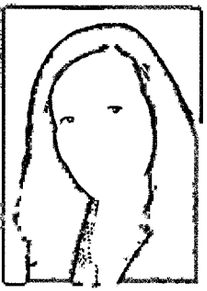

Dr Kyriaki Noussia, Ph.D., LL.M. is an Alexander von Humboldt Research Fellow (2007-2010) at the University of Hamburg (Faculty of Law, Institute of Procedural Law) and at the Max Planck Institute for comparative and international private law in Hamburg, Germany. Prior to that, she held academic positions in the UK, most recently at Birmingham Law School (University of Birmingham, UK) where she was the CCFI Lecturer in Common Law (2004-2007). She has held visiting appointments at various universities and other academic institutions. She is also a barrister and solicitor in Greece (Athens Bar Association) and a member of various associations and committees in the field of transport law, maritime law, international commercial law, international procedural and arbitration law. Her key research interests are in international commercial law, arbitration, and private international law.

Kyriaki Noussia

Confidentiality in International Commercial Arbitration

Arbitration is an essential component in business. In an age when transparency is a maxim, important issues which the laws governing arbitration currently fail to address are the extent to which disclosure of information can be constrained by private agreement along with the extent to which the duty to preserve confidentiality can be stretched. Absent a coherent legal framework and extensive qualitative and quantitative data, it is equally difficult to suggest and predict future directions. This book offers a tool for attaining centralised access to otherwise fragmentary and dispersed material, as well as a comprehensive analysis and detailed exposition of the position in relation to confidentiality in arbitration in the jurisdictions of England, USA, France and Germany.

ISBN 978-3-642-10223-3

9 783642 102233

springer.com

Noussia

Confidentiality in International Commercial Arbitration

Springer

Kyriaki Noussia

Confidentiality in International Commercial Arbitration

A Comparative Analysis of the Position under English, US, German and French Law

Springer

Thus, it follows, from ZPO §§ 1049(1) and 1048(3), and from the principle, that the arbitral tribunal may establish the facts of the case, by all appropriate means, that it may order the parties to produce documents. The right of the arbitral tribunal is limited, to documents, which have been described with reasonable particularity, and are considered, by the arbitral tribunal, as relevant and material to the dispute.[364] If a third party, refuses to comply voluntarily, the arbitral tribunal may seek the assistance of state courts, in conducting discovery, as per ZPO § 1050,[365] if it feels that the document is absolutely necessary for the resolution of the dispute.[366] According to ZPO § 1025(2), the German provision of ZPO § 1050 applies, even if the arbitral tribunal has its seat abroad, or the seat has not been defined.[367]

In the absence of an express duty of confidentiality, the parties may be free to use the information disclosed in arbitral proceedings for other purposes. Even if the parties are obliged to treat the information disclosed in the arbitral proceeding as confidential, further exceptions, to the parties' duty of confidentiality, relate to the protection of the legitimate interests of the parties.

The extent of the protection afforded to the confidentiality of proceedings, depends on the parties agreement, as there are no particular rules in the ZPO in this regard. Even where the parties do not provide for express exceptions, to their confidentiality obligations, arbitral proceedings, sited in Germany, are not protected by confidentiality, where the legitimate interests of the parties so require. Also, the confidentiality of arbitration can be limited, as a result of regulatory, administrative and penal proceedings and requirements.[368]

The confidentiality of documents can be problematic for an arbitrator, in continental law countries, where the arbitration laws give arbitrators the power to modernise the arbitral proceedings, and, especially, the hearing of the evidence. Arbitrators, can arrange the adduction of documents, which in one arbitration proceedings are pertinent to the decision. Arbitrators, can also order the production of documents, which are in an arbitration pertinent to the decision. To achieve this, they have to resort to the help of the state courts, as they have no authority to enforce the parties to produce these documents. The onus of proof, for the relevance of a document to the arbitration proceedings, stays with the party which claims that

[364]These limitations follow, from the traditions of German civil procedure law and from the aim to avoid "fishing expeditions" in German arbitration proceedings. In addition, such limitations are in line with internationally accepted principles on document production, such as the "IBA Rules on Evidence"; Rützel et al. (2005, pp. 133–134).

[365]Possible measures, include testimony of a witness, or an expert, the administration of an oath, or orders for production of documents in the possession of third parties. Rützel et al. (2005, p. 136).

[366]Rützel et al. (2005, pp. 133–134).

[367]This is a novelty among arbitration laws, since pursuant to article 1(2) of the UNCITRAL Model Law, article 27 of the UNCITRAL Model Law, only provides for court assistance, at the seat of the arbitral tribunal. The liberal approach, of the German arbitration law, has hardly been noticed internationally, which is certainly due to the fact that a German Court is very limited, in its ability to enforce orders for production of documents; Rützel et al. (2005, p. 138).

[368]Raeschke-Kessler et al. (1995, p. 163); Global Legal Group (2007, Chap. 25 – Germany, § 11).

the document is relevant to the arbitration involved. Otherwise, when the party is in no position to prove so, the arbitral tribunal can claim so.

It is uncommon that parties resort to fishing expeditions, with regards to certain documents, and arbitral tribunals have the authority to deal with such matters. When a party declares that a document is important, for the arbitral proceedings, the onus of preserving the confidentiality of that document, lies with the opposing party.[369] Of the methods used, to avoid conflict, between discovery and confidentiality, are the claim that only the arbitral tribunal gains access to the documents to be preserved and to remain confidential; as well as the claim, in particular, that only the judge has the right to gain total access to such documents, and that the parties gain limited, and to the extent that it is absolutely needed, access to such documents.[370]

4.3.3.5 The Public Interest Exception

Confidentiality, of the arbitral process and of the documents, created or disclosed in the course of arbitration proceedings, has long been mentioned, as one of the advantages of arbitration, as well as one of the reasons for resorting to arbitration.[371] Case law, together with the players in international arbitration, show, that confidentiality is still an important facet of the arbitral process.[372] At the same time, courts have formulated exceptions to this principle, and its application is certainly not absolute.

One of the exceptions, of the duty to observe confidentiality, is the "public interest" exception. It seems that the logic behind enforcing confidentiality, between private parties, does not extend to situations in which one of the parties is a public actor, because these concern not only the parties alone, but, also, people, in general.

[369]Günther (2000, pp. 345–349); Berger (1992).

[370]Günther (2000, pp. 351–354); Laeuchli (2007, p. 84).

[371]Paulsson and Raeding (1995, p. 303); Neil (1996, p. 287); Misra and Jordans (2006, p. 39).

[372]*The Eastern Saga* [1984] 2 Lloyd's Rep. 373 (Q.B.); *Hassneh Ins. Co f Israel* v *Mew* [1993] 2 Lloyd's Rep. 243 (Q.B.); *Insurance Co.* v *Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272; *Dolling Baker* v *Merrett* [1990] 1 W.L.R. 1205 (C.A.); *Ali Shipping* v *Shipyard Trogir* [1998] 1 Lloyd's Rep. 643 (C.A.); *Aita* v *Ojjeh, Paris*, February 18, 1986; See, e.g., Boyd (1995, p. 273) where at § 6 he states: "It became apparent to me, very soon, after taking up my responsibilities at the ICC that the users of international commercial arbitration, i.e. the companies, governments and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration. When enquiring, as to the features of international commercial arbitration which attracted parties to it, as opposed to litigation, confidentiality of the proceedings, and the fact that these proceedings, and the resulting award, would not enter into the public domain, was almost invariably mentioned. Indeed, it became quickly apparent to me, that should the ICC adopt a publication policy or any other policy, which would mitigate or diminish the strict insistence on confidentiality by the ICC, this would constitute a significant deterrent to the use of ICC arbitration."; Misra and Jordans (2006, pp. 39–40).

The state, can certainly have obligations to disclose information about its activities to its citizens.

In the continental countries, other legal regimes recognise confidentiality,[373] and others not.[374] In the common law world, English judicial decisions support the implied duty to observe confidentiality,[375] although exceptions to the principle are recognized. However, in other common law countries, such as Australia and the USA, such an implicit duty is not recognised.[376] Although, English case law deals with confidentiality of arbitral proceedings, nevertheless, the English Arbitration Act 1996, does not contain a provision on confidentiality.

Apart from the differences, between these legal systems, judges in the respective nations tend to make exceptions from the approaches of their countries. An example, is the case of *Aegis* v *European Re*,[377] a case concerning two arbitration proceedings, between the same two parties, where, in the Privy Council, it was stated that the confidentiality agreement was intended to prevent third parties from relying on material, generated during the arbitration against either of the two insurance companies; and, where it was also stated that the legitimate use, of an earlier award, in a later arbitration, between the same two parties, was, therefore, not a breach of the confidentiality agreement.

However, with respect to confidentiality in international commercial arbitrations, nothing should be taken for granted,[378] and, there is, in fact, no settled rule in either the common or civil law world. The status of the "public interest" exception, in itself, is quite complicated. On the one hand, European nations seem more reluctant, to admit the public interest exception to confidentiality, as this has been supported by the decision of the European Court of First Instance, in *Postbank NV* v *Commission of the European Communities*,[379] in which the court clearly mandated the taking of all necessary precautions, to protect any disclosure of confidential documents or information. In the common law world, on the other hand, the concept is nascent. Although courts, in Australia[380] and the United States,[381] have

[373]Such as France, e.g. *Aita v Ojjeh* (1986) Revue de' l Arbitrage 583.

[374]For example, the Swedish Supreme Court has ruled, that there is no real duty to observe confidentiality in *Bulgarian Foreign Trade Bank Ltd.* v *A.I. Trade Finance Ltd.*, Case No. T 1881-99 (Swedish Sup. Ct). However, in Sweden, as in Germany, the parties, to an arbitration agreement, are free to include a confidentiality clause in their agreement.

[375]*The Eastern Saga* [1984] 2 Lloyd's Rep. 373 (Q.B.); *Hassneh Ins. Co f Israel* v *Mew* [1993] 2 Lloyd's Rep. 243 (Q.B.); *Dolling Baker* v *Merrett* [1990] 1 W.L.R. 1205 (C.A.); *Ali Shipping* v *Shipyard Trogir* [1998] 1 Lloyd's Rep. 643 (C.A.).

[376]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391; *US v Panhandle Eastern Corp.*, D. Delaware 1988, 118 F.R.D. 346.

[377]*Associated Electric and Gas Insurance Services Ltd. v European Reinsurance Co. of Zurich*, UKPC 11, [2003] 1; Rawlings and Seeger (2003, p. 483).

[378]Trackman (2002, pp. 1–18).

[379]*Postbank NV v Commission of the European Communities*, [1996] E.C.R. II-8, at 90.

[380]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391.

[381]*US v Panhandle Eastern Corp.*, (D.Del.) 1988, 118 F.R.D. 346.

acknowledged the existence of the exception, it is highly unlikely that the English courts, which have not yet faced a case requiring its application, would embrace it, due to the fact that, under English law, it seems that the concept of privacy and confidentiality have not been separated. Thus, for English courts which believe, quite correctly, that arbitration proceedings are private, it would, indeed, be strenuous to admit a public interest exception.

However, in *Esso/BHP v Plowman*,[382] the High Court of Australia held that confidentiality is not an inherent part of arbitration in Australia, and even if it were considered to be, public actors might be under a positive duty to disclose information to the public, as there may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration, and where, subsequently, this would give rise to a public interest exception. Although, *Esso/BHP v Plowman*[383] has been characterised as a rigid exception to confidentiality, the decision does impose checks and balances, as to the duty to observe the public interest exception, and lift the veil of confidentiality. Application of this "public interest exception" is not, however, limited to arbitration, in which a state entity is involved. It may be applied, even in cases involving non-state actors.[384]

Contrary to the opinion, supporting the observance of the "public interest" exception in arbitration, there are also several factors, which tend to limit the "public interest" exception and prompt for the observance of the duty to preserve confidentiality in arbitration. For once, public image dictates so. Also, it is considered a truism, in international commercial arbitration, that one of the reasons private companies incline to arbitration over litigation, is to safeguard such a public image. Although, on the one hand, the desire to keep a low profile, on disputes that may have the potential to tarnish a company's public image or reputation, may be an important factor, weighing in favour of confidentiality and against disclosure under the public interest exception; on the other hand, when that is weighed against a state's moral or legal obligation, to inform its citizens of the progress/final outcome of an arbitration, then, the private parties' desire, to keep a low profile on disputes, becomes of a lesser importance. Another important factor, that would tend to militate in favour of greater confidentiality, is the desire to protect intellectual property, belonging to the private party to an arbitration. Equally with the factors, which tend to limit the "public interest" exception and prompt for the observance of the duty to preserve confidentiality in arbitration, there are also factors, which tend to expand the "public interest" exception, and prompt for the lifting of the veil of confidentiality in international commercial arbitration.

The work that lies ahead, for courts and arbitral tribunals, falls into, first, refining the notion of what is of "legitimate public interest". As the majority judgment, in

[382]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391.

[383]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391.

[384]De Saint Marc Denoix (2003, p. 211); Misra and Jordans (2006, pp. 39–48).

the *Esso/BHP v Plowman*[385] case, shows, there is real potential for all information, arising from a mixed, but, otherwise, ordinary commercial arbitration, which, broadly speaking, addresses matters of public interest, to be deemed to be "in the public interest" and, thus, to be disclosed indiscriminately.[386]

4.3.3.6 Tentative Observations

In *Esso/BHP v Plowman*,[387] the High Court of Australia held that arbitration is private, but declined to find a duty of confidentiality, attached to documents and information obtained during the course of an arbitration. In contrast, the English Court of Appeal, in *Ali Shipping v Shipyard Trogir*,[388] held that an implied term of confidentiality, ought, properly, to be regarded as attaching as a matter of law.

The decisions in *Esso/BHP v Plowman*[389] and in *Ali Shipping v Shipyard Trogir*,[390] provide a stark illustration of different approaches, adopted in two common law jurisdictions. In the light of the notoriety, that followed the High Court of Australia's decision, in *Esso/BHP v Plowman*,[391] and the trenchant criticism that the case received, together with the previously widely held assumption that arbitration is confidential, it might be though that the High Court of Australia's decision was an aberration. However, to consider so, would be like going much too far.

In the USA, the authority of *US v Panhandle Eastern Corp.*,[392] which predates the one in *Esso/BHP v Plowman*,[393] suggests that arbitration is not confidential.[394]

In France, unless legally obliged to, parties revealing otherwise information, with regards to discovery of documents, or other evidence used in arbitration proceedings, are regarded as breaking the duty to observe confidentiality, which is inherent to arbitration.

In Germany, where there is a lack of any ZPO provision, providing for the duty to preserve confidentiality, the extent of the protection of confidentiality, depends on what the parties have agreed.

[385] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.
[386] Pongracic-Speier (2002).
[387] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391.
[388] *Ali Shipping* v *Shipyard Trogir* [1998] 1 Lloyd's Rep. 643 (C.A.).
[389] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391.
[390] *Ali Shipping* v *Shipyard Trogir* [1998] 1 Lloyd's Rep. 643 (C.A.).
[391] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391.
[392] *US v Panhandle Eastern Corp.*, (D.Del.) 1988, 118 F.R.D. 346.
[393] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391.
[394] Pryles (2008, pp. 528–529).

