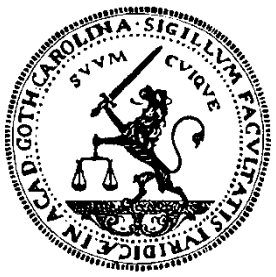

FACULTY OF LAW
Lund University

Jenny Forsberg

A Certain Uncertainty

The Duty of Confidentiality in International Commercial Arbitration

LAGF03 Essay in Legal Science

Bachelor Thesis, Law Programme
15 ECTS

Supervisor: Lotta Maunsbach

Semester: VT2013

Contents

A CERTAIN UNCERTAINTY

Summary

Arbitration is an immemorial dispute settlement method with references to be found in both Roman and ancient Greek law, such as Digesta, Codex Iustinianus and Novellae. Sweden also has a long tradition of commercial arbitration and it has been used as a dispute settlement method at least since the Hanseatic League was established. It is also believed that arbitration was used to settle commercial disputes in Visby during the 14th century.

The present paper will examine the duty of confidentiality and its consequences, after a delivered award in an international commercial arbitration and documents are disclosed or published. The main focus of the study is how different questions on confidentiality would be answered if the procedures take place in Sweden.

It is, however, essential to make comparisons to international arbitration institutes' regulations and case law since arbitration is an internationally established dispute settlement method.

The confidentiality agreement has become central in the international arbitration discussion after the decision by the Supreme Court of Sweden in *Bulbank*. This thesis describes and discusses the necessity of a confidentiality agreement in order to avoid disclosure of documents. It is essential for the parties to know what kind of duty the agreement imposes upon them or, if they have not agreed on confidentiality, what an absence of an agreement might lead to.

A disclosure or publication of documents might lead to a cause to claim damages for the aggrieved party, i.e. the complainant, but the question remains against whom an aggrieved party can bring actions for damages. There have been extensive discussions on the duty of confidentiality over the last years but still some questions remain to be answered; especially on what a breach of the duty of confidentiality might result in.

Sammanfattning

Skiljedomsrätt är sedan urminnes tider en använd tvistelösningsmetod. Hänvisningar till skiljerätt finns att hitta i både romersk och gammalgrekisk rätt, så som Digesta, Codex Iustinianus och Novellae. Även Sverige har en lång tradition av kommersiellt skiljeförfarande och metoden har nyttjats som ända sedan Hansan etablerades. Förmodligen har skiljeförfarandet även använts för att avgöra kommersiella tvister i Visby under 1300-talet.

Denna studie kommer att undersöka tystnadsplikten och dess konsekvenser efter att en skiljedom avkunnats i ett internationell kommersiell skiljeförfarande och dokument blivit utlämnade eller publicerade. Fokus är hur frågor rörande sekretess blir besvarade om förfarandet sker i Sverige.

Eftersom skiljeförfarandet är en internationellt vedertagen metod är det betydelsefullt att göra internationella jämförelser med internationella skiljeinstituts regelverk och till rättspraxis.

Sekretessavtalet har blivit central i den internationella skiljerättsdiskussionen efter Sveriges högsta domstols dom i *Bulbank*. Studien beskriver och diskuterar behovet av ett sekretessavtal för att undvika offentliggörande av handlingar. Det är essentiellt för parterna att veta vad för slags plikt de åläggs genom avtalet eller, om de inte har avtalat om sekretess, vad frånvaro av ett avtal kan leda till.

Ett utlämnande eller publicering av dokument kan leda till skadeståndsanspråk för den missgynnade parten, i.e. käranden, dock kvarstår frågan mot vem den missgynnade parten kan väcka skadeståndstalan. Trots omfattande diskussioner gällande tystnadsplikt de senaste åren kvarstår flera frågor att besvara vad ett brott mot tystnadsplikt kan leda till.

Preface

At the outset, I would like to emphasize my appreciation to my dear friends for their support during the study process. I also would like to thank my dear relative Marianne Knoepfler Kladny for her kind help with translations of legal articles when my knowledge of legal French was parsimonious.

I also want to take the opportunity to thank my supervisor Lotta Maunsbach for her time and discussions on raised questions while working on the current thesis. A special thanks to Jonathan Power for his invaluable help in proofreading this thesis.

Jenny Forsberg

Abbreviations

AAA	American Arbitration Association
AAA-ArbR	International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)
ACICA-ArbR	ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions
AIT	A.I. Trade Finance Inc.
Bulbank	Bulgarian Foreign Trade Bank Ltd.
CAMCA-ArbR	Commercial Arbitration and Mediation Centre for the Americas' Arbitration Rules
CIETAC-ArbR	CIETAC Arbitration Rules
Code of Professional Conduct	Code of Professional Conduct for Members of the Swedish Bar Association
ECE-ArbR	Arbitration Rules of the United Nation Economic Commission for Europe
ICC-RoA	Rules of Arbitration of the International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
KLRCA-ArbR	KLRCA Arbitration Rules
LCIA-RoA	Rules of Arbitration of London Court of Arbitration
PAISA	The Swedish Public Access to Information and Secrecy Act (SFS 2009:400)
Prop.	Governmental Bill
SAPTS	The Swedish Act on the Protection of Trade Secrets (1990:409)
SCA	The Swedish Contracts Act (SFS 1915:218)
SCC	Stockholm Chamber of Commerce
SCC Arbitration Rules	Arbitration Rules 2010
SCC-RoA	Arbitration Rules 2010

SCJP	The Swedish Code of Judicial Procedure (SFS 1942:740)
SFPA	The Swedish Freedom of the Press Act (SFS 1949:105)
SIAC-ArbR	Arbitration Rules of the Singapore International Arbitration Centre
SOU	Swedish Governmental Official Report
SPC	The Swedish Penal Code (SFS 1962:700)
UNCITRAL-ArbR	UNCITRAL Arbitration Rules
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
WIPO-ArbR	WIPO Arbitration Rules

1 Introduction

1.1 Background

> *If I maintain my silence about my secret, it is my prisoner.*
> *But if I let it slip from my tongue, I am its prisoner.*[1]

Arbitration is subject to the privilege of privacy. Privacy is a general rule of arbitration and expressed in institutions' arbitration rules and national legislation.[2] Confidentiality was deemed to be, until the High Court of Australia's judgement in *Esso v Plowman*[3], an essential attribute as well as a general rule of arbitration. Most scholars found privacy and confidentiality to go hand in hand. The reaction was therefore immense when the High Court of Australia rejected the principle of confidentiality as an axiomatic rule of arbitration.

The judgement in Australia was a starting point to debates on confidentiality in arbitration, which, eight years later, is continuing. The Supreme Court of Sweden followed the High Court of Australia's example rejecting confidentiality as a general rule and stated in *Bulbank*[4] that parties of arbitration are not obliged to confidentiality unless they entered a confidentiality agreement.

The dispute in *Bulbank*[5] arose from a disclosure of an interim award between the parties to Mealey's International Arbitration Report, which also published it. The Supreme Court of Sweden reasoned that the duty of confidentiality could only arise from an agreement entered by the parties.

Even if confidentiality has been discussed over the years there are still questions to be answered. The reach of confidentiality and its limitations within the arbitral proceedings have been reviewed thoroughly, but how the duty of confidentiality relates to third parties after an award is still an uncertainty.

---

[1] Arthur Schopenhauer.
[2] See e.g. privacy in hearings in Art. 26 (3) ICC-RoA and Art. 27 (3) SCC-ArbR.
[3] See *Esso v Plowman*.
[4] See *Bulbank*.
[5] See *Bulbank*.

