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# Confidentiality in International Commercial Arbitration

Master thesis  
20 points

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Comparative Law

Spring 2001

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# Summary

Confidentiality in arbitration has for many years been taken for granted by the parties involved. The question has, until recently, almost never been debated.

Even though there has been an assumption that there is a duty of confidentiality, it normally does not rest on a statutory basis. Two opposing views have been taken among judges and scholars regarding the legislative silence.

One point of view is that to the extent that confidentiality is an attribute of arbitration, it must be found in either the applicable arbitration rules or in the arbitration agreement itself. The other position is that confidentiality is an implied term in all arbitration agreement that depends on the nature of arbitration itself.

England and Australia can justly be said to be each other's counter poles regarding this issue. English courts act on the presumption that there is an implied duty of confidentiality in an agreement to arbitrate. Disclosure is allowed only to protect a party's right vis-à-vis a third party. The party wishing to make a disclosure has to establish that it is necessary to do so; in practice, that party would have to show that the right which it was seeking to enforce against third parties could not be enforced or protected without the reasoned award.

The High Court of Australia has expressly rejected the English view in the controversial *Esso* case, where it was argued that confidentiality is not an essential attribute of arbitration. This judgement was confirmed in a subsequent decision. The view in the United States seems to be in line with the Australian position.

Civil Law countries, like France, Switzerland and Germany have followed the English view, that confidentiality is an implied term in all arbitration agreements.

However, the Supreme Court of Sweden has, in a recent decision, held that a duty of confidentiality could not be implied into an arbitration agreement and concluded that a party in an arbitration proceeding under Swedish law is not bound by an undertaking of confidentiality, unless this has been specifically agreed.

The purpose of this thesis was to see whether there exists an international principle of confidentiality in arbitration. The answer is that there is a definite lack of consensus in the international arbitration community. What is certain is, that confidentiality should not be taken for granted.

My conclusion is that parties who submit their disputes to arbitration must draft their arbitration clauses with more care if they wish to retain confidentiality regarding the proceedings and the information obtained therein.

# Abbreviations

AAA	American Arbitration Association
A.C.	Law Reports, Appeal Cases, England
All. E.R.	All England Law Reports
A L R	The Australian Law Reports
Am. Rev. Int'l Arb.	American Review of International Arbitration
C.A.	Court of Appeal
C.J	Court Justice
Civ. Div.	Civil Division
Ch. D.	Chancery Division
Com. Ct.	Commercial Court
D.Del.	United States District Court for the District of Delaware
ECE	Economic Commission for Europe
E.G.L.R	Estates Gazette Law Reports
F.R.D.	Federal Rules Decisions
HC of A	High Court of Australia
H L	House of Lords
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
Int'l Arb. Rep.	International Arbitration Report
J.	Judge

Journ. Dr. Internat.	Journal du Droit International
K.B.	King's Bench
LCIA	London Court of International Arbitration
L.J	Lord Justice
Lloyd's Rep.	Lloyd's Law Reports
NSW	New South Wales
NSWLR	New South Wales Law Reports
V.R.	Victorian Reports
WIPO	World Intellectual Property Organisation
W.L.R.	The Weekly Law Reports
Q.B.	Queen's Bench Division
Q.C	Queen's Counsel
Rev. Arb.	Revue de l'Arbitrage
SASR	South Australian State Reports
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law



# 1 Introduction

## 1.1 Background

Common wisdom holds that arbitration is a private and confidential form of dispute resolution. Privacy and confidentiality are claimed to be among the most important advantages of arbitration and the primary reason why companies all over the world have used arbitration to resolve international commercial disputes.

Privacy is concerned with the right of persons other than the arbitrators, parties and their necessary representatives and witnesses, to attend the arbitration hearings.

Confidentiality, however, is concerned with the obligation of the arbitrators and the parties not to divulge information relating to the content of the arbitration. Confidentiality extends to both the arbitration proceedings and to the documents created or disclosed in the course of the proceedings.

The privacy of the hearing itself is not disputed, and is covered by most of the rules of Arbitral Institutions. However, until recently the question of confidentiality in arbitration was almost never debated. Books on arbitration, written prior to the 1990's, state only that "arbitration is held in private" or "arbitration is confidential".

In 1995, the silence was broken when the High Court of Australia rejected the common view that there is a general obligation of confidentiality in arbitration proceedings.<sup>1</sup> Since then, confidentiality in arbitration has been the subject of much heated debate.

Although there has been an assumption that there is a duty of confidentiality, it normally does not rest on a statutory basis. Neither the national arbitration laws in most leading commercial nations, nor the UNCITRAL Model Law state that arbitration is confidential.<sup>2</sup>

In relation to confidentiality, two opposing views have been taken among judges and scholars. One point of view is that to the extent that confidentiality is an attribute of arbitration, it must be found in either the applicable arbitration rules or in the arbitration agreement itself. The other position is that confidentiality is an implied term in all arbitration agreements that depend on the nature of arbitration itself.

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<sup>1</sup> *Esso/BHP v. Plowman*, (1995) 128 A.L.R. 391.

<sup>2</sup> Smit Hans, *Case-note on Esso/BHP v. Plowman*, 11 *Arbitration International*, at 299, (1995). (Hereinafter "*Case-note*")

England and Australia are on opposing sides regarding this issue. Most Civil Law countries have followed the English view, that confidentiality is an implied term in all arbitration agreements. However, Sweden might be an exception due to a recent decision by the Supreme Court of Sweden.

## **1.2 Purpose and Disposition**

The purpose of this thesis is to see whether there exists an international principle of confidentiality in arbitration. It is a fundamental issue for parties who agree to arbitration, that the dispute can be solved without the public's knowledge. The question is whether it is possible for an internationally accepted duty to be established for participants in arbitral proceedings to maintain confidentiality. Further, if you created such a duty, what would be its limitations?

As stated above, England and Australia have been the corner stones of the discussion. The English position developed through several cases during the last seven years. I will describe the English case law to examine how exceptions to the broad rule of confidentiality have been established.

The High Court of Australia expressly rejects the English position. The Australian standpoint is mainly based upon two cases; one is the controversial *Esso* case.

In my analysis on the position of other countries, France, Switzerland and Germany are used as examples to confirm the views of civil law countries. In these countries, the discussions are not as intense, maybe because they already have clear opinions.

Sweden is of current interest, since the Supreme Court, last October, decided a case regarding the obligation of confidentiality. I will analyse the decision and also refer to newly published articles regarding that case.

I will also present the provisions regarding confidentiality that the major Arbitral Institutions provide.

Finally, before my own analysis I will refer to discussions among scholars, and outline their main arguments on the subject.

## **1.3 Materials and Limitations**

Since the discussion on confidentiality is fairly new, I have had difficulties finding books, which address this issue. In most of the major works of arbitration, this issue is only briefly noted. However, in some of the newly

published and edited literature, for example *Redfern & Hunter*<sup>3</sup> and *Fouchard, Gaillard and Goldman*<sup>4</sup>, the questions and disputes surrounding confidentiality are commented on in more detail.

Since there is no statutory basis for confidentiality, authority had to be sought in case law. In fact, a large part of the discussions occurred between judges who disregarded each other's decisions. The legal positions of today, although uncertain, can be tracked down in case law.

Another important source were articles found in *Arbitration International* and *Mealey's International Arbitration Report*. Partners of Swedish law firms analysed the issue in more than one article.

I have, as stated above, limited my survey to countries that I found relevant. I am aware that it would have been interesting to investigate how the issue is handled in China, another large arbitration jurisdiction. However, it would probably have made the topic excessively wide since arbitration in China is intimately connected with several other factors.

Also, I have not dealt with statutory arbitration, but have rather focused on commercial arbitration. Although I have not noticed any dispute regarding the issue of privacy, I could probably have written several chapters regarding the different interpretations of the term. However, I will deal with privacy briefly, and only establish its common meaning.

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<sup>3</sup> Hunter Martin, Redfern. Alan, *Law and Practice of International Commercial Arbitration*, 3<sup>rd</sup>ed. London, (1999).

<sup>4</sup> Fouchard Philippe, Gaillard Emmanuel, Goldman Berthold, *On International Commercial Arbitration*, The Hague, (1999).

## 2 Privacy

A substantial portion of the arbitration community agrees that privacy in proceedings is an essential feature of arbitration. However, as will be shown in this thesis there are different opinions as to the consequences thereof.

The rules of some of the major Arbitral Institutions confirm the principle of privacy.<sup>5</sup> Even without regulations, it is taken for granted that arbitration proceedings are not open to the public.

Under the most common interpretation of privacy, the following persons are entitled to attend the hearings:<sup>6</sup>

- a) each party. If the party is a company, this will include an officer or servant whom the company desires to be present as the formal representative of the party.
- b) any person whom any party desires to represent him or it at the hearing. This might include counsel, solicitor or surveyor.
- c) subject to specific directions regarding evidence, any person whom a party reasonably wishes to have present as a witness, or otherwise to assist in the presentation of the party's case.
- d) a shorthand writer or other note taker, if the parties wish to have notes taken for the proper presentation of their case in instant arbitration.

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<sup>5</sup> For example LCIA Rules Art. 19.4 – *All meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise.*  
ICC Rules of Arbitration Art. 21(3) (.....) *Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.*  
[www.lcia-arbitration.com/rulecost/english.htm#a](http://www.lcia-arbitration.com/rulecost/english.htm#a)  
[http://www.iccwbo.org/court/english/arbitration/rules.asp#article\\_21](http://www.iccwbo.org/court/english/arbitration/rules.asp#article_21) ( March 5 2001)

<sup>6</sup> Bernstein Ronald, Tackaberry John, Marriott Arthur, *Handbook of Arbitration Practice*, 3<sup>rd</sup> ed. at 194, London, (1998).

## 3 English Case Law on Confidentiality

English law can be said to represent the traditional or orthodox view of the subject. English courts have considered the status of documents disclosed in arbitration in several cases. In *Hassneh Insurance Co. of Israel v Stuart J. Mew*<sup>7</sup> Judge Coleman said:

“If the parties to an English law contract refer their disputes to arbitration they are entitled to assume at the least that the hearings will be conducted in private. That assumption arises from a practice, which has been universal in London for hundreds of years and is, I believe, undisputed. It is a practice that represents an important advantage over the courts as means of dispute resolution. The informality attaching to a hearing held in private and the candour to which it may give rise is an essential ingredient of arbitration”.<sup>8</sup>

### 3.1 Oxford Shipping Co. LTD. v. Nippon Yusen Kaisha<sup>9</sup>

Related disputes between several different parties often have much in common, for instance, the same documents and witnesses may be used in both proceedings, so there would be considerable practical advantages in hearing them together.<sup>10</sup> Queen’s Bench considered this in *Oxford Shipping Co v. Nippon Yusen Kaisha* or the so-called “*Eastern Saga Case*”<sup>11</sup> in 1984.

#### 3.1.1 Background

The dispute between the owners of a vessel and a headcharterer was the mirror image of the dispute between the headcharterer and a subcharterer. The disputes were referred to arbitration and the same arbitrators were appointed in each of the cases. The headcharterer filed for and received an order for concurrent hearings by the arbitrators. The owner applied to the court for the order made by the arbitrators to be set aside. They claimed that

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<sup>7</sup> *Hassneh Insurance Co and others v. Stuart Mew*, (1993) 2 Lloyd’s Rep. 243 ( Q.B Com Ct.).

<sup>8</sup> *Ibid.* at 246.

<sup>9</sup> *Oxford Shipping Co. LTD. V. Nippon Yusen Kaisha*,(1984) 2 Lloyd’s rep. 373 (Q.B. Com.Ct.)

<sup>10</sup> Collins Michael, *Privacy and Confidentiality in Arbitration Proceedings*, 11 Arbitration International, 321 at 323, London, (1995).

<sup>11</sup> *Oxford Shipping Co. LTD. V. Nippon Yusen Kaisha*,(1984) 2 Lloyd’s Rep. 373 (Q.B. Com.Ct.)

to have concurrent hearings would be contrary to the implied term of privacy in the arbitration agreement.<sup>12</sup>

### 3.1.2 The Court Decision

Mr Justice Legatt held that the concept of private arbitration derives basically from the fact that the parties have agreed to submit disputes, between them and only between them, to arbitration. He continued by stating that it was implicit in the agreement that strangers should be excluded from the hearings and the process of arbitration. Even if it were convenient for disputes to be held concurrently, the arbitrators had no power to order concurrent hearings. The arbitrators' power could not be extended merely because of a similar dispute, is referred separately to arbitration under a different agreement.<sup>13</sup>

Privacy has been recognised in English law for a long time. However, prior to the *Oxford Shipping* case, many English practitioners believed it possible for arbitrators to order two separate arbitrations to be heard together. The decision was unexpected, as the alternative seemed attractive and sensible. Nevertheless, the decision was a reminder that arbitration is a private process.<sup>14</sup>

## 3.2 Dolling-Baker v Merret<sup>15</sup>

In *Dolling-Baker v. Merrett* the English Court of Appeal restrained a party in arbitration from disclosing, in a subsequent action, documents relating to the arbitration.

### 3.2.1 Background

The plaintiff claimed money due under a policy of reinsurance, in which the first defendant was one of the insurers and the second defendants were the placing brokers.

The plaintiff sought disclosure of documents relating to arbitration involving a different assured but the same insurer and brokers. The insurer counterclaimed by seeking an injunction restraining the broker from disclosing those documents to the plaintiff. The lower court refused the latter application. The decision was appealed.

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<sup>12</sup> *Ibid.* at 373-374.

<sup>13</sup> *Ibid.* at 379.

<sup>14</sup> Collins, *supra* note 10 at 325.

<sup>15</sup> *Dolling-Baker v. Merrett*, (1990) 1 W.L.R. 1205 (C.A).

### 3.2.2 The Court Decision

The Chief Judge of the Court of Appeal was Lord Justice Parker K. He considered, first of all, if the documents were confidential as they had genesis in private arbitration. Secondly, he considered whether the documents were relevant to the action, and thirdly, he considered if they were necessary for the determination of the action in question.<sup>16</sup> The first point decided was that it had not been established that the documents sought, were relevant to the action. The judge therefore allowed the appeal on that ground.<sup>17</sup>

However, Parker LJ continued to consider what the position would have been if the documents had been relevant. His starting point was a House of Lords decision in *Science Research Council v. Nassé*.<sup>18</sup> That case established the principle that if confidentiality attaches to documents for which discovery is sought, that is a relevant factor to be taken into account before an order is given.

The Judge recognised the need for an obligation, which would bind the parties to arbitration and preclude them from disclosing or using for some other purpose documents prepared for and used in arbitration. He compared this with the implied obligation of secrecy between banker and customer.<sup>19</sup>

Parker LJ did not think that it was necessary to give a precise definition of the extent of the obligation in this case. However, he expressly rejected the concept that the arbitration documents had any inherent confidentiality. The fact that a document is used in arbitration does not in itself confer on it any confidentiality or privilege that can be availed in subsequent proceedings.<sup>20</sup>

Nevertheless, he held that there is an implied undertaking binding each party to the arbitration. The obligation of confidentiality exists in some form. It is an implied obligation arising out of the nature of arbitration itself.<sup>21</sup>

When questions arise as to production of documents, the court must consider the existence of the implied duty of confidentiality. However, if it is established that, despite the implied obligation, disclosure is necessary for the fair disposal of an action against a third party, that consideration must prevail. When the court is reaching that conclusion it should consider whether disclosure is strictly necessary and whether the necessary facts can be established in some other way that does not involve breach of confidence.<sup>22</sup>

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<sup>16</sup> *Ibid.* at 1211.

<sup>17</sup> *Ibid.* at 1212.

<sup>18</sup> *Science Research Council v. Nassé*, (1980) A.C. 1028, (HL)

<sup>19</sup> *Dolling-Baker v. Merrett*, (1990) 1 W.L.R. 1205 at 1213 (C.A.).

<sup>20</sup> *Ibid.* at 1213.

<sup>21</sup> *Ibid.* at 1213.

<sup>22</sup> *Ibid.* at 1214.

In summary, Parker LJ did not want to give a conclusive definition of the obligation, recognising that there would be exceptions. For example, the implied obligation would be limited when disclosure was necessary to ensure a fair trial.

The rest of the cases from England moved forward from the Court of Appeal's decision in *Dolling-Baker* and explored the limits of further exceptions to the rule of confidentiality in arbitration documents.

### **3.3 Hassneh Insurance Co. of Israel v. Mew<sup>23</sup>**

*Hassneh Insurance* is another case from England that considers disclosure of documents arising out of arbitration.

#### **3.3.1 Background**

The plaintiffs, Hassneh Insurance, reinsured the defendant, Stuart Mew, under various insurance contracts placed by Heath. Arbitration took place, and the defendant was unsuccessful. He therefore wished to proceed against his placing broker, Heath, on the basis of negligence and breach. That action was not the subject of an arbitration agreement, and to prosecute his claim in the courts successfully the defendant sought to utilise the series of documents that had come into his possession during the previous arbitration. The documents included both documents that had specially been brought into existence for the purpose of the arbitration, such as the pleadings, witness statements and transcripts, as well as other documents that the plaintiffs discovered in the arbitration.<sup>24</sup>

The plaintiff, Hassneh Insurance Co., claimed an injunction to restrain disclosures by the defendant of the requested documents. They claimed that it would be a breach of confidentiality.<sup>25</sup>

#### **3.3.2 The Court Decision**

Mr Justice Coleman ruled in favour of the plaintiff, and issued an injunction to prevent disclosure of the material. The Judge based his decision on an assertion that the release of the subject documents would amount to a breach of confidence.<sup>26</sup>

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<sup>23</sup> *Hassneh Insurance Co and others v. Stuart Mew*, (1993) 2 Lloyd's Rep. 243 (Q.B (Com Ct.)).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* at 244.