4.3.4 *Confidentiality in Arbitration Proceedings in Relation to the Award*

4.3.4.1 England

Another important aspect, is the extent to which an award is confidential. Generally, an arbitration award is final and binding, only upon the parties to the arbitration and those claiming under or through them. The parties, by submitting their dispute to arbitration, undertake to be bound by the award. In what circumstances, are the findings in an award binding upon arbitrators, in a subsequent arbitration between different parties?[395]

In *Department of Economic Policy & Development of the City of Moscow (DEPD) v Bankers Trust Co*,[396] Bankers Trust sought to challenge an arbitration award, in favour of DEPD, on the basis that the arbitrator had failed to act fairly and impartially. The judgment, which rejected the applications of Bankers Trust, was given in private, and, when the parties disagreed, whether this should be published, the court held that the sensitivity of the material of the award favoured the preservation of confidentiality.

It is clear also, from the judgment in *Department of Economic Policy & Development of the City of Moscow (DEPD) v Bankers Trust Co*,[397] that applications not involving points of law will be primarily heard in private, unless the court orders otherwise. This, in effect, gives a lot of discretion to the courts, as to whether or not a judgment should remain private, but, if the court orders a hearing in public, this may obstruct the aim of arbitration as a private dispute resolution mechanism. It is notable, also, that, in *Department of Economic Policy & Development of the City of Moscow (DEPD) v Bankers Trust Co*,[398] the Court of Appeal, held that, the jurisprudence of the European Court of Human Rights, under article 6 of the ECHR, permitted both private hearings, and, where appropriate, also private judgments. Second, it was necessary to consider the developments, in the procedure applicable to arbitration applications, or claims, which took place in 1997 and 2002. These showed, that there was a trend towards greater privacy in the hearing of arbitration applications. Third, it was necessary to distinguish, between the question, whether a hearing ought to be in private, and the question whether the judgment ought to be private. CPR 62.10, dealt in terms with a hearing. Whatever the starting point, or actual position during a hearing, it was, although clearly relevant, not determinative of the correct approach to publication of the resulting judgment. There was a clear

[395] Woolhouse (2004, p. 150).
[396] *Department of Economic Policy & Development of the City of Moscow (DEPD) v. Bankers Trust Co.* [2003] EWHC 1337; [2003] 1 W.L.R. 2885.
[397] *Department of Economic Policy & Development of the City of Moscow (DEPD) v. Bankers Trust Co.* [2003] EWHC 1337; [2003] 1 W.L.R. 2885.
[398] *Department of Economic Policy & Development of the City of Moscow (DEPD) v. Bankers Trust Co.* [2003] EWHC 1337; [2003] 1 W.L.R. 2885.

beyond the issue of confidentiality of the proceedings of the ICC Court, although there also exists a considerable overlap. As regards the proceedings of the ICC Court, it publishes articles, regarding types of decisions, and trends, but without identifying the parties involved.[453]

4.5 Conclusions

Within the last decade, the concept of confidentiality, in arbitration, has become a topic which has instigated a lot of academic writings and analyses. All this instigated debate, has resulted in the questioning of what were, up to then, perceived as common assumptions, and, has lead in the conclusion that the subject, is more complex, obscure and less settled than originally thought.

Confidentiality, is indeed given as one of the reasons to arbitrate a dispute, instead of litigating it. An empirical analysis and study,[454] conducted by Dr Christian Bühring-Uhle, in 1992, whereby data was collected from participants in international commercial arbitration, as to the advantages and disadvantages of this method of alternative dispute resolution, showed that, following "neutrality of the forum" and "international enforcement by treaty", the third most important reason for choosing arbitration, is its confidential character and nature.[455]

Secrecy, has never been a concept used in international commercial arbitration. Even the concept of confidentiality, which is not assumed anymore to be automatically applicable, has come under judicial attack, in a number of countries, such as in Australia, in *Esso/BHP v Plowman*,[456] or in Sweden, in *Bulgarian Foreign Trade Bank Ltd. v A.L. Trade Finance Inc.*[457] It is also to be noted that arbitral institutional rules, generally do not provide for any general duty of confidentiality,[458] and this means that confidentiality is, from the outset, to be treated only as a stochastic and relative concept in international commercial arbitration.

[453]Buehler and Webster (2008, pp. 14–15).

[454]Bühring (1996).

[455]Pryles (2008, pp. 501–502).

[456]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391.

[457]*Bulgarian Foreign Trade Bank Ltd. v. A.L. Trade Finance Inc.*, Judgment of October 27, 2000, Swedish Supreme Court.

[458]The ICC Rules, article 21, only establishes the confidentiality of ICC hearings. However, the UNCITRAL Arbitration Rule 32(5), prohibits publication of awards without the consent of the parties. The LCIA Rules, in article 30, impose a duty of confidentiality on the parties, generally, unless they expressly agree to the contrary in writing, and the AAA International Rule 27, also, prohibits making the award public, unless the parties have consented, or because it is required by law. In contrast, the ICSID Rules, ICSID Arbitration Rule 48(4) and ICSID Financial and Administrative Regulation 22(2), prohibit the Centre from publishing awards, without the consent of the parties, but, at the same time, it is also submitted that parties are free to publish ICSID awards, unless they agree otherwise.

There is, of course, something to be said, in favour of confidentiality as well as transparency. While the potential for amicable solution, is one of the elements speaking for confidentiality, there are others, of a more general nature, such as the wish to not make a dispute public at all, or to protect business secrets, which are also valid.

On the other hand, it is obvious, that, not only, do arbitral institutions publish, more than ever, about arbitration cases, or that the law firms, and the parties they represent, speak more about it, but that the entire arbitration "community", is far better connected, resulting in more informal "sanitised" exchange, on cases of interest. This, in turn, means that the balance, between confidentiality and transparency, seems to tilt slightly more in favour of transparency, and the need for determining the right balance appears to be different, from case to case.

In addition, it is to be noted that, there are degrees of secrecy and confidentiality, depending on the function in question. At the one extreme, the internal deliberations of the tribunal, are and should remain secret. At the other extreme, it is difficult, or even inappropriate in some circumstances, to keep the arbitral award itself confidential, such as in the case of enforcing the award in domestic courts, where, obviously, the award cannot be kept secret.

All the above apart, it is notable that the non-respect for the confidentiality of awards, has certainly increased over the years. The trend, towards maintaining a balance between confidentiality and transparency, is also understandable. In weighing the concepts of confidentiality against transparency, one may bear in view, that, much of the reporting, done on arbitral proceedings, are not primarily made by the general media and with the intention of informing the public, as partly the case may be with major commercial litigation, but, rather, with the aim of keeping the professional circles informed of the developments. Further, the content of what is reported, of arbitral proceedings, is of some relevance. One gets the feeling that the intention, behind reporting of the arbitral developments, is to inform the professional circles, mostly, of the legal developments, rather than of detailed facts. That is, the reporting, made by the arbitration journals cited, should be seen in that light, without, however, denying the transparency effect of their publications.

However, it should also be accepted that, very often, the publication or circulation of arbitral awards, is by those individuals, or parties, who have an interest in certain views or philosophies being seen to be accepted in international arbitration. In this respect, scientific legal papers or articles, may only be based on a small number of arbitral awards, that have come into the public domain. It may also be that there are other awards, that have rejected, or, at least, eschewed, a particular view or philosophy, but have not been circulated, because their circulation serves no particular interest or view, and, therefore, the available corpus of published arbitral awards, should not be seen, as the equivalent of a fully reported body of case law, from a state court system, where all judgments are available.

Although the case law, on confidentiality, in commercial arbitration, has shown a disperse approach, in the treatment of the implied duty of confidentiality, nevertheless, it is accepted as essential that confidentiality be preserved, in certain situations, for business reasons, and, it is in this respect that, the courts attempt to

create a safety net, in that they try to balance the public's need for openness, and the individual's need for confidentiality of sensitive information, and permit non-observance of confidentiality when the public interest demands it.[459]

From the examined jurisdictions, as far as common law is concerned, cases such as *Associated Electrics and Gas Insurance Ltd (Aegis) v European Reinsurance Co of Zurich*,[460] *Insurance Co v Lloyd's Syndicate*,[461] and *Ali Shipping Corporation v Shipyard Trogir*,[462] show that confidentiality agreements may not always be recognised, where the same issues and parties are involved. Similarly, the ruling in *United States v Panhandle Eastern Corp. et al*,[463] demonstrated that confidentiality need be provided for expressly, where it is not statutorily procured, and that, even where this is the case, public interest considerations may require it to be overruled. Contrary to the above, *Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada*[464] demonstrated that confidentiality should be kept, in cases where third parties seek to rely on an award to which they have not been privy to.

In view of the fact that questions, on the preservation or not of confidentiality, are bound to be re-examined in future cases, it is highly probable that Courts will have to abstain, in the future, from their orthodox and rigid views on the duty to preserve confidentiality, in line also with the provision in s. 34 of the English Arbitration Act 1996, which encourages arbitrators to adopt an inquisitorial role in defining the facts of the case. Confidentiality, should not be an obstacle, when parties wish to use an earlier award in later proceedings, and where, to do so, would enhance the Court's powers, to define the issues accurately.[465]

In France, although there is a strong principle of confidentiality, there exists little, if any, case law on confidentiality in arbitration. Following *Aita v Ojjeh*,[466] in *Société True North et Société FCB Internationale v Bleustein et al*,[467] the French Court of Appeal restated that there exists an implied duty of confidentiality. However, recent case law, such as *Nafimco v Foster Wheeler Trading Company AG*,[468] shows that the attitude of the French Court of Appeal has been relaxed, as it does not categorically recognise the existence of such a principle.[469]

[459]Uff and Noussia (2009, pp. 1428–1449).

[460]*Associated Electrics and Gas Insurance Ltd (Aegis) v. European Reinsurance Co of Zurich* [2003] UKPC 11; [2003] 1 All E.R. (Comm) 253.

[461]*Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272.

[462]*Ali Shipping Corporation v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 643.

[463]*United States v Panhandle Eastern Corp. et al*, (D.Del. 1988) 118 F.R.D. 346.

[464]*Lincoln National Life Insurance Co v. Sun Life Assurance Co of Canada* [2004] EWHC 343; [2004] 1 Lloyd's Rep. 737, CA; [2004] EWCA 1660.

[465]Uff and Noussia (2009, pp. 1428–1449).

[466]*Aita v Ojjeh* (1986) Revue de'l Arbitrage 583.

[467]*Societe True North et Societe FCB Internationale v Bleustein et al*, Cour d'Appel de Paris 1999, Rev Arb 2003, 189.

[468]*Nafimco v Foster Wheeler Trading Company AG*, Cour d'Appel de Paris, 22.01.2004.

[469]Mueller (2005, pp. 218–219).

In Germany, the approach is similar. The OLG Frankfurt Court, in its decision of 22.10.2004,[470] stated clearly that there is a presumption towards the observance of confidentiality, but, that, where parties wanted to have specific effects, such as in the case to have an award annulled, because the alleged bias of the arbitrators impliedly pertained also an attack to the confidentiality, then they should have formulated a specific to this effect confidentiality clause.

The issue of disclosure, or not, of information of arbitral proceedings, to subsequent ones, or, of consolidation of arbitral proceedings, depends on the agreed the contractual confidentiality obligations. The right of an arbitral tribunal, to require production of documents, must be seen against the background of ZPO §§ 420–444 and 142, which allow only a limited production of documents. Depending on the agreement of the parties, the latter may be free, to use the information disclosed in arbitral proceedings for other purposes.[471]

Having in mind the Swedish Supreme Courts judgement, in *Bulgarian Foreign Trade Bank Ltd. v. A.L. Trade Finance Inc.*,[472] it is advisable for those who wish for confidentiality rather than transparency, to be very specific on confidentiality, when drafting arbitration clauses. Those who wish confidentiality, specifically, have to accept the burden of having to agree on that, especially since transparency and the risk of public display, generally, seem to work as a drivers for settlement, and, perhaps, mediation subject to complete secrecy, before even starting arbitration proceedings.[473] More specifically, parties drafting arbitration clauses, who are concerned to ensure a confidential arbitration process, should consider: (1) whether, the law of the location of the arbitration is a strong defender of confidentiality in arbitration, and, (2) if an arbitral institution has been chosen, what confidentiality provisions are contained in those rules.[474] If there remain concerns, about the level of confidentiality afforded by the chosen process, it will be prudent to include specific wording, in the arbitration clause, to ensure confidentiality.[475]

[470]OLG Framkfurt, Beschl. V. 22.10.2004 – Case 2 Sch. 01/04 (2).

[471]Rützel et al. (2005, pp. 133–134).

[472]*Bulgarian Foreign Trade Bank Ltd. v. A.L. Trade Finance Inc.*, Judgment of October 27, 2000, Swedish Supreme Court.

[473]Comment on Arbitration and Confidentiality, Transnational Dispute Management, Volume I, Issue 02 – May 2004.

[474]Herbert Smith Newsletter (2008).

[475]The lack of uniformity, amongst national laws, and the diverse treatment of confidentiality, raises a choice of law question. Usually the *lex cause*, will be the law applicable to the contract, which is the subject of the arbitration. Equally often, the law governing the arbitration agreement, will be the same as the law which governs the substantive contract, in which the arbitration agreement is usually found. However, an arbitration agreement is not invariably governed by the law of the substantive contract, as the law governing an arbitration agreement determines its validity and effect and this would not seem to encompass confidentiality of the arbitral proceedings themselves. Thus, the choices for the law governing confidentiality, would seem to lie between the *lex arbitri* or the *lex fori*. It is submitted, by many writers, such as Prof. Michael Pryles, that the *lex arbitri* is the law that should be chosen, as the law to apply. However, confidentiality may not always exist, under the applicable national law, but it may also arise as a result of contractual

A further remark, which needs to be made, is that confidentiality, in arbitration, derives from the applicable national law, or, from the party selected arbitration rules, or, from contractual provisions. As far as the applicable national law is concerned, there is no uniformity and the common assumption of confidentiality, albeit a somewhat vague concept, which is ill defined in extent and subject to diverse exceptions, was undermined by the High Court of Australia in *Esso/BHP v Plowman*.[476]

However, it is clear now that, this decision was not just an antipodean aberration, as it largely represents the law in the USA,[477] and has also been followed in Sweden.[478] In these circumstances, parties desiring confidentiality, in arbitration, should designate a particular set of arbitration rules, with appropriate and adequate, in number and extent of coverage, confidentiality, provisions within; or, absent or limited such provisions, conclude a confidentiality agreement, in the arbitration clause or elsewhere, dealing with all the existence of the arbitration, the award, as well as documents and information, obtained in the arbitration.

Due to the fact, that possible limitations, to the effectiveness of confidentiality agreements, exist, additional required measures, pertain that, both parties must agree to the terms of the agreement. Because a confidentiality agreement, only binds the parties to it, special provisions are required for the arbitrators, witnesses and any administering arbitral centre.

