

# “Arbitration and Confidentiality: Illusion or Disillusion?”

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## Plagiat et erreur méthodologique grave

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**List of Abbreviations**

AAA	American Arbitration Association
ABA	American Bar Association
AITF	A.I. Trade Finance
CEPANI	Belgian Centre for Mediation and Arbitration
CPR Rules	English Civil Procedure Rules
IBA	International Bar Association
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
ILA	International Law Association
IISD	International Institute of Sustainable Development
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Agreement
NAFTA FTC	NAFTA Free Trade Commission
TRIPs Agreement	WTO Agreement on Trade-Related Aspects of Intellectual Property
UNCITRAL	United Nation Commission on International Trade Law
US	United States of America
WIPO	World International Property Organization

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## **Introduction – Choice of the subject**

It is well known that the interest for a subject originates from the interest in its content, but mostly from the way it is taught. In my first year of master in law, I decided to choose the module ‘International Trade’. The course of international arbitration particularly drew my attention, as the lecture was very stimulating. Therefore, I would like to take this opportunity to thank Mister Jean-François Tossens and Mister Jan Kleinheisterkamp who gave me the willingness and the inspiration to write the present thesis. Furthermore, arbitration has captivated me because of its continuous state of growth as a private method of settlement of disputes. Over the last few years, arbitration has experienced an increasing success and has evolved as the leading reference for dispute settlement in international trade and business. Yet, the outlines of the arbitral procedure are not clearly defined because of its private character and as a result, it gives space to a greater flexibility than a procedure before the courts. This flexibility allows the practitioners and doctrinal authors to contribute to the multiple debates around key issues of arbitration, and namely concerning the principle of confidentiality. In addition, Mister Tossens gave me the opportunity to participate in the VIS Moot Court of International Commercial Arbitration, edition 2014-2015, which filled my desire to improve my understanding about arbitration. Furthermore, on 20 February 2014, I attended a conference relating to confidentiality in arbitration, which drove me to investigate the topic in greater depth and make my own contribution to the on-going debate.

The aim of the present study is to highlight the key points of the issues of confidentiality in the framework of arbitration. The subject involves various diverging views, which render the issue even more interesting. Given that the topic is very large, our study will mainly focus on specific considerations, mostly based on case law and the current doctrinal thinking.

The study is divided into different chapters, addressing the status and legal basis of confidentiality in international arbitration, the sources and judicial perspectives, the scope and extent of confidentiality, the various exceptions to the principle, and its advantages and means of enforcement.

## Chapter 1. Overview of the current status of confidentiality

For years, arbitration has been used as an effective alternative dispute resolution method because of its speed and expert arbitrators, but especially because of its private and confidential character<sup>1</sup>. Arbitration mainly evolved from a concern of rapidity that lacks in our own state justice, which is completely overwhelmed by judicial delays. This method has experienced an international success, especially in international business, where confidentiality and rapidity are essential features. In 1992, the London Business School conducted a survey on the perception of confidentiality in arbitration. It revealed that American and European corporations that have recourse to arbitration would perceive the principle of confidentiality as an undeniable advantage of this procedure<sup>2</sup>. In fact, the principle of confidentiality is traditionally presented as the cornerstone of the arbitral proceedings, and along with privacy, it is often cited as a main advantage of arbitration over litigation<sup>3</sup>. More and more cases involving well-known companies and individuals choose arbitration because they consider privacy and confidentiality as key elements of the conduct of their business. On the one hand it allows a corporation to control the flow of information, and on the other hand, it avoids damage of publicity from an adverse award. Indeed, the fact that the procedure and the award are confidential enables the parties to face each other in private, behind closed doors and thus prevent to spark a public debate around their dispute that could damage their reputation and benefit their competitors<sup>4</sup>. The confidentiality of arbitral proceedings also ensures that the substance of the proceedings will not be disclosed<sup>5</sup>.

Before arbitration even exists, commercial disputes were brought before the courts and tribunals or resolved by gentlemen’s agreements. These agreements have gradually evolved in more sophisticated procedures involving arbitrators, institutions and operating rules in a more

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<sup>1</sup> M. PRYLES, “The Leading Arbitrators Guide to International Arbitration, Confidentiality (Chapter 19)”, ed. by L. W. NEWMAN and R. D. HILL, Juris Publishing Inc., 2004, p. 416.

<sup>2</sup> H. BAGNER, “Confidentiality – A fundamental principle in International Commercial Arbitration?”, *Journal of international arbitration*, 2001, Vol. 18, Issue 2, pp. 243 – 249.

<sup>3</sup> See Survey question based on those designed by CHRISTIAN BUHRING-UHLE et al., “Arbitration and Mediation in International Business”, The Hague International, Kluwer, 1996 (his survey regarded confidentiality as the third most important advantage of arbitration, out of a list of eleven).

<sup>4</sup> P. ROTHMAN, “Pssst, Please Keep It Confidential: Arbitration Makes it Possible”, *Dispute Resolution Journal*, September 1994, Vol. 49, Issue 3, p. 69.

<sup>5</sup> *Ibid.*, p. 69.

elaborated and supervised framework<sup>6</sup>. Various arbitration institutions have been established in order to manage and control every aspect of the procedure. Arbitration then became the alternative method of dispute resolution *par excellence* in international commercial and investment disputes, allowing a quick decision delivered by expert arbitrators in the framework of a perfectly confidential procedure.

Until the end of the 1980s, this sacrosanct principle has never been contested. Nowadays, however, its large success has been put in doubt, in particular because some of its fundamental principles have been questioned for several years. One of them is the principle of confidentiality. During the last decade, two main schools of thought have developed around confidentiality. The first one denies the existence of an obligation of confidentiality and postulates that such duty would have been asserted for a long time if it really existed<sup>7</sup>. On the contrary, the second one argues in favour of a duty of confidentiality because it assumes that the private character of arbitration and in consequence the confidentiality of the proceedings are *de facto* obvious to the extent that it was not necessary to assert the principle in an explicit way<sup>8</sup>.

However, one may observe that confidentiality is not clearly defined or acknowledged on the national and international level yet, neither enshrined in the institutional arbitration rules. In addition, various national courts have denied the principle on several occasions. Accordingly, it seems manifest today that the former believe in the sacrosanct principle of confidentiality has lost its substance<sup>9</sup>.

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<sup>6</sup> H. BERNSTEIN & J. ZEKOLL, "The Gentleman's Agreement in Legal Theory and in Modern Practice: United States", *American Journal of Comparative Law*, 1998, Vol. 46, pp. 87-110.

<sup>7</sup> O. OAKLEY-WHITE, "Confidentiality revisited: is international arbitration losing one of its major benefits?", *International Arbitration Law Review*, 2003, Vol. 6, Issue 1, p. 29.

<sup>8</sup> C. MÜLLER, "La confidentialité en arbitrage commercial international: un trompe-l'oeil?", *ASA Bulletin* 2/2005 (juin), p. 216.

<sup>9</sup> J.-F. TOSSENS, "La confidentialité de l'arbitrage : valeur cardinale ou poncif ?", in *Arbitrage et confidentialité*, Bruxelles, Bruylant, 2014, p. 23.

## Chapter 2. Legal basis of the principle of confidentiality

The first issue in relation to confidentiality in arbitration concerns its legal basis. Indeed, no consensus has been reached yet on the exact basis of the duty of confidentiality. Since it has been observed that the courts do not systematically honour the confidentiality agreements between the parties to an arbitration, the question arises whether the principle has a legal basis. In fact, there has been no consensus of doctrinal views, and there has been differing judicial attitudes shown<sup>10</sup>. Nevertheless, it is arguable that most scholars and practitioners agree that a presumption of confidentiality – whether implied or explicit – exists between the parties to an international commercial arbitration. However, there is a disconnect between that presumption and the frequent realities of disclosure and publicity imposed by the courts, arbitrators, and sometimes even by the parties themselves<sup>11</sup>.

The present chapter examines the common assumptions and presumptions in relation to the origin of the duty of confidentiality, which is far from settled<sup>12</sup>.

### *Section 1. Confidentiality as an inherent principle of arbitration*

For a long time, it has been agreed that arbitration is the method of first choice for private settlement of disputes. By definition, the term 'privacy' implies that the hearings are held in camera, safe from prying eyes. The private character of the proceedings is commonly accepted as a key principle of arbitration and has been enshrined in most institutional rules and national legislations, unlike the principle of confidentiality, which is not established explicitly. However, the latter could be deduced from the former, since it can be argued that confidentiality derives from privacy. Indeed, the mere fact that third parties are automatically excluded from the procedure implies that the parties to the dispute should not be allowed to disclose information obtained during the proceedings. Furthermore, the duty of confidentiality should not only be respected by the parties, but also by the arbitrators, the counsels, experts, interpreters, and any other person involved in the procedure. Indeed, if one would reveal information outside the procedure, the principle of privacy would be meaningless, as it aims

<sup>10</sup> T. NAKAMURA, "Confidentiality in Arbitration: SVEA Court of Appeal Decision – Is it Good News from Stockholm?", *Mealey's International Arbitration Report*, 1999, p. 24.

<sup>11</sup> Y. FORTIER, "The Occasionally Unwarranted Assumption of Confidentiality", *Arbitration International*, 1999, Vol. 15, Issue 2, p. 131.

<sup>12</sup> A.C. BROWN, "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration", *American University International Law Review*, 2001, Vol. 16, Issue 4, p. 975.

to keep the dispute out of the reach of third parties. In fact, in our opinion, both principles are linked to each other, to the extent that one has no sense without the other. It may therefore be assumed that confidentiality is an implicit obligation that derives from the very nature of arbitration, as a private and confidential method of dispute resolution. As FORTIER observes, "*Those who support and extol confidentiality as one of the defining characteristics of arbitration rely upon this very silence and absence of discussion as proof that the duty exists and is simply taken for granted*"<sup>13</sup>. It means that one may derive the confidential character of arbitration from the mere fact that the legislations and arbitration institutions are silent on the issue. Indeed, arbitration has been developed with the purpose to create an *alternative* to litigation, and thus to offer what the national courts cannot offer, *i.e.* speed, technicality and confidentiality.

Various authors share this view and in particular PH. CAVALIEROS, who considers that confidentiality is widely recognised on the international level as an inherent principle of arbitration<sup>14</sup>. He even describes it as an international commercial usage that belongs to customary law<sup>15</sup>. Similarly, E. LOQUIN argues that the duty of confidentiality is implicitly contained in the arbitration agreement<sup>16</sup>. Accordingly, since the arbitral procedure has been widely presented as confidential and fast, it must be assumed that these principles are key elements of the parties' willingness to avoid litigation before the court. By agreeing to have recourse to arbitration, the parties mutually consent to preserve and comply with their duty of confidentiality. In the same vein, FRASER postulates that "*confidentiality and privacy are supposed to be among the hallmarks of arbitration. By this, it is usually meant that arbitration has an essentially private nature. Not only is the hearing in private with strangers excluded, but the parties, by entering into arbitration agreement, accept a mutual obligation not to disclose or use for any other purposes any documents which are prepared for and used in the arbitration*"<sup>17</sup>.

## ***Section 2. Principle of good faith***

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<sup>13</sup> Y. FORTIER, *op. cit.*, p. 132.

<sup>14</sup> PH. CAVALIEROS, "La confidentialité de l'arbitrage", *Les cahiers de l'arbitrage*, n° 15 décembre 2005/3, n°349, p. 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> E. LOQUIN, "Existe-t-il un principe général de confidentialité de l'arbitrage en droit français ? ", note sous Paris 1ère Ch, C 22 janvier 2004.

<sup>17</sup> D. FRASER, *Confidentiality in Arbitration*, available at [http://www.bakerinfo.com/Publications/Documents/756\\_tx.htm](http://www.bakerinfo.com/Publications/Documents/756_tx.htm)

Some authors try to base the obligation of confidentiality on a principle of good faith<sup>18</sup>. This approach allows a considerable freedom in the appreciation of information that could be revealed in compliance with good faith<sup>19</sup>.

Good faith has further been applied by the case law, notably in *A.I. Trade finance Inc v. Bulgarian Foreign Trade Bank Ltd.* The Swedish Court of Appeal held that the disclosure of information in the framework of the arbitral procedure should be considered as a violation of good faith<sup>20</sup>.

When there is no explicit contractual or statutory provision that provides for a duty of confidentiality, it may be adequate to invoke the principle of good faith, as it allows to bypass the controversy concerning the legal basis of confidentiality. However, it seems to us that the scope of 'good faith' as a source of confidentiality is limited to the extent that it can only be invoked in certain specific situations especially when a party has deliberately violated the principle of confidentiality, with the intent to damage the adversarial party.

### ***Section 3. Contractual provision***

Other authors are more reluctant to assimilate confidentiality with an implied duty of arbitration. This view is supported by SERGE LAZAREFF who has raised some doubts concerning the existence of an implied obligation of confidentiality. The latter held that "*the parties' predilection for the confidentiality of arbitration is doubtless not sufficient to give it the force of a principle*"<sup>21</sup>.

These critical authors argue that a duty of confidentiality may only arise when specifically contracted for by the parties, thus making the party's arbitration agreement the source of the obligation. Consequently, if the parties fail to provide for confidentiality, no such duty exists. In practice, however, it is very common that the parties will insert a specific provision in their agreement or that they will refer to an arbitral institution which provides for an obligation of

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<sup>18</sup> A. BUCHER & P.-Y. TSCHANZ, *International Arbitration in Switzerland* (Basel: Helbing & Lichtenhahn, 1989), p. 88.

<sup>19</sup> H. SMIT, "Breach of confidentiality as a ground for Avoidance of the Arbitration Agreement", *American Review of International Arbitration*, 2000, Vol. 11, Issue 4, p. 574.

<sup>20</sup> J.-F. POUURET & S. BESSON, *Comparative Law of International Arbitration*, London, Sweet and Maxwell, 2007, p. 318.

<sup>21</sup> S. LAZAREFF, "Confidentiality and Arbitration – Theoretical and Philosophical Reflections", in *Confidentiality in Arbitration*, 2009 special supplement, ICC International Court of Arbitration Bulletin, p. 81.

confidentiality in its institutional rules. By doing this, the institutional rules will be an integral part of the agreement that binds the parties. While the drafting of such confidentiality clause enables the parties to protect their documents and information against disclosure – they can contract for whatever extent of confidentiality they desire – BROWN rightly states that it could potentially cause some problems<sup>22</sup>. In practice, the parties enter into negotiations and reach an agreement. This contract primarily deals with the reciprocal obligations of the parties concerning their core business arrangement. At the end of the contract, they often provide for some degree of confidentiality, but it is practically difficult to draft an effective confidentiality clause due to the numerous exceptions articulated in recent judicial holdings<sup>23</sup>. Further, the model arbitration clauses offered by the major arbitration associations do not even mention confidentiality, or sometimes only refer to it without determining its extent<sup>24</sup>. As a result, when parties simply include one of these model arbitration clauses or refer to institutional rules in their business contract, they are likely to ignore the value of a well-defined confidentiality provision. Moreover, arbitration clauses are usually written into business contracts long before a dispute occurs. Thus, it is obvious that even the most sophisticated parties may feel uncomfortable in bringing up possible dispute resolution issues when “sealing a deal”. As FRASER notes, “parties may not want to talk about the funeral while negotiating the terms of the marriage”<sup>25</sup>.

#### ***Section 4. The basis of a duty of confidentiality remains uncertain***

Based on these findings, the question of the foundation of the principle of confidentiality still remains unanswered. Very little critical analysis has been brought to bear on this issue, as may readily be verified by reviewing textbooks on arbitration. In recent years, a handful cases in a number of national jurisdictions have demonstrated that the issue is indeed complex<sup>26</sup>. PAULSSON and RAWDING state that these cases illuminate not only the absence of an explicit absolute duty of confidentiality, but also the following paradox: “if they really thought it through, many parties might find it undesirable for the rule to be as comprehensive as they

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<sup>22</sup> A. C. BROWN, *op. cit.*, p. 989

<sup>23</sup> *Ibid.*; Cfr. *Eso Australia Resources v. Plowman* (1995), 128 A.L.R.; *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.*, SVEA Court of Appeal (Case n°. Y 1092-98), 1998, *Mealey’s International Arbitration Report*.

<sup>24</sup> See for example, standard arbitration clauses for the AAA, ICDR, and ICC, available at [http://www.skadden.com/sites/default/files/publications/Publications2153\\_0.pdf](http://www.skadden.com/sites/default/files/publications/Publications2153_0.pdf)

<sup>25</sup> A. C. BROWN, *op. cit.*, p. 990, quoting D. FRASER.

<sup>26</sup> See Chapter 4.

vaguely suppose it to be”<sup>27</sup>. Thus, according to these authors, a general obligation of confidentiality cannot be said to exist *de lege lata* in international arbitration. At best, it is a duty in *statu nascendi*. In order to create a general rule of confidentiality *de lege feranda*, PAULSSON and RAWDING postulate that the arbitration rules should be drafted so as to create an explicit positive duty on the part of participants in arbitration<sup>28</sup>. But, the problem is that most national legislations have not addressed the issue at all and these national differences generate uncertainty. A solution therefore would be to establish a supranational court to resolve these national differences, but the world has not evolved to this point yet<sup>29</sup>.

Since the question of the foundation of confidentiality remains an open issue, it is preferable for the parties to provide an explicit provision in their agreement in order to ensure a perfect confidential procedure, even if it is obviously uncomfortable to bring such issues on the table when settling a new deal. Thus, LOQUIN is right in asserting that the main feature of arbitration resides in its hybrid nature, namely its contractual and jurisdictional influence<sup>30</sup>.

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<sup>27</sup> J. PAULSSON & N. RAWDING, “The Trouble with Confidentiality”, *Arbitration International*, 1995, Vol. 11, Issue 3, p. 303.

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

<sup>29</sup> K. NOUSSIA, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law*, Berlin, Springer, 2010, p. 140.

<sup>30</sup> E. LOQUIN, “Les obligations de confidentialité dans l’arbitrage”, *Revue de l’arbitrage*, 2006, Vol. 2006, Issue 2, p. 329.

## Chapter 3. Sources

As already mentioned, even if the importance of confidentiality is well recognised in the international arbitral regime, the national and international legislations do not clearly define the principle, its scope and framework. In fact, when national or international rules provide for a duty of confidentiality, these rules are, for the most part, general in nature and application. It means that they tend not to define confidentiality nor do they delineate the nature and extent of its application<sup>31</sup>. The present chapter discusses these rules and distinguishes between the national and international sources.

### *Section 1. International Conventions*

It is surprising to note that there is no international convention in international commercial arbitration that ensures a duty of confidentiality<sup>32</sup>. Indeed, the three major conventions, *i.e.* the New York Convention<sup>33</sup>, the Geneva Convention<sup>34</sup> and the Panama Convention<sup>35</sup> do not provide for such duty. In fact, there are some reasons for this silence. First, if the individual nations are reluctant to codify a duty of confidentiality<sup>36</sup>, it is unlikely that groups of nations could come to a consensus on the issue either. Second, the primary purpose of these conventions is to facilitate the enforcement of international arbitral awards and not to focus on the details of the arbitral process itself. Therefore, they do not provide a source for an obligation of confidentiality<sup>37</sup>.

