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Duty of confidentiality: myth and reality

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**C.J.Q.* 68 There is a common agreement that arbitration is private and confidential and it is also widely assumed that confidentiality is one of the main advantages and reasons why the parties have chosen arbitration as the means of resolving disputes.¹ This widely acknowledged characteristic leads the parties to believe that they can keep their disputes from the gaze of the outside world and potential court proceedings at the enforcement stage. While the arbitration proceedings remain undisputedly private to outsiders, no international consensus has been reached on the issue of the duty of confidentiality. The duty of confidentiality is not provided in important international documents in relation to international commercial arbitration, such as the New York Convention and the United Nations Commission on International Trade Law's (UNCITRAL) Model Law. The only reference to the issue of confidentiality is the UNCITRAL Arbitration Rules. The relevant provision is mainly concerning the confidentiality of awards, rather than a general duty of confidentiality in relation to the information used in the arbitration proceedings.

Under these circumstances, a debate was readily provoked when Mason C.J. expressly dismissed the idea that confidentiality was the essential attribute of a private arbitration by stating that:

“Despite the view taken in *Dolling-Baker* and subsequently by Colman J in *Hassneh Insurance*, I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.”²

He decided that confidentiality should be secured by a private agreement which would impose contractual obligations to keep confidential information from the public domain.³ He also denied that the duty of confidentiality should be implied into an arbitration agreement. He stated that:

**C.J.Q.* 69 “The implication of a term as a matter of law is made by reference to ‘the inherent nature of a contract and of the relationship thereby established’, to use the words of Lord Wilberforce. As Deane J pointed out in *Hawkins v Clayton*, his Lordship focused on the nature of the contract and formulated the relevant test in terms of what is necessary or required in the circumstances on the footing that ‘such obligation should be read into the

contract as the nature of the contract itself implicitly requires, no more, no less.’ It follows that the case for an implied term must be rejected for the very reasons I have given for rejecting the view that confidentiality is an essential characteristic of a private arbitration. In the context of such an arbitration, once it is accepted that confidentiality is not such a characteristic, there can be no basis for implication as a matter of necessity.”⁴

Mason C.J.'s views echoed the decisions delivered in the United States--*United States v Panhandle Eastern Corporation*⁵ and *Bulgarian Foreign Trade Bank v A.I. Trade Finance Inc.*⁶

In contrast, Mason C.J. stated in relation to the duty of confidentiality, Parker L.J. of the English Court of Appeal strongly argued that the duty of confidentiality is in fact an implied obligation arising from the essentially private nature of arbitration.⁷ Colman J. of the English Commercial Court further argued that:

“... [I]n holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the Court is propounding a term which arises ‘as the nature of the contract itself implicitly requires’.”⁸

The debates were further fuelled by the 2010 Report on Confidentiality published by the International Law Association (ILA Report), which highlighted that:

“While neither statutes, judicial decisions, procedural rules, treaties nor contracts precisely or comprehensively defined the contours and limits of this confidentiality, there was widespread tacit acceptance of a generalized confidentiality principle. Many have long considered confidentiality to be a desirable feature of arbitration and one that distinguishes it from court litigation. This assumption was called into question by a few highly publicized court decisions in the mid 1990s which promoted considerable commentary and debate.”⁹

Due to the lack of definition on confidentiality, this issue is further complicated by these questions. How confidential information is defined, who is subject to such a duty, which laws may apply to this duty and what the legal status of institutionally imposed duty of confidentiality is. Furthermore, since Mason C.J.'s decision there have been some changes to the issue of confidentiality. The aim of *C.J.Q. 70 this article is to find out whether there is such a scope for an internationally accepted duty of confidentiality. To achieve this aim, a much wider survey of the arbitration laws or the relevant provisions of Codes of Civil Procedures of 93 jurisdictions, than the Report commissioned by the ILA, will be carried out in order to answer the following particular questions:

1. Is the duty of confidentiality is stipulated in different legislation?
2. If confidentiality is stipulated in different legislations, do they share the same characteristics and definition?
3. If confidentiality is stipulated in different legislations, who are imposed with such a duty?

4. Finally, the article will conclude whether the ILA Report's conclusion is correct in relation to its statement that there is no such thing as an internationally accepted duty of confidentiality.

Consensual duty of confidentiality and its restrictions

Based on the principle of party autonomy, the duty of confidentiality can be directly imposed by the parties' agreement or indirectly imposed by arbitration institutional rules governing the parties' submission. In principle, the parties can reach an agreement on the imposition of the duty of confidentiality if they do not wish to have the documents or evidence submitted to the arbitration to be revealed in the public or to be used in other dispute resolution proceedings. The duty can be contractually imposed upon the parties themselves, the members of the tribunal, third parties taking part in the arbitration proceedings, even the employee or agents of the arbitrators.

Alternatively, the parties can choose to indirectly impose the duty of confidentiality by submitting their disputes to an arbitration institution which has rules containing provisions on the duty of confidentiality, such as the Australian Centre for International Commercial Arbitration (ACICA),¹⁰ Belgian Centre for Mediation and Arbitration,¹¹ Milan Chamber of Arbitration (CEPANI),¹² China International Economic and Trade Arbitration Commission (CIETAC),¹³ Dubai International Arbitration Centre (DIAC),¹⁴ German Institution of Arbitration (DIS),¹⁵ Hong Kong International Arbitration Centre (HKIAC),¹⁶ Kuala Lumpur Regional Centre for Arbitration (KLRCA),¹⁷ London Court of International Arbitration (LCIA),¹⁸ Netherland Arbitration Institution (NAI),¹⁹ Singapore International Arbitration Centre (SIAC),²⁰ Swiss Rules of International Arbitration (Swiss Rules),²¹ Tehran Regional Arbitration Centre (TRAC),²² International Arbitral Centre of the *C.J.Q. 71 Austrian Federal Economic Chamber (Vienna Rules)²³ and the World Intellectual Property Organisation (WIPO)²⁴ as mentioned in the ILA Report.

However, like everything in international commercial arbitration, the parties' agreement is subject to the restrictions of mandatory rules and public policy of the relevant jurisdictions as examined in the section on the exceptions to the duty of confidentiality. Therefore, it does not matter whether it is directly or indirectly agreed duty of confidentiality, the parties' agreement can be further complicated and may lose its functions if the relevant applicable laws impose restrictions or allow exceptions to such an agreement as examined in the later section. The relevant applicable laws which may affect the parties consent on the duty of confidentiality include the law where the arbitration is held, the law where the tortious acts (breach of duty of confidentiality) were carried out, the law governing the confidentiality agreement, and the law of the country where the arbitral awards are recognised and enforced.

Though it is not disputed that the relevant domestic laws may have an ultimate say on the issue of confidentiality, the next question that needs to be analysed is whether there is a level of consensus among all the relevant jurisdictions. If a high level of consensus can be proven then there may be a scope for the development of an internationally accepted principle of

duty of confidentiality. Otherwise the likely conclusion will be that the domestic arbitration laws indeed hold the key to the issue of confidentiality.

Internationally accepted duty of confidentiality?

