International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration'*

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ABSTRACT

At the International Law Association's Seventy-fourth Biennial Conference in The Hague in 2010, the ILA International Commercial Arbitration Committee reported on 'Confidentiality in International Commercial Arbitration' and the Conference adopted a number of recommendations on these topics. The report and recommendations as well as a suggested model confidentiality clause are printed in this issue.[1]

The Committee's Hague report was the culmination of two years' work. Members of the Committee had met on a number of occasions to discuss the issues. Some Committee members produced national reports. The Committee's report relates to the question of confidentiality of arbitration proceedings from the initiation of proceedings to the final award and its aftermath. It endeavours to develop a framework for analysis and to provide practical recommendations for addressing any such confidentiality questions. The report gives a comparative analysis of national law and of arbitration rules as to confidentiality of arbitration proceedings. In this respect, it analyses the basis for confidentiality obligations and its exceptions. It also discusses the parties bound by confidentiality obligations and the lifespan of such obligations as well as the issue of enforcement of confidentiality obligations.

On the basis of its analysis, the report finds that expectations of users that arbitration is confidential is not always warranted and, thus, recommends that users, counsel and arbitrators provide for mechanisms to deal with confidentiality obligations and their exceptions. In relation

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1 They can also be found at the ILA's website at www.ila-hq.com.

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to this core recommendation, a model arbitration confidentiality clause is also proposed to assist participants in the arbitration process if there is a need for such a clause.

The ILA was established in 1873, with its objectives being 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law'. The ILA has some 25 committees, ranging from a Committee on Compensation for the Victims of War to a Committee on Space Law, together with several study groups. The Arbitration Committee is one of the ILA's oldest committees. Its current chairman is Professor Filip De Ly; its immediate past chairman was Professor Pierre Mayer, and before him Professor Emmanuel Gaillard. The Rapporteurs of the Committee during the project were Mark Friedman and Luca Radicati di Brozolo. The Committee currently has 63 members and alternates, who are appointed by their national committees.

Previous work of the Committee includes reports and recommendations on 'Public Policy as a Bar to Enforcement of Foreign Arbitral Awards',[2] 'Res Judicata and Lis Pendens in International Commercial Arbitration'[3] and 'Ascertaining the Contents of the Applicable Law in International Commercial Arbitration'.[4]

I. INTRODUCTION

At the Biennial Conference in Rio de Janeiro, Brazil, the Committee on International Commercial Arbitration was mandated to study the topic of confidentiality in international commercial arbitration and to report on it at the Biennial Conference in The Hague in August 2010. This is the Report prepared under this mandate which concludes the activities of the Committee on the topic.[5]

(a) General description of the topic

For many years commercial arbitration participants assumed that arbitration was confidential. While neither statutes, judicial decisions, procedural rules, treatises nor contracts precisely or comprehensively defined the contours and limits of this confidentiality, there was widespread tacit acceptance of a generalized confidentiality principle. Many have long considered confidentiality to be a desirable feature of arbitration and one that distinguishes it from court litigation.[6]

This assumption was called into question by a few highly publicized court decisions in the mid-1990s which prompted considerable commentary and debate.

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2 This can be found at the ILA website at www.ila-hq.com and at (2003) 19 *Arb. Int'l* 217.

3 *Id.* and at (2009) 25 *Arb. Int'l* 3.

4 *Id.* and at (2010) 26 *Arb. Int'l* 191 .

5 The Chairman and Rapporteurs are grateful to all those members who contributed to the Committee's work, and attended the meetings and submitted comments. Moreover they wish to thank Ms Lara Nicholls of Debevoise & Plimpton LLP for her valuable research and assistance in the drafting of this report.

6 According to the PWC and Queen Mary University of London School of International Arbitration, International Arbitration: Corporate attitudes and practices 2006 Survey, '*the top reasons for choosing international arbitration are flexibility of procedure, the enforceability of awards, the privacy afforded by the process and the ability of parties to select the arbitrator*' (*http://www.pwc.co.uk/eng/publications/International_arbitration.html* – pages 2 and 7). See also, Mistelis, *International Arbitration – Corporate Attitudes and Practices – 12 Perceptions Tested: Myths, Data and Analysis Research Report*, Am. Rev. Intl. Arb. 525 (2004).

Since then the issue has attracted much discussion. A growing number of countries have adopted specific legislative provisions on confidentiality and this issue has also been addressed in several court decisions and by arbitral institutions.

The solutions adopted by national legislators and courts and by the arbitral institutions vary substantially and today there is no uniform approach regarding confidentiality in commercial arbitration. Often the issue is addressed directly by the parties in their agreements. Consequently, whether some or all aspects of any given arbitration engage confidentiality obligations varies considerably depending on the arbitration agreement, the substantive contract in dispute, the applicable rules of arbitration and the applicable laws. Moreover, even when one of these sources of authority provides for confidentiality of some kind, the scope and limits of confidentiality may be unclear and poorly understood. Furthermore, there may be no effective mechanisms to enforce any confidentiality obligations that exist.

(b) Outline of the report

In this Report the Committee at Section II surveys current law and practice regarding confidentiality. In Section III the Committee identifies problems that may arise as a result of the inconsistent and uneven applicability of confidentiality. Finally in Section IV the Committee sets out its findings and offers recommendations concerning confidentiality, including two model clauses should parties wish to deal with the issue by agreement.

(c) Mandate

In defining the scope of its mandate the Committee decided to concentrate solely on confidentiality in international commercial arbitration, excluding any discussion of the topic as it relates to investor-State arbitration. In that context confidentiality raises distinct policy concerns and may warrant different approaches and solutions.[7] The fact that one of the parties in such cases is a State acting in its sovereign capacity introduces special circumstances giving rise to public interest in the proceedings and the outcome, as well as to substantive and procedural issues of public international law (including immunity issues) that are absent from commercial arbitration among private parties or involving a State acting as a commercial entity.

The Committee also decided to limit its mandate to what may be termed 'outbound' confidentiality, i.e. the confidentiality of information pertaining to the arbitral process itself and to the documents and other material which are a part of the arbitration. 'In-bound' confidentiality, i.e. the possibility of introducing, disclosing and using within the arbitral process documents or information from external sources (typically in the process of document discovery) raises completely different issues and for this reason was excluded from the Committee's mandate.

[7] At the time of writing Working Group II of UNCITRAL has started work on a study of transparency in investment treaty arbitrations.

The Committee held six meetings to discuss the preparation of this Report and Recommendations.[8] It received reports from several of its members on the laws of Australia, Austria, Belgium, Canada, China, Costa Rica, Denmark, Dominican Republic, Dubai, Ecuador, England Finland, France, Hong Kong, Iran, Ireland, Italy, Japan, The Netherlands, New Zealand, Nicaragua, Norway, Peru, Russia, Scotland, Singapore, Spain, Sweden, Switzerland, United States and Venezuela. The conclusions of those reports on the different national laws are summarized in Section A of Annex I to this Report.

II. SURVEY OF THE SOURCES OF CONFIDENTIALITY

(a) Introduction

Until the mid-1990s there was little discussion about confidentiality in arbitration. There was a widespread assumption that, since arbitration is a private process from which third parties can be excluded and documents relating to, or revealed within, arbitral proceedings were protected from disclosure to third parties not involved in the arbitration, everything about it would be confidential. However, while the concepts of privacy and confidentiality are clearly related, they are distinct. The concept of privacy is typically used to refer to the fact that only the parties, and not third parties, may attend arbitral hearings or otherwise participate in the arbitration proceedings. In contrast, confidentiality is used to refer to the parties' asserted obligations not to disclose information concerning the arbitration to third parties.[9]

During this time, the laws of only a few countries contained provisions dealing with the topic, and even those in an extremely limited fashion. Also the UNCITRAL Model Law on International Commercial Arbitration adopted in 1985[10] remained silent as to confidentiality.

The situation changed after the Australian and the Swedish courts handed down some decisions which immediately attracted much attention because they rejected the idea that there is an overall duty of confidentiality in arbitration.[11] In the *Esso Australia Resources Ltd v. Plowman* ('*Esso v. Plowman*')[12] and *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.* ('*Bulbank*')[13] judgments discussed below, the courts analysed various potential sources of authority for confidentiality obligations and

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8 In Dubai (Feb. 2009), in Paris (Apr. 2009), in Madrid (Oct. 2009), in Paris (Dec. 2009), in London (Mar. 2010) and in Rio de Janeiro (May 2010).

9 See G. Born *International Commercial Arbitration* 2251 f (Kluwer 2009).

10 As noted by P. Sanders *UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future* 21 Arbitration International 443 (2005), this is because the drafters felt that confidentiality is better dealt with in arbitration rules than in the Model Law.

11 See in particular the special issue of Arbitration International, Vol. 11 (1995) Issue 3, wholly devoted to the question of confidentiality in international arbitration in the wake of those decisions.

12 Australian High Court, 7 Apr. 1995, [1995] HCA 19, XXI Y.B. Comm. Arb., 1996, p. 137.

13 Swedish Supreme Court, Oct. 27, 2000, *Bulgarian Foreign Trade Bank Ltd v. Al Trade Finance Inc*, (2001) XXVI Y.B. Comm. Arb. 291.

concluded that in the circumstances of those cases no such authority could be identified. The discussion and debate prompted by these decisions led some countries to incorporate confidentiality obligations into their laws and others to enact laws providing a default rule of non-confidentiality, while still others left the matter to the development of case law. Arbitral institutions also began to wrestle with the topic, with some including confidentiality provisions in their rules and others choosing not to.

The result is that today the sources of the law of international arbitration vary significantly in their approaches to the question of the existence and of the extent of an obligation of confidentiality.[14]

Perhaps the only common feature amongst the sources which deal specifically with confidentiality is that all leave a broad margin to party autonomy. It seems settled that party autonomy plays a central role both in the systems which contain specific rules on confidentiality in arbitration and in those which do not. The general acceptance of the parties' freedom to regulate the matter as they wish is viewed as a reflection of the general acknowledgement of procedural autonomy in arbitration.[15] In practice provisions on confidentiality are often included in arbitration agreements or subsequent specific agreements between the parties, in terms of reference drafted by arbitrators and in similar instruments.

The following paragraphs of this Section provide a general survey of the different statutory, jurisprudential and institutional sources of confidentiality obligations. The specifics of the individual sources and their similarities and differences will be discussed in Section III.

For this survey the Rapporteurs have considered all the sources brought to their attention by members of the Committee and that they have been able to find through their own research. While the Rapporteurs believe that it provides a sufficiently comprehensive current overview of the different approaches to the topic, this survey does not claim to be exhaustive and is aimed primarily at illustrating the variety of laws, rules and solutions which operate in practice and can impact on the issue of confidentiality in any given case.