However, in order to fill in this gap, the International Bar Association (*hereinafter*, IBA) has adopted guidelines relating to various aspects of international arbitration. The IBA adopts rules that are dedicated to arbitration since 1983. More specifically, the rules of evidence established by the IBA allow the parties to an arbitral procedure to agree on the administration of proof. These rules constitute a compromise between the tradition of Civil and Common Law, and create a common ground between two completely different legal

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<sup>31</sup> L. E. TRAKMAN, "Confidentiality in International Commercial Arbitration", *Arbitration International*, 2002, Vol. 18, Issue 1, p. 7.

<sup>32</sup> C. MÜLLER, "La confidentialité en arbitrage commercial international: un trompe-l'oeil?", *ASA Bulletin* 2/2005 (June), p. 217.

<sup>33</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

<sup>34</sup> European Convention on International Commercial Arbitration of 1961

<sup>35</sup> Inter-American Convention on International Commercial Arbitration, of April 30, 1975.

<sup>36</sup> See Section §2.

<sup>37</sup> A. C. BROWN, *op. cit.*, pp. 990-991.

systems. In practice, the parties can integrate these rules in their arbitration agreement, or agree on them at the opening of an arbitration procedure or even during the proceedings<sup>38</sup>.

Article 3.13 of the IBA Rules covers the issue of confidentiality and provides that “*any document submitted or produced by either the parties or non-parties in the arbitration is to be kept confidential by the arbitral tribunal and by the other parties*”. Such document may be used only in connection with the arbitration. This requirement does not apply to documents that are already in the public domain or made public by the parties prior to production in the arbitration. Of course, parties remain free to make their own documents public at any time<sup>39</sup>.

The IBA Rules of Evidence take no position with respect to the confidentiality of non-documentary evidence such as oral testimony (although a transcript recording oral testimony would be subject to confidentiality protection as a document submitted or produced by a non-party).

Finally, the IBA Rules of Evidence also include certain exceptions to this obligation, namely when disclosure is required from a party in order to fulfil a legal duty, to protect and pursue a legal right or to enforce and challenge an award in *bona fide* legal proceedings before a state court or other judicial authority. In order to prevent inadvertent disclosure of documents, tribunals and parties are well-advised to discuss procedures for consideration of confidentiality in any consultation under Article 2.1 of the IBA Rules of Evidence (e.g., proper retention or deletion of evidence following conclusion of arbitral proceedings and any challenge or enforcement proceedings)<sup>40</sup>.

## ***Section 2. National Legislation***

While the principle of confidentiality has been widely cited as the main advantage of arbitration, one observes that its legal effectiveness is in dispute. To date, only one country – New Zealand – has codified a duty of confidentiality, which applies in both domestic and

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<sup>38</sup> D. MATRAY, “Les contraintes légales et les dispositions des règlements”, in *Arbitrage et Confidentialité*, Bruxelles, Bruylant, 2014, p. 49.

<sup>39</sup> IBA Rules on the Taking of Evidence in International Arbitration (2010), available at [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)

<sup>40</sup> Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, 1999, *IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee*, p. 13.

international arbitral proceedings<sup>41</sup>. In the US, for example, neither the *Federal Arbitration Act* nor the *Uniform Arbitration Act* ensures the principle of confidentiality. In fact, the parties or arbitrators are not required to guarantee the confidentiality of the procedures in which they are involved<sup>42</sup>. Similarly, the Belgian national law on arbitration, which forms the sixth part of the Judicial Code, does not address the issue of confidentiality. Even though the law of 24 June 2013 has substantially modified the Belgian national law on arbitration, making it closer to the UNCITRAL Model Law, it does not itself address the issue of confidentiality<sup>43</sup>.

### ***Section 3. Institutional Rules***

Dozens of national and international arbitration institutions promulgate rules on almost every aspect of the arbitral process, but rarely on confidentiality. Even when they do, they do not explicit its scope or extent, or they do it in an inadequate way<sup>44</sup>.

#### ***§1. UNCITRAL Model Rules***

The Arbitration Rules of the United Nations Commission on International Trade Law (*hereinafter*, UNCITRAL Rules) are particularly important because many nations base their local arbitration rules on the UNCITRAL model<sup>45</sup>. However, the UNCITRAL Rules only apply a duty of confidentiality concerning the arbitral award, by determining that “*the award may be made public only with the consent of both parties*”<sup>46</sup>, without referring to a more general principle of confidentiality. Article 38 of the Rules states that “*the hearings shall be held in camera unless the parties agree otherwise*”, but this provision only relates to the privacy of the procedure. Furthermore, the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) summarize the legal situation in holding that “*there is no uniform answer*

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<sup>41</sup> See Arbitration Act of 1996 § 14 (New Zealand), at <http://www.legislation.govt.nz/act/public/1996/0099/latest/whole.html#DLM1075804>; see D. WILLIAMS, “New Zealand: The New Arbitration Act – Adoption of the Model Law with additions”, *International Arbitration Law Review*, 1998, Vol. 1, Issue (6), p. 214; for more information about confidentiality under the New Zealand Arbitration Act 1996, see D. WILLIAMS, “New Zealand: the confidentiality of arbitral proceedings under the New Zealand Arbitration Act 1996”, *International Arbitration Law Review*, 2000, Vol. 3, Issue 2, pp. 24-25.

<sup>42</sup> A. REDFERN & M. HUNTER, *Law and Practice of International Commercial Arbitration*, 4<sup>th</sup> ed., London, Sweet and Maxwell, 2004, p. 30.

<sup>43</sup> See M. DAL, “La nouvelle Loi sur l’arbitrage”, *J.T.*, 2013, pp. 785-795, M. PIERS & D. DEMEULEMEESTER, “The Adoption of the UNCITRAL Model Law encouraging Arbitration in Belgium”, *b-Arbitra*, 2013/2.

<sup>44</sup> See A.C. BROWN, *op. cit.*, p. 992.

<sup>45</sup> A. WINSTANLEY, “London Court of International Arbitration: International Arbitration Rules”, *International Law Review*, 1997, Vol. 1, Issue 1, N6.

<sup>46</sup> UNCITRAL Model Law, Rule 52(5).

*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”<sup>47</sup>.*

## **§2. WIPO Arbitration Rules**

The Arbitration Rules of the World Intellectual Property Organization (*hereinafter*, WIPO Arbitration Rules), a specialized agency of the United Nations charged with developing an international intellectual property system and which specializes in managing international commercial disputes involving intellectual property, provide detailed provisions on the protection of confidential information disclosed by the parties. This is not a surprise because the cases brought before the WIPO typically involve intellectual property or trade secrets that are by nature confidential<sup>48</sup>.

Article 73 of the WIPO Arbitration Rules stipulates that “*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 reasons for it*”. In addition, Articles 74 and 75 of the WIPO Arbitration Rules provide specific conditions for disclosures made during the arbitration procedure and for the disclosure of the arbitral award<sup>49</sup>. When reviewing these rules, it seems clear that confidentiality is the rule and disclosure the exception.

## **§3. ICC Rules**

Surprisingly, the Rules of the International Chamber of Commerce (*hereinafter*, ICC Rules) do not mention any general rule of confidentiality. The reason for this silence is probably that the drafters could not reach a consensus on the issue, given that the ICC Rules

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<sup>47</sup> United Nations Commission on International Trade Law, *UNCITRAL Notes on Organizing Arbitral Proceedings*, p. 13. (See: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> )

<sup>48</sup> R. SENTNER & M. MC LAUGHLIN, “Expectations of Confidentiality in International Arbitration”, *International Arbitration Alert*, May 2010, available at [http://www.nixonpeabody.com/files/IADR\\_Alert\\_3\\_May\\_10.pdf](http://www.nixonpeabody.com/files/IADR_Alert_3_May_10.pdf), p. 2. (publication of Nixon Peabody LLP).

<sup>49</sup> WIPO Arbitration Rules, Art. 73-76, available at <http://www.wipo.int/amc/en/arbitration/rules/#conf2> (effective since 2002)

are intended to apply in numerous States<sup>50</sup>. In addition, it was also due to the problem of agreeing on exceptions and the lack of sanctions available<sup>51</sup>.

However, Article 20.7 of the ICC Rules provides that the arbitral tribunal has the power to “take measures for protecting trade secrets or confidential information”. Usually, the arbitrator proposes to the parties to integrate a confidentiality clause in the terms of reference<sup>52</sup>. Furthermore, Appendice I of the ICC Rules on the statutes of the international court of arbitration provides in its Article 6 that the work of the Court is of confidential nature, which must be respected by everyone who participates in that work in whatever capacity. The scope of this provision has been limited since the United States District Court in *United States v. Panhandle Eastern Corporation* stated that it only relates to the internal workings of the court and not the arbitral tribunal<sup>53</sup>. The Court further considered that even if institutional rules provide for a duty of confidentiality, the public interest should always be fostered<sup>54</sup>.

#### **§4. ICSID Rules**

The International Centre for Settlement of Investment Disputes (*hereinafter*, ICSID) has enacted a specific regulation on the settlement of investment disputes. The ICSID has introduced some degree of flexibility in the application of the duty of confidentiality and this is manifest at the reading of article 32.2 of the ICSID Rules that indicates: “*Unless either party objects, the Tribunal may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal to attend or observe all or part of the hearings, subject to appropriate logistical arrangements*”. However, the regulation stipulates that “*the Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information*”. Furthermore, Article 48(4) of the regulation provides that “*the Centre shall not publish the award without the*

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<sup>50</sup> M. HWANG & K. CHUNG, “Defining the Undefinable: Practical Problems of Confidentiality in Arbitration”, *Journal of International Arbitration*, 2009, Vol. 26, Issue 5, p. 639.

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

<sup>52</sup> E. A. SCHWARTZ, “International Chamber of Commerce: International Arbitration Rules”, *International Arbitration Law Review*, 1997, Vol. 1, Issue 1, N 4-5.

<sup>53</sup> *United States v. Panhandle Eastern Corp*, 119 F.R.D. (D. Del.), 21 March 1988, at 346.

<sup>54</sup> *Ibid.*; see also K. SAUVANT, *Yearbook of International Investment Law*, Oxford, Oxford University Press, 2013, p. 775.

*consent of the parties. The Centre, however, promptly includes in its publications, excerpts of the legal reasoning of the Tribunal “.*

While the ICSID Arbitration Rules regulate the confidentiality obligations of the Centre and its arbitrators<sup>55</sup>, they do not govern the actions of the parties. Indeed, it is not clear whether they are allowed to disclose any documents to the public during or after the proceedings. Basically, one has to decide whether a similar prohibition applies to the parties, most likely stemming from a general underlying notion of confidentiality as part of any arbitral proceedings, or whether one would simply follow a literal opposite approach, deducing therefrom that the confidentiality of the Centre aims at precisely avoiding such obligations to incur upon the parties<sup>56</sup>. This issue has been raised in *Amco v. Indonesia*, in which the Tribunal supports the latter approach by stating that “*as to the ‘spirit of confidentiality’ of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case*”<sup>57</sup>. It implies that the parties are free to publish documents or awards unless they have explicitly agreed upon confidentiality. In fact, a number of ICSID awards have been released unilaterally by one of the disputing parties. Nevertheless, the *Amco* Tribunal made it clear that there may be situations where the freedom of the parties to make information about ICSID proceedings publicly available will be limited<sup>58</sup>.

### **§5. LCIA Rules**

The Rules of the London Court of International Arbitration (*hereinafter*, LCIA) provide an extensive duty of confidentiality. Article 30.1 of the 2014 LCIA Rules stipulates that “*The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration 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 legal proceedings*

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<sup>55</sup> Cfr. Article 48(4) & (5) of the ICSID Arbitration Rules

<sup>56</sup> C. KNAHR & A. REINISCH, “Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise”, *The Law and Practice of International Courts and Tribunals*, 2007, Vol. 6, p. 100.

<sup>57</sup> *Amco Asia Corporation and other v. Republic of Indonesia*, 9 December 1983, ICSID Case N°. ARB/81/1, p. 412, para. 4.

<sup>58</sup> *Ibid.*

before a state court or other legal authority”<sup>59</sup>. Article 30.2 goes further in stating that “the deliberations of the Arbitral Tribunal shall remain confidential to its members...”<sup>60</sup>.

In addition, Article 30.3 indicates that “the LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal”<sup>61</sup>.

It is worth to note that England is one of the few countries that remains committed to a strong duty of confidentiality. Various publications even consider that “**Beyond England**, the current trend in international arbitration is to diminish, or at least question the confidentiality of arbitral proceedings as a whole”<sup>62</sup>.

### §6. CEPANI Rules

CEPANI is the Belgian Centre for Arbitration and Mediation founded in 1969. Until 2013, the CEPANI Rules of Arbitration were silent about confidentiality. However, the confidentiality of arbitration has been traditionally recognized and promoted in Belgium<sup>63</sup>. The general perception is that the issue of confidentiality does not cause frequent or significant problems under the Belgian skies<sup>64</sup>. In 2013, the CEPANI finally decided to rule on the issue of confidentiality, as it is the prevailing view and assumption that the parties choose arbitration with the intention to have their dispute settled behind close doors. The CEPANI adopted a new provision under Article 25, that states as follows: “Confidentiality of the Arbitration Proceedings – Unless it has been agreed otherwise by the parties of there is a legal obligation to disclose, the arbitration proceedings shall be confidential”<sup>65</sup>. However, it does not explicit the scope and extent of the duty.

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<sup>59</sup> Arbitration Rules of the London Court of International Arbitration of 2014, art. 30.1, available at [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx#Article%2031](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2031)

<sup>60</sup> *Ibid.*, art. 30.2.

<sup>61</sup> *Ibid.*, art. 30.3.

<sup>62</sup> N. BLACKABY, C. PARTASIDES, A. REDFERN, M. HUNTER, *Redfern and Hunter on International Arbitration*, 5<sup>th</sup> ed., Oxford, Oxford University Press, 2009, p. 152. ; G. B. BORN, *International Commercial Arbitration*, The Hague, Kluwer Law International, 2009, p. 87.

<sup>63</sup> J.-F. TOSSENS, “Confidentiality and Arbitration, The 2013 CEPANI Rules : The case for an explicit Duty of Confidentiality”, p. 3, available at [http://www.cepani.be/sites/default/files/images/viac-cep-confidentiality\\_and\\_arbitration\\_17\\_jan\\_2014\\_-\\_jf\\_tossens\\_strelia\\_doc\\_2.pdf](http://www.cepani.be/sites/default/files/images/viac-cep-confidentiality_and_arbitration_17_jan_2014_-_jf_tossens_strelia_doc_2.pdf)

<sup>64</sup> J.-F. TOSSENS, “Confidentiality and Arbitration, The 2013 CEPANI Rules : The case for an explicit Duty of Confidentiality”, *op. cit.*, p. 3.

<sup>65</sup> G. KEUTGEN, “Confidentialité”, in *Hommage à Guy Keutgen pour son action de promotion de l’arbitrage*, Bruxelles, Bruylant, 2013, p. 968.

The rules of good conduct for proceedings organized by CEPANI (schedule 3 to the Rules) further confirm the obligation of confidentiality as an explicit and personal duty of the arbitrators. Rule of conduct n° 9 states that "*the arbitrator shall obey the rules of strict confidentiality in each case referred to him by CEPANI*". In addition, Rule of conduct n°10 indicates that "*Awards may only be published anonymously and with the explicit approval of the parties. The secretariat shall be informed thereof beforehand. This rule applies to the arbitrators as well as the parties and their counsel*"<sup>66</sup>. It is further important to note that all CEPANI arbitration proceedings are subject to the same confidentiality obligations. This means that no distinction shall be made between national and international CEPANI arbitration proceedings<sup>67</sup>. However, one issue remains unsolved; the 2013 CEPANI Rules do not specifically organize protection or enforcement measures of the confidentiality rule. As a result, in case of dispute concerning confidentiality, no remedies are available under the CEPANI Rules.

## Chapter 4. Judicial perspectives on confidentiality

In the former chapters, it has been demonstrated that the legal basis of confidentiality in arbitration remains uncertain and that - apart from few exceptions - the principle is not unanimously recognised in the national legislations nor in the institutional arbitration rules. However, it is important to take a look at the case law on this issue given that the courts have the final say. Therefore, the present chapter provides an overview of the leading cases on the confidentiality issue.

### *Section 1. England*

The English case law seems to recognize an implied duty of confidentiality that arises from the nature of arbitration itself, as an inherent principle. In *C. Dolling-Baker v. Merrett*, Lord Justice PARKER held that "*Between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some **implied obligation** on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or*

<sup>66</sup> CEPANI Rules of Arbitration, Schedule III: Rules of Good Conduct for proceedings, available at <http://www.cepani.be/sites/default/files/files/reglement2013-en-arbitrage-3.pdf>

<sup>67</sup> *Ibid.*, p. 5.

*produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer*”<sup>68</sup>. In this case, there was no contention that the documents were confidential. Notwithstanding that, the court observed that neither confidentiality nor privilege are attached to the contents of a document prepared or used in an arbitration. KOURIS therefore postulates that the obligation not to disclose was based purely on facilitating and promoting the private nature of arbitration proceedings without considering whether the contents of the documents were confidential<sup>69</sup>. However, the Lord Justice PARKER emphasizes that certain exceptions could be raised, notably when the circumstances of the case so require<sup>70</sup>.

In *Hassneh Insurance Co. of Israel v. Stuart J. Mew*<sup>71</sup>, the Court considered whether an arbitrating party, in the context of an international arbitration, could disclose the award, its reasons, and other arbitral documents to a third party for the purposes of facilitating settlement discussions with the objective of avoiding proceedings<sup>72</sup>. The English Commercial Court relied largely on *Dolling-Baker* in holding that arbitration proceedings are subject to an implied duty of confidentiality. In particular, Justice COLMAN stated as follows: “*the requirement of privacy must in principle extend to the documents which are created for the purpose of the hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the doors of the arbitration room to that third party. Similarly, witness statements, being so closely related to the hearing, must be within the obligation of confidentiality*”.

## **Section 2. France**

Initially, the French courts and tribunals ruled in favour of a general principle of confidentiality, notably in *Aita v. Ojjeh*, decided in 1986, that involved a party who sought annulment in France of an arbitral award rendered in London. The Court of Appeal not only

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<sup>68</sup> *Dolling-Baker v. Merrett*, English Court of Appeal, [1990], 1 WLR 1205, 15 March 1990, at 1213.

<sup>69</sup> S. KOURIS, “Confidentiality: Is International Arbitration Losing One of Its Major Benefits?”, *Journal of International Arbitration*, Vol. 22, Issue, 2, p. 129.

<sup>70</sup> *Ibid.*, §§ 1213- 1214.

<sup>71</sup> *Hassneh Insurance Co. Of Israel and others v. Mew* (1993) 2 Lloyd’s Rep. 243.