<sup>26</sup> *Ibid.* at 243-244.



Coleman J started by investigating the scope and nature of the duty of confidence that applies in relation to arbitration. He was surprised that there was little authority on the issue, but referred to *The Eastern Saga* and *Dolling-Baker*.<sup>27</sup>

The *Dolling-Baker* case was applied to the general duty of confidentiality. Regarding the implied obligation, Coleman J held that the implied term must be based upon customary or business efficacy.<sup>28</sup>

### 3.3.2.1 The Proceeding Documents

Coleman J held that the requirement of confidentiality, which is implied in all arbitration agreements, must at least be extended to documents that are created for the purpose of the hearings. This undertaking is implied in the arbitration agreement itself. He said:

“The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents could be almost equivalent to opening the door of the arbitration room to that third party.”<sup>29</sup>

Witness statements, outline submissions and pleadings should also be included in this group of documents where confidentiality should be a matter of course.<sup>30</sup>

Pre-existing documents produced by the other party during discovery for arbitration are also subject to such an undertaking. However, in those circumstances the undertaking arises not only out of the arbitration agreement but also from a longstanding presumption of law that pertains to the uses that can be made of discovered material. In the context of litigation, there is an implied undertaking for each party not to use any documents disclosed in that litigation for any purpose except for the litigation in which the document was disclosed. Such undertaking arises regardless of whether there is a pre-existing contract between the parties to the litigation. When the parties in English law arbitration agree to use English discovery procedures, they must, by implication, have a mutual obligation to accord to documents the same confidentiality as with litigation.<sup>31</sup>

### 3.3.2.2 The Award

Regarding the arbitration award, Coleman J made another judgement. The reason was that the award had two characteristics, which did not apply to the other documents. First of all, the award identified the parties' rights. Secondly, the award was subject to court jurisdiction regarding supervision

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<sup>27</sup> *Ibid.* at 246.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at 247.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

by the court, or enforcement of the award.<sup>32</sup> In these cases, the award could be produced in an open court. The Judge held that, since the duty of confidence is based on an implied term of the agreement, that term must have regard to the expected use of the award.<sup>33</sup>

Furthermore, Coleman J held that rather than being absolute duty, the arbitration confidentiality obligation was subject to exceptions in circumstances where commercial or other considerations warranted or even compelled disclosure. One exception was derived from the law relating to a banker's duty of confidence to their customer.<sup>34</sup> He founded on the decision in *Tournier v. National Provincial and Union Bank of England*,<sup>35</sup> where it was held that one of the exceptions to the banker's duty of confidentiality was when the interests of the bank required disclosure. The bank may disclose customer's accounts and affairs to an extent reasonable and proper for its own protection.<sup>36</sup>

Coleman J argued that a similar qualification must be implied as a business efficacy in the obligation of confidentiality arising under an arbitration agreement. To demonstrate an exception from a party's implied obligation not to disclose an award, he applied, by analogy, the "protection of own interest" qualification from the *Tournier Case*. If it were reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party, it would not be a breach of the duty of confidentiality to disclose an award and the reasons for it.<sup>37</sup>

In summary, the Judge distinguished reasoned award on the one hand, from the documents created for and related to the hearing on the other hand. He refused to extend the liberty to disclose further than the award and its reasons and thought it obvious that outlines, pleadings and witness statements were subject to confidentiality. These were merely the prelude to the definition of the rights embodied in the award. To disclose such documents without the consent of the other arbitrating party would be a breach of the obligation of confidentiality.<sup>38</sup>

However, in his judgement, a qualification must be implied as a matter of business efficacy in the duty of confidentiality arising under an arbitration agreement. If it is a reasonable necessity for the establishment or protection of an arbitrating party's legal rights, the award should be disclosed.

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at 247-248.

<sup>34</sup> A hint had already been given by Parker LJ in the *Dolling-Baker* case, see footnote 19.

<sup>35</sup> *Tournier v. National Provincial and Union Bank of England*, (1924) 1 K.B. 461(C.A.).

<sup>36</sup> *Ibid.* at 486.

<sup>37</sup> *Hassneh Insurance Co and others v. Steuart Mew*, (1993) 2 Lloyd's Rep. 243 at 249 (Q.B Com Ct.).

<sup>38</sup> *Ibid.* at 252.

### 3.4 Hyundai Engineering & Construction Co v. Active Building & Civil Construction<sup>39</sup>

Additional support for the view expressed in the previous cases was provided in one unreported case, *Hyundai Engineering & Construction Co v. Active Building & Civil Construction*<sup>40</sup> in 1994. In that case, Philips LJ held that under English law any person who acquires confidential information arising from an arbitration is subject to the same duties of confidentiality as pertain to the parties in arbitration. Considering the decisions and discussions in *Dolling-Baker* and *Hassneh Insurance* this was an expected outcome. However, the duties are not always evident to the participants or the recipients. Philips LJ stated that:

“The English authorities demonstrate that the nature and extent of the duty of confidentiality applicable to documents and information obtained in arbitration proceedings is by no means fully charted. It is not clear whether the duty of confidentiality arises out of a contractual term or by virtue of the relationship between the parties. It is clear that a duty of confidentiality must be subject to limits or restrictions.....”<sup>41</sup>

This indicates that the English courts were moving away from the strict confidentiality undertakings to a more flexible regime that allowed disclosures under some circumstances.

### 3.5 Insurance Co. v. Lloyd’s Syndicate<sup>42</sup>

Mr Justice Coleman summarised the effect of his decision in *Hassneh Insurance* like this: (i) an agreement to arbitrate contained an implied term which imposed on both parties to it a duty to keep confidential from third parties the award, the reasons and all other documentary materials relating to the arbitration; (ii) the implied term further qualified that duty by exceptions that the award and reasons might be disclosed as of right if it was reasonably necessary for one party to disclose them for the purposes of the establishment of that party’s legal rights against a third party.<sup>43</sup>

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<sup>39</sup> *Hyundai Engineering & Construction Co v. Active Building & Civil Construction Limited*, (1994) 9<sup>th</sup> of March 1994, Unreported, cited by the editors in 11 *Arbitration International*, 232-233, London, (1995).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Insurance Co. v. Lloyd’s Syndicate*, (1995) 1 *Lloyd’s Rep.* 272 (Q.B. Com. Ct.).

<sup>43</sup> *Ibid.* at 273.

However, the scope of the qualification remained unclear. This issue was addressed in a subsequent decision by Coleman J in *Insurance Co. v. Lloyd's Syndicate*.

### 3.5.1 The Court Decision

This was also an insurance case, where one party sought disclosure of an award, which they claimed they needed for a subsequent court action. The crucial legal question was: “How necessary does disclosure of the award have to be for the protection of the party’s legal right before he is entitled to disclose it as of right?”<sup>44</sup> Must it be “strongly persuasive” or go further and show that it is an “essential element in the formulation” of the related action?<sup>45</sup>

Coleman J opted for the latter view. He argued that the disclosure of an award merely to have persuasive effects in a related dispute is not sufficient grounds for ousting the undertaking. In this case, the cause of action could be sufficiently established and formulated even without reference to the award. The award would have had no greater weight or relevance than say an opinion from counsel.<sup>46</sup>

The Judge held that the underlying assumption of parties who agree to arbitrate is that the award and the reason for it are to be kept confidential. Disclosure could only be motivated when it is an unavoidable necessity for the protection of the rights of the parties. He concluded that as a matter of business efficacy, the scope of the qualification could not be extended to purposes that were merely helpful, as distinct from necessary, for the protection of the rights of the parties.<sup>47</sup>

Coleman J saw that if the scope of qualification was extended to disclosure that was just helpful, a winning party could regard the award “helpful” in the pursuit of all manner of claims of a similar nature. This would divest the confidential status of arbitration awards for a wide variety of commercial activities. Due to a rise in uncertainty, disputes about disclosure would rise, and in practice, it would be difficult for the challenging party to challenge the other party’s assertion that the disclosure was helpful. In the end, this would not reflect the mutual intention of confidentiality that the parties had when they entered into the agreement.<sup>48</sup>

To determine whether a disclosure is necessary or not, a stern test should apply. Coleman J required the party wishing to make the disclosure, establish that it was necessary to do so; in practice, that party would have to

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.* at 275.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* at 276.

show that the right against third parties could not be enforced or protected without the reasoned award. The making of the award would be a necessary part in the establishment of that party's right vis-à-vis a third party. This was the widest boundary to the qualification which business efficacy would support. The mere fact that it would be helpful or persuasive in achieving the vindication of the claimed right did not justify breaching confidence.<sup>49</sup>

### **3.6 London & Leeds Estates Ltd. v. Paribas Ltd.<sup>50</sup>**

This case deals with the distinction problem of disclosure of witness statements submitted by expert witnesses from earlier arbitrations.

#### **3.6.1 Background**

In the arbitration in question, which was about rental valuation, an expert witness gave evidence for the landlords. The other party, the tenants, claimed that the witness had expressed himself in a materially different way when he gave evidence for tenants in a previous arbitration. The tenants therefore sought to obtain by subpoena the witness statements that had been given in the two earlier arbitrations.<sup>51</sup>

#### **3.6.2 The Court Decision**

The issue was whether the parties in arbitration owed duty of confidence to a witness.<sup>52</sup> Mr Justice Mance pointed out that confidentiality is an implied duty in arbitration agreements. He drew the conclusion that a witness should have rights of that confidentiality, although they should be subject to limitations.<sup>53</sup>

The judgement recognised that the arbitrating parties owed a duty of confidentiality and privacy in relation to the evidence given. They owed a similar duty to the witness himself. As regards the witness, he owed an obligation of confidentiality in respect to evidence given to both the parties that employed him, plus the opposite party.<sup>54</sup>

However, an expert witness must accept that any party to arbitration might require proofs or other material from the arbitration. The witnesses' interest in confidentiality should be subsidiary to such considerations<sup>55</sup> For example,

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<sup>49</sup> *Ibid.*

<sup>50</sup> *London & Leeds Estates Ltd. v. Paribas Ltd.*, (1995) 1E.G.L.R 102 (Q.B.).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at 106.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

as in this case; a witness expressed himself in a materially different way in two different arbitrations, and acting for different sides, which outweighed the general principle of confidentiality. Therefore regarding an earlier statement the Judge allowed the subpoena, ruled that the interests of the public and the individual litigants overrode the confidentiality attached to earlier evidence.<sup>56</sup>

Concerning the second subpoena, the evidence was not considered necessary for fair conduct of the arbitration. The subpoena was therefore not allowed.<sup>57</sup>

### **3.7 Ali Shipping Corporation v. Shipyard “Trogir”<sup>58</sup>**

The reasoning of the Court of Appeal in *Ali Shipping*, regarding the nature, scope and application of exceptions, constitutes an excellent analysis of English common law relating to arbitration.<sup>59</sup>

#### **3.7.1 Background**

Following a dispute between parties, an arbitration award was made in favour of the plaintiffs. Subsequently, another dispute arose, and went to arbitration between the defendants and other parties, who were in the same beneficial ownership as the first plaintiff. In the second arbitration, the defendant wanted to rely upon materials generated in the first arbitration. The first plaintiff applied for an injunction restraining the defendant from doing so on the basis that it would breach confidentiality in respect to the first arbitration. The lower court dismissed the claims, and the plaintiff appealed.<sup>60</sup>

#### **3.7.2 The Court Decision**

Lord Justice Potter gave the leading judgement in the Court of Appeal. He stated with respect to the origin and purpose of the rule of confidentiality:

“I observe by way of preliminary that, to date, the confidentiality rule has been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involves an obligation not to make use of

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<sup>56</sup> *Ibid.* at 109.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ali Shipping Corporation v. Shipyard Trogir*, (1998) 2 All. E.R. 136 (C.A. Civ. Div.)

<sup>59</sup> Fortier, Y.Lord, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 *Arbitration International*, 131 at 137, London, (1999).

<sup>60</sup> *Ali Shipping Corporation v. Shipyard Trogir*, (1998) 2 All. E.R. 136 at 136 (C.A. Civ. Div.)

material generated in the course of arbitration outside the four walls of the arbitration, even when required for use in other proceedings”.<sup>61</sup>

As to the specific nature of “the implied term of confidentiality”, Potter LJ made a reference to Lord Bridge’s decision in *Scally v. Southern Health and Social services Board*<sup>62</sup> where it was stated that a clear distinction is to be drawn:

“between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will necessarily imply as a necessary incident of a definable category of contractual relationship.”<sup>63</sup>

Potter LJ argued that arbitration clauses are examples of the latter type of implied terms. Confidentiality attached to an arbitration agreement as a matter of law, is a term implied by virtue of the contract itself. In other words, the parties have entered into a contract to which the law attributes particular characteristics. By entering the arbitration agreement, the parties have indicated their presumed intention to be bound by a duty of confidentiality.<sup>64</sup>

As to the boundaries of the obligation of confidentiality, the Judge held that the manner in which this may best be achieved, is by formulating exceptions of broad application to be applied in individual cases. This is to prefer, instead of seeking to reconsider or adapt the general rule on each occasion in light of the particular circumstances and presumed intentions of the parties at the time of their original agreement.<sup>65</sup>

Regarding exceptions, Potter LJ referred to previous decisions in the English courts that established exceptions. He agreed that in principle, confidentiality should be subsidiary to an arbitration party’s protection or enforcement against a third party. He argued that even if that exception as to that date, had only been held applicable to disclosure of the award, it was clear that the principle also covered for example pleadings, submissions, and transcripts of evidence.<sup>66</sup>

Furthermore, Potter LJ expressed the view that it was not necessary and even helpful to confine exceptions more narrowly than of “reasonable necessity”. He agreed with Coleman J<sup>67</sup> that it is not enough for a disclosure to be merely helpful, as distinct from necessary.

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<sup>61</sup> *Ibid.* at 149.

<sup>62</sup> *Scally v. Southern Health and Social Services Board*, (1992) 1 A.C. 294.

<sup>63</sup> *Ibid.* at 307.

<sup>64</sup> *Ali Shipping Corporation v. Shipyard Trogir*, (1998) 2 All. E.R. 136 at 146-147 (C.A. Civ. Div.).

<sup>65</sup> *Ibid.* at 147.

<sup>66</sup> *Ibid.*

<sup>67</sup> In *Insurance Co. v. Lloyd’s Syndicate*, (1995) 1 Lloyd’s Rep. 272 (Q.B. Com. Ct.).

Potter LJ argued that flexibility is required in a judgement of “reasonable necessity” regarding enforcement and protection of a party’s rights. The court should not require that the party seeking disclosure prove reasonable necessity regardless of difficulty or expense. Instead, the court should consider the nature and purpose of the proceedings in which the material was conducted and in which the material is required. For example, what is the material needed for, and what is the practicality and expense of obtaining such evidence elsewhere.<sup>68</sup>

In this case, the material that the defendant sought was not reasonably necessary for the protection and enforcement of their rights, because the plea in respect of which disclosure was sought to be justified was essentially one of law. The fact that the parties to whom disclosure was contemplated, were in the same beneficial ownership and management as the complainant did not justify further exceptions. The appeal was allowed, and an injunction issued.<sup>69</sup>

## **3.8 Conclusion of the English Law**

### **3.8.1 Confidentiality**

The English position can be tracked down in a number of cases. Until the obligation to keep proceedings private was examined in “Eastern Saga”, no one in England gave much thought to its precise legal basis. Today, the English view is that arbitration is a private process and that confidentiality attaches to the proceedings. The English courts act on the assumption that, in agreeing to arbitrate, each party considers that his interest will be best served by privacy and both parties recognise and undertake mutual obligations of confidentiality.

Confidentiality extends to awards, to documents produced as a result of the discovery process and to documents generated in the course of arbitration, such as pleadings, proofs and notes of evidence.

The position of witnesses has also been considered. In a case with an expert witness, the witness owes an obligation to both sides to respect the confidentiality of the arbitration proceedings.

Both the parties and the arbitrators owe the witness a reciprocal duty of confidence. Since the English judges only dealt with expert witnesses, there are no clear guidelines as to who is bound by the duty of confidentiality. It has been argued that third parties, in the absence of separate confidentiality

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<sup>68</sup> *Ali Shipping Corporation v. Shipyard Trogir*, (1998) 2 All. E.R. 136 at 147-148 (C.A. Civ. Div.)

<sup>69</sup> *Ibid.* at 136-137.



agreements, have no duty of confidentiality. It is suggested that the boundaries apply, by reason of the nature of the information and the circumstances in which the recipient received it. For example, if a person finds a document on the street, he is not bound by confidentiality duty. However, if a witness in arbitration receives documents connected to the proceedings, he would be bound by the duty of confidentiality.<sup>70</sup>

### 3.8.2 Exceptions

The duty of confidentiality is subject to exceptions. In addition to two obvious exceptions, consent and order of the court, English judges have recognised, and discussions have been focused on leave of court. It is the practical scope of this exception that causes difficulties; on what grounds should the court grant such a leave?

In the analogy on the implied obligation of secrecy between bankers and customers, disclosure will be given, when it is reasonably necessary for the protection of a legitimate interest of an arbitrating party. In this context, it means reasonably necessary for the protection or enforcement of an arbitrating party's legal right vis-à-vis a third party. The disclosure may be necessary in order to find a cause of action against, or to defend a claim brought by the third party. This means in practice, that the party would have to show that the right that it was seeking to enforce against third parties could not be enforced or protected without reasoned award.

Even though the “necessary exception” has so far only been applied to disclosure of the award itself, the principle also covers pleadings, written submissions, witness statements, as well as transcripts and notes of evidence given in arbitration.

