

CONFIDENTIALITY AND THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION : SOME  
PRELIMINARY REFLECTIONS

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The law student or practitioner who today would set his or her first steps in the world of international commercial arbitration may be surprised to hear about the existence of a general principle of confidentiality. Why! Confidentiality as an essential advantage of arbitration, with so much news about current arbitration proceedings available? Specialized law reviews are one thing – arbitral awards published in the *ICCA Yearbook*, in the *ICC Bulletin* and in other reviews are most of the time 'sanitized' to exclude all information which would allow identification of the parties. It is enough, however, to read the newspaper or to look at specialized publications to discover a wealth of information about disputes being arbitrated all over the (small) world of arbitration. The epitome of this trend is without any doubt the *Global Arbitration Review*, which makes available on a daily basis fresh news about ongoing arbitration proceedings. If one prefers to read the business section of newspapers, one will regularly find information about established companies and the difficulties they may have referred to arbitration.<sup>1</sup> It is sufficient to refer to the recent news reports about the award issued in the dispute between the French businessman/politician Bernard Tapie and Credit Lyonnais, featured prominently in French and foreign newspapers,<sup>2</sup> with the award being published on various websites.<sup>3</sup> Another recent example is the dispute between food giant Danone and its estranged Chinese partner, Wahaha, which was also discussed at length in international newspapers where it was reported that an arbitral tribunal sitting under the rules of the Stockholm Chamber of Commerce had denied a request filed by the French company for provisional measures.<sup>4</sup>

It may therefore appear bold or even misplaced to undertake research on the existence and limits of the principle of confidentiality in particular in the relationship with third parties. One should note, however, that the disputes which are publicized, probably only represent the proverbial tip of the iceberg. Below the water line, countless proceedings are ongoing, in arbitral institutions and outside, which remain private for the rest of the world. It is undeniable that even with the current trend towards more transparency, privacy remains the rule in arbitration and publicity the exception.<sup>5</sup>

The existence, nature and scope of a principle of confidentiality in arbitration remains,

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- 1 A simple search in the archives of the *Financial Times* limited to the year 2008 revealed not less than 112 entries answering to the key word 'arbitration' limited to the items in the category 'Law and legal issues'. Among the disputes featured in the FT, one could read about various sport disputes but also about the difficulties experienced by the *Danone* group in China, the dispute between *Scottish & Newcastle* and *Carlsberg* about the Russian joint venture *BBH* and the dispute between *Altimon*, the telecommunications arm of Russia's *Alfa* Group and Norway's *Telnor* which apparently had been submitted to a tribunal sitting in Geneva.
  - 2 See e.g. *Le Monde* of 24 July 2008 (« Le dossier Tapie met en lumière les pratiques d'arbitrage », by P. ROBERT-DIARD), which published an interview of Professor TH. CLAY about the award. It is noteworthy that the names of the three arbitrators were mentioned in media reports.
  - 3 See in particular [www.lexpress.fr/pdf/tapie.pdf](http://www.lexpress.fr/pdf/tapie.pdf).
  - 4 See e.g. *New York Times*, 14 June 2007 (« Battle for Control of China's Largest Beverage Maker Escalates », by D. BARBOZA).
  - 5 The current trend towards transparency has for the moment at least not touched mediation which seems to be covered in general by much stricter requirements of confidentiality (see e.g. Article 1728 of the Belgian Judicial Code, which provides for a comprehensive duty of non-disclosure of all information exchanged during the mediation process).

however, a subject of some controversy. It is therefore necessary, before addressing the position of third parties and the impact such a principle may have on their dealings with parties involved in arbitration proceedings, to briefly review what is the state of the law in international arbitration today (1). This will provide the basis to analyze the position of third parties, which may in many respects be concerned directly or indirectly by arbitration proceedings and as a consequence come into contact with the principle of confidentiality.(2)

Before addressing these issues, it is worth noting that confidentiality may have different sources. Since many participants to the arbitral process will be active attorneys, one should pay attention to professional privileges, which can be imposed by statutory or ethical rules and may restrict disclosure of information obtained by these participants. Lawyers involved in that capacity in an arbitration may indeed find that they are under a strict duty of confidentiality or non-disclosure by virtue of general professional rules. These privileges will remain outside the scope of the present research.. These rules, which come in addition to the specific duties of confidentiality which may arise out of the nature of the arbitral process, are indeed not specific to the arbitration process.<sup>6</sup>

### **(1) ARBITRATION AND CONFIDENTIALITY : WHERE DO WE STAND NOW?**

Writing about confidentiality in arbitration seems to have become a favorite pastime of arbitration specialists : one can hardly keep track of the number of scholarly contributions on the issue. Yet, the boundaries and the strength of a confidentiality obligation remain at best unsettled.<sup>7</sup>

It is common knowledge that the issue of confidentiality must be addressed differently depending on the nature of the dispute. Investment arbitration raises specific issues due to the prevailing public interests at stake, the consequences of which is to greatly reduce the degree of confidentiality afforded both to the proceedings and to the resulting awards.<sup>8</sup>

The same applies to much of the sport arbitration, which is widely publicized due to the concern of the media for the sportsmen involved. Rigozzi rightly points out that

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6 The situation is different for possible ethical duties of confidentiality which are specific to the arbitration process. One may refer to Article 9 of the IBA's ules of Ethics for International Arbitrators, which provide specifically for confidentiality of the deliberations of the arbitral tribunal.

7 Although it has been suggested that ad hoc arbitration offers better guarantees to keep the arbitration process confidential (see P. LALIVE, « Avantages et inconvénients de l'arbitrage 'ad hoc' », *Etudes offertes à Pierre Bellet*, Litec, 1991, (301), at p. 317-318), it is difficult to see what significant advantages ad hoc arbitration can offer (see in this sense, P. CAVALIEROS, « La confidentialité de l'arbitrage », reproduced in *Cahiers de l'arbitrage III*, A. MOURRE (ed.), Gazette du Palais, 2006, at p. 57).

8 See L. MISTELIS, « Confidentiality and Third Party Participation: *UPS v Canada* and *Methanex Corp v USA* », in T. WEILER (ed.), *International Investment Law and Arbitration. Leadings Cases from the ICSID, NAFTA, Bilateral Treaties and Customary Intenational Law*, Cameron May, 2005, at pp. 169 ff. (also published in *Arb. Int.*, Vol. 21-2 (2005), 211-231) and more recently J. F. DELANEY and D. MAGRAW, "Transparency and Public Interest", in *The Oxford Hanbook of International Investment Law*, P. MUCHLINSKI, F. ORTINO and C. SCHREUER (eds.), OUP, 2008.

confidentiality could in fact be not so much an advantage but rather a drawback in this field, at least for sport arbitration which concerns the status of an individual sportsman.<sup>9</sup>

One could also mention the work of the Iran-United States Claims Tribunal, much of which is also subject to public scrutiny.<sup>10</sup>

Turning to 'plain vanilla' commercial arbitration, another set of distinctions must be made. Confidentiality can indeed extend to the arbitration process in general, without distinction, or alternatively to the various elements of the process, such as the award, the hearing or the documents produced by the parties for the hearing. Further, one should bear in mind that if a duty of confidentiality is imposed, it may be imposed on all parties involved, or only concern the arbitrators, the arbitral institution<sup>11</sup> or the parties. One should therefore distinguish between these various elements, as it is unrealistic or at least uncommon that a single rule will cover all elements.<sup>12</sup>

When discussing these various elements, it is necessary to bear in mind that confidentiality obligations can be found in various sources : apart from the obvious recourse to national laws and rules adopted by arbitral institutions,<sup>13</sup> one can also turn, in the absence of a provision in the applicable statute or rules, to the fundamental principles. In that respect, one should determine whether a duty of confidentiality can be deemed to constitute an *implicit* obligation resulting from the arbitration agreement as such. The nature and origin of the duty of confidentiality is not merely an academic question. When discussing the impact of such duty on the position of third parties, it will become apparent that the duty of confidentiality will have to be weighed against other interests, such as a public interest in disclosure. Understanding whether the confidentiality surrounding the arbitration process

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9 A. RIGOZZI, *L'arbitrage international en matière de sport*, Bruylant - LGDJ-Helbing & Lichtenhahn, 2005, at p. 159, § 292 and at p. 164, § 307. According to Rigozzi, "Pour les litiges sportifs à proprement parler, et notamment en matière disciplinaire, les faveurs de la doctrine envers la confidentialité de l'arbitrage ne peuvent être partagées que pour le déroulement de la procédure et ne sauraient en aucun cas être étendues à l'issue de celle-ci et au contenu de la sentence arbitrale » (at p. 159).

10 The awards of the Tribunal are officially published in the *Iran-United States Claims Tribunal Reports*, edited by Cambridge University Press.

11 In the ICC system, there is an additional duty of confidentiality, which is imposed by Article 6 of the Statute of the International Court of Arbitration and imposes a blanket duty of confidentiality on all participants to the work of the Court. Given the powers exercised by the Court, especially the review of the draft award (Art. 27 ICC Rules), such an extension is only logic.

12 Rules adopted by the German Arbitration Institution (DIS) and by the Swiss Chambers of Commerce (2004) include, however, a very comprehensive provision dealing with almost all aspects of confidentiality. See Article 43.1 of the DIS Rules (which provides that « *The parties, the arbitrators and the persons at the DIS Secretariat involved in the administration of the arbitral proceedings shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings, and in particular regarding the parties involved, the witnesses, the experts and other evidentiary materials. Persons acting on behalf of any person involved in the arbitral proceedings shall be obligated to maintain confidentiality* ») and Article 43 of the Swiss Rules.

13 It seems that none of the international conventions dealing with arbitration include a provision dealing with confidentiality. The Uncitral Model Law is also silent on this issue. When the Model Law was discussed, the Working Group considered that it should not deal with the issue of confidentiality (see the references in J.D.M. LEW, L. A. MISTELIS and S. KRÖLL, *Comparative international commercial arbitration*, Kluwer Law International, 2003, at p. 660).

« derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them », as has been held,<sup>14</sup> and hence only has contractual value, is important because it will help determine whether the duty of confidentiality should or not trump a conflicting duty or interest.

Finally, one should note that when parties are under a duty of confidentiality, this duty generally applies notwithstanding the fact that the information protected is not, as such, sensitive. Indeed, in many arbitrations, the information at stake will not be sensitive, as there will be no trade secret involved or financial information worth protecting.<sup>15</sup> Nonetheless, even though the nature of the arbitration proceedings does not call for heightened confidentiality, the duty will remain.<sup>16</sup>

There are two main areas where confidentiality is an issue : first, confidentiality prior to award and secondly, confidentiality of the award itself. The first area will be addressed by looking at the arbitration hearing. The second area speaks of itself. After having addressed the hearing and the award, we will examine whether other elements of the arbitration process fall under an obligation of confidentiality.

### **(i) The arbitration hearing**

The arbitration hearing is by its very nature private. It will indeed usually be held in private premises, such as a conference room of a hotel or an arbitration institution. Sometimes, the hearing will take place in meeting rooms within the premises of a law firm. By this very fact, arbitration hearings are vested with a high degree of privacy. It is difficult to imagine a third party obtaining information on the date and place of the hearing, let alone a third party requesting access to such a private place.<sup>17</sup>

Some national laws nonetheless provide an express protection by imposing that the hearing be confidential. The Chinese arbitration law provides *e.g.* that hearings must be

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14 Leggatt J. in *Oxford Shipping Co. Ltd. v Nippon Yusen Kaisha (the 'Eastern Saga')*, [1984] 3 All.E.R. 835 at 842.

15 As Lew wrote, « . . . in reality, there are not many cases where there will be genuine secret or confidential information which the parties will not wish to have divulged; the exceptions will be certain disputes between sovereign States or State entities, *e.g.*, secret government projects or where the capability of secret technology is in usage » (J. D. M. LEW, « The Case for the Publication of Arbitration Awards », in *The Art of Arbitration. Essays on International Arbitration Liber Amicorum Pieter Sanders*, J.C. SCHULTZ and A. J. VAN DEN BERG (eds.), Kluwer, 1982, at p. 224).

16 This has been confirmed by the English Court of Appeal in the case *Ali Shipping Corporation v Shipyard Trogir* [1997] EWCA Civ 3054, at § 32. Lord Justice Potter indicated that the principle of confidentiality « did not depend upon any inherent confidentiality in the material protected . . . ». Compare, however, with Art. 34 of the AAA rules for international arbitration, which limit the prohibition of disclosure to “Confidential information disclosed during the proceedings by the parties or by witnesses . . .” (underlining added).