The survey carried out in this study involves 93 jurisdictions in total. Among them, 32 of them have express provisions regulating the issue of the duty of confidentiality in arbitration, mediation or conciliation. One is said to have incorporated the duty of confidentiality in its future new amendment, as well as five jurisdictions provides implied duty of confidentiality whereas another 56 jurisdictions fail to provide any guidance on this issue. Five jurisdictions including Austria, Ecuador, England, Singapore, and Venezuela are said to have implied duty of confidentiality imposed upon the relevant parties. The group of 32 jurisdictions have provisions in relating to the duty of confidentiality is arbitration, mediation or conciliation. They are: Algeria, Australia, Belarus, Bermuda, Costa Rica, Croatia, Czech Republic, Egypt, El Salvador, France, Hong Kong, India, Indonesia, Latvia, Lithuania, Morocco, New Zealand, Nicaragua, Nigeria, Panama, Peru, Romania, Scotland, Slovenia, Spain, Taiwan, Uganda, United Arab Emirates, United States, Venezuela, and Zambia. The Netherlands is the jurisdiction which will provide express duty of confidentiality in the new Amendment.

The 56 jurisdictions whose arbitration laws, do not expressly stipulate the duty of confidentiality are: Argentina, Antigua and Barbuda, Bahrain, Bangladesh, Belgium, Brazil, Bulgaria, Cambodia, Canada, Chile, China, Colombia, Cyprus, Denmark, Finland, Germany, Greece, Guatemala, Hungary, Iran, Ireland, Israel, Italy, Japan, Jordan, Kenya, Kuwait, Lebanon, Luxembourg, Madagascar, Mauritania, Mauritius, Mexico, Norway, Oman, Pakistan, Paraguay, Poland, **C.J.Q.* 72 Portugal, Qatar, Russia, Saudi Arab, Serbia, South Africa, South Korea, Sri Lanka, Sweden, Switzerland, Syrian, Thailand, Tunisia, Turkey, Ukraine, Yemen, Yugoslavia, and Zimbabwe.²⁵ (See Chart One).

However, among these 32 jurisdictions, only 20 of them have express provisions imposing some levels of duty of confidentiality in international commercial arbitration, two of them²⁶ have provisions restricting the reporting of court proceedings involving arbitration cases as well as 10 of them imposing confidentiality only on conciliation or mediation.²⁷ The 20 countries whose arbitration laws or the codes of civil procedures impose various levels of duty of confidentiality in arbitration include: Algeria, Australia, Belarus, Costa Rica, Czech Republic, Egypt, France, Hong Kong, Latvia, Morocco, New Zealand, Nicaragua, Peru, Scotland, Spain, Taiwan, United Arab Emirates, England, Venezuela, and Zambia.

One jurisdiction which needs to be mentioned is the Netherlands. The Netherlands is highlighted as one of the countries which currently does not have the duty of confidentiality imposed on the relevant parties involved in arbitration but the duty will be stipulated in the future amendment of Book Four of Code of Civil Procedures according to the ILA Report. The proposed provision is to provide confidentiality in arbitration and that, “all individuals involved either directly or indirectly are bound to secrecy, save and insofar as disclosure ensues from the law or the agreement of the parties”.²⁸

In general, the duty of confidentiality is imposed on a default basis. For example, in Venezuela,²⁹ art.42 of the Commercial Arbitration Act 1998 states that the default position is that arbitrators are under an obligation to keep confidentiality of the actions of the parties, the evidence and all that is contained in the arbitration proceedings. However, this default position can be modified or disapplied by parties' agreement. Similar provision can also be seen in art.1464 of the New French Arbitration Law 2011. In some minority cases, the power to ensure the duty of confidentiality is observed is given to the court official. In the case of Zambia, s.32(d) of the Zambian Arbitration Act 2000 empowers the Chief Justice *C.J.Q. 73 to make rules for the maintenance of confidentiality in terms of recognition and enforcement of New York Convention awards. (See Chart Two).

With only 20 jurisdictions imposing the duty of confidentiality on arbitration, it is clear that the ILA Report was correct to conclude that there is no such thing as an internationally accepted principle of duty of confidentiality. However, it is still worthwhile to examine the arbitration laws of these twenty jurisdictions to see whether there is a consensus among them on the issues of definition of confidential information, the person who is subject to the duty and the exceptions of the duty of confidentiality in order to serve as a model for a potential internationally accepted principle of confidentiality.

Implied duty of confidentiality

Apart from the consensual duty of confidentiality, according to ILA Report, Austria, Ecuador, England, Singapore and Venezuela are the jurisdictions whose arbitration laws are silent on this issue but rely on the case law. France was pointed out as one of the jurisdictions providing implied duty of confidentiality; nevertheless, after the promulgation of Art 1464 of the new French Arbitration law, France is now joining the group of 20 jurisdictions offering express duty of confidentiality to arbitration. For the rest of them, using England as an example, though the English Arbitration Act 1996 is silent on the issue of duty of confidentiality, from the decision delivered in *Dolling-Baker v Merret*,³⁰ it is clear that England has always insisted that confidentiality is an essential attribute to a private arbitration and the duty of confidentiality is implied into the parties' arbitration agreement. In *Dolling-Baker*, the Court of Appeal was asked to rule on whether the relevant documents in dispute could be disclosed after an issue of an automatic inspection of documents resulted by the plaintiff's application was raised. While pointing out that the ultimate test to be used in disclosure is whether discovery was necessary for disposing fairly of the proceedings, Parker L.J implied the duty of confidentiality into the arbitration agreement by stating that:

“What is relied upon is, in effect, the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained. As 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 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.”³¹

**C.J.Q. 74* The same view was also expressed in *Hassneh Insurance v Mew*³² and *Ali Shipping Corp v Shipyard Trogir*,³³ where the court upheld that the confidentiality duty applies to the parties to whom disclosure was contemplated were in the same beneficial ownership and management as the complaining party.³⁴ This implied duty of confidentiality was further upheld by Lawrence Collins L.J. in *John Foster Emmott v Michael Wilson & Partners Ltd*³⁵ in the words:

“[T]he case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration ...”³⁶

A similar view to the English implied duty of confidentiality with a twist was delivered in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* where the Singapore High Court accepted the arguments of implied confidentiality obligations in relation to arbitration documents.³⁷

Before the new French Law of 2011, the ILA Report indicates that while no statutory obligation can be found in the French Code of Civil Procedure Book IV, 1981, the French case law seemed to suggest a limited duty of confidentiality exists. The Report, *Aïta v Ojjeh*³⁸ was used as an example illustrating that duty of confidentiality may be imposed by the French court. In breach of such duty, the award can be set aside and damages can be ordered. However, in the same breath, the Report emphasises that the case is an exceptional case of manifest abuse since the French courts obviously lacked jurisdiction in that case on the ground that the award was rendered in London. The Report pointed out that the principle of confidentiality in arbitration was upheld in more general terms citing the private and confidential nature of arbitration by the Tribunal de Commerce of Paris.³⁹ Therefore, the Report pointed that an obligation of confidentiality cannot be taken for granted.⁴⁰ In the case *NAFIMCO v Forster Wheele*, the Paris Court of Appeal rejected a claim for damages for violation of confidentiality, the court pointed out that the claimant had failed to:

“[E]xplain the existence and reasons of a principle of confidentiality in French international arbitration law, irrespective of the nature of the arbitration and, in the event, the waiver of the principle by the parties in the light of the applicable rules.”⁴¹

However, this view shall no longer stand following the enactment of art.1464 of the New French Arbitration Law, (The 13 January 2011 Decree) which states, “Subject to legal requirements, and unless otherwise agreed by the parties, arbitral proceedings shall be confidential.”

