Confidentiality in International Arbitration

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I. Introduction

A. The issues

Confidentiality of the arbitral process and the documents created or disclosed in the course of arbitration proceedings has long been mentioned as one of the supposed benefits of resorting to arbitration.(1) A survey of the available case law(2) and of the perception of the players in international arbitration(3) seem to show that confidentiality is still an important facet of the arbitral process. It has been suggested that the most important reason for respecting confidentiality of an arbitral proceeding lies in the fact that the process of arbitration is intrinsically a private process, and thus the parties can justifiably ask for page "39" complete immunity of the proceeding from any sort of outside scrutiny.(4) The Queens Bench Division in the *Eastern Saga* case(5) aptly illustrates the principle, when Leggatt J. remarks: "The concept of private [or confidential] arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them."

However, it is quite clear that courts are starting to formulate an exception to this principle,(6) and its application is certainly not absolute. In fact, there is a movement toward treating privacy and confidentiality on different footings, quite opposite to the English trend. This dilution of confidentiality is now seen in cases involving states, and the dilution mostly takes place in the name of "public interest." It seems that the logic behind enforcing confidentiality between private parties does not extend to situations in which one of the parties is a public actor, because these concern not only the parties alone but also people in general. The state can certainly have obligations to disclose information about its activities to its *citizens*.(7)

Though arbitration involving states is not a new phenomenon,(8) there is not much literature on the dilution of confidentiality in proceedings involving states,(9) and it is the aim of this article to shed some light on this issue. It is argued that confidentiality, although important, can be dispensed with in certain situations.

II. Confidentiality in International Arbitration and the "Public Interest Exception"

A. The concept of confidentiality in national law

It has often been remarked that common and civil law jurisdictions treat the concept of confidentiality differently.(10) It is pertinent to note that the arbitration law of France, a civil law country, clearly includes a confidentiality requirement,(11) while that of the United Kingdom, which follows the common law tradition, does not. On the other hand, New Zealand, a common law country, enacted a new statute in 1996 based on the UNICITRAL Model Law with an amendment stating that the parties to an arbitration page "40" agreement shall be deemed to have agreed that "the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings … or to an award made in those proceedings."(12) Indian law(13) is quite peculiar on this aspect: where confidentiality has been made a requirement in conciliation proceedings,(14) the section dealing with application for setting aside of arbitral awards seems to incorporate "confidentiality" within the ambit of public policy.(15) However, it is certainly not clear whether a violation of confidentiality in an arbitral proceeding would be a violation of Indian public policy or if the use during a subsequent arbitration of confidential information obtained in a prior conciliation proceeding would be seen as violating public policy.

While in civil law countries such as France and Switzerland, confidentiality is viewed as an inherent part of the arbitration agreement,(16) the situation in Sweden, another civil law country, is

completely opposite: the Swedish Supreme Court has clearly stated that Swedish law does not consider confidentiality to be an inherent part of the arbitral process.(17) In Germany, also a civil law country, Book 10 of the Code of Civil Procedure, which contains the provisions relating to arbitration, does not include a section dealing with confidentiality.(18)

Similarly, in the common law world, English scholarly writing and decisions maintain an implied duty of confidentiality,(19) although exceptions to the principle are recognized.(20) Case law in Australia(21) and the United States(22) does not recognize any such implicit duty. And, although English case law deals with confidentiality of arbitral proceedings,(23) the English Arbitration Act 1996 does not contain a provision on confidentiality.

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Apart from the differences between these legal systems, judges in the respective nations tend to make exceptions from the approaches of their countries. An example is the Privy Council, which, in *Aegis v European Re*,(24) a case concerning two arbitration proceedings between the same two parties, stated that:

> The confidentiality agreement was intended to prevent third parties from relying on material generated during the arbitration against either of the two insurance companies; the legitimate use of an earlier award in a later arbitration between the same two parties was therefore not a breach of the confidentiality agreement.

Thus, it can in fact be stated that "with respect to confidentiality in international commercial arbitrations, *nothing should be taken for granted*,"(25) and there is in fact no settled rule in either the common or civil law world.