Not least, it should be noted that mandatory provisions of law, which provide for disclosure of information, will override confidentiality agreements.[479]

provisions concluded between the parties to arbitration, incorporated by reference, such as in the case of a set of institutional arbitration rules, whereby case any provision therein on confidentiality will also apply to the arbitration. International arbitration rules, either contain no provisions on confidentiality, such as the UNCITRAL Arbitration Rules, which contain a provision on privacy in Art. 25(4) but do not deal with confidentiality, or the ICC Rules, which deal with privacy in Art. 21 (3), and only contain an implicit provision on confidentiality, in Art. 20(7), whereby they state that the arbitral tribunal, may take measures, to protect trade secrets and confidential information, or, contain limited provision on confidentiality, such as the International Arbitration Rules of the American Arbitration Association, Art. 34, or contain extensive provisions on confidentiality, such as WIPO Arbitration Rules Art. 73, 74, 76, the Rules of the London Court of International Arbitration (LCIA), Art. 30, the Rules of the Australian Centre for International Commercial Arbitration (ACICA), Art. 18, or the 2007 Singapore International Arbitration Rules, Art. 18, or the "IBA Rules on Arbitration", Art. 3(12), 9); Pryles (2008, pp. 535–540).

[476] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391.

[477] *US v Panhandle Eastern Corp.* (D.Del.) 1988, 118 F.R.D. 346.

[478] *Bulgarian Foreign Trade Bank Ltd. v. A.L. Trade Finance Inc.*, Judgment of October 27, 2000, Swedish Supreme Court.

[479] Pryles (2008, pp. 551–552).

Chapter 5
Critical Analysis, Overall Assessment and Discussion

5.1 Overall Analysis of Arbitration and Confidentiality Within It

5.1.1 *Critical Assessment and Analysis of the Purpose of Arbitration and Its Interplay with Confidentiality*

"Globalization" is categorically with us. It has affected the world's economies, popular cultures, languages and legal systems. Indeed, in this last regard, globalization has contributed directly to the rapid and broad growth of international arbitration.

As many businesses have become inherently international, they have sought more effective and efficient means of resolving disputes without having to utilise national litigation systems that are often expensive and slow, or perhaps rife with national bias and political considerations. Often, these businesses have chosen the dispute resolution mechanisms embodied in international arbitration.

As international arbitrations have grown both in number and prominence, so too have they evolved in terms of procedure, style and content. Effective and efficient practices have tended to be incorporated into the international arbitral landscape while defective, inefficient or biased experiments are likely to be discarded. As gaps in international arbitration's capabilities have been identified, arbitral practices have evolved to fill them, and the result has positioned international arbitration as an efficient alternative to the perceived problems of domestic courts. In recent years, this evolutionary process has operated at an accelerated pace.[1]

With regards to confidentiality, as with numerous other considerations in the arbitral context, parties are generally free to tailor their agreements to fit specific needs and expectations. Courts generally enforce the terms of an arbitration agreement relating to confidentiality. Parties may include confidentiality provisions in

[1] Leahy and Bianchi (2000, p. 19).

K. Noussia, *Confidentiality in International Commercial Arbitration*,
DOI 10.1007/978-3-642-10224-0_5, © Springer-Verlag Berlin Heidelberg 2010

arbitration agreements, because they appear to use arbitration as a means to resolve disputes or because they assume, often incorrectly, arbitration to be private and confidential.[2]

Most national courts agree that arbitrations are intended to be private means of dispute resolution, in the sense that the general public has no right of access to the proceedings. For example, English and Australian courts have expressly held that arbitrations proceed under an implied condition of privacy.[3] More controversial is the issue of whether the proceedings are confidential, so that one party can restrain the other from divulging facts or documents relating to the arbitration. In the United States, confidentiality is not a rule of law,[4] but the longstanding arbitral practice is to observe confidentiality.[5] In England, courts have made confidentiality a legal requirement.[6] In Australia, the opposite position was established in the infamous to the arbitration world case of *Esso/BHP v Plowman*[7] and in other jurisdictions, such as Sweden, confidentiality is only exceptionally implied.[8] Thus, some national courts consider arbitration to be impliedly confidential. The exact scope of the obligation and the extent to which it applies to different participants in the arbitral process, i.e. the parties, their counsel, witnesses, experts, the administrative body, can vary considerably from one jurisdiction to the next.[9]

[2]Leahy and Bianchi (2000, p. 36).

[3]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391; *Hassnesh v Mew* [1993] 2 Lloyd's Rep 243.

[4]*United States v Panhandle Eastern Corp.* 118 F.R.D. 346 (D. Del. 1988).

[5]Domke (1999, § 24:07): "[t]he arbitrator should not give out any information about the proceeding or even make known the result of the arbitration to persons other than the parties. Though this is not a legal requirement, it has been sanctioned by long-standing practices. Privacy of arbitration is one of the essential factors carefully observed in institutional arbitration where no one other than the parties is allowed to gain any knowledge of the records and files".

[6]In *Hassneh Insurance Co. of Israel v Mew* [1993] 2 Lloyd's Rep. 243, where material introduced into evidence in a reinsurance contract arbitration was sought by one of the parties to be held in confidence, an English court found that there was an implied right of confidentiality in every arbitration. This implied right was the foundation upon which the court eventually required the materials to be held confidential. The court, citing *The Eastern Saga*, [1984] 2 Lloyd's Rep. 373 (Q.B.) stated, at 379: "... the concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only them. It is implicit in this that strangers shall be excluded from the hearings and conduct of the arbitration....."; Leahy and Bianchi (2000, pp. 35–37).

[7]In *Esso/BHP v Plowman* (1995) 128 A.L.R. 391 the High Court of Australia held that arbitrations are not *per se* confidential, whether on the basis of an implied term or as being inherent in the subject matter of the agreement; Leahy and Bianchi (2000, pp. 35–37); However, more recent case law – such as *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors [2006] VSC 175* – has demonstrated that confidentiality is observed, as the cases where documents will not be treated as confidential are rare; Derrington (2007, pp. 188–190).

[8]The Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd. v A.L. Trade Finance Inc.* [Judgment of October 27, 2000, Swedish Supreme Court] ruled that that a party in arbitration proceedings governed by Swedish law is not bound by confidentiality, unless the parties have entered into a specific agreement to that effect; Leahy and Bianchi (2000, pp. 35–37).

[9]Leahy and Bianchi (2000, pp. 35–37).

5.2 Critical Analysis on the Basis of the Examined Case Law in the Chosen Jurisdictions

5.2.1 The Current Position

In order to critically assess and analyse the stand of arbitration – on the basis of our study of the selected jurisdictions – we need to pose several questions, such as, for example: what is the position nowadays in relation to confidentiality in arbitration? Or what are the basic problems and the possible solutions detected and what does the future hold, i.e. will the problems encountered on confidentiality affect arbitration in all or in some of the examined jurisdictions?

To begin answering the above questions, one need ask a subsequent precedent one, i.e. which elements of arbitration fall under the confidentiality umbrella and to what extent is their protection guaranteed?

It has been standard practice to include the word "confidentiality" in any list of supposed benefits of arbitration.[10] The very existence of an arbitration may be protected by a duty of confidentiality as the mere fact that an arbitration is pending may be viewed as a secret.[11] Moreover, even more in the modern era, the concept of secrecy may no longer vary from country to country. The burden of the proof is on the party claiming that the information he wants to see protected is actually secret, or was before the wrongful disclosure occurred.

However, documents pre-existing to the arbitration are not necessarily secret. They may be stamped as confidential, or they may have been compiled in such circumstances that it is most likely that they were considered as confidential. Otherwise, no automatic protection should attach to them. The onus of proof rests with the party contending that there is a need for protection.

Nonetheless, as no firm evidence can be brought as to the fact that no publication ever occurred, a *prima facie* showing of confidentiality will shift the burden of proving confidentiality to the other party. If that party alleges that the information is no longer secret by reason of some specific disclosure to the public, it will usually be easy for him to produce evidence in that respect.[12]

In *Esso/BHP v Plowman*[13] the test for confidentiality of documents was clothed in the question whether it is proper to request its production in a subsequent case and as such constituted a rather inductive method of defining secrets.

Under continental law the arbitral tribunal or the supporting judge might deduce, from the fact that the information in question is not secret, the legal consequence that it has to be produced. It is submitted, thus, that the continental deductive method may yield more predictable results, especially as far as third parties are

[10]Paulsson and Raeding (1995, pp. 303–304).

[11]*Hassnesh v Mew* [1993] 2 Lloyd's Rep 243, 247.

[12]Dessemontet (1996, p. 16).

[13]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

concerned, by the request for production of evidence.[14] However, courts have not articulated a general rule on this issue for reasons such as the fact that the involvement of courts may detect that arbitration will become a public record.[15] In addition, the fact that lawyers and arbitrators may disclose the participation to arbitration, or that financial considerations, ethical duties and public policy issues may detect so, or that third parties participating in arbitration, such as expert witnesses, may form the grapevine through which arbitration is spread.[16]

Notwithstanding the above, the general rule remains that documents and evidence of the arbitration are protected by confidentiality.

In this respect *Ali Shipping v Shipyard Trogir*[17] provided the leading rule on this point and stated that not only parties directly connected to the arbitration are bound by confidentiality, but also third parties which are bound by a duty implied in law towards the observance of the obligation of confidentiality. Contrary to *Ali Shipping v Trogir*,[18] *Esso/BHP v Plowman*[19] – a decision with significance far beyond the shores of Australia[20] – shocked the arbitration world and at the same time created a totally antipodean precedent by stating that documents or other evidence of the arbitral proceedings are unlikely to remain confidential unless this is expressly and particularly stipulated. Up to that point in time, and although it was accepted that a general obligation of confidentiality in arbitration does not exist *de lege lata* but only *in statu nascendi*, a general rule of confidentiality *de lege ferenda*, was favoured.[21] However, the decision in *Esso/BHP v Plowman*[22] cast severe doubts with regards to the duty to observe confidentiality, more specifically with regards to the question whether, as a general principle, international commercial arbitration is to be considered as truly encompassing the feature of a confidential element as one of its basic characteristics which are embedded in its nature, and it has also raised the question of the extent of the exceptions to it.[23]

[14]Dessemontet (1996, pp. 19–20).

[15]Parties frequently involved in arbitration may not be able to withhold the fact of such involvement because although third parties are excluded from most types of international arbitration, nevertheless it does not necessarily follow that parties will not to disclose what has transpired in the process of an arbitration nor that there exists a positive and unlimited duty on the part of participants in arbitral proceedings to maintain confidentiality; Paulsson and Raeding (1995, pp. 303–304).

[16]Brown (2001, pp. 1000–1004).

[17]*Ali Shipping v Shipyard Trogir* [1998] 1 Lloyd's Rep 643.

[18]*Ali Shipping v Trogir* [1999] 1 W.L.R. 314.

[19]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[20]Editorial (1995, pp. 231–233).

[21]Paulsson and Raeding (1995, pp. 303–304).

[22]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[23]In England in *Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]* [1984] 2 Lloyd's Rep. 373 (QB), *Dolling-Baker v Merrett* [1990] 1 WLR 1205, and in *Hassnesh v Mew* [1993] 2 Lloyd's Rep 243, it was demonstrated that the nature and the extent of the duty of confidentiality in arbitration is by no means fully chartered but subject to certain limitations and exceptions. The possible exceptions, as articulated in the cases of *Ali Shipping v Shipyard Trogir* [1998] 1 Lloyd's Rep 643, *Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia and *Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd* Case No Y 1092-1098, SVEA Court of Appeal, relate to documents and evidence (parties may agree to disclosure of documents or evidence); Brown (2001, pp. 1008–1014); Editorial (1995, pp. 231–233).

Notwithstanding the initial impact of the decision in *Esso/BHP v Plowman*[24] and the statement that "... the best method of driving international arbitration away from England ... would be to reintroduce all the court interference that was swept away or ... for the House of Lords to overthrow Dolling-Baker and to embrace the majority judgment of the High Court of Australia in Esso/BHP ... as this would be to announce that English law no longer regards the privacy and confidentiality of arbitration proceedings ... as a fundamental characteristic of the agreement to arbitrate",[25] the implications of *Esso/BHP v Plowman*[26] seem to have lessened in the light of latest Australian case law. More specifically, *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors*[27] has demonstrated that there is no real danger to confidentiality, because the circumstances in which documents will not fall under the cloak of confidentiality for having been produced outside the usual discovery process or pursuant to subpoena will be relatively rare. Even in those cases, Australian courts are likely to hold that such documents have been produced subject to an implied undertaking not to use them other than for the purposes of the arbitration. Moreover, they will be reluctant to relieve a party from that undertaking – either pursuant to their supervisory powers, if they are applicable, or pursuant to any supposed head of inherent jurisdiction – in accordance with the view of the House of Lords in the decision of *Bremer Vulkan v South India Shipping Corpn Ltd*,[28] namely that the source of judicial powers over arbitrators is wholly statutory and not inherent.

Thus, following *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors*,[29] the practical effect of the distinction between the English and the Australian approaches to confidentiality in arbitration would appear as largely illusory.[30]

Another critical question which needs to be posed is in which ways can a duty of confidentiality be enforced and what are the sanctions for such a breach?

Equally to the case of *Esso/BHP v Plowman*,[31] the arbitration world was shocked by the harshness of the ruling of the City of Stockholm Court at first instance in *Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd*,[32] which stipulated stringent sanctions against those who breach the duty to observe confidentiality.

[24]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[25]Lord Neil (1996, p. 316).

[26]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[27]*Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors [2006] VSC 175.*

[28]*Bremer Vulkan v South India Shipping Corpn Ltd* 18 [1981] AC 909.

[29]*Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors [2006] VSC 175.*

[30]Derrington (2007, pp. 188–190).

[31]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[32]*Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd*, Case T-6-11-98, Stockholm City Court.

It may be thought that the Swedish Court went too far in invalidating the entire arbitration agreement on the basis of a breach of an implied duty to confidentiality. However, logic dictates that if confidentiality is perceived as an essential attribute of an arbitration agreement, then its breach should be treated as the breach of any other contractual provision. If the arbitration world wants the duty of confidentiality to be implied and as such give to arbitration proceedings integrity and a genteel nature, then it should not judge such sanctions as harsh, but it should instead seek to promote the notion of serious sanctions for parties who breach this duty.[33]

Another critical issue, involves the case where a party withholds evidence on the basis of a right to confidentiality. Equally, sanctions are imposed where parties exercise misconduct in that they withhold evidence, claiming a confidentiality justification for such conduct. Although all arbitral regimes allow arbitrators discretion in formulating measures to deal with such misconduct, nevertheless such sanctions are not universally without teeth. In this respect, in December 1998, the First Commercial Court of Istanbul, Turkey in *Technics Engineering Architecture Marketing Srl. (Italy) v Degere Enterprises Group AS (Turkey)*[34] enforced an ICC arbitration award made without considering expert evidence. The decision is significant in that it evidences the widening acceptance of arbitration decisions made without withheld evidence. Another option is for arbitrators to draw a negative inference on the withholding party. Such an inference, although it appears contrary to the UNCITRAL Rules, is expressly allowed under the Rules of the Stockholm Chamber of Commerce.[35]

Another critical aspect of confidentiality in arbitration – where there is also a judicial spilt – is with regards to whether the implied privacy of arbitration prohibits multi-party joinder in arbitrations.[36] Until the decision in *Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]*,[37] multi-party joinders were allowed and encouraged in England. However, in *Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]*[38] it was held that absent any inherent power of arbitrators, and due to the principle of privacy, such joinders are prohibited.[39]

[33]Brown (2001, pp. 1015–1017).