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[14] On the subject of confidentiality in international arbitration see in particular A. Dimolitsa, *International Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration*, ICC Bulletin 5, 22 (Special Supplement: Confidentiality in Arbitration 2009); Born, *supra* n. 9, at 2249 ff.; Ch. Müller, *La confidentialité en arbitrage commercial international: un trompe l'oeil*, ASA Bull. 216 ff (2005).; Born, *supra* n. 9, at 87. Dessemontet, *Arbitration and Confidentiality*, 7 Am. Rev. Intl. Arb. 299 ff (1996); Reed Haynes, *International Arbitration May Not be as Confidential as you Think – or Want*, in *Conflicting Legal Cultures in Commercial Arbitration. Old Issues and New Trends* 99–115 (Frommel and Rider eds., 1999); A. Jolles & M.C. de Cediel, *Confidentiality*, in *International Arbitration in Switzerland* 89 ff (Kaufmann.Kohler & Sticki eds., Kluwer 2004); Quentin Loh Sze On & Edwin Lee Peng Khoon, *Confidentiality in arbitration: how far does it extend?*, Singapore Academy of Law 115 (2007); L. Guglya, *Confidentiality in enforcement phase of international arbitration*, Saarbrücken VDM Verlag 66 (2008) ; P. Wautelet, *Confidentiality and third parties in international commercial arbitration*, in *L'arbitrage et les tiers, Brussels* 105–148 (Bruylant 2008); K. Noussia, *Confidentiality in international commercial arbitration* (Springer 2010).

[15] Born, *supra* n. 9, at 2255.

(b) National law

(i) Statutory provisions

Confidentiality, which was not traditionally addressed in legislation on arbitration, is now dealt with by an increasing number of national legislations. The relevant provisions, most of which are very recent, diverge significantly in their approach to the treatment of confidentiality and in their scope, ranging from those that exclude it altogether to those that provide for broad duties of confidentiality. The main features of the legislation considered by the Committee are summarized in Section A of Annex I.

The law of one country – **Norway** – addresses the issue by explicitly ruling out confidentiality. Chapter 1, section 5 of the General Provisions of the Arbitration Act of 2004 lays down as a default rule the principle that, failing a contrary agreement of the parties, confidentiality does not apply to arbitration, and specifically to the arbitration proceedings and the decisions reached by the arbitration tribunal.

Costa Rica, while not explicitly ruling out confidentiality, permits that *'once definitive, the arbitral award be made public, except when the parties have agreed to the contrary'* (Article 60 of Law No. 7727 of 1997). Confidentiality of the proceedings is not addressed. Similarly, in **Ecuador** Article 34 of the Law on Arbitration and Mediation of 4 September 1997 does not provide for confidentiality of the process unless agreed upon by the parties.

The laws of some other countries contain provisions that lay down only very limited and specific confidentiality obligations. This is the case, in particular, of France, Venezuela, Romania and Austria. In **France** Article 1469 of the Code of Civil Procedure lays down a legal duty of confidentiality expressly referenced to and limited to deliberations of the arbitrators, providing that *'the deliberations of arbitrators are secret'*. Likewise, in **Venezuela** Article 42 of the Law on Commercial Arbitration of 1998 only refers to the arbitrators' duty to *'observe the confidentiality of the parties' participation, of evidence and all the contents relating to the arbitral proceedings'*. In **Romania** Article 353 of the Code of Civil Procedure makes arbitrators liable for disclosure of information concerning the arbitration without the parties' consent. In **Austria,** since the adoption of the Arbitration Act 2006 Section 616(2) of the Code of Civil Procedure lays down an exception to the general principle of publicity of proceedings in State courts for proceedings for the setting-aside or the declaration of existence or non-existence of an arbitral award. Section 612(2) provides that at the request of the parties such proceedings may be kept private by excluding the public, if a legitimate interest can be shown. In **Singapore** Sections 22 and 23 of the Singapore International Arbitration Act provide that, upon the application of a party, court proceedings under the Act shall be heard otherwise than in open court and restrict the reporting of proceedings in such cases.

Yet another country – **Nicaragua** – while not laying down confidentiality as a specific obligation, includes it amongst the general principles of interpretation of

the law on arbitration (Article 3 of the Arbitration and Mediation Law (Law 540) of 2005).

The laws of a number of other countries lay down broader confidentiality obligations, which are spelled out in varying degrees of detail.

Rules providing for confidentiality in fairly general terms are contained in the laws of Spain, the Dominican Republic, Peru and the Dubai International Financial Centre. The obligation of confidentiality framed in the most general terms is contained in Section 14 of the Arbitration Law of the **Dubai International Financial Centre** (DIFC Law No. 1 of 2008) which provides that, unless otherwise agreed, *'all information relating to the arbitral proceedings be kept confidential, except where disclosure is required by an order of the DIFC Court.'* A somewhat more specific provision is contained in the law of **Spain**. Article 24(2) of the Arbitration Act states that the obligation of confidentiality is imposed on *'the arbitrators, the parties and the arbitral institutions . . . with respect to the information [acquired] in the course of the arbitral proceedings'*.[16] Similarly, in the **Dominican Republic** Article 22 of the Arbitration Law of 2008 (Law No. 489-08) imposes a duty of confidentiality on *'the arbitrators, the parties and the arbitral institutions . . . with respect to the information [disclosed] in the course of the arbitral proceedings'*.[17] In **Peru** Article 51 of the Legislative Decree No. 1071 of 2008 imposes a duty of confidentiality on *'the parties, the arbitral tribunal, the secretary, the arbitral institution'* and every person participating in the arbitral proceedings, including witnesses and parties' counsel, and covers *'the proceedings, including the award and any other information revealed in the proceedings'*. It also lays down two exceptions, one for information that is legally required to be made public to protect a right or to challenge or enforce the award and another for awards rendered in arbitrations to which the Peruvian State is a party.

Significantly more extensive provisions on the matter are contained in three recently enacted (Scotland) or revised (New Zealand and Australia) legislations which provide a comprehensive treatment of confidentiality.

In **New Zealand** the Arbitration Act 1996 as amended in 2007 provides that arbitral proceedings must be conducted in private (Section 14A) and implies into every arbitration agreement a term that neither the parties nor the arbitral tribunal shall disclose confidential information (Section 14B), subject to the five limited exceptions set out in section 14C. The Act further permits the disclosure of confidential information in the case that it is required by an order of the Tribunal (Section 14D) or permitted by the High Court in certain circumstances if the arbitral proceedings have been terminated or a party lodges an appeal concerning confidentiality (Section 14E). The High Court is also permitted to prohibit disclosure of confidential information in certain circumstances.

Section 14F imposes that court proceedings in relation to matters under the Arbitration Act should be conducted in public, unless the court orders otherwise in

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[16] See English version of article 24 in: Fernando Mantilla-Serrano, *Ley de arbitraje – una perspectiva internacional* 150 (Iustel ed. 2005).

[17] Translation inspired by the translation of the Spanish Law provision by Fernando Mantillay-Serrano, *id.*

circumstances where it is persuaded that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private. Further conditions relating to court proceedings under the Arbitration Act are then dealt with in Sections 14G to I. Section 14G provides that the applicant must state the nature of, and reasons for seeking, an order to conduct Court proceedings in private; Section 14H deals with matters that the Court must consider in determining an application for an order to conduct Court proceedings in private; and section 14I deals with the effect of an order to conduct court proceedings in private.

In **Scotland** the Arbitration Rules appended as Schedule 1 to the Scottish Arbitration Act 2010 provide at Rule 26 that disclosure of confidential information by the tribunal, any arbitrator or a party is '*actionable as a breach of an obligation of confidence*', save if authorized by the parties or if required by the tribunal or to comply with any enactment or rule of law, for the performance of public functions, for the protection of lawful interests, in the public interest or for the interests of justice or in situations where the discloser would have absolute privilege had the disclosed information been defamatory. Rule 26(2) requires the tribunal and the parties to take '*reasonable steps*' to prevent unauthorized disclosure of confidential information by third parties involved in the arbitration, while Rule 26(3) requires that the tribunal inform the parties of the confidentiality obligations at the outset of the proceedings. 'Confidential information' is defined in Rule 26(4) as any information relating to the dispute, the arbitral proceedings or award which is not and has never been in the public domain. In addition, under Section 15 of the Act ('anonymity in legal proceedings') allows a party to court proceedings relating to an arbitration to apply to the court for an order prohibiting the disclosure of the identity of a party to the arbitration in any report of the proceedings.

In **Australia** the International Arbitration Act 1974 as amended in 2010 addresses the issue in a detailed fashion, in the style of the New Zealand Arbitration Act. The Act introduces Sections 23C-G as a series of 'opt in' provisions, meaning that the parties must expressly provide for them to apply (Section 22(3)). This approach was adopted on the consideration that the parties should expressly turn their minds to the issue of confidentiality, rather than have rules unknowingly imposed on them. The general principle is contained in Section 23C which requires the parties and the arbitral tribunal not to disclose confidential information subject to a detailed set of exceptions governed by the subsequent sections 23D to 23E. 'Confidential information' is defined in Section 15 to mean '*information that relates to the proceedings or to an award made in the proceedings*', including (a) all pleadings, submissions, statements, or other information supplied by a party to the arbitral tribunal; (b) any evidence supplied to the tribunal; (c) any notes made by the tribunal of evidence or submission; (d) any transcript; (e) any rulings of the tribunal; and (f) any award. According to Section 23D the information may be disclosed to a professional adviser of one of the parties, if it is reasonably necessary to enable a party to present its case, to establish or protect its legal rights in relation to a third party, for the enforcement of the award, if required by an order or a

subpoena of a court or authorized or required by a relevant law (which includes also laws other than Australian law) or a competent regulatory body. Under Section 23E arbitral tribunals may allow disclosure of confidential information in other circumstances only at the request of one of the parties and after hearing the parties. Sections 23F and 23G govern the powers of State courts to prohibit or to permit the disclosure of confidential information in particular circumstances.

At the time of writing other countries are in the process of adopting legislative provisions on confidentiality. In **The Netherlands** a draft revision of the Dutch Arbitration Act proposes to revise the Dutch arbitration law to provide that '*arbitration is confidential*' and that '*all individuals involved either directly or indirectly are bound to secrecy, save and insofar as disclosure ensues from the law or the agreement of the parties*'.

In **Hong Kong** Clause 18 of the Hong Kong Arbitration Bill which is expected to be enacted into law in the course of 2010 stipulates that '*unless otherwise agreed by the parties, a party shall not publish, disclose or communicate any information relating to (a) the arbitral proceedings under the arbitration agreement; or (b) an award made in those proceedings*' unless the publication, disclosure or communication is contemplated by the Hong Kong Ordinance, is made to any government body, regulatory body, court or tribunal under an obligation of law, or is made to a professional or any other advisor of any of the parties. Additional exceptions, proposed by the Hong Kong Government in May 2010 as a Committee Stage Amendment are, '*that a party may publish, disclose or communicate any information relating to the arbitral proceedings or award for the purposes of protecting or pursuing a legal right or interest of the party, or of enforcing or challenging the award, in legal proceedings before a court or other judicial authority in or outside Hong Kong*'.[18]

Italy and **Ireland,** which respectively amended and adopted their arbitration legislation recently (respectively in 2006 and in 2010), have not included provisions on confidentiality.

(ii) Case law

The approaches of national courts to the subject are equally varied.

England, where the Arbitration Act 1996 is silent on confidentiality,[19] is the country where the courts have been the most eloquent in articulating the existence of a broad duty of confidentiality, starting from a decision of 1880.[20] Over time, English courts have formulated three relatively clear rules. The first is that arbitration proceedings are held in private,[21] which implies that, in the absence of the parties' consent, arbitrators have no power to order the concurrent hearing of

[18] LC Paper No. CB (2) 1620/09 – 10(02), Department of Justice, May 2010.

