PRIVACY, CONFIDENTIALITY AND DISCLOSURE OF INFORMATION RELATING TO ARBITRAL PROCEEDINGS

by

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INTRODUCTION

One of the defining features of arbitration is its ability to offer privacy[2] and confidentiality[3] as compared with domestic courts. The UNICTRAL Model Law does not articulate any provisions specifically relating to confidentiality. However, the drafting history of the UNCITRAL Model Law is clear in that confidentiality'may be left to the agreement of the parties or the arbitration rules chosen by the parties'.[4]

Therefore, arbitration is distinguishable from litigation in two essential ways: privacy of the proceedings,[5] and confidentiality of the process. The general assumption is that arbitration proceedings will be both private and

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2 Privacy is the right to keep personal matters and relationships secret. It is the ability of an individual or group to seclude themselves or information about themselves. They thereby express themselves selectively.

3 Confidentiality is the fact of private information being kept secret. It is the keeping of another person or entity's information private. It also refers to a duty of an individual or entity to refrain from sharing confidential information with others, except with the express consent of the other party.

4 See Report of the Secretary-General on Possible Features of a Model Law on International Commercial Arbitration (1981) UN Doc/CN 9/207 at [17].

5 It is a 'fundamental common law principle' that in litigation 'trials should be conducted and judgments given in public' per the English Supreme Court in *Al Rawi v Security Service* [2012] 1 All ER 1 at para [11]; [2011] UKSC 34 at [11]; see also *Scott (otherwise Morgan) v Scott* [1913] AC 417; [1911–13] All ER Rep 1.

confidential. The terms 'privacy' and 'confidentiality' had been used in arbitration interchangeably arising from the belief that an arbitration agreement is a private contractual arrangement.

It is a common misunderstanding that the private nature of arbitration means that the arbitration proceedings will be confidential. However, privacy and confidentiality are different in meaning.

Privacy is concerned with the exclusive right of persons involved in the proceedings, such as the arbitral tribunal, parties and witnesses who attend meetings and hearings to know about the arbitration.[6] It means that no third party can attend arbitral case management meetings and hearings. However, private hearings do not necessarily attach confidentiality obligations to the parties to arbitration.

Confidentiality refers to non-disclosure of specific information in public by virtue of the arbitration agreement or applicable arbitral rules. Arbitrators and parties are obliged not to divulge information relating to the contents of the proceedings, documents or the award.[7] The obligation of confidentiality is attached to the award, the pleadings, written submission, notes and transcripts of evidence given in the arbitration.

Neither party shall disclose to the third party, without the agreement of the other, the award, the reasons for the award, documents disclosed in the arbitration and documents prepared for the purposes of the arbitration. The confidentiality of arbitrations is also affected by the involvement of other participants in the arbitral proceedings like witnesses, translators, case officers of the arbitral institution, etc., who have access to confidential information but are not governed by the arbitral rules or the arbitration agreement.

Confidentiality benefits arbitration in that it reduces the possibility of damaging continuing business relations and setting adverse judicial precedents. It offers parties the freedom to present arguments they may otherwise be reluctant to make in an open court.[8] Confidentiality has been a hallmark of arbitration. It is essentially rooted in parties' ability to choose to

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6 Lew, 'Expert Report of Dr Julian Lew (in *Esso/BHP v Plowman*)' (1995) 11 *Arbitration International* 283 at p 285 para [16].

7 See Lew, 'Expert Report of Dr Julian DM Lew (in *Esso/BHP v Plowman*)', (1995) 11 *Arbitration International* 283 at p 285.

8 Avinash Poorooye and Ronan Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) 22 *Havard Negotiation Law Review* 275.

keep both their dispute and its resolution private and confidential.

PRIVACY

Privacy in international commercial arbitration is greatly assumed around the world. Arbitration is to be conduct in private. It is not a spectator sport.[9] Strangers are to be excluded from the hearing of the arbitration. One of the fundamental principles of arbitration is that arbitration proceedings are private.[10]

The parties to an arbitration agreement agree to submit to arbitration disputes arising between themselves and only between themselves. This means that the general public cannot attend the arbitration as against court proceedings which are open to them.

Privacy in arbitration affords parties a forum where disputes can be kept 'away from the intrusiveness of the media and the prying eyes of their competitors'.[11] It has also been said that '[t]he informality attaching to a hearing held in private and the candour to which it may give rise is an essential ingredient of arbitration'.[12]

Redfern and Hunter state that: 'International commercial arbitration is not a public proceeding. It is essentially a private process, and therefore, has the potential for being a confidential process'.[13] Arbitration is a private tribunal for the settlement of disputes. The public, therefore, may not be admitted if their admission is objected to by either party or the arbitrator.[14]

The Australian High Court in *Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals)*[15] observed:

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9 'The Decision of the High Court of Australia in *Esso/BHP v Plowman*' (1995) *Arbitration International*, 11 (3) 1 at pp 231–234,

10 *Tillam v Copp* (1847) 5 CB 211; 136 ER 357; *Haigh v Haigh* (1861) 3 De G F & J 157; 45 ER 838; *Russell v Russell* (1880) 14 Ch D 471 per Jessel MR at p 474; *Bibby Bulk Carriers Ltd v Cansulex Ltd* [1989] QB 155 at 166–167 per Hirst J held, 'I accept that the arbitration proceedings is a private one, but arises simply and solely as a result of the contract between the participants'.

11 Avinash Poorooye and Ronan Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) 22 *Havard Negotiation Law Review* 275 at p 281.

12 *Hassneh Insurance Co of Israel v Mew* [1982] 2 Lloyd's Rep 243 at pp 246–247.

13 Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th Ed, 2015) at para 2.161.

14 Anthony Walton, Mary Vitoria, *Russell on Arbitration* (20th Ed, 1982) at 260.

15 [1995] 128 ALR 391 at 398; (1995) 183 CLR 10 at para [26].

> Subject to any manifestation of a contrary intention arising from the provisions or the nature of an agreement to submit a dispute to arbitration, the arbitration held pursuant to the agreement is private in the sense that it is not open to the public… The arbitrator will exclude strangers from the hearing unless the parties' consent to attendance by a stranger. Persons whose presence is necessary for the proper conduct of the arbitration are not strangers in the relevant sense. Thus, persons claiming through or attending on behalf of parties, those assisting a party in the presentation of the case, and a shorthand writer to take notes may appear.

The privacy of the hearing itself has never been in dispute. Under English law, Coleman J in *Hassneh Insurance Co of Israel v Mew*[16] held:

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

The English Court of Appeal in *Ali Shipping Corporation v Shipyard Trogir*[17] affirmed this position.

However, the Privy Council undertook a guarded and nuanced approach in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich (Aegis)*[18] on the issue of use of arbitration materials obtained in a first arbitration intended to be utilised to support a plea of issue estoppel in a second arbitration. The Privy Council held that:

> Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in

16 [1993] 2 Lloyd's Rep 243 at 247.

17 [1998] 2 All ER 136; [1999] 1 WLR 136; [1998] 1 Lloyd's Rep 643 (CA) (Eng); see also *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314; [2005] QB 207; [2004] 2 All ER (Comm) 193 (CA) (Eng) and *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] 2 All ER (Comm) 193 (CA) (Eng).

18 [2003] 1 WLR 1041.

> litigation. But when it comes to the award, the same logic cannot be applied. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings (as Aegis referred to it for the purposes of the present injunction proceedings) or for the purposes of enforcing the rights which the award confers (as European Re seek to do in the Rowe arbitration). Generalisations and the formulation of detailed implied terms are not appropriate.[19]

Parker LJ in *Dolling-Baker v Merrett*[20] stated that:

> 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 whatever evidence that has been given by any witness in the arbitration — save with the consent of the other party or pursuant to an order or with 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.