[34]JCC Award, 1998; Case Comment (1999) JCC Award Upheld Doesn't Conflict With Turkish Law, Mealey's Int. Arbitration Report, 14(3):7.

[35]Lindahl and Avokatbyra (1983, pp. 12–13); Leahy and Bianchi (2000, pp. 43–44).

[36]Parties may wish to join multiple parties due to joint and several or imputed liability and subcontracting issues. Likewise, arbitrators, encouraged by Courts might seek to join parties for reasons of efficiency and reasons of *res judicata*; Leahy and Bianchi (2000, p. 40).

[37]*Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]* [1984] 2 Lloyd's Rep. 373 (QB).

[38]*Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]* [1984] 2 Lloyd's Rep. 373 (QB).

[39]The court in *Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]* [1984] 2 Lloyd's Rep. 373 (QB) at 384 stated: "[i]t seems to me that, as is graven upon the heart of any commercial lawyer, arbitrators in the position of these arbitrators enjoy no power to order concurrent hearings, or anything of that nature, without the consent of the parties. The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated with each other the disputes in question may be. The other powers which an arbitrator enjoys relate to the reference in which he has been appointed. They cannot be extended merely because a similar dispute exists which is capable of being and is referred separately to arbitration under a different agreement."; Leahy and Bianchi (2000, p. 40).

Although confidentiality is an undisputable feature of the nature of arbitration and constitutes an attraction for those opting to arbitrate their disputes, at the same time exceptions to its observance should be recognised, because the notion of an absolute confidential character of arbitration contributes to a broader concern that arbitration itself cannot vindicate important deterrent, declarative, and normative policies underlying various public rights.

Arguably arbitration can serve remedial and deterrent functions. However, without public knowledge of a dispute or its resolution, private arbitral decisions affect only the conduct of the participants and cannot guide the primary behaviour of others, making it difficult if not impossible for prospective violators to appreciate fully the costs of engaging in prohibited conduct as – unlike publicly available court decisions – unpublished arbitral awards do not communicate public values or educate the community about the underlying law. Thus, parallel to the existence of a need to preserve the duty of confidentiality, there are also advantages to be seen in limiting such a duty so that exceptions to it may help to fulfil the normative and declarative functions of litigation.[40]

5.2.2 *Critical Assessment, Analysis and Justification of the Interplay of Arbitration and Confidentiality*

Rightly or wrongly, parties expect arbitrations to be confidential, as confidentiality is widely perceived as an advantage over litigation where matters become public record.

In today's global market arena, corporations expand globally and as such they face greater challenges, complexities and risks. Consequently, cross-border disputes and regulatory investigations almost inevitably involve more than one legal system and parties, lawyers and arbitrators, judges or regulators from diverse legal, commercial and cultural backgrounds.

What does this mean for expectations of confidentiality in international disputes where very different, often ill-defined and sometimes contradictory notions of confidentiality or privilege interact? Has the recent approach of the judiciary in England and the European Union affected the provision of legal advice and assistance by eroding the confidentiality of arbitration and diminishing the role of legal privilege?

[40]Kratky-Dore (2006, p. 492).

Case law shows that questions of privilege and confidentiality can be a legal minefield in contentious proceedings at national level and even more so in international proceedings. Confidentiality in documents produced or divulged for the purpose of arbitration stem from an implied right of privacy in the arbitration process keeping matters private between the parties involved. The existence, extent and the basis of confidentiality in international commercial arbitration is a matter of scholarly debate and occasionally the focus of decisions of arbitration tribunals and state courts, and should not be automatically assumed.

In *Emmott v Michael Wilson & Partners Ltd*,[41] the decision of the Court of Appeal provided an in-depth analysis of the law on the private and confidential nature of commercial arbitration in England. The court acknowledged that there is a well-settled obligation, implied by law in England, not to disclose any documents prepared for and used in arbitration for any other purpose, but also recognised a concurrent and sometimes overriding public interest that means in certain circumstances disclosure may be permissible, albeit determinable only on a case-by-case basis.

Parties to arbitration in England may generally be allowed, and may even be required, to disclose details of the arbitration where parties to the arbitration expressly or impliedly consent; or where disclosure is reasonably necessary to protect legitimate interests of an arbitrating party – including requirements of public reporting, fiduciary obligations, auditing requirements, disclosures to insurers and disclosure in court applications; or where a court permits disclosure – by order or leave; or where the interests of justice require disclosure and perhaps where public interest requires disclosure.[42]

Importantly, the court in *Emmott v Michael Wilson & Partners Ltd*,[43] decided that "the interests of justice" were not confined to the interests of justice in England. The international nature of the dispute in the case demanded that the court take a broader view, considering whether the interests of justice would be served in another jurisdiction by permitting disclosure there.

Additional uncertainties arise as there is no single international code of commonly accepted principles on privilege though all professional privileges have the same rationale (to encourage frank and open communications between professionals and their clients). Legal professional privilege is intended to promote law-abiding behaviour by allowing business people to seek legal advice without the risk of it causing them prejudice. The right to proper legal advice is reflected in the principles of "legal privilege", as it is known in common law countries, and the principle of "professional secrecy" of civil law countries. While in common-law countries privilege is a right which also extends to in-house counsel – and it is only the client who can waive the privilege – the general civil law concept of professional secrecy is based on professional ethics, meaning only the lawyer, not the client, can invoke the privilege and only information in the lawyer's possession

[41] *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

[42] Sindler (2008).

[43] *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

created as part of the exercise of their profession is protected. The same information or advice attracts no protection in the hands of the client.

The European Court's decision in *AkzoNobel Chemicals v Commission of European Communities*[44] reaffirmed that in-house legal counsel cannot claim legal professional privilege protection when under investigation by the European Commission, going even further by holding that only communications emanating from independent lawyers qualified to practice in a member state within the EU can be privileged, meaning privilege of in-house and non-EU qualified lawyers is not respected at the EU level. English in-house lawyers might be protected in England, but not at EU level. Advice from non-EU qualified lawyers is similarly not protected at EU level.[45] What then of parties' and counsel's expectations about their communications in cross-border deals or disputes? If different rules of privilege are applied than those which the parties may reasonably expect – that they be accorded at least the same privilege rights as in their own domestic proceedings – parties and counsel may find they have to reveal information that was reasonably expected to be protected. Advice that is privileged in the country where it is given or from which it is sent may, however, not be protected everywhere a client operates or everywhere the advice is intended to be received. The importance of due process and equal treatment in arbitration means arbitrators are likely to look for the widest form of privilege to give parties equal protection. Where a person expects to enjoy additional evidentiary privileges before its national courts, a tribunal would allow the other party to benefit from such additional privileges, in the sense of "most favoured privilege treatment". The result is then more predictable, allowing parties to be confident that they would never be required to produce information that is considered privileged under the law of their home jurisdiction.

The case of *AkzoNobel Chemicals v Commission of European Communities*[46] and the case of *Emmott v Michael Wilson & Partners Ltd*[47] are useful reminders

[44] *AkzoNobel Chemicals v Commission of European Communities*, Joint Cases T-125/03 and T-253/03, European Court of First Instance of 17 Sept. 2007.

[45] Allowing the advice of internal counsel to be used against a company goes squarely against the very philosophy of privilege as corporate counsel are useful precisely because they help companies navigate legal risks. The same of course for non-EU qualified counsel. Advice from the best lawyer may not be protected if it is not also from the right lawyer. The very purpose of privilege should be to allow clients to confer openly about issues with the best person for the job both in-house and external counsel and should not be limited by the formality of Bar membership on which the court in *AkzoNobel Chemicals v Commission of European Communities* [Joint Cases T-125/03 and T-253/03, European Court of First Instance of 17 Sept. 2008] focused.

[46] *AkzoNobel Chemicals v Commission of European Communities* [Joint Cases T-125/03 and T-253/03, European Court of First Instance of 17 Sept. 2007], which held that only communications of independent EU qualified lawyers can be privileged, in other words that privilege of English in-house lawyers protected in England, but not at EU level and that privilege of non-EU qualified lawyers is not respected at EU level.

[47] *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, whereby the court found that the notion of "interest of justice" had an international character which extended outside the English jurisdiction and as such could justify its serving in other jurisdictions by permitting disclosure in them.

that care is needed when negotiating arbitration agreements or when preparing documents in the context of seeking legal advice from external lawyers or even internal lawyers in connection with investigations, international transactions, international arbitrations and cross-border litigation.

Legal inconsistencies across jurisdictions and different treatment by institutional arbitration rules mean parties to arbitration should not assume that confidentiality is absolute even where a confidentiality obligation is said to exist. Being proactive in preserving confidentiality by incorporating express confidentiality provisions in arbitration agreements, stipulating confidentiality terms in procedural directions or orders from the arbitral tribunal and opting for arbitration rules which provide for confidentiality protection, will help protect the confidentiality of business secrets and ensure their dispute and arbitration remain as confidential as possible. Parties should ensure arbitration agreements contain appropriate confidentiality clauses, covering all aspects which need remain confidential. Managing privilege and confidentiality is also about managing expectations and managing risks. It necessitates negotiating appropriate confidentiality protection at the outset of all transactions where needed and ensuring an awareness of the complexities that questions of privilege protection entail in a globalized world. Safeguards are available to assist in keeping protection where it is expected and maintaining confidentiality and secrecy where possible. While multinational cross-border corporations that participate in international dispute resolution processes cannot maintain a firewall between different procedures in different countries, managing interactions and foreseeing the effect of a seemingly prudent communication in one jurisdiction on another, is an important though difficult aspect of modern commercial and legal practice.[48]

5.2.3 *Critical Assessment, Analysis and Justification of the Desired Level of Confidentiality to Be Preserved*

As stated above, confidentiality is implied into arbitration in some legal systems, although its exact scope and extent varies considerably from one jurisdiction to the next. Thus, national courts are split as to whether documents used in or produced during an arbitration should maintain their confidentiality outside the arbitral process and the courts of some nations have found that the confidentiality of such documents is absolute except where consent of both parties has been given or pursuant to court order,[49] while other courts have found that no special confidentiality should be afforded[50] or that as a general principle, arbitration documents

[48]Sindler (2008).

[49]*Hassneh Insurance Co. of Israel v Mew* [1993] 2 Lloyd's Rep. 243.

[50]*United States v Panhandle Eastern Corp. et al* (D.Del. 1988) 118 F.R.D. 346.

should be considered confidential, but the application of that principle may vary depending upon the factual circumstances.[51]

The English view[52] is that the implied right of privacy of arbitration extends to the confidentiality of documents which are incidental to arbitration.[53] In contrast, the American view, by and large, appears to be that unless the parties agree, no confidentiality attaches to documents used or produced in the arbitration.[54] In Sweden, in *Bulgarian Foreign Trade Bank Ltd. v A.L. Trade Finance Inc*,[55] it was held that confidentiality of arbitration documents is an implied characteristic of arbitration, but that the extent of this confidentiality may vary depending upon the reason for disclosure and the nature of the information sought to be disclosed.[56] The approach of the Swedish judiciary in *Bulgarian Foreign Trade Bank Ltd. v A.L. Trade Finance Inc* which recognises an implied duty to observe confidentiality subject to fact-intensive factors, is a tentative solution. One of the pitfalls of absolute confidentiality would be that parties could then opt to use arbitration to protect damaging or incriminating documents from use in subsequent litigation by having such documents entered into evidence during an arbitration.[57] Obviously, such patent manipulation cannot be tolerated. Still, parties do appear to opt for arbitration as an alternative to litigation precisely because arbitration is private and confidential. Because domestic judicial systems have an interest in promoting arbitration, e.g. to encourage judicial efficiency, confidentiality of arbitration documents should be recognised by courts, at least in a limited capacity, in order to encourage use of the arbitration system.[58]

5.2.4 *Possible Solutions as to the Way Forward*

With regards to the issue of confidentiality in arbitration its future ramifications and any predictions for what the future holds, there are further questions which need be posed.

How do we assess the significance of the confidentiality problem? Is it a matter of practice only or does it have a systemic reach? Which interpretation has the greater appeal? What is the reason for privacy and confidentiality? Does the

[51]*Bulgarian Foreign Trade Bank Ltd. v A.L. Trade Finance Inc.*, Judgment of October 27, 2000, Swedish Supreme Court.

[52]Espoused in *Hassneh Insurance Co. of Israel v Mew* [1993] 2 Lloyd's Rep. 243.

[53]Leahy and Bianchi (2000, pp. 38–39).

[54]*United States v Panhandle Eastern Corp. et al* (D.Del. 1988) 118 F.R.D. 346.

[55]*Bulgarian Foreign Trade Bank Ltd. v A.L. Trade Finance Inc.*, Judgment of October 27, 2000, Swedish Supreme Court.

[56]Leahy and Bianchi (2000, p. 39).

[57]Leahy and Bianchi (2000, pp. 39–40).

[58]Leahy and Bianchi (2000, pp. 39–40).

antipathy towards public scrutiny indicate a motive or the need to hide certain types of conduct? Why should the adjudication of commercial disputes lurk in the shadows?[59] Is the public interest a factor in the issue and if so can a viable form of equilibrium be restored and maintained between public and private adjudication? What is the best solution and the way forward?

When reviewing the confidentiality issue in the context of an arbitration, a court will likely defer to the applicable rules of the arbitration institution chosen by the parties. The rules of the various institutional bodies vary significantly. Some are complete and comprehensive, while others simply touch upon the issue of confidentiality.[60] Where a reviewing court finds that institutional rules applicable to an arbitration agreement either do not address confidentiality or, for some reason, do not apply, a court will most likely apply the national default rules.[61]

Although uncertainty remains in respect of much with regards to confidentiality in arbitration, parties should strive for more definitive rules from institutional arbitration bodies and national sources in the near future, as institutional arbitration bodies will likely model future versions of their rules in order to increase certainty and comprehensiveness concerning confidentiality and privacy.

Likewise, national courts will likely look to the Swedish case of *Bulgarian Foreign Trade Bank Ltd. v A.L. Trade Finance Inc.*[62] and conclude that confidentiality should be qualified by the type of information sought to be protected and the reasons for disclosure. The Swedish rule is a logical extension of the qualified

[59]Carbonneau (2005, pp. 715–716).

