THE TROUBLE WITH CONFIDENTIALITY

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It has long been standard practice to include the word "confidentiality" in any list of supposed benefits of arbitration. Parties agreeing to an arbitration clause therefore expect any dispute to be resolved out of the sight of jealous competitors and inquisitive media, not to mention over-curious authorities.

But is this more than an act of faith? It is certainly true that third parties are excluded from most types of international arbitration. But does it follow that parties are obliged not to disclose to strangers what has transpired in the arbitration? Can one really point to a positive duty on the part of participants in arbitral proceedings to maintain confidentiality? If such a duty exists, what are its limits and its practical effects?

The truth is that while the emperor of arbitration may have clothes, his raiments of secrecy can be torn off with surprising ease. Parties may be astonished to find, when they actually test the matter, that the rule of confidentiality is not reliable.

Very little critical analysis has been brought to bear on this issue, as may readily be verified by reviewing textbooks on arbitration. Even the most comprehensive ones have little to say on this subject, except to repeat generalities which are presumed rather than proven. In recent years, a handful of cases in a number of national jurisdictions have demonstrated that the issue is indeed complex. These cases illuminate not only the absence of an explicit absolute duty of confidentiality, but also this paradox: if they really thought it through, many parties might find it *undesirable* for the rule to be as comprehensive as they vaguely suppose it to be.

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. Since we favour a general rule of confidentiality *de lege feranda,* we believe that arbitration rules, including those of the ICC, should be drafted so as to create an explicit positive duty on the part of participants in arbitrations. At the same time, it seems to us that such a general rule must be tempered by significant exceptions.

This is an important and delicate subject, and is only now coming under the microscope. We therefore present our conclusions as tentative, aimed at opening rather than closing the debate.

I - THE PRACTICAL ISSUES

The practical aspects of the confidentiality issue may be examined by reference to the following questions:

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A. Privacy of the proceedings proper

This is doubtless the easiest aspect of the problem. Outsiders are generally not allowed to attend arbitral hearings, and have no right of access to the written record of the proceedings. In particular, Article 15(4) of the ICC Rules provides that unless the parties *and* the arbitrators agree otherwise, "persons not involved in the proceedings shall not be admitted." As for the ICC Court, Article 2 of its Internal Rules provides: "The work of the Court of International Arbitration is of a confidential character which must be respected by everyone who participates in that work in whatever capacity." Its Secretariat is well-trained to be circumspect in its dealings with the public; unlike ICSID, the ICC does not even reveal to the outside world the identity of parties to disputes, or of arbitrators.[1]

B. Confidentiality prior to award

Here the relevant issues break down into a number of further questions:

1. May the mere existence of the dispute be publicised without the consent of both parties? In practice, parties often find it necessary or desirable from a commercial point of view to reveal unilaterally that they are involved in an arbitration, *e.g.* to explain the interruption of a source of revenue and management's response thereto. In particular instances, the disclosing party may be under a duty to provide such information to its auditors or shareholders, or to public regulators. (An arbitration may have significant consequences for many parties beyond those actually participating in the arbitration. In important cases, dozens of bankers and thousands of shareholders may be vitally affected by the process. And it is not at all unusual for the claimant to have been wholly or partially reimbursed by an insurer, so that the latter is the truly interested party.) Such disclosures may be unavoidable and harmless. Unilateral initiatives to publicise a party's view of a case, on the other hand, often degenerate into selective communication of evidence or tendentious explanations.

2. May evidence brought in a pending arbitration be disclosed for other purposes in other proceedings? Documents to be produced by party A in an arbitration with party B may turn out to be relevant to issues raised in a dispute between parties B and C (whether in court or arbitration). B may understandably take the view that it should be able to use the documents it has received from A, and that it would be pointless, burdensome, and time-consuming to force B to request judicial assistance to compel A to produce the documents once again, now for the purposes of the B v. C dispute. (B's position is all the more understandable if A is domiciled in a far-off jurisdiction; transnational procedures for obtaining evidence may well result in delay, or prove futile, while of course B is ready and willing - indeed eager - to produce the documents instantly.) But this is exactly what A might fear; if B owes A a duty of confidentiality in the context of their arbitration, how might A keep B from communicating the documents to C? (Or, indeed, to the whole world, because once C has the documents A can hardly invoke a duty owed to itself by C, a stranger.) May this apprehension justify non-disclosure by A, or disclosure subject to conditions as to B's use thereof? These questions are particularly vexing if one imagines that B is a contractor and A and C are an owner and a subcontractor, respectively. In such a case, a rule of absolute confidentiality might result in injustice to B.

3. Given the problem examined in section B.2 above, may one arbitral tribunal refuse to consider documents which party B has obtained as a result of disclosure in proceedings before another arbitral tribunal? It would appear difficult to justify such a refusal, even if one takes the view that B is violating a duty of confidentiality, because that duty is owed not to C, the objecting party involved in the second arbitration, but to A, which was involved only in the first arbitration. Absent highly special circumstances, the second arbitral tribunal would have no jurisdictional authority to penalise the breach of an agreement to arbitrate which is not the one under which that tribunal is constituted. For individual tribunals to police the international arbitral process generally would be hazardous, given the multiplicity, and therefore potential inconsistency, of relevant jurisprudence, and the fact that those whose interests are purportedly to be protected are not present to state their views.

