

## Chapter 19

# CONFIDENTIALITY

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Within the last decade confidentiality has become an important topic in arbitration. Many articles have been written and analyses undertaken. Common assumptions have been questioned and it is apparent the subject is more complex, obscure and less well settled than previously thought. Until the current flurry of activity, confidentiality was the subject of assumptions rather than established legal principles and rules. Moreover these assumptions were vague and general in nature and did not adequately address the different facets of confidentiality.

What has been the cause of the current flurry of activity on confidentiality? The answer is simple and is predicated on two factors. The first is the perceived existence and importance of confidentiality to arbitration, and in particular international arbitration. The second is a decision of the High Court of Australia in 1995 which disturbed the status quo.

As to the first factor, it is trite to note that confidentiality is often given as one of the reasons for choosing arbitration as a means of dispute resolution in contrast to litigation. This is well illustrated by the study of Dr. Christian Böhning-Uhle.<sup>1</sup> Dr. Böhning-Uhle conducted an empirical study from November 1991 to June 1992. His survey sought to collect data from participants in international commercial arbitration as to the advantages and disadvantages of this method of dispute resolution. Dr. Böhning-Uhle collected his data by way of questionnaires and personal interviews. The respondents resided in the United States, Europe, the Middle East and Australia.

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<sup>1</sup> Böhning-Uhle, *Arbitration and Mediation in International Business*, Kluwer Law International, 1996.

Dr. Böhling-Uhle's questionnaire listed 11 advantages of arbitration which comprised: neutral forum, international enforcement by treaty, confidential procedure, expertise of the tribunal, lack of appeal, limited discovery, speed, more amicable, greater degree of voluntary compliance, less costly procedure and more predictable results. His survey shows that the third most important reason for choosing arbitration is its confidential procedure. This rated very highly and was just below "neutrality of the forum" and "international enforcement by treaty." Over 60% of the respondents considered confidentiality to be either "highly relevant" or "significant." Likewise, Hans Bagner notes that a statistical survey of United States and European users of international commercial arbitration conducted in 1992 for the London Court of International Arbitration by the London Business School listed confidentiality as the most important perceived benefit.<sup>2</sup>

The case which did much to undermine common assumptions and open up the whole question of confidentiality is the decision of the High Court of Australia in *Esso Australia Resources Ltd v. Plowman*.<sup>3</sup> The High Court is the most senior court in Australia and possesses appellate jurisdiction from inferior federal courts and the State and Territorial courts, as well as certain original jurisdiction. In *Esso Australia*, the High Court, in a divided opinion, declined to recognize a broad obligation of confidentiality applying to all documents and information provided in and for the purposes of an arbitration. This decision will be examined in greater detail below.

This chapter is divided into two parts. Part A examines two different views on confidentiality espoused by the High Court of Australia and the English Court of Appeal. Part B comprises a broader analysis and survey of confidentiality.

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<sup>2</sup> Bagner, "Confidentiality - A Fundamental Principle in International Commercial Arbitration?" (2001) 18 *Journal of International Arbitration* 243.

<sup>3</sup> (1995) 183 CLR 10. The case is also reproduced in (1995) *Arbitration International*, Volume 11, No.3 at p. 235.

## I. TWO VIEWS ON CONFIDENTIALITY

### A. *The High Court Decision in Esso Australia*

#### (1) The Facts

Esso Australia Resources Ltd and BHP Petroleum (North West Shelf) Pty Ltd (“Esso/BHP”) were vendors of natural gas under agreements to sell to two utilities in the State of Victoria, Australia, namely the Gas & Fuel Corporation of Victoria (“GFC”) and the State Electricity Commission of Victoria (“SEC”).<sup>4</sup> Each of the sale agreements contained a clause whereby the price payable for the gas sold was to be adjusted by taking into account changes relating to royalties and taxes attributable to the production or supply of gas. Clause 12.8 of the GFC Sales Agreement provided:

Any such increases or decreases shall be effective upon the imposition thereof. In the event of any such increase or decrease Sellers shall provide Buyer with details of the increase or decrease and the method and distribution of such royalties, taxes, rates, duties or levies.

Clause 19.5 of the SEC Sales Agreement was in similar terms. In November 1991 Esso/BHP sought from GFC and SEC an increase in the price of gas supplied to them since 1 July 1990, the increase being attributable to the imposition of a new (federal) tax, the “Petroleum Resource Rent Tax,” which was imposed from that date following the abrogation of a royalty previously payable by the vendor on gas produced. GFC and SEC refused to pay. Pursuant to arbitration clauses in the Sales Agreements, Esso/BHP referred the disputes to arbitration.

Prior to referring the disputes to arbitration, Esso/BHP failed to provide GFC and SEC with the information required by clauses 12.8

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<sup>4</sup> It is coincidence that the writer was a member of the last board of GFC and was also a member of the Advisory Board of SEC.

and 19.5 of their respective sales agreements. However, it was anticipated that this information would be provided during the course of the arbitration.

Mr. Plowman, the Minister for Energy and Minerals of the State of Victoria, wished to have access to this information. He brought an action against Esso/BHP and GFC and SEC seeking a declaration that the information was not confidential and could be disclosed to the Minister and third parties. It should be pointed out that SEC was a statutory corporation, owned by the State, and GFC was a company, largely owned by the State. Both were in effect fully or partially state-owned utilities. For their part, Esso/BHP declined to give details pursuant to clauses 12.8 and 19.5 unless GFC and SEC entered into agreements that they would not disclose the information to anyone else including the Minister, the Executive Government and the people of Victoria. Esso/BHP asserted that the details were commercially sensitive. However the Executive Government of the State of Victoria wanted the details and claimed that, if GFC and SEC obtained them, GFC and SEC were under a statutory duty to pass them on.

The primary judge held that under clauses 12.8 and 19.5, Esso/BHP were obliged to furnish details of the increases sought under those provisions. The judge ordered that the details be provided to GFC and SEC respectively and refused an application by Esso/BHP that the furnishing of those details be stayed until the utilities entered into a confidentiality agreement.

The primary Judge then directed his attention to questions concerning the privacy of the arbitration and confidentiality. The first question was whether strangers could attend the arbitration hearings without the consent of the parties. The second question was whether a party was at liberty to disclose information imparted to it in the course of the arbitration. The third question was whether GFC and SEC were at liberty to disclose information provided pursuant to clauses 12.8 and 19.5. The primary Judge concluded that “the mere fact that the parties to a dispute agree impliedly or expressly to have it arbitrated in private does not import any legal or equitable obligation not to disclose to third parties any information at

all which may be said to have been obtained by virtue or in the course of the arbitration.” He said that there was no general legal or equitable obligation applicable to private arbitration which precluded a party to arbitration from using information obtained in the course of it except for the purposes of the arbitration. The primary Judge therefore granted the declarations sought by the Minister. An appeal was taken to the Appeal Division of the Supreme Court of Victoria. It left the primary Judge’s essential declarations in place. A further appeal was taken to the High Court of Australia. The High Court by a majority of four Justices to one in essence upheld the views espoused by the lower courts and held that there was no general over-riding principle of confidentiality which attached to documents disclosed in an arbitration. The leading judgment was given by Chief Justice Mason with whom Justices Brennan, Dawson and McHugh agreed in whole or in part.

## **(2) Privacy**

The first matter Chief Justice Mason addressed was the privacy of arbitration. He observed that it is well settled that when parties submit their dispute to a private arbitral tribunal, in the absence of some manifestation of a contrary intention, they confer upon that tribunal a discretion as to the procedure to be adopted in reaching its decision. Further there is no reason to doubt that an arbitrator, in the exercise of power with respect to procedural matters, can decide who shall be present at the hearing. However this power is not a free-standing power but rather a power to decide who is entitled to attend, having regard to the provisions of the relevant contract. He then concluded:

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. One writer has asserted that total privacy of the proceedings is one of the advantages of arbitration. The arbitration 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 the parties, those assisting a party in the presentation of the case, and a shorthand writer to take notes may appear. It does not matter much whether this characteristic of privacy is an ordinary incident of the arbitration, that is, an incident of the subject matter upon which the parties have agreed, or whether it is an implied term of the agreement. For the most part, the authorities refer to it as an implied term. But, for my part, I prefer to describe the private character of the hearing as something that inheres in the subject matter of the agreement to submit disputes to arbitration rather than attribute that character to an implied term. That view better accords with the history of arbitrations.<sup>5</sup>

### (3) Confidentiality

In his consideration of confidentiality the Chief Justice commenced by noting that some writers had asserted that the efficacy of a private arbitration would be damaged, even defeated, if proceedings in the arbitration were made public by the disclosure of documents relating to the arbitration. It was on this basis that the English Court of Appeal, in *Dolling-Baker v. Merrett*,<sup>6</sup> had restrained a party to an arbitration from disclosing on discovery in a subsequent action documents relating to the arbitration. However he noted that in Australia and the United States there was no support in the decided cases for the existence of such an obligation of confidence. The Chief Justice then observed that complete confidentiality of proceedings in an arbitration could not be achieved for many reasons. First, no obligation of confidence attaches to witnesses who are therefore at liberty to disclose to third parties what they know of the proceedings. Secondly, there are various circumstances in which an award made in an arbitration may come before a court involving

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<sup>5</sup> (1995) 183 CLR 10 at 26.

