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Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration

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The principle that arbitrations are private and confidential as between the parties would seem to be self-evident. Is this not one of the most important of the perceived advantages of arbitration and one of the main reasons why business people around the world have made arbitration the forum of choice for the resolution of international commercial disputes?[1]

INTRODUCTION

Much has been written about the duty of confidentiality[2] in international commercial arbitration.[3] Most scholars and practitioners

1. L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT'L 131 (1999).

2. In the context of international commercial arbitration, and for purposes of this article, the term "confidentiality" refers to the extent to which information relating to, or revealed within, an arbitral proceeding is protected from disclosure to parties (e.g., the general public) not involved in the arbitral proceedings. This concept is distinct from the notion of confidentiality as a privilege between counsel and client. For a discussion on confidentiality as a privilege in international arbitration, *see* Jason A. Fry, *Without Prejudice and Confidential Communications in International Arbitration (When Does Procedural Flexibility Erode Public Policy?)*, INT'L ARB. L. REV. 209 (1998).

3. For purposes of this Article, the term "international commercial arbitration" will encompass both arbitrations between sovereign governments relating to com-

agree that a presumption of confidentiality—whether implied or explicit—exists between the parties to an international commercial arbitration. However, there is a disconnect between that presumption and the frequent realities of disclosure and publicity imposed by courts, arbitrators, and sometimes even the parties themselves.[4] Despite the English Court of Appeal's 1997 decision in *Ali Shipping v. Shipyard 'Trogir'*,[5] which signaled a revived movement toward a judicially enforceable duty of confidentiality, the question of confidentiality in international arbitral proceedings is far from settled. Thus, through a comprehensive survey of relevant common law, statutory law, institutional rules, contract theory, and scholarly commentary, this article attempts to fill in the gaps between presumption and reality by shedding light on the current meaning of confidentiality in international commercial arbitration.

Part I of this Article examines common assumptions and presumptions about the duty of confidentiality in international arbitration. Part II provides an overview of the leading cases on the confidentiality issue. The heart of the Article is Part III, which frames the confidentiality issue in terms of six foundational questions. The analysis of these questions will focus on the extent to which each element (both procedural and substantive) of the international arbitral process is currently protected by a duty of confidentiality. Part IV considers arguments for and against a duty of confidentiality in international arbitration, given the values of the arbitral process and the realities of the arbitration practice. Part V offers practical suggestions for parties who wish to protect the confidentiality of their arbitral proceedings. Part VI concludes that to fully protect party autonomy, courts should only enforce a duty of confidentiality to the extent that the parties explicitly contract for it.

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mercial transactions and arbitrations between commercial parties of different nationalities.

4. Fortier, *supra* note 1, at 131.

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

I. UNREALISTIC EXPECTATIONS?

Confidentiality and privacy[6] are often cited as advantages of arbitration over litigation.[7] These concerns are the primary reasons many parties choose to arbitrate instead of litigate.[8] Even sophisticated

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6. Confidentiality and privacy are distinct, albeit interconnected, concepts. *See, e.g.*, Fortier, *supra* note 1, at 131. Privacy means the right of the parties to limit or prohibit the presence of "strangers" at the proceedings, although of course, who constitutes a "stranger" is another definitional problem. Confidentiality refers to the right of the parties to have those who are present at the proceedings not disclose the content or nature of the proceedings. The two concepts are clearly corollaries, since the reason for privacy is a concern for confidentiality. Confidentiality is impossible without privacy; privacy is meaningless without confidentiality. *Id.* at 132.

7. *See* CHRISTIAN BUHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS (1996) (surveying ninety-one arbitrators, attorneys, and in-house counsel from seventeen countries as to the perceived advantages of international commercial arbitration). Respondents to Dr. Buhring-Uhle's survey regarded confidentiality as the third—after neutrality of the tribunal and international enforcement by treaty—most important advantage of arbitration, out of a list of eleven. *Id.* at 136. *See also* Jeremy Winter, *Confidentiality in Arbitration in the UK* (June 18, 1999) *at* http://www.bakerinfo.com/Publications/Documents/1044_tx.html (citing confidentiality as a primary advantage of arbitration over litigation); David Fraser, *Confidentiality in Arbitration*, Address in Paris (Oct. 13, 1998) *at* http://www.bakerinfo.com/Publications/Documents/756_tx.htm (highlighting confidentiality as a hallmark of arbitration); Robert H. Smit & Nicholas J. Shaw, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary*, 8 AM. REV. INT'L ARB. 275, 316 (1997) (recognizing confidentiality as a key factor for selecting arbitration); Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267 (1996) (identifying the maintenance of relationships due to confidentiality in arbitration as an advantage over litigation).

8. Parties desire confidentiality because it allows them to control the flow of information, avoid the damage of publicity from an adverse award, and mitigate the potential for a flood of "copycat" litigation. *See* Philip Rothman, *Pssst, Please Keep It Confidential: Arbitration Makes It Possible*, 49-SEP DISP. RESOL. J. 69 (1994):

> [C]onfidentiality may be more important to some parties than either speed or economy. . . . These parties would prefer to keep their disputes private thereby avoiding publicity that may hurt their image or benefit their competitors. The confidentiality of arbitral proceedings enables parties to resolve their disputes in private, without media attention, and ensure that the substance of the proceedings will not be disclosed.

Id. See also Jerzy Rajski, *Arbitration in Central and Eastern Europe*, 2 INT'L ARB. L. REV. 47, 48 (1999) (noting that privacy and confidentiality are "particularly

parties presume that a duty of confidentiality is inherent in the arbitration process. Commentary by scholars and practitioners alike illustrates this presumption:

> Confidentiality and privacy are supposed to be among the hallmarks of arbitration, together with enforceability and party control. By this it is usually meant that arbitration has an essentially private nature. Not only is the hearing in private with strangers excluded, but the parties, by entering into arbitration agreement, accept a mutual obligation not to disclose or use for any other purposes any documents which are prepared for and used in the arbitration. This includes transcripts, notes of the evidence in the arbitration and the award.[9]

> Most international arbitration rules provide that both the hearings and the award are confidential absent an agreement to the contrary. As a result, third parties are normally excluded from hearings.[10]

> One of the advantages of arbitration is that it is a private process between the parties and the members of the arbitral tribunal; hearings are held in camera and outsiders are only present to the extent that the parties agree.[11]

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valued by foreign companies involved in investment and other business transactions in Central and Eastern Europe who may fear that their reputation and business may be damaged by having their disputes discussed in public by the media, representatives of political parties, or other organisations . . ."); *Commercial Arbitration*, Encyclopaedia Britannica *at* http://www.britannica.com/bcom/eb/article/0/0,5716,109579+2+106463,00.html (last visited Apr. 11, 2000) ("The privacy of the arbitration procedure is also much valued by parties to the controversy; situations unfavorable to the party's credit or deficiencies in manufactured goods revealed in arbitration proceedings do not become known to outsiders."). *But see* Delissa A. Ridgway, *International Arbitration: The Next Growth Industry*, 54-FEB DISP. RESOL. J. 50, 52 (1999) (arguing that "international arbitration exists largely because there is no real alternative to arbitration . . . international arbitration exists not so much for reasons of speed, economy, informality, confidentiality, or equity . . . but because there simply is no other neutral forum.").

9. Fraser, *supra* note 7. After stating this presumption, however, Mr. Fraser, an attorney with Baker & McKenzie, discusses its limitations and exceptions. *See id.*

10. JAY E. GRENIG, ALT. DISP. RESOL. § 12.58 (2d ed. 1997).

11. Tatsuya Nakamura, *Confidentiality in Arbitration: SVEA Court of Appeal Decision—Is It Good News from Stockholm?*, 14 MEALEY'S INT'L ARB. REP. 24 (June 1999); *see also* REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 23, 45 (2d ed. 1991) (supporting the notion of arbitration as a private process); DOMKE COMM ARBITRATION § 4.01,

> There is a general duty of confidentiality—albeit subject to limited exceptions and qualifications—that in principle a party shall not disclose any information about the arbitration, any information learned through the arbitral proceedings and any award or decision rendered by the arbitral tribunal.[12]

> Arbitration maintains privacy and confidentiality in both the proceedings and the award.[13]

One handbook for arbitration practitioners suggests it is common wisdom that "arbitration is a private tribunal for the settlement of disputes. . . . No authority is cited for this proposition but it seems implicit in an agreement to refer a dispute to arbitration."[14] It is precisely this lack of explicit authority that makes confidentiality and privacy issues problematic in international arbitration. As Yves Fortier observes:

> In fact, the principle [that a duty of confidentiality exists] — at least, in the absolute form in which it is generally understood by most parties — is more truism than truth . . . basic questions ranging from the nature and scope of the principle, in law, to its utility, in practice, to its formulation as a rule of arbitral procedure, are highly contentious.[15]

Thus, although parties assume that courts will honor confidentiality agreements, this is not always the case. In fact, "there has been no consensus of doctrinal views, and there have been differing judicial attitudes shown."[16] As an illustration:

> In England, the general duty of confidentiality has been upheld by several

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4.06 (noting the privacy of proceedings as an advantage of arbitration); SUTTON ET AL., RUSSELL ON ARBITRATION 162 (21st ed. 1997) (citing confidentiality as a determinative factor in choosing to arbitrate); BERNSTEIN ET AL., HANDBOOK OF ARBITRATION PRACTICE 5 (3d ed. 1998) (listing the potential advantages of arbitration).

12. Nakamura, *supra* note 11, at 24.

13. Philip Wright, *The Woolf Reforms: Largely a Re-Statement of Current Arbitration Practice*, INT'L ARB. L. REV. 157 (1999).

14. BERNSTEIN ET AL., *supra* note 11, at 193 .

15. Fortier, *supra* note 1, at 131.

16. Nakamura, *supra* note 11, at 24.

> court decisions. On the other hand, the High Court of Australia considered the English court decisions but concluded that the privacy of the hearing does not give rise to this duty. In addition, in the United States, a federal district court implied that this duty should be based upon the parties' agreement.[17]

The bottom line is that parties' expectations about the privacy and confidentiality of their arbitral proceedings are often disappointed, or even negated by the courts.[18] Consequently, the remainder of this Article will focus on the extent to which various elements of the arbitration process can be and are protected by a duty of confidentiality, given judicial sentiment, current institutional rules, national statutes, contract law standards, and practical considerations.

II. JUDICIAL PERSPECTIVES ON CONFIDENTIALITY

A. *AITA V. OJJEH*[19]

Aita v. Ojjeh, decided in 1986, involved a party who sought annulment in France of an arbitral award rendered in London.[20] The Court of Appeal of Paris ruled against the party, holding that the annulment proceedings violated the principle of confidentiality.[21] As the Court noted, the action "caused a public debate of facts which should remain confidential . . . the very nature of arbitral proceedings [requires] that they ensure the highest degree of discretion in the

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17. *Id. See also Ali Shipping Corp.*, 1 Lloyd's Rep. at 643 (finding that a duty of confidentiality is implied-in-law, albeit subject to some narrow exceptions); Esso Australia Res. v. Plowman, 128 A.L.R. 391 (1995) (holding that privacy and confidentiality are distinct concepts and that confidentiality is not an inherent attribute of arbitration); United States v. Panhandle E. Corp., 118 F.R.D. 346 (D. Del. 1988) (holding that a duty of confidentiality must be contracted for explicitly).

18. *See* Fortier, *supra* note 1, at 138 (warning that nothing should be taken for granted with respect to confidentiality in international commercial arbitration).

19. Judgment of 18 Feb. 1986, 1986 Revue DE L'ARBITRAGE 583, *discussed in* Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 ARB. INT'L 303, 312 (1995).

20. *See id.* (describing the outcome of the dispute).

21. *Id.*

resolution of private disputes, as the two parties had agreed."[22] The Court ordered the losing party to pay a penalty fine to the winning party for the breach of confidentiality.[23] This decision is a stringent defense of an implied duty of confidentiality. Even the American and English cases, discussed *infra*, justify exceptions for judicial enforcement of a party's legal rights.

B. *UNITED STATES V. PANHANDLE EASTERN CORP.*[24]

In 1988, a United States federal district court found that, absent explicit agreement by the parties or institutional rules on point, arbitration proceedings are not necessarily confidential.[25] In *Panhandle Eastern*, the United States government sought the production of documents related to a previous arbitral proceeding in Geneva, held under International Chamber of Commerce ("ICC") rules.[26] The Court ruled that because the arbitration agreement and applicable arbitration rules did not provide for the confidentiality of the proceedings, the government could access the documents. Fundamentally, the Court failed to recognize any general principle of confidentiality in international arbitration, and under this holding, any duty of confidentiality can only be implied-in-fact.[27] The import of this holding, at least in the United States, was to underscore the necessity of broad confidentiality clauses in arbitration agreements.[28] As discussed later, however, even the presence of a seemingly all-encompassing confidentiality provision does not necessarily protect the parties.

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22. *Id.*

23. *See id.* (documenting the orders of the court).

24. 118 F.R.D. 346 (D. Del. 1998).

25. *See* Charles S. Baldwin, IV, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451, 456 n.21 (1996) (explaining the court ruling in *United States v. Panhandle Eastern Corp.*).

26. 118 F.R.D. at 351.

27. *See id.*

28. *See* Baldwin, *supra* note 25, at 456 n.21 (illustrating the need for confidentiality clauses in international arbitration agreements).