C. Confidentiality after award

May the award, or other elements in the record of the arbitration, be publicised after the

(1) Some providers of arbitration facilities would do well to follow this course and refrain from publishing the names of the parties on notice boards outside arbitration rooms. Experienced arbitrators organising hearings in hotels request that notices in the lobby are anonymous, *e.g.* nothing more than "ICC Arbitration N° __".

conclusion of the arbitration without the consent of both parties? While time heals many wounds, an unfavourable award may remain an irritant for a very long time. And of course it is not only the dispositive portion of an award which may be sensitive, but also any number of conclusions of fact or law, which, if falling into the public domain, may inspire further litigation, or result in significant commercial prejudice. The readiest proof of this observation is the fact that post-award settlements (where the loser typically agrees to waive any rights of challenge against the award in return for a reduction of its debt) routinely contain a promise not to divulge the contents of the award.

It is unusual for one of the parties to lift the veil of confidentiality immediately after an award is rendered. The winning party understands quite well that its adversary may be embarrassed by the award, and that it may be wise not to divulge the award because that might imperil the prospects of voluntary compliance with it. As for the losing party, it knows that the chances are good that the winner will undertake to "bury" the award as a condition of immediate voluntary payment.

These considerations hardly apply, of course, when the award consists simply in the *rejection* of a claim, because there the winning party - the defendant - is less concerned, if at all, about compliance. Nor do they apply when the losing party has refused to comply with the award, and the winner brings enforcement proceedings, typically in jurisdictions where the loser's assets are located. Such proceedings are generally matters of public record. However, the extent to which the full record of the arbitration thus falls into the public domain - *i.e.* not only the award, but also the parties' pleadings, and occasionally evidence - is variable.[2]

II - CONTEMPORARY PRACTICE

Most of the questions raised above are not dealt with explicitly in the ICC Rules. It will therefore be necessary to consider instances of actual practice before arbitrators (known to the authors by chance, not scientific survey); other arbitration rules; national court decisions; and commentary. (National arbitration laws typically say nothing about either the privacy or confidentiality of arbitration.) The aim here is to reach an understanding of the legitimate expectations in the international community, and of the way institutional rules of arbitration, including those of the ICC, may be reformed to reflect them.

A. Privacy of the proceedings proper

On this point - and on this point alone - the ICC Rules of Arbitration are perfectly explicit. As seen above, Article 15.4 provides that "save with the approval of the arbitrator and of the parties, persons not involved in the proceedings shall not be admitted [to hearings before the arbitrator]."

The ICC Rules are in this respect consistent with Article 10.4 of the LCIA Rules and Article 25.4 of the UNCITRAL Rules.

Common law jurisdictions have held that this rule, even in the absence of a provision like Article 15.4 of the ICC Rules, would be *implicit* in an agreement to arbitrate. Thus, in *The Eastern Saga,* Leggatt J, then a judge of the English Commercial Court, stated that:

> "The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated with each other the disputes in question may be".[3]

(2) See note 18 *infra.*

(3) Oxford Shipping Co Limited v. Nippon Yusen Kaisha (The Eastern Saga) [1984] 2 *Lloyd's Rep.,* 373, at page 739. Similarly, Mustill & Boyd in *Commercial Arbitration,* 2nd Ed at pages 303-304 state that:

> "It is... implicit in the nature of private arbitrations that the proceedings are confidential, and that strangers shall be excluded from the hearing."

Similar statements of principle can also be found in Bibby Bulk Carriers Limited v. Cansulex Limited [1989] QB 155 at pages 166-167 and in the judgment of Colman J in Hassneh Insurance Co of Israel and Others v. Steuart J Mew [1993] 2 *Lloyd's Rep.,* 243 at page 246.

B. Confidentiality prior to award

1. May the existence of the dispute be publicised without the consent of both parties? No explicit provision in the ICC Rules prohibits a party from divulging the existence of an arbitration. If the other side feels aggrieved, which it might if the publicised information is slanted, it might theoretically persuade a court to enjoin or penalise the breach of an *implied* duty of confidentiality. We say "theoretically" because we are not aware of any case where such an initiative before a national court has been attempted.

Might relief be obtained from the arbitral tribunal?

Although many final awards are published, it is rare to find decisions by arbitrators dealing with issues of confidentiality. This is both because arbitrators are seldom asked to rule on such issues and because their decisions, in the odd case where the contrary is true, tend to arise at a preliminary stage of the proceedings. An exception is a decision rendered in 1983, in the context of one of the many episodes of the Amco Asia Corp. et al v. Republic of Indonesia case, by an ICSID tribunal chaired by Professor Berthold Goldman.[4]

The controlling shareholder of the claimants in that case, an investor in Indonesia, had informed a business newspaper of the claim in arbitration, and, according to the respondent Government of Indonesia, "recounted a one-sided version of the claimant's story in tones designed to be detrimental to international perceptions of the climate for foreign investment in Indonesia." Accordingly Indonesia asked that the tribunal recommend as a provisional measure that the claimants abstain from "presenting their case selectively outside this Tribunal." (Article 47 of the ICSID Convention allows arbitrators to "recommend" rather than *order* provisional measures.)