1.2 Purpose and Limitations

The purpose of the thesis is to examine the duty of confidentiality when disclosing documents produced in international commercial arbitral proceedings after an award. To know which material that is confidential and what can be disclosed is central for the parties to an arbitral proceeding. A party that discloses material that could result in a breach of contract must be avoided in order to elude damages.[6]

In order to examine the confidentiality this thesis will take its starting point in a fictional case: Party A and B have settled a dispute within arbitration. Both parties accepted and respected the award. After a period of time it comes to A's knowledge that B's witness, X, (1) gave a false testimony in profit of B and (2) divulged confidential documents that A disclosed to B after entering a confidentiality agreement. The questions, which will be answered below are: (i) can A publish the witness statement without penalisation if not bound by a confidentiality agreement? (ii) could B be held responsible for X's unauthorised disclosure? (iii) what would happen if A published documents even though the disclosure was a breach of confidentiality?

The thesis is limited to international commercial arbitral procedure in Sweden and examines the SCC Arbitration Rules but also the national legislation. These limitations are mandatory to keep the case concrete and in a specific direction. Short comparisons will be made with other national legislations and institutional arbitration regulations as comparisons to the position of arbitration in Sweden. Further, the doctrine of separability is acknowledged in international arbitration law and it is recognised that the arbitration clause is an independent agreement and separates it from the main agreement if it is conducted in such an agreement.[7] Therefore, the thesis will not take the main agreement into consideration.

[6] See *Bulbank.*
[7] See Heuman (2003), p. 43; Madsen, p. 66 – 67; compare to Section 3 SCC-ArbR.

1.3 Materials and Method

Even if the discussion on confidentiality in commercial arbitration is continuing since the judgement in *Esso v Plowman*[8] the published and edited literature and material in the field is still not extensive. The lack of literature on confidentiality is due to that the field of confidentiality in arbitration was mostly unexploited until the controversial judgement *Bulbank*.[9] Even if the judgement in *Esso v Plowman*[10] *is* stated differently, most scholars continue to argue that confidentiality is a general rule of arbitration which also is proved by English case law, such as *Ali Shipping*.[11]

The main authors on international arbitration in Sweden are Hans Bagner, Lars Heuman, Kaj Hobér, Finn Madsen and Stefan Lindskog. They are all well-established academics and practitioners and have either written commentaries on Swedish legislation, extensive literature on arbitration, arbitrators or counsels or a combination of them all.

Apart from Swedish articles, literature and legislation the main material are international scholars' literature and articles. The two classic works in international commercial arbitration, *Fouchard, Gaillard and Goldman on International Commercial Arbitration* and John Savage and *Redfern & Hunter on International Arbitration*, have been of great value. Apart from covering the arbitral proceedings in whole, both works discuss questions and disputes concerning confidentiality.

In contrast to the literature, which only examines confidentiality as a small part of the problem complex, the articles used in the thesis have been more focused upon confidentiality. The articles have discussed, except from given a focused perspective on confidentiality, case law thoroughly.

The case law presented in the thesis has been used to describe different standpoints in national legislations but also is an articulation of confidentiality in international

[8] See *Esso v Plowman.*
[9] See *Bulbank.*
[10] See *Esso v Plowman*.
[11] See *Ali Shipping*.

commercial arbitration. It is essential to study the case law and the principles arising from it since international arbitration develops through case law.

Confidentiality and the breach of a duty of confidentiality has been, as previously mentioned, studied through articles and literature. These studies have been made from a strict international perspective or a comparative perspective. With a legal dogmatic method as foundation, my work will primarily examine the aforesaid questions from a Swedish perspective. Since commercial arbitration is, in most cases, an international dispute settlement procedure, it is a necessity to give an international perspective to grip the national complexity. I will therefore include the international perspective in order to give the thesis a greater depth.

1.4 Disposition

After the introductory chapter, the thesis will define privacy and confidentiality in international commercial arbitration. The segment will firstly examine the difference between the concepts in an arbitral proceeding. A definition is essential to understand how to distinguish between and use the two of them. The most central case law on confidentiality in international commercial arbitration will be presented in the second subchapter for a better apprehension in the further reading.

In the third chapter it will be examined which general principles govern confidentiality and how extensively one can interpret the confidentiality agreement. The thesis will continue with a review on what breach of confidentiality might result and what could give right to damages, either for a party or for a third party.

Before the conclusions of the thesis an analysis will be presented on the stated questions: possibilities for a party to publish a witness statement, the effects of an entered confidentiality agreement between the parties if a party discloses a witness statement, and what a breach of the confidentiality agreement by disclosing information or material from the arbitral proceedings might result in.

2 Privacy and Confidentiality

Even if privacy and confidentiality might appear synonymous to each other, the difference is notable when it comes to the effects on the proceedings. The purpose of privacy is to keep the arbitrated proceedings private to the parties of the dispute and not available to third parties. Privacy is a general rule of the arbitral proceedings and is expressed in both arbitration acts and institutional regulations.[12] The privilege of privacy gives the parties a right to exclude a third party from the proceedings if the parties desire this.[13] Confidentiality, on the other hand, extends to an obligation not to disclose or publish any material or information from the arbitral proceedings to a third party.[14] In that sense privacy is both a privilege and a right given to the parties of the proceedings. Meanwhile confidentiality is merely a duty to remain silent and keep information secret.

A difference in the two concepts is that confidentiality includes an element of secrecy, which by many is interpreted as a sign of the superiority of confidentiality to privacy.[15] Uncompromised secrecy would lead to a definite obligation to keep all information and documents presented in the process secret. Such a level of confidentiality and secrecy would be difficult to ensure in the arbitral proceedings, since the award may be used in future proceedings as evidence. The possibility of disclosing the award has its basis in the fact that most national legislation does not notice the need to preserve arbitration confidential.[16] Another factor that makes it impossible to enable secrecy in the proceedings that there are too many third parties involved in the arbitral proceedings. The arbitral processes includes a wide range of people that are not included in the confidentiality agreement between the parties.[17]

[12] See Born (2012), p. 195; Redfern & Hunter, p. 137; compare to Art. 21 ICC-RoA and Art. 25.4 UNCITRAL-ArbR.
[13] See Brown, p. 972 n. 6: *"Privacy means the right of the parties to limit or prohibit the presence of 'strangers' at the proceedings."*.
[14] See Born (2012), p. 195.
[15] See, e.g., Oakley-White; Knahr & Reinisch p. 109; Noussia, pp. 1 -3.
[16] See Noussia, pp. 24-27.
[17] See Brown, p. 1004; Paulsson & Rawding, pp. 316 – 317; Gaillard & Savage, p. 187: *"[C]onfidentiality will never be absolute: a small circle of people will be aware of the award, and that circle will grow if the award gives rise to litigation before the courts and thereby becomes public."*.

What further problematizes the relationship between the two concepts is that there is no uniform attitude among practitioners and academics on how the two concepts interact with each other and if they are independent from each other.[18] The standpoint differs not only between the national legislations but also between the institutional regulations. In France, for example, the principle of privacy leads to a duty of confidentiality in the arbitral proceedings. A party will be penalised if a party fails to act according to the principle of confidentiality. The penalisation of a breach of confidentiality was stated in *Aïta v Ojjeh*[19].[20] In Sweden, however, the Supreme Court of Sweden took the standpoint in *Bulbank*[21] that privacy does not necessarily lead to confidentiality in the proceedings. The decision formulated by the Supreme Courts had its predecessor in the Australian decision *Esso v Plowman*[22] that also argued that confidentiality in arbitration was not absolute.