<sup>72</sup> S. KOURIS, *op. cit.*, p. 130.

dismissed the challenge, but also ruled that the annulment proceedings violated the principle of confidentiality and therefore ordered the challenging party to pay a significant penalty to the party who won the arbitration. The court further held that the action of annulment had “caused a public debate of facts which should remain confidential”, and that “the very nature of arbitral proceedings requires that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed”<sup>73</sup>. According to PAULSSON and RAWDING, the reasoning of the Court of Appeal is unsatisfactory because of its absolute position, at the extreme opposite of the spectrum from the US Panhandle Case<sup>74</sup>. On the one hand it does not deem to consider the ‘nature’ of arbitration that calls for confidentiality, and the fact that the parties had so ‘agreed’. On the other hand, it does not articulate any limits to the extent of the duty of confidentiality<sup>75</sup>.

In a more recent case, the Paris Court of Appeal seems to have reconsidered its initial decision. In 2004, the Court held in *Nafimco v. Foster Wheeler Trading Company* that the plaintiff claiming damages for a breach of the confidentiality of arbitration proceedings had to prove the ground for the alleged duty of confidentiality<sup>76</sup>.

### **Section 3. United States**

In contrast with the English case law, the United States do not recognize any duty of confidentiality. A United States federal district Court rendered a major decision on this issue in 1988. In *United States v. Panhandle Eastern Corp.*, the Court found that in absence of explicit agreement by the parties or institutional rules on point, arbitration proceedings are not necessarily confidential<sup>77</sup>. The facts were as follows; the United States government sought the production of documents related to a previous arbitral proceeding in Geneva, conducted under the ICC rules. Given that the arbitration agreement and applicable arbitration rules did not provide for the confidentiality of the proceedings, the Court stated that the government could access the documents. Thus, it failed to recognize any general principle of confidentiality in

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<sup>73</sup> *Aita v. Ojeh*, Court of Appeal of Paris, Judgement of 18 February 1986, *Revue de l'arbitrage*, p. 583; see also A. C. BROWN, *op. cit.*, pp. 975-976.

<sup>74</sup> See Section 3, United States.

<sup>75</sup> P. PAULSSON & N. RAWDING, *op. cit.*, p. 312.

<sup>76</sup> *Nafimco v. Foster Wheeler Trading Company A.G.*, C.A. Paris 1<sup>ère</sup> Ch, 22 January 2004, *Revue Arbitrale*, 2004, p. 646.

<sup>77</sup> *United States v. Panhandle Eastern Corp.*, 118 F.R.D. (D. Del.), 21 March 1988, at 346-350; see also C. S. BALDWIN, “Protecting Confidential and Proprietary Commercial Information in International Arbitration”, *Texas International Law Journal*, 1996, Vol. 31, Issue 3, p. 456.

international arbitration, and under this holding, any duty of confidentiality may only be implied-in-fact<sup>78</sup>. This case shows us that it is important to provide a broad confidentiality clause in arbitration agreements. However, this does not imply that the parties will benefit a better protection. More generally, it would appear that the asserted confidentiality of arbitration cannot, even when a confidentiality clause exists, justify non-compliance with a *subpoena duces tecum* or other judicial order that is based on law<sup>79</sup>.

#### **Section 4. Sweden**

In 1999, the Swedish Court of Appeal reversed a Stockholm City Court decision that had sanctioned *A.I. Trade Finance Inc.* for publishing an arbitral award<sup>80</sup>. The City Court had accepted the existence of an implied obligation of confidentiality arising from arbitration and considered that a breach of that obligation would permit the avoidance of the arbitration agreement. Accordingly, the City Court set aside the final award. However, in appeal, the Court reversed the City Court's decision in relation to the avoidance of the arbitration agreement. In essence, the Court of Appeal rejected the principle that a duty of confidentiality is implied in law, and instead, formulated a new "duty of loyalty" doctrine<sup>81</sup>. In fact, the Court of Appeal considered that although it would not be clear that confidentiality constitutes an implied term stemming from arbitration, a disclosure of the contents of such procedure would be likely to constitute a breach of the duty of good faith or loyalty between the parties<sup>82</sup>. In doing so, the Court noted that the disclosure of the fact of the arbitration is much different than disclosure of a party's trade secrets. Further, in determining which sanction should be applied for such breach, the reason for and the effects of the breach should be considered. In this context, the Court stated that "*It is likely in many cases that the making public of information in arbitral proceedings could be viewed as a breach of the duty of good faith imposed on the parties in relation to each other. In this assessment, great importance should be attached to what kind of information is made public. Thus, it is, for example, likely that information touching on the operations of the parties or its explanation of the action in the arbitration dispute may normally be regarded as more worthy of protection than information*

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<sup>78</sup> *United States v. Panhandle Eastern Corp.*, *op. cit.*, 118 F.R.D. at 351.

<sup>79</sup> H. SMIT, "Confidentiality in Arbitration", *Arbitration International*, 1995, Vol. 11, Issue 3, p. 300.

<sup>80</sup> *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.*, Svea Court of Appeal (Case n°. Y 1092-98), 1998, *Mealey's International Arbitration Report.*, p. 21.

<sup>81</sup> T. NAKAMURA, *op. cit.*, p. 26.

<sup>82</sup> T. COOK & A. I. GARCIA, *International Intellectual Property Arbitration*, Alphen aan de Rijn, Kluwer Law International, 2010, p. 246.

that an arbitration between parties is in progress or information that concerns purely procedural issues of a general nature. Furthermore, it should be taken into account, inter alia, whether there was an acceptable reason for publishing, to what extent the other party has been caused damage by this and, should it occur, whether the information was given with the purpose of harming the opposing party”<sup>83</sup>.

It was predictable that the arbitration practitioners and scholars would not warmly welcome the outcome of this decision. Indeed, the approach of the Swedish Court of Appeal may result in less predictability for the parties, given that a breach of confidentiality shall be determined in light of the circumstances of the case, by taking into account various elements of the arbitral proceedings. On the other hand, BROWN rightly highlights that the Swedish Court’s decision may increase efficiency in international arbitration by encouraging publication of arbitral awards, and thus creating a precedent system<sup>84</sup>. Indeed, the development of jurisprudence will enhance legal certainty and enable the parties to support their arguments on earlier cases.

### ***Section 5. Australia***

The major decision on confidentiality is undoubtedly the Australian High Court’s decision on *Esso Australia Resources Ltd. Et al. v. the Honourable Sidney James Plowman et al.* from 1995. This decision has placed in doubt a number of widely held assumptions as to what constitute the essential features of arbitration, and especially its confidential nature. The decision has generated a rush of academic analysis<sup>85</sup> in light of the High Court finding that while an arbitration is a private arrangement, it is not necessarily confidential<sup>86</sup>. Most international arbitration practitioners noted that *Esso v. Plowman* is a dramatic decision, with significance far beyond the shores of Australia<sup>87</sup>.

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<sup>83</sup> *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.*, *op. cit.*, A1-A2 (1999) ; See also A.C. BROWN, *op. cit.*, p. 987.

<sup>84</sup> A.C. BROWN, *op. cit.*, p. 987.

<sup>85</sup> See A. ROGERS & D. MILLER, “Non-Confidential Arbitration Proceedings”, *Arbitration International*, 1996, Vol. 12, Issue 3, p. 319.

<sup>86</sup> *Esso Australia Resources v. Plowman* (1995), 128 A.L.R., pp. 392-393.

<sup>87</sup> See for example, Y. FORTIER, *op. cit.*, p. 134.

The case is as such notorious that its facts may be stated briefly<sup>88</sup>. The case involved a dispute between Esso and the Australian Minister for Energy and Minerals, concerning the sale of natural gas by two Australian public utility companies. The price of the gas was fixed on the basis of determined formulas in the purchase agreement. Esso tried to obtain an increase of the price of the furnished gas but the public institutions refused to pay and it resulted in an arbitration procedure, as provided in the purchase agreement<sup>89</sup>.

After the request of arbitration was lodged, the Minister for Energy and Minerals, James Plowman, introduced a request against Esso and the two public utility companies. The Minister required to obtain the breakdown of the figures on which Esso founded its increase of price for natural gas. The Minister contended that because he had a public duty to supervise public utilities and the rates they charge for oil supplies, he had a right to inspect documents produced for the arbitration<sup>90</sup>. Therefore, he sought to obtain an order declaring that the information disclosed during the arbitral procedure was not subjected to any obligation of confidentiality. Of course, Esso categorically refused to give these details and based its claim on the commercial sensibility of the information required.

In first instance, Esso's argument was rejected on the basis that public institutions could not be refrained from revealing information to the Minister or a third party on the sole ground that the information was provided in the framework of an arbitral procedure.

In appeal, the High Court of Australia concluded that the documents were not confidential and thus, accessible to the Minister. First, the Court addressed the issue of the private character of arbitration. The Chief Justice Mason of the Court, delivering the judgement of the majority of the High Court in Esso, drew a distinction between privacy and confidentiality. He held that whilst arbitration proceedings were private, it did not follow that a duty of confidentiality was applicable<sup>91</sup>. It appears thus undisputed that arbitration is private in nature. However, the Court announced that confidentiality was not an 'essential attribute' of the arbitral process, and rejected the premise that a duty of confidence must follow an implied

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<sup>88</sup> M. PONGRACIC-SPEIER, "Confidentiality and the Public Interest Exception – Considerations for Mixed International Arbitration", *Journal of World Investment*, April 2002, Vol. 3, Issue 2, p. 235.

<sup>89</sup> *Esso Australia Resources Ltd and consorts v. The Honourable Sydney James Plowman (Minister for Energy and Minerals) and consorts*, High Court of Australia, 7 April 1995, *Revue de l'arbitrage*, Vol. 1996/3, pp. 539-544.

<sup>90</sup> *Esso Australia Resources v. Plowman* (1995), *op. cit.*, p. 391.

<sup>91</sup> X. DONGGEN & S. HUIYUAN, "Dilemma of Confidentiality in International Commercial Arbitration", *Frontiers of Law in China*, Vol. 6, Issue 3, September 2011, p. 407.

right of privacy<sup>92</sup>. The court declared that, contrary to the widespread understanding elsewhere (including England), there is no firm legal basis in contract to support the confidentiality of a commercial arbitration, as distinct from the privacy of the arbitral hearings<sup>93</sup>. In essence, parties could no longer expect that any element of their arbitral proceedings would remain protected by an umbrella of confidentiality. Furthermore, he added that even if a duty does exist by virtue of the parties' contract, it is not absolute<sup>94</sup>. Numerous reasons could legitimate a disclosure in arbitration, especially when a party requires the annulment of the award before a state court, or when it is subject to the public interest exception in the circumstances of the case<sup>95</sup>. In addition, the President stated that such duty can be imposed on parties and the arbitrator, but not on another person, such as a witness.

*Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.* is a second important case judged by an Australian Court<sup>96</sup>. The issues of this case are closely related to those in *Esso*. The arbitration involved Australia and Cockatoo Dockyard Pty. Ltd (*hereinafter*, Codock), and related to the Cockatoo Island, that is located near to Sydney. Australia leased the island to Codock for the operation of a naval dockyard. In 1991, the dock was closed and a dispute arose between both parties, composed of a claim of the Commonwealth of Australia, which alleged that Codock disposed industrial waste in the island and a claim of Codock for the early termination of the contract<sup>97</sup>. At some point in the arbitration, a journalist requested information about toxic waste on Cockatoo Island under the Freedom of Information Act, 1982. Codock claimed that this information was confidential. Australia resisted Codock's allegations on the basis that restrictions on the release of documents concerning Cockatoo Island would impair the free flow of information in society and impinge upon governmental powers<sup>98</sup>. The arbitrator issued several awards on the veil of confidentiality, imposing such obligation on the government. The Court of Appeal found that an arbitrator has no power to make procedural orders imposing an obligation of confidentiality on the government so as to limit the government's duty to account to the public or pursue the public interest.

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<sup>92</sup> *Esso Australia Resources v. Plowman* (1995), *op. cit.*, p. 391.

<sup>93</sup> Editorial, "Decision of the High Court of Australia in *Esso/BHP v. Plowman*", *Arbitration International*, 1995, Vol. 11, n° 3, p. 231.

<sup>94</sup> *Ibid.*, pp. 400-402.

<sup>95</sup> M. PONGRACIC-SPEIER, *op. cit.*, p. 236.

<sup>96</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.*, 36 N.S.W.L.R. 662 (C.A.), 1995.

<sup>97</sup> L. BURGER, note to "*Ali Shipping Corp. v. Shipyard Trogir*", Court of Appeal, Civil Division, 19 December 1997", *Revue de l'arbitrage*, 1998, Issue 3, p. 594.

<sup>98</sup> *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.*, *op. cit.*, p. 664.

For common law systems, the logical strength of the High Court's reasoning suggests that a statutory remedy may be required for England and elsewhere; for arbitral institutions, an express rule on confidentiality should now actively be considered; and for countries outside the common law tradition, their arbitration practitioners might wish to justify the legal basis for confidentiality under their respective legal systems, whether by contract, status, copyright or otherwise<sup>99</sup>.

### ***Section 6. General findings***

The foregoing considerations merit comment. Since the Australian Supreme Court has operated a complete reversal of case law on the principle of confidentiality, the question arises whether it will have an impact on the Anglo-Saxon case law. In other words, should we consider that *Esso* and *Cockatoo Island* are likely to become leading decisions or not?

Concerning the US and Australian position on the issue of confidentiality, it is worth to note that both decisions involved public interests, to which the US and the Australian courts attach special significance. When public interests are at stake, it seems more likely that confidentiality will be set aside. Indeed, one may ask why the consumers and the general public should be denied knowledge of what happens in an arbitration when the outcome clearly affects them? Thus, before leaping to any conclusions, we should wait for a decision that does not imply public interests, and then reconsider our position.

From the English courts' point of view, it seems clear that the principle of confidentiality derives from the private character of arbitration. Regarding the legal nature of this duty, the case law seems to find an anchor point in *Ali Shipping*, where the Judge POTTER postulates that this obligation – even if it is implicit – has a legal basis, and is not only required for the purpose of the efficiency of business. Thus it would not be necessary to consider the 'officious bystander' test and the individual circumstances of each case in order to determine whether a duty should actually be implied as a matter of business efficacy. The duty simply exists and is implied by law as a 'necessary incident' of a definable category of contractual relationship<sup>100</sup>.

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<sup>99</sup> H. BAGNER, "Confidentiality – A fundamental Principle in International Commercial Arbitration?", *Journal of International Arbitration*, 2001, Vol. 18, Issue 2, pp. 243-244.

<sup>100</sup> O. OAKLEY-WHITE, *op. cit.*, p. 31.

Thus, the actual status of the English case law consists in assuming an obligation of confidentiality, implied by law, but subject to exceptions, amongst which one may cite the consent of the parties, a court order, the authorisation of a tribunal, the reasonable necessity of the protection of a party's interest or even the interest of justice<sup>101</sup>.

Reflecting on the potential impact of *Esso* in 1996, PATRICK NEIL makes an interesting remark: “*If some Machiavelli were to ask me to advise on the best method of driving international commercial arbitration away from England, I think that I would say that the second best method would be for the House of Lords to overthrow Dolling-Baker and to embrace the majority judgement of the High Court of Australia in Esso/BHP. This would be to announce that English law no longer regarded the privacy and confidentiality of arbitration proceedings as a fundamental characteristic of the agreement to arbitrate. Lawyers and businessmen in France, Germany, Switzerland and in countries of the Commonwealth and elsewhere would take note and there would be a flight of arbitrations from this country to more hospitable climes*”<sup>102</sup>.

The decision of the English Court of Appeal in *Ali Shipping* was a loud response to the *Esso* Court's deviation from the previously accepted common law. It seems thus that the English Court does not regard the *Esso* decision as a leading decision and continues to preserve a close link between the private and confidential character of arbitration. By doing this, the court gets closer to the notion of arbitration as understood by the civil law scholars and practitioners, most of whom still assert the duty of confidentiality<sup>103</sup>.

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<sup>101</sup> L. BURGER, *op. cit.*, p. 594.

<sup>102</sup> P. NEILL, “Confidentiality in Arbitration”, *Arbitration International*, 1996, Vol. 12, Issue 3, pp. 316-317.

<sup>103</sup> L. BURGER, *op. cit.*, p. 595.

## Chapter 5. Privacy versus Confidentiality

The practitioners and scholars agree on the importance to distinguish between 'privacy' and 'confidentiality' in international arbitration<sup>104</sup>. In fact, the two terms are often used together and sometimes even used interchangeably, but they should actually not be confused<sup>105</sup>.

### *Section 1. Right to privacy in arbitration*

Privacy has been defined as the interest in controlling the gathering and disclosure of personal information about oneself<sup>106</sup>. In the context of arbitration proceedings, privacy means that only parties to the arbitration agreement may attend arbitral hearings and participate in the arbitral procedure<sup>107</sup>. Accordingly, strangers to the arbitration are absent from the arbitral process<sup>108</sup>. Privacy serves to protect the parties' confidences from disclosure to third parties and prevent them from interfering in the arbitral process, for example by making submissions in the arbitration or by seeking to participate in the arbitral hearing<sup>109</sup>.

But how further does it go than that? In particular, COLLINS raises the question as to whether the concept of privacy also prohibits (i) the consolidation of arbitration proceedings, or the holding of two or more arbitration hearings currently, in the absence of agreement by the parties, (ii) the use, for any purpose other than the arbitration itself, of material prepared for the arbitration or disclosed by one party to the other in the course of the arbitration<sup>110</sup>. The answer to these questions will vary depending on what system of law governs the arbitration

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<sup>104</sup> See case note D. KAPELIUK-KLINGER in relation to *Esso Australia Resources Ltd and consorts v. The Honourable Sydney James Plowman (Minister for Energy and Minerals) and consorts*, High Court of Australia, 7 April 1995, *Revue de l'arbitrage*, Vol. 1996, Issue 3, pp. 539-544; see also G. B. BORN, "Chapter 20: Confidentiality in International Arbitration", in G. B. BORN, *International Commercial Arbitration*, 2<sup>nd</sup> ed., The Hague, Kluwer Law International, 2014, p. 2781.

<sup>105</sup> X. DONGGEN & S. HUIYUAN, *op. cit.*, p. 407.

<sup>106</sup> R. WACKS, *Privacy and Press Freedom*, London, Blackstone Press, 1995, pp. 10-21.

<sup>107</sup> G. B. BORN, "Chapter 20: Confidentiality in International Arbitration", *op. cit.*, p. 2781.

<sup>108</sup> The term 'strangers' has been defined by Mr Justice BROOKING in *Esso Australia Resources v. Plowman*, 1994 at p. 12 as "persons whose presence is not necessary or expedient for the proper conduct of the proceedings".

<sup>109</sup> G. B. BORN, "Chapter 20: Confidentiality in International Arbitration", *op. cit.*, p. 2781.

<sup>110</sup> M. COLLINS, *Privacy and Confidentiality in Arbitration Proceedings*, *Arbitration International*, 1995, Vol. 11, Issue 3, p. 321.

in question. Indeed in England, the answer to both questions is likely to be ‘yes’ whereas in other jurisdictions, including the US and Australia, the answer may well be ‘no’<sup>111</sup>.