17 Drawing on their extensive practice, Messrs. Craig, Park and Paulsson usefully suggest that when a hearing is held in a hotel, notice of the hearing (on notice boards or at reception desks) should not include the name of the parties but only indirect reference to the proceedings (W. L. CRAIG, W.W. PARK and J. PAULSSON, *International Chamber of Commerce Arbitration*, 3<sup>rd</sup> ed., Oceana, Dobbs Ferry, 2000, at p. 312, note 37).

confidential. Similar provisions can be found in rules of the major arbitration institutions. Article 21(3) of the ICC Rules provides for example that « *persons not involved in the proceedings shall not be admitted* », save with the approval of the arbitrators and of the parties. This seems to imply that there is no duty as such to keep the existence and details about the hearing confidential. The only limitation is that third parties may not attend the hearing.<sup>18</sup>

Sometimes, the confidentiality is more limited. Under French law, the duty of confidentiality is limited to the deliberations of the arbitral tribunal.<sup>19 20</sup>

Even in the absence of a specific legal duty to keep the arbitration hearings confidential, courts have commonly assumed that third parties could not request access to the hearings. In *Ali Shipping v Shipyard Trogir*, the English Court of Appeal held it for granted that “*strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute should be heard or determined concurrently with or even in consonance with another dispute . . .*”<sup>21</sup> Likewise, the High Court of Australia has recognized that the arbitral hearing should have a confidential character.<sup>22</sup>

The confidential nature of the hearing seems to be generally accepted.<sup>23</sup> There is little doubt that this duty extends to the transcript of the hearing – be it a transcript of pleadings by the parties or of the hearing of the witnesses. There is indeed little difference between the hearing itself and the verbatim transcript.<sup>24</sup> It is more difficult to determine whether this

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18 The same can be said about Article 17(5) of the Ccpni Rules, according to which « *Les audiences ne sont pas publiques. Sauf accord du tribunal arbitral et des parties, elles ne sont pas ouvertes aux personnes étrangères à la procédure* ».

19 According to Article 1469 of the French Code of Civil Procedure, « *Les délibérations des arbitres sont secrètes* ».

20 For a similar provision, see e.g. Article 43(2) of the Swiss Rules (which provides that « *2. The deliberations of the arbitral tribunal are confidential* »).

21 *Ali Shipping v Shipyard Trogir* [1998] 1 Lloyd's Rep. 643, 650 (CA). See also *Eastern Saga* [1984] 2 Lloyd's Rep 373, 379 (QB) – in which the court held that « It is implicit . . . that strangers shall be excluded from the hearing and conduct of the arbitration » and *Hassneh Insurance Co. of Israel v. Mew*, [1993] 2 Lloyd's Rep. 243 (Colman J. held that « If parties to an English law contract refer their disputes to arbitration, they are entitled to assume at the least that the hearing will be conducted in private. That assumption arises from a practice which has been universal in London for hundreds of years and is, I believe, undisputed. It is a practice which represents an important advantage of arbitration over the Courts as a means of dispute resolution. The informality attaching to a hearing held in private, and the candor to which it may give rise, is an essential ingredient of arbitration » - at p. 247).

22 *Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals)*, *Arb. Int.*, 1995, 242; *Rev. Arb.*, 1996, 539 (CJ Mason).

23 See e.g. A. REDFERN, M. HUNTER, N. BLACKBAY and C. PARTASIDES, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell 2004, 28, at § 1-54.

24 In *Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals)*, CJ Mason held, speaking for the High Court, that « The efficacy of a private arbitration as an expeditious and commercially attractive form of dispute resolution depends, at least in part, upon its private nature. Hence the efficacy of a private arbitration will be damaged, even defeated, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration... If the hearing itself is private and confidential, then it would seem logical to regard

confidentiality also extends to documents which are used during the hearing and were created for the hearing – such as outline submissions.<sup>25</sup>

**(ii) The arbitral award**

The award is the end result of the arbitration process – at least unless it is challenged. In many national legal systems, arbitral awards are afforded the same or similar legal force as a judgment issued by a court of law.<sup>26</sup>

A major difference remains, however, between arbitral awards and judgments issued by courts of law. It seems indeed generally accepted that the award should remain confidential. To limit the review to the major institutions, one can find that there is a general acceptance that the arbitral awards shall not be made public.<sup>27</sup> This duty is imposed at least on the arbitration institution.<sup>28</sup> Some rules also extend the duty of confidentiality to the arbitrators.<sup>29</sup>

It is much less common to see that *parties* are required to keep arbitral awards (or other information related to the arbitration proceedings) confidential. No such duty is imposed by the ICC Rules of Arbitration, nor by the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The LCIA Rules go further and impose such duty.<sup>30</sup> Occasionally,

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documents created for the purpose of that hearing – such as witness statements, experts' reports and so on – as equally private and confidential. It would also seem logical to extend the same description to a note or transcript of what took place at the hearing. To do otherwise, would be almost equivalent to opening the door of the arbitration room to a third party » ([1995] 128 ALR 391 at p 399, as per Mason CJ).

25 The English Court of Appeal has adopted a comprehensive view, holding that the confidentiality of the hearing extended to all documents created for the hearing : *Hassneh Insurance Co. of Israel v. Mew*, [1993] 2 Lloyd's Rep. 243 (the Court recognized that « If it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly witness statements, being so closely related to the hearing must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included » (per Colman J., at p. 247).

26 This applies for example to the *res judicata* enjoyed by arbitral awards.

27 Some Arbitration rules do not impose any duty of confidentiality regarding the award. This is the case of the Cepani rules.

28 See *e.g.* Article 28(2) of the ICC Rules of Arbitration, which provides that the ICC Secretariat cannot make available a certified copy of an award to a third party. See also Article 30. 3 of the LCIA Rules, which prohibits the LCIA Court « to publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal ».

29 This is the case with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules), whose Article 46 imposes a duty to the SCC Institute and to the Arbitral Tribunal. Article 30.2 of the LCIA Rules also contemplates the position of the arbitral tribunal. However, this provision only deals with the the deliberations, which are confidential.

30 Article 30.1. of the LCIA Rules provides that « 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 ».

the confidential nature of the award will be specifically mentioned by the arbitrators.<sup>31</sup>

A specific issue in this context is that of the *publication* of awards. This question has been part of the long quest of arbitration for legitimacy : if the confidentiality of arbitration is said to be an asset which should be preserved, the publication of awards, which can serve as precedent, can certainly reinforce the legitimacy of arbitration as dispute resolution mechanism as it improves the confidence in the arbitration process.<sup>32</sup>

Occasionally, one sees a rule dealing specifically with the issue of the publication of the award. Article 42 of the DIS Rules provides that the award « *may be published only with written permission of the parties and the DIS* ». This provision also adds that the published version of the award may not include « *the names of the parties, their legal representatives or the arbitrators or any other information specific to the arbitral proceedings* ». <sup>33</sup> While 30 years ago, most arbitral institutions rejected the idea of publishing arbitral awards,<sup>34</sup> judging from the number of specialized publications dealing with arbitration law today, it cannot be denied that this position has changed.<sup>35</sup> It is now commonly accepted that awards may be published, at least provided that they have been ‘sanitized’. Whether or not this is a good development, is another debate.<sup>36</sup>

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31 The arbitral tribunal could in fact also decide to allow a party to publish the award or at least portion of it. This could be part of the reparation afforded to one party. See *e.g.* ICC Arbitral Award nr. 6932 (1992), *J.D.I.*, 1994, 1065, at p. 1069 (in that case, the tribunal refused to allow publication of the award. The tribunal recognized, however, that such a publication could be allowed in specific circumstances).

32 On the tension between on the one hand the desire to contribute to the development of arbitration precedents and on the other hand the confidentiality of awards, see A. MOURRE, “The Impact of the Confidentiality of Awards” in *Precedent in International Arbitration*, E. GAILLARD and Y. BANIFATEMI (eds.), Juris-Publishing, 2008.

33 Article 43(3) of the Swiss Rules is even more detailed. It provides that an award may only be published provided that a request to that effect is addressed to the Chambers and that all references to the parties' names have been deleted. Further, publication may be precluded if one of the parties objects to it.

34 See the plea made in 1982 by J. D. M. LEW, « The Case for the Publication of Arbitration Awards », in *The Art of Arbitration. Essays on International Arbitration Liber Amicorum Pieter Sanders*, J.C. SCHULTZ and A. J. VAN DEN BERG (eds.), Kluwer, 1982, 223-232, who complained at that time about the secretive position of arbitration institutions.

35 Messrs. Poudret and Besson offer the following view on the topic : « . . . we consider it admissible to divulge and publish the award if the publication does not reveal the identity of the parties or other facts from which the matter in question can be identified » (J.-F. POUURET and S. BESSON, *Comparative Law of International Arbitration*, Thomson/Schulthess, 2006, at p. 319, § 372). Likewise, Messrs. Paulsson and Rawding explain that while they have recognized a number of cases in which they acted, among the awards regularly published by the ICCA Yearbook or the Clunet, they « have no quarrel with the institutional publication of illustrative awards, sanitized to protect the parties' anonymity » : J. PAULSSON and N. RAWDING, « The Trouble with Confidentiality », *Arb. Int'l.*, 11(3) (1995), (303-320), at p. 316.

36 It is enough to compare the opinions of David and Lew on this issue. David wrote in that context that « Businessmen, when they resort to arbitration, are not interested in the lesson which others might derive from their unfortunate experiences; they prefer others not to know that they have experienced difficulties in their business and possibly that they have had to pay substantial damages for non-performance or faulty performance of a contract. The very reason why they have gone to arbitration rather than to the courts may have been a desire for secrecy » (R. DAVID, *Arbitration in International Trade*, Kluwer, 1985, at p. 353, § 393). M. Lew disagreed, as is evidenced from the following quote :



In the absence of a specific statutory prohibition to reveal the existence or the content of the arbitral award, one may wonder if the arbitral process by its very nature implies that parties should be under the obligation to keep the award confidential. The answer to this question is disputed. In *AI Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd.*,<sup>37</sup> the Swedish Supreme Court held that there was no legal duty to observe confidentiality in arbitration. Hence, the Court refused to set aside an arbitral award, in which the arbitrators had declined to accept that the arbitration agreement had become invalid following the publication by one of the parties of a partial award.

One important *caveat* should be added. If arbitral awards enjoy some degree of confidentiality, this may be lost when the award is produced in court, *e.g.* in the framework of proceedings issued to set aside the award or to obtain a declaration of enforceability.<sup>38</sup> As soon as a national court is called upon to participate in the arbitration process, the openness which characterizes court proceedings shines on the arbitration process.<sup>39 40</sup> As the English Court of Appeal has indicated, the fact that parties elect to refer disputes to arbitration as a confidential dispute resolution mechanism cannot dictate that court proceedings should also remain confidential because when courts are called upon to consider a challenge to an arbitral award, they act as a branch of the state and not as a mere extension of the

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« . . . privacy and confidentiality are only one of the advantages of arbitration, and, in fact, are not even considered so by many authorities who consider the independence of arbitration, the expertise of commercial or special arbitrators the principle merits of arbitration. Indeed one may wonder how many parties select arbitration as the form for dispute settlement because of their desire that the nature of their relationship and dispute remain secret? For that matter, would any lawyer recommend a dispute be submitted to arbitration only because the arbitration proceedings and awards are secret and confidential? » (J. D. M. LEW, *art. cit.*, in *The Art of Arbitration. Essays on International Arbitration Liber Amicorum Pieter Sanders*, J.C. SCHULTZ and A. J. VAN DEN BERG (eds.), Kluwer, 1982, at p. 224).

37 YCA XXVI (2001) at p. 291. The decision of the Svea Court of Appeal of 30 March 1999 has been published in YCA XXIV (1999) at p. 321.

38 As Lew wrote, « . . . absolute secrecy can never be ensured : should one party fail to voluntarily accept the arbitrators' award and seek to have it set aside, or the other party seek to have the award enforced in the national courts, the relevant facts of the contract between the parties and the dispute will become a matter of public record » ( *art. cit.* in *The Art of Arbitration. Essays on International Arbitration Liber Amicorum Pieter Sanders*, J.C. SCHULTZ and A. J. VAN DEN BERG (eds.), Kluwer, 1982, at p. 224).

39 Another more limited exception to the confidentiality usually enjoyed by arbitral awards can be found in arbitration organized by some trade associations. It is not uncommon for such institutions to use the publicity as a form of sanction for non-performance of an award. The association will make it known that a party has failed to comply with an award, in the hope of inducing that party to comply. This is a limited form of publicity, since it usually only involves the non-performance. The award as such will not be made public. See R. DAVID, *op. cit.*, Kluwer, 1985, at pp. 357-358, § 402. See generally on the practice of some professional organizations, the comments made by M. PIERS, *Sectorale arbitrage*, Intersentia, 2007, at pp. 293-297. It appears that while many specialized arbitral institutions provide that arbitral awards may be published, some institutions are very keen on insuring confidentiality for the disputes they undertake to settle.

40 The Swiss Arbitration Rules conveniently indicate that the general principle of confidentiality does not apply when a party wishes « *to enforce or challenge an award in legal proceedings before a judicial authority* » (Article 43(1) of the Rules). See to the same effect Article 73(a) of the WIPO arbitration rules (« (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. . . »).

consensual arbitration process.<sup>41</sup>

The publicity which is inherent in court proceedings will necessarily have an impact on the confidentiality of the arbitral process.<sup>42</sup> This does not mean, however, that all elements related to the arbitral process will automatically be available to third parties. For one thing, the publicity surrounding court proceedings may be merely theoretical. In most countries, court proceedings are indeed only reported to the general public when the story is likely to raise the interest of third parties. It may be doubted whether commercial disputes will be of any interest to the average newspaper reader. In the absence of such impetus, the papers filed with the court will not arise any interest and one may then safely assume that the privacy of the dispute will be preserved. Further, in some cases, the nature of the proceedings will provide an additional guarantee against publicity. This is the case when the local procedural law provides that a declaration of enforceability may be requested *ex parte*. The absence of direct confrontation with the award debtor reduces the risk that information will be leaked out.

Finally, even considering the publicity surrounding court proceedings, one should take into account that when an award is challenged or when enforcement is sought, this will not necessarily have as a consequence that all information concerning the arbitration will be made available to the public. It is one thing for the general public to know that two parties have submitted a dispute to arbitration. It is quite another to have access to the award and all other documents which have been exchanged during the proceedings.

