



CONFIDENTIALITY OF AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION

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LL.M. SHORT THESIS

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Abstract

Within the last decade confidentiality became an important topic in international commercial arbitration. Confidentiality has been regarded as a self-evident attribute, one of the reasons why parties choose to arbitrate. But following a 1995 decision of the High Court in Australia, the concept became a matter of scholarly debate and the focus of decisions of arbitration tribunals and state courts. Since the famous *Australian Esso v. Plowman* case many books, publications and court decisions dealt with the notion and extent of confidentiality, which led to different approaches in different countries. The once inherent perception of confidentiality is now highly diverse and fragmented in the various rules.

The materials I have studied during my research have convinced me that confidentiality is a very important issue which has to be dealt with care as early as possible at the outset of an agreement. On the other hand it is of crucial importance that the arbitral awards are available to the public in sufficient quantity for the development of commercial arbitration. To achieve availability to this extent systematic publication is needed. After studying the relevant sources the conclusion necessary follows that confidentiality should not bar the publication of the awards. There are several proposed solutions by which the publication becomes possible without the disclosure of confidential information. The confidentiality of the decisions may be preserved, while the awards are open for those who are interested in arbitration. The systematic mass publication of awards creates precedents, which may gradually lead to the emergence of arbitral jurisprudence. In this respect we may take a look at investment arbitration, where most of the final awards are public and thus case law started to crystallize. This level of transparency may be achieved in commercial arbitration should the necessary steps be taken by the appropriate parties, arbitrators and the institutions.

Introduction

Arbitration as one of the means of dispute resolution has been used instead of court litigation for a long time for its many benefits. One of these perceived advantages is the confidentiality of the procedure, the documents and the award. Confidentiality has been regarded as a self-evident attribute in arbitration, one of the reasons why parties choose to arbitrate. This has essentially changed within the last few decades. Confidentiality has become a controversial issue. The existence, extent and the bases of confidentiality are still a matter of scholarly debate and occasionally the focus of decisions of arbitration tribunals and state courts.

The trigger for this current flurry was the decision of the High Court of Australia in the case *Esso v. Plowman* (1995)¹. The ruling of the Australian Court disturbed the perceived existence of confidentiality in international commercial arbitration. “The High Court in a divided opinion, declined to recognize a broad obligation of confidentiality applying to all documents and information provided in and for the purposes of arbitration”.² The decision was highly debated in many countries (e.g. England) while others considered it as a general guideline for confidentiality questions (e. g. Norway). Since then many publications and court decisions attempted to define how far the notion of confidentiality extend, which lead to fundamentally different approaches in different countries.

In my thesis while providing a general overview of the topic, I will take a closer look at one of the facets of confidentiality, namely at the confidentiality of the arbitral awards. In commercial arbitration most of the awards are not disclosed due to an implied or expressed

¹ *Esso Australia Resources Limited and Others contra The Honorable Sidney James Plowman* (Minister for Energy and Minerals)

² Pryles, Michael, *The Leading Arbitrators Guide to International Arbitration, Confidentiality* (Chapter 19), ed. by Lawrence W. Newman and Richard D. Hill, 2004, Juris Publishing Inc., p. 416

obligation of confidentiality. Interestingly at the same time in another area of arbitration, investment arbitration, most of the final awards are available to the public. In this field the inherent public interest led to systematic publication of the arbitral awards. The identical solution repeated in a number of different cases contributed to the gradual emergence of arbitral jurisprudence in the field of investment arbitration.

Seeing the positive effects of publication in the evolution of investment arbitration, recent studies stress the need for publication in commercial arbitration. For similar development it is of crucial importance that final awards are available in sufficient quantity in commercial arbitration also, so as to provide precedent for future proceedings and develop clear practice. This high degree of transparency may be achieved only through systematic publication of the awards, which raises the problem of confidentiality.

In the thesis special emphasis is put on the question of whether confidentiality is a valid objection against the publication of the awards. Examining the relevant legislation and publications of many experienced scholars, one may draw the conclusion, that there is no overriding principle of confidentiality which would impede publication. Possible solutions are proposed for creating balance between the underlying interest of the parties in confidentiality and a uniform system of publication. Furthermore the paper examines the relevance of arbitral precedents and attempts answering the question whether arbitral jurisprudence is reality in international commercial arbitration.

Regarding the structure, the first two chapters provide a general overview on the notion of confidentiality, and examine the current state of the legislation in different legal systems. The third chapter is devoted to the disclosure of the award with special emphasis on publication. The possible exceptions to confidentiality and the remedies in case of unilateral disclosure are also mentioned under this heading. The fourth chapter discusses the concept of arbitral precedent and the possibility of the emergence of a settled arbitral case law.

I. Meaning of the term confidentiality

1.1 Definition of confidentiality

What is confidentiality? The notion of confidentiality is not defined by statutory norms or case law. Most of the books and articles written on the topic also get off to a running start without any definition. The only definition I found while I studied several books, journals and internet sources, was made by L.A. Mistelis, who concludes that “Confidentiality in its purest form, means that the existence of the arbitration, the subject matter, the evidence, the documents are prepared for and exchanged in the arbitration, and the arbitrators’ awards and other decisions cannot be divulged to any third parties.”³

To provide a proper definition is extremely hard since the existence, extent and the bases of confidentiality are still highly debated among scholars, arbitration tribunals and state courts. Most of the time the notions confidentiality and privacy are mentioned side by side but the nature of this relationship is also debated. In order to get closer to the true nature of confidentiality the connection between confidentiality and privacy has to be examined.

³ L. A. Mistelis, ‘Confidentiality and Third Party Participation; UPS v. Canada and Methanex Corporation v. United States’ (2005) 21 *Arbitration International* 211 quoted by George Burn and Alison Pearsall, *Exceptions to Confidentiality in International Arbitration*, ICC International Court of Arbitration Bulletin, 2009 Special Supplement, Confidentiality in Arbitration, Commentaries on Rules, Statutes, Case Law and Practice, International Chamber of Commerce (ICC), 2009, p. 24

1.2 General distinction between confidentiality and privacy

One of the main differences between arbitration and litigation is that the arbitral proceedings are private in nature while court proceedings are generally open to the public and the decisions are reported publicly. Privacy and confidentiality are the main reasons why parties choose arbitration over court litigation. It is often remarked that they are among the “hallmarks” of arbitration.

Privacy is generally considered alongside with confidentiality but it is nevertheless not the same. The two notions represent two independent, distinct concepts. According to Dr. Julian D.M. Lew, privacy is concerned with the rights of persons other than arbitrators, parties and witnesses to attend meetings and hearings and to know about the arbitration. Confidentiality is the obligation of the arbitrators and the parties not to divulge or give out information relating to the contents of the proceedings, documents or the award.⁴

One of the fundamental principles of arbitration is that arbitration proceedings are private.⁵ Privacy is the automatic consequence of the contractual nature of arbitration, “it derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising from them and only between them. It is implicit in this that strangers shall be excluded from the hearings and the conduct of the arbitration...”⁶ Privacy is largely defined by national laws and institutional rules and the concept remained undisputed.⁷ By definition it is generally

⁴ Expert Report of Dr. Julian DM Lew in *Esso/BHP v Plowman* (1995) 11 *Arbitration International* No. 8, p. 285

⁵ Sundra Rajoo, *Privacy and Confidentiality in Arbitration* (2003) at http://sundrarajoo.com/wp-content/uploads/2009/09/privacy_1_.pdf (2010-02-08)

⁶ Leggatt J in the decision *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha, (The Eastern Saga)* (1984) quoted by Sundra Rajoo in *Privacy and Confidentiality in Arbitration*, see source above at note 3

⁷ As Redfern and Hunter notes „International commercial arbitration is not a public proceeding. It is essentially a private process and this is seen as a considerable advantage by those who do not want discussion in open court, with the possibility of further publication elsewhere, of the kind of allegations which can and do arise in commercial disputes – allegations of bad faith, of misrepresentation, of technical or managerial incompetence, of lack of adequate financial resources, or whatever the case may be.” Allan Redfern, and Martin Hunter with Nigel

taken to refer to the arbitral hearing and the right of persons to attend or be present. Given the fact that arbitration is a private procedure, only the parties to the arbitration agreement and their representatives can attend any arbitration meeting or hearing.⁸

Confidentiality unlike privacy is far from a settled issue. Modern legislation on international arbitration has generally avoided the task of defining and delimiting duty of confidentiality in international arbitration. The recent arbitration statutes of England, Switzerland and Sweden, for instance, do not include general provisions on confidentiality. In domestic case law, widely varying approaches to the question are found. While it is commonly accepted that arbitration hearings are private, there is little analyses and support for an autonomous obligation of confidentiality. By way of illustration Redfern and Hunter see the principle of confidentiality in arbitration as the same as privacy.⁹

On the other hand some of the institutions recognize that confidentiality is only protected in case it extends and is respected by the parties, the arbitrators, arbitral institutions and also by third parties who have access to information. These institutions provide in their rules that everything that takes place at arbitration is confidential in that “neither party nor the arbitral tribunal shall, without the consent of the other, disclose to third persons, except for the purpose of the proper conduct of the arbitration, what has happened in the court of arbitration.”¹⁰