It must be noted in this context, however, that even where confidentiality is warranted by law, arbitration rules,(26) or agreement, it binds only the parties. Third parties, such as witnesses, would only be bound if a separate agreement were to exist with them.(27)

B. The public interest exception

The status of the "public interest" exception in itself is quite complicated. There is a body of opinion which suggests that European nations are more reluctant to admit the public interest exception to confidentiality.(28) This opinion is supported by the decision of the European Court of First Instance in *Postbank NV v Commission of the European Communities*,(29) in which the court clearly mandates the taking of "all necessary precautions" to protect any disclosure of confidential documents or information.

In the common law world, on the other hand, the concept is nascent. Courts in Australia and the United States(30) have acknowledged the existence of the exception, but it is highly unlikely that the English courts, which have not yet faced a case requiring its application, would embrace it.(31)

In order to understand the contents of the "public interest" exception, one needs to examine the Australian decisions in the *Esso* case(32) and *Cockatoo Dockyard* case,(33) as well as decisions rendered in several arbitrations under NAFTA.

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In *Esso*, the High Court of Australia faced a situation in which the public energy authorities were involved in arbitration proceedings with their suppliers and the minister responsible for the authorities applied to the courts for a declaration that the public authority was not barred from disclosing information regarding the arbitration, including the price-sensitive, proprietary information revealed by the vendors, to the minister and other third parties.

Mason, C.J., in his majority opinion, held that confidentiality is not an inherent part of arbitration in Australia, and even if it is considered to be, public actors might be under a positive duty to disclose information to the public:

> there may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration … [This] would give rise to a public interest exception.(34)

In spite, however, of the sharp criticisms that the *Esso* decision has

faced for allegedly formulating a broad exception to confidentiality, the decision does impose checks and balances. This is highlighted in the concurring opinion of Brennan, J.:

> The duty to convey information to the public may not operate uniformly upon each document or piece of information … Performance of the duty to the public is unlikely to require the revelation of every document or piece of information. It may be possible to respect the commercial sensitivity of information contained in particular documents while discharging the duty to the public and, where that is possible, the general obligation of confidentiality must be respected.

In the *Cockatoo Dockyard* case, a journalist requested release of information under the Freedom of Information Act 1982, in relation to an arbitration between Australia and Cockatoo Dockyard Pty Ltd., which essentially concerned the environmental conditions around the Cockatoo Island. Cockatoo Dockyard applied to the sole arbitrator to secure the confidentiality of the documents, and Australia resisted, on the ground that such an order would restrict the free flow of information and would also impinge upon governmental powers.(35)

In his award, the arbitrator on confidentiality directed both parties to maintain confidentiality with respect to the documents prepared for the arbitration, any document that might reveal contents of documents prepared for the arbitration, documents disclosed during the discovery proceedings, and documents filed as evidence.(36)

The arbitrator's decision was attacked by Australia in the Supreme Court of New South Wales, and thereafter before the Court of Appeals, asserting that the arbitrator had exceeded his powers. Kirby, J. gave the majority judgment in the Court of Appeals. He held first that matters relating to confidentiality are matters of procedure.(37) However, in overturning the award he reasoned:
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> For all this Court knows, it is both significant and urgent that the material should be made available, for the protection of public health and the restoration of the environment, both to [various governmental agencies] … or even to the public generally.(38)

Clearly, Kirby, J. effectively formulated a substantive defence to confidentiality and was not actually invoking any procedure to overturn the decision of the arbitrator.

The Australian decisions thus show that there would always exist a public interest exception to confidentiality whenever public actors are involved in arbitration, and that when there is a statutory requirement that information under consideration in arbitration be revealed, no confidentiality principle operates to abrogate that statute. On an international plane, decisions on confidentiality have come from a handful of NAFTA arbitrations, under either the ICSID Additional Facility Rules or under the UNCITRAL Arbitration Rules.(39)