As to the definition of “reasonable necessity”, it has been held that it is not enough that the award and reasons might have a commercially persuasive impact on the third party to whom they are disclosed, neither that the disclosure would be merely a helpful protection of such a right.

Further, the English court has, at least once,<sup>71</sup> made an exception when public interest demanded disclosure. However, it has been suggested that the Judge was referring to “public interest” in the sense of “the interest of the justice”. It is preferable to recognise such an exception as in “the interest of justice” rather than in “the public interest”. This definition is necessary to avoid the use of the latter phrase in relation to the issues of public interests, as in *Esso* case.<sup>72</sup>

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<sup>70</sup> Bernstein, Tackaberry, Marriott, *supra* note 6 at 196.

<sup>71</sup> In *London & Leeds Estates Ltd. v. Paribas Ltd.*, (1995) 1E.G.L.R 102

<sup>72</sup> Suggested by Lord judge Potter *Ali Shipping Corporation v. Shipyard Trogir*, (1998) 2 All. E.R. 136 at 148 (C.A. Civ. Div.)

The purpose of the “interest of the justice” exception is so judicial decisions can be reached on a basis of accurate evidence by witnesses. Although in the *Paribas* case, the issue was related to an expert witness, the same principle should apply when a non-expert witness has given materially different versions of the same events upon a previous occasion.<sup>73</sup>

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<sup>73</sup> *Ibid.*

## 4 Australian Case Law

With the decision in *Esso/BHP v. Plowman*<sup>74</sup> a majority of the High Court of Australia rejected the English judicial view that a general duty of confidentiality exists and that it is an implied term in agreements to arbitrate. The Australian view was subsequently confirmed in *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd*<sup>75</sup>

The two Australian cases placed in doubt a number of widely held assumptions as to what constitute the essential features of arbitration. It has tremendous potential to impact the outcome of much arbitration. The cases have been criticised by proponents of confidentiality, which I will also refer to in this chapter.

### 4.1 Esso Australia Resources Ltd. and others v. Plowman and Others

#### 4.1.1 Background

The two companies involved, Esso and BHP ('the companies'), had agreements with the Gas and Fuel Corporation of Victoria ("GFC") and the State Electricity Commission of Victoria ("SEC"). The agreements were for the supply of natural gas. Each of the contracts contained a clause whereby the price payable for the gas sold was to be adjusted by taking into account changes relating to royalties and taxes attributable to the production or supply of gas.<sup>76</sup>

The two companies each claimed that they were entitled to raise the price for the product on account of the fact that the Australian Government had introduced a new tax on the companies' profits derived from, inter alia, natural gas. If they succeeded in the arbitrations, the price of gas and electricity would be bound to rise and affect all consumers in the state of Victoria.<sup>77</sup>

The agreements provided that when the companies claimed price increases they were obliged to supply details as to the basis for the calculation leading to the increase. This, Esso/BHP refused to do unless GFC and SEC entered

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<sup>74</sup> *Esso/BHP v. Plowman*, (1995) 128 A L R 391, HC of A.

<sup>75</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662.

<sup>76</sup> **Clause 12.8** of the GFC Sales Agreement provides, amongst other things: any such increases or decreases shall be effective upon the imposition thereof. In the event of any such increase or decrease Sellers shall provide Buyer with details of the increase or decrease and the method and distribution of such royalties, taxes, rates, duties or levies.

**Clause 19.5** of the SEC Sales Agreement was in similar terms.

<sup>77</sup> *Esso/BHP v. Plowman*, (1994) 1 V.R. 1 at 3-5.

into a confidentiality agreement regarding the information supplied. When GFC and SEC refused to accept this demand, the companies referred the dispute to arbitration, pursuant to arbitration clauses in the agreements.<sup>78</sup> Two panels of arbitrators were appointed.

Meanwhile, the Minister for Energy and Minerals had heard of the dispute and of the attitude of the companies. He brought an action seeking a declaration to the effect that GFC and SEC were not restricted from disclosing to him the details provided by the companies pursuant to their obligation under the contractual clauses. Furthermore, he claimed, by declaration, that he was not restricted from receiving information obtained in the course of, or by reason of the arbitrations merely on the basis that it had been disclosed in arbitration.<sup>79</sup> GFC and SEC adopted the same stance and claimed freedom to pass on information to the Minister.

#### **4.1.2 The First Instance**

The Minister's application was largely accepted. The primary judge, Marks J, held "that the mere fact that parties to a dispute agree impliedly or expressly to have it arbitrated in private does not import any legal or equitable obligation not to disclose to third parties any information at all which may be said to have been obtained by virtue of or in the course of the arbitration."<sup>80</sup>

He accordingly made six declarations, which in general stated that there were no expressed or implied terms in the agreement restricting disclosure by GFC and SEC. Furthermore, he rejected the declaration as to confidentiality that the companies had urged on him. Marks J concluded that there were no general legal obligations, which precluded parties from using information obtained in the arbitration in other contexts.<sup>81</sup> Esso/BHP appealed.

#### **4.1.3 The Appeal Division**

The Appeal Division of the Supreme Court of Victoria upheld the fundamental parts of the decision. It left standing the declaration that permitted GFC and SEC to disclose to the Minister and to third parties in general, information obtained from the companies in the course of arbitration.<sup>82</sup>

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<sup>78</sup> *Ibid.* at 1.

<sup>79</sup> *Ibid.* at 4-5.

<sup>80</sup> *Esso/BHP v. Plowman*, (1995) 128 A L R 391 at 395. HC of A.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Esso/BHP v. Plowman*, (1994) 1 V.R. 1 at 36-37.

The Appeal division held that GFC/SEC were not restricted from disclosing information to the Minister and third persons by reason that:

- a) the information was obtained by it from Esso/BHP in the course of or by reason of arbitration pursuant to the sales agreement
- b) the information has not otherwise been published.<sup>83</sup>

Judge Brooking gave the leading judgement. He declined to accept the English view concerning implied obligation of confidentiality. For him, a lack of necessary precision in the formulation of the implied obligation of confidence was fatal. However, he accepted that arbitrations are private.<sup>84</sup> He was prepared to go so far as to recognise a rule of law:

“that is an implied term of arbitration agreement (which the parties may exclude if they want) that arbitrations should be heard in private in the sense of in the absence of strangers as just defined<sup>85</sup> unless the parties consent to the presence of a stranger.<sup>86</sup>”

Furthermore, he refused to accept the common view,<sup>87</sup> that confidentiality is a natural consequence of privacy. He pointed at the long history of arbitration and the absence of judicial rulings supporting such a view before *Dolling-Baker*<sup>88</sup> in 1990. He argued that he was not aware of any textbook on England, Australia or the United States that, before 1987,<sup>89</sup> suggested an implied duty of confidentiality in arbitration proceedings.<sup>90</sup>

However, Brooking J referred to the implied term of privacy, and expressed the view that went a long way towards assuring “privacy” in the wider sense. He argued that he did not believe that in the common understanding of the legal professions there was a duty not to disclose arbitration documents. It was his experience that substantial parts of the Victorian lawyers practising in the arbitration field, were of the opinion that the duty did not exist.<sup>91</sup>

#### 4.1.4 The High Court of Australia

Esso/BHP appealed to the High Court of Australia. The appeal was dismissed, but the matter was remitted to the Supreme Court to reformulate

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<sup>83</sup> *Ibid.* at 1-2.

<sup>84</sup> *Ibid.* at 12.

<sup>85</sup> Brooking J defined strangers as persons whose presence is not necessary or expedient for the proper conduct of the arbitration proceedings. *Esso/BHP v. Plowman*, (1994) 1 V.R. 1 at 12

<sup>86</sup> *Esso/BHP v. Plowman*, (1994) 1 V.R. 1 at 12-13.

<sup>87</sup> For example in Bernstein, Tackaberry, Marriott, *supra* note 6 at 196.

<sup>88</sup> *Dolling-Baker v. Merrett*, (1990) 1 W.L.R. 1205(C.A).

<sup>89</sup> When the first edition of Bernstein, Tackaberry, Marriott, *supra* note 6, was published.

<sup>90</sup> *Esso/BHP v. Plowman*, (1994) 1 V.R. 1 at 14.

<sup>91</sup> *Ibid.* at 14-15.

the declarations in light of the High Court judgements.<sup>92</sup> Mason CJ gave the leading judgement.<sup>93</sup>

Mason CJ accepted that the private character of arbitration is well established. However, he did not think of it as an implied term, instead he preferred to “describe the private character of the hearings as something that inheres in the subject matter of the agreement to submit disputes to arbitration...”<sup>94</sup>

The Minister argued that it is one thing to say that the proceeding is private and another thing to say that it is confidential. The Judge noted that the Minister had support for this statement. In *Scott v. Scott*<sup>95</sup> in 1913, Lord Atkinson held that an in-camera order meant nothing more than that the hearings would be in private.<sup>96</sup> There was also *John Fairfax & Sons v. Police Tribunal*<sup>97</sup> in 1986, where Mr Justice McHugh J.A drew a distinction between the power to exclude strangers from proceedings and a power to prohibit publication. In his opinion, there was no similarity between the two powers.<sup>98</sup>

The Minister also argued that before the *Dolling-Baker* case, there was no decision suggesting that an arbitration hearing was confidential, as distinct from private. Mason CJ agreed and pointed out that in the United States, case law is inconsistent with the proposition that confidentiality is a characteristic of arbitration proceedings.<sup>99</sup>

Mason CJ stated that, for various reasons, complete confidentiality of proceedings in arbitration can never be achieved. He argued that it is a common ground between the parties that no obligation of confidence attaches to witnesses, who are therefore free to disclose what they know of the proceedings. Even if the parties expressly agreed on confidentiality, this would not bind third parties. Secondly, Mason CJ gave several examples of situations where an award could come before a court involving disclosure.<sup>100</sup> Thirdly, an arbitrating party may have an obligation to disclose, for example under a policy of insurance, or to convey appropriate information in company accounts or to comply with statutory requirements such as those of the stock exchange, or even because a company considered it desirable to inform the market and shareholders about a company’s affairs.<sup>101</sup>

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<sup>92</sup> *Esso/BHP v. Plowman*, (1995) 128 A L R 391. HC of A.

<sup>93</sup> With which Judges Dawson and McHugh J concurred.

<sup>94</sup> *Esso/BHP v. Plowman*, (1995) 128 A L R 391at 398. HC of A.

<sup>95</sup> *Scott v. Scott*, (1913) AC 417 at 453.

<sup>96</sup> *Ibid.*

<sup>97</sup> *John Fairfax & Sons Ltd v Police Tribunale of New South Wales*, (1986) 5 NSWLR 465.

<sup>98</sup> *Ibid.* at 481.

<sup>99</sup> For example *USA v. Panhandle Eastern Corp, et al*, (1988) 118 F.R.D. 346 (D. Del.).

<sup>100</sup> For example, enforcement proceedings, judicial review, removal of an arbitrator and court’s power to make interlocutory orders in relation to an arbitration.

<sup>101</sup> *Esso/BHP v. Plowman*, (1995) 128 A.L.R. 391at 400-401. HC of A.

Those arguments lead Mason CJ to the following conclusion:

“Despite the view taken in *Dolling-Baker* and subsequently by Coleman J in *Hassneh Insurance*, I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is 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 purpose of the arbitration.”<sup>102</sup>

Further, Mason CJ said that if, contrary to his view, a duty of confidentiality existed it would have to be subject to a “public interest” exception.<sup>103</sup> He illustrated this by asking:

“Why should consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which all affect, in all probability, the price chargeable to consumers by the public utilities?”<sup>104</sup>

However, it must be stressed that public interest was not the main reason for his judgement. Instead, it relied on Mason CJ’s conclusion that confidentiality was not an essential attribute of arbitration in Australia.

#### **4.1.5 The Dissenting Opinions**

Mason CJ’s judgement is inconsistent. On the one hand he acknowledges the private character of the hearings as being inherent in the arbitration agreement. He even expressed this view:

“the efficacy of a private arbitration will be damaged, even defeated, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration.”<sup>105</sup>

On the other hand Mason CJ accepted a legal regime that allowed any party or witnesses to damage or defeat the hearings by disclosing in public what was going on in proceedings.

Mr Judge Toohey addressed this inconsistency:

“While clearly it is not possible to say that every aspect of an arbitration is confidential in every circumstance, no sharp distinction can be drawn between privacy and confidentiality in this context. They are, to a considerable extent, two sides of the same coin. The privacy of an

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<sup>102</sup> *Ibid.* at 401.

<sup>103</sup> *Ibid.* at 399.

<sup>103</sup> *Ibid.* at 402.

<sup>104</sup> *Ibid.* at 403.

<sup>105</sup> *Ibid.* at 399.

arbitration hearing is not an end in itself; surely it exists only in order to maintain the confidentiality of the dispute which the parties have agreed to submit to arbitration.”<sup>106</sup>

In the end, he repeated this opinion by stating that there must be an underlying principle that a party to arbitration is under a duty not to disclose information obtained by reason of the arbitration.<sup>107</sup>

Mr Justice Brennan gave another judgement. He held that the duty to produce and disclose documents to the other party is an invasion of a party’s right to keep that information confidential. If the other party has no duty of confidentiality in respect to documents, the burden would be increased beyond that contracted for.<sup>108</sup> He therefore wanted to imply a duty of confidentiality in arbitration agreements where parties are bound to produce documents or information to the other party for the purpose of the arbitration. However, he did not consider the duty as absolute. The exception included:

- (a) where disclosure of the otherwise confidential material is under compulsion by law;
- (b) where there is a duty, albeit not a legal duty, to the public to disclose;
- (c) where disclosure of the material is fairly required for the protection of the party’s legitimate interest; and
- (d) where disclosure is made with the express or implied consent of the party producing the material.<sup>109</sup>

It should be pointed out that except for b this was all said in *Dolling-Baker* and in relation to c, confirmed in *Hassneh Insurance*. At the time of this decision, the exception, “public interest” was new. Brennan J argued that there were cases, such as this, when the public had a real interest in the outcome, and even in the progress of the arbitration.<sup>110</sup>

However, he did not go so far as to endorse the view of the majority, that the “public interest” exception of indefinite scope would limit any duty of confidentiality. A right to disclose information because of public interest could not be absolute. Instead, special considerations had to be given in each specific case.<sup>111</sup>

The dissenting opinions of Toohey J. and Brennan J. harmonise to a considerable extent with the English position.

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<sup>106</sup> *Ibid.* at 411.

<sup>107</sup> *Ibid.* at 416.

<sup>108</sup> *Ibid.* at 405.

<sup>109</sup> *Ibid.* at 406.

<sup>110</sup> In this case the public interest was the energy prices. *Esso/BHP v. Plowman*, (1995) 128 A L R 391 at 407. HC of A.

<sup>111</sup> *Esso/BHP v. Plowman*, (1995) 128 A L R 391 at 407-408. HC of A.



## 4.2 Comments on the *Esso* Case

Several Expert Reports have been written concerning the decision in the *Esso* case.

The High Court of Australia decided that the strict legal theory left no room for a presumption of confidentiality in the Australian arbitration structure.<sup>112</sup> By doing so, principles that hitherto were considered fundamental, such as minimising interference, solving the dispute and achieving justice, have been subordinated to a yet undefined exception of public interest.<sup>113</sup>

Mr Stewart Boyd commented on the evidence presented by The Minister. The Minister's party argued that there was no duty of confidentiality, except in relation to secret formulae, trade secrets or similar confidential information.

Mr Boyd gave examples of cases he knew, where privacy and confidentiality were the main reasons the parties wanted to arbitrate. He referred to two cases where parties entered into arbitration after a dispute regarding the avoidance of publicity: one involved allegations of professional negligence by a solicitor against a barrister, the other concerned the settling of accounts between members of a shipping conference. In many cases, because of the nature of the transactions, privacy and confidentiality were primary considerations in choice of including an arbitration clause, for example, contracts governing relationships between members of a set of barristers. None of these cases involved such confidential information that, according to the Minister, would be entitled to protection.<sup>114</sup>

Mr Boyd stated that he had no doubt that Australian and English views were entirely different regarding the meaning of privacy.<sup>115</sup> The Australian view, if the Minister is right, limits privacy to the meaning that any person who is not involved in the process is excluded. This certainly differs from the English view, which is summarised by a distinguished barrister and arbitrator in this way:

"There would be little point in excluding the public from an arbitration hearing if it were open to a party to make public, for example in the press, or on television, an account of what was said or done at the hearing".<sup>116</sup>

The decision in the *Esso* case was founded on arbitration practices in Australia. Mason CJ expressly limited its impact to arbitration in Australia,

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<sup>112</sup> Miller Duncan, Rogers Andrew, *Non-Confidential Arbitration Proceedings*, 12 Arbitration International, 319 at 327, London, (1996).

<sup>113</sup> *Ibid.*

<sup>114</sup> Boyd Stewart, *Expert Reports of Stewart Boyd Q.C.*, 11 Arbitration International, 265 at 266, London, (1995).

<sup>115</sup> *Ibid.* at 265.