[19] At the time of drafting the Act, the Department Advisory Committee said that it *'is a developing topic and it is simply not possible to frame more than the most general principles . . . Thus the best we could have done would be to have stated some general rule about privacy and confidentiality and made it subject to "all just exceptions". That of course would have told the reader nothing at all'*. (see Lord Saville *The Arbitration Act 1996* (1997) Lloyd's Maritime and Commercial Law Quarterly 502 at 507).

[20] *Russel v. Russel* 14 Ch. D. 471, 474 (1880).

[21] See *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha (The Eastern Saga)* [1984] 3 All ER 835, followed in *Hassneh Insurance Co of Israel and Others v. Stuart J Mew* [1993] 2 Lloyd's Rep 246–47.

two arbitrations in which the arbitrators but not the parties were identical and the disputes closely associated. The second rule, expressed by the Court of Appeal in 1990, is that an implied obligation of confidentiality, binding on the parties, arises from the very nature of arbitration.[22] However, in a more recent case,[23] the Privy Council expressed reservations about the desirability or merit of adopting a general duty of confidentiality as an implied term of arbitration and then formulating exceptions to which such a duty would be subject. The third rule is that the duty of confidentiality is subject to the following specific exceptions (i) consent; (ii) order of the court; (iii) leave of the court; (iv) reasonable necessity; and (v) public interest.[24]

The approach of the English courts is followed in **Singapore** where the High Court accepted that the parties to an arbitration are under an implied duty to keep documents confidential but that disclosure is permitted when *'reasonably necessary'*, even without the leave of the court.[25] The court also held that the assessment of whether disclosure is *'reasonably necessary'* can change over time in the course of the same case.

In **Canada** the matter has not been squarely addressed by the courts. However a senior trial level judge in Ontario[26] has recently recognized that confidentiality is a well accepted benefit and a critical advantage of commercial arbitration and parties have reasonable legitimate expectations of confidentiality in arbitration. Further, when an arbitration matter is before a court, the court will weigh the public interest in public disclosure (open courts) against the important commercial interest in preserving confidentiality. This important commercial interest has been recognized as closely connected with the public interest in encouraging private dispute resolution by protecting the autonomy of the arbitral process.

The opposite approach, flatly rejecting an obligation of confidentiality, was taken by the Australian and Swedish courts. It is their judgments, respectively in the *Esso v. Plowman* and *Bulbank* cases, that, as mentioned above, contributed to focus attention on the subject of confidentiality in arbitration and to some extent were instrumental to the enactment in other countries of the legislation dealing with this topic discussed above.

In **Australia** the High Court in *Esso v. Plowman*[27] explicitly held that under Australian law a general obligation of confidentiality cannot be regarded as

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22 See *Dolling-Baker v. Merrett & Another* (CA 1990) [1991] 2 All ER 890, per Parker LJ.

23 *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich* [2003] UKPC 11, [2003] 1 WLR 11.

24 *Ali Shipping Corporation v. Shipyard 'Trogir'* (CA) [1998] 2 All ER 136. The implied duty of confidentiality and a limited number of exceptions has since been confirmed by the English courts on several occasions, most recently in *Emmott v. Michael Wilson & Partners* [2008] EWCA Civ 184 (*per* Collins J) where it was held that the exception to confidentiality in the 'interests of justice' is not limited to the interests of justice in England but may relate to a foreign jurisdiction where the dispute is of an international nature.

25 *Myanma Yaung Chi Oo Co Ltd v. Win Win Nu* [2003] 2 SLR 547, largely following the English decision in *Dolling-Baker v. Merrett* (*supra* n. 18).

26 Ontario Superior Court of Justice, Mar. 16, 207, *Telesat v. Boeing*, 2010 ONSC 22.

27 *Supra* n. 8, at 27, 33–37. The duty of confidentiality had already been implicitly denied in 1983 in *Alliance v. Australian Gas Light Co*, 34 SASR 215.

implicit in an agreement to arbitrate. While acknowledging that privacy is an inherent feature of arbitration (in the sense that hearings are not open to the public), the Court held that confidentiality is not an

> *essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration*

nor part of the *'inherent nature of a contract and of the relationship thereby established.'* The Court did, nevertheless, acknowledge that an obligation of confidentiality could be imposed on the parties through express contractual provision. As mentioned above, the issue is now addressed by the opt-in provisions recently introduced in the International Arbitration Act.

Along the same line, and on the basis of an extensive analysis of the law in several countries, in **Sweden** the Supreme Court in *Bulbank*[28] held that under Swedish law there is no legal duty of confidentiality in arbitration implied or inherent in an arbitration agreement.

The position is the same in the **United States** where neither the Federal Arbitration Act nor the Uniform Arbitration Act impose a confidentiality obligation on the parties. The position of the courts is that, unless the parties' agreement or applicable arbitration rules provide otherwise (and even then the result is far from certain), there is no requirement under US law for the arbitration proceedings and matters transpiring within them to be treated as confidential by the parties.[29] US federal case law appears stable in its reluctance to grant orders protecting arbitration communications and persists in rejecting arguments that confidentiality may be recognized by implication of law, by internal arbitration rules, or by the parties' general understanding that arbitration proceedings are confidential.[30] It is less stable with regards to the conscionability of confidentiality agreements within an arbitration clause. While certain circuit courts have upheld confidentiality provisions in arbitration agreements,[31] others have held such agreements to be unenforceable as an unconscionable term.[32]

In **France** the position of the courts is less trenchant. In one case the Paris Court of Appeal dismissed an action to set aside an arbitral award, ruling that the very fact of initiating the proceedings violated the principle of confidentiality and ordered the challenging party to pay a significant amount of damages to the party

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28 *Supra* n. 9.

29 *Industrotech Constructors Inc v. Duke University* 67 N/C/ App 741, 314 S.E. 2d 272 (1984); *Giacobazzi Grandi Vini S.p.A. v. Renfield Corp.* US Dist. LEXIS 1783 (1987).

30 *Contship Containerslines, Ltd v. PPG Industries, Inc* (2003 WL 1948807 (SDNY Apr. 23, 2003)); *Lawrence E Jaffee Pension Plan v. Household International, Inc* (2004 WL 1821968 (D Colo Aug. 13, 2004)).

31 See *ITT Education Services v. Arce,* 2008 WL 2553998 (5th cir); *Parilla v. IAP Worldwide Service VI, Inc.,* 368 F.3d 269 (3d Cir. 2004); *Lloyd v. Hovensa LLC,* 369 F.3d 263 (3d Cir. 2004); *Iberia Credit Bureau v. Cingular Wireless LLC,* 379 F.3d 159 (5th Cir. 2004); *Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359 (11th Cir. 2005).

32 *Davis v. O'Melveny & Myers,* 485 F.3d 1066 (9th Cir. 2007); and *Ting v. AT & T,* 319 F.3d 1126 (9th Cir. 2003).

that had won the arbitration.[33] This was, however, an exceptional case of manifest abuse, since the French courts obviously lacked jurisdiction in that case, the award having been rendered in London. The principle of confidentiality in arbitration was upheld in more general terms by the Tribunal de Commerce of Paris which ruled that:

> arbitration is a private procedure of a confidential nature; [. . .] recourse to arbitration accepted by the parties should avoid all publicity of the dispute between them and of its possible consequences; subject to a legal duty of information any breach of such confidentiality by a party to the proceedings is a breach of an obligation.[34]

On the other hand, the impossibility of taking confidentiality for granted emerges from a decision of the Paris Court of Appeal which rejected a claim for damages for violation of confidentiality in the context of a claim for abuse of process in bringing setting aside proceedings. In rejecting the claim the Court pointed out that the claimant had failed to:

> explain the existence and reasons of a principle of confidentiality in French international arbitration law, irrespective of the nature of the arbitration and, in the event, the waiver of the principle by the parties in the light of the applicable rules.[35]

(b) Arbitral rules

Unlike national laws, the rules of almost all of the main arbitration institutions contain provisions providing for some form of confidentiality (at least as regards the privacy of hearings, publication of awards and the duties of the institution). The main features of the provisions considered by the Committee are summarized in Section B of Annex I.

The majority of institutional rules now also include a specific provision on confidentiality, although these vary considerably in detail and scope. This is the case in particular of the arbitration rules of the London Court of International Arbitration (LCIA),[36] the Milan Arbitration Chamber,[37] the German Institution of

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33 Feb. 18, 1986, *Aïta v. Ojjeh*, *Rev. arb.*, 1986, p. 583. In a subsequent case, where setting aside proceedings were brought against a French award a claim for violation of the duty of confidentiality for abusive procedure was rejected (Paris Court of Appeal, January 22, 2004, *NAFIMCO v. Forster Wheeler*, Rev. arb. 2004, p. 647).

34 Tribunal de Commerce de Paris, Feb. 22, 1999, *Bleustein et autres v. Société True North et société FCB International*, Rev. arb. 2003, p. 373 which upheld a claim for damages for violation of confidentiality brought by the shareholders of a company party to an arbitration against the other party to the arbitration for having caused a drop in the share prices of the company in which they were shareholders by divulging the existence of an arbitration and the amount of the claims. The decision was reversed by the Paris Court of Appeal, Sept. 17, 1999, Rev. arb., 2003, p. 189 on the grounds of lack of standing of the shareholders.

35 *NAFIMCO. v. Forster Wheeler*, *supra* n. 29. Unlike in the *Bleustein* case (*supra* n. 30) the purported violation of confidentiality was referred to the disclosure not of the existence of the arbitration but of company balance sheets.

36 Article 30(1), 1998 Rules.

37 Article 8, 2010 Rules.

Arbitration (DIS),[38] the Netherlands Arbitration Institution,[39] the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud and Zurich (Swiss Rules),[40] the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation,[41] the Kuala Lumpur Regional Centre for Arbitration Rules for Arbitration (KLRCA),[42] WIPO,[43] the China International Economic and Trade Arbitration Commission (CIETAC),[44] the Dubai International Arbitration Centre Arbitration (DIAC),[45] , the Tehran Regional Arbitration Centre (TRAC),[46] the Singapore International Arbitration Centre (SIAC),[47] the Japan Commercial Arbitration Association Commercial Arbitration Rules (JCAA),[48] the Australian Centre for International Commercial Arbitration (ACICA)[49] and the Hong Kong International Arbitration Centre (HKIAC).[50] Further, a provision on confidentiality is contained in the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which are often chosen or agreed upon by the parties and which tribunals often refer to.[51]

Other important rules, instead, remain silent on the broader issue and do not include any specific provisions on confidentiality other than those mentioned above. This is the case in particular for the ICC Rules of Arbitration,[52] the AAA Rules of Arbitration and Conciliation, the SCC Arbitration Rules, as well as the UNCITRAL Arbitration Rules even in their revised version adopted on 29 June 2010. In many instances, it seems to have been a conscious choice when drafting the Rules to avoid the regulation of this issue due to the difficulties in reaching agreement on an appropriate formulation for a general duty of confidentiality and any list of exceptions.[53] In its 1996 Notes on Organising Arbitral Proceedings, UNCITRAL stated that:

> there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case . . . the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

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38 Article 43(1), 1998 Rules.
39 Article 34, 2010 Rules.
40 Article 43, 2006 Rules.
41 Rule 25.
42 Rule 9, 1998 Rules.
43 Articles 73, 74 & 75, 2002 Rules.
44 Articles 43(1) & 44(2), 2004 Rules.
45 Article 41(1), 2007 Rules.
46 Article 4.
47 Article 35(1)-(4), 2010 Rules.
48 Rule 40(2), 2008 Rules.
49 Article 18, 2005 Rules.
50 Article 39(1), 2008 Rules.
51 Article 3.13 IBA Rules, 2010 version.
52 At the time of writing the ICC Rules are undergoing revisions, but no decision has been taken as to the inclusion of provisions on confidentiality.
53 K Hober & W McKechnie *New Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 23 Arbitration International 261 (2007).