The *Metalclad* case,(40) held under the ICSID Additional Facility Rules, involved a claim brought by Metalclad Corporation against Mexico, alleging violation of various Chapter 11 provisions of NAFTA. During the proceedings, Metalclad provided information about the arbitration to shareholders, analysts and other members of the public who were interested in their activities. Irked by the disclosure, Mexico sought an order from the tribunal securing confidentiality.(41) The tribunal rejected the Mexican argument that confidentiality was implied in an arbitral proceeding, and pointed out that neither NAFTA nor the Additional Facility Rules imposed any confidentiality requirement on the parties. In the words of the tribunal "unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration."(42) The tribunal also noted that under the law of the United States, where Metalclad was incorporated, there was a duty of publicly listed companies to provide shareholders with information that can affect share price.(43) However, and perhaps in order to strike a balance, the tribunal urged the parties to keep disclosure to a minimum.(44) Thus, while rejecting confidentiality as inherent to arbitration, the tribunal encouraged modest disclosure.(45)

Another case under the ICSID Additional Facility Rules that gave rise to issues of confidentiality was *Loewen Group v United States*.(46) In this case, the United States requested that the minutes of the proceedings and all documents filed should be made public, to which the claimant objected. The tribunal rejected the respondent's contention, page "44" on the grounds that Article

44(2) of the Rules[47] prohibited the tribunal from making minutes of the proceedings public without the consent of the parties. Beyond this prohibition, the tribunal sought to apply the *Metalclad* standard.[48] Significantly, the tribunal rejected the claimant's argument that confidentiality was inherent to arbitration.[49]

Confidentiality issues arose in two other NAFTA arbitrations, and related to the validity of third party participation in the proceedings. The first among these was the *Methanex* case,[50] in which the Canadian-based International Institute for Sustainable Development (IISD) and several U.S.-based environmental NGOs petitioned the tribunal for standing as *amicus curiae*, thereby obtaining the right to file submissions and to have access to all documents filed in this arbitration, which concerned a Californian ban on a methanol derivative in gasoline.[51] The petitions sparked off a heated debate with regard to the permissibility of third party participation in proceedings under NAFTA Chapter 11 and the UNCITRAL Rules.

The tribunal ruled that, under the UNCITRAL Arbitration Rules, it had the discretion to accept written briefs by *amici*, but that *amici* had no right to participate in the proceedings by attending oral hearings or obtaining copies of the parties' submissions and other documents generated in the arbitration.[52]

It seems that the *Methanex* tribunal treated the matter as one of privacy rather than confidentiality. The decision revolved around the phrase "in camera" used with relation to proceedings in Article 25(4) of the UNCITRAL Rules.[53] It is understandable that the petitioners were excluded from participating in hearings under this rule, but the decision does not clarify why the request to receive documents was turned down, as this seems unrelated to the privacy of proceedings. What is, however, most significant about the *Methanex* case is that the tribunal acknowledged the existence of a public interest exception, and opened the door to third party participation by means of *amicus* submissions.[54]

The latest decision on the issue of third party participation and consequently confidentiality is found in the *UPS* case.[55] Here, the confidentiality issue arose after the Canadian Union of Postal Workers and another NGO petitioned the tribunal to allow them to participate as *amici* in a dispute between UPS and Canada for alleged breaches by Canada of various NAFTA provisions.

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The tribunal rejected the petitioners' plea on the basis of the in camera nature of the UNCITRAL proceedings, and with regard to disclosure of materials and confidentiality, the tribunal stated:

> While principles of transparency may support release of some of the documentation, that is not a matter which can be the subject of a general ruling. Some documentation may be available in the public domain, through any agreement or confidentiality order that might be made, or otherwise lawfully.

The tribunal did not take the opportunity afforded to it to explain the law regarding confidentiality and its exceptions.

What trend may be discerned from these arbitral decisions? It seems that they highlight the difficulties and the multitude of legal challenges that a tribunal faces when confidentiality is an issue. There does not seem to be a settled rule that can be stated; the jurisprudence is clearly in a formative state. It must, however, be noted that all of these tribunals decided the confidentiality question by reference to the institutional rules or national legislation under which the arbitration was being conducted, and this should certainly be the approach any arbitral tribunal must take, as it determines the limits of a tribunal's competence.[56]

It may also be noted, particularly from *Metalclad*, that even states may object to disclosure,[57] and that there is certainly a hint that "public interest" does not necessarily come into play when a state wants disclosure but may equally be applicable when it is a private party seeking disclosure.