***C.J.Q. 75 Statutory duty of confidentiality**

Definition of confidential information

The possible information which can fall into the scope of confidentiality includes information pertaining to the arbitral process itself and the documents and other materials which are part of the arbitration,⁴² the documents and information which were used, introduced and disclosed in arbitration proceedings from external source⁴³ and award. However, different legal definitions are provided by these 20 jurisdictions. Some jurisdictions provide very detailed definitions, including Scotland, Australia and New Zealand, while others provide for the duty of confidentiality in more general terms.

The jurisdictions which provide for the definition in more general terms usually contains a blanket duty by using the words “all information relating to arbitration”, “all matters relating to arbitration” or “keeping confidentiality duty” without specifying individual specific information. For instance, art.512(2) of Latvian Civil Procedure Law⁴⁴ states that information concerning arbitral proceedings is subject to the duty of confidentiality. Similarly, art.14 of the UAE Arbitration Law 2008 provides, “all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC court.”⁴⁵ A general duty of confidentiality over arbitral proceedings, award and any information of which they become aware through the proceedings, can also be seen in art.51 of the Peruvian Legislative Decree regulating Arbitration 2008 No.1071.⁴⁶ Similar wording such as “data” or “confidentiality of information” of which the arbitrators become aware during arbitration proceedings is also subject to the duty of confidentiality under art.353(c) of the Book IV, the Romanian Code of Civil Procedure on Arbitration⁴⁷ and art.24 of the Law 60/2003 on Arbitration in Spain.⁴⁸ Under Dominican Republic Arbitration Act, confidentiality information was defined as any information to which the parties, the arbitrators, and arbitration institutions are made privy in the course of the arbitral proceedings.⁴⁹ The term confidential information used in s.18 of the Hong Kong Ordinance 2011 (CAP 609) covers any information relating to the arbitral proceedings under the arbitration agreement or an award made in those arbitral proceedings.⁵⁰ Article 51 of the Peruvian Arbitration Act 2008 stipulates that confidential information includes arbitral proceedings, the award and any information of which they become aware through the proceedings.

Other jurisdictions provide more specific or detailed of definition of confidential information. Taking Morocco as an example, art.326 of the new Moroccan Law relating to Arbitration and Mediation Agreements, 2008⁵¹ specifies that the *C.J.Q. 76 deliberation between the arbitrators is confidential. It is worth noting that arbitrators are liable to criminal law liability if they breach the duty of confidentiality imposed.⁵²

Section 6(1) of the Arbitration Act 1995 of the Czech Republic stipulates that duty of confidentiality covers facts revealed to the arbitrators while performing the role of arbitrator.⁵³ While Egyptian Arbitration Law did not provide for duty of confidentiality, confidentiality regarding the technology obtained or improvement made to it was imposed

under art.83 of the Law No.17 of 1999 Promulgating the Trade Law. Preparatory activities, conversations, professional secret and partial covenants to the settlement are defined as confidential information according to art.14 of the Costa Rica Law on Alternative Resolution of Disputes and Promotion of Freedom from Social Unrest 1998.

The jurisdictions which are famous for providing detailed definitions of confidential information are Australia, New Zealand and Scotland. The Scots law provides a clear definition of “confidential information” which is stipulated in Arbitration (Scotland) Act 2010. Accordingly, confidential information in relation to an arbitration, covers any information relating to, (a) the dispute; (b) the arbitral proceedings; (c) the award; or (d) any civil proceedings relating to the arbitration in respect of which an order has been granted under s.15 of the Act (anonymity in legal proceedings). As well as all this, information is not and has never been in the public domain.⁵⁴ One point worth noting is that the tribunal's deliberation to make an award is not defined as confidential information as the tribunal may elect to disclose it to the parties, though they do not have to do so.⁵⁵

Like the Scots law, similar detailed definition of confidential information is also observed in s.15 of the Australian International Arbitration Act 1974, amended in 2010. It provides that confidential information means information that relates to the proceedings or to an award made in the proceedings and includes, (a) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party to the proceedings; and (b) any evidence (whether documentary or other) supplied to the arbitral tribunal; and (c) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal; and (d) any transcript of oral evidence or submissions given before the arbitral tribunal; and (e) any rulings of the arbitral tribunal; and (f) any award of the arbitral tribunal.

In the case of New Zealand,⁵⁶ with an intention to clarify the scope of the confidentiality of arbitral proceedings per se and, in particular, in related court proceedings, confidential information in relation to arbitral proceedings, means information that relates to the arbitral proceedings or to an award made in those proceedings.⁵⁷ It includes the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party⁵⁸; any evidence (whether documentary or otherwise) *C.J.Q. 77 supplied to the arbitral tribunal⁵⁹; any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal⁶⁰; any transcript of oral evidence or submissions given before the arbitral tribunal⁶¹; any rulings of the arbitral tribunal⁶²; and any award of the arbitral tribunal.⁶³

While the ILA Report pointed out that there is a limited duty of confidentiality stipulated in ss.22 and 23 of the Singaporean International Arbitration Act 2002 amended in 2010, but this provision mainly concerns reporting the court proceedings relating to arbitration.⁶⁴

While the English Arbitration Act 1996 does not provide a statutory duty of confidentiality but leaving this issue to be dealt with by the establish case laws, the definition of confidential information has to be found in the case law and the court practice relating to the discovery of

evidence and the relevant cases relating to duty of confidentiality. For instance, in *Dolling Bake* case,⁶⁵ the relevant documents which was decided to be subject to confidentiality includes, “All pleadings, documents, witness statements, experts reports and any other relevant documents produced and/or disclosed in the arbitration.”⁶⁶ The legal basis for the plaintiff's summons for discovery and inspection of the documents is RSC Ord.24 r.7 which allows the court judges to make an order if it is reasonably necessary. In this case, according to Parker L.J.,⁶⁷ the information which is subject to confidentiality includes the documents that were prepared for or used in an arbitration, or consist of transcripts or notes of evidence given, or the award. A similar view was upheld by Potter L.J. who points out that the exception to the duty of confidentiality cover awards, pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration in *Ali Shipping Corporation*.⁶⁸

Later in *Hassneh Insurance Co of Israel v Steuart J Mew*,⁶⁹ Coleman J. raised an issue on the scope of the confidentiality relating to the award and its reasoning. In this case, involving a claim for injunction to restrain disclosure of information he decided that, in this case, the disclosure of the award and its reasoning does not breach the duty of confidentiality. He distinguished awards from other documents according to three characteristics of an award namely; first, an award is an identification of the parties' respective rights and obligations, secondly it is at least potentially a public document for the purposes of supervision by the courts or enforcement in them, and thirdly awards can be enforced in the English courts by the summary procedures provided by s.26 of the Arbitration Act 1950 or by an action on the award. He further stated that if the latter course is adopted, the award *C.J.Q. 78 will be opened to the court, and may therefore be the subject of a law report which anybody can read.⁷⁰ Consequently, he ruled:

“It follows, in my judgment, that any definition of the scope of the duty of confidence which attaches to an arbitration award, - and I include the reasons -- which omitted to take account of such significant characteristics would be defective. Since the duty of confidence must be based on an implied term of the agreement to arbitrate, that term must have regard to the purposes for which awards may be expected to be used in the ordinary course of commerce and in the ordinary application of English arbitration law.”⁷¹

Furthermore, because the reasons are given to help to understand how parties' rights and obligations are decided in the award:

“I conclude that the exception to the duty of confidentiality which has held to apply by implication to arbitration awards applies equally to the reasons. If it is reasonably necessary for the protection of an arbitrating party's rights vis-à-vis a third party that the award should be disclosed to that third party, so to disclose it, including its reasons, would not be a breach of the duty of confidence.”⁷²

In the *Ali Shipping* case, Potter L.J. points out the confidential information includes awards, pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration.⁷³ Later, Lawrence Collins L.J. also mentioned that a

witness summons, documents which contain confidential material and trade secrets can also be the documents subject to confidentiality.⁷⁴ (See Chart Three).

Who is bound by the duty of confidentiality?

After examining the definition of confidential information, the next question that needs to be answered is who is bound by the obligation of confidentiality? In a consensual duty of confidentiality, the parties can reach agreements with the relevant parties to be bound by the obligations, such as the parties themselves, the tribunal, the arbitrator, witnesses, employees or agents of arbitrators, or any third parties who may be directly or indirectly involved in arbitration proceedings. Among the 20 jurisdictions, Belarus⁷⁵ is the one which did not specify who is subject to the duty of confidentiality. Others fall into four groups, which are: arbitrators, parties, arbitrators and parties and parties, arbitrators and third parties.

Arbitrators

Although art.1025 of Algerian Code of Civil and Administrative Procedure 2008 did not mention the person who shall be subject to the duty of confidentiality, the *C.J.Q. 79 words “the deliberations of the arbitrators shall be confidential” implies that such duty relating to deliberation is imposed on arbitrators only.

In the case of Costa Rica,⁷⁶ the duty was expressly imposed on arbitrators to maintain confidentiality regarding the actions of the parties during the proceedings and preparatory acts for the settlement. Similarly, under the laws of Czech Republic and Latvia,⁷⁷ the arbitrators are subject to the obligation not to disclose the facts revealed to them to the third parties while they perform the role of arbitrators.⁷⁸ A more general provision subject the arbitrators to the duty can be seen in the Taiwanese Arbitration Act 1998.⁷⁹

In accordance with the New Moroccan Law, it is the arbitral tribunal which is subject to the duty of confidentiality.⁸⁰ In breach of such duty, arbitrators are liable for criminal punishment. Also, it is a general provision without specifying the kind of information the tribunal cannot disclose.

Instead of criminal damage, under Romanian law, arbitrators have a duty of confidentiality and are liable for damages for civil actions if, without parties' authorisation, they publish or divulge information which they become aware of as arbitrators.⁸¹

It is all very well to subject the arbitral tribunal to the duty of confidentiality; however, the question is how effective the imposition of confidentiality would be if only arbitrators are imposed with the duty. How about the parties or even the third parties involved in the arbitration proceedings? With only arbitrators being subject to the duty of confidentiality, a total confidentiality is not likely to be achieved without a further consensual confidentiality agreement reached among the parties and third parties.

Parties

Instead of restraining the arbitrators from disclosing confidential information received in the arbitration proceedings, the second group of the jurisdictions decide to impose statutory duty of confidentiality on the parties only. For example, in relation to trade contract, under the Egyptian Law, both importers and suppliers are imposed with the duty of confidentiality. The importer is required to maintain confidentiality regarding the technology he obtains and regarding the improvements made to it.⁸² On the other hand, the supplier has to maintain confidentiality regarding the improvements made by the importer and transferred to the supplier.⁸³

Parties and arbitrators

The third group not only imposes the duty of confidentiality on the parties but also arbitrators who are required by law not to disclose confidential information in relation to arbitral proceedings. This can be seen in s.23C of the Australian **C.J.Q. 80 International Arbitration Act 1974*, amended in 2010 as well as the new Hong Kong Ordinance 2011 that parties and arbitrators are both imposed with the duty of confidentiality. Parties' duty was stipulated in s.18(1) which reads:

“Unless otherwise agreed by the parties no party may publish, disclose or communicate any information relating to the arbitral proceedings under the arbitration agreement; or an award made in those arbitral proceedings.”

However, arbitrators do not appear to have such a duty imposed on him, unless he acts as a mediator during the proceedings. Accordingly, unless the parties agree otherwise,⁸⁴ the termination of the mediation process without reaching settlement⁸⁵ or information is obtained during mediation proceedings,⁸⁶ an arbitrator who is acting as a mediator under s.33 of the Ordinance, must treat the information obtained by the arbitrator from a party as confidential.

Instead of allowing the parties to agree otherwise to waive the duty of confidentiality, an arbitration agreement between the parties is deemed to prohibit the disclosure of confidential information according to s.14B(1) of the New Zealand Arbitration Amendment Act 2007.⁸⁷ With a valid arbitration agreement, both parties and the arbitral tribunal must not disclose any confidential information. Taking the privacy and confidentiality of arbitral proceedings into their consideration, the duty of confidentiality shall also have impacts on the New Zealand courts when they are asked to make an order whether the whole or any part of the proceedings shall be conducted in private.

The duty of confidentiality is also imposed on both arbitrators and parties under the Scottish Arbitration Rules which specifies that unauthorised disclosure is actionable as a breach of an obligation of confidence. The tribunal also has a legal duty to inform the parties of the obligation of confidence under r.26(1) at the outset of the arbitration.⁸⁸ However, it needs to be noted that r.26 is a default rule which allows the parties to disapply or modify it to suit their needs. Although the law did not impose such duty on any third parties involved in arbitration, the Scottish Arbitration Rules requires the tribunal and the parties to take

reasonable steps to prevent any unauthorised disclosure of confidential information obtained during arbitration proceedings.⁸⁹

Parties, arbitrators and third parties

The final group of the jurisdictions which impose statutory duty of confidentiality adapt the catch-all approach by imposing a blanket duty on all parties involving in the arbitral proceedings. For instance, the Peruvian Arbitration Law properly is one of these jurisdictions.⁹⁰ According to the art.51 of the Peruvian Arbitration Law, subject to parties' agreement, the parties and their representatives and legal advisers,⁹¹ the arbitral tribunal, the secretary of the arbitral tribunal, the arbitral *C.J.Q. 81 institution and the witness, experts and any others who intervene in the arbitration proceedings shall be imposed with the duty of confidentiality.⁹²

Without touching on the issue of third parties, Spain imposes a slightly narrower scope of duty of confidentiality on the arbitrators, the parties and the arbitral institutions involved in arbitration proceedings.⁹³ (See Chart Four).