Counsel to Indonesia argued that the claimant's actions had been "incompatible with the spirit of confidentiality which imbues these international arbitral proceedings." Whenever a lawyer refers to "imbuing spirits" one can be certain that he has failed to come up with positive authority. Indeed, counsel to Indonesia could do no more than to argue its case by inference, *e.g.* from Article 48(5) of the ICSID Convention (which provides that ICSID shall not make awards public without the consent of the parties) and from a number of provisions of the ICSID Arbitration Rules, namely Articles 48(4) *(idem)*, 37(2) (third parties may attend hearings only with the consent of the parties), 6(2) (arbitrators must keep confidential everything they learn in the proceedings), and 15 (deliberations are secret).

The claimants first of all denied that their disclosures harmed Indonesia, but also argued that in any event the ICSID Rules "do not prohibit individual parties from discussing the case and the status of the arbitration, publicly or otherwise."

The tribunal declined to make the recommendation requested by Indonesia. It stated that in the circumstances, there had been no transgression of "the good and fair practical rule, according to which both parties should refrain, in their own interest, to do anything that could aggravate or exacerbate the dispute." The reference to this "good and fair rule," however, hardly seems more substantial than Indonesia's reference to the "spirit of confidentiality." In fact, the arbitrators acknowledged that "it is right to say that the Convention and the Rules do not prevent the parties from revealing their case."

In other words, the only duty which the arbitrators were prepared to recognise was not an explicit duty to maintain confidentiality but an implied duty not to exacerbate a dispute.

2. May evidence adduced in a pending arbitration be disclosed for other purposes in other proceedings? Does it necessarily follow, if any agreement to arbitrate implies a principle of privacy of the proceedings, that parties are under a further duty not to disclose to strangers information obtained during the course of the arbitration? If so, does that duty make it impossible for a third party to obtain an order for discovery of such information? Until recently, there has been little or no comment on these questions by national courts.

Since 1990, however, the leading decision in England on this matter is the Court of Appeal judgment in Dolling-Baker v. Merrett & Another[5] which disapproved of a decision made

(4) Decision of 9 December 1983, 24 *International Legal Materials* 365 (1985).

(5) Dolling-Baker v. Merrett & Another [1990] 1 WLR 1205.

two years earlier by Webster J in Shearson Lehman Hutton Inc & Another v. Maclaine Watson & Co. Ltd.[6] In the court of first instance, Phillips had ordered that discovery be given by the first defendant of all documents relating to an arbitration in which the first and second defendants had been involved. The Court of Appeal held that the order for discovery was too wide and that the documents sought were not relevant to the issues in the action, but went on to consider what the position would have been had it been shown that the documents were relevant. Parker LJ's analysis, with which the other members of the Court of Appeal agreed, was that:

> "What [was] relied upon [was], in effect, the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained. As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must... be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer."[7]

Parker LJ therefore identified an "implied obligation" as the basis for the confidentiality attaching to documents used in an arbitration or engendered in its course. Whilst commenting that it was unnecessary to give a precise definition of the extent of that obligation, he made the following observations:

> "... the fact that a document is used in an arbitration does not *confer* on it any confidentiality or privilege which can be availed of in subsequent proceedings. If it is a relevant document, its relevance remains. But that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself. When a question arises as to production of documents or indeed discovery by list or affidavit, the court must, it appears to me, have regard to the existence of the implied obligation, whatever its precise limits may be. If it is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail."[8]

In a later English case decided at first instance, Hassneh Insurance Company of Israel & Others v. Steuart J Mew[9], Colman J felt it necessary to draw a distinction between documents created for the purpose of the arbitration (which he found must include transcripts or notes of evidence, pleadings, written submissions and witness statements) and those documents not created for the purpose of the arbitration but disclosed in the proceedings (*i.e.* what one might call "historical documents"). The requirement of privacy inherent in arbitration ought, he decided, to extend to the first category of documents. Although he also considered historical documents to be protected by confidentiality, he suggested that such confidentiality arose only from the application by the arbitrator of relevant English rules of discovery, including the usual implied duty of parties litigating in England not to use discovery documents for any purpose other than the proceedings in question.[10]

This leaves open the question whether documents produced in the course of an arbitration taking place in a jurisdiction which does not recognise such an implied duty are subject to no constraint, and therefore entirely free to be used by one party in subsequent

(6) Shearson Lehman Hutton Inc & Another v. Maclaine Watson & Co. Ltd [1988] 1 WLR 946.
(7) Dolling-Baker v. Merrett & Another [1990] 1 WLR 1205 at page 1213.
(8) *Ibid* at pages 1213-1214.
(9) Hassneh Insurance Company of Israel & Others v. Steuart J Mew [1993] 2 *Lloyd's Rep.*, 243.
(10) The policy reason for recognising this implied duty is to encourage "full and frank" discovery, and this does not apply to *voluntary* disclosures of documents. Following this thought, one could therefore defend the proposition that the implied duty of confidentiality should attach only to documents produced pursuant to an order by the arbitrator, and not to documents submitted voluntarily.

litigation. From a practical point of view, this situation may be unlikely to arise given that the discovery rules in jurisdictions such as England and the US have a far wider scope than those in force elsewhere, especially in civil law jurisdictions.