In most cases indeed, it will only be necessary to file the award as such and the contract which governed the relationship between parties, to initiate the proceedings.<sup>43</sup> It may be that, when a party attempts to have an award set aside, this party also produces additional documents such as the terms of reference or the pleadings or submissions filed by the parties. It will, however, only rarely occur that a party chooses to file all relevant documents. One could even consider that the filing of unnecessary documents may cause damage. This question was raised during proceedings pending before the French court of Appeal in the *Namfico* case.<sup>44</sup> A company established in Lybia sought to have an ICC award set aside on various grounds. The award creditor filed a counterclaim, seeking damages for what it considered to be a breach of the duty of confidentiality. The award creditor argued that the award debtor had unnecessarily filed its annual accounts, which

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41 *Moscow v Bankers Trust and International Industrial Bank* [2004] 2 Lloyd's Rep 179, at § 34 (LJ Mance).

42 See the observations in this respect of IONNA THOMA, « Confidentiality in English Arbitration : Myths and Realities About its Legal Nature », *J Int'l. Arb.*, (2008), 299-314, at p. 299-300, who gives a striking account of the history of English arbitration and shows that the long-established intervention of English courts in arbitral proceedings compromised confidentiality.

43 It will fall on the local rules of procedure to decide who has access to documents, such as the arbitral award, filed in the framework of court proceedings. Under Belgian law, the president of the arbitral tribunal must file the award unless parties have expressly waived this (Art. 1702 § 2 C Judicial Code). An award which has been filed on this basis will, however, not freely be accessible. According to Keutgen and Dal, third parties who wish to obtain a copy of the award will have to obtain prior permission of the Public Prosecutor (G. KEUTGEN and G.-A. DAL, *L'arbitrage en droit belge et international – le droit belge*, Bruylant, 2006 at p. 424, § 529).

44 CA Paris, 22 January 2004, *Rev. arb.*, 2004, 647.

were not subject to any mandatory publication in Switzerland. The Court did not rule specifically on this issue.

Once court proceedings are filed, a dispute could therefore arise concerning the nature of documents which need to be filed in order to argue the case. If need be, one could consider applying for directions to the court on the documents which must necessarily be filed. If the court rules allow for it, a party could also seek a motion to protect the documents from further disclosure. It may be much more difficult to limit the publication of the judgment issued in the proceedings. In many jurisdictions, the publicity of court proceedings will stand in the way of any limitation to publication.<sup>45</sup> In recent cases, French and English courts have, however, accepted that the confidentiality of arbitration proceedings had an impact on the possibility to publish court decisions in relation with the arbitration proceedings. In a recent case, the Court of Appeal in England held that when an award is challenged in court, publication of the court judgment rendered following the challenge was only admissible in so far as a summary of the judgment was published, which should be objective and limited to legal issues and without entailing a disclosure of factual elements.<sup>46</sup> In the *True North* case, French courts accepted that publication of a press release indicating that an arbitral award had been declared enforceable could give rise to a claim for damages.<sup>47</sup> One may question the weight to be given to this ruling, which was issued in the framework of summary proceedings.<sup>48</sup> One cannot exclude that such limitations would conflict with the constitutionally mandated publicity of judgments.

In very specific circumstances, one could accept that the filing of court proceedings, *e.g.* to challenge the award, amounts to a dishonest attempt to circumvent the duty of confidentiality. This is what the Court of Appeals of Paris accepted in a case where an award made in London had been challenged before the French courts.<sup>49</sup> The Court, which was specifically concerned about the fact that the action had been filed before a court which was manifestly without jurisdiction to hear the claim, awarded a lump sum as damages.<sup>50</sup> Needless to say, this is an exceptional case.<sup>51</sup> A decision to award damages because a party

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45 See generally on the requirements imposed by Article 6 of the European Convention on Human Rights, P. VAN DIJK, F. VAN HOOF, A. VAN RIJN and L. ZWAAK, *Theory and Practice of the European Convention on Human Rights*, Intersentia, 2006, at pp. 596-602.

46 *Moscow v Bankers Trust and International Industrial Bank* [2004] 2 Lloyd's Rep 179 (CA). In that case, parties to an arbitration conducted under the Uncitral Rules had applied to the court following receipt of the award to have the award set aside on the ground of « *serious irregularity* ». During the course of the proceedings, a question arose as to the confidentiality of the proceedings, one party arguing that the judgment should remain confidential. In first instance, the court accepted that the judgment should remain private. The Court of Appeal confirmed and declined to allow publication of the judgment despite adopting a presumption in favor of disclosure.

47 Commercial Court of Paris, 22 February 1999, *Rev. arb.*, 2003, 191.

48 In appeal, the Court of Appeal did not rule on the issue of confidentiality, as it dismissed the claim based on the lack of standing of claimants.

49 CA Paris, 18 February 1986, *G. Aïta v. A. Ojeh*, *Rev. Arb.*, 1986, 583.

50 The Court noted that « *[the award creditor] fait valoir à bon droit que [the award debtor] a, de mauvaise foi, porté ses critiques devant une juridiction manifestement incompétente et a, de ce fait, permis un débat en audience publique sur des faits qui devaient rester confidentiels* ».

51 Which may have inspired those who drafted the LCIA rules. Article 30.1 of these rules provide an exception to the general duty of confidentiality when disclosure is required « *to enforce or challenge an award* ». This exception is, however, limited to « *bona fide legal proceedings* » - a clear reference

has filed an action against an arbitral award should be carefully balanced, taking into account the right of access to court guaranteed among others by Article 6 ECHR.<sup>52</sup>

**(iii) *The arbitral process : an implicit obligation flowing from the agreement to arbitrate disputes?***

The arbitral process includes other elements than the hearing and the award issued by the arbitral tribunal. During the proceedings, parties may exchange written submissions outlining their arguments in fact and in law. An extensive correspondence will also be exchanged, not only between parties but also with the arbitrators and with the arbitral institution which has been chosen to administer the proceedings. The arbitration may give rise to ancillary court proceedings in support of the arbitration. Finally, the existence as such of the arbitration proceedings and of the dispute may be subject to disclosure. Are these elements covered by any duty of non-disclosure?

Since most statutory provisions<sup>53</sup> and institutional rules impose limited duties of confidentiality,<sup>54</sup> one should determine whether an additional duty of confidentiality may flow from other sources, in particular from the arbitration agreement.<sup>55 56</sup>

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to the specific circumstances of the *Aita* case.

52 There is no question that Article 6 ECHR applies to the proceedings brought by a party before a court of law in order to challenge an arbitral award (See CH. JARROSSON, « L'arbitrage et la Convention européenne des droits de l'homme », *Rev. Arb.*, 1989, (573-607), at p. 587, § 27). A different question is whether Article 6 applies to the arbitral process as such. The answer to the latter question is undoubtedly negative.

53 One exception seems to be the New Zealand Arbitration Act of 1996, section 14 of which provides a series of specific obligations of confidentiality which apply to every arbitration for which the place of arbitration is New Zealand. The various duties range from the obvious (such as the one found in Section 14 A which reads as follows : « *An arbitral tribunal must conduct the arbitral proceedings in private* ») to the more sophisticated – such as Sections 14F to 14I, which provide for a detailed procedure allowing a party to request that court proceedings relating to arbitration be conducted in private. See also Article 24(2) of the Spanish Arbitration Act of 2003 (which provides that « The arbitrators, the parties and the arbitral institutions, if applicable, are obliged to maintain the confidentiality of information coming to their knowledge in the course of the arbitral proceedings »). On the other hand, Belgian law does not seem to mention at all the issue of confidentiality, not even when it comes to the deliberation of the arbitrators (see G. KEUTGEN and G.-A. DAL, *L'arbitrage en droit belge et international – le droit belge*, Bruylant, 2006 at pp. 392-393, § 485).

54 Exceptions exist. Article 43(1) of the Swiss Rules imposes a general duty of confidentiality which goes further than what is usually provided. According to this provision, « *the parties undertake as a general principle to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not otherwise in the public domain . . . . This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the Chambers.* »

55 Even in the absence of an express provision in the institutional rules, one could find a solution. It has been suggested for example that Article 20(7) of the ICC Rules, which entitles the Arbitral Tribunal to « *take measures for protecting trade secrets and confidential information* » could be used as a basis to request that the Arbitral Tribunal issues an order preventing parties from disclosing information obtained during the arbitration proceedings (see Y. DERAÏNS and E. SCHWARZ, *A Guide to the New ICC Rules of Arbitration*, ICC Publishing – Kluwer, 1998, at p. 264-265).

56 It has also been suggested that the principle of confidentiality should be recognized as a general principle of the *lex mercatoria* (see P. CAVALIEROS, « La confidentialité de l'arbitrage », *Gaz. Pal.*, 15

In that respect, one must in the first place bear in mind that confidentiality obligations are very common in contracts. This is in fact one of the boilerplate clauses which is included in many contracts, without always being reviewed in details by parties.<sup>57</sup> When nothing is said, it can be assumed that parties to the agreement have accepted that the duty of confidentiality imposed by the contract should extend to the period *after* the contract is terminated. From there it could also be argued that the duty therefore extends to the arbitration proceedings – although this appears to be controversial.<sup>58</sup> Much will depend on the wording of the clause.<sup>59</sup> If one accepts that a contractual duty of confidentiality included in a commercial agreement extends to the arbitration process, it should be determined whether all elements of the arbitration process are covered. If it is not otherwise qualified in the contract, there is good reason to accept that the duty extends to all elements of the arbitral process.

Failing a provision to that effect in the agreement, one should enquire whether, when concluding an arbitration agreement, parties may be deemed to have *impliedly* accepted a duty of confidentiality.<sup>60</sup> It is not surprising that different opinions exist on this issue, as it touches upon the essence of arbitration : is this a confidential process or only a private process?

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Dec. 2005, nr. 349, reproduced in *Cahiers de l'arbitrage III*, A. MOURRE (ed.), Gazette du Palais, 2006, at p. 57). Without opening the discussion on the status of the *lex mercatoria*, it is clear that even if the principle of confidentiality would indeed be part of the *lex mercatoria*, one should establish the scope and limitations of this principle. In view of the current debate on the existence of a duty of confidentiality (see hereafter), one should tread with caution when advocating a rôle for the *lex mercatoria* in this field. Mr. De Boissésou also argues in the same line that confidentiality should be « presumed » to exist in international commercial arbitration (M. DE BOISSÉSON, *Le droit français de l'arbitrage interne et international*, GLN, 1990, at p. 684, § 719a).

57 See for more details on the various issues which can be included in such a clause, e.g. M. FONTAINE and F. DE LY, *Droits des contrats internationaux*, 2<sup>nd</sup> ed., Bruylant, 2003, at pp. 259 ff.

58 See the observations of M. BÜHLER, « Les clauses de confidentialité dans les contrats internationaux », *Intl. Bus. L.J.*, 2002, (359-387), at p. 380, who takes argument out the fact that arbitration proceedings are regularly reported in financial newspaper to conclude that a confidentiality agreement does not as such cover arbitration proceedings. This reasoning fails to convince. Newspaper reports about arbitration proceedings may concern agreements which did not include a confidentiality clause. Further, even if such clause had been adopted in the relevant agreement, disclosure of information in the media about the proceedings may constitute a breach of the obligation of confidentiality without as such implying that no such obligation exists.

59 If the confidentiality agreement includes a list of exceptions which limits its scope, e.g. excluding certain type of information (such as information which has become part of the public domain) or specifying a fixed term (of e.g. 5 or 10 years) during which the obligation remains in force, without excluding specifically the arbitration process, one could argue that this indicates that parties have not wished to exclude the arbitration process from the scope of their confidentiality agreement.

60 Another solution is to provide for a duty of confidentiality in the Terms of Reference (in ICC proceedings) or in any other documents which the arbitrators will submit to the parties. Messrs. Paulsson and Rawling have usefully presented model clauses which could be used in this respect (see J. PAULSSON and N. RAWLING, « Les aléas de la confidentialité », ICC Bulletin, 1994, vol. 5-1, at p. 56). In the *AEGIS* case, it seems that an express duty of confidentiality was accepted by the parties as part of procedural directions issued by the tribunal (see *AEGIS v European Reinsurance Company of Zurich*, UKPC 11, 2003 1 WLR 1041).

Given the various answers, one should also enquire which law is relevant for the question. Will the issue of confidentiality be governed by the law of the seat or by the law applicable to the arbitration agreement? Messrs. Poudret and Besson have argued that this question should be governed by the law applicable to the arbitration agreement.<sup>61</sup>

This question is relevant. Courts have indeed adopted very different positions on this issue. English courts seem to accept that the mere fact that parties have agreed to arbitrate disputes, creates an *implied* term to the effect that parties are required to observe a duty of confidentiality. This was accepted by the Court of Appeal in *Dolling-Baker v. Merrett*<sup>62</sup> and subsequently confirmed in other cases.<sup>63</sup> This duty exists « *as a matter of law* » and not only « *as a matter of business efficacy* ». <sup>64</sup> This does not mean that the picture is completely clear under English law : in particular the existence and scope of the various exceptions to the duty of confidentiality are still a matter of controversy.<sup>65</sup> Further, a recent case seems to have provoked a shift from the existence of confidentiality as an implied term of the arbitration agreement to a more flexible approach under which a distinction should be made between the various stages of arbitration, each being granted a different measure of confidentiality.<sup>66</sup>

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61 J.-F. POUURET and S. BESSON, *Comparative Law of International Arbitration*, Thomson/Schulthess, 2006, at p. 317, § 369. In the same sense, see F. FAGES, « La confidentialité de l'arbitrage à l'épreuve de la transparence financière », *Rev. arb.*, 2003, (5), at p. 22, § 25.