C. *DOLLING-BAKER V. MERRETT*[29]

In *Dolling-Baker*, the English Court of Appeal held that there is an "implied obligation" of confidentiality "arising out of the nature of arbitration itself."[30] Although the Court did not "intend . . . to give a precise definition of the extent of the obligation,"[31] it did find, in the case before it, that the implied obligation of confidentiality applied to "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" as well as evidence had been given by any witness in the arbitration.[32] The Court also noted that there may be exceptions to the duty of confidentiality.[33] As Lord Justice Parker, writing for the Court, observed:

> [T]he court must . . . have regard to the existence of the implied obligation. . . . 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. But in reaching a conclusion, the court should consider amongst other things whether there are other and possibly less costly ways of obtaining the information which is sought which do not involve any breach of the implied undertaking.[34]

D. *HASSNEH INSURANCE CO. OF ISRAEL V. STEUART J. MEW*[35]

In *Hassneh*, the English Commercial Court relied largely on *Dolling-Baker* in finding that arbitration proceedings are subject to an implied duty of confidentiality.[36] As Justice Colman wrote:

> If it be correct that there is an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must

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29. 1 W.L.R. (Eng. C.A. 1990).

30. *Id.* at 1213.

31. *Id.*

32. *Id.* at 1213-14.

33. *See id.*

34. *Id.*

35. 2 Lloyd's Rep. 243 (Q.B. 1993).

36. *See id.* at 243, 246 (using the *Dolling-Baker* decision as the test for finding an implied duty of confidentiality in arbitration proceedings).

> in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly, witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included.[37]

Thus, the *Hassneh* Court agreed with the *Dolling-Baker* Court: if privacy is an inherent attribute of the arbitral process, then confidentiality must be as well, because privacy is meaningless without its confidentiality corollary.[38]

Ultimately the *Hassneh* Court found an exception to the confidentiality rule and held that disclosure of an arbitral award was permissible if necessary to establish causes of action in a subsequent proceeding.[39] As Justice Colman wrote, "[S]ince the duty of confidence must be based on an implied term of the agreement to arbitrate, that term must have regard to the purposes for which awards may be expected to be used in the ordinary course of commerce and in the ordinary application of English arbitration law."[40]

E. *ESSO AUSTRALIA RESOURCES V. PLOWMAN*[41]

In 1995, the High Court of Australia's opinion in *Esso Australia Resources v. Plowman* "crashed like a giant wave—a veritable Australian tsunami—on the shores of jurisdictions around the world."[42] The cause of this "uproar" in the world of international commercial arbitration was the Court's announcement that confidentiality—distinct from privacy—was not an "essential attribute" of the arbitral

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37. *Id.* at 247.

38. *Id.*

39. *See id.* at 249.

40. *Id.* at 247-48.

41. 128 A.L.R. 391 (1995).

42. Fortier, *supra* note 1, at 134; *see also* Editorial, 11 ARB. INT'L 3, 231 (1995) ("[*Esso*] is a dramatic decision, with significance far beyond the shores of Australia.").

process.[43] In essence, parties could no longer expect that any element of their arbitral proceedings would remain protected by an umbrella of confidentiality.[44]

The case involved a dispute between Esso and the Australian Minister for Energy and Minerals.[45] Esso had commenced arbitration proceedings against two Australian public utility companies.[46] The Minister contended that because he had a public duty to supervise public utilities, and the rates they charge for oil supplies, he had a right to inspect documents produced for the arbitration.[47] Esso argued that all of the documents were confidential;[48] the Minister claimed they were not.[49] After soliciting opinions on the issue from numerous experts in international arbitration, the High Court concluded that the documents were not confidential and thus, accessible to the Minister.[50]

The High Court largely agreed with the findings of Justice Brooking, who had issued the Supreme Court of Victoria decision on appeal.[51] Justice Brooking rejected the premise—long supported by

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43. 128 A.L.R. at 401.

44. As the editors of *Arbitration International* remarked, the *Esso* decision flew in the face of "widespread understanding elsewhere . . . not for the first time in recent legal history, the Australian High Court has shown that foreign legal emperors wear transparent clothes (but English judges none)." Fortier, *supra* note 1, at 135 (quoting 11 ARB. INT'L 3 (1995)). *See also* 11 ARB. INT'L 3, 231 (stating that the *Esso* decision "caste severe doubts on the question whether, as a general legal principle, international commercial arbitration is 'confidential.' ").

45. *See* 128 A.L.R. at 392-93 (explaining that the dispute stemmed from two agreements for the sale of natural gas).

46. *See id.*

47. *See id.* at 393. The documents requested included data on profit margins, production costs, and estimated gas reserves. *See* Fortier, *supra* note 1, at 135.

48. *See id.* at 396 (providing Esso's argument that "it is an incident of private arbitration that a party is not entitled to disclose").

49. *See id.* at 397 (providing the Minister's argument that an implied term restricting disclosure is ". . . not an incident of all private arbitrations and cannot be supported on grounds of necessity, reasonableness or common sense . . .").

50. *See id.* at 404 (holding that while confidentiality does apply in some circumstances, it should not apply in case because the appellants were trying to apply the obligation of confidentiality to *all* of the documents in arbitration).

51. *See* 128 A.L.R. at 391, 392 (illustrating that the High Court agreed with the

the English courts[52]—that a duty of confidence must follow from an implied right of privacy.[53] Likewise, the High Court found that confidentiality is not part of the inherent nature of the arbitration contract and of the relationship thereby established."[54] Furthermore, the High Court noted that even if a duty does exist by virtue of the parties' contract,[55] it is not absolute.[56] Hence, no obligation of confidentiality attaches to witnesses in the arbitral proceedings; judicial enforcement of an arbitral award would necessarily reveal details of the proceedings, and parties themselves may need to disclose details of the arbitration to insurers or shareholders.[57] In addition, any possible duty of confidentiality is vulnerable to a clear "public interest exception."[58] Writing for the High Court, Chief Justice Mason noted: "Why should the consumers and public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the Public Utilities?"[59]

Reflecting on the potential impact of *Esso* in 1996, Patrick Neill, a noted international arbitrator scholar, commented:

> If some Machiavelli were to ask me to advise on the best method of driving international commercial arbitration away from England I think that I would say that. . . . The second best method—but the two boats are only separated by a canvas—would be for the House of Lords to overthrow *Dolling-Baker* and to embrace the majority judgment of the High Court of Australia in *Esso/BHP*. This would be to announce that English law no

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appellate court that there is no implied right not to disclose information).

52. *See, e.g.*, Dolling-Baker v. Merrett, 1 W.L.R. 1205 (1990), discussed *supra* Part II.B.

53. *See* 1 V.R. 1 (1994); *see also* 128 A.L.R. 391 (citing [1994] 1 V.R. 1 as holding the same as the appellate court); 1 W.L.R., at 1205 (explaining that the defendants were restrained from disclosing the documents, even though they were not relevant to disposing the issues).

54. 128 A.L.R. at 401-02.

55. *See id.*

56. *See id.* at 400-01 (discussing that certain factors can be exceptions to the duty of confidentiality).

57. *Id.*

58. *Id.* at 402.

59. *Id.* at 403.

> longer regarded the privacy and confidentiality of arbitration proceedings (using that term in the broadest sense) as a fundamental characteristic of the agreement to arbitrate. Lawyers and businessmen in France, Germany, Switzerland and in the countries of the Commonwealth and elsewhere would take note and there would be a flight of arbitrations from this country to more hospitable climes.[60]

Fortunately for Mr. Neill and the English arbitration practice, the English courts have not followed Australia's lead, as the following case illustrates.

F. *ALI SHIPPING V. SHIPYARD 'TROGIR'*[61]

The English Court of Appeal's December 1997 decision in *Ali Shipping* was a loud response to the *Esso* Court's deviation from previously accepted common law. In *Ali Shipping*, the Court reemphasized the *Dolling-Baker* principle that there is an implied obligation of confidentiality in international arbitration and that confidentiality is a necessary incident to "the essentially private nature of arbitration."[62]

Due to the import of this decision, the basic facts of the case are worth discussing. Ali Shipping, the plaintiff, arbitrated a breach of contract dispute with Shipyard Trogir.[63] An award was made in Ali's favor.[64] Later, Shipyard Trogir had separate arbitration proceedings with Lavender Shipping, Leeward Shipping, and Leman Navigation, all sister companies of Ali.[65] In the second arbitration, Shipyard

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60. Patrick Neill QC, *Confidentiality in Arbitration*, 12 ARB. INT'L 287, 316-17 (1996) (on file with author); *see also* Michael Pryles, *supra* note 7, at 267 (agreeing with Neill's conclusion).

61. 1 Lloyd's Rep. 643 (Eng. C.A. 1998). For an overview of the case and brief discussion of its implications, *see* Audley Sheppard, Case Comment, Ali Shipping Corp. v. Shipyard 'Trogir', 1(3) INT'L ARB. L. REV. nn. 53-54 (1998).

62. 1 Lloyd's Rep. at 651.

63. *See id.* at 645 (noting that Ali rescinded the contract when the Yard failed to complete Hull 202 according to the terms of their agreement).

64. *See id.* at 646 (stating that the arbitrator gave Ali an award of approximately $34,000,000 plus costs).

65. *See id.* at 646 (explaining that these proceedings were in regards to Hull 204-206 arbitrations).

Trogir wanted to produce the arbitration award and other documents from its first arbitration with Ali.[66] Shipyard Trogir claimed that those documents were essential to establish an estoppel issue.[67] Ali Shipping obtained an injunction stopping the production of these documents by claiming that they were confidential.[68] The Court thus had to consider whether the injunction should be lifted and the documents produced in the second arbitration.[69]

Five facts complicated the case and thus made the ultimate outcome powerful.[70] First, Ali, Lavender, Leeward, and Leman were all ship-owning companies 100 percent owned by the same parent company—Greenwich Holdings—which was itself owned by a single individual.[71] Second, Ali Shipping and its three sister companies all shared the same lawyers.[72] Third, all four ship-building contracts in

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66. *See id.* (noting that one of the reasons that Shipyard wanted the documents was to rebut contentions about Lavender, Leeward, and Leman in regards to Hull 204-206 arbitrations).

67. *See* 1 Lloyd's Rep. at 647. The court stated:

> The yard says that the contents of those documents support its case that (1) the issue whether the companies were in breach of the contracts for Hulls 204-206 in not paying installments due was determined by Mr. Harris [the arbitrator in the first arbitration], so as to create an issue estoppel as between the yard and the three companies, and (2) that, even if there is no issue estoppel, the underlying material demonstrates that the three companies were indeed in breach of the contracts for Hulls 204-206 and have no defense to the yard's claims.

Id.

68. *See id.* at 646.

69. *See id.* at 645.

70. *See* Fraser, *supra* note 7; *see also* Jeremy B. Winter, *A Review of Decisions Under the Arbitration Act 1996 of England and Wales* (Oct. 2000) (stating *Ali Shipping* is the definitive case in English Law holding that there is an implied obligation of nondisclosure for all arbitration material).

71. *See* 1 Lloyd's Rep. at 647 ("Ali, Lavender, Leeward and Leman, and the various other companies, including the management company, Seatankers, were 100 per cent, owned by Greenwich and . . . Mr. Frederiksen was in turn the sole beneficial owner of Greenwich.").

72. *See id.* at 646 ("Ali's solicitors, who also act for Lavender, Leeward and Leman in the Hull 204-206 arbitrations, sought and obtained the ex parte injunction from Mr. Justice Longmore on the basis that use of the material would amount to breach of the yard's implied obligation of confidentiality in respect of the first

dispute had been negotiated by the same people.[73] Fourth, all four sister companies had the same personnel.[74] Fifth, Shipyard Trogir wanted to disclose Ali Shipping's documents to Ali's own sister companies—not to "strangers."[75]

In spite of these facts, the Court of Appeal held that the Shipyard could not disclose materials from the earlier arbitration because the documents and award were protected by an obligation of confidentiality.[76] Confidentiality, the Court observed, is not dependent on the private nature of the material in question, nor is it dependent on custom, usage, or business efficacy. Instead, confidentiality attaches to arbitration agreements as a matter of law:

> It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the Court is propounding a term which arises 'as the nature of the contract itself implicitly requires' . . . a clear distinction is to be drawn between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will necessarily imply as a necessary incident of a definable category of contractual relationship. In my view an arbitration clause is a good example

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arbitration.").

73. *See id.* at 649 ("all the negotiations took place between Seatankers and the yard in a context where, although each buyer was to be a separate legal entity, the negotiations concerning the contracts for Hulls 200-202 were concluded at the same time and by the same persons as those for Hulls 204-206.").

74. *See id.* ("There is no evidence that the owning companies had separate personnel. All their operations were carried out by Seatankers, no doubt on the instructions of Mr. Frederiksen.").

75. *See id.* at 648.

> The yard . . . argued that, in English law, the doctrine of confidentiality only applies in respect of 'third party strangers' to the arbitration and should not be applicable in a case such as the present where disclosure was proposed to be made to and/or used against an entity which, in reality, was not a stranger but in the same beneficial ownership as the other party to the arbitration.

Id.