These English cases were considered in some detail in an unreported Court of Appeal judgment in Australia, ESSO Australia Resources Limited & Others v. The Honourable Sidney James Plowman (The Minister for Energy and Minerals) & Others[11], in which Brooking J found that the respondents, two public utilities, were not restricted from disclosing to the Minister for Energy and Minerals documents to be produced in the course of an anticipated arbitration between the utilities and, *inter alia,* ESSO Australia. After a detailed review of English and American cases, Brooking J summed up his judgment in the following way:

> "The argument in favour of the implied term of confidentiality is essentially this: privacy is innate in the notion of an arbitration and so it is an incident of all arbitrations not only that the hearing shall be in private but also that the parties shall keep confidential what takes place in the course of the arbitration. I accept the first conclusion - the private hearing - but not the second."[12]

In considering whether parties to an arbitration came under some implied obligation of non-disclosure, the judge concluded that it could only arise from either:

> (i) the essentially private nature of an arbitration; or
> (ii) an implied undertaking or other obligation with regard to documents obtained on discovery similar to that which exists in court litigation in some (mainly common law) jurisdictions.

As to the "essentially private nature of an arbitration", Brooking J considered that, logically, it meant only that non-parties were to be excluded from the hearing unless both parties consented to their presence. It did not necessarily follow that parties participating in an arbitration must not disclose to strangers what takes place in the course of the proceedings. The judge found great difficulty in imagining what would be the scope of such an obligation of non-disclosure and the possible exceptions to it. Thus, as to the latter he considered that they ought, for example, to include disclosure under compulsion of law, disclosure for the purposes of legal proceedings concerning the award or the arbitration, and disclosure where the interests of the disclosing party require it. The two first exceptions seem straightforward enough, but the third seems totally nebulous, absent a definition of what "interests" may "require" disclosure, and in what circumstances. Similarly, Brooking J was unable to define a basis on which to decide whether arbitrators or judges should have power to authorise disclosure in particular cases. His overall conclusion was simply to state: "I am not persuaded that the suggested term of confidentiality is required by the nature of the contract."[13]

Although the result in the *ESSO Australia* case was to reject the confidentiality principle as a bar to disclosing documents produced in an arbitration, the judgment nevertheless exudes tentativeness, stemming no doubt from a recognition that the implicit privacy of arbitration suggests that some degree of confidentiality should logically attach to what is produced in the arbitration. A more extreme approach, bereft of *any* recognition of a confidentiality principle - and moreover arising in the context of an international arbitration under the ICC Rules - was taken by a US federal district court in United States v. Panhandle Eastern Corp. et al.[14]

In that case, the US government (acting to protect a security interest as guarantor of ship financing bonds) sought the production of documents relating to ICC proceedings in Geneva between a Panhandle subsidiary and Sonatrach, the Algerian national oil and gas company. The court noted that Panhandle's only argument against production was to the effect that the ICC Rules require documents pertaining to an arbitration to be kept confidential. The only positive ICC rules cited, however, were taken from the Internal Rules of

(11) ESSO Australia Resources Limited & Others v. The Honourable Sidney James Plowman (The Minister for Energy and Minerals) & Others (Supreme Court of Victoria, Appeal Division, Case N°. 7371 of 1992), transcript reprinted in 8 *International Arbitration Reports* N°. 1-H-1 (1993). See the comment by Prof. H. Smit in 2 *American Review of International Arbitration* 491 (1991) (*sic*).
(12) *Ibid,* at page 60 of the transcript.
(13) *Ibid,* at page 61 of the transcript.
(14) 118 F.R.D. 346 (D. Del. 1988).

the ICC Court, in particular Article 2 which provides that the "confidential character" of the work of the ICC Court "must be respected by anyone who participates in that work in any capacity." These provisions, the US court noted, are meant to apply "internally" and to govern members of the ICC Court, not "the parties to arbitration proceedings or the independent arbitration tribunal which conducts those proceedings."[15]

Panhandle also argued that an understanding had been reached at the outset of the arbitration that pleadings and related documents would be kept confidential. The court noted that no evidence to this effect had been produced, and so was unconvinced.

The cases reviewed above were all decided by national courts. There is also of course the possibility of requesting arbitrators to rule on issues of disclosure of allegedly confidential documents. The authors were recently involved in an ICC arbitration in London in which the claimant sought to use the distinction drawn by Colman J in *Hassneh Insurance* between documents created for the purpose of the arbitration and historical documents. The claimant wished to submit historical documents, which had been produced by the respondent, in another arbitration arising out of the same subject matter involving the claimant and another party. The respondent was prepared to produce relevant documents to the claimant only if the claimant gave an undertaking that such documents would be kept confidential and would be used only for the purposes of that arbitration in which the claimant and the respondent were involved.