As said before, the right to privacy is well-established in international arbitration and considered as an implied right which attaches to all agreements to arbitrate as an incident of such contract<sup>112</sup>. However, merely excluding strangers from the hearings does not ensure that the general public will not learn of what went on at the arbitration hearing or that documents prepared for or produced as evidence at the hearing will never be used for purposes unrelated to the arbitration itself<sup>113</sup>. This illustrates the border between privacy and confidentiality.

‘Confidentiality’ is typically used to refer to the parties asserted obligations not to disclose information concerning the arbitration to third parties<sup>114</sup>. Confidentiality encompasses two dimensions; one *ratione materiae* and one *ratione personae*. ‘Privacy’ relates only to the *ratione personae* dimension, to the extent that privacy of the proceedings may entail only the right to keep strangers out, not the obligation to keep secret what occurred in the proceedings<sup>115</sup>. In this context, the principle of confidentiality has a broader scope that embraces both the people involved in the procedure and the documents and information that are produced during the proceedings.

In essence, the purpose of the duty of confidentiality of the arbitral proceedings is to centralize the parties’ dispute in a single forum and to facilitate an objective, efficient and commercially-sensible resolution of the dispute, while also limiting disclosure of the parties’ confidences to the press, public, competitors and others<sup>116</sup>.

## ***Section 2. Multiparty disputes***

Obvious consequences of the right to privacy arise in the framework of multiparty disputes. Let’s assume that A has referred a dispute with B to arbitration and B has in turn referred a dispute with C to another arbitral procedure. Due to the right to privacy, C cannot be present in the arbitration between A and B since C is not party to their arbitration

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<sup>111</sup> See *Esso Australia Resources Ltd v. Plowman*, 1994 1 VR 1

<sup>112</sup> It has been confirmed in *Esso Australia Resources v. Plowman*, 1994, at 1 VR 1.

<sup>113</sup> M. COLLINS, *op. cit.*, p. 323.

<sup>114</sup> G. B. BORN, “Chapter 20: Confidentiality in International Arbitration”, *op. cit.*, p. 2781.

<sup>115</sup> H. SMIT, “Confidentiality in Arbitration”, *op. cit.*, p. 300.

<sup>116</sup> *Ibid.*

agreement<sup>117</sup>. However, this kind of related disputes between several different parties often have so much in common that there would be a considerable practical advantage to hear them together. Indeed, the same documents will commonly be relevant to both disputes, and the same witnesses will be required to give evidence. In this context, a speedy and effective resolution of the dispute at a reasonable cost would be more readily achievable if the disputes were heard together<sup>118</sup>. In addition, if the arbitral procedures are not simultaneously heard by the same tribunal, it is likely that the results will be inconsistent. Indeed, there is a risk that the tribunals might reach incompatible conclusions. This issue was considered for the first time in *Oxford Shipping Co. v. Nippon Yusen Kaisha (Called ‘Eastern Saga’)* in 1984. The Queen’s Bench stated that “*The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however closely associated with another dispute, however convenient that course may be to the party seeking it and however closely associated with each other party in question may be*”<sup>119</sup>. This decision has been regarded as reaffirming the private character of arbitration, as an implicit obligation of the arbitration agreement.

Nevertheless, attempts were soon made to sidestep the effect of the decision in the *Eastern Saga* by giving arbitrators express powers to hear two or more arbitrations concurrently when appropriate<sup>120</sup>.

### ***Section 3. Borderline between privacy and confidentiality***

As already mentioned before, while the right to privacy is unanimously recognised as an attribute of arbitration, it is not necessarily the case for confidentiality. However, it seems to us that both notions are intimately linked to each other. Indeed, the implied relationship between privacy and confidentiality has several competing features. One feature is that, if the concept of privacy in arbitration is to have commercial and procedural efficacy, it ought to be

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<sup>117</sup> M. COLLINS, *op. cit.*, p. 323.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Oxford Shipping Co v. Nippon Yusen Kaisha (The Eastern Saga)*, 1984, 2 Lloyd’s Rep. 373 (QB).

<sup>120</sup> See for example, *Compagnie Européenne de Céréales SA v. Tradex Exports SA*, 1986, 2 Lloyd’s Rep. 301 (QB).

implied that parties have a duty to maintain confidentiality<sup>121</sup>. As a distinguished barrister an arbitrator has observed: “*There would be little point in excluding the public from an arbitration hearing of 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. It is suggested that a party would be entitled to an injunction to restrain the other party from such publication. And the same principle must apply to the arbitration as a whole, including the pleadings or statements of case, expert reports or witness proofs that have been exchanged, as well as to evidence given orally at a hearing*”<sup>122</sup>. Other proponents of confidentiality in international arbitration frequently argue that the uniformly-accepted privacy of arbitration necessarily requires that this process also be confidential<sup>123</sup>. Indeed, it would make no sense to treat arbitral hearings as private, but then permit the parties to publicize the details of those hearings to third parties<sup>124</sup>. FORTIER also describes this rationale as follows: “*the concept of privacy would have no meaning if participants were required to arbitrate privately by day while being free to pontificate publicly by night*”<sup>125</sup>.

Other authors are more critical and reject this analysis, treating the privacy of arbitral hearings as a comparatively narrow concept that does not necessarily entail or require broader confidentiality obligations<sup>126</sup>. The border between the two notions remains unclear. In fact, the effective protection that will be ensured to the parties depends on the arbitral agreement but also on the circumstances of the case. Thus, an interesting question is who will make the ultimate determination on the extent to which arbitration is confidential? Insofar as confidentiality rests on a contractual provision, whether express or implied, the decision might be left to the arbitral tribunal. But to the extent the public interest, whether or not expressed in the law, imposes restraints on confidentiality, the ultimate decision will have to be rendered by the courts<sup>127</sup>.

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<sup>121</sup> L. E. TRAKMAN, “Confidentiality in International Commercial Arbitration”, *Arbitration international*, 2002, Vol. 18, Issue 1, p. 9.

<sup>122</sup> R. BERNSTEIN, *Handbook of Arbitration Practice*, London, Sweet & Maxwell, 1987, § 13.6.3;

<sup>123</sup> Expert Report of Stewart Boyd QC (in *Esso/BHP v. Plowman*), “Special Issue on Confidentiality of International Commercial Arbitration”, *Arbitration International*, Vol. 11, n° 3, p. 267.

<sup>124</sup> G. B. BORN, “Chapter 20: Confidentiality in International Arbitration”, *op. cit.*, p. 2782.

<sup>125</sup> Y. FORTIER, *op. cit.*, p. 132.

<sup>126</sup> Expert Report of Stewart Boyd QC, *op. cit.*, p. 266-268.

<sup>127</sup> H. SMIT, Case-note on *Esso/BHP v. Plowman* (supreme Court of Victoria, Australia), *Arbitration International*, 1995, Vol. 11, Issue 3, p. 301.

## Chapter 6. Scope of application of confidentiality

An important question arises concerning the extent of protection of confidentiality. Is it limited to substantive elements or does it apply to the procedural elements as well?

It is said that the principle of confidentiality has a large scope. Various authors observe that the principle of confidentiality is not a unique concept and that it may vary, depending on the situations that it is meant to cover<sup>128</sup>. In fact, it may extend to the proceedings in general, without distinction, or alternatively to different elements of the procedure, at the stage of the production of documents, when the award is rendered or throughout the debates. Besides, it is also important to analyse the scope of the principle on a *ratione personae* basis. In determining on whom the obligation may rest, a distinction may be made between the members of the arbitral tribunal and those who appear before it, whether as parties or witnesses<sup>129</sup>.

The scope of application will vary in function of the parties' agreement, and accordingly in function of the applicable law and the institutional rules, in case of institutional arbitration. The present chapter addresses all these questions. First, should the very 'fact of arbitration' remain confidential? Second, which kind of protection should be given to the documents produced in preparation for the proceedings, evidences produced during the proceedings, the transcripts or minutes of the proceedings, witness testimony, expert reports, procedural orders, deliberations of the tribunal? And third, what about the actors of the procedure?

The present chapter tries to answer these questions, which will be addressed by an element-by-element analysis of a typical arbitration.

### *Section 1. Scope ratione materiae*

#### *§1. The fact of the arbitration*

<sup>128</sup> J.-F. POUURET & S. BESSON, *Droit comparé de l'arbitrage International*, Zurich, Schulthess Verlag, Bruylant, LGDJ, 2002, n° 368.

<sup>129</sup> P. WAUTELET, "Confidentiality and Third parties in International Commercial Arbitration: Some Preliminary Reflections", in H. BOULARBAH & O. CAPRASSE, *L'arbitrage et les Tiers*, Coll. Cepani, Bruxelles, Bruylant, 2008, pp. 109-110.

Can the very existence of an arbitration procedure be protected under the duty of confidentiality? In some cases, the mere existence of an arbitration may be viewed as secret. BOYD mentions examples of such cases; one involving allegations of professional negligence by a solicitor against a barrister, another concerning the settling of accounts between members of a shipping conference, or one relating to a technology involving an invention that has not yet been patented<sup>130</sup>. However, the courts have not yet articulated a general rule on this issue. DESSEMONTET offers an explanation for the reluctance to create a general rule: “*The arbitration clause is chosen in many instances in view of the confidential nature of the information at stake. Therefore, it is not possible to affirm that in any and all cases, each party is free to disclose the fact that arbitration proceedings are under way. The interests at stake are too important for them not to receive attention on a case by case approach. There appears to be no general rule in this regard*”<sup>131</sup>.

Other practical reasons render illusory the existence of a duty of confidentiality concerning a pending arbitration. First, whenever the courts intervene – as ‘juge d’appui’ or to enforce arbitral awards – the existence of the arbitration will become public record<sup>132</sup>. Second, the statutory obligations and financial considerations may justify the disclosure of the ‘fact of arbitration’. For example, a company may be required to inform its insurers, bankers, auditors or its shareholders. Third, the confidentiality of the existence of arbitration is also constrained by the inability to compel third parties to respect it<sup>133</sup>. Indeed, most interpreters, translators, couriers, caterers, etc. are not bound by confidentiality agreements. DESSEMONTET raises two other practical issues that could refrain confidentiality of the existence of arbitration. First, he wonders if a member of an arbitration panel could – for a proceeding between A and B – disclose to other members of that panel the fact that A or B is also party to other arbitration proceedings, which he knows because he has been asked if he would accept the position of arbitrator in that second case as well<sup>134</sup>? It is a common occurrence that the world of international arbitration is small and that the services of particular arbitrators are in great demand<sup>135</sup>. On an ethical perspective, an arbitrator should disclose any potential conflicts of

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<sup>130</sup> Expert Report of Stewart Boyd QC (in *Esso/BHP v. Plowman*), “Special Issue on Confidentiality of International Commercial Arbitration”, *Arbitration International*, Vol. 11, n° 3, p. 266.

<sup>131</sup> F. DESSEMONTET, “Arbitration and Confidentiality”, *The American Review of International Arbitration*, 1996, Vol. 7, Issue 3-4, p. 300.

<sup>132</sup> C. MÜLLER, *op. cit.*, p. 226.

<sup>133</sup> *Ibid.*, p. 227.

<sup>134</sup> F. DESSEMONTET, *op. cit.*, p. 300.

<sup>135</sup> A. C. BROWN, *op. cit.*, p. 1002.

knowledge of a particular party<sup>136</sup>. Second, most trade journals or arbitration periodicals very often publicize reports on ongoing or recently-completed arbitration. While they remove the names of the parties, the description of the factual dispute and major issues often enable to discover the identity of the specific parties<sup>137</sup>.

## **§2. Documents produced before and during the arbitration**

Generally, the documents produced in the framework of arbitration – during or in preparation of the proceedings - such as the request for arbitration, the memorandum of the parties, the transcripts of oral testimonies, the written testimonies, the minutes of the hearings and the written submissions are protected by a duty of confidentiality<sup>138</sup>.

*Dolling-Baker v. Merrett* provides an interesting rule on point. The Court distinguished between two categories of documents<sup>139</sup>. The first category embraces the documents that have been created for the only purpose of the arbitration, namely the notes for submission, transcripts, notes of evidence, various reports amongst which the testimony of the witnesses, and the sentence. The second category consists of documents that existed before the arbitral procedure and that were produced in the framework of the inquiries. Regarding the first category, their presence in the arbitration is insufficient to confer them immunity. Furthermore, these documents are not confidential by nature<sup>140</sup>. However, the Court suggests - in order to determine the confidential character of a document - to refer to the essentially private nature of arbitration and the implicit obligation of a party who obtains a document during the inquiries not to use it for any other purpose than the arbitral procedure. Thus, the court emphasizes that the nature of arbitration is as such that the parties should be bound by an implicit obligation not to disclose the documents prepared for or used during the arbitration. It should therefore be clear that a document used in an arbitral procedure does not survive the arbitration, in the sense that it could be invoked again in a subsequent

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<sup>136</sup> See for example, The Code of Ethics for Arbitrators in Commercial Disputes of the American Arbitration Association, CANON IX, available at

[https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG\\_003867](https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG_003867)

<sup>137</sup> A. C. BROWN, *op. cit.*, p. 1003.

<sup>138</sup> See for example, LCIA Rules, art. 30.1 (“*all materials in the proceedings created for the purpose of the arbitration*”).

<sup>139</sup> *Dolling-Baker v. Merrett*, English Court of Appeal, [1991] 2 All ER, 15 March 1990, at 890.

<sup>140</sup> ‘A document confidential by nature’ consists in a document that is subject to a secret, such as a professional or industrial secrecy, see P. FOUCHARD, E. GAILLARD, B. GOLDMAN, *Traité de l’Arbitrage Commercial International*, Paris, Litec, 1996, p. 708, n° 1265.

procedure<sup>141</sup>. The Court added: “*But that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself. When a question arise to production of documents or indeed discovery by list or affidavit, the court must, it appears to me, have regard to the existence of the implied obligation, whatever its precise limits may be. If it is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail. But in reaching a conclusion, the court should consider, amongst other things, whether there are other and possibly less costly ways of obtaining the information which is sought which do not involve any breach of the implied undertaking*”<sup>142</sup>.

### **§3. Fact witness testimony**

Generally, even if the arbitrators and parties may encourage fact witnesses to keep their knowledge of the arbitral proceedings confidential, they cannot legally bind them to a duty of confidentiality<sup>143</sup>. According to the principle of relativity of the contracts, neither the arbitrators nor the parties can compel third parties to be bound by a duty of confidentiality regarding the information learned during the arbitral proceedings. In sum, unless the witness is under some type of contractual relation to the parties (for example, employee of one of the parties), it is difficult - if not impossible - to protect the confidentiality of fact witness testimony<sup>144</sup>.

### **§4. Expert witness testimony**

A similar reasoning applies to expert witnesses. However, given that expert witnesses are very often ‘hired guns’, the parties to an arbitration can bind them by making them sign a confidentiality agreement as a condition of being hired as expert witness<sup>145</sup>. Thus, while the expert witnesses cannot be bound by the arbitration agreement, they can still be bound to

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<sup>141</sup> L. BURGER, *op. cit.*, p. 587.

<sup>142</sup> *Dolling-Baker v. Merrett*, English Court of Appeal, [1991] 2 All ER, 15 March 1990, at 890.

<sup>143</sup> A. C. BROWN, *op. cit.*, p. 1006.

<sup>144</sup> C. MÜLLER, *op. cit.*, p. 228.

<sup>145</sup> A. C. BROWN, *op. cit.*, p. 1007.

confidence by supplementary agreements between themselves and at least one of the parties<sup>146</sup>.

It is important to note that no national legislations or institutional rules address specifically the protection accorded to expert witness testimony. It implies that an expert witness testimony established during an arbitration is not necessarily protected from later disclosure. This issue was subject of *London and Leeds Estates v. Paribas* in 1995. In this case, the English judge held that “*a party to court proceedings is entitled to call for the proof of an expert witness in a previous arbitration in a situation where it appeared that the views expressed by him in that proof were different from the views expressed in the court proceedings*”<sup>147</sup>.

As an experienced arbitration attorney noted in an address to other in the field; “*Those of you who act as expert witnesses will know that you are exposed to the risk that the adverse party may attempt to subpoena your working files if it is thought that you or, conceivably a partner or colleague in the same organisation, has addressed a similar question in the past and given a view which is not consistent with that given in your expert opinion*”<sup>148</sup>.

### §5. Trade secrets

The primary motivation of the majority of the parties who refer to arbitration is to protect their trade secrets through the duty of confidentiality. BROWN is right to consider that, if a duty of confidentiality exists at all, it should at least encompass the protection of trade secrets<sup>149</sup>. Nevertheless, if the protection of trade secrets is not guaranteed under the duty of confidentiality of arbitration, various national and international provisions that want to protect such trade secrets ensure their confidentiality<sup>150</sup>. It implies that neither the arbitrators, nor the arbitration institution can sell or trade the secret information. The question arises whether the parties are joint owner of the confidential information or if they can individually dispose of it? In the English case *London & Leeds Estates Ltd v. Paribas Ltd.*, the court stated that the

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<sup>146</sup> A. C. BROWN, *op. cit.*, p. 1007; C. MÜLLER, *op. cit.*, p. 228.

<sup>147</sup> *London and Leeds Estates v. Paribas*, 1995, 1 EGLR 102.

<sup>148</sup> D. FRASER, cited in A. C. BROWN, *op. cit.*, p. 1008.

<sup>149</sup> A. C. BROWN, *op. cit.*, p. 1008.

<sup>150</sup> See for example Article 38 of the Swiss Federal Rules on Civil Procedure, Law on Cartels, Law against Unfair competition, etc. cited by F. DESSEMONTET, *op. cit.*, p. 300.

arbitrating parties owe to each other a duty of confidence and privacy in relation to the evidence given<sup>151</sup>.

Regarding international protection of trade secrets, the first universally accepted provision bearing on trade secrets has been adopted by the WTO in Article 39 of the WTO Trade-Related Aspects of Intellectual Property Agreement (*hereinafter*, TRIPs). This provision stipulates that the allegedly secret information "*should have been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret*"<sup>152</sup>. Furthermore, the WIPO Rules provide a complete regulation of trade secret confidentiality<sup>153</sup>. Even the US, which is often seen as the stronghold of the anti-confidentiality school of thought, recognizes the need of safekeeping trade secrets in the Patent Arbitration Rules of the American Arbitration Association (*hereinafter*, AAA)<sup>154</sup>. It is now admitted that there is a world-wide law of trade secrets, and that the arbitration community should take it into account, especially in financial areas, where transparency is often promoted<sup>155</sup>.

### **§6. Transcripts of testimony and minutes of the hearings**

The right to privacy would be meaningless if the transcripts of testimony and the minutes of the hearings are not protected as well. Indeed, if such documents could be revealed to the public, the parties could invite third parties to assist the hearings<sup>156</sup>. In *Ali shipping*, the court extends the duty of confidentiality beyond the arbitration award and expressly includes the transcripts of the proceedings<sup>157</sup>. However, the parties should be aware that exceptional circumstances might warrant disclosure<sup>158</sup>.

