXIS 84297 (U.S. District Court for the Southern District of Indiana, Indianapolis Division), in which the court held that the court file relating to the action between the parties for breach of contract and tort was to remain under seal pending the decision of the court on whether or not to compel arbitration, as the parties had agreed to arbitration on the basis that the terms of their agreements (which contained provisions imposing confidentiality) remained confidential.

⁷⁷ DIFC Arbitration Law (DIFC Law No. 1 of 2008), s. 14 reads as follows: "Unless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court."

⁷⁸ Michael Hwang S.C. & Lee May Ling, *Confidentiality in Arbitration: The Criteria Adopted by Institutions*, SINGAPORE INSTITUTE OF ARBITRATORS NEWSLETTER 3-7 (No. 2, 2005).

Institution	(i) General confidentiality	(ii) Existence of arbitration	(iii) Documents used or generated	(iv) Arbitrator	(v) Witnesses	(vi) Award
LCIA	✓		✓	✓		✓
ICC						
UNCITRAL						✓
ICSID				✓		✓
SWISS	✓		✓	✓		✓
AAA	✓	? ("all matters relating to the arbitration or the award")		✓		✓
SIAC	✓	✓		✓		✓
KLRCA		? ("all matters relating to the arbitration proceedings")		✓		✓
BANI	✓		✓	✓		✓
CIETAC	✓		✓	✓	✓	
JCAA			✓	✓		
WIPO		✓	✓	✓	✓	✓

Figure 1: Protection of confidentiality by arbitral institutions

Figure 1 shows the first author's scorecard on the protection of confidentiality of the twelve institutions.

Based on the scorecard in Figure 1, most institutions had rules to cover three or four of the first author's designated aspects of confidentiality, and virtually all institutions recognized confidentiality in some way. Unsurprisingly, the champion was World Intellectual Property Organization (WIPO) with rules covering five out of six aspects

because it handles mainly intellectual property disputes, and disputants in such cases value confidentiality.

A. ICC

Surprisingly, the ICC Rules of Arbitration (“ICC Rules”) say nothing about confidentiality. The reason is that drafters found it too difficult when they drafted the 1988 rules and the position remained the same when the 1998 rules were drafted. This was partly due to the problem of agreeing on exceptions, and partly because the ICC Rules are meant for use in many countries, so it was difficult to devise a rule which would not conflict with national arbitration laws. Another problem was the lack of sanctions available.

However, there are some provisions in the ICC Rules that address privacy and confidentiality (to a very limited extent). Article 21(3) of the ICC Rules provides that arbitration hearings shall be held in private. The tribunal may also take measures to protect trade secrets and confidential information.⁷⁹ Further, the internal rules of the International Court of Arbitration of the ICC prevent disclosure of its proceedings. However, the *Panhandle* case held that these rules were neither binding on the parties nor the tribunal. Hence, the court in *Panhandle* refused to deny discovery of documents which had been filed in an ICC arbitration in a separate court action.

Although the ICC does not have express rules about confidentiality, in practice, the ICC pays great attention to confidentiality and warns its arbitrators to observe confidentiality when they are appointed. In addition, the ICC publishes sanitized accounts of their awards but will not do so if the parties object.

B. ICSID

There is no express recognition of confidentiality in the ICSID Convention, but the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Rules”) require the tribunal to respect confidentiality.⁸⁰ While the publication of the award as a whole remains subject to the consent of the parties,⁸¹ ICSID must promptly publish excerpts of the legal reasoning of an ICSID award regardless of whether the award is published as a whole.⁸² The Secretary-General arranges for the publication of the award in an appropriate form with a view to furthering the development of international law in relation to investments.⁸³ In practice, ICSID arbitrations are widely publicized because of a great public interest in arbitrations against governments.⁸⁴

⁷⁹ ICC Rules of Arbitration, art. 20(7).

⁸⁰ ICSID Rules, rule 6.

⁸¹ See also ICSID Convention, art. 48(5), which requires consent of parties for publication of the award.

⁸² ICSID Rules, rule 48(4).

⁸³ ICSID Administrative and Financial Regulations, reg. 22.

⁸⁴ See, e.g., <www.investmentclaims.com> for awards.