<sup>6</sup> [1990] 1 WLR 1205.

disclosure to the court by a party to the arbitration and publication of the court proceedings. Thirdly, there are other circumstances in which an arbitrating party must be entitled to disclose to a third party the existence and details of the proceedings and the award. For example, an arbitrating party may be bound under a policy of insurance to disclose to the insurer matters involved in the arbitration proceedings which are material to the risk insured against. Likewise there may be mandatory obligations to comply with statutory requirements relating to the provision of financial information by corporations or with stock exchange requirements which would require the disclosure of an arbitration.

Having concluded that there were some instances where disclosure was proper, two questions arose. First, is there a legal basis for holding that there is an obligation not to disclose? Secondly, if so, how is the obligation to be defined and what are the exceptions to it?

As to the first question, Chief Justice Mason observed that the parties can secure the confidentiality of materials prepared for or used in the arbitration and the transcripts and notes of evidence given by inserting a provision to that effect in their arbitration agreement. Such a contractual provision would bind the parties and the arbitrator but not others, for example, witnesses. Absent any express contractual provision on confidentiality, it is possible to argue that it arises as an essential characteristic of a private arbitration but the Chief Justice did not accept this. He observed:

Absent such a provision, it is difficult to resist the conclusion that, historically, an agreement to arbitrate gave rise to an arbitration which was private in the sense that strangers were not entitled to attend the hearing. Privacy in that sense went some distance in bringing about confidentiality because strangers were not in a position to publish the proceedings or any part of them. That confidentiality, though it was not grounded initially in any legal right or obligation, was a consequential benefit or advantage attaching to arbitration which made it an attractive mode of dispute resolution. There is, accordingly, a case for saying that, in the

course of evolution, the private arbitration has advanced to the stage where confidentiality is a characteristic or quality that inheres in arbitration.

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.<sup>7</sup>

Nor did Mason CJ consider that it was necessary to imply a term of confidentiality into a contract as a matter of law or to give business efficacy to a contract. Mason CJ continued by saying that if there was an implied term of confidentiality there would need to be exceptions to it which permitted disclosure. These were difficult to formulate. Coleman J, in *Hassneh Insurance Co. of Israel v. Men*,<sup>8</sup> stated an exception in the following terms:

If it is reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party, in the sense which I have described, that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it would not be a breach of the duty of confidence.

In the view of Mason CJ if there was an obligation of confidence this statement of qualification seemed unduly narrow. It did not recognize that there might be many circumstances in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration that would give rise to a "public interest" exception. The precise scope of such an exception was unclear. Of course these are matters which Mason CJ did not have to decide

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<sup>7</sup> Id. at 29-30.

<sup>8</sup> [1993] 2 Lloyd's Rep 243 at 249.



because he concluded that absent any express contractual provision in point there was no duty of confidentiality. However the “public interest” considerations adverted to by Mason CJ take on increased significance in the context of arbitrations involving States. This matter is addressed by Kaj Hobér in Part III of his Chapter entitled “Arbitration Involving States”.

Finally, Mason CJ did describe one incidence where confidentiality attached to documents in an arbitration. He noted that in litigation, in relation to documents produced by one party to another in the course of discovery, there is an implied undertaking, springing from the nature of discovery, by each party not to use any document disclosed for any purpose otherwise than in relation to the litigation in which it is disclosed. He thought this should also apply to arbitrations. But the obligation is strictly limited. In the words of Mason CJ:

But, consistently with the principle as it applies in court proceedings, the obligation of confidentiality attaches only in relation to documents which are produced by a party compulsorily pursuant to a direction by the arbitrator. And the obligation is necessarily subject to the public’s legitimate interest in obtaining information about the affairs of public authorities. The existence of this obligation does not provide a basis for the wide-ranging obligation of confidentiality which the appellants seek to apply to all documents and information provided in and for the purposes of an arbitration. If the judgments in *Dolling-Baker* and *Hassneh Insurance* are to be taken as expressing a contrary view, I do not accept them.<sup>9</sup>

Two of the Justices who agreed with Mason CJ did not deliver reasons of their own and simply concurred with the Chief Justice (namely Dawson and McHugh JJ). However Brennan J who also concurred with the Chief Justice, did deliver his own reasons. He stated:

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<sup>9</sup> (1995) 183 CLR 10 at 33.

For the reasons which the Chief Justice gives, I agree that, when one party produces documents or discloses information to an opposing party in an arbitration that is to be heard in private, the documents or information are not clothed with confidentiality merely because of the privacy of the hearing. Nor does the use of a document in such proceedings make the document confidential. I agree also that absolute confidentiality of documents produced and information disclosed in an arbitration is not a characteristic of arbitrations in this country. Accordingly, a party who enters into an arbitration agreement is not taken merely on that account to have contracted to keep absolutely confidential all documents produced and information disclosed to that party by another party in the arbitration.<sup>10</sup>

Brennan J went on to express the view that an obligation of confidentiality could not be implied although it may be express:

If a party to an arbitration agreement be under any obligation of confidentiality, the obligation must be contractual in origin. A term imposing an obligation of confidentiality could be expressed in an arbitration agreement but such a term would be unusual. Nor is such an obligation imposed by the *Commercial Arbitration Act* 1984 (Vict). A term is implied only where, inter alia, it is necessary to give to the contract "such business efficacy as the parties must have intended." The intended business efficacy must be inferred "from the very nature of the transaction." The parties may not have consciously adverted to the subject matter of the term which is said to be implied, but implication is determined according to their presumed intention. Obligations which, if proposed to the parties when they entered into their contract, would not have been accepted by both are not thereafter implied in the contract.<sup>11</sup>

Like the Chief Justice, Brennan J did imply an obligation of confidentiality in one instance, namely for the purpose of production or disclosure of documents. He reasoned that the duty to produce

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<sup>10</sup> Id. at 34.

<sup>11</sup> Id. at 34.

documents or disclose information to another is an invasion of a party's right to keep the documents and information confidential and the burden of that duty would be increased beyond that contracted for if there was no restriction on the other party's freedom to disseminate the documents and information. To give business efficacy to the limited purpose of production or disclosure an undertaking of confidentiality had to be implied. But Brennan J emphasised that such an undertaking was not one of absolute confidentiality. A number of exceptions arose:

Where a party is in possession of a document or information and is under a duty at common law or under statute to communicate the document or information to a third party, no contractual obligation of confidentiality can prohibit the performance of that duty. Moreover, a party may be under a duty, not necessarily a legal duty, to communicate documents or information to a third party who has an interest in the progress or outcome of the arbitration. To take an example, it could not be supposed, in the absence of a clear contrary indication, that a party which is a wholly owned subsidiary of a holding company intended to keep confidential from its holding company documents or information relating to the matter in dispute in the arbitration. Nor could a party be taken to have intended that it would keep confidential documents or information which it wished to reveal for the protection of its own interests. Nor could a party be taken to have intended that it would keep confidential documents or information when the party has an obligation, albeit not a legal obligation, to satisfy a public interest - more than mere curiosity - in knowing what is contained in the documents or information.<sup>12</sup>

He then went on to clarify the duty or obligation as follows:

I would hold that, in an arbitration agreement under which one party is bound to produce documents or disclose information to the other for the purposes of the arbitration and in which no other provision for confidentiality is made, a term should be implied that

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<sup>12</sup> Id. at 35.

the other party will keep the documents produced and the information disclosed confidential except (a) where disclosure of the otherwise confidential material is under compulsion by law; (b) where there is a duty, albeit not a legal duty, to the public to disclose; (c) where disclosure of the material is fairly required for the protection of the party's legitimate interests; and (d) where disclosure is made with the express or implied consent of the party producing the material.<sup>13</sup>

Brennan J noted that in the instant case the Minister had a statutory right under the *State Electricity Commission Act* 1958 to obtain information from SEC. Any implied obligation of confidentiality must be qualified accordingly. Although GFC was not subject to a similar statutory provision, it was a public authority and the public generally had a real interest in the outcome and perhaps in the progress of each arbitration. Brennan J therefore concluded that neither GFC nor SEC could be taken to have impliedly undertaken to keep confidential from the Government or the Minister documents or information relevant to the administration of the energy portfolio. The implied obligation of confidentiality was qualified accordingly.