III. Are Arbitrations between Non-State Entities Completely Confidential?

The foregoing discussion illustrates how the formulation of the public interest exception has watered down the concept of confidentiality in cases involving public actors. Application of this "public interest exception" is not, however, limited to arbitration in which a state entity is involved. It may be applied even in cases involving non-state actors. A common thread in the cases discussed above is that

confidentiality is not inherent to the arbitral process. There may, for example, be a legal obligation to disclose information to auditors, shareholders, public regulators, or specified third parties.[58] In addition, whether confidentiality is to be respected or not depends on the institutional rule or national legislation under which the arbitration is being conducted. As the tribunal in the *Loewen* case clearly stated: page "46"

> In an arbitration under NAFTA, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties, the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs.[59]

Had the ICSID Additional Facility Rules, under which this arbitration was conducted, imposed a strict confidentiality requirement, it would have been respected, but in its absence there is no implicit rule of confidentiality. This is borne out by the fact that various arbitral institutions have now included strict confidentiality norms as well as applicable exceptions[60] in their arbitration rules.[61] In contrast, however, the 1998 ICC Rules of Arbitration have intentionally refrained from inserting a provision specifically relating to the principle of confidentiality.[62] Thus, whether an arbitration proceeding remains confidential or not may depend on the choice of rules governing that arbitration.[63] As a practical matter, arbitration practitioners and parties desirous of confidentiality would do well to choose an institution whose rules expressly guarantee it. It is also advisable to insert a confidentiality clause in the arbitration agreement between the parties.[64]

However, even choosing the correct institutional rule may not be able to dilute a "public interest" exception. In the *Cockatoo* case,[65] the Australian court, while espousing the public interest exception, made clear that protection of public health and the restoration of environment are substantive elements of the exception.[66] It is surely possible that such concerns may arise in arbitrations between private entities as well, in which case disclosure of confidential information might well be permitted.

Legislation requiring companies and financial institutions to divulge information that could affect their share value may also form the basis for requiring private entities to divulge information regarding arbitration. In the *Publicis* case,[67] the Tribunal de Commerce of Paris (Commercial Court) prohibited all communication intended to "provide the public with information on the existence, the contents and the basis of the claim between the [the claimants] and Publicis SA currently subject to arbitration proceedings," although, the court added, the prohibition would have no effect on "legal obligations to page "47" disclose information which it is manifestly clear that these companies would be bound by."[68] The practices of ICSID Tribunals also lend support to the assertion.[69]

IV. Conclusion

There can be no doubt that confidentiality, though an important facet of the arbitral process, can no longer be considered inherent to it. The exceptions created by applicable law, or by the principle of "public interest," *are* applicable to arbitrations between non-state actors in the same manner as in arbitrations involving public actors. Confidentiality is a feature of arbitration that, for practical, commercial and legal reasons, must be subject to exceptions. Enforcement of awards through public domestic courts, the passing of information to shareholders, the involvement of third party witnesses, reliance on arbitral awards to enforce rights against third parties, the use of witness testimony given in arbitration to challenge inconsistent testimony given in other forums, and public interest considerations, are the most common exceptions to confidentiality, and may lead to a disclosure to third parties in certain defined circumstances.[70]

Parties may seek to ensure confidentiality in arbitration by including a confidentiality clause in their arbitration agreement and selecting a set of procedural rules imposing confidentiality on the arbitral proceedings. However, even these safeguards cannot guarantee confidentiality completely, as there may be overriding exceptions. page "48"

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[1] *See* Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 Arb. Int'l 303 (No. 3, 1995); Patrick Neil QC, *Confidentiality in Arbitration*, 12 Arb. Int'l 287 (No. 3, 1996); Ronald Bernstein et al., Handbook of Arbitration Practice 193 (1998).