In case law there is little guidance if a distinction is to be drawn between confidentiality and privacy. Regarding the case law in England, it may be argued that the ambitions to attain complete privacy lead to an inherent obligation of confidentiality. Chief Justice Colman remarked in the *Hassneh Insurance* case, “confidentiality, though it was not grounded initially

Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration*, 2004 London, Sweet & Maxwell, p. 27

⁸ See supra note 5

⁹ See supra note 7

¹⁰ See supra note 5, London Court of Arbitration (LCIA) Rules, Article 30, the China International Economic and Trade Arbitration Commission Arbitration (CIETAC) Rules, Article 34, World Intellectual Property Organization (WIPO) Rules, Articles 73-76

in any legal right or obligation, was a consequential benefit or advantage attaching to arbitration which made it an attractive mode of dispute resolution.”¹¹

An adverse point of view is taken in Australia, Chief Justice Mason in the *Esso v Plowman* case remarked, “Despite the view taken...by Colman J in *Hassneh Insurance*, I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration”¹²

Confidentiality may be a consequence of privacy, but the two notions are not synonymous. By all means it might be said that confidentiality cannot exist in the absence of privacy. The two concepts are interrelated, confidentiality can be defined only through privacy. One follows from the other, although it is hard to tell where one ends and where the other starts. According to a distinguished author, while privacy is a concept which prevents strangers from attending a hearing, confidentiality is a concept which imposes obligations on the participants in the arbitration.¹³ The question is that how much confidentiality follows from the private nature of the arbitration procedure. Does arbitration only provide the means to achieve confidentiality, or is there an imposition on the parties as a consequence of arbitration?

Except where parties have otherwise agreed, it is nowadays generally accepted that arbitrations are private and confidential.¹⁴ Arbitrations are to be held in private, and all information regarding the procedure is to be treated as strictly confidential. Today it is the

¹¹ Mason C. J., The Decision of the High Court of Australia in *Esso/BHP v. Plowman*, (1995) 11 Arbitration International p. 246

¹² See supra note 2, p. 422.

¹³ Ibid at p. 446

¹⁴ See supra note 5, relevant cases: *Ali Shipping Corp v. Shipyard Trogir* (1988), *Hassneh Insurance Co. of Israel v. Mew* (1993)

primary expectation of parties to an arbitration that their business and personal confidences will be kept.¹⁵

On the other hand it is highly recommended for parties to include in their arbitration agreement and expressly provide for the nature and extent of confidentiality so as to avoid any possible problem due to the above mentioned inconsistencies.

1.3 Three aspects of confidentiality

Diverse issues of confidentiality may arise in different stages during the arbitration. There are different aspects of an arbitration process and many different types of information are generated and documents produced in connection with the arbitrated issues. The question arises as to whether these issues are within or outside the confidentiality obligation and whether they can lose their confidentiality with the passage of time or under certain circumstances.¹⁶

The mere existence of an arbitration procedure can be an issue in itself. Even the disclosure of the involvement of one party in arbitration can cause harm. The rumor of legal disputes may decrease public confidence in companies which can negatively affect the value of their shares. Parties often opt for arbitration so as to protect their business reputation and to avoid either media attention or negative publicity. But even if it is assumed that there is a general obligation of confidentiality, how can it be reconciled with an obligation of the party to provide information to its shareholders or banks providing finance? May a party disclose that he is involved in arbitration with another party? Can he name the other party? The answers to these questions are not entirely clear, but the reasoning of the High Court of Australia in *Esso*

¹⁵ See supra note 5

¹⁶ Quentin Loh Sze On Sc, Edwin Lee Peng Khoo, Confidentiality in Arbitration: How far does it extend?, 2007, Singapore Academy of Law, p. 64

v Plowman suggests that there is no confidentiality attaching to the existence of arbitration. The position might be different in England.¹⁷

The most common aspect of confidentiality concerns the documents and information disclosed or obtained in the course of arbitration. This issue can arise during the arbitral proceeding itself, or after it was terminated, for example, in a subsequent judicial or arbitral proceeding. A party who assumes confidentiality will take it for granted that the documents and other information related to the arbitration cannot be used for other purposes. In England it is a common position that 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.¹⁸ Although this point of view is not shared in Australia.

Following the conclusion of an arbitration a third facet of confidentiality may arise, which is the confidentiality of the award itself. Is the award confidential or can it be published to third parties? Some arbitral institutions regularly publish the award removing parties' names and business data. Even under these circumstances a party might fear that some of the indications and descriptions are too explanatory and give hints about the parties in the dispute. Furthermore the obligation on a party to satisfy an award and pay damages can be subject to reporting obligation to shareholders, providers of finance and/or authorities. Another question arises regarding the extent of confidentiality at the enforcement stage, which will require the disclosure of the award in the court proceeding.

In summary we can say that confidentiality is far from a settled issue. There is no uniform regulation regarding these different aspects of confidentiality, the relevant legal sources contain diverse regulation.

¹⁷ See supra note 2, p. 447

¹⁸ Confidentiality in Arbitration, a presentation by Adam Robb, at 39 Essex Street, Wednesday 5th May 2004, at <http://www.39essex.co.uk/resources/publications.php> (2009-12-17)

II. An analyses of the legal sources of confidentiality

2.1 Institutional rules governing arbitration

In determining the level of confidentiality afforded to arbitration, a number of key considerations arise: the express agreement between the parties, the law governing the contract in question, the law of the place of arbitration, and the relevant institutional rules.¹⁹ If the parties designate that the arbitration will be governed by a particular set of arbitration rules, the confidentiality provisions in those institutional rules will apply to the dispute. International arbitration rules tend to fall into one of three categories.²⁰ The first category consists of rules which remain silent on confidentiality. Examples include the arbitration rules of the two most influential institutions, the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC). Both of the rules protect privacy but not confidentiality. Article 25 (4) of the UNCITRAL arbitration rules provides that “hearings shall be held in camera”, but confidentiality is not mentioned per se. This absence of regulation is significant because the UNCITRAL rule served as a model for many countries, which automatically means that the arbitration rules of these countries are silent on confidentiality too.

The ICC Rules of Arbitration make no provision for confidentiality either. The only section which mentions confidentiality is Article 20(7) which provides that “the Arbitral Tribunal may take measures for protecting trade secrets and confidential information.” There is some misunderstanding regarding the actual content of this rule between authors. According to

¹⁹ Sarah Walker, Bodil Ehlers, Lost in translation – what does confidentiality in arbitration really mean at http://www.twobirds.com/English/News/Articles/Pages/Lost_in_translation_confidentiality_arbitration.aspx (2010-02-09)

²⁰ See supra note 2, p. 448

Antonias Dimolitsa “this provision and the lack of any definition of ‘confidential information’ is rightly interpreted as granting the arbitral tribunal the power to issue an order protecting the confidentiality of pleadings, witness statements, the award and other information relating to the information or even its existence”.²¹ Contrary to this opinion Michael Pryles holds that “this rule does not on its face appear to make documents and other information provided in an arbitration confidential.”²² The primary reason for the lack of regulation is the difficulty agreeing on an appropriate formulation of a confidentiality rule. Both the UNICITRAL and the ICC preferred to avoid the regulation of this question after long consideration due to the lack of a uniform answer in national laws as to the nature and extent of confidentiality.²³

The second category of institutional rules contains limited provisions on confidentiality. An example for this is the international arbitration rule of the American Arbitration Association (AAA). The AAA rule contains an express confidentiality provision, but it is somewhat incomplete. Article 34 states that “Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or administrator. Except as provided in Article 27, unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.” The rule makes all matters relating to the arbitration or the award confidential but it appears that it seeks to bind only the arbitrator and the administrator but it does not bind the parties or the witnesses.

A third category of institutional arbitration rules contain extensive provisions on confidentiality. The London Court of International Arbitration (LCIA) deserves to be

²¹ Antonias Dimolitsa, Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration in Confidentiality in Arbitration, ICC International Court of Arbitration Bulletin, 2009 Special Supplement, Confidentiality in Arbitration, Commentaries on Rules, Statutes, Case Law and Practice, International Chamber of Commerce (ICC), p. 9

²² Supra note 2, p. 449

²³ In its 1996 Notes on Organizing Arbitral Proceedings, UNICITRAL stated that ‘there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case’ and suggested that ‘the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality’.

mentioned foremost since it was the first institution which introduced a sophisticated confidentiality provision in 1998. Article 30 contains an express provision dedicated to arbitration confidentiality. This rule served as a model for other institutions which followed suit closely, more or less.

The Chinese arbitration rules provided by the China International Economic and Trade Arbitration Commission (CIETAC) contain regulation regarding both privacy and confidentiality in Article 33. The rule first states that “hearings shall be held in camera”, the second section of the Article continues “for cases heard in camera, the parties, their representatives, witnesses, interpreters, arbitrators, experts consulted by the arbitral tribunal and the relevant staff-members of the Secretariat of the CIETAC shall not disclose to any outsiders any substantive or procedural matters of the case.”