There was one dissent in *Esso Australia*, Toohey J. He stated that parties agree to refer disputes to arbitration on the assumption that the hearing will be conducted in private. The law has given effect to this understanding in a number of ways, without any clear recognition of it as an independent legal rule. In his view, privacy should be implied as a term of the agreement to arbitrate, the implied term is attached as a matter of law rather than to give business efficacy to the agreement. Reasoning from the duty of privacy he thought a duty of confidentiality necessarily followed. In Toohey J's view if there is no restraint on a party to an arbitration making public what was said or done at an arbitration, including the contents of documents tendered to the arbitrator, there would be little point in excluding strangers from an arbitration. The fact that there are some exceptions to the obligation of confidentiality does not mean that

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<sup>13</sup> Id. at 36.

there is no obligation of confidentiality. He intimated that one exception arose from the provisions of the *State Electricity Commission Act 1958* which empowered the Minister to obtain from SEC “all documents papers and minutes which he requires either for Parliament or himself.” There was no comparable provision in the *Gas and Fuel Corporation Act 1958*. Toohey J concluded by saying:

That leaves for consideration whether, despite the qualifications already mentioned, there is nevertheless some obligation of confidentiality attaching to the documents and information emanating from an arbitration. I would find such an obligation to be a term implied as a matter of law in commercial arbitration agreements. The term is implied from the entry by the parties into a form of dispute resolution which they choose because of the privacy they expect to result. If this is said to confuse privacy and confidentiality, the answer is that they are not distinct characteristics. As Colman J said in *Hasneeb*:

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.

Any aspect of disclosure to third parties must infringe the privacy of the arbitration. Thus, if one party is free to disclose to a newspaper or media outlet the progress of an arbitration and the evidence adduced in its course, the notion of privacy is meaningless. There must be an underlying principle, significantly qualified in accordance with these reasons, that a party to an arbitration is under a duty not to disclose to a third party documents and information obtained by reason of the arbitration.

Although it did not arise in this appeal, I agree with the Chief Justice that there is a “public interest” exception to the principle. But it is unnecessary and inappropriate to discuss the boundaries of that exception.<sup>14</sup>

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<sup>14</sup> Id. at 47-48.

(B) *The Court of Appeal decision in Ali Shipping*

**(1) The Facts**

Earlier English authority had supported a duty of confidentiality. After the decision of the High Court of Australia in *Esso Australia*, the English Court of Appeal again considered confidentiality in a case where neither party challenged its general existence. The decision of the Court of Appeal is *Ali Shipping Corp v. Shipyard Trogir*.<sup>15</sup> Shipyard Trogir (“the yard”) undertook to build a number of vessels (described as hulls 202 to 206) for various companies which were all owned or acquired by Greenwich Holdings Ltd. Each of the separate ship building contracts contained a London arbitration clause and was governed by English law. The yard’s contract for hull 202 was with Ali Shipping Corp (“Ali”) which became a party to the contract by novation.

The yard failed to complete hull 202 in accordance with the hull 202 agreement, and Ali rescinded the contract and claimed substantial damages. The dispute went to arbitration (the first arbitration) and the sole arbitrator made an award in favour of Ali in the sum of \$21,594,391 plus interest. In the first arbitration, the yard sought to defend Ali’s claims for substantial damages on a variety of bases including the fact that the purchasers of hulls 204 to 206 had not paid the first instalment of the price of their contracts. In this connection the yard contended that its obligation to build hull 202 had become contractually dependant on performance of the subsequent contracts. It was further contended that the corporate veil should be pierced and that all the Greenwich-owned companies should be treated as one to permit the yard’s plea of justification and/or set-off in respect of its claims under the hull 204 to 206 contracts. The arbitrator rejected the yard’s arguments. Although he was satisfied that the purchasers were in breach of the hull 204 to 206 contracts he held that it was irrelevant to the issue of the defendant’s liability under the hull 202 agreement.

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<sup>15</sup> [1998] 2 All ER 136 (Court of Appeal).

The yard made no payment in respect of the award. Instead they reactivated three arbitrations previously commenced against the purchasers of hull 204 to 206. The yard applied for interim awards in the hull 204 to 206 arbitrations in respect of the first instalments of the contractual price under the respective ship building contracts. The arbitrators in the hull 204 to 206 arbitrations ordered the yard to serve all the evidence upon which it wished to rely in support of its application for the interim awards. The yard, in an affidavit, set out the documents upon which it wished to rely. These included certain documents generated in the course of the first arbitration namely the award, the written opening submission of Ali in the first arbitration and transcripts of the oral evidence given by certain witnesses for Ali in the first arbitration. Ali's solicitors, who also acted for the purchasers in the hull 204 to 206 arbitrations, sought and obtained an ex parte injunction from the English court on the basis that the use of the materials would amount to a breach of a yard's implied obligation of confidentiality in respect of the first arbitration.

The decision at first instance was given by Clarke J. Ali relied on previous English decisions which established a duty of confidentiality including *Dolling-Baker v. Merrett*,<sup>16</sup> *Hassneh Insurance*<sup>17</sup> and *Insurance Co. v. Lloyd's Syndicate*.<sup>18</sup> Before Clarke J, the yard was prepared to recognize that the material generated in the first arbitration was covered by a duty or implied obligation of confidentiality but reserved the right to argue before a higher court that English law should follow the approach of the High Court of Australia in *Esso Australia*. However, the yard argued that this case fell within recognized exceptions to the duty. In the first place the yard argued that in English law the document of confidentiality only applied in respect of "third party strangers" to the arbitration and should not be applicable in the case such as the present. The yard also asserted that even if disclosure in the hull 204 to 206 arbitrations might otherwise constitute a breach of duty of confidentiality owed to Ali, the

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<sup>16</sup> [1990] 1 WLR 1205.

<sup>17</sup> *Supra* n. 8.

<sup>18</sup> [1995] 1 Lloyd's Rep 272.

circumstances of the case fell within a recognized exception to such duty because disclosure was reasonably necessary for the protection of the yard's rights against a third party. Finally it was argued that the circumstances of the case fell within a further exception to the rule of confidentiality, namely public policy and/or that the facts were such that the case was not an appropriate one for injunctive relief.

Clarke J considered the full circumstances of the case and noted that at the relevant time all the parties were represented by Sea Tankers Management Co Ltd ("Sea Tankers") which was the owner of Greenwich Holdings. Although each buyer was to be a separate legal entity the negotiations were conducted at the same time and by the same person for all the hulls, it being a matter of indifference which particular companies should be the buyers of which hulls. It followed, in the Judge's opinion, that no term could be implied preventing disclosure by the yard to arbitrators in a dispute with those buyers.

## (2) The Appeal

An appeal was taken to the Court of Appeal and was allowed. On appeal Ali argued that the term of confidence in relation to arbitration proceedings attaches as a matter of law rather than as a matter of business efficacy. For its part, the yard argued as follows.

- (1) It again accepted the existence of a duty of confidentiality although it reserved the right to argue before the House of Lords that the decision in *Esso Australia* should be preferred.
- (2) It sought to support the Judge's approach to the implied term of confidentiality on the basis of the "officious bystander" test, i.e. as a matter of business efficacy, its nature and extent being variable, according to the circumstances of the particular case.
- (3) Alternatively, if the approach of the Judge was wrong and the implied term attaches as a matter of law rather than as a matter of a business efficacy, then nonetheless the



Judge's decision is to be supported on the basis that no breach of confidentiality is involved where the parties to whom disclosure is contemplated are not in any real sense "third party strangers."

- (4) In any event, disclosure was reasonably necessary for the protection and enforcement of the yard's rights in pursuit of its claims against the purchasers of hulls 204 to 206. In particular without being able to rely on the material sought to be disclosed, the yard would be unable to pursue its allegation of issue estoppel and abuse of process before the arbitrators, it would be hindered in demonstrating that the purported defences raised in the current arbitrations are without merit and it would be hindered in defending the application to dismiss for want of prosecution.
- (5) It would be contrary to the public interest to permit Ali to suppress evidence given in the first arbitration by the very persons whose evidence will be relied upon in the current arbitrations when any material alterations in their testimony should be before the arbitrators in their truth-seeking exercise.
- (6) Ali, as a single purpose, no-ship company in the same beneficial ownership as the respondents, has no legitimate interest in restraining the disclosure of the disputed material.

Potter LJ, in the Court of Appeal, proceeded to deal with each of the yard's submissions in order.

### **(3) The Nature of the Implied Term**

Potter LJ considered the yard's submissions (1) and (2) together. He rejected the notion that confidentiality arose from an implied term necessary to give business efficacy to a particular contract. That required an examination, which Clarke J had carried out, into the

facts and circumstances of the particular case. Rather Potter LJ considered that the implied term arose as a matter of law. He stated:

I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in 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.”<sup>19</sup>

Thus it was not necessary to inquire whether, in the particular circumstances of the case, an obligation of confidentiality arose in order to give business efficacy to a particular contract. The obligation existed as a matter of law and it was simply a matter of inquiring whether the case fell within any of the established exceptions to the obligation. Potter LJ dwelt on these at some length and it is worthwhile reproducing what he said in full. He stated:

As to those exceptions, it seems to me that, on the basis of present decisions, English law has recognised the following exceptions to the broad rule of confidentiality: (i) consent, ie where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court. It is the practical scope of this exception, ie the grounds on which such leave will be granted, which gives rise to difficulty. However, on the analogy of the implied obligation of secrecy between banker and customer, leave will be given in respect of (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means 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 against that third party or to defend a claim (or counterclaim) brought by the third party (see the *Hasneb* case).

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<sup>19</sup> Id. at 146.