Earlier, Leggatt J in *Oxford Shipping Co Ltd v Nippon Yusen Kaisha, The Eastern Saga*[21] explained:

> The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between 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 convenient that course may be to the party seeking it and however closely associated the disputes in question may be. The only powers which an arbitrator enjoys relate to the reference in which he has been appointed. They cannot be extended merely because a similar dispute exists which is capable of being and is referred separately to arbitration under a different agreement.

Given that arbitration is a private procedure, only the parties to the arbitration agreement and their representatives can attend any arbitration meeting or hearing. The public are excluded and have no right to attend a hearing before an arbitral tribunal. The witness's testimony is only heard by those persons allowed to be present.

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19 [2003] 1 WLR 1041 at p 20.
20 [1991] 2 All ER 890 at p 899, [1990] 1 WLR 1205 at p 1213 (CA) (Eng).
21 [1984] 3 All ER 835 at 842.

Mason CJ in his majority view in *Esso Australia Resources Ltd v Plowman (Minister of Energy and Minerals)*[22] emphasised that:

> ... the private character of the hearing as something that is inherent in the subject matter of the agreement to submit disputes to arbitration rather than attribute the character to an implied term.

He added that:

> The efficacy of a private arbitration as an expeditious and commercially attractive form of dispute resolution depends, at least in part, upon its private nature. Hence the efficacy of a private arbitration will be damaged, even defeated, if proceedings and documents in the arbitration are made public by the disclosure of documents relating to arbitration ... If the hearing itself is private and confidential, then it would seem logical to regard documents created for the purpose of that hearing — such as witness statements, experts' reports and so on — as equally private and confidential. It would also seem logical to extend the same description to a transcript of the hearing. The disclosure to a third party of [a note or transcript of the evidence] would be almost equivalent to opening the door of the arbitration room to that third party.[23]

Toohey J in his dissenting view in *Esso Australia Resources* opined:

> Privacy should be implied as a term of agreement to arbitrate. The implied term is attached as a matter of law rather than to give business efficacy to the agreement. A term is implied as a matter of law 'as the nature of the contract itself implicitly requires'. The very nature of arbitration agreements, the established practice for arbitrations to be conducted in private and the importance attached to privacy in arbitration hearings indicate that a term requiring privacy should be implied as a matter of law.[24]

Privacy is now simply taken for granted as one of the ordinary and necessary incidents of arbitration, (save in cases of statutory references) as an arbitration is the outcome of a private agreement between parties to withdraw their dispute from the courts, and submit it to the decision of a private arbitral tribunal.

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22 [1995] 128 ALR 391 at 398; (1995) 183 CLR 10 at para [26].

23 *Esso Australia Resources Ltd v Plowman* (1995) 128 ALR 391 at 399; (1995) 183 CLR 10, as per Mason CJ. This can be compared with the earlier decision in *Aerospatiale Holdings Australia Pty Ltd v Elspan International Ltd* (1992) 28 NSWLR 321 where Cole J held that there is no reason in principle why an arbitration and a reference dealing with closely associated matters and being principally between the same parties should not be held together. This decision has not found favour as it goes against the established principles consent, agreement and privacy deeply ingrained in arbitration law in all major jurisdictions.

24 *Esso Australia Resources Ltd v Plowman (Minister of Energy and Minerals)* (1995) 128 ALR 391; (1995) 183 CLR 10.

Arbitration institutional rules almost universally recognise the privacy of arbitration.[25] If the principle of privacy is breached, the arbitration may be compromised.[26] As such, the notion of privacy in arbitration is not contentious. However, the same may not be the case with confidentiality.

CONFIDENTIALITY

Confidentiality is widely lauded as one of the major benefits of arbitration.[27] Such benefit arises from the limits and duties placed on the parties, their lawyers, the arbitral tribunal and the administering institution who should know about the arbitration. Such duty extends to the existence of the arbitration, documents used or referred to in the arbitration and the award of the arbitral tribunal.

Traditionally, an arbitration agreement is considered to be a private contractual arrangement. It therefore, prevents uninvolved third parties from intruding into the parties' confidential information and impact upon the arbitral tribunal's independence. Many national arbitration laws do not contain specific provisions relating to the confidentiality of arbitration. This may be because of the difficulty of defining the scope of the duty of confidentiality.

However, party autonomy in the confidentiality of international arbitration proceedings is a generally well-recognised concept by way of an implied term in developed legal systems.[28] Lawrence Collins LJ in the English Court of Appeal of *Emmott v Michael Wilson & Partners Ltd*[29] explained that:

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25 For example, article 28(5) of the UNCITRAL Arbitration Rules 2010 provides that 'hearings shall be heard in camera unless the parties otherwise agree'. See also article 22(3) of the ICC Arbitration Rules 2017; article 30.1 of the LCIA Arbitration Rules.

26 *Baker v Cotterill* (1849) 18 LJQB 345; *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1961] 2 Lloyd's Rep 392 at 402; *Liverpool City Council v Irwin* [1977] AC 239.

27 Bond, 'Expert Report of Stephan Bond Esq (in *Esso/BHP v Plowman)*' (1995) 11 Arbitration International 273 stated that the adoption of a policy to publish awards would 'constitute a significant deterrent to the use of ICC arbitration'. At the time of writing, the investment arbitration between *AS Tallinna Vesi and Estonia* involves the question of what documents or information should published on the International Centre of Settlement of Investment Dispute ('ISCID') website. The final hearing of the issues is scheduled for November 2016. See https://globenewswire.com/.

28 'Chapter 20: Confidentiality in International Arbitration', in Gary B. Born, *International Commercial Arbitration* (2nd Ed, Kluwer Law International, 2014) at pp 2779–2831.

29 [2008] EWCA Civ 184 at para [81], [2008] Bus LR 1361], [2008] 2 All ER (Comm) 193 at para [71] (CA) (Eng).

> An implied obligation (arising out of the nature of arbitration itself) 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 the award, and not to disclose in any other way what evidence has 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.

Party autonomy in this context is the ability of parties to expressly provide for confidentiality of proceedings in the arbitration agreement.

There are limitations apparent with respect to the scope of the parties' autonomy to agree upon the confidentiality of arbitral proceedings.[30] Firstly, any confidentiality provision in the parties' agreement is binding only on the parties themselves, and not on third parties (including witnesses).[31] Secondly, even as between the parties to arbitral proceedings, there may be circumstances where an agreement regarding confidentiality will be unenforceable on public policy or mandatory law grounds.[32]

That said, the parties can benefit by providing for confidentiality in the arbitration agreement by way of specific procedural rules which can be put in place in relation to matters such as the material or information that is to be kept confidential. Such material may include evidence adduced, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, the award itself.

Other matters to be considered may encompass the measures for maintaining confidentiality of such information and hearings and whether any special procedures should be employed for maintaining confidentiality of information transmitted by electronic means. In short, the parties should provide for the circumstances in which confidential information may be disclosed in part or in whole.

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30 'Chapter 20: Confidentiality in International Arbitration', in Gary B Born, *International Commercial Arbitration* (2nd Ed, Kluwer Law International, 2014) at p 2789.

31 See *Esso Australia Resources Ltd v Plowman* (1995) 128 ALR 391; (1995) 183 CLR 10: 'Importantly, such a provision [in the arbitration agreement] would bind the parties and the arbitrators, but not others. Witnesses, for example, would be under no obligation of confidentiality'.