The dispute in *Bulbank*[23] arose from a publication of a partial award. The award was handed over to and published in Mealey's International Arbitration Report by AIT. As a response, Bulbank filed a plaint to the Stockholm District Court claiming the arbitration agreement void due to the breach of the confidentiality agreement. The District Court sustained Bulbank's claim. The Supreme Court agreed with Court of Appeal's decision to overrule the District Courts judgement, but reasoned differently in its findings. The Supreme Court took notice that the parties had not entered a confidentiality agreement and that no guidance could be found in neither the institutional regulations chosen[24] nor in national legislation. The Supreme Court further noted that there was no international unilateral opinion on the duty of confidentiality in arbitration and reasoned that there could not be an obligation of confidentiality without a concluded confidentiality agreement between the parties. A breach of contract could not have occurred since such agreement was not entered and both the agreement and award were valid.[25]

[18] See Henkel, p. 1067.
[19] See *G. Aïta c A. Ojjeh*.
[20] See Sarles, pp. 6-7; Loh Sze On SC & Lee Peng Khoon, p. 51.
[21] See *Bulbank.*
[22] See *Esso v Plowman*.
[23] See *Bulbank.*
[24] Art. 29 ECE-ArbR states: *"The proceedings shall be held in camera"*.
[25] See Chapter 4.1 *"Disclosure by a Party to the Arbitration Proceeding"* for further reading.

3 Confidentiality of the Arbitral Proceedings

3.1 The Confidentiality Agreement and Its Effects on Arbitration

There are many ways of conducting a confidentiality agreement. The simplest way is to include, in pre-dispute arbitration agreements, a paragraph on confidentiality within the arbitration agreement.[26] If the parties desire to keep the arbitral proceedings confidential they should consider using a model clause that includes confidentiality provided by arbitration institutes.[27] When the institutional rules do not provide confidentiality they should consider such an agreement themselves.[28]

It has been stated by some academics and practitioners, but also in case law, that confidentiality is a general rule of arbitration.[29] On the other hand this point of view was demolished by case law.[30] Thus, some arbitration institutes have included provisions in their arbitration regulations to ensure confidentiality of the material and information in the arbitral proceedings.[31] The only reasonable conclusion, as argued by Fortier, is that "[w]hat is evident today is that, with respect to confidentiality in international commercial arbitration, *nothing* should be taken for granted."[32]

The confidentiality clause plays a surprisingly small part in the pre-dispute arbitration agreements, but to some extent even in the arbitration agreements

[26] See Moses, p. 49.
[27] See e.g. the ICDR Model Confidentiality Clause *"Except as may be required by law, neither a party not its representatives may disclose the existence, content, or results of any arbitration […] without the prior written consent of […] parties"*. ICDR is a division to AAA, www.adr.org/aaa/faces/aoe/icdr.
[28] See Dessemontet, p. 300; Bagner, pp. 248 – 249.
[29] See e.g. Fortier; Paulsson & Rawding, pp. 303 – 304. For further reading see also Bond; Boyd; case law: *Ali Shipping*; *Dolling Baker v Merrett*; *Hassneh v Mew*.
[30] See e.g. *Esso v Plowman*, *Bulbank, USA v Panhandle*. Also note the discussion on confidentiality by Partasides (2000). See also Smith and Smith (1995) elaborating against a general rule of confidentiality.
[31] See e.g., Art. 34 AAA-ArbR., Art. 18 ACICA- ArbR., Art. 36 CAMCA- ArbR., Art. 36 CIETAC-ArbR., Rule 12 KLRCA- ArbR., Art. 30 LCIA-RoA., Art. 35.1 SIAC- ArbR., Art. 73 WIPO- ArbR.
[32] See Fortier, p. 137.

entered after a dispute has arisen.[33] So why are not parties entering confidentiality agreements? The most likely cause is that the parties take confidentiality of the arbitral proceedings for granted, that they do not want to prolong the contractual negotiations or that they do not know what standpoint they would have when a dispute arises.[34] Parties often enter arbitration agreements by using a institutional model clause. The problems with most arbitration model clauses are that they rarely include confidentiality, but refer to institutional regulations. Institutional regulations then again do not normally include confidentiality.[35] The problem arises because most arbitration agreements are normally vaguely stated with lack of detailed regulations.[36] The parties reasoning is surprising since the confidentiality agreement between the parties might be the determining factor when determining if a duty of confidentiality exists or not.[37] It is further recommended by scholars not to wait until a dispute arises, since in situations of dispute the parties rarely agree on anything.[38]

Leaving the question of confidentiality unsettled is dangerous. *Lex loci arbitri* will rule on the confidentiality if the agreement, institutional rules and *lex mercatoria* remain silent, and the national legislation might be unknown to the parties if the tribunal has its seat in a foreign country.[39] In Sweden it has been reasoned through case law that proceedings are confidential only if the parties have agreed upon a confidentiality agreement, and sometimes not even then.[40]

Even if a confidentiality agreement is of great importance, it is central for the parties to note that the duty of confidentiality arising from an agreement is not absolute. Information and material from the dispute may be revealed due to mandatory legislation in the applicable law.[41] This might be an unforeseen uncertainty, especially when the parties' choice of the arbitral tribunal's seat is a

[33] See Redfern & Hunter, pp. 109 – 111.
[34] See Brown, pp. 989 – 990; Paulsson & Rawding, p. 303.
[35] See e.g. SCC-ArbR's Arbitration Model Clause, http://www.sccinstitute.com/english-14.aspx.
[36] See Madsen, p. 67.
[37] See Paulsson & Rawding, p. 314; Bagner, p. 248.
[38] See Bagner (2000), p. 55; Sarles, p. 2.
[39] See Redfern & Hunter, p. 4; Paulsson & Rawding, p. 314.
[40] See *Bulbank*, pp. 550 – 551.
[41] See Dessemontet, pp. 303 & 318; Brown, p. 1014; Smeureanu, p. 137.

country with legislation unknown to both parties. The disclosure can be a result of a legitimate request or interest. The *Tournier v Bank of England*[42] has been a leading case in the Anglo-Saxon legislation ever since the judgement was delivered. *Tournier v Bank of England*[43] stated four principles (i.e. the Tournier principles) on when exceptions to the duty of confidentiality are legitimate; (1) compulsion by law, (2) the public interest requires disclosure, (3) it is required due to an arbitration party's legal rights vis a vis a third party, and (4) if the parties consent to the disclosure.[44] The Tournier principles are to be seen as general rules of arbitration and were used in both *Emmott v MWP*[45] and in *Esso v Plowman*[46] as reasoning by the courts to legitimate the disclosure and are to be seen as principles indicating principles when to make exceptions from the duty of confidentiality.

3.2 Who can be Bound by Confidentiality?

The confidentiality agreement is in its conclusion governed by the principles of contract law. Privity of contract, i.e. that only the parties to the agreement are bound by the agreement, is more or less a principle of contract law.[47] A third party cannot invoke for its own profits the contractual relationship of the parties and the parties cannot oblige a third party to any action by their confidentiality agreement.[48] However, the agreement may have legal consequences on a third party and they thereby obtain a protection from the UNIDROIT Principles.[49]

In its essence there are five categories of participants in arbitral procedures that potentially hold the obligation to respect confidentiality in the arbitral proceeding. These are: (i) the parties, (ii) the representatives and legal advisors of the parties, (iii) the arbitral tribunal and the secretary of the tribunal if applicable, (iv) the

[42] See *Tournier v Bank of England.*
[43] See *Tournier v Bank of England.*
[44] See Neill, pp. 290 – 294.
[45] See *Emmott v MWP.*
[46] See *Esso v Plowman.*
[47] See Adlercreutz, *Avtalsrätt* I pp. 148 – 149; Ramberg & Ramberg, p. 247; Lindskog, p. 101.
[48] See Hobér, p. 127; Heuman (2003) p. 77.
[49] See Ramberg & Ramberg, p. 247; UNIDROIT Principles 5 chap. 2 section *Third Party Rights*; also note Heuman, pp. 97 -98 discussing who can obtain the right to litigate and NJA 1955 s 500.

arbitration institutions and (v) third parties that are participating in the proceedings (such as witnesses, experts, secretaries, assistants to lawyers or experts etc.).[50]