In that connection, I make two particular observations. Although to date this exception has been held applicable only to disclosure of an award, it is clear (and indeed the parties do not dispute) that the principle covers also pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration (see *Dolling-Baker's* case). Second, I do not think it is helpful or desirable to seek to confine the exception more narrowly than one of “reasonable necessity.” While I would endorse the observations of Colman J in the *Insurance Co* case [1995] 1 Lloyd’s Rep 272 at 275 that it is not enough that an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed, nor that their disclosure would be “merely helpful, as distinct from necessary, for the protection of such rights,” I would not detach the word “reasonably” from the word “necessary,” as the passage just quoted appears to do. When the concept of “reasonable necessity” comes into play in relation to the enforcement or protection of a party’s legal rights, it seems to me to require a degree of flexibility in the court’s approach. For instance, in reaching its decision, the court should not require the parties seeking disclosure to prove necessity regardless of difficulty or expense. It should approach the matter in the round, taking account of the nature and purpose of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere.

Finally, in at least one decision, the English court has tentatively recognised a further exception (v) where the “public interest” requires disclosure: see *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102. In that case Mance J, ruling upon the validity of a subpoena, held that a party to court proceedings was entitled to call for the proof of an expert witness in a previous arbitration in a situation where it appeared that the views expressed by him in that proof were at odds with his views as expressed in the court proceedings. Mance J observed (at 109):

If a witness were proved to have expressed himself in a materially different sense when acting for different sides,

that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest.

It seems to me clear that, in the context, Mance J was referring to the “public interest” in the sense of “the interests of justice,” namely the importance of a judicial decision being reached upon the basis of the truthful or accurate evidence of the witness concerned. Whereas the issue in the *Paribas* case related to a matter of expert opinion rather than objective fact, I see no reason why such a principle, which I would approve, should not equally apply to witnesses of fact who may be demonstrated to have given a materially different version of events upon a previous occasion. As a matter of terminology, I would prefer to recognise such an exception under the heading “the interests of justice” rather than “the public interest,” in order to avoid the suggestion that use of that latter phrase is to be read as extending to the wider issues of public interest contested in the *Eso Australia* case. In that case, only the dissenting judgment of Toohey J appears to me to treat the law of privacy and confidentiality in relation to arbitration proceedings on line similar to English law. While it may well fall to the English court at a future time to consider some further exception to the general rule of confidentiality based on wider considerations of public interest, it is not necessary to do so in this case.<sup>20</sup>

#### **(4) Third Party Strangers**

Next Potter LJ considered whether a further exception should be created to the confidentiality rule where the parties to whom disclosure is contemplated are in the same beneficial ownership and management as the complaining party. He concluded that no such exception should be created for two reasons. First, whatever the position in the instant case, it is possible to envisage a situation where, despite the feature of common beneficial ownership between them, one entity may wish to keep private from another the details of

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<sup>20</sup> Id. at 147-148.

materials generated in an earlier arbitration. Secondly, where the problem arises in relation to disclosure in later proceedings, to propound such an exception is to leave out of account that the real interest of the objecting party is to withhold disclosure of such materials from the subsequent decision maker. Potter LJ went on to observe that the fact that the arbitrator in the subsequent proceedings will in turn be bound by duties of confidentiality is no cure for the damage which the objecting parties perceives may be cause to his interests from an adverse decision resulting from, or influenced by, the disclosure sought to be made.

#### **(5) Reasonable Necessity**

In order to come within the exception of “reasonable necessity,” Potter LJ considered it necessary for the yard to show that the use of the documents was reasonably necessary for the protection or enforcement of the yard’s rights in relation to the hull 204 to 206 arbitrations. The yard sought to come within the exception on two bases. The first was issue estoppel. It asserted that it wished to plead issue estoppel in respect of certain findings made in the first arbitration. This was rejected by Potter LJ on the basis that the parties in the hull 204 to 206 arbitrations were not the same as those in the first arbitration. The yard also sought to come within the exception of “reasonable necessity” on the basis that the documents in the first arbitration were needed to demonstrate that the defences raised were without merit. This was also rejected on the basis that the same witnesses who were called in the first arbitration could be called to give evidence in the hull 204 to 206 arbitrations. Potter LJ ventured the opinion that in the absence of agreement between the parties, convenience and good sense were not in themselves sufficient to satisfy the test of “reasonable necessity.” The Judge also observed that while the yard understandably sought to obtain interim awards in respect of payments which on the face of them were due, an arbitrator did not, without the consent of the parties, have power similar to the High Court under Order 14.

Potter LJ concluded by deciding that the yard should be subject to a final injunction restraining it from employing in the hull 204 to 206 arbitrations the material generated in the course of the first injunction. However the yard was given liberty to seek exemption from its terms in certain circumstances including the situation, should it arise, where any witness for the owners of hulls 202 to 204 was to give evidence inconsistent in some relevant respects with evidence which the witness gave in the first arbitration.

Brooke and Beldam LJ agreed with the opinion of Potter LJ. In the end result the appeal was allowed.

### (6) Subsequent Citation

In *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich*<sup>21</sup> the Judicial Committee of the Privy Council, on appeal from the Court of Appeal of Bermuda, commented on the *Ali Shipping* case. Lord Hobhouse of Woodborough, delivering the judgment of their lordships expressed reservations about resting the duty of confidentiality upon an implied term subject to exceptions and observed:

However Potter LJ, who delivered the leading judgement, having followed *Dolling-Baker v Merret (sup)* affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term (p 326) and then to formulate exceptions to which it would be subject (pp 326-7). 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.

However in *Associated Electric* the parties had expressly agreed that the arbitration was private and confidential. Consequently it was un-

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<sup>21</sup> Privy Council Appeal No. 93 of 2001, 29 January 2003.

necessary for their Lordships to further consider any implied term. The Privy Council held that as a matter of construction the express confidentiality provision did not apply to the enforcement of the award or to its reliance, in a subsequent arbitration between the two parties, as constituting an issue estoppel.

### **(7) Arbitration Proceedings in the Courts**

Because of the confidentiality attaching to arbitration in England, the question has arisen as to what confidentiality exists when an “arbitration claim” is raised in a court. Following the enactment of the *Arbitration Act 1996* court proceedings involving an arbitration were held *in camera*. A significant change was made in 2002 following amendments to the Civil Procedure Rules (“CPR”). Rule 62.10 now provides as follows:

CPR 62.10:

- (1) The Court may order that an arbitration claim be heard either in public or in private.
- (2) Rule 39.2 does not apply.
- (3) Subject to any order made under paragraph (1) -
  - (a) the determination of -
    - (i) a preliminary point of law under section 45 of the 1996 Act; or
    - (ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award, will be heard in public; and
  - (b) all other arbitration claims will be heard in private.
- (4) Paragraph (3)(a) does not apply to -
  - (a) the preliminary question of whether the Court is satisfied of the matters set out in section 45(2)(b); or
  - (b) an application for permission to appeal under section 69(2)(b).

The term “arbitration claim” is itself defined in Rule 62.2 as follows:

- 62.2 - (1) In this Section of this Part “arbitration claim” means -
- (a) any application to the Court under the 1996 Act,
  - (b) a claim to determine -
    - (i) whether there is a valid arbitration agreement;

- (ii) whether an arbitration tribunal is properly constituted; or
- (iii) what matters have been submitted to arbitration in accordance with an arbitration agreement;
- (c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and
- (d) any other application affecting -
  - (i) arbitration proceedings (whether started or not); or
  - (ii) an arbitration agreement
- (2) This Section of this Part does not apply to an arbitration claim to which Section II or III of this Part apply.

In *City of Moscow v International Industrial Bank*<sup>22</sup> an arbitration was held in England involving three sets of parties, the Department of Economic Policy and Development of the City of Moscow and the City of Moscow; the Bankers Trust Company and the International Industrial Bank. An award was made which was subsequently challenged under Section 68 of the *Arbitration Act 1996*. The court dismissed the application. A copy of the judgment was obtained by Lawtel which summarised the judgment on its website with a link to the full text. Following an objection by one of the parties to the arbitration, the material on Lawtel's website was deleted.

The Moscow parties sought an order that the judgment, or failing that the Lawtel summary, should be available for general publication or alternatively for limited publication to sub-participants who had advanced monies to one of the parties in the arbitration.

In the Court of Appeal Mance LJ, with whom Carnwath LJ agreed, referred to the changes to the CPR and the importance of privacy and confidentiality in relation to arbitration proceedings in England. He observed:

30. The rule changes in 1997 and 2002 rest clearly on the philosophy of party autonomy in modern arbitration law,

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<sup>22</sup> [2004] 2 Lloyd's Rep 179 (Court of Appeal)



combined with the assumption that parties value English arbitration for its privacy and confidentiality.

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32. The rule makers clearly deduced from the principles of the Arbitration Act, 1996 that any Court hearing should take place, so far as possible, without undermining the reasons of inter alia privacy and confidentiality for which parties choose to arbitrate in England. Their conclusion in this regard has not been challenged. It may be justified on the simple basis that arbitration represents a special case, in relation to which there has been very considerable development during recent years. An alternative and overlapping consideration is that parties may be deterred from arbitrating or at any rate from invoking the Court's supervisory role in relation to arbitration if their understanding regarding arbitral confidentiality and privacy is ignored. I would personally doubt whether it can be said without any positive evidence that the publication that has in the past frequently followed applications to set aside arbitration awards, e.g. for misconduct, has itself been likely to be detrimental to parties' keenness or otherwise to agree to arbitrate in London. But I find it easier to accept that, having arbitrated unsuccessfully here, a party could well be deterred from making an arbitration claim in Court if there was a risk that by doing so really confidential matters might be disclosed.