32 Examples include reporting obligations imposed by national security regulations or disclosure and investigatory powers granted to governmental agencies. See also Denoix de Saint Marc, 'Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations' (2003) 20 Journal of International Arbitration 211.

Despite the inherent benefit of parties defining the scope of confidentiality in the arbitration agreement, many parties do not include such a provision in their arbitration agreement. This gives rise to the question of whether there is an implied duty of confidentiality in arbitration.

Professor Gary Born adds that due to an absence of international norms prescribing a duty of confidentiality, the national legal systems have taken widely differing approaches on whether international arbitration proceedings are confidential, and the scope of any implied confidentiality obligations.[33]

Internationally, there is some divergence in how confidentiality of arbitral proceedings is treated in different jurisdictions.[34] Various jurisdictions take different approaches. The Model Law is silent on confidentiality in international arbitration. Many legislations in many jurisdictions, such as Korea, Japan, the United States, Switzerland etc do not stipulate any express obligations.

At the other end the Hong Kong's Arbitration Ordinance and Malaysian Arbitration Act 2005 ('the AA 2005'), as amended in 2018, provides for protection of confidentiality in arbitral proceedings as well as court proceedings related to such arbitral proceedings.[35] The Singapore Arbitration Act provides that parties and arbitral tribunals may not publish information about an arbitration unless 'all parties to the proceedings agree to such information may be published'. However, confidentiality is not absolute.[36]

On the other end, the English Arbitration Act 1996 is silent on the matter.[37] However, English Courts consider arbitration to be a private means of dispute resolution and consider an obligation of confidentiality to be implied in the

33 'Chapter 20: Confidentiality in International Arbitration', in Gary B Born, *International Commercial Arbitration* (2nd Ed, Kluwer Law International, 2014) at pp 2784 and 2785.

34 Justice BN Srikrishna, 'Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India', (30 July 2017) http://legalaffairs.gov.in/.

35 Hong Kong Arbitration Ordinance (Cap 609) ss 16–18; Malaysian Arbitration Art 2005 (Act 646) s 41A — Disclosure of information relating to arbitral proceedings and awards prohibited.

36 Singapore Arbitration Act s 57(4) clarifies that if an arbitration award is 'of major legal interest', a court may publish it, although in that event, the court can still conceal the identities of the parties in the published judgment, preserving some confidentiality.

37 English Arbitration Act 1996 s 23.

arbitration agreement between the parties.[38] The real difficulty which arises from such an approach is defining the exceptions to that implied duty of confidentiality.

The International Law Association explained the conundrum as follows:

> Even where an obligation of confidence does exist, it will normally be subject to exceptions. All rules on confidentiality, where contained in statutes, arbitral rules or in the pronouncements of courts, contemplate exceptions to the duty, although there is less agreement as to what the exceptions are and as to their scope. Actually, the difficulty in defining the exceptions is one of the reasons given to explain why certain legislations and arbitral institutions have so far abstained from adopting rules on the subject.[39]

Different arbitration rules vary in their approach to confidentiality. They predetermine and establish the extent of the confidentiality when parties select the particular arbitration rules. The ICC Arbitration Rules do not by itself oblige the parties to keep the proceedings confidential. However, the Rules authorise the arbitral tribunal to make orders and to take measures to protect trade secrets and confidential information. The International Chamber of Commerce (ICC) Arbitration Rules 2017 itself does not guarantee confidentiality. As a matter of practice, the parties often agree to confidentiality in their arbitration agreement or in the Terms of Reference.

The International Centre for Dispute Resolution (ICDR) Arbitration Rules provide that 'confidential information disclosed during the arbitration shall not be divulged by an arbitrator or the Administrator'. Awards 'may be made public only with the consent of all parties or as required by the law'. ICDR awards when published must be 'edited to conceal the names of the parties and other identifying details'. The Arbitration Rules of the London Court of International Arbitration ('LCIA') and the German Arbitration Institute (DIS) provide for limited confidentiality and parties are allowed to agree on a wider provision for confidentiality.

Confidentiality is secure only if it extends to and is respected by the parties, the arbitral tribunal and arbitral institution as well as by third parties having access to information and evidence. To this end, some arbitration rules

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38 *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

39 International Law Association, 'Confidentiality in International Commercial Arbitration' in *The Hague Conference* (2010) at p 16 cited in Michael Hwang SC and Nicholas Thio, 'A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self-Governing Code' in *Selected Essays on International Arbitration* (Academy Publishing, 2013) at p 161.

specifically provide that all that takes place at arbitration is confidential. Neither party nor the arbitral tribunal shall, without the consent of the other, disclose to third persons, except for the purpose of the proper conduct of the arbitration, what has happened in the course of the arbitration.[40]

Whilst it is commonly accepted that arbitration hearings are private, confidentiality has become a slightly confusing proposition. Until recently, the issue of confidentiality had mostly been addressed in a cursory fashion with the attendant paucity of statutory and case law authorities.

PRIVACY AND CONFIDENTIAL AS DISTINCT CONCEPTS

The English court in *Emmott v Michael Wilson & Partners Ltd*[41] recognises privacy and confidentiality as separate concepts. While arbitration is confidential, in many cases, the arbitral proceedings is merely private. In the context of arbitration, privacy and confidentiality are necessarily the same.

Confidentiality of arbitration can be undermined, even where all participants concerned are originally determined to maintain it. For example, the court, whose proceedings are a matter of public record, may vitiate or undermine confidentiality before or during arbitral proceedings when the parties attempt to set aside or enforce the arbitral award. The parties or non-party may see fit to use one or another element of prior arbitral proceedings in subsequent arbitral or court proceedings.

It would be difficult, if not impossible, to prevent a winning party from using the elements of its success in an arbitration proceeding, in subsequent proceedings. Witnesses may not be meaningfully restricted from revealing knowledge of arbitration proceedings where they had given evidence. The parties may not be able to ensure maintenance of confidentiality by such witnesses.

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40 See the Asian International Arbitration Centre (AIAC) Arbitration Rules 2018 r 16; the International Chamber of Commerce (ICC) Rules of Arbitration 2017 art 22(3), appendix I art 6, appendix II art 1; the American Arbitration Association International Dispute Resolution Procedure (Including Mediation and Arbitration Rules), art 37; the London Court of International Arbitration Rules 2014 art 30; the China International Economic and Trade Arbitration Commission Arbitration Rules 2015 art 38; Arbitration Rules of the World Intellectual Property Organisation (WIPO) (2014) arts 54, 75–78; Expedited Arbitration Rules of the World Intellectual Property Organisation (WIPO) (2020) arts 48, 68–71; the UNCITRAL Arbitration Rules (2010) art 34(5) the MCIA Arbitration Rules 2016, r 35; the SIAC Arbitration Rules 2016 r 39.

41 [2008] EWCA Civ 184; [2008] 2 All ER (Comm) 193 (CA) (Eng).

If indeed a distinction is to be drawn, there is little guidance in case law regarding the distinction between privacy and confidentiality. The question is whether privacy automatically results in confidentiality or does it automatically demand confidentiality?