<sup>116</sup> Bernstein, Tackaberry, Marriott, *supra* note 6.

by stating that: “I do not consider that, in *Australia*,..... that confidentiality is an essential attribute of a private arbitration....”<sup>117</sup>

This should not be binding in other countries. It is not likely to be followed, especially not in England. The main reasons for that are:

- a) the practice as followed in Australia differs from the practice that has been followed in England for centuries
- b) even in Australia the decision of the High Court was a narrow one, the majority for was three judges out of five
- c) the general opinion of judges and arbitrators in England is that to remove the protection of confidentiality from arbitration proceedings would be to weaken gravely, and perhaps fatally, the institution of arbitration.<sup>118</sup>

### **4.3 Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.**<sup>119</sup>

The Court of Appeal of New South Wales decided in this case that an arbitrator had no power to make a procedural direction imposing an obligation of confidentiality which would have the effect of preventing the Government from disclosing to a state agency, or to the public, information and documents which ought to be made known to that authority or to the public.<sup>120</sup>

#### **4.3.1 The Background**

The arbitration proceedings between the Commonwealth and Codock concerned a naval dockyard on Cockatoo Island. The Codock operated the Dockyard under a series of Lease and Trading Agreements until its decommissioning in 1991. At that time, the final Trade and Lease Agreement had not expired. What is relevant here is the pollution dispute in the arbitration proceedings, which was concerned by the allegations of the Commonwealth, that when Codock yielded the Island, they would leave behind industrial substances, which was in breach of the Lease Agreement.<sup>121</sup>

The specific issue before the New South Wales Court of Appeal was a challenge by the Commonwealth as to whether a series of directions made by one of the arbitrators concerning confidentiality of documents, were

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<sup>117</sup> *Esso/BHP v. Plowman*, (1995) 128 A.L.R. 391 at 401.

<sup>118</sup> Bernstein, Tackaberry, Marriott, *supra* note 6 at 195.

<sup>119</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662.

<sup>120</sup> *Ibid.* at 663.

<sup>121</sup> *Ibid.* at 665.

beyond the power of the arbitrator to make. The confidentiality concerned both documents prepared for the purposes of the arbitration, plus those produced by each party for inspection and discovery.<sup>122</sup>

### 4.3.2 The Decision of the Arbitrator

The Arbitrator's decision was made in response to the Commonwealth, who wished to disclose a series of expert reports that had been prepared for the purpose of the arbitration.

The relevant directions of the arbitrator were as follows:

“Direct that neither party to the proceedings disclose or grant access to:

- (a) any documents or other material prepared for the purposes of this arbitration;
- (b) any documents or other material, whether prepared for the purposes of this arbitration or not, which reveal the contents of any document or other material which was prepared for the purposes of this arbitration;
- (c) any document or material produced for inspection on discovery by the other party for the purposes of these proceedings;
- (d) any document or material filed in evidence in these proceedings”.<sup>123</sup>

A provision was added permitting disclosure to legal advisers and agents.

The Commonwealth attacked the reasons given by the arbitrator. Therefore, to understand the Court's decision, it is necessary to refer to the reasons that accompanied the directions of the arbitrator.<sup>124</sup>

The Arbitrator recognised that the dispute concerning his directions arose from a private arbitration, and that his powers were limited to determining the issue before him. To do that, he used both relevant legislation and the references brought to him by the parties. He also stressed that his orders were not to be interpreted as an attempt to limit the Commonwealth's duty to carry out its public function or in its legitimate use of its own material. The Arbitrator did not think there was enough evidence to demonstrate public interest.<sup>125</sup>

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<sup>122</sup> *Ibid.* at 664 and 666.

<sup>123</sup> Cited by Kirby P, in *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662 at 669.

<sup>124</sup> The Arbitrator's reasons are not public. However Rogers, A. QC and Miller, D have by assistance from the subsequent court judgement found some extracts from the reasons and presented these in: Miller, Rogers, *supra* note 112 at 335.

<sup>125</sup> Miller, Rogers, *supra* note 112 at 336.

### 4.3.3 The Court of Appeal

The conclusion of the First Instance was that the directions in question were within the powers of the Arbitrator. The Judge considered this a case where one of the parties, the Commonwealth, misunderstood the directions.<sup>126</sup> The decision was appealed.

When the case came before the New South Wales Court of Appeal the decision of the first instance was, by a majority, set aside. Directions a, b and d were held to have been outside the arbitrator's power.<sup>127</sup>

Basically, the Court needed to review the scope of the arbitrator's power to make directions, pertaining to the confidentiality of information produced for the purpose of the arbitration.

The leading judgement for the majority was that of Mr Justice Kirby. He held that the arbitrator's directions were impermissibly wide. They would prevent the Commonwealth from legitimate disclosure of arbitration documents.<sup>128</sup> The directions "properly characterised went outside the concerns of the Arbitration."<sup>129</sup>

Kirby P referred to the *Esso* case, where Mason CJ had held that confidentiality was not an essential attribute of arbitration in Australia. He also recognised the advantage of having the *Esso* case to rely on: "Rolfe J<sup>130</sup> did not have the advantage of the decision of the High Court in *Esso*, which this court has."<sup>131</sup>

Kirby P relied upon the public interest exception suggested by Mason CJ in *Esso*.<sup>132</sup> He held that the set of confidentiality directions, extended to documents the Commonwealth wished to give to State Authorities. While this information was important for the public, it was urgent for public health and restoration agencies.<sup>133</sup> Kirby P argued that there should not be a duty of confidentiality to a party's own documents prepared for arbitration, if they have a wider public interest.<sup>134</sup>

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<sup>126</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd*, NSW Supreme Court (Unreported) 15 November (1994), Proceedings 55049/94 at 7.

<sup>127</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662 at 683.

<sup>128</sup> *Ibid.* at 680.

<sup>129</sup> *Ibid.* at 677.

<sup>130</sup> The Judge in the First Instance.

<sup>131</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662 at 665.

<sup>132</sup> However, the decision in *Esso* did not mainly relied upon the public interest exception, but it was discussed in Mason 's obiter dicta.

<sup>133</sup> Since the documents concerned the pollution on the island.

<sup>134</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662 at 680.

Mr Justice Kirby concluded:

“Whilst private arbitration will often have the advantage of securing for parties a high level of confidentiality for their dealing, where one of those parties is a government, or an organ of government, neither the arbitral agreement nor the general procedure powers of the arbitrator will extend so far as to stamp on the government litigant a regime of confidentiality or secrecy which effectively destroys or limits the general governmental duty to pursue the public interest.”<sup>135</sup>

He therefore would not accept that a private arbitration agreement could destroy or limit the Commonwealth’s duty to pursue the public’s interest.<sup>136</sup>

#### 4.4 Comments on the *Codock* case<sup>137</sup>

According to Rogers QC<sup>138</sup> and Miller<sup>139</sup> the *Codock* case raises a number of questions and concerns. First of all, it appeared that Kirby P classified the expert reports in question as the Commonwealth’s own materials, without even considering whether the documents in question came from *Codock*.<sup>140</sup>

Further, by analysing the arbitrator’s reasoning, it appears that during all procedures, the original intent of the arbitrator was ignored. Rogers and Miller suggested that in the Court of Appeal, the justice between the parties was subordinated by the majority’s wishes to make the case an outline of the constraints that applied to arbitrators who made orders that could “potentially impede a public entity in carrying out its functions of acting in the public’s interest, or disclosing information of wider public concern.”<sup>141</sup>

Kirby P gave an extremely wide definition of the public interest exception. The Court of Appeal did not know whether the information the Commonwealth wished to disclose was significant for public interest. A mere suspicion of that was sufficient for the majority to hold that the information was in the public’s interest.<sup>142</sup>

Another concern is that the public interest in the information took priority over all competing interests. This “public interest-based confidentiality model”, placed the Commonwealth, states and state entities in a new, more favourable situation in arbitration procedures. There was not much the Court

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<sup>135</sup> *Ibid.* at 682.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662. In this part referred to as the *Codock* case.

<sup>138</sup> Formerly Chief Judge of Commercial Division of the Supreme Court of New South Wales.

<sup>139</sup> Barrister, Supreme Court of New South Wales.

<sup>140</sup> Miller, Rogers, *supra* note 112 at 341.

<sup>141</sup> *Ibid.* at 335.

<sup>142</sup> *Ibid.* at 342.

could do to prevent these entities from releasing information under the public interest label, though in reality its release might have been for other purposes. Even the threat of publication could be used for tactical purposes in the arbitration itself. Neither the High Court in *Esso* nor the Court of Appeal in the *Codock* case questioned the real motivation underlying the public entities wish to disclose information.<sup>143</sup>

Rogers and Miller noted that the decision in the *Codock* case would be the same, even if the parties had agreed to an expressed confidentiality clause. This conclusion was drawn from the language used by Kirby K, and seemed a logical conclusion based on the *Esso* case.<sup>144</sup>

In Australia, the immediate question became how, in the future, could any party dealing with a public entity refer disputes to arbitration. The public parties would have an unfettered right to disclose any information that arose during the arbitration, just by claiming public interest.<sup>145</sup> The public interest would not even have to be strictly legal. Kirby J referred to the comments in the *Esso* case, and concluded that the interest could also be a moral, political or strongly held philosophical interest.<sup>146</sup>

Rogers and Millers also suggest that it was only a coincident that one party was the government in each of the Australian cases. The public's right to know if land is contaminated is just as strong when arbitration is between two individuals, as it is when one of the parties happens to be a public authority.<sup>147</sup>

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<sup>143</sup> *Ibid.* at 327.

<sup>144</sup> *Ibid.* at 342.

<sup>145</sup> *Ibid.* at 343.

<sup>146</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662 at 681.

<sup>147</sup> Miller, Rogers, *supra* note 112 at 342.

# 5 The United States

Professor Hans Smit<sup>148</sup> wrote an article about the position of confidentiality in the United States. He considered whether, under the laws prevailing in the United States, in the absence of explicit provisions or rules in the arbitration agreement, a party to an arbitration proceeding must, by virtue of the agreement or custom, treat as confidential what transpires in the arbitration proceedings.<sup>149</sup>

There are no American statutes with provisions requiring the parties or arbitrators to keep arbitration proceedings confidential. As a consequence, unless the parties' agreement or applicable arbitration rules provide otherwise, the parties are not required by American law to treat the arbitration proceedings as confidential.<sup>150</sup>

This view is confirmed by a ruling in *USA v. Panhandle Eastern Corp, et al.*<sup>151</sup>

## 5.1 USA v. Panhandle Eastern Corp, et al.

### 5.1.1 Background

In *USA v. Panhandle Eastern Corp, et al*, the Federal Maritime brought action to protect its security, interest as guarantor of ship financing bonds. They sought to compel disclosure of documents related to arbitration proceedings where Panhandle Corp. was one of the parties. The arbitration was conducted under the ICC International Court of Arbitration. The Panhandle Corp. sought a protective order to prevent the disclosure.<sup>152</sup>

### 5.1.2 The Court Decision

Panhandle's first argument was that they were obligated to keep the documents confidential under ICC Rules.<sup>153</sup> The Court answered this argument by pointing out that the rule about confidentiality obligation was

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<sup>148</sup> Professor of Law and Director, Parker School of Foreign and Comparative Law, Columbia University.

<sup>149</sup> Smit Hans, *Expert Report of Professor Hans Smit in Esso/BHP*, 11 *Arbitration International*, 297, London, (1995). (Hereinafter "*Exp. Rep.*")

<sup>150</sup> *Ibid.*

<sup>151</sup> *USA v. Panhandle Eastern Corp, et al*, (1988) 118 F.R.D. 346 (D.Del.).

<sup>152</sup> *Ibid.*

<sup>153</sup> The Rule was under the chapter of "Internal Rules of the Court of Arbitration", and read "*(t)he work of the Court of Arbitration is of a confidential character which must be respected by everyone who participates in that work in whatever capacity*".

meant to apply internally, governing the members of the Court of Arbitration. It did not apply to the parties of the arbitration proceedings.<sup>154</sup>

The second argument was that the parties to arbitration had a general understanding that the pleadings and related documents in the arbitration would be confidential. The Court did not accept this argument either. Panhandle could not point to any confidentiality agreement between the parties. It was not enough to argue that a “general understanding” about confidentiality existed.<sup>155</sup>

Furthermore, Panhandle argued that disclosure would severely prejudice future business negotiations, regarding issues such as prices, quantities and terms of delivery.<sup>156</sup> The party seeking the protective order against disclosure must show good cause by demonstrating a particular need for protection.<sup>157</sup> A party can do that by proving that disclosure will cause a clearly defined and serious injury.<sup>158</sup>

Panhandle failed to establish that “good cause” existed for issuance of a protective order to prevent disclosure of documents relating to arbitration. The Court therefore ordered disclosure.<sup>159</sup>

## 5.2 Public Interest

In the United States, a court would order disclosure of information submitted in arbitration, if such information were sought in order to satisfy public interests. This seems to be the case even when parties to arbitration have agreed expressly to confidentiality in the arbitration.<sup>160</sup>

For example, in a major unpublished case involving a Swiss utility and an American purveyor of uranium, the arbitral tribunal ordered the parties to keep the arbitral proceeding and the award confidential. Shortly after the award was rendered, the American purveyor filed a report with the US Securities and Exchange Commission providing information about the proceedings and the award. It was assumed that the private confidentiality order had to give way to the public interest in disclosure.<sup>161</sup>

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<sup>154</sup> *USA v. Panhandle Eastern Corp, et al*, (1988) 118 F.R.D. 346 at 349-350 (D.Del.).

<sup>155</sup> *Ibid.* at 350.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.* at 346.

<sup>158</sup> *Ibid.* at 350.

<sup>159</sup> *Ibid.* at 351.

<sup>160</sup> Smit, *Exp. Rep.*, *supra* note 149 at 298.

<sup>161</sup> *Ibid.* The author participated as an arbitrator in the case.



# 6 Examples from Civil Law Jurisdictions

## 6.1 Sweden

### 6.1.1 General

Under the Swedish Arbitration Act<sup>162</sup> there are no rules regarding confidentiality. In the early 1990's a Government Commission was appointed to review the Swedish Arbitration Act, and some opinions on the issue of confidentiality were expressed in its Report.<sup>163</sup> It was stated that even if the principle of public access to official records did not include an arbitration panel, it was not automatically confidential.<sup>164</sup>

Furthermore, it was held that confidentiality could stem from an explicit agreement between parties. The Swedish Law for protection of trade secrets<sup>165</sup> also gives some legal support for confidentiality. A party that is bound by confidentiality under the Trade Secret Law is also bound by that in an arbitration. The Trade Secret Law should also bind Arbitrators if they get access to trade secrets during arbitration proceedings.<sup>166</sup> The conclusion of the Commission was that even if arbitration proceedings are of a confidential nature, there are no explicit legal sanctions prohibiting parties and arbitrators from disclosing information concerning the dispute. Finally, it was stated that the duty of confidentiality is based on weak legal ground, mainly upon the parties' mutual trust.<sup>167</sup>

In 1996 a Swedish lawyer wrote that the duty of confidentiality was taken for granted by most Swedish lawyers.<sup>168</sup> In a commentary on Swedish Arbitration Law it was stated that confidentiality should be assumed if parties have not agreed otherwise. The author's motivation was that one of the reasons parties choose arbitration over litigation is to avoid the principle of public access to official records.<sup>169</sup> In another recently published work, it

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<sup>162</sup> Lag (1999:116) om skiljeförfarande.

<sup>163</sup> SOU (1995:96), Näringslivets tvistlösning.

<sup>164</sup> *Ibid.* at 182.

<sup>165</sup> Lag (1990:409) om skydd för företagshemligheter.

<sup>166</sup> SOU(1995:96), Näringslivets tvistlösning, at 185.

<sup>167</sup> *Ibid.* at 186.

<sup>168</sup> Jarvin Sigvard, *Sekretess i svenska och internationella skiljeförfaranden*, 18 Juridisk Tidskrift vid Stockholms Universitet, at 149, (1996/1997) Sigvard Jarvin is a partner at Lagerlöf & Leman, Stockholm, Sweden and former General Counsel, ICC:s International Arbitral Tribunal.

<sup>169</sup> Cars Thorsten, *Lagen om skiljeförfarande: en kommentar*, at 103, Fakta Info Direkt, Stockholm, (1999).

was held that since arbitration is considered private, the parties must be assumed to have agreed to confidentiality.<sup>170</sup>

There is generally a presumption of confidentiality. This was confirmed in a newly published article, where parties, counsels and arbitrators are said to adhere to confidentiality.<sup>171</sup> However, this position may be modified due to a decision of the Supreme Court in the so-called “*Bulbank*” case.

### 6.1.2 The Bulbank Case

In September 1998, the Stockholm District Court rendered its decision in the matter of *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.*<sup>172</sup> The Case became a three-act drama, which ended when the Supreme Court of Sweden made a decision in October, 2000.

#### 6.1.2.1 The Background

The parties in the *Bulbank* case were a Bulgarian bank (claimant) and an American Financial Institution (defendant). The Bulgarian bank entered in to a credit facility agreement with an Austrian bank on terms that included an arbitration clause, according to the Arbitration Rules of the UN Economic Commission for Europe (the “ECE” Rules”). The Austrian bank assigned the loan agreement to an American Financial Institution.<sup>173</sup>

The American party requested arbitration in Sweden against the Bulgarian bank for payment of a loan. The Bulgarian bank challenged the jurisdiction of the arbitration panel arguing that, despite the assignment, their arbitration agreement with the Austrian bank was not binding on them with the American Financial Institution. The arbitrators issued an award affirming its jurisdiction. The decision of the arbitrators was communicated by the American party to the periodical *Mealey’s International Arbitration Report* and was subsequently published.<sup>174</sup>

The Bulgarian Bank applied to the panel for an order declaring the arbitration agreement null and void and requested that the arbitration proceedings be ended without an award. The claimant argued the defendant’s alleged breach of its obligation of confidentiality. The panel rejected the claimant’s application and made an award against the claimant. The claimant then applied to the Stockholm District Court requesting the award be declared invalid.<sup>175</sup>

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<sup>170</sup> Heuman, Lars, *Skiljemannarätt*, at 33, Norstedts Juridik, Stockholm, (1999).

<sup>171</sup> Petersson Lennart, Romander Claes, *Confidentiality in Swedish Arbitration*, Stockholm Chamber of Commerce Newsletter, 1 at 2, February 7 (2001).  
<http://www.chamber.se/arbitration/index.html>, (March 9, 2001)

<sup>172</sup> Stockholm District Court, 1998-09-10, Case T 6-111-98.