Finally some words have to be devoted to the most lengthy and precise regulation of the concept of confidentiality provided by the World Intellectual Property Organization (WIPO) Arbitration Rules. Due to the fact that WIPO cases usually deal with trade secrets, confidentiality is of primary importance and a foremost consideration. The whole of Chapter 7 is devoted to the matter of confidentiality. The Articles within the Chapter deal with the various aspects of confidentiality. Article 73 regulates “Confidentiality of the Existence of the Arbitration”, Article 74 reads as “Confidentiality of Disclosures Made During the Arbitration”, Article 75 contains the prevailing rules regarding “Confidentiality of the award” and finally Article 76 rules on “Maintenance of Confidentiality by the Center and Arbitrator.” It may be concluded from this short comparative survey that the institutional rules vary in their degree of detail and sophistication regarding confidentiality. We may find elaborated provisions which aim to cover all kinds of confidentiality issue which may arise during the arbitration (WIPO Rules), but there are institutions which do not address this issue at all (UNCITRAL, ICC). Therefore parties for whom confidentiality is of primary importance

have to choose carefully among these rules and incorporate the most favorable into the arbitration agreement.

2.2 National laws on confidentiality

It is inherently-understandable that giving thought to the issue right at the outset of a contract and including a mutual confidentiality agreement can save considerable uncertainty in the sequel. However the haste to seal a deal often means that parties do not think that far ahead. Equally, parties may actually consider the issue but think incorrectly, that it works in all countries as in their own. In the absence of any express provision regarding confidentiality, the parties must look to the governing national law.²⁴ The position on confidentiality and privacy varies greatly between jurisdictions. A very few national statutes contain provisions regarding confidentiality (Norway, New Zealand). Indirect regulation exists through case law however the decisions often reflect contradictory results. This present overview focuses on (some of those) national systems that take a particular position. These countries can be divided into two categories: National systems which reject an implied duty of confidentiality (Norway, Australia, United States) and countries which recognize such an obligation (New Zealand, England, France).

Starting with the first category, Norway is one of the few states which adopted regulation on confidentiality in national statutes. The general provisions of the Norwegian Arbitration Act declare the inexistence of any obligation of confidentiality with respect to the proceedings and the award: “unless the parties have agreed otherwise, the arbitration proceedings and the decisions reached by the arbitration tribunal are not subject to a duty of confidentiality.”²⁵ The

²⁴ See supra note 19.

²⁵ Norwegian Arbitration Act, Chapter 1, section 5, supra note 21, p. 14

Act does not protect privacy either express agreement is needed if the parties want to conduct the hearings in private.

In its case law, Australia has also rejected a general duty of confidentiality. In the famous 1995 decision *Esso v Plowman* the High Court shook the international arbitrating community by rejecting the, at the time, well-settled English principle of confidentiality in arbitration. The Australian Minister for Energy and Minerals brought an action against two utility companies seeking a declaration that information disclosed in the course of arbitration is not subject to any obligation of confidence. In its ruling the Court held that confidentiality, unlike privacy, is not “an essential attribute” of commercial arbitration, therefore the Minister, who was not a party to the arbitration, was entitled to discovery of arbitration documents and information.²⁶ The court did nevertheless acknowledged that an obligation of confidentiality can be imposed on the parties through express contractual provisions.

The United States is also among the countries which does not impose a confidentiality obligation upon the parties. Neither the Federal Arbitration Act nor the Uniform Arbitration Act set forth such an obligation and there are many court decisions which explicitly reject an implied duty of confidentiality. In the most often discussed *United States v. Panhandle Eastern Corporation* the Court granted the United States Government’s request for the production of documents in a subsequent arbitration proceeding between Panhandle and the Algerian national oil and gas company. In a more recent case between *Lawrence E. Jaffee Pension Plan* and *Household International, Inc.*, the court also compelled the production of documents from a former arbitration, notwithstanding an explicit confidentiality agreement between the parties covering all documents disclosed in connection with the arbitration. In summary U.S. case law seems to be stable in its reluctance to grant orders protecting

²⁶ Jeffrey W. Sarles: Solving the Arbitral Confidentiality Conundrum in International Arbitration at <http://www.appellate.net/articles/Confidentiality.pdf> (2010-02-10)

arbitration communications and persistently rejects the notion of an innate duty of confidentiality.²⁷

As members of the second category (national laws which recognize a duty of confidentiality) I will mention New Zealand, the United Kingdom and France. The New Zealand regulation is the reverse of the Norwegian, since New Zealand is the only country which has explicitly codified a duty of arbitral confidentiality. The New Zealand Arbitration Act of 1996 explicitly sets forth that confidentiality is an implied obligation of the parties. The relevant section states that unless they agree otherwise, “the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings”²⁸. The explicit enactment of the confidentiality obligation is due to an inverse reaction to the Australian case *Esso v Plowman*. The legislators wanted to avoid the Australian decision serving as a precedent in New Zealand’s courts.²⁹

The English Arbitration Act is silent on the confidentiality issue and has left the regulation of the matter to the courts entirely. Through many significant decisions on the topic the following principles were established. First English case law sees it as self evident that arbitration proceedings are held in private, and generally does not allow exceptions thereto. Furthermore English law recognizes an implied obligation of confidentiality binding on the parties, which implicitly arises from the very nature of arbitration. In *Dolling Baker v Merrett & Another* the Court of Appeal asserted about the arbitration proceedings that “...their very nature is such that there must ...be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in arbitration, or transcripts or notes of the evidence in the arbitration or the award...”³⁰

²⁷ See supra note 21, p. 16

²⁸ See supra note 26.

²⁹ See supra note 21, p. 16

³⁰ See supra note 21, p. 18, quote by the author, Antonias Dimolitsa from the case *Dolling Baker v Merrett & Another*

French law seemed to provide even tighter protection for the confidentiality of arbitral proceedings and award, at least in the most often quoted French case *Aita v Ojeh*. The Court dismissed an action to annul an arbitral award rendered in London and penalized the party bringing the annulment action for breaching the inherent confidentiality principle in arbitral proceedings.³¹ Nevertheless in a recent case (*Société National Company for Fishing and Marketing 'NAFIMCO' v. Société Foster Wheeler Trading Company AG*), in which the claimant applied for setting aside an arbitration award, the Paris Court of Appeal rejected respondent's counterclaim for damages for violation of confidentiality. The Court observed that the respondent "abstains from providing an explanation for the existence of and reasons for a principle of confidentiality in French law of international arbitration".³² This last decision reflects certain 'drawing-away' from the legal theory that "French law contains a presumption of confidentiality in arbitration."³³

2.3 Contractual confidentiality agreements

Since the Australian High Court decision in *Esso v Plowman* we know that without an explicit provision on confidentiality, there is always a possibility that a given court will reject confidentiality as an inherent concept in arbitration proceedings. If parties in arbitration wish to ensure the confidentiality of the proceedings and the award, they may need to provide for their own confidentiality clause. This will be necessary if the applicable national law does not contain provisions regarding confidentiality or there is uncertainty as to which national law applies.³⁴

³¹ See supra note 26.

³² See supra note 21, p. 21, quote by the author from the case *NAFIMCO*

³³ See supra note 21, p. 21

³⁴ See supra note 2, p. 454

The easiest way to incorporate confidentiality obligations into the agreement is to adopt the rules of an arbitration institution. However as we have seen earlier, many of the commonly used arbitration rules say little or nothing on the topic, so selection should be made with the greatest possible care.

The parties can also devise their own confidentiality rules. These so called ‘ad hoc’ confidentiality provisions can be incorporated into the main contract between the parties or the parties may conclude a confidentiality agreement at a later stage, after the commencement of a dispute. Both these scenarios bear certain risks. According to Michael Pryles “neither course may be easy”.³⁵ The parties may lack the enthusiasm and the interest to devote the necessary time to prepare an extensive confidentiality clause to be inserted into their substantive contract. After a dispute has arisen and one of the parties has commenced arbitration, the relationship may have so deteriorated between the parties that a mutual agreement on confidentiality is not a possibility anymore.

Notwithstanding, there are three matters which should be considered by the parties who draft an ad hoc agreement. The first question is that which issues are to be covered in the agreement. The three aspects mentioned in section 1.3 may be the subject of the clause (the existence of the arbitration, the documents or other evidence produced in the arbitration and the award). The second matter relates to the extent of the confidentiality obligation. It is unrealistic and undesirable to establish an absolute provision, in certain situations there is a legitimate need to divulge certain information (e.g. enforcement proceeding). On the other hand the clause should provide adequate protection against unilateral disclosure. Finally the clause must denominate those persons who are to be covered by the confidentiality obligation (e.g. arbitrators, parties, witnesses..).³⁶ In drafting a good and comprehensive confidentiality

³⁵ See supra note 2, p. 455

³⁶ See supra note 2, p. 456-458

agreement the parties may find that some of the institutional rules serve as a good precedent (WIPO rules are typically excellent as a model).

In spite of all inadequacies, leading arbitrators agree in suggesting the stipulation of a clear duty of confidentiality upon all the persons involved in the arbitral proceedings for parties desiring confidentiality in arbitration.