III. THE ISSUES

(a) Introduction

The subject of confidentiality in international arbitration raises several types of specific issues that need to be addressed, and that may be solved differently, in respect of each individual case in relation to which the issue may arise.

The first one is that of the source of the putative confidentiality obligations. Given the different treatment of confidentiality in different legal systems, this raises complex conflict of laws issues which will often be closely intertwined to issues of conflicts of jurisdiction. Even where confidentiality is addressed by contract or by similar instruments, the need may arise to identify the law which governs the instrument's validity, effects and interpretation.

A second type of issue is which type of information can be considered confidential. Information related to an arbitration can fall into different categories and for each one of them it is essential to determine whether they indeed are covered by a duty of confidentiality.

Another issue is who is bound by the duties in question? A typical arbitration involves many different types of persons who may have access to information that could be expected to be, and to remain, confidential: the parties, their directors, employees, agents, shareholders and advisors, parties' counsel, the arbitrators and their assistants and secretaries, the arbitral institutions, witnesses and experts, translators, interpreters and other support staff, etc. In relation to each one of these persons the question arises of the source, the nature and the extent of any confidentiality obligations to which they may be subject.

Since no duty to maintain the confidentiality of material related to an arbitration can be absolute, it is also necessary to determine the exceptions to the duties in question.

Further issues that require to be taken into consideration are those of the means of enforcement of the confidentiality obligations and the duration of such obligations.

The answers to most of these questions are by no means necessarily identical or even similar in all situations. Actually, for the most part there is very little certainty as to what the answers in any given situation will be. In the following subsections this Report will touch upon these issues, in particular by pointing out whether and how they have been dealt with in the various sources described in the preceding section.

(i) Applicable law and jurisdiction

One of the reasons for the difficulties in establishing the existence and the extent of confidentiality obligations in relation to a given international commercial arbitration lies in the uncertainty as to which law governs such obligations and in the fact that different aspects of confidentiality may be governed by different laws.

The first law to consider in order to determine the existence of confidentiality obligations will usually be the law of the seat of the arbitration, since this law governs most aspects relating to the conduct of the arbitration and the duties of the parties and the rights and duties of the arbitrators. The law of the seat is arguably the first source of the rules dictating the extent to which the parties, and where relevant the arbitral institution, are free to lay down specific rules on the subject as well as the default rules governing confidentiality in the absence of party agreement. The statutory and jurisprudential rules on confidentiality of the different national laws, and in particular the ones discussed above, presumably apply to arbitrations having their seat in the respective countries, although this may not be explicitly stated.

Insofar as confidentiality obligations are, or may be held to be, the subject of contractual undertakings – or of equivalent instruments such as terms of reference – one will also have to look to the law governing such undertakings. In the absence of a specific choice of law to govern the confidentiality undertakings, that law would probably be the law governing the arbitration agreement, since the confidentiality undertakings would seem to be a part of such an agreement.

The law governing the merits of the dispute, if different from the one governing the arbitration confidentiality agreement, will usually not be directly relevant to the confidentiality of the arbitration, although in some circumstances there may be an overlap between the two laws if the underlying relationship is also subject to confidentiality obligations. The law governing the merits may be relevant to establish whether a confidentiality undertaking contained in the underlying agreement extends to the arbitration.

Furthermore, where an alleged breach of confidentiality may lead to a claim for damages in tort, reference would have to be made to the law governing non-contractual liability. Specific rules on confidentiality may derive from the law governing the professional obligations of certain participants to the arbitration (foremost amongst which attorneys), while exceptions to confidentiality could come from yet other laws (for instance those to which the individual participants are subject which impose certain types of disclosures, the laws of the places of enforcement and so forth).

Regardless of the confidentiality regime of the law of the seat of the arbitration and of the law governing the arbitration confidentiality agreement, confidentiality obligations may often be affected by the laws of other countries, particularly when it comes to mandatory exceptions to confidentiality. The law governing the corporate obligations of a party, the law of country where a party's securities are traded or where a party is engaged in certain types of activities or transactions or regulatory obligations and, of course, the law of the place of enforcement of the award are some obvious examples.

The uncertainties are further increased by the likely multiplicity of fora before which actions relating to alleged breaches of confidentiality can be brought pursuant to the rules on conflicts of jurisdiction of the different countries potentially involved. Since each forum may follow different conflict of law approaches, the applicable law may vary depending on the forum. The

uncertainty can be reduced by an appropriate forum selection, for example by stipulating in the confidentiality clause that all disputes regarding confidentiality obligations will be subject to the jurisdiction of the arbitral tribunal, or of a particular national court. However, even such an agreement would ordinarily be binding only on the parties to that agreement and any actions against other parties (e.g. experts, witnesses, court reporters and arbitral institutions, as well as the arbitrators) would have to be brought before the national court having jurisdiction by virtue of general principles.

The principal conclusion that flows from this is that it is impossible to speak in the abstract of the existence or non-existence of confidentiality obligations, or of the limits of such obligations. There exists a multitude of laws and rules which purport to govern the subject and which differ very significantly in their approaches and solution. In most international arbitrations the duties of all the different participants to disclose or to refrain from disclosing given information will potentially be affected by several laws which may be applicable by virtue of different conflict of laws principles and which may on occasion even be squarely in conflict with each other. The applicability of these different rules in any given case is not easy to foresee beforehand. Given that some of the potentially relevant rules may be mandatory, in particular those laying down exceptions to confidentiality, in most cases a choice of law specifically to govern confidentiality will not significantly reduce the uncertainties.

(ii) Aspects of the arbitration and information covered by confidentiality

A crucial issue is identifying the aspects of the arbitration and the categories of information relating to the arbitration which fall within the scope of the hypothetical confidentiality obligations. These issues are addressed in different ways by the laws and institutional rules dealing with this matter and expectations may vary considerably.

The first aspect conceivably covered by the obligation of confidentiality is the existence of the arbitration.[54] In many cases the parties do not want even the existence of the dispute and of the proceedings to become public and the fact that this matter will not become of public domain is considered to be one of the advantages of the arbitration over proceedings in court, which are almost always public. Nevertheless, this obligation is not always spelled out explicitly. Notable exceptions are the Scottish Arbitration Rules (Rule 26(4)(a) and (b)), which includes *'the dispute'* and *'the arbitral proceedings'* in the definition of *'confidential information'*, the WIPO Rules (Article 73(a)), which forbid the unilateral disclosure by a party of any *'information concerning the existence of an arbitration'*, the HKIAC Rules (Article 39(1)) and the SIAC Rules (Article 34(3)). The obligation to keep the existence of the arbitration confidential can probably be gleaned from other more general provisions, such as those imposing confidentiality as to the *'conduct of arbitral proceedings'* (DIS Rules, Article 43(1)), *'the proceedings'* (Milan Rules, Article 8(1)), *'all*

[54] See the decision of the Tribunal de Commerce de Paris in *Bleustein*, *supra* n. 30.

matters relating to the arbitration proceedings' (KLRCA Rules, Rule 9), '*all matters relating to the proceedings*' (SIAC Rules, Rule (34(1)), '*all information relating to the arbitral proceedings*' (Arbitration Law of the DIFC, Section 14).[55] The obligation to keep confidential '*any substantive or procedural matters of the case*' is laid down by the CIETAC Rules (Article 33(2)) only for cases heard in camera.

Where there is an obligation to keep confidential the existence of the arbitration, this would reasonably seem to imply also an obligation to maintain confidential all information concerning the details of the dispute and of the arbitration, such as the identity of the parties, the causes of action, the prayers for relief, the amounts claimed, the existence of counterclaims, the composition of the arbitral tribunal, and the identity of parties' counsel and of witnesses and experts.[56] Also the details of the proceedings, such as hearing dates, deadlines for submissions and the identity of witnesses, would seem to fall under the same obligation. A prohibition on the disclosure of at least some of this information might be considered to exist even if the existence of the arbitration itself is not covered by the obligation or is otherwise known.

To the extent that it exists, the obligation of confidentiality could cover also the parties' submissions, hearing transcripts, all documents and evidence filed in the arbitration, including witness statements and expert reports.

The materials and information covered by the obligation are sometimes, but not invariably, spelled out in the relevant rules. The New Zealand Arbitration Act refers to the prohibition generally to disclose '*confidential information*', without giving a definition (Section 14B(1)) unlike the Australian Act and the Scottish Arbitration Rules which contain a comprehensive definition (respectively at Section 15 and at Rule 26(4)). The Scottish Arbitration Rules define '*confidential information*' as '*any information relating to (a) the dispute, (b) the arbitral proceedings, (c) the award [. . .] which is not and never has been in the public domain*'. While the Spanish Arbitration Act refers to '*information acquired in the proceedings*' (Article 24), the Arbitration Law of the Dominican Republic refers to '*all information to which they are made privy in the course of the arbitral proceedings*' (Article 22) and the Peruvian Legislative Decree refers to '*all information revealed in the proceedings*' (Article 51). The Hong Kong Bill refers to '*any information relating to the arbitral proceedings*' (Clause 18(1)).

Several arbitration rules refer to '*all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party*' (LCIA Rules, Article 30(1)), '*the parties involved, the witnesses, the experts and other evidentiary materials*' (DIS Rules, Article 43(1)), '*any documentary of other evidence given by a party or a witness in the arbitration*' (WIPO Rules, Article 74(a)), '*all materials submitted by another party*'(Swiss Rules, Article 43(1)), '*all materials in the proceedings created for the purpose of the arbitration and other documents produced by another party*' (DIAC Rules, Article 41(1)), '*facts related to*

[55] The view that the obligation of confidentiality extends to the existence of the arbitration is shared by Lew, Mistelis, Kröll, *Comparative International Commercial Arbitration* para. 1–26 (Kluwer 2003).

[56] Parties, witnesses and experts are explicitly mentioned in Article 43(1) of the DIS Rules.

arbitration cases or facts learned through arbitration' (JCAA Rules, Article 40(2)), '*all materials and documents relating to the arbitral proceedings, including [. . .] all correspondence, written statements, evidence*' (HKIAC Rules, Article 39(1)). Also the IBA Rules on the Taking of Evidence in International Commercial Arbitration mandate confidentiality concerning '*all documents produced by a Party*' (Article 3.12).

A distinction is sometimes made between documents *'created for the purpose of the arbitration'*,[57] which are covered by the obligation, and *'historical'* documents, i.e. documents which exist independently of the arbitration and are filed in the arbitration as evidence or otherwise, which may not be covered by the obligation.