The English Court of Appeal in *Emmott v Michael Wilson & Partners Ltd*[42] held that:

> It is not always easy to distinguish confidentiality and privacy, and it is also important to bear in mind the context of the decisions. ... Three legal concepts or categories have been in play in these cases. The first is privacy, in the sense that because arbitration is private that privacy would be violated by the publication or dissemination of documents deployed in the arbitration. The second is confidentiality in the sense where it is used to refer to inherent confidentiality in the information in documents, such as trade secrets or other confidential information generated or deployed in an arbitration. The third is confidentiality in the sense of an implied agreement that documents disclosed or generated in arbitration can only be used for the purposes of the arbitration. The distinction between the second and third cases may be illustrated by the case (not far from this one) where the relevant documents in the arbitration (such as the defence) do not contain anything in themselves which is confidential: nevertheless the parties are under an obligation not to use it for any purpose other than the arbitration, and that obligation is described in the authorities as an obligation of confidence.[43]

STAGES OF CONFIDENTIALITY

There are two crucial stages of confidentiality: firstly, confidentiality prior to the publication of an award, including the time when the hearings are ongoing, and secondly, confidentiality after the award is published. In the former situation, the parties may want to unilaterally reveal that there is a dispute, either for commercial purposes or in pursuit of collateral requirement.

For example, the parties may, however, be under a statutory or other duty to provide information to insurers, auditors, shareholders, public regulators, etc. A spouse or a partner may well need to know the outcome of the reference. These outsiders can include, for example, a subcontractor who may be entitled to a proportion of the claim made by the main contractor.

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42 [2008] EWCA Civ 184 at para [71], [2008] 2 All ER (Comm) 193 at para [71] (CA) (Eng).
43 [2008] EWCA Civ 184 at paras [71] and [79], [2008] 2 All ER (Comm) 193, CA (Eng) at pp 79–84.

An outsider may also have an agreement to indemnify the party to the arbitration against any liability incurred in the arbitration. The outsider may, thus, have a legitimate interest in being familiar with the evidence, or of the outcome by way of award, in order to pursue his or her own legal interest.

In the latter situation, parties facing issues of commercial prejudice may pursue further litigation. They may use the award, pleadings and evidence which are part of the public record in challenge of enforcement proceedings, to varying extents.

The court in *Dolling-Baker v Merrett*[44] held that in the absence of an express term in an arbitration clause providing for confidentiality, the presumption of confidentiality applies as an implied term arising out of the very nature of the arbitral process. It held on the implied duty of confidentiality as follows:

> 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 whatever evidence that has been given by any witness in the arbitration — save with the consent of the other party or pursuant to an order or with leave of the court. That qualification is necessary just as it is in the case of an implied obligation of secrecy between banker and customer.[45]

The English courts have applied the implied duty of confidentiality in international commercial arbitration. The English Court of Appeal in *Ali Shipping Corporation v Shipyar Trogir*[46] implied a duty of confidentiality by operation of law into an arbitration agreement. However, it also held that this legal duty was not absolute. Some exceptions include instances where there was consent to divulge information, the interest of justice demanded disclosure, and disclosure was reasonably necessary to protect the interests of a party to arbitration.[47]

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44 *Dolling-Baker v Merrett* [1991] 2 All ER 890 at p 899; [1990] 1 WLR 1205 at p 1213 (CA) (Eng).
45 [1991] 2 All ER 899.
46 [1998] 2 All ER 136, [1999] 1 WLR 136, [1998] 1 Lloyd's Rep 643 (CA) (Eng).
47 Leon E Trakman, 'Confidentiality in International Commercial Arbitration' (2002) 18(1) *Arbitration International* 1.

As a matter of law, the court in *Ali Shipping Corporation v Shipyard Trogir*[48] held such confidentiality as attaching to arbitration agreements as a 'necessary incident of a definable category of contractual relationship' apart from issues of custom, usage or business efficacy, with limitations. The arbitral tribunal and the parties owe a general duty of confidentiality to each other.

The Singapore High Court in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu*[49] adopted the English position when it held that:

> Parties who opt for arbitration rather than litigation are likely to be aware of and influenced by the fact that the former are private hearings while the latter are open hearings. Rather than to say there is nothing inherently confidential in the arbitration process, it is more in keeping with the parties' expectations to take the position that the proceedings are confidential and that disclosures can be made in the accepted circumstances.

DIMINISHING CONFIDENTIALITY

Lord Hobhouse in *Associated Electric and Gas Insurance Services Ltd. v European Reinsurance Co of Zurich* expressed reservations about a broad-brush approach and therefore the possible exceptions to the confidentiality rule have to been decided in light of the context in which they arise and particularly the area of confidentiality that they fall under.[50]

The court in *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co*,[51] addressed the issue of whether a judgment dismissing an application should be available either for general publication or for limited publication to specified financial institutions. The dispute was arbitrated in London under UNCITRAL Rules of Arbitration. The Bankers Trust sought to challenge the award under s 68 of the English Arbitration Act 1996, and this was heard in private.

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48 [1998] 2 All ER 136, [1999] 1 WLR 136, [1998] 1 Lloyd's Rep 643 (CA) (Eng). This decision was in part a reaction against the ruling in *Esso Australia Resources Ltd v Plowman (Minister of Energy and Minerals)* (1995) 128 ALR 391; (1995) 183 CLR 10; see Smeureanu, *Confidentiality in International Commercial Arbitration* (2011) at p 44. See also *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243; *London & Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102 ; [1995] 2 EG 134; *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272; *Sacor Maritima SA v Repsol Petroleo SA* [1998] 1 Lloyd's Rep 518; *Aquator Shipping Ltd v Kleimar NV, The Capricorn 1* [1998] 2 Lloyd's Rep 379.

49 [2003] 2 SLR(R) 547 at para [17].

50 [2003] UKPC 11; [2003] 1 All ER (Comm) 253.

51 [2004] EWCA Civ 314; [2005] QB 207; [2004] 2 All ER (Comm) 193, CA (Eng).

The court considered the question of publication of the judgment after dismissing the application to set aside the award. A number of factors could be considered when deciding on this issue, for example, the parties' attitude towards publication of arbitration-related information, the essential private and confidential nature of arbitration, and nature of the application made by the parties.

It opined that the essential factor in assessing these factors was the overall interests of justice, and decided against publicising the judgment. However, some details of the award became public when Lawtel, a legal reporting website, published the summary details of the challenge. The court went on to rule that this disclosure and the mere result of that litigation did not amount to a breach of any duty of confidentiality. This was because disclosure to investors and stakeholders was important to the parties.

The English Commercial Court in *Teekay Tankers Ltd v STX Offshore and Shipbuilding Co Ltd*,[52] rejected a counterclaim for breach of confidentiality, as the disclosure fell within the 'interests of justice' exception. The court reasoned that the references to the award as made by Teekay Tankers Ltd were made in support of an arguable assertion that was put forward in good faith. As such, what transpired in the arbitrations could be relied upon for the purpose of Teekay's assertions in the English proceedings. Additionally, the court asserted that STX was given sufficient warning prior to the disclosure to enable it to take any necessary steps to preserve confidentiality.

The Australian High Court in *Esso Australia Resources Ltd v Plowman*[53] ruled on whether a third party, that was not a party to the arbitration proceedings, was entitled to discovery of information and documents concerning the arbitration. It held that confidentiality is not an essential attribute of private arbitration, whether on the grounds of longstanding arbitral custom and practice or in order to give efficacy to the private nature of arbitral proceedings.

This meant that a duty of confidentiality could not be implied into an arbitration agreement. Complete confidentiality in arbitration could only be achieved through the agreement of the parties. Mason CJ held:

> If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement.

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52 [2017] EWHC 253.
53 (1995) 128 ALR 391; (1995) 183 CLR 10.