62 *Dolling-Baker v. Merrett and another* [1991] All ER 890, [1990] 1 WLR 1205 CA. Parker LJ stated that « As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or with leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer. » ([1990] 1 WLR 1205 at p 1213D).

63 *E.g. Hassneh Insurance Co. of Israel v. Mew*, [1993] 2 Lloyd's Rep. 243 (the Court recognized the existence of an « *implied term in every agreement to arbitrate* », which requires parties to respect the confidentiality of the hearing and of all documents created for the hearing. The Court did not, however, comment on the consequences of such an implied term for the confidentiality of the award). In *Ali Shipping v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 634, 635 (CA), the Court of Appeal also recognized the existence of an implied term to every arbitration agreement, requiring confidentiality.

64 As was explained by LJ Potter in *Ali Shipping v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 634, 651 (« *I consider that the implied term ought properly to be regarded as attaching as a matter of law* »). The distinction between implied terms arising out of business efficacy or attached as a matter of law has consequences on the existence of exceptions to the duty of confidentiality. See on this distinction, I. THOMA, *art. cit.*, *J Int'l. Arb.*, (2008), 299-314, at p. 307-308 and the explanations by LJ Potter at § 35 of his judgment in *Ali Shipping*.

65 This is one of the reasons why the 1996 Arbitration Act remained silent on the issue of confidentiality, see *Russel on Arbitration*, 22<sup>nd</sup> ed., by Sutton and Gill, Thomson, 2003, at p. 214, § 5-196.

66 *AEGIS v European Reinsurance Company of Zurich*, UKPC 11, 2003 1 WLR 1041, also published in *ASA Bulletin* (2003), at pp. 857-869. See the comments by N. RAWDING and K. SEEGER, « *Aegis v. Europe Re and the Confidentiality of Arbitration Awards* », *Arb. Intl.*, 2003, vol. 19/4, pp. 483-489. Messrs. Rawding and Seeger point out (at p. 488-489) that it is unclear whether the Privy Council's reluctance to embrace a general principle of confidentiality in arbitration « *constitutes a . . . set backwards or merely a pragmatic realization that the issue is of such complexity that it needs to be determined on a case-by-case basis rather than by formulating principles of general application in the abstract* ».

Likewise, French courts have accepted that parties to an arbitration agreement are bound by a duty to hold certain information confidential. On this basis, the Court of Appeal of Paris has held in the *Aïta* case that « *it is the very nature of arbitral proceedings to assure the maximum of discretion for the resolution of private disputes as the parties agreed* ». <sup>67</sup> It is interesting to note that the Court did not refer to the concept of confidentiality. It merely used the concept of « *discrétion* », which suggests something less exacting. <sup>68</sup> In contrast, the Commercial Court of Paris seemed to accept a very strict confidentiality standard flowing from the existence of an arbitration agreement. In *True North*, this court accepted that « *every breach of the duty of confidentiality should give rise to liability* ». <sup>69</sup> As already indicated, in that case, a company sought damages following the publication by its contract partner of a news release indicating the existence of arbitration proceedings and the fact that an arbitral award had been declared enforceable.

The picture under French law is, however, far from complete or settled. While the *Aïta* and *True North* cases suggest that arbitration is confidential under French law, the Court of Appeal of Paris has nonetheless held in the *Namfico* case decided in 2004 that a party seeking damages following the breach of a duty of confidentiality should first demonstrate the existence of such a duty. <sup>70</sup> This seems to suggest that businesses opting to submit disputes to arbitration should not blindly rely on an implied term of confidentiality. <sup>71</sup>

On the other side of the world, the Australian High Court adopted a much more restrictive approach, holding that confidentiality « *is not an essential attribute of private arbitration* ». <sup>72</sup> In that case, the issue arose because of the request by a state authority to receive copies of documents which had been filed by one of the parties in arbitration proceedings involving on the one hand public energy authorities in the state of Victoria and on the other hand their suppliers of natural gas. The state authority had applied to a court for a declaration that the energy authorities were not barred from disclosing information revealed by the suppliers during the arbitration proceedings. Although he recognized that at least the arbitration hearing should remain private, Chief Justice Mason, writing for the

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67 CA Paris, *Aïta v. Ojje*, *Rev. Arb.*, 1986, at p. 583.

68 The Court noted that « *il est en effet de la nature même de procédure d'arbitrage d'assurer la meilleure discrétion pour le règlement des différends d'ordre privé ainsi que les deux parties en étaient convenues* » (I underline).

69 Commercial Court of Paris, 22 February 1999, *True North & FCB International v. Bleustein et al.*, *Rev. arb.*, 2003, 191. The Court noted that « *... l'arbitrage est une procédure privée à caractère confidentiel. Que la voie d'arbitrage acceptée par les parties devait éviter toute publicité du litige qui les opposaient et de ses éventuelles conséquences. Que sous réserve d'une obligation légale d'information, tout manquement éventuel à cette confidentialité par une des parties soumises à ladite procédure est fautif* ».

70 CA Paris, 22 January 2004, *Rev. arb.*, 2004, 647.

71 According to Mr. Cavalieros, the *Namfico* ruling should be read not so much as casting doubt on the existence of a principle of confidentiality under French law, but rather as a (misplaced) decision that absent a specific duty of confidentiality agreed upon parties, parties selecting to arbitrate disputes under the ICC rules should be taken to have waived any claim to confidentiality as the ICC rules remain silent on the question (reproduced in *Cahiers de l'arbitrage III*, A. MOURRE (ed.), Gazette du Palais, 2006, at p. 58-59).

72 *Esso Australia Resources Ltd. and others v. The Hon. Sidney Jams Plowman, The Minister for Energy and Minerals and others* (1995) 183 CLR 10

majority, found that there did not exist as a matter of Australian law, an implied duty of confidentiality in arbitration.<sup>73</sup> After considering the importance of the public interest at stake, the learned judge concluded that the circumstances were such that third parties had a legitimate interest in knowing what transpired in the arbitration.<sup>74</sup> Here again, one should tread carefully : although the ruling of the High Court is clear,<sup>75</sup> judge Toohey adopted a different opinion. In his opinion, there is room for an implied duty of confidentiality.<sup>76</sup>

In a similar vein, the highest Swedish court has held that, although arbitration proceedings are of a « *private nature* » and outsiders should not be allowed to attend hearings or have access to written submissions, there was no implied duty of confidentiality in relation to the award.<sup>77</sup> The Court specifically rejected the view that parties entering an arbitration agreement should be deemed to have accepted an overall duty of confidentiality.<sup>78</sup>

In other countries, it is unclear whether one can assume that parties having agreed to refer disputes to arbitration, can be deemed to have impliedly agreed to keep the proceedings confidential. The position under US law does not appear to be settled. In the literature on confidentiality in arbitration, one finds many references to the *Panhandle* case, which is supposed to support the lack of duty of confidentiality.<sup>79</sup> In that case, the District Court of Delaware refused to grant a motion filed by a party seeking a protective order against a

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73 According to Mason CJ, « *An obligation not to disclose may arise from an express contractual provision. If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement. Such a provision would bind the parties and the arbitrator* ».

74 It seems that following the ruling of the court in *Esso*, users of commercial arbitration became concerned about the holding. This may have prompted some arbitral institutions to amend their rules to provide expressly for confidentiality (as explained in the Report produced by the Departmental Advisory Committee on Arbitration on the Arbitration Bill, dated February 1996, at § 13, reproduced in *Mustill and Boyd on Commercial Arbitration*, 2<sup>nd</sup> ed., 2001 Companion, Butterworths, at p. 397).

75 It is noteworthy that the High Court had the benefit, when reviewing the case, of substantial input from leading English lawyers who provided expert opinions on confidentiality in arbitration.

76 Judge Toohey indicated that « *Privacy should be implied as a term of agreement to arbitrate; the implied term is attached as a matter of law rather than give business efficacy to the agreement. A term is implied as a matter of law 'as the nature of the contract itself implicitly requires, the very nature of arbitration agreements, the established practice for arbitrations to be conducted in private and the importance attached to privacy in arbitration hearings indicate that a term requiring privacy should be implied as a matter of law'* » : *Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals)* [1995] 128 ALR 391 at p 411, as per Toohey J.

77 *A.I. Trade Finance Inc. v Bulgarian Foreign Trade Bank Ltd.*, Supreme Court of Sweden, October 27, 2000, YCA vol. XXVI (2001), 291; *World Trade and Arbitration Materials*, 2001, at p. 147. This ruling has been criticized by Messrs. Redfern and Hunter, who point out that « *It seems odd to accept that arbitration is a private process, if nothing is done to protect that privacy* » (*op. cit.*, at p. 31, § 1-59). The Supreme Court has, however, inferred from the private nature of arbitration proceedings that the hearings was not accessible to third parties and that the written submissions should likewise remain confidential.

78 The dispute arose following the publication by Mealy's Report of an interim award, which had been communicated by AIT Trade Finance to the editors of the journal. In the arbitration proceedings which followed, the other party complained about the publication and argued that this amounted to a gross breach of the contract between parties. According to Bulbank, the breach was such to justify holding that the arbitration agreement was void. When this argument was rejected by the arbitral tribunal, Bulbank sought to have the award set aside.

79 *United States of America v Panhandle Eastern Corp. et al.*, 118 F.R.D. 346 (US D. C. Delaware).



request for discovery. The order aimed to protect documents and information relating to ICC arbitration proceedings held in Geneva, between Panhandle and the well known Algerian company Sonatrach. The Court did not comment on the existence of an implied duty of confidentiality. Rather the court focused on the specific test which governed the issue of the protective order. Under the applicable rules of procedure, such an order could only be granted if good cause was shown. This required a detailed showing of a clearly defined and serious injury. Reviewing the evidence presented by Panhandle, the Court found that no such showing had been made, the plaintiff having failed to provide specific examples of the harm that could occur upon disclosure.

It is true that in order to come to its decision, the Court reviewed the position under the ICC rules of arbitration and found that these rules did not impose any duty of confidentiality on the parties involved in the arbitration process. It is, however, still open to question whether this ruling should be read as implying a denial of the existence of a duty of confidentiality under US arbitration law or even a denial that parties entering an arbitration agreement are bound by an implied term of confidentiality.<sup>80</sup>

In sum, the picture is at best mixed. While some jurisdictions seem to be more inclined than other to accept that by entering into an arbitration agreement, parties have necessarily accepted to keep certain information relating to the arbitration process confidential, the scope of this obligation is far from settled. Further, in other jurisdictions confidentiality as an inherent feature of arbitration is more a myth than reality.<sup>81</sup> Many commentators have in view of that conclusion referred to the 'embarrassment' of the arbitration community, incapable of providing firm legal ground for what is usually touted as one of the key advantages of arbitration.<sup>82</sup>

More generally, the review of current law and practice is important in that it reveals that confidentiality may be traced to different sources. It is important to determine the nature, scope and origin of any obligation of secrecy or confidentiality, since this will also be relevant when determining the effects this obligation may have vis-à-vis third parties. To take one example, if one considers that the duty of confidentiality is an attribute of the

80 See the comments by Messrs. Redfern and Hunter (*op.cit.*, at p. 30, § 1-57, note 35) who note that the decision of the Court was *obiter* and that too much should not be read in the decision as the onus of establishing a 'good cause' under the applicable rules was a heavy one.

81 Hence the skeptical or sometimes even thought provoking titles given to some recent contributions on this subject, see *e.g.* L. YVES FORTIER, « The occasionally unwarranted assumption of confidentiality », *Arb. Intl.* (1999), at pp. 131-140; H BAGNER, « Confidentiality – A Fundamental Principle in International Commercial Arbitration? », *J. Intl Arb.*, 2001 at pp. 243-249 and A. EDWARDS, « Confidentiality in Arbitration : Fact or Fiction » *Intl Arb. L. Rev.*, 2001 (43), at pp. 94-95

82 The controversy surrounding the existence and the scope of confidentiality in arbitration have led to different reactions. While some arbitration institutions have intervened and modified their rules to include a comprehensive and detailed duty of arbitration (see *e.g.* the rules recently adopted by the Swiss Chambers of Commerce), the ICC has chosen in 1998 not to include a new provision in the rules relating to confidentiality. Although it appears that the Working Party debated the merits of such a provision, authoritative sources report that the Working Party preferred to leave it to parties to address this issue in their contract and eventually to the arbitrators to intervene on a case by case basis (see Y. DERAÏNS and E. SCHWARZ, *A Guide to the New ICC Rules of Arbitration*, ICC Publishing – Kluwer, 1998, at p. 264 and W. L. CRAIG, W.W. PARK and J. PAULSSON, *International Chamber of Commerce Arbitration*, 3<sup>rd</sup> ed., Oceana, Dobbs Ferry, 2000, at p. 313-314).

agreement to arbitrate, this can only mean that the duty does not extend to third parties. Third parties are indeed not bound by the agreement to arbitrate and hence are not required to keep confidential information they may have collected about the arbitration process. This applies particularly to *witnesses*, who may have been part of the process and may on this occasion have learned much about the dispute. Since the witnesses will not be party to the arbitration agreement, they are not bound by the confidentiality duty.<sup>83</sup> This does not mean that a witness could start spreading the news about an ongoing arbitration without incurring any liability. In practice, witnesses may be under an obligation of confidentiality as employees or managers of one of the parties. Alternatively, they may be required to sign a confidentiality agreement. In any case, the foundation of the duty of confidentiality is relevant as it also commands the limits of such duty.