The duty of confidentiality, or more specifically its component of privacy of the hearing, is almost invariably held to apply, in the sense that persons not involved in the arbitration are not permitted to be present at hearings unless the parties, and in some cases also the arbitral tribunal, give their approval.[58]

The obligation of confidentiality is generally considered to extend to the award[59] and to all orders and other decisions of the arbitral tribunal,[60] although it is usually admitted that these texts can be published for research purposes if appropriately redacted (e.g. omitting the names of the parties and possibly of the arbitrators,[61] and all details relating to the dispute capable of disseminating information which is covered by the confidentiality obligation).[62] In practice redacted awards are often published for scientific purposes even in the absence of the parties' consent.

Even though, as will be seen below, there is also little question that the award can be disclosed in challenge and enforcement proceedings before the competent

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57 For instance, LCIA Rules, Article 30(1).

58 Article 21(3) ICC Rules, Article 27(3) SCC Rules, Article 20(4) AAA Rules, Article 19(4) LCIA Rules, Article 25(4) Swiss Rules, Article 23(7) HKIAC Rules, Article 33(1) CIETAC Rules, Article 25(4) UNCITRAL Rules, Article 20(4) Vienna Rules, Article 28(3) DIAC Rules and Article 40(1)(j) CAA Rules. Only a few, being the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Chamber of National and International Arbitration of Milan and the arbitration rules of the German Institution of Arbitrators, do not include a specific provision; although there is nothing to suggest in the text of those rules that there is an intention to depart from the principle of private hearings; New Zealand Arbitration Act, Section 14 A.

59 The publication of awards involving the State is permitted by Article 51 of the Peruvian Legislative Decree.

60 Rule 26(4)(c), Scottish Arbitration Rules; Article 27(4) AAA Rules, Article 8(2) Milan Rules, Article 30(3) LCIA Rules, Article 43(3) Swiss Rules and Article 39(3) HKIAC Rules. Article 32(5) of the UNCITRAL Rules also includes a contractual prohibition on the publication of the award without the consent of the parties. While the ICC Rules do not contain a specific provision relating to publication with the consent of the parties, there is a general provision in Article 28(2) stating that awards shall not be made available to anyone other than the parties.

61 However, according to Th. Clay, *The Role of the Arbitrator in the Enforcement of the Award*, 20 ICC Bulletin 46, the award is a *'product of the intellect'* of the arbitrators, who therefore would have the right that their name appear, or alternatively not appear, if the award is disclosed.

62 LCIA Rules, Article 30(1); Milan Rules, Article 8; Stockholm Rules, Article 46; KLRCA Rules, Rule 9; WIPO Rules, Article 75; Swiss Rules, Article 43(1); DIAC Rules, Article 41(1); SIAC Rules, Article 34(1); HKIAC Rules, Article 39(1).

courts,[63] in some cases there are express provisions ensuring that confidentiality is preserved also in the context of court proceedings relating to arbitration.[64]

One point as to which there is probably not much dispute is that the deliberations of the arbitral tribunal are confidential,[65] even though this does not prevent an arbitrator from issuing a separate opinion (dissenting or concurring) or the tribunal from disclosing the extent to which an arbitrator has, in the event, not participated in the deliberations.[66]

(iii) Who is bound by confidentiality obligations?

The question of who is bound by confidentiality obligations is intimately linked to the two questions discussed above, i.e. the sources and the scope of the obligation.

The tribunal and individual arbitrators are the category of arbitration participants that is probably most widely assumed to be bound by an obligation of confidentiality, even in the absence of a specific reference to them in the relevant rule on confidentiality, and presumably in the absence of an overarching duty of confidentiality. There seems to be a broad consensus that the duty of confidentiality is one of the primary duties of an arbitrator, and that it covers most aspects of the arbitration.[67] Many of the sources which spell out a confidentiality obligation specifically mention arbitrators.[68] The same duty would seem incumbent also on the secretaries and assistants of the arbitral tribunal.[69] Nevertheless, while it would seem that the assumed duty of confidentiality of arbitrators covers the specifics of the arbitration, it is sometimes questioned whether arbitrators are permitted to divulge the information about their appointments, particularly for the purposes of verifying conflicts of interest, insofar as this may lead to a dissemination of information about the existence of the

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63 See for instance the *New Zealand Arbitration Act* s. 14. In this connection the decision of the Paris Court of Appeal in *G. Aita v. A. Ojjeh*, Feb. 18, 1986 is of interest, because in that case it was held that the bringing of proceedings before a manifestly incompetent court (in that case setting aside proceedings before a court which was not that of the seat) amounted to a breach of confidentiality.

64 See for instance the *New Zealand Arbitration Act* s. 14F; Austrian Code of Civil Procedure, Article 616(2) and Scottish Arbitration Act 2010 under which in certain circumstances the Court may prohibit the disclosure of the identity of a party to the court proceedings relating to arbitration.

65 LCIA Rules, Article 30(2); Swiss Rules, Article 43(2); French Code of Civil Procedure, article 1469; Venezuelan Law, Article 42; Scottish Arbitration Rules, Rule 27; TRAC Rules, Article 4; Dominican Republic Commercial Arbitration Law, Article 22; and Spanish Arbitration Act, Article 24. See Lew, Mistelis, Kröll, *supra* n 55. at 12–20.

66 See Court of Appeal of Paris, Oct. 9, 2008, *SAS Merial v. Klocke*, Rev. arb., 2009, 352, rejecting the claim that a dissenting opinion violates the secrecy of arbitral deliberations and thereby public policy and holding that the violation of the secrecy of deliberations is not a ground for setting aside an award.

67 Born, *supra* n. 9, at 1631 ff.; Fouchard Gaillard Goldman, *On International Commercial Arbitration* 612 f (Kluwer 1999); J.D. Lew, L.A. Mistelis, S.M. Kroll, *Comparative International Commercial Arbitration* 283 (Kluwer 2003); J.F. Poudret, S. Besson, *Comparative Law of International Arbitration* 320 (Sweet & Maxwell 2007).

68 For an express reference to the arbitrators see the Spanish Arbitration Act, Article 24(2); Venezuelan Law, Article 42; Peruvian Legislative Decree of 2008, Article 51; Rule 26(1), Scottish Arbitration Rules; Swiss Rules, Article 43(1); Milan Rules, Article 8(1); Stockholm Rules, Article 46; Austrian Rules, Article 5(9); DIS Rules, Article 43(1); KLRCA Rules, Rule 9; SIAC Rules, Rule 35(1); HKIAC Rules, Article 39(1); JCAA Rules, Rule 40(2); Russian Chamber of Commerce and Industry Rules, Article 25.

69 See Swiss Rules, Article 43(1); HKIAC Rules, Article 39(1); Peruvian Legislative Decree of 2008, Article 51.

arbitration. Even this would seem not to be permitted where the obligation of confidentiality is held to cover the existence of the arbitration itself.

The situation is in many ways similar regarding arbitral institutions, for which confidentiality would seem to be inherent in the overall nature of their functions. The obligation of confidentiality for the institution and its members and staff is generally spelled out in the relevant institutions' internal rules.[70]

The position of the parties is less clear. Even the rules that deal with confidentiality obligations do not always include the parties amongst those bound by the duty, at least explicitly.[71] In some cases the obligation seems only to relate to information provided '*by another party*',[72] which could be interpreted to mean that parties are allowed to disclose their own documents, unless this conflicts with a broader obligation, such as the one to keep confidential the existence of the arbitration. Absent an explicit confidentiality obligation (arising from the applicable law, from the arbitration rules or from the arbitration agreement or some other similar source, such as the terms of reference) it cannot be generally assumed that the parties will be bound by such an obligation.

There is even less certainty as to whether the rules on confidentiality bind other parties that may become involved in an arbitration in different capacities, such as witnesses, experts (appointed by the parties and by the tribunal[73]), court reporters, interpreters and translators, and even counsel, to the extent that they are not bound by specific confidentiality obligations arising from an affiliation with professional bodies (e.g. membership of a bar).[74] In principle none of these parties will be bound by the arbitration rules or by the arbitration agreement. In some cases it could be assumed that there is an obligation incumbent on the parties to ensure that the persons whom they involve in the arbitration will be held to confidentiality. Such an obligation is expressly stated in Rule 26(2) of the Scottish Arbitration Rules pursuant to which '*the tribunal and the parties must take reasonable steps to prevent unauthorized disclosure of confidential information by any third party involved in the conduct of the arbitration*'.[75]

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70 This obligation is expressly laid down in the Internal Rules of the ICC International Court of Arbitration (Article 1); in the DIS Rules (Article 43(1)); in the Stockholm Rules (Article 46); in the JCAA Rules, Rule 40(2); in the HKIAC Rules (Article 39(1)); in the Russian Chamber of Commerce and Industry Rules (Article 25). See also the Spanish Arbitration Act, Article 24(2); Peruvian Legislative Decree of 2008; Arbitration Law of the Dominican Republic; and Scotland, ACICA Rules, Article 18(2).

71 The parties are expressly mentioned in the Scottish Arbitration Rules (Rule 26(1); Stockholm Rules (Article 46) and Milan Rules (Article 8). The Netherlands Rules impose the obligation on '*all individuals involved either directly or indirectly*' in the arbitration (Article 55(1)).

72 Swiss Rules, Article 43(1).

73 The confidentiality undertaking is expressly extended to tribunal-appointed experts by Article 43(1) of the Swiss Rules and by Article 39(2) of the HKIAC Rules.

74 Article 51 of the Peruvian Legislative Decree imposes confidentiality on '*witnesses, experts and every person participating in the arbitral proceedings*'.

75 See also DIS Rules, Article 43(1): '*Persons acting on behalf of any person involved in the arbitral proceedings shall be obligated to maintain confidentiality*'.

(iv) Exceptions to confidentiality

Even where an obligation of confidentiality does exist, it will normally be subject to exceptions.[76] All rules on confidentiality, whether contained in statutes, arbitral rules or in the pronouncements of courts, contemplate exceptions to the duty, although there is less agreement as to what the exceptions are and as to their scope. Actually, the difficulty in defining the exceptions is one of the reasons given to explain why certain legislators and arbitral institutions have so far abstained from adopting rules on the subject. However, the issue in now addressed in a detailed manner in the recent New Zealand, Scottish and Australian statutes which may serve as useful starting points for drafting confidentiality provisions in arbitration agreements.

The most general exception is the one that defers to the agreement of the parties. Since confidentiality is primarily in the interest of the parties, it is reasonable to assume that they are free to waive their right to it where such a right exists.[77] The role of party autonomy in this context is such that, conversely, even in the presence of an outright exclusion of confidentiality, it is admitted that the parties can impose it through an express contractual provision.[78] The question may arise whether other participants in the arbitration are entitled to claim that information concerning them remains confidential (for example witnesses and experts as regards the content of their testimony and reports). This point is not expressly dealt with in any of the sources.