76. *See id.* at 655 ("While, in broad terms, the position of Ali appears to be more tactical than meritorious, it is based upon an assertion of principle which, in my view, entitles Ali to relief.").

of the latter type of implied term.[77]

The Court also noted:

> While acknowledging that the boundaries of the obligations of confidence which thereby arise have yet to be delineated [. . .], the manner in which that may be best achieved is by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in light of the particular circumstances and presumed intentions of the parties at the time of their original agreement.[78]

Thus, although the Court did recognize potential exceptions to the confidentiality rule: the consent of the parties, a court order, the "reasonable necessity" to protect or enforce a party's legal rights, and the "interests of justice," the Court did not find any of these exceptions applicable in this case.[79] As Lord Justice Potter stated:

> Are there good reasons why that principle should not apply or, put another way, should a further exception be created to the confidentiality rule, simply because the parties to whom disclosure is contemplated are in the same beneficial ownership and management as the complaining party? I do not think so. I say that for two particular reasons. First, whatever the position in this case, it is possible to envisage a situation where, despite the feature of common beneficial ownership between them, one entity may wish to keep private from another the details of materials generated in an earlier arbitration. Second, where the problem arises in relation to disclosure in later proceedings, to propound such an exception is to leave out of account that (as appears to be the position in this case) the real interest of the objecting party is to withhold disclosure of such materials from the subsequent decision maker. In this context, the latter is the 'third party stranger' in respect of disclosure to whom the objecting party seeks protection.[80]

In short, the Court found that the existence of possible justifica-

77. 1 Lloyd's Rep. at 651.

78. *Id.*

79. *Id.* at 652 (stating that the Court did not find exceptions to the confidentiality rule in this case).

80. *Id.* at 652-53.

tions for disclosure of arbitration materials or information does not diminish the general obligation of confidentiality. Further, Lord Justice Potter expressly found that the duty of confidentiality applies not only to the award, but also to "pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration."[81]

Clearly, *Ali Shipping* is a landmark decision that gives teeth to confidentiality protection in international arbitration. Rather than rethink their view on confidentiality as an implied-in-law obligation in light of *Esso*'s judicial reasoning, the English courts dug in their heels and fortified their position. While most arbitration practitioners cheer *Ali*'s result,[82] others wonder if the Court of Appeal, in allowing Ali to use confidentiality as a "strategy" in its dispute resolution battles, went too far.[83] As one commentator has observed:

> The Court of Appeal's decision in Ali Shipping stands in sharp contrast to the general trend of recent English decisions against technical legalism. It takes the doctrine of arbitral confidentiality far beyond its original purpose which was simply to close proceedings to the public. The decision is, however, consistent with the greater emphasis English judges place on contractual as opposed to judicial aspects of arbitration. Potter L.J. acknowledged that the outcome "[did] not assist in the course of justice."[84]

The implications of a broad confidentiality rule are discussed further in Part IV.

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81. *Id.* at 652.

82. *See, e.g.*, Sean Upson, *Arbitrations—How Confidential Are They?*, DISPUTE RESOLUTION NEWSLETTER (July 1998) *at* http://www.bakernet.com/Publications/Documents/1025_tx.htm (praising the *Ali Shipping* decision because it "confirms that disputes involving commercial agreements are better arbitrated than litigated.").

83. *See* Stewart R. Shackleton, *Global Warming: Milder Still in England: Part 2*, 2(4) INT'L ARB. L. REV. 117, 126 (1999) (discussing confidentiality agreements in arbitration).

84. *Id.*

G. *TRADE FINANCE INC. V. BULGARIAN FOREIGN TRADE BANK LTD.* (BULBANK)[85]

In 1999, the Swedish Court of Appeal reversed a Stockholm City Court decision that had sanctioned *A.I. Trade Finance Inc.* ("AIT") for publishing an arbitral award.[86] Fundamentally, the Court of Appeal rejected the principle that a duty of confidentiality is implied-in-law and instead formulated a new "duty of loyalty" doctrine.[87] In doing so, the Court distinguished between various elements of the arbitral proceedings, noting, for example, that disclosure of the fact of the arbitration is much different than disclosure of a party's trade secrets.[88] Further, in determining whether a party who breaches its duty of good faith and loyalty should be sanctioned, the reason for and effect of the breach should be considered.[89] As the Court stated:

> It is likely in many cases that the making public of information in arbitral proceedings could be viewed as a breach of the duty of good faith imposed on the parties in relation to each other. In this assessment, great importance should be attached to what kind of information is made public. Thus it is, for example, likely that information touching on the operations of the parties or its explanation of the action in the arbitration dispute may normally be regarded as more worthy of protection than information that an arbitration between the parties is in progress or information that concerns purely procedural issues of a general nature. Furthermore, it should be taken into account, *inter alia*, whether there was an acceptable reason for the publicising, to what extent the other party has been caused damage by this and, should it occur, whether the information was given with the purpose of harming the opposing party.[90]

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85. Case No. Y 1092-98, SVEA Court of Appeal, 14 MEALEY'S INT'L ARB. REP. 4, A1 (1999). For a comment on the case, *see* Nakamura, *supra* note 11, at 25.

86. The Stockholm City Court's decision was considered "extreme." *See* C. Partasides, *Bad News from Stockholm: Bulbank and confidentiality ad absurdum*, 13 MEALEY'S INT'L ARB. REP. 21 (1998); *see also* Fortier, *supra* note 1, at 137 ("At the very least, it should stand as a warning to all those involved in international ventures where disputes are to be resolved by arbitration.").

87. Nakamura, *supra* note 11, at 26.

88. *See id.* (explaining the nature of the disclosure).

89. *See id.* (noting that the court allows compensation for damages suffered).

90. Case No. Y 1092-98, SVEA Court of Appeal, 14 MEALEY'S INT'L ARB.

The Court's approach in *Bulbank* deviated from the English line of cases, particularly *Ali Shipping*, and has been sharply criticized by practitioners and scholars as a result. As one arbitration practitioner understated, "The SVEA Court of Appeals decision has not contributed positively to the development to [sic] the concept of confidentiality in arbitration."[91]

Although it has created ripples of worry in the international arbitration community, *Bulbank* takes a common sense approach to the confidentiality issue. Its rejection *of Ali Shipping*'s bright-line rules may result in less predictability for parties, but if followed by other courts, *Bulbank* may increase efficiency in international arbitration by encouraging publication of arbitral awards, thus creating a precedent system. The advantages of disclosure are discussed in detail in Part IV.

III. THE FRAMEWORK OF THE CONFIDENTIALITY DEBATE

Judicial perspectives provide an overview of the duty of confidentiality in international commercial arbitration. To facilitate a more comprehensive understanding of the issue's complexities, however, a conceptual framework is needed. Thus, the issue of confidentiality in international arbitration can now be broken down to six questions, each of which provokes additional queries:

(1) Can there be any duty of confidentiality?

(2) From where can a duty of confidentiality arise?

(3) Which elements of the arbitration fall under the confidentiality umbrella and to what extent do they remain protected?

(4) Who may be bound by a duty of confidentiality?

(5) Is the duty of confidentiality subject to any exceptions?

(6) How can a duty of confidentiality be enforced?

Each of these questions will be addressed in turn, with the fourth and fifth questions subsumed by the third to avoid redundancy.

REP. 4, A1-A2 (1999).

91. Nakamura, *supra* note 11, at 27.

A. CAN THERE BE ANY DUTY OF CONFIDENTIALITY?

To reach the last five questions, this first question must be answered in the affirmative. Scholars, judges, practitioners, and arbitrators all seem to agree that parties at least can contract for some degree of confidentiality, and in many cases, a duty of confidentiality is assumed and preserved.[92] Even the *Esso* decision acknowledged that some degree of confidentiality might be contracted for by the parties; it is just not an implied attribute of arbitration. Thus, the next five questions flesh out the subtleties of the confidentiality issue.

B. FROM WHERE CAN A DUTY OF CONFIDENTIALITY ARISE?

1. Implied-in-law

Some scholars argue that it should not be necessary to define explicitly every legal duty—that the duty of confidentiality, like the duty of good faith and fair dealing, is implied-in-law. As Fortier observes, "those who support and extol confidentiality as one of the defining characteristics of arbitration rely upon 'this very silence and absence of discussion' as proof that the duty exists—surely—and is simply taken for granted."[93] Fortier considers the dicta of a tribunal conducting an arbitration under the International Chamber of Commerce (ICC) Rules in Paris:

> While the confidentiality of ICC proceedings is not mentioned in the ICC Rules . . . it has been the experience of the members of this Tribunal and their colleagues whom they have consulted who often act as ICC arbitrators that, as a matter of principle, arbitration proceedings have a confidential character which must be respected by everyone who participates in such proceedings . . . We invite both parties, in the future, to respect the confidential character of the proceedings.[94]

As discussed above, the Australian and American courts have not found an implied legal duty of confidentiality, whereas the English

92. *See* discussion, *supra* Parts I, II (providing scholarly and judicial assumptions regarding the nature of confidentiality in arbitration).

93. Fortier, *supra* note 1, at 132.

94. *See id.* at 132-33 (considering the dicta of a tribunal under the ICC Rules in Paris).

courts have held, as illustrated in *Dolling-Baker*, *Hassneh*, and *Ali Shipping*, that confidentiality is "a necessary part of a definable category of contractual relationship."[95]

2. By Party Agreement

The absence of explicit confidentiality rules may be viewed by some as indication of an implied duty in law, however, the approach of the *Esso* and *Panhandle Eastern* courts suggests the opposite: a duty of confidentiality may only arise when specifically contracted for by the parties, thus making the source of the obligation the party's arbitration agreement. If parties fail to contract for a duty of confidentiality, no such duty exists.[96] Although this approach to the protection of confidentiality respects parties' autonomy—they can contract for whatever extent of confidentiality they desire—it is also pragmatically problematic. Parties often do contract for some degree of confidentiality in potential arbitral proceedings, but it is practically and diplomatically difficult to draft an effective confidentiality clause due to the numerous exceptions articulated in recent judicial holdings. Further, the model arbitration clauses offered by the major arbitration associations do not even mention confidentiality;[97] if parties simply include one of these model arbitration clauses as boilerplate in their business contract (for sales, construction, a joint venture, etc.), they are likely to ignore—inadvertently, perhaps—the need for a confidentiality provision. Some parties may even assume that confidentiality of the proceedings is just a "given" and not contract for it expressly. Since arbitration clauses are usually written into business contracts long before a dispute occurs,[98] even the most so-

95. Fraser, *supra* note 7 (discussing English court holdings regarding confidentiality in arbitration agreements).

96. *See* 128 A.L.R. at 401; 118 F.R.D. at 351.

97. For examples of model arbitration clauses, see *Text of Select Model Clauses*, *at* http://www.internationaladr.com (visited Apr. 30, 2000) (listing twenty-seven examples of model arbitration clauses, none of which include a confidentiality provision).

98. *See* W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 151 (1997) (quoting Stephen R. Bond, *How to Draft an Arbitration Clause*, J. INT'L ARB. 65 (1989)).

phisticated parties may feel uncomfortable in bringing up possible dispute resolution issues when "sealing a deal." As one experienced practitioner notes, parties "may not want to talk about the funeral while negotiating the terms of the marriage."[99] Consequently, arbitration clauses—and their confidentiality agreements—are typically poorly drafted. Thus, when confidentiality concerns arise during or after an arbitral proceeding, parties, judges, and third parties often find loopholes in the arbitration clause. If the source of a confidentiality duty is indeed the parties' contract, as the *Esso* court suggests, then a general principle of confidentiality in international arbitration does not exist—only the will of the parties can create an obligation of confidence.[100]

3. *International Conventions*

Three major conventions[101] govern international commercial arbitration: the New York Convention,[102] the Geneva Convention,[103] and the Panama Convention.[104] These conventions, which are usually codified and given legal meaning by individual nations, do not ensure a duty of confidentiality. This is not surprising for two reasons. First, if individual nations are reluctant to codify a duty of confidentiality,[105] it is unlikely that groups of nations could come to a consensus on the issue either. Second, the purpose of these conventions is to

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99. Fraser, *supra* note 7.

100. *See infra* Part IV (discussing the merits of this approach).

101. *See Treaties & Conventions, at* http://www.internationaladr.com/tc.htm. (last modified Jan. 28, 2000) (listing various treaties and conventions).

102. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, available at* http://www.un.or.at/uncitral.

103. *See European Convention on International Commercial Arbitration of 1961, available at* http://www.asser.nl/ica/eur.htm.

104. *See Inter-American Convention on Arbitration of 1975, available at* http://www.asser.nl/ica/iaci.htm. The Panama Convention is particularly significant because it takes precedence over the New York Convention in cases where the majority of parties to the arbitration agreement are citizens of countries that are signatories to the Panama Convention. *See International ADR: Treaties and Conventions, at* http://www.internationaladr.com/yc.htm (visited May 6, 2000) (signifying the importance of the Panama Convention).

105. *See* Part III(B)(4), *infra.*

facilitate enforcement of international arbitral awards; because of this ends-focused macro-perspective, they are not intended to focus on the details of the arbitral process itself. Thus, although these international conventions provide the force for the finality of international arbitral awards, they do not provide a source for an obligation of confidentiality.