## (2) CONFIDENTIALITY AND THIRD PARTIES – BASIC SCENARIOS AND SOME TENTATIVE ANSWERS

The preceding overview has revealed the variety of situations in which confidentiality can play a role in the framework of arbitration proceedings. It has also demonstrated that there is no easy answer to the question of confidentiality : if one discards the traditional view that arbitration is by its very nature confidential in order to look for a firmer legal basis, one finds a very mixed picture.

It is against this background that one should enquire how an obligation of confidentiality may affect or may benefit third parties. Before turning to this issue, it is necessary to remind the reader that the definition of third parties is a vexed question in the law. A common denominator of legal rules is that although most are said not to concern third parties, no definition of who must be considered to be a third party is offered. Failing such definition, one must accept that this includes any party other than the Claimant and Respondent.<sup>84</sup> Parties include the parties bound by the arbitration agreement and their legal representatives.<sup>85</sup>

Third parties include those who may be affected in one way or another by the arbitral process (such as shareholders or investors of a company involved in arbitration proceedings, insurers or a subcontractor who may be entitled to a portion of the claim made by the main contractor and who therefore may have a legitimate interest in knowing some aspect of the evidence, or of the outcome by way of award in order to pursue his own legal interest). Other third parties may come in contact with the arbitration process without being

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83 In this sense, H. SMIT, Case note on *Esso/BHP v. Plowman* (Supreme Court of Victoria), *Arb. Int.*, vol. 11/3 (1995), at p. 300.

84 This is a vexed question. See the general considerations of J. GHESTIN, General introduction in *Les effets du contrat à l'égard des tiers. Comparaisons franco-belges*, LGDJ, Paris, 1992, at pp. 18 ff, § 10 ff.

85 On the question whether a corporate subsidiary or a parent company may be considered a third party, see the considerations of the English Court in *Ali Shipping v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 634, 653. In that case, the court refused to brush aside the corporate veil and consider that so called 'one ship companies' were in fact identical to the company holding the shares or holding the beneficial ownership of the companies.

affected, even if indirectly. They include among others auditors and public regulators.

Given the variety of situations and circumstances in which third parties may come in contact with arbitration, it will prove impossible to offer a comprehensive analysis of all situations and difficulties. It seems more useful to discuss several typical scenarios in which third parties may come in contact with arbitration. These scenarios have been selected based on a ( cursory) review of the case law and of current practice.

**(i) Scenario 1 : Can a third party access arbitration hearings?**

A first, basic scenario concerns the request by a third party who wishes to attend an arbitration hearing. This situation may appear to be quite uncommon, as third parties will often not know about the date or location of such hearing and hence will rarely be able to request access thereto. It becomes somewhat more realistic if one considers that the request could come from a person linked to one of the parties. One can think of the general legal counsel of the group a subsidiary of which is involved in the arbitration or the representative of the main shareholder behind one of the parties. Technically, the legal counsel and the shareholder are third parties to the arbitration process who cannot therefore claim access. In practice, their attendance will almost always be tolerated. In fact most of the time, no question will even be raised when one party puts their names on the list of persons who will be attending the hearing. If a question is raised, it could in fact easily be solved by granting these third parties a special proxy to represent the party to the proceedings.

It remains that the general counsel and similar persons must be seen as third parties. May they insist on obtaining access to the hearing? As already indicated, there is unanimity to consider that the arbitration hearing is private and should not be open to third parties. This is one of the few elements which can find support in statutory texts. If the confidentiality of the hearing is not protected by statute, it will at least find support in the rules of the relevant arbitral institution.

Whatever the nature and the origin of the private nature of the hearing, the answer to the question does not appear to raise special difficulties. It is indeed difficult to see what right or interest the third party could claim to exercise when requesting access to the arbitration hearing. At most, this request will be based on what one hopes to be sound curiosity. At worst, the interest for the hearing will hide less legitimate motives. Whatever the basis, the request does not appear to be based on a legitimate interest which could trump the private nature of the hearing.

This is not to say that third parties should never be granted access to arbitration hearing. For one thing, the question of access could easily be solved by having the third party signing a comprehensive confidentiality agreement. Further, even without such express confidentiality agreement, parties could agree to let a third party attend parts of the hearing. It is submitted that if parties indeed do not oppose attendance by a third party, the arbitrators should respect this agreement.

**(ii) Scenario 2 : May an arbitrator use an award issued in a previous arbitration?**

A second scenario concerns the situation of the arbitrator. As Smit has observed, « *the arbitrators will have the least reason for not preserving confidentiality* ». <sup>86</sup> Nonetheless, arbitrators could also be in a situation where disclosure is in order. One can think of the situation where one person sitting as an arbitrator in one dispute wishes to point out to other members of the tribunal that in another dispute, a party has defended a completely different position in law. An arbitrator could also wish to make reference to his or her experience in credentials compiled for biographical purposes.

It is not contested anymore that the mission of the arbitrator is based on a complex contract. According to Mr. Clay, a general duty of confidentiality is an implied term of this contract. <sup>87</sup> This has also been confirmed by the case law. The Swedish Supreme Court has accepted that the arbitrator should observe discretion by virtue of the assignment entrusted to them. <sup>88</sup> This contractual duty may be reinforced by specific provisions found in codes of ethics or codes of conduct for arbitrators.

The duty is a general one. It is not qualified according to the nature of the information obtained by the arbitrator. There is in fact no good reason to distinguish between the award and other documents or witness statements. It can also easily be accepted that the obligation to keep the information confidential should survive the arbitration proceedings. <sup>89</sup> If this were not the case, this would deprive the obligation of much of its essential content.

Against this general duty of contractual nature, what interest could the arbitrator rely on to reveal information relating to the arbitration? If the desire to lift the veil of confidence is solely justified by the private interest of the arbitrator, it is submitted that no exception should be allowed. This will be the case if the arbitrator wishes to make reference to the arbitration for his personal advantage, for example in a commercial publication offering an overview of reputable arbitrators.

A different solution could prevail when the arbitrator is compelled in court to reveal information about the arbitration process in which he or she has been involved. One can think of a dispute with the tax authorities, on the occasion of which the arbitrator wishes to reveal the nature of his involvement in the arbitration proceedings. Further, the arbitrator

86 H. SMIT, Case note on *Esso/BHP v. Plowman* (Supreme Court of Victoria), *Arb. Int.*, vol. 11/3 (1995), at p. 299.

87 TH. CLAY, *L'arbitre*, Dalloz, 2001, at p. 599, § 774. Mr. Clay writes that « *Le véritable fondement juridique qui impose à l'arbitre de garder le secret sur ce qu'il apprend au cours d'une instance arbitrale est l'engagement qu'il prend en ce sens dans le contrat d'arbitrage* ». See in the same sense, PH. FOUCARD, E. GAILLARD and B. GOLDMAN, *Traité de l'arbitrage commercial international*, Litec, 1996, at p. 629, § 1132, who also point out (at p. 642, § 1167) that the arbitrator is not only required to observe the confidentiality, but is also entitled to rely on the confidentiality of the proceedings and the award.

88 *A.I. Trade Finance Inc. v Bulgarian Foreign Trade Bank Ltd.*, Supreme Court of Sweden, October 27, 2000, YCA XXVI (2001), 291 at p. 295, § 10.

89 TH. CLAY, *L'arbitre*, Dalloz, 2001, at pp. 601-602, § 778-779 (implicit solution).

could also be called upon to testify as a witness. The conflict is then between the contractual duty of non disclosure and the statutory obligation to testify or otherwise reveal information relating to the arbitral process. We will come back to this type of conflict hereinafter when discussing the fourth scenario.

**(iii) Scenario 3 : May a counsel for one party make reference to arbitration proceedings in which he/she has been involved?**

A similar situation arises when a lawyer who has acted in a previous arbitration wishes to make reference to this arbitration. Such a reference could be required in order to complete a pitch in which a firm wishes to present success it has had in the past for clients or present its arbitration capabilities. A prospective client could also request information on the arbitration experience of a firm. Finally, an attorney could also wish to make reference to an unpublished arbitral award in a later dispute, in order to provide support for a legal argument.

The answer to these questions will depend in the first place on the applicable bar rules. As the attorney has obtained the information and certainly the award because of his/her involvement as an attorney in the arbitration process, it is far from excluded that applicable rules of ethics governing the conduct of attorneys already prohibit disclosure of the material. In the respect, it is common knowledge that lawyers established in continental Europe are by and large subject to rather restrictive rules when it comes to disclosing previous intervention on behalf of clients.

Leaving aside the potential influence of ethical rules, it may be accepted that attorneys acting in arbitration accept at least implicitly a general duty of confidentiality which becomes part of the contractual relationship between attorney and client.<sup>90</sup> The duty of confidentiality resting on the attorney is hence of a contractual nature.

This duty of confidentiality appears to be stronger than the mere interest the attorney may have to make reference to its involvement in a case on behalf of another party. Likewise, the duty of confidentiality seems to be stronger than the benefit which a firm could derive from boasting about its arbitration capability in a pitch.<sup>91</sup>

However, one should be wary of too general solutions. In so far as the duty of confidentiality resting on the attorney is deemed to be of a contractual nature and derives

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90 That the relationship between an attorney and his client is of a contractual nature cannot be seriously questioned. The content of that relationship may be based on a written agreement or standard conditions prepared by the firm. Alternatively, one will have to look at the provisions which practices and customs have made part of the agreement.

91 On the primacy of 'subjective rights' (such as the one derived from a contract) on mere 'interests', see the comprehensive analysis by TH. LÉONARD, *Conflits entre droits subjectifs, libertés civiles et intérêts légitimes. Un modèle de résolution basé sur l'opposabilité et la responsabilité civile*, Larcier, 2005, at pp. 576 ff. Mr. Léonard points out that by its very nature, the subjective right must trump the interest, no matter how legitimate the latter may be. The only reservation made by Léonard can be found in the doctrine of abuse of rights.

from an implied term, one could also accept that this implied term only prohibits the attorney from disclosing specific details about the case and the parties. A general reference to e.g. “*acting as counsel in an ICC case involving a dispute between a French and a German company relating to the termination of a joint venture agreement*” - which may be commonly found on the web-site or in the brochures published by law firms all over the world - does not constitute a breach of such duty.<sup>92</sup>

**(iv) Scenario 4 : Can a party to an arbitration rely on an award (or other documents) obtained in an earlier arbitration?**

Another scenario which must be addressed is that in which a party involved in an arbitration would like to produce or otherwise use the resulting award or other documents produced on the occasion of the arbitration, in later proceedings, be it for an arbitral tribunal or another court. This could be justified by the wish for example to pursue a subsequent claim against insurers in respect of the same loss.<sup>93</sup> Alternatively, the party could wish to produce the award in order to rely on an interpretation of the underlying agreement adopted by the arbitral tribunal.

In recently adopted institutional rules, this situation is sometimes covered and the rules allow a party to use materials produced in the arbitration. Article 43(1) of the Swiss rules allow for example a party to disregard the general obligation of confidentiality if such is needed “. . . to protect or pursue a legal right . . .”<sup>94</sup>

Most often, the rules will contain no such reservation. The question then arises whether allowance could be made for production of the award or use of arbitration materials. Likewise, when the duty of confidentiality finds its source in an express agreement between parties and the agreement does not include any exception for production of the award in other proceedings, one must examine whether a party could nonetheless escape liability if it does produce the award. Finally, if the duty of confidentiality is based on a general principle or is deemed to be an implied term of the agreement to arbitrate, the same question should be answered.

Different methods could be used to solve the question. First, when the duty of confidentiality has been expressly agreed by parties, one could attempt to interpret the express confidentiality clause in order to determine whether parties have indeed wished to preclude disclosure in the circumstances at hand. This is what the Privy Council has done in *AEGIS*, in which two reinsurers had concluded an express confidentiality agreement

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92 Likewise it may be that bar rules allow attorneys to make some reference to their previous involvement in arbitration cases, provided all details relating to the identity of the client are left out.

93 A similar situation arises when the beneficiary of an insurance policy obtains an award against his insurer and the latter brings proceedings to obtain indemnity from his reinsurer under the reinsurance agreement.

94 In a similar vein, Article 75(iii) of the WIPO rules provides that an award may be disclosed to third parties “. . . in order to establish or protect a party's legal rights against a third party” and Article 30.1 of the LCIA Rules, which refer to the situation where “disclosure may be required of a party by legal duty, to protect or pursue a legal right . . .”.

providing that the result of the arbitration proceedings should not be disclosed to “*any individual or entity in whole or in part, which is not a party to the arbitration*”. After it obtained a favorable award, European Insurance sought permission to use the award in subsequent proceedings against the same party. The Privy Council held that on a proper construction, the confidentiality agreement did not preclude reliance on the award in the second arbitration.<sup>95</sup> In order to come to this result, the Privy Council placed much reliance on the fact that preventing disclosure of the award would frustrate a legitimate use of the award and run counter to an implied term of the arbitration agreement that the parties agree to perform the award. Whether such ruling could serve as inspiration in other jurisdictions will depend in the first place on the applicable rules of interpretation of contract. Whatever rules are applicable, it is submitted that the courts will probably be influenced by the nature and strength of the case made by the party who seeks disclosure of the information relating to the arbitral process.<sup>96</sup>

In the absence of an express confidentiality clause, English courts have approached the issue of disclosure by building further on the doctrine of the implied term of confidentiality. Starting from the assumption that the duty of confidentiality is an implied term to the arbitration agreement, courts have held that this implied duty, far from imposing an absolute obligation of confidentiality, may on the contrary be nuanced in several circumstances. Technically it seems that the courts are ready to accept that the implied term should be accompanied by an “*implied exclusion*”.<sup>97</sup> One of the exceptions which courts have accepted relates precisely to the situation where it is “*reasonably necessary*” for a party to rely on the award in the framework of other proceedings.