Restrictions on third parties' reporting on the court proceedings relating to arbitration

In some jurisdictions, there is no statutory duty of confidentiality imposed but there are provisions relating to the restrictions on third parties' reporting on the court proceeding relating to arbitration. Taking the Bermuda International Conciliation and Arbitration Act 1993 as an example, it does not specify who is subject to the duty of confidentiality; however, it does contain a provision restricting the report of court proceedings relating to arbitration or conciliation in general.⁹⁴ Upon any parties' application, this restriction applies to proceedings in any court which is empowered to give directions as to what information relating to the proceedings may be published.⁹⁵ Similar provision also appears in s.23(2) of the Singaporean International Arbitration Act.⁹⁶

In the case of Hong Kong, the Arbitration Ordinance 2011 (CAP 609) not only imposes the statutory duty of confidentiality on both the parties and arbitrators, s.17 also impose the restriction on reporting court proceedings relating to arbitration. Accordingly, a court in which closed court proceedings are being heard must, on the application of any party, make a direction as to what information relating to the proceedings may be published. However, a court cannot make a direction permitting information to be published unless all parties agree that the information may be published⁹⁷ or the court is satisfied that the supposedly published information would not reveal any matter which the parties wish to remain confidential.⁹⁸

Others

One of the countries which expressly impose the duty of confidentiality in general terms but failed to specify who is subject to such a duty is United Arab Emirates. Article 14 of the Arbitration Law 2008 reads:

“Unless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court (the Dubai International Financial Centre)”.⁹⁹

Similarly, the Zambia Arbitration Act did not set rules for duty of confidentiality in detail like some jurisdictions do. However, it allows the Chief Justice, by *C.J.Q. 82 statutory instrument, make rules for the maintenance of confidentiality in relation to legal proceedings concerning recognition and enforcement of New York Convention Award.¹⁰⁰

Exceptions to the duty of confidentiality

From the examination of the arbitration laws of the jurisdictions relating to the duty of confidentiality, it was noticed that some jurisdictions allow the duty to be waived under different circumstances provided in the statutes. However, there are also nine countries, Algeria, Belarus, Egypt, Latvia, Morocco, Nicaragua, Peru, Spain and Zambia, that fail to provide any provisions on the exceptions to the duty of confidentiality.

The rest of the jurisdictions imposing the duty of disclose allows different levels of relief of such duty. The duty can be either relieved by the parties' agreement or under some judicial grounds. For example, art.42 of Venezuelan Commercial Arbitration Act 1998 and art.14 of the United Emirates Arbitration Law 2008¹⁰¹ allow the parties to modify or disapply the duty of confidentiality by means of agreements.

Other jurisdictions, such as Czech Republic, France, Scotland, Hong Kong, Australia and New Zealand allow the duty of confidentiality to be waived by parties' agreement and judicial consideration. For instance, the Arbitration Law of Czech Republic allows the parties to relieve the arbitrators the duty of confidentiality. However, if the parties fail to do so with substantial reasoning, the duty can be relieved by the chairman of the competent district court at the arbitrator's residence.¹⁰²

More detailed grounds to be used to discharge the relevant parties involved in arbitration the duty of confidentiality can be seen in the Arbitration Acts of Scotland, Hong Kong, Australia and New Zealand. In Scotland the breach of the duty of confidentiality is actionable against the arbitrators, tribunal, and parties unless the breach is expressly or impliedly authorised by the parties (or can reasonably be considered as having been so authorised),¹⁰³ is required by the tribunal or is otherwise made to assist or enable the tribunal to conduct the arbitration.¹⁰⁴ Alternatively, the duty can be breached if it is required to comply with any enactment or rule of law,¹⁰⁵ for the proper performance of the discloser's public functions,¹⁰⁶ or in order to enable any public body or office-holder to perform public functions properly,¹⁰⁷ as well as for the protection of a party's lawful interests,¹⁰⁸ public interest,¹⁰⁹ the interests of justice,¹¹⁰ or the disclosure is made in circumstances *C.J.Q. 83 in which the discloser would have absolute privilege had the disclosed information been defamatory.¹¹¹

Similarly, in Hong Kong, the duty of confidentiality can also be relieved by an agreement between the parties to the arbitral proceedings,¹¹² alternatively, for the purposes of the protection or pursuance of a legal right¹¹³ or interest of the party or for the enforcement or

challenge of an arbitral award rendered¹¹⁴ in legal proceedings before a court or other judicial authority in or outside Hong Kong. Additionally, the confidential information can be disclosed to a professional or any other advisors of any of the parties¹¹⁵ or if the law requires the party to make such disclosure to any government body, regulatory body, court or tribunal.¹¹⁶

Under the Australian Arbitration Act, confidential information may be disclosed by an arbitral tribunal or a party to the arbitral proceedings with the consent of all the parties to the arbitral proceedings,¹¹⁷ to a professional or other adviser of any of the parties to the arbitral proceedings,¹¹⁸ to allow a party with full opportunity to present his case,¹¹⁹ for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party,¹²⁰ for the enforcement of an arbitral award,¹²¹ for the purposes of the Act of International Arbitration or the Model Law,¹²² in accordance with a court order or subpoena,¹²³ or if the disclosure is authorised by another relevant law¹²⁴ or required by a competent regulatory body.¹²⁵ Apart from this long list of the exceptions to the duty of confidentiality, an arbitral tribunal¹²⁶ and a court¹²⁷ is also empowered to make an order allowing a party to arbitral proceedings to disclose confidential information. In the case of a court order, the court must be satisfied that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the information to be disclosed¹²⁸ and the disclosure is not more than is reasonable for that purpose.¹²⁹

Conversely, an Australian court may decide to make an order prohibiting a party to arbitral proceedings from disclosing confidential information in relation to the arbitral proceedings if the public interest in preserving the confidentiality is not **C.J.Q. 84* outweighed by other considerations that render it desirable in the public interest for the information to be disclosed.¹³⁰

Again, parties are allowed to make disclosure if there is a written agreement, whether in the arbitration agreement or otherwise under the New Zealand Arbitration Act.¹³¹ Similar to those exceptions provided in the Australian and Hong Kong Arbitration Act, in New Zealand a party or an arbitral tribunal may disclose confidential information to a professional or other adviser of any of the parties¹³²; by court order or subpoena,¹³³ the disclosure is necessary and no more than what is reasonably required to ensure that a party has a full opportunity to present his case,¹³⁴ for the establishment or protection of a party's legal rights in relation to a third party¹³⁵; or for the making and prosecution of an application to a court under this Act.¹³⁶ The duty can also be discharged if the disclosure is authorised or required by law or required by a competent regulatory body¹³⁷ with a written explanation of the reason for the disclosure to the other party and the tribunal.¹³⁸ Similar to the Australian International Arbitration Act, a tribunal can order¹³⁹ the disclosure of confidential information if a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under s.14C(a)-(d)¹⁴⁰; and at least one of the parties agrees to refer that question to the arbitral tribunal concerned.¹⁴¹

In England, from the implied obligation in *Dolling-Baker* to reasonable necessity in *Hassneh Insurance*, the issue of confidentiality and its exceptions were made even clearer in *Ali Shipping Corp v Shipyard Trogir* where Potter L.J. laid down five exceptions to the duty of confidentiality. They are: (1) consent of the parties; (2) order of the court; (3) leave of the court; (4) disclosure when and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party, such as the establishment or protection of an arbitrating party's legal right, vis-à-vis a third party, in order to find a cause of action against that third party or to defend a claim (or counterclaim) brought by the third party; and (5) where the public interest requires disclosure.¹⁴² These five exceptions were followed in *John Foster Emmott v Michael Wilson & Partners Ltd*,¹⁴³ where Lawrence Collins L.J. explained:

“[T]he confidentiality was subject to two possible exceptions in the present case. The first was where disclosure was reasonably necessary for the protection of the legitimate interests of an arbitrating party, including reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action *C.J.Q. 85 against a third party, or to defend a claim or counterclaim brought by the third party ... The second relevant exception was the exception of public interest.”¹⁴⁴

Furthermore:

“The limits of that obligation are still in the process of development on a case-by-case basis. On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.”¹⁴⁵

...