Mance LJ went on to point out that the consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to the Court. Court proceedings are not consensual and the possibility of pursuing them exists in the public interest. Nonetheless in drafting the Rules, the Rule Committee and the courts could still take into account the parties expectations regarding privacy and confidentiality when agreeing to arbitrate.

Mance LJ remarked that under CPR 62.10 the Rule Committee considered that in cases where permission to appeal was appropriate, the starting point was to treat the public interest in a public hearing as outweighing any wish on the parties part for continuing privacy and confidentiality. However in the case of other arbitration claims, the

starting point was reversed. The Court of Appeal went onto say that even with a hearing conducted in private the court should, when giving judgment, do so in public where this could be done without disclosing significant confidential information. In deciding how to exercise its discretion under CPR 62.10 the court had to weigh together factors militating in favour of publicity together with the confidentiality of the original arbitration.

In the case before it, the Court concluded that the trial judge's conclusion that the judgment should remain private was justified. However the Lawtel summary raised different considerations. It offered a brief and factually neutral insight into the legal issues and did not disclose any sensitive or confidential information. Further there was no sensible means of preventing further publication by subscribers to Lawtel of the summary and there was no reason of arbitral sensitivity or confidentiality mitigating against its publication.

A slightly different case is that of *Glidepath BV v Thompson*<sup>23</sup>. There proceedings were commenced in England between a claimant and a defendant who were parties to a joint venture agreement. The claimant was Glidepath BV and the allegations in the proceedings which it had commenced involved a transaction whereby part of the business of a company called Spherion (UK) Ltd was transferred to a company called STA/Rel Q.

The joint venture agreement contained an arbitration clause and the proceedings in the English court were eventually stayed under Section 9 of the *Arbitration Act 1996*. However prior to the making of the stay order, there had been applications by the claimants for freezing injunctions and disclosure orders. These orders were made in the course of hearings in private. There were further applications to discharge these orders, also made in private, and they were unsuccessful.

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<sup>23</sup> [2005] 2 Lloyd's Rep. 529

After the English proceedings were stayed the applicant, a Mr Onwuka, who was not a party to the proceedings, but was employed by Spherion (UK) Ltd applied under CPR 5.4(5) for copies of documents in the court file including particulars of claim, notices of application in respect of the freezing injunction and the disclosure application as well as the respective orders.

Mr Onwuka, who was employed by Spherion (UK) Ltd was in dispute with his employers concerning his exclusion from the transfer of employment of the employees of Spherion to STA/Rel Q. He claimed that he was unlawfully excluded from this transfer and that he was the victim of adverse treatment on grounds of race.

The defendants to the application for copies of the documents submitted that all the classes of documents covered by the application were confidential to the parties to the arbitration. They further submitted that the claimant wrongfully resorted to the courts instead of referring the disputes to arbitration and accordingly, as regards a non-party, the court should protect the confidentiality of the arbitral procedure by declining to permit any of the documents to be disclosed. They further submitted that the applicants' interest in gaining access to the documents was in reality to obtain cross-examination material for use in the employment tribunal proceedings.

The applicant, for its part, relied on the decision of the court in *The City of Moscow v International Industrial Bank* [2004] 2 Lloyd's Report 179.

Colman J distinguished the decision in the *City of Moscow* and observed:

19. That case was concerned with the publication of judgments in respect of applications for ancillary relief. The judgment does, however, recognise that the confidentiality of the arbitral process should in general be protected unless in the public interest it is appropriate that a judgment should be published. However, it is

definitely not authority for the proposition that arbitration claims except those covered by CPR 62.10(3)(a) should be heard in public unless the court otherwise orders.

20. Whereas it is true that an application notice issued under section 9 of the 1996 Act is not an arbitration claim form and that by CPR 62.8 it has to be served on all other parties to the court proceedings, it is certainly an arbitration claim which has to be heard in private unless the court decides otherwise. That is at least some indication that, even at the stage *before* the court has ordered a stay, the private and confidential character of proceedings ancillary to the arbitral process ought to be protected." (at p 4-5)

Colman J said that the relevant test was:

24. I therefore conclude that the permission of the court to a stranger to an arbitration and to proceedings in which a section 9 stay has been applied for to inspect either an application notice under section 9 and any evidence on the court file or arbitration claim forms for ancillary relief under section 44 and evidence appended on the court file should not be granted unless all the parties to the arbitration consent or there is an overriding "interest of justice" as envisaged in *Ali Shipping Corporation v Shipyard Trogir*. Further, in a case where, as in the present case, the application under section 9 is *preceded* by an application for a freezing injunction or for a *Normich Pharmacal* disclosure order in the face of a binding arbitration agreement, the exercise of the court's discretion upon an application by a stranger to the arbitration agreement or the proceedings to inspect those applications or the evidence supporting them on the court file should similarly be exercised by reference to the principles of confidentiality attaching to arbitral proceedings. (at p 5)

The judge concluded that on the facts of the application neither the specific interests of the applicant in establishing his alleged rights before the employment tribunal nor the interests of justice generally justified the granting of access to any of the list of documents the subject of the application.

## II. AN ANALYSIS AND SURVEY

### *A. Other National Laws*

In *Esso Australia* the High Court of Australia held that arbitration is private but it declined to find a duty of confidentiality attached to documents and information obtained during the course of an arbitration. However the High Court did hold that a duty of confidentiality arose in two circumstances. The first was where the parties had made express provision for confidentiality. Secondly the High Court held that confidentiality attached to documents which are produced by a party compulsorily pursuant to a direction of the arbitrator. But this limited obligation was itself subject to a number of exceptions including the public's legitimate interest in obtaining information about the affairs of public authorities. In contrast the English Court of Appeal in *Ali Shipping* held that an implied term of confidentiality ought properly to be regarded as attaching as a matter of law. The consequence is that it automatically applies and it is not necessary to establish any need to imply the term in a particular case to give business efficacy. However the implied term of confidentiality is subject to a number of exceptions which the court enunciated.

The decisions in *Esso Australia* and *Ali Shipping* provide a stark illustration of different approaches adopted in two common law jurisdictions. A question which might legitimately be asked is which view is generally prevalent? In the light of the notoriety which followed the High Court's decision in *Esso Australia*, and the trenchant criticism which it received, together with the previously widely held assumption that arbitration is confidential, it might be thought that the High Court's decision was an aberration. But this would be going much too far. In the United States there is authority, predating *Esso Australia*, which suggests that arbitration is not confidential; and, the High Court's decision was to prove influential in a subsequent consideration of confidentiality in a non-common law jurisdiction, namely Sweden.

There do not appear to be many decided cases in the United States on confidentiality. In *United States v. Panhandle Eastern Corp.*,<sup>24</sup> a United States District Court held that confidentiality does not attach to documents obtained in an arbitration. The case involved a civil action brought by the United States Government against Panhandle Eastern Corporation (“PEC”) and its affiliates and certain other corporations. The United States Government served PEC with a request for documents relating to a previous arbitration held in Geneva between a subsidiary of PEC known as Panhandle Eastern Park Line Co (“PEPL”) and Sonatrach, the Algerian national oil and gas company (“Sonatrach Arbitration”). The documents requested by the United States comprised:

All documents relating to the Sonatrach Arbitration, including, but not limited to: briefs, correspondence and other papers filed with or submitted to the arbitrators, or their delegates; communications between any and all of the defendants, depositions or other witness statements; transcripts of all hearings before the arbitrators, or their delegates; proposals to settle the arbitration; and, inter-or intra-company documents.

PEPL sought an order of protection before a Delaware Court that the discovery not be had. PEPL rested its application on two grounds, that disclosure would cause PEPL to suffer economic injury and secondly that the arbitration was confidential in nature. The court rejected the letter and said:

In light of the foregoing requirements, it is clear that PEPL has failed to carry its burden of showing good cause. The only foundation that PEPL has provided in support of its motion is that affidavit of Louis Begley (“affidavit”) (D.I.76), who served as lead counsel for PEPL and Trunkline LNG Co. (“TLC”) in the Sonatrach Arbitration. The affidavit first presents the argument that the applicable Rules of the Court of Arbitration of the International Chamber of Commerce (“ICC Rules”) require the

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<sup>24</sup> 118 F.R.D. 346 (D. Del.1988).