Another explanation could be offered to determine whether a party may disregard its obligation of confidentiality. When faced with a claim for damages (or a request for injunctive relief) from the other party to the arbitration proceedings, the party seeking to disclose information could rely on the doctrine of *abuse of rights* – provided it exists in the applicable law governing the contractual relationship. It is indeed not unreasonable to accept that in specific circumstances, the insistence of one party on confidentiality could be deemed to be abusive. The *Insurance Co* case decided by the English court illustrates the method. In that case, the famous syndicate Lloyd’s had accepted to insure maritime risks and obtained reinsurance from five reinsurers. After having compensated its insured, Lloyd’s sought reimbursement from its reinsurers. One reinsurer claimed that the reinsurance policy was void because of certain non-disclosure. Lloyd’s brought arbitration proceedings against this reinsurer and obtained an award which it wished to send to the four other reinsurers who had not yet admitted liability for the loss. The first reinsurer did not consent to the disclosure, although it admitted that it would not suffer any specific damage or prejudice if the award and the reasons were to be disclosed to the other reinsurers.

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95 *Associated Electric & Gas Insurance Services Ltd. v European Reinsurance Co of Zurich*, [2003] 1 All ER (Comm) 253 (Privy Council). In this case, the two parties were involved in two arbitration proceedings in Bermuda. The arbitral panels were differently constituted.

96 In *Aegis*, the Privy Council also justified the ruling on the basis of the doctrine of issue estoppel, noting that the principle of issue estoppel meant that the parties to proceedings were bound by an earlier arbitral award on the same issue.

97 Mr. Merkin refers to the “*implied exclusion of the implied duty of confidentiality*” (R. MERKIN, *Arbitration Law*, LLP, 2004, at p. 666, § 17.31).

It is submitted that in these circumstances, the insistence of one party on the confidentiality attaching to the award or to other documents produced in the framework of the arbitration, could be characterized as an abusive exercise of the right to demand confidentiality.<sup>98</sup>

Whatever technique is used to allow disclosure - construing the express confidentiality agreement or the implied term to include an exception or characterizing the refusal to allow disclosure as abusive - the difficulty will be to articulate with precision the boundaries within which disclosure should be allowed<sup>99</sup> : when does it become abusive for a party to prohibit the other party from disclosing the award or other documents? When is it “*reasonably necessary*” to disclose the award or other documents?<sup>100</sup> English courts have taken the lead in defining the limits of disclosure as an exceptional breach of the duty of confidentiality. While recognizing that the court must retain a degree of flexibility when determining whether disclosure is indeed justified by reasonable necessity, the courts have had the opportunity to rule on different situations and by doing so to put some flesh on the bare concept of 'reasonable necessity'. In *Ali Shipping*, the court has for example refused to allow disclosure of the award and other materials related to the arbitration after having been convinced that the plea which the party seeking disclosure sought to make on the basis of the award, had no prospect of success.<sup>101</sup> In *AEGIS* on the other hand, the Privy Council ruled in favor of disclosure and allowed a party to produce an award it had obtained in a previous arbitration against the same party.

Given the variety of situations which could arise, it is submitted that it is not possible to

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98 It will fall upon the law applicable to the agreement to determine the consequences to be attached to an abuse of a contractual right. One may assume that if the party seeking disclosure can demonstrate that the refusal by the other party is abusive, the court will at least allow disclosure. It is not excluded that the court could also award damages.

99 It is submitted that the analysis should not be made dependent on the nature of the information for which disclosure is sought. There appears to be no good reason of policy to distinguish say between on the one hand the award and the underlying reasons and on the other hand the other materials produced in the arbitration, such as written submissions or transcripts. The balancing exercise should be the same in all cases, as was decided by the English court in *Ali Shipping*. In that case, the Court decided that the exception of 'reasonable necessity' covered not only the award but also pleadings, written submissions and the account given by witnesses as well as transcripts and notes of the evidence given in arbitration (*Ali Shipping Corp. v Shipyard Trogir* [1998] 1 Lloyd's Rep. 634, at p. 651(LJ Potter)).

100 Or, as justice Colman put it in *Insurance Co. v. Lloyd's Syndicate*, [1995] 1 Lloyd's Rep. 272, at p. 273 : “*How necessary does disclosure of the award have to be for the protection of the party's legal rights before he is entitled to disclose it as of right?*”

101 In that case, the dispute concerned three separate agreements which had been entered into by a shipyard (Trogir), which had accepted to build three ships. In the course of the performance of the agreements, the original customers were replaced by new companies which all belonged to the same group. When the yard failed to build the first ship on time, proceedings were brought by the customer to rescind the contract and obtain damages. The arbitrator found in favor of the customer and refused to accept that the shipyard's obligation to build the first ship had become dependent on the other customers paying the first instalment of the price of the other contracts. The yard then brought new arbitration proceedings against the other customers and sought to disclose the award, the submissions and a transcript of the oral evidence. According to the yard, these materials were necessary in order to make a plea of issue estoppel against the customers. The Court was convinced that the assertion of issue estoppel which the party seeking disclosure was willing to make, did not stand sufficient chances of succeeding.



describe with precision when disclosure should be allowed. The reasons and circumstances which one party may call upon to justify disclosure may indeed prove very different. Rather, every case should be treated on its own.

It may, however, be possible to draw some lessons from existing case law. If one considers for example the various situations which have been submitted to English courts so far, one could distinguish between two hypotheses. In a first situation, the party who seeks to lift the confidentiality veil, would like to do so in order to protect or pursue a legal right. This is the case when an insurer is sued by a party who has been ordered by an arbitral tribunal to pay damages to a third party.

In another scenario, the production of the award aims not so much to protect a right, but rather to obtain an *advantage*. This is the case when a party wishes to produce an award or an expert opinion to support its case.<sup>102</sup> This was the situation in *Dolling-Baker v Merrett*,<sup>103</sup> in which a party sought permission from the court to obtain disclosure of an award issued in the framework of previous arbitration proceedings between the defendant and a third party, as well as the transcript of the hearing. The transcript and the award were relevant because the dispute between parties concerned the same question which had been put to arbitration, i.e. whether a contract of reinsurance was void because of non-disclosure of crucial information. *Dolling Baker* sought disclosure in effect in order to understand how the arbitrator had come to decide that the reinsurance was void, apparently in order to avoid losing its case on the same grounds.<sup>104</sup>

The nature of the underlying interest is different in the two cases : in the second case, the desire to jettison confidentiality is merely justified by what could be deemed to be an interest.<sup>105</sup> This interest may be legitimate. It is, however, difficult to see how it could trump the contractual or statutory right to confidentiality enjoyed by the other party.<sup>106</sup> Save in the situation where the latter abuses its right, it is suggested that confidentiality should prevail. This is the position under English law, since courts have rejected the possibility to grant

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102 In both cases, it will not be frequent that the question of confidentiality is raised during the proceedings (with the insurer or the third party). Indeed, the confidentiality is not meant to protect the insurer nor the third party. Rather, the confidentiality aims to protect the party who participated in the first arbitration proceedings. As the latter will as a rule not be involved in the new proceedings in which the question of confidentiality arises, this question will often only arise later when the breach of confidentiality is discovered and this breach leads to a claim for damages (on which, see hereinafter). Alternatively, the question could also be put to court if the party opposing disclosure, seeks to obtain an injunction prohibiting the other party from disclosing materials related to the arbitration (see e.g. *Insurance Co. v Lloyd's Syndicate*, [1995] 1 Lloyd's Rep. 272 – in that case the claimant, reinsurers, sought an injunction restraining Lloyd from disclosing the result of an arbitration – the award and the reasons – to five reinsurers who undertook the same risk).

103 [1991] 2 All ER 890 (CA).

104 In deciding the case, the Court of Appeal only examined whether the documents, disclosure of which was sought, were truly necessary for disposing of the issues of which it was seized. The Court found in the negative and did not therefore rule on whether the implied duty of confidentiality could be deemed to allow disclosure in these specific circumstances.

105 This concept is elaborated by Mr. Leonard in his masterly analysis, in particular at pp. 247-257.

106 For a similar analysis when the duty of confidentiality is imposed by a general contractual clause to that effect, see J. MILQUET, « La production en justice, par un cocontractant, de renseignements et de documents protégés par une clause de confidentialité », *Intl. Bus. L. J.*, 1991, (153), at p.165.

leave to escape confidentiality when “*an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed*”.<sup>107</sup> As judge Potter explained, no exception can be tolerated if disclosure of the award or of other material “*would be merely helpful, as distinct from necessary, for the protection of . . . rights*”.<sup>108</sup> The Lloyd’s case may serve to illustrate this situation : Lloyd’s sought permission from the court to disclose an award and the underlying reasons it had obtained against a reinsurer. The award apparently ruled in favor of Lloyd’s and rejected the reinsurer’s claim that the reinsurance policy was void for lack of disclosure. Lloyd’s sought disclosure in order to communicate the award to other reinsurers who had subscribed part of the risk. It was accepted that such disclosure would be “*helpful*” in persuading the other reinsurers to accept that the risks were within the reinsurance cover.<sup>109</sup> The Court did not accept that disclosure should be allowed because although the disclosure of the award might have a persuasive effect on the other reinsurers, this disclosure was not necessary in order for Lloyd’s to form the basis of a cause of action against the other reinsurers or serve as the foundation of a defence to a claim made by a third party.

The reasoning must be different if the party who wishes to produce or use the award can rely on something more than a mere interest. If a party wishes to use an award in proceedings against an insurer, the award is used for something more than merely convenience or interest. It is in fact the legal basis of the claim made against the insurer, together with the insurance policy. In that case, the production of the award seems justified by a reasonable necessity.<sup>110</sup>

This distinction between two categories of cases is by no means comprehensive. It is most probable that other scenarios could be contemplated. In all cases, a balancing exercise must be made between on the one hand the protection of confidentiality as specific feature of the arbitration process and on the other hand, the concern for justice and fairness between parties. It will fall upon the court to determine in each case the nature of the interest of the party seeking disclosure and to weigh this interest against the duty of confidentiality. Much will probably depend on the link existing between the issues which have to be arbitrated. The fact that some of the parties to the various proceedings may share common interests, may also play a role. Once the court has decided in favor of disclosure or not, it may frame its decision on the basis of the applicable law and of the various techniques which have already been discussed.

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107 *Ali Shipping Corp. v Shipyard Trogir Ali Shipping v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 634, 651 (LJ Potter).

108 *Ali Shipping Corp. v Shipyard Trogir Ali Shipping v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 634, 651 (LJ Potter). Judge Potter added that if disclosure is justified by the concern to save time and expense (e.g. because a first award could already be used in a later arbitration and reduce the risk of inconsistent findings), this is not enough to satisfy the test of ‘reasonable necessity’. According to judge Potter, “convenience and good sense are in themselves [not] sufficient to satisfy the test of ‘reasonable necessity’”. (at p. 654).

109 *Insurance Co. v Lloyd’s Syndicate*, [1995] 1 Lloyd’s Rep. 272, at p. 275.

110 Compare with the analysis by Messrs. Fontaine and de Ly, who argue that a contractual duty of confidentiality must be respected and cannot suffer an exception when a party wishes to use protected information « *de son propre chef afin d’assurer sa défense dans un litige contre un tiers* » (M. FONTAINE and F. DE LY, *Droits des contrats internationaux*, 2<sup>nd</sup> ed., Bruylant, 2003, at p. 321). This appears to be too radical a position.

Before turning to the next scenario, one should also ask what consequences should attach if the court finds that disclosure is not warranted and the party who sought disclosure, disregards the court's decision. The most obvious remedy for the party who opposed disclosure, is to seek damages. However, it will not be easy to demonstrate that damage has indeed be suffered. If the information has been disclosed in the framework of other arbitration proceedings, it will be confined to the proceedings and there is not much risk that third parties could be informed. If the information is used in court proceedings, the risk of third parties obtaining the information is probably bigger. It will remain difficult, however, to demonstrate that damage has been suffered. As has been noted in general for confidentiality clauses in agreements, if the information which is disclosed is as such not sensitive, there will hardly be any damage – except maybe some moral damage. If the information is on other hand sensitive, i.e. because it relates to business secrets, it could already be sufficiently protected by other mechanisms and in particular law incriminating the disclosure of such secrets. Hence, the party complaining about disclosure may face difficulties in demonstrating the existence of damage.<sup>111 112</sup> This limitation will not apply if what is sought is interlocutory relief in the form of an injunction prohibiting any disclosure. Finally, the breach of confidentiality should not have any consequence on the award. In a case already referred to, a party sought to have the award set aside on the basis of the disclosure by the other party of information relating to the arbitration. In first instance, the Swedish court set aside the final award. This ruling has rightly been quashed in appeal, the Svea Court of Appeal holding that the violation of the duty to keep information relating to the arbitration confidential, could not justify invalidating the arbitration agreement or the award.<sup>113</sup>

**(v) Scenario 5 : Can a company disclose information pertaining to arbitration proceedings in its annual reports?**

Corporations are subject to a growing variety of information duties. The most well-known apply to companies whose stock is traded on the stock exchange. All businesses, however, are subject to some form of transparency. One can refer in particular to the duty to cooperate with auditors in charge of the annual accounts. In the process of verifying such accounts, auditors may stumble upon a dispute which must or has been referred to arbitration. There is no question that the auditors are third parties to the arbitration process. How much information may the company disclose to its auditors?<sup>114</sup>

111 See in general J. MILQUET, *art. cit.*, *Intl. Bus. L.J.*, 1991, (153), at pp. 157-158 and M. BÜHLER, *art. cit.*, *Intl. Bus. L.J.*, 2002, (359) at p. 375-376. See in particular in relation to the obligation of confidentiality in the framework of arbitration, PH. FOUCHARD, E. GAILLARD and B. GOLDMAN, *Traité de l'arbitrage commercial international*, Litec, 1996, at p. 787, § 1412.