[60]For example, the AAA Rules require only that the members of the arbitration panel and the arbitration administrator keep the proceeding in confidence – See AAA International Arbitration Rules, Art. 34. The AAA Rules make absolutely no mention of any duty of confidentiality applicable to parties or witnesses. Likewise, the UNCITRAL Rules do not even mention privacy or confidentiality of arbitrations. The Rules of Arbitration of the ICC assign slightly greater importance to confidentiality, but, where explicit, govern only the internal workings of an arbitration – *Rules of Arbitration of the International Chamber of Commerce*, Appendix II, Article I. – and are ambiguous as to their potential application to the parties to an arbitration – *Rules of Arbitration of the International Chamber of Commerce, Statutes of the International Court of Arbitration of the ICC*, Appendix I, Article 6: "The work of the Court is of a confidential nature and must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to the materials submitted to the Court and its Secretariat". The WIPO Rules provide for complete confidentiality except where both parties expressly agree to the disclosure of information, or where the law, or a court or other competent authority, so orders – and then only to the extent necessary – World Intellectual Property Organization Arbitration and Mediation Center, *Complete Listing of the Arbitration Rules*, Articles 73–76; Leahy and Bianchi (2000, pp. 40–41).

[61]In *United States v Panhandle Eastern Corp.* (D. Del. 1988), 118 F.R.D. 346, at 349–350 the court applied US law concerning protective orders after determining that ICC rules concerning confidentiality did not apply to the parties, only to the internal ICC mechanism.

[62]*Bulgarian Foreign Trade Bank Ltd. v A.L. Trade Finance Inc.*, Judgment of October 27, 2000, Swedish Supreme Court.

confidentiality found by English courts in *Hassneh Insurance Co. of Israel v Mew*,[63] and will likely garner international interest.

At the same time, calls for public disclosure may become pertinent. The impact of public disclosure upon the institution of arbitral adjudication should be carefully weighed before allowing such disclosure aiming to fulfil normative and declarative functions, for the courts' dominant concern is to allow access to information for the purpose of building a record in another action. On the one hand, maintaining the confidentiality of private arbitral justice may be outweighed by the needs of the public interest in adjudication, but, on the other hand, a balance between the imperatives of private and public justice should, therefore, be drawn. However, it should also be borne in mind that the challenge to arbitral confidentiality may reflect a communitarian need for public debate and scrutiny of justice determination.[64] If indeed public proceedings are instrumental to adjudication, the movement toward privatised justice may be confronting its first significant hurdle. It may also have come full circle as the difficulty to articulate adequate regulatory provisions on the question may indicate a need to return to the prior form of judicial adjudication via state court litigation. Having said that, there may exist another interpretation. In other words it may simply be the case that problems with arbitral confidentiality, due to their infrequency, are nothing more than a momentary difficulty. The courts may not have had, so far, the opportunity really to focus on the problem and are likely to respond appropriately as more cases will arise.

In addition, there remains always a possibility that national courts may abandon confidentiality and opt for full disclosure of awards and proceedings in order to develop a form of arbitration case law, or at the very least, a solid record of patterns and practices in arbitrations. The existence of arbitration reporting services[65] establishes this as a distinct possibility. Those calling for a record of arbitration opinions point to the importance such a record can have in increasing the certainty that arbitration parties enjoy when contemplating or planning to defend a claim in arbitration and of the increased accountability such records impose upon arbitrators.[66] They are also critical of the publication of awards in edited forms which leave the basis of the arbitrators' decisions unclear. However, although understandably valid, if such a public record of awards were to be created, the possibility of publicising edited awards seems to be the only workable solution in order to satisfy those fearing the loss of confidentiality. Still, though sanitized and edited, such awards would allow the development of the law and practice of international commercial arbitration and provide a guide to future parties and arbitrators facing similar legal issues, as well as bring consistency and predictability to the system. Not least, the sharing of experiences, the greater transparency and the referral to

[63]*Hassneh Insurance Co. of Israel v Mew* [1993] 2 Lloyd's Rep. 243.

[64]Carbonneau (2005, pp. 715–716).

[65]Such as Mealey's International Arbitration Report.

[66]Leahy and Bianchi (2000, pp. 41–42).

established principles from prior decisions would help further develop the notion of a *lex mercatoria* in international commercial arbitration.[67]

The protection of confidentiality in the arbitration derives not only from the law of arbitration but also from the law of proprietary information and the law of trade secrets. There is no use in debating whether there exists a worldwide principle of confidentiality in the arbitration proceedings as it is accepted that not only the national traditions differ, but also that the legal or institutional rules are generally scant. Meanwhile, multinational corporations having recourse to arbitration will long for certainty. The public domain is not defined in relation to a given country but on a worldwide basis, for the word wide web bridges regional or national barriers to the free flow of information. Thus, there is no presumptive secrecy. The party who contends that an arbitration is confidential in whole or in part has to show it.[68] A handful of cases in the last decades, in a number of national jurisdictions, have demonstrated that the issue of the observance of the duty of confidentiality and of the sanctions that should exist is complex and that there exists the paradox that parties may in practice find it undesirable for the rule to be as comprehensive as they vaguely suppose it to be.[69] These national differences generate uncertainty. Our world has not evolved to the point where a supranational court is available to resolve these national differences. Moreover, relying on institutional rules will not solve the problem as simply incorporating the rules of an arbitral institution is not likely to resolve uncertainties about confidentiality because although institutional rules commonly provide that the arbitrators shall maintain the confidentiality of the proceedings, some, however, prohibit disclosure by the parties.[70]

[67]Ong (2005, pp. 177–180).

[68]Dessemontet (1996, pp. 27–31).

[69]In Australia it was held in *Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia that confidentiality, unlike privacy, is not "an essential attribute" of commercial arbitration. In the United States, in the leading case of *United States v Panhandle Eastern Corp. et al* (D.Del. 1988) 118 F.R.D. 346 the court held that there is no inherent duty of confidentiality unless the parties contract for it, and that the ICC Rules place no obligation of confidentiality on arbitrating parties and granted the government's request to compel production of the documents. English law holds that arbitral parties are subject to an implied duty of confidentiality. In the leading case of *Ali Shipping v Shipyard Trogir* [1998] 1 Lloyd's Rep 643 the court held that such an obligation is implied in every arbitration agreement as "an essential corollary of the privacy of arbitration proceedings". However, English law also recognises certain exceptions. French law appears to provide even more stringent protection for the confidentiality of arbitral proceedings and awards. In *Aita v Ojjeh*, Cour d' Appel de Paris, February 18, 1986 the French court of Appeal dismissed an action to annul an arbitral award rendered in London, penalizing the party bringing the annulment action for thereby breaching the principle that arbitral proceedings are confidential. The decision does not even appear to allow for the narrow exceptions recognised by English law; Editorial (1995, pp. 231–233).

[70]For example, Article 25(4) of the Arbitration Rules of UNCITRAL provides that hearings shall be held "in camera" but it does not say what the parties may or may not reveal outside the hearing. The rules of the ICC, though excluding from hearings "persons not involved in the proceedings" and permitting the arbitral tribunal to "take measures for protecting trade secrets or confidential information", are silent on the confidentiality of awards and of materials produced and information divulged in the proceeding.

A ready solution to the problem of duelling confidentiality laws and rules is not at hand. Moreover, although the existence of a consistent judicial approach would be the best way to achieve the observance of the duty of confidentiality,[71] nevertheless case law such as *Esso/BHP v Plowman*[72] and *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd &* Ors[73] constitute a vivid proof of the contrasting practical difficulty to achieve and guarantee such a judicial consistency[74] and also further validate the presumption that a solution is not likely to come from the courts because they are often bound by prior decisions and face competing incentives. On the one hand, upholding an implied duty of confidentiality may attract arbitrations and the business they bring to the host country. On the other hand, courts may view the confidentiality of arbitral materials as interfering with the search for truth in judicial proceedings. In addition, courts cannot easily enforce confidentiality duties or agreements, in part because damages are often nonexistent or difficult to prove. Nor can one count on national governments to step in and resolve their differences on this issue.

Given the difficulties in getting the necessary consensus for even "modest treaties", amending existing arbitral enforcement treaties like the New York Convention or entering into a new treaty is far from likely.

Similarly, a solution is most likely not to come from the arbitral institutions or the arbitration participants themselves,[75] simply because their differences reflect competition for the lucrative arbitration business.

One might think that the parties themselves hold the key to a solution because they may include a provision in their agreement expressly specifying whether and to what extent the arbitral proceeding and award are to be kept confidential. That may help, but it does not provide any certainty. First, disputes subject to arbitration often arise years after the contract was negotiated. It is difficult to predict so far in advance where one's interest will lie on the confidentiality spectrum. Second, a clause that would cover all contingencies would have to be quite detailed and lengthy, raising the transactional costs of entering into the agreement at a time when the parties prefer not to focus on contingent future disputes. Finally, it is not clear that a particular national court would respect the entirety of the parties' agreement, especially those aspects that may conflict with the public policy of the forum country. Similarly, the parties cannot obviate the difficulties by simply incorporating the rules of an arbitral institution with strong confidentiality protections into their agreement. None of these rules specify what

[71]Brown (2001, pp. 1015–1017).

[72]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[73]*Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors [2006] VSC 175.*

[74]Editorial (1995, pp. 231–233).

[75]Dessemontet (1996, pp. 21–23).

recourse a party would have if confidentiality is breached after the arbitration is concluded.[76]

Nevertheless, if the question of confidentiality was to be left to the parties in their commercial agreement or arbitration agreement, a draft form of a detailed confidentiality clause that would serve as a basis for discussion and negotiation when confidentiality is important to the parties and a version of an extensively drafted confidentiality could possibly have the following format:[77]

Draft Confidentiality Agreement

Subject to any applicable and overriding law and duty, the parties agree for themselves and any persons or companies under their control and direction that any arbitration conducted under the authority of this agreement will be private and confidential, and all documents, evidence, orders and awards, whether electronic or otherwise, will be kept private and secret and will not be disclosed to persons who are not participating in the arbitration proceeding. This obligation continues during the course of the proceeding and thereafter unless all parties otherwise agree. If a party concludes that its legal duty requires disclosure of such material, it will give the opposing party notice of its intention to disclose before making any such disclosure. If the opposing party will not consent to the disclosure, the parties agree that the question of whether there is any applicable and overriding law and duty in relation to the material under consideration will be presented for decision to the arbitrator who is appointed under this agreement. The parties agree to be bound by the ruling of the arbitrator whose decision will be final and binding. The arbitrator may determine the timing, nature and extent of disclosure. The parties agree that any failure to abide by the decision of the arbitrator may give rise to a claim for an injunction.

The parties agree that they will expect and require a person who is appointed as an arbitrator under this agreement to agree with, and for the benefit of, all parties that all documents, evidence, orders and awards, whether electronic or otherwise, in relation to this arbitration will be kept secret, private and confidential by the arbitrator; will be not be disclosed by the arbitrator to anyone who is not a participant in the proceeding; and will be destroyed by the arbitrator at the conclusion of the proceeding.

The parties agree that they will expect and require the person who is appointed as a court reporter or clerk under this agreement to agree with and for the benefit of all parties that all documents, evidence, orders and awards, electronic or otherwise, in relation to the arbitration will be kept secret, private and confidential by him or her and will not be disclosed to anyone who is not a participant in the proceeding.

The parties agree that they will expect and require all counsel and their staff who are retained or appointed to act for a party in an arbitration under this agreement will be expected and required to agree with, and for the benefit of, all parties that all documents, evidence, orders and awards, whether electronic or otherwise, in relation to the arbitration will be kept secret, private and confidential by them and will not be disclosed by them to anyone who is not a participant in the proceeding unless the counsel is bound by an overriding law or duty.

[76]Presumably, a party would have to go to court, where the vagaries of national law would come into play. But, if this were the case, would a court in the USA hold that the parties' incorporation of the rules of the LCIA Arbitration International represents a binding agreement to keep proceedings confidential? Perhaps, but the dearth of authority on this issue makes reliance on such an outcome hazardous.

[77]Thompson and Finn (2007, pp. 75–78).

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

The parties agree that they will expect and require a person whom they present as a witness at any hearing held pursuant to this arbitration to agree with, and for the benefit of, all parties that all documents, evidence, orders and awards, electronic or otherwise, in relation to the arbitration will be kept secret, private and confidential by the witness and will not be disclosed by the witness to anyone who is not a participant in the proceeding.[78]

Notwithstanding the above suggestion, whether formed separately or as part of the arbitration agreements, when devising a confidentiality agreement it should be borne in mind that the fact that confidentiality has different value to different parties in different contexts and the fact that the shear fact of a lack of consistent methods of framing such confidentiality agreements, denote the possibility of disparate interpretations. Thus, consideration and special attention should be given, when drafting confidentiality agreements, to that which should be rendered confidential, the reason for doing so, the extent of confidentiality desired and the means of so providing, as well as to the nature of applicable law and its connection and relation to arbitral confidentiality, as it may be needed to vary confidentiality provisions to accommodate differences in applicable laws and business practices. Finally the cost of devising a confidentiality provision or agreement need be considered, and more specifically the cost of negotiating and the concessions that parties may need to do, should be calculated.[79] Moreover, parties should adopt interpretative aids to avoid disparate interpretations and evaluate the nature of the law governing confidentiality in arbitration and, at the same time, arbitrators should be willing to scrutinise confidentiality agreements in light of the applicable law each time in best serve the interests of the parties involved as well as consider the delicate balance that exists between freedom of contract and the regulation of contract, including contracts regulation of confidentiality provisions.[80]

5.2.5 *Tentative Conclusion*

The confidentiality problem appears so pressing and intractable as to demand some sort of joint resolution, if only to prevent discontent with the arbitral process from becoming endemic. Because no one can be sure of the scope of confidentiality protections today, there is an urgent need for a uniform rule.

[78]Thompson and Finn (2007, pp. 75–78).

[79]Trackman (2002, pp. 12–13).

[80]Trackman (2002, pp. 17–18).

However, what should it look like and how can it be achieved?

What is needed is a universally accepted default rule, i.e. a rule binding in the absence of mutual assent otherwise.[81] Although the existence of a consistent judicial approach would be the best way to achieve the observance of the duty of confidentiality,[82] nevertheless, and due to the fact that case law such as *Esso/BHP v Plowman*[83] and *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd &* Ors[84] constitute a vivid proof of the contrasting practical difficulty to achieve and guarantee such a judicial consistency, it is submitted that a pertinent solution could be best achieved via the means of a statutory remedy.[85]

[81]Sarles (2002).

[82]Brown (2001, pp. 1015–1017).

[83]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[84]*Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors [2006] VSC 175.*

[85]Editorial (1995, pp. 231–233).

Chapter 6
Transnational Law and Arbitration

In recent years "transnational law" has become a term often used in legal terminology especially in the context of international commercial arbitration whereby, expressions such as "transnational law" or "new *lex mercatoria*" denote non-national or supra-national legal rules or principles employed by arbitration tribunals in the course of disputes settlement.[1]

This chapter discusses the impact of transnational law on international commercial arbitration and its interconnection with confidentiality. More specifically, we address the modern European and global character of arbitration and the way in which the various levels of protection of confidentiality affect it, before discussing the advantages and disadvantages as well as the possibility of achieving a uniform transnational arbitration law.