III. Confidentiality of arbitral award

3.1 Legal background

Most of the institutional rules place an obligation upon the parties and the institution not to disclose the award without the consent of the other party. According to Article 30(3) of the LCIA Rules: “The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.”³⁷ The procedural rules of the American Arbitration Association (AAA) contain very similar provisions, according to Article 27(4): “an award may be made public only with the consent of all parties or as required by law.”³⁸ The UNICITRAL Rules also prohibit the publication of the award without the consent of the parties, but this contractual obligation is assumed by the parties and it is not an obligation incumbent on the institution. Article 32(5) reads as follows: “an award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”³⁹

The Rules of the ICC may be singled out again, since there is no specific rule relating to publication. The only relevant provision, Article 28(2), states that awards shall not be available to anyone other than the parties.⁴⁰ The WIPO followed also a different pattern, the arbitration rules set out explicitly the conditions in which arbitration awards may be disclosed to third parties. Article 75 states that disclosure may take place “where both parties consent,

³⁷ LCIA Arbitration Rules at http://www.lcia.org/ARB_folder/arb_english_main.htm#article26 (2010-03-06)

³⁸ American Arbitration Association – International Arbitration Rules (amended and effective September 1 2000) at <http://www.jus.uio.no/im/american.arbitration.association.international.arbitration.rules.2000/doc.html#129> (2010-03-06)

³⁹ See *supra* note 21, p. 7

⁴⁰ See *supra* note 21, p. 7

or where it falls into the public domain as a result of an action before a national court or other competent authority, or where disclosure is a legal requirement imposed on a party or for the purpose of establishing or protecting a party's legal rights against a third party.” Notwithstanding it has to be noted that a kind of disclosure takes place when institutions, such as the ICC, publish “edited and redacted copies” of arbitral awards to serve as a guide for lawyers and arbitrators.⁴¹

Regarding the national arbitration acts, there is no uniform legislation. The few national statutes that include provisions on confidentiality are contradictory. Previously the main differences have been discussed between the various national regimes in section 2.2. Here only some concluding remarks will be provided. Among those countries which explicitly regulate the confidentiality of the award one of the extreme is the Norway, which declares the nonexistence of any obligation of confidentiality (except where the parties agree otherwise) with respect to the award (Norwegian Arbitration Act, Chapter 1, Section 5). New Zealand is the other end of the “scale”, the New Zealand Arbitration Act explicitly prohibits the disclosure of confidential information in Article 14B.

In common law jurisdictions the legal basis for confidentiality may be found in case law. The confidentiality-friendly English courts consistently insist on the general rule of the confidential nature of the arbitral award. There are limited exceptions evolved also by case law, which nevertheless question the validity of the rule as such. In *Hassneh Insurance Co. of Israel and others v Mew* for example, the judge held that the award was “potentially a public document for the purposes of supervision by the courts or enforcement in them” and therefore ruled that the award may be disclosed in circumstances where the disclosure was reasonably necessary to establish or protect a party's legal rights vis-à-vis third parties.⁴²

⁴¹ See supra note 7, p. 30

⁴² See supra note 7, p. 31

We have to point out repeatedly, that the only certain way to avoid disputes relating to confidentiality issues, and so the undesirable unilateral disclosure of the award, is to provide for a clear and unambiguous provision in the initial agreement. On the other hand it is admitted, that there are situations when an award need to be made public (for example enforcement proceeding by the national court). The following pages will discuss the necessity and importance of disclosure by publication.

3.2 Disclosure of awards by publication

Publication of the awards is one of the heavily discussed topics in today's arbitration practice. There is a growing demand and support in favor of wider availability of final arbitration awards. Contrary to these efforts, most of the time awards remain unpublished. On one hand there is a legitimate concern by the parties that publication may result in the disclosure of confidential information. On the other hand there are strong reasons to support publication.⁴³ These benefits of publication most of the time do not convince the parties to give their consent to the disclosure. It is understandable that at least one, the losing party will not consent easily to the publication of such an award to which, obviously, that party is critical. The Swedish Supreme Court case *Bulgarian Foreign Trade Bank (Bulbank) v. A.I. Trade Finance Inc. (AIT)* may serve as an illustration. In this case regarding the dispute first a separate decision was rendered by the arbitrators. Representatives of AIT provided the decision to the journal Mealey's International Arbitration Report for publication. After noticing the publication Bulbank revoked the arbitration agreement claiming fundamental breach of contract and requested that the arbitration panel declare the arbitration agreement

⁴³ William W. Park, *Arbitration of International Business Disputes*, Studies in Law and Practice, Oxford University Press, 2006 p. 383

invalid. After the panel was hesitant to do so, Bulbank contested the final award. The Swedish Appellate Court ruled against the proposition that the publication of the award constituted a fundamental breach and did not support the implied concept of confidentiality.⁴⁴

In practice most of the time arbitral awards are generally treated as confidential, unless the parties agree otherwise. As a result only few arbitral awards are published without the consent of the parties. During the last two decades, however the situation seems to have changed a bit, with some international arbitration institutions allowing publication of arbitral awards rendered under their auspices (ICC, Stockholm Chamber of Commerce). Typically these arbitration institutions remove the identifying elements of the parties' dispute from the content of the award. There are experts, who do not support this "sanitation" of the awards, holding that it may lead to the omission of important holdings of the arbitrators. They assume that summaries in extracts are frequently insufficient to make a finding possible.⁴⁵

But the situation is still better in institutional arbitration than in ad hoc arbitration, where almost no awards are published, although they probably represent a very consistent share of the total volume of arbitration decisions rendered each year. Therefore it may be said that arbitral institutions are basically the exclusive source of published arbitration awards⁴⁶. In summary "awards are published randomly, depending on whether they have been rendered under the aegis of one of the institutions having a publication policy. In addition, the availability of information depends on the editorial policy of these institutions".⁴⁷

⁴⁴ Tibor Várady, John J. Barceló, III, Arthur T. von Mehren, *International Commercial Arbitration*, A Transnational Perspective, 4th Edition, West, 2009 pp. 584-595

⁴⁵ Alexis Mourre, Alexandre Vagenheim, *Is arbitral Jurisprudence more than a myth?*, at <http://kluwerarbitrationblog.com/blog/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions%E2%80%A6/> (2010-03-08)

⁴⁶ Ibid

⁴⁷ Ibid

3.2.1 Why is there a need for publication?

Recently more and more experts urge systematic publication of complete awards in international commercial arbitration. Chang-fa-Lo, the professor of the National Taiwan University lists ten apparent benefits arising from publication.⁴⁸ He holds inter alia that publishing arbitral awards would help the development of laws and rules applied by the arbitral tribunals and would contribute to the evolution of *lex mercatoria*⁴⁹. In international transactions previous practices or usages may help the arbitrators to make their decisions. Since *lex mercatoria* is not connected to any national law, there are not written statutes referring to it. A more identifiable *lex mercatoria* due to available decisions would increase the predictability of this “spontaneous law”.

Available arbitral awards would also allow others to read and criticize the reasoning of the decisions, which would enhance the progress and the stability of the arbitration system. This helps the parties manage their business, control the possible risks and avoid disputes in the future to some certain extent. Since parties choose the arbitrators who render the decision over their dispute, it is of primary importance that they should be able to evaluate the arbitrator’s previous work. Former awards help them to decide whether they find the potential candidate sufficiently qualified for the settlement of their underlying debate.

Transparency gained by publication would also raise the awareness of the arbitrators and impose a sense of liability on them. It would further them to render comprehensive,

⁴⁸ Chang-fa-Lo, On Balanced Mechanism of Publishing Arbitral Awards at http://www.law.ntu.edu.tw/center/wto/project/admin/SharePics/A_08_05%20pp%20235_Chang-%20fa%20Lo.pdf (2010-03-07)

⁴⁹ There is no uniform definition of the term ‘*lex mercatoria*’. Berthold Goldman describes it as „a spontaneous law, composed of professional usages, legal arrangements and contractual clauses about which one could and should consider whether their repetition does not raise them to the level of customary institutions, of arbitral awards.” Pierre Duprey quotes Berthold Goldman in *Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration Be Distinguished in this Regard from Arbitration Based on Investment Treaties?*, IAI Series on International Arbitration No. 3.), *Towards a Uniform International Arbitration Law?*, ed. by A. V. Schlaepfer, P. Pinsall & L. Degos, Juris Publishing Inc., 2005, p. 260

sufficiently detailed decisions, which would enhance the quality of arbitral awards and make easier the identification of important findings.

Wider availability of awards may be beneficial for the international institutions also, since they would be able to show their expertise and profession in certain fields and accumulate credibility and reputation in the arbitration community.⁵⁰

Finally, publication is of primary importance in training current and future arbitrators. In common law jurisdictions future lawyers and judges learn by the case law method, which means that they are expected to study and understand the law through critical examination of a series of cases that were decided according to different principles. As argued by Alexis C. Brown “just as future lawyers and judges (at least in common law nations) learn by the case law method, future arbitration counsel and arbitrators could learn from the work of those already established in the field.”⁵¹ Studying former decisions is also of equal importance for civil law lawyers in order to become a professional arbitrator.

Although it is admitted that an important part of arbitral decisions may not represent any interest (e.g. awards settle only issues of fact), “publication on the whole would contribute to the strengthening of the fairness and the quality of the arbitrators, the arbitration procedures and of the arbitral awards and thus could enhance the willingness of the parties to resort to arbitration procedures in the future.”⁵² Therefore it may be concluded that publication is of crucial importance for the further development of commercial arbitration. The question arises whether publication and the parties’ interest in confidentiality are reconcilable.