<sup>173</sup> *Ibid.* at 2.

<sup>174</sup> *Ibid.* at 2-3.

<sup>175</sup> *Ibid.* at 3-4.

### **6.1.2.2 The Stockholm District Court**

Neither the applicable arbitration rules nor the arbitration clause contained any provision prohibiting the parties from disclosure of the award or the ruling made by the arbitral tribunal.

However, the Court found that the wording of the ECE rule implied that the dispute, subject to arbitration and the proceedings, was to be confidential.<sup>176</sup> The Court also concluded that even if the Swedish Arbitration Law was silent on the subject, it must be assumed that an arbitration agreement contained an implicit provision of confidentiality. The legislative silence was interpreted as reflecting the existence of an implied rule.<sup>177</sup>

Any disclosure of arbitral rulings, awards or other information obtained during proceedings is a breach of the fundamental principle of confidentiality and therefore a breach of the arbitration agreement. In this case, the mere fact that something became known about the arbitration proceedings and that this occurred with the co-operation of one of the parties constituted a fundamental breach of the arbitration agreement. Since the breach was considered to be fundamental, it constituted valid grounds for the Bulgarian bank to negate the contract.<sup>178</sup>

The District Court concluded that since there was no valid arbitration agreement on the date that the award was issued, the award itself was null and void.<sup>179</sup>

### **6.1.2.3 The Court of Appeal**

The decision of Stockholm District Court not only established an implied duty of confidentiality in arbitration agreements, but also established a severe penalty for breach of that duty. The ruling has been criticised, and is highly controversial. It was appealed in the Court of Appeal in Stockholm.<sup>180</sup>

The Court of Appeal held that, even if Swedish Arbitration Law did not say anything, there was an implied duty of confidentiality. The parties in arbitration have a duty not to make public information from the proceedings. The Court defined it as a “duty of loyalty”.<sup>181</sup>

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<sup>176</sup> *Ibid.* at 13-14. The institutional rule primarily intended to ensure the confidentiality in the hearings, according to the French version “L’audience”, but the Court held that it could be extended to apply to the entire proceedings.

<sup>177</sup> Stockholm District Court, 1998-09-10, Case T 6-111-98, at 15.

<sup>178</sup> *Ibid.* at 17.

<sup>179</sup> *Ibid.* at 18.

<sup>180</sup> The Svea Court of Appeal, 1999-03-30, Case T 1092-98.

<sup>181</sup> *Ibid.* at 5.

To publish information from proceedings is definitely considered a breach of duty of loyalty imposed upon parties. However, the Court emphasised that it is important to consider the type of information and how it was published.<sup>182</sup> The Court made a distinction between information on the activities of the parties and their claims, which are matters that justify confidentiality and information about the existence of the arbitral dispute or general procedural matters, which do not require the same confidential protection.<sup>183</sup>

Furthermore, it should be considered whether there was an acceptable reason for publishing the information, and whether this caused the other party damage.<sup>184</sup>

The Court concluded that the sanction in a case like this should be damage for actual losses suffered. To cancel an arbitration agreement, a party has to cause a substantial breach of contract. Considering the far-reaching consequences of the nullification of an arbitration agreement, such a sanction must be given a very limited scope.<sup>185</sup>

In this case, the substantial part of the disclosed information consisted of procedural matters of a general character. The Court of appeal therefore did not find any grounds for nullification.<sup>186</sup>

#### **6.1.2.4 The Supreme Court**

On October 27, 2000 the Supreme Court of Sweden rendered its final decision in the “*Bulbank*” case. The judgement of the Court of Appeal was confirmed. In addition, the Supreme Court held there was no legal duty of confidentiality implied or inherent in an arbitration agreement.<sup>187</sup>

The Court held that arbitration is based upon an agreement, whereby the proceedings are private and confirmed that arbitral proceedings are fundamentally private and that factor is one of the main advantages and reasons why companies choose arbitration.<sup>188</sup>

However, the Court distinguished privacy and confidentiality. The fact that arbitration proceedings are private does not automatically mean that a precondition of confidentiality prevails for the parties. The real meaning of privacy, compared with judicial proceedings, is that the proceedings are not public, that is, that the public does not have the right to attend the hearings

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<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.* at 5-6.

<sup>184</sup> *Ibid.* at 6.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> The Supreme Court of Sweden, 2000-10-27, Case T 1881-99.

<sup>188</sup> *Ibid.* at 7.

or have access to documents. The Court argued that there is no contradiction in the parties' ability to disclose information obtained in the proceedings.<sup>189</sup>

Although, in most cases both parties are interested in, and recognise confidentiality, there is no a legal duty of confidentiality attached to legal sanctions.<sup>190</sup>

The Court also stated that neither the Swedish Arbitration Act nor the applicable ECE institutional rules imposed a duty of confidentiality. The key question was therefore, whether or not a duty of confidentiality was implied in the arbitration agreement and if it therefore followed from general principles and the nature of arbitration proceedings.<sup>191</sup>

The Court made an evaluation to see whether there was a general accepted opinion regarding a duty of confidentiality. The Court did not find the existence of such an opinion among lawyers and arbitrators. Instead the general view was that there was no duty of confidentiality unless the parties specifically agreed to it.<sup>192</sup>

The Court also made reference to the Commission's Report<sup>193</sup>, which stated that the confidential character of arbitral proceedings relied on weak legal ground, and that if a party for some reason wished to make the dispute public he should be free to do so.<sup>194</sup> On other hand, the Court found some support for a duty of confidentiality in the Jurisprudence.<sup>195</sup>

The Supreme Court surveyed the international scene and found that opinions were divided. On one hand, English and French views<sup>196</sup> upheld the general principle of confidentiality in arbitration. Conversely, the Court cited the decision of the High Court of Australia in *Esso*, which rejected the duty of confidentiality.<sup>197</sup>

Based on these facts, the Supreme Court concluded that a party in an arbitration proceeding under Swedish law could not be bound by confidentiality, unless it had been specifically agreed. Consequently, the counter party to the Bulgarian bank did not commit a breach of contract whereby the bank was permitted to rescind the arbitration agreement. Therefore, the award was not set aside.<sup>198</sup>

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<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.* at 8.

<sup>191</sup> *Ibid.* at 5.

<sup>192</sup> *Ibid.* at 9.

<sup>193</sup> Statens Offentliga Utredningar 1995:65, Näringslivets tvistlösning, at 182.

<sup>194</sup> *Ibid.*

<sup>195</sup> See chapter 6.1.

<sup>196</sup> The Supreme Court cited *Ali Shipping v. Shipyard Trogir and G. Aitac.v. Ojeh*

<sup>197</sup> The Supreme Court of Sweden, 2000-10-27, Case T 1881-99, at 10.

<sup>198</sup> *Ibid.*

### 6.1.2.5 Comments on the *Bulbank* case

#### 6.1.2.5.1 The District Court's decision

The District Court of Stockholm held that the arbitration agreement in question was subject to an implied term of confidentiality and that if any party disclosed arbitral decisions, awards or other information obtained during the proceedings, it amounted to breach of contract, rendering the arbitration agreement null and void.

The District Court's decision was widely criticised. It was "unquestionably too severe".<sup>199</sup> It was also said that the Stockholm District Court "seems stuck on an alarmingly primitive *idée fixe*: that the arbitral process is absolutely invalid if not kept absolutely confidential".<sup>200</sup> The statement by the District Court that "the legislative silence on the question of confidentiality can only reflect the existence of implied rules that are obvious",<sup>201</sup> was also criticised. The Court in these contestable arguments, with a "worrying lack of inhibition", concluded that arbitration proceedings enjoy a special status.<sup>202</sup>

It was argued that even if confidentiality were a fundamental characteristic of arbitration, to sanction a breach in this way made arbitration an unsustainable, fragile process: "fatally susceptible even to the mere communication to a third party of the existence of the proceedings. In a cynical moment, one could imagine an unscrupulous party engineering a leak and then relying on it to avoid an unfavourable award".<sup>203</sup>

The effect of such brutal sanctions on any breach of confidentiality may have negative effects on arbitration as a solution for disputes. The question is whether it is reasonable that every disclosure, however limited, by the parties involved would be considered a breach of confidentiality with the effect that the arbitration agreement, as well as the award, was declared null and void. The parties then would have to litigate, which was what they initially wanted to avoid.<sup>204</sup>

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<sup>199</sup> Fouchard, Gaillard, Goldman, *supra* note 4 at 774.

<sup>200</sup> Partasides Constantine, *Bad News From Stockholm: Bulbank And confidentiality AD ABSURDUM*, 13 Mealy's Int'l Arb. Rep., December (1998) Lexis, Online, Area of Law-By Topic-ADR-Legal News. (January 12, 2001) (Hereinafter "*Bad News*")

<sup>201</sup> Stockholm District Court, 1998-09-10, Case T 6-111-98, at 15.

<sup>202</sup> Partasides, *Bad News*, *supra* note 200.

<sup>203</sup> *Ibid.*

<sup>204</sup> Bagner, Hans, *Confidentiality in Arbitration*, 14 Mealy's Int'l Arb. Rep., January (1999). Lexis, Online, Area of Law-By Topic-ADR-Legal News (January 12 2001). (Hereinafter "*Confidentiality*")

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#### **6.1.2.5.2 The Court of Appeal's decision**

The Court of Appeal reversed the decision by concluding that, although a duty of loyalty not to disclose information might be imposed upon the parties, the sanction of cancellation must be given a limited scope of application. Damages would be an appropriate remedy.

The international arbitration community breathed a collective sigh of relief after this decision.<sup>205</sup> The Court of Appeal however introduced a new concept of “duty of loyalty”, which brought up questions as to its extent and scope. The Court indicated that the duty not to disclose information obtained during proceedings was not of an absolute nature as the District Court held. Instead, it was suggested that it should be a question of degree regarding whether information should be protected from disclosure.<sup>206</sup>

For a solution like that to work, rulings on its application were needed. The arbitration community therefore hoped that the Supreme Court would not only confirm the Court of Appeal's decision, but also clarify this new rule introduced by the Appeals Court.<sup>207</sup>

#### **6.1.2.5.3 The Supreme Court's decision**

The Supreme Court decided that as a matter of Swedish law, a duty of confidentiality was not to be implied in an arbitration agreement. In Sweden, if parties want confidentiality, they must expressly agree to it. Sweden thereby took its place among the growing number of important jurisdictions that have rejected the notion of the implied duty of confidentiality. A Swedish lawyer said:

“The myth about the duty of confidentiality in arbitration, fatally wounded in 1995 by the Australian High Court, has now been laid to rest, at least in Sweden”<sup>208</sup>

The conclusion in Sweden by the Supreme Court is that arbitral proceedings in general are private, and parties are expected to treat information obtained during the proceedings with appropriate discretion. However, there exists no implied legal duty of confidentiality.

It should be pointed out that this decision does not discuss the type of information that can be disclosed.<sup>209</sup>

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<sup>205</sup> Partasides Constantine, *Bulbank- The Final Act*, 15 Mealy's Int'l Arb. Rep. December (2000). Lexis, Online, Area of Law-By Topic-ADR-Legal News (January 12 2001).

(Hereinafter “*The Final Act*”)

<sup>206</sup> *Confidentiality in International Commercial Arbitration Practice to be Reviewed by the Swedish Supreme Court*, The VINGE News Letter, Litigation and Arbitration Department, (November 1999). <http://www.vinge.se/pub/ld2pub.htm>, (February 5 2000).

<sup>207</sup> *Ibid.*

<sup>208</sup> Bagner, *Confidentiality*, *supra* note 204.

<sup>209</sup> Since the appellant did not specify the grounds for its appeal.

## 6.2 France

### 6.2.1 Jurisprudence

In France, there is a strong principle of confidentiality. In an article about the principle of confidentiality in international arbitration, it was said that even if the rule of confidentiality was not written, the French tradition was that parties were entitled to confidentiality regarding the award, unless they consented to publicity.<sup>210</sup>

The overall impression was that most parties thought confidentiality was extremely important. After a review of jurisprudence and case law, the conclusion was that confidentiality in arbitration is a principle that is assumed unless parties make an agreement to the contrary.<sup>211</sup>

In another French work on arbitration, the author considered confidentiality as a fundamental principle in international arbitration. When parties refer disputes to arbitration, one of the reasons is the confidentiality attached to the documents and oral statements related to the proceedings.<sup>212</sup>

### 6.2.2 Aita v. Ojeh<sup>213</sup>

This case also deals with the question of sanctions for a breach of duty of confidentiality.

#### 6.2.2.1 Background

The background to this French case was an arbitration award issued in England between the parties, Mr Aita and Mr Ojeh, concerning a loan agreement. Aita requested in the Court of Appeal of Paris that the award be dismissed, on the grounds that there was no valid arbitration agreement, that they did not have the opportunity to pursue their claim during arbitration, and that the award was contrary to French *ordre public*.<sup>214</sup>

Ojeh disputed the Court's authority and he also claimed damages for Aita starting an unnecessary trial.<sup>215</sup>

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<sup>210</sup> Gaillard Emmanuel, *Le principe de confidentialité de l'arbitrage commercial international*, Recueil Dalloz-Sirey, 22eme Cahier-Chronique 153 at 154-15 (1987).

<sup>211</sup> *Ibid.*

<sup>212</sup> Boisseon de, Matthieu, *Le Droit Francais de l'Arbitrage Interne et International*, at 684, GLN-editions, Paris, (1990).

<sup>213</sup> *G. Aita c. A. Ojeh*, C.A. Paris, February 18, 1986, 1986 Rev. Arb. 583.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.*



### 6.2.2.2 The Paris Court of Appeal

The Court of Appeal held that it did not have authority to make a judgement and dismissed Aita's challenge of the award. The Court stated that by bringing the proceedings to a forum he knew did not have authority, Aita had violated the principle of confidentiality.<sup>216</sup> To seek an annulment in France of an award rendered in London was merely seeking to provoke a publication of confidential information.

The action caused a public debate that should have remained confidential, as it is the very nature of arbitral proceedings to have the highest degree of discretion in the resolution of private disputes.<sup>217</sup>

By challenging the award, Aita caused Ojeh damage, and he therefore had to pay a penalty.<sup>218</sup>

## 6.3 Switzerland and Germany

### 6.3.1 Switzerland

The view in Switzerland was expressed in a publication on International Arbitration in Switzerland.<sup>219</sup>

Regarding the duties of arbitrators, it was held that the law does not deal with all questions. Therefore, supplementary rules are derived from the contractual nature of the arbitrator's office. The office of arbitrator involves a fiduciary relationship from which certain obligations may arise in connection with the conduct of arbitration. One of these obligations is the duty to maintain confidentiality.<sup>220</sup>

In the same publication it was written that an Arbitral Tribunal has the power to order parties to refrain from publicising any aspect of the case. This was particularly true when a party presented a one-sided account of the dispute outside of the proceedings. Confidentiality was held to be an essential part of arbitration. The parties therefore, had an implied duty of confidentiality arising from the arbitration agreement itself.<sup>221</sup>

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<sup>216</sup> *Ibid.* at 584.

<sup>217</sup> "Il est en effet de la nature même de la procédure d'arbitrage d'assurer la meilleure discrétion pour le règlement des différends d'ordre privé..". *G. Aita c. A. Ojeh*, C.A. Paris, Feb. 18, 1986, 1986 Rev. Arb. 583 at 585.

<sup>218</sup> *G. Aita c. A. Ojeh*, C.A. Paris, Feb. 18, 1986, 1986 Rev. Arb. 583 at 585.

<sup>219</sup> Bucher Andreas, Tschanz, Pierre-Yves, *International Arbitration in Switzerland*, Helbing & Lichtenhahn, Basle, (1988).

<sup>220</sup> *Ibid.* at 65.

<sup>221</sup> *Ibid.* at 87.

There is no doubt that in Switzerland, arbitral proceedings are confidential if the information in question is "not generally known or readily accessible", and that the owner is intent on keeping it secret.<sup>222</sup>

### 6.3.2 Germany

The German view seems to be in line with the views in Switzerland and France. In German literature it has also been held that confidentiality is one of the main reasons why parties choose arbitration.<sup>223</sup> The award should only be published with the consent of the parties.<sup>224</sup> Even though there is no legislative support there is a duty of confidentiality based on customary law.<sup>225</sup>

The arbitrator must guarantee the confidentiality, both regarding the context of the proceedings and the existence of it.<sup>226</sup> Despite that, arbitrators also have a right of confidentiality. A consequence thereof is that even if the parties wish, the arbitrators are not allowed to testify regarding the arbitration proceedings.<sup>227</sup>

However, the international uncertainty, and the need for a clear rule is pointed out. The Arbitration agreement should regulate the duty of confidentiality regarding all information, trade secrets or not, arising out of the arbitrations.<sup>228</sup>

## 6.4 Conclusion of Civil Law

It seems like civil law countries have more or less the same fundamental view as the English courts, where confidentiality is an essential part of arbitration. This is confirmed in a new work by three French authors,<sup>229</sup> who consider confidentiality a fundamental principle, and one of the main advantages of international arbitration.<sup>230</sup> In another article it was stated

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<sup>222</sup> Dessemontet Françoise, *Arbitration and Confidentiality*, 7 Am. Rev. Int'l Arb. 299 at 310 (1996). Lexis-On Line, Secondary Legal : Law Reviews & Journals : Individual Law Reviews & Journals (February 27 2001)

<sup>223</sup> Schutze Rolf, Tscherning Dieter, Walter Wais, *Handbuch des Schiedsverfahrens, Praxis der deutschen und internationalen Schiedsgerichtsbarkeit*, at 10 and 119, Berlin, 2<sup>nd</sup> ed., Walter de Gruyter, (1990).