These matters lead me to the conclusion that the interests of justice required disclosure. The interests of justice are not confined to the interests of justice in England. The international dimension of the present case demands a broader view.”¹⁴⁶

Also, the need for the protection of parties' legal rights was ruled to be the exceptions to the duty of disclosure in *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich*.¹⁴⁷ The Privy Council ruled that the confidentiality clause does not restrain the disclosure of the award if the disclosure is essential to enforce a party's legal rights conferred by the award. (See Chart Five).

Conclusion

As stated at the beginning of this research, confidentiality is generally accepted to be one of the advantages of arbitration when the parties are advised to submit their disputes to this dispute resolution mechanism. However, from a survey conducted in this research, it is clear that this assumption is indeed a fallacy. While there is no such thing as an internationally

accepted principle of duty of confidentiality in international commercial arbitration, the reality is that the search for the answer to confidentiality shall start from the maze of domestic legislations. However, some jurisdictions restrict the duty only to mediation or conciliation but not arbitration. Of the 20 domestic legislations offering the duty of confidentiality, as seen in the case law and statutes, they also provide different definitions for confidential information, impose the duty upon the different relevant parties, furthermore they allow different exceptions to the duty of confidentiality. With the evidence presented in this in-depth examination into the leading cases and statutes of 93 jurisdictions, the present author is in the position to conclude that the duty of confidentiality, if indeed existing, is actually controlled by the domestic arbitration law and the relevant codes of civil procedures of different jurisdictions which can be grouped into four categories; jurisdictions that offer no duty of *C.J.Q. 86 confidentiality, jurisdictions that allow the duty to be imposed by parties' agreement, jurisdictions that imply such duty on the basis of arbitration agreement, and the jurisdictions that offer express statutory duty of confidentiality. Most of them do not share the same view on the duty of confidentiality. Without an internationally accepted duty of confidentiality or general consensus on this issue, the present writer is in the view that, first, it would be rather inappropriate to advertise confidentiality as one of the main characteristics of international commercial arbitration. Secondly, the parties and their advisers shall be aware of the diversity of views on this issue and the impact which they may have on the cases. Finally, considering the successful experience in dealing with and promoting the awareness of the issue of arbitrator's independence and impartiality, it is worthwhile considering introducing an internationally accepted guideline on the consensual duty of confidentiality among the parties, arbitrators and relevant third parties in order to reflect the widely accepted view that confidentiality is one of the advantages when choosing arbitration as a private means of dispute resolution.¹⁴⁸

Appendix

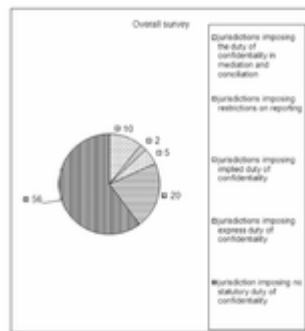


Chart One

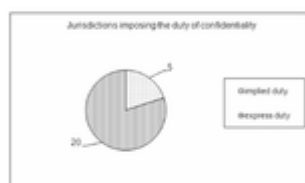


Chart Two

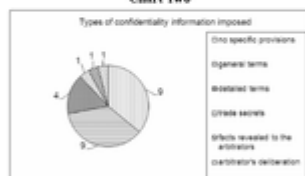


Chart Three

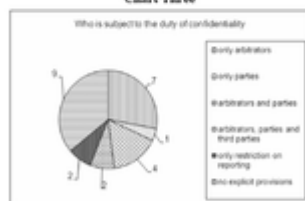


Chart Four

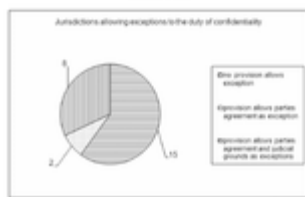


Chart Five

C.J.Q. 2012, 31(1), 68-88

1. F. De Ly, L. di Brozolo and M. Friedman and the members of the committee, *Confidentiality in international commercial arbitration*, reported by International Commercial Arbitration Committee, International Law Association, The Hague conference (August 2010), <http://www.ila-hq.org/en/committees/index.cfm/cid/19> [Accessed October 27, 2011].

2. *Esso Australia Resources Ltd v Plowman* [1995] H.C.A. 19; (1995) 128 A.L.R. 391; (1995) 69 A.L.J.R. 404; (1995) 183 C.L.R. 10 at [35].

- [3.](#) *Esso Australia Resources Ltd v Plowman* [1995] H.C.A. 19; (1995) 128 A.L.R. 391; (1995) 69 A.L.J.R. 404; (1995) 183 C.L.R. 10 at [33].
- [4.](#) *Esso Australia Resources Ltd v Plowman* [1995] H.C.A. 19; (1995) 128 A.L.R. 391; (1995) 69 A.L.J.R. 404; (1995) 183 C.L.R. 10 at [36] and [37].
- [5.](#) *United States v Panhandle Eastern Corporation* (D. Del. 1988) 118 F.R.E. 346.
- [6.](#) *States v Panhandle Eastern Corporation* (D. Del. 1988) 118 F.R.E. 346. For further discussion, see the discussion in O. Oakley-White, “Confidentiality Revisited: Is international arbitration losing one of its major benefits” (2003) 6(1) Int. A.L.R. 29, 32.
- [7.](#) *Dolling-Baker v Merret* [1990] 1 W.L.R. 1205 at 1213.
- [8.](#) *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Rep. 243.
- [9.](#) *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Rep. 243.
- [10.](#) Australian Centre for International Commercial Arbitration (ACICA) art.18.
- [11.](#) Belgian Centre for Mediation and Arbitration Point 9 of Appendix 2.
- [12.](#) Milan Chamber of Arbitration (CEPANI) Rules 2010 art.8.
- [13.](#) China International Economic and Trade Arbitration Commission (CIETAC) 2004 arts 43(1) and 44(2).
- [14.](#) Dubai International Arbitration Centre (DIAC) Rules 2007 art.41(1).
- [15.](#) German Institution of Arbitration (DIS) Rules 1998 art.43(1).
- [16.](#) Hong Kong International Arbitration Centre (HKIAC) Rules 2008 art.39(1).
- [17.](#) Kuala Lumpur Regional Centre for Arbitration (KLRC) Rules 1998 r.9.
- [18.](#) London Court of International Arbitration (LCIA) Rules 1998 art.30.
- [19.](#) Netherland Arbitration Institution (NAI) Rules art.55(2).
- [20.](#) Singapore International Arbitration Centre (SIAC) Rules 2007 art.34.
- [21.](#) Swiss Rules of International Arbitration (Swiss Rules) arts 15(5), 27, 43 and 44.
- [22.](#) Tehran Regional Arbitration Centre (TRAC) Rules art.4.
- [23.](#) International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna Rules) Rules 2006 arts 3(6), 5(3), 7(4) and 20(4).
- [24.](#) World Intellectual Property Organisation (WIPO) Rules 2002 arts 73-75.
- [25.](#) See Appendix one.