4. National Legislation

Like the international conventions, national legislation helps provide structure for international commercial arbitration. To date, however, only one country—New Zealand—has codified a duty of confidentiality in either domestic or international arbitration.[106] While other countries have passed extensive arbitration legislation, none include a confidentiality provision.[107] Thus, only New Zealand includes a confidentiality provision in its national arbitration legislation, which applies to both domestic and international arbitral proceedings. Section 14 of the New Zealand Arbitration Act, which came into force in July, 1997, provides that ". . . an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings."[108] According to one commentator, this

106. *See* David Williams, *New Zealand: The New Arbitration Act -- Adoption of the Model Law with Additions*, 1(6) INT'L ARB. L. REV. 214, 216 (1998) (illustrating the Arbitration Act 1996 §14 (New Zealand)). *See also* Arbitration Act of 1996 § 14 (New Zealand), *available at* http://rang:knowledge-basket.com.nz. 9Pacts/public/text/1996/an/099.html.

107. *See International Alternative Dispute Resolution: Treaties & Conventions*, (last modified Jan. 28, 2001), *at* http://www.internationaladr.com/tc.htm (listing countries that have passed extensive arbitration legislation without confidentiality provisions). These countries include Algeria, Australia, Austria, Bahrain, Belgium, Bermuda, Bolivia, Brazil, Bulgaria, Canada, China, Columbia, Costa Rica, Croatia, Cyprus, the Czech Republic, Denmark, Egypt, Finland, France, Georgia, Germany, Greece, Hong Kong, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kenya, Korea, Kuwait, Lebanon, Libya, Malaysia, Malta, Mexico, Morocco, the Netherlands, Nigeria, Norway, Pakistan, Peru, the Philippines, Portugal, Qatar, Russia, Saudi Arabia, Singapore, Slovakia, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Taiwan, Thailand, Tunisia, the Ukraine, the United Kingdom, the United States, Yemen, and Zimbabwe. *Id.*

108. Williams, *supra* note 106, at 216.

provision was intended to overcome the *Esso* precedent.[109]

5. *Institutional Rules*

Dozens of national and international arbitration associations[110] promulgate rules on almost every aspect of the arbitral process,[111] including confidentiality. Unfortunately, as the following survey of model rules, major international institution rules, and select national institution rules illustrates, most of these institutional rules either do not explicitly protect confidentiality at all, or do so inadequately.

a. *Model Rules.* The Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") provide only that hearings shall be held in camera; arbitrators can exclude certain persons from the hearings to maintain the privacy of the proceedings.[112] Thus, while privacy is protected; confidentiality is not. These rules are particularly influential since dozens of nations pattern their local rules on the UNCITRAL model.[113]

b. *International Institution Rules.* The 1998 Rules of Arbitration[114]

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109. *See id.*

110. In addition to the major institutions—ICC, LCIA, AAA, and WIPO—there are newcomers that are popping up around the world faster than Starbucks franchises. *See* Ridgway, *supra* note 8, at 51.

111. For an overview of recent developments in institutional rules, see David W. Rivkin, *1997: A Year of Rules Changes*, 1(2) INT'L ARB. L. REV. 9-94, 91 (1998) (describing how in 1997 each large international arbitration institution amended its international arbitration rules to make the process easier to use).

112. *See* UNCITRAL Rules, art. 25 (4), *available at* http://www.un.or.at/uncitral (last modified Jan. 28. 2001) (noting further that the arbitral tribunal can examine witnesses the way it desires).

113. The UNCITRAL rules are particularly important because many nations base their local arbitration rules on the UNCITRAL model. *See, e.g.*, Adrian Winstanley, *London Court of International Arbitration: International Arbitration Rules*, 1(1) INT'L ARB. L. REV. nn. 6-7 (1997) ("The new LCIA rules are intended to be in harmony with the UNCITRAL Model Law . . ."); Jerzy Rajski, *supra* note 8, at 48-49 (noting that Hungary, Moldova, Lithuania, Bulgaria, the Czech Republic, the Slovak Republic, the Russian Federation, Ukraine, Croatia, Romania, Slovania, Poland, and Yugoslavia have followed, to some extent, the UNCITRAL model in promulgating their own national rules).

114. *See* ICC Rules of Arbitration (1998) *available in* English, *at* http://www.iccwbo.org/court/english/arbitration/rules.asp (listing ICC Rules of

promulgated by the ICC[115] do not mention a general rule of confidentiality because the drafters could not reach consensus on the issue.[116] Although Article 20.7 of the ICC rules does give the arbitral tribunal power to "take measures for protecting trade secrets or confidential information,"[117] for the most part, the rules implicitly defer to the will of the parties and to domestic law.[118]

In contrast, Article 30.1 of the London Court of International Arbitration ("LCIA") rules provides:

> Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their

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Conciliation and ICC Publication No. 581). *See also* Filip De Ly, *The 1998 ICC Arbitration Rules*, 1(7) INT'L ARB. L. REV. 220 (1998) (establishing a general overview of the 1998 Rules).

115. The ICC is the premier international business organization, headquartered in Paris. In 1999, 529 requests for arbitration—from 1354 parties of 108 different nationalities—were filed with the ICC, resulting in arbitrations in 48 different countries on five continents and 269 approved awards. *See* International Chamber of Commerce, *at* http://www.iccwbo.org (last visited May 6, 2000).

116. *See* Fortier, *supra* note 1, at 133 (explaining that the ICC's lack of any general rule of confidentiality reflects that there is no international consensus of whether, because commercial arbitration is private, it must be confidential). The rules do provide for a general expectation of privacy, however. Article 21.3 of the rules notes that "The Arbitration Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitration Tribunal and the parties, persons not involved in the proceedings shall not be permitted." *Id.* But as discussed *infra*, privacy is not sufficient to ensure confidentiality. .

117. ICC Rules of Arbitration, at art. 20.7. As one commentator has observed:

> I am not quite sure whether this is an entirely adequate provision in those cases where a party will wish to use the press to gain commercial advantage from an arbitration or to improve its position in the arbitration itself. I would have preferred a provision where confidentiality was the rule and the party had to obtain the specific permission of the Arbitral Tribunal to publish any information on the arbitration other than its existence and the mere outline of the facts.

Fortier, *supra* note 1, at 134.

118. *See* Fortier, *supra* note 1, at 133; *see also* Eric A. Schwartz, *International Chamber of Commerce: International Arbitration Rules*, 1(1) INT'L ARB. L. REV. nn. 1-5, n.4 (1997) ("Parties agreeing to ICC arbitration will, therefore, continue to be required to consider whether, in the circumstances of an individual case, it is desirable to supplement the arbitration clause with a related agreement on confidentiality.").

> arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain—save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.[119]

Article 30.2 goes further to note that "[t]he deliberations of the Arbitral Tribunal are likewise confidential to its members . . . ."[120] In addition, Article 30.3 provides that "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."[121] Although intended as a response to the lack of confidentiality protection in the 1996 English Arbitration Act, these confidentiality provisions, which went into effect in 1998, are regarded as controversial by arbitration practitioners and academics in London.[122]

The World Intellectual Property Organization ("WIPO") also includes a comprehensive confidentiality provision in its arbitration rules. Article 52(a) states:

> For the purposes of this Article, confidential information shall mean any information, regardless of the medium in which it is expressed, which is (i) in the possession of a party, (ii) not accessible to the public, (iii) of commercial, financial or industrial significance, and (iv) treated as confidential by the party processing it.[123]

Article 52(b) articulates the procedure by which a party can de-

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119. Arbitration Rules of the London Court of International Arbitration of 1998 art. 30.1, *available at* http://www.lcia-arbitration.com/rulescost/english.htm#ad (last modified Feb. 8, 2001). *Cf. LCIA Mediation Procedure*, 2(5/6) INT'L ARB. L. REV. 186-188 (1999).

120. Arbitration Rules of the London Court of International Arbitration of 1998 art. 30.2, *available at* http://www.lcia-arbitration.com/rulecost/english.htm#ad (last modified Feb. 8, 2001).

121. *Id.* at art. 30.3.

122. *See* Adrian Winstanley, *Conferences: LCIA Rules Conference at King's College London*, 1(6) INT'L ARB. L. REV. n.89 (1998) (discussing the concerns, of leading arbitration practitioners and representatives of user companies of the LCIA rules at the LCIA New Rules Conference).

123. WIPO Arbitration Rules. art. 52(a).

clare information confidential; Article 52(c) provides guidance for the tribunal on how to determine whether information should be kept confidential; Article 52(d) permits the tribunal to appoint a confidentiality advisor; and Article 52(e) allows the tribunal to designate the confidentiality advisor as an expert.[124] Given WIPO's interest in protecting intellectual property and trade secrets, it is not surprising that these institutional arbitration rules are so cautious with respect to confidentiality.

The Commercial Arbitration and Mediation Center for the Americas ("CAMCA") Mediation and Arbitration Rules, which became effective March 15, 1996, provide:

> Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. 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.[125]

This provision only binds the arbitrators and institutional administrator—not the parties.[126] Further, it does not specify what remedies are available for a breach of confidentiality.[127]

Similarly, the International Centre for the Settlement of Investment Disputes ("ICSID") Arbitration Rules provide for privacy of the proceedings and for a confidentiality obligation on the part of the arbitral tribunal.[128] Rule 6(2) provides that each arbitrator must sign a declaration that includes a confidentiality provision: "I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal."[129] Rule 15(1) states that "[t]he delib-

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124. *See id.* art. 52 (b)–(e).

125. CAMCA Arbitration Rules, art. 36 (1996), *available at* http://www.adr.org/rules/international/camca_rules.html.

126. *See id.*

127. *See id.*

128. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159, *available at* http://www.asser.nl/ica/wash_en.htm.

129. ICSID ARBITRATION R. 6(2) (2000), *available at* http://www.asser.nl/ica

erations of the Tribunal shall take place in private and remain secret."[130] Rule 48(4) reads: "The Centre shall not publish the award without consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal."[131] In addition, Article 44 of the ICSID Schedule C Additional Facility Rules provides that the minutes of the hearings "shall not be published without the consent of the parties."[132] Thus, ICSID allows for privacy of the proceedings and confidentiality of the final award, while binding arbitrators to an overall duty of confidentiality.[133]

The Center for Public Resources ("CPR") includes a much broader confidentiality provision in its Rules for Non-Administered Arbitration of International Disputes.[134] Rule 17 states that "the parties, the arbitrators, and the CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential" except in connection with an action to challenge or enforce an award or as otherwise required by law.[135] Two commentators on the CPR rules suggest that Rule 17 "extends confidentiality to all appropriate aspects of the arbitral proceedings while avoiding the pitfalls of trying to regulate in detail every specific issue that might arise."[136] The same commentators also note, however, that CPR Rule 17 does not specify how the confidentiality provision can be enforced, or what sanctions are appropriate for a breach of confidentiality.[137] Thus, "[r]ecourse to the courts, rather than the Tribunal, to enforce the confidentiality of the arbitration may be necessary prior to the constitution of the Tri-

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/icsid2.htm.

130. ICSID ARBITRATION R. 15(1) (2000).

131. ICSID ARBITRATION R. 48(4) (2000).

132. ICSID SCHEDULE C ADDITIONAL ARBITRATION FACILITY RULES art. 44 (2000), *available at* http://www.asser.nl/ica/icsid4.htm.

133. *See generally* Arbitration Rules (ICSID 2000) (setting forth the provisions for the proceedings and the arbitrators role in the arbitration).

134. *See* Smit & Shaw, *supra* note 7, at 316 (noting that the CPR rules are broader than many of the other sets of international arbitration rules in their treatment of confidentiality).

135. CPR RULES FOR NON-ADMINISTERED ARBITRATION OF INT'L DISPUTES R. 17 (2000), *cited in* Smit & Shaw, *supra* note 7, at 316.

136. Smit & Shaw, *supra* note 7, at 317.

137. *See id.* (identifying the shortfalls of CPR Rule 17).

bunal . . . or after the final award has been rendered."[138] Because CPR Rule 17 lacks an enforcement mechanism, or a detailed itemization of permissible exceptions to the confidentiality rule, it has shortcomings as a protective device for the parties.

Finally, the Rules of Procedure of the Inter-American Commercial Arbitration Commission ("IACAC") do not explicitly address a duty of confidentiality.[139] Although Article 25 allows for privacy,[140] there is no complementary provision for confidentiality.[141]

c. *Select National Institution Rules for International Arbitration.* The American Arbitration Association ("AAA") International Rules of 2000 do include a confidentiality provision.[142] Article 34 states:

> Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless 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.[143]

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138. *Id.* at 317-18. Smit and Shaw do note that CPR Rule 11 (allowing the tribunal to issue protective orders) and CPR Rule 15 (vesting the tribunal with general disciplinary powers) help give teeth to the confidentiality provision. *See id.* at 317.

139. *See* Baldwin, *supra* note 25, at 455 (noting that the IACAC Rules do not provide specific regulations regarding confidentiality). *See generally* INTER-AMERICAN ARBITRATION COMM'N, RULES OF PROCEDURE (1988) (setting forth the arbitration rules).

140. INTER-AMERICAN ARBITRATION COMM'N, RULES OF PROCEDURE art. 25 (1988), *available at* http://www.sice.oas.org/DISPUTE comarb/iacac rop_e.asp ("Hearings shall be held in camera unless the parties agree otherwise.").

141. *See* Baldwin, *supra* note 25, at 455.