6.1 The Need for Transnational Law

6.1.1 In Relation to International Commercial Law

In the context of international commercial law, transnational law denotes the following: Firstly, it denotes the general legal regime of an international commercial transaction, which includes the applicable law of the transaction together with all other norms which impinge on the transaction. Secondly, it denotes the factual uniformity or similarity in contract laws applicable to or contractual patterns used in international commercial transactions – whereby transnational law denotes the noticeable and considerable similarity of the norms, principles, rules, contractual documents and clauses employed in international commercial transactions irrespective of the geographical location of the transaction. Thirdly, it denotes the international sources of commercial law, i.e. the laws which are the product of a conscious

[1]Bamodu (2001, pp. 6–16).

K. Noussia, *Confidentiality in International Commercial Arbitration*,
DOI 10.1007/978-3-642-10224-0_6, © Springer-Verlag Berlin Heidelberg 2010

courts, although avoided altogether as a starting point, will enforce this agreement. Not least, the provision of penalties, in the event of a breach of the confidentiality agreement will deter breaches where damages from a breach may be non-existent or minimal.[17]

Another solution, could be the following uniform rule which provides for a general protection against non disclosure:

> No information concerning an arbitration will be unilaterally disclosed to a third party by any participating party unless required to do so by law or by a competent regulatory body and then only by disclosing no more than what is legally required and furnishing to the arbitrator details of the disclosure and an explanation of the reasons for it.

More detailed provisions regarding discovery and the productions of evidence or other documents or in relation to the award, could be as follows:

1. Any documentary or other evidence given by a party or a witness in an arbitration shall be confidential and not disclosed to any party directly involved to the arbitration or any third party without the consent of the parties to the arbitration agreement or an order of a court or arbitral tribunal.
2. Written pleadings will not be disclosed to third parties for any purpose save as stated above in 1.
3. An arbitrator, when issuing an order for the protection of documentary or other evidence, may in his discretion make such order conditional upon the other party's or parties' special written undertaking not to disclose any of the evidence or details of it to third parties.

Awards should be treated as confidential and not communicated to third parties unless all parties and the arbitrator(s) consent or they fall into the public domain as a result of enforcement actions before national courts or other authorities or they must be disclosed in order to comply with a legal requirement imposed on an arbitrating party or to establish or protect such a party's legal rights against a third party.[18]

The above gives effect to the need for parties to safeguard the duty to observe confidentiality by the introduction of specific terms, as confidentiality of arbitration is not explicitly protected.

[17]Sarles (2002, pp. 13–14).

[18]Paulsson and Raeding (1995, pp. 315–317).

Chapter 8
Conclusions

8.1 A General Critique

8.1.1 An Overview

Both privacy and confidentiality are among the major advantages of arbitration. That having been said, the two concepts differ in their nature significantly. The privacy element, does not presuppose or guarantee that any information, revealed in arbitration, is automatically also confidential. The right to privacy is recognised in English law as an implied right, which attaches to all agreements to arbitrate as an incident of such a contract, unless it is expressly excluded by agreement of the parties. In *Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]*,[1] it was held that privacy, albeit implied, was nevertheless a substantive and core element of arbitration. This position, was also adopted in Australia in *Esso/BHP v Plowman*.[2]

Confidentiality has been defined by English courts either as a contractual obligation, or as a legal duty, or from a perspective.[3] In the case where confidentiality is treated as a contractual obligation, it has been traditionally identified as an implied contractual term, as stated in *Associated Electric and Gas Insurance Services (AEGIS) v European Reinsurance Company of Zurich*.[4] Where confidentiality is perceived and treated as an implied contractual term, it can be implied either in fact, as this is regarded as part of the need of the parties to give business efficacy to a transaction, or by operation of law, as demonstrated in *Ali Shipping Co Ltd v*

[1]*Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]* [1984] 2 Lloyd's Rep. 373 (QB).

[2]*Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[3]Thoma (2008, p. 300).

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

K. Noussia, *Confidentiality in International Commercial Arbitration*,
DOI 10.1007/978-3-642-10224-0_8, © Springer-Verlag Berlin Heidelberg 2010

Shipyard Trogir,[5] in which it was recognised as an inherent element of arbitration and where it was established that the duty arose directly from the arbitration agreement, or by custom of a market, trade, or locality, as illustrated in *Hassneh Insurance Co of Israel v Steuart J Mew*.[6]

In relation to the issue of confidentiality in arbitration proceedings, with regards to the arbitral proceedings themselves, the established English practice of consolidating proceedings was initially overturned in *Oxford Shipping Co v Nippon Yesen Kaisha (The "Eastern Saga")*,[7] and later on in *Sacor Maritima v Repsol*,[8] *Aquator Shipping Ltd v Kleimar NV (The Capricorn)*,[9] *Ali Shipping Co. v Shipyard Trogir*,[10] *Laker Airways Inc. v FLS Aerospace Ltd*,[11] *Owners, Master and Crew of the Tug "Hamtun" v Owners of the Ship "St. John"*,[12] *Associated Electric & Gas Insurance Services Ltd. (AEGIS) v European Reinsurance Company of Zurich (Bermuda)*.[13] In the USA, the predominant position is that consolidation would be permitted, as case law, such as *Compania Espanola de Petroleos SA v Nereus Shipping SA*[14] and *Volt Info. Sciences v Board of Trustees*,[15] has demonstrated, although the opposite view has also been followed, in cases such as in *Baesler v Cont'tal Grain Co*[16] and in *Protective Life Ins. Corp. v Lincoln Nat'l Life Ins. Corp.*[17] In Germany, an academic debate exists with regards to the existence or not of an implied duty to observe confidentiality in the absence of an express agreement. The judiciary favours the idea that the obligation to preserve confidentiality exists only in relation to the proceedings themselves and not beyond them.

In relation to the issue of confidentiality in arbitration proceedings with regards to the disclosure (discovery) of documents, in England the existence of the duty of confidentiality, in relation to documents disclosed on discovery in arbitral proceedings, was established in *Dolling-Baker v Merrett*,[18] followed by the decisions

[5] *Ali Shipping Co Ltd v Shipyard Trogir* [1998] 2 All ER 136 (CA).

[6] *Hassneh Insurance Co of Israel v Steuart J Mew*, [1993] 2 Lloyd's Rep 243 (Com.Ct.).

[7] *Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]* [1984] 2 Lloyd's Rep. 373 (QB).

[8] *Sacor Maritima SA v. Repsol Petroleo SA* [1998] 1 Lloyd's Rep. 518 (QBD (Comm)).

[9] *Aquator Shipping Ltd v Kleimar NV (The Capricorn)* [1998] 2 Lloyds Rep 379.

[10] *Ali Shipping Co. v Shipyard Trogir* [1998] 1 Lloyd's Rep. 643.

[11] *Laker Airways Inc. v FLS Aerospace Ltd* [1999] 2 Lloyd's Rep. 45.

[12] *Owners, Master and Crew of the Tug "Hamtun" v Owners of the Ship "St. John"*, March 11, 1999, Admiralty Court.

[13] *Associated Electric & Gas Ins. Serv. Ltd. v. European Reinsurance Co. of Zurich (Bermuda)* [2003] UK PC 11 (Jan. 29, 2003) (AEGIS).

[14] *Compania Espanola de Petroleos SA v Nereus Shipping SA*, 527 F2d 966 (2d Cir. 1975).

[15] *Volt Info. Sciences v Board of Trustees* (489 US 468 (1989)).

[16] *Baesler v Cont'tal Grain Co*, 900 F2d. 1193 (8th Cir. 1990).

[17] *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989).

[18] *Dolling-Baker v Merrett* [1991] 2 All E.R. 890.

in *Hassneh Insurance Co. of Israel v Mew*,[19] and in *Insurance Co v Lloyd's Syndicate*.[20] Conversely, the decisions of the High Court of Australia, in *Esso Australia Resources Ltd v Plowman*,[21] and of the Swedish Supreme Court, in *Bulgarian Foreign Trade Bank Ltd. v A.L. Trade Finance Inc.*,[22] have shown that the notion of confidentiality is not absolute and may be overturned. However, in *Ali Shipping Corporation v Shipyard Trogir*,[23] the position which supports the duty to observe confidentiality was re-determined, and was further restated in *Glidepath BV and Others v Thompson and Others*.[24] In *Emmott v Michael Wilson & Partners Ltd*,[25] although limits to confidentiality were recognised in occasional circumstances which required confidentiality to be relaxed, it was emphasised that arbitrations in England are private and confidential. In the USA, the ability to obtain pre-arbitral discovery, was demonstrated in *Amgen Inc v Kidney Center of Delaware County Ltd.*[26] Later on, in *United States v Panhandle Eastern Corp.*[27] it was recognised that release of discovery documents was permissible, where no express confidentiality intention existed.[28] The same approach was adopted in *Cont'ship Containerlines, Ltd. v PPG Industries, Inc.*,[29] *Lawrence E. Jaffee Pension Plan v Household International, Inc.*,[30] *Urban Box Office Network v Interfase Managers*,[31] and in *Re Application of Leonard Bernstein et al v On-Line Software International Inc. et al.*[32] However, case law, such as *Industrotech Constructors Inc. v Duke University and Turner Construction Company*[33] and *ITT Educational Services Inc. v*

[19] *Hassneh Insurance Co. of Israel v Mew* [1993] 2 Lloyd's Rep. 243.

[20] *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272.

[21] *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 A.L.R. 391.

[22] *Bulgarian Foreign Trade Bank Ltd. v. A.L. Trade Finance Inc.*, Judgment of October 27, 2000, Swedish Supreme Court.

[23] *Ali Shipping Corporation v Shipyard Trogir* [1998] 1 Lloyd's Rep. 643.

[24] *Glidepath BV and Others v Thompson and Others* [2005] 2 Lloyd's Rep. 549.

[25] *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

[26] *Amgen Inc v Kidney Center of Delaware County Ltd* 879 F.Supp. 878 (N.D.III 1995).

[27] *United States v Panhandle Eastern Corp.* 118 FRD 346 (D.Del. 1988).

[28] Baldwin (1996, pp. 485–486).

[29] *Cont'ship Containerlines, Ltd. v. PPG Industries, Inc.*, No. 00 Civ. 0194 RCCH BP, 2003 WL 1948807 (S.D.N.Y. Apr. 23, 2003).

[30] *Lawrence E. Jaffee Pension Plan v. Household International, Inc.*, No. Civ. A. 04-N-1228 (CBS, 04-X-0057), 2004 WL 1821968 (D. Colo. Aug. 13, 2004).

[31] *Urban Box Office Network v. Interfase Managers* No. 01 Civ. 8854 (LTS) (THK), 2004 WL 2375819 (S.D.N.Y. Oct. 21, 2004).

[32] *Re Application of Leonard Bernstein et al v On-Line Software International Inc. et al*, 232 A. D.2d 336, 648 N.Y.S.2d 602.

[33] *Industrotech Constructors Inc. v Duke University and Turner Construction Company* 1984 67 N.C.App. 741, 314 S.E.2d 272, 17 Ed. Law Rep. 269.

Roberto Arce et al,[34] has demonstrated that confidentiality clauses are enforceable and, thus, should be observed. In France, in *Société True North et Société FCB Internationale v Bleustein et al*,[35] the French Court of Appeal recognised that arbitration, as a private procedure, entails a confidentiality element. In Germany, the issue of disclosure or not of information about the existence of arbitral proceedings, depends on the precise content of the contractual confidentiality obligations.

In relation to the issue of confidentiality in arbitration proceedings with regards to an arbitral award, the English judiciary favours the preservation of confidentiality, as shown in *Department of Economic Policy & Development of the City of Moscow (DEPD) v Bankers Trust Co*[36] and further considered in *Insurance Co v Lloyd's Syndicate*,[37] *Ali Shipping Corp. v Shipyard Trogir*[38] and in *Associated Electrics and Gas Insurance Ltd (Aegis) v European Reinsurance Co of Zurich*.[39] However, courts may allow disclosure of an award, as shown in *Sacor Maritima v Repsol*[40] under certain circumstances, such as where the latter is reasonably necessary, as shown in *Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada*,[41] in *Nesté Chemicals SA v DK Line SA (The Sargasso)*[42] and in *Aegis* v *European Re*.[43] In the USA, the confidentiality of arbitral awards is not implicitly guaranteed or entailed in the parties' arbitration agreement, as case law like *United States v Panhandle Eastern Corp.*,[44] has demonstrated. In France, the position is different, as demonstrated in *Aita v Ojjeh*,[45] and the rule is that there is an implied duty strictly to observe confidentiality of awards. In Germany, the position is that the protection of confidentiality of the arbitral awards should be guaranteed by a detailed express provision by the parties.

[34] *ITT Educational Services Inc. v Roberto Arce et al* 2008, 533 F.3d 342; WL 2553998 (C.A. 5, June 27, 2008).

[35] *Societe True North et Societe FCB Internationale v Bleustein et al*, Cour d'Appel de Paris 1999, Rev Arb 2003, 189.

[36] *Department of Economic Policy & Development of the City of Moscow (DEPD) v. Bankers Trust Co.* [2003] EWHC 1337; [2003] 1 W.L.R. 2885.

[37] *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272.

[38] *Ali Shipping Corp. v Shipyard Trogir* [1991] 1 W.L.R. 314, C.A.

[39] *Associated Electrics and Gas Insurance Ltd (Aegis) v. European Reinsurance Co of Zurich* [2003] UKPC 11; [2003] 1 All E.R. (Comm) 253.

[40] *Sacor Maritima SA v. Repsol Petroleo SA* [1998] 1 Lloyd's Rep. 518 (QBD (Comm)).

[41] *Lincoln National Life Insurance Co v. Sun Life Assurance Co of Canada First Instance* [2004] EWHC 343; [2004] 1 Lloyd's Rep. 737, CA; [2004] EWCA 1660.

[42] *Nesté Chemicals SA v DK Line SA (The Sargasso)* [1994] 2 Lloyd's Rep. 6 [1994].

[43] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co. of Zurich* UKPC 11, (2003)1 WLR 1041.

[44] *United States v Panhandle Eastern Corp.* 118 F.R.D. 346 (D. Del. 1988).

[45] *Aita v Ojjeh*, Judgment of 18 Feb. 1986, 1986 Revue de l' Arbitrage 583.