[2] Case law from both the common law world as well as the civil law world tends to converge on this point. *See* the Eastern Saga [1984] 2 Lloyd's Rep. 373 (Q.B.); *Hassneh Insurance* v *Stewart* [1993] 2 Lloyd's Rep. 243 (Q.B.); *Insurance Co.* v *Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272; *Dolling Baker* v *Merrett* [1990] 1 W.L.R. 1205 (C.A.); *Ali Shipping* v *Shipyard Trogir* [1998] 1 Lloyd's Rep. 643 (C.A.); *Auction Finance Group Co. Ltd.* v *Bob Dickenson Auction Service Ltd.* [2000] O.J. No. 3384 (Ontario, S.C.J.); *Aita* v *Ojjeh, Paris*, February 18, 1986, *as discussed in* Fouchard Gaillard Goldman on International Commercial Arbitration 612 (Emmanuel Gaillard & John Savage eds., 1999); Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 30 (1999).

[3] *See*, *e.g.*, the Expert Report of Stephen Bond, Esq. in *Esso v Plowman*, 11 Arb. Int'l 273 (No. 3, 1995). At ¶ 6 while recounting his experience as the Secretary of the ICC, Bond writes:

> It became apparent to me very soon after taking up my responsibilities at the ICC that the users of international commercial arbitration, i.e. the companies, governments and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration. When enquiring as to the features of international commercial arbitration which attracted parties to it as opposed to litigation, confidentiality of the proceedings and the fact that these proceedings and the resulting award would not enter into the public domain was almost invariably mentioned. Indeed, it became quickly apparent to me that should the ICC adopt a publication policy or any other policy which would mitigate or diminish the strict insistence on confidentiality by the ICC, this would constitute a significant deterrent to the use of ICC arbitration.

[4] *See* Jerzy Jakubowski, *Reflections on the Philosophy of International Commercial Arbitration and Conciliation*, *in* The Art of Arbitration: Essays in International Arbitration, Liber Amicorum Pieter Sanders 175, 177 (Jan C. Schultsz & Albert Jan van den Berg eds., 1982); François Dessemontet, *Arbitration and Confidentiality*, 7 Am. Rev. Int'l Arb. 299 at 313–14 (1996).

[5] *See* Eastern Saga, *supra* note 2, at 379.

[6] *See Esso* v *Plowman*, 128 A.L.R. 391 (1995); *Bulgarian Foreign Trade Bank Ltd.* v *A.I. Trade Finance Ltd.*, Case No. T 1881–99, October 27, 2000 (Swedish Sup. Ct).

[7] In this regard it may be noted that several nations have legislation governing rights to information.

[8] The first recorded arbitration between a state and a private party at the ICC took place in 1922. *See* Karl Heinz Boeckstiegel, *Arbitration of Disputes between States and Private Enterprises in the International Chamber of Commerce*, 59 A.J.I.L. 579, 581 (1965).

[9] For an excellent example of literature on this aspect, *see* Monique Pongracic Speier, *Confidentiality and Public Interest Exception: Considerations for Mixed International Arbitration*, 3 J. World Inv. 231 (No. 2, 2002).

[10] In this regard *see* Dessemontet, *supra* note 4.

[11] *See* NCPC, art. 1469 (Fr.).

[12] Arbitration Act, 1996, sec. 14(1) (N.Z.).

[13] The common law tradition is deeply rooted in India.

[14] Arbitration and Conciliation Act, 1996, sec. 75 (India).

[15] *Id.* explanation to sec. 34(2)(b)(ii).

[16] *See Aita* v *Ojjeh*, *supra* note 2; Jean Louis Delvolve, *Vraies et fausses confidences, ou les petit et le grands de l'arbitrage*, 1996 Rev. Arb. 373, 391; Andreas Bucher & Pierre Yves Tschanz, International Arbitration in Switzerland 65, 87 (1989) *cited in* Expert Report of Stephen Bond, *supra* note 3, at 276–77.

[17] *See Bulgarian Foreign Trade Bank Ltd.* v *A.I. Trade Finance Ltd.*, Case No. T 1881–99 (Swedish Sup. Ct).

[18] In both Germany and Sweden, however, the parties to an arbitration agreement are free to include a confidentiality clause in their agreement.