142. AAA INTERNATIONAL RULES art. 34 (2000), *available at* http://www.adr.org/rules/international_arb_rules.html.

143. *Id. Cf.* AAA COMMERCIAL ARBITRATION RULES R-25 (2000) (revised and effective July 1, 1996), *available at* http://www.adr.org/rules/commercial_rules.html ("The arbitrator and the AAA shall maintain the privacy of the hearings[.]"). Further, "[t]o help the arbitrator carry out this mandate, she has the authority to exclude from the hearings any person who is not a party or "essential person." Rothman, *supra* note 8, at 69.

As one commentator observes:

> The result of this rule is that any arbitration held in accordance with the commercial rules of the AAA is presumed to be a private affair, with the ar-

Meanwhile, the American Bar Association ("ABA") and AAA Code of Ethics for Arbitrators in Commercial Disputes applies to all arbitrators (but only to arbitrators) in AAA arbitration.[144] Cannon VI(B) provides of the Code of Ethics that "[u]nless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."[145] One commentator interprets this rule in the following manner:

> Thus, not only is an arbitrator empowered by administrative rules to maintain confidentiality, he is ethically *obligated* to keep the proceedings confidential. Canon VI (B) proscribes an arbitrator from speaking with any third parties about the case. This includes the delegation of certain duties (e.g., research or a site inspection).[146]

The Japanese Commercial Arbitration Association ("JCAA") also provides for confidentiality in its procedural rules.[147] Rule 42, "Closed Proceedings, Obligation of Confidentiality" states that:

> (1) Arbitral proceedings and records thereof shall be closed to the public.
> (2) The arbitrators, the staff of the Association, the parties and their representatives or assistants shall not disclose facts related to arbitration cases or facts learned through arbitration cases; provided that disclosure may be made subject to the conditions provided in a consent of the arbitral tribunal.[148]

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bitrator having powers to ensure such privacy. In addition to the specific grant of power to the arbitrator, the AAA will not release any information about any pending case to a third party. In fact, the AAA will not even confirm a case has been filed. This policy is particularly useful when a well-known personality or corporation is involved.

Rothman, *supra* note 8, at 69.

144. *See generally* Baldwin, *supra* note 25, at 455 (stating the role of ethical codes in the confidentiality of arbitration proceedings).

145. CODE OF ETHICS FOR COMMERCIAL ARBITRATORS CANON VI(B) (ABA & AAA 1977), *available at* http://www.adr.org/rules/ethics/code.html.

146. Rothman, *supra* note 8, at 70.

147. JAPANESE COMMERCIAL ARBITRATION ASSOCIATION R. 42 (1998), *available at* http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/shouji4-1-e.html (last visited Apr. 11, 2000) [hereinafter JCAA] (illustrating the JCAA's arbitral proceedings).

148. *Id.*

The Chinese Arbitration Rules of 1995, which are promulgated by the China International Economic and Trade Commission ("CIETAC"), provide for confidentiality in two related articles.[149] Article 36 states: "The arbitration tribunal shall not hear cases in open session. If both parties request a hearing to be held in open session, the arbitration tribunal shall decide whether to hold the hearing in open session or not."[150] Article 37 continues:

> When a case is heard in closed session, the parties, their attorneys, witnesses, arbitrators, experts consulted by the arbitration tribunal and appraisers appointed by the arbitration tribunal and the relevant staff-members of the secretariat of the Arbitration Commission shall not disclose to outsiders the substantive or procedural matters of the case."[151]

Thus, by default, Chinese arbitration proceedings are private under Article 36, and Article 37 preserves the confidentiality of the private sessions.

d. *Analysis of Institutional Rules.* Although parties can choose, in their arbitration agreement, which arbitral institution's rules will apply in the event of a dispute, these blanket confidentiality rules are often too broad or too vague to be of practical guidance. None of the rules specify possible exceptions to the preservation of confidentiality or clarifies the extent to which each element of the process is protected. Further, they do not address whether information remains confidential *after* the arbitration is concluded. Thus, while arbitration institutions may help foster the common presumption that confidentiality is an advantage of arbitration by including confidentiality provisions in their rules, these rules do not provide ipso facto protection of confidentiality.

6. *Common Law*

Finally—at least in common law jurisdictions—regardless of what institutional rules, national statutes, international conventions, trade

149. China International Economic and Trade Arbitration Commission Arbitration Rules arts. 36 & 37 (1998) (setting forth the confidentiality provisions of the CIETAC arbitration rules).

150. *Id.* art. 36.

151. *Id.* art. 37.

secrets law, and contractual language may provide, ultimately, any duty of confidentiality is protected at the whim of the courts.[152] Given the general lack of statutory authority or convention provision for a duty of confidentiality, courts must view any such duty either as arising out of the parties' express contractual language, or as an implied-in-law obligation.[153] Since parties can contract for the application of a particular set of arbitral rules,[154] the institutional rules provisions discussed *supra* Part III.B.5. are encompassed by the former perspective.

In any event, the web of presumptions, institutional rules, common law, and national legislation is tangled further by the issue of whether the *lex causae*,[155] the *lex fori*,[156] the *lex mercatoria*,[157] or the *lex arbitri*[158] should prevail when these sources of law are in conflict.[159] While this choice of law issue is beyond the scope of this arti-

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152. *See supra* Part II for a discussion of relevant case law.

153. *See* Baldwin, *supra* note 25, at 456 (discussing the contractual aspects of confidentiality in arbitration).

154. *See generally supra* Part III.B.5 (discussing the contractual aspects of confidentiality in arbitration).

155. *Lex causae* is the law applicable to the case. *See* William Tetley, Glossary of Maritime Law Abbreviations Definitions, Terms and Odds'N Ends (2000), *at* http://Tetley.law.mcgill.ca. (last visited Apr. 30, 2000). In other terms, it is the "law applicable to the contract giving rise to the dispute." Francois Dessemontet, *Arbitration and Confidentiality*, 7 AM. REV. INT'L ARB. 299, 307 (1996).

156. *See* BLACK'S LAW DICTIONARY 910 (6th ed. 1990) (defining *lex fori* as the law of the seat of the arbitral tribunal—the law of the forum state).

157. *See id.* at 911 (stating that *lex mercatoria* is commercial law— "that system of law which is adopted by all commercial nations, and constitutes a part of the law of the land."); *see also* Norsolor S.A. v. Pabalk Ticaret Sirketi S.A., 1983 REVUE DE L'ARBITRAGE 465, 468 (defining *lex mercatoria* as "the general principles of obligations generally applicable to international commerce").

158. *Lex arbitri* is the law applicable to the arbitration, usually provided for in the original arbitration agreement. It is usually considered to be the procedural law governing the arbitration. *See* TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 404, 527-30 (1999) (discussing the meaning and scope of *lex arbitri*); Note, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816, 1817 n.9 (1988) (noting the distinction between *lex arbitri*, arbitration procedure and the substantive law governing disputes).

159. *See generally* VARADY, *supra* note 158, at 527-85 (detailing the complica-

cle, it is a potentially complicating factor for parties who arbitrate in one nation, using the substantive law of another, and then seek enforcement in the courts of a third.[160]

With the understanding that any duty of confidentiality is limited by judicial interpretation of its scope, the next analytical step is to filter through the case law, rules, and statutes to determine exactly which components of the arbitral process enjoy confidentiality protection.

C. WHICH ELEMENTS OF THE ARBITRATION FALL UNDER THE CONFIDENTIALITY UMBRELLA, AND TO WHAT EXTENT DO THEY REMAIN PROTECTED?

This third question is the heart of the issue for parties, arbitrators, judges, and lawyers. Is confidentiality protection limited to substantive elements, or does it extend to procedural elements as well? Should the very "fact of the arbitration" remain confidential? What protection is or should be given to documents produced in preparation for the proceedings, evidence introduced in the proceedings, transcripts or minutes of the proceedings, trade secrets revealed during the proceedings, fact witness testimony, expert witness testimony, procedural orders, the deliberations of the tribunal, and the content of the final award? Because distinctions are often drawn between "classes of materials" for purposes of confidentiality protection,[161] these questions are best approached by an element-by-element analysis of a typical arbitration.

1. The "Fact of the Arbitration"

Can the very existence of an arbitration be protected by a duty of confidentiality? In some cases, "[t]he mere fact that an arbitration broke out and is now pending before an arbitral tribunal may be viewed as a secret."[162] Clearly, many parties—particularly those wor-

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tions of choice of law issues in international arbitration).

160. *Id.*

161. *See* Baldwin, *supra* note 25, at 456 (citing Hassneh Ins. Co. of Israel v. Mew, 2 Lloyd's Rep. 243, 247 (Q.B. 1993)).

162. Dessemontet, *supra* note 155, at 300.

ried about adverse publicity—may wish for the very fact that they are arbitrating a dispute to remain confidential.[163]

Courts have not yet articulated a general rule on this issue. Professor Francois Dessemontet offers an explanation for the reluctance to create a blanket rule:

> [T]he arbitration clause is chosen in many instances in view of the confidential nature of the information at stake. Therefore, it is not possible to affirm that in any and all cases, each party is free to disclose the fact that arbitration proceedings are under way. The interests at stake are too important for them not to receive attention on a case by case approach. There appears to be no general rule in this regard.[164]

There are numerous practical reasons why the existence of the arbitration may not, or even should not, remain confidential. First, whenever courts become involved—to interpret arbitral rules or to enforce arbitral awards, for example—the fact that an arbitration is or was in existence will become public record. Thus, a concerted effort to maintain the confidentiality of the existence of the arbitration ultimately may be undermined when one of the parties pursues judicial involvement.

Professor Dessemontet raises a second practical issue through a hypothetical:

> Can a member of an arbitration panel for a proceeding between A and B disclose to the other members of that panel the fact that A or B is also party to other arbitration proceedings, which he knows because he has been asked if he would accept the position of arbitrator in that second case as well?[165]

In the relatively small world of international arbitration, where the services of particular arbitrators are in great demand, this is a common occurrence. Ethically, an arbitrator should disclose any potential

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163. *See id.* (providing examples in which the fact of arbitration may be secret for the reason of avoiding publicity such as between a solicitor and a barrister for professional negligence).

164. *Id.* at 300 (citing Stewart Boyd, Expert Report (in *Esso/BHP v. Plowman*)), *reprinted in* 11 ARB. INT'L 265, 266 (1995).

165. *Id.*

conflicts or knowledge of a particular party.[166] Thus, in situations where parties are frequently involved in arbitral proceedings, it may be impossible—even ethically undesirable—to keep the "fact" of such involvement confidential.

Third, arbitrators and lawyers often disclose—sometimes just by implication—that a particular party is involved in arbitral proceedings. For example, although most trade journals and arbitration periodicals "sanitize" reports of ongoing or recently-completed arbitration by removing the names of the parties, the description of the factual dispute and major issues often point to specific parties.[167]

Practical financial considerations, ethical duties, and public policy agenda also may necessitate or justify disclosure as to the existence of an arbitration. For example, directors of a public company have an affirmative duty to disclose claims that may have an impact on the company's financial position, even if those claims are the subject of arbitral proceedings.[168] Further, statutory requirements may compel a party to disclose the existence of arbitral proceedings.[169] In addition, a corporation may be obligated to inform insurers, stock brokers, and bankers, all of whom have potential financial interests at stake.[170] These statutory requirements and ethical obligations often trump a party's agreement to keep all matters relating to the arbitration confi-

166. *See* CODE OF ETHICS FOR COMMERCIAL ARBITRATORS Cannon 11 (ABA & AAA 1977), *available at* http://www.adr.org/rules/ethics/code.html (providing an example of the ethical disclosure requirements for arbitrators who may have an interest that is likely to effect the impartiality of the proceedings); AAA INTERNATIONAL ARBITRATION RULES art. 7 (2000) ("If, at any stage during the arbitration, new circumstances arise that may give rise to such doubt [of impartiality], an arbitrator shall promptly disclose such circumstances to the parties and the administrator").

167. *See* Fraser, *supra* note 7 (stating that the ICC follows the practice of publishing "sanitized" versions of arbitration awards).

168. *See id.* (providing examples of the practical and legal limitations of confidentiality in arbitrations).

169. *See id.* (concluding that the legal limitations may necessitate the disclosure of the existence of a dispute or arbitration).

170. *See id.* (explaining that insurers who pay parties' legal costs for arbitration, reinsurance underwriters in the London market, and third parties, such as bankers, who are concerned about the outcome of arbitration, seek information, and thus an end to confidentiality).

dential. In addition, because the parties to an international commercial arbitration are usually sophisticated repeat-players, there are few normative arguments against such mandatory disclosures as to the existence of an arbitration.

The confidentiality of the "fact of the arbitration" is also limited by the inability to bind third parties to confidentiality agreements. While the parties to an arbitration may agree to keep the "fact" of the arbitration confidential, and while arbitrators are bound by ethical considerations to do so, "leaks" are inevitable.[171] The typical international commercial arbitration involves dozens—sometimes even hundreds—of people, most of whom are in supporting roles.[172] Most expert witnesses, law firm support staff, employees of the parties, stenographers, messengers, caterers, and administrators are not bound by confidentiality agreements.[173] Even if the arbitral proceedings are technically "private," and thus free from the presence of "strangers," there are still third parties who are fundamental to the process and must be present. These third parties can form the grapevine through which information about an arbitration may be spread.[174]

2. *Documents Produced During Discovery & Evidence Introduced in the Arbitral Proceedings*

In general, documents produced during, or in preparation for, an arbitration, as well as evidence introduced during the arbitration, are protected by a duty of confidentiality.[175] Again, *Ali Shipping* provides the leading, and most recent, rule on point: both the physical pieces

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171. *See id.*.