Following oral and written submissions from the parties, the tribunal made an order in which it "recognised and declared" that there was a general obligation on a party to an arbitration not to use documents disclosed by the other party for any purpose other than the arbitration in which the parties were involved. The tribunal further asserted that, if the parties were unable to accept this common obligation, the tribunal would order the production of a document by one party to the other only upon receipt of that party's undertaking not to use any document for any purpose other than the arbitration unless it first received the consent of the other party or an order from an appropriate national court permitting it to do so.

(15) *Id.* at page 350.

C. Confidentiality of the award.

In the case of Aïta v. Ojjeh, the Court of Appeal of Paris - perhaps the most important jurisdiction in France in the context of international arbitration given the fact that it reviews almost all challenges to awards - rendered a judgment against a party which rather bizarrely was seeking the annulment in France of an award rendered in London (by Lord Wilberforce acting as umpire). The Court of Appeal not only dismissed the challenge, but ruled that the very bringing of the proceedings violated the principle of confidentiality and therefore ordered the challenging party to pay a significant penalty to the party which had won the arbitration, noting that the action had "caused a public debate of facts which should remain confidential," and that it is in "the very nature of arbitral proceedings that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed".[16]

Since it does not give authority for either of these premises (*i.e.* that the "nature" of arbitration intrinsically calls for confidentiality, and that the parties had so "agreed"), and since it does not articulate any limits to the extent of the duty of confidentiality, the reasoning of the Court of Appeal is unsatisfactory. This is all the more so given its absolute position - at the extreme opposite end of the spectrum from the US *Panhandle* case. One is left with the impression that the Court was determined to punish what it evidently viewed as a hopeless attempt to set aside an English award by taking it to the French courts in order to embarrass the winner of the arbitration, a well-known international businessman living in Paris. This was not, perhaps, a context that lent itself to a careful balancing of considerations.

In *Hassneh Insurance*, by contrast, Colman J noted that a reasoned award was quite distinct from other documents created or produced during an arbitration. He considered that an award created "an independent contractual obligation to perform the award" and contained reasons which explained that obligation. The award was "an identification of the parties' respective rights and obligations" and was "...potentially a public document for the purposes of supervision by the Courts or

(16) Judgment of 18 February 1986, 1986 *Revue de l'arbitrage* 583.

enforcement in them..." He also pointed out that an award made pursuant to the Arbitration Acts 1950 to 1979 was subject to the supervisory jurisdiction of the English courts and was liable to be enforced by the English courts. According to Colman J, these factors imbue an arbitration award with characteristics not found in other documents. Accordingly, he found that the award could be disclosed if it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party, *i.e.* to serve as the basis for a defence or a cause of action against that party. Thus, in such circumstances, the disclosure of a reasoned award would not be a breach of the duty of confidentiality and could be disclosed without obtaining the consent of the other party to the arbitration, or leave of the court.

There may be other situations where a party has a legitimate interest in making disclosures about an arbitration, or indeed an obligation to do so, such as instances where a party is asked to respond to an investigation by a public body, or to a self-regulatory organisation having supervisory jurisdiction over a certain sector of activity.(17) Indeed, when a public entity (such as a State corporation or a government) participates in an arbitration, one must think twice before making a blanket assertion that the agreement to arbitrate implies an obligation of secrecy. Public bodies are, after all, accountable to the public. (In the *ESSO Australia* case, one of the parties was a state-owned utility subject to the jurisdiction of the Minister of Energy and Minerals, who was authorised by statute to require the disclosure of information that might affect rates payable by consumers.) Proponents of arbitration must be careful not to allow the process to become - or to appear to be - a sanctuary for those who would escape mandatory regulations.

III - SUGGESTED STIPULATIONS REGARDING CONFIDENTIALITY (IN INSTITUTIONAL RULES OR CONTRACTUAL CLAUSES)

Given the uncertainty and confusion that prevail in attempts to define the scope of a general duty of confidentiality in arbitration, we believe that institutional rules of arbitration should contain express provisions along the lines of those suggested below. They are not offered as ready-made amendments to existing rules, but rather as pointers to the elements to be considered by drafters.

A. Information generated in the course of the proceedings

In the context of ICC arbitration, Article 15(4) of the Rules is a sound provision in and of itself but, as we have seen above, does not ensure that the explicit privacy of hearings will be interpreted as creating an implied obligation of confidentiality with respect to information generated in the course of an arbitration. Relying on such an implied obligation would not only be unsafe (because one would have to argue about its application to innumerable sets of facts and circumstances), but would give rise to inconsistent results depending on the attitudes of various tribunals and courts which would be asked to rule upon alleged breaches of the obligation. As we have seen, even such intimately related legal systems as those of England, the US, and Australia have produced decisions which are difficult to reconcile.

One may note by way of introduction that Article 6 of the ICC's Rules of Optional Conciliation provides for confidentiality in the broadest terms:

> "The confidential nature of the conciliation process shall be respected by every person who is involved in it in whatever capacity."