The duty of confidentiality for legal councils consists of an obligation not to disclose any information or material received by the client or the arbitration institution. Information obtained by participating witnesses or experts are included in the obligation.[51] The fact that arbitrators are bound by the obligation of confidentiality arises not only from their ethical obligations as decision-makers or judges, but sometimes also from the arbitration agreement between the parties or from the institutional arbitration regulations that are applicable to the arbitral proceedings.[52] The arbitration institutions that are used for the proceedings do have their own regulations of confidentiality[53] and the arbitral proceedings remain confidential, unless the parties bilaterally agree to make the procedure official and do not include third parties in the proceedings.[54]

According to general principles of contract law it is only the parties that the confidentiality agreement binds.[55] Some academics and practitioners argue that it is possible for parties to bind third parties to their arbitration agreement, but also bind them to confidentiality if the agreement includes a paragraph of confidentiality.[56] As discussed by Redfern and Hunter, there are many ways for the parties to bind third parties to their agreement:

> Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession.[57]

[50] See Paulsson & Rawding, pp. 316 -317; Smeureanu, p. 133.
[51] See Smeureanu, p. 138; The duty arising from the ethical regulations by national bar associations, e.g. Section 2.2. Code of Professional Conduct, or from the attorney-client privilege, see Henkel, p. 1096.
[52] See Smeureanu, pp. 141-142; Moses, p. 49.
[53] See Paulsson & Rawding, pp. 318 – 319; compare with Art. 46 SCC-ArbR, Art. 30 LCIA-RoA, and Art. 6 Appendix I and Art. 1 Appendix II ICC-RoA.
[54] See Smeureanu, pp. 147-148.
[55] See Heuman (2003), p. 77.
[56] See Moses, pp. 3-4: *"Confidentiality is provided in some institutional rules, and can be expanded (to cover witnesses and experts, for example) by the parties' agreement to require those individuals to be bound by a confidentiality agreement."*.
[57] See Redfern & Hunter, p. 99.

In Sweden, unlike many other countries, the arbitration agreement does not have to be a written contract by law; parties may enter an agreement orally or even by conduct even if it rarely happens.[58] According to Hobér, the way of conducting an arbitration agreement is therefore closely linked to the idea that even a third party may be bound by the agreement.[59]

That the arbitration agreement can extend and also include third parties is a misinterpretation, according to Müller, who argues that the only way to safeguard that confidentiality is enforced on all participants in the arbitral proceedings is to enter a confidentiality agreement with all of them:

> Comme la convention d'arbitrage ne lie pas des tiers, les parties craignant la violation de la confidentialité par de tells personnes devraient solliciter – ou, en cas d'expert ou d'employé, exiger – la signature d'un accord de confidentialité. […] Il ne suffirait par contre pas de simplement étendre les règles sur la confidentialité relatives au contrat principal car ce dernier ne lie que les parties au contrat et non pas des tierces personnes appelées à intervenir dans le cadre de l'arbitrage comme par exemple des témoins.[60]

The confidentiality of the proceedings might be protected even though the parties have not entered a confidentiality agreement. If the parties have agreed, in their arbitration agreement or by concludent action, on using institutional regulation the confidentiality might be protected depending on which institutional regulation they are referring to. In procedures governed by the SCC Arbitration Rules, however, the proceedings are not protected by confidentiality. The SCC Arbitration Rules only put a duty of confidentiality on the arbitrators and the SCC itself but do not include other participants of the arbitral proceeding.[61]

---

[58] See SOU 1994:81 p. 95; Prop. 1998/99:35 p. 67; Heuman (2003), p. 30; Hobér, pp. 91 & 96; Madsen, p. 70.

[59] See Hobér, p. 133; compare with Noussia, p. 152 who discusses possibilities for a third party to invoke in the arbitration proceedings.

[60] See Müller p. 239: *"Since the arbitration agreement does not bind upon third parties, the parties who fear a breach of confidentiality by such persons should require – or, in case of an expert or employee, demand – a signing of a confidentiality agreement. […] However, the idea to extend the confidentiality of the arbitration agreement would not be helpful enough because the agreement binds only upon the contracting parties and is not enforceable against third parties in the arbitration such as witnesses.*" (Translation by the writer).

[61] Section 46 SCC-ArbR, compare with the Art. 30.1 LCIA-RoA: *"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*

3.3 The Confidentiality Agreement's Limitation in Swedish Legislation

The Swedish Arbitration Act does not provide any regulation on confidentiality between the parties. The Section 1-6 of the Arbitration Act (under the title "*The Arbitration Agreement"*) mainly constitutes the basic regulations of how an agreement can be conducted and its legal effects. The Swedish standpoint on the duty of confidentiality is therefore based upon case law. The standpoint in Sweden, uttered by the case law and above all in *Bulbank*[62], is that confidentiality cannot govern the relationship between the parties to arbitral proceedings without an agreed confidentiality agreement by the parties:

> Mot bakgrund av det anförda finner HD att part i ett skiljeförfarande inte kan anses bunden av tystnadsplikt, såvida inte parterna har träffat överenskommelse därom.[63]

So what is protected by the Swedish legislation? There are no regulations in regulating confidentiality agreements, but Swedish legislation provides confidentiality and secrecy under certain circumstances. This is mainly provisioned by two acts; the Swedish Act on Protection of Trade Secrets and the Swedish Public Access to Information and Secrecy Act. Whilst the Arbitration Act and Act on Protection of Trade Secrets are applicable on the arbitral proceedings independently from judicial proceedings, the Public Access to Information and Secrecy Act is only applicable to disputes settled by a national court.

The concept of a trade secret is defined in the Act on Protection of Trade Secrets. In order for the Act on Protection of Trade Secrets to be applicable three objective necessary prerequisites that define a trade secret needs to be met: firstly, the information concerns the business or the industrial relations of a person conducting business or industrial activities; secondly, the person wants to keep the information

---

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.".

[62] *See Bulbank.*

[63] See *Bulbank,* p. 552: *"In view of the foregoing, the Supreme Court holds that a party to arbitration proceedings cannot be deemed bound by a confidentiality undertaking, unless the parties have agreed thereon specifically."* (Translation by SCC)*;* compare to Lindskog, p. 122: *"The principle of confidentiality does not rule the relationship between the parties if they have not expressively agreed upon such an obligation."*.

secret; and finally, a disclosure or publication would be likely cause damages to the trader from the point of view of competition.[64] The definition is limited to unauthorised disclosure or publication of a trade secret.[65] If a violation of confidentiality does occur it can be remedied with damages.[66] This is the only damages provision applicable to arbitration in the Act on the Protection of Trade Secrets and covers the situations when a person publishes trade secrets on another person's business or industrial activity that it has received through business transactions in confidentiality. Thus, the provision does not penalise a legal confidentiality but rather the contractual agreement entered by the parties.

An arbitration award must be challenged and tried at a national court in order for the Public Access on Information and Secrecy Act to be applicable.[67] The Swedish Freedom of the Press Act ensures all Swedish citizens the right to access all obtainable documents. The fundamental law established, and thereby protects, the principle of public access to public records.[68] This provision is limited. Documents can be protected by secrecy if it is advocated by an individual's personal and economical interest.[69] However, there must be legislative support for the secrecy of documents in order to keep the information handed in to the authorities confidential. A legal provision in the Public Access on Information and Secrecy Act states that documents in judicial proceedings on business and operating relations are privileged with confidentiality if a party can be assumed to suffer a considerable injury if the information would not be concealed. The necessary prerequisite "*considerable*" significantly impedes the range of disputes that are covered by the protection of the paragraph.[70] If a violation of the provision is committed, the breach will be penalised according to the Swedish Penal Code.[71]

[64] See 1 § SAPTS.
[65] See 2 § SAPTS.
[66] See 6 § SAPTS.
[67] According to Section 43 SCC-ArbR is a challenge of the award is to be decided by a Swedish Court of Appeal; see Lindskog, pp. 1039 – 1041 for further commentary.
[68] See 2 chap. 1 § SFPA.
[69] See 2 chap. 2 § 6 p SFPA.
[70] See 36 chap. 2 § PAISA.
[71] See 20 chap. 3 § SPC for the legal provision of penalisation.