<sup>224</sup> *Ibid.* at 254.

<sup>225</sup> Meyer, Bettina, *Der Schiedsgutachervertrag, eine Untersuchung des rechtlichen Verhältnisses zwischen Schiedsgutachtern und Parteien mit vergleichenden Ausführungen zum Schiedsrichtervertrag*, at 107, Verlag V. Florentz GmbH, Munich (1995).

<sup>226</sup> Schutze, Tscherning, Walter, *supra* note 223 at 119.

<sup>227</sup> *Ibid* at 254.

<sup>228</sup> *Ibid.*

<sup>229</sup> Fouchard, Gaillard, Goldman, *supra* note 4.

<sup>230</sup> *Ibid.* at 612.

that: “According to the view prevailing in Europe, arbitral proceedings are subject to strict confidentiality”,<sup>231</sup>

The question is how the decision of the Supreme Court of Sweden should be interpreted. The decision of the District Court was much too rigorous, and would be reversed. What is interesting is not the outcome of the different judgements, but the reasons behind the judgements.

The Court of Appeal reversed only the remedy; they held that there was an implied duty of confidentiality, or at least a “duty of loyalty”. The Supreme Court’s decision did not change the actual outcome of the case, but changed the reason for it, by noting that there was no legal obligation of confidentiality.

There was also a discrepancy regarding possible remedies. The Court of Appeal did not rule out remedies in the form of damages and in extreme cases, rescission of the arbitration agreement.

The policy in Sweden has not been unanimous, which this three-act drama confirms, but this case hopefully clarifies some uncertainties.

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<sup>231</sup> Dessemontet, *supra* note 222 at 299.

# 7 Institutional Rules

The Rules of some Arbitral Institutions contain provisions regarding confidentiality. Parties, who refer their dispute to such an institution, have the protection that such rules provide. I will now present the Rules of some of the major Arbitration Institutes for international commercial arbitration.

## 7.1 The ICC

ICC Rules provide a duty of confidentiality for the ICC Court itself. A general provision regarding the “confidential nature” of the work of the Court is stated in the Statutes of the ICC Court.<sup>232</sup> Further, the Court’s internal rules provide a duty of confidentiality for the Court itself and its Secretariat.<sup>233</sup>

ICC Rules have no provision requiring the parties to respect the confidentiality of the arbitration. Like several other rules of arbitration, ICC Rules have never explicitly obligated the participants<sup>234</sup> in the arbitration to protect the confidentiality of the proceedings.

When ICC reviewed the Rules in 1998, it was observed that recent court cases showed that confidentiality could not be taken for granted without an expressed agreement. The ICC was therefore required to consider whether to introduce a general confidentiality provision. It was decided to leave the matter to the parties involved, and if necessary, the local courts to determine. The main obstacle was that the Working Groups were unable to agree on an exact formulation because of the many legitimate exceptions that could arise.<sup>235</sup>

Instead of a general duty of confidentiality, article 20(7) was added to the Rules. It explicitly authorises the Arbitral Tribunal to “take measures for protecting trade secrets and confidential information”.<sup>236</sup> The Arbitral Tribunal has the power similar to that issued by a court in conjunction with the production or discovery of documents. For example, the Tribunal can order discovery of documents, but forbid the use of those documents in other contexts. However, the reference to “confidential information” is not sufficiently broad to extend to documents produced for the purpose of the

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<sup>232</sup> The 1998 ICC rules of Arbitration, Appendix 1, Art. 6. **See Supplement A.**  
[http://www.iccwbo.org/court/english/arbitration/rules.asp#article\\_1\\_2](http://www.iccwbo.org/court/english/arbitration/rules.asp#article_1_2) (February 20 2001)

<sup>233</sup> *Ibid.* Appendix II, Art. 1.

<sup>234</sup> Except for the ICC Court itself in its internal rules.

<sup>235</sup> Derains Yves, Schwartz E, *A Guide to the New ICC Rules of Arbitration*, at 12-13, The Hague, (1998).

<sup>236</sup> 1998 ICC Rules of Arbitration, Art. 20(7). **See Supplement A.**  
[http://www.iccwbo.org/court/english/arbitration/rules.asp#article\\_1\\_2](http://www.iccwbo.org/court/english/arbitration/rules.asp#article_1_2), (Februar 20 2001).

arbitration itself, such as witness statements, pleadings, the award or other information relating to the arbitration.<sup>237</sup>

Thus, if one party discloses information about the arbitration to the press, the Arbitral Tribunal might order the party to stop doing so. The Tribunal does not ordinarily have the power to force compliance with such an instruction, but the order can be useful anyway. The order might, if it is breached, serve as a basis of a claim for damages, or it might even be capable of a judicial enforcement in some jurisdictions. Despite that, an Arbitral Tribunal's order usually has a significant deal of moral authority.<sup>238</sup>

However, article 20(7) falls short of actually providing that arbitration proceedings are confidential.<sup>239</sup>

In a recent arbitration<sup>240</sup> conducted under ICC Rules in Paris, the Tribunal was called upon to dispose of a dispute concerning a purported breach of confidentiality. The claimed breach consisted of statements describing the arbitration, made during the general shareholder meeting of the respondent's company. The respondent counter-claimed and argued that the claimant had caused the problems by disclosing the existence and nature of the arbitration to the financial press. The Tribunal dealt with the dispute as follows:

“While the confidentiality of ICC proceedings is not mentioned in the ICC Rules (...) it has been the experience of the member of this Tribunal and their colleagues whom they have consulted who often act as ICC arbitrators that, as a matter of principle, arbitration proceedings have a confidential character which must be respected by everyone who participates in such proceedings....We invite both parties, in the future, to respect the confidential character of the proceedings.”<sup>241</sup>

Although it seems ironic to cite an arbitral award as support for confidentiality, the decision in that case clearly describes the general duty of confidence.<sup>242</sup>

Mr Bond<sup>243</sup>, a senior ICC employee, says that, in his experience, the users of international arbitration place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration. Mr Bond claims that if ICC adopted a policy that mitigated or diminished the strict

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<sup>237</sup> Derains, Schwartz, *supra* note 235 at 263-264.

<sup>238</sup> *Ibid.* at 265.

<sup>239</sup> *Ibid.* at 263.

<sup>240</sup> “Recent” was written in 1999, the details in the award are confidential, but it was cited unnamed by Fortier, *supra* note 59 at 133.

<sup>241</sup> Fortier, *supra* note 59 at 133.

<sup>242</sup> *Ibid.*

<sup>243</sup> Secretary General, a senior ICC employee responsible for the Secretary of the Court. Among his responsibilities very many which involved the issue of confidentiality in international arbitration.

insistence on confidentiality by ICC, this would be a significant deterrent to using ICC arbitration.<sup>244</sup>

In an ICC-case from 1992,<sup>245</sup> the Arbitral Tribunal opened a door for exceptions from the strict confidentiality practice of ICC.

An Austrian company, the plaintiff, acquired licenses from a French engineer. In the arbitration, the plaintiff requested that the licensee agreement be declared null and void on the ground that it was in conflict with the European Union Competition Law.<sup>246</sup>

The French engineer requested that the award be published in the Specialist press. The Arbitral Tribunal held that such publishing would be legitimate if the Austrian party had denigrated in public, the French engineer's technology, or had caused him severe damages on the market. The engineer could not prove this, so the Tribunal refused his request.<sup>247</sup>

The Tribunal pointed at arbitration's private and discreet way of resolving disputes. However, it seems like the main reason behind the decision of the Tribunal was insufficient evidence. Even if the principle of confidentiality was expressly confirmed, the Tribunal accepted publication under certain circumstances.<sup>248</sup>

In the commentary to this decision the former Secretary of the International Chamber of Commerce argued that publishing could be motivated to protect the interests of the winning party. However, this exception would have a limited application. He also questioned whether this was appropriate, with respect to the duty of confidentiality imposed upon the Court and its Secretariat in the ICC Rules.<sup>249</sup>

## 7.2 The LCIA

The drafters of the new LCIA Rules took a different approach regarding confidentiality, than the ICC drafters. In spite of legal and practical complexities associated with the formulation of a general rule of confidentiality, the LCIA decided to clarify it.

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<sup>244</sup> Bond Sthephan, *Expert Report of Stephan Bond Esq in Esso/BHP v. Plowman*, 11 Arbitration International, at 273, London, (1995).

<sup>245</sup> *ICC case 6932*, Chambre de Commerce Internationale, Paris, 1992, 121 Journ.Dr.Internat., 1065, Paris (1994).

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.* at 1069.

<sup>248</sup> *Ibid.*

<sup>249</sup> Derains, Yves, *Observations on ICC case 6932*, 121 Journ.Dr.Internat., 1070-1071, Paris (1994).

Their primary reason was to strengthen the inherent confidentiality. The new rule, article 30, is an explicit statement of the parties' obligations concerning confidentiality. Unless the parties expressly agree to something else, there is a presumption of confidentiality. The parties have to keep confidential, all awards and other material concerning the proceedings. However, there are exceptions, which are generally in line with English case law, that is, if disclosure is required for the protection or enforcement of a party's legal rights.<sup>250</sup>

## 7.3 The UNCITRAL

### 7.3.1 The Model Law

Perhaps the most important instrument in international arbitration in recent years is the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law in June 1985. The main purposes for the Model Law are to uniform and modernise national laws on arbitration. It is designed to assist the States in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. Since it was adopted, it has been enacted into law by a large number of jurisdictions from both developed and developing countries. Just like most national laws, Model Law does not consist of any provision regarding confidentiality.<sup>251</sup>

### 7.3.2 The Arbitration Rules

UNCITRAL also adopted Arbitration Rules. The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree upon the conduct of arbitral proceedings arising out of their commercial relationship. The Rules are widely used in ad hoc arbitrations as well as administered arbitrations.<sup>252</sup>

The only provision regarding confidentiality is article 32 (5), where it is expressly endorsed that the award may be made public only with the consent of both parties.<sup>253</sup>

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<sup>250</sup> The LCIA Rules art. 30. See **Supplement B**. <http://www.lcia-arbitration.com/rulecost/english.htm>, (22 February 2001).

<sup>251</sup> <http://www.uncitral.org/en-index.htm>, (25 February 2001).

<sup>252</sup> *Ibid.*

<sup>253</sup> The UNCITRAL Rule of Arbitration art. 32 (5). See **Supplement B**.

### 7.3.3 The UNCITRAL Notes

In 1996 UNCITRAL adopted “the UNCITRAL Notes on Organizing Arbitral Proceedings”. The Notes are designed to assist arbitration practitioners by providing an annotated list of matters on which the Arbitral Tribunal may wish to formulate decisions during the course of arbitral proceedings. The text, which is in no way binding, may be used whether or not an arbitral institution administers the arbitration.<sup>254</sup>

The headline of point 6 of the Notes is “Confidentiality of information relating to the arbitration; possible agreement thereon”.

Part of it states:

“It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, 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. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognise an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.”<sup>255</sup>

There are several suggestions on what an agreement of confidentiality might cover, for example the material to be kept confidential, measures to maintain confidentiality and circumstances in which confidential information may be disclosed in part or in whole.<sup>256</sup>

## 7.4 The SCC Institute

The Rules of Arbitration of the Stockholm Chamber of Commerce do not contain any provision obligating parties to adhere to confidentiality. However, the Institute does not disclose any information regarding proceedings under their supervision. Article 9 contains a duty of confidentiality for the SCC itself.<sup>257</sup>

The SCC Rules obligate the Arbitral Tribunal to maintain the confidentiality of the proceedings.<sup>258</sup>

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<sup>254</sup> <http://www.uncitral.org/en-index.htm>, (February 25 2001).

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> The SCC Rules of Arbitration art. 9. See **Supplement B**.  
<http://www.chamber.se/arbitration/english/index.html> (February 25 2001).

<sup>258</sup> *Ibid. art. 20.*



## 7.5 The AAA International Arbitration Rules

The provision regarding confidentiality in the AAA Rules also addresses only one side of the table, the institution and the arbitrators. Article 34 says that confidential information disclosed during proceedings by parties or witnesses shall not be divulged by an arbitrator or by the administrator. The members of the Tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.<sup>259</sup>

Without special agreement, parties are free to use, for their own purpose, information disclosed by the other party during the arbitration proceedings.

## 7.6 The WIPO

The Arbitration Center of the WIPO began operating in 1994 as an international center offering mediation, arbitration and other services for the resolution of international commercial disputes involving intellectual property. The WIPO Arbitration Rules provide provisions regarding confidentiality in arbitration. In fact, confidentiality even has its own chapter in the Rules.

Article 73 concerns the confidentiality of the existence of the arbitration. It states that no information concerning the existence of arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body. If disclosure is required, the party is obligated not to disclose anything more than what is legally necessary. The disclosing party is also required to communicate the disclosure with reasons to the other party.<sup>260</sup>

The question is how to interpret the extension of this provision. It appears that it is prohibited to disclose information that would indicate the existence of arbitration. Does the provision forbid limited information, for example, the identification of subject matter? At the end of the day, as long as the parties in the dispute are not identified, mere disclosure that a particular type of dispute is being arbitrated would not normally have any potentially unfavourable effect.<sup>261</sup>

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<sup>259</sup> The AAA International arbitration Rules, art 34. See **Supplement B**. <http://www.adr.org> (February 25 2001).

<sup>260</sup> The WIPO Arbitration Rules , art. 73. See **Supplement C**. <http://arbiter.wipo.int/arbitration/arbitration-rules/confidentiality.html> , (February 25 2001).

<sup>261</sup> Smit, Hans, *Confidentiality Report art.73-76*. 9 Am. Rev. Int'l Arb., 233 at 237 (1998). Lexis- On-Line, Secondary Legal-Law Reviews & Journals- Individual Law Reviews & Journals (February 27 2001) (Hereinafter “*Confidentiality Rep.*”)

However, it might not make a difference how far the prohibition reaches, because a party that discloses frequently benefits from one of the exceptions. On other hand, a party involved in arbitration may wish to inform third parties of the existence of the arbitration, even though it is not required to do so.<sup>262</sup>

Article 74 deals with confidentiality of disclosures made during arbitration. Documentary or other evidence given by a party or a witness in arbitration shall be treated as confidential. To the extent that information in the documents is not in the public domain, it may not be used or disclosed to any third party by a party participating in arbitration.<sup>263</sup>

Even witnesses have a duty of confidentiality. The party calling a witness is responsible for the maintenance, by the witness, of the same degree of confidentiality as that required of the party.<sup>264</sup>

However, witness duty limits its reach to disclosure regulated by Article 74. Disclosure regulated by Article 73 is therefore not affected. Since a witness is permitted to disclose the existence of the arbitration, a party who wish to disclose it could easily avoid application of Article 73 by encouraging a friendly witness to disclose the existence of the arbitration. A party seeking this type of confidentiality would therefore have to bind the witnesses with a special confidentiality agreement.<sup>265</sup>

Confidentiality of the Award is established in article 75. The presumption is that the parties shall treat the award as confidential. The award may only be disclosed when; (i) the parties consent, (ii) the Award falls into the public domain as a result of an action before a court or (iii) in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.<sup>266</sup>

Finally, there is an obligation for the Center and the Arbitrators to maintain confidentiality.<sup>267</sup>

Despite that, WIPO Rules have a separate provision regarding protection of trade secrets and other confidential materials. Article 52 deals with the protection in arbitration of information that is confidential before the arbitration. It differs from the information covered by Articles 73-76 that is confidential, because it is disclosed in arbitration. The purpose of Article 52 is to provide a procedure pursuant to which, through the intervention of the

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<sup>262</sup> *Ibid.*

<sup>263</sup> The WIPO Rules art. 74 (a). **See Supplement C.**  
<http://arbiter.wipo.int/arbitration/arbitration-rules/confidentiality.html>

<sup>264</sup> *Ibid.* art. 74 (b).

<sup>265</sup> Smit, *Confidentiality Rep.*, *supra* note 261 at 239-240.

<sup>266</sup> The WIPO Rules art. 75. **See Supplement C.**  
<http://arbiter.wipo.int/arbitration/arbitration-rules/confidentiality.html>

<sup>267</sup> *Ibid.* art. 76.

Tribunal, trade secrets and secret know-how is protected from improper disclosure. It authorises the Tribunal to issue a protective order similar to that issued by a court.<sup>268</sup>

Article 52 provides protection additional to that provided by Articles 73-76. Protection under Article 52 can be obtained only by order of the Tribunal. Protection under Articles 73-76 attaches by operation of the Rules themselves.

WIPO Rules regulate confidentiality in great detail. It makes little sense to regulate confidentiality in such detail while, at the same time, leaving room for the argument that confidentiality reigns in cases not covered by the Rules.<sup>269</sup>

## 7.7 Conclusion of Institutional Rules

The conclusion is that the Arbitration rules of the major<sup>270</sup> Arbitration Institutions, provides for confidentiality in one form or another. However, most of the Institutional Rules only provide a duty of confidentiality for the arbitrators and the institution itself.

It is interesting to note the different approaches taken by ICC and LCIA in the drafts of their new Rules, even though they were drafted at the same time. It shows how complex this issue is, and it also illustrates the difficulties in drafting a reasonable provision regarding confidentiality.

UNCITRAL Rules are in a special position, since the United Nations, who are meant to reflect the common understanding in the world, adopted them. Other Arbitration Centers have adopted special rules for cases where they are requested to appoint a sole or presiding arbitrator under the UNCITRAL Arbitration Rules.<sup>271</sup>

WIPO Rules are the set of Rules that provide the most detailed regulation of confidentiality.<sup>272</sup> One of the reasons is that WIPO Rules were designed specifically for intellectual property disputes. It would be fair to say that the special characteristic of intellectual property disputes would require even more confidentiality than ordinary business disputes. This explains why WIPO Rules contain such detailed and innovative provisions to protect confidentiality.