⁵⁰ See supra note 48.

⁵¹ Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969, 1014, (2001)

⁵² See supra note 48.

3.2.2 The way to create balance between confidentiality and publication

The importance of publication was recognized even 25 years ago by Dr. Julian D.M. Lew. He reached the following conclusion:

“the publication of arbitral award would...identify the real advantages of arbitration: specialist and expert arbitrators operating on the international level. The development of an arbitral case law would give to arbitration a greater certainty than that presently existing, with respect to the probable attitude of the arbitrators, and would facilitate the commercial world’s knowledge and acceptance of the *lex mercatoria*. This would almost certainly obviate many recurring problems presented to arbitrators and would influence the negotiating attitudes and commercial decisions of businessmen. Above all, the systematic publication of arbitration awards would show that not only is arbitration an alternative to national courts as a system of dispute settlement, but it would prove conclusively that arbitration is the most appropriate forum in which to resolve disputes arising out of international commerce.”⁵³

The suppositions of Dr. D.M. Lew are still valid today. Unfortunately awards are still not available in sufficient quantity which would be necessary for the realization of the above mentioned advantages. At the same time it is often submitted that a systematic publication of full arbitration awards would go against the confidential nature of arbitration. It is necessary to examine whether the confidentiality principle may be balanced with the publication of the awards. To be able to decide this issue we have to examine the parties’ underlying interests in non-disclosure.

The first and most often expressed reason for the importance of confidentiality is the protection of trade secrets. There is a genuine interest of the parties deriving from the need of protecting undisclosed information of economic value. On the other hand under the recent publication policies confidential business data are removed from the awards before disclosure, so this fear should not hinder the publication of the decisions.

⁵³ Julian D.M. Lew, The case for the publication of arbitration awards, in *The Art of Arbitration –Essays on International Arbitration- Liber Amicorum Pieter Sanders* 12 September 1912-1982, p. 223 (Kluwer 1982), quoted by Alexis Mourre in *Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards*, IAI Series on International Arbitration No. 5.), *Precedent in International Arbitration*, ed. by Y. Banifatemi, Juris Publishing Inc., 2008 p. 39

The parties often want to keep secret even the existence of a dispute and the parties to it. Simultaneously it may be argued that there is hardly any dispute that does not have any connection with other persons (for example shareholders, creators or debtors of a party), which means that in today's globalizing economy the existence of a dispute is less likely to remain secret.⁵⁴ Notwithstanding the international institutions remove the names of the parties' prior publication. Some might argue that it is not impossible to match the parties with the award rendered even when the names do not appear in the document, but this minimal risk of being identifiable should not outweigh the benefits of the wider availability of awards. By way of illustration the International Chamber of Commerce discloses arbitral decisions only at least three years after they were rendered by the arbitrators. Therefore one might wonder "what would be rationale of preventing the publication of an award years after it was rendered if the names of the parties and any potentially secret or confidential information has been removed".⁵⁵

Thirdly the parties often desire to avoid the disclosure and finding of facts by the arbitrators. Unless it is within the scope of confidential business information, it is hard to find a sound basis to prevent the disclosure of the factual part and the reasoning of the award.⁵⁶ The reasoning is of great importance since it helps to determine the quality of the award and the laws that are applied in the decisions. Finding of facts also relates to the application of substantive and procedural law, including law of evidence. These findings all have great relevance with public interest and the arbitrators will feel also more responsible for the quality of decisions they hand down in case their work is more accessible to the public.⁵⁷

The fourth issue we have to mention is the identity of the arbitrators. Most of the time awards are published without the name of the arbitrators. This is the most controversial issue, there is

⁵⁴ See supra note 45.

⁵⁵ See supra note 48.

⁵⁶ See supra note 45.

⁵⁷ Ibid

no apparent reason not to disclose the identity of the arbitrators. In the course of arbitration, awards are rendered by individuals who are selected for their personal credential and reputation. In order to choose a suitable arbitrator, parties should have a chance to evaluate their previous work, former decisions should be available for the parties. As a matter of fact disclosure of the name should be very positive in enhancing the quality of arbitrators.⁵⁸

3.2.3 Possible methods for a uniform system of publication

Albeit it is not easy, it is also not impossible to create a uniform system of publication. There are several existing methods, which could serve as a model for international commercial arbitration. We do not have to reach out too far for a positive example, it is enough to cast a glance at investment arbitration. In investment law, when States are parties to the arbitration, the public interest involved has lead to increased demands for the publication of the arbitral awards. In practice the majority of awards rendered by the International Centre for Settlement of Investment Disputes (ICSID) has been disclosed by the Centre or by the parties. “These decisions may be used as precedents and/or guidelines for future disputes or with respect to activities with a view to avoiding future disputes.”⁵⁹ As discussed earlier, systematic publication could have similar positive effects in international commercial arbitration. Professor Chang-fa-Lo mentions three possible methods to achieve the goal of publishing awards.

The first possible way is to encourage the parties to agree to publication. As an illustration he quotes Article 27 of International Convention on Salvage 1989 (entered into force in 1996):

⁵⁸ Ibid.

⁵⁹ See supra note 2., p. 156

“States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases”.⁶⁰

The second possibility in his view is to grant the arbitration institutions with the right to publish. He suggests an automatic publication mechanism in which the arbitrators at the institutions prepare two draft awards. In the first award they prepare the decision by quoting all the relevant business and confidential information (confidential edition), while in the second one all the confidential parts identified by the parties are removed from the ruling (non-confidential edition). This non-confidential edition would be immediately and automatically subject to full publication. Furthermore the process of publication would consist of four steps. First, when the parties prepare their submissions, they should have to identify the confidential parts. Secondly, the parties have to justify the omission of these information, they have to prove that there is a genuine interest to keep them confidential. Third, the identification of confidential parts would be subject to rebuttal by the other party, so as to prevent excluding the publication of non-confidential parts. Forth, and lastly the arbitrators would prepare the two editions of the arbitral awards, the confidential and the non-confidential version. As mentioned above, the only difference between the two editions is that in the non-confidential editions some parts would be deleted. The confidential version would be given to the parties and the non-confidential edition issued for publication.⁶¹

The third possible way professor Chang-fa-Lo mentions in his study is to publish only when the parties agree so. This is the method followed today by most of the institutions in international commercial arbitration and as we see, it did not encourage widespread publication.

⁶⁰ The International Convention on Salvage, IMO 1989, at <http://www.jus.uio.no/lm/imo.salvage.convention.1989/doc.html#115> (2010-03-09)

⁶¹ See supra note 45.

Alexis Mourre and Alexandre Vagenheim propose a different method for achieving mass publication of complete awards.⁶² They suggest that the CLOUT database could serve as a model to be followed.⁶³ The CLOUT is an information system established in 1988 by the UNCITRAL Secretariat for collecting and disseminating information on court decisions and arbitral awards relating to the Conventions and Model Laws. The purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts.⁶⁴

In the opinion of Mourre and Vagenheim a similar system could easily be organized under the aegis of the UNICITRAL. Awards would be submitted to the Secretariat, which would make sure that the names of the parties and the relevant confidential information are removed from the awards. The secretariat should also ensure that there is no objection from the parties to their award being published online a certain period of time after it was rendered. According to these authors such a system would allow the creation of a comprehensive database which would constitute the necessary basis of the elaboration of a true system of arbitral precedents, provided that an efficient index and a search system are available.

In my opinion both of these systems suggested by the named authors are excellent to promote the international awareness of arbitral decisions. A system akin to Westlaw should be maintained by the arbitral institutions, in which the inquirers could access the database using a personal account. To create the conditions for publication is only the first step, systematic and persistent disclosure is needed so as to achieve similar transparency like in investment arbitration.

⁶² See supra note 45.

⁶³ Ibid

⁶⁴ Information on CLOUT at http://www.uncitral.org/uncitral/en/case_law.html (2010-03-09)

3.3 Consequences of unilateral use and disclosure of arbitral awards

On one hand we know that the award might become public in case court proceedings are initiated concerning its validity or enforcement. On the other hand we have to remember that arbitral awards are final decisions, most of the time voluntarily executed, which means that the parties often comply with the ruling of the arbitrators without further court intervention and disclosure of the content of the award. There is always a risk that one party discloses information, documents or testimony to third parties or to the media without the consent of the other party. The question arises: what are the consequences of unilateral disclosure by one party against the other party's will?

According to Rubino-Sammertano since the duty of confidentiality may be an express or implied term of a contractual relationship, the party (depending on the applicable substantive law) may commit a tort or a breach of contract in case he divulges confidential information intentionally or due to negligence.⁶⁵ He holds that whenever a duty of confidentiality exists, its breach by a party may amount to a breach of contract in case the parties are in a contractual relationship, or it may amount to a tort if committed by a party not bound by a contract.