### **§7. Final Award**

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<sup>151</sup> *London & Leeds Estates Ltd v. Paribas Ltd.*, 1995, EG 137, cited by P. NEILL, "Confidentiality in Arbitration", *Arbitration International*, 1996, Vol. 12, Issue 3, p. 287.

<sup>152</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods, 15 April 1994, art. 39, §2, c).

<sup>153</sup> See Module about the trade secrets under the WIPO rules:

[http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip\\_panorama\\_4\\_learning\\_points.pdf](http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_4_learning_points.pdf)

<sup>154</sup> Article 24 states: "*The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary ... The arbitrator shall (...) have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness*"

<sup>155</sup> F. DESSEMONTET, *op. cit.*, pp. 300-301.

<sup>156</sup> C. MÜLLER, *op. cit.*, p. 229.

<sup>157</sup> *Ali Shipping Corp. v. Shipyard Trogir*, 1997, 1 Lloyd's Rep., at 652.

<sup>158</sup> See Chapter 7, *Exceptions to confidentiality*.

In principle, as part of the arbitral procedure, the award should not be disclosed. However, there is an increased pressure on institutions to allow access to their awards by full or redacted publication. MISTELIS postulates that the redaction of awards to be published ensures the privacy of the process but he recognises that there is merit in the establishment of a body of law stemming from arbitration practice without necessarily creating a doctrine of arbitral precedent<sup>159</sup>.

Some institutional rules state that the award could be published, provided that the parties have consented to it<sup>160</sup>. Despite such prohibition, the final award is often disseminated to media or to third parties. Typically, arbitration reviews and journals publish the award after having removed the names of the parties, but it is often ineffective in protecting the parties' anonymity. Indeed, it is likely that - given the specificity of the cases - the interested lecturers may identify the name of parties in the light of the context<sup>161</sup>. But, most of the time, it is the parties themselves who are responsible for an award's disclosure, when they initiate proceedings concerning its validity or enforcement in a national court<sup>162</sup>.

This issue has been debated in *Aegis v. European Re* and the English Court seems to have undermined the principle of confidentiality of the award<sup>163</sup>. In fact, the case concerned the question of whether an award made in one arbitration could be referred to in a second arbitration between the same parties despite an express confidentiality agreement preventing disclosure of the award. The confidentiality agreement stated that the arbitration result would not be disclosed at any time to any individual or entity, in whole or in part, which is not a party to the arbitration<sup>164</sup>. The English Privy Council held that it could not conceivably impose an absolute ban on disclosure of the award, as this would clearly render the award incapable of being enforced in the courts. In sum, it implies that the legitimate use of an

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<sup>159</sup> L. A. Mistelis, “Confidentiality and Third Party Participation: *UPS v. Canada and Methanex Corporation v. United States*”, *Arbitration International*, 2005, Vol. 21, Issue 2, p. 216.

<sup>160</sup> See for examples, N. BLACKABY, J.M. HUNTER, C. PARTASIDES, A. REDFERN, “The Agreement to Arbitrate”, in N. BLACKABY, J.M. HUNTER, C. PARTASIDES, A. REDFERN e.a., *Redfern and Hunter on International Arbitration*, New York, Oxford University Press, 2009, p. 140, n° 2.158.

<sup>161</sup> P. CALLENS, “Vertrouwelijkheid bij Arbitrage: Uitwerking ten aanzien van de Actoren”, in P. CALLENS, O. CAPRASSE, M. FLAMÉE, F. LEFÈVRE, D. MATRAY, G. MATRAY, J.-F. TOSSENS, K. VAN DEN BROECK, *Arbitrage et Confidentialité*, Coll. CEPANI, Bruxelles, Bruylant, 2014, p. 122.

<sup>162</sup> P. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op. cit.*, pp. 773-774.

<sup>163</sup> *Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Co. of Zurich* UKPC 11, 2003 WLR 1041.

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

earlier award in a later arbitration between the same two parties is not as such a breach of the confidentiality agreement<sup>165</sup>.

In the same vein, Mr Justice Colman held in *Hassneh Insurance* that where it is reasonably necessary for the establishment of protection of an arbitrating party's legal rights against a third party, the award could be disclosed, together with any reasons given for it, in order to substantiate a defence of a cause of action<sup>166</sup>. This disclosure could be made without leave of the court and without any breach of the duty of confidence. He gave three reasons for this conclusion: first, the award determines the rights of the parties *inter se* in respect of the issues that it has decided and gives rise to an independent contractual obligation to perform the award. Second, the award is subject to the supervisory jurisdiction of the court, and third, the award is capable of enforcement in the English courts either by summary procedure or by an action on the award<sup>167</sup>. In all three cases, the award may be produced in open court and thus introduced into the public domain<sup>168</sup>.

Although the publication of an arbitral award undermines the wish of the parties to conduct their dispute in a confidential environment, GAILLARD and SAVAGE postulate that there are benefits to the public disclosure of arbitral awards<sup>169</sup>. In fact, a broad movement has developed in favour of publishing awards, notably in France, where the ICC has decided to publish arbitral awards in an annual review since 1974 and the ICSID since 1986. In reading the awards, one observes that the more recent awards are based on earlier decisions and that the decisions reached are generally consistent. We agree with FOUCHARD and SAVAGE who emphasize that confidentiality is not breached by the publication of the reasons for an award on an anonymous basis. Such publication satisfies the general interests of business and legal practice<sup>170</sup>. However, we do not fully agree with the following statement; "*it is legitimate that arbitration users and practitioners have access to the rules applied and the decisions reached by the arbitrators*". In our opinion, the parties who have chosen for arbitration as a private and confidential procedure instead of litigation before the court should have known that there is no precedent rule in arbitration and in consequence no access to former decisions rendered

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<sup>165</sup> N. RAWDING, "Aegis v. European Re and the Confidentiality of Arbitration Awards", *Arbitration International*, 2003, Vol. 19, n° 4, pp. 485-486.

<sup>166</sup> *Hassneh Ins Co. Of Isr. v. Mew* (1993), 2 Lloyd's Rep. 243 (QB).

<sup>167</sup> *Hassneh Ins Co. Of Isr. v. Mew* (1993), 2 Lloyd's Rep. 243 (QB).

<sup>168</sup> M. COLLINS, *op. cit.*, p. 332.

<sup>169</sup> P. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op. cit.*, p. 189.

<sup>170</sup> *Ibid.*, pp. 188-189.

by the arbitrators. Nevertheless, it cannot be denied that the disclosure of awards would positively contribute to the predictability of future decisions and to the codification of usages.

## ***Section 2. Scope ratione personae***

The duty of confidentiality applies to the documents produced during and in preparation of the procedure, but also to the actors who are directly or indirectly involved to it. The main actors are the parties and arbitrators. Further, the counsels, experts, witnesses, secretariat of arbitration are also involved in the procedure, but they are not part of the arbitration agreement. Therefore, it seems worth to distinguish their duties regarding the principle of confidentiality.

### ***§1. The parties***

It has been agreed that, for the parties to an arbitration, the principle of confidentiality is a key element of the procedure. In this context, there is a double concern: the parties try to protect their dispute against disclosures from third parties but also - and this is the most difficult task - from the adversarial party. In practice, it is very often that the winning party does not want to keep its success quiet. In particular, when listed companies are involved, the Stock Market regulation requires to disclose some information, even when it relates to the introduction of an arbitral procedure<sup>171</sup>. According to other practitioners, amongst which CALLENS, it is more likely that the parties do not really attach great importance to confidentiality but foster the recourse to arbitration mostly because of the way the procedure takes place. Indeed, apart from confidentiality, the other significant advantages of the procedure consist in the rapidity of the procedure and the involvement of expert arbitrators and counsels who have knowledge about technical and complex matters<sup>172</sup>.

As regards the exchange of information between the parties, DESSEMONTET suggests to distinguish two types of information. He postulates that a separate ownership is conceivable for some pieces of information and a joint ownership for other pieces of information. For instance, when a party discloses information to the other party, there is clearly an owner and a recipient. The owner may then disclose the same information to third parties, state agencies newspapers, etc. This might apply, for instance, to specific or economic data, flow charts and

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<sup>171</sup> P. CALLENS, *op. cit.*, pp. 116-117.

<sup>172</sup> *Ibid.*, p. 117.

other specific documents produced during the arbitral proceedings. Other information is generated within the course of arbitration, for example in an expert report, an interim award, or a procedural order. The ‘owners’ of this type of information are jointly the parties. If the parties do not agree on the publication or disclosure of the confidential information that belongs to them as joint owners, it is obvious that they should not be able to dispose of it by separately publishing it<sup>173</sup>.

## **§2. Arbitrators and deliberations of the arbitral tribunal**

The arbitrator is bound by a duty of confidentiality<sup>174</sup>. Regarding trade secrets, DESSEMONTET explicitly states that the arbitrator owes a duty of confidence and privacy to both parties, given that he is by no means owner of the secrets expounded in the arbitral proceedings<sup>175</sup>. They must keep all matters relating to an arbitration confidential. Certain arbitration institutions, such as the CEPANI and the ABA<sup>176</sup>, have adopted a Code of Conduct, providing that the arbitrator shall obey the rules of strict confidentiality in each case referred to him<sup>177</sup>.

This principle applies in particular to the deliberations of the arbitral tribunal, with the purpose of ensuring equality of the parties and respect of the right of defence<sup>178</sup>. Indeed, given that the parties have both appointed one arbitrator, they may have a real complicity with each other and be incited to play a role of informer, by informing the parties of the evolution of the opinion of each arbitrator<sup>179</sup>. It is obvious that such attitude may affect the equality of the parties.

While the ICC Rules and the UNCITRAL Model Law do not provide any provision regarding the confidentiality of the deliberations, GAILLARD and SAGAVE observe that however vague or ‘cautious’ relevant institutional rules may be, “*it is clear that the rule*

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<sup>173</sup> F. DESSEMONTET, *op. cit.*, pp. 313-316.

<sup>174</sup> P. DE BOURNONVILLE, *Droit Judiciaire: L’Arbitrage*, Bruxelles, Larcier, p. 145.

<sup>175</sup> F. DESSEMONTET, *op. cit.*, pp. 316-318.

<sup>176</sup> For further information concerning the various codes of conduct in arbitration, see <http://bg-consulting.com/docs/DocsFeb01.pdf>

<sup>177</sup> CEPANI Rules, Schedule III: Rules of Good Conduct for Proceedings organized by CEPANI, Rule 9.

<sup>178</sup> E. LOQUIN, “Les Obligations de Confidentialité dans l’Arbitrage”, *Revue de l’arbitrage*, 2006, Vol. 2006, Issue 2, p. 329.

<sup>179</sup> Y. DERAIS, “La Pratique du Délibéré Arbitral”, in G. AKSEN, K. H. BÖCKSTIEGEL, P. M. PATOCCHI, A. M. WHITESELL (eds.), in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner*, ICC Publishing, 2005, p. 226.

*applies to arbitrators, who are service providers with no personal interest in the case, and who must ensure that the dispute remains confidential, as the parties clearly intended*”<sup>180</sup>.

The confidentiality of the deliberations between the arbitrators is a specific form of confidentiality; in principle, the parties have no access to the deliberations, it is the secret of the arbitrators. According to BOISSÉSON, the rule that such ‘deliberations’ should be and remain secret is a “*fundamental principle, which constitutes one of the mainsprings of arbitration, as it does of all judicial decisions*”<sup>181</sup>. The confidentiality of the deliberations applies as soon as the arbitrators take up their function<sup>182</sup>. The duty of confidentiality not only binds, but also protects the arbitrators, their independency, to the extent that they should feel free to give their opinion on the case and share it with their colleagues<sup>183</sup>. Furthermore, the deliberations between the members of an arbitral tribunal remain confidential as well. The content of the deliberations may not be disclosed to anyone, even the parties<sup>184</sup>. MÜLLER considers, however, that arbitrators may indicate whether they reach their final decision by majority or unanimously<sup>185</sup>. He also indicates that the confidentiality of the deliberations does not prevent that an arbitrator makes a dissident opinion<sup>186</sup>. We are not sure that the practitioners of international arbitration commonly share this opinion. Therefore, it seems worth to discuss this issue in more details.

VAN DEN BERG notices that dissenting opinions appear to have become an accepted practice in international arbitration<sup>187</sup>. In the same vein, REDFERN notes that “*at present, a generally relaxed attitude towards dissenting opinions seems to be taken not only by the arbitral institutions, but also by the arbitrators themselves*”<sup>188</sup>. The UNCITRAL Model Law explicitly includes in its Article 31 the possibility for an arbitrator to refuse to sign the arbitral award “*provided that the reason for any omitted signature is stated*”. Certain practitioners

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<sup>180</sup> P. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op. cit.*, p. 613.

<sup>181</sup> M. DE BOISSÉSON, *Le Droit Français de l'Arbitrage Interne et International*, Paris, Joly, 1990, p. 296.

<sup>182</sup> M. PIERS, “De “Dissenting Opinion”, wettelijkheid-wenselijkheid-werkbaarheid”, in G. KEUTGEN, *Hommage à Guy Keutgen*, Coll. Cepani, Bruxelles, Bruylant, 2013, p. 694.

<sup>183</sup> *Ibid.*, p. 696.

<sup>184</sup> P. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op. cit.*, pp. 627-628, pp. 750-751, cited in A.C. BROWN, *op. cit.*, p. 1012.

<sup>185</sup> C. MÜLLER, *op. cit.*, p. 229.

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

<sup>187</sup> A. J. VAN DEN BERG, “Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration”, in M. H. ARSANJANI et al (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Leiden, Brill (Martinus Nijhof Publishers), 2011, p. 821.

<sup>188</sup> A. REDFERN, “Dissenting Opinions in International Commercial Arbitration: the Good, the Bad and the Ugly”, *Arbitration International*, 2004, Vol. 20, Issue 3, p. 242.

derive from this statement that dissenting opinions are implicitly allowed. The Explanatory note of the UNCITRAL Model Rules further states that it “*neither requires nor prohibits dissenting opinions*”<sup>189</sup>. In contrast, for example, the Belgian judicial code does not mention the possibility to give reasons for refusing to sign an arbitral award. PIERS, however, believes that this option should be available under Belgian Law<sup>190</sup>. According to a study conducted by ARROYO in 2008, it appears that 24 out of 107 national legislations expressly allow that arbitrators give a dissenting opinion<sup>191</sup>.

In the context of international arbitration, it is worth to ask whether such dissenting opinions serve any useful purpose. First, a dissenting opinion does not fit with the concern for independence and impartiality, and second, it is contrary to the principle of confidentiality of arbitration. REDFERN further distinguishes ‘good’ from ‘ugly’ dissents<sup>192</sup>. The latter are dissents in which the dissenting arbitrator does not merely disagree with his colleagues on issues of fact or law, or on their reasoning, but rather takes the opportunity of issuing a dissenting opinion to attack the way in which the arbitration itself was conducted. This is risky because one of the few grounds on which an arbitral award may be annulled or refused recognition and enforcement, is the failure to observe the requirements of due process. Of course, such opinions will encourage the losing party to challenge the award in court, which implies a new procedure and as a result also the loss of confidentiality that was guaranteed in arbitration. In the event that a dissenting arbitrator complains that the proper procedures were not followed, the other arbitrators could be called upon to testify as to the meetings and discussions that were held, which implies that the secrecy of the tribunal’s deliberations may be breached. In addition, REDFERN rightly argues that it would be difficult for arbitrators to have a frank and open exchange of views to advance ideas and proposals, to change their mind and then perhaps to change it back again if what they had said and what they had not said, what they had thought and what they had not thought, was to become known to the parties, particularly in a situation in which two of the three members of the tribunal are

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<sup>189</sup> Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 23, § 39.

<sup>190</sup> M. PIERS, *op. cit.*, p. 698.

<sup>191</sup> M. ARROYO, “Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal”, *ASA Bulletin*, 2008, Vol. 26, p. 442; see also J. PAULSSON (ed.), *International Handbook on Commercial Arbitration*, Den Haag, Kluwer Law International, 1984, supplement 52, 2008, p. 1-16; see examples of such legislations: Article 37(3) of the Spanish Arbitration legislation 60/2003; Article 23(2) of the Portuguese legislation 31/86 as amended by the legislation 38/2003 of the 8 March 2003; § 36, 2<sup>nd</sup> paragraph of the Norway Arbitration legislation of 14 May 2004.

<sup>192</sup> A. REDFERN, *op. cit.*, p. 229.

chosen by the parties themselves<sup>193</sup>. This is in essence the justification for keeping secret the deliberation of the arbitral tribunal. But can secrecy still be guaranteed if dissenting opinions are permitted? An argument in favour of dissenting opinions is that it has the potential to affect decisions in the future. However, in international arbitration, it is unlikely that dissenting opinions will contribute to change the law because arbitration has no system of *stare decisis* or precedent<sup>194</sup>. Yet, PIERS states that the value of a 'dissent' lies in the fact that it encourages arbitrators to have an open, self-critical attitude with regard to their own judgement, and it could be an incentive to a more accurate dialogue<sup>195</sup>. We do not fully agree with this statement, because the major consequence of such opinion is to undermine the authority of the award. Indeed, in our opinion, an arbitral award will be accepted more easily when the decision is rendered unanimously.

According to KEUTGEN and DAL, the mere fact that the deliberations are confidential implies that dissenting opinions are excluded<sup>196</sup>. PIERS, however, states that arbitrators could - under certain conditions - publish their dissenting opinion. But, the question arises to what extent the principle of confidentiality leaves space to dissenting opinions<sup>197</sup>. The ICC arbitration rules allow an arbitrator who disagrees with the majority to submit - in certain circumstances - a dissenting opinion to the other members of the arbitral tribunal and to the ICC court<sup>198</sup>. The dissenting arbitrator must communicate to the other members of the tribunal that he has a dissenting opinion. Afterwards, the majority must verify that the dissenting opinion is not biased, that it does not unjustifiably question the way the arbitration proceedings were conducted and that it is not likely to provide grounds for setting aside the award<sup>199</sup>. Furthermore, it is up to the arbitral tribunal itself to decide whether the parties should be informed of the dissenting opinion. In addition, in accordance with the general rule laid down in Article 35 of the ICC Rules, the arbitral tribunal and the Court must check whether disclosure of the dissenting opinion could undermine the enforceability of the

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<sup>193</sup> A. REDFERN, *op. cit.*, pp. 238-239.

<sup>194</sup> R. MOSK & T. GINSBURG, "Dissenting Opinions in International Arbitration", in M. TUPAMÄKI (ed.), *Liber Amicorum Bengt Broms*, Helsinki, PMS Print Oy, 1999, pp. 267-268.

<sup>195</sup> M. PIERS, *op. cit.*, p. 701.

<sup>196</sup> G. KEUTGEN & G.-A. DAL, *L'Arbitrage en droit belge et international*, Bruxelles, Bruylant, 2006, p. 393.

<sup>197</sup> M. PIERS, *op. cit.*, p. 697.

<sup>198</sup> "Final Report of the Working Party on Dissenting Opinions", 1991, *ICC International Court of Arbitration Bulletin*, Vol. 2, Issue 1, p. 32.