Irrespective of a waiver of confidentiality, information relating to the arbitration can be disclosed by the parties in a variety of circumstances. One of the most obvious and widely accepted, also where not specifically provided for, is where the information is destined for the purposes of challenging or enforcing the award,[79] or more generally in the context of proceedings relating to the arbitration (such as proceedings in support of the arbitration, to obtain interim measures etc) although – as mentioned above – in some cases it is possible to obtain a specific protection of confidentiality even in such proceedings.[80]

The relevant sources likewise generally admit that information relating to the arbitration can be disclosed by the parties to professional advisers.[81]

Similarly, there may be an exception to confidentiality where a party or another participant in the arbitration is required to do so in order to comply with an obligation deriving from a law (including a foreign law[82]) or regulation or an order

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76 See generally G. Burn & A. Pearsall, *Exceptions to Confidentiality in International Arbitration*, ICC Bulletin p. 23 ff. (Special Supplement 2009)

77 Sec. 14, Arbitration Law of the Dubai International Financial Centre; Article 51, Peruvian Legislative Decree of 2008; in England see *Ali Shipping Corporation v. Shipyard 'Trogir'*, *supra* n. 20.

78 See for instance Chapter 1, Sec. 5 of the Norwegian Arbitration Act and *Esso v. Plowman* (*supra* n. 8).

79 See e.g. Article 51 of the Peruvian Legislative Decree; *New Zealand Act* s. 14F.

80 See e.g. Sec. 612(2) of the Austrian Code of Civil Procedure; *New Zealand Act* s. 14F; *Australian Act* s. 23D(6); Hong Kong Arbitration Bill, Sec. 16(1).

81 See Article 51 of the Peruvian Legislative Decree; *New Zealand Act* s. 14C(a); *Australian Act* s. 23D(3).

82 See e.g. *Australian Act* s. 23D(10)(c).

of a regulatory, administrative or judicial body.[83] In particular, where a State or a State entity is a party to the arbitration, the law of that State may in some circumstances require disclosure of some confidential information relating to the arbitration, even outside the context of investment arbitrations. In these circumstances the party which is the subject of these obligations may find itself faced with conflicting obligations (typically a contractually undertaken confidentiality obligation and one deriving from a statute or judicial or administrative order) and may have to make the choice as to which one it intends to comply with and which one it is prepared to breach.

Disclosure of confidential information concerning the arbitration may also be permitted where it is necessary for the purposes of enforcing or defending rights in proceedings other than the arbitration at issue (before national courts or other arbitral tribunals). In this connection the Scottish Arbitration Rules refer to '*information that can be reasonably considered as being needed to protect a party's lawful interests*'.[84] Particularly in jurisdictions where disclosure is permitted and may be assisted by court orders, the disclosure of confidential information may occur at the order, or with the consent, of a competent court or of the arbitral tribunal.[85]

Other exceptions sometimes referred to are those of '*public interest*',[86] '*public purpose*',[87] the performance of '*public functions*' of the discloser or of a public body or office holder[88] or '*the interests of justice*'.[89]

Certain legislations spell out clearly that, even where permitted, the disclosure of confidential information should be 'no more than reasonable' for the intended purpose.[90]

(v) The enforcement of confidentiality obligations

As with all legal obligations, one of the fundamental questions relates to the possibility of enforcement. This raises the issue of who has the power to adjudicate on the existence and the extent of a confidentiality obligation in a given circumstance, to authorize or prohibit the disclosure of certain information and to decide on the consequences and remedies in case of breach. This is an area on which the sources are mostly silent.

Insofar as such obligations arise directly or by implication from the arbitration agreement it would seem that they fall within the jurisdiction of the arbitrators, although it cannot be excluded that proceedings can also be brought before a national court in parallel to those before the arbitral tribunal. Of course, the powers of the arbitrators in this respect will reach only as far as the assumed

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83 See e.g. *New Zealand Act* s. 14C(c); *Australian Act* s. 23(D)(8) and (9).

84 Rule 26(1)(d). See also *New Zealand Act* s. 14C(b)(i)(B) and *Australian Act* s. 23D(5).

85 See e.g. *New Zealand Act* s. 14D and 14E; *Australian Act* s. 23E and 23F.

86 Scottish Arbitration Rules, Rule (26)(1)(e); *Australian Act* s. 23G(1)(a); *New Zealand Act* s. 14E(2)(a).

87 See e.g. *New Zealand Act* s. 14E(2)(a).

88 Scottish Arbitration Rules, Rule (26)(1)(c)(ii) and (iii).

89 Scottish Arbitration Rules, Rule (26)(1)(f) and English Court of Appeal in *Emmott v. Michael Wilson & Partners*, *supra* n. 20.

90 See e.g. *Australian Act* s. 23D(4)-(7).

breaches of the duties of confidentiality are attributable directly to the parties – since only they are bound by the arbitration agreement – or, at most, to third parties for whom the parties to the arbitral agreement are considered to be responsible. The situation may be the same where the duties in question arise from instruments such as the terms of reference in ICC arbitrations. Arbitrators will normally have no powers in respect of the confidentiality obligations of the arbitral tribunal or its members, secretaries, arbitral institutions, witnesses and experts or other auxiliaries, such as interpreters and reporters. In theory, however, it is conceivable that, where such third parties (excluding the arbitrators) are made to accept specific undertakings of confidentiality, these too could be brought within the jurisdiction of the arbitral tribunal. If the obligations derive from the arbitration agreement, any disputes relating thereto could be subject to the jurisdiction of the arbitrators not only for the duration of the proceedings, but even after the award has been rendered. For disputes relating to confidentiality which arise after the close of the original proceedings it is conceivable that a new arbitration could be commenced, although no instances of this have come to the attention of the Committee.

Where the duties of confidentiality do not arise from the arbitration agreement, the only possible forum for the adjudication of any dispute relating to them seems to be a national court. In this case the solution to all the possible questions – existence and scope of the obligation and of any relevant exception, remedies etc. – may vary considerably depending on the court which will hear the dispute and on the rules it will apply, which in turn raises the conflict of jurisdiction and conflict of laws issues highlighted in Section III.A above. The situation may be further complicated where a person holding confidential information relating to the arbitration may be subject to an obligation to disclose it, for instance to a regulatory authority or in the context of different proceedings. In such a case, where there may be a conflict between the duty of confidentiality and the duty to disclose, the party bound by such duties may find itself subject to conflicting decisions.

In many situations the enforcement of any assumed duty of confidentiality may prove to be problematic due to the uncertainties surrounding many of the legal issues which will be relevant in a given factual situation (the questions of jurisdiction and conflict of laws, the lack of precision as to the content of the substantive applicable obligation, the difficulty in proving damage in case of breach for the purposes of compensation) as well as because of the difficulties that may arise in the enforcement of any decision establishing liability.

(vi) The lifespan of confidentiality obligations

The duration of confidentiality obligations, as regards both the moment when it arises and when it ends, is equally the subject of uncertainty and is not dealt with in the sources. The answer will probably vary to a large extent depending on the nature of the information and, obviously, on the source of the duty. If the source is contractual, the duration might be stated in the contract (which may be prior to

the beginning of the arbitration or subsequent) or should be able to be derived through the interpretation of the contract. The fact that the duty of confidentiality usually covers the award seems to point to an expectation that the regime of confidentiality should outlive the arbitral proceedings and that the obligations will not cease after the end of the arbitration. It is less clear whether the obligations are perpetual or whether at some point they lapse, and if so at what point. It is reasonable to assume that the obligations cease where it can be established that confidentiality is no longer relevant. One such case is where the information in question has become of public domain.[91]

(b) Problems arising in practice and potential solutions

The foregoing overview of the law on confidentiality in arbitration as it is laid down by the different sources confirms the fallacy of the assumption that confidentiality is an inherent feature of arbitration which was exposed in the aftermath of the *Esso v. Plowman* and *Bulbank* cases. The rules vary amongst different jurisdictions, and in many cases the rules that do exist are not very precise as to their scope and leave a great deal of leeway for interpretation. Overall there is a lack of a general consensus even on some of the fundamental issues. The uncertainties are complemented by the additional uncertainties as to the precise circumstances in which the individual rules will be applicable by virtue of the relevant principles of conflict of laws and jurisdiction.

As a result, in relation to the majority of international arbitrations it will be impossible, or imprudent, to take for granted that an obligation of confidentiality exists. To this of course must be added the difficulties in enforcing any obligation which may be held to exist.

The practical consequence of all of this is that the different participants in an arbitration may find themselves faced with situations which do not comport with their expectations. In certain cases participants may find that information they expected to be and to remain confidential is not covered by a confidentiality obligation. Other times participants may find themselves constrained from using information that they thought they could use. Just as frequently participants are likely to face a considerable uncertainty as to whether and to what extent a given information or document is covered by confidentiality and may even find themselves subject to conflicting obligations.

The primary victims of this uncertainty are the parties. However, arbitrators may also have to deal with issues of confidentiality when conducting the proceedings, and may very well find themselves without clear guidelines to decide whether an obligation of confidentiality exists, what its scope is and what powers they have to enforce it or to grant relief for its violation. The issue may even arise as to whether the arbitrators, or instead the courts (and in this case which courts), have the power to decide issues of confidentiality. Arbitrators, for instance, may

[91] The Scottish Arbitration Rules explicitly exclude from the definition of confidentiality information which is in the public domain (Rule 26(4)).

have to decide whether they are permitted to raise such issues of their own motion or if they have to defer to the initiative of the parties, even where breaches of confidentiality may be perceived to interfere with the appropriate conduct of the proceedings.

Due to the current absence of universally recognized standards and to the variety of sources that may impact on the situation, these and other uncertainties will often be largely unavoidable. Parties will simply have to take stock of this state of things and be prepared for different outcomes, also having regard to the different rules that may reasonably be held to apply. To some extent, however, the parties have the option of laying down contractual rules to govern the issues relating to confidentiality, first and foremost if they do or do not want confidentiality to apply and to whom and to what it must apply. Although the agreement of the parties will not ensure complete confidentiality, particularly where the disclosure of information is required by an overarching public or third party interest, most legal systems will recognize such an agreement even if confidentiality is not guaranteed by law in the absence of specific agreement.

In the light of this situation the Committee has drawn up the set of findings and recommendations contained in Section IV. The purpose of these is to highlight the main issues which arise in connection with confidentiality in international arbitration and which must be considered by anyone concerned with ensuring the confidentiality or non confidentiality of information relating to an international arbitration and to provide some suggestions to parties and arbitrators on how to address these issues insofar as they are free to do so under the applicable laws.

In light of the conclusion that the most appropriate way to deal with confidentiality is by party agreement, the Committee has also drawn up model arbitration confidentiality and non-confidentiality clauses (see Section C of Part IV below). A brief commentary is appended to the model confidentiality clause. Since it is impossible to propose a 'one size fits all' confidentiality agreement, these clauses are merely intended to serve as a starting point for contract drafters. They must be carefully considered and specifically tailored to the circumstances of the case prior to their adoption in a specific agreement.

(IV) FINDINGS AND RECOMMENDATIONS

(a) Findings

1. Confidentiality is an important feature of international commercial arbitration.
2. Many users of international commercial arbitration assume when choosing arbitration that arbitration is inherently confidential. This assumption is not warranted because many national laws and arbitral rules do not currently provide for confidentiality and those that do vary in their

approach and scope (including the persons affected, the duration and the remedies).