26. Bermuda and Singapore.

27. They are Croatia, El Salvador, India, Indonesia, Lithuania, Nigeria, Panama, Slovenia, Uganda and USA. Croatia: Law on Arbitration (2001), El Salvador: the institutional rules of the Mediation and Arbitration Centre of the Chamber of Commerce and Industry of El Salvador art.16; India: Arbitration and Conciliation Act 1996 s.75; Indonesia: Procedural Rules, Law No.30 of 1999 Governing Arbitration and ADR, Lithuania: the Law on Conciliatory Mediation in Civil Disputes, Lithuania 2008, Nigeria: Conciliation Rules And Conciliation Decree 1988. Decree No.11, March 14, 1988 art 14 Sch.3; Panama: Decree No.5 July 5, 1999, Slovenia: In the context of mediation, the duty was imposed under the Law of Mediation in Civil and Commercial Matters Slovenia 2008 arts 4(2) and 11; Uganda: the Arbitration and Conciliation Act 2000 s.61(1); USA: the Uniform Mediation Act 2003 s.8.

28. ILA Report, 7 and 26 (fn.1). For the current Dutch position on this issue, see Eelco Meerdink and Edward van Geuns, Netherlands, in *The International Comparative Legal Guide to International Arbitration 2010* [12.1], <http://www.iclg.co.uk/khadmin/Publications/pdf/3817.pdf> [Accessed October 27, 2011]. It pointed out that in case confidentiality is a major issue, it is advisable to sign a confidentiality agreement setting out the exact obligations of the parties in this respect.

29. Y.B. Molina and M. Espinosa, Nicaragua, *The International Comparative Legal Guide to International Arbitration* (2007), Ch.57. As far as Nicaragua is concerned, the ILA Report stated that privacy and confidentiality are expressly stated under art.3 as the governing principles of its arbitration laws. However, this statement contradicts with a report written by Yali B. Molina and Maricarmen Espinosa, on the issue whether information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings ([11.2]). According to Molina and Espinosa the positive answer shall be given to the question since the Mediation and Arbitration Law 2005 doesn't cover this limitation. Therefore, information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings. They further stated that arbitration and future proceedings are not protected by confidentiality ([11.3]).

30. *Dolling-Baker v Merret* [1990] 1 W.L.R. 1205.

31. *Dolling-Baker v Merret* [1990] 1 W.L.R. 1205 at 1213.

32. *Hassneh Insurance v Mew* [1993] 2 Lloyd's Rep. 243.

33. *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All E.R. 136; [1998] 1 Lloyd's Rep. 643.

34. *Ali Shipping Corp v Shipyard Trogir* [1998] 1 Lloyd's Rep. 643 at 652 and 653.

35. *John Foster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

36. *John Foster Emmott* [2008] EWCA Civ 184 at [107].

37. *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] S.G.H.C. 124.

- [38.](#) *Aïta v Ojeh* [1986] Rev. arb. 583.
- [39.](#) Tribunal de Commerce de Paris, February 22, 1999, *Bleustein et autres v Société True North et société FCB International* [2003] Rev. arb. 373. Discussed in ILA Report, 9 (fn.1).
- [40.](#) Court of Appeal (Paris), January 22, 2004, *NAFIMCO v Forster Wheeler* [2004] Rev. arb. 647.
- [41.](#) ILA Report, 10 (fn.1).
- [42.](#) ILA Report (fn.1), this type of information is termed outbound confidentiality.
- [43.](#) ILA Report (fn.1), this type of information is termed inbound confidentiality which was excluded from the study.
- [44.](#) Part D: Arbitration Court, 1999.
- [45.](#) The UAE Arbitration Law 2008 DIFC Law No.1 of 2008.
- [46.](#) Legislative Decree Relating to Arbitration No.1071, Peru.
- [47.](#) The word “data” was used. The Book IV, Code of Civil Procedure, Romania as amended by Law No.59, of July 23, 1993.
- [48.](#) “Confidentiality of information” was used in the Spanish Law 60/2003 on Arbitration, 2004.
- [49.](#) Dominican Republic Arbitration Law 2008, No.489-08(1) art.22.
- [50.](#) Section 18(1)(a) and (b).
- [51.](#) No.05.08.
- [52.](#) The New Moroccan Law, No.05.08, relating to Arbitration and Mediation Agreements 2008 art.327.
- [53.](#) Czech Republic Act No.216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards (the Arbitration Act) 1995.
- [54.](#) Arbitration (Scotland) Act 2010 Sch.1 at [26(4)].
- [55.](#) Scottish Arbitration Rules r.27.
- [56.](#) New Zealand Arbitration Amendment Act 2007 s.4.
- [57.](#) New Zealand Arbitration Amendment Act 2007 s.4(1)(a).
- [58.](#) New Zealand Arbitration Amendment Act 2007 s.4(1)(b)(i).
- [59.](#) New Zealand Arbitration Amendment Act 2007 s.4(1)(b)(ii).
- [60.](#) New Zealand Arbitration Amendment Act 2007 s.4(1)(b)(iii).

- [61.](#) New Zealand Arbitration Amendment Act 2007 s.4(1)(b)(iv).
- [62.](#) New Zealand Arbitration Amendment Act 2007 s.4(1)(b)(v).
- [63.](#) New Zealand Arbitration Amendment Act 2007 s.4(1)(b)(iv).
- [64.](#) Section 22 provides: “Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.” Section 23 states: “(1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court. (2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published.”
- [65.](#) *Dolling-Baker* [1990] 1 W.L.R. 1205.
- [66.](#) *Dolling-Baker* [1990] 1 W.L.R. 1205 at 1207.
- [67.](#) *Dolling-Baker* [1990] 1 W.L.R. 1205 at 1213.
- [68.](#) *Ali Shipping Corp* [1998] 1 Lloyd's Rep. 643 at 651.
- [69.](#) *Hassneh* [1993] 2 Lloyd's Rep. 243.
- [70.](#) *Hassneh* [1993] 2 Lloyd's Rep. 243 at 247.
- [71.](#) *Hassneh* [1993] 2 Lloyd's Rep. 243 at 247 and 248.
- [72.](#) *Hassneh* [1993] 2 Lloyd's Rep. 243 at 249.
- [73.](#) *Ali Shipping Corp* [1998] 1 Lloyd's Rep. 643 at 651.
- [74.](#) *John Foster Emmott* [2008] EWCA Civ 184 at [72] and [81].
- [75.](#) Law of the Republic of Belarus July 9, 1999.
- [76.](#) Law of Alternative Resolution and Promotion of Freedom from Social Unrest art.13.
- [77.](#) The Law of the Republic of Latvia, Civil Procedure law Pt D: Arbitration Court 1999 art.512(2).
- [78.](#) Act No.210/1994 Coll. On Arbitral Proceedings and Enforcement of Arbitral Awards (the Arbitration Act S.6.
- [79.](#) Article 15.
- [80.](#) The New Moroccan Law No.05.08, Relating to Arbitration and Mediation Agreements, 2008 Arts 326 and 327-22.
- [81.](#) Romanian Code of Civil Procedure on Arbitration (arts 340-370) 1993 Book IV.
- [82.](#) Law No.17 of 1999 Promulgating the Trade Law art.83(1).