The Australian High Court in *Esso Australia Resources* added that if there was a duty of confidentiality, it was not absolute and it could be curtailed in the public interest, for example, natural gas prices charged by a utility company to consumers.[54] In particular, it was commented that such interest could be 'the public's legitimate interest in obtaining information about the affairs of public authorities'.[55]

Therefore, the court in *Esso Australia Resources* held that the general duty of confidentiality cannot be implied in an agreement to arbitrate (notwithstanding that privacy of proceedings is an implicit part of arbitration). It was held that confidentiality is not an essential attribute of private arbitration, and also not part of the inherent nature of contract and relationship established by such contract.

It held that even if such a duty exists, it is not absolute as there is a general public interest exception to confidentiality where the outcome of the arbitration affects public interest, for example natural gas prices charged by a utility company to consumers.[56] In effect, the High Court of Australia made out a distinction between 'privacy' and 'confidentiality' in arbitration. In doing so, the court concluded that while privacy is an essential feature attached to arbitration, confidentiality, unless expressly agreed upon by the parties in the contract, is not.

The *Esso Australia Resources* decision has generally been regarded in the international arbitration circles as unwelcome and inapposite. It is viewed as a break with the central principle of confidentiality. It had been described as a

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54 Sundra Rajoo, *Law, Practice and Procedure of Arbitration*, (2nd Ed, LexisNexis, 2016) at p 59.

55 *Esso Australia Resources Ltd v Plowman* (1995) 128 ALR 391; (1995) 183 CLR 10 at [43]. It should be noted that since the *Esso* decision, legislation has been adopted in Australia with respect to confidentiality in international arbitration: see Australian International Arbitration Act 1974 (Cth), ss 23C–23G. Confidentiality provisions also exist in the uniform legislation on domestic commercial arbitration in the Australian States and Territories. This legislation includes provisions on confidentiality on an opt-out basis: see Commercial Arbitration Act 2017 (ACT), ss 27E–27I; Commercial Arbitration Act 2010 (NSW), ss 27E–27I; Commercial Arbitration (National Uniform Legislation) Act 2011 (NT), ss 27E–27I; Commercial Arbitration Act 2011 (SA), ss 27E–27I; Commercial Arbitration Act 2011 (TAS), ss 27E–27I; Commercial Arbitration Act 2011(VIC), ss 27E–27I; and Commercial Arbitration Act 2012 (WA), ss 27E–27I.

56 See *Television New Zealand Ltd v Langley Productions Ltd* [2000] 2 NZLR 250 for an example of an exception where there is a serious public interest.

'nuclear event' in the arbitration world.[57] It resulted in New Zealand enacting a default rule of confidentiality as embodied in s 14 of its Arbitration Act, 1996.[58]

Redfern and Hunter commented on *Esso Australia Resources:*

> This could be a dangerous road to tread, leading to increased intervention by the courts in the arbitral process. On balance, it is hoped that the case is confined to its particular facts - namely, one in which the relevant Minister sought information to enable him to carry out his duty of supervising public utilities. Even if the parties had expressly agreed that everything that occurred in the arbitration would be confidential, the Minister would have been entitled to the information he sought. For clearly, the parties could not by private agreement displace a duty imposed by statute.[59]

Similar attitudes regarding a general duty of confidentiality have been expressed in the USA[60] and in Sweden.[61] For example, in *United States v Panhandle Eastern Corp*,[62] the United States Federal Government sought to have Panhandle, a US company, produce documents from an ICC arbitration between Panhandle's subsidiary and the Algerian state oil company. Panhandle sought to block discovery on the basis that arbitration is confidential in nature and the disclosure would frustrate the parties' expectations. The United States Federal District Court held that there is no inherent duty of confidentiality unless the parties' contract for it.

Redfern and Hunter argue that there is evidence of a trend in some parts of the world towards the diminishing, or at least questioning, of a default requirement of confidentiality.[63] It may well be that in proceedings relating to

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57 P Neill QC, 'Confidentiality in Arbitration', (1996) 12 Arbitration International 287.

58 Public Act 1996 No 99. See also Williams QC and Kawhar, *Williams & Kawharu on Arbitration*, (2011) at para 13.3.1.

59 Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, (3rd Ed, 1999) at p 29.

60 *Industrotech Constructors Inc v Duke University* (1984) 67 NC App 741; 314 S E 2d 272*;* for a fuller review of the US position see Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th Ed, 2015) at paras 2.173–2.176.

61 The Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc, Supreme Court, 27 October 2000, 15(11) Mealey's IAR B1* (2000) 13(1) WTAM 147(2001) held that 'a party to arbitration proceedings cannot be deemed bound by a confidentiality undertaking, unless the parties have agreed thereon specifically'.

62 119 F R D 346 (D Del 1988).

63 Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th Ed, 2015) at para 2.170.

arbitrations involving public authorities, 'the public's legitimate interest in obtaining information about the affairs of public authorities'[64] would supplant the principles of confidentiality.[65]

The principle of confidentiality is recognised as an essential corollary to privacy and will, in most countries, be implied as a term in the arbitration agreement.[66] Except where parties have otherwise agreed, it is now generally accepted that arbitrations are private and confidential.

POSITION IN MALAYSIA

Prior to the introduction of s 41A to the AA 2005, the AA 2005 was silent on the issue of confidentiality in arbitration. Arbitrations conducted under the auspices of the Asian International Arbitration Centre ('AIAC') (formerly known as the Kuala Lumpur Regional Centre for Arbitration) were, however, already subject to confidentiality requirements prior to the enactment of s 41A of the AA 2005.[67]

Earlier, despite the AA 2005's silence on the issue of confidentiality, Malaysian courts have recognised the implied duty of confidentiality in arbitration agreements.

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64 Mason CJ in *Esso Australia Resources Ltd v Plowman (Minister of Energy and Minerals)* (1995) 128 ALR 391 at p 247; (1995) 183 CLR 10. This principle has been argued to apply to investment arbitrations, see Legum 'Investment Treaty Arbitration's Contribution to International Commercial Arbitration' (2005) 60 Disp Resol J 71.

65 Briggs J in *Milsom v Ablyazov* [2011] EWHC 955 (Ch) at [30] said 'arbitration confidentiality or privacy is not absolute. Its preservation in any particular situation, for example an arbitration appeal, is only the starting point and may be overridden where either the public interest or, I would add, the interests of justice require'.

66 *Liverpool City Council v Irwin* [1977] AC 239 ; [1976] 2 All ER 39 ; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 ; [1957] 1 All ER 125 (HL); *Ali Shipping Corp v Shipyard Trogir* [1988] 2 All ER 136 ; [1999] 1 WLR 314 (CA) (Eng); *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243. Cf *Esso Australia Resources Ltd v Plowman (Minister of Energy and Minerals)* (1995) 128 ALR 391; (1995) 183 CLR 10.

67 Specifically, AIAC Arbitration Rules 2018 r 16 sets out the confidentiality requirement for proceedings administered by the AIAC. Rule 16(1) provides that the arbitral tribunal, the parties, all experts, witness and the AIAC were to keep confidential 'all matters relating to the arbitral proceedings'. The meaning of 'all matters relating to the arbitral proceedings' is set out in r 16(2) as 'the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings and all other documents produced by another Party in the proceedings or the award arising from the proceedings, but excludes any matter that is otherwise in the public domain'.

The High Court in *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc*[68] held that privacy and confidentiality are two major benefits of arbitration. It referred to the English decision of *Dolling-Baker v Merrett*[69] and noted that the case stood for the proposition that 'in the absence of an express term in an arbitration clause providing for confidentiality, then the presumption of confidentiality arises as an implied term by the very nature of the arbitral process itself'.