<sup>199</sup> E. SCHÄFER, H. VERBIST & C. IMHOOS, *ICC Arbitration in Practice*, The Hague, Kluwer Law International, 2005, p. 120.

award<sup>200</sup>. Imposing such requirements helps to prevent the awards from being challenged, and it also protects the independence of the arbitrators.

Finally, an important concern about the dissenting opinion is to guarantee the confidentiality of the deliberations. Indeed, the arbitrator should be careful not to give information that has been shared during the deliberations<sup>201</sup>. The minority opinion should therefore limit its arguments to the facts and the application of the law. If the minority opinion respects these limits, it seems arguable that it does not breach the duty of confidentiality of the deliberations<sup>202</sup>.

It is also worth to note that, although dissenting opinions are chiefly found in common law countries, many other legal systems, such as German and Swiss law, do not in principle prohibit their use in arbitration. In such circumstances, an arbitral tribunal may decide that, for the parties' information, a dissenting opinion should be attached to the award when notified to them<sup>203</sup>.

### **§3. Experts & Witnesses<sup>204</sup>**

While the obligation of confidentiality imposes itself on the parties, their counsels, the arbitrators and the institution as an automatic result of their participation to the arbitral procedure, the actual acceptance of the rule of confidentiality should still be demonstrated when applied to external participants to the proceedings, such as experts or witnesses<sup>205</sup>. It is therefore recommended to formally notify a duty of non-disclosure to 'external' participants and to request their explicit acceptance to be bound by an obligation of confidentiality<sup>206</sup>.

As already mentioned before, neither the experts nor the witnesses are part of the arbitration agreement. However, as regards the experts, it is frequent that they are bound by a duty of confidentiality through an independent confidentiality undertaking<sup>207</sup>. A typical

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<sup>200</sup> E. SCHÄFER, H. VERBIST & C. IMHOOS, *op. cit.*, p. 120

<sup>201</sup> M. PIERS, *op. cit.*, p. 702.

<sup>202</sup> M. PIERS, *op. cit.*, p. 702.

<sup>203</sup> E. SCHÄFER, H. VERBIST & C. IMHOOS, *op. cit.*, p. 121.

<sup>204</sup> See also §§3-4 of Section 1, Chapter 6.

<sup>205</sup> J.-F. TOSSENS, “Confidentiality and Arbitration, The 2013 CEPANI Rules : The case for an explicit Duty of Confidentiality”, p. 5, available at [http://www.cepani.be/sites/default/files/images/viac-cep-confidentiality\\_and\\_arbitration\\_17\\_jan\\_2014\\_-\\_jf\\_tossens\\_strelia\\_doc\\_2.pdf](http://www.cepani.be/sites/default/files/images/viac-cep-confidentiality_and_arbitration_17_jan_2014_-_jf_tossens_strelia_doc_2.pdf)

<sup>206</sup> J.-F. TOSSENS, “Confidentiality and Arbitration, The 2013 CEPANI Rules : The case for an explicit Duty of Confidentiality”, *op. cit.*, p. 5.

<sup>207</sup> P. CALLENS, *op. cit.*, p. 118.

example of such agreement can be found in Article 57 (a) of the WIPO Arbitration Rules, that stipulates: “*The Tribunal may (...) appoint one or more independent experts to report it on specific issues... Any such expert shall be required to sign an appropriate confidentiality undertaking*”<sup>208</sup>.

The difference between experts and witnesses resides in the fact that the latter only punctually intervene in the framework of their declarations, which means that they will have access to a limited number of information whereas experts may have access to a broader range of information. Besides, experts are seeking for new missions, whereas witnesses are required to testify and are not demanding for it. In consequence, it is more difficult to submit witnesses to an audition and, in addition, require them to sign a confidentiality undertaking<sup>209</sup>.

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<sup>208</sup> WIPO New Arbitration Rules, available at <http://www.wipo.int/amc/en/arbitration/rules/newrules.html>

<sup>209</sup> P. CALLENS, *op. cit.*, p. 119.

## Chapter 7. Exceptions to confidentiality

The analysis of the judicial perspectives of confidentiality brings us to the conclusion that a party may have the right – in certain circumstances – to disclose confidential information. It could be so when the parties agree to it or when the court, the law or the statutes order it<sup>210</sup>. Besides, a party could be forced to reveal confidential information when it seeks to represent its rights in a procedure against a third party. It might be the case, for example, when an arbitral procedure has been launched between parties A and B, and the final award affects the position of party C, which is not part of the dispute. The latter may have a legitimate interest in obtaining information regarding the arbitration between parties A and B. However, this exception should be limited to the award and its reasons<sup>211</sup>. Finally, confidentiality may also be set aside when the public interest is involved, notably when the arbitration involves a state or a public entity<sup>212</sup>.

### *Section 1. Public interest*

As already mentioned, those who do not want discussion in open court consider the private character of arbitration as a considerable advantage. Indeed, the possibility to keep a low profile on disputes that may have the potential to tarnish a company's public image or reputation could be an important factor weighing in favour of confidentiality and against disclosure under the public interest exception<sup>213</sup>. However, when weighed against a state's moral or legal obligation to inform its citizens of the progress or final outcome of an arbitration, the power of the private party's image rationale starts to fade<sup>214</sup>. In comparison with State's duties to its citizens, a company's desire to exercise damage control with respect to a commercial dispute is of obviously lesser importance<sup>215</sup>.

The public interest exception has been addressed in the ground-breaking Australian case *Esso Australia Resources Ltd v. Plowman*<sup>216</sup>. The Australian Court considered that the

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<sup>210</sup> C. MÜLLER, *op. cit.*, pp. 230-231.

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

<sup>212</sup> *Ibid.*

<sup>213</sup> M. PONGRACIC-SPEIER, "Confidentiality and the Public Interest Exception", *The journal of World Investment*, 2002, Vol. 3, Issue 2, p. 258.

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

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

<sup>216</sup> Cfr. Chapter 4, Section 5.

obligation of confidentiality should be set aside when necessary for the public's legitimate interest in obtaining information about the affairs of public authorities<sup>217</sup>. This exception is particularly prevalent in investment arbitration, notably in ICSID arbitrations<sup>218</sup>. In fact, the aspect of public interest is very important in any arbitration brought by an investor against a government, especially if the claim is for a large sum of damages<sup>219</sup>. This explains why it is common place for investment arbitrations to be relatively freely reported; awards are rarely secret and inevitably, they find their way into the public domain<sup>220</sup>. Similarly, in commercial arbitration, the exception of public interest is mostly invoked in cases where public authorities are involved.

Thus, what happens to confidentiality when one of the parties to an international commercial arbitration is not a private party, but a state, government or public agency (collectively, public actors)? Arguably, a commercial dispute between a private party and a public actor is not something arising between them and only between them<sup>221</sup>. Indeed, a public actor, by definition, 'concerns the people as a whole' and it may have a duty to publicly disclose information about its activities. Therefore, PONGRACIC-SPEIER is right to postulate that the dimensions of a dispute between a private party and a public actor may be 'between them and everyone else' and that confidentiality will be seriously restricted<sup>222</sup>.

While it does not appear from the civil law tradition that the high courts have already adjudicated the topic, it seems that doctrinal authors and other commentary suggest that civilians would be less likely than common-law practitioners to sacrifice confidentiality in favour of the public interest<sup>223</sup>. DESSEMONTET, for example, mentions that "*the European approach is more reluctant to accept that the public interest would redeem a breach of confidentiality...*"<sup>224</sup>. A significant case regarding this approach is *Postbank NV v. Commission of the European Communities*, in which the European Court of First Instance blamed the Commission for having released documents gathered for an administrative

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<sup>217</sup> D. KAPELIUK-KLINGER, Note in *Esso Australia Resources Ltd v. the Honourable Plowman*, 7 April 1995, *Revue arbitrale*, 1996, pp. 550-551.

<sup>218</sup> International Centre for Settlement of Investment Disputes arbitrations, see <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>

<sup>219</sup> M. HWANG & K. CHUNG, *op. cit.*, p. 618.

<sup>220</sup> See ICSID Arbitration Rules, Rule 48(4).

<sup>221</sup> M. PONGRACIC-SPEIER, *op. cit.*, p. 232; see also *The Eastern Saga*, p. 379 (Justice Leggatt).

<sup>222</sup> M. PONGRACIC-SPEIER, *op. cit.*, p. 233.

<sup>223</sup> *Ibid.*, p. 234.

<sup>224</sup> F. DESSEMONTET, *op. cit.*, pp. 312-313.

proceeding to a party in a national court proceeding without having first examined the views of the private parties whose interest were affected, concerning the production of those documents in court<sup>225</sup>.

In the common-law tradition, the public interest exception has been endorsed, in particular in the US and in Australia<sup>226</sup>. It appears that the exception would apply equally in situations where the state itself is a party to arbitration and to those where a public corporation is the participant<sup>227</sup>.

## ***Section 2. The matter has come to court***

The confidentiality of an arbitral procedure is automatically undermined when it comes to court, namely when a party claims the enforcement or the setting aside of the arbitral award. Indeed, the High Court of New Zealand held in *Television New Zealand v. Langley Productions* that the confidentiality provisions in the arbitration no longer apply, as "*the confidentiality which the parties have adopted and embraced with regard to their dispute resolution in arbitration cannot automatically extend to processes for enforcement or challenge in the High Court*"<sup>228</sup>. While parties may have agreed to arbitrate in a confidential and private way, this cannot dictate the position in respect of arbitration claims that are brought before the courts. In particular, one countervailing factor that militates against the extension of the implied obligation of confidentiality to court proceedings is the principle of open justice<sup>229</sup>.

In *Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co*<sup>230</sup>, for example, the English courts had to strike a balance between the confidential character of arbitration and the need for publicity. The issue involved the government and a department of the city of Moscow and addressed the effects and implications of rule 62.10 of the English Civil Procedure Rules (*hereinafter*, CPR Rules). The latter provision postulates

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<sup>225</sup> *Postbank NV v. Commission of the European Communities* (T-353/94), 1996 E.C.R., II-8.

<sup>226</sup> Cfr. Leading US case, *United States v. Panhandle Eastern Corp.*, 118 F.R.D. (D. Del.), 21 March 1988, at 346, and *Esso Australia Resources Ltd. et al. v. the Honourable Sidney James Plowman et al.*, 128 A.L.R. 391, 1995; *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.*, 35 N.S.W.L.R. 704 (S.C.), 1994.

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

<sup>228</sup> *Television New Zealand v. Langley Productions*, 2000 N.Z.L.R., p. 250 (H.C.)

<sup>229</sup> M. HWANG & K. CHUNG, *op. cit.*, p. 619.

<sup>230</sup> *Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co.*, 2004, 3 W.L.R., at 533

that the English courts have the discretion to order an arbitration claim to be heard in public or private. The facts were as follows; an arbitration took place in private and the arbitral award was published only to the parties. The case came to the court because the respondent applied for an order for general publication of the judgement or alternatively, a summary of the judgement. The lower court found that the judgement should remain private. In appeal, the English Court held that the parties' wish for confidentiality and privacy should outweigh the public interest in public hearings. The court, however, held that a summary could be published for general circulation, since it does not disclose any sensitive or confidential information and there are no other grounds to preclude its publication. Significantly, the Court of Appeal held that the CPR rule 62.10, in providing for arbitration claims to be heard in private, represented only the starting point of the analysis and could easily give way to a public hearing<sup>231</sup>. The court further held that, even though a hearing might have been in private, the court should, when preparing and giving judgement, bear in mind that any judgement should be given in public, where this could be done without disclosing significant confidential information<sup>232</sup>. In this context, Lord Justice MANCE considered that “*the public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militates in favour of a public judgement... The desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity... Arbitration is an important feature of international, commercial and financial life, and there is a legitimate interest in its operation and practice. The desirability of a public judgement is particularly present in case where a judgement involves points of law or practice which may offer future guidance to lawyers or practitioners*”<sup>233</sup>. In fact, while the English Law is very protective with confidentiality in arbitration, the court considers, however, that a judgement shall be published when no significant confidential information would be disclosed. In our point of view, such decision is dangerous because it opens the door to a subjective approach when deciding whether or not confidentiality should be ensured. Accordingly, it may undermine the legal certainty over time, because the courts have the opportunity to order the publication of an award on the only basis of the ‘circumstances of the case’. In addition, a question arises to what extent information should be considered as ‘non-confidential’. Indeed, a party could

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<sup>231</sup> M. HWANG & K. CHUNG, *op. cit.*, p. 620.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co.*, *op. cit.*, at 533-555, cited in M. HWANG & K. CHUNG, *op. cit.*, p. 620.

regard certain information as non-confidential, whereas the interesting party could consider that it should not be revealed.

### ***Section 3. Consent of the parties***

The third exception to the duty of confidentiality consists in the parties' consent. This is the most obvious exception to confidentiality. Consent can be given by adding a specific provision into the substantive agreement between the parties or after a dispute has arisen in a 'post-dispute' arbitration agreement<sup>234</sup>. Consent may also arise implicitly, for example when an arbitrating party applies to the court for the removal of an arbitrator, in which case this party gives consent to the challenged arbitrator to disclose information concerning the arbitration to the court<sup>235</sup>. However, such 'implied' consent is a tricky notion, because a party could pretend that an implied consent has been given whereas it was actually not the case. For example, when a party applies to the court without asking for the proceedings to be held in camera, does it mean that the latter gave its consent to public disclosure of all facts and documents put before the court? Thus, the arbitral tribunal should be careful when considering that an implicit consent has been given, in particular the arbitrator should verify that the implicit consent is clear and unambiguous.

### ***Section 4. Compulsion of Law***

The duty of confidentiality also faces various exceptions resulting from the proliferation of statutory provisions regarding financial and Stock Market law. According to BUYS, the arguments in favour of decreasing confidentiality and increasing transparency are more compelling with respect to arbitrations involving a State party than those involving private commercial parties<sup>236</sup>. These areas of law require the immediate publication of facts or information that is likely to have an impact on the Stock Market. This obligation of disclosure finds its source in European Law, in a growing harmonisation movement regarding the requirements of transparency in finance at an international level<sup>237</sup>. An obligation of disclosure is also imposed when the production of information is required by tax or penal

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<sup>234</sup> M. HWANG & K. CHUNG, *op. cit.*, p. 621.

<sup>235</sup> *Ibid.*

<sup>236</sup> C. G. BUYS, "The Tensions Between Confidentiality and Transparency in International Arbitration", *American Review of International Arbitration*, Vol. 14, p. 134.

<sup>237</sup> G. KEUTGEN, *op. cit.*, p. 965.; See also F. FAGES, "La Confidentialité de l'arbitrage à l'épreuve de la transparence financière", *Revue arbitrale*, 2003, p. 5.

legislations or by energy law<sup>238</sup>. The refusal to communicate information and documents cannot be justified by a duty of confidentiality<sup>239</sup>. In fact, in case of conflict between the rule of confidentiality and a statutory provision that obliges the parties to give financial information, the latter will prevail. The underlying reason is that the law (in a broad sense) takes precedence over a contractual obligation in the hierarchical pyramid. Severe sanctions are provided if a party refuses to publish the information required and disastrous consequences may arise from the failure to publish this information, especially regarding the Stock Market value of listed companies<sup>240</sup>. The tension between confidentiality and transparency in finance will be discussed in more details in section six of the present chapter.

### ***Section 5. Transparency in investment arbitration***

Various rules provide for disclosure of documents produced during investment arbitrations<sup>241</sup>. There is a different level of transparency and availability of documents pursuant to the three most widely used arbitration procedures for the settlement of investment disputes, notably UNCITRAL, ICSID and NAFTA<sup>242</sup>. The UNCITRAL has established very restrictive rules for disclosure. Accordingly, it is often impossible to gain access to documents in the framework of an UNCITRAL arbitration. In addition, awards and other arbitration related documents are rarely made public at all. The ICSID arbitration also handles confidentiality issues very restrictively<sup>243</sup>. By contrast, under the NAFTA<sup>244</sup> Rules, access to documents is easier<sup>245</sup>.

The ICSID and the UNCITRAL arbitration procedure have already been addressed in Chapter 3, Section 3, paragraphs 1 and 4 of the present paper. Therefore, this section will

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<sup>238</sup> C. MÜLLER, *op. cit.*, p. 230.

<sup>239</sup> D. KAPELIUK-KLINGER, Note in *Esso Australia Resources Ltd v. the Honourable Plowman*, 7 april 1995, *Revue arbitrale*, 1996, p. 539.

<sup>240</sup> G. KEUTGEN, *op. cit.*, p. 967; see also, P. WAUTELET, “Confidentiality and third parties in international commercial arbitration: some preliminary reflections”, in H. BOULARBAH & O. CAPRASSE, *L’Arbitrage et les tiers*, Coll. Cepani, Bruxelles, Bruylant, 2008, pp. 138-146.

<sup>241</sup> See for example Article 43 of the ICSID Convention, that empowers tribunals to order document production at any stage of the proceedings; see also the UNCITRAL Arbitration Rules, Article 24(3), that provides that specifies that a tribunal may, at any time during the proceedings, require the parties to produce documents.; see for more details, A. J. MENAKER, “Document Production in International Investment Arbitration”, the White and Case Newsletter of Summer 2010, available at [http://www.whitecase.com/idq/summer-2010-2/#.VX\\_VE6ayD0M](http://www.whitecase.com/idq/summer-2010-2/#.VX_VE6ayD0M)

<sup>242</sup> C. KNAHR & A. REINISCH, *op. cit.*, p. 98.

<sup>243</sup> C. KNAHR & A. REINISCH, *op. cit.*, p. 99.

<sup>244</sup> North American Free Trade Agreement, see <http://www.state.gov/s/l/c3439.htm>

<sup>245</sup> C. KNAHR & A. REINISCH, *op. cit.*, p. 98.

mainly focus on the NAFTA mechanisms for investor-state arbitrations, especially its Chapter eleven. In fact, NAFTA Chapter eleven does not provide for its own arbitration rules but offers a choice between the ICSID and UNCITRAL Rules. Chapter eleven postulates that “*a NAFTA investor who alleges that a host government has breached its investment obligations may have recourse to the ICSID and the UNCITRAL Rules*”<sup>246</sup>. The NAFTA establishes a framework of rules and disciplines that provide investors with a predictable, rule-based investment climate, as well as dispute settlement procedures, which are designed to provide timely recourse to an impartial tribunal<sup>247</sup>. However, it does not contain any express rule on confidentiality. On the contrary, under pressure from the US Congress<sup>248</sup>, the NAFTA members have expressly excluded most confidentiality obligations in relation to Chapter eleven and have encouraged more transparency, notably by providing rules relating to the information of NAFTA States about pending cases, their possibility to intervene, etc.<sup>249</sup> However, in the absence of clear rules of confidentiality regarding the proceedings and information, arbitrations should not be open to the public until the NAFTA Parties establish rules that would resolve these problems<sup>250</sup>.

The first award to uphold a claim submitted to arbitration under Chapter eleven of the NAFTA has been rendered on 30 August 2000 in a proceeding instituted by *Metalclad corporation* against *the United Mexican States*<sup>251</sup>. Ruling on the basis of the ICSID Rules, the *Metalclad* Tribunal held that “*neither the NAFTA nor the ICSID Rules contain any express restriction on the freedom of the parties in this respect. Though, it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such limitation, each of them is free to speak publicly of the arbitration*”<sup>252</sup>.