C. WIPO

As mentioned above, the WIPO Arbitration Rules expressly provide for five out of six aspects of the first author's scorecard on confidentiality (see Figure 1). Although there is no rule expressing the principle of confidentiality, given the five aspects of confidentiality that the WIPO Arbitration Rules already cover,⁸⁵ it could be argued that the general principle of confidentiality underpins all the Rules.

D. SIAC

In Singapore, the SIAC Rules (3d edition, July 1, 2007) have the most detailed institutional rule on confidentiality in Rule 34,⁸⁶ but this is far from perfect. Rule 34 is still open to criticism by providing (in effect) that the listed exceptions in Rule 34.2 are exhaustive with no allowance for release from confidentiality by the tribunal or the court.

E. HKIAC

The new HKIAC Administered Arbitration Rules are applicable to international arbitrations with effect from September 1, 2008. Article 39 of the Administered Arbitration Rules⁸⁷ expressly provides for five out of six aspects of the first author's scorecard on confidentiality, and also provides that deliberations of the tribunal are confidential. The obligation of confidentiality under Article 39 also applies to tribunal-appointed experts, the secretary to the tribunal, HKIAC Secretariat and Council of the HKIAC. The UNCITRAL Rules continue to govern unadministered international arbitrations.

⁸⁵ See, e.g., WIPO Arbitration Rules, arts. 73–76.

⁸⁶ SIAC Rules (3d ed. 2007), rule 34 reads as follows: "34. Confidentiality 34.1 The parties and the Tribunal shall at all times treat all matters relating to the proceedings, and the award as confidential. 34.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any such matter except: a. For the purpose of making an application to any competent court of any State under the applicable law governing the arbitration; b. For the purpose of making an application to the courts of any State to enforce or challenge the award; c. Pursuant to the order or a subpoena issued by a court of competent jurisdiction; d. To a party's legal or other professional advisor for the purpose of pursuing or enforcing a legal right or claim; e. In compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or f. In compliance with the request or requirement of any regulatory body or other authority. 34.3 In this Rule, "matters relating to the proceedings" means the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings or the award arising from the proceedings but excludes any matter that is otherwise in the public domain."

⁸⁷ HKIAC Administered Arbitration Rules, rule 39 reads as follows: "39.1 Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all matters and documents relating to the arbitral proceedings, including the existence of the proceedings as well as all correspondence, written statements, evidence, awards and orders not otherwise in the public domain, save and to the extent that a disclosure may be required of a party by a legal or regulatory duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the HKIAC Secretariat and Council. 39.2 The deliberations of the arbitral tribunal are confidential. 39.3 An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions: (a) a request for publication is addressed to the HKIAC Secretariat; (b) all references to the parties' names are deleted; and (c) no party objects to such publication within the time limit fixed for that purpose by the HKIAC Secretariat. In the case of an objection, the award shall not be published."

Article 26 of the HKIAC Domestic Arbitration Rules (1993 edition) also provides for confidentiality,⁸⁸ but the commentary on this provision in the HKIAC Revised Guide to Arbitration under the Domestic Arbitration Rules 1993 suggests that Article 26 follows the position in *Esso Australia*.⁸⁹ In other words, apart from the confidentiality which attaches to particular documents or classes of documents, there is no implied obligation of confidentiality.

XI. WHAT ARE THE POSSIBLE SANCTIONS OR CONSEQUENCES OF BREACH OF CONFIDENTIALITY?

If there is an established rule of confidentiality applicable to an arbitration and there is a breach of that rule, what are the possible sanctions and consequences that may arise? Sanctions against breach of confidentiality are not easy to devise. A tribunal can issue an injunction against future breaches of confidentiality, but if the horse has bolted from the stable, such an injunction appears to be of limited value if arbitration information has been disclosed.

What about the consequences of past breaches? If confidentiality is considered a contractual right, then there can be a suit for damages for breach, but damages for breach of confidentiality (whether nominal or substantial) are difficult to establish (unless a liquidated damages clause is used, but the difficulties of drafting such a clause would require a separate article to explain). In Singapore, an application can be made to court for an injunction to prevent future breaches, and the court can impose sanctions for such breaches (at least if the party is within the jurisdiction of the court). A further question is whether an injured party can claim repudiatory breach of contract and terminate the arbitration proceedings. However, this is rare in practice because the consequence would be that a case would have to be tried in court with no confidentiality at all.