172. *See id.* (noting that the number of people involved in a large arbitration is about equal to a large court case).

173. *See* Fraser, *supra* note 7 (attributing lack of privacy to lost papers and comments among those involved in the proceeding).

174. *See, e.g.*, Winter, *supra* note 7 (explaining that through the press and the grapevine the arbitration process is not really confidential, despite that an alleged advantage of arbitration over litigation is confidentiality).

175. *See* Dessemontet, *supra* note 155, at 302 (noting that a duty of confidentiality applies to documents produced, but not to minutes of hearings). *See also* Winter, *supra* note 7 (suggesting that confidentiality is an obligation implied in the private nature of arbitration).

of paper, and the information contained on them, are protected by a duty of confidentiality that binds all of those involved in the arbitration—the parties, the arbitrators, the lawyers, and the witnesses.[176] Third parties (such as witnesses) are bound, not by the contractual agreement to arbitrate made by the parties, but by an implied-in-law duty that is a "necessary incident"[177] of the "essentially private nature of an arbitration."[178]

The *Ali Shipping* rule stands in direct opposition to the *Esso v. Plowman* rule in Australia. Under the *Esso* precedent, documents or other evidence produced during arbitral proceedings are unlikely to be afforded any confidentiality protection by the Australian courts, unless the parties expressly and specifically contracted for such protection.[179]

The possible exceptions to the confidentiality duty, as recognized by *Ali Shipping*, *Bulbank*, and *Esso*, are particularly relevant to documents and evidence. First, the parties may consent to disclosure of particular documents or pieces of evidence.[180] Second, a court, in a later action, may order a party to produce documents from an earlier arbitration.[181] Third, a party may disclose when necessary to protect a legal right, as long as the documents present a "reasonable necessity" to do so.[182] Fourth, disclosure is permissible when "in the interests of

176. *See supra* Part II.F (setting forth the Court's determination that confidentiality applies to arbitration agreements). *See also* Winter, *supra* note 7 (reinforcing the holding of *Ali Shipping* that there exists in private arbitrations an implied obligation of confidentiality).

177. 1 Lloyd's Rep. 643, 651 (Eng. C.A. 1998) (citing Lord Bridge in *Scully v. Southern Health Bd.*).

178. *Id.* (citing Lord Justice Parker in *Dolling-Baker*).

179. *See supra* Part II.E (asserting the Australian court's rule that confidentiality is not inherent in arbitration). *See also* Winter, *supra* note 7 (explaining that confidentiality is an essential attribute of arbitration in the English law, but does not prevail elsewhere, such as in Australia).

180. *See* Winter, *supra* note 7 (citing the proposition that, since arbitration is a contractual matter, consent is an exception to the confidentiality rule).

181. *See id.* (describing an example of an exception that is based on an order of the court).

182. *Id.*

justice," which allows a potentially broad public interest exception.[183] With the *Ali Shipping* and *Esso* courts on opposite sides of the ring with regard to the breadth of these exceptions, the more recent *Bulbank* decision is instructional. The *Bulbank* approach would distinguish between different types of materials and apply a type of balancing test to determine when disclosure should be permitted.[184]

3. Fact Witness Testimony

With the exception of fact witnesses who are employees of one of the parties, fact witnesses are generally not bound by a duty of confidence. Although arbitrators and parties may encourage fact witnesses to keep their knowledge of the arbitral proceedings confidential, they cannot legally bind such third parties to a duty of confidentiality. Further, if a fact witness testifies in an arbitration and then gives materially different testimony in a future arbitration or judicial proceeding, his testimony from the first arbitration may be disclosed in the subsequent proceeding. Consequently, although parties to an arbitration may encourage fact witnesses to keep their knowledge of the dispute or arbitral proceedings confidential, unless that fact witness is under some type of contractual obligation to the parties (i.e. an employee of a corporate party), it is difficult—if not impossible —to protect the confidentiality of fact witness testimony.

4. Expert Witness Testimony

a. *Are Expert Witnesses Bound by A Duty of Confidentiality?* A similar analysis to the proceeding applies to expert witness testimony. An arbitration agreement is certainly binding for the parties who sign it, but third parties, such as expert witnesses, generally are not bound by, and cannot incur obligations under, the agreement.[185]

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183. *See generally* Winter, *supra* note 7 (providing as an example of a broad exception a situation where an expert witness' position in an arbitration is directly opposed to his position in another court action).

184. *See generally supra* Part II.G (contrasting, for example, disclosure concerning the fact of arbitration and disclosure of trade secrets, and weighing the necessity for sanctions against the effect of a breach).

185. *See* Zhivko Stalev, *Interim Measures of Protection in the Context of Arbitration*, *in* INTERNATIONAL ARBITRATION IN A CHANGING WORLD 103, 108 (Albert

Yet, one commentator asserts, an expert witness "owes an obligation not only to the side for whom he appeared but also to the other side to respect the confidentiality of the arbitration proceedings."[186] If this obligation does exist, it does not arise from the principles of contract law, in which an independent third party cannot be bound by an agreement made between two other parties.[187] Thus, any obligation on the part of expert witnesses or other third parties must instead be implied-in-law, an obligation that is a fundamental attribute of the arbitration process.

Because expert witnesses are typically "hired guns," however, parties to an arbitration can bind expert witnesses by making them sign confidentiality agreements. For example, Party A is likely to have a number of potential engineering experts among which it can choose an expert witness to testify on its behalf. As a condition of being hired as an engineering expert witness, Party A can require the expert to sign a confidentiality agreement. Thus, although expert witnesses cannot be bound by the arbitration agreement of the parties, they can be bound to confidence by supplementary agreements between themselves and at least one of the parties.

b. *Is The Testimony of An Expert Witness in An Arbitration Protected by Confidentiality?* Expert witnesses are not themselves protected by the confidentiality agreements that govern the proceedings in which they participate. For example, an expert witness who testifies on behalf of Party A, in favor of Issue X, during in Arbitration 1, later testifies on behalf of Party C, against Issue X, during Arbitration 2. Party D, who is adverse to Party C in Arbitration 2, may subpoena the expert witness' working files from Arbitration 1 to prove

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Jan Van Den Berg ed., 1993) (asserting that, since an agreement is not binding for third parties, a tribunal can only exercise power over parties to the dispute, not over third parties).

186. Neill, *supra* note 60, at 290.

187. *See generally* E. ALLAN FARNSWORTH, CONTRACTS (2d ed. 1990) (indicating that, unless an agreement otherwise provides, the claims of one party against another party do not affect the rights of a third party, and a third party is not bound by an agreement made by other parties). Obviously, contract law would apply if an expert witness, who is being paid by one of the parties to the arbitration, signs or agrees to be bound by the confidentiality agreement that already exists between the parties themselves. *Id.*

the inconsistency of the expert's opinion.

A situation similar to this hypothetical was the subject of *London and Leeds Estates v. Paribas*,[188] a case brought before an English court in 1995. The judge held that "a party to court proceedings was entitled to call for the proof of an expert witness in a previous arbitration in a situation where it appeared that the views expressed by him in that proof were different from his views expressed in the court proceedings."[189] As one experienced arbitration attorney noted in an address to others in the field:

> Those of you who act as expert witnesses will know that you are exposed to the risk that the adverse party may attempt to subpoena your working files if it is thought that you or, conceivably a partner or colleague in the same organisation, has addressed a similar question in the past and given a view which is not consistent with that given in your expert opinion.[190]

In short, expert witness testimony that one gives during an arbitration is not necessarily protected from later disclosure. No institutional rules or national statutes address the specific protections accorded to expert witness testimony. Consequently, even the confidentiality-friendly English courts have found practical policy reasons to allow disclosure. Whether in the "interests of justice" or in the "public interest," expert witness testimony is subject to disclosure, use, and scrutiny long after the conclusion of an arbitration.[191]

5. *Trade Secrets Revealed During the Proceedings*

For many parties, protection of their trade secrets is the primary motivation for seeking a confidential dispute resolution process.[192] Thus, intuitively, if a duty of confidentiality exists at all, at the very least, it should encompass the protection of trade secrets.

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188. 1 EGLR 102 (1995).

189. Fraser, *supra* note 7. Fraser notes that this holding is consistent with the English rule that issue estoppel applies to arbitration. *See generally* 1 EGLR 102.

190. Fraser, *supra* note 7.

191. *See id.* (explaining that "public interest" means "in the interests of justice," and the public interest requires disclosure).

192. *See generally* Dessemontet, *supra* note 155, at 299 (analyzing the arbitration and confidentiality issue in the context of the law of trade secrets).

Case law, institutional rules, and legislation support this intuition.[193] In particular, the WIPO rules, discussed *infra* Part III.B.5.b, provide the "most complete regulation" of trade secret confidentiality.[194] Further, trade secrets may be protected by patent and copyright conventions, national criminal laws, or national rules of civil procedure, many of which allow for the issuance of protective orders for trade secrets.[195] In Switzerland, for example, the following trade secret "data" are explicitly designated as confidential: pricing policies, bids and offers, terms and conditions for providing goods or services, rebates, an advertising campaign before it is launched, statistical data on turnover or reliability, loans and borrowings, comments on a balance sheet, taxation schemes, employee salaries, technical tables, blueprints, drawings and designs, software, lists of temporary employees, customer lists, and compilations of data on service providers and raw materials or semifinished product suppliers as well as their price structures.[196]

Francois Dessemontet suggests that the arbitration community also should consider Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs").[197] Article 39 provides:

> In the course of ensuring effective protection against unfair competition as provided in Article 10 of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 below and data submitted to governments or governmental agencies in accordance with paragraph 3 below.
>
> Natural and legal persons shall have the possibility of preventing infor-

193. *See generally id.* at 304-07 (framing the confidentiality versus public interest issue in terms of rule protecting trade secrets).

194. *Id.* at 306.

195. *See id.* at 304-09 (articulating the applicable rule regarding confidentiality and the existence of protective orders and an implied obligation of secrecy).

196. *See id.* at 310 (citations omitted) (describing the categories of information into which the most sensitive information to be protected falls).

197. *See* Dessemontet, *supra* note 155, at 299-300 (explaining that the promulgation of Article 39 of TRIPs represents the first restatement of the law of trade secrets in a multilateral treaty). Over 150 countries have signed, ratified, or acceded to the TRIPs Agreement. *See id.* at 307.

> mation lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: is secret in the sense that it is not . . . generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; has commercial value because it is secret; and has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.
>
> Members . . . shall protect such data against unfair commercial use. . . . Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.[198]

Article 39 also defines "a manner contrary to honest commercial practice" as including "breach of confidence."[199] Dessemontet finds this confidentiality rule particularly compelling because the construction of Article 39 was a joint effort between the United States and Western European nations.[200] Dessemontet notes that the United States, which is "often seen as the stronghold of the anti-confidentiality school of thought" still encourages measures to protect trade secrets.[201]

Given the plethora of case law, institutional rules, national statutes, international conventions, and national civil procedure rules on point, trade secrets comprise one informational element of the arbitral process that are clearly protected by a duty of confidentiality.

6. Transcripts and Minutes of the Hearings

Once again, *Ali Shipping* is the leading case on-point. Lord Justice Potter's broad interpretation of the confidentiality obligation ex-

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198. General Agreement on Tariffs & Trade-Multilateral Trade Negotiations (the Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods, Apr. 15, 1994, art. 39, 33 I.L.M. 81, 98 (1994) [hereinafter TRIPS].

199. *Id.*

200. *See* Dessemontet, *supra* note 155, at 303 (describing the joint effort as an indication that assertions that the United States fails to protect confidentiality are inaccurate).

201. *Id.* at 304.

pressly includes transcripts of the proceedings.[202] Although in 1996, Francois Dessemontet argued that "confidentiality does not extend to the minutes of hearings, or so it would seem according to English practice,"[203] recent case law seems to suggest otherwise. Logically, this should be the case. Every English court since *Dolling-Baker* emphasizes that the privacy of the arbitral proceedings—which everyone, even the Australian courts, takes for granted—is meaningless if confidentiality is not protected as well.[204] After all, if the transcripts of the proceedings are made public domain, parties might as well invite "strangers" to observe the proceedings in person. Thus, the presumption that arbitration transcripts fall under the umbrella of the confidentiality obligation is generally justified.

Like other elements of the arbitral process, however, there are exceptions under which disclosure of transcripts may be permissible. These have been discussed in previous sections[205] and do not need reiteration; however, parties should be mindful that exceptional circumstances may warrant disclosure.

7. *Deliberations of the Tribunal*

Emmanuel Gaillard and John Savage suggest that arbitrators are bound by four obligations.[206] First, they must act equitably and impartially;[207] second, they must function within the contractual and legal deadlines imposed;[208] third, they must pursue their functions until

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202. *See* 1 Lloyd's Rep. at 652 (extending the duty of confidentiality beyond the arbitration award).

203. Dessemontet, *supra* note 155, at 302.

204. *See supra* Part II.C, II.F (asserting that decisions that follow *Dolling-Baker* reiterate the premise that an implied duty of confidentiality exists in arbitration proceedings).

205. *See supra* Parts II.E, II.F, III.C.1, & III.C.2.

206. *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 609-13 (Emmanuel Gaillard & John Savage eds., 1999) (describing four obligations that bind arbitrators).