The Court of Appeal in *Vincent Tan Chee Yioun & Anor v Jan De Nul (M) Sdn Bhd & Anor*[70] commented that courts would be slow to invoke the public policy ground for refusing to recognise an arbitral award under s 39 of the AA 2005 because:

> ...in arbitration the party autonomy concept and confidentiality concept lead to the award being private and confidential. If the award is private and confidential, it may not qualify to satisfy the public element unless the rule of law will be violently breached in allowing enforcement of the award.[71]

The court in *Maybank Islamic Bhd v Ibsul Holdings Sdn Bhd (WWE Holdings Bhd, intervener)*[72] considered whether the failure of a garnishee to provide any evidence that some variation works were subject to arbitration gave 'rise to the irresistible inference that the same is in fact admitted'.

The High Court held that the judgment creditor's contention that the garnishee had failed to show any proof of arbitration could not be accepted 'as it is trite law that arbitration proceedings are private and confidential'.

As such, the garnishee could not disclose the cause papers and documents in the arbitration proceedings merely to deflect the judgment creditor's 'irresistible inference' that the variation works were subject to arbitration.[73] The High Court also cited the comment noted above in *Malaysian Newsprint Industries Sdn Bhd* with approval. Hence, an implied duty of confidentiality in arbitration agreements was recognised by the Malaysian courts prior to the Arbitration (Amendment) (No 2) Act 2018 ('2018 Amendments').

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68 [2008] 5 MLJ 254.
69 [1991] 2 All ER 890.
70 [2017] MLJU 1183.
71 *Ibid* at [3].
72 [2017] MLJU 198.
73 *Ibid* at para [21].

However, the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other Appeals*[74] commented that s 8 of the AA 2005 would not exclude court intervention in any matter not regulated by the AA 2005. It held that:

> matters which are not governed by the Model Law include the following areas: the inherent jurisdiction in the court to grant an injunction to stay arbitral proceedings; and the whole topic of confidentiality of arbitral proceedings.

Given the introduction of s 41A in the AA 2005 under the 2018 Amendments, the above-mentioned possibility is no longer applicable with respect to the topic of confidentiality of arbitral proceedings.

SECTION 41A(1) OF THE ARBITRATION ACT 2005

Prior to the introduction of s 41A in 2018 to the AA 2005, the AA 2005 was silent on the issue of confidentiality in arbitration. Arbitrations conducted under the auspices of the AIAC were, however, already subject to confidentiality requirements prior to the enactment of s 41A of the AA 2005.

Section 41A(1) of the AA 2005 is identical to s 18(1) of Hong Kong's Arbitration Ordinance. It enhances the concept of party autonomy in that parties can contract out of the provision with express terms in the arbitration agreement.

The scope of the confidentiality in s 41A(1) of the AA 2005 is two-fold. It applies to information on the actual arbitration proceedings, and it also applies to information on an award arising out of those proceedings. Thus, if parties were ordered to do or refrain from undertaking certain tasks as part of the award, then the parties would need to ensure that these tasks are not published, disclosed or communicated in any form after the award has been rendered.

It should be noted that the scope of the confidentiality requirement is limited to the 'parties'. 'Party' is defined in s 2 of the AA 2005 to mean:

> [A] party to an arbitration agreement or, in any case where an arbitration does not involve all the parties to the arbitration agreement, means a party to the arbitration.

This means that the scope of the confidentiality requirement in s 41A of the AA 2005 is not as expansive as r 16 of the AIAC Arbitration Rules 2018, where the

74 [2018] 1 MLJ 1 at para [114].

arbitral tribunal, experts and witnesses are also bound by the confidentiality requirement. In this regard, it is advisable for parties to include a provision in their arbitration agreement on the types of persons who would be bound by the confidentiality of the proceedings.

SECTION 41A(2) OF THE ARBITRATION ACT 2005

Section 41A(2) of the AA 2005 sets out the exceptions to the confidentiality requirement in sub-s (1). Section 41A(2) of the AA 2005 is similar to s 18(2) of Hong Kong's Arbitration Ordinance. The grounds themselves are relatively self-explanatory. Section 41(2)(a) expressly applies to legal proceedings both within and outside Malaysia. However, no similar reference is found in s 41(2)(b) and 41(2)(c).

It is not clear on whether parties are required to make an application to a court or an arbitral tribunal for an order permitting the disclosure of otherwise confidential information. Traditionally, applications for the disclosure of arbitral documents have been made to the courts. The Court of Appeal in *Syarikat Sesco Bhd v Genesis Force Sdn Bhd*[75] considered the disclosure of arbitral documents for the purpose of litigation proceedings where the party seeking the disclosure was not a party to the arbitration proceedings.

The Court of Appeal held that the court has a discretion to admit arbitral documents despite the confidentiality concept if the interest of justice demands such disclosure:

We have no doubt that it is the correct law. Thus, whenever the court is called upon to determine whether the disclosure of the arbitral documents is in the interest of justice, the court must look at the arbitral documents and then make a judgment call as to whether it ought to exercise the aforesaid discretion. It goes without saying that when a court is called upon to exercise a discretion it must be do so judicially and must examine the arbitral documents. Not to look at these documents, any exercise of discretion can only amount to an uninformed exercise of discretion.[76]

The section provides that the parties may come to an agreement on information that would be subject to disclosure without any court or arbitral tribunal interference. However, in the event the parties require further

75 [2015] MLJU 2235.
76 *Ibid* at para [5].

clarifications on any issues, there is no reason why an interim order on the same could not be sought from the High Court or the arbitral tribunal.

Section 41(2)(a) refers to 'other judicial authority'. This may include another arbitral tribunal in back-to-back arbitration proceedings. Edward Lui and Jonathan Hooi have commented on an equivalent Hong Kong provision as follows:

> The effect is that in theory, in a back to back arbitration which is not otherwise consolidated or made concurrent, all of the materials disclosed by a party, for example a claimant, would not be disclosable down the chain of references to the end respondent. The current terms of s 18 may not afford the tribunal with any jurisdiction to permit disclosure otherwise than where s 18 does not allow for it. However, as a matter of principle, one might expect that the law would be intended to permit disclosure where it was necessary 'to protect or pursue a legal right or interest of the party' before any forum, and not just before a court or other judicial authority.[77]

Section 41A of the AA 2005 prescribes the requirements for the confidentiality of arbitrations in Malaysia beyond the earlier implied common law duty of confidentiality. The inclusion of s 41A clarifies Malaysia's position on the issue. The provision enhances party autonomy by allowing parties to contract out of or expand the scope of the provision through the express terms of the arbitration agreement.

SECTION 41B OF THE ARBITRATION ACT 2005

Section 41B of the AA 2005 is similar to s 16 of Hong Kong's Arbitration Ordinance. It is a new provision which has been incorporated into the AA 2005 by the 2018 Amendments.

Section 41B(1) states that court proceedings under the AA 2005, meaning those relating to both interim orders, preliminary orders, or the recognition and enforcement of awards, are to be heard otherwise than in open court. This means that all court proceedings under the AA 2005 will be confidential and heard in-camera.

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77 Edward Lui and Jonathan Hooi, 'Confidentiality under the Arbitration Ordinance' (*Hong Kong Lawyer*, November 2017) http://www.hk-lawyer.org/content/confidentiality-under-arbitration-ordinance.

However, s 41B(2) sets out an exception to s 41B(1) in that the court may order proceedings to be heard in open court either on the application of any party or on a case-by-case basis if the court is satisfied that those proceedings ought to be heard in open court.