The same author examined the responsibility of other participants of an arbitration procedure. He submits that a counsel of a party owes a confidentiality obligation not only to his client, but also to the other parties to the proceedings, although contractual relationship exists only between the counsel and one of the parties. The same might apply to experts and consultants to a party. As to the witnesses, the liability seems to lie in tort due to fact that the contractual relationship is most likely lacking. Considering a possible breach of confidentiality by the

⁶⁵ Mauro Rubino-Sammertano, *International Arbitration, Law and Practice*, 2nd edition, Kluwer Law International, 2001, pp. 804-805

arbitral institution, the responsibility seems to lie in contract, provided that it is assumed that there is an implied duty of confidentiality.⁶⁶

Regarding the sanctions, the available remedy is damages. In the alternative or in addition to damages affirmative or negative action might be ordered. Evidencing will never be easy, for a successful claim for damages the aggrieved party needs to establish not only the source and unlawful nature of the disclosure, but also the existence of resulting loss.⁶⁷

Contrary to this statement the French court in the case *Aita v Ojeh* quite easily awarded damages against the party responsible for litigation. The party sought an order at the French court to set aside an arbitral award, when the court clearly lacked jurisdiction (the decision was rendered in England). The court found that this conduct of the party amounted for a breach of confidentiality since “allowed a public debate on fact which should have remained confidential” and awarded a substantial amount of damages against the party at fault.⁶⁸

But the most relevant case dealing with the effects of the breach of confidentiality was the *Bulbank v. AIT*. In this case one of the parties provided the decision for publication to a journal without the consent of the other party. The Stockholm City Court found that the disclosing party committed a fundamental breach of contract, which constitutes a valid ground for the other party to avoid the contract. But the Svea Court of Appeal did not share this opinion and concluded that “the publishing of information in arbitration proceedings could be viewed as a breach of the duty of good faith...the sanction most likely comprised compensation payable to the other party for loss proven.”⁶⁹

⁶⁶ Ibid at p.805

⁶⁷ Fouchard, Gaillard, Goldman on International Commercial Arbitration at <http://books.google.hu/books?id=4QGmxU7-bKwC&pg=PA774&dq=remedies+in+case+of+breach+of+confidentiality,+arbitration&cd=2#v=onepage&q=&f=false> (2010-03-10)

⁶⁸ Ibid

⁶⁹ See supra note 65, p. 805

In summary the sanctions for breach of the duty of confidentiality will depend on the applicable law. The general remedy is damages. In the alternative or in addition to damages affirmative or negative actions might be available.⁷⁰

3.4 Exceptions to the confidentiality obligation

The unilateral disclosure of the award is considered as a breach of the duty of confidentiality. On the other hand it is understandable that a party would like to invoke a former decision in case the underlying legal dispute is similar, especially in case that party prevailed. It is also difficult for the arbitrators to reject this submission, since the disclosing party owes a duty of confidentiality not to the objecting party in the second procedure but to the party who was involved in the first arbitration. Since in common law countries parties regularly invoke former decisions in front of tribunals, English courts encountered this issue from time to time.

In the often quoted case, *Ali Shipping Corp. v. Shipyard Trogir* a party wanted to disclose materials from one arbitration in a subsequent arbitration proceeding. The other party sought an order to restrain the disclosure of evidence from the earlier arbitration. The Court of appeal ruled that exceptions to the duty of confidentiality may be allowed in case (and only) if the following circumstances are met:

- parties to the arbitration give their consent to the disclosure,
- court orders disclosure,
- court might grant permission where the interest of justice requires it,
- in cases where disclosure is reasonably necessary for the protection of the interests of a party to the arbitration.

⁷⁰ See supra note 65, p. 806

The courts in England are very strict in applying these exceptions. For example in the cases *Dolling –Baker v. Merrett* and *Insurance Co v. Lloyd’s Syndicate*, the court dismissed the submission of a party holding that the disclosure was not reasonably necessary for the protection of the party’s interest, “because the party seeking disclosure of the materials could not reasonably expect its arguments to prevail in the second arbitration.”⁷¹

Later the Privy Council took a different view in *Associated Electric & Gas Insurance Services Ltd. v. European Reinsurance Co. of Zurich*. In this case there were two arbitrations involving the same parties to a reinsurance agreement. The court concluded that the principles established in *Ali Shipping* only applicable where there are different parties to the arbitrations. The court found that disclosure of materials from the first arbitration is permitted in sequential arbitrations between the same parties “where non-disclosure would prevent enforcement of the award and thus frustrate the purpose of the arbitration” (and disregarded the criteria established in *Ali Shipping*).⁷²

Sometimes a single set of circumstances gives rise to complicated and interrelated legal disputes. For example many parties are involved in a complex infrastructure investment project as employer or main contractor and sub-contractors. Disputes might arise between these various participants of the investment. It is understandable that one party might want to produce the award or information on claims made in another procedure (since the parties take part in the same project). Is the duty of confidentiality breached in these cases?⁷³

The English court had to address this issue in *Hassneh Insurance Co. of Israel and Others v. Stuart J. Mew*. During the trial one of the parties wanted to disclose materials from an earlier proceeding (including the award) against a third party broker in order to support his claims. The other party sought an injunction restraining the disclosure of the materials generated in the preceding litigation. The party argued that such a disclosure would amount to a breach of

⁷¹ See supra note 3, p. 28

⁷² Ibid at p. 29

⁷³ Ibid

the confidentiality obligation. The judge, Colman J. rejected this argument, ruling that the party is entitled to use the arbitration award including the reasoning in it, without editing or having to apply to the Court for leave to do so, since it is reasonably necessary for the establishment by the party of his causes of action.⁷⁴

Relying upon these findings it may be said that the English courts set out the basic exceptions regarding the use of confidential information. These exceptions are: the consent of the parties, a court order, a court authorization, the reasonable need to protect the interest of one of the parties and finally a reason linked to the administration of justice.

⁷⁴ Ibid at p. 29

IV. Precedent v. confidentiality

4.1 Concept of arbitral precedent

First of all we have to consider if we can talk about precedent in international commercial arbitration and what is meant by it. Legal precedent may be defined as the making of law by a court in recognizing and applying new rules while administering justice. The term precedent can also refer to a decided case that furnishes a basis for determining later cases involving similar facts or issues.⁷⁵ The legally binding effect of past decisions is dependent on the given legal system. Precedent does not exist in this pure form in commercial arbitration. Thomas Walde defines precedent in international arbitration on three levels.⁷⁶ On the lowest or “softest” level precedent is “the suggestion to the tribunal that other experts have dealt with similar issues and that their experience and wisdom might serve as a good illustration of how to solve the issue facing the tribunal. On the next level, as “persuasive precedent”, is the idea that, by analogy of domestic courts (in common law and civil law systems) and to international courts (ECJ, ICJ, WTO), special respect is owed to expert “colleagues” acting in quasi judicial capacity. That gives previous decisions more weight than would simply be owed to an expert legal opinion. On the third and highest level, cumulative arbitral jurisprudence in the field of investment arbitration could be said to crystallize into “settled jurisprudence”.⁷⁷ It has to be noted that Walde considers the third level, the emergence of settled jurisprudence, only in connection to investment arbitration. This is due to the fact that awards are published only in investment arbitration in sufficient quantity to be used as

⁷⁵ Black’s Law Dictionary, Abridged 8th Edition, ed. by Bryan A. Garner, Thomson/West, 2005

⁷⁶ Thomas Walde, Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication, IAI Series on International Arbitration No. 5.), Precedent in International Arbitration, ed. by Y. Banifatemi, Juris Publishing Inc., 2008, p. 115

⁷⁷ Ibid at p. 115

precedents or guidelines for future disputes, which is crucial for the crystallization of a settled case law. At the same time it is uncontested that there is reliance on past awards in commercial arbitration also, but in a less advanced form. It more resembles the features of the second level on Walde's scale, persuasive precedent is predominant in commercial arbitration. Alexis Mourre defines persuasive precedent as the "de facto tendency for an international arbitrator to accept what has been consistently decided in a significant number of past arbitral decisions."⁷⁸ This fundamental difference between the two fields of arbitration often raises questions regarding confidentiality. It is disputed if confidentiality is a valid objection to the publication of the awards in commercial arbitration.

At any rate we have to bear in mind that arbitral precedent is far from the concept originally maintained by the courts. The jurisprudence of state courts present characteristics of homogeneity in a hierarchical system that arbitral tribunal does not and cannot have.⁷⁹ Commercial arbitration awards are autonomous decisions issued by tribunals, but they are not rooted in the judicial system of the seat of the arbitration. Due to its free standing and international character arbitration will never be driven by precedents at the same way as courts are. The common law doctrine of stare decisis is unknown, awards rendered by one tribunal are not binding for another. At the same time former decisions are referred to by other arbitrators from time to time and they may convince future tribunals to adopt the previous solution. "In commercial arbitration precedent is no more and no less than this capacity of past arbitration awards to convince future tribunals to adhere to the solution they embody."⁸⁰

⁷⁸ Alexis Mourre, *Precedent in International Arbitration, Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards*, IAI Series on International Arbitration No. 5.), Precedent in International Arbitration, ed. by Y. Banifatemi, Juris Publishing 2008, p. 41

⁷⁹ Ibid at p. 41

⁸⁰ Ibid

4.2 Is arbitral jurisprudence a reality in commercial arbitration?

Case law generally consists of all the cases and judgments pronounced by courts and tribunals in order to solve a legal problem. In that regard it may be considered as the judiciary practice. Since arbitrators do not have a forum and their decision is not part of any national order, awards do not have a natural tendency to constitute an established case law.⁸¹ Nonetheless the development of international arbitration and the emergence of specialized arbitration areas tend to evidence the similarities between arbitral decisions and the gradual evolution of judicial case law. At the same time it is hard to examine and measure this development. Professor Kaufman Kohler studied several hundred awards to determine if and how arbitral tribunals rely on previous awards. She reached the conclusion that “arbitrators do what they want with past cases and ... there is no clear practice in this field”.⁸²