3. A general provision of confidentiality in a contract does not necessarily extend to the arbitration.
4. The parties can, however, by agreement provide for confidentiality and determine the scope, extent and duration of the obligation as well as the available remedies.
5. Typically, arbitration confidentiality obligations (in both contracts and arbitral rules) serve to bind the parties to the dispute and their agents and representatives (including counsel), and arbitrators, arbitral institutions and if applicable, secretaries to the arbitral tribunal, as well as other persons under their control.
6. Normally such arbitration confidentiality provisions in contracts or rules do not impose an obligation of confidentiality on other persons who may become involved in the arbitration (such as fact or expert witnesses, translators, stenographers or court reporters), unless those other persons expressly agree to be bound by the confidentiality provisions.
7. The laws of various countries may be applicable to assessing the existence and scope of any confidentiality obligation. Those laws may be inconsistent with each other.
8. A person bound by an obligation of confidentiality may also be subject to a competing obligation to disclose information covered by the confidentiality obligation. It may therefore be that a person is subject to conflicting obligations regarding confidentiality.
9. Disputes regarding confidentiality may be brought before a variety of fora, even after the arbitration. If the parties have agreed to arbitral confidentiality, the arbitral tribunal has jurisdiction over disputes between the parties regarding the agreed confidentiality. National laws creating confidentiality obligations may also empower arbitral tribunals to make decisions regarding those obligations.
10. Where an arbitral tribunal has jurisdiction over an arbitral confidentiality dispute, it may make use of the entire range of powers conferred on it by law, rules or agreement. For example it may order injunctive or declaratory relief, award damages, bar the introduction into the record of evidence derived from a confidentiality breach, treat the breach as a breach of the underlying contract or grant any other remedies appropriate in the circumstances and available to it. However, such power would not extend to making awards or orders against persons who are not party to the arbitration.
11. If a member of an institution or an arbitrator breaches an obligation of confidentiality, there may be a right of recourse under law or contract against the institution or the arbitrator, provided the party has not waived such a claim.

(b) Recommendations

1. Given the different approaches to confidentiality in various jurisdictions and in the various institutional rules and under various professional rules, the best way safely to ensure confidentiality (or non-confidentiality) across many jurisdictions is to provide for it by express agreement at some point prior to or during the arbitration.
2. In the absence of contractual provisions on confidentiality, arbitrators should consider drawing the attention of the parties to confidentiality and, if appropriate, addressing the issue in terms of reference or a procedural order at the outset of the proceedings.
3. Express agreement to confidentiality should specify the scope, extent, duration of the confidentiality obligation, the exceptions to it and how it may be enforced.
4. Given that confidentiality provisions do not normally impose obligations of confidentiality on the non-core participants in the arbitral process ('third parties'), it should be incumbent upon the participant in the arbitration bound by a confidentiality obligation who brings the third party into the proceedings to make reasonable efforts to obtain such third party's express agreement to preserve confidentiality and, in addition to that third party's own responsibility, to bear responsibility for failure to take reasonable efforts to ensure that the agreement is carried out. There are many different ways in which such an obligation can be imposed, for example the core participant could provide an undertaking to take reasonable steps to ensure that the third parties comply with their confidentiality obligations.
5. Reasonable exceptions to an obligation of confidentiality may include:
   (a) prosecuting or defending the arbitration or proceedings related to it (including enforcement or annulment proceedings), or pursuing a legal right;
   (b) responding to a compulsory order or request for information of a governmental or regulatory body;
   (c) making a disclosure required by law or by the rules of a securities exchange; or
   (d) seeking legal, accounting or other professional services, or satisfying information requests of potential acquirers, investors or lenders;

   provided that in each case disclosure is no broader than necessary to satisfy the legitimate purpose of the disclosure and that where possible the producing party takes reasonable measures to ensure that the recipient preserves the confidentiality of the information provided.

(c) Model clauses

(1) Model arbitration confidentiality clause

'[A] The parties, any arbitrator, and their agents or representatives, shall keep confidential and not disclose to any non-party the existence of the arbitration, all non-public materials and information provided in the arbitration by another party, and orders or awards made in the arbitration (together, the 'Confidential Information'). [B] If a party or an arbitrator wishes to involve in the arbitration a non-party – including a fact or expert witness, stenographer, translator or any other person – the party or arbitrator shall make reasonable efforts to secure the non-party's advance agreement to preserve the confidentiality of the Confidential Information. [C] Notwithstanding the foregoing, a party may disclose Confidential Information to the extent necessary to: (1) prosecute or defend the arbitration or proceedings related to it (including enforcement or annulment proceedings), or to pursue a legal right; (2) respond to a compulsory order or request for information of a governmental or regulatory body; (3) make disclosure required by law or by the rules of a securities exchange; (4) seek legal, accounting or other professional services, or satisfy information requests of potential acquirers, investors or lenders, provided that in case of any disclosure allowed under the foregoing circumstances (1) through (4) where possible the producing party takes reasonable measures to ensure that the recipient preserves the confidentiality of the information provided. The arbitral tribunal may permit further disclosure of Confidential Information where there is a demonstrated need to disclose that outweighs any party's legitimate interest in preserving confidentiality. [D] This confidentiality provision survives termination of the contract and of any arbitration brought pursuant to the contract. This confidentiality provision may be enforced by an arbitral tribunal or any court of competent jurisdiction and an application to a court to enforce this provision shall not waive or in any way derogate from the agreement to arbitrate.'

(2) Commentary to the model arbitration confidentiality clause

Subject to appropriate adaptations in light of the circumstances of the case, the above text can be incorporated by the parties in their agreement to arbitrate or adopted by them at any time prior to or during the arbitration. It can also serve as guidance for the arbitrators for use in procedural orders or terms of reference. The confidentiality obligations provided for in this clause may supplement those deriving from other sources.

When using this text the following should be considered in relation to each of the alphabetically marked sections of the clause:

(a) This sentence defines the scope of the confidentiality obligation. The model clause prohibits disclosure of all information revealing the

existence of the arbitration, information and documents provided by the other parties and all information and documents created for the purposes of the arbitration. It does not cover a party's own 'historical' documents and documents and information in the public domain. Since the confidentiality clause will usually be a part of the arbitration agreement, the reference to the arbitrators contained in it should have the effect of incorporating the confidentiality obligation in the mandate of the arbitrators, even if they are not parties to the confidentiality agreement.

(b) This sentence creates a general obligation to endeavour to preserve confidentiality when non-parties in some way become involved in the arbitration. The parties may want to consider further how specifically they will fulfil that general obligation. For example, expert witnesses, stenographers and other non-parties who enter into a contract or engagement letter are often prepared to accept a confidentiality commitment in that document. The situation may be more complicated with fact witnesses or other non-parties who participate in the arbitration without any form of agreement. The parties may wish to consider agreeing upon a form of request to these non-parties asking them to preserve confidentiality, or even upon a written undertaking to be signed by the non-party.

(c) These sentences define permitted disclosure of otherwise confidential information. The opening words of the first sentence indicate that disclosure is permitted only to the extent necessary to fulfil one of specifically enumerated circumstances requiring disclosure. For instance, if there is a requirement to disclose the existence of the arbitration, this will not of itself justify the disclosure of any other Confidential Information.

The exceptions should be specifically tailored to the particular circumstances. For example, the inclusion of the securities exchange exception would only be relevant to listed companies. The parties may also consider whether specific reference to another regulatory authority, such as a competition authority, may be advisable.

The clause also imposes on the disclosing party the duty, where possible, to take reasonable measures to ensure that the recipient preserves the confidentiality of the information. In some circumstances it may simply be impossible to take any such measures. For example, disclosure pursuant to securities exchange rules is disclosure to the market generally. On the other hand,, when disclosure is to a retained professional, the disclosing party may be in a position to obtain a written agreement to maintain confidentiality. There may also be an opportunity for the disclosing party to request confidentiality even when disclosing to a regulatory authority.

The language of this model clause provides for the right of the parties to disclose Confidential Information also in order to pursue

legal rights unrelated to the arbitration, and confers on the tribunal the power to permit further disclosure. The parties should consider carefully whether to permit disclosure in those circumstances, and if so whether such disclosure should be further subject to more precisely defined or limited conditions. The parties should also consider whether to empower the arbitrators to allow further disclosure in exceptional circumstances, as provided by the text of the model clause.

(d) These sentences concern duration and enforcement of confidentiality. The parties may wish to fix the duration of the obligation. The model clause language allows a party to seek enforcement from the tribunal or a national court, which might be important if, for example, a party seeks compulsory injunction, or seeks a remedy against a non-party to the arbitration. Considering the likely difficulties in quantifying the damages arising from a breach of a confidentiality undertaking, the parties may wish to consider providing for liquidated damages, bearing in mind, however, that these might have to be tailored to the nature of the breach and that consideration should be given to whether the party accepts liability for breaches that cannot be attributed to it with certainty.

(3) Model arbitration non-confidentiality clause

'Save to the extent required by any applicable law and by any other obligations to which a party may otherwise be bound, the parties shall have no obligation to keep confidential the existence of the arbitration or any information or document relating thereto'.

Mark W. Friedman

Rapporteur

Luca G. Radicati di Brozolo

Rapporteur

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Chairman

ANNEX 1

The following tables provide a general summary of the obligations of confidentiality under various national laws and arbitration rules. As noted in the Report these tables are not intended to be exhaustive and are aimed primarily at illustrating the variety of rules and solutions which operate in practice and which can impact on the issue of confidentiality in any given case.

A. Summary of national laws

Country	*Confidentiality Obligation?*	
	Statute?	*Case law?*
UNCITRAL (Model Law)	**No** – UNCITRAL Model Law 1985 makes no provision for confidentiality	
England	**No –** English Arbitration Act 1996 makes no provision for confidentiality.	**Yes –** implied duty of confidentiality, with certain exceptions.
United States	**No –** United States Federal Arbitration Act, 9 USC 1-16 (2000) makes no provision for confidentiality.	**No** – no inherent duty of confidentiality unless the parties contract for it.
Australia	The Australian International Arbitration Act as amended in 2010 includes in Article 23 detailed provisions on confidentiality, subject to exceptions, which the parties can choose to apply to their arbitration on an 'opt in' basis.	**No –** *Esso v. Plowman* case provides that there is no implied duty of confidentiality.
Austria	**Limited –** explicit statutory provision, in section 616(2) of the Austrian Code on Civil Procedure following the introduction of the Austrian Arbitration Act 2006, relating to the confidentiality of court proceedings dealing with arbitration matters.	

Country	*Confidentiality Obligation?*	
	Statute?	*Case law?*
	There are no other statutory provisions regarding confidentiality.	
Belgium	**No** – provision of the Belgian Judicial Code makes no provision for confidentiality.	**Yes** – case law seems to suggest such a duty exists.
Brazil	Despite the lack of specific rules on confidentiality in arbitration, it is widely held that the publicity principle laid down in Article 37 of the Brazilian Federal Constitution mandates some degree of disclosure in arbitration proceedings involving the State and State-owned entities Disclosure may also be required in arbitrations between a company and its shareholders under Brazilian corporation law	
Canada	**No** – no express statutory provision for confidentiality. Each province has adopted the UNCITRAL Model Law, which does not contain a provision for confidentiality.	**Yes** – recent recognition that confidentiality is a well accepted benefit and a critical advantage of commercial arbitration and parties have reasonable legitimate expectations of confidentiality in arbitration.
China	**No** – China's Arbitration Act 1994 does not regulate the matter. Article 40 simply prohibits arbitration from being held in public unless the parties otherwise agree.	