One must however recognise the inherent differences between conciliation and arbitration. The process of conciliation cannot produce a binding result unless the parties so agree. Therefore there is no apparent need to disclose facts about a conciliation to third parties. Its objective is to encourage compromise, concession and accommodation. Therefore the need to communicate information and proposals in total confidence is crucial. The broad scope of Article 6 of the ICC Rules of Conciliation is accordingly indispensable in the context of conciliation, but is not necessarily appropriate in that of arbitration.

In order to suggest provisions applicable to the context of arbitration, it is first of all necessary to review which of the issues considered above need to be treated explicitly.

(17) Article 28.4 of the American Arbitration Association's International Arbitration Rules provides, though without elaboration:

> "An award may be made public only with the consent of all parties *or as required by law.*"

It seems unrealistic and undesirable to establish an absolute prohibition against unilateral publication of the mere *existence of the arbitration.* On the other hand, a legitimate need to divulge such information seldom arises. Accordingly, it would appear possible to establish a general principle of non-disclosure, qualified as follows:

Suggested Provision 1

No information concerning an arbitration, beyond the names of the parties and the relief requested, may be unilaterally disclosed to a third party by any participating party unless it is required to do so by law or by a competent regulatory body, and then only:
— by disclosing no more than what is legally required, and
— furnishing to the arbitrator details of the disclosure and an explanation of the reason for it.

As for the *use of evidence* produced in an arbitration for other purposes, the fact that otherwise discoverable evidence has been produced in an ICC arbitration cannot confer on it any special privilege. On the other hand, it is undesirable that a party defending its interests in an arbitration should have to weigh the need to produce evidence in the arbitration, the disclosure of which could *not* be compelled elsewhere, against the harm that might flow from unrelated uses that its adversary may make of it. One might therefore envisage a provision to the following effect:

Suggested Provision 2

1. Any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential, and shall not be disclosed, by any party whose access to such evidence arises exclusively as a result of its participation in the arbitration, to any third party for any purpose without the consent of all parties or order of a court [or arbitral tribunal] having jurisdiction. (For the purpose of this rule, a witness called by a party shall not be considered a third party. To the extent that a witness is given access to evidence obtained in the arbitration in order to prepare his testimony, the party calling such a witness shall be responsible for his maintaining the same degree of confidentiality as that required of the party.)

2. [To the extent that they describe or refer to evidence,] written pleadings shall not be disclosed to third parties for any purpose save as stated in 1 above.

3. An arbitrator, when issuing an order for the production of documentary or other evidence, may in his discretion make such order conditional upon the other party or parties' specific written undertaking not to disclose any of the evidence (or details of it) to third parties.

It should be noted that this wording does not deal with the issue described under the heading "practical issues" I.B.3 *supra.* Paragraph 3 explicitly authorises the arbitrators to rule as they did in the ICC arbitration in London described above, but this relates to a condition on discovery designed to inhibit the "outward leak" from an arbitration, not a prohibition on an "inward leak" into one arbitration from another. For the reasons stated in the discussion of issue I.B.3, we do not believe that the latter could be achieved with any degree of fairness and practicality.

B. Confidentiality of awards

It is of course true that awards may fall into the public domain as a result of challenge or enforcement actions.[18] A party may also reasonably need to invoke the award to establish or protect a right against a third party, as noted by the English High Court in the *Hassneh Insurance Co.* case referred to *supra,* or be compelled by a public authority to disclose the award. No other circumstances appear to justify the unilateral publication of an award, or of information concerning an award. Indeed, such publication may be positively harmful, as it creates a temptation for vindictive parties to disclose selective or erroneous information in the knowledge that it is putting unfair pressure on its adversary, which has the choice of making counter-revelations about a matter which it legitimately wishes to be confidential, or

(18) This does not, however, always mean that third parties have easy access to the award itself. In many if not most jurisdictions, a third party could not get a copy of the award from the court. Public circulation of the award is thus in fact the result of its dissemination by someone having participated in the arbitration. The most interesting position in this respect is that which obtains in Hong Kong as a result of the 1989 Amendments to the Arbitration Ordinance. Section 2.D thereof provides that all court actions relating to arbitration (e.g. appointment of arbitrators, provisional measures, enforcement of awards) will not be heard in open court if a party so requests, and publication of the proceedings may be withheld subject to the sanction of contempt. See N.Kaplan, "The Hong Kong Arbitration Ordinance: Some Features and Recent Amendments," 1 *American Review of International Arbitration* 25, at 35 (1990).

keeping silent in the face of misinformation. Nor is such disclosure of value to the legal community; information produced unilaterally in the context of arbitration cannot be verified and is therefore of little, if any, scientific value. (On the other hand, we have no quarrel with the *institutional* publication of illustrative awards, sanitised to protect the parties' anonymity. We have over the years recognised a number of our own cases among the extracts published in the ICCA *Yearbook* or *Clunet*; while the omission of incidental aspects of the awards may detract from a full understanding of the case, we have not perceived any breach of confidentiality.) Hence, we would propose this rule:

> *Suggested Provision 3*
>
> *Awards should be treated as confidential and not be communicated to third parties unless*
>
> *all parties [and the arbitrator] consent; or*
>
> *they fall into the public domain as a result of enforcement actions before national courts [or other authorities]; or*
>
> *they must be disclosed in order to comply with a legal requirement imposed on an arbitrating party or to establish or protect such a party's legal rights against a third party.*

C. The duties of arbitral institutions, arbitrators, counsel, and witnesses

All of the rules suggested above are addressed to parties, but they are not the only possible transgressors. The other "usual suspects" are: the arbitral institution itself, arbitrators, counsel, and witnesses.