XII. A MODEL CONFIDENTIALITY CLAUSE?

One example of what may be a model confidentiality clause is set out in Robert Merkin and Julian Critchlow, *Arbitration Forms and Precedents*,⁹⁰ paragraph 1G.1.1 of which reads:

1G.1.1. Arbitration Clause providing for confidentiality

Neither party shall disclose to any third party the existence, nature, content or outcome of any arbitration, or purported arbitration, brought in respect of this Agreement.

Neither shall any party disclose to any third party:

⁸⁸ HKIAC Domestic Arbitration Rules (1993), art. 26 reads as follows: "No information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration."

⁸⁹ [1995] 128 A.L.R. 391 (H.C.A.).

⁹⁰ Looseleaf (2000, updated to August 2002).

- (i) Any document prepared or procured in the course of or otherwise for the purpose of the arbitration.
- (ii) Any document prepared or procured by the other party and received in the course of or otherwise for the purpose of the arbitration.
- (iii) Any document received directly or indirectly from the Tribunal or any court of competent jurisdiction including, but not limited to, any direction, order or award.

Save insofar as may be necessary for the purpose of conducting the Arbitration itself, or making any application to a court of competent jurisdiction in respect of the arbitration, or for the enforcement of any order or award of the Tribunal, or of any order or judgment of the Court, or as may be required to comply with any lawful authority.

If this model confidentiality clause is compared to some of the provisions on confidentiality in sections 14A to I of the New Zealand Arbitration Act 1996, it is clear that there can be no universal confidentiality clause that can comprehensively cover the exceptions to confidentiality. For example, the criteria for the disclosure of confidential information where it is necessary for the purpose of conducting the arbitration are not set out in this confidentiality clause, but section 14C(b) of the New Zealand Arbitration Act 1996 describes circumstances where disclosure of confidential information is necessary, and adds that the disclosure must at the same time be “what is reasonably required” to serve those circumstances. The model confidentiality clause also fails to provide the arbitral tribunal with the discretion to allow disclosure of confidential information in certain circumstances similar to that in section 14D of the New Zealand Arbitration Act 1996, so that the tribunal may deal with the questions concerning the disclosure of confidential information before a party applies to court for an order. In short, it is virtually impossible for a contractual confidentiality clause to be drafted so as to encompass all of the possible exceptions (including those mentioned earlier as everyday situations), and not taking into account unforeseen situations where justice or expediency would require an exception to be allowed. This makes the intervention of a third party arbiter essential.

XIII. CONCLUSIONS

The authors’ conclusions are therefore as follows.

- (1) We need to clear our minds when addressing the question of confidentiality in arbitration to understand the different facets of that concept in order to understand the difficulty in defining the rules and the exceptions to those rules.
- (2) The most promising attempt to establish a complete code of confidentiality is the current New Zealand model, but it is still an imperfect code.
- (3) The Robertson Report itself acknowledged that it was not able to provide for all the exceptions to confidentiality in section 14(C), and the committee did not think it desirable or practical to set out a detailed code. In short, the most recent authoritative investigation into the problem of confidentiality has conceded

that it is not possible to provide a comprehensive list of all the exceptions to confidentiality. It follows from this that the categories of exceptions are never closed.

- (4) It also follows that all the existing statutory provisions and institutional rules providing for confidentiality are imperfect.
- (5) Nevertheless, the New Zealand approach has introduced a practical solution to the problem of the constant discovery of new classes (as well as the modification of accepted exceptions) to suit the circumstances of the particular case. This solution is to allow the tribunal to determine on an ad hoc basis whether or not there should be an exception to the principle of confidentiality, and the exact scope of that exception tailored to the case in question. The guidelines developed in the New Zealand legislation for the exercise of the tribunal's decision are useful in identifying the common situations where exceptions will be recognized. However, there should be residual discretion reserved to the tribunal to permit exceptions to confidentiality where the justice of the case requires or where it is otherwise appropriate to do so. This will allow the statutory exceptions to be extended or restricted or otherwise modified by individual tribunals. In short, there cannot be a "one-size-fits-all" definition of the rule or its exceptions.
- (6) Where the tribunal cannot perform this function (e.g., after it has become *functus officio*) then that function should be performed by the appropriate curial court.
- (7) It may be thought that the remarks of Thomas and Collins, L.JJ., quoted earlier, about the lack of jurisdiction of a court to determine whether an exception to confidentiality exists and applies could be an impediment to developing the proposed solutions. However, (i) these remarks only apply to the English Arbitration Act 1996; (ii) they only apply to preclude such jurisdiction as an implied term; (iii) they do not therefore preclude an express adoption of an independent third party to resolve difficulties in identifying and defining the exceptions to confidentiality.