207. *See id.* at 609 (explaining that the arbitrators' status as judges imply that they satisfy this obligation, and by accepting their appointment as arbitrators, they are obligated contractually).

208. *See id.* at 610 (noting that arbitrators are required to act diligently).

a final award is made;[209] and fourth, they must keep all matters relating to an arbitration confidential.[210] With respect to the fourth obligation, Gaillard and Savage observe that however vague or "cautious" relevant institutional rules[211] may be, "it is clear that the rule applies to arbitrators, who are service providers with no personal interest in the case, and who must ensure that the dispute remains confidential, as the parties clearly intended."[212] This duty of confidentiality not only binds, but also protects arbitrators and deliberations between members of an arbitral tribunal remain confidential as well.[213] The content of the deliberations may not be disclosed to anyone, even the parties.[214] Arbitrators may, however, indicate whether they reached their final decision by a majority or unanimously.[215]

8. *Final Award*[216]

Despite the existence of institutional rules prohibiting unauthorized publication of the final arbitral award,[217] as well as the general presumption that an arbitral award is confidential,[218] in reality, the fi-

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209. *See id.* at 611 (imposing an obligation on arbitrators not to resign unless they provide appropriate grounds for doing so).

210. *See id.* at 612 (citing confidentiality as a major advantage of international arbitration).

211. *See, e.g.*, AAA International Arbitration Rules art. 34 (2000), *available at* http://www.adr.org/rules/international/AAA175-0900.htm (last amended Sept. 1, 2000) (stating that all matters relating to the arbitration or award to remain confidential, unless the parties otherwise agree or applicable law requires).

212. FOUCHARD, *supra* note 206, at 613.

213. *See id.* at 627-28 (describing confidentiality of the arbitration process and deliberations as a prerogative).

214. *See id.* at 750-51.

215. *See id.* at 750 (defining secrecy as the rule, despite the fact that secrecy of deliberations is not an explicit requirement of arbitration).

216. This analysis applies to procedural orders as well.

217. *See, e.g.*, AAA, Procedures for Cases Under the UNCITRAL Rules Arbitration Rules art. 32 (5) (2000), *available at* http://www.adr.org/documents/AAA112-0900.htm (last amended Sept. 1, 2000) (providing that "the final award 'may be made public only with the consent of both parties.' ").

218. FOUCHARD, *supra* note 206, at 773 (citations omitted) (asserting that those who use arbitration select the process because it is confidential).

nal award is often disseminated to media and other third parties.[219] Typically, trade journals and arbitration reporters remove identifying features of the parties from the text of the award, but such "sanitation" of the award is often ineffective in protecting the parties' anonymity.[220] As discussed above, the "fact of the arbitration" is almost impossible to conceal; thus, when the public is aware that an arbitration is occurring between two parties, and subsequently, an award is issued and published, it is not difficult to match parties with awards.

Although publication of the final award often undermines the wishes of parties who chose arbitration out of confidentiality concerns, there are benefits to public disclosure of arbitral awards. Emmanuel Gaillard and John Savage discuss the growing trend of publishing arbitral awards:

> [I]n the field of state contracts, ICSID awards, *ad hoc* awards concerning disputes arising out of state contracts, and awards made in important and well-known cases are often published with commentaries, and will naturally serve as precedents. More generally, a broad movement has developed in favor of publishing awards: in France, the *Journal du droit international* has had an annual review of ICC arbitral awards since 1974 and ICSID awards since 1986. The Yearbook Commercial Arbitration, among a number of other publications, has also contributed to the "lifting of the veil." On reading the ICC awards and their commentaries, one significant phenomenon becomes clear: the more recent awards are based on earlier decisions, and the decisions reached are generally consistent. The publication of awards thus enhances their homogeneity. In both arbitration law and international commercial law, arbitral awards have now become a private source carrying considerable weight and have undoubtedly helped to create the arbitral component of lex mercatoria.[221]

Gaillard and Savage also articulate well the reasons why publica-

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219. *See, e.g.*, Dessemontet, *supra* note 155, at 302-03 (describing disclosure of awards and procedural orders).

220. *See id.* (noting that "giving all that information is sometimes tantamount to giving the name of the parties"). *But see* FOUCHARD, *supra* note 206, at 773-74 (citations omitted) (arguing that "[t]he principle is not threatened by the fact that anonymous extracts from awards may be published, as in the case in the *Yearbook Commercial Arbitration* and the *Journal du Droit International*, particularly for ICC and ICSID awards.").

221. FOUCHARD, *supra* note 206, at 189.

tion of awards can be important and useful:

> In any event, it is important to underline that confidentiality is not breached by the publication of the reasons for an award on an anonymous basis. Such publication satisfies the general interests of business and legal practice, as it is legitimate that arbitration users and practitioners have access to the rules applied and the decisions reached by the arbitrators. . . . In many areas, arbitral awards are published, in most cases without disclosing the names of the parties. . . . The disclosure of awards is universally considered to contribute to the predictability of results, and the codification of usages by a professional organization will very often by the result of the publication of such decisions.[222]

In sum, although there are institutional rules that prohibit unauthorized disclosure of the contents of a final arbitral award, in reality, these awards are often made public in some form. Often the parties themselves are responsible for an award's disclosure—as when they challenge or enforce the award in a national court.[223] Further, public policy reasons support publication of awards, as discussed in greater detail *infra* Part IV.

D. HOW CAN A DUTY OF CONFIDENTIALITY BE ENFORCED?

What are the sanctions for breaching this duty? How are damages for breach of confidentiality obligations measured? Is there a difference between breach of confidentiality damages and breach of contract damages?

There is very little case law addressing the issue of sanctions for breach of a confidentiality duty. Until it was overturned by the Swedish Court of Appeal, the Stockholm City Court's opinion in *Bulbank*, discussed in Part II.G, was the primary judicial authority on point. In the *Bulbank* matter, AIT obtained a favorable partial award from an arbitral tribunal and then published the award in *Mealey's International Arbitration Report* without Bulbank's consent.[224] Bul-

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222. *Id.* at 188-89.

223. *See id.* at 773-74 (citations omitted) ("On the other hand, the award will become public if court proceedings are initiated concerning its validity or enforcement. . . . Nevertheless, the principle [of confidentiality] remains intact.").

224. *See* Nakamura, *supra* note 11, at 25 (commenting that the award was pub-

bank argued that the publication of the award constituted a breach of confidentiality and that it was thus entitled to avoid the entire arbitration agreement.[225] The arbitral tribunal disagreed and made a final award on the merits of the case.[226] The Stockholm City Court agreed with Bulbank, and in a September 1998 decision, held that confidentiality is a fundamental rule in arbitral proceedings.[227] As the "City Court Concludes that *any* breach of confidentiality is a fundamental breach of the arbitration agreement, and as such, constitutes valid grounds for invalidation of an award."[228] Consequently, the City Court declared the arbitration agreement invalid and the arbitral award void.[229] The initial *Bulbank* decision shocked the arbitration community. As Gaillard and Savage commented, "[t]his decision was unquestionably too severe[.]" Thus, most commentators were pleased by the Swedish Court of Appeal's overruling of the City Court decision.[230]

The commentary on the *Bulbank* cases is discordant with the commentary on *Esso*. After *Esso*, arbitration experts were shocked, worried, and disheartened by the Australian courts' rejection of an implied duty of confidentiality in arbitration.[231] When a Swedish court, three years later, attempted to reinforce the importance of confidentiality through stringent sanctions against those who breach the duty, however, arbitration experts were again shocked, worried — even outraged—by the harshness of the ruling.[232] Perhaps the Stock-

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lished in an earlier edition of *Mealey's*).

225. *See id.* (noting that the publication of the award without Bulbank's consent or knowledge was what constituted the breach of the arbitration agreement).

226. *See id.* at 26 (declaring that the Swedish Court of Appeal concluded that the decision of the arbitral tribunal rested on an examination of legal principles and Bulbank had not shown cause to evade arbitration).

227. *See id.* at 25 (furthering the City Court's contention that the arbitration agreement could be voided for breach of confidentiality).

228. Partasides, *supra* note 86, at 22 (quoting the decision of the Stockholm City Court).

229. *Id.* at 23.

230. *See* FOUCHARD, *supra* note 206, at 773-74 (noting that the Swedish Court of Appeals "rightly reversed" the Stockholm City Court decision).

231. *See infra* Part II.E (describing the process, outcome, and impact of the *Esso* case on confidentiality in international arbitration proceedings).

en outraged—by the harshness of the ruling.[232] Perhaps the Stockholm City Court did go too far in invalidating the entire arbitration agreement based on a breach of an implied duty of confidentiality. Logically, though, if the duty of confidentiality is an "essential attribute" of an arbitration agreement, then a breach of this duty should be treated as would a breach of any other contractual provision. It thus seems that arbitration practitioners and scholars want the best of both worlds—an implied duty of confidentiality, which gives arbitration proceedings integrity and a genteel nature, but no serious negative consequences for parties who breach this duty.

In light of the Swedish Court of Appeals' 1999 decision overturning *Bulbank*, the only remedies now generally available when a party breaches its duty of confidentiality are monetary damages and injunctions against further disclosures. Obtaining such remedies is pragmatically difficult, however. For Party A to be awarded damages for a breach of confidentiality committed by Party B, Party A must show that: (1) a duty of confidentiality did exist between Party A and Party B; (2) a breach of that duty was committed; (3) the breach was committed by Party B; (4) the breach caused injury to Party A; and (5) the injury caused to Party A is quantifiable and compensable by monetary damages. The most problematic element of this test is the third—unless a party openly distributes supposedly confidential information, it is difficult to pinpoint the source of a disclosure. Leaks occur, and frequently a party's own employees, lawyers, and staff are to blame. Further, it is difficult to assess the monetary effect of unauthorized disclosures of information; without a clear calculus for the determination of monetary damages, any damage awards for breach of confidentiality are arbitrary at best. As Gaillard and Savage conclude, "it will never be easy to establish which party is responsible for the document's release, and it may be difficult for the disclosing party to prove that it suffered loss as a result of any breach by its adversary."[233]

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232. *See, e.g.*, Partasides, *supra* note 86, at 21 (calling the decision "astonishing"); *see also* Fortier, *supra* note 1, at 137 ("[The Stockholm City Court's decision in *Bulbank*] should stand as a warning to all those involved in international ventures where disputes are to be resolved by arbitration").

233. *See* FOUCHARD, *supra* note 206, at 617.

Although the issue of sanctions against parties to an arbitration is unclear, arbitrators are held to their duty of confidentiality. Arbitrators who breach their duty of confidentiality may be subject to termination of their contract, or even to personal liability; however, a breach of confidentiality by an arbitrator will not invalidate the arbitral award.[234]

Ultimately, any duty of confidentiality is meaningless if it can be violated without consequence. The threat of a mere token punishment ineffectively deters unauthorized disclosures of information. Like all aspects of the confidentiality issue, much depends on how courts treat the matter. There is a pressing need for consistent judicial resolution of the sanctions question.

IV. IS CONFIDENTIALITY A GOOD THING?

Much of the above discussion assumes that confidentiality is a good that should be protected. But in addition to the exceptions carved out by courts, there are several arguments against a duty of confidentiality in international arbitration.

First, protecting the confidentiality of arbitral proceedings can produce inconsistent resolutions of disputes arising out of the same transaction. Complex international business transactions often produce multiple disputes involving several parties.[235] Because all of the parties may not be bound by the same arbitration clause, two or more arbitrations may arise out of the same facts. When the proceedings of each arbitration are kept confidential and arbitral tribunals are not permitted to share findings with one another, the same dispute may be resolved in inconsistent ways.[236]

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234. *See id.* at 617.

235. *See* Shackleton, *supra* note 83, at 125 (explaining that a single transaction can bring together a large number of parties that are not necessarily linked together by the same arbitration clause).

236. *See id.* (discussing the disadvantages in complex business transactions when multiple arbitration proceedings are hampered by non-access to information across hearing due to confidentiality provisions in a given country's arbitration statute); Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT'L L.J. 121, 123 (1995) (noting the advantages of hearing related disputes between differing parties in that documents and information will be relevant to each of the disputes).

Second, protecting the details of arbitral proceedings and final awards can be inefficient. Many international commercial arbitrations involve common issues of law or fact. When the proceedings and ultimate award are kept confidential, subsequent parties, arbitrators, and judges cannot utilize them for learning purposes.[237] Whereas in litigation, participants can refer to common law precedent for instruction, participants in the international arbitration process have little such guidance.[238] This can result in duplicative effort on the part of parties, lawyers, witnesses, and arbitrators, and thus greater expense. Further, as a general rule, precedent breeds predictability, and predictability facilitates efficiency. If the outcome of an arbitration is predictable, because parties know that cases similar to theirs were decided a certain way earlier, they will be encouraged to forgo formal methods of dispute resolution and settle, again saving considerable expense and time.

Third, beyond efficiency, there are additional economic and public policy reasons why publication of awards, and the resulting precedent system created, would be beneficial. As Delissa Ridgway, an arbitration scholar and judge, comments:

> Are international arbitrators applying the law consistently, and in such a way as to foster a certainty and predictability in international business transactions? Does it matter? Much of the value in the doctrine of the rule of law lies in consistency and predictability. Social and economic stability, as well as respect for the law, require that parties have the ability to know the likely legal consequences of what they do in advance, at the time they act. How can business people be expected to set prices and allo-

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237. *See Commercial Arbitration*, Encyclopaedia Britannica, *available at* http://www.britannica.com/bcom/eb/article/0/0,5716,109579+2+106463,00.html ("This uncertainty resulting from lack of reasoned precedents, moreover, makes the arbitral decision less predictable.").