Whilst there is no express general obligation of confidentiality imposed on the parties, the American Arbitration Association's International Arbitration Rules do contain a general prohibition directed at arbitrators and the AAA itself:

> "Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator (*i.e.* the AAA). 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."

In the next Article, however, one finds that neither the members of the tribunal nor the administrator may be held liable to any party for "any act or omission in connection with any arbitration conducted under these rules."

As for the ICC Court and its Secretariat, we can only say that in our experience they occasionally go too far in over-secrecy - or so it may seem to practitioners of the day -, but never fail in the other direction. Arbitrators, on the other hand, have been known to be indiscreet.(19) Yet they are not, by far, the worst sinners - here the greatest guilt is borne by the lawyers, who have without doubt far more often been the true causes of the unilateral publication of information about awards than their clients.(20)

Indiscreet lawyers typically justify themselves by referring to a wish to contribute to the body of international trade law, but somehow the reader cannot keep the word "self-aggrandisement" from creeping into his mind. Of course lawyers are perhaps less sturdy than others in resisting the temptation to try to convince the world of the importance of what they do, and that is unlikely to change. (For that matter, what client would want a lawyer who does *not* believe that what he is doing is terribly important?) The crucial thing is to circumscribe the expression of this self-aggrandisement so that it does not violate legitimate expectations of confidentiality.

This is not an idle concern. Two years ago in France, for example, a weekly gossip newsletter devoted to the legal profession began to publish

(19) This is sometimes true of those one would never have suspected; but as Samuel Johnson wickedly put it: "The vanity of being known to be trusted with a secret is generally one of the chief motives to disclose it."
Bucher and Tschanz, *International Arbitration in Switzerland* (1988), express the view, at p. 65, that arbitrators in Switzerland have a "fiduciary" duty to maintain confidentiality. It is unclear whether this proposition (which we entirely support in principle, and which is reflected in the IBA Ethics for International Arbitrators and the ABA/AAA Code of Ethics for Arbitrators) has a clear foundation in positive law.
An obvious issue of confidentiality arises from time to time as a result of multiple nominations of the same arbitrator in cases that are related but do not involve the same parties on both sides. We do not see how such a practice could *per se* be prohibited. Disclosure by an arbitrator of what he learned in a previous case should, however, clearly be forbidden.
(20) One of the authors recognises that he might be seen as throwing stones from a glass house, having been criticised for the publication of an ICSID award in 1984; see E. Gaillard, "Le principe de confidentialité de l'arbitrage commercial international," 1987 *Dalloz* (chronique) 153. Rather than explaining the circumstances of that publication, the author prefers to affirm his general support for Prof. Gaillard's view, and to note that his record in the last decade has been clean.

information about the results of certain important arbitrations, obtained over the telephone (as it turned out) from lawyers anxious to make known their successes. Not wanting to be left behind, many others followed suit in the following weeks, sometimes describing awards obtained many months before, thereby confirming the old Swedish saying that a good example is admired, but a bad one followed. Needless to say, information which percolated in this fashion resulted in the most extraordinary and embarrassing distortions, leading to violent protests from opposing counsel and happily, it would seem, to the discontinuance of the practice.[21]

As noted above, the non-disclosing party may be put in an intolerable position by this kind of misinformation. But the situation is even worse for an ethical arbitrator, if - as was the case in the French incidents just described - his name is cited and his careful reasoning in a complex award is mangled. The French publication went so far as to disclose the unverifiable amount of fees arbitrators were alleged to have received, and somehow managed - by using the word *contre* to suggest a quid pro quo - to convey the odious impression that the fees were in proportion to the amount of the award, a risible notion to any specialist, but a dangerous thing for the uninitiated to see in print.

It seems to us that a specific reference in the ICC Rules to the duty of parties' representatives may have a significant dissuasive effect in this regard. For example, it would provide a positive text which could be invoked by a complainant before the offender's law society or bar association.[22] It should be kept in mind that while parties remain bound by their obligations under the arbitration agreement, their legal representatives may discontinue in that function, and so become strangers to that agreement.