[19] *See* Sir Michael J. Mustill & Stewart C. Boyd, Commercial

Arbitration 303–4 (2d ed. 1991), where the authors state: “It is, however, implicit in the nature of the arbitration proceedings that the proceedings are confidential, and that strangers should be excluded from the hearing. A party's right to attend the hearing may not be exercised, except with the consent of all other parties, so as to allow persons to attend except for the purpose of conducting the proceedings or giving evidence.” *See also* Eastern Saga, *supra* note 2; *Hassneh Insurance* v *Stewart*, *supra* note 2; *Insurance Co.* v *Lloyd's Syndicate*, *supra* note 2; *Dolling Baker* v *Merrett*, *supra* note 2; *Ali Shipping* v *Shipyard Trogir, supra* note 2.

[20] “However, three broad exceptions have been recognised. First, disclosure is permissible with the express or implied consent of the party who originally produced the material. Second, disclosure is permissible by order of the court, or by leave of the court, which may be given when and to the extent that it is reasonably necessary for the establishment or protection of a party's legal rights vis-à-vis a third party or to defend a claim brought by a third party, or otherwise in the interests of justice. A third exception exists, for obvious reasons, in the case of admissible material deployed before the court in proceedings concerning the arbitration.” Mustill & Boyd, *supra* note 19, at 112.

[21] *See Esso* v *Plowman*, *supra* note 6. For a comparison between the Australian and English decisions, *see* Peter Sheridan, *Privacy and Confidentiality: Recent Developments: The Divergence Between English and Australian Law Confirmed*, 1 Int'l Arb. L. Rev. 171 (No. 5, 1998).

[22] *United States* v *Panhandle Eastern Corporation*, 118 F.R.D. 346 (D. Del. 1988).

[23] The obligation of confidentiality attaches to the award, the pleadings, written submissions, notes and transcripts of evidence given in the arbitration. *Dolling-Baker* v *Merrett*, *supra* note 2.

[24] *Associated Electric and Gas Insurance Services Ltd.* v *European Reinsurance Co.* of Zurich, UKPC 11, [2003] 1 W.L.R. 1041. *See Nigel Rawding & Karolos Seeger*, *Aegis v European Re and the Confidentiality of Arbitration Awards*, 19 Arb. Int'l 483 (No. 4, 2003).

[25] L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 Arb. Int'l 131, 138 (1999).

[26] *See infra* for a survey of some institutional arbitration rules and their approach to confidentiality.

[27] *See* Leon E. Trakman, *Confidentiality in International Commercial Arbitration*, 18 Arb. Int'l 1, 8 (No. 1, 2002).

[28] Dessemontet, *supra* note 4, at 312–13.

[29] [1996] E.C.R. II-8, at 90.

[30] The *Panhandle* decision, *supra* note 17, acknowledges the validity of the principle, however, it was not a case applying the principle.

[31] This is due to the fact that under English law it seems that the concept of privacy and confidentiality have not been separated. Thus, for English courts which believe, quite correctly, that arbitration proceedings are private, it would indeed be strenuous to admit a public interest exception.

[32] (1995) 128 A.L.R. 391 (Austl.).

[33] *Commonwealth of Australia* v *Cockatoo Dockyard Pty Ltd.*, [1995] 36 N.S.W.L.R. 662 (CA) [hereinafter “*Cockatoo*”].

[34] (1995) 128 A.L.R. 391, ¶ 38 (Austl.) ¶ 38.

[35] *Cockatoo*, at 664.

[36] *Id.* at 669.

[37] *Id.* at 675, 679. It seems that this, the first definitive pronouncement on the nature of confidentiality, matters. Earlier authors or commentators could not agree on any firm categorization of confidentiality. *See*, *e.g.*, Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 Arb. Int'l 303 (1995). The authors state: “Our conclusion is that a general obligation of confidentiality cannot be said to exist de lege lata in international arbitration. At best, it is a duty *in statu nascendi*. Most national jurisdictions have not addressed the issue at all. As shall be seen, those that have seem to produce more questions than answers.”

[38] *Cockatoo*, at 680.