Sonatrach Arbitration documents to be kept confidential. (*Id.* 5-9, at 2-5.) In support of this argument Begley cites to various rules, including one which states that “[t]he work of the Court of Arbitration is of a confidential character which must be respected by everyone who participates in that work in whatever capacity.” (*Id.* 7, at 3). However, this rule, as well as another which the affidavit quotes for support, have been culled from Appendix II of the Rules, which is entitled: “Internal Rules of the Court of Arbitration.” (*See* Appendix to United States’ Brief, D.I. 79A, A16.) These rules are therefore meant to be applied internally, governing the members of the Court of Arbitration. They do not apply to the parties to arbitration proceedings \*350 or to the independent arbitration tribunal which conducts these proceedings. Furthermore, even if the internal rules somehow applied to the parties, they would govern only those proceedings which take place within the Court of Arbitration, as opposed to those proceedings conducted by arbitrators who were appointed by the Court of Arbitration. As the ICC Rules themselves state: “The Court of Arbitration does not itself settle disputes. Insofar as the parties shall not have provided otherwise, it appoints, or confirms the appointment of, arbitrators in accordance with the provisions of this Article.” (*Id.* at A6.) Therefore, the rules governing the internal functioning of the Court of Arbitration are not applicable here, and provide no support for PEPL’s motion.”

The Court in *Panhandle* did not accept that the arbitration documents were confidential. However there is authority in the United States that the deliberations of the Arbitral Tribunal are confidential. Lisk<sup>25</sup> cites the decision of the San Antonio Court of Appeals in *Rutherford v. Blank*,<sup>26</sup> which raised the question of whether an arbitrator could be called upon to testify about an attorney’s fee dispute which was arbitrated before the Fee Dispute Committee of the San Antonio Bar Association. According to Lisk, after the arbitration award was rendered, one of the Committee members resigned and made some negative comments about the Committee.

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<sup>25</sup> Derek Lisk, “Confidentiality of Arbitrations” 63 Tex. B.J. 234.

<sup>26</sup> Unreported.

The attorney, whose fees had been disputed, then applied to vacate the award, alleging corruption, fraud and wilful misbehaviour on the part of one or more of the arbitrators. The attorney tried to take depositions of the Committee members and the Bar Association moved to quash the depositions. When one of the Committee members resigned the attorney sought to depose the departing Committee member. The trial court found that the discussions and conduct of the arbitrators during deliberations should remain confidential. On appeal the Court of Appeals noted two conflicting considerations. The first was that the Committee's interest in protecting the arbitration process was supported by the Texas legislature's express statement that it was the policy of that State to encourage the peaceful resolution of disputes. On the other hand the court felt that this interest was countered by the attorney's interest in discovering relevant evidence. But the Court of Appeals did not have to finally decide where the balance lay because it found that the attorney had waived his right to complain about the trial court's ruling by not going forward with the depositions after the ruling and making a record of the questions the trial court would have precluded.

The approach of the High Court of Australia was followed in Sweden in the *Bulbank v. AIT* case.<sup>27</sup> The Swedish case concerned arbitral proceedings conducted in Stockholm under the Arbitration Rules of the United Nations Economic Commission for Europe. The Claimant was an Austrian creditor and the Respondent was a Bulgarian bank. The Respondent challenged the jurisdiction of the arbitral tribunal. This challenge was unsuccessful and the tribunal issued an interim award upholding its jurisdiction. The tribunal's decision was sent to Mealey's International Arbitration Report by a representative of the Claimant and it was published. Subsequently

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<sup>27</sup> The case is discussed at some length by Bagner, *supra* n.2 at 245-249. A detailed case note by Romander and Pettersson, entitled "Confidentiality in Swedish Arbitration Proceedings" can be viewed at [http://www.sccinstitute.se/\\_upload/shared\\_files/artikelarkiv/confidentiality\\_in\\_swedish\\_arbitration\\_proceedings.pdf](http://www.sccinstitute.se/_upload/shared_files/artikelarkiv/confidentiality_in_swedish_arbitration_proceedings.pdf).



the chairman of the tribunal at a social function, disclosed information about the interim decision to a Justice of the Supreme Court and the Supreme Court in its ruling made reference to the published interim award.

Before the arbitral tribunal, the Respondent contended that the Claimant had repudiated the arbitration agreement and that the chairman of the tribunal had disqualified himself. The arbitral tribunal rejected these contentions and proceeded to render its final award.

The respondent appealed to the Stockholm City Court which found that there was a general implied duty of confidentiality in Swedish arbitration proceedings and that the Claimant's disclosure of the decision had constituted a material breach of this duty which gave the Respondent a right to revoke the arbitration agreement. In consequence the arbitration agreement was not valid at the time of the tribunal's final award. The court therefore decided to nullify the award. An appeal was taken to the Svea Court of Appeal which set aside the judgment of the Stockholm City Court. It would appear that the Appeal Court did recognize a duty of confidentiality but it drew a distinction between the different types of information. The Appeal Court held that in many cases a reasonable sanction for a breach of confidentiality would be the payment of damages. Only in cases where the breach was significant would the other party be entitled to declare the arbitration agreement void. In the instant case the Appeal Court found that the information disclosed had been mainly of a procedural nature and did not give rise to a right to terminate the arbitration agreement. The Appeal Court also held that the chairman's action did not warrant his disqualification as he was motivated by an interest to participate in the development of the law.

The Supreme Court recognized that arbitral proceedings were private in character and that third parties did not have a right to attend. However in the court's view this did not restrict the parties' freedom to disclose information about the arbitral proceedings. The court recognized that generally parties might have an interest in not disclosing information about the proceeding but that this would not always be the case. But the general recognition by parties themselves,

in many cases, that arbitral proceedings should be treated as confidential was quite different from holding that a legal duty of confidentiality existed. The Supreme Court noted that the new *Arbitration Act* 1999 of Sweden did not incorporate any rule on confidentiality. The court also noted the position in other countries. While some countries recognized a duty of confidentiality others did not and the Supreme Court referred to the decision of the High Court of Australia in *Esso Australia*. The Supreme Court unanimously ruled that a party in arbitration proceedings governed by Swedish law could not be regarded as bound by confidentiality unless the parties had entered into a specific agreement. It followed that the Claimant's disclosure did not constitute a material breach of the arbitration agreement giving the Respondent the right to revoke the agreement.

Commenting on the Swedish Supreme Court decision, Bagner observes:

The myth about the duty of confidentiality in arbitration, fatally wounded in 1995 by the Australian High Court, has now been laid to rest, at least in Sweden.<sup>28</sup>

But of course while the United States, Australia and Sweden do not recognize a broad and general legal obligation of confidentiality attaching to documents and information obtained in an arbitration, a different situation applies in some other countries. We have already noted the position in England. It appears that French law also recognizes such an obligation. The case usually cited is *Aita v. Ojjeb*.<sup>29</sup> The case, as summarized by Paulsson and Rawding<sup>30</sup> is as follows:

In the case of *Aita v. Ojjeb*, the Court of Appeal of Paris - perhaps the most important jurisdiction in France in the context of international arbitration given the fact that it reviews almost all

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<sup>28</sup> Bagner, *supra* n. 2, at 248.

<sup>29</sup> Judgment of 18 February 1986, 1986 *Revue de L'arbitrage* 583.

<sup>30</sup> Paulsson and Rawding, "*The Trouble with Confidentiality*" (1995) 11 *Arbitration International* 303 at 312.

challenges to awards - rendered a judgment against a party which rather bizarrely was seeking the annulment in France of an award rendered in London (by Lord Wilberforce acting as umpire). The Court of Appeal not only dismissed the challenge, but ruled that the very bringing of the proceedings violated the principle of confidentiality and therefore ordered the challenging party to pay a significant penalty to the party which had won the arbitration, noting that the action had “caused a public debate of facts which should remain confidential,” and that it is in “the very nature of arbitral proceedings that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed.

Another jurisdiction which recognizes a broad obligation of confidentiality is New Zealand. It is somewhat unique in that the obligation is enshrined in legislation. Section 14 of the *New Zealand Arbitration Act* 1996 provides:

- (1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.
- (2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection—
  - (a) If the publication, disclosure, or communication is contemplated by this Act; or
  - (b) To a professional or other adviser of any of the parties.

Leaving aside the case of New Zealand, the dearth of legislative provisions on confidentiality includes the most important contemporary law on international commercial arbitration, the UNCITRAL Model Law on International Commercial Arbitration.

In Canada, the Supreme court of British Columbia in *Hi-Seas Marine Ltd v Boelman*<sup>31</sup> noted the contradictory positions taken by the English court in *Ali Shipping* and the Australian court in *Esso Australia* and observed that “it may be necessary for the courts of this province to comprehensively address [it]” but found it unnecessary to do so in the case before it.

*B. Selection of the Application National Law*

The lack of uniformity amongst national laws and the diverse treatment of confidentiality raises a choice of law question. Which law determines the issue of confidentiality? There is little to be said for application of the *lex causae*, the law governing the substantive rights of the parties. This will usually be the law applicable to the contract which is the subject of the arbitration. Nor is there much to be said for application of the law governing the arbitration agreement. This will often be the same law as the law which governs the substantive contract in which the arbitration agreement is usually found.<sup>32</sup> However an arbitration agreement is not invariably governed by the law of the substantive contract. The law governing an arbitration agreement determines its validity and effect. This would not seem to encompass confidentiality of the arbitral proceedings themselves. The choices for the law governing confidentiality would seem to lie between the law applicable to the arbitral proceedings (*lex arbitri*)<sup>33</sup> or the law of the place where the issue of confidentiality arises (*lex fori*). Thus if an arbitration were held in Singapore and documents obtained in the course of that arbitration were sought to be produced in court proceedings or in an arbitration in Australia, the choice of law applicable to confidentiality would lie between that of Singapore (as the seat of the arbitration and

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<sup>31</sup> 2006 BCSC 488; (2006) 17 B.L.R (4th) 240.