8.1.2 Tentative Conclusions

The general rule, as depicted in the case law, is that documents and evidence of in the arbitration are protected by confidentiality, although in *Esso/BHP v Plowman*[46] it was stated that documents or other evidence of the arbitral proceedings are unlikely to remain confidential unless this is expressly and in detail stipulated: Nevertheless, the test for confidentiality of documents, is the one stated in *Ali Shipping v Shipyard Trogir*,[47] where it was held that parties, directly to the arbitration and third parties, are bound by a duty towards the observance of the obligation to confidentiality. However, this test had already been submitted to limitations and exceptions, as shown in *Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]*,[48] *Dolling-Baker v Merrett*,[49] and in *Hassnesh v Mew*,[50] and was further exemplified in *Esso/BHP v Plowman*[51] and *Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd*.[52] In addition, fairly recent case law, such as *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors*,[53] has shown that the implications of *Esso/BHP v Plowman*[54] seem to have lessened, and that there is no real difference, anymore, between the English and Australian approach towards confidentiality.[55]

In spite of the disparity in the case law on confidentiality in international commercial arbitration, the general trend still pursues the protection of confidentiality. In the common law world, cases, such as *Associated Electrics and Gas Insurance Ltd (Aegis) v European Reinsurance Co of Zurich*,[56] *Insurance Co v Lloyd's Syndicate*,[57] *Ali Shipping Corporation v Shipyard Trogir*,[58] *United States v Panhandle Eastern Corp. et al*[59] and *Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada*,[60] have demonstrated the need to protect

[46] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[47] *Ali Shipping v Shipyard Trogir* [1998] 1 Lloyd's Rep 643.

[48] *Oxford Shipping Co v Nippon Yesen Kaisha [The "Eastern Saga"]* [1984] 2 Lloyd's Rep. 373 (QB).

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

[50] *Hassnesh v Mew* [1993] 2 Lloyd's Rep 243.

[51] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[52] *Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd* Case No Y 1092-98, SVEA Court of Appeal.

[53] *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors* [2006] VSC 175.

[54] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[55] In *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors [2006] VSC 175.*

[56] *Associated Electrics and Gas Insurance Ltd (Aegis) v. European Reinsurance Co of Zurich* [2003] UKPC 11; [2003] 1 All E.R. (Comm) 253.

[57] [1995] 1 Lloyd's Rep. 272.

[58] *Ali Shipping Corporation v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 643.

[59] *United States v Panhandle Eastern Corp. et al*, (D.Del. 1988) 118 F.R.D. 346.

[60] *Lincoln National Life Insurance Co v. Sun Life Assurance Co of Canada* [2004] EWHC 343; [2004] 1 Lloyd's Rep. 737, CA; [2004] EWCA 1660.

confidentiality further in order to guarantee its observance. In the continental law world, there is also a strong presumption towards the observance of confidentiality. Thus, in France, in *Aita v Ojjeh*[61] and, more recently, in *Société True North et Société FCB Internationale v Bleustein et al*,[62] the existence of an implied duty of confidentiality was re-emphasised, although other case law such as *Nafimco v Foster Wheeler Trading Company AG*,[63] has demonstrated that there is no absolute guarantee for its existence and subsequent observance.[64] The situation is similar in Germany. The OLG Frankfurt Court, in its decision of 22.10.2004,[65] stated clearly that there is a presumption towards the observance of confidentiality. However, generally speaking, other judgments such as the one in *Bulgarian Foreign Trade Bank Ltd. v. A.L. Trade Finance Inc.*[66] show that in order for the observance of confidentiality to be guaranteed, this need be specifically provided for in the arbitration agreement.

8.2 Ways to Safeguard Confidentiality

The confidentiality problem creates an urgent need for measures to be adopted with the aim of providing a solution to the problems encountered in practice, with regards to the preservation of confidentiality in arbitration.

At first glance, the existence of a consistent judicial approach would be the best way to achieve the observance of the duty of confidentiality.[67] However, the diversity of the established judicial trends and of the judicial reasoning behind them, as illustrated in *Esso/BHP v Plowman*[68] and *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd &* Ors,[69] constitute a vivid proof of the contrasting practical difficulty of achieving and guaranteeing judicial consistency.[70]

Courts have not articulated a general rule on this issue for various reasons, such as the fact that the involvement of courts may reveal that an arbitration will become a public record; or the fact that parties frequently involved in arbitrations, may not be able to withhold the fact of such involvement; or the fact that lawyers and

[61] *Aita v Ojjeh* (1986) Revue de'l Arbitrage 583.

[62] *Societe True North et Societe FCB Internationale v Bleustein et al*, Cour d'Appel de Paris 1999, Rev Arb 2003, 189.

[63] *Nafimco v Foster Wheeler Trading Company AG*, Cour d'Appel de Paris, 22.01.2004.

[64] Mueller (2005, pp. 218–219).

[65] OLG Frankfurt, Beschl. v. 22.10.2004 – Case 2 Sch 01/04 (2).

[66] *Bulgarian Foreign Trade Bank Ltd. v. A.L. Trade Finance Inc.*, Judgment of October 27, 2000, Swedish Supreme Court.

[67] Brown (2001, pp. 1015–1017).

[68] *Esso/BHP v Plowman* (1995) 128 A.L.R. 391, High Court of Australia.

[69] *Transfeld Philippines Inc & Ors v Pacific Hydro Ltd & Ors* [2006] VSC 175.

[70] Editorial (1995, pp. 231–233).

arbitrators may disclose their participation to an arbitration; or the fact that financial considerations, ethical duties and public policy issues may detect so; or the fact that third parties participating in an arbitration, such as expert witnesses, may form the grapevine through which information concerning an arbitration is spread.[71] Moreover, in the common-law tradition, the debate on confidentiality in arbitration has been also intensified, in the sense that public interest, on the one hand, may, at times, require arbitration proceedings to remain confidential, but, on the other hand, it may also in some other instances preclude confidentiality. In effect, public policy reasons may require the lifting of the veil of confidentiality. Public interest considerations may also compel the courts to authorise some publicity of the arbitral proceedings.[72]

The above observations show that the solution of a consistent judicial approach is illusionary.[73] In light of the above consideration, it is, therefore, pertinent that a policy be considered in order to establish the best protection of confidentiality within arbitration. What are the factors to be considered when drafting such a policy?

8.3 Policy Means and Considerations

An initial inquiry in crafting a transparent and effective policy which would protect the confidentiality of arbitration agreements, is to determine how such a policy should evolve: i.e. via contract drafting, or via the revision of institutional arbitral rules, or via changes in the substantive law?

Arbitration is a matter of contract, and therefore it would be ideal if parties protected their own and the public's interests in their individual bargains. Bargaining realities, however, often prevent individuals from negotiating confidentiality provisions in arbitration contracts.

Moreover, the public, generally, has no say in parties' private agreements. Legislative or administrative rules may, therefore, be warranted to increase access to information affecting important public interests, without jeopardizing arbitrating parties' legitimate secrecy needs.[74]

8.3.1 Contractual Creation?

Parties to a pre-dispute contract containing an arbitration clause often do not invest time or resources in negotiating privacy and confidentiality rules for possible

[71] Brown (2001, pp. 1000–1004).

[72] Dessemontet (1996).

[73] Brown (2001, pp. 1015–1017).

[74] Schmitz (2006, p. 1241).

proceedings. This, generally, is efficient, because there is no reason for these parties, to waste resources wrangling over details of future arbitration proceedings they never expect to pursue.

Accordingly, it is unlikely that such a reform, to include confidentiality related clauses, will occur solely through parties' contract negotiations, because, on the one hand, companies generally lack the incentive to draft their standard form contracts to require publication of awards, and, on the other hand, individuals usually lack resources or experience, to negotiate successfully for contract provisions protecting the confidentiality of their sensitive information.

8.3.2 *Incorporation Through Institutional Arbitration Rules*

Institutional or administrative arbitration rules apply when parties incorporate them in their contracts. In other words, these rules may become contract terms by reference. Accordingly, arbitral institutions could reform their rules to cover confidentiality and transparency expressly. This would save contracting parties from having to invest their resources in drafting these provisions. It also may also foster a more balanced approach for the interests of all involved in arbitration, because bargaining and resource imbalances may play less of a role in the development of institutional rules than in parties' contractual negotiations.

Some arbitral institutions have already promulgated transparency rules in order to foster goodwill. However, most institutions that administer arbitrations under parties' private agreements take no position on whether parties should agree to keep information regarding their cases confidential. They may, also, be reluctant to embrace the time-consuming and possibly contentious tasks of developing transparency rules and publishing awards in a systematic manner. Moreover, some administering institutions would be hesitant to risk losing repeat clientele by requiring disclosure of awards. Such rules may cause repeat players to avoid these institutions, or reform their arbitration contracts to require *ad hoc* administration.

8.3.3 *Legislative Regulations*

As stated above, it may be difficult for parties to draft and mutually accept confidentiality provisions that appropriately protect all parties, as well as the public's interests in access to information because, on the one hand, parties usually do not voluntarily publish arbitration awards that indicate statutory violations, and all disputants do not enjoy equal access and power and, also, because, on the other hand, arbitral institutions are unlikely to act in unison to develop and implement uniform transparency reforms.

Accordingly, legislative regulation may be necessary to foster such reforms. However, this would not be an easy and simple task, in that legislators who draft

such reforms would have to consider tensions between contract freedom and fair access to information, in the light of the need to balance the interests of contracting parties as well as the public. Nonetheless, legislators hopefully would pursue that task with balanced concerns and understandings. Legislative rules also allow for greater scope by extending not only to parties to an arbitration agreement, but also to arbitrators, and other third parties who participate in arbitration proceedings.

8.3.4 *Considerations with Regards to the Publication and Enforcement of Awards*

Although it is suggested that the regulation of the borders of confidentiality will not exclude the publication of arbitration awards, nevertheless, the latter should only occur to a limited extent. In effect, at the same time that publication of awards, affecting important public interests, would occur, default rules, which protect the confidentiality, of individuals' sensitive personal information revealed in arbitration, should also exist. In some cases, this may warrant publication of an arbitration report with careful extraction of individuals' personal information that the public has no right or need to know. Furthermore, it may justify injunctive relief or sanctions to enforce rules precluding non consensual disclosure or use of one's personal information.[75]

Any rules requiring publication of awards should be limited with respect to types of cases covered, substantive writing requirements and means for publishing these awards. Publication rules could also minimise inefficiencies by limiting the substance of reports. Published reports could be limited to the identity of the parties and arbitrators, arbitrator and administrative fees, hearings and disposition dates, a brief description of the claims, and a statement of results. Such limited reports may not further the development of the law to the extent of reasoned and publicly reported judicial opinions, but they would provide more public information than purely private awards or settlement agreements.

Confidentiality protection rules should also prescribe reasonable enforcement mechanisms to prevent parties from leaking information to the press or otherwise revealing sensitive information in order to manipulate or coerce the other party into settlement, or to prevent innocent disclosures, and to minimise the difficulties and inefficiencies which would arise if parties were required to prove actual damages for breach of confidentiality rules. Such rules could also allow for injunctive relief to preclude parties from disclosing information in the first place, and, if disclosure has occurred, monetary sanctions for intentional disclosure of protected information.

[75]Schmitz (2006, p. 1245).

Obviously, there is great need for empirical research on all these questions and issues. Confidentiality protection should balance concern for all parties involved in disputes, while not overly intruding on contractual liberty. Regulation should not go beyond proper protection to paternalism, because overly protective measures could backfire by providing repeat players with auxiliary means for hiding information.[76]

8.4 Arguments Against Confidentiality

Those against confidentiality claim that the continued confidentiality of arbitration decisions is short-sighted, in that it reduces the availability of relevant precedent that can benefit both the judiciary and the business community. The inability to publicise a relevant precedent, capable of being used in future proceedings means that only parties directly involved with the contract in question will be affected by it. Parties who are frequent participants in arbitration may greatly benefit from such precedents, as those parties are better able to select arbitrators with prior knowledge of the particular business, a choice which, may be substantially beneficial for the party. Without precedents businesses will be unable to use dispute outcome information to evaluate their risk in filing suit. The ability to examine dispute outcomes is one easy way in which a business can balance the cost of pursuing a claim against the actual loss suffered. However, confidentiality will hide this information from the business community. Moreover, the confidentiality of the arbitral proceeding has a detrimental effect on the use of reputation in contractual choice. Businesses, when choosing a contracting party, frequently consider reputation as one variable to aid in the selection of the appropriate contracting party. Businesses may determine that reputation is highly important in many areas, from sales potential to customer relations, all of which may factor into the contract's value. However, the confidentiality of arbitration awards shields negative and positive outcomes from becoming part of the businesses' identity. Thus, the confidentiality of the arbitral award may have an impact upon a business because it is not allowed to reveal information that may benefit the business by making its contracts more valuable.

Moreover, the risk of not having appropriate information specific to the business's reputation may cause the contracting party to assume a higher level of risk caused by its choice of contracting partner. Policy-making bodies may be unable to develop regulations that mirror current business practices. Policy-making bodies, especially in industries where confidential arbitration is widely used, have to rely partially upon the published decisions, which will be limited, in number, because of confidential awards. This lack of information, may prevent policy-making bodies

[76]Schmitz (2006, p. 1252).

from fully capturing the customs and practices within the industry. Therefore, the policies and regulations developed may become a hindrance to business, as they do not reflect current business practices.

Finally, the current trend of implying a term of confidentiality into the business's contract, where no express term exists, is possibly the most important concern for a business, The imposition of a blanket term of confidentiality in all arbitration clauses clearly fails to recognise the autonomy of the parties, which should allow parties not to have confidentiality in their arbitration agreement. Certainly, the parties should be free to decide the content of the contract, within the noted exceptions of public policy limitations and mandatory laws, and should be able to determine for themselves whether any information is worth protecting as confidential. It is quite possible that neither business will want the outcome of a dispute to be confidential, such as in cases where the outcome has a direct impact on the financial status of one or both the businesses. In such a situation, it may be desirable to release the outcome of the proceedings, and this decision should be honoured by the state and the courts as it in no way impacts, influences, or infringes the authority of the state or the public it is attempting to protect.

In addition to impacting individual businesses, increased protection of the confidentiality of awards would potentially cause damage to international commercial law, as a whole. First and foremost, the *lex mercatoria* is founded on the customs developed by the merchants themselves. Tenets of *lex mercatoria* allow, if not demand, the custom to adapt to the changing environment and commercial practices. However, the use of confidentiality in arbitral proceedings and awards, diminishes the rate of adaptation. As this occurs, the system of *lex mercatoria* will suffer, because it will begin to lag behind the practice of merchants.[77]

8.5 Other Relevant Factors: Legal Cultures and Traditions

Codes, laws and guidelines governing international commercial arbitration developed by various organizations[78] have been drafted against the background of common-law and civil-law values. In balancing these two great legal traditions, it was assumed that together they represent a composite legal tradition, governing international commercial arbitration. The result of that assumption was decades of fine work, enshrining international arbitration doctrines, principles, and rules of law and procedures that blend these two important legal traditions.

How pervasive are the common and civil-law traditions? Are they sufficiently uniform, in nature and operation, to justify their dominant status in formulating

[77]Raymond (2005, pp. 502–516).

[78]Such as the International Court of Arbitration, the International Bar Association and the International Chamber of Commerce.

codes, laws and rules governing international commercial arbitration? And, has international commercial arbitration become unduly reliant upon both the common and civil-law traditions at the expense of other legal traditions that operate against the background of different and changing legal cultures?