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<sup>268</sup> *Ibid.* art. 52.

<sup>269</sup> Smit, *Confidentiality Rep.*, *supra* note 261.

<sup>270</sup> in the sense of numbers of cases submitted to them each year.

<sup>271</sup> For example SCC and LCIA and AAA.

<sup>272</sup> Compared with the other main Institutional Rules.

# 8 Pro- Confidentiality

The Australian cases started an intensive debate about whether or not confidentiality was an essential element in international commercial arbitration. In this chapter I will refer to arguments for a duty of confidentiality, while also keeping in mind the comments on the Australian cases.<sup>273</sup>

## 8.1 Lack of Previous Authority

For many years, at least up until the 1990's, the issue of confidentiality in relation to arbitration proceedings and documents created or disclosed, was a subject, which was never debated.<sup>274</sup>

The proponents of the two main schools of thought to reached opposite conclusions, relying upon silence and an absence of discussion. Arguments for confidentiality took for granted that arbitration is an efficient method of private dispute resolution. Arbitrators, parties and advisers, traditionally respected the confidentiality of proceedings and documents, and there were no problems. They argued that the distinction between privacy and confidentiality was chimerical since the privacy of arbitration is well established and the concept of privacy would have no meaning if parties were required to “arbitrate privately by day while being free to pontificate publicly by night”.<sup>275</sup> Proponents admit there have been exceptions and qualifications attached to the duty, but those have been attached to a general rule.<sup>276</sup>

Exceptions have been limited to situations where the result of the arbitration had to become public. Publications were limited to relevant sections while the detailed charges and documents were not published. For example,<sup>277</sup> in a partnership dispute, where the arbitrators uphold the expulsion of a miscreant partner, only the relevant section is told to the public, that is “Mr X is no longer a member of the partnership.” Detailed charges against him are not and should not be published. Another situation is if the unsuccessful party breaches its duty to satisfy the arbitration award, whereby the winning party may go to court to have the award enforced. Then the terms of the award can become public fact. However, it is one thing to make the result of arbitration public, when public interest or private rights require it, it is totally different to deny confidentiality to proceedings and documents.<sup>278</sup>

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<sup>273</sup> See chapter 4.2 and 4.4.

<sup>274</sup> Neill Patrick, *Confidentiality in Arbitration*, 12 *Arbitration International*, 287, (1996).

<sup>275</sup> Fortier, *supra* note 59 at 132.

<sup>276</sup> *Ibid.*

<sup>277</sup> Example given by Neill, *supra* note 274 at 288.

<sup>278</sup> *Ibid.*

Proponents of confidentiality take these facts as evidence that confidentiality is an essential part of arbitration, and that it has been taken for granted. The argument is that there have not been any problems with confidentiality in arbitration. Occasionally, during the 20<sup>th</sup> century, there was a problem with arbitrators' right to rule that particular individuals should or should not be present at arbitration hearings. But until the last decade, there had been no cases dealing with violation of the duty of confidentiality.<sup>279</sup>

Since everybody involved has accepted the duty of confidentiality, it should be considered a fundamental principal of international arbitration. The Australian cases are considered mistakes, isolated to Australia, in the world of international arbitration.

However, there is another school of thought, which I will discuss in chapter 9.1 that rely upon negative evidence and silence to support the opposite conclusion.

## 8.2 General Arguments / Jurisprudence

One hundred years ago, a master of equity, Sir George Jessel, took it as self-evident that if a dispute were referred to arbitration there would be no publicity. He spoke about the arbitration clause in a partnership agreement in this way:

“As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful.”<sup>280</sup>

Arbitration is an attractive dispute resolution for commercial disputes because of its privacy. Hence, the efficacy of a private arbitration will be damaged if proceedings are made public by the disclosure of documents relating to the arbitration. There would be little point in excluding the public from an arbitration hearing if the parties were able to publish what was said and done at the hearings. The same principle should apply to arbitration as a whole, including pleadings, expert reports or witness proof that has been exchanged, as well as to evidence given orally.<sup>281</sup> Some rules must be followed as a matter of course, even if they are not included in the arbitral clause. Confidentiality is one of those rules.<sup>282</sup>

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<sup>279</sup> *Ibid.*

<sup>280</sup> *Russell v. Russell*, (1880) 14 Ch. D 471 at 474-475.

<sup>281</sup> Bernstein., Tackaberry, Marriott, supra note 6.

<sup>282</sup> Mbaye Keba, *Arbitration Agreements: Conditions Governing Their Efficacy*, ICCA Congress Series No.9, Improving the Efficiency of Arbitration Agreements and Awards: 40

A newly released civil law orientated text on international commercial arbitration<sup>283</sup> wrote that confidentiality is a fundamental principle, and one of the main advantages of international arbitration.<sup>284</sup> This means it is generally considered that the arbitral award, like the existence of the arbitral proceedings, is confidential. Even though the authors criticised the decision by the City Court in the *Bulbank* case as too severe, they said, “confidentiality of the arbitral process is not to be taken lightly”.<sup>285</sup> The authors did not consider the principle threatened by the fact that anonymous extracts from awards<sup>286</sup> are published, for example, in the Yearbook of Commercial Arbitration and the Journal du Droit International.<sup>287</sup>

Even proponents of confidentiality favour a publication of modified versions of awards, especially if it is done with the consent of the parties. In cases where there is no consent, it could be justifiable when the publication by an Arbitral Institution uses languages that makes it impossible to determine whom the parties were and who won.<sup>288</sup> However, it has been argued that there is no school of thought in England or in international commercial arbitration, which considers it proper for a party or a witness to disclose in public, what took place in an arbitration hearing. This was also the view of Mr Boyd QC in his expert report on *Esso/BHP*, where he concluded:

“I am in no doubt that in England, the practice in conduct of arbitration is consistent with there being an implied term of an arbitration agreement that the parties to an arbitration must keep confidential information acquired by them in the course of the arbitration, and in particular, the pleadings, the oral and documentary evidence, and the award, except in so far disclosure is necessary for the purpose of the arbitration proceedings themselves. I believe this to be consistent with the practice in international commercial arbitration in most, if not all, jurisdictions where such arbitrations are held.”<sup>289</sup>

The Handbook of Arbitration Practice<sup>290</sup> states that privacy and confidentiality are implicit in an agreement to arbitrate. It points to several English decisions that support this view.<sup>291</sup> Also, in the standard English text<sup>292</sup> on international commercial arbitration, the authors refer to the duty of confidentiality as one of the advantages of arbitration as opposed to

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Years of Application of the New York Convention, International Arbitration Congress Paris, 3-6 May 1998, at 101, (1999).

<sup>283</sup> Fouchard, Gaillard, Goldman, *supra* note 4.

<sup>284</sup> *Ibid.* at 612.

<sup>285</sup> *Ibid.* at 775.

<sup>286</sup> In particular ICC awards.

<sup>287</sup> Fouchard, Gaillard, Goldman, *supra* note 4 at 774.

<sup>288</sup> Neill, *supra* note 274 at 301.

<sup>289</sup> Boyd, *supra* note 114 at 270-271.

<sup>290</sup> Bernstein, Tackaberry, Marriott, *supra* note 6.

<sup>291</sup> *Ibid.* at 193.

<sup>292</sup> Hunter, Redfern, *supra* note 3.

litigation. The authors however, agree that there are limits to confidentiality. A public company may need to inform shareholders that arbitration is taking place, and the results of it.<sup>293</sup> These are not controversial cases, but the important thing is the presumption of confidentiality. The authors wrote that regardless of the *Esso* and *Panhandle* cases, there is a strong body in the international arbitration community who believe confidentiality of material disclosed in arbitration proceedings is a “desirable element of arbitration”.<sup>294</sup> Confidentiality should be maintained to the maximum extent possible, and the decision in *Dolling-Baker* confirmed that view, at least in England, France and Switzerland.<sup>295</sup>

In summary, the proponents of confidentiality argue that confidentiality has been a custom in international commercial arbitration. The duty of confidentiality has been taken for granted as an ordinary and necessary part of arbitration. An arbitration agreement is seen as a private agreement between private parties to withdraw their dispute from the public courts to submit it to a private individual chosen by them for a decision. This view is the norm in the field of international commercial arbitration.

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<sup>293</sup> *Ibid.* at 27.

<sup>294</sup> *Ibid.* at 30.

<sup>295</sup> *Ibid.* at 29-30.

# 9 Anti- Confidentiality

## 9.1 Lack of Previous Authority

There are two main schools of thought, which reached different conclusions by relying upon silence and the absence of discussions regarding confidentiality. The school that seeks to deny or minimise confidentiality argues that if there were such a duty of confidentiality there would be old authorities proclaiming the existence of such a duty. Since the courts have not proclaimed a duty of confidentiality be imposed on parties in arbitration, there is no such duty.<sup>296</sup>

Mason CJ is an example of this school of thought, which takes the lack of authority as evidence that the duty of confidentiality does not exist. In his decision in *Esso*, he relied on an absence of authority before *Dolling- Baker* in 1990.

## 9.2 Contractual Arguments

Dr Julian D.M Lew,<sup>297</sup> Head of School of International Arbitration, Queen Mary & Westfield College, wrote an expert opinion on the *Esso* case, where he criticised the idea of a duty of confidentiality.

He expressed scepticism regarding confidentiality, based on his experience in international commercial arbitration. Even though he could see the advantages of confidentiality, he saw no binding rule that an arbitration proceeding is confidential. The parties are therefore, not precluded from disclosing details about the arbitration to third parties.<sup>298</sup>

Dr. Lew based this opinion on the fact that the fundamental basis of arbitration is the arbitration agreement itself. The parties have mutually agreed to submit certain disputes to arbitration. The party's autonomy has always been an essential ingredient in the framework of arbitration, which means that the parties determine the arbitrators' power, authority, the applicable arbitration rules, the underlying law and the conduct of the arbitration.<sup>299</sup>

A natural consequence of this is that the extent, to which the contents and other aspects of the arbitration remain confidential, is a matter of agreements

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<sup>296</sup> Neill, *supra* note 274 at 288.

<sup>297</sup> Listed in Euromoney expert guide as one of the world's top twenty experts on international commercial arbitration.

<sup>298</sup> Lew Julian, *Expert Report in Esso/BHP v. Plowman*, 11 Arbitration International, at 283, (1995).

<sup>299</sup> *Ibid.*



between the parties. If the parties are silent concerning some issues of the arbitration, it is according to *lex arbitri*, the law that governs the arbitration that will regulate these issues. In the absence of agreement and statutes, there may be a general practice, which allows the arbitrator to determine how particular issues should be dealt with.<sup>300</sup>

Parties can of course expressly state in the agreement that a certain level of confidentiality shall apply. However, there is no basis on which one can automatically imply confidentiality, as the English judges have suggested.<sup>301</sup>

Dr Lew would agree that, as in all contracts, there may be an implied term in the agreement that can, if it is clear what the parties would have intended, provide for confidentiality.<sup>302</sup>

### 9.3 Third Party Interest

Another argument against confidentiality is that in much arbitration, it is necessary to communicate the process and development with third parties.

Dr Lew gave an example, using a case that he was acting on at the time. The case involved an exporter suing for payment of goods delivered. The goods were covered by an export credit guarantee, which was payable, provided that there were no justifications for the non-payment by the buyer, such as defective goods. In a case like this it is necessary to keep the insurers fully apprised of the development in the proceedings.<sup>303</sup>

There are other reasons as to why the result in arbitration may be relevant to a third party. Mr Justice Brooking, in the *Esso* case, suggested several; a stock exchange requirement of disclosure of information which might materially affect the price of the shares of one of the parties; the interest of a majority shareholder; the concern of creditors; a statutory duty of disclosure to the public in the context of a new share issue or a public flotation.<sup>304</sup>

### 9.4 General Arguments

Dr Lew is not convinced that privacy is self-evident. He held that there is no reason why arbitration should necessarily be held in private. Obviously, there is no certainty that privacy and confidentiality are the only reasons that parties choose arbitration. He considered privacy an option that is available to parties if they wish. There even has to be a clear intention with both parties, that they want privacy. Even if arbitration is private, however, it

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<sup>300</sup> *Ibid.* at 283-284.

<sup>301</sup> *Ibid.* at 284.

<sup>302</sup> *Ibid.*

<sup>303</sup> *Ibid.* at 285.

<sup>304</sup> *Esso Australia v. Plowman* (1994) 1 VR 1 at 15.

does not necessarily mean that the procedure and the documents in the arbitration cannot be disclosed.<sup>305</sup>

Publishing of the award has a special position in this discussion. Publication of awards serves a variety of public interests. For example, it provides insight into how society resolves disputes; it contributes to the development of the law by disclosing to the world at large the rules arbitrators apply to international disputes and by exposing their decisions to critical analysis; and it enables arbitrators in subsequent cases to draw guidance and inspiration from decisions others made in comparable cases.<sup>306</sup>

The fact that arbitrators and counsel in many cases are obliged to observe confidentiality does not provide guidance on the issue of the parties' obligations. Similarly, the non-public character of proceedings offers little help. The fact that one or both of the parties do not want the proceedings to be made public does not in itself constitute a legal obligation to observe confidentiality.<sup>307</sup>

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<sup>305</sup> Lew, *supra* note 298 at 286.

<sup>306</sup> Smit, *Confidentiality Rep.*, *supra* note 261 at 236.

<sup>307</sup> *Ibid.*

# 10 Conclusion

Confidentiality has until recently, been taken for granted by a large part of the international arbitration community. It would be fair to say that parties who choose arbitration expect their disputes to be solved private and confidential. In some cases, that might be the main reason for their choice, since a public dispute might damage a company's reputation or business.

Doubtless, the debate about confidentiality is necessary. The International Arbitration Community thought they had the answers, but recent cases show that more discussions are needed.

What can parties to arbitration expect today? It is true that third parties, in general, are excluded from arbitration proceedings. On other hand, the question is whether privacy has any meaning if the counter party can reveal the dispute and information from the proceedings. The issue of confidentiality is fundamental and should no longer be taken as self-evident.

In its most comprehensive form, the concept of confidentiality assumes that all aspects of arbitration proceedings are protected from disclosure. However, such an extreme duty of confidentiality does not exist. In recent years, a handful of cases in a number of national jurisdictions showed the absence of an implied absolute duty of confidence. Even in England, one of the leading jurisdictions that has advocated a duty of confidentiality, uses a case-by-case approach, to establish certain exceptions to confidentiality.

It is worth pointing out that when the English judges have applied "reasonable necessity", the criterion was not fulfilled. Therefore, it is difficult to draw precise conclusions with regard to the practical scope of exceptions.

England's position is based on cases where release is sought in order to prosecute or defend court action or arbitration arising out of the same transaction or events but involving different parties. The English judges have not yet considered the situation where one party to arbitration is seeking to release information obtained in arbitration to a third party for a purpose unrelated to the dispute.

Although in the *Paribas* case an exception, when the public interest demands disclosure, was recognised. However, it has been suggested, and I am apt to agree, that the Judge was referring to "public interest" in the sense of "the interest of the justice".

If that assumption is right, English courts have not yet considered a "real" public interest case, like the Australian cases. If they did, they might come to the same conclusion as in the *Esso* case. Of course, not based on the same

grounds as the High Court of Australia, which believes there is no duty of confidentiality. Instead, the English court would claim confidentiality as the presumption, but make an exception for disclosure when as necessary for public interest.

Regarding the *Esso* case, I agree with the obiter dicta of Mason J's decision, regarding the situation if there would have been a duty of confidentiality. That is, it could be motivated by public interest in a case where the outcome would, for example, affect energy prices. Of course, public interest would have to reach a considerable degree.

The fact today is that, in Australia, arbitration is subject to privacy but not to confidentiality. One of the key elements in the different views is the way they look at privacy, or the extent and effect of privacy. One side sees confidentiality as a natural consequence of privacy, like two sides of the same coin. That would lead to the conclusion that confidentiality is an implied term in all arbitration agreements.

The other side sees privacy as separate from confidentiality. For example, the High Court of Australia acknowledges that privacy excludes third parties from a hearing, yet accepts that parties can disclose documents and other material arising from private proceedings. This inconsistency is one of the issues that the *Esso* case has correctly, in my opinion, been criticised for. However, it is possible to see privacy as an opportunity to keep confidentiality if the parties wish to. It should be observed that even Potter J in the *Ali Shipping* case rejected the automatic connection between privacy and confidentiality.

The Swedish *Bulbank* case is notable. Judging the same case, the courts took opposite positions. It started with the District Court applying the duty of confidentiality in a brutal way, and ended with the Supreme Court rejecting an implied duty of confidentiality.

Even for those who are pro- confidentiality, the existence of an implied duty of confidentiality is controversial and it should be applied with circumspection. That is why the conclusion in the decision of the Stockholm District Court, that *any* breach of confidentiality is a valid ground for invalidation of an award, is so remarkable. A party could so easily use this to avoid an unfavourable award

In my opinion, the Svea Court of Appeal took the "easy way out" by not taking a position in the controversy.

The Supreme Court of Sweden took a position that certainly was a surprise to me. After evaluating the different views in the world, I assumed it would concur with the French and English views. It had the opportunity to agree that there is, with some exceptions, a duty of confidentiality. Then it could

have recognised the different degrees of disclosure suggested by the Court of Appeal. The outcome would have been the same.

Nevertheless, it is appreciated that the Supreme Court gave clear answers as to the Swedish position.

Suppose that there once had been an international principle of confidentiality in arbitration. Was the development after *Esso* an evolution, or are the anti-confidentiality cases simply exceptions to the general practice?