The Swedish Code of Judicial Procedure governs the proceedings if a dispute is tried at a Swedish court. The general rule is that all court hearings are public.[72] The proceedings can be held in camera if it can be assumed that information privileged with confidentiality according to 36 chapter 2 § Public Access on Information and Secrecy Act will be disclosed and it is of exceptional importance that the information remains confidential.[73] The court can decide that information disclosed in camera may not be disclosed after the proceedings.[74] This legal obligation of confidentiality is sanctioned by law and a breach of confidentiality will be fined.[75] The parties can conclude a contract on confidentiality with the court, but it would not be effective if a third party requested access to the documents. Accessing public documents is a fundamental principle of Swedish law, a principle that cannot be negated by a contract.[76]

The Swedish Contracts Act can be applicable, at least analogously, on the confidentiality agreement due to the fact that the Contracts Act in general governs contractual relationships concluded in commercial contexts.[77] The Contracts Act provides sanctions for a contractual breach if the violated clause is of an essential nature for the agreement in whole, such as waiving the contract.[78] It should also be taken into account are the general principles of contract law are applicable on the contractual relationship of the parties. A governmental commission report on the protection of trade secrets proclaims that contractual freedom rules the relation between the parties and is only delimited by the 36 § Contract Act.[79]

[72] See 5 chap. 1 § 1 sentence SCJP.
[73] See 5 chap. 1 § 2 sentence SCJP, note that the proceedings only are held in camera when the part that discloses the confidential information.
[74] See 5 chap. 4 § SCJP.
[75] See 9 chap. 6 § SCJP.
[76] See Fahlbeck, pp. 51, 64 & 74; Tonell, p. 145 n 270.
[77] See Lindskog, s. 91.
[78] See 36 § SCA.
[79] See SOU 2008:63 s. 200.

4 Effects of Disclosing Documents

4.1 Disclosure by a Party to the Arbitral Proceedings

Breaches of confidentiality by a party to an arbitration or confidentiality agreement do occur, even if it might not be that common. The problem with a breach of confidentiality is how to identify, assess and finally penalise the breach. This subchapter will, firstly, examine a breach of confidentiality if an agreement has been entered into by the parties, and following it if there is no such agreement. Finally, it will be studied how a breach of confidentiality would be handled in Sweden.

Identifying a breach of confidentiality is not easy. The burden of proof is according to general principles of procedure placed on the aggrieved party, i.e. the complainant. In order to prove a breach of contract and be entitled damages the aggrieved party needs to show that: (i) an obligation of confidentiality existed between the parties; (ii) that the accused party did commit the breach of confidentiality; (iii) that it was the accused party who published or disclosed the documents to a third party; (iv) that the aggrieved party was caused injuries by the disclosure; and (v) that the caused injuries was "quantifiable and compensable by monetary damages".[80] Thus, the complainant needs to identify the source of disclosure but also the causal link between the disclosure or publication and the harm suffered. If all the criteria's are fulfilled a unilateral disclosure of information by one of the parties can be considered as a breach of confidentiality.[81]

The main difficulties for an aggrieved party is to prove that it was the other party that committed the publication and thereby the breach of confidentiality, but also that the aggrieved party suffered loss due to it. It can be hard to trace the source of a publication due to the number of people involved in the arbitral proceedings. Even if the aggrieved party identifies the source, it still needs to assess the monetary

[80] See Brown, p. 1016.
[81] See Smeureanu, p. 161.

effect of the unauthorized disclosure or publication of the information and provide the arbitral tribunal or national court with a clear calculus of the effects. If the party cannot provide the arbitral tribunal or national court with a clear calculus, the damage award would be in the best-case scenario arbitrary.[82]

The problem with breaches of confidentiality in arbitration is that the arbitral tribunals have not reasoned on the issue. The lack of arisen confidentiality disputes in arbitral tribunals, or in courts for that matter, leads to an undeveloped system of sanctions.[83] General principles of contract law are applicable if there is no institutional regulation or national legislation governing the issue.[84] There are some main sanctions to be considered by the aggrieved party when a breach of confidentiality agreement occurs. Firstly, the aggrieved party may claim annulment of the contract. This is an ineffective demand since an annulment of the contract would give the breaching party full right to further publication. To claim remedial action would also give no result since the damaging breach already occurred.[85] What might be more efficient for the aggrieved party would be to order a stop to any further disclosures, claim monetary damages or combine the two.[86] Logically, there are only two remedies available: an order of stop for further disclosure and monetary damages.[87]

The problem of monetary damages is that it might be hard for the aggrieved party to get proportional compensation for its loss; the rectification by means of monetary damages will seldom be adequate. This is linked to the burden of proof and that the aggrieved party needs to show the existence of a duty of confidentiality and declare all losses that occurred due to the unauthorised publication.[88]

[82] See Brown, p. 1016; Gaillard & Savage, p. 692: *"it will never be easy to establish which party is responsible for the document's release, and it may be difficult for the disclosing party to prove that it suffered loss as a result of any breach by its adversary."*.
[83] See Smeureanu, pp. 160 – 161.
[84] See Redfern & Hunter, p. 4.
[85] See Tonell, p. 86.
[86] See Müller, p. 231; Smeureanu, p. 168.
[87] See Brown, p. 1016.
[88] See Müller, pp. 232 – 233.

In cases when a unilateral disclosure or publication of information has occurred and when no confidentiality agreement is concluded between the parties, the breach of confidentiality largely depends on the *lex loci arbitri*, the attitudes of the arbitral tribunals or national courts.[89] There are only three national legislations at the moment that statutorily orders confidentiality in arbitration.[90]

In Sweden it takes, as discussed in chapter 3, a confidentiality agreement to be able to imply a duty of confidentiality between the parties. Thus, sanctions against violations of confidentiality cannot be remedied without an agreement with provisions on confidentiality.[91] In *Bulbank*[92], the Stockholm District Court reasoned that the disclosure and publication of the award was a material breach of contract[93] and that Bulbank therefore was entitled to terminate the arbitration agreement. The reactions to the court's decision created an outburst in the international arbitration community,[94] a reaction that was somewhat calmed by first the Svea Court of Appeal's decision and later by the Supreme Court of Sweden's decision.

What is noteworthy is that some scholars responses to the outburst on *Bulbank*[95]. Brown criticizes the general view of arbitration practitioners and academics on remedies of breaches of confidentiality:

> It thus seems that arbitration practitioners and scholars want the best of both worlds – an implied duty of confidentiality, which gives arbitration proceedings integrity and a genteel nature, but no serious negative consequences for parties who breach this duty.[96]

Brown goes on to state that if confidentiality should be pictured as an essential element of an arbitration agreement, as some practitioners and scholars state, then a breach of such a duty should also be treated as any other breaches of vital contractual provisions.[97] On one hand to contend a general duty of confidentiality,

[89] See Smeureanu, p. 161.
[90] See Born, p. 2253 n. 20. The exceptions are New Zealand, Spain and Romania.
[91] See Hobér, p. 138.
[92] See *Bulbank,* pp. 542 – 544.
[93] See e.g. The District Court reasoned that confidentiality was implied by the arbitration agreement and the arbitration proceedings. Confidentiality was a general principle of arbitration, just like privacy.
[94] See e.g. Gaillard & Savage, p. 773: *"This decision was unquestionably too severe and has been rightly reversed by the Svea Court of Appeals […]"*; compare to Partasides.
[95] See *Bulbank*.
[96] See Brown, p. 1016.
[97] See Brown, p. 1016.

but on the other hand to neglect effective penalty for breaches of such an obligation is inconsequent according to Müller. Müller even argues that confidentiality is pointless if breaches may occur without being penalized. Müller's conclusion is that arbitration tribunals and national courts need to find sanctions that are discouraging enough for a party not to commit unilateral publication, but at the same time are not so far-reaching that a breach would waive the agreement or the award.[98]