Section 17 of Hong Kong's Arbitration Ordinance sets out the requirements for 'closed court proceedings'. Section 17(4) of the Arbitration Ordinance states that if a court gives a judgment in closed court proceedings and the court considers that the judgment is of major legal interest, then the court must direct for the publishing of the judgment. The AA 2005 does not have a similar provision.

Section 41B(3) states that the High Court order made under s 41B(2) is final. It is not subject to any appeal.

Section 41B of the AA 2005 modifies the manner in which arbitration matters are heard in court. Such matters can now only be heard in closed court unless otherwise ordered by the court. The underlying benefit of this provision rests in the enhancement of the privacy and confidentiality of the arbitration process.

DRAFTING ARBITRATION AGREEMENTS FOR CONFIDENITALITY

Arbitral proceedings are private, and have the potential to be confidential. Parties in concluding arbitration agreements, bearing in mind the judgment of the Australian High Court in *Esso Australia Resources*.[78] They may to decide whether the confidentiality of the proceedings is important to them, the nature and scope of the confidentiality obligation should be addressed. In such circumstances, they must provide expressly in their arbitration agreement for the nature and extent of confidentiality. Otherwise, confidentiality can be difficult to protect and or enforce.

Extent of confidentiality may depend on the grounds relied on when asking for disclosure. The recognised exceptions to the rule: where disclosure is made by express or implied consent of a party; where disclosure is made mandatory by law, such as a court order; where it is in the public interest/interest of justice

78 Trakman, 'Confidentiality in International Commercial Arbitration', (2002) 18 *LCIA Arbitration International* 1 at p 12*;* Bagner, 'The Confidentiality Conundrum in International Commercial Arbitration', (2001) 12(1) *ICC International Court of Arbitration Bulletin* 18.

to disclose documents; where disclosure is necessary for the establishment or protection of an arbitrating party's legal rights *vis a vis* a third party.

However, parties arbitrating in Malaysia will not be concerned with the position taken by the High Court of Australia in *Esso Australia Resources*, as s 41A in the AA 2005 provides for confidentiality as the default position. However, it is not clear if the extent and nature of the confidentiality obligations be altered by the arbitration agreement.

The parties may agree to maintain confidentiality. While the law does not require it, It may be beneficial to include enhanced confidentiality obligations in the arbitration agreement The purpose of such enhanced provisions may be to keep the dispute and sensitive information secret, to ensure that information disclosed in the arbitration cannot be relied upon in other legal proceedings.

However, it is advisable not to regulate confidentiality in absolute terms. In some instances, disclosure may be necessary for the benefit of one of the parties, or for the enforcement of the award. Disclosure of confidential information to third parties (such as witnesses or expert witnesses) may also be required and necessary during the preparation of claims, counterclaims and defences.

The parties may desire to draft an appropriate arbitration agreement demarcating the extent and nature of confidentiality obligations to apply in any future arbitration They may have to consider on whether it apply to the parties, the arbitrators, witnesses, the evidence, the pleadings, the proceedings, the documents, the award and/or the very existence of the arbitration be confidential.

The secondary question is whether such information may nevertheless be made public in specified circumstances. Such circumstances may include for example, enforcement proceedings, court challenges, in compliance with the law and regulations, disclosure requirements by the Stock Exchange regulations, or to satisfy insurers, auditors and other parties for the purpose of protecting the legitimate interests of an arbitrating party.

The arbitration agreement may also potentially address what sanctions should follow in the event of breach, since s 41A of the AA 2005 does not mention any consequence for a parties' failure to comply with the confidentiality obligation. An example of the model confidential agreement is as follows:

> IG.1.1 Arbitration Clause providing for confidentiality Neither party shall disclose to any third party the existence, nature, content or outcome of any arbitration, or purported arbitration, brought in respect of this Agreement.

Neither shall any party disclose to any third party:

(i) Any document prepared or procured in the course of or otherwise for the purpose of arbitration.

(ii) Any document prepared or procured by the other party and received in the course of or otherwise for the purpose of the arbitration.

(iii) Any document received directly or indirectly from the Tribunal or any court of competent jurisdiction including, but not limited to, any direction, order or award.

Save insofar as may be necessary for the purpose of conducting the Arbitration itself, or making any application to a court of competent jurisdiction in respect of the arbitration, or for the enforcement of any order or award of the Tribunal, or of any order or judgment of the Court, or as may be required to comply with any lawful authority.[79]

With such an arbitration agreement in place, parties may request the arbitral tribunal to rule on an issue of confidentiality in the course of the arbitration, such as in respect of a particular document or trade practice adduced in evidence. This may take the form of a procedural order issued by the arbitral tribunal.[80] Parties may also raise issues of confidentiality following the arbitration and initiate further arbitration or litigation.

JURISPRUDENCE AND TRANSPARENCY

Some judges and commentators in the common law world have raised concerns on the remarkable success of international arbitration in diverting more disputes away from the courts and to arbitration. They suggest that an unintended side-effect of the increase in arbitration is the corresponding reduction in litigation and as a consequence, new case law. They are alarmed that by cases moving away from courts to international commercial arbitration causes a dearth of precedent in certain areas of the law. It is perceived by them as a threat to the orderly development of the law.[81]

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79 Robert Merkin & Julian Critchlow, *Arbitration Forms and Precedents*, (2000) Informa Looseleaf.

80 Michael Hwang SC and Nicholas Thio, 'A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self-Governing Code' in *Selected Essays on International Arbitration* (Academy Publishing, 2013) at p 160. A sample of the said Order is provided at pp 166-169. See also *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 where procedural directions on confidentiality made by an arbitrator was set aside.

81 Ank Santens & Romain Zamour, 'Dreaded Dearth of Precedent in the Wake of International Arbitration — Could the Cause also Bring the Cure?' (2015) 7 YB *Arb & Mediation* 73.

For example, Lord Thomas of Cwmgiedd observed that after the codification of *The Nema* rules in the English Arbitration Act 1996 that the number of cases able to satisfy the threshold test for grant of leave to appeal became less.[82] He cited that only 19 cases were granted leave to appeal in 2015 as compared to the years before 1979, when the court considered 300 cases on appeal. He lamented that this drop in the number of appeals obviously reduced the court's ability to develop and progress the law.

Lord Thomas challenged the perceived benefit of confidentiality as overrated. He observed that there is leakage and 'the market tends to know which parties are involved in which arbitrations and what the arbitration is about'; the enforcement regime is problematic because it provides the losing party with 'one more opportunity to stave off what might have been thought to be the inevitable'.[83]

Unfortunately, it is trite that parties care only for their own commercial advantage. They focus on the money and the bottom line. Most parties are not interested in acting altruistically for the development of the law or the wider industry. Also, they will not pursue a court case if the judicial determination is not likely to go their way. The correctness of a legal decision is less important and interesting, than winning and finality.

The parties' objective is achieved when arbitral tribunal decide their disputes by applying the applicable law to the facts. It is an inherently private and autonomous process. The parties select and pay the arbitrators. Unlikely judges, arbitrators are not publicly accountable. Their sole function is to decide on the dispute. That arbitration awards do not contribute to the development of the law is not a fact within the contemplation of the parties.

It is true that the success of arbitration as a means of settling commercial disputes means that parties veer away from the courts. Additionally, the confidentiality as applied to international commercial arbitration means that most arbitral awards are not published which leaves gaps in the evolution of common law jurisprudence. There is a growing concern that this decrease in new jurisprudence is stunting the development of the common law. This

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82 The Lord Thomas of Cwmgiedd, 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration', The Bailii Lecture 2016 (9 March 2016) https://www.judiciary.uk/.