A legal culture is distinguishable from, and wider than, a legal tradition. Identifying a legal culture, involves an analysis of the parameters of the nature, source and operation of that culture. The source of a culture may revert back to the social, political and economic roots of that culture. The content of a legal culture, may find formal expression in a legal tradition, such as in codes, statutes and judicial decisions, which are set out in the principles, standards and rules of law governing arbitration. The development of a legal culture may follow religious, political or social patterns, or some combination of all three. A legal culture may also evolve out of market forces that impact upon it differently, over time, place and space. The operation of a legal culture, may be described in the legal literature that outlines how legal rules ought to work, in theory, and how they actually function in practice. A legal culture may also develop, in response to social values that are attributed to law, such as when rendering the operation of law efficient, comprehensible or fair. A legal culture may be described in attitudes towards law, such as the attitudes of the international business community to the cost, impartiality and reliability of national courts of law, or the attitudes of politicians to the regulation of international business through domestic legislation.[79]

A legal tradition is conceived more narrowly than a legal culture and, in some measure, is a subset of that culture. Identifying a legal tradition includes analysing the source, development and operation of a legal system itself. The development of a legal tradition, as it applies to international commercial arbitration, may encompass a particular historical institution, such as the influence of the medieval Law Merchant, upon the evolution of modern international commercial arbitration. The development of an arbitration tradition may also include global traditions, such as the institutionalisation of arbitration in international arbitration codes, laws and guidelines, and the manner in which commercial arbitration is practised in a particular region or global community generally. In some respects, the medieval Law Merchant reflects a legal tradition among merchants that both predated and had an impact upon modern international commercial arbitration. The Law Merchant was cosmopolitan, in incorporating the trading practices of itinerant merchants who travelled across the, then-known, world trading in their wares. In some respects it is in this tradition that international commercial arbitration has evolved into an alternative means of resolving disputes to national courts of law.

International commercial arbitration, is decidedly more complex today when compared to historical variants of dispute resolution, like the medieval Law Merchant.

[79]Trackman (2006, p. 5).

Given that arbitration is grounded in party consent, learning how that consent arises in practice, within discrete business communities, is important in understanding how a culture of international commercial arbitration has evolved. Understanding how law impacts on culture, and culture upon law, also has a significant bearing on the operation of each, in relation to the other in the context of international commercial arbitration. Analysing legal cultures, like those associated with international commercial arbitration, can help to understand not only the attributes of those cultures, but also their disparate application, in a changing global community, including international commercial arbitration.

By considering trends in legal cultures, one can observe the effect of cultural shifts upon the operation of legal institutions, like arbitration. One can observe tendencies, practices, habits and customs that are imputed to a legal culture, as well as perceived changes in those tendencies. Moreover, one can develop measured institutional and non-institutional responses to perceptions of cultural change.

However, because much international commercial arbitration transcends or resists discrete cultural difference, it follows that arbitration is unavoidably affected by disparate legal culture. That influence occurs when international commercial arbitration is grounded in distinct legal cultures, such as when civil-law influences lead to restrictions in the admission of oral testimony in arbitration. Differences in legal culture, among end users, also lead to the development of novel arbitration services.[80] Whether these cultural influences arise by deliberate design or by accretion, they impact on the culture of arbitration itself. As a result, international commercial arbitration consists of a variable amalgam of legal cultures. It is not the product of a single, determinative and pre-existing arbitral culture.

Ultimately comes the question: whether arbitration is the product of cultural pluralism, derived from a blend of civil and common-law traditions and, if so, to what extent? To what extent is this blend itself changing in our global environment?[81] From the perspective of international commercial arbitration legal traditions can also be broken down into local, regional and international traditions. Local legal traditions, encompass the rules and practice of a state or local legal system, such as are embodied in a state's commercial code. Regional legal traditions, include the laws and practices of regional organizations, like the European Union and the North American Free Trade Agreement. International legal traditions include the various institutions adopted by a multitude of states. Thus, a stereotypical conclusion is that international commercial arbitration, along with the lawyer-arbitrators and counsel who serve it, emanates primarily from an amalgam of civil and common-law traditions that are unified by international organizations, like the ICC. However, it should not be blindly assumed, that international commercial arbitration has simply replicated an amalgam of these traditions. As a matter of

[80]Such as the development of uniform, expedited and enforceable procedures to protect the trademarks of established businesses from infringement and from cyber squatters.

[81]Trackman (2006, pp. 7–13).

practice, common and civil-law traditions vary markedly from country to country, as well as over time and space.[82]

A reliance on common and civil-law traditions is also insufficient to serve as the basis for the legal traditions governing international commercial arbitration in the modern era. First, even if civil and common-law traditions were dominant globally and historically, such a dominance has become both "nationalised" and "regionalised" as a consequence of the advent of the modern state, the influence of local custom on the evolution of commercial law and practice, and the development of regional free trade zones. So, too, local legal traditions have evolved, and they are significantly impacted by domestic political, economic and social forces, beyond their early roots in civil or common-law systems.[83] Given the amalgam of different legal traditions, can one detect a distinctively international legal tradition, in commercial arbitration? And, if so, what is the nature and significance of that tradition?

There are different principles by which to gauge the legal tradition of international commercial arbitration. The first principle is consensual, that is to say, the parties choose arbitration. The parties are free to select the nature, form and operation of arbitration, irrespective of whether its nature is *ad hoc* or institutional; or, whether its form is modelled on European, English, American or "other" legal traditions; or whether it is conducted primarily through oral testimony or written submissions; or whether it is impacted by a multi-or bilateral treaty or by discrete customary law influences. The parties to arbitration presumably exercise their choices for distinctive reasons, such as, the existence of a reputation of a preferred arbitration association; or because the particular arbitrators chosen supposedly have commercial expertise beyond that of domestic courts of law; or because international commercial arbitration is perceived to be less costly, more efficient and more "party sensitive" than courts of law; or because of the privacy and confidentiality features, entailed in international commercial arbitration; or simply, to avoid having to rely on the domestic laws and procedures of the legal system and courts of one party. These reasons, for resorting to international commercial arbitration, may be misplaced, but they nevertheless are repeatedly invoked, as bases for resorting to arbitration. A second principle is that parties can make choices which accommodate preferred legal traditions, while still not choosing domestic courts. A third principle is that the manner in which arbitration is conducted may reflect in varying degrees a particular legal tradition and, more broadly, a preferred cultural orientation. A fourth principle is that particular procedures, associated with international commercial arbitration, stand out more starkly when they are modelled on a particular legal tradition. For example, all other factors being constant, one may

[82]English lawyers, ordinarily engage in a more rigorous formulation, of legal doctrine, than American lawyers, who tend to treat the law in a more piecemeal fashion. Civil lawyers, who follow the French tradition of the Code Napoleon, tend to focus less intensively on the scientific analysis of concepts, like "causa" in the law of obligations, than those who adhere to the more recent and scientifically textured German Code, the Bürgerliches Gesetzbuch (BGB).

[83]Trackman (2006, pp. 16–17).

well expect to encounter less reliance on oral testimony before arbitration tribunals, like the ICC, than before an association like the AAA, in which the examination and cross-examination of witnesses, including experts, is often extensive. A fifth principle, is that variations in the services, provided by international commercial arbitration inevitably are influenced by the customer.[84]

A study of the rules of arbitration of different international, regional and local associations reveals that, while commercial arbitration has attributes of a pervasive legal tradition, the rules and procedures through which that tradition are expressed diverge noticeably from one arbitration association to the next. This diversity in arbitral practice, across the global arbitral community does not imply that the legal tradition surrounding international commercial arbitration is either convoluted or a sham. One can debate the nature, extent and value of those differences, but it would be doubtful to insist, as a matter of principle, that rules and procedures, in international commercial arbitration, should be uniform in nature. However, the point is also not that a legal tradition of international commercial arbitration should resist uniformity, any more than it should replicate the already over-generalized traditions of the civil or common law, but that, in as much as international arbitration proceedings transcend proceedings, before national courts, its traditions should differentiate it, from those national law traditions. A further point is that an international arbitration tradition may well warrant having diverse constituent parts, not only because arbitration associations should be free to market their distinct services, but also because parties should be free to choose different arbitration options based on their discrete circumstances and their free choice. Similarly, parties ought to be able to choose among arbitration associations according to their perceptions of the expertise of the association, its reputation, its rules and procedures, the quality of its roster of arbitrators, its costs, and its record of having its awards recognised and enforced in particular foreign jurisdictions. At the same time, the more expansive and complex the choices available to the parties are, the greater is the potential for one party to pressure another to acquiesce in preferred arbitration rules and procedures which closely resemble the dominant party's domestic rules and procedures.

In what respects are the traditions of international commercial arbitration truly global and pervasive in their sphere of application?[85] International commercial arbitration, has evolved, primarily, against the background of two unifying international traditions: the private international legal tradition, directed at the harmonization of laws; and the public international law tradition, committed to reducing global barriers to trade. Despite the fragmentation of global trade along bilateral and regional lines, international commercial arbitration has remained a vital, yet adaptable, constant in the world trade equation. Can international commercial

[84]The London Court of International Arbitration states that changes in commercial dispute resolution procedures are, quite properly, driven by the end-user. That is, by the international business community.

[85]Trackman (2006, pp. 20–26).

arbitration adjust culturally to meet the future?[86] Emanating from diffuse economic, social and political environments, parties contemplating international commercial arbitration today can choose from a range of sophisticated instruments which demonstrate what, when, and how, to arbitrate disputes. They can choose arbitration forums and rules based on the perceived stability of the applicable arbitral systems, the development of their jurisprudence, and their record of successfully concluded and enforced arbitrations. Parties can also choose from an increasing number of national and regional arbitration centres that accommodate different legal traditions and respond differently to disparate legal cultures. They can adopt a variety of arbitration clauses, duly adapted to meet their particular needs, i.e. they can opt for the specific protection even of rights that are not explicitly provided for, such as the duty and right to observe confidentiality. In addition, parties are not only able to make choices among different types of international commercial arbitration but they can tailor those choices to their own diverse needs and preferences. International commercial arbitration has also entered the global culture of the Internet. Mainstream local, regional and international arbitration associations also offer various online services, including online resources and the ability to file cases online, carefully protected by sophisticated and password-protected gateway services. There is also evidence that arbitration centres once regarded with suspicion in the international business community are becoming not only more competitive but also readier to provide transparent services and enforceable results. Finally centres directed primarily at providing arbitration education have evolved to assist parties to decide whether and how to use arbitration. These centres vary from advising parties on how to draft arbitration clauses and choose arbitrators to advising them how to form realistic expectations about the time and costs involved in arbitrating disputes.[87]

International commercial arbitration will face ongoing cultural challenges. Again, "localisation" and "regionalisation", as opposed to "internationalisation" of arbitration, is neither good nor bad in itself. In order for the culture, surrounding international commercial arbitration to be non-exclusionary of other cultures, and, wherever for it exclusionary, to be remedied, international commercial arbitration needs be vigilant, so as to avoid being dubbed culturally myopic, in times of change It is important, that arbitrators use modern law merchant practices but scrutinise them, bearing always in mind fairness to the parties involved.

Due to the fact that legal culture surrounding international commercial arbitration have grown both more diffuse and more complicated in operation, while arbitral institutions sometimes have failed to adapt to the demands of changing markets for their services, international commercial arbitration needs to address those legal cultures and traditions once ignored historically, but now carrying far greater political and economic weight. To ignore these legal traditions and cultural influences will be at the peril of arbitration itself. This is not to suggest that

[86]Trackman (2006, pp. 28–30).

[87]Trackman (2006, pp. 34–35).

international commercial arbitration has stood still. Significant progress has been made by local, regional and international arbitration organizations, at demystifying arbitration. Information is increasingly available that explains to parties how arbitration works, and there is also an impressive body of online databases that clarify what, when, how and where to arbitrate, along with the inclusion of a host of conventions, codes, laws, rules and practices on international commercial arbitration. In spite of the existence of such developments, international commercial arbitration is unlikely to be a panacea, but, needs to be able to recognise cultural prejudices and to be sensitive to cultural traditions.[88]

8.6 Future Prospects and Suggested Routes

Alternative dispute resolution should not be dismissed wholesale, because it does not explicitly recognise and protect the need for confidentiality. Instead, it should be recognised as a growing mechanism of dispute resolution. Freedom of contract, or party autonomy, should continue to exist and, within it, businesses and individuals, should be able to secure their ability to create arbitration agreements encompassing their desire to protect the confidentiality aspect of any potential dispute therein involved.

That having been said, there is a growing need to counterweight the disadvantages of confidentiality, before actually proceeding to any widespread legislative measure, to reinforce its protection. Although the business community nowadays widely accepts confidentiality, notwithstanding the term's lack of definition or certainty, it should also consider factors such as, for example, the place and role of confidentiality, within a system that has only a very limited right of appeal. Furthermore, the use of the term confidentiality, which is unsettled and uncertain, is probably short-sighted, in that it removes from the spectrum of general knowledge, not only the establishment of precedent, but also, impacts the gathering of information, the elimination of which could negatively impact the judiciary and the business community.

Thus, the suggestions is made that confidentiality should be observed, but within limits. Although full disclosure and lifting of the veil of confidentiality damages business reputation, publication of certain information at certain stages of the arbitral process, such as the revelation of some information within awards, could be allowed. Parties could still request the protection of information, but would need to demonstrate to the tribunal a need to protect the release of the information, especially the release of information of not so big importance, in terms of secrecy, such as the business names of the parties and nature of the dispute. The availability of this basic information is vital to the business and legal community. Moreover, the confidentiality afforded should be judged on a case by case basis. Blanket

[88]Trackman (2006, pp. 40–43).

confidentiality is an unwise imposition by the judiciary, in light of the need for legal decisions to stand as precedent. Moreover, blanket confidentiality protections may be an unwise agreement for a business, from both a business and public community perception.[89]

Because it is highly probable that parties in international disputes face an uncertain route to the resolution of their dispute, it is important that they take action to smoothen their path, by taking steps such as the drafting of their own dispute resolution clauses. In drafting such clauses, they should consider the required content and length of the clause, the set of dispute resolution rules to be incorporated, as well as the question of their modification or supplementation and the question of the way in which the whole process is to be administered, i.e. whether it will be administered *ad hoc* or via an institution.

More specifically, in drafting arbitration clauses, parties should avoid blindly adopting a wholesale boilerplate clause, but enquire into the possible question of modification or supplementing of the said clause, and in particular they should ensure that they address the *lex arbitri* or *lex fori*; the seat of arbitration, which will determine the procedural applicable laws and will impact on the enforcement

whilst also giving parties to the arbitration a breach of contract remedy in cases of unauthorised disclosure.[92]

8.7 A Final Thought

Courts of justice form part of one of the three pillars of state. Their authority does not rest on consent but on state power. This is so even though a plaintiff is, in a sense, a consenting party, and even though it is possible to point to much litigation where foreign parties have agreed contractually to submit their disputes to the jurisdiction of the courts of a certain state. Once invoked, the jurisdiction is exercised over the parties, not on the basis of their consent, but by virtue of the power of the court as an emanation of the relevant state. So, it is recognised that the activities of courts must be open, so that the proper exercise of that power may be observed, not just by the parties, but by the public at large, which may one day also