4.2 Disclosure by a Third Party

The arbitral proceedings are privileged with privacy, but whether the principle of privacy does or does not include a duty of confidentiality is an on-going discussion. A general conclusion among scholars is that it depends on *lex mercatoria*, the institutional regulation or *lex loci arbitri*.[99] In Sweden, however, confidentiality is dependent on agreement imposing confidentiality.[100] The person who commits the unauthorised publication needs to be bound by the confidentiality agreement to be able to commit a breach of contract.[101] Whilst some scholars claim that the arbitration agreements can be extended to also include third parties,[102] others argue that is not wise to risk a non-remedial publication by a third party of important business secrets due to the lack of a confidentiality agreement.[103]

The general principles of contract law, the main source to rely on when the opinion is unanimous in the international arbitration community, proclaim that the agreement only binds upon the parties that have signed the agreement.[104] If no agreement has been entered, there is no duty for either of the parties or third parties participating to keep the documents or information confidential. The lack of a confidentiality agreement when documents are disclosed would lead to a non-controversial publication and not give the aggrieved party right to damages for the aggrieved party. Academics and practitioners therefore advise the arbitration parties

[98] See Müller, pp. 231 – 232.
[99] See Born, pp. 2252 – 2254; compare with Noussia's discussion on transnational arbitral law, Noussia, pp. 148 – 153.
[100] See Chapter 2 *"Privacy and Confidentiality"* for further reading.
[101] This principle comes from the decision in *Bulbank* but is also argued by Müller, p. 228.
[102] See Noussia, p. 152.
[103] See e.g., Paulsson & Rawding, p. 319; Müller, pp. 239 – 240; Tonell, p. 63.
[104] See Adlercreutz, *Avtalsrätt* I pp. 148 – 149; Ramberg & Ramberg, p. 247.

to enter supplementary confidentiality agreements with all participating third parties and thoroughly consider asking a third party who does not agree to entering a confidentiality agreement.[105]

An interesting question arising from a disclosure by a third party is if the disclosure could make a party to the arbitration responsible. If B has disclosed information on A to X in order for X to make a better witness statements or expert opinion, could a party (B) be held responsible for a third party's (X) disclosure? What first must be studied is if any agreement has been entered into that imposes confidentiality on the parties and if any exceptions to the duty of confidentiality are at hand. A penalisation of a breach of confidentiality would include non-pecuniary damages. The general rule in Swedish contract law is that an aggrieved party in a contractual relationship can only be compensated for economic damages and not non-pecuniary damages. However, some non-pecuniary damages, such as repute and goodwill, can be compensated even in a contractual relationship according to the general principles of law of damages.[106]

[105] See Brown, p 1024 ; Müller, p. 239, Smeueanu, pp. 150 - 151.
[106] See Ramberg & Ramberg, p. 239; Tonell, p. 117; Compare to Art 7.4.2(2) UNIDROIT Principles.

5 Analysis

5.1 The Possibility for a Party to Publish Witness Statements

Leaving the issue of confidentiality unsettled is dangerous for the parties when entering an arbitration agreement due to the uncertain outcome if publication would occur. This subchapter will answer to question (i): can A publish the witness statement without penalisation if it is not bound by a confidentiality agreement?

The uncertainty of leaving the confidentiality issue unsettled is based on the vagueness of what a publication would result in and what remedies that could be effective or even possible. The answer to these questions depends on whether the institutional regulation or the national legislation regards confidentiality or not.

As thoroughly examined above, the Swedish standpoint is that the agreement between the parties governs the duty of confidentiality. The parties can therefore publish information and material if not prohibited by an agreement. It is thereby clearly stated that privacy and confidentiality are not dependent on each other. These conclusions, reasoned by the Supreme Court of Swedish in *Bulbank*[107], must logically also apply to the parties in relation to the third parties who participate in the proceeding. Thus, a party cannot be awarded damages if publishing a witness statement when the party has not entered a confidentiality agreement with neither the other party nor the witness. On the other hand, the court needs to respect the legal provisions provided by national legislation on confidentiality. If a party would publish confidential information that was confidential according to Swedish legislation, the disclosure or publication would be a breach of law and result in awarded damages.

Confidentiality has been questioned as a general principle of arbitration since *Esso v Plowman*[108] and *Bulbank*[109] finally settled the matter; confidentiality is not a

[107] See *Bulbank*.
[108] See *Esso v Plowman.*

general principle of arbitration. Thus, a disclosure of a witness statement by a party that is not bound by the duty of confidentiality by agreement, or in a provision stated in national legislation or in an institutional regulation cannot be awarded damages.

5.2 The Effects of a Disclosure when Entered into a Confidentiality Agreement

The duty of confidentiality binds upon B if B has entered a confidentiality agreement with A and a publication by B would be a breach of agreement, but can that duty be extended to also include a third party that one of the parties has called in the arbitral proceedings as a witness? In this subchapter the thesis will examine and answer to question (ii) could B be held responsible for X's unauthorised disclosure?

It is essential to highlight that the third party is not bound by the duty of confidentiality if there is no confidentiality agreement governing the relationship between the parties and the participating third party. The lack of regulation on confidentiality between a third party and the arbitration parties would lead to that a publication of confidential information by a third party would not be penal. In contrast, the aggrieved party would not be able to publish the witness statement as a reaction to the third party's publication without risking damages if the parties have entered a confidentiality agreement. The confidentiality agreement between the arbitration parties would penalise the publication if the published witness statement concerned confidential information on the other party or could be held as material or information disclosed to the arbitral proceedings.

For example, if A and B have entered a confidentiality agreement, Agreement I, this agreement binds upon A and B, not on X. If B enters a confidentiality agreement with X, Agreement II, the agreement creates a contractual duty of confidentiality between B and X. It is of importance to note that the two agreements are independent from each other and regulate two different contractual relations. A

[109] See *Bulbank.*

cannot claim damages due to a breach of contract when X publishes confidential information since A is not a party to the agreement that binds upon X.

Further, A could not claim damages of B if A had given its consent, regarding the disclosure of the confidential information, to B according to the Tournier principles and general principles of contract law. A would, however, be able to bring action for damages against B due to the breach of the confidentiality agreement if A has not given consent to disclose the information to X. B could therefore not be held responsible for X's disclosure. However, B could be held responsible, if A did not consent to the disclosure or publication of the confidential information by B to X, for a breach of agreement.

Finally, would B be entitled to claim damages from X, if A has brought actions against B and B has been penalised with damages? If B and X have entered a confidentiality agreement, X would be obliged not to disclose the information disclosed to X by B. X's publication of the confidential information or material would thereby be a breach of the confidentiality agreement between B and X, and B would accordingly be entitled to claim damages of X for the injury X's disclosure caused B. However, the only claim B could set forward would be a non-pecuniary damage, since its only repute and possibly goodwill that has been damages by X disclosure. Non-pecuniary damage is not recognised by Swedish legislation as an applicable damage in cases of breaches of agreements except if the aggrieved party has suffered loss due to lost goodwill or repute. B would therefore have to base its cause of action on loss of repute to be able to receive non-pecuniary damage.

An agreement binds upon the parties who have entered the agreement. Therefore, it is not possible for B to be held responsible for X unauthorised publication of the information, but B can be held responsible for its disclosure to X of the information if A has not given consent to such disclosure. The parties should enter confidentiality agreements with all participating third parties or between them stipulate that the arbitration party, who called the third party to participate in the proceedings, will be held responsible for an unauthorised disclosure committed by the third party.

5.3 Breaching the Confidentiality Agreement by a Disclosure

A publication by the party in conflict with the confidentiality agreement would, according to general principles of contract, result in a breach of agreement. It is difficult, however, to prefigure if the breach of confidentiality would result in awarded damages. As a final question to debate, the thesis will examine (iii); what would happen if A published documents even though the disclosure or publication was a breach of confidentiality.