If the duty of confidentiality was not assumed only in Australia, it would have been appropriate to limit their effect to the jurisdiction of Australia. However, it is fair to say that, at least in the United States, the position is similar. Probably in Sweden as well, after the *Bulbank* decision, although some Swedish scholars and lawyers might have a different opinion.

On the other hand, there are other large arbitration nations like France, Switzerland and England claiming that confidentiality is a fundamental principle of arbitration. However, this position may have weakened over the last years. At least it has become apparent that a more modified concept must be found, which properly accommodates both the needs of the parties and the public. The final boundaries of the duty of confidentiality have not yet been fully outlined in these jurisdictions.

Although I suggest that the English Courts would have come to the same decision, to permit disclosure, as the High Court of Australia in the *Esso* case, there is a huge difference between regarding confidentiality as a presumption, and totally rejecting it. These two courts have fundamentally different starting points in their analysis of arbitration.

I believe that it is a trend that confidentiality is no longer seen as an implied term in arbitration. Due to the increasing number of arbitrations taking place, it is essential to have clear guidelines concerning the consequences of entering an agreement to arbitrate. As the arbitration community is growing, it is not wise to base such an important aspect as the principal of confidentiality on an implied term in the agreement.

On other hand, I favour the English position, which offers the most reasonable results as of today. I have no doubt that the legal position, at least until a couple of years ago, was that confidentiality was a fundamental obligation of arbitration. Parties that agreed to arbitrate in the past, did so under such an assumption. It would be unwarranted for one of the foundations of the agreement to be disregarded simply because a party claims a right to disclose information.

Both legal writing and cases fail to offer an unanimous approach to this issue. The legal situation is uncertain, but this does not have to be a major

problem. In the future, if parties want confidentiality, they can regulate it into their mutual agreement. Parties who choose to submit disputes to arbitration must draw their arbitration clauses with more care, to retain confidentiality regarding the proceedings and the information obtained in them. This is something for attorneys to consider when advising clients around the world.

It is problematic to draw a provision for confidentiality and its limits in an effectual way, for example, concerning the degrees of disclosure that are permitted. Parties also have to address the issue of enforcement and remedies, since the disclosure of confidential material could cause substantial damages.

These preparations will take extra effort during negotiations of the agreement, but it is worth it to avoid the variable decisions of the court. It actually gives the parties an opportunity to regulate their relationship, which might be preferable having a rule or principle automatically, implied in the agreement.

Another possibility is to refer the arbitration proceeding to an institution that has a duty of confidentiality stipulated in its rule. If one were concerned with confidentiality, they could refer the dispute to, for example, LCIA or WIPO, who both impose an obligation of confidentiality upon the parties. Parties who choose another arbitration institution can, in most cases, be assured that, at least the institution will have a duty of confidentiality. There, it might be wise to have a separate confidentiality agreement with your counter part.

One of the arguments to uphold confidentiality is that it is one of the main advantages of arbitration. This is true; litigation usually makes all information disclosed during a proceeding public. However, there are many other reasons for parties to choose arbitration before litigation, for example, it is faster and parties can decide on the arbitrators, applicable law and location of the proceedings.

Confidentiality might not be a self-evident element in arbitration in the future, but parties do have the means at their disposal to ensure confidentiality if they desire it. At the end of the day arbitration is a mutual and voluntary way of solving your disputes.

# Supplement A

## The ICC Rules (1998)<sup>308</sup>

### APPENDIX I

#### Statute of the International Court of Arbitration of the ICC

##### Article 6

###### Confidentiality

The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to the materials submitted to the Court and its Secretariat.

### APPENDIX II

#### Internal Rules of the International Court of Arbitration of the ICC

##### Article 1

###### Confidential Character of the Work of the International Court of Arbitration

1

The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat.

2

However, in exceptional circumstances, the Chairman of the Court may invite other persons to attend. Such persons must respect the confidential nature of the work of the Court.

3

The documents submitted to the Court, or drawn up by it in the course of its proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the Chairman to attend Court sessions.

4

The Chairman or the Secretary General of the Court may authorize researchers undertaking work of a scientific nature on international trade law to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings.

5

Such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from any publication in their respect without having previously submitted the text for approval to the Secretary General of the Court.

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<sup>308</sup> [http://www.iccwbo.org/court/english/arbitration/rules.asp#article\\_1\\_2](http://www.iccwbo.org/court/english/arbitration/rules.asp#article_1_2), (February 20 2001)

6

The Secretariat will in each case submitted to arbitration under the Rules retain in the archives of the Court all awards, terms of reference, and decisions of the Court as well as copies of the pertinent correspondence of the Secretariat.

7

Any documents, communications or correspondence submitted by the parties or the arbitrators may be destroyed unless a party or an arbitrator requests in writing within a period fixed by the Secretariat the return of such documents. All related costs and expenses for the return of those documents shall be paid by such party or arbitrator.

## **Rules of Arbitration of the International Chamber of Commerce**

(in force as from 1 January 1998)

### **Article 20**

#### **Establishing the Facts of the Case**

(.....)

(7)

The Arbitral Tribunal may take measures for protecting trade secrets and confidential information.



# Supplement B

## The LCIA Rules (1998)<sup>309</sup>

### Article 30

#### Confidentiality

30.1 Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.

30.2 The deliberations of the Arbitral Tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26.

30.3 The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal

## The UNCITRAL Arbitration Rules (1976)<sup>310</sup>

### GENERAL ASSEMBLY RESOLUTION 31/98

#### FORM AND EFFECT OF THE AWARD

#### Article 32

(.....)

(5). The award may be made public only with the consent of both parties.

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<sup>309</sup> <http://www.lcia-arbitration.com/rulecost/english.htm>, (February 22 2001).

<sup>310</sup> <http://www.uncitral.org/en-index.htm>, (February 25 2001).

# **The Rules of the Arbitration Institute of the SCC (1999)<sup>311</sup>**

## **Article 9 Procedures of the SCC Institute**

The SCC Institute shall maintain the confidentiality of the arbitration and shall deal with the arbitration in an impartial, practical and expeditious manner.

## **THE PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL**

### **Article 20 Procedures of the Arbitral Tribunal (.....)**

(3) The Arbitral Tribunal shall maintain the confidentiality of the arbitration and conduct each case in an impartial, practical and expeditious manner, giving each party sufficient opportunity to present its case.

# **The International Arbitration Rules of AAA(2000)<sup>312</sup>**

## **Confidentiality**

### **Article 34**

Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.

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<sup>311</sup> <http://www.chamber.se/arbitration/english/index.html> ( February 25 2001).

<sup>312</sup> <http://www.adr.org>, (February 26 2001).

# Supplement C

## The WIPO Arbitration Rules (1994)<sup>313</sup>

### Arbitration Rules: Confidentiality

#### Confidentiality of the Existence of the Arbitration

##### Article 73

(a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only

(i) by disclosing no more than what is legally required, and

(ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.

(b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.

#### Confidentiality of Disclosures Made During the Arbitration

##### Article 74

(a) In addition to any specific measures that may be available under Article 52, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction.

(b) For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness's testimony, the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

#### Confidentiality of the Award

##### Article 75

The award shall be treated as confidential by the parties and may only be disclosed to a third party if and to the extent that

(i) the parties consent, or

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<sup>313</sup> <http://arbiter.wipo.int/arbitration/arbitration-rules/confidentiality.html>, (February 25 2001).

(ii) it falls into the public domain as a result of an action before a national court or other competent authority, or

(iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.

### **Maintenance of Confidentiality by the Center and Arbitrator**

#### **Article 76**

(a) Unless the parties agree otherwise, the Center and the arbitrator shall maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed during the arbitration, except to the extent necessary in connection with a court action relating to the award, or as otherwise required by law.

(b) Notwithstanding paragraph (a), the Center may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the parties or the particular circumstances of the dispute to be identified.

### **Disclosure of Trade Secrets and Other Confidential Information**

#### **Article 52**

(a) For the purposes of this Article, confidential information shall mean any information, regardless of the medium in which it is expressed, which is

- (i) in the possession of a party,
- (ii) not accessible to the public,
- (iii) of commercial, financial or industrial significance, and
- (iv) treated as confidential by the party possessing it.

(b) A party invoking the confidentiality of any information it wishes or is required to submit in the arbitration, including to an expert appointed by the Tribunal, shall make an application to have the information classified as confidential by notice to the Tribunal, with a copy to the other party. Without disclosing the substance of the information, the party shall give in the notice the reasons for which it considers the information confidential.

(c) The Tribunal shall determine whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality. If the Tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.

(d) In exceptional circumstances, in lieu of itself determining whether the information is to be classified as confidential and of such nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality, the Tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate a confidentiality advisor who will determine whether the information is to be so classified, and, if so, decide under which conditions and to whom

it may in part or in whole be disclosed. Any such confidentiality advisor shall be required to sign an appropriate confidentiality undertaking.

(e) The Tribunal may also, at the request of a party or on its own motion, appoint the confidentiality advisor as an expert in accordance with Article 55 in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the Tribunal.

# Bibliography

Bagner Hans, *Confidentiality in Arbitration*, 14 Mealy's Int'l Arb. Rep., January (1999), Lexis, Online, Area of Law-By Topic-ADR-Legal News (January 12 2001)

Bagner Hans, *Confidentiality in Arbitration, Don't take it for granted!*, 15 Mealy's Int'l Arb. Rep., December (2000), Lexis, Online, Area of Law-By Topic-ADR-Legal News (January 12 2001)

Bernstein Ronald, Tackaberry John, Marriott Arthur, *Handbook of Arbitration Practice*, 3<sup>rd</sup> ed, Sweet & Maxwell, London, (1998)

Boisseon de, Matthieu, *Le Droit Francais de l'Arbitrage Interne et International*, GLN-editions, Paris, (1990)

Bond Stephen, *Expert Report of Stephan Bond Esq in Esso/BHP v. Plowman*, 11 Arbitration International, 273, London, (1995)

Boyd Stewart, *Expert Report in Esso/BHP v Plowman*, 11 Arbitration International, 265, London, (1995)

Bucher Andreas, Tschanz Pierre-Yves, *International Arbitration in Switzerland*, Helbing & Lichtenhahn, Basle, (1988)

Cars Thorsten, *Lagen om skiljeförfarande: en kommentar*, Fakta Info Direkt, Stockholm, (1999)

Collins Michael, *Privacy and Confidentiality in Arbitration Proceedings*, 11 Arbitration International, 321, London, (1995)

*Confidentiality in International Commercial Arbitration Practice to be Reviewed by the Swedish Supreme Court*, The VINGE News Letter, Litigation and Arbitration Department, November 1999  
<http://www.vinge.se/pub/ld2pub.htm>, (February 5 2001)

Derains, Yves, *Observations on the ICC case 6932*, 121 Journ. Dr. Internat., 1070, Paris (1994)

Derains Yves, Schwartz Eric, *A Guide to the New ICC Rules of Arbitration*, Kluwer Law International, The Hague, (1998)

Dessemontet Françoise, *Arbitration and Confidentiality*, 7 Am. Rev. Int'l Arb. 299 (1996). Lexis-On Line, Secondary Legal : Law Reviews & Journals : Individual Law Reviews & Journals (February 27 2001)

Fortier Yves, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 *Arbitration International*, 131, London, (1999)

Fouchard Philippe, Gaillard Emmanuel, Goldman Berthold, *On International Commercial Arbitration*, Kluwer Law International, The Hague, (1999)

Gaillard Emmanuel, *Le principe de confidentialité de l'arbitrage commercial international*, Recueil Dalloz-Sirey, 22eme Cahier-Chronique, 153 Paris (1987)

Heuman Lars, *Skiljemannarätt*, Norstedts Juridik, Stockholm (1999)

Hunter Martin, Redfern Alan, *Law and Practice of International Commercial Arbitration*, 3<sup>rd</sup> ed., Sweet & Maxwell, London, (1999)

Jarvin Sigvard, *Sekretess i svenska och internationella skiljeförfaranden*, 18 *Juridisk Tidskrift vid Stockholms Universitet*, at 149, (1996/1997)

Lew Julian, *Expert Report in Esso/BHP v. Plowman*, 11 *Arbitration International*, 283, (1995)

Mbaye Kéba, *Arbitration Agreements: Conditions Governing Their Efficacy, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, International Arbitration Congress Paris, 3-6 May 1998, ICCA Congress Series No.9 (1999)

Meyer, Bettina, *Der Schiedsgutachtervertrag, eine Untersuchung des rechtlichen Verhältnisses zwischen Schiedsgutachtern und Parteien mit vergleichenden Ausführungen zum Schiedsrichtervertrag*, Verlag V. Florentntz GmbH, Munich (1995)

Miller Duncan, Rogers Andrew, *Non-Confidential Arbitration Proceedings*, 12 *Arbitration International*, 319, London, (1996)

Neill Patrick, *Confidentiality in Arbitration*, 12 *Arbitration International*, 287 (1996)

Partasides Constantine, *Bad News From Stockholm: Bulbank and confidentiality AD ABSURDUM*, 13 *Mealy's Int'l Arb. Rep.*, December (1998) LEXIS- Online, Area of Law-By Topic-ADR-Legal News (January 12 2001)

Partasides Constantine, *Bulbank- The Final Act*, 15 *Mealy's Int'l Arb. Rep.* December (2000) Lexis- Online, Area of Law-By Topic-ADR-Legal News (January 12 2001)

Petersson Lennart, Romander Clas, *Confidentiality in Swedish Arbitration*, Stockholm Chamber of Commerce Newsletter, February 7 (2001).  
<http://www.chamber.se/arbitration/index.html>, (March 9 2001)

Schutze, Rolf, Tscherning, Dieter, Walter, Wais, *Handbuch des Schiedsverfahrens, Praxis der deutschen und internationalen Schiedsgerichtsbarkeit*, 2<sup>nd</sup> ed., Walter de Gruyter, Berlin, (1990)

Smit Hans, *Expert Report of Professor Hans Smit in Esso/BHP*, 11 *Arbitration International*, 297, London,(1995)

Smit Hans, *Case-note on Esso/ BHP v. Plowman*, 11 *Arbitration International*, London, 299, (1995)

Smit Hans, *Confidentiality Report art.73-76.*, 9 *Am. Rev. Int'l Arb.*, (1998).  
Lexis-On Line, Secondary Legal : Law Reviews & Journals : Individual Law Reviews & Journals (February 27 2001)



# Table of Cases

*G. Aita c. A.Ojje*, C.A. Paris, February 18, 1986, (1986) Rev. Arb. 583

*Ali Shipping Corporation v. Shipyard Trogir*, (1998) 2 All. E.R. 136 (C.A. Civ. Div.)

*Alliance Petroleum Australia NL v. Australian Gas Light Co*, (1983) 34 SASR, 215

*Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.*, Stockholm District Court, 1998-09-10, Case T 6-111-98

*Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.*, The Svea Court of Appeal, 1999-03-30, Case T 1092-98

*Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.*, The Supreme Court of Sweden, 2000-10-27, Case T 1881-99

*Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd*, N S W Supreme Court (Unreported) 15 November (1994), Proceedings 55049/94

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

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

*Esso/BHP v. Plowman*, (1994) 1 V.R.1

*Esso/BHP v. Plowman*, (1995) 128 A L R. 391 HC of A

*Hassneh Insurance Co and others v. Steuart Mew*, (1993) 2 Lloyd's Rep. 243. (Q.B Com Ct.)

*Hyundai Engineering & Construction Co v. Active Building & Civil Construction Limited*, (1994) 9<sup>th</sup> of March 1994 (unreported)

*ICC case 6932*, Chambre de Commerce Internationale, Paris, 1992, 121 Journ.Dr.Internat, 1065, Paris (1994)

*Insurance Co. v. Lloyd's Syndicate*, (1995) 1 Lloyd's Rep. 272 (Q.B. Com. Ct.)

*John Fairfax & Sons Ltd v Police Tribunale*, (1986), 5 NSWLR, 465

*London & Leeds Estates Ltd. v. Paribas Ltd*, (1995) 1 E.G.L.R 102 (Q.B.)

*Oxford Shipping Co. LTD. V. Nippon Yusen Kaisha*, (1984) 2 Lloyd's rep. 373 (Q.B. Com.Ct.)

*Russell v. Russell*, (1880) 14 Ch.D. 471

*Sally v. Southern Health and Social Services Board*, (1992) 1 A.C. 294

*Scott v. Scott*, (1913), AC, 417

*Tournier v. National Provincial and Union Bank of England*, (1924) 1 K.B. 461(C.A.)

*USA v. Panhandle Eastern Corp, et al*, (1988) 118 F.R.D. 346 (D.Del.)

# Internet Sources

[www.adr.org](http://www.adr.org)

[www.chamber.se](http://www.chamber.se)

[www.iccwbo.org](http://www.iccwbo.org)

[www.lcia-arbitration.com](http://www.lcia-arbitration.com)

[www.uncitral.org](http://www.uncitral.org)

[www.vinge.se](http://www.vinge.se)

[www.wipo.int](http://www.wipo.int)

## Database

Lexis

# Table of Legislation and Institutional Rules

The International Arbitration Rules of AAA (2000)

The ICC Rules of Arbitration (1998)

Lag (1999:116) om skiljeförfarande (Government Bill)

Lag (1990:409) om skydd för företagshemligheter (Government Bill)

The LCIA Rules of Arbitration (1998)

The UNCITRAL Arbitration Rules (1976)

The UNCITRAL Model Law on International Commercial Arbitration (1985)

The UNCITRAL Notes on Organizing Arbitral Proceedings (1996)

The SCC Rules of Arbitration (1999)

SOU 1995:96, Näringslivets tvistlösning (Government Commission Report)

The WIPO Arbitration Rules (1994)