XIV. PRACTICAL SOLUTIONS

A. HOW THEN SHOULD THE PROBLEM BE APPROACHED FOR THE FUTURE?

1. *Legislation*

The New Zealand legislation is a promising start, but it needs to be modified as suggested above. While it is certainly desirable to have a clear definition of the general rule and a list of the more commonly accepted exceptions to that rule, legislators should not make the mistake of locking in the concept of confidentiality by a fixed list of exceptions.

2. *Contractual Solutions*

As a general rule, it would be too much to expect the contractual parties to draft an arbitration clause that can address all the concerns outlined in this article. The difficulties of defining the rule and its exceptions are by now well known and, given that the arbitration clause is often a “midnight clause” (i.e., added in at the end of the contractual negotiations when neither party would like to spend much time on it) it would be more likely than not that a confidentiality clause would create more problems than it solved because of insufficient definition of the exceptions (or worse still, not providing for any exceptions) so that legitimate breaches of confidentiality would apparently be prohibited by the arbitration clause.

3. *Institutional Rules*

In general, arbitrating parties have solved the problem of confidentiality (at least in part) by adopting institutional rules, and most institutional rules provide for confidentiality to a greater or lesser extent. But we have demonstrated above that none of the institutional rules are perfect, and indeed can create problems where the exceptions are insufficiently or imperfectly defined, leading to difficulties for one or both parties in protecting their legitimate interests because of the apparent inflexibility of those institutional rules.

4. *Model Clauses*

The only medium term solution which might address the problems set out in (2) and (3) above would be for a major arbitration research institution (such as UNCITRAL, the ICC Commission, the Chartered Institute or the International Council for Commercial Arbitration) to develop a model law or a model clause for adoption by arbitration institutions or contracting parties. This could be based on the New Zealand model, adapted in the way suggested in conclusions (1) and (6) above.

B. WHAT SHOULD PARTIES DO IN THE MEANTIME?

Until there is a change in the applicable laws, contractual provisions or institutional rules governing confidentiality, we suggest that the way forward for tribunals and parties to minimize the problems of confidentiality could be as follows:

- (1) The specific needs of confidentiality should be addressed at an early directions meeting by parties and/or the tribunal of its own motion and an order (ideally a consent order) be issued laying out the parameters of confidentiality applicable to the particular arbitration.
- (2) The order should provide for a blanket rule of confidentiality but allowing parties to apply to the tribunal for an exception to or modification of that rule

depending on the circumstances of the case, with a fallback to the court should the tribunal be unable to act (i.e., adapting sections 14A to 14I of New Zealand Act as appropriate).

- (3) This would in effect allow the tribunal to work as a common law court to develop sensible and fair exceptions to the blanket rule.
- (4) If institutional rules are already applicable to that tribunal, those rules should be modified by a consent order (which is the only way that those rules could be so modified) so that the tribunal will have the residual power set out in (2) above.
- (5) Ultimately, the solution would be truly ad hoc, but the strength of the solution is that it will allow the parties and tribunals to cope appropriately with the myriad situations (many of which are unforeseeable) which will inevitably arise and which will need to be accommodated so as to override confidentiality to a greater or lesser extent.

Guide to Authors

The Editor will be pleased to consider contributions provided they are not, or have been, submitted for publications elsewhere. The following is a brief guide concerning the submission of articles which may be of assistance to authors.

1. Articles must be presented in their final form, in English. They should be double spaced with wide margins for ease of editing. Please provide the text in Microsoft Word or Word Perfect, and deliver to the General Editor at editorjoia@kluwerlaw.com
2. Special attention should be given to quotations, footnotes and references which should be accurate, complete and in accordance with the Journal style sheet, which is available online at www.kluwerlawonline.com/JournalofInternationalArbitration.
3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. Please ensure a brief biographical note giving details of the professional/academic status of the author(s) is provided.
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