238. *See* FOUCHARD, *supra* note 206, at 188 ("the very idea of arbitral precedent is considered to be contrary to the confidential nature of both arbitration and the resulting awards."); Winstanley, *supra* note 122, at n.90 ("Concern was expressed at the lack of arbitration "case law," for the benefit of practitioners and academics alike, resulting directly from the confidentiality principle."); Pryles, *supra* note 7, at 286 (noting that when seeking to establish legal precedent in the resolution of a dispute, litigation offers openness of forum and decision whereas arbitration and mediation usually provide for confidentiality); Fraser, *supra* note 7 (noting that there are certain exceptions to common law precedent with respect to confidentiality).

> cate risk, without certainty and predictability as to the law governing their deal?[239]

Fourth, the release of procedural orders and awards may be useful for the purpose of training current and future arbitrators.[240] Just as future lawyers and judges (at least in common law nations) learn by the case method, future arbitration counsel and arbitrators could learn from the work of those already established in the field.

Fifth, the realities of the current system may make protection of confidentiality a wasted effort. Confidentiality is often undermined by enforcement and challenge proceedings in national courts. As Gaillard and Savage note, "confidentiality will never be absolute: a small circle of people will be aware of the award, and that circle will grow if the award gives rise to litigation before the courts and thereby becomes public."[241]

Sixth, many parties solicit a reciprocal confidentiality obligation without giving thought to the opportunities and rights they may be foreclosing as a result. In addition to the obvious advantages—beneficial publicity following a favorable award, for example—parties may inadvertently forgo the potential res judicata effects of an arbitral award.

Although efficiency and public policy concerns may support an open and public arbitral process, the primary justification for confidentiality in international arbitration is party autonomy. If parties value privacy and confidentiality above financial efficiency, they should be able to resolve their disputes in a manner that respects their priorities. This is an especially valid justification for a confidentiality rule since international commercial arbitration is a private regime in the sense that private parties—not taxpayers—pay for use of the system.

Of course, the autonomy of the parties, often considered the hall-

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239. Ridgway, *supra* note 8, at 52. Ridgway also notes, however, that "the cure [of publishing arbitral awards] may be worse than the disease." *Id.*

240. *See* Dessemontet, *supra* note 155, at 303 (questioning whether the publication of awards and the resultant educational benefits of disclosure outweigh the need of the parties for confidentiality).

241. *See* FOUCHARD, *supra* note 206, at 188.

mark of the arbitral process, can be undermined by national courts that impose an implied duty of confidentiality on parties to an arbitration when no such duty is contracted for in the arbitral agreement. For reasons discussed above, parties may not want a blanket confidentiality rule. Thus, as in *Ali Shipping*, when a court imposes a duty on parties who did not expressly agree to it, the ability of arbitral parties to make autonomous choices is negated. This suggests that despite the practical difficulties in drafting effective confidentiality agreements, the solution to the confidentiality quagmire is for parties to contract explicitly for the degree of confidentiality they want preserved, and for courts to enforce only those obligations that the parties themselves assume ex ante. Part V thus offers practical suggestions on how parties can provide for confidentiality in their arbitration proceedings.

V. PRACTICAL SUGGESTIONS FOR PROTECTION OF CONFIDENTIALITY

Given the inconsistent case law, lack of protective national legislation, and over-broad or nonexistent institutional rules on-point, what are the most efficacious steps a party can take to preserve as much confidentiality as possible?

First, and most obviously, parties who desire it should include confidentiality provisions in their arbitral agreements. Even if courts ultimately justify disclosure of information on public policy or other grounds, a well-drafted confidentiality provision can mitigate the damage. One practitioner suggests the following phraseology, which is at least facially comprehensive:

> The Parties hereby mutually agree that the existence, terms and content of any Arbitration or Dispute Resolution entered into pursuant to this Agreement, as well as all information or documents evidencing any Results, Final Order, Judgment, Settlement, or the performance thereof, shall be maintained in confidence and not be given, shown, disclosed to, or discussed with any third person or party except: (a) by prior written agreement of both parties; (b) solely as contemplated by this Agreement and limited thereby, courts or other tribunals whose assistance is necessary to secure or protect a right of the parties relating to the performance of this Arbitration Agreement or the enforcement of an award rendered pursuant hereto, in which case the existence and content of such proceedings shall be disclosed only to the extent necessary and all efforts contemplated by

> this Agreement to maintain the confidentiality of documents and information shall be taken; (c) counsel and accountants who shall agree to maintain its confidentiality; (d) to the extent required by applicable reporting requirements; and (e) upon compulsory legal process.[242]

A more concise (although perhaps less effective) clause might read: "Except as may be required by law, neither a party nor the arbitrators may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties."[243]

Second, parties should consider confidentiality concerns when drafting other sections of their arbitration agreements. For example, among the many considerations in choice of law, parties should consider the extent to which a particular country's law protects confidentiality. Additionally, the parties can limit the information they will have to produce in the arbitration (and thus limit the potential information that may become public) by carefully defining the issues that will be subject to arbitration—the more narrow the scope of the arbitration, the more narrow the scope of disclosure.[244] Parties should be cognizant, however, of the possibility that issues excluded from arbitration by their own agreement may be subject to litigation in a fully public forum.[245]

Third, parties may consider requesting a protective order or stipulation to ensure the confidentiality of the arbitration proceedings.[246]

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242. Baldwin, *supra* note 25, at 456-57.

243. AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES 24 (1993). For a general discussion of confidentiality clauses, see Rothman, *supra* note 8, at 70-71.

244. *See* Baldwin, *supra* note 25, at 457 (providing model language for incorporating confidentiality concerns into arbitration agreements and discussing issues effecting the "nature and extent" of information disclosed throughout the arbitral process).

245. *See id.* (noting that such an arrangement may be deleterious to one or both parties if a situation were to arise where litigation paralleled arbitration).

246. *See id.* at 457-58 (describing additional methods the parties may take to ensure confidentiality in the arbitration proceedings and conclusion); Rothman, *supra* note 8, at 71 (commenting on the process and consequences of the arbitrator issuing a protective order with respect to confidentiality); Fraser, *supra* note 7 (detailing the consequences of the use of instruments that provide for sanctions when confidentiality is breached).

Typically, protective orders may be obtained by the agreement of the parties, or by the direction of an arbitrator. Stipulations are created by the parties and presented to the tribunal. A sample stipulation reads as follows:

> The parties acknowledge that the Arbitration Proceeding is a private forum and that allegations, statements and admissions made or positions taken by either party therein (concerning X subject) are solely for the purpose of the Arbitration Proceeding and not intended for any other forum. The parties, therefore, mutually agree that all pleadings, memorials, briefs, memoranda, exhibits, affidavits, reports, transcripts, and other documents or information, including any pages or parts thereof and any information obtained from review of the documents or information produced, including any notes, summaries, abstracts, indices or any other work product created or produced in the Arbitration Proceedings ('Arbitration Records') shall be deemed confidential, and shall not be given, shown, or disclosed to or discussed with any third person or party except upon compulsory legal process or as contemplated by this Agreement.[247]

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247. Baldwin, *supra* note 25, at 459. Baldwin also notes that the confidentiality stipulation can provide for ownership and physical treatment of the information during and after the arbitration. For example, he suggests that the stipulation may provide:

> Access to materials concerning this arbitration and to information contained therein (including any and all extracts, copies, notes, and summaries derived therefrom), shall be restricted to: (a) Parties and the attorneys who appear on their behalf in this arbitration; (b) personnel and staff members of the attorneys who appear on behalf of a Party to this arbitration, if such personnel and staff members are directly employed by these attorneys or their law firms and are assisting the attorneys in their work in this arbitration; (c) experts or consultants retained by a Party or their attorneys for the purposes of this arbitration; (d) the Tribunal and Tribunal personnel, including such stenographic reporters engaged in these proceedings as are necessarily incident to this matter; and (e) such other persons as shall be authorized in writing, or as ordered by the Tribunal.

Id.

> The Parties further agree that any and all documents or information provided by a Party, including all originals and copies thereof, and any documents created by counsel or any agent or representative from review of the materials produced in this arbitration, including without limitation, any notes, summaries, abstracts, indices or any other work product, shall remain the property of the producing party and shall be returned or destroyed, at the option of the producing party (and at the producing party's cost) in the presence of the producing party's lawyers or representatives, within 30 days of the conclusion of

If a party should violate a confidentiality stipulation, it may be liable for breach of contract damages or subject to an order of specific performance.[248] If the confidentiality provision is executed through a protective order and subsequently violated by one of the parties, evidence may be precluded and fees may be assessed against the offending party.[249] Consequently, the use of a protective order or confidentiality stipulation can be an effective means of deterring unauthorized disclosure of confidential information.[250]

Fourth, parties may consider obtaining a provisional measure to protect confidential information. Typically in the form of injunctions, provisional measures are allowed under most institutional rules.[251]

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the dispute resolution, as there will be no further need for the documents or information. At such time, or within 10 days thereafter, the party destroying or returning documents or information shall certify in a writing, to be deposited with the Arbitral or Supervising Tribunal, that all such documents or information have been returned or destroyed.

Id. at 459-60.

248. *See id.* at 458 (citations omitted) (adding that intellectual property disputes are "fertile ground" for the use of confidentiality devices such as protective orders).

249. *See id.* (citations omitted) (submitting that in addition to confidentiality provisions, the parties to an arbitration may agree in advance to fees and penalties for breaches thereof).

250. *See* Baldwin, *supra* note 25, at 458-61 (citations omitted) (laying out a number of measures the arbitrator may take to ensure and enforce confidentiality of information in the proceedings such as the use of injunctions, sequestration orders, etc.). Noting that "party-initiated confidentiality devices" are especially popular in intellectual property disputes, Baldwin offers the following example of a "specific designation of confidential information":

> The term 'Protected' or 'Confidential' as applied to documents, testimony or information produced by Stet Corp. shall be deemed to include all non-public, proprietary, trade secret, confidential or commercially sensitive business information of X Corp., including without limitation: engineering; data, drawings, orders, research data, test methods and results, protocols, methodologies, various proposals and reports, systems analyses, indices, summaries and data compilations; studies, methods of gathering and storing information; development, design, production, manufacturing, assembly and technical information; marketing, accounting, pricing and other financial and business information; Inspection Reports and supporting documents; and all information referring, relating or pertaining to such information.

Id. at 457 n.28.

251. *See id.* at 460-66 (discussing ICC, AAA, and UNCITRAL rules for provi-

Courts, however, are often reluctant to grant provisional measures in aid of arbitration, thus making this option for confidentiality protection less viable.[252]

Fifth, as a unilateral logistical means of mitigating potential disclosure of confidential information, parties should consider use of legend paper in their arbitration document production.[253] When documents produced on legend paper are photocopied, a superimposed "legend" appears as a "black blot" and inhibits use of the documents.[254] In addition, parties should stamp documents as "confidential" during discovery to deter copying and distribution.[255] Obviously, these techniques only address concerns about distribution of documents and do not alleviate concerns about disclosure of other information pertaining to the arbitration.

Sixth, parties worried about a breach of confidentiality by third parties should ask (or require, as in the case of expert witnesses or employees) relevant third parties to sign confidentiality agreements.[256] Doing so will deter third parties from disclosing information about an arbitral proceeding while giving parties to the arbitration a breach of contract remedy should an unauthorized disclosure occur.

CONCLUSION

Although it is undisputed that a duty of confidentiality can exist in

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sional measures and investigating the ability of arbitrators and national courts to enforce such measures).

252. *See id.* at 461 (stating that the reluctance of courts to grant such provisional measures stems from the absence of such measures in the arbitration agreement and the fact that such measures may be in violation of the participant's choice of arbitration versus litigation or the pertinent arbitration statutes).

253. *See id.* at 460 (noting that legend paper was used by litigants in recent tobacco disputes).

254. *Id.*

255. *See* Dessemontet, *supra* note 155, at 310 (outlining the steps mentioned in Article 39(2)(c) of the TRIPs, which are considered reasonable in the protection of documents and other media consideration as trade secrets).

256. *See* Baldwin, *supra* note 25, at 467 (discussing the problems in confidentiality that may arise from multi-party proceedings when all parties do not share privity).

international commercial arbitration, whether by parties' explicit agreement or incorporation of institutional rules, or by virtue of confidentiality being an inherent element of the arbitral process, the extent to which this duty applies is an issue far from settled. For parties concerned about protecting the confidentiality of their arbitral proceedings, the encouraging news is that parties—through their choices of an arbitral institution, forum, and contractual language—have considerable control over the answer to the confidentiality question. As discussed in Part IV, however, given potentially undesirable implications—both for individual parties and for the arbitration practice as a whole—a blanket confidentiality obligation may not be the socio-economic good it is often presumed to be. Thus, parties should consider precisely why and to what extent they want confidentiality protection, as well as the possible negative ramifications of any confidentiality provision, before constructing their arbitration agreements, so as not to take a blind leap of faith. Further, courts should respect the autonomy of the parties and only enforce confidentiality obligations to the extent that parties, international conventions, national legislation, or institutional rules explicitly provide for them.