It is challenging for an aggrieved party to receive damages even if an unauthorised publication has occurred due to the burden of proof, the number of possible leaks and the complexity of calculating the actual damage of a publication. It is, however, an unsustainable situation when a party can disclose confidential acts from a procedure without being penalised damages due to difficulty for the aggrieved party to prove its calculus.

The reactions from scholars to the decision reasoned by the Stockholm District Court articulates an inconsistent view upon breaches of confidentiality; on one hand confidentiality is by some claimed to be a fundamental and important principle of arbitration and is included in the arbitration agreement, but on the other hand an agreement that does not subordinate to the general principles of contract law. It is an illogical standpoint and one of the main factors that problematizes the efficiency of penalising unauthorised publications and disclosures. If an unification cannot be reached regarding penalisations of breaches of confidentiality an inconsistency will continue to govern the duty of confidentiality in arbitration, due to the dependency on the national courts and its legislation. Arbitration is, as mentioned previously, an international procedure and is formed by its own case law and institutional regulations. Thus, the arbitration community has the possibility to create an unification and wipe out the last uncertainties.

The uncertainty still remains considering penalisation on breaches of confidentiality since not that many disputes on breach of confidentiality agreements have been

judged by national court or arbitral tribunals. Müller, as previously mentioned in the thesis, argued that it would be meaningless to obtain a duty of confidentiality if a breach of the duty goes unpunished but that waiving an award if too far-reaching. A conclusion that can be drawn from scholars' conclusions is that confidentiality is not such an important part of an arbitration agreement that a breach on such a clause could waive the contract and thereby also the award. Such an argumentation is controversial since some national legislations protect confidentiality and sees it as a general rule of arbitration. The Stockholm District Court built its decision on the reasoning that confidentiality was to be seen as a general principle of arbitration and an essential part of the arbitration agreement. Thus, a breach of confidentiality was a severe breach of contract and according to general principles of contract a legitimate cause for waiving the agreement and the award. This reasoning was, according to prominent scholars, too severe. Noteworthy is that both the Svea Court of Appeal and Supreme Court found that confidentiality was not a general principle of arbitration and therefore not a part of the arbitration agreement, but neither of the courts opposed the waiving of the contract if a breach of a fundamental prerequisite in the contract occurred.

The issue of an actual breach of a confidentiality agreement therefore still remains unsettled, at least in Sweden. The international community of arbitrators and practitioners has opposed a solution of waiving the agreement and thereby also the award. Such a refusal negates a general principle of contract. What is needed is a uniformity of confidentiality, not only in the arbitral proceedings but also after a pronounced award since that is when it is needed the most.

6 Conclusions

This thesis' purpose was to examine the duty of confidentiality when divulging documents produced in arbitral proceedings after an award. An arbitration party's duty of confidentiality depends, primarily, on institutional regulations and the agreement and, secondarily on the national legislation and case law.

Parties can easily regulate the duty of confidentiality between them by concluding a confidentiality agreement. Possibilities to make exceptions to confidentiality or to waive an agreement are restricted to general principles of contract law and the Tournier principles. It is therefore easy to discover an unauthorised disclosure. However, the problem for an aggrieved party is not only to know what sanctions that are applicable on the breach but also to fulfil the burden of proof and receive monetary damages from the breaching party.

The grey-zone concerning the third parties, their duty of confidentiality and in what ways a disclosure or publication can be penalised, is alarming. Arbitration parties should consider including a paragraph in the confidentiality agreement that holds the party who calls a third party to the arbitration responsible for the third party's actions and disclosures. By including such a paragraph in the agreement the party disclosing the information and material to the third party could be held responsible even if the other party gave its consent. Another solution would be that the parties enter confidentiality agreements with all third parties to the proceedings.

The only certainty is that the status of confidentiality in arbitration and the penalisation of a breach remains unsettled. It is therefore difficult to say what results a disclosure of confidential documents would lead to. The burden of proof makes it hard for the aggrieved party to obtain damages for all the injuries that the disclosure leads to. The lack of case law and the difference between the national legislations contributes to a vagueness on what is applicable in the particular case. This uncertainty is a negative aspect of the arbitral proceedings and parties should be aware of the uncertainty when drafting and entering arbitration agreements.

Table of Litigations and Institutional Rules

Governmental Publications

SOU 1994:81, *Ny lag om skiljeförfarande*, Ministry of Justice [Cite: SOU 1994:81].

SOU 2008:63, *Förstärkt skydd för företagshemligheter*, Swedish Government Official Reports, Ministry of Justice [Cite: SOU 2008:63].

The Swedish Act on the Protection of Trade Secrets (1990:409) [Cite: SAPTS].

The Swedish Arbitration Act (SFS 1999:116) [Cite: SAA].

The Swedish Code of Judicial Procedure (SFS 1942:740) [Cite: SCJP].

The Swedish Contracts Act (SFS 1915:218) [Cite: SCA].

The Swedish Freedom of the Press Act (SFS 1949:105) [Cite: SFPA].

The Swedish Penal Code (SFS 1962:700) [Cite: SPC].

Prop. 1998/1999:35, *Ny lag om skiljeförfarande,* Government Bill [Cite: Prop. 1999/1999:35].

The Swedish Public Access to Information and Secrecy Act (SFS 2009:400) [Cite: PAISA].

International Rules of Arbitration Institutions

ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions, 2005, Australian Centre for International Commercial Arbitration [Cite: ACICA-ArbR].

Arbitration Rules of the Singapore International Arbitration Centre, 2010, Singapore International Arbitration Centre [Cite: SIAC-ArbR].

Arbitration Rules of the United Nations Economic Commission for Europe [Cite: ECE-ArbR].

CIETAC Arbitration Rules, 2012, China International Economic and Trade Arbitration Commission [Cite: CIETAC-ArbR].

Code of Professional Conduct for Members of the Swedish Bar Association, Swedish Bar Association, 2008, Online recourse: http://www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/Code_of_Professional_Conduct_with_Commentary.pdf [Cite: Code of Professional Conduct].

Commercial Arbitration and Mediation Centre for the Americas' Arbitration Rules, 1996, Commercial Arbitration and Mediation Centre for the Americas [Cite: CAMCA-ArbR].

The ICC Rules of Arbitration, 2012, International Chamber of Commerce [Cite: ICC-RoA].

International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), 2009, American Arbitration Association [Cite: AAA-ArbR].

KLRCA Arbitration Rules, 2012, Kuala Lumpur Regional Centre for Arbitration [Cite: KLRCA-ArbR].

The LCIA Rules of Arbitration, 1998 [Cite: LCIA-RoA].

SCC Arbitration Rules, 2010, Arbitration Institute of Swedish Chamber of Commerce [Cite: SCC-ArbR].

The UNCITRAL Arbitration Rules, 2010, United Nations Commission on International Trade Law [Cite: UNCITRAL-ArbR].

The UNIDROIT Principles of International Commercial Contract, 2010, International Institute for the Unification of Private Law [Cite: UNIDROIT Principles].

The WIPO Arbitration Rules, 2002, World Intellectual Property Organization [Cite: WIPO-ArbR].

Table of Cases

G. Aïta c A. Ojjeh, Cour d'appel de Paris (1Chambre suppl.), 18 February 1986, restated in Rev. de l'Arb. 1986, No. 4, pp. 583-584. [Cite: *Aïta v Ojje*].

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

Bulgarian Foreign Trade Bank Ltd.) v A.I. Trade Finance Inc., T 1881-99, 27 October 2000 (NJA 2000 s. 538) (Translation by the SCC of the judgement by the Swedish Supreme Court, view the entire judgement on http://www.arbitration.sccinstitute.com/files/108/1083535/T%201881-99_eng%20English.pdf) [Cite: *Bulbank*].

Dolling Baker v Merrett [1991] 2 All ER 890 [Cite: *Dolling Baker*].