112 If damages are awarded, the court will often award a lump sum as it will prove difficult to put an exact figure on the prejudice suffered. See the examples given by M. BÜHLER, *art. cit.*, *Intl. Bus. L.J.*, 2002, (359) at p. 375-376.

113 Svea Court of Appeal, 30 March 1999, *YCA XXIV* (1999) at p. 321. Mr. Clay approves this position (*L'arbitre*, Dalloz, at p. 601, § 778).

114 The same question could arise when a company is involved in merger discussions. In that context, the company could be required by law to disclose information relating to an ongoing arbitration to regulatory authorities.

A similar question arises when a person who has been party to an arbitration, either as counsel, arbitrator or in any other capacity, is called as a witness in court proceedings and in that context is put under a specific obligation to disclose information about the arbitration process.<sup>115</sup> In both cases, the nature of the conflict is similar. It also differs from the conflict addressed in the previous scenario. To the extent that confidentiality in arbitration rests not upon a statutory obligation, but is a mere attribute of the arbitration process, it rests upon a contractual basis.<sup>116</sup> On the other hand, the duty to disclose information will most often be based on the law and more specifically on a statutory duty.<sup>117</sup> It may follow directly from a statutory provision, such as those applicable to all companies whose shares are traded on the stock market. A duty of disclosure may also arise in the framework of proceedings, either before a court or an administrative body. It is submitted that in both cases, the problem should be addressed on the basis of the same principles. Whether the duty of disclosure is specifically provided for in a statute or finds support in a court decision, the origin of the duty is in essence similar : it is founded not on the will of parties but on a general legal rule.<sup>118</sup>

The answer to the question can be determined easily when the duty of confidentiality resting on parties involved in the arbitration process is established by rules which also make an express reservation for statutory obligations of disclosure.<sup>119</sup> This is the case for example with the WIPO Arbitration Rules. Article 73(A) of these rules provides that the existence of the arbitration proceedings are confidential « *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*

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115 Under a variety of rules. See e.g. Article 871 Belgian Judicial Code.

116 If the duty of confidentiality is not based on the contract between parties, but on the rules of the arbitration institution (see e.g. Art. 43 of the Swiss Arbitration Rules), this does not modify in substance the analysis. The rules of the arbitral institution are indeed incorporated in the agreement between parties. Their legal force is not different from the legal force of a contract.

117 For a comprehensive account under Belgian law, see Y. DE CORDT and G. SCHAEKEN WILLEMAERS, *La transparence en droit des sociétés et en droit financier*, Larcier, 2008, 381 p.

118 Under English law, a different approach is adopted when the breach of confidentiality follows from a court decision ordering production of document or a witness to testify. It is said in that case that the court order must trump the duty of confidentiality in « *the interests of justice* » (*Ali Shipping Corp. v Shipyard Trogir* [1998] 1 Lloyd's Rep. 634, 652 (LJ Potter)). This is akin to a public policy exception, which aims to guarantee that a judicial decision be issued on the basis of a complete and truthful account of the facts. For an application, see *London & Leeds Estates Ltd v Paribas Ltd.* (N°2), [1995] 2 EG 134 – the court ruled in favor of disclosure of information provided by an expert witness in an earlier arbitration between different parties because it was alleged that the expert had provided evidence which was inconsistent with the evidence provided in a new arbitration. See also more recently *John Forster Emmott and Michael Wilson & Partners Ltd.*, [2008] EWCA Civ 184; WLR (D) 82 (in this case, Lawrence Collins LJ held for the Court of Appeal that the « interests of justice » required an English court to ensure as far as possible that parties to London arbitrations should not seek to use the cloak of confidentiality with a view to misleading foreign courts (in this cases a court in New South Wales and in the British Virgin Islands), particularly where the cases being presented in the foreign courts raised essentially the same or similar allegations and were proceeding in parallel).

119 Similarly, the conflict which may exist between a legal duty of disclosure and a contractual agreement mandating confidentiality can be easily solved when the latter expressly includes a reservation for information which must be disclosed to governmental agencies under applicable rules (see the examples given by M. FONTAINE and F. DE LY, *op.cit.*, 2003, at pp. 286-287).

*party to any third party unless it is required to do so by law or by a competent regulatory body . . . ».*<sup>120</sup>

In that case, there is no conflict between the duty of disclosure and the duty of confidentiality, as the latter already includes a reservation allowing disclosure. The only remaining question is not one of principle, but of application. If disclosure is allowed, as in the WIPO rules, when it is required by law or by order of a competent body, it remains indeed to be determined when a party is legitimately faced with such a requirement. In that respect, one should probably read the reservation broadly so as to include not only obligations of disclosure imposed by the law or judicial bodies of the seat of arbitration but also of the State in which each party is established or even where a party has operations. Conveniently, the WIPO rules also provide details on how the confidential information should be disclosed.<sup>121</sup> Further, one should also take into account that statutory rules requiring disclosure will not unfrequently allow some exceptions. A person called to testify in court could rely on a privilege or another exception to refuse to provide the information required. Before disclosing the information requested, a party to the arbitration process should verify in good faith that no exception apply which could allow to avoid disclosure.<sup>122</sup> This could involve requesting a protective order from the court in order to obtain that the information disclosed in the framework of proceedings is not unduly disseminated. Unless the agreement provides otherwise, it would, however, go too far to require the party under the duty to disclose, to give prior notice to the other party so as to allow the latter to challenge the disclosure.<sup>123</sup>

In most cases, the solution to the conflict will be less easy to determine as there is no express reservation in the arbitration rules or otherwise for a duty of disclosure mandated by law. The question therefore arises whether the contractual duty of confidentiality must give way to demands for disclosure based on the law.<sup>124</sup> This seems to be the generally

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120 We underline. See also to the same effect, Article 43 (1) of the Swiss Rules of Arbitration, which make an express reservation for the disclosure which « may be required of a party by a legal duty or to protect or pursue a legal right. . . ».

121 According to Article 73(a), a party required to disclose information should disclose « *no more than what is legally required* » and should in all cases give notice to the arbitral tribunal (if the case is still pending) and to the other party about the disclosure, together with some explanation of the reason for such disclosure.

122 In this sense for the obligation imposed in general by a contractual agreement of confidentiality, see M. BÜHLER, *art. cit.*, *Intl Bus. L.J.*, 2002, (359) at p. 378. According to M. Bühler, « . . . *la partie requise devra fournir ses meilleurs efforts pour essayer d'obtenir, lorsque c'est possible, une dispense* ».

123 Mr. Bühler provides examples of contractual agreements imposing such an obligation (*art. cit.*, at pp. 378-379).

124 The question could also arise in the mirror-situation in which the request to lift confidentiality is not made by one of the parties to the arbitration proceedings, who wishes to disclose information relating to these proceedings to a third party, but by a third party who requests to be granted access to information exchanged by parties during the arbitration proceedings. This scenario is probably less likely to occur. It did occur in the *Esso/BHP* dispute which was finally settled by the Australian High Court (see above). In this case, a public authority requested information on the price for gas charged by suppliers, which had been disclosed during arbitration proceedings.

*Prima facie*, there is no good reason to adopt a different approach of this peculiar scenario. It is submitted, however, that court should probably use more restraint when entertaining a request filed by a third party to have access to information disclosed during arbitration proceedings. The court should

accepted solution. Commenting on the famous *Esso* case decided by the Australian High Court, Professor Smit wrote for example that a private contractual arrangement cannot shield information from disclosure required by the law.<sup>125</sup> Likewise, in the *True North* case, the judge in first instance, while ordering True North to refrain from all publication or communication to the public of information relating to the arbitration which opposed True North to Publicis, made an express reservation for legal duties of disclosure which could trump the duty of confidentiality.<sup>126</sup> It is striking, however, that the Court did not offer any explanation as to the reasons justifying such a solution. English courts have been similarly shy about explaining why an exception should be accepted to the duty of confidentiality which attaches as an implied term to the arbitration agreement when a party is under an order of the court to produce documents. While this exception has been generally recognized,<sup>127</sup> its scope is the subject of further refinement in the case law.<sup>128</sup>

The question requires, however, closer scrutiny. It must be determined whether the duty of confidentiality automatically and necessarily must give way before the statutory duty. This question is not only relevant when the duty of disclosure is the consequence of a statutory provision. The same type of conflict arises when one party is ordered by a court to disclose information pertaining to arbitral proceedings. Should the contractual duty of confidentiality, provided it exists, form an obstacle to such court ordered disclosure? Or should one accept that the obligation to disclose serves a public interest and as such prevails over the duty of confidentiality?

In both cases, the question can be addressed from different perspectives. It has for example been suggested that one could solve the difficulty by accepting that national rules mandating disclosure of information should be considered internationally mandatory. As such, these rules would naturally enjoy priority over the contractual duty of confidentiality.<sup>129</sup> According to Fages, one could accept that rules mandating transparency of financial markets could in general be characterized as internationally mandatory.<sup>130</sup>

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in particular determine whether the interest on which the third party bases its request, is sufficiently strong as to justify opening the doors of the arbitration process to a third party. Only a very compelling public interest will justify such a degree of openness.

125 H. SMIT, Case note on *Esso/BHP v. Plowman* (Supreme Court of Victoria), *Arb. Int.*, vol. 11/3 (1995), at p. 299.-300.

126 Commercial Court of Paris, 22 February 1999, *True North & FCB International v. Bleustein et al.*, *Rev. arb.*, 2003, 191. According to the President of the Commercial Court, True North was ordered not to « *fournir au public des informations sur l'existence, le contenu et l'objet du différend les opposant à la SA Publicis actuellement soumis à l'arbitrage, mais sous réserve des obligations légales d'information dûment démontrées auxquelles seraient soumises ces sociétés* » (we underline).

127 See e.g. *Ali Shipping Corp. v. Shipyard Trogir* *Ali Shipping v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 634 at p. 651 (LJ Potter).

128 See very recently, *John Forster Emmott and Michael Wilson & Partners Ltd.*, [2008] EWCA Civ 184; WLR (D) 82.

129 See in particular F. FAGES, « La confidentialité de l'arbitrage à l'épreuve de la transparence financière », *Rev. arb.*, 2003, at pp. 22-25, § 26-32.

130 Fages writes for example that « *les objectifs poursuivis par les lois organisant la transparence des marchés devraient permettre d'émettre une opinion globale quant à leur qualification de loi de police. . . Il est . . . tout à fait probable qu'un juge français ou un arbitre estimera que ces dispositions revêtent l'habit de lois de police et qu'elles sont applicables aux émetteurs cotés en France* » (at pp. 22, § 27).

It is true that rules requiring disclosure of financial information are by essence mandatory. Offering to solve the difficulty by adopting a general characterization of all rules requiring disclosure of financial information as internationally mandatory, seems, however, too radical a solution. It also presents serious shortcomings.

According to Mr. Fages, one could consider that rules mandating disclosure of financial information can be considered to be '*lois de police*'. This broad characterization ignores both the diversity of disclosure rules and the rich debate on their characterization in private international law.

First, the scholarly debate on the conflict of laws treatment of capital markets and capital markets rules reveals that if some rules are indeed considered so important that they are viewed as internationally mandatory,<sup>131</sup> this does not apply to all rules mandating disclosure. In fact, there is a debate on the characterization of disclosure requirements as part of the *lex societatis* or of the law of the relevant market place.<sup>132</sup> Serious doubts can therefore be expressed on the attempt to solve the issue by relying solely on the mandatory rules approach.<sup>133</sup> These doubts are reinforced if one takes into account the fact that the discussion on the conflict of laws treatment of capital markets rules is still in its infancy. If one puts aside for a moment the attempts made in the German literature to offer a comprehensive approach of such questions,<sup>134</sup> the general picture is one of lack of interest by private international law scholars on the continent.<sup>135</sup> One could therefore legitimately ask whether it is reasonable to close the debate by accepting that all rules mandating disclosure are internationally mandatory – and hence render moot the effort to characterize

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131 Among the mechanisms which seem to justify a characterization as internationally mandatory, one finds in the first place rules relating to notification of crossing of shareholding threshold and shareholders' agreement (see e.g. D. BUREAU and H. MUIR WATT, *Droit international privé – Partie spéciale*, PUF, 2007, at p. 441, § 1045 and A. COURET, « L'entreprise privée face au commerce international », in *Droit du commerce international*, J. BEGUIN and M. MENJUCQ, Litec, 2005, at pp. 185-186, § 477). Continuous reporting obligations for companies listed are sometimes also viewed as internationally mandatory (see e.g. G. WEGEN and C. LINDEMANN, "The Law Applicable to Public Offerings in Continental Europe", *The Law of Cross-Border Securities Transactions*, H. VAN HOUTTE (ed.), Sweet & Maxwell, 1999, (153), at p. 156, § 6.07).