<sup>32</sup> See Sykes and Pryles, *Australian Private International Law* (3d edition 1991) at 141-42; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (2d edition 1991) at 75-76.

<sup>33</sup> Sykes and Pryles at 149; Redfern and Hunter at 77.

the *lex arbitri*) and that of Australia (the *lex fori*). In this writer's opinion the *lex arbitri* should apply. Thus an Australian court or arbitrator should test the confidentiality of the documents sought to be produced in accordance with the law of Singapore.

### *C. Issues of Confidentiality*

Confidentiality can be broken down into a number of discrete issues. The first is that of privacy. Strictly speaking, privacy is a separate matter to confidentiality but is generally considered alongside confidentiality. It was so in the Australian High Court's decision in *Esso Australia*. Privacy is generally taken to refer to the arbitral hearing and the right of persons to attend or be present. There seems to be broad agreement that arbitral proceedings are private in the sense that strangers have no right of admission. Only the parties, their representatives and legal advisers and witnesses have a right to be present. However with regard to witnesses the right is limited and qualified. A witness may be excluded until asked to give evidence and a witness who has given evidence in the form of a witness statement and whose presence is not required by either party would have no right to attend.

The private nature of arbitration proceedings was recognized by the High Court of Australia in *Esso Australia*. The High Court stated that it did not matter whether the characteristic of privacy is an ordinary incident of the arbitration, that is, an incident of the subject matter upon which the parties have agreed, or whether it is an implied term of the agreement. The Court noted that earlier authorities referred to it as an implied term but the High Court preferred to describe the private character of the hearing as something that inheres in the subject matter of the agreement to submit disputes to arbitration rather than attribute that character to an implied term.

The location of arbitration hearings is also suggestive of the private nature of arbitrations. Hearings are usually held in conference rooms in hotels, arbitration centres or offices which are hired for this purpose. Whether such rooms are hired for arbitration hearings, social purposes or business proceedings, it is a trite fact that the public have no right of admission. Of course, the public can be admitted to a hearing by agreement. In one arbitration I chaired in Manila, which concerned an application for an extraordinary increase in water rates, it was agreed that the matter was of great interest to

the public and the public should have the opportunity to observe the proceedings. Because of the physical constraints of the hearing room itself, it was agreed that the proceedings would be televised and the public admitted to an adjoining room where they could view the proceedings on a television screen. In an ICC arbitration both the parties and the arbitral tribunal must agree to the admission of strangers. Article 21(3) of the ICC Rules of Arbitration provides:

The Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.

While privacy is a concept which prevents strangers from attending a hearing, confidentiality is a concept which imposes obligations on the participants to the arbitration. Where it attaches it applies to the parties and the arbitrators though probably not to witnesses. Certainly if confidentiality arises from an implied term in the arbitration agreement it cannot extend to witnesses because they are not parties to the agreement and are not bound by it. In contrast, the arbitrators acquire a contractual relationship with the parties and are bound by the arbitration agreement. A witness could only acquire an obligation of confidentiality by rule of law or, alternatively, by entering into a confidentiality agreement.

The most common issue of confidentiality which arises, and that which was before the High Court of Australia in *Eso Australia*, concerned documents and information obtained in the course of an arbitration. A party claiming confidentiality will assert that such documents or other information cannot be used for any other purpose. However other issues of confidentiality may also arise. One issue concerns the existence of the arbitration itself. May a party to an arbitration disclose its involvement in an arbitration with another named party? If it cannot name the other party can it disclose that it is involved in an arbitration with an unnamed party? If there is a general obligation of confidentiality in these circumstances, how does this sit with obligations which may be

imposed upon a party to an arbitration to provide information to its shareholders, to the stock exchange or to banks providing finance? If there is an obligation of confidentiality either as an implied term or as a term of law, is that obligation subject to such obligations of disclosure? Is a distinction to be made where disclosure is required as a matter of law and where disclosure is required as a matter of contractual obligation?

The answer to these questions are not entirely clear. In Australia the decision in *Esso Australia* deals with confidentiality attaching to documents and information not to the existence of the arbitration itself. But the reasoning of the High Court would suggest that there is no confidentiality attaching to the existence of the arbitration. The position might be otherwise under the law of England and Wales.

A third issue of confidentiality which may arise concerns the award itself. Is the award confidential or can it be published to third parties? Again, the existence of an obligation on a party to satisfy an award to pay damages is a fact which may have to be disclosed to regulatory authorities and perhaps providers of finance. Also enforcement of an award will require disclosure to a court. Hence any obligation of confidentiality attaching to the existence of the arbitration clearly gives rise to questions concerning the exceptions to that obligation.

Finally, issues of confidentiality may arise in court proceedings to set aside or enforce an award or with respect to court intervention in the arbitral proceedings themselves.

It follows that these diverse issues of confidentiality may arise at various stages during the arbitration. An issue concerning the disclosure of the existence of an arbitration may arise at the very commencement of the arbitral proceedings. Questions concerning the disclosure of documents or information obtained during the arbitration can arise during the proceedings themselves or after they have terminated, for example in subsequent arbitral or judicial proceedings. Following the conclusion of an arbitration an issue may arise as to whether the award can be published.



#### *D. Arbitration Rules*

Confidentiality may exist under the applicable national law. It may also arise as a result of contractual provisions concluded between the parties to the arbitration. A contractual provision on confidentiality can be incorporated by reference. For example, if the parties designate that the arbitration will be governed by a particular set of arbitration rules, any provision in those arbitration rules on confidentiality will apply to the arbitration. A survey of commonly used rules in international arbitration discloses no common pattern.

International arbitration rules tend to fall into one of three categories. The first are rules which contain no provisions on confidentiality. An example is the UNCITRAL Arbitration Rules. These Rules contain a provision on privacy but do not deal with confidentiality. As far as privacy is concerned, Article 25(4) of the UNCITRAL Arbitration Rules provides:

Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

It will be noted that the UNCITRAL Arbitration Rules enable the parties to agree that the hearing shall not be private. In contrast, Article 21(3) of the ICC Rules of Arbitration provides that persons not involved in the proceedings can only be admitted with the approval of the parties *and* the Arbitral Tribunal.

The ICC Rules of Arbitration are also probably classified as rules which make no provision for confidentiality. The rules deal with privacy, as is noted above. But in relation to confidentiality the only provision is article 20(7) which provides:

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

This rule does not on its face appear to make documents and other information provided in an arbitration confidential. It empowers the arbitral tribunal to take measures to protect information which is otherwise confidential i.e. where the confidentiality arises apart from article 20(7) of the rules.

Appendix I of the ICC Rules of Arbitration contains the statutes of the International Court of Arbitration of the ICC. Article 6 provides as follows:

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

This provision does not deal with confidentiality in the arbitral proceedings themselves but simply makes the work of the Court confidential. As the United States District Court held in the *Panhandle* case,<sup>34</sup> these provisions do not suffice to make ICC arbitration confidential. Yves Fortier has observed that when the ICC reviewed its previous rules and formulated the new 1998 ICC Rules of Arbitration, much time was devoted to considering confidentiality. He says that the working party charged with proposing updated rules was unable to arrive at a consensus regarding an appropriate formulation of a general duty of confidentiality and as a result no such duty was proposed.<sup>35</sup>

A second category of arbitration rules contains limited provisions on confidentiality. The international arbitration rules of the

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<sup>34</sup> *Supra* n. 21.

<sup>35</sup> Fortier, "The Occasionally Unwarranted Assumption of Confidentiality" (1999) 15 *Arbitration International* 131 at 133.

American Arbitration Association provide an example. Article 34 states:

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

This provision makes all matters relating to the arbitration or the award confidential but only so far as the tribunal and the administrator is concerned. It does not, of itself, impose obligations on the parties to the arbitration.

A third category of arbitration rules contain extensive provisions on confidentiality. An outstanding example is the WIPO Arbitration Rules. Article 73 deals with confidentiality concerning the existence of the arbitration, as follows:

- (a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only:
  - (i) by disclosing no more than what is legally required; and
  - (ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.
- (b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief

requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.

Article 74 deals with confidentiality of disclosures made during the arbitration and provides:

- (a) In addition to any specific measure that may be available under Article 52, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction.
- (b) For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness's testimony, the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

Confidentiality of the award is provided in Article 75 as follows:

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

- (i) the parties consent, or
- (ii) it falls into the public domain as a result of an action before a national court or other competent authority, or
- (iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party."

The WIPO Rules also provide for confidentiality by the Centre and the Arbitrator in Article 76, as follows:

- (a) Unless the parties agree otherwise, the Centre and the arbitrator shall maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed during the arbitration, except to the extent necessary in connection with a court action relating to the award, or as otherwise required by law.
- (b) Notwithstanding paragraph (a), the Centre may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the parties or the particular circumstances of the dispute to be identified.”