83 The Lord Thomas of Cwmgiedd, 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration', The Bailii Lecture 2016 (9 March 2016) https://www.judiciary.uk/.

problem is particularly pronounced in relation to construction law where final and binding arbitration is the default dispute resolution mechanism.

Confidentiality is viewed as a hallmark of international arbitration.[84] It imposes an obligation on the parties (and the arbitral tribunal and the arbitration institution) not to disclose information concerning, or acquired in the course of, the arbitral proceedings. In arbitration proceedings, parties in dispute often have to disclose internal information regarding their finances, trade, intellectual properties and other material information.

If such information is published and publicised, it may affect their market standing and competitiveness. Most parties wish to ensure complete confidentiality of disputes which, if aired publicly, may negatively affect other business relationships and public trust in their business. Thus, arbitration agreements often include a provision for the protection of confidential information when in dispute.

Governments, companies and other individual parties place utmost importance on the maintenance of confidentiality of arbitral proceedings and awards.[85] While national litigation is aimed at settling claims in public eye, arbitration helps parties settle disputes without any press or public involved. It is necessary to strike a harmonious balance between confidentiality and transparency.

However, with the growing popularity of international arbitration, the position taken by the High Court of Australia in *Esso Australia Resources* may not be too far placed. Over the last decade, more and more jurisdictions and arbitral institutions have made consistent attempts at achieving organised and desirable transparency in international commercial transparency. At present, there is a need for arbitration mechanisms to balance party interests in confidentiality with the general interest of transparency.

The issue is how to mitigate the impact of confidentiality in arbitration on the development of the law. Parties do expect a degree of transparency to enhance their confidence in the arbitral process. They also require clarity as to how aspect of their cases was decided. The publication of arbitral awards is likely to make the work of arbitrators more visible and also, increase the

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84 Emmanuel Gaillard & Yas Banifatemi (eds), *Precedent In International Arbitration* (2008); see Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th Ed, 2015) § 2.145 at 136.

85 'Expert report of Stephen Bond in *Esso/BHP v Plowman*' (1995) 11 Arbitration International 273.

foreseeability of the outcome. It would promote a better understanding and strengthen the legitimacy of the arbitral system. Future users will be encouraged by the certainty, uniform and consistent application of rules.

There is a movement by particular arbitration institutions to publish arbitral awards appropriately sanitised to maintain the parties' confidentiality. The argument is that the legal reasoning, would have the potential to contribute to the development of the law. It may also assist on procedural issues for example, how to interpret and apply arbitration rules, the manner and extent on how the arbitral tribunal exercises its powers.

Users of arbitration services will benefit from such publication in that they will be better informed. Unlike a court judgment, an arbitration award would never have precedential value. On the other hand, a well-reasoned arbitral award from a respected arbitrator is likely to be just as persuasive as other non-precedential material regularly used by courts when considering novel or difficult issues. The parties or the arbitral institution to make a better-informed decision in selecting the arbitrator for their dispute based on the record.

In 2019, the ICC released updates to its 'Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration' ('ICC Note'). In the ICC Note, it has been stated that all awards made as on 1 January 2019 may be published by the ICC, no less than two years after their notification, subject on an opt-out procedure.[86]

In terms of the opt-out procedure, any party may at any time object to the publication of the award, or request that the award be sanitised or redacted. In such a case, the award will either not be published or be sanitised or redacted in accordance with the parties' agreement.

Similarly, the Singapore International Arbitration Centre ('SIAC') Rules account for the publication of an award with the names of the parties and other identifying information redacted, albeit only with the consent of the parties.[87] The LCIA publishes anonymised decisions on arbitrator challenges, in the form of a digest.

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86 The International Chamber of Commerce (ICC) Rules of Arbitration 2017, paras 40–46. The International Court of Arbitration of the International has released updates to its Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration, effective 1 January 2019. The Note provides parties and arbitral tribunals with practical guidance concerning the conduct of arbitrations under the ICC Rules and summarises the practices of the ICC Court.

87 SIAC Arbitration Rules 2016 r 32.12.

Transparency is both a procedural and substantive notion. It corresponds to openness, accessibility to information, clarity, and reliability of the judicial process.[88] National legislations have different approaches to achieve transparency. Some for example, American law stipulate that transparency prevails over confidentiality.[89] Under French law, confidentiality is regarded as an essential condition of arbitral proceedings save and except when parties consent to publication of proceedings and awards.[90]

The New South Wales Court of Appeal in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*[91] tried to bring out the equilibrium between transparency and confidentiality in international arbitration. The arbitrator in this case issued a blanket confidentiality order. The court held that there should not be a duty of confidentiality to a party's own documents prepared for arbitration, if they have a wider public interest.[92] The court explained:

> Where an arbitrator, in the course of giving a procedural direction, goes beyond the establishment of procedures necessary for the commercial arbitration between the parties and makes orders which impinge upon the public's legitimate interests, the arbitrator goes outside the arbitration ... where the Court concludes that the direction made has gone beyond the purpose of the arbitration proceedings, and is thus extra-jurisdiction and unlawful, it will, in a proper case, provide relief. In my view, this is such a case ... In my view, [the order made by the arbitrator] is impermissibly wide ... Effectively, it puts a lid on the direct or indirect use of material prepared for the arbitration, no matter how significant that material may be to the public at large. For all this Court knows, it is both significant and urgent that the material should be made available, for the protection of public health and restoration of the environment, both to the State Environmental Protection Authority and to other Federal State agencies or even to the public generally ... The arbitrator's directions go beyond the control of the use of the documents produced under the obligations of the arbitration. They extend to controlling the use of the Commonwealth of its own documents. They had the effect of limiting the operation of the Freedom of Information Act

88 Natalie Limbasan & Loretta Malintoppi, 'Living in Glass Houses? The Debate on Transparency in International Investment Arbitration' (2015) *BCDR International Arbitration Review* 2 31–58.
89 *United States v Panhandle Eastern Corpn* (1998) 118 FRD 346 (D Del).
90 *Aita v Ojjeh* 1986 Rev Arb 583 (CA).
91 (1995) 36 NSWLR 662.
92 *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 at 680.

> in a way which is contrary to, and in my view larger than, that envisaged by s 46 of that Act. They purport to remove from public debate matters of legitimate public concerns.[93]

Therefore, parties may determine the level of confidentiality for their arbitration by deciding a particular seat of arbitration by reviewing the level on confidentiality provided in the national laws and arbitral institution rules. In doing so, the parties establish the local arbitration law of that jurisdiction as the *lex arbitri* including its legal provisions regarding confidentiality. Laws in different jurisdictions regarding confidentiality varies substantially. Parties should carefully choose the seat of their arbitrations.

They should also consider the extent to which selection of particular arbitration rules may override statutory presumptions. They will then be faced with the question on whether they can go further by providing for confidentiality in their arbitration agreement. They also have to appreciate that confidentiality options may be limited for governments and publicly traded companies which have statutory disclosure obligations which may trump confidentiality provisions.

CONCLUSION

The 2018 Amendments to the AA 2005 attempts to bring such a balance and prescribes the requirements for the confidentiality of arbitrations in Malaysia beyond the earlier implied common law duty of confidentiality. The inclusion of ss 41A and 41B in the AA 2005 clarifies the position on the issue. On the other hand, the provisions enhance party autonomy by allowing parties to contract out of or expand the scope of the provision through the express terms of the arbitration agreement.

93 *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 at 679–681.