Country	*Confidentiality Obligation?*	
	Statute?	*Case law?*
	However, it seems to be accepted under Chinese law, that arbitration commissions, arbitrators, parties and participants in arbitral proceedings have a duty of confidentiality.	
Costa Rica	**No** – Costa Rica's Arbitration Law (No. 7727 of 1997) does not regulate the matter. It simply states at Article 60 that arbitral awards shall be made public, except when the parties have agreed to the contrary. The arbitral tribunal's deliberations are secret, by virtue of Article 15 of the Code of Ethics of the International Centre for Conciliation and Arbitration of Costa Rica.	
Denmark	**No** – no statutory provision in relation to confidentiality in the Danish Arbitration Act 2005.	**No** for parties / **Yes** for arbitrators – prevailing view is that there is no general duty of confidentiality on the parties but that the arbitrators are subject to a general duty of confidentiality. Further, it is generally agreed that arbitral hearings are private.

Country	*Confidentiality Obligation?*	
	Statute?	*Case law?*
Dominican Republic	**Yes** although limited in scope – Article 22 of the Dominican Republic Commercial Arbitration Law (No. 489-08 of 2008) provides for an express duty of confidentiality by the parties, arbitrators and arbitral institutions with respect to the information to which they are made privy in the course of the arbitral proceedings.	
Dubai International Financial Centre	**Yes** – Law No. 1 of 2008 provides for all information relating to the arbitration to be confidential, except by order of the DIFC court.	
Ecuador	**Limited** – the Ecuador Law on Arbitration and Mediation (No. 000.RO/145 of 1997) contains a provision at Article 34 relating to the possibility of the parties agreeing to keep the arbitral proceedings confidentiality, but that is all.	
Finland	**No** – no statutory provision in relation to confidentiality in the Finnish Arbitration Act 1992.	Although there do not appear to be any binding cases on this point, there are certain acknowledged principles when it comes to confidentiality.

Country	*Confidentiality Obligation?*	
	Statute?	*Case law?*
France	**Limited** – the French Code of Civil Procedure, Book IV, 1981 at Article 1469, includes a statutory provision for the secrecy of arbitrators deliberations, but nothing else.	**Yes** – case law seems to suggest such a duty exists, although it is limited in scope.
Hong Kong	**Limited –** the current Hong Kong Ordinance 1997, contains in Section 2 a statutory provision relating to the ability to hold court proceedings relating to arbitration in private. Other than that there are no further provisions for a general duty of confidentiality. Clause 18 of Hong Kong's Law Reform Commission's consultation paper contains a recommendation for a provision similar to the one contained in New Zealand's 1996 legislation, prohibiting disclosure of information relating to arbitral proceedings.	**Yes** – case law (following English common law) seems to suggest an obligation of confidentiality is implied into the arbitrationagreement.
Iran	**No** – the 1997 International Commercial Arbitration Act (based on the 1985 UNCITRAL Model Law) is completely silent on the confidentiality of arbitration.	

Country	*Confidentiality Obligation?*	
	Statute?	*Case law?*
Ireland	**No** statutory provision for confidentiality under either the 1954 or the 2010 Irish Arbitration Act. Constitutional requirement for all court proceedings to be in public.	No court decisions on confidentiality, although certain general assumptions in relation to confidentiality exist.
Italy	**No** – the Italian provisions on arbitration (Articles 806 ff. of the Code of Civil Procedure) contain no express provision on confidentiality, although it may be argued that it is an implied term resulting from commercial usage or custom. Arbitral awards filed in the context of enforcement proceedings are considered public documents available to anyone who requests a copy (Art. 744 Code of Civil Procedure). The "privacy code" (Legislative Decree 30 June 2003, n. 196, art. 52, par. 6) entitles parties having a "legitimate interest" to request that the arbitrators omit the names and other data through which the party could be identified in case of publication of the award.	

Country	*Confidentiality Obligation?*	
	Statute?	*Case law?*
Japan	**No** – there is no express provision in the Japanese Arbitration Law No.138 of 2003. Court proceedings arising from arbitration are treated as "non contentious proceedings" closed to the public	
Netherlands	**Yes** in the future – a draft proposal dating from 2005 proposes to revise the Dutch arbitration law to provide for confidentiality.	
New Zealand	**Yes** – there is an explicit and comprehensive confidentiality regime in the New Zealand Arbitration Act 1996 at Article 14, as a result of the Arbitration Amendment Act 2007.	
Nicaragua	**Yes** – under the Nicaragua Arbitration and Mediation Law (Law 540) whilst there is no specific provision regulating issues of confidentiality, privacy and confidentiality are expressly stated under Article 3 to be governing principles of its Arbitration Law.	
Norway	**No** – express provision at Chapter 1, Section 5 of the General Provisions ruling out confidentiality.	

Country	*Confidentiality Obligation?*	
	Statute?	*Case law?*
Peru	**Yes** – the Peruvian Legislative Decree No 1071 of 2008 contains at Article 51 an express, Comprehensive and broad provision providing for a duty of confidentiality.	
Scotland	**Yes** – confidentiality obligations are contained in Rules 26 and 27 of Schedule 1 to the Scottish Arbitration Act 2010.	
Singapore	**Limited** – Section 22 of the Singapore International Arbitration Act (Cap. 143A, 2002 Rev. Ed.) ("IAA") allows a party to apply to court for proceedings under the IAA to be heard otherwise than in open court. Section 23 IAA (applicable if a party obtained an order under Section 22) restricts the reporting of proceedings heard otherwise than in open court.	**Yes** – case law (following English common law) recognizes that an obligation of confidentiality is implied into the arbitration agreement.
Spain	**Yes** although limited in scope – under Article 24 of the Spanish Arbitration Act (Law 60/2003) parties, arbitrators and arbitral institutions have a duty to keep confidential information made known to them during the course of the arbitral proceedings. Further, the arbitral tribunal's deliberations are confidential.	

Country	*Confidentiality Obligation?*	
	Statute?	*Case law?*
Sweden	**No** – no duty of confidentiality in the Swedish Arbitration Act 1999.	**No** – current case law states that there is no duty of confidentiality imposed on the parties.
Switzerland	**No** – Swiss Federal Private International Law Act 1987 is silent as to the issue of confidentiality.	**No** – there have been no known Swiss court cases confirming an implied duty of confidentiality of the parties.
Venezuela	**Limited** – the Venezuelan Law on Commercial Arbitration 1998 imposes at Article 42 an obligation on the arbitrators to keep all matters relating to the arbitration confidential, but nothing other than that.	

B. Summary of arbitration rules

Rules	*Confidentiality Obligation*
UNCITRAL	**Limited** – these address the privacy of the hearings and the confidentiality of the award, but not confidentiality more generally.
American Arbitration Association International Arbitration (ICDR)	**No** – there is no provision.
Australian Centre for International Commercial Arbitration (ACICA)	**Yes** – Article 18 provides for the arbitration to be private and confidential.
Belgian Center for Mediation and Arbitration (CEPANI)	**Yes** – Appendix 2, point 9 of the CEPANI Rules provides that the arbitrator, mediator or third person shall obey the rules of strict confidentiality. Further point to provide for awards only to be published anonymously and with explicit approval of the parties.

Rules	*Confidentiality Obligation*
	Article 17.5 provides for privacy of the hearings, save with the approval of the Tribunal and the parties.
Milan Chamber of Arbitration	**Yes** – specific provision at Article 8 of the 2010 Rules relating to the confidentiality of the proceedings and the award.
China International Economic and Trade Arbitration Commission (CIETAC)	**Yes** – there are provisions at Articles 43(1) and 44(2) of the 2004 Rules.
Dubai International Arbitration Centre (DIAC)	**Yes** – provision at Article 41(1) of the 2007 Rules.
German Institution of Arbitration (DIS)	**Yes** – provision at Article 43(1) of the 1998 Rules.
Hong Kong International Arbitration Centre (HKIAC)	**Yes** – extensive confidentiality regime at Article 39(1) of the 2008 Rules, which deals with the confidentiality of matters and documents in the arbitral proceedings, the deliberations of the arbitral tribunal and the confidentiality of the award.
Iran Chamber of Commerce	**No** – the 2007 Rules, otherwise inspired by the ICC Rules, raise the issue but clearly limit it to the privacy of the proceedings (Article 43, para E).
International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (ICAC)	**Limited** – Article 25 provides that arbitrators, reporters, experts appointed by the arbitral tribunal, the ICAC and its staff refrain from disclosing information about disputes which may impair the legitimate interests of the parties.
International Chamber of Commerce (ICC)	**Limited** – the rules provide for the arbitral tribunal to take measures to protect trade secrets and confidential information (Article 20(7)); for the work of the Court to be kept confidential by everyone who participates in that work in whatever capacity (Article 6, Appendix 1) and for parties not involved in the arbitration not to be admitted to hearings save with the approval of the arbitral tribunal and the parties.

Rules	*Confidentiality Obligation*
Japan Commercial Arbitration Association (JCAA)	**Limited** – provision at Rule 40(2) of the 2008 Rules in relation to the arbitrators, the officers and staff of the association.
Kuala Lumpur Regional Centre for Arbitration (KLRCA)	**Yes** – provision at Rule 9 of the 1998 Rules.
London Court of International Arbitration (LCIA)	**Yes** – specific duties in Article 30 of the 1998 Rules to keep the award, disclosed materials and the deliberations of the Arbitral Tribunal confidential.
Netherland Arbitration Institution (NAI)	**Yes –** subject to timely objection (<28 days) NAI entitled to publish award in anonymous form (Article 55(2)).
Singapore International Arbitration Centre (SIAC)	**Yes** – Article 34 of the 2007 Rules.
Stockholm Chamber of Commerce (SCC)	**Limited** – arbitrators and the institution have to maintain the confidentiality of the award.
Swiss Rules of International Arbitration (Swiss Rules)	**Yes** – obligation to keep the award, submitted materials and the deliberations of the arbitral tribunal confidential under Articles 43 and 44. Applies also to tribunal-appointed experts (Article 27), the secretary of the tribunal (Article 15(5)) and the Chambers. No mention of witnesses or party-appointed experts. Further, under Article 44(2) a party cannot seek to make a member of the Chambers, an arbitrator, a tribunal-appointed expert or the secretary of the arbitral tribunal a witness in any legal or other proceedings arising out of the arbitration.
Tehran Regional Arbitration Centre (TRAC)	**Yes** – both the 2005 TRAC Rules (otherwise based on the UNCITRAL Rules) and the internal regulations provide for confidentiality of the arbitral proceedings and the dispute. Article 4 of the Rules contained an express and comprehensive duty of confidentiality on the arbitrators, parties, counsel, experts,secretaries and institution.

Rules	*Confidentiality Obligation*
	Article 4 of the regulations contains an express and comprehensive duty of confidentiality on the Director, members of the Secretariat and Arbitration Board.
International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna Rules)	**Yes** – Articles 3(6), 5(3), 7(4) and 20(4) of the 2006 Rules expressly provide that the arbitral proceedings shall take place in private, and that the arbitral institution and the arbitrators shall keep all relevant matters confidential. However, no provision for confidential with respect to the parties.
World Intellectual Property Organisation (WIPO)	**Yes** – the 2002 Rules contain very detailed provisions on confidentiality at Articles 73, 74 and 75.