132 See generally H. KRONKE, « Capital Markets and Conflict of Laws », *Collected courses of the Hague Academy*, 2000, vol. 286, (254-386) at pp. 296-300, with many further references to German literature.

133 In the French literature, the question does not seem to have been solved in a definite manner. In a note under the celebrated *Banque Ottomane* ruling of the Commercial Court of Paris, Mr. Synvet first observed that the obligations of disclosure to companies whose shares are traded on the stock market, could be governed by the law of the market and not by the law of the corporation, as was usually defended. Mr Synvet also added that such rules could also be characterized as internationally mandatory (note published in *Rev. crit. dr. int. priv.*, 1984, (108), at pp. 117-118).

134 As with other issues, German scholars seem to have taken the lead in offering solutions for novel problems raised by the ever increasing internationalization of legal intercourse.

135 In Belgium, the question has been touched recently when the Code of Private International Law was adopted. Commentators were puzzled by Article 114, according to which « Claims resulting from a public issue of titles are governed, at the choice of the security holder, by the law applicable to the body with separate legal personality or by the law of the State on the territory of which the public issue took place ». This has opened a (short lived) debate on the treatment of capital markets operation in private international law. See e.g. M. GOLLIER, "Droits international privé des émissions publiques de titres", *R.D.C.B.*, 2005, at pp. 628-636.

the nature of the underlying legal relationship.

One further element casting doubt on the solution suggested by Mr Fages concerns the difficulty raised by the application of foreign mandatory rules. In practice, rules mandating disclosures will indeed often not be part of the *lex contractus*. As is generally known, courts are not inclined to apply foreign mandatory rules.<sup>136</sup> Hence if a court were to be seized of a claim for damages arising out of the breach of a duty of confidentiality by one party to an arbitration, there is no guarantee that the court will effectively apply the foreign mandatory rule or even take it into account in order to rule on the request for damage or for injunctive relief.<sup>137</sup> Any solution based on the idea that rules requiring disclosure must be characterized as internationally mandatory will hence inevitably lead to legal uncertainty.

On top of this, solving the confidentiality puzzle on the sole basis of internationally mandatory rules does not prove possible if the obligation to disclose information pertaining to the arbitration originates in a court order and not in a statutory provision. In that case the disclosure is indeed not mandated by statutory rules but by a court order, which makes it impossible to resort to the doctrine of internationally mandatory rules.

Although the recourse to the technique of internationally mandatory rules could offer a workable solution in some circumstances, it is suggested that other solutions should not be excluded. One alternative method starts from another perspective : instead of focusing on the statutory rules requiring disclosure, the perspective focuses on the *nature* of the interests at stake. In essence, this is a conflict between on the one hand a *contractual* right to refuse disclosure and on the other hand a *legal* duty of disclosure. Looking at the problem from a contractual perspective, it may be enquired whether a party who is under a contractual obligation of confidentiality may breach this duty, or more precisely may escape liability for a breach of this duty, if it can show that it was in fact required to ignore its duty of confidentiality.

One should enquire whether such a legal duty of disclosure constitutes a supervening event which may excuse the breach by one party of its contractual obligation.<sup>138</sup> It is well known

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136 See e.g. the comments of Wilderspin on the application by national courts of the possibility offered by Article 7(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations. Reviewing the case law of Member States, Wilderspin concludes that Article 7(1) has been invoked in « rare occasions » (M. WILDERSPIN, « The Rome Convention : Experience to date before the courts of Contracting State », *Harmonisation of Substantive and Private International Law*, O. LANDO, U. MAGNUS (eds), P. Lang, 2003, (111), 131).

137 Fages argues that a French court will pay attention to disclosure requirements imposed by US securities law and explains that it is « probable » that a court in France will apply such requirements as foreign mandatory rule (at p.24, § 28).

138 For a similar reasoning when the dispute concerns the possibility for a party to a contract to reveal information protected by a confidentiality clause when asked to do so in the framework of court proceedings, see M. FONTAINE and F. DE LY, *op. cit.*, 2003, at p. 321 (according to these authors, « . . . la clause de confidentialité ne peut faire obstacle à la révélation d'informations en justice, lorsque le plaideur en est requis . . . En pareilles circonstances, son indiscretion forcée ne devrait pas entraîner sa responsabilité contractuelle envers son partenaire, la violation du secret étant justifiée par le 'fait du Prince' ou par l'intérêt public »). See also M. BÜHLER, *art. cit.*, *Intl Bus. L.J.*, 2002, (359) at p. 378 and J. MILQUET, *art. cit.*, *Intl. Bus. L. J.*, 1991, (153), at p.157-158.



that the answer to this question differs according to the applicable law. Some legal systems tend to favor the principle *pacta sunt servanda* and limit or even exclude the possibility for one party to call upon a case of *force majeure* to justify a breach of contract – this is especially the case under French law which only recognizes a limited version of the *force majeure* doctrine and rejects in principle the doctrine of *imprévision*. In other legal systems, there is more room for a party to escape liability if it can demonstrate that a so-called supervening event which parties did not expect, rendered performance impossible.<sup>139</sup> So it is that under French law, the intervention of the government, e.g. under the form of the adoption of a new provision requiring disclosure of certain information, may constitute a cause of excuse under Art. 1148 of the French Civil Code.<sup>140</sup> In order to qualify as an excuse, the '*fait du prince*' must, however, be legitimate, unforeseeable and irresistible. Under certain circumstances, such a *fait du prince* may even justify adapting the agreement to the new circumstances.<sup>141</sup> Courts have in some instances refused to accept that the intervention of government constitutes a situation of force majeure susceptible of immunizing a party against liability.

Comparative analysis learns that in most legal systems, a party to a contract may validly breach its obligation under the agreement provided the breach is the result of the unforeseeable and irresistible intervention of government. Under English law, this is known as the doctrine of *frustration*. It is accepted under English law that a subsequent change in the law or in the legal position affecting a contract is a head of frustration.<sup>142</sup>

Drawing upon this analysis, a party who is or has been involved in an arbitration process and is by this fact under a duty of confidentiality in respect of all or some of the information related to the arbitration, could attempt to escape liability by showing that compliance with a duty of disclosure falls under one of the doctrines of frustration. As the duty of confidentiality and the liability which could arise as a consequence of the breach of this duty, are closely connected to the arbitration proceedings, one could argue that the applicable law is the law of the arbitration agreement. It is this law which provides a duty of confidentiality. Accordingly, it is in this law that one should determine whether liability exists or not.

The doctrine of '*fait du prince*' does not appear, however, to be an absolute defence to liability for breach of the confidentiality. If one takes the example of French law, the duty to disclose information will only constitute a valid excuse provided it is irresistible and unforeseeable. The first requirement will be met if there is no escaping from the obligation.

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139 For a comparative overview, see e.g. A. FARNSWORTH, « Comparative Contract Law » in *The Oxford Handbook of Comparative Law*, R. ZIMMERMAN and M. REINMAN (eds.), OUP, 2006, at pp. 926-927 and K. ZWEIGERT and H. KÖTZ, *Introduction to Comparative law*, Oxford, Clarendon, 1998, at pp. 516-536. See also the useful compilation of precedents in *Casebook on the Common Law of Europe – Contract law*, H. BEALE et al. (eds.), Hart, Oxford, 2002, at pp. 592 ff.

140 See e.g. F. TERRÉ, P. SIMLER and Y. LEQUETTE, *Les obligations*, Dalloz, 2005 at p. 573, § 584.

141 See the explanations of J. GHESTIN, C. JAMIN and M. BILLIAU, *Les effets du contrat*, in *Traité de droit civil*, LGDJ, Paris, 2001, at pp. 373 ff, § 311 ff.

142 See e.g. *Chitty on Contracts*, 29<sup>th</sup> ed., Sweet & Maxwell, 2004, at p. 1323, § 23-021; P. S. ATIYAH, *An introduction to the law of contract*, 4<sup>th</sup> ed., Clarendon Press, 1989, at p. 248 and M. P. FURMSTON, *Cheshire, Fifoot and Furmston's Law of Contract*, 15<sup>th</sup> ed., OUP, 2006, at p. 728.

If it appears that the law offers an excuse and that the party has not used it, liability is in order.<sup>143</sup> Turning to unforeseeability, this requirement appears *prima facie* to raise difficulties. Strictly speaking, frustration only offers a defence to a liability claim if the supervening event was not known when parties concluded the agreement. This seems difficult to reconcile with the fact that disclosure requirements imposed to companies are well known and even though they may be modified from time to time, the substance remains. Likewise, the duty to appear in court as a witness rests upon legal provision which are well known and established.

A closer examination reveals, however, that the doctrine of frustration could still prove useful, in particular when the disclosure is the consequence of a court order. In that case, the party under the obligation to disclose, could validly argue that it could not have reasonably foreseen, when entering the agreement to arbitrate, that it would one day be summoned by a court to disclose information. Everyone may be deemed to know the law and hence to be aware of the fact that court have the possibility to issue an order to produce information. It is rather the court proceedings and not the statute, which constitutes the unforeseen contingency preventing the performance of the duty of confidentiality. Unless such proceedings were already started when parties agreed to refer disputes to arbitration, it is not unreasonable to accept that the proceedings constitute an irresistible and extraneous cause for which the party under the obligation to disclose does not bear responsibility.

If the requirement of unforeseeability could be met, so should the fact that the agreement to arbitrate may be governed by a foreign law not raise too difficult a problem. It may indeed be that the *fait du prince* finds its origin in a decision of a foreign government, i.e. another State than the State where the arbitration has its seat and than the State whose law governs the agreement. This does not need to change the outcome or at least prevent using the doctrine of frustration to resolve the opposition between disclosure and confidentiality. Foreign *fait du prince* are taken into account by modern laws of contract.<sup>144</sup>

To conclude, several methods could be used to solve the antagonism between on the one hand a contractual duty of confidentiality and on the other hand a statutory requirement of disclosure. Given the variety of situations in which such conflict could arise, one should probably keep all options available and examine in each case what the preferred method should be. As with the solutions suggested for the preceding scenario, the difficulty lies not so much in selecting the techniques which could offer a solution, but in applying these different techniques taking into account the concrete circumstances. A practical example of difficulty which could arise relates to the information which should be given to the contract partner : if one party who is or has been involved in arbitration, is or is threatened to come under a court order mandating disclosure, should that party give notice to the other party about the court order? Given the flexibility inherent in the doctrine of frustration and the

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143 Hence, in order to escape liability, the party under the duty of disclosure should first attempt to obtain the benefit of one of the exceptions provided by the applicable law. A debate could arise if it appears that a party did indeed request the benefit of such an exception but the other party argues that the request was not sufficiently motivated.

144 See for English law, e.g. *Chitty on Contracts*, 29<sup>th</sup> ed., Sweet & Maxwell, 2004, at p. 1325, § 23-026. In general, P. KINSCH, *Le fait du prince étranger*, L.G.D.J., 1994, at pp. 18-50 (Mr. Kinsch offers an overview of the effects of foreign 'fait du prince' under French, English and US law).

overall principle of good faith which should govern performance of a contract, it is not excluded that a court finds that such notice should have been given in order to benefit from the supervening event.<sup>145</sup>

### **By way of conclusion**

When reviewing the changes to be made to its arbitration rules in 1998, the ICC decided not to include a specific provision on confidentiality of the arbitration proceedings in view of the fact that the law on this issue was in a state of development and conflict.<sup>146</sup> If anything, the preceding analysis has revealed the uneasiness surrounding both the scope and effects of the principle of confidentiality in international commercial arbitration remains. When one considers the impact such principle may have on the relationship with third parties, the picture is even more troubled. The law on these questions is far from settled. Questions abound and answers are more tentative than firmly grounded. This should suggest that parties are well advised to take the law in their hands and provide for an express confidentiality agreement which also covers arbitration proceedings. This could be done either *ex ante* when parties enter into a contractual relationship – the confidentiality covenant could then be added to the agreement to arbitrate disputes. Parties could also confirm their wish to keep all information related to arbitration confidential when the dispute has arisen. The confidentiality covenant could then for example be included in the Terms of Reference.

These contractual stipulations, which should be drafted with care for all details,<sup>147</sup> may not prevent all difficulties, not in the least because the clause will only have effect between parties and will not be binding upon third parties. A limited measure of self help protection is, however, better than no protection at all.

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145 See in that sense in general for the effects of court orders requesting disclosure on confidentiality agreements, M. FONTAINE and F. DE LY, *op. cit.*, 2003, at p. 321.

146 As explained by W. L. CRAIG, W.W. PARK and J. PAULSSON, *International Chamber of Commerce Arbitration*, 3<sup>rd</sup> ed., Oceana, Dobbs Ferry, 2000, at p. 314, § 16.06

147 Parties should at least consider whether is the proceedings, the documents, the award and/or possibly the very existence of the arbitration which should be confidential and whether such information may nevertheless be made public in specified circumstances, such as in the framework of enforcement proceedings, court challenges, when a party is under a court order or is required by statutory rules (such as SEC Regulations), or to satisfy insurers, auditors and other parties, to disclose information. The clause may also address of what sanctions shall follow in the event of breach.