The Rules of the London Court of International Arbitration also contain substantial provisions on confidentiality. Unlike the WIPO Rules, those of the LCIA do not expressly provide for confidentiality of the existence of the arbitration. Article 30 of the LCIA rules is in the following terms:

### Article 30 Confidentiality

- 30.1 Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.
- 30.2 The deliberations of the Arbitral Tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26.
- 30.3 The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.

Another set of rules with a comprehensive confidentiality provision is the Rules of the Australian Centre for International Commercial Arbitration. Similarly to the WIPO Rules, the ACICA Rules expressly provide that the existence of the arbitration is confidential. Article 18 of the ACICA Rules provides as follows:

- 18.1 Unless the parties agree otherwise in writing, all hearings shall take place in private.
- 18.2 The parties, the Arbitral Tribunal and ACICA shall treat as confidential and shall not disclose to a third party without prior written consent from the parties all matters relating to the arbitration (including the existence of the arbitration), the

award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain except:

- (a) for the purpose of making an application to any competent court;
- (b) for the purpose of making an application to the courts of any State to enforce the award;
- (c) pursuant to the order of a court of competent jurisdiction;
- (d) if required by the law of any State which is binding on the party making the disclosure; or
- (e) if required to do so by any regulatory body.

18.3 Any party planning to make disclosure under Article 18.2 must within a reasonable time prior to the intended disclosure notify the Arbitral Tribunal, ACICA and the other parties (if during the arbitration) or ACICA and the other parties (if the disclosure takes place after the conclusion of the arbitration) and furnish details of the disclosure and an explanation of the reason for it.

18.4 To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

Recently the Singapore International Arbitration Centre promulgated a new set of Arbitration Rules. The SIAC Rules (3rd Edition) came into effect on 1 July 2007, and among the changes made in this new edition was the inclusion of a comprehensive confidentiality provision. These Rules also include the existence of the arbitration within the cloak of confidentiality. Rule 34 states:

- 34.1 The parties and the Tribunal shall at all times treat all matters relating to the proceedings, and the award as confidential.
- 34.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any such matter except:
- (a) for the purpose of making an application to any competent court of any State under the applicable law governing the arbitration;
  - (b) for the purpose of making an application to the courts of any State to enforce or challenge the award;
  - (c) pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
  - (d) to a party's legal or other professional advisor for the purpose of pursuing or enforcing a legal right or claim;
  - (e) in compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or
  - (f) in compliance with the request or requirement of any regulatory body or other authority.
- 34.3 In this Rule, "matters relating to the proceedings" means the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings created for the purpose of the arbitration 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.

#### *E. IBA Rules*

The International Bar Association has promulgated rules on *The Taking of Evidence in International Commercial Arbitration* (1999) and *Ethics for International Arbitrators* (1987). Each of these contains a provision on confidentiality. Neither set of rules will apply to an arbitration unless the parties have adopted them. Article 3(12) of the



Rules of Evidence provides for the confidentiality of documents produced as follows:

All documents produced by a Party pursuant to the IBA Rules of Evidence (or by a non-Party pursuant to Article 3.8) shall be kept confidential by the Arbitral Tribunal and by the other parties and they shall be used only in connection with the arbitration. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement is without prejudice to all other obligations of confidentiality in arbitration.

This is a limited provision and does not deal with the confidentiality of the arbitration itself nor of the Award. Article 9 of the Rules of Ethics provides:

The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator should not participate in, or give any information for the purpose of assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators.

This is also a limited provision. It is confined to the confidentiality of the Award and appears to impose an obligation of confidentiality only on the arbitrators.

#### *F. Drafting Confidentiality Agreements*

If parties to an arbitration wish to ensure the confidentiality of the proceedings they may need to draft their own confidentiality provisions. This will be necessary if the applicable national law does not make adequate provision for confidentiality or if there is some uncertainty as to which national law will apply. The easiest way to incorporate confidentiality obligations in an arbitration is to select a set of arbitration rules which contains appropriate confidentiality provisions. However, as we have seen, many of the most widely used

arbitration rules say little or nothing about confidentiality. In these circumstances the parties may have to devise their own provisions on confidentiality.

Ad hoc confidentiality provisions drafted by the parties themselves can be included in the arbitration agreement. Alternatively, the parties may conclude a confidentiality agreement at a later stage, after a dispute has arisen and an arbitration has been commenced. Neither course may be easy. When drafting an arbitration agreement to be inserted into a substantive contract, the parties, or their legal advisors, may lack interest or enthusiasm to devote time and effort to preparing a confidentiality agreement. When a dispute has arisen, and a party has commenced an arbitration, the relationship between the parties may have broken down to such an extent that the conclusion of a confidentiality agreement will be no easy task. However in practice if a party wishes to obtain documents from the other party, the conclusion of a confidentiality agreement may be a condition insisted upon before disclosure of documents is made.

The UNCITRAL Notes on Organising Arbitral Proceedings suggest that the question of confidentiality can be raised by the arbitral tribunal at a preliminary conference. Paragraphs 31 and 32 of the Notes provide as follows:

31. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognise an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to

discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

32. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identify of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

In drafting confidentiality agreements, the parties may find that provisions in arbitration rules furnish a useful precedent, particularly the provisions in the WIPO Rules which are undoubtedly the most extensive. Three matters which need to be considered are:

- which issues are to be covered in the agreement;
- the extent of the confidentiality obligation;
- the persons to be covered.

The first point raises the question of whether the confidentiality obligations should embrace the existence of the arbitration, the documents and other evidence produced in the arbitration and the awards themselves or only one or two of these matters. In practice the second is likely to be the most important but all three may be of significance. The second matter relates to the extent of the confidentiality obligation and in particular with the obligation and

exceptions to it. Paulsson and Rawding<sup>36</sup> say that it is unrealistic and undesirable to establish an absolute prohibition against unilateral publication of the mere existence of the arbitration. On the other hand, a legitimate need to divulge such information seldom arises. They suggest a provision along the following terms:

Suggested Provision 1

No information concerning an arbitration, beyond the names of the parties and the relief requested, may be unilaterally disclosed to a third party by any participating party unless it is required to do so by law or by a competent regulatory body, and then only:

- by disclosing no more than what is legally required, and
- furnishing to the arbitrator details of the disclosure and an explanation of the reason for it.

In relation to the confidentiality of documents and other information provided during an arbitration, Paulsson and Rawding suggest a provision which includes documentary and other evidence and written pleadings. Their provision also confers authority on an arbitrator, when issuing an order for production of documents, to order production on condition that the receiving party executes a written undertaking not to disclose the evidence. It would seem, however, that an arbitrator would in any event possess such power and that its express conferral on the arbitrator in a confidentiality agreement or elsewhere is not necessary.

In relation to the confidentiality of awards, Paulsson and Rawding suggest the following provision:

Suggested Provision 3

Awards should be treated as confidential and not be communicated to third parties unless

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<sup>36</sup> Supra n. 28.

- all parties [and the arbitrator] consent; or
- they fall into the public domain as a result of enforcement actions before national courts [or other authorities]; or
- they must be disclosed in order to comply with a legal requirement imposed on an arbitrating party or to establish or protect such a party's legal rights against a third party.”

The third matter concerns the persons covered by confidentiality obligations. Of course a confidentiality agreement will only bind the parties to the agreement and not others. If it is desired to embrace the arbitrators then they should be included as parties to the confidentiality agreement or should be asked to sign a separate confidentiality agreement. The same is true of an administering centre unless, of course, the applicable arbitration rules make provision for confidentiality on its part. Witnesses who give evidence to the tribunal will not be under an obligation of confidentiality unless it arises as a matter of law or unless the witness himself or herself executes a confidentiality agreement.

### III. CONCLUSION

1. Confidentiality in arbitration derives from:
  - the applicable national law;
  - arbitration rules selected by the parties;
  - contractual provisions.
2. As far as the applicable national law is concerned there is no uniformity. The common assumption of confidentiality, albeit a somewhat vague concept, ill defined in extent and subject to diverse exceptions, was undermined by the High Court of Australia in *Esso Australia*. It is clear, now, that this decision is not an antipodean aberration. It has been followed in Sweden and probably represents the law in the United States.

3. In these circumstances, parties desiring confidentiality in arbitration should designate a particular set of arbitration rules which contain appropriate confidentiality provisions (but these are limited) or conclude a confidentiality agreement in the arbitration clause or elsewhere. A confidentiality agreement should deal with all or any of:
  - the existence of the arbitration;
  - documents and information obtained during the arbitration;
  - the award(s).
  
4. However there are limits to the effectiveness of confidentiality agreements.
  - (a) In the first place both parties must agree to the terms of the agreement.
  - (b) A confidentiality agreement only binds the parties to it.
  - (c) Special provision is therefore required for:
    - the arbitrators;
    - an administering arbitral centre;
    - witnesses.
  - (d) Mandatory provisions of law, providing for disclosure of information, will override confidentiality agreements.