- [83.](#) Law No.17 of 1999 Promulgating the Trade Law art.83(2).
- [84.](#) Hong Kong Arbitration Ordinance 2011 (CAP 609) s.33(3)(b).
- [85.](#) Hong Kong Arbitration Ordinance 2011 (CAP 609) s.33(4)(b).
- [86.](#) Hong Kong Arbitration Ordinance 2011 (CAP 609) s.33(3)(a).
- [87.](#) This provision is subject to the exceptions listed in s.14C.
- [88.](#) Rule 26(3).
- [89.](#) Rule 26(2).
- [90.](#) Peru, Legislative Decree Relating to Arbitration No.1071 2008.
- [91.](#) Article 51(2). This provision is subject to the legal needs for disclosure.
- [92.](#) Article 51(1).
- [93.](#) Spain law 60/2003 of December 23 on Arbitration (in force March 26, 2004).
- [94.](#) Section 46(1).
- [95.](#) Section 46(2).
- [96.](#) Singapore Arbitration Act 2001 (Ch.10) (revised 2002 edn) (Incorporating amendments as at January 1, 2010). Similar provision can also be seen in Singapore Arbitration Act 2001 (Ch.10) (revised 2002 edn) s.57(2).
- [97.](#) Hong Kong Arbitration Ordinance 2011 (CAP609) s.17(3)(a).
- [98.](#) Hong Kong Arbitration Ordinance 2011 (CAP609) s.17(3)(b).
- [99.](#) Arbitration Law 2008--DIFC Law No.1 2008.
- [100.](#) Zambia Arbitration Act No.19 2000 (Enacted by the Parliament of Zambia December 29, 2000).
- [101.](#) DIFC Law No.1 2008.
- [102.](#) The Arbitration Act, Czech Republic, the Act No.216/1994 Coll. On Arbitral Proceedings and Enforcement of Arbitral Awards s.6.
- [103.](#) Scottish Arbitration Rules r.26(1)(a).
- [104.](#) Scottish Arbitration Rules r.26(1)(b).
- [105.](#) Scottish Arbitration Rules r.26(1)(c)(i).
- [106.](#) Scottish Arbitration Rules r.26(1)(c)(ii).

- [107.](#) Scottish Arbitration Rules r.26(1)(c)(ii).
- [108.](#) Scottish Arbitration Rules r.26(1)(d).
- [109.](#) Scottish Arbitration Rules r.26(1)(e).
- [110.](#) Scottish Arbitration Rules r.26(1)(f).
- [111.](#) Scottish Arbitration Rules r.26(1)(g).
- [112.](#) Hong Kong Arbitration Ordinance 2011 (CAP609) s.18(1).
- [113.](#) Hong Kong Arbitration Ordinance 2011 (CAP609) s.18 (2)(a)(i).
- [114.](#) Hong Kong Arbitration Ordinance 2011 (CAP609) s.18 (2)(a)(ii).
- [115.](#) Hong Kong Arbitration Ordinance 2011 (CAP609) s.18 (2)(c).
- [116.](#) Hong Kong Arbitration Ordinance 2011 (CAP609) s.18 (2)(b).
- [117.](#) International Arbitration Act 1974 s.23D(2), amended 2010.
- [118.](#) International Arbitration Act 1974 s.23D(3).
- [119.](#) International Arbitration Act 1974 s.23D(4).
- [120.](#) International Arbitration Act 1974 s.23D(5).
- [121.](#) International Arbitration Act 1974 s.23D(6).
- [122.](#) International Arbitration Act 1974 s.23D(7).
- [123.](#) International Arbitration Act 1974 s.23D(8).
- [124.](#) According to s23(D)(10), the relevant law means (a law of the Commonwealth, other than the Act of international Arbitration, a law of a state or territory, a law of a foreign country, or of a part of a foreign country, as well as in which a party to the arbitration agreement has its principal place of business, in which a substantial part of the obligations of the commercial relationship are to be performed or to which the subject matter of the dispute is commonly connected.
- [125.](#) International Arbitration Act 1974 s.23D(9). However, a written explanation of reasons and details of the disclosure must be provided by the persons making such disclosure.
- [126.](#) The Australian Arbitration Act s.23(E).
- [127.](#) The Australian Arbitration Act s.23(G).
- [128.](#) The Australian Arbitration Act s.23(G)(1)(a).
- [129.](#) The Australian Arbitration Act s.23(G)(1)(b).

- [130.](#) The Australian Arbitration Act s.23(F).
- [131.](#) New Zealand the Arbitration Amendment Act 2007 (the Amendment Act) s.14.
- [132.](#) New Zealand (the Amendment Act 2007) s.14C(a)
- [133.](#) New Zealand (the Amendment Act 2007) s.14C(c)
- [134.](#) New Zealand (the Amendment Act 2007) s.14C(a)(i)(A).
- [135.](#) New Zealand (the Amendment Act 2007) s.14C(a)(i)(B).
- [136.](#) New Zealand (the Amendment Act 2007) s.14C(a)(i)(C).
- [137.](#) New Zealand (the Amendment Act 2007) s.14C(d)(i).
- [138.](#) New Zealand (the Amendment Act 2007) s.14C(d)(ii).
- [139.](#) New Zealand (the Amendment Act 2007) s.14D(2)
- [140.](#) New Zealand (the Amendment Act 2007) s.14D(1)(a).
- [141.](#) New Zealand (the Amendment Act 2007) s.14D(1)(b).
- [142.](#) *Hassneh* [1998] 1 Lloyd's Rep. 643 at 651.
- [143.](#) *John Foster Emmott* [2008] EWCA Civ 184.
- [144.](#) *John Foster Emmott* [2008] EWCA Civ 184 at [27] and [28].
- [145.](#) *John Foster Emmott* [2008] EWCA Civ 184 at [107].
- [146.](#) *John Foster Emmott* [2008] EWCA Civ 184 at [109]-[111].
- [147.](#) *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] UKPC 11.
- [148.](#) The IBA Guidelines on Conflicts of Interest in International Commercial Arbitration (2004) available at [http://www.ibanet.org/Search/Default.aspx?q=guidelineön"conflictöfinterests](http://www.ibanet.org/Search/Default.aspx?q=guidelineön) [Accessed July 26, 2011].