It is still uncontested by experts, that arbitral case law is reality in practice, albeit an imperfect one. Solutions adopted by past arbitrators do have an impact on later cases, but arbitrators rarely refer to these previous decisions in their awards, so it is hard to determine to what extent is there a reliance on past cases. According to Alexis Mourre it is beyond doubt that solutions adopted in past arbitration awards are likely to be considered as precedent by arbitrators. He even quotes a particular decision, the Dow Chemical award, which might serve as an evidence for the existence of arbitral precedent:

“the solutions of these (arbitral) tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs

⁸¹ Pierre Duprey, *Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration Be Distinguished in this Regard from Arbitration Based on Investment Treaties?*, IAI Series on International Arbitration No. 3., *Towards a Uniform International Arbitration Law?*, ed. by A. V. Schlaepfer, P. Pinsalle & L. Degos, Juris Publishing, 2005, p. 258

⁸² Prof. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse? – The 2006 Freshfields Lecture*, 23(3) *ARB. INT’L* 357(2007) quoted by Alexis Mourre, *Precedent in International Arbitration, Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards*, IAI Series on International Arbitration No. 5.) *Precedent in International Arbitration*, ed. by Y. Banifatemi, Juris Publishing 2008, p. 43

of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond”⁸³

This award was rendered in a dispute of arbitral jurisdiction over a group of companies. Since then, the same solution has been adopted not only by subsequent arbitral awards but also by national courts.⁸⁴ Therefore we may set out that arbitral case law is a reality, although admittedly it will never achieve the state of development as it is common in court litigation (especially if we consider common law jurisdictions).

Now we should examine the question in which areas of arbitration is the emergence of arbitral jurisprudence the most likely. Mourre concludes that decisions on procedural issues or questions of arbitral jurisdiction are the natural ground for the emergence of arbitral jurisprudence. He thinks that this is due to the fact that tribunals have the first say on these issues and having no forum, they will generally not resolve them by reference to any particular national law.⁸⁵

Issues regarding the applicable law may be proper ground also. The arbitral tribunal may resolve the dispute by referring to the rules of law they think is appropriate in case there is no choice of law provision in the parties’ agreement.⁸⁶ On the other hand arbitral precedents may play a role in the resolution of the dispute even if the parties opted for particular legal system. Two situations have to be mentioned in connection with this second possibility.⁸⁷

In the first one a particular legal issue has not been settled under the chosen applicable law. A good example would be the pay-if-paid or pay-when-paid clauses in construction sub-contracts, which validity and interpretation have not been settled yet (the unresolved question is that if they should be considered as a term or a condition).⁸⁸ The second situation, in which former awards might play a role as precedents, is when the tribunal faces issues which are not

⁸³ See supra note 78, p. 44

⁸⁴ Ibid at p. 45

⁸⁵ Ibid at p. 46

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Ibid

settled by the particular law chosen by the parties. Construction of hardship clauses or force majeure clauses might be mentioned as examples, since these concepts are unknown in many systems of law.⁸⁹

International Conventions may also provide natural ground for the development of arbitral precedent. Substantive rules of law in these Conventions might need further interpretation, especially if the Convention is particularly detached from national laws (e.g. United Nations Convention on Contracts for the International Sales of Goods (CISG)).⁹⁰ Lastly arbitral precedents may play an important role in situations when the courts' case law is unclear or contradictory.

To sum it up we have to see that arbitral jurisprudence is an existing notion and it may be a source of legal rules in a number of different fields, although there are several steps to be taken in order to facilitate the evolution of a clear and consistent arbitral case law.

4.3 Requirements for the development of arbitral jurisprudence

This last section will consider the necessary measures which should be taken for the growth of case law in international commercial arbitration. It has been discussed earlier that in the most advanced form case law has been crystallized in the field of investment arbitration. Although reliance on past awards is existent in commercial arbitration also, but in more limited and unexpressed form.

First and foremost it is crucial that arbitration awards are available in sufficient quantity for the emergence of arbitral jurisprudence. This statement leads us back to the importance of publication repeatedly. The fundamental importance of publication of awards derives from the

⁸⁹ Ibid at p. 47

⁹⁰ Ibid

fact, that in the absence of the doctrine of stare decisis in arbitration, arbitral precedent will only operate if identical solutions are repeated in a number of different cases.⁹¹ From that perspective - in the opinion of Alexis Mourre - arbitral precedent works as a rule-making mechanism, comparable that of trade usages. Consequently there need to be something called 'path dependency' for state courts, the accumulation of identical or similar solutions in a line of decisions, in order for past awards to be perceived as binding.⁹² This high degree of availability may be achieved only through systematic publication of the awards, which raise the problem of confidentiality.

Most of the experts on this topic share the view, that there is no overriding principle of confidentiality which would impede publication.⁹³ The majority of the arbitration statutes do not expressly provide for a general principle of confidentiality. The same may be said regarding one of the most influential institutional rule (the one of the ICC's), which contemplate a duty to protect business secrets but do not embody a general rule preventing arbitration.

Even if a confidentiality obligation exists, it is never absolute. There are several exceptions when the disclosure of the awards becomes possible (see Chapter III., subsection 3.4). It has to be emphasized that there are several methods of publication by which the interest in non-disclosure remain intact, since trade secrets identified by the parties will not become public (see Chapter III, subsection 3.2.3).

It is also important that the holdings of the arbitrators should be easily identifiable. The awards ought to be well reasoned and necessarily detailed. At the same time repetition is the key factor for the evolution of case law, one well reasoned award might serve as a mere

⁹¹ Ibid at p. 48

⁹² Ibid

⁹³ See supra note 45

illustration for future cases, while the same solution will have a compelling effect, if adopted by several other awards rendered in comparable cases.⁹⁴

After the requirements formulated in connection with the final award, we should turn to the arbitrators and examine their role in the emergence of a settled case law. In the opinion of Alexis Mourre “the persuasiveness of past arbitral awards implies to a certain extent that international arbitrators see themselves as part of a group of international adjudicators, whose role and *raison d’être* is to fulfill the particular needs of the international business community”.⁹⁵ He thinks that the arbitrators should regard themselves as adjudicators of a free standing autonomous system of international justice and try to do their best being as consistent as possible with past decisions of other international tribunals. In other words arbitrators should focus on the interest of the business community at large instead of the expectations of the parties (as it is typical today).

To sum it up all these recommendations aim to achieve a higher level of transparency in arbitration which is of primary importance for the attainment of arbitral jurisprudence. Contrary to the above mentioned requirements we have to admit that commercial arbitration have already developed a great deal in this respect in the last couple of years. This positive advancement have been observed by one of the experts, Klaus Peter Berger, who noted that

“growing practice reveals that international arbitration is gradually developing into a self-contained judicial system in which the different judicial bodies, even though usually created on an ad hoc basis and becoming *functus officio* once their task is accomplished, regard themselves as having precedential authority, their rulings having a significance that goes well beyond the individual case for which they were originally created by the parties.”⁹⁶

If this course continues in the future, the evolution of arbitral practice will unquestionably lead to the development of case law.

⁹⁴ See supra note 78, p 48

⁹⁵ Ibid at p. 42

⁹⁶ Klaus Peter Berger, *The International Arbitrators’ Application of Precedents*, 9(4) J. INT’L ARB. 5, 19 (1992) quoted by Alexis Mourre, *Precedent in International Arbitration, Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards*, IAI Series on International Arbitration No. 5.) *Precedent in International Arbitration*, ed. by Y. Banifatemi, Juris Publishing 2008, p. 43

Conclusion

The principle that arbitrations are private and confidential would seem to be self-evident. It is assumed that one of the most important reasons why business people around the world choose arbitration over court litigation is the confidential nature of the procedure and the award.

In fact the principle of confidentiality is more truism than truth.⁹⁷ Until very recently, the question of confidentiality was seldom, if ever debated. This has essentially changed within the last few decades. The issues of privacy and its corollary, confidentiality have been the subject of much heated debate recently in various jurisdictions and institutions.⁹⁸ “The conclusions reached in those instances demonstrate what might be called a “definite lack of consensus”.”⁹⁹ The once uniform perception of confidentiality is now highly diverse and fragmented in the various legal systems.