The NAFTA Free Trade Commission (*hereinafter*, FTC) clarified certain provisions of Chapter eleven, and as for the issue of transparency, it established that “*nothing in the NAFTA*

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<sup>246</sup> NAFTA Rules, Chapter 11, available at <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions>

<sup>247</sup> [http://www.naftanow.org/dispute/default\\_en.asp](http://www.naftanow.org/dispute/default_en.asp)

<sup>248</sup> See 19 U.S.C. §§3802(b)(3)(H)(i), (ii), U.S. Congress directed U.S. President to ensure in treaty negotiations that “all requests for dispute settlement are promptly made public”.

<sup>249</sup> See for example, art. 1127 NAFTA.

<sup>250</sup> M. R. JIMÉNEZ, “Considerations of NAFTA Chapter 11”, *Chicago Journal of International Law*, 2001, Vol. 2, Issue 1, p. 250

<sup>251</sup> A. A. ESCOBAR (ICSID), “Introductory note on *Metalclad Corporation v. Mexico*, Case N° ARB(AF)/97/1, Award, 30 August 2000”, 16 ICSID Review 168 (2001); 40 ILM 36 (2001), para. 13.

<sup>252</sup> See *Metalclad Corporation v. Mexico*, *op. cit.*, para. 113.; see further, M. PONGRACIC-SPEIER, *op. cit.*, p. 244.

imposes a general duty of confidentiality on the disputing parties to a Chapter eleven arbitration, and, subject to the application of article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven Tribunal<sup>253</sup>. It provides expressly for general disclosure of information, subject to only specified and narrow exceptions (such as the protection of confidential business or privileged information, security interest, and other rights of privacy)<sup>254</sup>. The International Institute of Sustainable Development (*hereinafter*, IISD) states that there is indeed nothing in the NAFTA Rules that imposes a general confidentiality of documents. Nevertheless, the arbitral tribunal may establish additional rules for the proceedings at the outset of procedures, such as confidentiality orders<sup>255</sup>. It is within these additional rules, agreed to in each case by the disputing parties, that every tribunal to date has established high levels of secrecy. Does it mean that the ‘transparency rule’ is completely meaningless? The IISD seems to consider that it is not necessarily the case. Clearly, the intent of the Ministers is to impose openness on the proceedings but their statement does not specifically direct the tribunals to adopt open procedures in the future. Accordingly, such consideration may encourage parties to draft confidentiality agreements where previously, secrecy was assumed<sup>256</sup>.

Another interesting case called *Biwater Gauff v. Tanzania* was brought before an arbitral tribunal in 2005 under the ICSID Rules and deals with the unilateral disclosure of documents without the agreement of both parties to this effect<sup>257</sup>. First, the tribunal reiterates the commonly accepted statement that confidentiality and privacy have not played the same role in the field of investment arbitration as they have in international commercial arbitration<sup>258</sup>. There is no doubt that a marked tendency towards transparency is evolving in treaty arbitration. But, in order to bypass such disclosure, the parties are free, of course, to conclude any agreements on confidentiality. The tribunal approved a request for “a specifically

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<sup>253</sup> Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, available at <http://www.dfait-maeci.gc.ca/message.aspx?&mst=404>

<sup>254</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case N° ARB/05/22, Procedural Order N° 3, 29 September 2006, para. 131, Available at <http://www.italaw.com/documents/Biwater-PONo.3.pdf>

<sup>255</sup> International Institute for Sustainable Development, Note on NAFTA Commission’s July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions, p. 1, available at, [http://www.iisd.org/pdf/2001/trade\\_nafta\\_aug2001.pdf](http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf)

<sup>256</sup> International Institute for Sustainable Development, Note on NAFTA Commission’s July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions, p. 2, available at [http://www.iisd.org/pdf/2001/trade\\_nafta\\_aug2001.pdf](http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf)

<sup>257</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *op. cit.*

<sup>258</sup> *Ibid.*, para. 114.

identified, narrow category of documents that are of obvious potential relevance and materiality to the issues in dispute”<sup>259</sup>. At the same time, the tribunal denied requests for broad categories of documents, including one “which might total hundreds of thousands of individual accounts or subscriptions”<sup>260</sup>. In the absence of any agreement between the parties on the issue, there is no provision imposing a general rule of confidentiality. The ICSID Rules only contain limitations on specific aspects of confidentiality and privacy, such as the fact that the Centre shall not publish the award without the consent of the parties<sup>261</sup>. Due to the lack of a general rule on this issue, is it arguable that it is in the discretion of each individual tribunal to consider the extent of confidentiality to which the proceedings should be conducted<sup>262</sup>. In *Biwater Gauff v. Tanzania*, the Tribunal argued that the “prosecution of a dispute in the media or in other public fora, in particular in such highly publicized case, could aggravate or exacerbate the dispute and may impact upon the integrity of the arbitral procedure”<sup>263</sup>. These concerns have been recognised in a number of previous decisions, in particular in *The Loewen Group, Inc. and Raymond L. Loewen v. USA* and in *Metalclad Corp. v. United Mexican States*, in which the court held that “it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings they were both to limit public discussion of the case to what is considered necessary”<sup>264</sup> and that “... subject only to any externally imposed obligation of disclosure by which either of them may be legally bound”<sup>265</sup>. Further, the arbitral tribunal stipulated that the concerns about procedural integrity should be evaluated differently depending on whether proceedings were still pending or an award had already been rendered<sup>266</sup>. It held that, while the proceedings remain pending, there is an obvious tension between the interests in transparency and in procedural integrity<sup>267</sup>, but after a final award had been rendered, in the normal course, concerns as to procedural integrity no longer apply<sup>268</sup>.

## ***Section 6. Financial transparency***

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<sup>259</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *op. cit.*, Procedural Order n°1, para. 104, available at <http://www.italaw.com/sites/default/files/case-documents/ita0087.pdf>

<sup>260</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *op. cit.*, Procedural Order n°1, para. 106.

<sup>261</sup> Article 48(5) of the ICSID Convention.

<sup>262</sup> C. KNAHR & A. REINISCH, *op. cit.*, p. 105.

<sup>263</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *op. cit.*, Procedural Order n° 3, para. 136.

<sup>264</sup> *The Loewen Groep, Inc. And Raymond L. Loewen v. USA* (ICSID Case N° ARB (AF) 98/3, 5 January 2001, para. 26.

<sup>265</sup> *Metalclad Corporation v. Mexico*, *op. cit.*, para. 10.

<sup>266</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *op. cit.*, Procedural Order n° 3, para. 140.

<sup>267</sup> *Ibid.*, para. 140.

<sup>268</sup> *Ibid.*, para. 142; see also C. KNAHR & A. REINISCH, *op. cit.*, p. 106.

Corporations are subject to a duty of financial transparency, especially when they are listed on the Stock Exchange Market. In essence, they must reveal information to their shareholders and to the market regarding litigations in which they are involved. One may observe that a clear tension appears between the duties of transparency required by mandatory legislations relating to financial law and the duty of confidentiality that is supported by arbitration. In this context, it is common knowledge that the primacy of transparency over confidentiality may be justified by the protection of the public interest<sup>269</sup>.

One may also observe that the conflict arising between these two principles has a moral character. On the one hand, transparency refers to virtues, such as the 'truth' and may be described as 'clarity', 'limpidity' and 'purity'. On the other hand, confidentiality may reflect a veil, something opaque and obscure that is hiding the truth and that may be referred to as a 'secret', a 'lie', an 'artifice' or even a 'mystery'<sup>270</sup>. These considerations lead to a suspicion vis-à-vis the confidentiality. The mistrust regarding confidentiality evolved during the financial crisis, and resulted in the establishment of increasing obligation of transparency. These obligations apply to the financial and market operators that are controlled by regulatory authorities<sup>271</sup>. In addition, transparency applies more broadly to corporations whose shares are listed on a Stock Market and to publicly traded companies.

In order to gain the trust of investors, it is essential for companies to deliver information about their financial situation, with the aim to render the company more transparent and, as a result, more trustful. FAGES rightly postulates that without transparency, there would be no trust, and accordingly, the investors would rapidly retreat from the financial markets and shift towards more sustainable investment mechanisms<sup>272</sup>.

Yet, it should be recognized that while transparency is an essential value in corporate governance, it cannot be absolute. First, it is obvious that information has a cost, and second, it is important to take into account business confidentiality. Indeed, every corporation has a legitimate interest in keeping certain information confidential, for technological and commercial reasons. These types of information are the so-called 'trade secrets'. The

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<sup>269</sup> F. FAGES, *op. cit.*, p. 5.

<sup>270</sup> *Ibid.*

<sup>271</sup> F. FAGES, *op. cit.*, p. 5.

<sup>272</sup> *Ibid.*

arbitrators, the arbitration institution and their personnel have a duty of confidentiality and cannot sell or trade the secret information<sup>273</sup>.

In practice, it is likely that parties refer to institutional arbitration rules with the aim to keep their dispute confidential without taking into consideration their information duties towards the public institutions. Indeed, it often appears that a conflict arises between these two principles, in particular when the arbitration occurs on an international level. As regards this conflict, WENGER states that it may be considered as a conflict of law between two independent legislators, of which one obliges a party to act at one moment in a precise place, whereas the other prohibits this same party to act in the same way, at the same moment and at the same place<sup>274</sup>.

The first issue to be addressed is that of the law applicable to the confidentiality of arbitration. In principle, the duty of confidentiality finds its source in the law applicable to the arbitration<sup>275</sup>. As DESSEMONTET reminds us, the law applicable to the arbitration is not necessarily the same as the law applicable to the contract that gives rise to the litigation or as the law of the seat of the arbitral tribunal<sup>276</sup>. If the parties made no choice of law, the arbitrator will determine the proper law by applying the conflicts of law rules. Most often, the arbitral tribunal shall apply the procedural rules of the forum<sup>277</sup>, unless the parties expressly release the tribunal of any obligation in that respect, which would allow the arbitrators to choose the law that is the most adequate in that particular case. The ‘most adequate’ law shall be determined by taking into account the need to ensure the recognition of the award<sup>278</sup>.

The key provisions on which the arbitrator will have to focus are the ‘mandatory provisions’, commonly called ‘lois de police’<sup>279</sup>. This step is crucial because it will determine which law may be applicable, and by definition it will also enlighten the “lois de police” that impose a duty of transparency. It is important to remind that these ‘lois de police’ are applicable even if the judicial order to which they belong is not designated by the conflict or

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<sup>273</sup> F. DESSEMONTET, *op. cit.*, p. 311

<sup>274</sup> W. WENGLER, “General Principles of private international law”, *RCDAl*, 1961, Vol. 104, p. 279.

<sup>275</sup> G. B. BORN, *International Commercial Arbitration: Commentary and Materials*, 2<sup>nd</sup> ed., The Hague, Kluwer Law International, 2001, p. 109.

<sup>276</sup> F. DESSEMONTET, *op. cit.*, p. 307.

<sup>277</sup> Also called ‘lois du for’, which means the legislation of the seized arbitrator.

<sup>278</sup> F. DESSEMONTET, *op. cit.*, p. 307.

<sup>279</sup> See, for more details P. MAYER & V. HEUZÉ, *Droit International Privé*, 7<sup>th</sup> ed., Précis Domat, Montchrestien, 2001.

law rules. For instance, when the situation presents an intimate attachment with a particular State, it seems likely that its mandatory rules shall be observed<sup>280</sup>.

In terms of financial transparency, it is about organising the information of the markets in an equitable and efficient way. The observation of these mandatory provisions is necessary for the safeguard of a State’s economical organization, as the same rules should apply to all the operators that interact on the same market.

Lets assume that an arbitrator is seized with the question of confidentiality under an applicable law and that one of the parties is a listed corporation under a foreign law. This situation may arise, for example, when the law of the contract is the French law and the corporation is listed in the US. Accordingly, the Sarbanes Oxley Law - an American law that aims to restore the financial-market confidence after the scandals that arose in the years two thousand – could be applied as a ‘loi de police’. Indeed, its purpose is essential for the economic organisation of the country, and it expressly claims its application to American listed companies. However, the French arbitrator is not automatically bound by the application of this legislation. Indeed, if the arbitrator considers that the purpose of the legislation is not legitimate, he may refuse its application<sup>281</sup>. Nevertheless, it is widely acknowledged that this kind of financial legislation presents a legitimate interest, since the community as a whole pursues the same objective, namely to inform the general public of the situation of the Stock Market. Therefore, it is likely that arbitrators will apply these ‘lois de police’ and thus, recognise the primacy of transparency as superior to confidentiality<sup>282</sup>.

While transparency is favoured over confidentiality, it does not mean that the latter should be completely denied. On the contrary, a breach of confidentiality should be strictly limited to what is needed to reach the objectives followed by the financial law. Therefore, in order to reconcile both principles, the arbitrator should take into account the legitimate interest of the parties<sup>283</sup>. This means that confidentiality should be protected when the disclosure is not necessary to the information of the market. In sum, it is essential to assess the value of information in regard to the impact that a disclosure may have on the market. Therefore, it

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<sup>280</sup> P. MAYER & V. HEUZÉ, *op. cit.*, n° 120, p. 82.

<sup>281</sup> F. FAGES, *op. cit.*, pp. 22-23.

<sup>282</sup> *Ibid.*

<sup>283</sup> See for example, Cass. Chambre Com., 3 June 1998, *RJDA*, 1998, n° 115 (the court considered that a contract classified as “Top Secret” should not be communicated to the shareholders).

appears to be useful to strike a balance between information that is essential to the market and information that has no added value and find a compromise between the interests at stake.

In addition, it seems that the obligation of financial information does not necessarily require full transparency. Indeed, disclosure should only apply to information that is relevant for the general public and the financial market. For instance, the mere existence of an arbitral procedure may be considered as useful information but, on the other hand, its disclosure could have a negative impact on the parties' interest. In such case, it seems obvious that the arbitrator will have to assess both scenarios and their impact on the parties and on the market. According to FAGES, the financial issue is more relevant than the 'existence of arbitration', given that the financial information may enlighten the investors more precisely about the market situation. Indeed, in most cases, the publication of the name of the parties is not essential, no more than the subject of the dispute, unless it could have a major impact on the future activity of the company, especially when the loss of a patent or licence is at stake<sup>284</sup>.

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<sup>284</sup> F. FAGES, *op. cit.*, p. 25, n° 32.

## Chapter 8. Non-disclosure agreements

### *Section 1. General considerations*

Given the inconsistent case law, the lack of protective national legislation and the over-broad non-existent institutional rules on point, parties may be encouraged to adopt an express confidentiality agreement<sup>285</sup>. This agreement may include the types of information to be kept confidential, such as the technical data, evidence, arguments, documents and information obtained in a due diligence, the course of proceedings themselves and the issue of the award<sup>286</sup>.

The recommendations of the 74<sup>th</sup> Conference of the International Law Association (*hereinafter*, ILA) that took place in the Hague in 2010 emphasizes the opportunity of a reflection of such non-disclosure agreements. In its conclusions, the ILA summarizes the main considerations as follows: “*Confidentiality is an important feature of international commercial arbitration. Many users of international commercial arbitration assume when choosing arbitration, that arbitration is inherently confidential. **This assumption is not warranted** because many national laws and arbitral rules do not currently provide for confidentiality and those do vary in their approach and scope. A general provision of confidentiality in a contract does not necessarily extend to the arbitration. **The parties can, however, by agreement provide for confidentiality and determine the scope, extent and duration of the obligation as well as the available remedies**”<sup>287</sup>.*

### *Section 2. Types of agreements*

There is a range of contractual methods used to provide for confidentiality, of which the contractual stipulation within the arbitration agreement is the most common<sup>288</sup>. Even if courts ultimately justify disclosure of information on public policy or other grounds, a well-drafted confidentiality provision can mitigate the damage. Another method is to conclude a separate confidentiality agreement. Both types of agreement have the same purpose, *i.e.* to express the

<sup>285</sup> A. C. BROWN, *op. cit.*, p. 1020.

<sup>286</sup> L. E. TRAKMAN, *op. cit.*, p. 11.

<sup>287</sup> Findings of the Report n°1/2010 from the International Association of Law, p. 19.

<sup>288</sup> O. CAPRASSE, “Les conventions relatives à la confidentialité en arbitrage”, in P. CALLENS, O. CAPRASSE, M. FLAMÉE, F. LEFÈVRE, D. MATRAY, G. MATRAY, J.-F. TOSSENS, K. VAN DEN BROECK, *op. cit.*, pp. 135-141.

will of the parties on the issue of confidentiality, but they may have different features, depending on the intent of the parties, the scope of confidentiality envisaged, along with the business context.

### ***§1. Providing for confidentiality in the arbitration agreement***

In commercial contracts, the parties may include provisions in the arbitration agreement concerning the confidential treatment of information by the parties. It is even recommended to provide such agreement, because in the absence of the latter, the parties are generally not ensured to be protected by any duty of confidentiality<sup>289</sup>.

Practitioners therefore recommend the parties to insert a detailed clause that states as follows: “*The Parties hereby mutually agree that the existence, terms and content of any Arbitration or Dispute Resolution entered into pursuant to this Agreement, as well as all information or documents evidencing any Results, Final Order, Judgement, Settlement or the performance thereof, shall be maintained in confidence and not be given, shown, disclosed to, or discussed with any third person or party except: (i) prior written agreement of both parties; (ii) solely as contemplated by this Agreement and limited thereby, courts or other tribunals whose assistance is necessary to secure or protect a right of the parties relating to the performance of this Arbitration Agreement or the enforcement of an award rendered pursuant hereto, in which case the existence and content of such proceedings shall be disclosed only to the extent necessary and all efforts contemplated by the Agreement to maintain the confidentiality of documents and information shall be taken; (iii) counsel and accountants who shall agree to maintain its confidentiality; (iv) to the extent required by applicable reporting requirements; and (v) upon compulsory legal process*”<sup>290</sup>.

Second, BROWN suggests that the parties also consider confidentiality concerns when drafting other sections of their arbitration<sup>291</sup>. For example, among the many considerations in choice of law, parties should consider the extent to which a particular country’s law protects

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<sup>289</sup> See *United States v. Panhandle Eastern Corp.*, 118 F.R.D. (D. Del.), 21 MArch 1988, at 346-350 (refusing to exclude documents from prior arbitration on grounds of confidentiality where parties and the tribunal expressed no intent concerning confidentiality of the documents”; see also C. S. BALDWIN, *op. cit.*, p. 456.

<sup>290</sup> See for example, C. S. BALDWIN, *op. cit.*, pp. 456-457, see also. A. C. BROWN, *op. cit.*, p. 1020; and also O. CAPRASSE, “Les conventions relatives à la confidentialité en arbitrage”, *op. cit.*, p. 137.

<sup>291</sup> A. C. BROWN, *op. cit.*, p. 1021.

confidentiality. They may also narrow the scope of the arbitration, and as a result, the scope of disclosure will be more restricted<sup>292</sup>.