Such a rule should also include arbitrators. It is true that the ICC Court's Secretariat, in its form letter notifying persons of their appointment as arbitrators, "emphasises that the arbitrator's mission requires the utmost respect for the confidential nature of the proceedings." But the nominee does not sign an undertaking to this effect, and there is therefore no explicit duty running from the arbitrator to the parties.[23] To create such a duty would be consistent with the IBA Ethics for International Arbitrators, Article 9 of which provides as follows:

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

(21) The following excerpt from a lawyer's letter to the editor is indicative of the strong feelings understandably triggered by the publication:
"Your account of the award, which is presented in such a way as to be of no interest to anyone, significantly deforms reality. I do not myself wish to be an accomplice to a breach of confidentiality by correcting your information. I simply believe it useful to stress that you have understood nothing of the meaning of the award and that in particular, contrary to your assertion, [my client] was not ordered to pay any damages to its adversary."
La lettre des juristes d'affaires, N°. 144 (1992).
The letter concluded by reserving the right to seek damages on account of breach of confidentiality, and expressing the hope that the publication would in future consider the harm such disclosure may cause to Paris' reputation as a leading venue for international arbitration.
For similar incidents across the Atlantic, see C. Lamm, "Winning Firm Objects to Summary of Amco Asia Dismissal," 1986 *International Arbitration Report* 795; and the open letter from the Secretary General of the ICC Court published in 1986 *International Arbitration Report* 966 "regretting" the publication of information relating to an award and concluding:
"We would think that your publication could only benefit by its publicly stating and maintaining a policy that it will publish only material which is in the public domain and that it will not aid and abet those who, for narrow reasons of their own and without the courage to identify themselves, choose to violate the principle of confidentiality which they very well know should have been respected."

(22) By way of analogy, the "Code de déontologie des avocats de la CEE," which is incorporated into national bar rules within the European Community, provides in Article 2.4 that:
"Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity,"
and, in Article 4.5, following the rule established in Article 4.1 to the effect that lawyers must "comply with the rules of conduct" applicable before national jurisdictions where they appear, that:
"The rules governing a lawyer's relations with the courts apply also to his relations with arbitrators ..."
(23) To create such a duty raises obvious questions with regard to the liability of arbitrators; it may be that any breach of confidentiality by an arbitrator would be tantamount to wilful misconduct and therefore ordinarily beyond the protection of any legal or contractual exclusion of liability.

We would suggest a rule along the following lines:

Suggested Provision 4

Any person serving as arbitrator, or expert appointed by an arbitral tribunal, or appearing as the representative of a party in an arbitration, thereby undertakes on his own behalf mutatis mutandis to respect the rules of confidentiality defined in Articles ___.

Beyond its effect on participants in the arbitration, the presence of explicit principles of confidentiality in the ICC Rules may also serve to inhibit the dissemination of information by third parties (notably the media), on the basis that it may provide support for legal action of a delictual nature.[24]

As a matter of drafting technique, it may well be preferable to telescope such a provision into a more general rule by using an expression such as "all participants in an arbitration, whether a party, its representatives, the arbitrators, or experts appointed by the arbitrators," and so obviate any special provision for the latter three categories. We have set out this separate Suggested Provision 4 simply to highlight the issue.

Witnesses are of course a potential source of limitless leaks, particularly those, such as party-appointed experts, who are given access to the arbitration file. It would, however, seem unrealistic and even dangerous to attempt to impose a duty on witnesses. For the witnesses who have the most reliable contribution to make to the dispute - *i.e.* truly disinterested third parties - are also the most likely to shy away from appearing at all if to do so exposes them to an obligation. Perhaps, at the most, a duty could be placed on *parties* to the effect that they should seek to obtain from witnesses they wish to call an undertaking that they will not disclose what they learn about the case outside the arbitration, or alternatively a duty on parties not to disclose information obtained in the arbitration to witnesses (for use in preparing their testimony) unless they obtain such an undertaking. The latter rule would appear more manageable, because it would make it possible to call witnesses who do not need to consult evidence and pleadings without having to trouble them with a possibly dissuasive request for an undertaking. This is the thrust of the text within parentheses in Suggested Provision 2(1) above. However, we recognise the difficulties in suggesting an obligation on a party which requires it to police compliance even by "its" witnesses, who may include persons (such as former employees or independent contractors) over whom the party may otherwise have no legal control without recourse to the courts. If our suggestion were adopted, if such a witness were to refuse to give appropriate assurances, the party calling him would have to take care not to provide him with sensitive documents.

It seems likely, in light of the unhappy inconsistencies of national court decisions from the extremes of Aïta v. Ojjeh in France (unqualified confidentiality) to *Panhandle* in the US (no confidentiality) that the next revision of the ICC Rules will include an explicit confidentiality provision. Awaiting that revision, parties may be well advised, in appropriate cases, to consider contractual definitions of the duty of confidentiality, either in the original arbitration clause or in the Terms of Reference. In some sectors, such as contracts involving intellectual property, such provisions are second nature to experienced drafters.[25] At any rate, the propaedeutic reflections of this article may provide a basis for refining parameters of the duty that are suitable to specific situations.

(24) Such as that threatened by the irate French lawyer's letter quoted in note 21 *supra*.

(25) This may explain why the draft Arbitration Rules of the World Intellectual Property Organisation (WIPO) produced on 18 October 1993 (Document ARB/DR/2) contains the following article:
"55.(a) Unless the parties agree otherwise, the International Bureau, the arbitrator and the parties shall treat the arbitration, any disclosures made during the arbitration and the decisions of the arbitrator as confidential, except to the extent necessary in connection with a judicial challenge to, or enforcement of, an award, or as otherwise required by law.
(b) Notwithstanding paragraph (a), the International Bureau may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the identity of the parties or the subject matter of the dispute to be identified."