Emmott v Michael Wilson & Partners LTD [2008] EWCA Civ 184 [Cite: *Emmott v MWP*].

Esso Australia Resources Ltd and Others v The Honourable Sidney James Plowman and others (1995) 183 C.L.R. 10 [Cite: *Esso v Plowman*].

Hassneh Insurance Co of Israel v Mew [1993] 2 Lloyd's Rep 234 [Cite: *Hassneh v Mew*].

NJA 1955 s 500.

Tournier v National Provincial and Union Bank of England [1924] 1 KB 461 [Cite: *Tournier v Bank of England*].

United States of America v Panhandle Eastern Corp., 118 F.R.D. 346 (D. Del. 1988) [Cite: USA v Panhandle].

Bibliography

Literature

Adlercreutz, Axel & Gorton, Lars, *Avtalsrätt I*, 13., [rev.] edn., Juristförlaget, Lund, 2011 [Cite: Adlercreutz & Gorton].

Born, Gary B., *International commercial arbitration*, Vol. 2, Kluwer, Alphen aan den Rijn, 2009 [Cite: Born].

Fahlbeck, Reinhold, *Lagen om skydd för företagshemligheter: en kommentar och rättsöversikter*, 2., [rev.] edn., Norstedts juridik, Stockholm, 2004 [Cite: Fahlbeck].

Gaillard, Emmanuel & Savage, John (red.), *Fouchard, Gaillard, Goldman on international commercial arbitration*, Kluwer Law International, The Hague, 1999 [Cite: Gaillard & Savage].

Heuman, Lars, *Skiljemannarätt*, 1. edn., Norstedts juridik, Stockholm, 1999 [Cite:Heuman].

Heuman, Lars, *Arbitration law of Sweden: practice and procedure*, Juris Publishing, Huntington, N.Y., 2003 [Cite: Heuman (2003)].

Hobér, Kaj, I*nternational commercial arbitration in Sweden*, Oxford University Press, Oxford, 2011 [Cite:Hobér].

Madsen, Finn, *Skiljeförfarande i Sverige: en kommentar till lagen (1999:116) om skiljeförfarande och till reglerna för Stockholms handelskammares skiljedomsinstitut*, 2. edn., Jure, Stockholm, 2009 [Cite: Madsen].

Moses, Margaret L., *The principles and practice of international commercial arbitration*, Cambridge University Press, Cambridge, 2008 [Cite: Moses].

Noussia, Kyriaki, *Confidentiality in international commercial arbitration: a comparative analysis of the position under English, US, German and French law*, Springer, Heidelberg, 2010 [Cite: Noussia].

Lindskog, Stefan, *Skiljeförfarande: en kommentar*, 2., [rev.] edn., Norstedts juridik, Stockholm, 2012 [Cite: Lindskog].

Loh, Quentin S. O, & Edwin P. K. Lee., *Confidentiality in Arbitration: How Far Does It Extend?*, (Online), Singapore: Academy Pub., Singapore, 2007, Available: GoogleBooks [Cite: Loh & Edwin].

Smeureanu, Ileana M., *Confidentiality in Commercial Arbitration*, Kluwer Law International, Alphen aan den Rijn, 2011 [Cite: Smeureanu].

Tonell, Magnus, *Sekretessavtal: och det rättsliga skyddet för företagshemligheter*, Jure, Stockholm, 2012 [Cite: Tonell].

Ramberg, Jan & Ramberg, Christina, *Allmän avtalsrätt*, 8., [rev.] edn., Norstedts juridik, Stockholm, 2010 [Cite: Ramberg & Ramberg].

Redfern, Alan, Blackaby, Nigel, Partasides, Constantine & Hunter, Martin, *Redfern and Hunter on international arbitration*, 5. edn., Oxford University Press, Oxford, 2009 [Cite: Redfern & Hunter].

Articles

Bagner, Hans, *Confidentiality – A Fundamental Principle in International Commercial Arbitration?*, (2001) 18 J. Int. Arb. 2, 243. Kluwer Law International. Accessed May 15 2013. [Cite: Bagner].

Bagner, Hans, *Confidentiality In Arbitration – Don't Take It For Granted*!, 15 Mealey's Int'l Arb. Rep. 12, 52, (2000). Google Scholars. Accessed May 22 2013. [Cite: Bagner (2000)].

Bond, Stephen, *Expert Report of Stephan Bond Esq in Esso/BHP v Plowman*, 11 Arb. Int. 3, 273, London, (1995). Kluwer Law International. Accessed May 15 2013. [Cite: Bond].

Boyd, Stewart, *Expert Report in Esso/BHP v Plowman*, 11 Arb. Int. 3, 265, London, (1995). Kluwer Law International. Accessed May 15 2013. [Cite: Boyd].

Brown, Alexis C., *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 Am. U. Int'l L. Rev., 969, (2001). http://www.wcl.american.edu/journal/ilr/16/brown.pdf. Accessed April 5 2013. [Cite: Brown].

Dessemontet, Francois, *Arbitration and confidentiality*, 7 Am. Rev. Int'l Arb., 299, (1996). http://www.unil.ch/webdav/site/cedidac/shared/Articles/Arbitration%2520%26%2520Confidentiality.pdf. Accessed May 10 2013. [Cite: Dessemontet].

Fortier, Yves L., *The Occasionally Unwarranted Assumption of Confidentialit*y, 15 Arb. Int'l 2, 131, London, (1999). Kluwer Law International. Accessed April 5 2013. [Cite: Fortier].

Henkel, Christoph, *The Work-Product Doctrine as a Means Toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration*, 37 N.C.J. Int'l L. & Com. Reg. 4, 1059, (2012). Available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163285. Accessed May 5 2013. [Cite: Henkel].

Knahr, Christina & Reinisch, August , *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6 L. & Practice Int'l Cts & Tribunals 1, 97, (2007) [Cite: Knahr & Reinisch].

Müller, Christoph, *La confidentialité en arbitrage commercial international: un trompe-l'œil?* 23 ASA Bulletin, 216, (2005). Kluwer Law International. Accessed April 5 2013. [Cite: Müller].

Neill, Patrick, *Confidentiality in Arbitration*, 12 Arb. Int'l 3, 287, London, (1996). Kluwer Law International. Accessed April 5 2013. [Cite: Neill].

Oakley-White, Olivier, *Confidentiality Revisited – Is International Arbitration Losing One of Its Main Benefits?*, 2003 Int'l Arb. L. Rev., 29, [Cite: Oakley-White].

Partasides, Constantine, *Bad New from Stockholm: Bulbank and Confidentiality Ad Absurdum*, 12-13 Mealey's Int'l Arb. Rep. 17, 20, (1998) [Cite: Partasides].

Partasides, Constantine, *Bulbank - The Final Act*, 15 Mealey's Int'l Arb. Rep. 12, 44, (2000). Google Scholars. Accessed May 22 2013. [Cite: Partasides 2000].

Paulsson, Jan & Rawding, Nigel, *The Trouble with Confidentiality*, 11 Arb. Int'l 3, 303, London, (1995). Kluwer Law International. Accessed May 15 2013. [Cite: Paulsson & Rawding].

Sarles, Jeffrey W., *Solving the Arbitral Confidentiality Condundrum in International Arbitration,* AAA's Annual Volume, 18 ed. ADR & the Law, New York. http://www.appellate.net/articles/Confidentiality.pdf. Accessed April 23 2013 [Cite: Sarles].

Smit, Christoph, *Confidentiality in Arbitration*, 11 Arb. Int'l 3, 337, London, (1995). Kluwer Law International. Accessed May 15 2013. [Cite: Smit].

Smit, Christoph, *Expert Report of Professor Hans Smit (in Esso/BHP v. Plowman)*, 11 Arb. Int'l 3, 297, London, (1995). Kluwer Law International. Accessed May 15 2013. [Cite: Smit 1995].