[39] In fact there might be more such decisions, but confidentiality of the proceedings must have restricted their entry in the public domain.

[40] *Metalclad Corp.* v *United Mexican States*, ICSID Case No. ARB(AF)/97/1, August 30, 2000, 5 ICSID Rep. 209 [hereinafter “*Metalclad*”].

[41] Mexico in fact argued that the guarantee of confidentiality is implicit in arbitration.

[42] *Metalclad*, ¶ 113.

[43] *Id.*

[44] *Id.*

[45] *See* Pongracic Speier, *supra* note 9, at 245.

[46] *Loewen Group* v *United States*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, January 5, 2001, *available at* <www.naftaclaims.com> [hereinafter "*Loewen*"].
[47] Article 44(2) of the ICSID Additional Facility Rules, January 1, 2005, provides that "[e]xceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points."
[48] *Metalclad*, ¶ 25.
[49] *Id.* ¶ 26.
[50] *Methanex Corp.* v *United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 2001, *available at* <www.naftaclaims.com> [hereinafter "*Methanex*"].
[51] For details, *see* Pongracic Speier, *supra* note 9, at 247.
[52] *Methanex*, ¶ 47.
[53] *Id.* ¶ 41.
[54] *Id.* ¶¶ 45, 49. *See generally* Pongracic Speier, *supra* note 9.
[55] *See United Postal Service of America* v *Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, October 17, 2001, *available at* <www.naftaclaims.com>.
[56] *See* Pongracic Speier, *supra* note 9, at 231, 257.
[57] In fact, in 1987 Emmanuel Gaillard wrote that states are even more attached to confidentiality than corporate houses, and he attributed this to the yearning of the state to protect its image, and to political realities which restrict a state from taking a multitude of actions. *See* Emmanuel Gaillard, Le principe de confidentialite de l'arbitrage international (1987).
[58] Valéry Denoix de Saint Marc, *Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations*, 20 J. Int'l Arb. 211 (No. 2, 2003).
[59] *See Loewen*, ¶ 26.
[60] *See, e.g.*, Singapore International Arbitration Center, Arbitration Rules, October 22, 1997, art. 34(6).
[61] The London Court of International Arbitration (LCIA) has introduced express confidentiality provisions in its rules in art. 30(1) Similarly, the American Association of Arbitrators International Arbitration Rules provide for privacy and confidentiality in arts. 20(4), 27(4), 34. The Swiss Arbitration Association has enacted new Rules in 2004, which contain a provision on confidentiality in Section 6, arts. 43 and 44.
[62] The Rules do, however, empower the tribunal to include a confidentiality clause in their terms of reference, *see* International Chamber of Commerce Rules of Arbitration, January 1, 1998, art. 20(7).
[63] *See* Olivier Oakley-White, *Confidentiality Revisited: Is International Arbitration Losing One of its Major Benefits?*, 2003 Int. A.L.R. 29, 33 for an overview of more rules of arbitral institutions.
[64] *See* Julian D.M. Lew et al., Comparative International Commercial Arbitration 8–45 (2003).
[65] *See Cockatoo*, at 622.
[66] *Id.* at 7 (of quotation from judgment).
[67] Publicis, February 22, 1999, Tribunal de Commerce de Paris, Ordonnance de referé pronounced by Mr. Costes, President of the Tribunal, no. R.G. 99 010036 (ultimately set aside by the Paris Court of Appeal on September 17, 1999 on the grounds of inadmissibility).
[68] Publicis, February 22, 1999, at 3: "*que sous reserve d'une obligation légale d'information, tout manquement éventuel à cette confidentailité par une des parties soumise à la dite procédure, est fautif.*"
[69] Arbitrators working with the International Centre for Settlement of Investment Disputes (ICSID) have reportedly acknowledged that because of duties imposed by domestic laws, a company could find itself "under a positive duty to provide certain information about its activities to its shareholders, especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value." *See* Margrete Stevens, *Confidentiality Revisited*, 17 News from ICSID 2 (No. 1, 2000), *available at* <www.worldbank.org/icsid/news/n-17-1-2.htm>.
[70] Oakley-White, *supra* note 63, at 34.