BALDWIN mentions an additional threshold issue that greatly affects the nature and extent of information to be disclosed in the arbitration, namely the parties’ agreement concerning issues ‘to be arbitrated’<sup>293</sup>. The parties may wish to include in the arbitration agreement or subsequent agreement a clause specifically setting forth the issues that will or will not be arbitrated. By expressly limiting the scope of the tribunal’s inquiry, the parties may protect confidential information by obviating the need to produce vast sums of documents unnecessary to the resolution of the matters at issue<sup>294</sup>.

However, this form of ‘self-regulation’ is not without risk in the sense that the express provision may fall foul of the law of the seat of arbitration or the place where the enforcement is sought. Therefore, the drafters must be conscious of these laws when drafting the provision, which is a difficult - if not an impossible - and expensive task<sup>295</sup>.

## **§2. Confidentiality stipulation or protective order**

The confidentiality stipulation or protective order is an additional means to ensure the confidentiality of the proceedings, by providing explicit instructions concerning the treatment of either all information or specific information received during and after arbitration. Stipulations or orders may be initiated by agreement of the parties or at request of one party and direction of the arbitrator<sup>296</sup>. The stipulation may provide that the access to materials concerning the arbitration and to information contained therein shall be restricted to the parties and their attorneys, the personnel and staff members of the attorneys who appear on behalf of the party to this arbitration, experts or consultants retained by a party, the tribunal and its personnel, and to other persons as authorized in writing, or ordered by the Tribunal<sup>297</sup>.

Should a party fail to comply with a confidentiality stipulation, it may be liable for breach of contract damages or subject to an order of specific performance. If the arbitrator grants a protective order, the violation of such order may result in the preclusion of certain evidence or

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<sup>292</sup> A. C. BROWN, *op. cit.*, p. 1021.

<sup>293</sup> C. S. BALDWIN, *op. cit.*, p. 457.

<sup>294</sup> C. S. BALDWIN, *op. cit.*, p. 457.

<sup>295</sup> S. KOURIS, *op. cit.*, p. 128.

<sup>296</sup> See for example, American Arbitration Association Rules (AAA Rules), 1993, Rule 10 and 34.

<sup>297</sup> C. S. BALDWIN, *op. cit.*, p. 459.

the assessment of fees against the violating party<sup>298</sup>. Consequently, the use of a protective order of confidentiality stipulation can be an effective means of deterring unauthorized disclosure of confidential information<sup>299</sup>.

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<sup>298</sup> C. S. BALDWIN, *op. cit.*, p. 458.

<sup>299</sup> A. C. BROWN, *op. cit.*, p. 1014.

## Chapter 9. Enforcement of the duty of confidentiality

The question concerning the sanctions of non-compliance with the duty of confidentiality is a delicate issue and is difficult to conceive because it has not been addressed by any legislation or arbitration rules, and there is very few case law on this subject<sup>300</sup>. The present chapter first addresses the issue of the jurisdiction of the arbitrator to render an award on the duty of confidentiality and second, it discusses the remedies available to the injured party.

### *Section 1. Competence of the arbitrator*

#### *§1. Duty of confidentiality arises from the arbitration agreement*

A question arises whether the arbitral tribunal shall have jurisdiction to hear and render an award on a potential breach of confidentiality<sup>301</sup>. Given that the dispute relates to the execution of the arbitration agreement and not to the execution of the contract in itself - which is the object of the arbitration agreement - it is questionable whether the dispute should be brought under the arbitrator's jurisdiction<sup>302</sup>. Since the arbitration clause is independent from the contract that contains it, the arbitrator should in principle not be competent to hear it. The mission of the arbitrator is enclosed in the terms of references, which does generally not embrace the execution of the arbitration agreement. However, in our opinion, the competence-competence principle empowers the arbitral tribunal to rule on its jurisdiction, and thus notably to decide whether or not he has jurisdiction to hear the issue of confidentiality<sup>303</sup>. In the same vein, BORN stipulates that it seems logical that the arbitrators should be competent to resolve the disputes regarding confidentiality obligations<sup>304</sup>. The English Court also states that "*A dispute in relation to the scope of the implied term of confidentiality and privacy between the parties relates to the interpretation of the terms of the arbitration agreement, in exactly the same way as a dispute over the scope of an express term incorporated for example through an institutional rule. It follows from this that the decision*

<sup>300</sup> A.C. BROWN, *op. cit.*, p. 1014.

<sup>301</sup> S. CROOKENDEN, "Who Should Decide Arbitration confidentiality Issues?", *Arbitration International*, Vol. 25, Issue 4, p. 606, see also K. VAN DEN BROECK, "Vertrouwelijkheid in arbitrage: geschillen, sancties en schadeherstel", in P. CALLENS, O. CAPRASSE, M. FLAMÉE, F. LEFÈVRE, D. MATRAY, G. MATRAY, J.-F. TOSSENS, K. VAN DEN BROECK, *op. cit.*, pp. 153-161.

<sup>302</sup> E. LOQUIN, "Les obligation de confidentialité dans l'arbitrage", *op. cit.*, p. 349.

<sup>303</sup> See for further details concerning the competence-competence rule, A. KAWHARU, "Arbitral Jurisdiction", *New Zealand Universities Law Review*, December 2008, Vol. 23, Issue 2, pp. 238-264.

<sup>304</sup> G. B. BORN, "Chapter 20: Confidentiality in International Arbitration", *op. cit.*, p. 2813.

on the ambit of the obligations as between the parties to the arbitration agreement should ordinarily, during the currency of the arbitration, primarily be one of the arbitral tribunal<sup>305</sup>. LOQUIN rightly mentions that it would be paradoxical to deprive the arbitrator of its jurisdiction whereas the principle of confidentiality is designed to ensure its competence<sup>306</sup>. Even if the arbitrator is - in principle - not entitled to judge on the execution of the arbitration agreement, it must be admitted that the arbitral tribunal has jurisdiction to adjudicate any litigation between the parties that relates to the arbitration agreement. The arbitral tribunal is also entitled to decide on any precautionary measure aiming to end the infringement<sup>307</sup>.

## **§2. Duty of confidentiality does not arise from the arbitration agreement**

The same approach does not necessarily apply when the obligation of confidentiality arises from another agreement than the arbitration agreement. This will be the case when an arbitrator or the arbitral institution has breached the duty of confidentiality. Indeed, in virtue of the principle of relativity of contracts, neither the arbitrator nor the arbitral institution is bound by the arbitration agreement concluded between the parties. In such instance, the arbitral tribunal has no jurisdiction to determine the merits of the claim, and the latter will be referred to a judge, who will take into consideration the obligation of confidentiality, regarding the circumstances of the case<sup>308</sup>.

## **Section 2. Remedies in case of breach of confidentiality**

### **§1. The breach emanates from one of the parties**

If there is an established rule of confidentiality applicable to an arbitral procedure and this rule is breached, what are the remedies for the injured party? The contractual source of confidentiality determines the sanctions of a breach. This implies that compensation for a prejudice suffered will be assessed under the contractual liability regime<sup>309</sup>. In principle, the

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<sup>305</sup> *Michael Wilson & Partners v. Emmott*, English Court of Appeal, 2008, Lloyd's Report 1361, at. 1387-1388

<sup>306</sup> E. LOQUIN, “Les obligation de confidentialité dans l'arbitrage”, *op. cit.*, p. 349.

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

<sup>308</sup> *Ibid.*, p. 350.

<sup>309</sup> *Ibid.*, p. 349.

party that ignored the obligation of confidentiality will engage its responsibility and will have to compensate the prejudice suffered by the other party as a result of the disclosure<sup>310</sup>.

HWANG and CHUNG specify that sanctions against a breach of confidentiality are not easy to devise<sup>311</sup>. They suggest that a tribunal may issue an injunction against future breaches of confidentiality, but given that the damage is done – *i.e.* the information has already been disclosed - such injunction appears to be of limited value<sup>312</sup>. Furthermore, the injured party could sue the other party in order to obtain monetary damages, but those are sometimes difficult to establish. Indeed, the injured party will have to show that (i) a duty of confidentiality exists between them, (ii) a breach of that duty has been committed, (iii) the adversarial it the author of the breach, (iv) the latter caused an injury, and (v) the injury is quantifiable and compensable by monetary damages<sup>313</sup>. As GAILLARD and SAVAGE conclude, it will not be easy to establish the source of disclosure, and it may be difficult for the disclosing party to prove that it suffered a loss as a result of any breach by its adversary<sup>314</sup>. In addition, it is also difficult to assess the monetary impact of unauthorized disclosures of information<sup>315</sup>.

Apart from the possibility to sanction the breach of confidentiality by means of compensation, is it conceivable to impose the annulment of the arbitration agreement? It would imply that an injured party could claim a repudiatory breach of contract and terminate the arbitration proceedings<sup>316</sup>. Technically, this type of sanction is conceivable and may be obtained judicially or, in certain circumstances, unilaterally declared by the injured party if the infringement is sufficiently severe as to require such sanction<sup>317</sup>. However, it seems unlikely that a party would try to obtain such sanction because the consequence is that the case would be judged in court with no confidentiality at all. Yet, this sanction may be applied in certain circumstances, for example when the winning party publishes the award in order to

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<sup>310</sup> K. VAN DEN BROECK, “Vertrouwelijkheid in arbitrage: geschillen, sancties en schadeherstel”, in P. CALLENS, O. CAPRASSE, M. FLAMÉE, F. LEFÈVRE, D. MATRAY, G. MATRAY, J.-F. TOSSENS, K. VAN DEN BROECK, *op. cit.*, p. 173.

<sup>311</sup> M. HWANG & K. CHUNG, *op. cit.*, p. 641.

<sup>312</sup> *Ibid.*

<sup>313</sup> A. C. BROWN, *op. cit.*, p. 1016.

<sup>314</sup> P. FOUCHARD, E. GAILLARD, B. GOLDMAN, *op. cit.*, p. 617.

<sup>315</sup> *Ibid.*

<sup>316</sup> E. LOQUIN, *op. cit.*, p. 350.

<sup>317</sup> K. VAN DEN BROECK, “Vertrouwelijkheid in arbitrage: geschillen, sancties en schadeherstel”, in P. CALLENS, O. CAPRASSE, M. FLAMÉE, F. LEFÈVRE, D. MATRAY, G. MATRAY, J.-F. TOSSENS, K. VAN DEN BROECK, *op. cit.*, p. 170.

affect the adversarial party’s reputation. In such case, it is arguable that the defendant could invoke a breach of confidentiality and require the annulment of the arbitration agreement, which implies, by definition, that the award will be void<sup>318</sup>.

This happened in *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance*, judged by the City Court of Stockholm on 10 September 1998<sup>319</sup>. The significance of this decision lies in the Court’s findings concerning the legal sanction resulting from a breach of confidentiality<sup>320</sup>. In short, the facts are as follows; A.I. Trade Finance (*hereinafter*, AITF) obtained a favourable partial award from an arbitral tribunal and then published the award in *Mealey’s International Arbitration Report* without Bulbank’s consent. Bulbank applied to the panel for an order declaring the arbitration agreement null and void by reason of AITF’s alleged breach of its obligation of confidentiality. The arbitral tribunal rejected Bulbank’s application. After the final award was issued, Bulbank applied to the Stockholm City Court and requested that the award be declared invalid. The City Court agreed with Bulbank and held that “*confidentiality comprises a basic and fundamental rule in arbitration proceedings*”<sup>321</sup>. Accordingly, the court found that the mere fact that something became known about the arbitration proceedings and that this occurred through the cooperation of a party constituted a fundamental breach of the arbitration agreement. In the words of the court: “*The breach of contract, which was thereby fundamental, constituted valid grounds for Bulbank to avoid the contract*”<sup>322</sup>. The City Court therefore concluded that there was no valid arbitration agreement on the date when the arbitration was issued. As a result, the award was declared void. However, shortly after the decision was rendered, the Swedish Court of Appeal overturned the City Court’s opinion on the basis that a duty of confidentiality could not be implied-in-law<sup>323</sup>. Afterwards, it has been commented that the decision of the City Court was unquestionably too severe<sup>324</sup>. We share BROWN’s opinion that stipulates that perhaps, the City Court went too far in invalidating the entire arbitration agreement based on a breach of an implied duty of confidentiality, but on the other hand, it may be argued that – if the duty of

<sup>318</sup> A. C. BROWN, *op. cit.*, p. 1016.

<sup>319</sup> *Bulgarian Foreign Trade Bank Ltd v. AI Trade Finance Inc.*, City Court of Stockholm, 10 September 1998, Case n° T 6-111-98.

<sup>320</sup> Y. FORTIER, *op. cit.*, p. 137.

<sup>321</sup> *Bulgarian Foreign Trade Bank Ltd v. AI Trade Finance Inc.*, *op. cit.*, at 17-18.

<sup>322</sup> *Ibid.*, at 18-19.

<sup>323</sup> *A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.*, *op. cit.*, further confirmed by the Swedish Supreme Court in Case No. T-1881-99, decided in Stockholm on 27 October 2000.

<sup>324</sup> See for example, T. NAKAMURA, *op. cit.*, p. 26; C. PARTASIDES, “Bad news from Stockholm: Bulbank and Confidentiality ad absurdum”, *Mealey’s International Arbitration Report*, 1998, p. 21.

confidentiality is still an essential attribute of the arbitration agreement – the breach of this duty should be treated in the same way as a breach of any other contractual provision.

**§2. *The breach emanates from the arbitrator, the arbitral institution, or a third party***

Arbitrators who breach their duty of confidentiality may be subject to termination of their contract, or even to personal liability. However, a breach of confidentiality by an arbitrator will not invalidate the arbitral award<sup>325</sup>.

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<sup>325</sup> K. VAN DEN BROECK, “Vertrouwelijkheid in arbitrage: geschillen, sancties en schadeherstel”, in P. CALLENS, O. CAPRASSE, M. FLAMÉE, F. LEFÈVRE, D. MATRAY, G. MATRAY, J.-F. TOSSENS, K. VAN DEN BROECK, *op. cit.*, pp. 169-170.

## Conclusion

The present study of confidentiality in the framework of an arbitral procedure has shown us that, about twenty years ago, most authors and practitioners of international arbitration considered that a presumption of confidentiality exists<sup>326</sup>. Indeed, the issue of confidentiality in relation to the arbitral procedure and the documents created or disclosed in the course of the arbitral proceedings was a subject that was never debated and could almost be said not to have existed. It has been taken for granted that arbitration is an efficient method of *private* dispute resolution.

We asked ourselves the question whether contemporary authors still feel the same way. Therefore, we conducted a survey, which aimed at obtaining a personal opinion of several practitioners of arbitration on the following question: "*Do you consider that the principle of confidentiality is still a key principle of arbitration?*" How amazed we were when realising that 85 per cent of the answers were negative. In fact, the results of our survey have shown that most practitioners do not consider confidentiality as a key angle of arbitration anymore. However, they all suggest that the principle may be guaranteed by other means, and in particular by a specific confidentiality agreement, by incorporating institutional rules that provide for such duty or by an adequate choice of law. Indeed, since it is undisputed that a duty of confidentiality *can* exist in international commercial arbitration, the attorneys of the parties in an arbitration should encourage them to include in their contracts a comprehensive provision as part of the dispute resolution clause. Similarly, it is crucial that arbitrators be fully informed about the legal and policy issues surrounding confidentiality in order to appropriately resolve disputes concerning those aspects of an arbitration that should, or should not, be confidential<sup>327</sup>.

For these reasons, confidentiality clauses undoubtedly become not only predominate, but also represents nowadays a universal practice in international arbitration. The drafters of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) have emphasized the significance of adding confidentiality provisions in commercial contracts. A confidentiality agreement might include (i) the types of information to be kept confidential, *e.g.*, reserve, seismic and other technical data, evidence, arguments, documents and information obtained in

<sup>326</sup> See for example P. NEILL, "Confidentiality in Arbitration", *Arbitration International*, Vol. 12, Issue 3, p. 287.

<sup>327</sup> X. DONGGEN & S. HUIYUAN, *op. cit.*, pp. 415-416.

discovery, the course of proceedings, the content of the award; (ii) the measures for maintaining confidentiality; and (ii) the circumstances in which confidential information may be disclosed.

At the same time, our research has shown that various exceptions to confidentiality deprive the principle of its substance. First, various courts have set aside confidentiality in order to promote publicity when public interests are at stake, especially in the US and in Australia. Whenever a public authority is involved in an arbitration, it is preferable not to rely too heavily on the confidentiality of the procedure, given that a public entity has to comply with several duties of transparency towards the general public. Second, the investment and Stock Market legislations have severely reduced the confidentiality to the benefit of transparency, especially when listed companies are involved in an arbitration procedure. In addition, various other exceptions have been invoked in order to limit confidentiality, especially when a party's interest requires it. Finally, it is also worth to note that confidentiality will automatically be denied when the issue comes to the court, namely when a party requires the annulment of the arbitral award or when a party seeks to enforce it through public courts. In the light of these considerations, it seems very difficult to rely on a duty of confidentiality since it might easily be overridden and denied, even when the parties have referred to it in their arbitration agreement.

In addition, the remedies available for an injured party are not clearly and precisely defined in any legislation or institutional rule. In fact, there is little or no protection against unscrupulous parties who wish to disclose confidential evidence for their own ends. Indeed, OAKLEY-WHITE rightly argues that a party may claim that the disclosure falls within one of the accepted exceptions of confidentiality<sup>328</sup>. In addition, it is often the case that it is simply impossible to prove the source of the improper disclosure<sup>329</sup>. Furthermore, when information is disclosed in breach of the parties' arbitration agreement or in disregard of the institutional rules or national and international legislations, the threat of a mere token punishment ineffectively deters unauthorized disclosures of information. Like all aspects of the

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<sup>328</sup> O. OAKLEY-WHITE, *op. cit.*, p. 35.

<sup>329</sup> *Ibid.*

confidentiality issue, much depends on how courts treat the matter. Therefore, there is a pressing need for consistent judicial resolution of the sanctions question<sup>330</sup>.

However, one should keep in mind that arbitration is a unique system of alternative settlement of dispute, which is in full expansion on the international level. Even if some of its principles, such as confidentiality are put in doubt, we are convinced that it does not undermine the fundamental value of arbitration. Indeed, as BALDWIN and BUYS postulate, the parties foster arbitration over litigation for a variety of reasons, including, *inter alia*, a greater party autonomy, greater efficiency in terms of both money and time, greater predictability as to the applicable law, the forum in which the dispute will be heard and jurisdictions issues, and greater ability to enforce the resulting decision in foreign countries<sup>331</sup>.

In our opinion, the fact that the issue of confidentiality is neither all black nor all white renders the debate even more interesting, especially for passionate arbitration practitioners. And, as Racine quoted regarding confidentiality, we should never forget that “*There are no secrets that time does not reveal*”<sup>332</sup>.

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<sup>330</sup> A. C. BROWN, *op. cit.*, p. 1017.

<sup>331</sup> C. S. BALDWIN, *op. cit.*, p. 453; C. G. BUYS, *op. cit.*, p. 122.

<sup>332</sup> Quoted by J. RACINE.

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