The first part of the thesis demonstrates the notions privacy and confidentiality. Although the two categories seem to be synonymous, we have to bear in mind that privacy is a right to attend meetings and hearings and to know about the arbitration. Contrarily, confidentiality is an obligation not to divulge information, documents and the award.¹⁰⁰

A comparative analysis on the legislation of confidentiality shows that countries may be divided into two main categories. In the first category there are the countries which deny the existence or limit the application of the principle. They hold that a confidentiality obligation exists only in the case, where the relevant norms explicitly provide for it. The second category consists of states, which support and extol a general, inherent duty of confidentiality. These

⁹⁷ L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, *Arbitration International*, Vol. 15 No. 2 (1999), pp 131-140, at <http://www.kluwerarbitration.com/arbitration/print.aspx?ipn=14324> (2010-03-18)

⁹⁸ *Ibid*

⁹⁹ *Ibid*

¹⁰⁰ See *supra* note 4

countries assume that “the private nature of arbitral proceeding is well established and the concept of privacy would have no meaning if participants were required to arbitrate privately by day while being free to pontificate publicly by night.”¹⁰¹

After the general introduction of the topic the research paper focuses on one of the aspects of confidentiality, namely on the confidentiality of the arbitral awards. In commercial arbitration most of the final awards remain undisclosed due to an implied or expressed obligation of confidentiality. At the same time it is evidenced in the area of investment arbitration that the systematic publication of the awards is an absolute necessity for the development of arbitral jurisprudence. Therefore, it is also of crucial importance that awards are published in sufficient quantity in commercial arbitration. On the other hand parties have natural interest to keep the awards confidential in order to avoid the disclosure of important trade secrets. Hence the underlying question remains whether the confidentiality of the award and publication is reconcilable?

According the authorities I studied the natural answer is that it is possible to create balance between these two contradictory interests. By an adequate method of publication the confidential character may be preserved while the reasoning of the award may serve as guideline for future disputes. Arbitration institutions may play a major role in publication by a favorable publication policy (such as the one of the ICC’s). Simultaneously scholars advocate uniform methods for publication (automatic publication system, evolved by Chang-fa-Lo, a method similar to the CLOUT database, recommended by Alexis Mourre)¹⁰².

Publication and precedent are two closely related topics. Precedent is an existing notion in commercial arbitration although not in the same sense as it is used in connection with court litigation. Persuasive precedent is the right word to use, which is the tendency of the

¹⁰¹ Ibid

¹⁰² See supra note 45 and 48

arbitrators to adopt a solution, which has been consistently decided in a number of cases.¹⁰³ It is crucial that the awards need to be available, in order to identify these returning findings. The emergence of consistent practices slowly and gradually leads to the emergence of arbitral case law. Due to fact that in commercial arbitration the decisions are generally not available, the emergence of settled case law remains wishful thinking for the present.

The thesis consistently emphasizes the fact that similar transparency may be achieved in commercial arbitration as in investment arbitration. For the attainment of this high degree of transparency the key factor is publication. Without the availability of the awards arbitral jurisprudence cannot emerge as such. At the same time it is possible to preserve the confidential information identified by the parties while the award is published in sufficient length in order to recognize important ruling. It may seem as a paradox but in the long run less confidentiality may make commercial arbitration more popular among business entities.

¹⁰³ See *supra* note 78

Bibliography

Books and dictionaries

The Leading Arbitrators Guide to International Arbitration, ed. by Lawrence W. Newman and Richard D. Hill, Juris Publishing Inc. 2004

ICC International Court of Arbitration Bulletin, 2009 Special Supplement, Confidentiality in Arbitration, Commentaries on Rules, Statutes, Case Law and Practice

Allan Redfern, and Martin Hunter with Nigel Blackaby and Constantine Partasides, Law and Practice of International Commercial Arbitration, Sweet & Maxwell 2004

Quentin Loh Sze On Sc, Edwin Lee Peng Khoo, Confidentiality in Arbitration: How far does it extend? Singapore Academy of Law 2007

William W. Park, Arbitration of International Business Disputes, Studies in Law and Practice, Oxford University Press 2006

Tibor Várady, John J. Barceló, III, Arthur T. von Mehren, International Commercial Arbitration, A Transnational Perspective, 4th Edition, West 2009

IAI Series on International Arbitration No. 3.), Towards a Uniform International Arbitration Law?, ed. by A. V. Schläpfer, P. Pinsall & L. Degos, Juris Publishing Inc. 2005

IAI Series on International Arbitration No. 5.), Precedent in International Arbitration, ed. by Y. Banifatemi, Juris Publishing Inc. 2008

Mauro Rubino-Sammertano, International Arbitration, Law and Practice, 2nd Edition, Kluwer Law International 2001

Black's Law Dictionary, Abridged 8th Edition, ed. by Bryan A. Garner, Thomson/West 2005

Articles

Expert Report of Dr. Julian DM Lew in the Decision of the High Court of Australia in Esso Australia Resources Ltd. and Others v. the Honorable Sidney James Plowman (The Minister for Energy and Minerals) (1995) 11 Arbitration International No. 8

Mason C. J. in the Decision of the High Court of Australia in Esso Australia Resources Ltd. and Others v. the Honorable Sidney James Plowman (The Minister for Energy and Minerals) (1995) 11 Arbitration International No. 3

Alexis C. Brown, Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration, 16 (2001) American University International Law Review, Issue 4

Internet sources

Sundra Rajoo, Privacy and Confidentiality in Arbitration (2003) at

http://sundrarajoo.com/wp-content/uploads/2009/09/privacy_1_.pdf

Confidentiality in Arbitration, a presentation by Adam Robb, at 39 Essex Street, Wednesday

5th May 2004 at <http://www.39essex.co.uk/resources/publications.php>

Sarah Walker, Bodil Ehlers, Lost in translation – what does confidentiality in arbitration

really mean? At

http://www.twobirds.com/English/News/Articles/Pages/Lost_in_translation_confidentiality_arbitration.aspx

Jeffrey W. Sarles: Solving the Arbitral Confidentiality Conundrum in International

Arbitration at <http://www.appellate.net/articles/Confidentiality.pdf>

Alexis Mourre, Alexandre Vagenheim, Is arbitral Jurisprudence more than a myth? at

<http://kluwerarbitrationblog.com/blog/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions%E2%80%A6/>

Chang-fa-Lo, On Balanced Mechanism of Publishing Arbitral Awards at

http://www.law.ntu.edu.tw/center/wto/project/admin/SharePics/A_08_05%20pp%20235_Chang-%20fa%20Lo.pdf

Fouchard, Gaillard, Goldman on International Commercial Arbitration at

<http://books.google.hu/books?id=4QGmxU7->

[bKwC&pg=PA774&dq=remedies+in+case+of+breach+of+confidentiality,+arbitration&cd=2](http://books.google.hu/books?id=4QGmxU7-bKwC&pg=PA774&dq=remedies+in+case+of+breach+of+confidentiality,+arbitration&cd=2)

[#v=onepage&q=&f=false](http://books.google.hu/books?id=4QGmxU7-bKwC&pg=PA774&dq=remedies+in+case+of+breach+of+confidentiality,+arbitration&cd=2#v=onepage&q=&f=false)

L. Yves Fortier, The Occasionally Unwarranted Assumption of Confidentiality, *Arbitration*

International, Vol. 15 No. 2 (1999) at

<http://www.kluwerarbitration.com/arbitration/print.aspx?ipn=14324>

http://www.uncitral.org/uncitral/en/case_law.html (information on the UNICITRAL CLOUT system)

Arbitration Rules, International Conventions

Arbitration Rules of the United Nations Commission on International Trade Law

(UNCITRAL rules)

1998 Rules of Arbitration promulgated by International Chamber of Commerce (ICC)

American Arbitration Association International Rules (AAA)

Arbitration Rules of the London Court of International Arbitration (LCIA)

Arbitration Rules of the China International Economic and Trade Arbitration Commission

(CIETAC)

Arbitration Rules of the World Intellectual Property Organization (WIPO)

International Convention on Salvage 1989 (entered into force in 1996)

National Arbitration Acts

Norwegian Arbitration Act (effective 1 January 2005)

New Zealand Arbitration Act of 1996 (amended on 18 October 2007)

English Arbitration Act of 1996

Federal Arbitration Act of the United States

Uniform Arbitration Act of the United States

Court and Arbitral Tribunal Cases

Esso Australia Resources Limited and Others v. The Honorable Sidney James Plowman
(Minister for Energy and Minerals), 128 A.L.R. 391, 400-01 (1995) (Austl.)

Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha, (The Eastern Saga) (1984) 2 Lloyd's Rep.

373

Hassneh Insurance Co. of Israel and Others v. Steuart J. Mew, (1993) 2 Lloyd's Rep. 243

United States v. Panhandle Eastern Corporation, 118 F.R.D. 346, 350 (D.Del. 1988)

Lawrence E. Jaffee Pension Plan v. Household International Inc., 2004 WL 1821968 (D. Colo. Aug. 13, 2004)

Dolling Baker v. Merrett & Another, 1 W.L.R. 1205 (Eng. C.A. 1990)

Aita v. Ojjeh, Rev. arb. 1986.583 (Annot. G. Flecheux)

Société National Company for Fishing and Marketing 'NAFIMCO' v. Société Foster Wheeler Trading Company AG, Rev. arb. 2004.647 (Annot. E. Loquin)

Bulgarian Foreign Trade Bank (Bulbank) Ltd. v. A.I. Trade Finance Inc. (AIT), Case No. T 1881-99 (2000)

Ali Shipping Corporation v. Shipyard Trogir, 1 Lloyd's Rep. 643 (Eng. C. A. 1998)

Insurance Co. v. Lloyd's Syndicate, (1995) 1 Lloyd's Rep. 272

Associated Electric & Gas Insurance Services Ltd. v. European Reinsurance Co. of Zurich, (2003) UKPC 11